STEWARTS

The Policyholder Review

2024/25

Focused on high value and complex insurance litigation for policyholders, the team is immensely experienced, agile, well resourced, and tenacious.

The Legal 500

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Foreword

I am delighted to introduce this inaugural edition of the annual Stewarts Policyholder Review.

Providing essential reading for insurance intermediaries, coverage professionals and insured businesses, our review features a survey of key legal developments across a range of core commercial lines of business, coupled with unique insight into market trends from some of our broker partners (Gallagher, Howden, Lockton and McGill).

Across a range of practice areas, 2024 was a busy year for insurance coverage professionals and produced a multitude of important developments.

Cyber risks have continued to grow in scale and visibility: we consider some of the unresolved coverage issues posed by the Crowdstrike incident, cyber warfare, and GDPR fines and penalties.

In the rapidly growing **Warranty and Indemnity** field, we examine some recent court decisions highlighting some of the difficulties that can arise in proving a covered loss under a W&I policy.

Last year saw no slowing in the onslaught of Covid-19 business interruption litigation sweeping through the English courts, and our team has had the privilege of leading a number of the key test cases. Our **Property damage and business interruption** section summarises the key decisions of 2024, as well as looking forward to the 'final chapter' of the saga in 2025.

Construction is a perennially fertile ground for coverage disputes, and we take a deep dive into some of the challenges posed by the continually evolving liability landscape for cladding and fire safety defects.

D&O coverage remains a permanent high priority for any company director, and our **Financial and professional risk** section considers the increased exposures arising from the Economic Crime and Corporate Transparency Act. We also consider the impact of litigation against directors in an insolvency context in *Wright & Ors* v *Chappell & Ors*.

War and political risks provide inherently controversial subject matter, and it is no surprise that disputes are arising in relation to some very significant losses. We consider key recent and ongoing cases concerning coverage of risks in the Middle East and Ukraine.

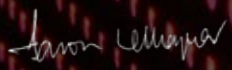
Finally, 2024 was a turbulent year in the **Costs and Funding** sector. We discuss the ongoing response to the *PACCAR* Supreme Court decision, the Legal Services Board Review of Litigation Funding, and the Post Office Horizon litigation, amongst other developments.

The Policyholder Review also collects a range of relevant articles by our team published in 2023 and 2024, which can be found at pages 98-149. If you would like to receive copies of our future articles as they are published, please subscribe via our website.

It has been a pleasure putting together this first edition of the Policyholder Review, and I extend my sincere thanks to all of the contributors, who together have produced a rich and substantive survey of the insurance coverage landscape. We hope that you find it an enlightening and reference tool for the year ahead.

Aaron Le Marquer

January 2025



Our team

Aaron Le Marquer
Head of Policyholder Disputes

With over twenty years' experience in insurance law on both the policyholder and insurer side, Aaron now acts exclusively for policyholders in in diverse sectors including financial services, hospitality and retail, energy and construction, sports and entertainment. He is experienced in all commercial lines of business, including business interruption, directors and officers, professional liability, cyber, environmental risks, property and casualty. Aaron spent eight years practising in the Asia Pacific region and is particularly experienced at resolving international and reinsurance disputes, often via arbitration.

Aaron has been ranked as a leading insurance practitioner in the Legal 500, Chambers and Partners, and Who's Who Legal since 2013.

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> Aaron Le Marquer is outstanding on all fronts. Extremely bright, brilliant on the law and even better on the tactics. Totally unflappable and rightly hugely popular with clients.
>
> *The Legal 500*

Chloe Derrick
Partner

Chloe specialises in insurance coverage and professional negligence. Having previously acted for insurers, she now acts exclusively for businesses and individuals in high-value disputes against the insurance market and the financial and professional services sectors. Chloe has successfully recovered significant funds for clients, and has represented clients in disputes spanning a number of jurisdictions (including the United States, Canada, South Africa, Mauritius and Gibraltar, and countries across the Channel Islands and Europe).

Before joining Stewarts, Chloe practiced in the insurance disputes team at another policyholder practice, and prior to that the professional and financial risks team at RPC where she advised Lloyd's and London Market insurers on their high-profile market loss exposures and drafted policy wordings for existing and new insurance products.

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> Brilliant on a technical basis. She is one of the best out there.
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> *The Legal 500*

James Breese
Partner

James is ranked by Chambers and Legal 500 as an 'Up and Coming' and 'Next Generation Partner'. He has represented policyholders in the UK and internationally for seven years, having previously acted on the insurer-side. James uses his knowledge of both sides of the market to strategically advance policyholders' complex insurance disputes.

James' clients range from listed companies, private equity houses, asset managers and multinational enterprises, to high-net-worth individuals and directors of companies. He is regularly instructed to resolve coverage disputes under W&I, D&O, cyber, and investment management insurance policies.

Since 2020, James has also represented policyholders in the leading Covid-19 insurance litigation in the Commercial Court and Court of Appeal. James is widely regarded for his strong business interruption insurance expertise having recovered tens of millions from insurers, including for distressed or insolvent businesses.

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> James Breese is fantastic. He is on-the-ball, user-friendly, incisive in his advice and excellent in client handling.
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> Stewarts' insurance team is one of the leading policyholder teams in the country.
>
> *The Legal 500*

Policyholder Disputes at Stewarts

We act exclusively for policyholders in high-value, complex insurance disputes.

Our team of insurance coverage specialists has a well-recognised track record acting for UK-based and multinational clients in all business sectors, and across all commercial lines of business.

- We are free to pursue claims against the insurance market as we only act for Policyholders, captives and overseas cedants, and do not act for London market insurers.
- Our substantial litigation platform, combined with expertise with our wider team of litigation specialists in tax, insolvency and asset recovery, financial crime, fraud and employment law provides a unique one-stop-shop for insured companies and their directors and officers.
- We have extensive experience handling disputes with an international reach, particularly those linked to the Asia-Pacific region, the Middle East and the US. We regularly act in litigation and arbitration for clients based in overseas jurisdictions with insurance placed through the London market.

Our expertise covers:

Speciality lines: assisting policyholders in all sectors to navigate coverage of first-and third-party financial and professional risks, including directors and officers (D&O) liability; professional indemnity, cyber, warranty and indemnity, trade credit and political risk.

First-party insurance: advising policyholders in the event of loss or damage to physical property, caused by natural catastrophes, accident or theft. Our expertise covers complex and catastrophic losses in the energy, marine construction and manufacturing sectors, often with a multinational scope.

Third party liability: assisting policyholders to ensure insurers meet their obligations in relation to third-party claims. We are experienced in coverage of claims arising from all forms of negligence and statutory liability.

Business interruption insurance: representing policyholders to recover their loss of profit when a company is unable to trade normally due to unforeseen circumstances.

> Incredibly strong and technical policyholder disputes team. People are user-friendly and fight hard to do the best for their clients.
>
> *The Legal 500*

> Stewarts are very skilful in navigating complex insurance issues, they work very hard to make handling the case easier for their client.
>
> *Chambers*

> Stewart's policyholders' insurance practice team is excellent. The team is on top of all cutting-edge areas of the law and provides clients with the support needed to bring about a positive outcome."
>
> *The Legal 500*

About Stewarts

Stewarts is the UK's largest disputes-only law firm acting in some of the most high-profile and ground-breaking cases.

Specialist Expertise:

We are widely recognised for our innovative and cutting-edge approach to high-value and complex litigation. Clients instruct us when the stakes are high and where genuine disputes experts are needed.

Our strength and depth rivals that of many disputes teams across the elite UK, US and international firms.

Conflict-free status

As a disputes-only firm, we are conflict-free and uniquely placed to advise where other law firms may be conflicted.

Client Service

We get to the core of the dispute at hand as well as our clients' underlying commercial and strategic objectives so that our advice is tailored and holistic.

Our lawyers handle a small number of cases to ensure that they give our clients the care and responsiveness they need to go against the most well-resourced opponents.

Reputation

Our reputation is confirmed by our rankings in the leading legal directories, as well as The Times 'Best Law Firms' list. We are consistently recognised as a "truly client-focused outfit whose calibre and experience is second to none".

International Reach

The great majority of our work is international. As an independent law firm, we are free to work with our clients' existing advisers and can also draw on our strategic alliances with leading international law firms. This enables us to work in a global counsel role to coordinate complex multi-jurisdictional matters via a single point of contact.

Depth

We have **200 lawyers,** including **90 partners,** and **450 staff** across our London and Leeds offices.

Clients

We act for **corporates** and **individuals** in high-value and complex disputes in the UK and around the globe.

Practices

We have **15 practice areas** across Commercial Disputes, Private Client Disputes and Injury Disputes.

Rankings

All of our practices are highly ranked in the **Chambers and Partners and Legal 500** guides.

Cyber risks

Chloe Derrick

The Cyber Frontier

A vast landscape of ever-increasing threats, crowded with dangerous actors and considerable perils. A marketplace of traders selling a variety of protections, some more comprehensive and stronger than others. The boundary lines between protection and loss can vary drastically, and the difference can be potentially catastrophic. Against that perilous backdrop, it is unsurprising that cyber insurance has been coined the "cyber frontier".

Cyber insurance continues its upward growth trajectory as the fastest-growing global insurance product. Prompted by rising global cyber threats, an increasing number of businesses worldwide, across industry sectors, are either purchasing standalone cyber coverage for the first time or broadening the scope of their existing coverage.

For a product line still in its relative infancy, policyholder appetite means there are now 77 cyber risk insurers operating within the Lloyd's market, each competing for market share by offering increasingly tailored products, bespoke wordings and coverage extensions.

The wide variance in coverage currently offered by cyber policies, combined with the lack of market standard terms and conditions, means disputes arising out of nuances in policy wordings are increasingly likely. The risk of dispute is further exacerbated by the fact that novel distinctions in policy coverage are often not alighted upon until after the loss. Plus, a total absence of judicial authority on the interpretation of cyber insurance clauses means the potential for cyber coverage litigation is ripe.

For that reason, the cyber market is understandably becoming increasingly wary of the national or global damage that a systemic cyber event might cause. The recent global CrowdStrike outage brought to the forefront market-wide queries around how cyber insurance might respond to cover the estimated billions of dollars of business interruption losses in that instance. Below, we comment on some of the developments in the cyber insurance market and give our outlook for 2025.

Recap from 2024

Reflections following CrowdStrike

In July 2024, CrowdStrike's security software outage caused widespread interruption to businesses in all sectors around the world, with those in the travel, healthcare and financial services industries particularly affected.

With global payment systems impacted and planes grounded, even short outages in such sectors were said to have given rise to billions of dollars of losses. Delta Air Lines is a good example. In October 2024, it commenced proceedings against CrowdStrike for losses in excess of $500m following 7,000 cancelled flights over a period of five days, which were said to have impacted 1.3 million passengers.

CrowdStrike was widely anticipated to be the largest systemic loss on record. Yet prior to the incident, a significant part of the market commentary focused on malicious cyber-attacks and state-backed bad actors. CrowdStrike brought to the forefront the catastrophic impact of a single point of failure (SPOF) loss event and prompted global conversations around some of the following key issues and risks in cyber coverage.

Insured perils

First and foremost, due to the wide variance in coverage provided by cyber policies, not all businesses were able to establish that an insured peril (or "covered event") had occurred.

The outage arose out of system failure rather than a malicious attack, meaning that policies with insuring clauses that provided coverage for "system failures" or an "unintentional and unplanned interruption of computer systems" were brought into focus. Not all policies extend to cover non-malicious events, and the CrowdStrike incident will no doubt have led some insureds to discover that their coverage was not as broad as they had imagined.

Equally, the outage prompted discussions around third-party risk management and the scope of an insured's coverage for digital supply chain losses. Instances where the insured business continued to operate uninterrupted, but disruption was caused from the supply chain may have been covered if the policy extended to cover "dependent business interruption loss" for events suffered by the insured's customers or suppliers, but again not all policies will have provided this extended coverage.

Waiting periods

Another issue that came to the forefront for policyholders was the "waiting period" for business interruption, which is often written into cyber coverage and specifies a minimum timeframe for which the insured event must continue before coverage is triggered, usually expressed as a number of hours.

Depending on the drafting of the policy, this may be structured as a condition of coverage, incorporated into the scope of the insured peril itself, or take the form of an excess or self-insured retention. The distinction can be important when it comes to consideration of coverage.

While it was widely reported that the London market received a significant volume of notifications following the CrowdStrike outage, it is understood that many of those notifications did not mature into claims because the business interruption suffered did not extend past the "waiting periods". Had CrowdStrike not been able to remedy the outage so quickly, the landscape could have been vastly different.

Causation

Having established that "system failure" or another insured peril has occurred, the policyholder must also demonstrate that its loss was proximately caused (and not just contributed to) by the peril. The claim will fail if the effective cause of loss was something other than the insured peril.

Causation in business interruption came under close scrutiny by the Supreme Court in *FCA v Arch (the FCA Test Case),* where it was determined that millions of occurrences of Covid-19 in the UK were each an equal and effective cause of the first UK government lockdown. A single occurrence of Covid-19 within a specified radius of the policyholder's premises was, therefore, sufficient to establish the insured peril in the context of a "notifiable disease" clause.

Importantly, the Supreme Court in *FCA v Arch* also overturned the "wide area damage" principle first set down by the High Court in *Orient Express v Generali*. In that case, which concerned a business interruption claim brought by a hotel in New Orleans damaged by Hurricane Katrina, the insurers argued successfully that the proximate cause of the hotel's loss was not the damage to the hotel itself but damage to the wider area. "But for" the damage to the hotel, the insurers said, the hotel would still have suffered the same loss anyway. The damage to the hotel was not, therefore, the proximate cause of loss, and the claim was not covered.

In *FCA v Arch,* the Supreme Court rejected that argument. Instead, it ruled that the correct analysis should have been one of concurrent causes, meaning that applying the "but for" test was inappropriate. Applying that conclusion to the pandemic meant a policyholder was not required to demonstrate that an occurrence of Covid-19 within a radius of its premises was a "but for" cause of loss. It did not matter that the policyholder's losses were also caused by thousands of other cases of disease outside of the radius.

Whether insurers will seek to raise similar causation arguments in relation to cyber business interruption ("BI") claims arising from a global event such as CrowdStrike remains to be seen. However, if they do, policyholders will need to study the reasoning in *FCA v Arch* closely to resist such an approach.

Exclusions

If the policyholder can establish a *prima facie* claim for coverage, policy exclusions must also be considered. If the loss claimed was proximately caused (even concurrently) by an excluded cause, the claim will fail. The insurer bears the burden of proving that an exclusion is engaged.

In the context of a system failure, relevant exclusions that might be engaged include:

War risks: Depending on the type of business impacted and/or the magnitude of the system failure, insurers will no doubt be searching for any hint that the incident was malicious, and if so, whether it might have been state-sponsored (or even "state-aligned") such that the provisions of the mandatory cyber war exclusions are engaged.

Reasonable precautions: A typical exclusion excludes loss arising from a failure on the policyholder's part to ensure that all systems are maintained to industry standards. Where an outage has affected businesses worldwide, policyholders may appear to have a good defence to any reliance on such exclusions. However, insurers may point to other businesses with similar systems that were not affected in the same way as evidence that the policyholder did not maintain its systems to reasonable industry standards.

Suppliers and service providers: In some policies, cover for losses caused by insured events suffered by third-party suppliers is expressly excluded rather than expressly covered as described above. This could be important in the present context, where both the policyholder and its third-party supplier have suffered similar system failures as a result of the outage. In those circumstances, insurers may argue there are concurrent causes of loss, one of which is excluded. Therefore, in accordance with *Wayne Tank & Pump Co. Ltd v Employers Liability Incorporation Ltd,* the claim will fail. Again, the reasoning in *FCA v Arch* will be vital to defeating such arguments.

Coverage for business interruption losses

The core business interruption cover contained in cyber policies will typically be structured in the same way as any other form of "non-damage" BI clause: cover is provided for a loss of "income", "revenue", "net profit", or "gross profit".

However, somewhat surprisingly, these terms are often less well defined in the cyber context than in a traditional BI policy, meaning the true scope of cover may be ambiguous and subject to dispute. In addition to lost income or profit, most policies will provide for increased costs of working reasonably incurred to avoid a loss of profit. Cyber policies frequently also provide standalone cover for remediation and crisis response costs that sit outside the business interruption cover.

The value of the covered claim will also depend on the indemnity period provided for in the policy. Some policies will restrict the indemnity period to the period during which the insured peril continues. Others will allow for an additional "restoration period" or a more traditional indemnity period, defined simply as the period during which the results of the business are affected by the interruption. This can make a stark difference to the level of cover provided since some businesses will continue to be affected by the outage long after it has been rectified.

Additionally, the business interruption losses that flow from malicious cyber-attacks are now, in many instances, much higher than the value of any ransom request.

Finally, the quantum of the claim will depend on forensic expert evidence to demonstrate what the performance of the business would have been in the absence of the insured peril and its underlying cause. Here, causation arguments again surface. It is important that insurers do not seek to argue that the business would have, in any case, been affected by the wider circumstances of the incident, regardless of any failure of their own systems. Following *FCA v Arch,* such an approach is impermissible.

Cyber warfare and state-backed attacks

State-backed cyber warfare remains firmly at the top of the agenda when reviewing systemic cyber risk.

Shortly after the commencement of Russia's invasion of Ukraine and in the aftermath of *Merck v ACE*, Lloyds issued its first 'Market Bulletin Y5381', which was aimed at reducing syndicates' exposure to war and non-war, state-backed cyber-attack liabilities. The bulletin required that all market-standard cyber policies include a suitable clause, in addition to a war exclusion, which excludes liability for losses arising from "state-backed cyber-attacks".

To assist the implementation of the bulletin, the Lloyd's Market Association (LMA) produced a variety of model cyber war clauses, which were swiftly met with some opposition from many brokers and policyholders.

At that point in time, subject to increased underwriting control monitoring, certain managing agents received dispensation from Lloyd's to provide bespoke coverage with wording that contained broader coverage. For example, extensions for state-backed cyber-attacks that solely impacted the insured business or write-backs to permit the recoverability of losses suffered outside the territory of the states who were a party to the war.

Our view, following Market Bulletin Y5381, was that the LMA model clauses (potentially alongside other bespoke clauses) had the potential to give rise to significant coverage disputes.

Attribution

One of the key issues in seeking to refine cyber exposures for potential state-backed cyber events is attribution.

In the case of physical loss or damage to property, establishing whether war was a factual cause of the loss may be expected to be fairly uncontroversial (although arguments over proximate causation are inevitable). However, in the case of a cyber-attack, investigating and establishing with certainty whether the origins and perpetrator(s) of the attack are state-backed is rife with difficulties.

For that reason, the LMA model clauses include a mechanism by which state-backed cyber operations are to be identified, primarily on the basis of attribution by another state. Pending any such attribution, insurers are relieved from paying the loss.

There are obvious problems with that approach from a coverage perspective. The necessary evidence might not be publicly available, for example, and it is highly unlikely that any technical expert, outside of government, will be able to attribute the attack to a state or provide evidence to dispute such attribution. Equally, a state might deny its involvement or, for political reasons, blame another state.

Even accounting for the fact that UK and US agencies are now much more routinely publishing details of reported state-sponsored activity or cyber conduct by military intelligence services, the issue of attribution is still fraught with challenges.

The National Cyber Security Centre's announcement that there is now an interlinked new class of cyber adversary in the form of "state-aligned actors" (who are actors that are not "state-backed" but have expressed a desire to cause a disruptive impact for political reasons) only increases the uncertainty around state attribution issues and the potential for coverage disputes.

Lloyd's Market Bulletin Y5433

Cyber war exclusions are yet to be tested in the English courts. However, reports of state-backed cyberattacks are increasing in frequency, size and nature. Reported acts of "hybrid warfare" by malicious actors are also growing.

NATO describes hybrid warfare as antagonistic acts that have the following two defining characteristics: (1) the line between war and peacetime is rendered obscure, and (2) hybrid attacks are intentionally ambiguous and obscure, designed to complicate attribution[1].

Against that background, on 14 May 2024, Lloyd's issued its second state-backed cyber bulletin (Y5433), which sought to further regulate and refine the scope and extent of cyber coverage written by the market. In the bulletin, Lloyd's chief underwriting officer reiterated that "policy language should be clear so that the scope of coverage is understood by all the parties and the exposure is properly assessed and monitored by syndicates". Additionally, Lloyd's made clear that from 1 January 2025, coverage for state-backed cyber-attacks carried out as part of a conventional war now sit outside the market's standard risk appetite, such that syndicates that wish to write that risk must now do so with its explicit approval and on a clear and distinct basis (potentially via a separate product).

While the latest bulletin forms a part of the ongoing steps taken by Lloyd's to safeguard the market's exposure to very large loss events, it does highlight that there are still likely to be products or wordings in circulation that offer coverage for a level of systemic war risk exposure outside of Lloyd's current risk appetite.

In the present climate, should there be a systemic event that may be state-backed, impacted policyholders should review their coverage carefully, particularly where there are any variations from the model clauses. Given the attribution issues, policyholders should equally be alert to the fact that it is highly unlikely they can expect prompt payment of any significant claim under a policy containing such a clause.

[1] NATO Review - Hybrid Warfare – New Threats, Complexity, and 'Trust' as the Antidote

Civil fines and penalties

The extent to which insurance policies might indemnify regulatory fines is an issue being discussed more frequently in the UK and other jurisdictions. This is particularly so in the context of the UK and EU General Data Protection Regulations (GDPR), where levels of enforcement and regulatory fines are now at headline levels.

In its Cyber Security and Resilience Bill (to be introduced to parliament in 2025), the government recently set out its intention to introduce changes to the UK's regulatory framework, which encompassed amendments to put regulators on a "strong footing". At present, it is not clear what this means, save to say that the government has indicated this will include potential cost recovery mechanisms to provide resources to regulators alongside powers to investigate potential vulnerabilities proactively. Such proactive investigation will no doubt increase the levels of regulatory enforcement and fines even further.

In March 2024, the Information Commissioner's Office (ICO) also published new data protection fine guidance, which replaced the sections on penalty notices that had been in place since 2018. The new guidance aims to provide greater transparency around how the increasing fines for breaches of the GDPR are decided and calculated. The upshot is that the ICO has set out a specific number of defining factors relevant to the imposition and amount of any fine. One of those factors is whether the nature of the infringement was "intentional" or "negligent". Perhaps coincidentally, the guidance follows a decision by the Court of Justice of the European Union[2], which ruled that fault must first be established (either by way of intent or negligence) before an infringement can result in a fine.

As to whether such fines are indemnifiable, some London market policies contain an exclusion explicitly stating that the insurer will not indemnify any civil or regulatory fines, penalties or sanctions the business is obliged to pay. The Association of British Insurers has similarly stated in its guide to some common cyber insurance exclusions that policies will not cover criminal, civil or regulatory fines, penalties or sanctions, albeit it acknowledges that exclusions will vary between insurers.

There are, however, policies in the market that explicitly insure civil fines and penalties assessed by a regulatory agency, subject to the proviso "to the extent insurable by law". Certain insurers have also expressly confirmed they will provide broader wording or cyber liability extensions that indemnify regulatory costs and fines (though any wording should be reviewed carefully). For instance, cover triggered upon a "cyber incident" or "cyber event" is typically narrower and may not respond to losses arising out of misuse of customer data. Issues might also arise where the policyholder operates in numerous jurisdictions, which could give rise to a conflict between the country imposing the fine and the applicable law of the policy; again, the policy wording should be reviewed carefully.

Where there is coverage for civil regulatory fines and costs, a policyholder might reasonably interpret that to mean they will be indemnified for a GDPR fine if the character of the infringement is merely negligent rather than intentional. In our experience, however, some insurers seemingly adopt a sweeping stance that GDPR fines are not insurable for public policy reasons on the grounds that the fine engages the *ex turpi causa* principle (ie the insured cannot benefit from their own wrongful act). Arguably, such a sweeping approach renders any explicit cyber coverage provided in the policy for civil fines by a regulatory agency wholly illusory.

Notwithstanding that type of generalised defence, the position is not clear-cut. It is highly fact-dependent, and the insurability of GDPR fines is an issue yet to come before the English court.

Some of the case authorities typically cited on this issue include (1) *Safeway Stores Ltd v Tigger*[3] (breach of competition law), (2) *Les Laboratoires Servier & Anor v Apotex Inc & Ors*[4] (infringement of a pharmaceutical patent), and (3) *Sainsbury's Supermarkets Ltd v MasterCard Inc*[5] (breach of competition law). However, in our view, there is a distinction to be drawn between intentional breaches by large corporates (that are capable of triggering the illegality defence) and the circumstances that may lead to a finding of negligence by a small or mid-sized business.

Indeed, it is worthwhile noting here the Court of Appeal's commentary in *WM Morrisons Supermarket Plc v Various Claimants*[6], where in answer to the increasing prevalence of significant data breaches on a massive scale, the Court of Appeal commented: "[the] solution is to insure against such catastrophes". While those proceedings concerned a UK class action for data breach (and a subsequent decision by the Supreme Court that Morrisons was not vicariously liable for the criminal acts of its employee), it nonetheless touches on the importance of cyber insurance to cover the potentially significant losses arising out of data breach claims.

Another authority worth noting is the Irish Supreme Court decision in *Quinn v IBRC*[7], which observed that applying the *ex turpi causa* maxim will depend on the nature of the wrongdoing. In that regard, when considering how the flexible public interest test set out by the Supreme Court in *Patel v Mirza*[8] might be applied in the cyber context, each case must be considered on its own facts. For GDPR fines, the test is likely to require a court to consider (1) the underlying circumstances and degree of responsibility, including whether acts were negligent or deliberate, (2) the level of the fine imposed, and (3) the statements made by the Data Protection Commission with their reasoning for the fine.

Overall, the key question for any policyholder faced with a GDPR fine is whether their conduct giving rise to the fine should be uninsurable as a matter of public policy.

In *Les Laboratoires Servier,* while Lord Sumption, in his leading judgment, recognised the principle that civil sanctions of a penal character could give rise to the illegality defence, when handing down judgment he observed that (a) the public policy defence had traditionally been said to arise in any case where the claimant's acts amount to "turpitude"; and (b) turpitude was "an archaic and ill-defined expression which might loosely be translated as 'wickedness'".

It remains to be seen whether certain contraventions of the GDPR are sufficiently turpitudinous to engage the *ex turpi causa* principle in the same way that certain breaches of competition law might. Arguably, regulatory fines arising from negligent conduct, where there is no turpitude or act of "wickedness", do not engage the public interest in the same way.

Policyholders should, therefore, resist any suggestion by insurers that GDPR fines and similar penalties are uninsurable as a matter of law.

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[2] [2023] C-683/21
[3] [2010] EWCA Civ 1472
[4] [2014] UKSC 55
[5] [2020] UKSC 24
[6] [2018] EWCA Civ 2339
[7] [2015] IESC 29
[8] [2016] UKSC 42

Looking ahead to 2025

As the cyber threat landscape continues to evolve and expand rapidly, the scope of coverage is shifting. A wide variance of cover is available through the market, and not all policies are created equal.

Businesses should continue to review the policies they have in place carefully to ensure they are comfortable with the coverage provided. In addition to the issues already discussed, looking ahead to 2025, the following points are likely to become increasingly relevant to coverage and risk management:

- How will the business and policy respond in the event of a major cyber event? Does the policy have limitations on attribution, cause of loss, geography or industry sector?
- What is the scope of coverage for emerging cyber risks, such as generative artificial intelligence (AI) risks?
- Is there sufficient business interruption cover, and will it respond to indemnify losses flowing from third-party system failures or other vulnerabilities in the supply chain? How does the deductible or waiting period apply, and is the indemnity period sufficient if there is a major cyber event?
- Does the policy allow for multiple occurrences, do the limits aggregate, and are reinstatements available?
- Does the business have appropriate cyber security measures in place, and is the information in the proposal form accurate and maintained? A lack of multifactor authentication discovered following a cyber incident continues to be a focus area, and the level of detail required in some proposal forms is increasingly technical. Are the directors and officers sufficiently engaged in cyber security and regulatory compliance?

For further commentary, see our earlier articles:

What can cyber insurance policyholders learn from recent attacks? [2023]

How will cyber insurance respond to the CrowdStrike outage? [2024]

Deciphering the insurability of GDPR fines [2024]

Cyber risks: Broker perspective

Gallagher

Crowdstrike – the 'black swan' event that never was

In reflecting on the past year, it is clear the cyber threat landscape remains as unpredictable as ever. Who could have foreseen that one of the most significant cyber events of 2024 would be a global technology outage in the form of the CrowdStrike incident? However, despite impacting an estimated eight and a half million devices worldwide, the long-term effects of this incident were not as severe as originally anticipated.

As a broker, we were at the forefront of the flurry of new notifications in the wake of the incident. However, the vast majority of these new notifications were merely precautionary. Despite the event's significant traction in the news and social media, impacted organisations were limited to those that utilised the CrowdStrike Falcon platform for threat detection. Many SME businesses or larger organisations that utilised an alternative endpoint protection platform, such as SentinelOne, were not impacted. In terms of the length of the outage itself, the majority of businesses had remobilised in a number of hours thanks to the speedy introduction of a fix from CrowdStrike, meaning that applicable 'waiting periods' had not been met, and any business interruption loss was minimal.

The global cyber market is reported to be worth over US$15bn in annual gross written premium ("GWP"). Even at the US$1.5bn top end of insured loss estimates for the CrowdStrike outage, that only represents 10% of global GWP. Despite not having the significant financial impact on the global cyber insurance market that was predicted, the incident has fundamentally changed how businesses perceive cyber risks as not being solely from a malicious source. The majority of insureds who purchase cyber insurance traditionally cite their main concerns as attacks from foreign threat actors. However, this incident has prompted businesses to review their applicable cover for system failures or dependent system failures. CrowdStrike confirmed that the outage was simply a software coding error and not the act of a rogue employee. There are concerning predictions that threat actors may take inspiration from the CrowdStrike event and manipulate a software update to cause a mass global outage.

Threat actor landscape – "health is wealth"

While ransomware remains a persistent cyber risk, the threat actor landscape continues to evolve rapidly. Increased cyber resilience from companies has prompted threat actors to adapt their strategies accordingly. In general, there has been a decrease in the sums demanded by threat actors to ensure a more targeted approach. By requesting a lower sum, companies are more likely to have the funds readily available and feel more inclined to pay. This has driven more challenging discussions at boardroom level for impacted businesses considering whether to make a payment.

Gone are the days when companies would receive a neat threat actor profile from negotiators based on their previous experiences. New ransomware groups are constantly emerging, and existing members conducting business using dark web addresses. This trend can be attributed in part to the need to avert sanctions and from the multiple law enforcement takedowns this year, most notably the LockBit ransomware group in February. Law enforcement officials responsible for the takedown made an unfortunate discovery, namely that LockBit was holding onto data it had pledged to delete after receiving a ransom payment. This new evidence calls into question the reliability of the deal terms made with threat actors.

The healthcare sector has been widely targeted by ransomware groups in 2024, both in the UK and across the pond. The US healthcare payment provider Change Healthcare was impacted by a significant ransomware attack in February. Change Healthcare's parent company, United Health Group, reportedly paid the perpetrators a US$22m ransom in exchange for restoring its systems. The breach not only compromised sensitive patient information but also severely impacted the company's ability to deliver essential healthcare.

In June 2024, a ransomware attack on a third-party pathology testing organisation, Synnovis, caused widespread disruption to the NHS. Not only did this impact the day-to-day running of multiple hospitals (over 3,000 appointments were disrupted), but there was also a significant loss of patient data. It is predicted that ransomware groups will continue to target healthcare providers as the increased pressure of threats to patient care is more likely to drive organisations to pay ransom demands.

The state of the cyber insurance market – may the odds be ever in your favour

The cyber insurance market is undoubtedly in insureds' favour, with companies receiving significant reductions on their premiums and a relaxation in minimum security requirements. The softening of the cyber insurance market can be attributed to several factors, including the significant competition among carriers due to the new injection of capacity in the market. This new capacity takes the form of existing players who have an increased appetite to consider more diverse risks and managing general agents who distinguish themselves from traditional insurers by combining a cyber insurance offering with a form of preventive security technology. Standalone cyber insurance offerings exhibit notable price discrepancies, often ranging from 20% to 40% for identical risks among different carriers. This variability complicates pricing strategies for insureds and underscores the volatility within the cyber insurance market.

While insureds can be tempted to move to alternative insurer providers based on premium savings alone, they should carefully consider any coverage discrepancies and claims track records to ensure they will receive the support they need in a time of crisis. insureds must carefully navigate these wide pricing differentials with their broker to secure optimal coverage that aligns with their risk management and budgetary objectives.

The sole purpose of this article is to provide guidance on the issues covered. This article is not intended to give legal advice, and, accordingly, it should not be relied upon. It should not be regarded as a comprehensive statement of the law and/or market practice in this area. We make no claims as to the completeness or accuracy of the information contained herein or in the links which were live at the date of publication. You should not act upon (or should refrain from acting upon) information in this publication without first seeking specific legal and/or specialist advice. Arthur J. Gallagher UK accepts no liability for any inaccuracy, omission or mistake in this publication, nor will we be responsible for any loss which may be suffered as a result of any person relying on the information contained herein.

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Warranty and indemnity

Aaron Le Marquer

W&I: Beneficial, but not limitless

Warranty and indemnity (W&I) insurance is becoming an increasingly popular product in the UK and international markets and is developing into a standard feature of merger and acquisition ("M&A") deals for good reason.

When placed effectively, the product can provide a complete transfer of risk that would otherwise be a barrier to the conclusion of a deal, and it can therefore be the final piece of the puzzle that facilitates the completion of a difficult transaction.

However, recent legal cases have highlighted some difficulties that can arise with claims under such policies. These cases serve as a reminder that while W&I policies provide an extra layer of protection, they cannot be assumed to be a fail-safe backstop that will respond in all circumstances.

Case law - insurance

Finsbury Foods v Axis

As one of the first W&I coverage disputes to be decided in the English courts, the decision in *Finsbury* illuminates the court's approach to such claims, and serves as a cautionary tale to any policyholder seeking to claim against its insurer for an alleged breach of warranty.

Finsbury Food Group Plc ("Finsbury") was a group of food manufacturing companies that purchased Ultrapharm Limited, a specialist manufacturer of gluten-free baked goods. Finsbury claimed Ultrapharm had breached warranties in the share purchase agreement ("SPA") and that the terms of its buyer-side warranty and indemnity insurance policy covered the alleged breaches.

The claim failed, with the judge concluding that Finsbury had failed to establish a breach of warranty, and that even if it had, the knowledge exclusion would have precluded coverage of the claim. He further found no proven causative link between the alleged breach and any loss, and even if there had been, the value of the claim was worth a small fraction of the amount claimed. Finsbury therefore lost on all of the disputed issues.

The judge's discussion of the issues provides helpful guidance for those considering coverage of claims more generally, but it is important to note the role the policyholders' conduct played in the outcome. As a starting point, the judge found there were serious deficiencies in the evidence produced by Finsbury, with its disclosure "profoundly unsatisfactory", its six witnesses of fact "unreliable", "belligerent" and "untruthful", and its expert witness "prepared to make assumptions in favour of Finsbury when the evidence did not always justify him in so doing".

As a result, it is perhaps unsurprising that Finsbury was unable to discharge its burden of proof in relation to any of the matters in dispute. The case serves as a reminder that the standard of proof required of a policyholder to establish liability against an insurer is the same as that in any civil litigation matter, and must be met with adequate resourcing and appropriate regard to truthfulness.

See our article listed at the end of this chapter for a more detailed analysis of the case.

Project Angel Bidco v Axis

In *Project Ange*l, a rather different dispute arose, this time not focused on whether a breach of warranty had occurred, but on whether the drafting of an exclusion in the policy was to be interpreted so as to exclude any loss caused by the alleged breach.

The claim was brought under a warranty and indemnity policy purchased by the buyer of a construction company, which alleged that the buyer had breached warranties relating to bribery and corruption (the "B&C Warranties").

The B&C Warranties were expressly noted as "covered" in the cover summary issued alongside the policy. Unfortunately, however, the policy also contained an exclusion for any loss arising out of "ABC Liability". This was defined as "any liability or actual or alleged non-compliance by any member of the Target Group or any agent, affiliate or other third party in respect of Anti-Bribery and Anti-Corruption Laws". There was, therefore, a direct contradiction between the cover summary and the ABC Exclusion.

The insurer declined the claim in reliance on the ABC Exclusion. In response, the policyholder argued that there must have been a mistake in the drafting of the exclusion because the objective intent of the parties, as demonstrated by the cover summary, was to cover breaches of the B&C Warranties. Therefore, The ABC Exclusion was to be construed more narrowly to enable a limited degree of cover in relation to the B&C Warranties.

The court concluded that the apparent contradiction between the cover spreadsheet and the ABC Liability exclusion did not mean there had been an obvious error. The cover spreadsheet delineated the prima facie scope of cover granted, while the exclusions then acted to restrict cover in certain circumstances. There was nothing unusual about that, even if it meant that, in practice, a breach of the B&C Warranties would never be covered. Further, even if there had been an obvious mistake, there was no obvious correction since it was not clear whether the cover spreadsheet or the ABC Liability exclusion should be amended to either preclude or allow coverage, respectively.

There was nothing unusual about that, even if it meant that, in practice, a breach of the B&C Warranties would never be covered. Further, even if there had been an obvious mistake, there was no obvious correction since it was not clear whether the cover spreadsheet or the ABC Liability exclusion should be amended to either preclude or allow coverage, respectively. As a matter of construction, the court (by a majority decision) was unable to read the ABC Liability exclusion in the way advocated by the claimant. On the plain terms of the policy, the claim was excluded.

See our article (listed at the end of this chapter) for a more detailed analysis of the case.

Takeaways

What do these cases tell us (other than not to purchase a W&I policy from Axis)? There are several key takeaways for policyholders.

