

Your World First

C/M/S/

Law . Tax

Insurance issues

Key issues for the insurance market



December 2014

Contents

4	Accountants' PI
6	Aviation
8	Construction PI
10	Consumer and A&H
12	Costs and Funding
14	Cyber
16	Energy
19	Financial Advisors
22	Financial Institutions and D&O
24	Healthcare
27	Insurance Brokers
29	Insurance Law Reform
31	Pensions Professionals
34	Property
37	Reinsurance
39	Solicitors' PI

Welcome



Ed Foss
Partner
Head of Insurance and
Reinsurance Group
T +44 (0)20 7367 2313
E ed.foss@cms-cmck.com



Diane Jerry
Professional Support Lawyer
Insurance and Reinsurance
Group
T +44 (0)20 7367 3051
E diane.jerry@cms-cmck.com

Welcome to the latest edition of Insurance Issues, our regular six-monthly review of claims trends and key issues for the insurance market.

With the introduction of the Insurance Bill to Parliament in July potentially significant legislative changes are on the horizon. As well as containing reforms to insurance contract law, the Bill would pave the way for the coming into force of the Third Parties (Rights Against Insurers) Act 2010. We have included a section on the Bill in this edition of Insurance Issues and will continue to monitor developments.

In the courts we have seen a number of important decisions, in particular in claims against professionals. In November the Supreme Court handed down its judgment in *AIB v Redler* on compensation payable in breach of trust claims, while in August the Court of Appeal provided some comfort to professional indemnity insurers with its decision on liability for negligent misstatements in *Hunt v Optima*.

Regulatory scrutiny is continuing, in particular on the financial services industry and we may well see a rise in the number of claims against financial services firms and professionals arising, for example, from the crackdown on tax mitigation schemes. The financial services sector is also, however, innovative and fast moving and insurers will be watching developments in such areas as shadow banking and digital currencies with interest.

We hope you find Insurance Issues useful and informative. We are always keen to hear your views on our publications. If you have any comments, or if there are areas you would like us to cover in future editions, we would very much like to hear from you.

Know Your Risk Seminars

We hold regular Know Your Risk seminars in Lloyd's Old Library on areas covered in this bulletin. If you would like to be added to our email list please contact Diane Jerry. Our seminars are CPD accredited.

Reactions

LEGAL SURVEY

2014

WINNER



Law-Now

Over 28,000 people subscribe to Law-Now, our free email alert and online information service, to keep up to speed with legal issues affecting their business. Law-Now lets you choose the topic areas and jurisdictions you are interested in. It only takes a couple of minutes to register online: visit www.law-now.com/register and follow the instructions on screen.

Accountants' PI

Key Issues

Retainers rule supreme

Much has been written on the case of *Mehjoo v Harben Barker* (2014), in which an accountant was initially held to be negligent for not identifying that his client could have avoided a tax liability had he taken full advantage of his non-domiciled status (which the accountant also failed to recognise). The Court of Appeal later overturned the decision, ruling in favour of the accountant in question.

Commentators speculated that the first instance decision created some form of general duty on an accountant to assist clients to make use of questionable tax mitigation schemes. We disagreed; the decision served as a warning on the scope of an accountant's duty and the requirement to identify a need for specialist tax advice, but no general duty to advise on dubious tax schemes had been created.

To the relief of the general accounting profession, the Court of Appeal provided favourable clarity on these matters. A generalist accounting practice providing standard tax advice is not automatically assuming a duty to that client to be an expert on potential specialist tax mitigation schemes that could be available to the client. It follows that an advisor who is unaware that tax savings might be available to his client through such specialist schemes is not under a duty to obtain further advice on them.

The Court of Appeal judgment does however leave accountants under a duty to refer their clients to specialist advisors where they are or should be aware that the client would benefit from specialist advice.

What should an independent audit look like?

The International Ethics Standards Board for Accountants (IESBA) sets the ethical standards for the accountancy profession and seeks to facilitate the convergence of these standards internationally. Many national regulatory bodies, including the ICAEW and ACCA, adopt these standards as the basis of their own ethics codes.

This summer the IESBA published two sets of proposed changes to its Code of Ethics designed to strengthen and clarify the provisions dealing with the appearance of auditor independence. The IESBA has stressed that while "*independence is the bedrock of all audits*", the appearance of independence also plays a significant role in public trust in auditors.

One set of changes addresses auditor independence in longstanding client-auditor relationships, reflecting the IESBA's view of shifting expectations on what are considered to be acceptable safeguards to the risks of long association between auditor and client. The second set of proposed changes relate to the provision of non-assurance services to audit clients, which in the IESBA's view can create threats to the independence of an audit team, including the threat of self-review, self-interest and advocacy.

The Financial Reporting Council (the UK's lead audit regulator) has flexed its muscles in a response to the non-assurance services proposals, identifying that the proposed changes in relation to non-assurance services will leave the Code short of the robust new EU regulations on audits, due to take effect in June 2016. The FRC has suggested that bringing the Code into line with the new EU regulations would assist in the audit of international audit clients and further reduce the perceived threats to auditor independence. Whilst the question of whether the IESBA will further toughen up the Ethics Code remains to be seen, the FRC's response is a continuing reminder of its aggressive attitude to auditors falling short of audit standards, and a warning to auditors (and their insurers) of its commitment to penalise those who do.

What's on the horizon?

The number of transactions involving digital currencies such as Bitcoin is still miniscule compared to mainstream fiat currencies, but Faye Choudhury, CEO of the International Federation of Accountants, to which 2.9

million accountants are indirectly affiliated, suggested in June 2014 that the distributed network technology behind digital currencies could have a direct impact on accounting in the future.

Choudhury called for the accounting profession to be at the forefront of considering the implementation of digital currency within client industry business models, believing that the coalescence of form and content involved with the encryption processes will lead to a shrinking gap between accounting and IT that offers potential for accounting firms to expand their advisory services.

The nature of auditing may change if the 'block chain', i.e. the public transaction record of all digital currency transactions becomes widespread, with greater transparency and a focus on cryptographic proof rather than human trust. Perhaps most interesting is the potential impact on accounting fraud. Digital currencies are essentially distributed public ledgers that do not allow retrospective meddling. It may be, as Choudhury postulates, that the public ledger, block chain and other encryption proprieties can evolve into transparent systemic safeguards against fraud.

Claims trends

Since 14 August 2014, consumers looking for probate services are now able to use appropriately qualified ICAEW Chartered Accountants as an alternative to solicitors. To be eligible to be a licensed firm, at least one principal within the firm must be either an authorised person or an authorised firm and they must also:

- Be ICAEW qualified or hold a qualification by another approved regulator (e.g. be a solicitor)
- Attend a 2 day ABS course
- Pass an assessment (gaining at least a 50% pass mark).

The Legal Services Board has previously raised concerns about the minimum level of PI cover required of £500,000 (in contrast to solicitors who must buy a minimum of £2 million), and the scope of the Probate Compensation Scheme underpinning this work (e.g. its entirely discretionary nature and the fact that losses arising from professional negligence would appear not to be covered). Given that probate has historically generated a large proportion of PI claims for solicitors, it remains to be seen how underwriters of accountants' PI business will develop their rating models to take account of this change to the business mix of insured accountants who start to undertake this type of work, and whether claims activity reaches the same level as solicitors. It may be that if accountants restrict their work to non-contentious, process driven probate work there is little to go wrong – but whilst a process driven service promises to deliver efficiency and cost reductions it can also replicate the same mistake/fault many hundreds of times if the problem is not spotted at the outset. Watch this space.

To find out more

Visit our Law-Now website at www.law-now.com and read more on the [first instance](#) and [Court of Appeal](#) decisions in *Mehjoo v Harben Barker* and on the [regulation of Bitcoin and virtual currencies](#).

Contacts



Simon Garrett

T +44 20 7367 2786
E simon.garrett@cms-cmck.com



Caroline Hall

T +44 (0)20 7367 2578
E caroline.hall@cms-cmck.com



Belinda Schofield

T +44 (0)20 7367 3053
E belinda.schofield@cms-cmck.com



John Enoch

T +44 (0)20 7367 2432
E john.enoch@cms-cmck.com



Zoe Burge

T +44 (0)20 7367 3053
E zoe.burge@cms-cmck.com



Scarlett West

T +44 (0)20 7367 2652
E scarlett.west@cms-cmck.com



Chris Bradshaw

T +44 (0)20 7367 3523
E chris.bradshaw@cms-cmck.com



David Walsh

T +44 (0)20 7367 3769
E david.walsh@cms-cmck.com

Aviation

Key Issues

Application of Regulation 261

There have been a series of cases that have shed some light on the application of Regulation (EC) No 261/2004 (Regulation 261).

Time of arrival

The European Court of Justice ruling on the case of *Germanwings v Ronny Henning* (2014) provides clarification on how 'arrival time' should be interpreted in the context of Articles 2, 5 and 7 of Regulation 261.

Mr Henning suffered a delay on this flight from Salzburg to Cologne/Bonn. The ECJ considered whether touchdown on the tarmac, parking and application of brakes and the chocks, or the opening of the doors constituted 'time of arrival'. It was decided that time of arrival is the time at which at least one of the doors of the aircraft is opened. The rationale behind the decision was that until the doors are opened, the passenger's situation does not significantly change as they are still regarded as being sitting in an enclosed space, subject to various constraints and unable to continue with their personal, domestic, social or business activities.

This decision is a shift toward the promotion of consumers' rights and a departure from the previously widely accepted definition of arrival time as being the moment the chocks are applied.

UK limitation period

The Court of Appeal ruling on the case of *Dawson v Thomson Airways* (2014) considered what the relevant limitation period was for bringing a claim under Regulation 261. Mr Dawson suffered a six hour delay to his flight and began proceedings under the provisions of Regulation 261. The defendant, Thomson Airways, contested on the grounds it was time barred as a claim had not been issued within the two year time limit set down by Article 35 of the Montreal Convention 1999.

The court decided that the loss of time inherent with flight delay within the meaning of Regulation 261 was distinct from the meaning of damage occasioned by delay within the meaning of the Convention. As a result, the Court of Appeal upheld the decision that the limitation period for bringing a claim under Regulation 261 was not within scope of the Convention and that it is a matter for the domestic law of Member States. In this instance, a six year limitation period for breach of statutory duty under the Limitation Act 1980 applied. We are now left with the situation where domestic limits will apply, with significant disparity between limitation periods in different Member States.

Assignment of rights to compensation

A County Court considered the validity of a claim for compensation pursuant to Regulation 261 in a case where a passenger's right to make a claim for delayed flights had been transferred to a third party company by way of assignment.

The judge was of the view that there was no debt that could be the subject of an assignment as the debt had not crystallised and become certain as there had been no determination as to whether or not the delay to the flight was subject to a defence under Article 5(3) of Regulation 261. The judge also decided that the cause of action itself could not be assigned since the claimant had no genuine commercial interest in the action other than to make a profit. Therefore the assignment of the cause of action was void under the legal concepts of maintenance and champerty. The claim was therefore struck out with costs in favour of the carrier.

This is an important decision as it will deter companies seeking to set up business solely to profit from assignments of rights to compensation.

Recent Belgian ruling

The highest administrative court in Belgium, the Council of State, recently delivered a verdict that clarified the powers of national enforcement bodies under Regulation 261.

Passengers on delayed flights filed a claim against an airline (the carrier) with the Belgian Civil Aviation Authority (BCAA), the Belgian national enforcement body which ensures that passenger rights under Regulation 261 are respected. The BCAA decided that the carrier had to pay compensation to the passengers and the carrier went to the Council of State to challenge this decision.

The Council of State confirmed that the decision of the BCAA could only be considered an opinion and not binding or producing of legal effect. Regulation 261 states that national enforcement bodies must take *“the measures necessary to ensure that the rights of passengers are respected”*. The Council of State was of the opinion that this does not necessarily provide them with the power to decide upon infringements in specific cases or compel carriers to pay compensation as a result.

Court of Appeal ruling on admissibility of air accident reports in English civil proceedings

The Court of Appeal judgment in *Hoyle v Rogers* (2014) has upheld the first instance decision that Air Accident Investigation Branch (AAIB) reports are admissible as evidence in English court proceedings. The judgment will assist parties to litigation resulting from air accidents or incidents both with forming and proving their respective cases where previously it might have been considerably more difficult to obtain the information underlying AAIB reports.

The decision will make it considerably easier for the parties to form and prove their respective cases. Historically, it has proved challenging to obtain the information used by the AAIB to form their opinion. While it may seem obvious to the general public that the reports should be admissible, it is a departure from the

industry’s historic understanding of the AAIB’s role and broadens the purpose of the reports. It remains to be seen how the AAIB will react to the role that its reports could now play in legal proceedings and the effect that it may have on potential witnesses and their willingness to come forward to the AAIB.

Airline liability for international parent kidnapping

In wake of US Department of State figures showing that abductions by parents in the context of child custody disputes have increased by a factor of three in the past decade, there have been a number of parents commencing litigation to impose civil liability upon commercial airlines. Historically such litigation has been concluded in favour of the airline and the recent US First Circuit Court of Appeals case of *Bower v El-Nady* continued this trend.

The claimant was a father whose two minor sons and Egyptian born mother took a one way flight from the US to Egypt in violation of a family court custody order. The claimant argued the airline should have flagged unusual circumstances relating to the journey, including the fact one way tickets were purchased with US\$10,000 cash on the day of the flight and the fact the children’s last names were different to their mother’s.

The First Circuit Court of Appeals affirmed the previous District Court decision to dismiss the case. It was decided that the matter was pre-empted by the Airline Deregulation Act 1978, which prohibits states from enforcing any law *“relating to price, route or service”* of any carrier. In this instance, the complaint was lodged around the ticketing, check-in and boarding procedures of the airline, which was deemed sufficiently related to ‘service’. It was therefore decided there was no need to reach a conclusion on whether the airline owed a duty of care to the father to prevent parental kidnapping. It should be noted that the earlier District Court decision (and other similar cases) came to the conclusion that no duty is owed in this regard as the father didn’t purchase a ticket and he had no contractual or other relationship with the airline.

Contacts



Simon Garrett

T +44 20 7367 2786
E simon.garrett@cms-cmck.com



David Walsh

T +44 (0)20 7367 3769
E david.walsh@cms-cmck.com



Alaina Wadsworth

T +44 (0)20 7367 2722
E alaina.wadsworth@cms-cmck.com



Sophie Newman

T +44 (0)20 7367 3659
E sophie.newman@cms-cmck.com

Construction PI

Key Issues

Architects – duty of care to third party purchasers

In August, the Court of Appeal overturned the High Court's decision in *Hunt & Others v Optima (Cambridge) Ltd & Others*. The dispute concerned a block of flats in Peterborough, which required substantial remedial works. Eight purchasers of the flats claimed against Strutt & Parker (S&P) in relation to certificates confirming satisfactory construction of the flats.

At first instance, the court found that the certificates contained enforceable contractual warranties, that they amounted to negligent misstatements (even though six of the purchasers only received them post-purchase) and that S&P's duties extended to exercising reasonable skill and care for the purpose of the subsequent production of certificates.

The Court of Appeal, however, found that, for a claim in negligent misstatement to succeed, the purchasers had to show reliance on the statement in question (the appeal dealt only with the six purchasers who received the certificates post-purchase). Further, the certificates were not described as a promise, warranty or guarantee, so they did not amount to contractual warranties. Importantly, the fact that S&P owed a contractual duty to Optima did not necessarily mean that it owed similar tortious duties to future certificate holders.

The successful appeal reverses a first instance decision which arguably expanded the scope of professionals' liability to third parties. However, the court left open the possibility of a successful claim based on an assumption of responsibility by the professional. Architects and other professionals should also remain live to the risk of a claim for negligent misstatement if reliance can be established.

"No loss" arguments and securitisation of loans

On 30 September 2014, Mr Justice Blair handed down a lengthy judgment on a valuers' professional negligence case, finding against the defendants in *Titan Europe 2006-3 plc v Colliers International UK plc (in liquidation)*.

Colliers argued (among other points) that Titan had suffered no loss. The property in question was one

of a number of commercial properties mortgaged and forming part of a securitisation arrangement by Credit Suisse. Titan was Credit Suisse's nominee SPV, incorporated to issue the commercial mortgage backed securities. On purchasing the senior tranche of the loans, Titan received funds from subscribers to the floating rate notes, which it issued to the noteholders on a non-recourse basis, i.e. Titan was, essentially, an economically neutral conduit between the investing noteholders and the debt in which they were investing.

The judge accepted Colliers' general point that, from an economic perspective it was the note holders, rather than Titan, who had suffered the loss, as a reduction in the value of the mortgage receivables was matched by a reduction in the repayment obligation of the notes. However, the judge held that Titan had, nevertheless, suffered a loss the moment it acquired a chose in action worth less than the price it paid for it (*Foster v Outred & Co (1982)*). The fact that Titan had issued the securities on a non-recourse basis was irrelevant.

In summary, as the judge noted, while this particular securitisation was complex and not a conventional issue of securities in which investors look to the issuer to repay the debt, the developing case law shows that the courts are reluctant to accept 'no loss' arguments.

Limitation issues for surveyors – when does time start to run?

Under the Limitation Act 1980 proceedings for a claim in contract must be brought within 6 years of the date of breach (or 12 years if the contract was executed as a deed). In contrast, a claim in the tort of negligence must be brought within 6 years from the date of damage, which can be sustained some considerable time after any breach has occurred.