1. **The burden of proving a breach of warranty is no less onerous when making a claim under a W&I policy than in a claim against the seller directly.**
   This is the key takeaway from the Finsbury Foods case. It was clear in that case that the policyholder viewed the insurance policy as a shortcut to obtaining compensation when it did not believe it had received the deal it had bargained for. However, it was not evidentially prepared to prove its case in the manner required. The policyholder's evidence was found to be woefully lacking, both in terms of inadequate disclosure and unreliable witnesses. The failure of the claim for these reasons serves as a good reminder that the burden of proof lies with the claimant policyholder, and that the insurers are entitled to defend a claim in exactly the same way the seller might.

2. **A breach of warranty does not by itself give rise to an indemnifiable claim.**
   A secondary reason for the failure of Finsbury's claim was that, even if it had been able to prove a breach of warranty, it was unable to prove it had suffered any loss as a result.
   The court found that Finsbury would have paid the same price for the company regardless, so there was no causative link between any breach of warranty and its alleged loss. Again, the burden of proof lies on the claimant policyholder to prove the loss caused by the breach, and it will need to put forward a justifiable mechanism for the calculation of loss supported by contemporaneous evidence. The negotiations between the parties around the purchase price of the business are likely to be key to establishing whether the buyer actually relied on the warranty alleged to have been breached when settling on the agreed price for the shares.

3. **W&I policies are drafted on a bespoke basis, and it is more important than ever that the policy drafting is subject to meticulous scrutiny to ensure it provides the cover intended by the parties.**
   This is the key takeaway from the Project Angel case. W&I policies are the opposite of 'off the shelf' general commercial policies drafted with a 'one size fits all' approach. They are generally negotiated and drafted on a bespoke basis with the assistance of professional advisors to address the specific risk under consideration. It is, therefore, more important than ever that extreme care is taken with the drafting since the parties will be assumed to have intended exactly what is meant by the words used, and the opportunity to take a liberal approach with contractual interpretation will be limited.

Case law – non insurance

Drax Smart Generation Holdco Ltd v Scottish Power Retail Holdings Ltd [2024] EWCA Civ 477 (08 May 2024)

Outside of the insurance context, the case of *Drax v Scottish Power* highlights the importance of paying close attention to time limits, notification provisions and other procedural obligations in the SPA and other contractual documents.

Facts

The dispute arose in relation to Drax's purchase of a power company from Scottish Power. One of the company's assets was a site in Kent upon which a new power station was intended to be built, but in order to do so the new station would need to be connected to the national grid. The SPA contained a warranty to the effect that the company was sold with the benefit of an option to acquire an easement over adjoining land for that purpose, but it later transpired that the company no longer held the option when the SPA was executed.

Drax claimed against Scottish Power both for breach of warranty and for an indemnity under alternative provisions in the SPA. Without addressing the substance of the claim, Scottish Power applied for summary judgment on the basis that the notice provisions in the SPA had not been complied with and the claims were effectively time-barred. At first instance, Scottish Power was successful in relation to the warranty claim, but the court allowed the indemnity claim to proceed. Both sides appealed.

Decision

The Court of Appeal came down firmly on the side of Drax, reversing the lower court's decision in relation to the warranty claim and upholding it in relation to the indemnity claim. Therefore, both claims were permitted to proceed (although no consideration was given to the substantive merits of Drax's claim).

The decision turned primarily on whether the notice given by Drax of its claim met the requirement in the SPA to set out "in reasonable detail the nature of the claim and the amount claimed".

Scottish Power alleged that Drax's notice failed on both counts because it set out a completely different basis on which Drax had suffered loss (by way of liability to a third party) from that now claimed in the proceedings (the difference between the warranted value of shares and the actual value). At first instance, the court agreed with Scottish Power.

Adopting a more purposive approach than the court at first instance, Lord Justice Males declined to allow the claim to be struck out for what he clearly saw as a merely technical breach of a contractual notice provision. Noting that the commercial purpose of such clauses is to provide a contractual limitation period, and given this effectively rendered the provision an exclusion clause, it was to be interpreted narrowly. Approving various earlier authorities, Lord Justice Males noted: "The parties are not lightly to be taken to have intended to cut down the remedies which the law provides for beach of important contractual obligations without using clear words having that effect."

He continued: "It is important that Notice of Claim clauses should not become a technical minefield to be navigated, divorced from the underlying merits of a buyer's claim." The judge also said "courts should not interpret such clauses as imposing requirements which serve no real commercial purpose unless compelled to do so by the language of the clause".

Against that background, Lord Justice Males found that Drax's notice gave Scottish Power all it needed to assess its liability. He said that the estimate of loss given by Drax in the notice was a genuine estimate at the time, notwithstanding that Drax had later pivoted to an entirely different basis for its claim. He therefore found that the notice satisfied the requirements of the notice of claim clause. Drax's appeal was allowed, and the claim was permitted to proceed.

Takeaways

Lord Justice Males' common-sense approach will provide comfort to claimants attempting to comply with notification provisions in contracts in circumstances where they may not yet have fully formed views on the exact scope of the claim to be pursued. The terms of such clauses should still be observed as far as possible, and differently drafted clauses may impose more stringent requirements than those considered in the Drax case. Nonetheless, the court's approach demonstrates the court's disclination to allow defendants to take technical points and escape liability by doing so.

The decision may have some helpful read across to the insurance context, where breaches of notification provisions are frequently raised as a defence to claims under the policy, even where late notification has caused the insurer no prejudice. Lord Justice Males' "commercial purpose" approach may provide useful support to policyholders facing such challenges.

Conclusions

The appetite for W&I insurance is not slowing. With the M&A market now showing signs of rebounding from the 2023 slump and the hard insurance market yet to soften, disputed W&I insurance claims are becoming more commonplace.

The recent cases demonstrate some of the pitfalls that can arise with such claims and serve as a reminder that the claimant has two hurdles to overcome when pursuing a W&I insurance claim: first, proving that there has been a breach of warranty causing measurable loss to the claimant and secondly, that such breach and loss are covered (and not excluded) under the terms of the policy. The second aspect appears routinely to be neglected. It is therefore essential that policyholders seek specialist advice and representation in relation to their rights and obligations under the insurance policy as well as the SPA before pursuing a claim against insurers.

For further commentary, see our earlier articles:

Commercial Court determines policyholder unable to claim for breach of warranty under warranty and indemnity policy [2023]

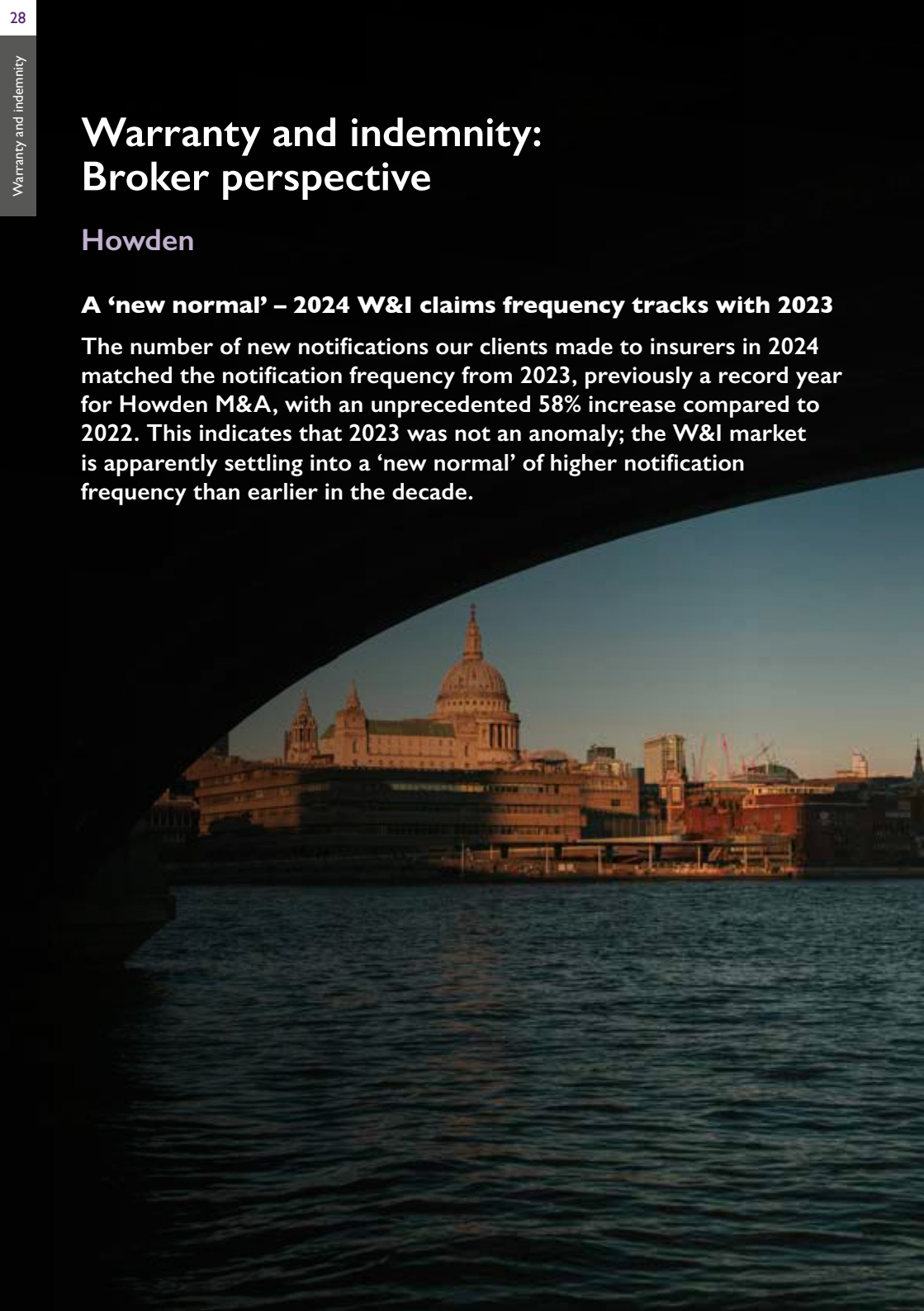
Breach of warranty by policyholder would preclude cover even when that breach could not cause the loss [2024]

Warranty and indemnity: Broker perspective

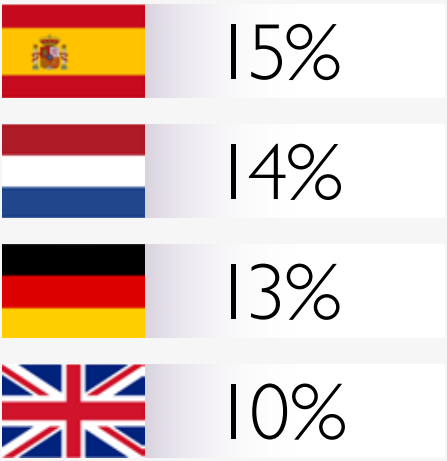
Howden

A 'new normal' – 2024 W&I claims frequency tracks with 2023

The number of new notifications our clients made to insurers in 2024 matched the notification frequency from 2023, previously a record year for Howden M&A, with an unprecedented 58% increase compared to 2022. This indicates that 2023 was not an anomaly; the W&I market is apparently settling into a 'new normal' of higher notification frequency than earlier in the decade.



Most claims are notified 12-18 months after policy inception. Historically, increases in notification frequency usually followed periods of increased M&A deal activity. However, the turbulent economic conditions since 2022 (higher inflation followed by higher interest rates) led to a comparative slowdown in deal activity across Europe. If deal frequency is not the driving factor, this 'new normal' could be attributed at least in part to the same economic turbulence. Notifications were spread across Europe in 2024, with the standout jurisdictions being: (1) Spain (15%); (2) the Netherlands (14%); (3) Germany (13%); and (4) the UK (10%). Correspondingly, all these nations experienced anaemic growth in 2024.



That said, inflation rates have recently levelled off, leading to a less volatile interest rate environment providing greater transaction stability. Economies across Europe are expected to recover further in 2025. We have observed an increase in deal activity in the latter half of 2024. If this trend continues into 2025, we will likely see a corresponding increase in notification frequency during H2 2025 and H1 2026. Combined with our clients' increased propensity to notify claims over the past two years, 2025 could be another record year for W&I notifications.

W&I insurance pays

Despite recent macroeconomic and geopolitical turbulence, our clients recovered a record amount from insurers last year. In 2024, our W&I policyholders in the UK and continental Europe recovered over EUR 150m.

€150m

Analysing this sum in more detail, the most common warranty breaches resulting in this record year of paid W&I claims were (1) financial statements (47%), and (2) tax (14%). In terms of industries and sectors, the most common for paid W&I claims in 2024 were: (1) energy and infrastructure (32%), and (2) manufacturing and industrial (14%).

While we are now operating in this 'new normal' of higher notification frequency, the most common warranty breaches are not surprising. Financial statements and tax warranties have consistently been the most common warranty breaches causing our clients' covered losses over recent years. Simply put, it is more of the same.

Tax authorities are increasingly taxing – insurance can help

Our clients' exposure to claims from tax authorities can be covered under W&I policies (covering unknown tax risks from transactions) or specific tax risk policies (covering known but contingent tax risks, either standalone or transaction-related).

A noticeable trend in recent years is the increased rate of tax notifications. Similar to the overall number of W&I claims, the frequency of tax notifications under our W&I policies in 2024 tracked 2023, which saw a significant year-on-year increase of approximately 207% compared to 2022. Our clients' specific tax risk policy notifications also experienced a 67% year-on-year increase in 2024, following a 17% increase in 2023.

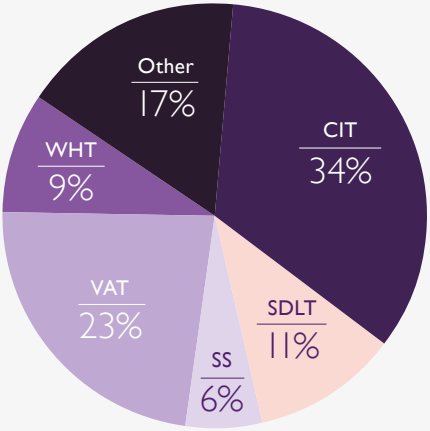
The economic slowdown has likely exerted downward pressure on tax receipts across Europe. Increased public spending, including on debt interest following the pandemic, may explain the heightened activity from tax authorities in challenging our clients' tax affairs. Fortunately, capacity and expertise are growing across the insurance market. W&I and tax insurance policies provide our clients with support during the investigation phase (covering adviser costs), any appeals and the final determination of the tax assessment. Policies cover a range of taxes levied by various European tax authorities.

From the notifications in 2024, the most common taxes audited were: (1) corporate income tax (CIT) (31%), (2) VAT (23%), and (3) Stamp Duty Land Tax (SDLT) (11%).

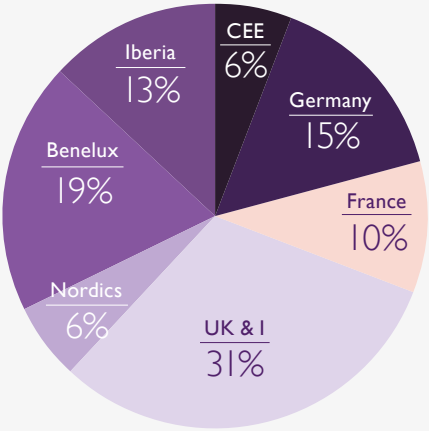
The most common jurisdictions for notifications were (1) the UK and Ireland (31%), (2) Benelux (19%), and (3) Germany (15%).

2024 Tax Notifications by Tax Type

SS = Social Security



2024 Tax Notifications by Regional Jurisdictions



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Property damage and business interruption

James Breese

The causation issue

In 2024, there was a common issue for insurance disputes relating to property damage and/or business interruption losses: causation.

There have been a series of decisions in 2024, including Court of Appeal judgments in which principles of causation have been examined in this context. This trend will continue in 2025 insofar as Covid-19 business interruption insurance disputes are concerned.

This section considers the causation decisions determined in the context of property damage and business interruption insurance policies.

Property damage

University of Exeter v Allianz Insurance Plc [2023] EWCA Civ 1484

The Court of Appeal handed down the first of the causation decisions in January 2024. The court found that World War II ("WWII") was the proximate cause of the losses suffered by the University of Exeter in 2021 when an unexploded bomb was found during construction works and, for safety reasons, detonated by the Ministry of Defence.

The university was insured for damage to its property under a policy issued by Allianz but not for loss "occasioned by war".

While the parties agreed that the dropping of the bomb was an act of war, the university argued that the deliberate detonation of the bomb was the sole proximate cause of the damage. The university argued that the parties could not have intended that the war exclusion apply to WWII and that the consequences of WWII (having ended some 76 years earlier) were too remote to be the proximate cause of losses suffered in 2021.

The Court of Appeal was asked to consider the position after the High Court found that (a) the dropping of the bomb was the sole proximate cause of loss, and (b) in any case, the bomb was at least a concurrent cause of loss that was excluded by the war exclusion in the policy.

Judgment

The Court of Appeal disagreed with the lower court that WWII was the sole proximate cause of loss. The controlled detonation was also a proximate cause. However, as the war was still a concurrent proximate cause, the outcome remained the same, and the claim was excluded.

In reaching its judgment, the Court of Appeal relied on the principle established in *Wayne Tank & Pump Co Ltd v Employers Liability Incorporation Ltd* [1974] QB 57. This principle states that where there are concurrent causes of approximately equal efficiency and one is an insured peril and the other is excluded by the policy, the exclusion will usually prevail.

In Exeter, Allianz had no liability for loss "occasioned by war".

However, it may have been open to the university to argue that Allianz had no liability for such loss because it was not expressly covered by the insuring clause, rather than liability for such losses being separately and expressly excluded by virtue of an exclusion clause. This alternative argument would seek to rely upon the principle established in *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1987] 1 Lloyd's Rep 32 that where losses arise concurrently from two proximate causes, one of which is not covered but not expressly excluded from cover, the claim will be covered.

While it is impossible to know whether it would have been successful, the university did not run that argument.

Accordingly, where there was no dispute as to the application of *Wayne Tank*, the principle would apply such that if the court found (which it did) that the dropping of the bomb was at least a concurrent cause of loss, the claim would not be covered.

The university relied heavily on its argument that the controlled detonation of the bomb in 2021 was the sole proximate cause of loss. In deciding that issue, the Court of Appeal held that the bomb's detonation does not have to be the proximate cause of loss just because it is the most recent. It found that the question is more nuanced than that, noting that the passage of time had no effect on the potency of the bomb.

Comment

This was an interesting case that, on its face, feels like an unfair outcome for the university. From a common sense perspective, it might be difficult for the reasonable policyholder to accept that (a) a war that ended 76 years before the inception of an insurance policy can determine the extent of coverage for damage occurring under that insurance policy, and (b) the parties would have had in mind the risk WWII might still represent when negotiating the terms of the policy 76 years later.

Nevertheless, on the arguments before the Court of Appeal, it is equally difficult to fault the court's conclusions. Policyholders might seek some comfort from (a) the fact that this case turns on a unique set of circumstances that might limit the extent to which the decision has wider application, and (b) were similar facts to arise on future property damage claims, the Court of Appeal's judgment may signpost how claims may still be validly paid.

What lies ahead?

Insurance disputes relating to damage to property can arise at any time. They can and often do concern typical coverage issues such as allegations of non-disclosure or misrepresentation or allegations that a policyholder has failed to comply with the terms of the insurance contract.

However, there are themes for this line of insurance that stretch beyond these typical coverage issues. Property damages claims arising from climate change-related issues or because of underlying construction defects have increased in number and may continue to do so in 2025. The Grenfell Inquiry will continue to have consequences for policyholders and insurers in 2025 and beyond.

Business interruption

Business interruption insurance disputes arising from the Covid-19 pandemic have dominated the Commercial Court in England and Wales since 2020. The ongoing series of test cases, commencing with the Financial Conduct Authority's test case in 2020, has examined a variety of issues and policy wordings.

Notably, the courts have been asked to determine:

1. The extent to which principles of causation apply to different business interruption wordings.
2. How different aggregating mechanisms (or the lack thereof) operate within different policy constructions.
3. Whether composite policies of insurance entitle separate insured entities to their own limits of indemnity.
4. Whether insurers are entitled to deduct from any indemnity owed the sums the policyholder has received from the UK government via the Coronavirus Job Retention Scheme, ie furlough.

This is not an exhaustive list of the issues, but the key issues that are still the subject of litigation today. All these issues are the subject of appeals to the Court of Appeal, listed for January 2025.

What lies ahead?

In January 2025, the Court of Appeal will hear various appeals from insurers arising from the cohort of cases that went to preliminary issue trials in autumn 2023 in relation to Liberty Mutual's proprietary Prevention of Access (Non Damage wording).

Causation will again be determined, this time in the context of this Non-Damage Denial of Access wording rather than a disease wording. Aggregation issues will also be under the spotlight in the lead case, *Bath Racecourse v Liberty Mutual*. Notably, this will include the "composite policy issue", in which the court will be asked to consider whether a composite insurance policy entitles multiple insureds under a single composite policy to their own separate limits and sub-limits of indemnity. This important point of principle has ramifications that extend far beyond the business interruption context into all lines of business.

For the first time, the Court of Appeal will also be asked to determine in a separate appeal from policyholders whether it is correct that insurers should be entitled to deduct from any indemnity owed the sums policyholders received from the government's Coronavirus Job Retention Scheme, ie furlough payments. The law in England and Wales currently favours insurers on this issue following the judgment in *Stonegate v MS Amlin & Ors*, for which Stonegate had permission to appeal before settling prior to the appeal hearing in November 2023. Conversely, a series of courts in Australia have reached the opposite conclusion on the same issue. The reasoning of Mr Justice Butcher in Stonegate and the Australian judges will no doubt come under close scrutiny. Again, the point is being decided in the lead test case, *Bath Racecourse v Liberty Mutual.*

Beyond January, the Supreme Court might again be asked to consider issues in Covid-19 business interruption insurance litigation. In December 2024, the Supreme Court refused permission to Allianz Insurance Plc to appeal the causation ruling that went against it in London International Exhibition Centre Plc in relation to "at the premises" wordings. Allianz is the only one of six insurers on risk in that case that pursued the further appeal.

However, while the Supreme Court declared it the end of the road for causation in "at the premises" cases, it seems likely that one or more issues from the January 2025 appeals may be further appealed to the Supreme Court no matter the outcome, particularly furlough but potentially also the composite policy issue.

Subject to the extent of agreement between the parties once the key outstanding coverage and aggregation issues have been resolved, there may be a need for a decision from the courts on the number of relevant government measures for the purposes of assessing aggregation of loss under "occurrence" based policy wordings, ie how many times could a policy respond in principle to multiple losses suffered during the policy year. The principles were settled in *Stonegate*. *Greggs Plc v Zurich Insurance Plc* was set to consider the issue in more granular detail, but the case settled after the preliminary issue trial. Therefore, there is no authority to indicate how many materially different government actions business interruption policies could respond to during 2020 and 2021.

Finally, Covid-19-related reinsurance disputes have now started to be litigated in England and Wales. It will be interesting to monitor whether further reinsurance litigation arises, given the extent to which the courts are favouring policyholders in the underlying primary Covid-19 business interruption insurance litigation.

Section 13A – damages for late payment

The ongoing Covid-19 business interruption insurance litigation invokes thoughts about the application of section 13A of the Insurance Act 2015 (which was implemented under the Enterprise Act 2016). Section 13A implies a new term into insurance contracts from 4 May 2017 requiring insurers to pay claims within a reasonable time.

There has been scant authority on the application of section 13A since the new legislation was implemented. The legal framework and the two decisions that have briefly considered it are discussed in our article below. Both decisions went against the policyholders on that issue, and policyholders remain without any authority on exactly when section 13A might apply.

While the implied term is available in principle to all insureds with insurance policies incepted on or after 4 May 2017, the facts around Covid-19 business interruption insurance claims might provide an interesting matrix for the courts to examine.

As it has now been almost five years since policyholders started to suffer losses due to Covid-19, policyholders with unresolved claims may well think the time it is taking for those losses to be indemnified is unreasonable and causing them additional damage. Indeed, if the Covid-19 business interruption context does not engage the terms of section 13A, it is hard to envisage circumstances where it will ever apply.

With limitation approaching in March 2026, there will no doubt be a flurry of litigation activity over the coming year as policyholders with unsettled claims race to protect their rights against insurers. It will be interesting to see whether any cases will provide the court with the opportunity to determine the circumstances in which a policyholder has an actionable remedy against its insurer for late payment of its claim.

For further commentary, see our earlier article:

How might a claim for damages for late payment under an insurance contract succeed? [2024]

The journey of Covid-19-related insurance litigation is illustrated in this timeline, in which we have analysed all the key decisions.

Covid-19 and business interruption: a timeline

15 September 2020

Divisional Court hands down first instance judgment following Financial Conduct Authority's test case. Partial success for policyholders. Leapfrog appeal to the Supreme Court is ordered.

15 October 2020

Commercial Court hands down judgment in *TKC v Allianz*, in which it was found that Covid-19 did not cause loss of property.

15 January 2021

Supreme Court finds in favour of policyholders in the FCA Test Case; provides significant ruling on causation that paves the way for further wordings to respond to cover Covid-19 losses.

17 October 2022

First instance judgments in *Stonegate v MS Amlin & Ors, Greggs v Zurich and Various Eateries v Allianz*. Court finds that losses do not aggregate to a single occurrence, paving the way for policyholders to recover multiple limits of indemnity; but denies policyholders a 'per premises' recovery. Mr Justice Butcher considered that insurers are entitled to deduct from indemnity the 'furlough' payments that policyholders received from the government.

26 May 2023

Aggregation decision in *Pizza Express v Liberty Mutual.* Pizza Express was not entitled to a per premises recovery due to the construction of its 'occurrence'-based wording. Permission to appeal was denied.

16 June 2023

Commercial Court rules in favour of policyholders in 'At the Premises' test case, *London International Exhibition Centre Plc v RSA & Ors*. Mr Justice Butcher found that the Supreme Court's ruling on causation in the FCA Test Case also applies to this additional category of disease wordings.

16 January 2024

Court of Appeal hands down judgment in *Various Eateries v Allianz*. All appeals and cross-appeals dismissed.

26 January 2024

Court rules in favour of policyholders on the key issues in the *Gatwick Investments* test case. However, furlough is again decided in favour of insurers as Mr Justice Butcher's judgment in Stonegate is followed. Permission to appeal is granted on most issues including furlough.

26 January 2024

Court finds against International Entertainment Holdings in its claim against Allianz under its 'policing authority' wording. The government is not considered to be a 'policing authority' so the policyholder is not entitled to cover.

6 September 2024

Court of Appeal upholds 'At the Premises' ruling in favour of policyholders.

30 September 2024

Court of Appeal determines pandemic was a "catastrophe" under reinsurance contract.

28 October 2024

Court of Appeal determines Covid-19 is an "incident likely to endanger life" in *International Entertainment Holdings Ltd v Allianz*.

25 February 2021

Judgment handed down in *Rockliffe Hall v Travelers* in which Covid-19 was found not to be 'plague', such that the specified disease cover would not respond as it expressly covers certain diseases, of which Covid-19 was not one.

10 September 2021

Lord Mance hands down public award in China Taiping Arbitration; considers that the Supreme Court's findings on causation may have a wider application than just the disease wordings considered by the Supreme Court.

25 February 2022

Judgment handed down in *Corbin & King v Axa.* Mrs Justice Cockerill finds in favour of policyholders on coverage and aggregation. Policyholders with a non-damage denial of access wording entitled to recover on the basis of the Supreme Court's findings on causation. Their composite policy and 'any one claim' wording entitle the policyholders to separate limits of indemnity per insured entity and per premises. Axa did not appeal.

24 October 2023

Further test case, *Gatwick Investments*, including other groups of policyholders such as *Liberty Retail* and Bath Racecourse in which policyholders sought to argue that that the Supreme Court's findings on causation can also extend to Liberty Mutual's prevention of access (non damage) wording, and that multiple limits were available pursuant to composite policies of insurance.

November 2023

Stonegate settles its dispute with MS Amlin & Ors shortly before appeal is to be heard. This leaves first instance decision on furlough undisturbed, and which favours insurers.

28 November 2023

Various Eateries v Allianz appeal is heard. The furlough issue is not live, but Court of Appeal is asked to reconsider the key aggregation issues; namely whether losses aggregate to a single occurrence or whether multiple limits of indemnity are available.

31 January 2024

Sir Richard Aikens hands down public arbitration award in relation to *Salon Gold policyholders v Canopius.* Supreme Court's analysis on causation against applied in favour of policyholders with a non-damage denial of access wording, and which responds to an insured peril within the 'vicinity' of the premises.

19 February 2024

Mrs Justice Cockerill grants Flat Iron and Wahaca summary judgment against QIC in relation to its non-damage denial of access wording that responds to a danger within the 'immediate vicinity'. Permission to appeal granted but both policyholders settled their disputes later in 2024.

30 April 2024

Court of Appeal says no cover for Covid-19 losses under damaged-based policy wording in *Bellini v Brit*.

December 2024

Supreme Court denies insurers permission to appeal in 'At the Premises' test case, meaning the Court of Appeal's policyholder favourable decision is final.

21 – 24 January 2025

Bath Racecourse defends insurers' appeals in relation to Commercial Court ruling in favour of policyholders in relation to the 'composite policy issue', ie that policyholders with multiple insured entitles under a composite policy are entitled to their own limits of indemnity. Causation also again the subject of appeal.

28 – 29 January 2025

Bath Racecourse appeals the insurer-favourable decision on furlough. This is the first time that the Court of Appeal is asked to examine the issue.

Construction

Chloe Derrick

A landscape shift

The construction sector has been subject to a significant liability shift following a wholesale review of building regulation and practice after the Grenfell Tower fire in June 2017.

The Building Safety Act 2022 ("BSA") has altered the landscape, and the changes in the law introduced have given rise to an influx of disputes. Historical defect claims previously time-barred have been brought back to life by renewed limitation periods. Additionally, several new duties and liabilities have been introduced, alongside a handful of groundbreaking remedies that have the potential to give rise to significant financial orders, including on a non-fault basis.

Against that backdrop, construction disputes, particularly those on issues of building safety, remain firmly at the forefront and show no signs of slowing down. Concurrently, such a seismic shift in duties, liabilities and remedies has an equivalent impact on the potential for coverage disputes, particularly in areas of unchartered territory.

Unfortunately, more than seven years on from the Grenfell Tower tragedy, unsafe cladding remains on thousands of high-rise and tall buildings across England.

The sheer scale of the remediation works still to be undertaken across England is evident from the government's 85th data release on building safety remediation.

As at 30 November 2024:

a. Of the 4,998 "tall" residential buildings (11 meters and over in height) that require remediation works for unsafe cladding, only 48% of buildings have completed or are undertaking remediation works, with 2,601 tall buildings yet to be remediated, and

b. Of the 514 "high-rise" residential and publicly owned buildings (18 metres and over in height) that have aluminium composite material ("ACM") cladding systems, 22 buildings are yet to start remediation works, and

c. Of the 809 high-rise residential buildings with unsafe non-ACM cladding eligible for funding from the Building Safety Fund ("BSF"), 288 buildings are yet to start remediation works[9].

The headline is that thousands of affected buildings and leaseholders are still awaiting remediation works, which will take many more years to complete. That is without even factoring in the 4,000 to 7,000 buildings across England that the government estimates have unsafe cladding but are yet to be identified[10].

On 2 December 2024, in an effort to address the delays (the reasons for which are numerous), the government published its "Remediation Acceleration Plan". The upshot of the plan is that by the end of 2029, the government expects (1) all high-rise (18m+) buildings with unsafe cladding falling within a government-funded scheme to have been remediated, and (2) every tall building (11m+) with unsafe cladding to have either been remediated or have a date for completion, with landlords placed under threat of "severe penalties" if they do not comply.

The latest announcement will be welcome news to the thousands of leaseholders living in limbo in potentially unsafe developments that may be impossible to sell. Indeed, there are an estimated 66,000 residential dwellings in just the 809 high-rise buildings that are eligible for funding in the BSF with non-ACM cladding.

What many leaseholders do not see, however, is the involvement of insurers behind the scenes who agreed to provide professional indemnity (PI) insurance to developers, architects, engineers and contractors for such risks. Insurers are now seeking to avoid coverage for the significant liabilities arising.

Indeed, we have witnessed insurers across the London market adopt differing approaches to coverage, particularly on notification, aggregation, the scope of exclusions and any non-insured losses apportionment. Additionally, while fire safety claims have often been notified many years ago, we have seen multiple insurers delay setting out any position on coverage until a matter of weeks before the policyholder is required to make remediation payments. In such circumstances, there is no doubt that disputes over insurance coverage of remediation works are contributing to the ongoing delay in completing or even commencing work.

Coverage disputes are becoming more commonplace across the construction market. Policyholders facing claims (notified under any professional indemnity, contractors' all risk ("CAR"), product liability and/or directors' and officers' policy) should carefully consider their policy wording and any arguments raised to extinguish or reduce cover.

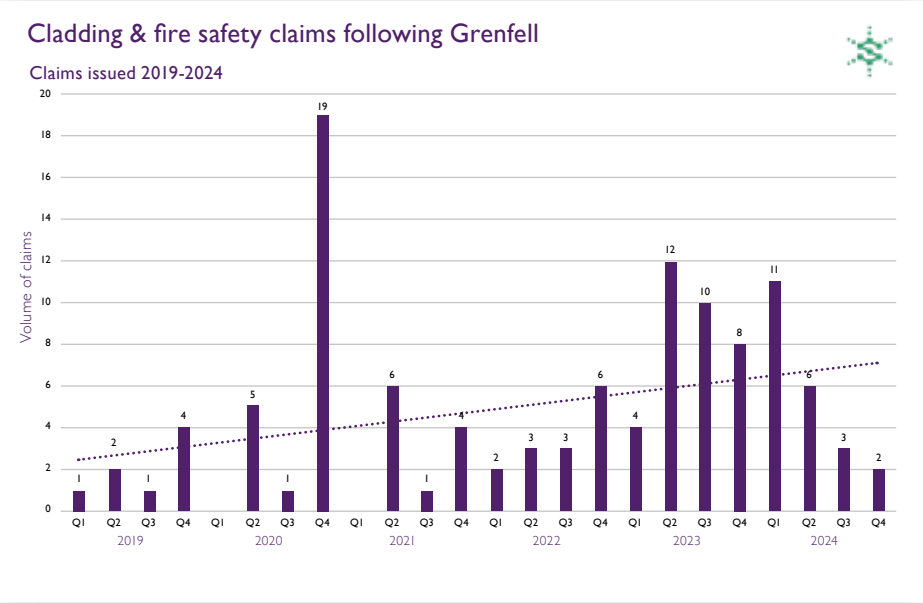
[9] A further 2,857 buildings registered with the BSF did not obtain funding
[10] Remediation Acceleration Plan, 2 December 2024

Cladding and fire safety claims

Following the Grenfell Tower fire, the number of claims issued in the Technology and Construction Court (the "TCC") relating to cladding or defective buildings and fire safety continues to increase.

Since 2019, there have been 114 such claims issued in the TCC, with total specified claim values exceeding £640m. Notably, the number of claims issued per year peaked in 2023, no doubt due to the introduction of the BSA.

Looking forward, although 2024 saw fewer claims issued in the TCC, the BSA has led to parties seeking new remedies in the Property Chamber of the First-tier Tribunal (the "FTT"), which are not available in the TCC. Therefore, it is possible that we may see an influx of claims returning to the TCC for determination in due course when disputes arise as to which party should ultimately bear the costs of any Remediation Orders made.



Source: Solomonic app database
Data correct as of 15 December © Solomonic
Excludes insolvency & Companies List

Developments in 2024

Grenfell Tower Inquiry: Phase 2 Report

In September 2024, the Grenfell Tower Inquiry published its Phase 2 Report ("the Report"), which contained industry-wide recommendations for the construction sector and government on improving fire safety.

The Report is essential reading for insureds, with ramifications for manufacturers, contractors and sub-contractors, architects, landlords, tenant management organisations and building control.

Across seven volumes and 58 recommendations, the Report paints a picture of a construction industry whose regulation for developing and refurbishing high-rise buildings had become "too complex and fragmented" and, as a result, seriously defective in several respects.

Of note for developers and designers, the Report concludes that before the Grenfell Tower fire in June 2017, the statutory guidance contained in Approved Document B was "poorly worded and liable to mislead designers into thinking that complying with its terms would inevitably ensure that the building would comply with the legal requirements of the Building Regulations"[11]. The Report also reaches the view that building control bodies allowed themselves to be seen as a "guidance and advice service" rather than bodies required to enforce building regulations rigorously.

Central government does not come out of the Report unscathed either. The Report levies significant criticism at government and private corporations responsible for certifying the safety of products. On the issue of regulation, the Report finds that the "government department responsible for the Building Regulations failed actively to monitor the performance of the system and failed to ensure that dangers of which it became aware were communicated to industry". Indeed, it concludes that by 2017, more than a handful of government departments, local authorities and commercial organisations were tasked with monitoring the regulatory arrangements, which created "a recipe for inefficiency and an obstacle for effective regulation".

The true impact of the Report remains to be seen, but we summarise some of the key ramifications for policyholders below if the government accepts its recommendations.

[11] Chapter 113 Recommendations, paragraph 113.2

The "Construction Regulator"

To address deficiencies and build a "new climate" with regulation at the forefront of building control, the Report recommends an independent "Construction Regulator" be established, who shall be responsible for reporting directly to a secretary of state and their "Chief Construction Adviser".

It is proposed that the Construction Regulator will have extensive duties and powers far beyond those of the Building Safety Regulator (notably a role only recently created as part of the BSA). The overall intention is that the newly appointed Construction Regulator will draw together dispersed government functions to (a) better regulate work on high-rise buildings, (b) monitor regulation and oversight of building control to a higher competence standard, and (c) test and regulate construction products.

Insofar as construction products are concerned, one of the Report's key recommendations is state intervention over the approval of construction products. If accepted, manufacturers will be required to obtain test certificates from the Construction Regulator, with applications supported by a full history of the product's test data. Additionally, under the recommendations, a centralised public library of test data and publications will be assembled.