Claimants often seek to rely on the fact that damage was not sustained until some time after any contractual breach to overcome difficulties with limitation. This is particularly the case with lenders' claims where any loss to the lender may not occur until some years after a mortgage valuation report was submitted. *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (1997)* held that a determination as to when damage has

occurred involved an assessment of the amount lent against the value of the property and the borrower's repayment covenant.

It is often assumed that the borrower's covenant becomes 'bad' when the borrower defaults but *DnB Mortgages Ltd v Bullock & Lees* (2000) indicates that it could be much earlier. Accordingly, unless a tardy lender can make use of section 14A of the Limitation Act 1980, which allows a claimant to bring a claim within 3 years from the 'date of knowledge' of damage having been suffered, it may have a more serious limitation issue than first anticipated.

What's on the horizon?

The Insurance Bill, introduced to Parliament on 17 July 2014, underwent a second reading at the House of Lords on 30 July 2014. The draft Bill introduces new law (amending the common law) and amends sections of the Marine Insurance Act 1906. It is anticipated that the Bill will be enacted before the next general election in May 2015.

The Bill also introduces amendments to the Third Parties (Rights Against Insurers) Act 2010, which received Royal Assent in March 2010, but has yet to be enacted. The amendments should enable the Act to be brought into force, thus allowing claimants to bypass an insolvent defendant and claim directly against the defendant's insurers, resulting in time and costs savings.

Contacts



Martin Fox
T +44 (0)20 7367 2823
E martin.fox@cms-cmck.com



Monica Lesny
T +44 (0)20 7367 2873
E monica.lesny@cms-cmck.com



Cheryl Gibson
T +44 (0)20 7367 2927
E cheryl.gibson@cms-cmck.com



Harriet Munro
T +44 (0)131 220 8993
E harriet.munro@cms-cmck.com



Martin Davis
T +44 (0)20 7367 2888
E martin.davis@cms-cmck.com

Claims trends

We are seeing an increasing number of claims by funders against monitoring engineers/surveyors. Historically, funders have been slow to bring claims against project monitors, but this trend may be set to continue in the aftermath of the recession in circumstances where funders are unable to recover their investment via claims against contractors or other construction professionals.

A recurring theme in claims is that of stretched resources; claims arise often from projects that have been procured seemingly in a rush, tendered in too short a space of time leaving both contractors and consultants overstretched and so vulnerable to allegations that insufficient resources were deployed/available. We have also noticed an increase in onerous contractual terms imposed by employers and accepted by those tendering. In emerging from the economic downturn, there has been an imperative to ensure a full order book but contractors and consultants alike need to ensure they have the resources to meet timetables and deadlines.

To find out more

Visit our Law-Now website at www.law-now.com and read more on the decision in *Titan v Colliers* and on [limitation issues for surveyors](#).



Billie Bingham
T +44 (0)20 7367 2766
E billie.bingham@cms-cmck.com



Robert Jones
T +44 (0)20 7367 2635
E robert.jones@cms-cmck.com



Michelle Radcliffe
T +44 (0)20 7367 3173
E michelle.radcliffe@cms-cmck.com



David Walsh
T +44 (0)20 7367 3769
E david.walsh@cms-cmck.com

Consumer and A&H

Key Issues

Fraudulent claims on the rise

In a report issued by the ABI this summer it was revealed that the value of fraudulent insurance claims discovered by insurers rose to £1.3 billion in 2013, an 18% rise from the 2012 figure. While the value of fraudulent claims went up the actual number of fraudulent claims has dropped. Overall, the annual cost of insurance fraud was around £50 a head.

Following a warm summer it is reported that insurers have also seen a rise in fraudulent claims among holidaymakers who cancel pre-booked trips in order to enjoy the heatwave at home instead. VFM Services, an agency that works with travel insurers to uncover fraud, said it believed holidaymakers were claiming against the travel policies citing medical or other emergencies as the reason to cancel simply so they could enjoy the unusually hot conditions at home at no cost. VFM state that the average claim for cancellation on a travel insurance policy was £1,200 and that fake heatwave-related claims could cost the industry hundreds of thousands of pounds.

The news about the increase in fraudulent claims comes on top of the 2013 statement by Aviva that whiplash claims added £118 to every motorist's annual car insurance bill and that premiums had risen by 80% in the five years from October 2008 due to an increase in personal injury claims, especially whiplash. The insurance industry has made a £230 million investment in fraud detection methods, such as the development of the Insurance Fraud Register. The ABI believe the headline figures are on the rise because it has "never" been harder to get away with committing fraud; more people are reporting it and more resources are being used to fight fraud.

In a decision that has been welcomed by insurers, in October the Court of Appeal held in *Versloot Dredging BV v HDI Gerling* that the insurers had been entitled to resist an insurance claim in its entirety because of a

recklessly made representation by the insured which constituted a fraudulent device. The question whether a 'fraudulent device', such as a fabricated invoice to support an otherwise genuine claim, means that the whole claim is forfeit, has troubled the courts for some time. Subject to an appeal to the Supreme Court the position now appears settled. If, in making a claim under an insurance policy, an insured uses a fraudulent device to support the claim and the device is (a) directly related to the claim, (b) intended to advance the claim and (c) if believed it would have tended to yield a not insignificant improvement in the insured's prospects of success, the use of the fraudulent device means that the insured loses its right to indemnity for the entire claim.

It remains the case, however, that fighting fraudulent claims can often cost the insurer more than simply paying the claims themselves, leaving insurers in an unenviable position.

UK regulators ban car insurer deals on price comparison websites

Following the FCA's March announcement that it would "shake up" the £1 billion general insurance add-on market to promote competition, the Competition and Markets Authority (CMA) has announced that it will ban car insurers from making agreements with price comparison websites. The agreements prevent insurers from making their products available more cheaply on other online platforms. The CMA has stated it wants to bring an end to any restrictions on an insurer's ability to offer the cheapest price on different online channels.

It is predicted that the crackdown on price comparison websites' prices for car insurance will be just the beginning with deals on other types of insurance likely to be scrutinised under EU competition law. It remains to be seen how much further the CMA will go for other classes of business.

What's on the horizon?

The use of big data by insurance companies is on the rise. Insurers are using data hived from satellites, social media and even sales of cigarettes to help identify and build up customer profiles. This is likely to be a key talking point over the next year as insurers seek to gain a competitive edge through the use of data. In addition discussions will take place over how to monetise the data that is harvested and whether the data can be used or pooled to allow insurers to collaborate and benefit from shared information. This will need to be balanced against the rules on controlling and using data, which will face additional regulatory oversight from the forthcoming EU Data Protection Regulation.

There has been considerable discussion over the 'internet of things' and how technological advances can benefit insurers. A fully connected home benefits the insurance market in various ways such as risk prevention (where alarms, smoke and water leak detection systems can help avert disaster before it arises) or giving better, more accurate underwriting information from the devices within the home. Some US insurers have teamed up with alarm system providers to offer discounts on installation and subsequently home insurance. This could give them a competitive edge when attracting new business. We expect this area of connected data provision to grow and grow and insurers can benefit from additional, targeted information.

Claims trends

Following the St Jude's storm and the terrible flooding that occurred it may be surprising to learn that personal household and property insurance premiums have actually decreased. It is reported that claims levels are at their lowest for some time and it is anticipated that premium rates will continue to fall in personal and commercial household insurance by between 5 – 10%.

Smartphones are driving the growth in device specific mobile phone insurance. The industry saw global revenues of \$30 billion in 2013 and is anticipated to grow to double that size by 2018. Perhaps unsurprisingly the level of mobile phone claims is also on the rise. YouGov state that *"As smartphones make up more of the mobile market in the UK the number of claims will rise further still, giving insurers more work to do and potentially presenting consumers with higher premiums"*.

To find out more

Visit our Law-Now website at www.law-now.com to read more on the [rise in fraudulent claims](#).

Contacts



Stephen Netherway

T +44 (0)20 7367 3015

E stephen.netherway@cms-cmck.com



Alaina Wadsworth

T +44 (0)20 7367 2722

E alaina.wadsworth@cms-cmck.com



Ed Foss

T +44 (0)20 7367 2313

E ed.foss@cms-cmck.com



Amit Tyagi

T +44 (0)20 7367 3578

E amit.tyagi@cms-cmck.com



Kate Murphy

T +44 (0)20 7367 2869

E kate.murphy@cms-cmck.com

Costs and Funding

Key Issues

Third party funders' liability for adverse costs

In October the Commercial Court ordered in *Excalibur Ventures LLC v Texas Keystone Inc* that the claimant's professional funders should pay the successful defendants' costs on an indemnity basis. The claimant obtained third party funding at various stages of the litigation from different funders in what has been described as the largest case supported by third party funding (the total funding required was almost £32 million). The claim, described by the judge as "speculative and opportunistic", failed and, in making the order for indemnity costs, the court made clear that the case was "outside the norm".