How those recommendations will work in practice remains to be seen. We have already witnessed the significant delays that flowed from the introduction of the EWS1 framework (in relation to the cladding of external wall systems), for example, due to a shortage of suitably qualified professionals. A new product certification process that requires the Construction Regulator to conduct detailed assessments to ensure conformity with legislation, statutory guidance and industry standards will undoubtedly take some time to implement. It is also unclear who will pay for and maintain the public library, which will be a significant task.

Additionally, products where certificates are withheld or product updates are required following an analysis of historical test data is an obvious liability risk area for manufacturers and suppliers, who should liaise with their broker and insurer about any such risks. Any inability to obtain product certification might also encourage third parties to pursue manufacturer claims, particularly now that there are long-tail exposures for manufacturers after the extended limitation periods[12] and a new cause of action against manufacturers of defective construction products[13] introduced under the BSA.

The meaning of "higher-risk building"

Section 65 of the BSA presently defines a "higher-risk building" as a building in England that is at least 18 metres in height (or has at least seven storeys) and contains at least two residential units[14]. The Report recommends an urgent overhaul of that definition so that buildings are not simply determined as high risk by reference to height only.

In July 2024, the FTT weighed in with its own views on how higher-risk buildings should be categorised, noting the issue was not a straightforward one after considering the relevant law and contradictory government guidance.

Within the context of an application for a remediation order in *Smoke House & Curing House,*[15] the FTT determined that a roof garden should be categorised as a "storey" where, for the purpose of assessing fire safety, persons may well be located there such that "the level of the roof garden will be significant in determining height". Notably, that is a significant departure from the government's own guidance note of 21 June 2023, which, contrary to the legislative definition, defined a storey as a "fully enclosed" space and expressly excluded "open rooftops such as rooftop gardens" from the measurement of storeys and height. That advice note has come under some criticism by the FTT decision as an attempt to amend a critical and legal definition of "storey". While the government confirmed on 18 October 2024 that it was considering the views expressed by the FTT, for the time being, the sector and regulatory bodies are directed to the existing government guidance, which states that "a storey must be fully enclosed, and the roof of a building (including rooftop gardens) should not be counted".

While an unenviable task due to the increasingly mountainous amounts of evolving government guidance[16], policyholders should closely monitor this area as it may have potential ramifications for the scope of information to be provided to insurers at policy inception or renewal (where a proposal form might request disclosure of any "higher-risk" buildings exposure, for example). Equally, for any existing notification, it is important to note that when considering whether there has been a fair presentation, it is the legislation and guidance that existed when the policy was entered into that will be relevant for knowledge under the provisions of the Insurance Act 2015.

[12] BSA, section 150
[13] BSA, sections 147 - 151
[14] As supplemented by The Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023, which provide guidance as to how the height of a building is to be measured.
[15] LON/00BG/HYI/2023/0024
[16] Interestingly, the FTT observes in Smoke House & Curing House that as of July 2024, there are "now more than 50 web-pages [of government guidance] relevant to the Building Safety Act and the other legislation such as Leaseholder protections" which "do not constitute a reliable method of interpretation of law" due to the continuously changing nature of the government guidance notes

Approved Document B

The inquiry does not consider that "Approved Document B" (the building regulation covering fire safety in buildings) provides the information needed to design buildings that are safe in fire, and the Report recommends that a revised document be published as a matter of urgency. Its investigations are said to have revealed an industry-wide approach to treating statutory guidance as if it were a definitive statement of the legal requirements. The Report does not comment on specific changes to the Approved Document B, which it rightly observes are matters for qualified fire engineers on individual assessments. It is a point for construction professionals, particularly designers, to bear in mind, however, when considering whether the design of buildings complied with the requirements of building regulations at the time of construction.

Other statutory requirements

Specific recommendations arising out of the inquiry concern fire engineers, architects and contractors.

The Report recommends that "fire engineers" be formally recognised as skilled professionals subject to formal qualifications, ongoing professional development and regulation by a professional body. At present, the standard of skill and care to be reasonably expected of a fire engineer is undefined. This underlines the importance of contracting parties ensuring that construction contracts have appropriate provisions addressing standards of care during a project's design and construction. Equally, a formally recognised and regulated profession will likely lead to the introduction of standard minimum terms of PI insurance for fire engineers.

Architects receive criticism in the Report for failure to investigate or properly understand the nature of the materials chosen for a particular purpose on a project, with similar insulation and rainscreen panels to the Grenfell Tower found on hundreds of other high-rise buildings. To address this and reinforce an architect's often key role in project design, the Report recommends that, as a statutory requirement, an application for building control approval on the construction or refurbishment of a higher-risk building is supported by "a statement from a senior manager … that all reasonable steps have been taken to ensure that on completion the building as designed will be as safe as is required by the Building Regulations". It remains to be seen what impact this will have on PI insurance for the principal designer, but any statement that later proves to be incorrect could give rise to a personal liability exposure.

As for contractors and sub-contractors (and with a view to the design-build model), the inquiry urges better-defined contractual agreements that clarify which entity is responsible for specific design and fire safety elements. The Report recommends that (a) the newly appointed Construction Regulator operate a "licensing system" for principal contractors who wish to work on higher-risk buildings, and (b) a senior individual from the principal contractor is personally responsible for ensuring fire safety. In a similar vein to the increased regulatory burden placed upon the principal designer, the Report recommends that an application for building control approval is supported by "a personal undertaking from a director or senior manager of the principal contractor to take all reasonable care to ensure that … the building is as safe as is required by the Building Regulations". Similarly to architects, if implemented, we expect this undertaking to have liability and coverage implications.

Building Safety Act 2022

The BSA introduced sweeping legal and regulatory changes impacting liability and insurance cover. It is undoubtedly a complex and radical piece of legislation, notably supported by over 400 pages of explanatory notes endorsed by parliament to explain to the reader what the act means in practice and how it will impact existing legislation.

Limitation for Defective Premises Act claims (section 135)

Perhaps the most widely commented upon shift in the law following the introduction of the BSA is the significant, retrospective extension of the limitation periods that apply to claims pursued under the Defective Premises Act 1972 ("the DPA"). Before the introduction of the BSA, any cause of action in respect of a breach of duty imposed by the DPA could only be brought within six years from the date the dwelling was completed. As of 28 June 2022, however, the BSA[17] applied the following special time limits for certain actions in respect of building defects:

- For buildings completed after 28 June 2022, claims can be commenced up to 15 years from the date the right of action accrued, and
- For buildings completed prior to 28 June 2022, claims can be commenced up to 30 years from the date the right of action accrued.

Additionally, claims can also now be brought under the DPA for defective refurbishment or rectification works to existing dwellings, with an applicable 15-year limitation period. For such "further work" claims, the cause of action (and the start of time running) accrues from the date the further work is finished.

Over the past two and a half years, we have witnessed the impact of the new limitation periods. From a coverage perspective, disputes are arising. Claims are being reawakened against developers, contractors and consultants who, at the material points in time, might reasonably have taken the view that they had no liability exposure on historical projects post-Grenfell.

While each case will turn on its own facts, there will be instances where all causes of action against a policyholder were statute-barred until the introduction of the BSA and the DPA's extended limitation periods. Arguably, it was only once a potential liability under the DPA reignited in 2022 that the position here changed. For any policyholders facing sweeping coverage statements by insurers that fire safety exposures should have been notified or disclosed almost immediately after the Grenfell Tower fire in 2017, it may be worthwhile considering this point.

Similarly, now that DPA claims are increasing in significance due to renewed limitation periods, policyholders should be alert to potential coverage points being raised around the possibility of whether the DPA imposes strict liability, which would mean that a claimant does not have to prove fault or negligence (with potential implications for PI cover and whether there is a wrongful act). That point gathered some market commentary after the government published a (notably now withdrawn) factsheet in early 2022. Our view is that liability under the DPA is not a strict one and that DPA claims are indemnifiable under PI policies, as supported by the court's considerations of reasonable skill and care within the context of a DPA claim in *Vainker*[18]. Equally, it is worthwhile bearing in mind the court's recent criticism over the accuracy of government guidance on matters of legal interpretation in *Smoke House & Curing House.*

[17] BSA, section 135
[18] Vainker v Marbank Construction Ltd & Ord [2024] EWHC 667 (TCC)

URS Corporation Limited v BDW Trading

There are also considerable legal knots flowing out of the BSA, including how the significant and far-reaching extensions of limitation might impact existing claims between commercial parties subject to ongoing proceedings before the revised limitation periods introduced by the BSA came into force.

In December 2024, illustrative of the significance of the judgment, the Supreme Court appeal in *URS Corporation Limited v BDW Trading Limited*[19] came before seven Supreme Court justices to determine a number of points of significance arising out of the BSA on liability and limitation.

In headline terms, URS was retained by BDW (a property developer) as the structural design engineer on the construction of 12 residential tower blocks. The tower blocks contained fire safety defects, although by the time BDW discovered this in 2019, it had sold the premises. Nevertheless, prompted by the Grenfell Tower fire, BDW agreed to perform remedial works, although it was subsequently accepted between the parties that any action brought against BDW by third parties would have been time-barred. Thereafter, BDW pursued a claim against URS for its losses arising out of the alleged negligent design of the tower blocks, and it was successful at first instance. On appeal to the Court of Appeal, BDW also obtained permission to amend its pleadings to include a DPA claim against URS, given the extended limitation period.

Ultimately, the case has now come before the Supreme Court to determine the following issues:

1. If a developer opts to conduct remedial works to property it no longer owns and in respect of defects for which it cannot be held liable due to the expiry of applicable limitation periods, has it suffered actionable and recoverable damage that falls within the duty of care owed to it by the designer?
2. Do the retrospective extended limitation periods provided for by section 135 of the BSA apply (i) in the circumstances set out above, and (ii) to claims brought before section 135 came into force and are the subject of pending proceedings?
3. Does the duty to build dwellings properly (under section 1(1)(a) of the DPA) apply only to purchasers of properties, or does it also apply to commercial developers? and
4. Is the developer entitled to bring a contribution claim against the designer[20] notwithstanding that (i) there has been no judgment or settlement between the developer and any third party, and (ii) no third party has asserted any claim against the developer?

When handed down in 2025, the Supreme Court's judgment will be of instrumental importance to the construction and insurance sector. Indeed, it will be the Supreme Court's first consideration of the BSA and DPA. On matters relating to the DPA, the position at present, set out by the Court of Appeal, is that (a) the amendments to the DPA's limitation period are to be treated as having always been in force, and (2) DPA rights of action could be owed equally to commercial entities as well as purchasers of properties. The Court of Appeal also found in favour of the developer on the entitlement to bring a contribution claim even in the absence of a formal claim from a third party. It will be interesting to see whether the Supreme Court reaches a similar view. The judgment will be of significance for any developer seeking to pursue a DPA claim against third parties, particularly where other causes of action would be time-barred.

[19] UKSC/2023/0110
[20] Pursuant to section 1 of the Civil Liability (Contribution) Act 1978

Remediation Orders (section 123)

Section 123 of the BSA provides the FTT with the power and discretion to issue a "Remediation Order" ("RO") against landlords requiring them to remediate defective buildings.

The first RO was granted in *Kedai*[21], in which the FTT provided some insight on the application of its section 123 powers, including how it would assess whether there was a "relevant defect" to be remediated (as defined by section 120 of the BSA). Notably, the decision makes clear that in establishing whether there is a relevant defect, it is irrelevant whether the works in question satisfied building regulations at the time of construction. Rather, the test to be applied is whether the defect caused a "building safety risk"[22], applying industry knowledge at the date of the hearing.

An application for an RO was also made by the Secretary of State in October 2022 against the freehold owner of Vista Tower in Stevenage (*Grey GR Limited Partnership*[23]) following alleged failings to progress fire safety remediation works at a sufficient pace. In that case, by the time of the hearing, remediation works had commenced and were ongoing, but the Secretary of State continued to pursue its application, which Grey GR resisted. In the government's press release following the RO, there are repeated references to Grey GR's ultimate owner (the UK's rail workers' pension fund, which manages £34bn in assets), which we suspect might have had some bearing on the government's approach to the application, alongside the ROs sought on a further five Grey GR buildings.

The decision is a clear indication to any policyholders required to undertake remedial works that the FTT is able (and willing) to make ROs to ensure works are conducted swiftly and to a fixed timetable. This remains the case even where funding is in place and remediation works have commenced.

The FTT subsequently adopted a similar approach on an application in *Di Bari and others v Avon Ground Rents Ltd*[24]. In that case, while the landlord had proactively engaged in remediation discussions, the tribunal granted an RO requiring certain works to be carried out in a specified timescale on the grounds that the prejudice to leaseholders in not having a binding order would leave them "at the mercy of" the landlord. Again, this is a clear signal that leaseholders' interests will be considered paramount.

The FTT's decisions raise the question of whether and on what grounds ROs can reasonably be contested where the tribunal has unfettered discretion, which is not subject to the same express "just and reasonable" criteria as sections 124 (Remediation Contribution Orders) and 130 (Building Liability Orders) of the BSA.

It is possible that with the threat of ROs, we will see more proactive engagement by insurers to seek to resolve coverage issues earlier so that insurance funds needed to carry out necessary remediation works are received without delay. Pursuant to section 13A of the Insurance Act 2015, it is an implied term of every insurance contract that the insurer must pay any sums due in respect of the claim within a reasonable time. If, as a result of any delay in payment, policyholders are facing ROs they might not otherwise have been subject to, section 13A claims for losses may follow against insurers as a result. Such losses might include, for example, (1) costs incurred in responding to an application for an RO, and (2) any additional remediation costs that arise when measuring the costs of the remedial works ordered under a RO (assessed by reference to the building regulations in force at the time of the application hearing, rather than the regulations in place at the time of the works), against losses that might flow from claims in contract, tort or under the DPA.

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[21] Waite & others v Kedai Limited LON/00AY/HYI/2022/005 & 0016
[22] A 'Building Safety Risk' as defined by BSA section 120(5): "a risk to the safety of people in or about the building arising from – (a) the spread of fire, or (b) the collapse of the building or any part of it"
[23] CAM/26UH/HYI/2022/0004
[24] LON/00AP/HYI/2022/0017

Remediation Contribution Orders (section 124)

In addition to ROs, section 124 of the BSA makes provision for "Remediation Contribution Orders" ("RCOs"), pursuant to which the FTT may, on the application of an interested person, make an order that requires a "specified body corporate or partnership" to contribute towards the costs of remedying relevant defects if they are an "associated person". This effectively pierces the corporate veil.

On 19 January 2024, the FTT handed down its first decision on when it might be "just and equitable" to issue an RCO in *Triathlon Homes LLP v Stratford Village Development Partnership and others*[25]. The RCO application concerned five residential building blocks in the former Olympic Village in Stratford, London. Triathlon, which had long leasehold interests across all of the blocks, pursued (1) the original developer and nominal freeholder, "SVDP"; (2) its parent company, Get Living Plc, which owned the private rented housing and long leaseholder units, and (3) a company jointly owned by Triathlon and Get Living Plc ("EVML"), which was responsible for the repair and maintenance of the structure and common parts of the development.

Following the Grenfell Tower fire, some fire-safety defects had been identified in the blocks, with the total cost of remediation works exceeding £24.5m. Triathlon sought an RCO against the original developer and its parent company pursuant to section 124, to reimburse the expenditure it had incurred through service charges for fire safety measures and preliminary works. Of more significance, it also sought orders requiring the developer and its parent company to reimburse expected expenditure of approximately £16m, which represented its share of the total remediation cost.

Distinct from ROs under section 123 of the BSA, section 124 provides that the FTT may issue RCOs so long as it is "just and equitable" to do so. In this case, the FTT determined that it was just and equitable to issue the RCO requested against the original developer and its parent company as an "associate" of the developer. It did so on the basis that under the BSA, primary responsibility for the cost of remediation falls on the original developer. Where the original developer depends on its wealthy parent company (or other wealthy entity) for financial support, it will be caught by the association provisions and cannot "evade responsibility for meeting the cost of remedying the relevant defects by hiding behind the separate personality of the development company". Additionally, it is worthwhile noting that in this application, funds had been secured from BSF and dispersed after the RCO applications had commenced. In addressing submissions on this point, the tribunal found that the public interest in securing reimbursement of funds to the BSF as quickly as possible strongly supported making the order.

[25] LON/00BB/HYI/2022/0018-22

As to the applicant's motivations for pursuing the application, the FTT made clear that this will be of little significance. (It was said Triathlon's only real interest was in protecting itself from having to pay for remediation, effectively to try and bypass the parties' existing contractual arrangements.) The tribunal observed that RCOs are a new and independent non-fault based remedy created by parliament as a route for parties to secure funding for remediation works without "complex, multi-handed, expensive and lengthy litigation". In our view, while that may have been parliament's intention, concentrating on what is "just and equitable" without reference to fault or the parties' contractual arrangements before the introduction of the BSA is, without doubt, a radical remedy that challenges well-established legal principles.

As to how non-fault based remedies fit within the realms of indemnity insurance, any entity facing an RCO as an "associated" person should consider their policy wording carefully and, if needed, take coverage advice. Subject to the terms of each policy, coverage disputes might arise if the "associated" entity was not a party to the underlying contract(s) or involved in the development at the material point in time. Equally, rather than a composite policy, the developer and associated entity could feasibly be insured under separate policies with separate insurers and differing terms, which may further complicate the issue. Overall, the FTT has been granted the power to provide remedies that are far broader than would ordinarily be the case in litigated construction disputes proceeding in the TCC so that applicants can avoid the cost and complexities ordinarily associated with such litigation. That does not, however, mean that the expensive and lengthy litigation ramifications will not be felt by parties in knock-on coverage disputes or later TCC claims that flow from the RCO.

Building Liability Order (sections 130-132)

In a similar vein to RCOs, another groundbreaking reform introduced by the BSA is the power now provided to the High Court to issue a "Building Liability Order" ("BLO"), which will make another specified body corporate jointly and severally liable for the relevant liability.

BLOs will similarly be subject to the "just and equitable" test (meaning the court should have regard to the facts in each case). However, distinct from the approach to RCOs, such orders will only be secondary remedies that follow once primary liability is established. A BLO does not, therefore, create a new independent remedy. It does, however, provide the court with additional options for enforcement by allowing the court to pierce the corporate veil and extend liability to associates of the original developer or landlord liable under (a) the DPA, (b) section 38 of the Building Act 1984 (which establishes a statutory cause of action for breach of building regulations); or (c) as a result of some other widely defined "building safety risk" claim.

The TCC recently considered the new BLO regime in *Willmott Dixon Construction*[26], in which the court was asked to stay a secondary additional claim pursued against third parties under a BLO until the primary claim had been determined. Mrs Justice Jefford, having acknowledged that the BLO is a "relatively new creation on which there is little if any authority", refused the application for a stay and ordered that the additional claim be heard at the same time as the main claim. In doing so, she concluded that as a matter of principle, third parties against whom a BLO is sought do not need to be made a party to the main claim or participate in those proceedings (although it may, subject to the circumstances of each case, be sensible and efficient for the third party to do so).

BLOs are another radical remedy, which, for similar reasons to RCOs, are likely to result in insurance ramifications and potential disputes over the scope of coverage for costs incurred in contingent claims. In expensive, multi-party construction proceedings such as *Willmott Dixon*, a third party subject to an additional claim for a Building Liability Order which is required to participate in the main claim will undoubtedly incur significant defence costs. Indeed, as Mrs Justice Jefford acknowledged, that third party may wish to participate in the main claim and adduce its own expert evidence. It will also likely incur significant legal fees participating in submissions and cross-examination on whether there is a relevant liability under section 130 of the BSA or whether it is just and equitable to make a BLO. Policyholders, particularly those with group companies, should review their policy wording to check how their policy might respond and, if they are indemnified for legal costs, if they were added as an additional party to proceedings as part of a BLO claim.

Liability for past defaults relating to cladding products (section 149)

A widely anticipated £70m dispute in *Shepherd Construction v Kingspan* settled prior to an 11-week trial listed for October 2024. It was due to be the first case to consider the new cause of action against cladding product manufacturers introduced under section 149 of the BSA (which allows parties suffering injury, damage or loss due to dangerous cladding to recover their losses from cladding manufacturers). Therefore, the apportionment of responsibility for defective cladding claims under section 149 remains to be determined.

[26] [2024] EWHC 1190 (TCC)

Looking ahead to 2025

How does this all fit together in practice, and what should policyholders consider?

There has been a seismic shift across the industry on issues relating to building safety risk, and further clarification is still awaited on several pertinent issues that might have coverage ramifications. Ongoing developments should be closely monitored.

Under PI policies, for policyholders whose business includes multiple higher-risk buildings potentially with differing fire-safety issues, the policy's aggregation clauses and how those apply to limits and deductibles may be of particular importance, together with policy attachment. Multiple limits of indemnity for example might be possible under different years of account depending on the circumstances of each claim.

Equally, any clauses referenced or relied upon by insurers to reduce or extinguish cover (such as workmanship and contractual warranty exclusions) should be carefully considered, as counterarguments can often be raised to obtain a higher indemnity payment under the policy. Policyholders should also take advice on the reasonableness of any alleged late notification or fair presentation stances adopted by insurers, particularly where claims arise out of historical developments brought back to life by revived limitation periods that were otherwise statue-barred.

The scope and wording of any directors' and officers' (D&O) policies are of equivalent importance, particularly for policyholders who hold a duty holder role as a principal designer or contractor. This is not least to ensure that (a) any professional service exclusion includes a carve-back provision for claims arising from a failure to supervise, and (b) all potentially relevant individuals fall within the definition of an insured. The scope of coverage for individuals of associated companies should also be reviewed given the new remedies introduced by the BSA, which permit the pursuit of parent companies and other associated entities. Additionally, indemnity limits for legal costs, together with the limit of any regulatory fines and penalties coverage should be reviewed to ensure the amounts are satisfactory, given that the Building Safety Regulator now has the power to pursue criminal sanctions and unlimited fines.

Construction: Broker perspective

Lockton

The market perspective: a softening market

The market for construction professional indemnity ("PI") insurance has moved on significantly since the dark days of the hard market. In recent months, we have witnessed the expansion of capacity within the market. This is the result of both the opening of new markets and the growing appetite for new business among established insurers, aided in part by increasing interest rates and greater clarity on the claims environment.

The construction PI market started to harden in 2018, reaching its peak in 2020 before softening again in 2022. During the hard market, many insurers were remediating their renewal books and earning considerable premiums. With premium rates having returned to profitable levels, the market once again represents a more attractive proposition for insurers, who in turn have greater capacity and appetite to underwrite new business.

In particular, the growth of healthy competition within the market is improving conditions for buyers, with insurers looking to increase lines on held risks or offering rating decreases to firms with strong claims records and sustainable growth. Small and medium-sized enterprise (SME) buyers stand to benefit the most from this trend, thanks in part to their lower relative risk exposure. Insurers continue to show some hesitance with regard to larger, multinational exposures, although premium rates are decreasing in the right circumstances.

Cladding and fire safety exclusions ease

One notable change is the availability of cladding and fire safety cover for the majority of firms. While the standard International Underwriting Association (IUA) cladding and fire safety clauses remain, complete exclusions for these risks are becoming rare. Once again, this reflects a growing appetite within the market. As insurers increasingly seek out new business, they must keep themselves competitive. Added to this, previous projects involving cladding and/or potential fire safety issues will, in most cases, have already been notified to prior insurers. Therefore, any cover given going forward may not yet apply to the entirety of firms' work profiles.

As ever, insurers continue to consider cladding and fire safety issues on a case-by-case basis. Where firms can provide evidence of effective risk management and clear information, insurers are demonstrating a willingness to write limited cover back into the policy as required. However, this is likely to have a retroactive inception date, whereas it was previously excluded entirely. Where cover is available, it is still largely on a restricted basis, with aggregate limits, increased excesses and consequential loss exclusions applied.

Insurers are no longer insisting on specific cladding and fire safety questionnaires looking at a 12-year portfolio, easing the administrative burden on insureds.

The Building Safety Act ("BSA") is one of many lingering uncertainties

Despite these improvements, uncertainty remains around the lasting impact on the insurance industry in the wake of the Grenfell Tower disaster. The Building Safety Act 2022 ("BSA")) came into force on 28 April 2022 and implemented a number of Dame Judith Hackitt's recommendations in her 2018 report 'Building a Safer Future'. Although the full ramifications of the BSA are not yet apparent, it has undoubtedly increased the potential for civil claims. This is not least because of the extension of the limitation period under section 1 of the Defective Premises Act, which has given rise to issues on historical projects that would previously have been statute-barred. It will be some time before the impacts of the limitation extension are fully understood, but the extension does present a challenge to an otherwise improving market.

In addition, the principal designer role was also expanded within the BSA, creating increased obligations related to building regulations. This, too, has the potential to create a more vibrant claims environment in the construction PI sector.

Principal designer role

The BSA's introduction of a new "principal designer" role has created concerns for design professionals about whether they could or should undertake the role themselves.

Uncertainties around the extent and requirements of the new role have exacerbated these concerns.

The BSA does not yet represent a finalised position, with secondary legislation and guidance having been issued only recently or is still awaited. As such, affected firms, commentators and insurers have not yet received all the details of the changes. Nevertheless, firms looking to undertake the role should ensure they take adequate steps to understand and comply with their potential obligations.

Under the BSA, a principal designer is required for a variety of developments, including some domestic projects, and is not simply confined to higher-risk buildings.

A principal designer can be an individual or an organisation, such as:

- architects
- engineers (structural and others)
- surveyors

The duties and competencies expected of the BSA principal designer are set out under British Standards Institution (BSI) standard PAS 8671. Primarily, this consists of a duty to plan, manage and monitor design to achieve compliance of that design with building regulations. Individuals and organisations must possess the required competency, skills and established management processes to fulfil the BSA principal designer role.

It is important to note that this role is separate from the principal designer role as defined under the Construction Design and Management (CDM) Regulations 2015, which is concerned with managing foreseeable risks to health and safety in the pre-construction phase. However, the appointed principal designer in each case may be the same entity or individual.

Implications for professional indemnity insurance

While the new principal designer role is a statutory duty, there are elements of reassurance when considering whether it represents significant new exposure and could have a negative impact on the professional indemnity insurance market.

Specifically, the changes under the BSA may serve to:

- Increase clarity around areas of responsibility, particularly where a responsibility might be said to have previously 'fallen down the cracks' between the scopes of different project participants. This focus of attention may be positive from the liability claims perspective in narrowing issues. Simplifying responsibilities may also lead to a corresponding reduction in time and cost in dealing with a claim.
- Improve competence so that when responsibilities are allocated, it is clear the participant is suitable for the role they have been given. This may also be positive for liability claim exposures going forward, as it might be thought that more appropriately experienced project participants will lead to fewer problems and, therefore, fewer claims.

In considering the degree of new exposure that has been created, it should be acknowledged that many construction professionals are already under contractual liability relating to similar areas and outcomes. Construction appointments (and their attendant collateral warranties) often contain obligations relating to compliance with building regulations or assisting the other party with their own compliance with legislation or project requirements.

PI claims experience shows that where there are significant deviances in the works, construction professionals can face claims that a failure to identify and flag a problem represented a fundamental breach of their duty of reasonable skill and care. This is regardless of whether they had explicit inspection or monitoring duties. This has been especially the case for architects and project managers.

If contractual liability already existed and the default litigation landscape included attempted claims against project participants in any event, it might be asked how much additional exposure the new role represents.

Areas of concern for design professionals

One area of concern for some professionals considering undertaking the BSA principal designer role is the requirement to sign a compliance statement and whether this entails signing off compliance with relevant requirements in areas outside their professional discipline. From a practical perspective, it may well be impossible for there to be someone skilled in every professional discipline across a complex project. Even if such a person existed, how many of them are there? There would be a significant national shortage of such multi-skilled practitioners.

British Standard Publicly Available Specification ("PAS") 8671 is helpful in considering this particular concern. The language used in the PAS across multiple sections is the need for the principal designer to manage the process for designers to achieve consensus that the coordinated design work complies with relevant requirements (for example, 4.4.2 h or 4.5.1 b). This does not represent the principal designer confirming compliance themselves based on their individual knowledge. The PAS specifically acknowledges that it is unlikely a principal designer can have sufficient knowledge across every relevant discipline (for example, note 1 at 4.5.2). This is reassuring, but nonetheless there is a tension in the drafting; the PAS also states that the principal designer must be able to find and apply information in guidance or standards to appraise and challenge designers' evidence of design work compliance (4.5.2 b i).

Another practical concern relates to the duty of the BSA principal designer to monitor compliance and what that would represent when the principal designer performed another role on a design and build project, and their appointment had been novated to the contractor. In essence, would they face a conflict of interest in performing their statutory duty of monitoring compliance of what is, in other respects, their own employer? There are clearly practical difficulties in trying to perform effectively in such a situation. This perhaps parallels some of the difficulties observed around the role of clerk of works on a design and build project; commentators have suggested that it led to a decline in the use of clerks of works and problems with project quality as a result.

Reassuring underwriters is key

Another recurring concern for construction professionals is whether PI insurance covers the BSA principal designer role and whether it will continue to do so in the future. Given the legislation's developing rather than settled state, PI insurers are still formulating their views. However, for the above reasons, underwriters are not presently averse to the exposure.

Unfortunately, this does not provide any guarantees for the future. Underwriting is often based on actual claims experience. As a new set of changes, there are not yet any significant patterns of claims or headline losses to influence market perception of the exposure. It is not clear where we might be in three or five years' time.

Underwriters will likely need to be reassured of the depth and quality of practices around performing the role and will be more anxious about a firm dabbling in this area.

Firms considering undertaking the role should commit to the role seriously in terms of resourcing and develop conscious and explicit protocols and practices around performing the role.

Optimistic outlook

Although questions remain, the PI market is undoubtedly improving from a buyer's perspective and rate (or premium) decreases are becoming more commonplace. Early engagement is still key, but ultimately, renewals are yielding better results for the vast majority of firms.

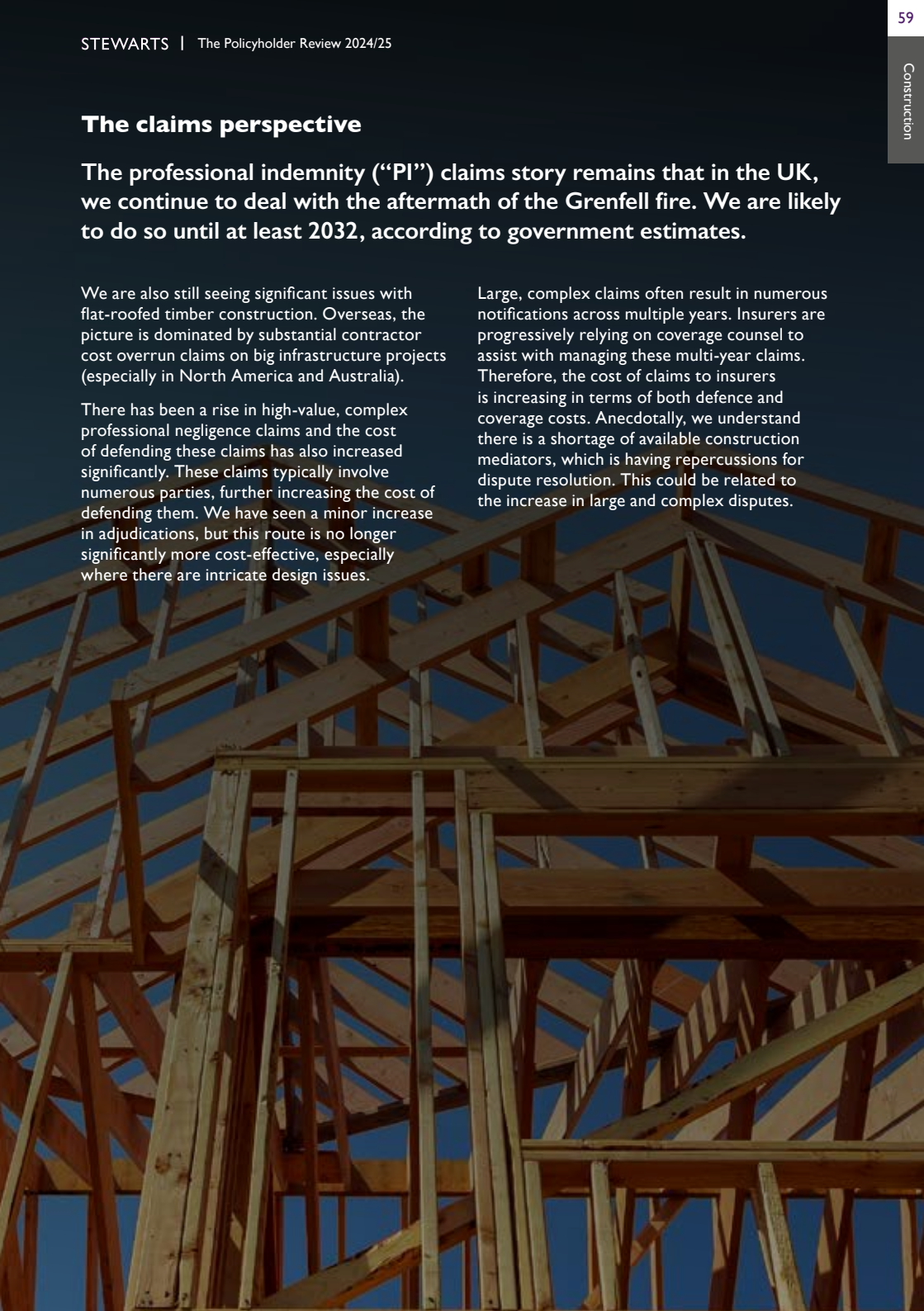
The claims perspective

The professional indemnity ("PI") claims story remains that in the UK, we continue to deal with the aftermath of the Grenfell fire. We are likely to do so until at least 2032, according to government estimates.

We are also still seeing significant issues with flat-roofed timber construction. Overseas, the picture is dominated by substantial contractor cost overrun claims on big infrastructure projects (especially in North America and Australia).

There has been a rise in high-value, complex professional negligence claims and the cost of defending these claims has also increased significantly. These claims typically involve numerous parties, further increasing the cost of defending them. We have seen a minor increase in adjudications, but this route is no longer significantly more cost-effective, especially where there are intricate design issues.

Large, complex claims often result in numerous notifications across multiple years. Insurers are progressively relying on coverage counsel to assist with managing these multi-year claims. Therefore, the cost of claims to insurers is increasing in terms of both defence and coverage costs. Anecdotally, we understand there is a shortage of available construction mediators, which is having repercussions for dispute resolution. This could be related to the increase in large and complex disputes.



CDM Regulations

RIBA's CDM Regulations Principal Designer Professional Services Contract 2020 (2024 amendment), which requires consultants to detail their professional indemnity insurance cover for cladding and fire-related issues (in addition to material exclusions). This is causing the industry to review contractual provisions further. This can often be time-consuming and involve detailed discussions with brokers and PI insurers. Contractual provisions are frequently magnified when a claim arises.

Department for Levelling-Up, Housing and Communities ("DLUHC")

We expect DLUHC to continue to get its house in order and pursue reimbursement from contractors for monies tendered under the Building Safety Fund.

Where remedial schemes have already been implemented, we are seeing further disputes where the relevant parties contest liability in respect of the original design and the scope of the remedial work undertaken.

In respect of cladding and fire safety claims, we have not yet seen the issue of liability apportionment tackled between design, construction and building maintenance, but we anticipate this soon.

The extended retrospective limitation periods under the Defective Premises Act 1972 ("DPA 1972") introduced under the Building Safety Act 2022 have, as expected, led to an increase in historical claims being initiated, reestablished and pursued, but not (at the time of writing) to the extent we anticipated. We have seen some challenges in respect of documentation production for the historical projects. To date, we have not seen an argument fully tested in relation to section 135(5) of the Building Safety Act, which allows the courts to dismiss any claim brought in reliance on the extended retrospective limitation periods under the DPA 1972 if the same claim would breach a defendant party's right to a fair trial. We anticipate this cannot be abated for long.

Grenfell Tower Inquiry's Phase 2 report – September 2024

The report heavily criticised the lack of accountability in all phases of a build: building management, procurement, design, construction, and safety compliance. The report proposes recommendations to improve fire and building safety further and focuses on reform of the construction industry.

Arguably, this sector is still grappling with the changes in legislation and is now braced for further significant changes in the years ahead, especially with First-tier Tribunals starting to grapple with current legislation. For example, in *Blomfield and others v Monier Road Limited,* the First-tier Tribunal scrutinised the guidance for 'higher risk buildings', in particular, how to count building storeys. The tribunal found contradictions in the legal requirements and said a usable rooftop terrace constitutes a storey; this is contrary to the government's online guidance, which says a storey must be fully enclosed to be considered a storey.

Insolvencies within the construction sector

Several insolvencies within the sector have been reported. These appear to result from the continually increasing cost of materials and general energy expenses in an industry that has not yet recovered to pre-pandemic stability. We are now seeing the further impact of global conflict upon the sector, with cost inflation and supply chain disruptions.

There have been some large contractor insolvencies. These repeatedly result in disrupting projects, be they new or remedial schemes. They also cause uncertainty within the supply chain, often resulting in other leading entities reviewing their contractual matrices and payment terms. It is not unusual to note an increase in project notifications following a key contractor insolvency and concern around business continuity.

Environmental, social, and governance ("ESG")

Alongside many other sectors, the construction industry is progressively focused on environmental, social and governance issues, which has been compounded by the voluntary 'Net Zero Carbon Building Standard' released in September (aiming to structure the reduction of the construction sector's environmental impact). While we have seen some claims arising from ESG against directors' and officers' insurance policies, we expect the frequency of such claims to increase.

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Financial and professional risk

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It was clear in 2024 that emerging risks will continue to affect various financial lines of insurance, particularly directors' and officers' insurance ("D&O"). This section focuses on some of the key decisions and trends during 2024.