The decision highlights a number of important issues:

- The courts' discretion to determine "by whom and to what extent the costs are to be paid" is very wide and extends to the form of the order to be made, the proportion of any costs to be paid and the quantum of any award.
- The court followed the Court of Appeal's decision in *Arkin v Borchard Lines* (2005). In *Arkin* the court recognised two competing principles: (1) that costs should follow the event so that a funder who wholly or partly causes the defendant to incur costs should be liable for those costs; and (2) exposure of funders to the risk of having to pay costs on an indemnity basis might increase the risk and price of funding litigation. The court's solution was to hold that a professional funder who financed part of a claimant's costs of litigation should be potentially liable for costs of the opposing party to the extent of the funding provided (the 'Arkin' cap). In *Excalibur* the court held that the different funders' liability was limited to the extent of the funding provided. The funders were only liable for costs incurred by the defendants after the date of their contribution and, within each funder group, the funders were jointly and severally liable for the costs that they were ordered to pay.
- Certain of the funders' parent companies were held liable for the defendants' costs where the subsidiary funder was unable to satisfy any order made against them. The court was willing to pierce the corporate

veil where the parent produced all (or a substantial portion) of the funding that the subsidiary provided, the economic reality was that the parent company would have been the ultimate beneficiary of any successful action, and the funding vehicle did not appear to have any independent interest separate from that of its owners. In the circumstances, the court held that parent and subsidiary should 'stand together'.

Challenge to paying party's liability for success fee and ATE premium

In *Coventry v Lawrence (No. 2)* (2014) the Supreme Court considered whether the pre-April 2013 costs regime infringed the European Convention on Human Rights (ECHR). The paying respondents argued that an order that they should pay the appellants' success fee and ATE insurance premium infringed Article 6 of the ECHR (the right to a fair trial). The Supreme Court was clearly concerned by the level of costs incurred in the case, which the court described as "highly regrettable". The court ordered that the appeal should be adjourned saying that it would be wrong to decide the point without the Government having the opportunity to make representations.

The case concerns the recovery of costs under the pre-Jackson costs regime and not CFAs entered into since April 2013. It is possible, as suggested by the court, that if the relevant legislation is declared incompatible with the ECHR, this would raise the prospect of claims being made against the Government by those who have paid success fees and ATE premiums under the old costs regime. The case is expected to return before the Supreme Court in February 2015.

Damages Based Agreements

The Ministry of Justice has asked the Civil Justice Council to consider how the drafting of the DBA Regulations can be improved. The CJC has been asked for advice on a number of issues related to the drafting, but the Government has said that hybrid DBAs will not be permitted.

Relief from sanctions

In July the Court of Appeal handed down its judgment in *Denton v TH White, Decadent Vapours Ltd v Bevan, Utilise TDS Ltd v Davies* (2014) concerning three appeals from decisions regarding applications for relief from sanctions pursuant to CPR rule 3.9.

The Court of Appeal in *Denton* described its decision as “clarifying and amplifying” the court’s earlier decision in *Mitchell v News Group Newspapers Ltd* (2013) and restated the approach that should be applied to relief from sanctions applications. The court should:

- identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court direction. If the breach is not serious or significant, then relief from sanctions should usually be granted;
- consider why the failure or default occurred, and whether there was good reason for it. Where there is good reason for a serious and significant breach, relief is likely to be granted;
- consider all the circumstances of the case to enable it to deal with the application justly, including the need (a) for litigation to be conducted efficiently and at proportionate cost and (b) to enforce compliance with rules, practice directions and orders. The effect of the breach, the conduct of the defaulting party and the promptness of the application should be considered.

In its judgment the Court of Appeal discouraged parties and their lawyers from taking advantage of mistakes made by opposing parties and acting unreasonably in opposing applications for relief from sanctions.

A non-defaulting party should only contest an application for relief from sanctions in exceptional cases and the court will be more ready in future to penalise opportunism and unreasonable refusals to agree extensions for deadlines.

Recovery of in-house legal costs

The recent Employment Appeal Tribunal decision in *Ladak v DRC Locums Limited* upheld the Employment Tribunal’s decision that any costs incurred by in-house lawyers on a matter may be recovered, serving as a reminder that in-house legal costs may be recovered in litigation. The decision in *Ladak* concerned a claim before the Employment Tribunals but the principle that in-house representatives may recover their costs for legal work has long been established in the civil courts, on the condition that the work can be categorised as legal work. Costs for secretarial work and research into the facts of the matter will therefore not be recoverable. This should be kept in mind by in-house teams when assessing the level of costs that may be recovered.

The above said, in certain circumstances it may be possible to claim wasted management time. While it is not possible to claim these as costs, it may be possible to claim them as damages if they have arisen as a result of the events underlying the claim (i.e. staff have been diverted from their usual activities) as opposed to in the course of bringing or defending the claim.

To find out more

Visit our Law-Now website at www.law-now.com to read more on the decision in *Denton v TH White* and the [recovery of in-house legal costs](#).

Contacts



Stephen Netherway

T +44 (0)20 7367 3015
E stephen.netherway@cms-cmck.com



Neil Beighton

T +44 (0)20 7367 3017
E neil.beighton@cms-cmck.com



Stephen Tester

T +44 (0)20 7367 2894
E stephen.teste@cms-cmck.com



Joanna Owens

T +44 (0)20 7367 2631
E joanna.owens@cms-cmck.com



Anna Crew

T +(0)20 7367 2591
E anna.crew@cms-cmck.com

Cyber

Key Issues

High profile breaches

Cyber-attacks have continued to make the headlines, with a number of high-profile breaches occurring in recent months.

August 2014 saw the US Hold Security Group report on what was described as the biggest data theft to date, with an estimated 1.2 billion user names and password combinations stolen. Russian hackers allegedly used a botnet, a group of virus-infected computers, to identify weaknesses in every website visited by each victim's computer.

In September 2014 breaches were back in the news, with the Shellshock Bug being discovered in the software component Bash, a command prompt on many Unix computers. As operating systems such as Linux and Apple's OSX are built on Unix, the bug had the potential to affect hundreds of millions of machines. Thousands of servers were compromised as the virus allowed additional code to be added to websites as if the person were using the hacked machine.

A key concern with the above breaches, and others like them, is the potential for multiple intrusions into the network over a period of time, resulting in separate data breaches. This is a consideration for the insurance market when underwriting cyber policies, as the way aggregation and breach events are defined could make a great difference to the amount paid out. With millions of devices left at risk of cyber-attack by Shellshock due to vulnerabilities, the way that multiple losses from one incident are dealt with under the policy is of paramount importance.

Right to be forgotten

In addition to cyber terrorism, the risks associated with holding data for too long have also been examined recently. In May 2014 the European Court of Justice found that Google Spain was a data controller, in a case brought by a Spaniard who claimed that links on Google to articles about previous financial difficulties infringed his right to privacy.

Despite Google's submissions that they did not hold the data, but merely provided links to information on the internet, the court decided that search engines are under a duty to remove web links when requested. This duty will only apply in circumstances when the information is "out of date, no longer relevant or excessive". By September 2014 Google had received over 120,000 requests for information to be removed, and had granted approximately half of them. Microsoft's search engine Bing quickly followed by also allowing requests for deletion of links.

Concerns have been raised that this ruling could be used to suppress information of national importance and that it infringes on the freedom of speech and of the press. The House of Lords conducted a report into the judgment, concluding that the case is "misguided in principle and unworkable in practice" and suggested that the judgment does not reflect the way that technology is currently used. The report went on to call upon the UK Government to ensure that the definition of data controller in the Data Protection Regulation, currently in draft form, is not extended to include search engines and for the right to be forgotten to be removed.

UK Government's Cyber Essentials Scheme

The UK Government launched the Cyber Essentials Scheme in June 2014, aimed at ensuring that all types of business have a basic level of protection against cyber threats. The framework provides information and advice on appropriate cyber security practice and could reduce the vulnerability of many organisations. In addition, businesses will receive a Cyber Essentials badge, demonstrating to the public that the necessary safeguards are in place.

The scheme is designed to provide a cost-effective and basic level of security, and will not therefore protect against more advanced, targeted attacks. However with the recent high-profile breaches at the forefront of many people's minds, the scheme may provide assurances that businesses are approaching the threat

of attacks from a risk management perspective. It will be interesting to see what effect, if any, holding a Cyber Essentials badge has on cyber insurance policies, whether resulting in reduced premiums or becoming a prerequisite for buying cyber insurance.

What's on the horizon?

Further investment in cyber insurance policies

It has been predicted that the amount of money British businesses spend on cyber insurance will increase rapidly over the coming years, with some underwriters estimating that £450 million will be spent in the next five years alone. This anticipated increase is being attributed to a combination of factors, one cause being an increased awareness of the risks due to high-profile breaches and the new Cyber Essentials Scheme. In addition, the EU Data Protection Regulation (see below) will increase the burden on businesses to report data breaches once it comes into force. This increased regulation is likely to drive the market and increase uptake.