The Economic Crime and Corporate Transparency Act 2023 ("ECCTA")

The ECCTA introduces a series of company law reforms designed to achieve corporate transparency and reduce economic crime.

Significantly, from 1 September 2025, the ECCTA introduces a new "failure to prevent fraud" strict liability offence. Potential offences are wide-ranging, as set out in Schedule 13, and include (a) false accounting, (b) false statements by directors, (c) obtaining services dishonestly, and iv) fraudulent trading.

The offence will apply to "large organisations" that satisfy at least two of the following: (a) more than 250 employees, (b) turnover of over £36m, and/or (c) assets in excess of £18m. The ECCTA may also have international reach; international companies could be found to have committed an offence if an element of the fraud takes place in the UK or targets the UK.

Organisations may be held criminally liable where (a) an employee, agent, subsidiary or other "associated person" commits fraud, (b) the intention of the fraud is to benefit the organisation or the client, and (c) the organisation did not have reasonable fraud prevention procedures in place.

Section 196 of ECCTA provides: "If a senior manager or a body corporate or partnership acting within the actual or apparent scope of their authority commits a relevant offence … the organisation is also guilty of the offence."

"Senior manager" is defined in section 196(4) as "an individual who plays a significant role in (a) the making of decisions about how the whole or a substantial part of the activities of the [organisation] are to be managed or organised, or (b) the actual managing or organising of the whole or a substantial part of those activities".

Section 199(7) of EECTA provides that a person is associated with a relevant body if: (a) the person is an employee, agent or subsidiary of the relevant body, or (b) the person otherwise performs services for or on behalf of the body. Section 199(8) goes further by stating that an associated person can be an employee of a subsidiary company.

Comment

We anticipate that the ECCTA will present further challenges for insured persons under a D&O policy and insurers of such policies.

Both sides of the market will be concerned to establish whether an "associated person" meets the definition of an "insured person" within the context of a D&O policy. Absent any express cover to this effect, we expect insurers will resist any assertion that the definition of "insured person" is wide enough to cover an "associated person" on the basis that the breadth of cover afforded by a D&O policy would be extended beyond traditional directors and officers of a company.

Further, and to state the obvious, the objective of the ECCTA is to prevent fraud from arising in the first place. It follows that the policies and procedures companies and individuals have in place will likely be significant factors in determining liability under the ECCTA. The same is likely to be true for any insurance claims that arise, whether pursued by the company or an individual insured person. Insurers will rightly expect to see that appropriate steps have been taken to educate, mitigate and comply.

It should not be forgotten that D&O policies are designed to treat insured persons as 'innocent until proven guilty'. While policies exclude liability for claims arising from fraud and dishonesty, such allegations must be established at a final adjudication unless otherwise admitted. For any claims that touch on the application of the new offences under the ECCTA, the underlying principles of a D&O policy will doubtless be tested.

Finally, the question of whether penalties imposed under the new law are insurable is bound to arise. It is clear that loss arising from the insured's own deliberate or reckless conduct cannot be covered as a matter of policy.

However, as the new offence is one of strict liability, any fines or penalties arising as a result of a successful prosecution could arguably be covered under a typical "fines and penalties" insuring clause.

As in the context of GDPR fines covered (or not) under cyber policies, the new offence may provide further testing ground for the insurability of fines and penalties generally, in respect of which more detailed judicial guidance is badly needed.

Directors' duties

Wright & Ors v Chappell & Ors [2024] EWHC 1417 (Ch) concerned the liquidators' claims on behalf of the British Homes Stores Group ("BHS") following its administration in 2016.

In summary, the liquidators alleged that former BHS directors knew or ought to have known that there was no reasonable prospect of BHS avoiding insolvent liquidation and that the directors breached their duties under the Companies Act 2006 by continuing to trade when it was not in BHS or its creditors' best interests to do so. Claims for wrongful trading and misfeasance were brought against the former directors.

The court found against the directors in respect of both the wrongful trading and the misfeasance claims. Three former directors were found to be personally liable for sums exceeding £100m in the aggregate.

D&O

While the facts of BHS are extreme, the court's findings are applicable to all directors, no matter the size of the company and the underlying facts to which an insolvency event relates.

Notably for directors are the findings that:

1. The limit of indemnity available to directors under a D&O policy is not a relevant consideration for determining the extent of a director's liability for claims established against him/her. This is unsurprising since otherwise, directors could avoid liability simply by failing to procure adequate insurance.

2. In this case, the limit of indemnity available to the directors under the D&O policy was inclusive of defence costs. Consequently, the amount that would be recovered for creditors might be limited in any case, given the cost of litigation.

3. Subject to the facts, it may not be a defence for directors to seek to rely on professional advice from third parties. It is the directors' duty to determine the appropriate course of action, not external advisors. This is not to say that a director's independent view will automatically override any external professional advice, but directors will need to evidence that an assessment of all the relevant facts and advice has been undertaken.

4. The above applies to the internal decision-making of the board. All directors are equally responsible for decisions that are taken.

5. It is unnecessary for the directors' conduct to be the proximate cause of the losses. The liquidators only needed to show that the directors' failure to comply with their duties caused BHS to continue trading.

Comment

The decision in BHS is noteworthy for the insurance market. It ought to cause insurers and insureds to think carefully about the extent of cover available under a D&O policy, particularly in relation to the limits of indemnity.

It also raises familiar questions about whether those limits should or could be ring-fenced to afford adequate levels of cover for multiple directors of large corporate groups. D&O cover of £20m, as was the case in BHS, might suffice for many D&O disputes, but that sum will quickly be eroded in complex claims with multiple defendants. It will be eroded even quicker if multiple directors are the subject of the same or similar allegations, all of whom are in a race to exhaust a single non-ringfenced limit of indemnity.

For the directors themselves, the positives to take from BHS are the clear findings as to where a director may find him or herself liable to claims from liquidators. When carefully considering the takeaways from BHS and other cases, it follows that directors ought to be able to determine how they mitigate any risk of liability arising.

Climate change

One does not have to look very hard to establish the extent to which businesses, directors and officers are concerned with climate change-related risks.

The body of commentary and authority continues to build with cases such as *ClientEarth v Shell [2023]* EWHC 1137 (Ch) making its way through the courts. While ClientEarth was unsuccessful with its derivative claim against Shell, such decisions (a) make the obvious point that the risk of claims against companies, directors and officers exists even if litigation is ultimately unsuccessful and (b) provide some legal authority for future claimants to rely on when seeking to find a route to a successful outcome. Future claimants may be better equipped to succeed where ClientEarth failed.

Indeed, it is interesting to note that in November 2024, The Hague Court of Appeal partially overturned the first instance decision in *Milieudefensie et al v Royal Dutch Shell*, in which the District Court of The Hague ordered Shell to reduce its greenhouse gas emissions across its global operations by 45% by the end of 2030 as compared with 2019 levels. While the Court of Appeal found that corporations had a duty of care under Dutch law and, as a matter of human rights, to reduce emissions, it stopped short of ordering Shell to reduce its emissions to a specific level. Climate change activists and others might consider that the real victory is the fact that an appellate court affirmed the decision that corporations owe duties such as this. The consequences that flow from that will continue to be tested on both sides.

Alongside the threat of litigation is the intensifying regulatory landscape. Various bodies such as the Financial Conduct Authority ("FCA"), Advertising Standards Authority and Competition Markets Authority have made it a priority to maintain greater scrutiny over companies' ESG responsibilities.

For example, the FCA has made it mandatory for authorised financial services firms to ensure that sustainability-related claims are fair, clear and not misleading.

These Sustainability Disclosure requirements are the sort of obligation that directors, officers, asset managers and various others need to ensure compliance with to avoid becoming the subject of a regulatory investigation and/or civil allegations.

The extent to which insurers will confirm cover for climate-change-related litigation insofar as it concerns D&O, investment management and/or management liability policies may, in many respects, be determined by the insureds' compliance with not just external regulatory frameworks but also internal policies and procedures that should have been put in place. Policyholders will, therefore, be well advised not to delay implementing best practices and, indeed, should already have them in place.

What lies ahead?

The list of risks facing directors is ever-increasing rather than decreasing.

As with cyber and climate change in previous years, which were (and perhaps remain) emerging risks that are not completely understood, the emergence of artificial intelligence and its increasingly wider use appears likely to demand the attention of directors.

For companies that use AI, directors will need to understand (a) AI generally and its use in the business, (b) the laws and regulations around its use, (c) the extent to which it poses a risk to the business, and (d) the adequacy of protection in place in relation to AI. All this requires clear policies, procedures and responsibility regarding the implementation of AI. The sooner those issues are grappled with, the better.

For further commentary, see our earlier article:

Directors' and officers' insurance and ESG risks – are policyholders covered? [2023]

Financial and professional risk: Broker perspective

McGill and Partners

D&O in 2024

With the hard market behind us, the D&O insurance environment continues to be dominated by downward pricing. The ongoing pricing reductions mean many clients are reconsidering their purchasing choices, adding back cover (ie side B or side C) they may have jettisoned during the hard market or seeking to reduce high retentions in favour of more proportionate/pre-hard market levels. Long-term agreements have returned, with clients entering into three-year deals (often with a price reduction embedded for years two and three) to ensure stability and consistency and take advantage of current market conditions for several years.

Despite those positive signs, the market continues to cause challenge and uncertainty for all parties involved in D&O insurance. These soft market conditions persist even though claims activity/claims costs are not reducing and may, in fact, be increasing. The long-tail nature of D&O claims also means that insureds and insurers often see significant development on older claims.

The key value of the D&O policy is often defence costs to support directors, even in the face of spurious claims. However, claims inflation and significant increases in legal fees/hourly rates mean these costs continue to rise, eroding policy limits faster and faster (a recent US claim saw the insured person retain an attorney charging US$2,300/hour). This is particularly true where each director defendant retains their own lawyer to defend them in the claim because of perceived or actual conflicts of interest between the insured persons.

Within the D&O claims environment, the standard financial accounting claim has been replaced by a volatile 'anything goes' environment with less predictability to claims patterns and claims against directors resulting from almost any scenario. As always, there is significant activity both in the regulatory and the litigation environment, with regulatory investigations often creating a road map for subsequent litigation.

Some of the ongoing areas of concern:

Regulatory activity

A common source of D&O claims is regulatory activity. Typically, this relates to issues such as accounting irregularities, bribery and corruption or fraud. However, in recent years, we have seen regulatory activity expand into areas such as privacy, cybersecurity and ESG-related issues.

In addition, we are seeing an increased focus on fraud prevention. The UK government suggests that fraud now accounts for over 40% of crime and "fraud is now estimated to be the UK's most prevalent crime" according to the Serious Fraud Office ("SFO"). As a result, the government has introduced a new offence of failure to prevent fraud, which comes into force on 1 September 2025.

The offence, under the Economic Crime and Corporate Transparency Act (("ECTA")), creates a new corporate criminal offence for "large" companies of failure to prevent fraud. The broadening of the identification principle enhances the scope of the offence, and companies can now be prosecuted for criminal acts of their senior managers and not just the actions of those identified as the "directing mind or will" of the company.

The new offence will have broader extraterritorial reach, meaning overseas companies will also be impacted. (The explanatory note published by the government states: "If an employee commits fraud under UK law, or targeting UK victims, their employer could be prosecuted, even if the organisation (and the employee) are based overseas.")

Although the offence is solely a corporate offence, the impact on individual directors and senior managers could be significant given the expansion of the pre-investigative (section 2) powers of the SFO to compel individuals and corporations to provide information at a pre-investigation phase. Before the amendments made under section 211 of ECTA, a section 2 notice could only be issued in suspected international bribery and corruption cases. Now, the SFO can use these pre-investigative powers in all fraud and domestic bribery cases, requiring individuals to attend an interview or produce documents in cases where the SFO may be casting about for information to allow them to open a formal investigation. The challenge for an individual director/officer in these cases will be whether the company will indemnify them if they (wisely) seek legal advice in responding to a section 2 notices or whether the company's D&O policy will respond to these "pre-investigation" costs.

Insolvency

One of the most serious risks for any director is the company's insolvency.

According to Allianz Research, global corporate insolvency is expected to rise by more than 10% in 2024 (Allianz Research, Global Insolvency Outlook: The ebb and flow of the insolvency wave, 15 October 2024). Insolvency remains a significant source of claims activity in the D&O sphere, with directors being challenged with claims of breach of fiduciary duty, often based on wrongful trading in the time leading to insolvency.

One aspect of D&O cover that can cause issues for directors is the insolvency hearing cost cover, which is often sub-limited at a small percentage of policy limits. This can present a significant challenge when directors are summoned to an interview with the insolvency practitioner (who may not be an "official body" as defined in the policy and required to trigger coverage). A savvy director would ensure they are represented by lawyers at such a meeting, so it is critical those costs are covered under the policy without the imposition of a small sub-limit that will not be anywhere near sufficient to cover the costs of all the directors interviewed by the insolvency practitioner. This is particularly relevant since the company is not around to indemnify the directors.

Fines and penalties

Fines and penalties continue to be a contentious area under D&O policies. The variety of fines and penalties a director is exposed to (and the potential severity of those fines) means insureds should be advocating for the broadest fines and penalties cover available. Cover should be available for fines insurable by law and not limited to coverage for "civil fines". Also, the policy should not contain a blanket exclusion for criminal fines, as these coverage clauses can give rise to significant debate and confusion.

The "washing" and "hushing" claims

The introduction of environmental, social and governance ("ESG") goals into the corporate culture has resulted in the development of an ESG-related industry that can be time-consuming for many businesses. ESG issues have caused significant concern for many clients and insurers, as there is little consensus about what ESG really means, coupled with a lack of objective measurement and general uncertainty about how a company can become fully "ESG compliant". ESG issues have also given rise to a spate of regulatory and litigation activity.

Initially, there were claims labelled "greenwashing" against companies accused of overstating their ESG credentials. For instance, in 2022, the UK Competition and Markets Authority launched an investigation into fast fashion brands Boohoo, George at ASDA and Asos relating to their eco marketing claims. This questioned whether the companies were "greenwashing" through the use of words such as "sustainable", "eco", and "responsible" in their advertising and marketing. Although no legal action was ultimately taken against the companies, each organisation agreed to undertakings regarding sharing clear and accurate information about the sustainability credentials of their fashion products.

We have seen similar "washing" activity in the AI sphere, with around 34 AI-related securities lawsuits filed between 2020-2024 and nine filed between January and September 2024 (Stanford Law School Class Action Clearing House). Many of these relate to AI-washing and the overstatement of AI capabilities or the understatement of AI risks.

As demonstrated by the Client Earth v Shell case, activist groups are also playing a part in advancing the ESG/green agenda. In Europe, a client was one of a number of companies that received correspondence from an environmental organisation focused on climate justice, demanding that these companies produce a climate action plan aligned with the Paris Agreement. Litigation was threatened if compliance was not achieved. A notification was made to D&O insurers, and although a covered claim did not materialise, interacting with the activists took up a significant amount of valuable management time and incurred large legal costs. These types of matters are now becoming almost an ordinary cost of business for large companies.

In what has been labelled an "anti-woke" backlash, primarily in the US, claims have been brought against companies due to their proactive ESG policies (mainly diversity, equity and inclusion). These claims seek to punish companies for proactively advancing an ESG agenda, resulting in what has now been labelled "greenhushing", or companies keeping quiet about their ESG initiatives to avoid a backlash from conservative politicians/organisations.

In the US, in a claim against Harvard University, the US Supreme Court ruled that race-based policies should not be used in the admissions process. Although arguably a case of limited application, it did not stop a group of Republican attorney generals (from Alabama, Arkansas, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, South Carolina, Tennessee, and West Virginia) sending a public letter to Fortune 100 CEOs raising concerns about the legality of corporate diversity, equity and inclusion ("DEI") plans.

On 27 November 2024, Texas attorney general Ken Paxton sued institutional investors BlackRock, State Street and Vanguard for "Illegally Conspiring to Manipulate Energy Markets, Driving Up Costs for Consumers" (AG Texas Press Release, 27 November 2024). He alleges that the three companies conspired to artificially constrict the market for coal through anti-competitive trade practices. By gaining substantial stockholdings in "every significant publicly held coal producer in the United States", they gained control of the policies of the coal companies, allowing them to "weaponize their shares to pressure the coal companies to accommodate 'green energy' goals" and breaking Texas antitrust and deceptive trade practices laws.

These developments have caused significant issues for directors of companies as they struggle to deal with conflicting positions, namely trying to address pressure requiring companies to improve their ESG commitments while at the same time dealing with other "activists" trying to force companies to move away from the "woke" agenda.

The D&O market is just beginning the ESG journey, and issues being raised now will likely make compliance with ESG requirements (for both insureds and insurers) more complex and time-consuming. However, it is unlikely the ESG issue will go away. Clients must work closely with their brokers and insurers to get clarity about ESG requirements while ensuring the credibility of their own goals to deliver results that secure both sustainable ESG results and the business's success.

Conclusion

The D&O market continues to be a challenging one for insurers and insureds. The focus of regulators and aggressive claimants (particularly in the US) means D&O claims could come from any angle. Directors and officers need to be prepared to demonstrate rational thought processes behind decisions made in the operation of their businesses.

The election of a new administration in the US could have an impact on the regulatory environment (in the form of less regulation of business rather than more). Still, it remains to be seen what, if any, substantive impact this will have on regulatory action against directors and officers.

It is critical that the coverage afforded under the D&O policy meets this changing environment. The current soft market is a good time to discuss coverage with brokers and insurers, remove unnecessarily restrictive clauses and ensure coverage is broad enough to protect the insured person as much as possible in this highly volatile environment.

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McGILL AND PARTNERS

War and political risk

Aaron Le Marquer

A new era of conflict

In a year marked by continued or increasing political instability, with no end in sight for Russia's invasion of Ukraine and a rapid escalation of hostilities in the Middle East, the appetite for political and war risks insurance has never been keener.

It is often ironic that the more acute the need for cover, the greater the likelihood that such risks become uninsurable, or at least that insurers prefer to avoid the risk. This has become readily apparent in several contexts this year.

First, in the cyber arena, the insurance market remains nervous of insuring systemic risks, particularly those associated with war and state-sponsored terrorism. This has led to the blanket imposition of cyber war exclusions in the Lloyd's market, a move that has caused confusion and alarm in equal measure. The exclusions remain to be tested, but the global CrowdStrike outage in July 2024 provided an example of the type of event where they may become relevant. The short-lived nature of the CrowdStrike incident did not ultimately lead to a flood of claims, and there was no suggestion that bad actors, state-sponsored or otherwise, caused the incident. However, a similarly widespread future event occurring over a longer timeframe and with less certain origins may well provide the first test of the insurers' approach to exclusions, in particular, whether and on what basis they will deny coverage on the basis of assumed "state-backed" actions.

Outside of the cyber context, war cover has come under scrutiny in the flood of claims issued in the English courts by aircraft lessors against insurers and reinsurers in respect of losses flowing from aircraft stranded in Russia following the invasion of Ukraine in 2022 (the "Russian Aviation Litigation"). The cases have dominated the English Commercial Court this year and provided useful takeaways via interim decisions ahead of the three-month 'mega trial' in Aercap v AIG, which started in October 2024 but was subsequently adourned. We comment below on some of the key takeaways from the Russian Aviation Litigation so far but start with consideration of a relatively rare decision on coverage under a political violence policy.

Political violence: *Hamilton Corporate v Afghan*

This decision serves as a useful reminder of the distinct coverages provided by political risk and political violence policies and the need to select the right policy for the risk.

The claimant reinsurers sought a declaration of non-liability under two reinsurance policies issued to the owners of a warehouse located in Afghanistan. The policies were issued on the market standard AFB Political Violence wording, which excluded "loss or damage directly or indirectly caused by seizure …". The defendant and underlying insured, Anham, had lost possession and control of a warehouse when the Taliban seized it in August 2021. There were two issues for the court to determine.

First, did exclusion 4.2 of the policy apply only to seizure by a "governing authority" or to any seizure whatsoever? Secondly, and relatedly, did the insuring clause itself extend to loss by deprivation (including seizure), or was it restricted to physical loss and damage to property?

The issues were decided by the court in the context of a summary judgment application by the reinsurers. The court had no hesitation in granting the reinsurers' request.

Seizure

On the first issue, the policyholder's primary argument was that the words "by law, order decree or regulation of any governing authority", which appeared later in the drafting of the relevant exclusion, should be read as also qualifying the word "seizure", so that not all losses caused by seizure were excluded, only losses caused by seizure of a governing authority (which the Taliban was not).

The court rejected this construction and found that the exclusion was structured into three sections. The words "by law, order, decree…" clearly only applied to the second section of the exclusion, and if they had applied to the word "seizure" as well, the first part of the exclusion would be rendered otiose.

The policyholder advanced a further argument based on the noscitur a sociis doctrine, ie that the meaning of "seizure" should derive from its context in clause 4.2. As it was located next to the words "confiscation, nationalisation", etc, which typically concern the acts of a governing authority, the exclusion should be read similarly as to seizure. The court also rejected this, saying the exclusion referred both to acts likely to be carried out by a governing authority and those that were not. Therefore, there was no common characteristic upon which to base a noscitur a sociis reading of the word seizure.

Finally, the policyholder sought to establish as a matter of commercial purpose (relying on a relevant factual matrix) that the exclusion was intended to be limited to acts of a governing authority.

It argued that there was a well-recognised distinction in the market between the risk of action by a governing authority (such as expropriation and nationalisation) insured by political risk policies and challenges to the governing authority (such as insurrection and rebellion) insured by political violence policies.

The policyholder's proposed narrower reading of the exclusion was consistent with this practice because it ensured that action by a governing authority was excluded from coverage without undermining the intended coverage of the political violence policy.

The court recognised (and the reinsurers admitted) that the market understanding described by the policyholder was common but noted that the reinsurance policies did cover some perils arising from government action. In any case, the recognised market practice was not sufficient to displace or rewrite the terms of the exclusion as drafted, which were clear. Therefore, the policyholder's narrow reading of the seizure exclusion was rejected.

Physical loss or damage

Consideration of commercial purpose also engaged the second question, ie aside from the issue of whether the exclusion was engaged, whether the coverage under the policy extended to loss of use or possession or whether it was limited to physical loss and damage.

For the policyholder's favoured construction of the exclusion to work, it would also be necessary to establish that the policy was capable of responding to loss caused by deprivation, with no physical loss or damage to the property. The challenging starting point for the policyholder was that:

- the interest provision of the reinsurances provided cover "in respect of Property Damage only as a result of Direct Physical loss of or damage to the interest insured",
- the wording was headed "Political Violence Insurance Property Damage Wording", and
- The insuring clause 2 indemnified the insured against "Physical loss or Physical damage to the Building and Contents".

To overcome these provisions, the policyholder argued that the references to physical loss and damage throughout the policy merely indicated that business interruption was not covered. It also relied on Sections 57 and 60(1) of the Marine Insurance Act 1906 in support of an argument that there is a total loss where the assured is irretrievably deprived of his property, and a constructive total loss where the assured is deprived of possession of his property and it is unlikely he will recover it. Both arguments were unsuccessful. The court noted first that had the insured purchased business interruption cover, the wording of the relevant clauses would have remained the same.

Secondly, it said the fact that the insured might have suffered a total loss within the meaning of the Marine Insurance Act did not mean that it had suffered physical loss or damage within the meaning of the policy wording. Following the authority in *Pilkington v CGU*, this required a changed physical state of the property.

Conclusions & Comment

The word "seizure" was therefore to be given its natural and ordinary meaning, which had been answered by settled authority as covering all acts of taking forcible possession either by a lawful authority or overpowering force. It was not limited to acts of a legitimate government or a sovereign power. As it was common ground that the warehouse had been seized, the claim was excluded and the reinsurers were granted a declaration of non-liability.

The case serves as a useful reminder of the distinction between the coverage typically provided by political violence and political risk policies and the need to ensure the policy wording issued provides the cover required.

Regardless of the title at the top of the policy, wordings commonly cover a wide range of risks, some of which might traditionally be described as political violence and some of which might normally be regarded as "non-damage" political risk perils. It is vital in each case that the wording in question is considered carefully to ensure it responds to the actual risks faced.

The Russian aviation litigation

Russia's invasion of Ukraine in February 2022 provoked immediate and wide-ranging sanctions from Western powers, one strand of which was focused on the Russian aviation sector.

In response, the Kremlin immediately imposed counter-sanctions preventing the export of foreign-owned aircraft from Russia, leaving Western aircraft lessors with approximately 400 aircraft stranded in Russia and no obvious route to recovery. Many of the aircraft were insured or reinsured in the London and international markets.

Unsurprisingly, with total losses estimated at over $10bn, the situation has led to a flood of litigation in the English courts, commenced primarily by aircraft owners and lessors against insurers and reinsurers.

Key cases include *Aercap v AIG* (the "Aercap LP Proceedings") in which the lessors are seeking to recover under "contingent and possessed" policies, which themselves are split into all risks and war risks coverages. These proceedings are focused on (i) whether there has been an irretrievable deprivation under the all risks cover, (ii) whether any of the war risks perils has occurred, (iii) whether coverage terminated upon termination of the underlying leases, (iv) whether applicable sanctions prohibit payment of the claims, and (v) whether other policies should respond first.

In *Zephyrus v Fidelis* (the "Operator Proceedings"), the lessors are seeking to recover directly from the reinsurers of the Russian operators of the aircraft (the "Operator Claims"). The claims are similarly pursued under all risks and war risks coverages and raise similar coverage issues.

Both cases have been joined to other proceedings issued by lessors seeking to determine similar issues. Aside from considering matters of primary insurance coverage, including which policies are triggered at which time, the cases have also touched upon some issues of more general application. These have been decided on a preliminary basis and may have wider application outside the immediate claims.

Sanctions

The circumstances in which claims under war and political risks policies arise often give rise to sanctions considerations. The interaction of state-imposed trade sanctions with war and political risks coverage leads to some complex questions over the insurability of war and state-sponsored terrorism risk. Often, multiple rapidly evolving sanctions regimes must be considered (i) at the time of placement, (ii) at the point of loss and (iii) at the point of indemnity to ensure the payment of claims will not breach any relevant sanctions. This can make claims challenging to navigate both for policyholders and insurers.

In Aercap v AIG, the insurers have argued that UK and EU sanctions prevent payment of the claims regardless of the other pleaded defences. The court's determination of these issues will provide important authority for other claims arising from the Russia-Ukraine conflict.

In the meantime, two interim decisions this year have shed some light on particular aspects of the sanctions regimes pertaining to claims for compensation in respect of Western assets lost or detained in Russia.

Aercap v AIG

In the Aercap LP Proceedings, an application for third-party disclosure against the brokers of Operator Policies was decided in January 2024 by Mr Justice Butcher.

The application turned on whether the provision of the documents by the broker would contravene the restrictions contained in Regulations 28, 29 or 29A of the Russia (Sanctions) (EU Exit) Regulations 2019 ('the Regulations'), which prohibited the provision of financial services, brokering services and insurance and reinsurance services relating to aviation goods for use in Russia.

Mr Justice Butcher concluded that the provision of documents pursuant to an order of the court did not amount to the provision of financial services, brokering services or insurance and reinsurance services. Therefore, there could be no breach of the sanctions for that reason. However, at the parties' request, he also considered the position that would apply in the absence of any court order requiring production of the documents.

Mr Justice Butcher considered the correct starting point was the purpose of the Regulations, which he noted (citing Mr Justice Hancock in *Celestial v Unicredit* at first instance) was to stop the supply of restricted goods to Russia. Against that backdrop, he found that the provision of documents would not breach Regulations 28 and 29 because there was no sufficiently close connection with an arrangement to supply restricted goods.

In relation to Regulation 29A, the provision of any insurance or reinsurance service would not properly be regarded as "relating to aviation … goods … for use in Russia" because the insurance did not cover (or facilitate) the use of the aircraft and engines in Russia. Rather, at least on one of AerCap's cases, it was to provide cover in circumstances where the items remain in Russia as a result of the termination of a lease and against the lessor's will.

Mr Justice Butcher's decision was consistent with guidance issued by the Foreign, Commonwealth & Development Office in relation to the Regulation 29A restriction. This guidance says the prohibition on the direct or indirect provision of insurance and reinsurance "would not apply where the insurance is for the benefit of the non-Russian owner of the items, rather than their user or operator. Nor does it apply where the items either remain in Russia as the result of the termination of a lease and against the lessor's will, or are being flown out of Russia in the process of returning them to their owner."

As such, while decided in the relatively narrow context of a disclosure application, Mr Justice Butcher's ruling provides some comfort to policyholders. It may indicate the likely direction of travel when the equivalent issues fall to be decided in the insurance coverage context in the ongoing trial.

Celestial v Unicredit

Mr Justice Butcher's decision described above was based, in part, upon Mr Justice Hancock's decision at first instance on similar (but not identical) issues in *Celestial v Unicredit*. However, that decision was subsequently overturned on appeal and merits scrutiny.

Rather than relating to insurance, the dispute arose from Unicredit's non-payment of standby letters of credit issued in connection with aircraft leases to Russian airlines. Unicredit contended that payment was prohibited by UK sanctions (principally regulation 28(3) of the Russia (Sanctions) (EU Exit) Regulations 2019 as amended in 2022) and US sanctions. At first instance, the judge held that Unicredit was not entitled to refuse payment and that the UK sanctions did not apply in circumstances where the aircraft had been supplied before the sanctions came into force and where the obligation under the credits was an autonomous one.

The purpose of the Regulations was to prevent support from being provided for the supply of aircraft to Russia, but the restrictions were applied prospectively and not retrospectively. At the time the aircraft had been supplied, and when the letters of credit had been issued, no such restrictions were in place. The judge also recognised that fulfilling Unicredit's obligations under the letters of credit was not intended to benefit any Russian entity involved in the underlying transaction.

The Court of Appeal disagreed. It found that the purpose of the regulation was not simply to stop further aircraft going to Russia by preventing financing arrangements that facilitate that. Rather, it was a "relatively blunt instrument that is intended to cast the net sufficiently wide to ensure that all objectionable arrangements are caught, such that the overall purpose of putting pressure on Russia is achieved". Importantly, the Court of Appeal decided that the effect of regulation 28 is not limited to arrangements entered into after 1 March 2022, and financial assistance in connection with the export of aircraft was prohibited regardless of the date of the lease. The words "in connection with" were given a wide interpretation, meaning that payment under the letters of credit was prohibited by regulation 28.

While the Court of Appeal's decision remains subject to an application for permission to appeal to the Supreme Court, the decision will be of concern to policyholders seeking recovery of losses in respect of restricted asset classes where perfectly legal and enforceable supplies may have been made prior to the imposition of sanctions. The court's consideration of analogous issues in Aercap v AIG will be key to understanding the extent to which the Court of Appeal's decision in Celestial may extend beyond the context of letters of credit to the world of insurance.

Jurisdiction

Aside from producing some valuable analysis of the sanctions position, the Russian Aviation Litigation has also provided some helpful consideration of the issue of jurisdiction. It is well established that the English court will stay proceedings brought in England in breach of an exclusive jurisdiction clause ("EJC") in favour of an overseas court unless the claimant can satisfy the court that "strong reasons" exist to allow them to continue (*Donohue v Armco Inc* [2002] 1 All ER 749). Two contrasting decisions in the Russian Aviation Litigation have provided examples that may serve as helpful guidance for overseas policyholders and/or reinsurers seeking to have their claims determined in the English courts.

Zephyrus v Fidelis

In these proceedings, the claimant lessors seek recovery of their losses directly from the London market and international reinsurers of the policies held by the Russian operators of aircraft now stranded in Russia (the "Operator Policies").

They seek to do so by way of (i) certificates noting them as "Additional Insureds" under the underlying policies, and (ii) cut-through clauses in the reinsurance policies.

The first matter to be decided by Mr Justice Henshaw was the issue of jurisdiction. The claimants brought claims in the English Commercial Court against the insurers and reinsurers of the aircraft, seeking a total sum of c.US$10bn in respect of their losses. Initially, all the reinsurers challenged the jurisdiction of the English court, relying on exclusive jurisdiction clauses in favour of the Russian courts. By the date of the hearing, most all risks reinsurers had submitted to the jurisdiction, but the war risks markets, with a few exceptions, maintained their challenge.

In March 2024, Mr Justice Henshaw dismissed the reinsurers' jurisdiction challenges, holding that there were strong reasons not to enforce the Russian jurisdiction clauses.

The principal basis for the judge's conclusion was that the claimants were unlikely to obtain a fair trial in Russia, including because (i) the Russian courts would be unlikely to determine objectively whether war perils caused the loss of the aircraft, (ii) the Russian state had an interest in the outcome of the litigation, and (iii) the claimants are from what the Russian state considers to be "unfriendly foreign states". The judge also thought there would be a risk of inconsistent findings if the claimants' claims were to proceed in Russia.

Mr Justice Henshaw's decision therefore offers hope to policyholders seeking to have their claims determined in the English courts, even where the underlying policy(ies) may have exclusive jurisdiction clauses seemingly barring such action.

Aercap v PJSC

It is instructive to compare and contrast the decision in Zephyrus with the opposite conclusion reached by the same judge in the related proceedings of Aercap v PJSC. His decision demonstrates that the "strong reasons" test is a high bar to meet.

Similarly to the Zephyrus claim, in Aercap v PJSC, the claimant lessors (and some Ukrainian lessees) sought recovery in respect of lost aircraft, but this time against reinsurers of Ukrainian insurers who had covered the Ukrainian operators of the aircraft. The relevant reinsurance contracts contained EJCs in favour of the Ukrainian court, and the defendant reinsurers applied to set aside the proceedings.

The claimants argued first that the EJCs did not bind them as third parties that did not consent to the clauses. After considering the position under Ukrainian law, the court found that the claimants were bound by the EJCs, both under the direct and the reinsurance policies.

The claimants' second line of attack was that if the EJCs bound them, there were "strong reasons" why they should not be enforced. Repeating and following the test rehearsed in Zephyrus, Mr Justice Henshaw found no "strong reasons" not to enforce the EJC. In particular, he found that the evidence of the effects of the war on the Commercial Court in Kyiv was that it was not likely to give rise to substantial delays or other problems. In any case, it was unlikely that individuals located outside Ukraine would need to attend court to give oral evidence, and even if they did, they could do so remotely.

Rejecting the further reasons put forward in support of a stay, including the possibility of a multiplicity of proceedings and the defendants' lack of genuine desire for a trial in Ukraine, Mr Justice Henshaw granted the defendants' applications and stayed the proceedings in favour of proceedings in the courts of Ukraine.

The decision will no doubt have been disappointing to the claimant lessors who may have hoped their claims would be determined in the same forum, by reference to the same facts, potentially by the same judge(s) and in the same timeframe as many of the other claims forming the Russian Aviation Litigation. It serves as a reminder that the presumption of the court will be to recognise and enforce exclusive jurisdiction clauses in most cases.

Conclusions

Claims under political risk, political violence, war and associated policies are inevitably complex and often contentious due to the volatile nature of their subject matter.

The global scope of the policies and the perils insured engages international trade sanctions regimes and other aspects of public and private international law, which can combine to make the navigation of claims a challenging process for policyholders, brokers, insurers and reinsurers alike.

The current wealth of aviation and related risks litigation is to be welcomed in the hope it will continue to augment a relatively sparse body of judicial authority on the principles of insurance coverage in this field. In particular, the decision in *Aercap v AIG* (and related cases) will be eagerly awaited, although it will, no doubt, be subject to further appeal. In the meantime, the interim decisions on issues including sanctions and jurisdiction may find wider application across a broad spread of practice areas.

For further commentary, see our earlier articles:

- Concurrent causation continued in University of Exeter v Allianz [2024]
- Jurisdiction challenge success for claimants in $9.7 billion Russian aviation insurance dispute [2024]

Costs and funding

Julian Chamberlayne

2024: A spotlight year

Third-party litigation funding ("TPF") has been in the spotlight during the past year, perhaps more so than in any previous year. The ripple effects of the Supreme Court's bombshell 2023 decision in *R (on the application of PACCAR Inc) v Competitional Appeal Tribunal* [2023] UKSC 28 ("*PACCAR*") have continued to be felt.

The upshot of that decision was that litigation funding agreements ("LFAs") referencing the funder's fee as a percentage of the damages fell within the scope of the Damages-Based Agreements Regulations 2013 ("DBA Regulations 2013"), as incorporated into the Courts and Legal Services Act 1990 ("CLSA 1990").

In the first half of 2024, it looked like the Litigation Funding Agreements (Enforceability) Bill would rapidly reverse the decision in PACCAR and restore LFAs rendered unenforceable by the Supreme Court decision. However, the snap election left that bill on the shelf and the Labour government has resisted calls to press on with it in isolation to the wide-ranging review of litigation funding being undertaken by the Civil Justice Council ("CJC"), which will likely run into the second half of 2025.

Funders are now well-versed in drafting LFAs to circumnavigate this decision. In some instances, they have included conditional alternative provisions referencing the funder's fee as a percentage of the damages recovered. This is in the hope that before damages are realised, parliament will have passed something similar to the Litigation Funding Agreements (Enforceability) Bill.

In the meantime, there has been a burst of activity trying to combat the uncertainty left by PACCAR. The Competition Appeal Tribunal ("CAT") has faced a host of applications in which defendants have attempted to challenge funding agreements. Some of these are heading to the Court of Appeal, the results of which will come to light over the next six months and will have an impact on the wider commercial funding market. Back in that wider market, some funded clients who had succeeded in their claims sought to challenge their funding agreements. This has usually been through confidential alternative dispute resolution procedures prescribed in the LFA, as upheld by the Commercial Court late in 2023 in *Therium Litigation Funding AIC v Bugsby Property LLC* [2023] EWHC 2627.

The question of whether the time has come for regulation of litigation funding has loomed large this year, including detailed consideration in the seminal reports for the Legal Services Board by Professor Rachael Mulheron KC and in the European Law Institute (ELI) Principles of Third Party Funding.