One key development in the market recently is a new cyber-insurance company set-up by Tom Ridge, the former US homeland security chief, with a series of Lloyd's underwriters. With the announcement coming only days after a damaging data breach at JP Morgan Chase, Mr Ridge has commented that the insurance is

also aimed at encouraging businesses to manage their cyber protection more effectively. Policies up to \$50 million will be available from Ridge Insurance Solutions immediately but with the challenges for businesses in calculating their exposure to cyber risks remaining, it will be interesting to see how the market develops.

The draft Data Protection Regulation

As discussed in the April 2014 edition of Insurance Issues, the draft Data Protection Regulation is set to be the most significant global development in data protection law since the EU Data Protection Directive. Peter Hustinx, the European Data Protection Supervisor, announced in July 2014 that consensus on the draft Regulation has increased in the Council, and that therefore the proposal will be adopted. Furthermore it appears that in relation to the main points of the Regulation, the European Parliament is unlikely to change its position. With the UK apparently keen to finish the process before the general election in May 2015, this is set to be an important development in the near future.

Claims trends

With a growing number of high-profile breaches and Government focus on the issues of cyber insurance, this is an area which looks likely to grow rapidly in the near future.

Contacts



Stephen Tester
T +44 (0)20 7367 2894
E stephen.testster@cms-cmck.com



Chris Bradshaw
T +44 (0)20 7367 3523
E chris.bradshaw@cms-cmck.com



Monica Lesny
T +44 (0)20 7367 2873
E monica.lesny@cms-cmck.com



Michelle Radcliffe
T +44 (0)20 7367 3173
E michelle.radcliffe@cms-cmck.com



Tom Scourfield
T +44 (0)20 7367 2707
E tom.scourfield@cms-cmck.com



Sophie Newman
T +44 (0)20 7367 3659
E sophie.newman@cms-cmck.com

Energy

Key Issues

Energy companies facing up to the threat of a cyber-attack

There has been a huge increase in demand for cyber insurance by energy and utility companies in the past year as they wake up to the threat posed by a cyber-attack. However, companies are facing difficulties in finding the right product or sufficient capacity to meet their evolving needs. At present, demand for insurance exceeds supply but the insurance market is moving quickly to bridge the gap.

Earlier this year it was reported that energy companies were being declined cyber insurance cover by insurers at Lloyd's because of perceived weaknesses in their systems employed to keep out intruders. Analysts in the US say insurers' reluctance to offer broad cyber insurance is down to a difficulty in pricing risk where potential losses are considerable and still relatively novel.

Were hackers to manage to hit an oil and gas company with a major cyber-attack that compromised key systems at a refinery or a deep water platform, the losses would dwarf the c. \$150 million experienced by Target following their cyber breach last year. An attack that successfully targeted equipment meaning power was blacked out for end users could result in even more extreme losses; the 2003 Northeast blackout in the US saw power restored for most users within 24 hours but caused estimated economic losses of between \$7–10 billion. With potential losses on this scale the need for adequate risk management, of which insurance cover is part, is obvious.

Energy companies are working to improve their systems to give insurers the comfort they need that insurance is not being used as a substitute for security. In turn, insurers are asking energy companies more questions about their security arrangements to try and distinguish between good and bad risks, and awareness across the market is improving rapidly. As policies become commonplace security arrangements will come under even greater scrutiny.

In answer to the issues facing energy companies with gaps in cover some brokers are developing products that will indemnify an insured for losses arising from a cyber-attack that would be excluded under normal

liability policies. Policies may be accompanied by underwriting standards that test a company's approach to detecting, defending against and recovering from cyber-attacks. As in other sectors, companies that pass underwriting standards would benefit from reduced rates, and those that fail would not, if they were able to secure cover at all.

Cyber insurance is an issue that will remain at the top of the agenda for energy companies for the foreseeable future. Risk managers need to marry robust security arrangements with adequate insurance coverage to ensure the energy company is prepared in the event of a cyber-attack.

Is fracking the future?

Although the fracking industry in the UK is still at the speculative stage it is clear from the substantial shale oil and gas reserves that there is enormous potential for growth in the future if the conditions are right. Government support is behind the process which looks set to be a key issue in the discussion over the UK's power needs.

Politically speaking fracking is a contentious issue because of both the environmental concern of potential pollution to water supplies from the chemicals used in the process, and the potential for an earthquake from seismic tremors caused by fracking. These are the same issues that will interest insurers looking to enter this market. The potential for liability claims arising from the use of chemicals will concern insurers, as will the possibility of a large earthquake as a result of fracking exploration. However, these concerns can be managed provided the developers stick to robust, agreed standards which will lead to safer fracking processes.

Insurers are understandably cautious about entering into a market that seems to attract a lot of negative press but the reality is that fracking risks will not be wildly different from other energy risks where insurers have considerable underwriting experience and claims records to fall back on when pricing the risk. It remains to be seen the extent to which fracking takes off in the UK but fracking risks are likely to be an attractive proposition for insurers with the appropriate appetite and expertise.

Insurance demand in renewable energy on the rise

The insurance industry has responded to the increased investment in renewable energy by launching new products that seek to mitigate the potential volatility faced by energy companies in developing green energy projects. This includes developing products to insure investors in renewable projects against the possible withdrawal of subsidies for developments from governments, an issue which continues to arise in recent years.

Swiss Re estimates a 50% increase in renewable energy investment by the end of the decade which it says is likely to lead to a doubling of insurance spending in six of the world's leading renewable energy markets. For example, a number of solar energy projects are planned in Dubai – each with a value of over \$1 billion.

Capacity for established types of renewable projects is readily available and while Lloyd's is at the forefront of developing products for emerging risks, such as wind or bio-energy, these do not have a similar track record on which to assess risk and are harder to underwrite. Risks tend to be located in a vast array of territories and, among the usual risks, insurers must factor in the changing political landscape in each. As there is no claims history to review the focus is on due diligence into the insured's risk management procedures and the role of a risk manager in sourcing insurance is of critical importance.

Covers are available to mitigate risk and an insured will need to work closely with its broker and legal advisors to ensure it has the most appropriate cover for any prospective renewable energy project.

What's on the horizon?

London energy market facing up to £1.3 billion SBM claim

SBM Offshore has notified the offshore energy constructors' market that it is making a \$1.29 billion claim to cover the costs of its ill-fated Yme MOPUStor platform venture with Talisman Energy. The claim reflects the huge writedowns that SBM was forced to take on the project after it was scrapped last year. The project had suffered several delays and safety issues including the evacuation of 140 workers from the offshore production due to structural concerns.

At the time the project was disbanded SBM made significant up-front payments to bring an end to all

agreements and arbitration procedures over the project. These are rumoured to have included a \$400 million impairment charge and a \$200 million provision for possible decommissioning costs.

SBM Offshore has indicated they intend to claim the full limit on three policies covering the construction of the platform. It is understood that the claim is being investigated and insurers may choose to dispute the loss or pay out only on a portion of the policies. Any proceeds recovered under the policies will be split equally between SBM and Talisman.

Insurance cover for third party liability for nuclear damage

Following revisions to the Paris/Brussels Conventions on nuclear third party liability, operators of nuclear installations and related waste disposal facilities face considerably increased statutory limits of strict liability in the event of a nuclear incident. Currently operator liability is limited to £140 million per incident; this is increasing by over 400% to £1.2 billion to be phased in over a five year period starting at an increased level of £700 million. There will also be an extended period of limitation for personal injury claims. The changes will affect existing nuclear operators as well as any new developments.

These exposures require new insurance and reinsurance solutions and will test the capacity and appetite of nuclear insurers. Uninsurable exposures may require suitable collateralisation from operators who must satisfy the Government that they have adequate financial arrangements in place (such as insurance) to satisfy their statutory duty under section 19(1) of the Nuclear Installations Act 1965.

Claims trends

Is it the right time to review insurance arrangements?

The pace at which energy insurance prices are reducing is surprising the industry. New streams of capital have led to increased capacity and the resulting loss of business to reinsurance companies has increased competition on pricing. Tough growth targets are becoming difficult to meet for energy insurers suffering from an increase in capacity and resulting premium reductions. While the news is good for insureds there is uncertainty over how long the increased capacity will remain so now is a good time for the risk manager to review their arrangements.