The significant role third-party funding plays in enabling access to justice has been highlighted this year by the Post Office Horizon litigation, as dramatised in the gripping TV series Mr Bates vs The Post Office. How third-party funding enables access to justice is one of the key themes the CJC is seeking views on in its consultation on litigation funding. The outcome of the CJC's consultation will be one of the key events of 2025 for those with any interest in litigation funding. Whether it will result in a recommendation for the regulation of funding in the UK, if so, by whom, and whether it will be light-touch or highly prescriptive, all remains to be seen.

This year has also seen significant developments regarding the disclosure of funding information in support of applications for security for costs and non-party costs orders, as well as the extension of litigation privilege to insurers and litigation funders

PACCAR developments

In the summer of 2023, the Supreme Court handed down the landmark decision in *PACCAR*, which found that litigation funding agreements that calculate the funder's fee by reference to a percentage of the damages recovered are damages-based agreements ("DBAs").

This has had significant implications for the litigation funding market, as LFAs were not drafted to comply with the strict statutory requirements that apply to DBAs, a breach of which has the draconian effect of unenforceability. This decision was surprising as there was no suggestion the reports of Lord Justice Jackson that preceded the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO 2012") and the DBA Regulations 2013 that he had intended LFAs to be considered as DBAs. On the contrary, he advocated for Litigation Funding, which was then a fledgling industry to remain self-regulated.

However, adopting a strict approach to the interpretation of the wording of the legislation, the majority of the Supreme Court found that litigation funders fell within the definition of a DBA in section 58AA of the CLSA 1990 as they provide "claims management services". Under sections 4(2) and 4(3) of the Compensation Act 2006 (and now section 419A of the Financial Services and Markets Act 2000), this includes the provision of financial services or assistance.

One immediate area of uncertainty stemming from this decision was whether litigation funding agreements that calculate the funder's fee according to a multiple of the funding provided would also fall foul of this decision.

The PACCAR decision has had a particularly significant effect on ongoing opt-out collective proceedings in the CAT, where it is prohibited to use DBAs in relation to these claims. As a result, many of the recent CAT decisions have related to LFAs that have been revised or drafted to attempt to side-step PACCAR. The impact of these decisions will likely resonate beyond the CAT and will also influence the wider commercial litigation funding market.

By way of context, collective proceedings in the CAT are brought by a proposed class representative on behalf of a class of claimants. To bring a collective proceedings claim, the eligibility of the claim and the proposed class representative must first be approved (known as "certification") and recorded in a collective proceedings order ("CPO"). Many of the cases that deal with the impact of PACCAR relate to whether the CAT will make a CPO, as one of the factors the CAT examines in doing so is whether the proposed class representative has adequate funding in place to meet their own and adverse costs.

Following the decision in PACCAR, the proposed class representative and funder in Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe Ltd [2023] CAT 73 had varied the terms of the litigation funding agreement (which both parties to the proceedings had agreed was originally unenforceable following PACCAR). The amendment provided for the funder's fee to be determined by the greater of either (i) a multiple of the funding provided or (ii) to the extent enforceable and permitted by applicable law, a percentage of the damages recovered.

The CAT held that the revised LFA was not a DBA. Referencing the funder's fee to a multiple of the funding provided did not fall within the definition of a DBA, which requires limiting the funder's fee *"by reference to the amount of the proceeds"*. The CAT rejected Sony's argument that the LFA was a DBA because the CAT ultimately has the discretion to limit the funder's fee by reference to any amount obtained by judgment or settlement. Furthermore, the CAT found that the alternative provision providing for payment by reference to a percentage of the damages recovered was conditional and, therefore, has no legal effect until that contingency eventuates.

A similar issue arose in *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and others* [2024] CAT 10, in which the court applied the decision in Sony to find that the revised LFA was not a DBA. In January 2024, the CAT granted Sony permission to appeal this point to the Court of Appeal on the grounds there was a compelling reason for there to be a conclusive decision on this issue. The appeal is due to be heard by 19 December 2024.

In January this year, the CAT also held in *Commercial and Interregional Card Claims I Ltd v Mastercard Incorporated* [2024] CAT 3 that revised litigation funding agreements against Visa and Mastercard, respectively, which provided for the funder's fee by reference to a multiple of the funding provided, were not DBAs. This case differed from Sony in that the agreement contained an express clause capping the funder's fee to the amount of damages available for distribution.

The CAT found it would be arbitrary for a funding agreement to be a DBA only where there is an express cap on the funder's fee with the intent to limit the proposed class representative's costs liability to the funder but not in the reverse situation where the proposed class representative potentially has unlimited liability. The revised agreements were not DBAs, as they were primarily based on calculating the funder's fee by reference to a multiple of the funding provided. Other factors that might affect the fee do not necessarily determine the mechanism for the funder's fee. In March of this year, the CAT granted Visa and Mastercard permission to appeal this decision on the grounds that there were compelling reasons for doing so. The appeals are due to be heard by 17 February 2025.

In *Gutmann v Apple Inc* [2024] CAT 18, the proposed class representative and funder revised the LFA to avoid falling foul of the Supreme Court's decision in PACCAR. As part of that revision, the waterfall mechanism in the LFA, which set out the order of priority of payment from any damages recovered, placed the funder before the class members. The CAT held that a class representative could enter into an LFA that provided for payment to the funder ahead of the class members, as no provision in the Competition Appeal Tribunal Rules 2015 prevented this. Furthermore, there was an express provision empowering the tribunal to order payment of damages to a non-party as it sees fit. The CAT gave Apple permission to appeal this judgment to the Court of Appeal in April this year. The appeal is due to be heard by 24 March 2025.

Justin Le Patourel v BT Group PLC was the first opt-out case to be heard at trial, early in 2024. This eagerly awaited judgment was handed down in December with the CAT finding that whilst BT's fees were excessive, they were not unfair. Consequently the claimants were unsuccessful. It will be interesting to see whether this case proceeds to appeal in 2025 – in the meantime there is a risk that this decision may make it even more difficult for claims representatives to secure funding and insurance for this complex and costly class of claim.

Legal Services Board research into litigation funding

In May 2024, the Legal Services Board published A Review of Litigation Funding in England and Wales, authored by Professor Rachael Mulheron KC.

The almost 200-page report covers numerous aspects of litigation funding (including regulation, costs and the success fee) and provides previously unpublished data on litigation funding. It is a font of knowledge for anyone looking to learn more about the evolution and current state of litigation funding.

The review found that litigation funding engaged many of the Legal Services Board's regulatory objectives, including protecting and promoting the public interest, improving access to justice, protecting and promoting the interests of consumers, promoting competition in the provision of legal services, encouraging a strong and effective legal profession, increasing the public understanding of citizens' rights and duties, and promoting the prevention and detection of economic crime.

Just a month after the publication of this report, we were fortunate to have Professor Mulheron join an eminent international panel for the Stewarts/Asertis co-hosted event in London International Disputes Week ("LIDW") on how attitudes towards third-party litigation funding are shifting around the world. I also chaired an LIDW panel including Mrs Justice Cockerill, Tom Goodhead, and Helen Fairhead, who had an engaging discussion on the challenges and opportunities facing the funding market in the UK, EU and beyond, and what these mean for organisations seeking disputes finance or facing funded claims.

Civil Justice Council review of litigation funding/European Law Institute's Principles Governing the Third Party Funding of Litigation

Following the Supreme Court's decision in PACCAR, the then Conservative government tasked the CJC to undertake a review of the litigation funding market considering the current position of TPF, whether it delivers effective access to justice, and any recommendations for reform.

In October 2024, the CJC published its interim report on the development of TPF in England and Wales. The report details how the self-regulation of TPF has developed, the different jurisdictional approaches to the regulation of TPF, the relationship between costs and funding, and the available funding options.

As part of the interim report, the CJC launched a detailed consultation seeking views from all those interested in litigation funding to help inform the CJC's final report, which is due to be published by the summer of 2025. The long list and wide range of questions show the CJC is approaching the issue of litigation funding in its broadest sense, including CFAs, DBAs, before-the-event insurance ("BTE"), after-the-event insurance ("ATE"), and even crowdfunding.

Significant insight to the issues of regulation of TPF that the CJC is considering can be gleaned from the Principles Governing the Third Party Funding of Litigation published by the European Law Institute ("ELI") in October this year.

The project, led by Mrs Justice Cockerill and Professor Susanne Augenhofer, sets out a light-touch framework for fair functioning of the third-party litigation market through 12 principles aimed at facilitating access to justice, ensuring the fair operation of the market, and addressing the knowledge imbalance between funders and funded parties. The principles do not have any statutory force, but it is open to any jurisdiction to incorporate some or all of them into their national legal framework. They set out best practices that third-party funders should adhere to and provide valuable guidance for legal advisors to help them advise their clients on many facets of third-party funding, including transparency, capital adequacy of the funders and funders' fees.

I had the privilege of being the only practising lawyer invited to speak at ELI's first webinar addressing the publication, to give the perspective of the legal industry. My starting point was that the ELI principles provide a

powerful blueprint for guidance, advice and decisions on third-party funding. They helpfully assume and allow for flexibility between different jurisdictions and practice areas rather than seeking to impose a one-size-fits-all approach. I also addressed potential issues raised by the draft commentary to the principles of who can provide "independent legal advice" to prospective funded parties. This topic is addressed more fully in my article in the December issue of Litigation Funding magazine and has now resulted in a positive change to the ELI commentary relating to their principle 4.2.

The collapse of law firm SSB Law and its impact on its clients has led to an ongoing Solicitors Regulation Authority ("SRA") investigation. The firm's administration and consequent termination of their CFAs with clients, including those involved in a major cavity wall group action, had the knock-on effect of breaching the terms of the clients' ATE policies, leaving them personally exposed to adverse costs when that action was discontinued. The SSB Victims Support Group has called for regulators to revisit the regulation of CFAs, including the use of "no win, no fee" terminology. The SSB Law collapse raises real-world examples of some of the issues that will be debated as part of the CJC's review, including the extent of reliance of some law firms on litigation finance to enable them to offer CFAs or DBAs on an industrial scale. It has already resulted in the SRA issuing a warning notice to the profession and a guide for the public relating to "no win, no fee" agreements.

The ELI report and the CJC consultation also raise the issue of the extent to which funders exert control over proceedings. Reputable funders are mindful of the issue of control, and there is little evidence that funders are controlling litigation they have funded. Properly advised funded parties will ensure that the terms of the LFA do not cross into the line of control.

However, after decades in which there were no public examples of overt funder control this issue raised its head in December when a litigation funder was accused of attempting to control the litigation by challenging a settlement reached in the competition group claim *Merricks v Mastercard.*

This has received significant press coverage, in part due to the rarity of the situation. A hearing in which the CAT will consider whether to approve the settlement, including whether the funder can successfully challenge the settlement, is expected to take place early in 2025.

While some might think the CJC's review is focused on potential checks and balances on litigation funding, a key objective is to increase access to justice for and fairness to all parties to funded litigation, notably weaker parties. With that in mind, one of the thought-provoking questions posed by the CJC is whether the costs of litigation funding should be recoverable as a litigation cost in court proceedings. The origin for this question likely lies in a developing line of authorities where courts have upheld awards by arbitrators for reasonable litigation funding costs[26].

On the face of it, these authorities run counter to the rationale behind the cessation of the recovery of CFA success fees and ATE insurance premiums by LASPO 2012, following Lord Justice Jackson's seminal review. However, over ten years later on, we have in 2024 seen a LASPO-related decision from the European Court of Human Rights ("ECHR") in Associated Newspapers Limited v the United Kingdom. The ECHR held that a success fee of nearly £250,000 charged by lawyers in a high-profile claim against the Daily Mail violated the newspaper's right to freedom of expression. However, they declined to make a similar finding in relation to the recoverable ATE insurance premium, because that cover was important to provide security for costs to the opponent.

It will be interesting to see whether the CJC lands on a halfway house that perhaps enables claimants who require CFA/DBAs, funding and/or insurance to recover at least some of those costs, notably if the opponent's conduct, including their approach to alternative dispute resolution, caused the claimants to incur additional costs.

[26] *Tenke Fungurume Mining SA v Katanga Contracting Services SAS* [2021] EWHC 3301 and *Essar Oilfields Services v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm)

Alan Bates & others v The Post Office

Against the backdrop of PACCAR and the CJC's review into litigation funding, the Post Office Horizon litigation has highlighted the fundamental importance of third-party litigation funding in enabling access to justice.

The group action was financed by a litigation funder and was unquestionably the only way the sub-postmasters could obtain justice in a truly 'David vs Goliath' case. The case vividly illustrated the attritional tactics adopted by some defendants to frustrate and delay group claims in the hope the group will exhaust their funding or lose interest. There were even some tragic examples in this case of sub-postmasters dying before justice was finally achieved.

This litigation also provoked commentary on whether there ought to be a cap on funders' fees. Mr Bates condemned criticism regarding the funder's fees as "nonsense promoted by an outfit calling itself 'Fair Civil Justice', affiliated to the US Chamber of Commerce, an organisation that represents the interests of big business". Mr Bates confirmed that the sub-postmasters' lawyers clearly explained the terms of the agreement, and the funder took a haircut on their return to ensure the victims of the Post Office Horizon scandal received financial redress that enabled them to pursue further court cases. Mr Bates criticised the suggestion to include a cap on the funder's fee, stating it would have served no other purpose than providing a costs target for the defendant to use to "break" the sub-postmasters' funding.

The case also formed the core of one of the most compelling legal lectures of the year: Professor Richard Moorhead's Hamlyn lecture titled Frail Professionalism. This examined the ethics of the lawyers advising the Post Office and concluded by asking whether the time has come to reconsider aspects of legal professional privilege.

Privilege

There are two distinct types of legal professional privilege that may apply to a party's documents. The first is legal advice privilege, which covers communications passed between a party and their solicitor (or barrister) created for the sole or dominant purpose of giving or receiving legal advice. The second is litigation privilege, which covers communications passed between the solicitor and third party or client and third party that relate to contemplated or commenced litigation and have been created for the sole or dominant purpose of that litigation.

The Court of Appeal confirmed in *Al Sadeq v Dechert LLP and others* [2024] EWCA Civ 28 that non-parties in the litigation, such as liability insurers and litigation funders, can claim litigation privilege provided the relevant document has been prepared for the dominant purpose of seeking or obtaining legal advice or information or evidence in connection with litigation in reasonable contemplation. It is common for insurers and litigation funders to play a significant part in the conduct of proceedings to which they are not parties. The court noted it would be absurd if litigation privilege attached to communications by the insured for the dominant purpose of gathering evidence and conducting the proceedings but did not attach to insurers who commonly undertake that function.

Disclosure of funding, security for costs and non-party costs orders

Generally, the funder's identity and the terms of the funding arrangement are confidential and privileged. However, this year has seen the court's willingness to disclose information regarding the funding of a claim in support of applications for security for costs and non-party costs orders.

In the Dieselgate litigation, *Various Claimants v Mercedes-Benz Group AG and others* [2024] EWHC 695 (KB), the defendants had sought an order for the disclosure of the litigation funding agreement between the funder and the solicitor's firm (who in turn acted for the claimants under a CFA) and copies of all other documents explaining the claimants' funding arrangement. This was on the basis that they were considering applying for security for costs against the funder. Security for costs can be sought against someone other than the claimant, including litigation funders, if that person contributed or agreed to contribute to the claimant's costs in return for a share of any damages recovered by the claimant. The defendants sought to challenge the claimants' denial that the funders satisfied this test and requested to view the terms upon which the funder agreed to fund the litigation.

The court had to consider whether it was appropriate to order disclosure against a non-party without having either joined that party and/or given that party the opportunity to make submissions. To answer whether a non-party has contributed or agreed to contribute to the claimant's costs in return for a share of any recovered damages, the court will need to look at the words involved; this is a question of substance and not form.

The court noted that the claim could only be advanced because of the provision of funding. The court found that the routing of funds in this case (in which the funder provided funding to the firm, which then acted for the claimants under a CFA) can amount to contributing or agreeing to contribute to the claimants' costs.

The court held that determining whether there is a sufficient link between the funding and the costs for which recovery is sought can only be ascertained by examining the funding arrangements.

Therefore, the court held that the terms of the funding agreement were potentially disclosable. However, the application for disclosure was premature without considering any submissions from the funder. The court held it would be appropriate to revisit this issue after the costs budgets are fixed and in light of the claimants' intention to take out ATE insurance. The claimants contend that this will render the security for costs application against the funder redundant as it would likely satisfy the defendant's entitlement to security for costs.

This decision is a timely reminder that any calls for disclosure of the funding arrangements must be grounded in and limited to satisfying the underlying procedural requirement. It also reinforces the trend for anti-avoidance endorsements ("AAE") to ATE insurance, which is the primary method for funded claimants to provide security for costs.

In *Topalsson GmbH v Rolls Royce Motor Cars Ltd* [2024] EWHC 297 (TCC), the High Court granted an order for disclosure of funding information in support of a non-party costs order in relation to outstanding costs in favour of the defendant exceeding £1m against the managing director and majority shareholder of the claimant and potentially other funders.

The defendant had applied for the disclosure of the identity of any and all funders of the proceedings, any guarantees provided by the claimant's managing director in relation to any funding arrangements, the amount and terms of funding provided, the extent of the funder's involvement in the conduct of the action, and the nature and extent of their interest in the outcome of the proceedings.

The court found that the application against the managing director was not inherently weak or fanciful. There were reasonable grounds to consider that other non-party funders may exist, which meant there may be more than one "real party" to the litigation. The information sought, therefore, was likely to be highly relevant to the court's consideration of the non-party costs application.

The court also ordered the disclosure of funding information in *Jalla & Ors v Royal Dutch Shell PLC & Ors* [2024] EWHC 578 (TCC) in the context of an application for a non-party costs order against the claimants' lawyers in unusual circumstances. The claimants were initially represented by a firm of solicitors via a DBA who had secured a facility with another firm to provide funding for litigation services and working capital and who had contracted to receive a percentage of the DBA payment in this case. The initial firm ceased to trade, and the firm that provided the funding went on record as the claimants' solicitors. In addition the court had previously found that the solicitors lacked authority to act for the majority of the claimants.

The defendants sought the disclosure of funding information on the basis it would assist in determining how the proceedings were funded, the funding structure facilitating the funding and the identity of any non-parties against whom the defendants could seek to enforce their costs.

The defendant contended it would be extremely difficult to enforce costs orders against the claimants as there was no ATE insurance in place. The judge commented that non-party costs orders against a party's solicitors are outside the run of ordinary cases, and that the mere fact that a legal representative provides funding and has a substantial financial interest in the success of the litigation will not necessarily expose that legal representative to a costs order. However, here there was a reasonable belief that the solicitors "crossed the line" by acting as a funder and a party. Consequently she ordered the solicitors be joined as a defendant to answer the application.

The court found that it would be appropriate to order disclosure of the information, taking into account the range of serious issues raised by the defendants in relation to the firm's control of the litigation, potential benefit from the litigation, absence of authority, lack of ATE insurance and involvement of a third-party investor. It was not a matter for the court at this stage to determine whether these issues had any real merit. Furthermore, the information sought would likely "shine a light" on the control and funding arrangements for the litigation and will help the court decide in making a non-party costs order. Lastly, the court held that where a DBA or similar is used and a successful party cannot recover costs from those benefitting from the DBA, it is unsurprising that the successful party would wish to understand the funding terms.

Costs and budgeting

Away from the rarified world of funded cases, there have been a number of important decisions in relation to costs this year.

In *Oakwood Solicitors Ltd v Menzies* [2024] UKSC 34, the Supreme Court held that "payment" for the purposes of section 70 of the Solicitors Act 1974 requires an agreement to pay the sum specified in the bill. Even though it is not a breach of the Solicitors Accounts Rules for a solicitor to deduct payment for their bill from damages recovered for the client, if they do so without the informed agreement of their clients, there is a risk the courts will be more likely to indulge a late challenge to that bill.

The Solicitors Act 1974 continues to be viewed by most commentators as no longer fit for modern purposes, and the CJC's long-planned review is not yet at the top of their to-do list. When it gets there, one of the peripheral but important themes will be to consider how the court approves the costs of protected parties (who lack mental capacity) and children, who should bear the cost of that approval process: the losing party in the litigation, the protected party (from their damages) or their solicitor.

Following one of the themes of the CJC's 2022 review of Costs, the Civil Procedure Rule Committee has developed two new draft costs budgeting pilots (one for cases in the Business and Property Courts ("BPC"), expected to cover the Rolls Building and at least two BPC District registries) and the other for certain other cases valued at under £1m (to operate in at least two district registries). These were approved in principle, along with a new precedent costs form modelled on the existing front page of Precedent H.

In the meantime, the Commercial Court has shown a greater zeal for budgeting the largest cases and the value of combining their judge's experience with that of a costs judge from the Supreme Court Costs Office (SCCO). In this respect, the Dieselgate litigation gets a second mention, with Mr Justice Constable and Senior Costs Judge Gordon-Saker describing the cost budgets of both parties as "eye-watering".

Following a three-day costs hearing featuring 23 counsel, they reduced the claimants' costs budget from £208m to £52m and the defendants' budget from £212m to £114m.

Another notable aspect of this cost budgeting decision was that the court accepted it was acceptable for defendants' budgets to be based on lower hourly rates than the lawyers were charging, provided it was done transparently and simply reflected a recognition that the higher rate would not be recoverable inter partes.

A much less extreme and more consensual example arose in *Aabar Holdings S.À.R.L & Others v Glencore Plc & Others*. At the first case management conference, Mr Justice Bryan directed for an exchange of Precedent H costs budgets and Precedent R budget discussion reports but left open the question of whether the court would make a costs management order.

The parties subsequently agreed to budgeting and the case will now proceed to a three-day costs management hearing early in 2025 before a costs judge and a judge of the Financial List sitting together. This illustrates the importance of budgeting for all parties in mega cases for transparency over their potential exposure, so that suitable levels of ATE insurance can be secured and to inform the scale of any security for costs.

The "Wagatha Christie" (*Rooney v Vardy*) case provides another example of the court accepting that it was not misconduct for a party to reduce the figure stated for their incurred costs in their Precedent H on the grounds that they knew the full title was beyond the parameters of being reasonable and proportionate. However, the way it was done lacked transparency, and the senior costs judge commented that the Rules Committee may wish to consider refining the wording of the statement of truth in Precedent H.

There has also been a changing of the guard in the SCCO with the above- mentioned Senior Costs Judge Andrew Gordon-Saker retiring after many excellent years behind the helm and Jason Rowley stepping up as Acting Senior Costs Judge.

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Costs and funding: Broker perspective

Gallagher

The milestones of 2024

2024 has been seen a number of key milestones in the use of insurance solutions in the litigation genre affecting "cost and funding.

Opponent's Cost (and own side disbursements) (commonly known as ATE)

With the recoverability of legal costs in jurisdictions such as England, the Cayman Islands, and Australia, the insurance market continues to play a key role in insuring the claimant's legal liability for Opponents Costs.

Policy wording continues to be a key issue in opponent's costs insurance, with anti-avoidance endorsements ("AAEs") becoming mainstream and taking over from the historical use of Deeds of Indemnity in fortifying defendant's Security for Costs to the Defendant.

The case of *Saxon Woods Investments Limited v Francesco Costa and Ors* [2023] EWHC 850 (Ch) saw an AAE tested in the English courts to good effect for the claimant. However, there continues to be variations in the endorsement. For example, some are non-cancellable and non-voidable, while others are non-voidable but cancellable upon the key policy triggers, such as a reduction in merits. As ever, beware of the detail in the language of the policy and AAE, as we saw in *Asertis Ltd v Lewis Barry Bloch* [2024] EWHC 2393 (Ch), where the court decided not to allow the use of a specific policy / AAE noting issues with termination, certain controlling policy provisions, and lack of direct benefit in addition to the quantum of the policy/AAE.

With regard to the available insurer capacity, this year, Swiss Re exited the market for funded related cases. This has affected the capacity of several managing general agents ("MGAs") and direct insurers . However, the rise of MGAs with large per case capacity has reshaped the market from the average line size of the previous four years. The case of *BMC Software v. IBM*, No. 22-20463 (5th Cir. 2024) while relating to an Appeal Protection policy, has also negatively affected capacity in the Opponent's Costs space. That said, Gallagher still estimate market capacity for Opponents Costs for a single case to be in excess of £60m+ for the right case.

We have seen an increase in the use of funder's indemnities, where the funder indemnifies the claimant for the legal liability for the defendant's costs. Many funders will look to access the insurance market to transfer all or part of their risk for this aspect. One may argue that there are certainly cases where a funder's indemnity is the appropriate course, such as where a degree of self-insurance is required.

However, if we are advising a claimant and they have a choice, we would suggest they consider an insurance policy held in their name, that they control, is insured with A- or above-rated insurers and operates within a highly regulated arena rather than a non-cash collateralised indemnity provided by the funder. It is worth remembering that the claimant generally has no direct access to an insurance policy purchased by the funder to mitigate the funder's risk, and a funder may invalidate their own insurance through breach of Fair Presentation or policy condition, over which the claimant will have no control. However, from a funders perspective, a claimant may invalidate its own policy leaving the funder with an exposure for costs through a third party cost order, so there are considerations for both parties as to the appropriate approach.

Appeal protection

Appeal Protection, which is designed to insure the overturning of a claimant's positive judgement in a lower court, has seen a huge rise in use by claimants and funders to offset the uncertainty of the appeal.

However, the IBM case was rumoured to be the largest loss in the market of this type, with a policy loss in excess of $700m following the $1.6 billion judgment overturned on appeal. This loss sent shock waves through the market, affecting capacity availability and pricing in global markets, especially in New York, London, and Bermuda.

While this type of product is still available, insurance market appetite is limited at the time of writing.

Capital protection

The rise of the use of the insurance market to provide insurance solutions for capital in 2024 continues. Capital Protection insurance can mean varying things, but at its customary broadest scope the solution looks to provide cover for risks including:

- win/lose
- "adequate" quantum
- recovery of such defined quantum, and
- claim duration.

Duration risk is not always offered and can carry a higher premium. Interest tends not to be insured.

2024 saw this potential solution grow in its discussion, both for a single case in addition to the more customary portfolio.

Contingent and tax

For defensive protections for claimants outside their customary insurance solutions, Contingent and Tax insurance may be appropriate to consider, although the Contingent market was also affected in 2024 by the *IBM* issue. If there is a specific legal uncertainty, then this Contingency market, a separate market from ATE market, can be a useful solution to insure awards arising from the legal uncertainty. Own-side defence costs may possibly be covered at final resolution on occasion.

For Tax-related uncertainties, the Contingent coverage can extend to "damages", "penalties", "costs" and "interest". "Residency"-style tax uncertainties in litigation may wish to consider this potential solution.

Arbitration Award Default Insurance ("AADI") against a sovereign state

For arbitration cases against a sovereign state, AADI looks to insure the non-payment by the sovereign state of an award in the claimant's favour within a defined time period, usually 120 days after the conclusion of any annulment proceedings and registration of the award in the local courts.

Solutions such as this can be a great option to assist with securing financing or potentially selling the successful award

In 2024, appetite appeared to remain in the market. However, as this solution is placed within the political risk market, the stability and underlying economy of the said State will impact capacity and pricing when endeavouring to secure the policy.

In summary

2024 has seen active adjustments in the litigation insurance genre; claimants will need to continue to consider their specific risks and mitigations thoroughly. The term "litigation insurance" is perhaps now too broad to capture the ups and downs of these individual segments of this broad market

The sole purpose of this article is to provide guidance on the issues covered. This article is not intended to give legal advice, and, accordingly, it should not be relied upon. It should not be regarded as a comprehensive statement of the law and/or market practice in this area. We make no claims as to the completeness or accuracy of the information contained herein or in the links which were live at the date of publication. You should not act upon (or should refrain from acting upon) information in this publication without first seeking specific legal and/or specialist advice. Arthur J. Gallagher UK Limited accepts no liability for any inaccuracy, omission or mistake in this publication, nor will we be responsible for any loss which may be suffered as a result of any person relying on the information contained herein.

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Articles by our Policyholder Disputes team

Cyber

- What can cyber insurance policyholders learn from recent attacks?
- Deciphering the insurability of GDPR fines
- How will cyber insurance respond to the CrowdStrike outage?

Warranty and indemnity

- Commercial Court determines policyholder unable to claim for breach of warranty under warranty and indemnity policy
- Breach of warranty by policyholder would preclude cover even when that breach could not cause the loss

Property damage and BI

- "Otherwise" – the English court's contrasting approach to jurisdiction in Covid-19 business interruption claims
- Covid-19 BI aggregation decision in claim brought by Pizza Express
- Court of Appeal determines Covid-19 pandemic was a "catastrophe" under reinsurance contract and upholds arbitration award in favour of reinsured
- *Various Eateries v Allianz*: Covid-19 business interruption insurance examined again by the Court of Appeal
- Court rules in favour of policyholders in LMIE Test Cases
- Court of Appeal says no cover for Covid-19 losses under "damage" policy wording
- Court of Appeal upholds 'At the Premises' Covid BI test case ruling in favour of policyholders
- Court of Appeal determines Covid-19 is an "incident likely to endanger life" when considering business interruption losses
- How might a claim for damages for late payment under an insurance contract succeed?
- Is controversy over High Court denial of insurer's right to seek contribution from third party justified?

Financial and professional risk

- Directors' and officers' insurance and ESG risks – are policyholders covered?

War and political risk

- Concurrent causation continued in University of Exeter v Allianz
- Jurisdiction challenge success for claimants in $9.7 billion Russian aviation insurance dispute

What can cyber insurance policyholders learn from recent attacks?

Recent cyber attacks including the MOVEit hack by Clop and the theft of information from Capita have demonstrated the scale of the potential threat posed to businesses.

In the instance of losses resulting from a cyber crisis, a business should take all necessary steps to understand what protection their insurance policies can provide.

Aaron Le Marquer, Head of Policyholder Disputes, comments here on the recent high-profile cyber attacks and the lessons which companies and their directors should learn from them.

Consequences of the MOVEit hack

In June 2023, cyber organisation Clop announced on a blog that they had exploited a zero-day vulnerability on file transfer software MOVEit to steal confidential information from multiple UK-based organisations. The group, believed to be based in Russia, have demanded a ransom from affected companies and subsequently begun leaking stolen information.

The origins and backing of Clop remain shrouded in mystery. These circumstances may therefore provide the first real life test of Lloyd's of London's Market Bulletin Y5381 mandating that all cyber policies must exclude losses arising from war (whether declared or not), and restrict cover for state-backed cyber attacks.

The mandate, and the subsequent Lloyd's Market Association (LMA) model clauses intended to be compliant with Bulletin 5381, have provoked considerable controversy since their publication and led to the publication of a two alternative sets of clauses. There are now a total of twelve versions of the LMA clauses available to insurers and policyholders, as well as a variety of bespoke clauses drafted by brokers and insurers.

Whether this state of affairs is conducive to a harmonious understanding of the correct application of the exclusions as between insurers, brokers and policyholders, or alternatively is a recipe for disaster, remains to be seen.

There is no question that the exercise has been carried out with the best of intentions, ie ensuring contract certainty and avoiding misunderstandings over coverage, but the array of subtly different formulations now on offer seems unlikely to achieve that aim.

One of the key areas of uncertainty is around attribution. Exactly how a cyber attack is to be attributed as 'state-backed' remains highly contentious, and seems certain to result in disputes between cyber attack victims and their insurers. In the case of the MOVEit attack, Clop has been accused of "being at the forefront of the Kremlin's large-scale disinformation campaign to manipulate international public opinion on Russia's illegal war in Ukraine."

Will insurers therefore regard claims made under cyber policies as a result of the MOVEit attack to be "losses arising from war" that are excluded from cover? And even if not, is there sufficient evidence for insurers to establish that the attack is "state-backed", in which case coverage might or might not be excluded, depending on the scale of the cyber attack and which version of the LMA Exclusions (or equivalent) is adopted?

Definitive proof of the ultimate origin of a cyber attack is rarely available, meaning that virtually any cyber attack may be alleged by insurers to be state backed, giving rise to coverage disputes that will be difficult to resolve. Although the Lloyd's Market Bulletin requires insurers to set out a robust basis by which a cyber attack is to be attributed to one or more states, the latest version of the LMA clauses simply provide that the parties "will consider such objectively reasonable evidence that is available to them", which does not necessarily move matters forward.

The growing list of victims includes Ofcom, TfL, Aer Lingus, British Airways, Boots and the BBC – though Clop has suggested it does not have data from all of these organisations, raising the threat of a separate cyber attack.

Regardless of the nature of the attackers, there is no doubt that targeted organisations will be closely studying the terms of their insurance to determine whether are covered for losses caused by the attack.

Cyber attack on Capita

Outsourcing giant Capita was hit by a cyber attack in March 2023, and confirmed that hackers had likely seized data related to its pensions clients from about 4% of its servers. In May the company contacted trustees to confirm that some pensions data "is likely to have been exfiltrated" but found "no evidence" of data being made available on the dark web.

Capita's losses, estimated between £15-20m for professional fees and remediation expenses, underline the need for comprehensive cyber cover for all enterprises exposed to cyber breaches and attacks. In the modern digital era, that is of course most businesses.

In response to the Capita hack, the UK's biggest private sector pension plan USS subsequently launched an identity protection service for members. This consisted of credit monitoring and identity monitoring activities, in which online activity is constantly checked to identify any potentially improper use of the individual's personal profile or credit details, with potential issues flagged for checking to avoid or limit any fraudulent activity.

It is highly likely that other affected pension plans or other financial institutions whose customer data has been actually or potentially compromised by the Capita breach will have offered similar rectification measures to their customers. It is also likely that they will seek to recover such costs from Capita, leading to the question of whether Capita is covered for such third party liabilities under the terms of its cyber insurance.

Aside from cover for direct losses caused by attack, businesses may require cover for third party liabilities and business interruption losses flowing from the incident, which could dwarf the immediate costs of responding to and remediating the attack.

Conclusions

The impact of a cyber incident, and result not only in direct losses incurred in remediating and limiting damage, but also in third party claims from customers, suppliers and any other parties on whose behalf data was held. In today's hyper-connected world, it is very difficult to ring-fence the harm caused by a cyber attack or breach, and the ripples can extend much further than the immediate target of the attack.

Cyber cover continues to be a rapidly evolving and highly differentiated insurance product, and policyholders should take care to ensure that they understand the nature and extent of cover in full, and more importantly any limitations that exclusions that may undermine the cover that is apparently in place.

Deciphering the insurability of GDPR fines

GDPR fines turn data protection infringements into expensive mistakes. Can a business get insurance for a GDPR fine, particularly if the fine follows a cyberattack?

In this article, first published on 15 January 2024, associate Arjun Dhar challenges the view that GDPR fines are categorically uninsurable in England and Wales. This insight contains key takeaways for insurance policyholders, and was updated in May 2024 to reference the ICO's proposed fine against the Police Service of Northern Ireland.

The problem

The UK General Data Protection Regulation ("GDPR") applies to data controllers and processors in the UK and to data controllers and processors anywhere whose processing activities relate to offering goods and services to or monitoring the behaviour of data subjects in the UK. Importantly, it applies regardless of the data controllers' and processors' size or industry.

Consider the following fictional companies:

- A fast-growing startup on a mission to improve customer experiences by integrating new AI technologies into data analytics,
- A successful and growing sports centre with outlets across the country that keeps digital copies of the health declarations made by each of its members when they join, or
- A long-established family bookstore that keeps records of its customers and their purchases on an Excel spreadsheet on their shop computer.

Each of these is susceptible to the risk of a cyberattack by which hackers isolate personal data held on the company's servers and threaten to release or delete it if a ransom is not paid. As required by Art. 33 GDPR, these companies must notify the appropriate data protection authority ("DPA"), who may then open an investigation into the company's data handling practices and security measures. If the DPA concludes that the company's security methods were not robust enough to meet the threshold set by Art. 32(1) GDPR, fines may be imposed on the business.

Since it came into effect on 25 May 2018, the GDPR has given UK businesses an important but steep hill to climb. One difficulty is that the adequacy of the technical and organisational measures a company employs is judged in most cases (including our set of scenarios) only after a personal data breach has occurred, ie after the measures have failed to stop a hacker from accessing personal data. Unfortunately for the companies, while their good intentions may get the infringement classified as "negligent" rather than "intentional", it does not necessarily absolve them of a penalty. Combine this with the reality of the fast-growing sophistication of cybercrime, and the risk becomes a shapeshifting, ever-present one, even for companies that have invested in cybersecurity measures and believe they have appropriate measures in place.

The commercial solution and the legal problem

The good news is that many cyber risk insurance policies contain provisions covering GDPR fines, using the language of "privacy regulatory awards" or similar. The bad news is that these provisions often contain the caveat "to the extent insurable by law" or similar, purporting to put the policyholder on notice that such a provision would be void of effect if precluded by the laws of the relevant jurisdiction. There has not yet been a case settling the question definitively in England and Wales, giving insurers space to decline claims by asserting that GDPR fines are either uninsurable or that their insurability is uncertain. This is despite them having included and priced in cover for such fines when the insurance policy was placed.

The law

In England and Wales, courts have historically declined to enforce indemnities that would facilitate the evasion of penalties. The legal mechanism for this is known as the illegality exception or the common law Latin *maxim ex turpi causa non oritur actio* (which translates as "no action can arise from an illegal act"). Rationales for this include that it would be "immoral" to do so, it is an abuse of the court process, "a person should not benefit from his or her wrong", and that the law should "be coherent and not self-defeating, condoning illegality by giving with its right hand what it took away by its left hand". A single overarching principle conveniently unites these rationales: a court will decline to enforce a contractual term where doing so would be contrary to public policy. This forms the basis for insurers' arguments that GDPR fines are uninsurable.

This analysis is, however, incomplete. The law is not so binary as to provide insurers with cover for blanket declinature. As Lord Justice Bingham said in *Saunders v Edwards*, "… it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct". Moreover, it is clear following *Patel v Mirza* that the maxim is based on public policy, requiring the court to "[weigh] up the equities of each case as it arises".