Contacts



Simon Kilgour

T +44 (0)20 7367 2152

E simon.kilgour@cms-cmck.com



Harriet Munro

T +44 (0)131 200 7677

E harriet.munro@cms-cmck.com



Stephen Tester

T +44 (0)20 7367 2894

E stephen.testers@cms-cmck.com



Neil Beighton

T +44 (0)20 7367 3017

E neil.beighton@cms-cmck.com



Alex Denslow

T +44 (0)20 7367 3050

E alexander.denslow@cms-cmck.com



Amit Tyagi

T +44 (0)20 7367 3578

E amit.tyagi@cms-cmck.com

Financial Advisors

Key Issues

Increasing number of tax mitigation scheme complaints brought before FOS

In its latest annual review, the Financial Ombudsman Service has reported that complaints relating to film partnerships have increased by 139%. In addition, HMRC continue to crack down on tax mitigation schemes generally showing no hesitation in using new powers which require upfront payments by investors when their tax liabilities are challenged. A recent example being the notices issued to investors in one or more of 800 schemes which may require repayment of the contested tax liability within 90 days. Advisors and accountants remain in the firing line as investors who lose out on tax relief or suffer following the failure of the scheme seek to recover from those who introduced them to, promoted or set up the scheme.

In our experience, FOS takes a dim view of advice to 'ordinary' retail investors to invest in film (and technology) tax mitigation schemes. Such schemes are likely to be Unregulated Collective Investment Schemes (UCIS) which are subject to stringent rules regarding their promotion and sale and which have been the subject of criticism from the Regulator since 2013.

However, a number of recent decisions by the FOS not to uphold complaints relating to such schemes suggest there may be defences available to advisors facing similar complaints. In each case, FOS noted that certain rules on promotion had not been met by the advisor, for example the sophisticated investor certificates were not correctly completed. Despite these failings, the FOS did not uphold the complaint because each investor was found to be sufficiently experienced and knowledgeable to understand the risk presented by the scheme, either as a result of having made similar investments in the past or because the investor was employed in the financial services sector, and would have gone ahead with the investment even if the correct procedural steps had been taken by the advisor. It is also noteworthy that in each case where the complainant alleged that inappropriate advice had been given, FOS was unable to find sufficient evidence of such advice and concluded that the service provided had been 'execution only'.

IFAs, accountants and their insurers should bear these decisions in mind when faced with such complaints in the future, particularly where it is alleged that certain regulatory formalities have not been met or where the complainant is a sophisticated or experienced investor. While these recent decisions do not necessarily mark an overall change in approach by the FOS towards UCIS, they do indicate that, when formulating a defence to such complaints, it is worth considering the complaint in the context of any evidence regarding the nature of the service being provided and the individual investor's experience with previous investments of a similar nature or any relevant employment or dealings in the financial services industry.

Still In Focus – FOS and the limit of its award powers

In February 2014 in a case where CMS acted for the IFA, *In Focus*, the Court of Appeal determined that a complainant cannot accept an award from the Financial Ombudsman Service and make a claim based upon the same facts in court. Accordingly, a complainant cannot claim for the so-called 'balance of the loss' in excess of the FOS award limit, or (regardless of the amount awarded) for other losses arising from the same facts which the FOS declined to award.

The result was welcomed by the IFA industry and their insurers which faced the re-opening of their back book of IFA business. Much has been said about the significance of the judgment. One query is whether an IFA can rely on the opinion of an adjudicator who recommends an IFA pay certain redress to deny a complainant a court claim in the way *In Focus* suggests. As the adjudicator is not issuing a *decision* which the complainant (may) *accept*, the complainant could go on to court. In the usual course, it is therefore in the IFA's interest to refer the complaint to an ombudsman for a decision.

Similarly, to successfully argue that the FOS has already determined a matter and it cannot therefore be effectively re-heard in court, it may be in the IFA's interest to refer facts to the FOS which the complainant has not himself referred. That may be, for example, as to further investment in the same product which is the

subject of the FOS complaint. Should the complainant go on to pursue a court claim for that further investment, the IFA might reasonably argue that the court claim concerns the same facts which were before the FOS, therefore subject to complaint, and have already been determined.

These nuances mean that IFAs and their insurers should still consider defences and tactics carefully when faced with a FOS complaint. Overall however, the decision has brought much-needed clarity at appeal level. Although it will take a willing IFA (and its insurer), the next Court of Appeal level case – may – reconsider the status of a direction by the ombudsman to pay in excess of the FOS award limit. Currently, *Bunney v Burns Anderson PLC* provides the answer is that it is outside the FOS' jurisdiction. However, the FOS may be of a different view. For example, its Online Technical Resource for Misrepresentation and Non-disclosure states that: *"If we decide that cover should be reinstated in this way, our £150,000 award limit does not apply - because we are telling the insurer to re-instate a policy and then deal with a claim. The award limit applies only where compensation is a money award for financial loss the consumer has suffered - not as a limit to any future amount that is paid only if the insurer accepts the claim"*. We may therefore see a judicial challenge to *Bunney* over the coming year.

What's on the horizon?

In the FCA's 2014/15 business plan, published in March, it said it would consider the case for a 15-year time limit on complaints to the Financial Ombudsman Service, a move which has long been advocated for by financial service firms. The Association of Professional Financial Advisers (APFA) launched the 'Fair Liability 4 Advice' campaign in 2012 to fight for a long stop and in September 2013 Tenet, a support service provider for advisers, launched an e-petition to ask the government to address the issue.

However, this still appears some way off as in July 2014 the FCA chief executive, Martin Wheatley stated that discussions over the time limit *"cannot move forward"* at present. The reason provided was that the European Alternative Dispute Resolution Directive, which Member States are to comply with by 9 July 2015, looks at whether a long-stop on complaints would be a constraint on consumer rights. Martin Wheatley said that until this has been clarified, the FCA cannot introduce the long stop. The FCA has been criticised for using the European Directive as an excuse. The FOS has also recently said that it cannot have 15 year longstop as mortgages and pensions last much longer than 15 years. Whether the FCA returns to this issue anytime soon remains to be seen.

It is therefore unlikely, in the short term at least, that the number of complaints against financial service firms is going to decrease. In fact, as the time for implementation of the European Directive fast approaches, we are likely to see an increase in complaints next year; one of the requirements of the European Directive is that consumers will have one year to submit a complaint to the FOS following a firm's final decision letter, rather than the six months the consumer has at present.

FCA upcoming thematic review of advisor's platform due diligence

As part of a wider thematic review, the FCA are currently examining the level of due diligence that financial advisory firms must undertake when recommending an investment platform to retail investors.

Recently, the use of platforms has increased as it allows investors to select and monitor their investments, usually in an online format.

The due diligence review forms part of the FCA's 2014/2015 business plan, although its length and scope is yet to be confirmed by the FCA. Uncertainty as to the scope of the review has caused concern within the industry as financial advisors could find they have an enhanced obligation to undertake due diligence on potential investments offered within the platform.

Speaking at the FE Investment Summit on 30 September 2014, Rory Percival of the FCA highlighted various areas which the review would encompass. He said that over the last four or five years inadequate due diligence has been a key factor in almost all of the incidences of 'crystallised risk', pinpointing specific examples such as Keydata and Arch Cru. Insurers will recognise both failed investments as they have generated multiple claims and complaints against IFAs.

The FCA has suggested that reviewing marketing material from discretionary fund managers does not amount to appropriate due diligence when selecting an investment platform. When considering platforms firms should rely on 'facts' rather than opinion. The FCA used an example of a statement of a platform's top ten holdings being an example of fact, contrasted with a statement of an investment's perceived risk profile being an opinion requiring further due diligence. The FCA also stated that advisors should continue to monitor whether the platform remains the right fit for the client over time.

At the recent conference, Mr Percival also alluded to the fact that advisors should be trying to fit the platform to the client, taking into account the client's financial circumstances. This suggests that bespoke due diligence will become a regulatory requirement once the official guidance has been issued by the FCA.

If experience of the Regulator's due diligence requirements of pensions professionals is an appropriate barometer, the FCA's review is likely to spark an increase in claims against IFAs.

Contacts



Simon Garrett

T +44 (0)20 7367 2786
E simon.garrett@cms-cmck.com



Emma Morris

T +44 (0)20 7367 2474
E emma.morris@cms-cmck.com



Belinda Schofield

T +44 (0)20 7367 3053
E belinda.schofield@cms-cmck.com



Caroline Hall

T +44 (0)20 7367 2578
E caroline.hall@cms-cmck.com



Alex Denslow

T +44 (0)20 7367 3050
E alexander.denslow@cms-cmck.com



Tim Evans

T +44 (0)20 7367 2367
E tim.evans@cms-cmck.com



Chris Bradshaw

T +44 (0)20 7367 3523
E chris.bradshaw@cms-cmck.com



Joanna Owens

T +44 (0)20 7367 2631
E joanna.owens@cms-cmck.com



Lucy Russell

T +44 (0)20 7367 3202
E lucy.russell@cms-cmck.com



John Enoch

T +44 (0)20 7367 2432
E john.enoch@cms-cmck.com



Fozia Akhtar

T +44 (0)20 7367 3255
E fozia.akhtar@cms-cmck.com



Alaina Wadsworth

T +44 (0)20 7367 2722
E alaina.wadsworth@cms-cmck.com

Financial Institutions and D&O

Key Issues

Innovation in the financial markets: shadow banking, crowdfunding and digital currencies

Over the last couple of years much of the commentary on the financial lines insurance sector has focused on the mistakes of the past, with numerous regulatory investigations into institutions and individuals, some of which, such as the forex trading investigation, are still on-going and expected to result in further substantial penalties. Regulatory investigations have also been followed by civil claims with claimant lawyers seizing on information, correspondence and documents made public as part of agreements reached with regulators.