Public policy

As Lord Sumption said in *Les Laboratoires Servier v Apotex*: "The paradigm case of an illegal act engaging the defence is a criminal offence." However, in the same case, Lord Sumption suggested that the maxim would apply to "the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character". In *Patel v Mirza*, Lord Toulson, in explaining the division of responsibility between the criminal and civil courts, said: "Punishment for wrongdoing is the responsibility of the criminal courts and, in some instances, statutory regulators." These, and their interface with public policy, were not considered in further detail.

The lack of further engagement with public policy is important because regulatory penalties are not a monolith, and there is unlikely to be a single answer as to their insurability. A Financial Conduct Authority ("FCA") fine interacts differently with public policy from a Competition and Markets Authority ("CMA") fine or a DPA fine. The application of the maxim to *some* types of regulatory penalties does not imply its application to all. Moreover, the "turpitude" (using Lord Sumption's language in *Les Laboratoires Servier*) of conduct leading to regulatory fines is not uniform. Commentators have criticised a rule-based approach for its failure to differentiate between serious criminality and a minor breach of a statutory regulation. Examples of meaningful differences include the seriousness of the conduct, whether it was intentional, and the disproportionality of disallowing the claim to the unlawfulness of the conduct (all factors considered potentially relevant by the court in *Patel v Mirza*).

In a GDPR context, one example is that restrictions on insurance would incentivise data controllers and processors to disregard their obligations at the reporting stage, using liberal interpretations of uncertain GDPR concepts such as "likelihood of high risk to the rights and freedoms of data subjects" or "undue delay" to minimise disclosure. The risk of a GDPR penalty also falls on vastly more small-and-medium enterprises (who are less likely to have access to legal advice, particularly on data protection) than do the risks of FCA or CMA penalties.

Meanwhile, in an environment of uncertainty, it is instructive to look at the approach taken by regulators. Whereas the FCA Handbook expressly forbids insurance that would indemnify against a financial penalty, the UK ICO *expressly declined* to take a position on the subject. There appears, therefore, to be no generally applicable principle that GDPR fines are uninsurable as a matter of public policy.

An example in practice

Following a 2023 breach, the ICO announced a proposed fine of £750,000 against the Police Service of Northern Ireland (PSNI). The fine was initially assessed at £5.6 million, and reduced in line with the Information Commissioner's "revised approach to working more effectively with public authorities". A similar approach was taken to the Cabinet Office's fine in November 2021, which was reduced from £500,000 to £50,000.

The size of the fine can be understood against recently-released guidance by the ICO on its fining practices. In particular, the Commissioner considers, when deciding whether to impose a fine:

- the seriousness of the infringement or infringements;
- any relevant aggravating or mitigating factors; and
- whether imposing a fine would be effective, proportionate and dissuasive.

The guidance confirms that in imposing a fine, the ICO is guided by these three factors rather than solely whether it matches the turpitude of the breach of the GDPR. This demonstrates that ICO fines interact differently with public policy than other types of penalties, rendering some ICO fines insurable.

Conclusion

Unless and until the courts conclude definitively that GDPR fines as a category are uninsurable, it is for insurers to establish, in each declinature, policy-based reasoning why a relevant GDPR fine is uninsurable. Policyholders with cyber risk policies covering GDPR fines should demand that if cover is declined on the basis that a penalty is uninsurable, then the insurer provides thorough, policy-based reasoning to explain why.

Takeaways for policyholders

1. The insurability of any GDPR fine depends on the facts of the case and how they interact with public policy. Factors such as the seriousness of the harm, the intentionality of the breach, public policies that conflict with the insurability of the fine, the likelihood of the perpetrator profiting from the wrongdoing, etc., should be considered.

2. Each case is judged on its own merits. Policyholders whose claims are denied are entitled to a thorough explanation of the reasons for the declinature.

3. A Data Protection Commissioner's (DPCs) decision can be a useful starting point in applying the relevant factors. For example, a DPC's finding that data was accessed but not expropriated by a hacker or that the breach was negligent and not intentional can go towards establishing a lower seriousness of harm and a lack of intentionality.

How will cyber insurance respond to the CrowdStrike outage?

The CrowdStrike outage has caused interruption to businesses in all sectors around the world, with those in the travel, healthcare and financial services industries particularly affected. With planes grounded and global payment systems impacted, even short outages in these sectors can quickly give rise to significant losses.

Aaron Le Marquer, Head of Policyholder Disputes, considers some of the key legal issues that are likely to arise in considering coverage of CrowdStrike-related losses under cyber insurance policies.

The CrowdStrike outage is already estimated to have caused billions of dollars of losses to affected businesses. Cyber specialist insurer Beazley's share price dropped by 7% on 19 July 2024, reflecting a market expectation that significant cyber losses would be incurred. In the meantime, affected policyholders should check the terms of their cyber coverage to consider the extent to which they are insured.

In a different context, business interruption (BI) coverage has fallen squarely in the sights of the English courts for the first time in recent years, as thousands of policyholders continue to seek indemnity for their pandemic-related losses. Although business interruption in the cyber context will no doubt give rise to novel coverage issues of its own, there will be valuable lessons to be learnt from the recent spate of Covid-19 BI litigation.

Insured peril

The first hurdle in making a valid business interruption claim (or, indeed, any insurance claim) is establishing that an insured peril (or "covered event") has occurred.

This will be by no means certain in the context of cyber policies since there is a wide variance in coverage provided by cyber policies. Some products focus primarily on third-party losses arising from data breaches, with others tailored towards security failures and external cyber-attacks.

In the present circumstances, policyholders will need to look for insuring clauses providing coverage for "system failures" or similar. A peril with a broad definition, such as "an unintentional and unplanned interruption of computer systems", provides wide coverage that may extend to the CrowdStrike incident; however, it may include carve outs for system failures caused by malicious attacks or other security breaches.

What if the policyholder's systems were not directly affected by the outage, but their customers' or suppliers' systems have gone down, causing blocks in the supply chain that have affected the insured business? Some policyholders may still be covered if they have "dependent business interruption loss" cover or similar that expressly responds to covered events suffered by the business's customers or suppliers.

Waiting period

Most policies specify a "waiting period" or minimum timeframe for which the insured event must continue before coverage is triggered, usually expressed as a number of hours. Depending on the drafting of the policy, this may be structured as a condition of coverage, incorporated into the scope of the insured peril itself, or take the form of an excess or self-insured retention. The distinction can be important when it comes to consideration of coverage. So, the contractual architecture of the policy and the relevant clauses will need to be fully understood to assess what coverage is available.

Causation

Having established that "system failure" or another insured peril has occurred, the policyholder must also demonstrate that its loss was proximately caused (and not just contributed to) by the peril. The claim will fail if the effective cause of loss was something other than an insured peril.

Causation in business interruption came under close scrutiny by the Supreme Court in *FCA v Arch* (the FCA Test Case), where it was determined that millions of occurrences of Covid-19 in the UK were each an equal and effective cause of the first UK government lockdown. A single occurrence of Covid-19 within a specified radius of the policyholder's premises was therefore sufficient to establish the insured peril in the context of a "notifiable disease" clause.

Importantly, the Supreme Court in *FCA v Arch* also overturned the "wide area damage" principle first set down by the High Court in Orient Express v Generali. In that case, which concerned a business interruption claim brought by a hotel in New Orleans damaged by Hurricane Katrina, the insurers argued successfully that the proximate cause of the hotel's loss was not the damage to the hotel itself but damage to the wider area. "But for" the damage to the hotel, the insurers said, the hotel would still have suffered the same loss anyway. The damage to the hotel was not, therefore, the proximate cause of loss, and the claim was not covered.

In *FCA v Arch*, the Supreme Court rejected that argument. Instead, it ruled that the correct analysis should have been one of concurrent causes, meaning that applying the "but for" test was inappropriate. Applying that conclusion to the pandemic meant a policyholder was not required to demonstrate that an occurrence of Covid-19 within a radius of its premises was a "but for" cause of loss. It did not matter that the policyholder's losses were also caused by thousands of other cases of disease outside of the radius.

It is too early to say whether insurers will raise similar causation arguments in relation to cyber BI claims arising from a global event such as this. However, if they do, policyholders will need to study the reasoning in *FCA v Arch* closely to resist such an approach.

Exclusions

Having established a prima facie claim, policy exclusions must also be considered. If the loss claimed was proximately caused (even concurrently) by an excluded cause, the claim will fail. The insurer bears the burden of proving that an exclusion is engaged, but in practice, insurers regularly rely on exclusions to deny claims and expect the policyholder to prove the exclusion does not apply.

In the context of the Crowdstrike outage, relevant exclusions that might be engaged include the following:

War

This is a controversial topic in recent times, following the introduction of mandatory cyber war exclusions by Lloyd's of London. There appears to be no suggestion at this stage that any third party intentionally caused the CrowdStrike outage. However, were such allegations to surface with any hint that the attack may have been state-sponsored (or even "state-aligned"), the provisions of war exclusions may be engaged.

Reasonable precautions

A typical exclusion excludes loss arising from a failure on the policyholder's part to ensure that all systems are maintained to industry standards. Where an outage has affected businesses worldwide, policyholders may appear to have a good defence to any reliance on such exclusions. However, insurers may point to other businesses with similar systems that were not affected in the same way as evidence that the policyholder did not maintain its systems to reasonable industry standards.

Suppliers and service providers

In some policies, cover for losses caused by insured events suffered by third-party suppliers is expressly excluded, rather than expressly covered as described above. This could be important in the present context, where both the policyholder and its third-party supplier have suffered similar systems failures as a result of the outage. In those circumstances, insurers may argue there are concurrent causes of loss, one of which is excluded. Therefore, in accordance with *Wayne Tank & Pump Co. Ltd v Employers Liability Incorporation Ltd*, the claim will fail. Again, the reasoning in FCA v Arch will be vital to defeating such arguments.

Quantum

Having established that a claim is covered and not excluded, what losses can typically be claimed under a cyber policy?

The core business interruption cover will typically be structured in the same way as any other form of "non-damage" BI clause: cover is provided for a loss of "income", "revenue", "net profit" or "gross profit". However, somewhat surprisingly, these terms are often less well defined in the cyber context than in a traditional BI policy, meaning the true scope of cover may be ambiguous and subject to dispute. In addition to lost income or profit, most policies will provide for increased costs of working reasonably incurred to avoid a loss of profit. Cyber policies frequently also provide standalone cover for remediation and crisis response costs that sit outside of the business interruption cover.

The value of the covered claim will also depend on the indemnity period provided for in the policy. Some policies will restrict the indemnity period to the period during which the insured peril continues. Others will allow for an additional "restoration period" or a more traditional indemnity period, defined simply as the period during which the results of the business are affected by the interruption. This can make a stark difference to the level of cover provided since some businesses will continue to be affected by the outage long after it has been rectified.

Finally, the quantum of the claim will depend on forensic expert evidence to demonstrate what the performance of the business would have been in the absence of the insured peril and its underlying cause. Here, causation arguments again surface. It is important that insurers do not seek to argue that the business would have, in any case, been affected by the wider circumstances of the incident, regardless of any failure of their own systems. Following FCA v Arch, such an approach is impermissible.

Comment

The CrowdStrike outage may or may not give rise to a flood of cyber BI claims. Either way, it serves as a good reminder to policyholders to check the level of cover held and consider what claims could be pursued either in the present case or if future system failures give rise to even more catastrophic losses. The wide variance of cover available in the market means that policies are far from equal. It is therefore essential that policyholders have a full understanding of both the coverage available in the market and the coverage they have purchased.

Commercial Court determines policyholder unable to claim for breach of warranty under warranty and indemnity policy

A recent Commercial Court decision relevant to policyholders serves as a reminder that warranty and indemnity (W&I) insurance policies are not a panacea to failed or defective merger and acquisition (M&A) transactions.

Aaron Le Marquer, Head of Policyholder Disputes, examines the Commercial Court's decision in *Finsbury Food Group Ltd v Axis Corporate Capital & ors* [2023] EWHC 1559 (Comm).

Background

Finsbury Food Group Plc ("Finsbury") was a group of food manufacturing companies, including various bakery businesses. Ultrapharm Limited ("Ultrapharm") was a specialist manufacturer of gluten free baked goods, its chief business in the UK being the supply of its products to Marks & Spencer.

The case concerns Finsbury's claim against the defendant insurers under a buyer-side warranty and indemnity insurance policy ("the Policy") issued in connection with the sale and purchase of the shares in Ultrapharm to Finsbury under a sale and purchase agreement ("SPA").

Finsbury claimed Ultrapharm had breached warranties in the SPA, and the terms of the Policy covered these breaches. Finsbury contended that this reduced the overall value of Ultrapharm's business by £3,194,370.

The issues

The case turned on four key issues:

- the meaning of two particular warranties in the SPA (the 'Trading Conditions Warranty' and the 'Price Reductions Warranty'), and whether a recipe change and/or a price reduction agreed between Ultrapharm and M&S amounted to a breach of either of those warranties;
- whether Finsbury's knowledge of the alleged breaches excluded liability under the SPA and cover under the Policy;
- if not, whether Finsbury would have proceeded with the transaction in any event (ie causation); and
- if not, how was Finsbury's loss arising from the breach to be valued?

The decision

As a starting point, the judge found that there were serious deficiencies in the evidence produced by Finsbury with its disclosure "profoundly unsatisfactory", its six witnesses of fact "unreliable", "belligerent" and "untruthful", and its expert witness "prepared to make assumptions in favour of Finsbury when the evidence did not always justify him in so doing".

It is, therefore, perhaps unsurprising that the judge found in favour of insurers on each of the key issues.

- Breach of warranty

Finsbury argued that the Trading Conditions Warranty was breached both by the recipe change and the price reduction. In relation to the recipe change, the court found that (i) it was both agreed and came into effect before the relevant date for a breach of warranty claim (the "Accounts Date"); (ii) it did not give rise to a material adverse change, which the court deemed to mean one that exceeds 10% of the financial position or turnover of the company; and (iii) it was simply part of the ordinary course of the bakery's business. The recipe change did not, therefore, breach the Trading Conditions Warranty.

In relation to the price reduction, it was agreed that this had been offered or agreed to be offered by Ultrapharm prior to the Accounts Date but had not been implemented until after that date. Finsbury argued that the implementation date was relevant. In contrast, the insurers argued that it was the date on which the reduction was offered or agreed to be offered that was relevant.

The judge agreed with the insurers that the Price Reduction Warranty was directed at the date upon which the price reduction was offered or agreed to be offered and not the date upon which it actually becomes effective. As this had taken place prior to the Accounts Date, he was satisfied that the price reduction did not breach the Price Reduction Warranty.

As there had been no breach of warranty, it followed that the remaining issues were not relevant. However, the judge went on to consider what the answer would have been on the assumption that he was wrong about the breach of warranty.

- Knowledge

If there had been a breach of warranty, the terms of the Policy provided there would be no coverage if Finsbury had actual knowledge of the circumstances of a warranty claim and was actually aware that such circumstances would be reasonably likely to give rise to a warranty claim. On this issue, the judge found that the key witness's evidence was untruthful and his knowledge at the relevant time was fatal to Finsbury's case. The knowledge exclusion applied, and even if there had been a breach of warranty, coverage was, therefore, excluded under the policy.

- Causation

The insurers further argued that even if Finsbury had known about the circumstances it now claimed amounted to a breach of warranty, Finsbury would have proceeded with the transaction at the same price anyway. The breach would therefore have caused no loss. Examining the evidence, the judge's key factual finding was that the purchase price of £20m was fixed from the beginning and was "hard-coded" into the transaction. On that basis, the judge concluded that Finsbury would have proceeded with the transaction at the same price in any event and was therefore unable to prove it had suffered any loss as a result of the alleged breach.

- Quantum

Given that the judge found that Finsbury's claim failed on both liability and causation, quantum did not arise. The judge dealt with it briefly anyway.

The value of the claim turned on the warranted value of Ultrapharm at the time of its purchase (and whether the purchase price reflected that warranted value); and (ii) what the actual value of Ultrapharm was at that time.

In relation to the first question, the judge found that the fact of the "hard-coded" £20m purchase price meant that there was no "warranted value" of the business at the time of the transaction. The purchase price was simply the price that Finsbury was prepared to pay and was based on a simple multiple of 1x sales.

As to the second question, the actual value of the business at the time of the sale was found to be in the range of £15.3m to £16.9m. However, as there was no warranted value and the purchase price had simply been fixed by reference to sales, the comparison between the actual value of the company and the purchase price was irrelevant for the purpose of calculating loss caused by any breach of warranty (and, in any case, the judge had found that there was no breach.)

Had he found there to be a breach of warranty, as the purchase price had been fixed by reference to total group sales, the judge would have assessed any loss to have been limited to the actual reduction in sales caused by the breach. On the evidence before the court, that reduction amounted to only £300,000.

Comment

W&I insurance can be a powerful tool to facilitate and de-risk M&A transactions. However, the overarching takeaway from the decision is a reminder to policyholders that a W&I policy does not necessarily provide an easier route of recovery than otherwise would have been available under an SPA for a breach of warranty. Nor does it provide the purchaser with protection against a bad bargain. The policy is intended to transfer risk for any breaches to the insurers, but the onus of proving a breach of warranty claim remains with the purchaser and is not diluted. Purchasers should not assume that insurers will not hold them to the same standard of proof as a seller would have in a breach of warranty claim.

The case also demonstrates a common difficulty of valuing breach of warranty claims and is a warning that a retrospective assessment of loss is not sufficient. When considering both causation and quantum, the claim must be viewed objectively through the lens of the facts and circumstances pertaining at the time of the transaction. That approach can produce very different results from the policyholder's subjective analysis carried out with the benefit of full hindsight.

Breach of warranty by policyholder would preclude cover even when that breach could not cause the loss

The Insurance Act 2015 (the "Insurance Act") brought about a seismic shift in insurance law by introducing many new protections for policyholders. Yet, since it came into force in 2016, surprisingly few cases have addressed these newly introduced rights.

The recent case of *Mok Petro Energy FZC v Argo (No. 604) Limited* [2024] EWHC 1935 ("*Mok Petro v Argo*") does, however, consider policyholders' strengthened rights in relation to breaches of warranties introduced by the Insurance Act. In this article, Policyholder Disputes associate Hebe Peck explains this case's relevance to all involved in insurance law.

Case background

The claimant ("Mok Petro") was an oil trading company based in Dubai insured under an all-risks marine cargo open cover for shipments of petrochemicals declared to the policy. Mok Petro was insured by Cedar Insurance & Reinsurance Co. Ltd but brought its claim against its reinsurers directly pursuant to a cut-through clause.

Mok Petro arranged a shipment of 11,800 MT (+/- 5%) of gasoline with an insured value of $7.5m to be transported from Sohar in Oman to Hodeidah in Yemen, which was declared to the policy in May 2017. The cargo was certified as being on specification when it left the port in Oman. Unfortunately, when the cargo arrived in Yemen, it was found to be off-specification and unmarketable due to a raised phase separation temperature (a risk the product was vulnerable to, particularly if contaminated with water).

The three main issues were as follows:

1. Mok Petro claimed that the product was on specification at the load port but was fortuitously contaminated with water during loading. Mok Petro sought indemnity for its losses attributable to this contamination. In response, insurers denied there had been any contamination, stating instead that the cargo had been off specification prior to loading. At the crux of this issue was a factual dispute about the accuracy of the load port certificates of quality, which stated the cargo was on specification.

2. Alternatively, Mok Petro argued that if the cargo was off specification at the time of loading, then the blending of the cargo itself was a fortuity covered by the policy. Insurers disputed this point saying that this fell outside the scope of cover.

3. Insurers further argued that, in any event, they were not required to provide cover because Mok Petro had breached a warranty requiring inspection and certification by a marine surveyor. The warranty read as follows:

"Quantitative/Qualitative survey carried out by internationally recognised marine surveyor at loading port/discharge port at owners cost, including inspection/certification of the cleanliness of the vessel tanks at load port and the shore tanks at discharge port and the connecting pipelines between the vessel and the shore tanks at both load and discharge port.

"Failure to comply with a warranty will, in normal circumstances, void this insurance policy."

The court's findings

The court found that Mok Petro's claim failed on all three points.

Although the cargo was certified as being on specification when it left Oman, the court agreed with insurers there were doubts as to the reliability of these certificates. Contrary to the specification on the certificates, samples taken at the time of loading showed that the cargo had a raised phase separation temperature. Mok Petro suggested these samples could not be relied on because:

- the parties could not be certain they were samples taken from the cargo at the time of loading, and
- they were first analysed more than a year after the loading took place and may have degraded during that time.

The court dismissed both these concerns and found that on the balance of probabilities the samples could be relied on. Accordingly, the cargo was found to be off specification when loaded. Therefore, no damage had occurred during the voyage that would be covered by the policy.

Further, the court did not accept Mok Petro's argument that the actual blending of the off-specification cargo was a fortuity covered by the policy. The policy specifically covered the shipment, which was identified as a cargo of 11,800 MT +/- 5% to be carried on the vessel. As such, the insured product did not exist and was not covered until it was fully loaded onto the named vessel in the specified quantity. Any issues arising from the blending were not "damage" to the insured product (which did not yet exist) and would be outside the scope of the cover. In other words, there was no damage during the voyage because it was damaged from the outset.

The court also found in favour of insurers on their breach of warranty defence. While the judgment is obiter (ie, a non-binding observation by the judge that is not essential to the decision) on this issue, it remains the first reported decision grappling with the provisions in section 11 of the Insurance Act. The remainder of this article considers this section of the judgment in detail.

The Insurance Act 2015 – key provisions

One of the key changes brought about by the Insurance Act was the strengthening of policyholders' rights in the event of any breach of the warranties set out in the policy. Previously, insurers could discharge all liability in the event policyholders breached their warranties regardless of whether that breach brought about the loss or increased the risk of that loss. For example, a breach of a warranty to ensure a working fire alarm was in place could, for instance, have precluded recovery for property damage caused by flooding.

The Insurance Act created a more policyholder-friendly position, in particular through the introduction of the following provisions:

- Section 10 – Abolished the blanket rule that breach of warranty discharged insurers' liability. Instead, this section broadly provides that insurers' liability is discharged from the time the breach of warranty occurs until the breach is remedied, at which point insurers come back on cover.
- Section 11 – Provides that even where there is a breach of warranty (or other clause that looks to reduce the risk of a loss of a particular kind/at a particular location/at a particular time), insurers cannot exclude, limit or discharge their liability if the policyholder can show that the breach of that clause could not have increased the risk of the loss that actually occurred in the circumstances in which it occurred.

Since the introduction of the Insurance Act, there has been much discussion regarding how Section 11 would be applied. The explanatory notes to the Insurance Act appeared to favour a broad interpretation, stating: "A direct causal link between the breach and the ultimate loss is not required. That is, the relevant test is not whether the non-compliance actually caused or contributed to the loss which has been suffered" (paragraph 96). There was, however, no substantive judicial commentary on this point until Mok Petro v Argo.

The court's commentary regarding the breach of warranty

As explained above, the court found that the policyholders' claim failed for reasons aside from the policyholders' breach of warranty, and this issue was therefore rendered moot. However, the parties made detailed submissions about the interpretation and application of sections 10 and 11 of the Insurance Act. Although not relevant to the outcome, the judgment provides some useful obiter guidance.

Importantly, the survey warranty (set out above) required two separate actions to be carried out: firstly, inspection and secondly, certification. Insurers alleged that the warranty was breached because no proper survey of the shorelines was carried out nor any timely certification of this survey. Mok Petro brought witness evidence confirming that inspection had taken place prior to loading of the cargo and said that the certification requirement was satisfied by the issuance of a certificate almost six years post-inspection.

Based on the witness evidence, the court was prepared to accept that an inspection had taken place and that Mok Petro was not in breach of that aspect of the warranty. However, the court found that the certification requirement had been breached. The court found that the delay of almost six years between inspection and the issuance of the certificate breached an implied temporal limit requiring certification to occur within a reasonable time (according to industry standards). Accordingly, Mok Petro was in breach of the survey warranty.

While it was clear that breach of the inspection aspect of the warranty would increase the risk of water contamination, Mok Petro argued that it was only the certification aspect of the warranty that was relevant when considering whether insurers would be on cover as only this limb of the warranty had been breached. Mok Petro's position was that a lack of certification would not increase the risk of the loss occurring. The court disagreed and found that the warranty must be looked at as a whole, and both the inspection and certification aspects should be viewed together.

Accordingly, although there had only been a breach of the certification aspect of the warranty, both elements of the warranty were relevant when considering whether the breach increased the risk of the loss that actually occurred occurring in the circumstances in which it occurred (which was hypothetically the risk of water damage to the cargo, which Mok Petro had asserted had occurred). Since a breach of the inspection aspect of the warranty would increase the risk of the loss, the policyholder's breach of the survey warranty more broadly was relevant to whether insurers would be on risk – ie although only the certification aspect was breached, the court was entitled to consider whether a breach of the inspection aspect would increase the risk of the loss occurring.

Therefore, the court concluded that had Mok Petro succeeded on its primary case (that the product was contaminated by water during loading), its claim would nevertheless have failed because Mok Petro had breached the survey warranty, and a breach of this warranty would increase the risk of the loss occurring.

Key takeaways

Mok Petro v Argo provides commentary on the application of sections 10 and 11 of the Insurance Act. Importantly, it has stated that warranties with multiple aspects to them should be considered as a whole when deciding whether a breach would increase the risk of a loss occurring for the purposes of section 11. Consequently, this case is unhelpful to policyholders as it indicates that insurers can avoid cover where policyholders have breached warranties under the policy even if only a narrow aspect of the warranty was breached and this narrow breach would never be causative of the loss or increase the risk of it.

For that reason, the decision appears harsh, and going forward, we expect policyholders to look to distinguish the case based on its facts and the particular policy wording. It should also be noted that as the comments are obiter, they will not create a binding precedent. Nevertheless, *Mok Petro v Argo* stands as a useful reminder of the serious consequences arising from breaches of warranty. Policyholders should be mindful at all times of any warranties set out in their policies and take steps to ensure they comply with them.

"Otherwise" – the English court's contrasting approach to jurisdiction in Covid-19 business interruption claims

Two recent contrasting decisions on jurisdiction demonstrate the emerging reputation of the English courts as the policyholder's choice of forum for determining Covid-19 business interruption (BI) coverage disputes. The two cases produced different results for very different reasons, but curiously both turned in part on the meaning of the word "otherwise".

Aaron Le Marquer reviews the two cases and considers lessons for policyholders and practitioners.

Al Mana v Fidelity

Al Mana is a Middle Eastern food, beverage and retail group that did not carry on business in the UK. It sought an indemnity for its Covid-19 business interruption losses from three insurers in the UAE, Qatar and Kuwait under local policies governed by local law. As such, the English courts may not seem an obvious choice of venue for the policyholder to have its business interruption claim heard, and certainly the three insurers objected on that basis. Nonetheless, Al Mana relied on the following jurisdiction clause in arguing that the English courts had non-exclusive jurisdiction over the dispute:

Applicable law and jurisdiction

"In accordance with the jurisdiction, local laws and practices of the country in which the policy is issued. Otherwise England and Wales UK Jurisdiction shall be applied,

"Under liability jurisdiction will be extended to worldwide excluding USA and Canada."

It was common ground that the clause was poorly drafted. However, the parties differed on its intended meaning, with particular focus on the word "otherwise" as a qualifier for the jurisdiction of the English courts. For its part, the policyholder argued that "otherwise" simply meant "or" or "if not", with the effect that the policyholder was entitled to elect where to bring its claim: in the local jurisdiction or England and Wales.

The insurers unsurprisingly argued that the word "otherwise" rendered the England and Wales jurisdiction option a fallback. It would only apply if the local court did not have or would not accept jurisdiction. It was not disputed that the local courts would accept jurisdiction over the claims, and the policyholder was not therefore entitled to elect to bring its claim in England and Wales instead.

At first instance, Mrs Justice Cockerill agreed with Al Mana for three reasons. First, she considered the word "otherwise" as used in the clause was most naturally equivalent to "or", granting the policyholder a choice. Second, the difficulty with the insurers' fallback argument was that the clause did not identify the circumstances in which the fallback was to apply. And thirdly, the policyholder's interpretation made more commercial or practical sense. Al Mana was therefore entitled to pursue its claim in the English courts.

The insurers appealed successfully. In the Court of Appeal, two of the judges were persuaded that the mandatory choice of local law supported the insurers' 'fallback' interpretation. The primary intention of the clause was for the local courts to have jurisdiction over the dispute, with the English court's jurisdiction only coming into play where that was not possible. Mrs Justice Cockerill was therefore wrong to find that it was open to the policyholder to elect to bring proceedings in the English court when the local courts would accept jurisdiction.

Lady Justice Andres, dissenting, agreed with Mrs Justice Cockerill's conclusions. She found that from the perspective of the reasonable policyholder, the word "otherwise" did indeed confer on the policyholder a choice as to jurisdiction and that such an interpretation was consistent with business common sense. The fact that the local courts would accept jurisdiction should also not oust the parties' contractual bargain to allow a choice. She would therefore have allowed the action to proceed. Nonetheless, the majority decision of the Court of Appeal was that the English court had no jurisdiction to try the claimant's claims and that Service of the Claim Form should therefore be set aside.

DC Bars v QIC Europe

Unlike Al Mana, this decision concerned a UK-domiciled policyholder's claim under an English-law governed policy issued by a UK-authorised insurer. Rather than considering the potential jurisdiction of a foreign court, it turned on the construction of an arbitration clause in a form commonly found in insurance policies:

"If any difference shall arise as to the amounts to be paid under this Policy (liability being otherwise admitted) such difference shall be referred to an arbitrator who will be jointly appointed in accordance with statutory provisions."

The claim was brought under a 25-mile radius disease clause, and primary liability was not disputed, the insurer having already paid £2,168,870 in respect of losses suffered by the policyholder during the three months following the first occurrence of disease within the specified radius.

What was disputed was the insurer's liability for further losses caused by further occurrences of disease within the radius during the policy period but after the expiry of the three-month maximum indemnity period. The policyholder argued that it was entitled to recover losses in relation to three subsequent three-month indemnity periods, while the insurer maintained that its total liability was limited to the losses suffered during a single three-month indemnity period.

This was, therefore, a dispute over limits, which the insurer sought to cast as a matter of quantum, ie it was a question of "the amounts to be paid under this Policy (liability being otherwise admitted)". In reliance on the arbitration clause, the insurer therefore sought a stay of the proceedings commenced by DC Bars.

DC Bars, on the other hand, argued that the dispute was not only as to quantum. It was also about liability in relation to the second to fourth indemnity periods, for which the insurer denied it was liable to make any payment at all. The insurer's case was that the quantum of the further claims pursued under the policy was zero. Therefore, the arbitration clause did not bite, and the policyholder was entitled to have its claim determined in the English courts.

The judge agreed with the policyholder, citing Mr Justice Potter's 1990 finding in *New Hampshire v Strabag Bau*, in relation to a similar clause:

"It seems to me the word 'otherwise' is apt to emphasise the fact that it is 'mere' disputes as to quantum which are to be arbitrated, thus excluding disputes as to amount which, despite prima facie acceptance of liability, depend upon the application of particular provisions or exemptions in the policy which place limitations on categories of loss, or otherwise apply to limit the amount recoverable. Such cases would raise a question of liability in the sense and to the extent that they involve a point of law or construction rather than a mere dispute on quantum."

Noting that the insurer claimed not to be liable for the subsequent three indemnity periods because "there was one three- month maximum indemnity period which has already been exhausted", the judge concluded that it could not be said that there was a difference "as to the amounts to be paid under this Policy (liability being otherwise admitted)". The parties were not therefore obliged by contract to refer to arbitration the differences between them, and the insurer's application for a stay of the proceedings was dismissed.

Comment

While emphasising the need to construe policy wordings in their full context, both decisions are interesting as evidence of the eagerness of policyholders and the reluctance of insurers to have further Covid-19 BI issues determined in the English courts, and support a common perception that the English courts have adopted a policyholder-friendly stance in these matters (at least in contrast to courts in other jurisdictions).

The Al Mana case is perhaps confined to the peculiarities of the drafting of the jurisdiction clause in question, and given that the dispute would still have had to have been determined by the English courts in accordance with local law, it is not clear exactly what advantage the policyholder perceived in seeking the jurisdiction of the English courts.

DC Bars v QIC, on the other hand, is a useful confirmation to insurance practitioners that the common arbitration clause considered in the case is limited in its application to disputes of 'pure' quantum (ie those that are most likely to come down to forensic evidence and a 'battle of the experts'), rather than the determination of issues of principle and policy construction that are issues of law. That interpretation makes practical and commercial sense, and the decision will help guide policyholders and insurers towards agreeing the appropriate framework for resolving future disputes in all lines of business.

Covid-19 BI aggregation decision in claim brought by Pizza Express

The latest coronavirus (COVID-19) BI judgment to be handed down in the English courts deals with aggregation of losses under the Aon Trio policy wording. The claim was pursued by Pizza Express, whose 475 restaurants were all subject to coronavirus lockdown restrictions in 2020.

The question before the court was not one of coverage but whether, if coverage could be established, the relevant £250,000 sublimit in the Policy applied in the aggregate to all Pizza Express's losses arising from one source or original cause. On the insurers' case, this limited the value of Pizza Express's claim to £250,000, while on Pizza Express's case the insurer would be liable to indemnify Pizza Express in full to the tune of £178m. The court determined that insurers were right to argue that the aggregating provision contained within the definition of 'Occurrence' applied to the clauses in question, meaning that Pizza Express's covered losses under the Policy would be aggregated by reference to a single source or original cause.

This article by Head of Policyholder Disputes Aaron Le Marquer was first published by LexisNexis on 5 June 2023.

What was the background?

Pizza Express was insured under a policy issued by Liberty Mutual using the Aon Trio wording, a standard policy wording developed by global broker Aon and used by insurers across the market. The policy contained two clauses under which Pizza Express seeks indemnity, both of which Liberty argues do not respond.

Unusually, in this case, the issue of aggregation was determined before it was established whether the either of the clauses was capable of responding to Pizza Express's losses at all.

The first clause (an 'At the Premises' Disease clause) formed part of a series of test case trials led by *London International Exhibition Centre v RSA* in April–May 2023, in respect of which the judgment is awaited.

The second clause (a Prevention of Access clause) will be tested in a second set of test case trials in October 2023 (the 'Liberty Proceedings'). The Liberty Proceedings will revisit *Corbin & King v Axa* [2022] EWHC 409 (Comm) to determine (i) whether it was correctly decided by Mrs Justice Cockerill in 2022; and (ii) whether the reasoning can be read across to other NDDA wordings.

Both clauses in the Pizza Express Policy were subject to a sub-limit of liability of £250,000. The policy schedule further stated that 'all Limits of Liability apply any one Occurrence', while Occurrence was defined in the Policy as 'any one loss or series of losses arising out of and directly resulting from one source or original cause'.

Liberty argued that in the absence of any words to the contrary, the sub-limit of liability was a 'Limit of Liability' that applied 'per Occurrence', meaning that Pizza Express's losses were to be aggregated by 'source or original cause', and that any indemnity due to Pizza Express would accordingly be limited to £250,000 or alternatively £750,000.

Pizza Express argued that the sub-limit of liability was not captured within the capitalized term 'Limit of Liability', and that the £250,000 sub-limit was not therefore subject to the aggregating language found in the Occurrence definition. Rather, Pizza Express argued, the £250,000 applied to each occurrence of an insured peril, allowing it to claim its full losses estimated at £178m.

What did the court decide?

The court confirmed that the established principles of construction set down in *Wood v Capita Insurance Services and Arnold v Britton* [2017] AC 1173 were applicable, ie that:

- the policy must be construed objectively by asking what a reasonable policyholder would have understood the language of the Policy to mean
- the words must be assessed in the context of the clause in which they appear as well as in the landscape of the document as a whole, and
- commercial common sense should not be invoked retrospectively in an attempt to assist an unwise party or to penalize an astute party

Applying those principles, the court found that 'as a matter of ordinary language, a sub-limit is just as much a limit of liability as an aggregate or overall limit'.

Considerable weight was also given to the placement and formatting of the words and limits in the relevant parts of the Schedule in order to establish the objectively reasonable meaning. Finding in favour of the insurers, the court determined that the £250,000 sub-limit was a 'Limit of Liability' that applied any one Occurrence, and not any one Incident.

As a result, subject to coverage being established, all of Pizza Express's losses 'arising out of and directly resulting from one source or original cause' would be aggregated and subject to a single sub-limit of liability under both the Notifiable Disease and Prevent of Access clauses. The question of to what extent as a matter of fact Pizza Express's losses arose from or directly resulted from one source or original cause was not, however, decided.

At time of publication, the judgment remains subject to appeal and has yet to become final.

What are the practical implications of the case?

The case indicates that coronavirus BI claims pursued under the Aon Trio policy wording are likely to be subject to relatively broad aggregation by reference to one 'source or original cause', which will limit the amount recoverable, particularly in the case of policyholders with multiple insured premises.

However, care should be taken not to extrapolate too widely from the Pizza Express ruling.

First, it should be noted that coverage is in any case subject to judgment in LIEC v RSA and the Liberty Proceedings listed for October 2023. Until those cases are finally resolved, the matter of coverage under the Aon Trio wording remains undetermined.

Secondly, the Pizza Express ruling turned on a narrow point of construction that was entirely specific to the policy wording in question, and the judge's decision was heavily influenced not just by the content of the standard policy wording, but by the structure and formatting of the policy schedule, which may vary considerably between policyholders and insurers using the Aon Trio wording. For policyholders insured under other policy wordings, the judgment may have limited relevance.

Third, while the court confirmed that the sub-limit of liability applied per 'Occurrence' in Pizza Express's case, there was no argument and no finding as to exactly what that meant in practice. Liberty argues that aggregation by 'original cause' leads to either a single Occurrence or at most three Occurrences, whereas Pizza Express argues for a higher number of Occurrences. However, that issue was not determined in the present judgment.

Court of Appeal determines Covid-19 pandemic was a "catastrophe" under reinsurance contract and upholds arbitration award in favour of reinsured

The Court of Appeal recently provided clarity on the recovery of business interruption losses caused by the Covid-19 pandemic under excess of loss reinsurance policies.