However, financial institutions (and their insurers) must also keep an eye on the future. When it works at its best, the financial services sector is innovative and fast moving. Innovation gives rise to both new opportunities and new challenges. Two examples are the rise of shadow banking and digital currencies.

Shadow banking refers principally to the rise of non-bank lending. In recent years, providers of debt finance to corporations and businesses are increasingly found outside the mainstream lending banks. For example, the private equity industry has become an increasingly important player in the debt markets along with specialist credit funds. Moreover, it is a trend that may well be fuelled further by the current focus of international banking authorities on bank solvency (such as the recent stress tests carried out by the ECB which 25 banks failed). While the focus on solvency is entirely understandable given the shockwaves that are still being felt from the bank collapses in 2008, a possible consequence of forcing banks to hold more equity and reduce leverage is that alternative, potentially less regulated, entities step in to meet demand in the market for finance. Change is also happening in the consumer finance market with the rise of crowdfunding and peer-to-peer lending. Innovation is also evident in the rise to prominence of digital currencies in recent years. While Bitcoin has stolen most of the headlines there are numerous digital currencies in existence and it remains to be seen which will survive in the long term. While a lot of attention has been focused on the volatility of Bitcoin as a store of value, arguably the real significance of digital currencies is their function as a means of exchange. Banks and other mainstream financial

institutions who fail to adapt to the challenges to existing payment systems might quickly discover that the implications of such changes have wider significance for their business models.

The rise of new markets for the provision of finance, and the potential to transform payments systems via the use of digital currencies, presents new opportunities for the financial services sector and by extension potential new sources of business for financial lines insurers. However, these developments are likely to come under close regulatory scrutiny and the business models remain at a relatively early stage. Financial lines insurers will need to adapt as quickly as the institutions which they underwrite given the potential for the risk profile of those institutions to change significantly.

What's on the horizon?

Changes to the Approved Persons Regime (APER)

Banks, building societies and Prudential Regulation Authority authorised investment firms will soon be required to comply with substantial proposed reforms to the APER, which will be abolished for these entities but will continue in place elsewhere, although there has already been some informal consideration of extending aspects of the new regime to non-banks, and ultimately abolishing APER entirely. Responses to the recent FCA and PRA consultation on the proposed changes were due by 31 October 2014.

A new Senior Managers' Regime, applicable to a narrower range of individuals, is proposed to replace the APER. A Certification Regime, whereby firms would have to self-certify certain employees as 'fit and proper', will apply to a wider pool of individuals than the APER. New banking conduct rules for individuals, based on the rules in APER, but applying to almost all of a firm's employees, are also proposed.

The proposed regime includes a new statutory 'Presumption of Responsibility' where, if a firm has breached a regulatory requirement, the Senior Manager responsible for the area of the breach will have to satisfy the regulators that he took 'reasonable steps' to prevent, stop, or remedy that breach – with the

possibility of facing individual sanctions if he cannot do so. Senior Managers are also liable to prosecution for the new criminal offence “relating to a decision causing a financial institution to fail” (section 36 of the Financial Services (Banking Reform) Act 2013).

These changes will entail significant operational investment by the entities affected. The new sanctions potentially applicable to Senior Managers and the reversed burden of proof that the ‘Presumption of Responsibility’ will entail will be of interest to financial lines insurers given their exposure to potentially increased costs in defending regulatory enforcement action.

Claims trends

Tax mitigation schemes

The recent change in the approach of the UK government and HMRC to tax mitigation schemes, prompted by the tide of public opinion turning against corporations and individuals seeking to avoid paying tax, is likely to impact on claims against financial services professionals, including accountants, IFAs, wealth managers, promoters and devisers of the schemes and lawyers. Many of the schemes entered into by individuals to defer and/or mitigate their liability

to UK income tax are now the subject of HMRC challenge. Some of these schemes, including those set up to generate investment in the UK film industry, had been in operation for over 10 years without challenge. HMRC’s more aggressive stance will inevitably lead to investors being denied the tax advantages they had claimed previously, with the possibility of exposure to tax payments of many multiples the amount originally invested. Financial services professionals involved with the schemes will inevitably become vulnerable to claims in professional negligence. The results of the first test cases are expected in the early part of next year and will no doubt be of interest to financial lines insurers.

To find out more

CMS Cameron McKenna’s lawyers have a detailed understanding of tax mitigation schemes, the types of claims that can arise and how best to protect professionals involved in setting up or advising on such schemes. If you would like us to provide a ‘lunch and learn’ presentation on the subject to you and your colleagues then please contact Simon Garrett. Our weekly Financial Lines bulletins provide summaries of key developments in the sector. To be added to our email list contact Simon Garrett.

Contacts



Simon Garrett
T +44 (0)20 7367 2786
E simon.garrett@cms-cmck.com



Emma Morris
T +44 (0)20 7367 2474
E emma.morris@cms-cmck.com



Belinda Schofield
T +44 (0)20 7367 3053
E belinda.schofield@cms-cmck.com



Caroline Hall
T +44 (0)20 7367 2578
E caroline.hall@cms-cmck.com



Chris Bradshaw
T +44 (0)20 7367 3523
E chris.bradshaw@cms-cmck.com



Tim Evans
T +44 (0)20 7367 2367
E tim.evans@cms-cmck.com



Estelle Duxbury
T +44 (0)20 7367 2366
E estelle.duxbury@cms-cmck.com



Joanna Owens
T +44 (0)20 7367 2631
E joanna.owens@cms-cmck.com



Fozia Akhtar
T +44 (0)20 7367 3255
E fozia.akhtar@cms-cmck.com



John Enoch
T +44 (0)20 7367 2432
E john.enoch@cms-cmck.com

Healthcare

Key Issues

NHSLA's annual report

NHSLA published their annual report on 9 July 2014 and confirmed "an unprecedented number of clinical negligence claims" to the order of 11,945 in the 2013-14 claims year and stated that, for the first time, they received more than 1,000 claims per month in a six month period.

They also reported that the majority of cases in the 2013-14 period were commenced before the Legal Aid, Sentencing and Punishment of Offenders Act came into force, meaning that they were still in the main subject to 'no-win, no-fee' arrangements and increased claimant costs as a result.

NHSLA were scathing about the effect of changes to claimants' legal funding arrangements, for example, reduced fixed costs in motor personal injury claims which, they said, attracted a number of new entrants to the clinical negligence arena as one of the last remaining areas where claimant solicitors could charge an hourly rate. They reported that they had also seen an increase in poorly investigated claims and claims being brought by lawyers who did not specialise in clinical negligence work where the care given was clearly not negligent. In addition, they had noticed significant front loading of costs in some cases prior to the notification of claims, often resulting in a disproportionate costs claim by the claimant's lawyers compared to the damages payable.

Asbestos

The Mesothelioma Act 2014 came into force on 31 March 2014 and 1 September 2014. The effect of the Act is to create a scheme to compensate victims of mesothelioma who have been diagnosed since 25 July 2012 and who cannot trace their insurers or previous employers. The scheme will be funded by a 2.74% industry-wide levy on premiums on current employer's liability insurance providers and will also ensure greater research into a cure for the disease. Under the scheme, mesothelioma sufferers will receive 75% of the compensation amount they would have received if the matter had gone to court. This was in direct response to pressure from insurers not to accept a 100%

compensatory scheme, and has sparked criticism from mesothelioma action groups and the Association of Personal Injury Lawyers. The employer's liability market has responded by saying that it is unlikely to be able to absorb the 2.74% levy on premiums that will fund this and may be forced to increase premiums, especially after taking such a big hit on industrial deafness claims in 2013.

The recent case of *McGregor v Genco (FC) Limited* (2014) gave some practical guidance on the correct approach to the date of knowledge for breach of duty in mesothelioma cases. The claimant worked in a shoe concession at a department store where she was exposed to asbestos dust for a few months in 1976 when work was undertaken at the store to remove old escalators and install new ones. She was diagnosed with mesothelioma in August 2012 and sought damages from the successor to her employer. The judge accepted that her exposure to asbestos at the store probably caused her mesothelioma. However, the claim was dismissed because the judge was unable to accept that during 1976 the defendants should have appreciated that she was at risk of an asbestos related injury and that their failure to appreciate and take what would now be regarded as appropriate precautions or to make enquiries about the nature of the dust was not negligent. It was clear to the judge that: "It is important...not to look back with the rose tinted glasses of hindsight and consider the position by the standards operative in 1976".

What's on the horizon?