In the case of *Unipol Sai Assicurazioni SpA v Covéa Insurance Plc* [2024] EWCA Civ 1110, the court determined that the outbreak of Covid-19 was a "catastrophe" and provided helpful insight into aggregation under reinsurance policies containing 'hours clauses'. Associate Claudia Seeger examines the decision.

Background

Covéa provided cover to policyholders that ran children's nurseries and childcare facilities, including cover for business interruption caused by perils other than physical damage to insured property. Such policyholders incurred losses as a result of instructions from the UK government to close childcare facilities from 20 March 2020 in response to the Covid-19 pandemic. Covéa indemnified its policyholders and consequently sought the recovery of such losses from reinsurers UnipolSai under its property catastrophe excess of loss reinsurance policy (the "Reinsurance Policy"). The case concerned an appeal from an arbitration award, where the arbitration tribunal had determined Covéa was entitled to an indemnity under the Reinsurance Policy.

The Reinsurance Policy indemnified for "each and every Loss Occurrence", which was defined as losses arising out of and directly occasioned by "one catastrophe". The duration of the "Loss Occurrence" was limited to "168 consecutive hours for any Loss Occurrence of whatsoever nature", with Covéa being entitled to choose the date and time when any period commenced (the "Hours Clause").

UnipolSai raised two key objections to payment under the Reinsurance Policy.

Firstly, UnipolSai argued that the outbreak of cases of Covid-19 in the UK in the run-up to the closures from 20 March 2020 was not a "catastrophe", as required for cover to be triggered under the Reinsurance Policy. Secondly, UnipolSai argued that for aggregation purposes, the Hours Clause limited the recovery of losses to payments only within the stipulated 168-hour period (and not to losses occurring outside this period).

"Catastrophe"

The Reinsurance Policy did not contain a definition of "catastrophe", and it was common ground that there was no special market definition or meaning of the word. Therefore, the arbitral tribunal had turned to the meaning of "catastrophe" in ordinary language to determine whether the outbreak of Covid-19 constituted a "catastrophe".

UnipolSai argued that there were three aspects of the word "catastrophe" the arbitral tribunal had failed to recognise:

1. that it must be an event or species of event, whereas Covid-19 was a state of affairs,
2. that it must be a sudden and violent event, and
3. that it must cause or be capable of causing physical damage.

UnipolSai's first argument drew on the distinction made in *Axa v Field* [1996] 1 WLR 1026 between "event" and "originating cause". The judges considered the fact that the word "event" was not used in the Reinsurance Policy and, if the intention was that "catastrophe" was to be synonymous with "event", the Reinsurance Policy would have said so or would have specifically used the word "event".

Similarly, the word "occurrence" was also not used in the Reinsurance Policy outside of the phrase "Loss Occurrence", which was separately defined by reference to "one catastrophe". The judges maintained that in such circumstances, what "occurrence" means in underlying contracts, such as those considered by the Supreme Court in the FCA Test Case, is irrelevant.

In applying the principles held in *Axa v Field*, the judges determined that a broad application of the two unities of time and place was most appropriate. For example, the terms of the Reinsurance Policy envisaged that a flood could last three weeks and be considered a "catastrophe", as could Australian bush fires that develop over an extended period of time. Consequently, the judges disagreed with UnipolSai's contention that the outbreak of Covid-19 in March 2020 could be considered a "state of affairs".

In relation to UnipolSai's second argument (that a "catastrophe" must be a sudden and violent event), the judges held that while some definitions included reference to sudden happenings, not all did. The judges noted that many of the perils identified in the Reinsurance Policy were not necessarily sudden in their inception or violent in their impact. For example, riots and civil commotions are not always sudden and often develop over time, as do floods, for example, with long periods of heavy rainfall. Nevertheless, the judges determined that if an element of suddenness was required, this had been satisfied in any event. The court agreed with the tribunal's comment that "it is evident that the exponential increase in Covid-19 infections in the UK during the first three weeks of March 2020 did amount to a disaster of sudden onset such as to qualify as a catastrophe".

Finally, the judges rejected UnipolSai's third argument that a "catastrophe" must cause or be capable of causing physical damage. The judges noted that such a requirement is not inherent in the word's ordinary meaning. In arguing this point, UnipolSai attempted to rely on the principle of *ejusdem generis*, which is the principle that where general words follow specific words, the general words are limited to (or, in other words, are ejusdem generis with) things of the same class as the specific ones. The judges considered this approach to be misconceived. They held that the Hours Clause did not purport to set out a defined class; it simply ascribed hours to specific recognised catastrophes. Additionally, the words "any Loss Occurrence of any whatsoever nature" are extremely wide and intended to encompass other non-identified catastrophes.

The judges, therefore, unanimously rejected UnipolSai's arguments, finding that the analysis of the arbitration tribunal was correct and that the outbreak of cases of Covid-19 in the UK in the run-up to 20 March 2020 was a "catastrophe".

Aggregation and application of Hours Clause

The central question for determining the application of the Hours Clause was when does the "individual loss" (being the loss incurred by the original policyholder) occur? Clearly, where the individual loss occurs outside the relevant period of hours, here being 168 hours, it cannot be included in the Loss Occurrence.

The judges held that "occur" is to be read as "first occur", such that all individual losses that first occur during the relevant period can be aggregated, even where the financial loss resulting from the individual losses continues to develop after the 168 hours has expired. Reinsurance market practice is to treat damage business interruption loss as occurring simultaneously with property damage; the judges did not consider there was any basis to treat non-damage business interruption losses any differently.

Consequently, the judges held that an "individual loss" first occurs when a covered peril affects the insured premises and where this is a loss of use, the individual loss occurs at the same point as that loss of use. Additionally, an "individual loss" only occurs once for the purposes of the Hours Clause, irrespective of how long the financial loss suffered continues; the "individual loss" encompasses the entirety of the loss sustained as a result of the relevant catastrophe.

The judges found there was nothing in the Hours Clause requiring the loss to be apportioned such that only the part sustained during the 168-hour period is to be indemnified. Such conclusion is logical in light of other provisions of the Reinsurance Policy, as well as the principle of "losses occurring during" (re)insurance, where the loss is attributable to the policy year in which it first occurs. The judges considered UnipolSai's approach "artificial and gives rise to considerable practical difficulties" such as "slicing and dicing" a net loss arrived at in the underlying insurance.

Conclusion

The Court of Appeal's decision will be a welcome one for insurers seeking recovery of Covid-19 losses under excess of loss reinsurance policies. The Court of Appeal's determination that financial losses incurred outside of the relevant period of hours stipulated in an 'hours clause' can be indemnified (provided they result from an "individual loss" first occurring within the relevant period) is particularly helpful for insurers seeking to maximise their recovery under their policies.

The decision is also consistent with Mr Justice Butcher's ruling in *Stonegate v MS Amlin* [2022] EWHC 2548 (Comm) that coverage of the insured's business interruption losses extended until at least the end of the lockdown period that had begun during the period of insurance, despite the fact that the period of insurance had expired in the meantime. As such, the Court of Appeal's decision may have some further application in the context of aggregation disputes under direct insurance policies as well as reinsurance.

Various Eateries v Allianz: Covid-19 business interruption insurance examined again by the Court of Appeal

The Court of Appeal has rejected both parties' appeals and upheld the first instance decision of the Commercial Court in *Various Eateries v Allianz*. Most importantly for policyholders, insurers failed with their argument that only a single sub-limit of indemnity will be available.

Various Eateries was one of the trio of Covid-19 business interruption insurance claims under the Marsh Resilience wording that proceeded to preliminary issue trials in 2022, led by *Stonegate Pub Company Ltd v MS Amlin & Ors*, and alongside *Greggs Plc v Zurich*. Both these cases settled after first instance judgments were handed down in all three cases in late 2022.

Various Eateries proceeded to appeal in November 2023. Judgment has been handed down today, and in this article James Breese briefly examines the Court of Appeal's findings.

Recap

The Marsh Resilience wording ('RSA4' in the FCA Test Case) was found by the Divisional Court in the FCA Test Case to respond to business interruption losses flowing from the Covid-19 pandemic.

The key issues for determination in Various Eateries, Stonegate and Greggs were causation and aggregation, both of which related to the quantum of the covered claim(s) rather than coverage per se. Furlough was also a live issue in Stonegate and Greggs but not in Various Eateries. The key issue of furlough deductions remains unconsidered by the Court of Appeal to date.

First Instance

Causation

Various Eateries ran different causation arguments, each of which was constructed to persuade the court that government action taken after the expiry of the policy was in response to earlier cases of Covid-19. By doing so, *Various Eateries* argued that later losses were proximately caused by insured perils.

Conversely, *Allianz* argued that the indemnity period must have ceased shortly after *Various Eateries'* policy expired on 28 September 2020.

The Commercial Court rejected *Various Eateries'* causation arguments but noted that some later losses may be able to be proved based on the facts. The necessary evidence to do so was not before the court for the purposes of the preliminary issue trial. At first instance, and from a causation perspective, *Various Eateries'* recovery was limited to the losses suffered during the policy period and within a few weeks of it expiring.

Aggregation

The parties unsurprisingly adopted polarised positions in relation to aggregation.

Allianz argued that *Various Eateries'* losses "arose from, were attributable to, or [were] in connection with" a single occurrence, which would cap insurers' liability to a single sub-limit of indemnity of £2.5m.

Notwithstanding that *Allianz* argued that there was a single occurrence to which losses aggregate, *Allianz* pleaded 18 different candidates for that single occurrence.

Various Eateries argued that there was no single occurrence, enabling it to recover many multiples of the £2.5m sub-limit subject to proof of loss. Alternatively, *Various Eateries* argued that the losses aggregated on a per government action, per premises basis.

The court was unpersuaded by either side's extreme cases on aggregation. Rather, the court found that losses would aggregate on a "per government action basis", subject to precisely what those actions were. *Various Eateries* was, therefore, entitled to recover multiple limits of £2.5m, albeit not on a "per premises" basis.

While the court found that the initial human infection(s) in Wuhan amounted to a single occurrence, it was too remote from *Various Eateries'*s losses for *Allianz*'s case to succeed. The same analysis applies in respect of the point at which Covid-19 entered the UK; while that may amount to a single occurrence, corresponding aggregation arguments still fail on the basis of remoteness.

Issues for appeal

The principal issue on appeal was whether the effect of the aggregation clause in the policy ("arise from, are attributable to or are in connection with a single occurrence…") resulted in *Various Eateries* being entitled only to a single sub-limit of indemnity of £2.5m.

The Commercial Court's judgment on causation was not reconsidered, and permission was not granted to appeal those issues.

In addition to the extreme cases of "single occurrence" or "per premises" aggregation, *Various Eateries* also sought to appeal the finding that the July 2020 restrictions were not a new occurrence for which a new sub-limit of indemnity would be unlocked.

Court of Appeal's decision

The Court of Appeal dismissed all appeals and upheld the lower court's findings on the same bases. Notably:

- *Allianz's* case on there being a single occurrence to which Various Eateries losses aggregate failed on the grounds of remoteness. The losses suffered were too remote from the single occurrences that infections in Wuhan and the disease's entry to the UK were.
- *Various Eateries'* "per premises" analysis failed because the Court of Appeal found nothing in the policy to suggest unequivocally that the limits of indemnity apply separately to each insured location. This was supported by the operation of the retention in the policy.
- The Court of Appeal did not grant permission for *Various Eateries* to appeal Mr Justice Butcher's decision in relation to the July 2020 measures. They were not new measures for which a new sub-limit of indemnity would be available.
- Finally, the Court of Appeal confirmed that *Various Eateries* is "entitled to recover the Business Interruption Loss proximately caused by [the] Covered Event, even if that loss extends beyond the Period of Insurance, subject only to the longstop that the Maximum Indemnity Period in the policy schedule…"

Comment

This judgment largely leaves the first instance decision undisturbed. It can be considered a win for policyholders insofar as there is no single occurrence to which policyholders' losses will aggregate. Policyholders insured under the Marsh Resilience wording may still, therefore, be entitled to claim multiple limits of indemnity. However, it does make it difficult for policyholders with the Resilience wording to recover losses from insurers on a "per premises" basis.

The door is firmly ajar in relation to other contracts of insurance. The Court of Appeal expressly referred at paragraph 81 to Mrs Justice Cockerill's findings in *Corbin & King & Ors v Axa*, where, in that case, the claimants had a composite policy of insurance.

The Court of Appeal drew a "material distinction" between that case, where there were multiple insureds each separately owning different restaurants, from Various Eateries' policy construction. Mr Justice Butcher drew the same distinction in Stonegate.

It would, therefore, seem open for policyholders with composite insurance policies to argue they should be entitled to separate sub-limits of indemnity for each insured entity. This point is being tested in relation to the Marsh Resilience wording in *The Arsenal Football Club Plc & Various Ors v Allianz Insurance Plc & Various Ors* (CL-2022-000248). It was also considered (as was the fundamental issue of furlough) in relation to other wordings being considered in the recent test cases against Liberty Mutual, for which judgment is awaited.

Policyholders with multiple insured entities should continue to consider their position. So, too, should policyholders with policy periods that extended to late 2020 and beyond, given that the facts may differ from those considered in the FCA Test Case and the Marsh Resilience litigation. Policyholders with multiple insured entities and/or whose claims are affected by the furlough issue should await the forthcoming decision in *Gatwick Investments v Liberty Mutual* and associated cases.

Court rules in favour of policyholders in LMIE Test Cases

On 26 January 2024, Mr Justice Jacobs handed down judgment in the latest of a line of test cases stretching back to and arising out of the FCA Test Case (FCA v Arch), relating to business interruption coverage and the Covid-19 pandemic lockdowns.

In a group of five cases against Liberty Mutual Insurance Europe (LMIE), heard sequentially in October 2023, the court was asked to consider whether the Prevention of Access (Non-Damage) ("POAND") extension responded to cover losses caused by Covid-19. James Breese and Aaron Le Marquer examine the decision here.

In summary, the court decided:

- The Supreme Court ruling on concurrent causation applies to NDDA clauses in the same way as disease clauses.
- The UK Government is a 'statutory authority' within the meaning of the NDDA clause.
- The NDDA clause therefore responds to Covid-19 BI losses arising from the general government measures.
- The limit of liability does not apply per premises where owned/operated by a single insured.
- The limit of liability does apply separately to multiple insured entities under a composite policy.
- Insurers are entitled to take the benefit of furlough payments received by policyholders.

There was one additional set of proceedings, *International Entertainment Holdings Limited & Ors v Allianz Insurance Plc*, which was heard after the proceedings against LMIE. This case concerned a different wording and produced a different outcome, and will be evaluated in a separate article.

Background

POAND or Non-Damage Denial of Access ("NDDA") wordings are a category of non-damage BI extension that respond to a prevention or hindrance of access or use of the insured premises, following action taken by an authority in response to, typically, a danger or disturbance within one mile radius of the insured premises. Similar wordings were included within the scope of the 2020 FCA Test Case. The Divisional Court found that such wordings would not respond and the FCA decided not to appeal the finding.

In its analysis of the causation issue in relation to disease wordings, the Supreme Court found that "each of the individual cases of illness resulting from Covid-19 which had occurred by the date of any Government action was a separate and equally effective cause of that action (and of the public response to it)." Logically, the same analysis could equally apply to the NDDA clauses – but as the NDDA clauses were not subject to appeal, the question was left open of whether the same reasoning could be applied to unlock cover.

The LMIE Test Cases represent in some ways the natural conclusion of the FCA Test Case, in examining whether the Supreme Court's causation analysis can apply to POAND and NDDA policyholders, such that they are entitled to cover in the same way as policyholders with ATP and radius disease wordings are.

LMIE Test Cases

There were six sets of proceedings in relation to the LMIE wording, each of which had consecutive preliminary issue trials in October 2023. Save for the Arena Group, for which cover had already been confirmed, the claimants each had materially similar policy wordings, which LMIE denied would respond to cover Covid-19 losses.

The following key issues were before Mr Justice Jacobs in the LMIE Test Cases:

- Causation: does the Supreme Court's concurrent causation analysis apply to NDDA wordings?
- Statutory Authority: does the undefined term 'Statutory Authority' include central government?

- Aggregation: are the sub-limits of indemnity available per government action and per insured entity and/or per insured premises, or in the aggregate?
- Furlough: are insurers entitled to take the benefit furlough payments received by the policyholder?

Each of these is discussed below.

Causation

Although LMIE sought to argue that *Corbin & King* was wrongly decided, and that the Supreme Court's concurrent causation was inapplicable to the POAND clause, it ultimately accepted that this argument was not available at first instance. LMIE therefore consented to judgment in the policyholders' favour on this issue, subject to permission to appeal.

Statutory Authority

LMIE argued that the UK Government was not a 'Statutory Authority' within the meaning of the policy on the basis that the undefined term was concerned with the status of the originator of the restrictions, and not the powers being exercised. Neither the UK Government nor the Secretary of State for Health was formed by statute, and were not therefore statutory authorities.

Mr Justice Jacobs rejected that position: "A pedantic lawyer might be interested in the constitutional and legal origin of the originator of the relevant restrictions. I do not consider that it would occur to the reasonable ordinary policyholder (or indeed insurer) that the words "Statutory Authority" required the examination posited by Liberty Mutual's argument."

Accordingly, the UK Government was found to be a Statutory Authority within the meaning of the wording which, coupled with the ruling on causation, led to a finding of coverage under the NDDA clause.

Aggregation

The policyholders had different cases on aggregation because of their differing policy wordings. All of the policyholders operated multiple premises, and all had been subject to various restrictions during the policy period, but in each case the total losses suffered exceed the limit of liability under the POAND many times over.

They all therefore sought to argue that they were entitled to multiple limits of liability to indemnity their losses, but the position and the arguments available to each of the policyholders was different.

Hollywood Bowl and Fuller Smith & Turner ("Fuller") were each single insured entities operating multiple insured premises. These claimants argued that the limit applied 'per premises' and 'per government action.'

The claimants in Gatwick Investment were separate corporate entities within the same corporate group, each insured under its own policy. The Gatwick claimants were not therefore concerned with 'per premises' but argued that the limit applied 'per government action'.

The claimants in the Starboard Hotel, Liberty Retail and Arena Group cases were also separate entities within the same group, but insured together under a composite policy of insurance. They therefore argued that the limit applied 'per entity', 'per premises' and 'per government action'.

For its part, LMIE adopted a variety of aggregation positions across the cases, but generally argued for an application of the limit on an annual aggregate basis.

Per premises

Hollywood Bowl and Fuller's arguments for 'per premises' recovery were premised on the word 'Limit' in the policy schedule, meaning something different to the defined term 'Limit of Indemnity'. This applied a 'per occurrence' aggregation mechanism.

The court rejected any such distinction. Mr Justice Jacobs concluded that the reasonable reader would not find any fundamental distinction between "Limit" and "Limit of Indemnity", commenting that this approach produces certainty and a commercial sensible result. As a result, a single insured policyholder with multiple premises is not entitled to a separate limit of liability per premises.

Having found that the machinery of the policy provides for "per occurrence" aggregation, it followed for this and other reasons that LMIE failed with its opposing argument that there was an annual aggregate limit for the POAND clause.

It is notable that the occurrence-based construction again did not produce a 'per premises' result, which is consistent with the outcome of the Marsh Resilience litigation, as confirmed by the Court of Appeal in Various Eateries v Allianz recently and in Pizza Express v Liberty Mutual & Anr.

The exception in these proceedings was Arena Racing's policy, which provided for the limit to apply 'any one loss'. Although the meaning of 'any one loss' was not itself determined in these proceedings, it is clear from the reasoning in Corbin & King (which concerned an 'any one claim' wording) that these words point to the most granular form of aggregation ie per premises per insured event.

Composite Policy

The parties in Starboard, Liberty Retail and Arena Group agreed that the policies were composite with separate contracts of insurance between the insurer(s) and each of the insured entities in respect of their own insured interest.

Policyholders argued that this entitled them to separate limits of indemnity for each insured entity, whereas LMIE maintained that just one limit of indemnity was available to be shared in an unspecified way between all the insured entities.

Mr Justice Jacobs commented that the court in Corbin & King found the relevant policy was a composite policy in respect of which each insured could claim up to the relevant policy limit. Mr Justice Jacobs found no material distinction between the cases before him and the policy in Corbin & King, which itself had relied upon the Court of Appeal decision in *New Hampshire Insurance Co Ltd v MGN Ltd*.

The observations in Corbin & King that:

- the wording expressly referred to "premises";
- the insured entities had separate insurable interests; and
- the premises were in different locations and so could be affected differently, all applied equally to the LMIE Test Cases in which the composite policy argument was pursued.

The court found that there was no basis upon which to distinguish the reasoning and there was nothing to suggest that Mrs Justice Cockerill was wrong in Corbin & King, or that a reasonable policyholder would understand that the limit should be shared between the insureds.

Furlough

Furlough was a live issue in all cases except Fuller's. The question for the court was whether the insurers were entitled to take the credit of furlough payments received by the policyholders from the Government.

The existing decision on this issue was given by Mr Justice Butcher in Stonegate, and favoured insurers. It was due to go to appeal in November 2023 before Stonegate settled shortly before the appeal hearing.

The court in these LMIE Test Cases followed Mr Justice Butcher's decision, and found that the insurers are entitled to deduct the furlough payments that the policyholders have received in the relevant period from the indemnities that are paid under the policy. The court gave the following reasons:

- There was no need to depart from Mr Justice Butcher's decision that furlough payments had reduced the costs to the business, as the policy constructions in dispute and arguments in relation to them were materially the same on this issue.
- A concurrent causation analysis applies to furlough payments received in the same way as concurrent causation principles determine coverage. Insurers therefore succeeded in establishing that furlough payments were received "in consequence of the insured peril".
- Furlough payments were not benevolent gifts but a measure introduced to mitigate the economic impact of the restrictions imposed by the government, and insurers would be subrogated to the recovery of those sums under the general law.

Permission to appeal

Permission to appeal was granted on the causation and furlough issues, but refused on the issues relating to limits, statutory authority, and composite policy.

Comment

The outcome of these cases is significant to policyholders for a number of reasons.

First, the court has once again confirmed that NDDA policyholders are entitled to cover. This is consistent with Mrs Justice Cockerill's comments in Corbin & King, and Lord Mance's comments in the China Taiping Arbitration, and means the large majority of policy wordings originally considered in the FCA Test Case respond to Covid-19 BI losses. Large numbers of policyholders who remain uncompensated four years on from the commencement of the pandemic may now therefore be able to pursue their claims.

Secondly, policyholders with composite policies are entitled to separate limits of indemnity for each of the entities insured by their policy. Again, this is consistent with Corbin & King and earlier case law, and may have important ramifications beyond the context of business interruption as well as hugely increasing the indemnities available to large corporate groups.

Thirdly, the decision is consistent with prior decisions in relation to per premises claims on occurrence-based policy constructions, and furlough. As it stands, the 'per premises' argument now appears limited to wordings applying an 'any one claim' or 'any one loss' scheme of aggregation.

In relation to furlough, which has important implications across the market, the position is unchanged. Insurers succeeded on that issue in Stonegate, and Mr Justice Jacobs has not departed from that decision when considering the same issue in the LMIE Test Cases. Policyholders have been granted permission to appeal the outcome on furlough, and we may therefore finally see a decision from the Court of Appeal on that issue later this year.

Court of Appeal says no cover for Covid-19 losses under "damage" policy wording

The series of business interruption insurance-related disputes arising from the Covid-19 pandemic has considered various policy wordings.

In the recent judgment of *Bellini (N/E) Ltd v Brit UW Limited* [2024] EWCA Civ 435, the Court of Appeal confirmed there is no cover for losses where the policy wording requires "physical loss or damage", even though the clause in question purported to cover business interruption arising from infectious disease.

Claudia Seeger reviews the outcome of the case, which acts as a helpful reminder of the principles the court will apply in interpreting policy wording and its wariness in correcting mistakes by construction.

Background

Bellini brought a claim for losses arising from the closure of its restaurant due to the Covid-19 pandemic. Bellini relied on the "murder, suicide or disease" extension to its policy. The extension, unlike those considered in various other Covid-19 cases, expressly required the business interruption to be the result of damage, thereby differentiating the extension from previously considered non-damage business interruption clauses. The extension provided:

"8.2.6 Murder, suicide or disease

We shall indemnify you in respect of interruption of or interference with the business caused by damage, as defined in clause 8.1, arising from:

1. any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the premises or within a twenty five (25) mile radius of it; […]

The insurance for this clause shall only apply for the period beginning with the occurrence of the loss and ending not later than three (3) months thereafter during which the results of the business shall be effected in consequence of the damage."

Damage was defined, notably not at clause 8.1, as:

"18.16.1 Damage

Damage means

18.16.1 physical loss, physical damage, physical destruction […]"

It was common ground between the parties that there had been no physical loss or damage to Bellini's premises.

Preliminary issues trial

At a preliminary issues trial, the first instance court determined that on the ordinary meaning of the words, there was no cover under the extension in the absence of damage (as defined). The judge at first instance held there was no inconsistency or ambiguity in the wording: a reasonable SME such as Bellini would have read the wording and understood that damage was required for cover to be triggered.

Bellini had argued that the words "caused by damage" and "in consequence of the damage" should be disregarded as the plain meaning would "render [cover] illusory or pointless" and make a nonsense out of the policy. However, the judge at first instance found this argument was of limited weight, particularly as insurance contracts commonly contain repetition. Additionally, it was held that the fact that a notifiable disease off the premises was less likely to cause physical damage was not a sufficient justification for giving the word "damage" a different meaning.

Appeal

On appeal, Bellini departed from its original argument that "damage" meant "the effect of the peril". Instead, Bellini submitted that the words "caused by damage, as defined by clause 8.1" should have been deleted, and the words "in consequence of the damage" should have read "in consequence of the insured perils set out above". Bellini argued that this was the only way to make sense of the policy as, in its view, damage was not defined in 8.1.

The insurer disputed this interpretation of the policy, arguing that the entirety of clause 8.2 dealt exclusively with physical damage and that rewriting the policy to provide non-damage cover was impermissible.

Sir Geoffrey Vos, Master of the Rolls, upheld the first instance judge's decision and determined that considering the policy in its entirety, the policy did not provide non-damage cover. Sir Geoffrey Vos held that Bellini had attempted to "push the boundaries" of the principles of the correction of mistakes by construction (as set out in more detail below).

Sir Geoffrey Vos provided the following reasons for his decision, having considered the extension in its context:

1. Clause 8.2 was what insurers called a "damage sandwich": each of the extensions provided for loss as a result of physical damage. Additionally, while the ordinary interpretation of the "murder, suicide or disease" extension (ie the requirement for damage) may make less sense in the context of the Covid-19 pandemic, pandemics of such scale had not occurred, nor were they in reasonable prospect, at the time the cover was written.
2. The reference to "damage, as defined in clause 8.1" was not an obvious mistake. The phrase was used in most other extensions in Clause 8.2 and did define "damage" by way of various provisos.
3. The fact that the policy only provides limited additional business interruption cover does not make it absurd. Sir Geoffrey Vos agreed with the judge at first instance that insurance policies are subject to repetition, adding they are "sometimes clumsily drafted". However, this does not in itself make the cover absurd to the extent the policy must be rewritten.
4. Insurance policies placed before the Covid-19 pandemic must be interpreted as at the inception date. Policies cannot be interpreted through "the telescope of Covid-19".

Notably, the court did not explain on what basis it considered the manifestation of disease at the premises or within a 25-mile radius was capable of causing physical damage.

Relevant principles for policyholders to consider

In coming to his decision, Sir Geoffrey Vos considered and applied the principles set out in *East v Pantiles (Plant Hire) Ltd* [1982] 2 EGLR 111. According to East v Pantiles, where there is a clear mistake in a policy, such mistake can be corrected by construction. However, this is subject to a number of conditions. Firstly, there must be a clear mistake on the face of the policy. Secondly, it must be clear what correction ought to be made to fix the mistake. Additionally, mistakes can only be corrected in "limited circumstances", such as "obvious clerical blunders or grammatical mistakes". Lord Justice Brightman summarised the principle as applying only where a reader with sufficient experience of the sort of document would inevitably identify a) the mistake made and b) the correction required.

The principles in *East v Pantiles* were considered in greater detail by Lord Hoffmann in *Chartbrook Limited v Persimmon Homes Limited* [2009] 1 AC 1101. Lord Hoffmann determined that in ascertaining whether there is a clear mistake, the background and context of the policy must always be taken into account. While the courts are hesitant to readily accept that people have made mistakes in formal documents, Lord Hoffmann stated there is no limit to the amount of correction the court is allowed to make where a mistake has been found.

In *Bellini,* Sir Geoffrey Vos found no clear mistake in the language used for the reasons set out above. Consequently, the principles of *East v Pantiles* did not apply.

As there was no clear mistake, Sir Geoffrey Vos did not consider what correction ought to be made. He did see some force in the argument that if it were clear something had gone badly wrong with the language the parties had used and if it were obvious that non-damage cover was intended by the parties to be provided, it would be harsh to deprive the insured of that intended cover because there was more than one way to give it effect. As such, he apparently indicated the potential for some flexibility in the second limb of the East v Pantiles test, ie, it must be clear what correction ought to be made to fix the mistake. However, in light of his conclusion that there was no mistake, he found that question would have to be considered in a case in which it arises.

Conclusion

The Court of Appeal's decision will have been deeply disappointing for the policyholder, who perhaps understandably concluded they had purchased disease cover but who will now be forced to accept that the "murder, suicide or disease" clause provided no such cover.

This case is a reminder that the court is reluctant to readily accept that people have made mistakes in formal documents, particularly when it considers the terms are clear on their face. That remains the case even where the terms as drafted provide little or no commercial value.

Genuine mistakes can be corrected as a matter of construction, but such circumstances are limited, and the court is wary of correcting mistakes outside of obvious clerical blunders or grammatical mistakes. A bad or worthless bargain is to be distinguished from a mistake in drafting.

Finally, the case reminds policyholders and insurers alike that policies cannot be interpreted through the limited lens of Covid-19 when the terms were concluded before Covid-19 existed.

Court of Appeal upholds 'At the Premises' Covid BI test case ruling in favour of policyholders

In June 2023, the first instance decision in the 'At the Premises' Test Case found that thousands of policyholders with relevant wordings in their insurance policies are entitled to claim for losses caused by the Covid-19 pandemic.

The Court of Appeal has now upheld Mr Justice Jacobs' landmark decision in London International *Exhibition Centre v RSA* (the 'ATP Test Case'), and has dismissed all of the insurers' appeals. Partners Aaron Le Marquer and James Breese, who acted for the lead policyholder in this test case, review the appeal judgment in this article.

Background

The ATP Test Case arose as a natural extension of the original Covid-19 business interruption test case brought by the Financial Conduct Authority (FCA) in 2020, culminating in the Supreme Court's landmark 2021 decision in *FCA v Arch*.

At the heart of the Supreme Court's decision in FCA v Arch was its detailed analysis of the causation issue in the context of non-damage business interruption cover, which led to a conclusion that each and every occurrence of Covid-19 in the UK was a concurrent proximate cause of government action, and therefore business interruption loss.

The Supreme Court's conclusions were clear and unequivocal in relation to the 'radius' disease clauses under consideration in that case. But many policyholders found that they were covered under a different variant of disease clause, which responded to loss caused not by an occurrence of notifiable disease within a specified radius of the insured premises, but instead by an occurrence of disease 'at' the insured premises.

Insurers by and large argued that the Supreme Court's reasoning and findings on concurrent causation did not extend to these 'at the premises' (ATP) disease clauses, and refused to indemnify ATP policyholders for their Covid lockdown losses in the same way as radius clause policyholders.

One such policyholder, the LIEC (operator of London's ExCeL exhibition centre) commenced proceedings with a view to testing the point as a preliminary issue. LIEC was selected as the lead claimant in a series of six linked test cases, heard together in June 2023.

First instance decision and grounds of appeals

At first instance, Mr Justice Jacobs found in favour of the policyholders, concluding that "the Supreme Court analysis applies on the causation argument, and that none of the insurers' arguments in support of the contrary conclusion are persuasive." Our detailed analysis of the decision can be read here.

The lead insurer in LIEC's case (RSA) elected to accept Mr Justice Jacobs' decision, and settled its share of LIEC's claim. The remaining insurers chose to appeal and in all cases focused primarily on the causation issue. Additional grounds of appeal were pursued in relation to secondary issues including:

- the meaning of 'Medical Officer of Health for the Public Authority',
- occurrences of Covid-19 before it was designated as a notifiable disease, and
- the meaning of 'suffered'.

The insurers' cases

All of the insurers argued that Mr Justice Jacobs had approached the question from the wrong angle. Instead of starting with the Supreme Court's decision and asking whether the reasoning in relation to radius clauses could be applied to ATP clauses, they argued that the judge should have started with the policy wording and applied a normal iterative approach to construction.

Between them, the nine insurers mounted an array of alternative cases as to the correct answer to the causation question, which such an approach would have produced. In summary:

- Allianz, Aviva, Zurich, Chubb and HDI argued for a 'distinct effective cause' approach to causation, which allowed for multiple concurrent causes but required the occurrence at the premises to have been known to the public authority, and specifically targeted in its response. On this basis, the vast majority of occurrences of Covid-19 at insured premises would not be regarded as proximate causes of covered loss.
- Ageas, Zenith and QIC argued for a more stringent 'but for' causation test. In the context

of the pandemic, an occurrence of Covid-19 at any given premises would never be regarded as a proximate cause of loss

- Finally, Axa accepted that the clauses allowed for multiple concurrent proximate causes, but focused specifically on government knowledge in considering whether a given case of Covid was itself a proximate cause. Axa's case hinged on the argument that the government was only responding to the small number of reported cases of Covid when it imposed the first national lockdown, and not to the much larger number of unreported (but suspected) cases.

Court of Appeal decision

The Court of Appeal dismissed all of the insurers' appeals.

As a starting point, the Court of Appeal agreed with the insurers that the correct approach to the exercise was to begin with the interpretation of the policies in issue, having regard to their language and context, rather than asking whether those clauses differ materially from the radius clauses considered in *FCA v Arch*. However, the Court of Appeal's agreement with insurers ended there, as this approach ultimately led to the same conclusion as in the first instance decision.

Key aspects of the reasoning were:

- The nature of the insured peril in question is key to establishing the applicable causation test, and other perils mentioned in different limbs of the insuring clause (eg vermin infestation, drains, murder) are irrelevant.
- The insured peril in this case consisted of (or included) notifiable diseases capable of spreading rapidly and widely and which are generally unlikely to be confined to occurrences at a single premises: "Such occurrences come not single spies but in battalions."
- Consequently, the parties cannot have contemplated that closure or restrictions would likely be imposed in response only to an occurrence of disease at the premises. Rather, they would be imposed in response to a local or national outbreak.
- A 'but for' approach to causation cannot therefore have been intended. Instead, the parties must have intended that the causation requirement would be satisfied if the occurrence at the premises was one of a number of causes of closure, whether the number of other causes was large or small.
- It was unrealistic to think that, when imposing restrictions, an authority would apply its mind to identifying particular premises at which there had been occurrences.
- It was more realistic to regard the restriction in question as a response by the public authority to all cases of the disease, whether known or unknown. This reflected a finding of fact by both the Divisional Court and the Supreme Court in FCA v Arch, that the government was responding to each and every case of Covid-19 in the UK (reported or unreported) when imposing the first national lockdown in March 2020.

The Court of Appeal preferred to base its conclusion on the language and context of the 'at the premises' clauses in issue, and the parties presumed common intentions, rather than on how the Supreme Court interpreted the radius clauses. Nonetheless, the Court of Appeal agreed with the conclusion of Mr Justice Jacobs and much of his reasoning on the common causation issue. Although there were differences between radius and ATP clauses, those differences did not materially affect the nature of the causal link to be proved.

Comment

This is the latest in a line of Covid-19 BI judgments that has now extended for over four years, since the first lockdowns were imposed in March 2020. This latest judgment has consolidated policyholders' success in establishing coverage.

It remains to be seen whether any of the insurers will seek permission to appeal further to the Supreme Court. However, it might be considered that given the comprehensive panoply of arguments marshalled by the nine insurers in support of their appeals, all of which were rejected by the Court of Appeal, room for further argument may be limited.

As it stands, the Court of Appeal's decision represents a resounding endorsement and independent application of the Supreme Court's concurrent causation reasoning first set out in 2021 in *FCA v Arch*, and demonstrates that the court will be reluctant to disapply or row back from those principles.

Looking forward, the decision may give some indication of the Court of Appeal's potential approach when considering the related causation issue in the context of Prevention of Access clauses, the issue to be considered in the Liberty Mutual appeals in January 2025 in which Stewarts also acts for the lead policyholder.

Likely to be the final major causation decision in the Covid BI context, the appeal in *Bath Racecourse v Liberty Mutual* will also finally decide the contentious issue of whether policyholders are required to pass on the benefit of taxpayer funds (ie furlough payments) to their insurers, or whether the benefit should rest with the businesses who were the intended recipient of the relief at the time.

Court of Appeal determines Covid-19 is an "incident likely to endanger life" when considering business interruption losses

In the latest instalment of post-pandemic insurance litigation, the Court of Appeal has confirmed that a case of Covid-19 is an "incident likely to endanger human life".

Associate Claudia Seeger reviews the recent decision of *International Entertainment Holdings Limited & Ors v Allianz Insurance Plc & another* [2024] EWHC 124 (Comm) which additionally provides helpful insight on the operation of policy limits on a per-premises basis and the application of the term "policing authority".

Background

International Entertainment Holdings Limited ("IEH") and its subsidiaries owned, operated and managed theatres, cinemas, concert halls and a restaurant business. During the Covid-19 pandemic, IEH was required to close its premises in compliance with regulations enacted by the Secretary of State for Health and Social Care.

IEH was insured by Allianz for business interruption losses under a Commercial Select policy (the "Policy"). The Policy was a composite policy, meaning multiple policyholders' interests are separately insured under a single document. The relevant "'Non-Damage Denial of Access" (or "NDDA") clause provided cover for interruption/ interference as a direct result of "an incident likely to endanger human life or property within 1 mile radius of the premises in consequence of which access to or use of the premises is prevented or hindered by any policing authority" (emphases added) (the "NDDA Clause"). Recovery under the NDDA Clause was limited such that "any one claim in the aggregate during any one Period of Insurance shall not exceed £500,000".

Appeal

The issues considered by the Court of Appeal were originally tried as preliminary issues by Mr Justice Jacobs (see Gatwick Investment Ltd v Liberty Mutual Insurance Europe SE [2024] EWHC 124 (Comm). However, IEH appealed the judge's decision on three grounds, with Allianz appealing on two additional grounds. The questions in consideration were:

1. Was the Secretary of State for Health and Social Care a policing authority?
2. Does the presence of a case of Covid-19 amount, without more, to an "incident likely to endanger human life" within the meaning of the clause?
3. If so, must the case of Covid-19 occur within a one-mile radius or can the case occur outside the radius?
4. Does the limit of £500,000 apply separately to each insured premises or does it apply separately to each insured claimant?
5. Is there, in any event, an aggregate limit of £500,000?

We consider each of these points below.

"Policing authority"

The central issue, and the key barrier to recovery of IEH's losses, was whether the term "policing authority" incorporated the Secretary of State, who had enacted the regulations by which IEH's premises were closed. The Court of Appeal agreed with Mr Justice Jacobs, determining that a reasonable policyholder would not regard the term "policing authority" as extending to the Secretary of State.

However, the Court of Appeal accepted that the term extends more widely than covering solely the police themselves. Consequently, restrictions imposed by a similar body performing policing functions in circumstances likely to endanger human life would also be within the scope of the NDDA Clause (and potentially similar wordings). However, the Court of Appeal declined to consider how much more widely the term could extend, so this continues to be a question of policy interpretation.

Therefore, there was no coverage for IEH's losses under the NDDA Clause as a result of the outcome of the first issue. However, the Court of Appeal went on to consider the additional issues, the outcome of which may provide significant assistance to policyholders seeking to recover under differently worded clauses.

"Incident likely to endanger human life"

The court of first instance had determined that while a case of Covid-19 was likely to endanger

human life, such a case could not be considered an "incident". In the judge's view, an "incident"' must be something which was apparent at the time, whereas cases of Covid-19 could be undetected both to the carrier and to passersby.

On this issue, the Court of Appeal disagreed with the court of first instance, determining that a case of Covid-19 within the radius amounts to an "incident", much as it amounts to an "event" or an "occurrence" (as held by the Supreme Court in *FCA v Arch*). In the context of the NDDA Clause in the Policy, a case of Covid-19 is an "incident" as it is an event which endangers human life or property so as to call for a response by a policing authority. This was further backed up by the use of the word "occurrence" later in the NDDA Clause, suggesting that the words "occurrence" and "incident" were being used interchangeably.

The Court of Appeal also found it immaterial that the case of Covid-19 may not have been apparent as cases would have been detectable had a test been performed.

However, the Court of Appeal clarified that its analysis may be different where "incident" is used in other wordings. The court referred to the Divisional Court's decision in *FCA v Arch*, which said, in relation to the Hiscox NDDA clause considered in that case, "it is a misnomer to describe the presence of someone in the radius with the disease as 'an incident'".

The Court of Appeal declined to overrule (but also did not affirm) the Divisional Court's reasoning in that case. Consequently, policyholders will need to consider the exact wording of their policies carefully to ascertain whether cover is available for their business interruption losses.

One-mile radius

The Court of Appeal agreed with Mr Justice Jacobs that the clearest interpretation of the NDDA Clause is that the incident must occur within the radius; it was not sufficient to show that an incident occurring outside the radius had an impact on premises within the radius.

Per-premises recovery

The court of first instance had determined that the limit of £500,000 applied separately to each claim, with each closure of premises being a separate claim. Each case of Covid-19 was a separate incident, and nothing in the Policy indicated that the limit must operate on a per-insured basis.

The Court of Appeal agreed with this decision, stating that the insured peril is specific to each premises insured and that each prevention of access gives rise to a separate claim.

Lord Justice Males also considered that the Policy draws no distinction between the members of the IEH group that owned or operated only one venue and those that operated multiple. It would, therefore, be fickle to interpret the limit as applying separately to each policyholder rather than each premises absent wording to that effect. As a result, if coverage had been triggered, IEH would have been entitled to claim up to £500,000 for each of its 31 insured theatres.

Aggregate limit

The court of first instance had rejected Allianz's argument that the phrase "any one claim in the aggregate" should be corrected by corrective interpretation to read "any one claim and in the aggregate". Allianz argued that this meant that only a single aggregate limit was available to each of the insured entities.

The Court of Appeal applied the principles of corrective interpretation set out in *Bellini (N/E) Ltd v Brit UW Limited* [2024] EWCA Civ 435, finding that there was a mistake in the language but that it was not clear what the correction should be. Consequently, the Court of Appeal rejected Allianz's case of correction by construction and upheld the first instance decision. There was no aggregate limit.

Conclusion

While the Court of Appeal's decision will be an unwelcome one for IEH and for policyholders whose policies require action by a "policing authority", the judgment provides helpful clarification that a case of Covid-19 may well be an "incident" and that policy limits may apply on a per-premises basis, which can make a significant difference to the value of the indemnity to which a policyholder with multiple premises is entitled. However, this is dependent on the exact policy wording, and policyholders should continue to exercise caution when considering whether cover is available for their business interruption losses. The decision also provides additional authority on the application of the principles of correction by construction set out in Bellini, outlining that a clause will not be corrected where it is not clear what such correction should be. The Court of Appeal also commented on the interpretation of 'pick and mix' policies (being those made up of a selection of clauses adopted from other contracts without much consistency). In such circumstances, "the inference of consistent usage has little or no force" and "reference to the same or similar language in other clauses of the policy may shed little light on the meaning of the term in question".

How might a claim for damages for late payment under an insurance contract succeed?

Section 13A of the Insurance Act 2015 implied a new term into contracts of insurance from 4 May 2017. The term requires that insurers "must pay any sums due in respect of [a] claim within a reasonable time".

Section 13A recognises that a breach of the term may give rise to additional losses for which the insurer may be liable to compensate the policyholder. While considered a useful tool for policyholders, the extent to which it is successfully deployed in practice might be debated.

In this article, Policyholder Disputes partner James Breese and associate Arjun Dhar examine the two decisions in which the courts have considered this remedy:

1. *Quadra Commodities S.A. v XL Insurance Company SE and Ors [2022] EWHC 431 (Comm) ("Quadra"), and*
2. *Delos Shipholding S.A. and Ors v Allianz Global Corporate and Specialty S.E. and Ors [2024] EWHC 719 (Comm) ("Delos").*

*Neither decision favours the policy*holder in respect of their claim for damages for late payment, but this article examines how policyholders might navigate through those decisions to succeed in a claim for damages for late payment.

Section 13A

Section 13A provides:

- It is an implied term of every contract of insurance that if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time.
- A reasonable time includes a reasonable time to investigate and assess the claim.
- What is reasonable will depend on all the relevant circumstances, but the following are examples of things which may need to be taken into account –
  1. The type of insurance,
  2. The size and complexity of the claim,
  3. Compliance with any relevant statutory or regulatory rules or guidance,
  4. Factors outside the insurer's control.
- If the insurer shows that there were reasonable grounds for disputing the claim (whether as to the amount of any sum payable, or as to whether anything at all is payable) –
  1. The insurer does not breach the term implied by subsection (1) merely by failing to pay the claim (or the affected part of it) while the dispute is continuing, but
  2. The conduct of the insurer in handling the claim may be a relevant factor in deciding whether that term was breached and, if so, when.
- Remedies (for example, damages) available for breach of the term implied in subsection (1) are in addition to and distinct from –
  1 Any right to enforce payment of the sums due, and
  2. Any right to interest on those sums (whether under contract, another enactment, at the court's discretion or otherwise).

The Explanatory Notes to the Enterprise Act 2016, which implemented section 13A, provide some guidance on its application. Mr Justice Butcher refers to some of the relevant factors in his decision in Quadra.

Quadra

The claimant, Quadra, was insured under an all-risks marine cargo open cover policy, which included cover for (1) fraudulent documents: "physical loss or damage to goods … through the acceptance by the Assured … of fraudulent shipping documents" and (2) misappropriation: "all physical damage and/or losses directly caused to the insured goods by misappropriation".

Quadra fell victim to a fraud perpetrated by the Agroinvest group of companies, which sold the same grain multiple times to different buyers, including Quadra. Having been unable to inspect or take possession of its grain, Quadra claimed an indemnity under its insurance policy under the misappropriation clause or alternatively under the fraudulent documents clause. Quadra claimed additional damages under section 13A for the defendant insurers' conduct of the claim being "wholly unreasonable, and its investigations either unnecessary or unreasonably slow".

The fraud was uncovered in around January 2019, and a notice of loss was provided to insurers on 13 February 2019. Legal representatives and loss adjusters were not instructed until January and February 2020, respectively, following a letter before action from Quadra in December 2019. Proceedings were issued in May 2020.

Mr Justice Butcher ruled that Quadra was entitled to an indemnity but denied its claim under section 13A. Mr Justice Butcher noted the following:

1. "The fact that, in some respects, the Defendants' actual conduct of the claims handling can be said to have been slow or lethargic, does not itself answer the question of what was a reasonable time."
2. No expert or detailed comparative evidence was adduced.
3. In determining that the conduct was slow, it was found that: a) the investigation was unduly protracted given the number of hours spent on it; b) there was a delay in instructing loss adjusters and legal representatives; and c) there was a delay to releasing investigation reports to Quadra.
4. Property claims usually take less time to value than, for example, business interruption claims.
5. Relevant factors in determining whether there was any delay were the origins of the claim, that the claim related to fraud, the uncertainty around the underlying facts, the destruction of documents, the existence of legal proceedings, recovery efforts in another jurisdiction, the application of foreign law and the unavailability of evidence. Many of these factors were outside the insurers' control.
6. Notwithstanding the list of factors above, it was found that "a reasonable time was not more than about a year from the Notice of Loss … assuming that the investigation had indicated no reasonable grounds for disputing it or part of it".
7. As to the final point, Mr Justice Butcher decided that "the fact that I have found those grounds were wrong does not indicate that they were not reasonable". He continued: "Quadra did not… contend that that bases on which the Defendants had defended the claim in the action were not reasonable grounds to do so. Nor is there any question here of unreasonable conduct or prolongation of the litigation by the Defendants."

There was therefore no breach of the implied term pursuant to section 13A(4)(a).

Delos

Delos was the registered owner of the Capesize bulk carrier "WIN WIN" (the "Vessel"). The Indonesian Navy detained the Vessel in Eastern Outer Port Limits Singapore (an area that spanned international, Malaysian and Indonesian territorial waters) for illegally parking in Indonesian waters.

Delos was insured by the defendant insurers for war risks, including the risk of detention. Delos claimed under the policy, asserting that the Vessel was a constructive total loss by virtue of being detained for more than six months. It claimed additional damages under section 13A for the defendant insurers' delay in processing the claim. It also argued that it suffered a missed business opportunity in that the insurance funds would have been used to fund the purchase price of an Eco Capesize vessel, which they would eventually have traded at a profit.

Mrs Justice Dias denied Delos's claim under section 13A. The following aspects of her decision are noteworthy:

1. The court found that there was an undetermined point of principle as to whether a claim under section 13A is limited to damages for an unreasonable failure to pay prior to the commencement of proceedings and whether any recompense for late payment thereafter becomes subsumed into an interest award. This point was not decided.
2. Mrs Justice Dias agreed with Mr Justice Butcher that "the mere fact that a defence fails does not of itself mean that it was unreasonably taken".
3. Insurers were at a disadvantage by not fully understanding the facts, and were dependent on disclosure for detailed knowledge of the facts.
4. In relation to the loss of opportunity, it was noted that no evidence was adduced to show that the opportunity was taken any further or discussed by the claimant or that a business plan was drawn up. Mrs Justice Dias also felt that there was force in the insurers' submission that the claimant group was profitable and could have purchased the Eco Capesize vessel without the insurance proceeds if it wished.

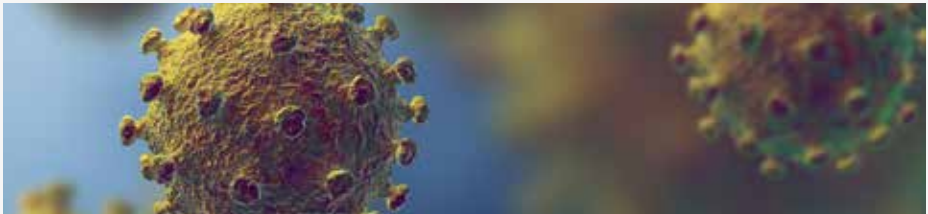
Comment

In both cases, the court ruled against the policyholders. While tempting to assume this means the bar for the remedy is a high one, there were good reasons why these section 13A claims were denied. Nonetheless, the judges' comments provide helpful indicators of where claims may succeed.

First, it is potentially significant that both cases were defended to trial. In most cases that go to trial, it is more likely than not that any section 13A claim might appear to be in difficulty. It will often be the case that there was a reasonable basis for insurers to defend the claim (on liability or quantum) even if the defence eventually fails. However, most claims do not get to trial. The position on reasonableness will almost certainly be different in the case of a claim in which an insurer abandons part or all of its defence on liability or quantum before reaching trial.

Secondly, the factors listed in Quadra in determining the reasonableness of the time an investigation has taken are significant explanations as to why an investigation could take time on the facts of that case. Yet the court still found that the investigation should have been completed in about a year. We see vast numbers of insurance claims that take longer than a year to resolve, even without proceedings and where factors such as those in Quadra are absent. This is, therefore, a useful benchmark for policyholders, notwithstanding the fact that Quadra did not succeed.

The court might take the view that a case with simpler facts should be resolved far quicker. It seems inevitable that the point will be revisited in the context of the ongoing Covid-19 business interruption litigation, where many claims remain unpaid more than four years after the loss. In that context, the focus may turn to section 13A(3)(a). This provides that the type of insurance involved is a relevant factor in determining what is reasonable, having regard to the court's established recognition that "the purpose of business interruption insurance is to inject additional funds into a going concern to maintain it as a going concern and, in that respect, to return it to an operational state as soon as possible".



Policyholders should note that in both cases, it was confirmed that the burden of proof is on the assured to demonstrate that the insurer failed to pay within a reasonable time. However, the burden is on the insurer to show that it had reasonable grounds for disputing the claim. It is interesting that Mr Justice Butcher commented in Quadra that no expert or detailed comparative evidence was relied on by the policyholder to discharge its burden.

Where a section 13A claim is pursued, policyholders will be well advised to:

1. rely on expert or detailed comparative evidence,
2. seek regular updates from their insurers as to the progression of the investigation to understand what steps are being undertaken and agree timescales for such steps, and
3. insofar as it is appropriate, provide insurers with as much information as reasonably and proportionately possible and as quickly as possible.

These steps provide a documentary record to revert to should the need arise.

Finally, it may be reasonably foreseeable that a delay to indemnity will prevent a policyholder from making the commercial decisions it would have made if the indemnity to which it was entitled was forthcoming within a reasonable time. If that is the case or such a possibility will arise, insurers should be put on notice of that at an early stage, supported by evidence.

Is controversy over High Court denial of insurer's right to seek contribution from third party justified?

A recent High Court decision in *Riedweg v HCC International Insurance Plc & Anor* [2024] EWHC 2805 has ignited a flurry of discussion among legal commentators.

They have variously described it as "critical", "important", and, for one displeased commentator, a "nasty little trap". We suggest a different view: while the outcome may not have satisfied insurers, it was predictable and arose from a straightforward construction of statute. It affirms rather than shifts the legal tectonic plates.

The central question in the Riedweg case is an interesting one: when a claimant sues an insurer directly for a liability of its insured, can the insurer recover a contribution from a third party? The court answered simply: no.

Policyholder Disputes associate Arjun Dhar explains why in this article.

Background

The claimant was a property buyer who engaged Goldplaza, a property valuer. Goldplaza valued a property at £8m. The claimant, in reliance on that valuation, entered into a contract to purchase it. Subsequently, it emerged that the property had been vastly overvalued, leaving the claimant with losses of £2.2m.

The claimant sought to bring a claim in negligence against Goldplaza for its losses, but Goldplaza had gone into liquidation. Nevertheless, Goldplaza had professional liability insurance, which meant if the claimant was successful, the insurer would have to pay for its losses.

The Third Parties (Rights Against) Insurers Act 2010 (TPRAI)

The TPRAI was designed for situations like this. It enables a claimant to pursue an insolvent defendant for an insured liability through its insurer directly. The claimant is said to "step into the shoes" of the insured for the purposes of bringing the claim. In technical terms, the rights of the insured in respect of the liability "are transferred to and vest in the person to whom the liability is or was incurred".

Relying on this provision, the claimant sued the defendant's professional indemnity insurer, HCC International.

The insurer then argued that the buyer's solicitors were at least partially responsible for the claimant having overpaid for the property and applied for permission to join them to the claim as co-defendants.

Civil Liability (Contribution) Act 1978 ("CLCA")

The CLCA enables a person legally responsible for damage to recover a contribution from any other person legally responsible for the same damage. The insurer argued that the CLCA gave it the right to claim a contribution from the claimant's solicitors, who it said had committed various wrongs and breaches and were partially responsible for the claimant having overpaid for the property.

Issue

The claimant's solicitors objected to being named co-defendants. They deployed a technical argument to say that the insurer had no right to bring the claim because the CLCA only allowed a party to claim against another in respect of the "same damage". The damage they had allegedly done to the claimant, they said, was not the "same damage" in respect of which the insurer was potentially liable. Importantly, both parties agreed there would be no issue if Goldplaza were the defendant and had tried to name the solicitors as co-defendants.

The court's decision

The court sided with the solicitors. The key elements of its reasoning were as follows:

- The CLCA only permits a contribution for the "same damage". Case law says that (i) the "same damage" means common liability to the same claimant, and (ii) the only "damage" an insurer is capable of inflicting is in refusing to pay out under an insurance policy. This is not the same as the damage its insured was accused of having caused the claimant, ie causing her to incur a loss because of a negligent overvaluation.

- The TPRAI expressly creates a statutory mechanism for a "claimant" to pursue an "insurer" It does not create a mechanism for the insurer to acquire the insured's rights or to step into the insured's shoes in any other way.

For these reasons, the court held that an insurer being pursued directly for its insured's liability pursuant to the TPRAI cannot assume the rights of its insured (including the right to seek contribution from a third party).

Reflections

Why did the case stir so much interest? On one view, it would have been a balanced and fair outcome for a court to find that the insurer could seek a contribution from a third party for its insured's damage, as the insured would have been able to do if it was defending the claim itself and as the insurer would be entitled to on a subrogated basis after having indemnified the insured or paid the claimant directly. If an insurer is responsible for defending a claim against its insured itself, then, the argument goes, an insurer should be able to defend with the same tools that its insured would have had. This includes the ability to seek a contribution from a third party responsible for the same damage.

The problem with that view is that the TPRAI does not make any provision for an insurer to acquire the rights of its insured, and it is not a natural state of affairs for any party to step into an insured's shoes. The TPRAI disrupts the natural contractual state by expressly creating a pathway for a claimant to sue an insurer directly.

Interest

Some interesting elements emerge from the case.

First, the court described the effect of the two pieces of legislation on the claimant-defendant-insurer relationship. When a claimant steps into an insured's shoes, it gains nothing more or less than the insured's right to sue the insurer under the insurance policy. The corollary of this is that the insurer's liability is no more than an obligation to pay out under the insurance contract. The insurer does not become responsible to a third party for the damage its insured caused. This maintains a distance from the original damage that insurers would do well to preserve.

Second, the decision is low stakes from insurers' perspective. It remains open (and is usual) for an insurer to pursue a contribution through a subrogated claim. In a situation such as this, an insurer would typically pay out a claim once liability has been established. At that point, it becomes subrogated to its insured's rights of suit, including its right to seek a contribution from a third party. From a public policy perspective, it is not a bad outcome for an insurer to have to pay out to a claimant once an insured liability is established before pursuing other responsible parties. It avoids dragging out the litigation with the injured party.

Ultimately, the decision's immediate impact is minimal because it takes a combination of unlikely events for an insurer to need to make a contribution claim specifically (ie where the ability to make a subrogated claim would be inadequate). It would require (1) a claimant pursuing an insolvent insured through their insurer, (2) a third party with significant liability for the same damage, and (3) some reason why a claim would need to be brought against the third party urgently (for example, because they are likely to become insolvent in the near future). These circumstances are not inconceivable, and insurers would feel the impact of the decision if such circumstances manifested in the context of a significant loss. In the long term, therefore, this could prove to be a more significant decision than it appears to be

Future

Several commentators have opined that the case is destined for appeal. While the court's core reasoning is robust, there is certainly one question an appellate court could helpfully clarify: the TPRAI pathway for insolvent defendants. If the insured defendant is liquidated before the insurer pays out the claim, the insurer cannot acquire rights through subrogation because a dissolved entity, being a legal non-person, has no rights capable of subrogation. In that scenario, the only way an insurer could claim a contribution is to restore the liquidated entity purely to acquire the subrogated right to claim against third parties. This is a complex and cumbersome process, and it is unclear whether it is a purpose for which a court would order a company's restoration. An appellate court could usefully clarify this.

Conclusion

The decision is robust. It may not produce neatness or parity between injured claimants and defendants' insurers, but it affirms the objectives of TPRAI with minimal practical detriment to insurers. While there are reasonable moral and practical grounds to suggest insurers should be able to bring contribution claims when sued on behalf of an insured, the solution is to seek an update to the law. The decision is a reminder that an outcome does not have to be neat to be legally right.

Directors' and officers' insurance and ESG risks – are policyholders covered?

As governments, businesses and individuals become more concerned with environmental, social and governance (ESG) issues and greater regulation is introduced, the risk of ESG disputes increases.

While it's now looking like Client Earth's recent claim against directors of Shell PLC may not proceed, others will surely follow, and the case has brought into sharp focus the personal exposure of directors to the risk of ESG disputes. Policyholders may wish to dig out their directors' and officers' (D&O) insurance policies and ask: "Am I covered?"

Against this backdrop, Oliver Ingham and Aaron Le Marquer consider the possible ESG risks directors may face, whether D&O policies are likely to cover them and how D&O insurers may respond to this increased risk going forward.

What is D&O insurance?

Directors' and officers' insurance is designed to protect directors and officers of a company from loss resulting from claims made against them in their capacity as directors and officers in the discharge of their duties. This could arise out of claims by the company itself, shareholder actions, regulatory investigations, competition disputes and/or claims by liquidators. D&O cover is designed to insure against losses such as payment of legal expenses and damages.

What ESG-related risks do directors face?

Due to the broad and evolving nature of ESG issues, the risks for directors are wide-ranging. Below are just some examples of possible disputes that may arise:

- Shareholder claims, which could include derivative claims by activist shareholders (such as the claim against Shell) or broader securities litigation based on, for example, misrepresentations by the board on ESG issues.
- Regulatory investigations and penalties brought by bodies such as the Financial Conduct Authority relating to, for example, failure to meet regulatory obligations.
- Supply chain issues where companies and their boards may be held accountable for ESG-related failings of a supplier or subsidiary, for example, in relation to emissions or workplace safety.
- Employment claims brought against directors, particularly in relation to issues such as discrimination and diversity and inclusion.

Will directors be covered by their D&O policies?

Where claims are brought or threatened against directors, the individuals in question will want to know they have immediate access to coverage of legal representation costs, which may be significant and beyond the resources otherwise available. Whether coverage is available will depend on the facts of the claim and the terms of the policy. However, insurers may seek to deny coverage based on the following common exclusions.

- Conduct: this would exclude cover in situations where a court has found that the insured has acted illegally, dishonestly and/or fraudulently. This may apply in cases such as those involving misrepresentations. However, a D&O policy would likely provide for legal expenses for the insured up to the point at which a finding is made by the court, meaning the insured is treated as innocent until proven guilty.
- Pollution: claims arising out of pollution are often excluded from D&O policies. This may be particularly relevant in environmental/climate disputes involving, for example, allegations of excessive carbon emissions. Where insurers seek to rely on this type of exclusion, disputes will likely arise between policyholders and insurers regarding the definition of "pollution" and how widely these clauses can be interpreted. The scope of the

exclusion may be limited to losses directly arising from pollution, such as clean-up costs. Or, they may extend more widely to any claim directly or indirectly connected with pollution or environmental contamination, which may potentially capture many ESG claims against directors.

- Property damage/bodily injury: this will often be excluded from D&O cover and may be relevant to claims involving environmental disasters or workplace safety. Again, while these exclusions may cause difficulties, the scope of the exclusion may be narrow or broad in the same way as the pollution exclusion. Cover may be provided for legal expenses for defending claims, even if not for payment of damages.

While these exclusions may apply under D&O policies, many companies will have alternative cover for specific risks, such as pollution, under which directors and other senior managers may also be insured as individuals. Nevertheless, one issue directors and officers should consider is whether their D&O cover applies where a company brings a claim against its own directors.

How will D&O insurers respond going forward?

When considering the extent of D&O cover and premiums, insurers will take into account the risks associated with operating the company. Traditionally, the focus has been on financial performance. Insurers would therefore consider the company's financial statements and results, whether a company is publicly or privately traded, the company's business activities and the industry/sector in which it operates (financial, pharmaceutical, and other highly-regulated industries are generally seen as higher risk).

While these factors continue to be important in the underwriting risk assessment process, insurers will now additionally need to consider ESG issues such as:

- ESG-related disclosures and credentials, including any representations the company has made to the market in this respect
- Exposure to supply chain issues
- Whether a company has activist shareholders.

Companies operating in highly ESG-exposed industries, such as energy, will likely be considered even higher risk from a D&O perspective. Insurers will also likely seek to draw exclusions for issues such as pollution as widely as possible to include, for example, emissions claims.

Conclusion

The rise of ESG-related disputes is yet another possible liability for directors and officers to keep in mind. While D&O insurance should provide some comfort, as highlighted above, difficulties regularly arise when claims are notified. As well as preparing for more stringent underwriting and possibly higher premiums on renewal, policyholders may wish to review their policy terms to understand the extent of coverage, any notification requirements and other policy conditions and be ready for coverage disputes in respect of ESG-related claims.

Concurrent causation continued in University of *Exeter v Allianz*

The latest consideration of concurrent proximate causation arose in the interesting context of loss caused by the controlled explosion of a WWII bomb almost 80 years after it was dropped.

Was the damage "occasioned by war" and therefore excluded under the terms of the policy?

Head of Policyholder Disputes Aaron Le Marquer examines the recent Court of Appeal decision in University of *Exeter v Allianz*. In this unusual case, the Court of Appeal found that the second world war was a proximate cause of the loss despite the extreme passage of time, and the university's claim was therefore excluded from coverage.

However, the judgment is perhaps most interesting for highlighting a number of questions that were not determined by the court rather than those that were. This suggests that the case may not represent the last word on the application of war exclusions to losses suffered long after a war has ended.

Background

In 1942, Exeter suffered a series of devastating Luftwaffe bomb raids during the course of the second world war. One 1,000kg bomb fell onto farmland on the outskirts of the city but did not explode. Seventy-nine years later, in 2021, contractors working on what was by then a construction site adjacent to some of the University of Exeter's halls of residence unearthed the bomb. It was determined that a controlled detonation was required to dispose of the bomb, which when carried out caused damage to buildings in the immediate vicinity of the site, including the university's halls of residence.

The university was insured for damage to its property under a policy issued by Allianz, which at general exclusion 2 excluded loss "occasioned by war". Having refused to cover the claim in reliance on the war exclusion, Allianz then took the unusual step of issuing proceedings against the university, seeking declarations that it was entitled to decline the claim.

The primary issue before the court was whether the damage claimed by the university was "occasioned by war" and, therefore, excluded from coverage. It was agreed by the parties that the dropping of the bomb was an act of war and that the words "occasioned by" meant "proximately caused by" in the context of the policy. The issue, therefore, became whether the loss was proximately caused by the dropping of the bomb.

The university argued that the deliberate detonation of the bomb in 2021 was the sole proximate cause of the damage and that the claim was, therefore, covered. It claimed that the second world war was too remote to be viewed as a proximate cause of loss occurring in 2021, and the parties could not have intended that the war exclusion should apply to historic wars that had long ended.

The university's alternative case, if the dropping of the bomb was found to be a concurrent proximate cause, was that the rule in Wayne Tank was ousted by the drafting of the war exclusion, which lacked the express references to multiple causes found in other exclusions. (*The Wayne Tank rule* is that insurers may avoid liability where there are concurrent proximate causes of damage, one of which is expressly excluded from coverage under the policy.) If the rule in *Wayne Tank* was ousted, as argued by the university, the excluded proximate cause would not prevail over the covered cause, and the claim would succeed.

The first instance judgment

At first instance, His Honour Judge Bird found that the dropping of the bomb was the sole proximate cause of the damage, which was therefore excluded from cover. Alternatively, if the dropping of the bomb was a concurrent proximate cause with the controlled detonation, then he rejected the university's argument that the Wayne Tank rule was ousted by the express drafting of the policy. The claim would still, therefore, be excluded.

The Court of Appeal judgment

The university appealed on several grounds, focused primarily on challenging the judge's finding that the dropping of the bomb was the sole proximate cause of the loss.

The Court of Appeal disagreed with the court below that the dropping of the bomb was the sole proximate cause of the loss. In the Court of Appeal's view, the dropping of the bomb in 1942 and its controlled detonation some 80 years later were concurrent causes. However, that finding led inexorably to the same conclusion that the claim was excluded from cover since, by the university's own admission at appeal, a finding of concurrent proximate causes would lead to the claim being excluded from cover as a result of the rule in *Wayne Tank*.

Comment

Both the Court of Appeal and the court below reached a firm conclusion that the war was at least a proximate cause of the loss, and the parties agreed (at appeal) that, in that case, the claim was excluded from cover. The university does not appear to have sought permission to appeal the judgment further, and it is final as far as this policyholder is concerned.

However, a number of comments in the Court of Appeal's judgment serve as a reminder that the decision was reached specifically on the basis of the grounds advanced by the university and upon a number of points agreed by the parties. Notably, in various parts of his judgment, Lord Justice Coulson signposted a number of matters that were not in issue, were not argued and were not, therefore, decided:

"None of the grounds of appeal seek specifically to challenge the judge's alternative analysis [that a finding of concurrent proximate causes would lead to the claim being excluded]."

"In my view, this is a classic case where there were two concurrent causes of the loss and damage […] One of those concurrent causes was expressly excluded from cover under the policy. In those circumstances, the rule in Wayne Tank is that the exclusion will generally prevail. Mr Pliener advanced no argument on appeal that the rule did not apply. For that straightforward reason, if my Lords agree, I would dismiss this appeal."

".. at trial, Mr Pliener had an alternative argument, not pursued on appeal, that envisaged that the two causes might be held to be of approximately equal efficacy, but that Wayne Tank did not apply."

The Court of Appeal therefore appears to have contemplated that further argument may have been pursued as to the effect on the coverage analysis of a finding of concurrent proximate causes. In that context, it may be notable that at paragraph 11 of his judgment, Lord Justice Coulson also found it relevant to repeat the finding of the judge at first instance as to the proper nature of the exclusion in question:

"… the structure of the general insuring clause was such that no liability to indemnify in respect of loss occasioned by war ever arose. The exclusions were therefore part of the definition of the scope of cover, not exemptions from liability for cover which would otherwise have existed."

It is well-settled law that where a loss arises concurrently from two proximate causes, one of which is not covered but not expressly excluded either, the claim will be covered (The *Miss Jay Jay*). In contrast, where one of two concurrent proximate causes is expressly excluded, the exclusion prevails, and the claim fails (*Wayne Tank*).

In light of the judge's comments above, was it therefore open to the university to argue that since loss occasioned by war simply fell outside the scope of the insurance cover provided, rather than forming the basis of an exemption from liability, the rule in T*he Miss Jay Jay* should apply rather than that in *Wayne Tank* so that the uncovered concurrent proximate cause would not undermine the covered cause (the detonation), and thereby allow the claim to succeed?

Secondly, Lord Justice Coulson was at pains to point out that his rejection of the university's ground of appeal on the construction of the war exclusion itself was driven in large part by matters agreed by the parties:

"But, as a result of a number of specific agreements between the parties, addressed below, I am driven to conclude that there is really no point of difference between them as to the proper interpretation of the War exclusion clause."

"Secondly, it is agreed that the dropping of the bomb was an act of war. Thus it was agreed that the War exclusion clause would apply unless the appellant could show that the dropping of the bomb was not the proximate cause, or a concurrent proximate cause of approximately equal efficiency, of the loss and damage."

"Potential issues which might have arisen, such as i) whether the "war being referred to could mean a war that had ended at the time that the buildings were built and the policy was incepted; or ii) whether the damage did not result from a war-like desire to damage and destroy, but from a controlled explosion which had been an attempt to eliminate or at least minimise any damage at all; did not arise between the parties, either at first instance or on appeal. On the basis of the agreements about the proper interpretation of the War exclusion clause, I therefore conclude that Ground 3 of the Appeal must fail."

It is impossible to know whether such arguments would have succeeded (and certainly there is no indication in the judgment that they would have), but it is relatively unusual for the court to have volunteered in such detail issues which "might have arisen" but did not. As such, the Court of Appeal's ruling appears to have left room for further argument should similar facts arise in the future.

With the Ministry of Defence confirming that it has been involved in making safe an average of 60 unexploded second world war bombs annually since 2010, the possibility of further claims seems far from a remote possibility. In that case, policyholders may find that the Court of Appeal's conclusions in the *University of Exeter* case do not necessarily represent the end of the line.

Jurisdiction challenge success for claimants in $9.7 billion Russian aviation insurance dispute

At a hearing held from 7 to 13 February 2024, the claimants in ongoing market-wide Russian aviation insurance disputes proved successful in arguing their claims should continue to be heard in the courts of England and Wales, rather than in Russia. Claudia Seeger reviews the significance of the ruling.

The claimants in *Zephyrus Capital Aviation Partners 1d Limited & Ors v Fidelis Underwriting Limited & Ors* [2024] are all owners and lessors, financing banks (or their assignees) or managers of aircraft and/or engines that were leased to Russian airlines. The leases were all governed by English, Californian or New York law and required the airlines to insure the aircraft against all risks and (separately) war risks. The airlines consequently insured the aircraft with Russian insurance companies, who reinsured the risk into the London and international market.

Such reinsurance was to be on a back-to-back basis and to include a cut-through clause either in the terms set out in the leases or as reasonably satisfactory to the lessor. Notably, the leases did not stipulate that the (re)insurance should be subject to any particular law, and the Certificates of (Re)Insurance were silent on this point. Unbeknownst to the claimants, the reinsurance slips referenced Russian governing law and contained "exclusive jurisdiction clauses" (EJCs) in favour of the Russian courts.

Proceedings issues

Following Russia's invasion of Ukraine on 21 February 2022, and the corresponding introduction of sanctions against Russia by various governments, the claimants issued termination notices to the airlines and demanded the aircraft/engines be returned. The airlines failed to do so and the aircraft and/or engines remain in Russia to this day. The claimants therefore issued proceedings in England and Wales to reclaim the losses from reinsurers, pursuant to the cut-through clauses in the reinsurance policies.

The reinsurer defendants applied to have the claims stayed in England and Wales and litigated in the Russian courts instead, relying on the inclusion of the EJCs in the (re)insurance policies. The applications related to a total of 78 aviation insurance claims, worth $9.7 billion. Initially, every reinsurer to the claims challenged the jurisdiction of the courts of England and Wales, but by the hearing's commencement the majority of reinsurers had withdrawn their challenges and submitted to English jurisdiction.

The court's decision

Siding with the claimants, Mr Justice Henshaw dismissed all remaining jurisdiction challenges, finding there were strong reasons to not stay proceedings in England and Wales. In particular, Mr Justice Henshaw concluded that the claimants are "very unlikely to obtain a fair trial in Russia" given, among other factors, the Russian state's interest in the claims.

Mr Justice Henshaw also stated that staying the proceedings in favour of the Russian courts' jurisdiction would lead to an increased multiplicity of proceedings and a greater risk of inconsistent findings, where other defendants have already agreed to the jurisdiction of the courts of England and Wales. Finally, Mr Justice Henshaw considered there was a risk of personal attacks on individuals who in the ordinary course would attend trial in Russia, which added further support to why strong reasons existed to refuse the stay sought by reinsurers.

What does this mean for the insurance market?

Partner Chloe Derrick comments: "This is a very significant judgment, which assists not only aircraft lessors but potentially many other insureds who have significant assets trapped in Russia or other unfriendly states, and are (re)insured out of the London market.

The High Court has now made abundantly clear that (re)insurers cannot rely on EJCs to force insureds to litigate in foreign states where they are unlikely to obtain a fair trial.

Mr Justice Henshaw's detailed analysis is welcome commentary following the Court of Appeal's judgment in *Al Mana Lifestyle Trading LLC & others v United Fidelity Insurance Co PSC & others* [2023], which found that a poorly worded jurisdiction clause provided exclusive jurisdiction to the local court where the policies were issued (in that case the UAE, Qatar and Kuwait).

The circumstances of the Russian aviation challenge are of course clearly distinguishable from Al Mana, which concerned a narrow policy construction dispute over the words used in a particular clause. In contrast, we expect Mr Justice Henshaw's judgment to have significant wider ramifications across the insurance market.

Policyholders who have claims arising under (re) insurance policies placed into the London or international market, particularly those placed on standard terms, should now carefully consider the enforceability of any EJC that requires them to pursue their claim in an unfriendly foreign state."

Stewarts would like to thank the following for their contributions to The Policyholder Review 2024/25:

- Arthur J. Gallagher & Co.
- Howden Group
- Lockton
- McGill and Partners
- Solomonic
- Westgate Communications
- Simon Manuel

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