Medical Innovation Bill

On 27 June 2014 the Medical Innovation Bill, sponsored by Lord Saatchi, received its second reading in the House of Lords and took a further step towards achieving Royal Assent and becoming an Act of Parliament. The widely debated Bill faced further discussion in the Committee Stage on 24 October 2014, where there was a line by line examination of the proposals, and a further detailed review will now take place in the Report Stage.

The purpose of the Bill is “to encourage responsible innovation in medical treatment (and accordingly to deter reckless irresponsible innovation)”. It seeks to achieve this by providing that it will not be negligent “for a doctor to decide to depart from the existing range of accepted treatments for a condition if the decision is taken in accordance with a process that is accountable, transparent and allows full consideration of all relevant matters”.

This process, as set out in the current draft of the Bill, must include the following:

- Consultation with colleagues, including any relevant multi-disciplinary team;
- Notification by the doctor to their responsible officer;
- Consideration of opinions or requests of the patient;
- Obtaining those consents required by law; and
- Consideration of matters reasonably necessary to reach a clinical judgment, including an assessment of risks and consequences.

Lord Saatchi stated that the Bill seeks to achieve its aim of safe and responsible innovation by increasing certainty for doctors in order to overcome the prohibitive effect which the possibility of litigation presents and move “the Bolam ‘responsible persons’ test from after the event to before the event”. Lord Saatchi argued that this will result in more certainty regarding what constitutes lawful medical innovation and thereby combat the potential barrier to innovative treatment posed by clinical negligence claims.

Care Bill

We reported in the last edition of Insurance Issues that the Care Bill was making its passage through Parliament. It received Royal Assent in May and various administrative provisions came into effect on 1 October 2014. The more significant provisions, which reform the law relating to care and support for adults and support for carers, in particular the calculation of care costs including their assessment and capping where appropriate, will come into force on 1 January 2015.

Claims trends

The cosmetic surgery and procedures market continues to throw up industry-wide issues. A Group Litigation Order (GLO) was made by the High Court in Cardiff

in 2012 in relation to personal injury claims made by women who received PIP breast implants. The trial of those preliminary issues was recently adjourned pending determination of issues of relevant insurance. A GLO has also been established for hundreds of individuals who allege that they have suffered injuries as a result of their DePuy Pinnacle Ultamet metal-on-metal hip prosthesis.

Following the 2013 review into cosmetic interventions by the medical director of the NHS in England, Sir Bruce Keogh, insurers have been considering the provision of corrections and complications cover. The Aesthetic Surgery Commitment Scheme, which runs alongside the British Association of Aesthetic Plastic Surgeons (BAAPS), provides approved cosmetic surgeons with complication insurance and we expect to see more of these products being written in the market following recent claims trends.

Judgment was handed down by the Court of Appeal in May in *Webster & Others v Liddington & Others* (2014). The Court of Appeal held that damages for misrepresentation were payable by the defendant clinicians who had provided manufacturers’ literature regarding a non-surgical cosmetic treatment called Isolagen. The procedure involved removing some of the patient’s own cells, culturing them in a bovine calf serum and then re-injecting them in the patient. The manufacturers’ literature stated that only the patient’s cells would be re-injected whereas in fact small quantities of the bovine calf serum were also injected. Whilst none of the 50 plus claimants had suffered any injury as a result, they were awarded compensation on the basis that they would not have had the procedure had they known that bovine calf serum would be present. The first instance decision that the medical practitioners had adopted the content of the literature as their own representations and that those representations were false was upheld by the Court of Appeal, in the absence of an express disclaimer as to the content of that literature. This serves as a warning to medical practitioners in the use of third party products on their patients and, in the recent cosmetic intervention climate, we may see more of these types of claims.

To find out more

Visit our Law-Now website at www.law-now.com to read more on the [Medical Innovation Bill](#) and the decision in [Webster v Liddington](#).

Contacts



Stephen Netherway

T +44 (0)20 7367 3015

E stephen.netherway@cms-cmck.com



Alaina Wadsworth

T +44 (0)20 7367 2722

E alaina.wadsworth@cms-cmck.com



Kate Murphy

T +44 (0)20 7367 2869

E kate.murphy@cms-cmck.com



Sophie Newman

T +44 (0)20 7367 3659

E sophie.newman@cms-cmck.com



Joanna Owens

T +44 (0)20 7367 2631

E joanna.owens@cms-cmck.com

Insurance Brokers

Key Issues

Eurokey v Giles

The recent case of *Eurokey Recycling Ltd v Giles Insurance Brokers Ltd* (2014) found in the broker's favour in relation to a £16 million business interruption negligence claim with Mr Justice Blair finding that the broker was not liable for the gross under-insurance of his client.

The court held that a broker is not expected to calculate the business interruption sum insured or choose a maximum indemnity period itself, as the client had the relevant knowledge to do so. However, the broker should give an adequate explanation of how to calculate the sum insured and choose a maximum indemnity period. Further the broker must also take reasonable steps to ensure that the client fully understands the meaning of 'insurable gross profit' and to ascertain the nature of the client's business and its insurance needs.

Mr Justice Blair found that a broker is not required or expected to conduct a detailed investigation into the client's business. If a client, who appears to be well informed about his business, provides a broker with information, the broker is not expected to verify that information unless he has reason to believe that it is not accurate. Where he is given express instructions as to the cover to be obtained, he must exercise reasonable care to adhere to those instructions.

The nature and scope of a broker's obligation to assess a commercial client's business interruption insurance needs will depend upon the particular circumstances of the case, including the client's sophistication and the number of times the broker has met the client in the past.

Of particular interest is that Mr Justice Blair found, in the particular circumstances of this case, that the broker could act merely as a post contractual post box (and as such not following previous case law) and that, even if he was wrong on that, he would have found the insured 50% contributory negligent.

This judgment gives a helpful steer to brokers on their duty to advise in the business interruption arena. The extent to which this case has a wider application remains to be seen.

FCA Thematic Review on conflicts of interest

The Financial Conduct Authority has found that some of the brokers that serve small and medium businesses do not have proper structures and processes in place to work in the best interest of their clients. The FCA's review was prompted by changes to brokers' business models with a number of brokers taking on functions traditionally carried out by insurers.

The FCA found that significant conflicts of interest were created, particularly where firms or groups fulfilled multiple roles in the distribution chain and acted as agent for both the customer and insurer in the same transaction. Many intermediaries relied on disclosure as the main way to address conflicts of interest rather than having effective control frameworks that prevent conflicts of interest working against customers' interests.

The FCA is taking action in supervisory engagement with the firms involved to address specific issues identified, using the full range of regulatory tools available and deemed appropriate as well as feeding these findings into the planned thematic work on commercial claims.

Brokers should ensure that they undertake a review of their conflicts procedures in light of the FCA's findings with a view to ensuring that conflicts of interest are identified and managed.

What's on the horizon?

Revision of the Insurance Mediation Directive

The Insurance Mediation Directive 2002/92/EC (IMD) sets out the regulatory requirements of EU insurance intermediaries allowing them to operate in other Member States on an establishment or freedom of services basis. The Commission is now looking to enhance the framework through the introduction of IMD2.

The aim of IMD2 is to improve consumer protection in the insurance sector through requirements for increased information provision and advice and by creating

common standards for insurance sales, improving the regulation of retail insurance sales and distribution practices across the single European market.

Key changes will be extending the scope to cover direct insurance sales as well as professional claims management and loss adjusting and prescribing mandatory disclosure at the pre-contractual stage by insurance intermediaries of the nature, basis and amount of remuneration received, as well as any variable remuneration received by individual employees. There will also be additional information requirements for the sale of bundled products. Further, the revised directive will enforce stricter requirements for the sale of life insurance products with investment elements, enhance transparency and facilitate cross-border trade by the use of a single electronic database of cross-border insurance intermediaries.

IMD2 will be a minimum harmonisation Directive, enabling Member States to impose higher standards if they wish. The Directive is likely to come into force in Member States two years from the date it is adopted by the European Parliament. Currently it is expected to be adopted in 2014 coming into force in Member States in 2016.

Contacts



Ed Foss

T +44 (0)20 7367 2313
E ed.foss@cms-cmck.com



Stephen Netherway

T +44 (0)20 7367 3015
E stephen.netherway@cms-cmck.com



Belinda Schofield

T +44 (0)20 7367 3523
E belinda.schofield@cms-cmck.com



Simon Garrett

T +44 (0)20 7367 2786
E simon.garrett@cms-cmck.com



Amit Tyagi

T +44 (0)20 7367 3578
E amit.tyagi@cms-cmck.com

Insurance contract law reform

With the Insurance Bill currently progressing through Parliament utilising the special procedure for uncontroversial Law Commission Bills, major changes are likely to be seen to insurance contract law within the next two years. While further changes may be made to the Bill, it is already clear that brokers will need to ensure that they are familiar with the proposed changes to avoid falling foul of them and thus potentially incurring more claims.

Claims trends

Professional negligence claims against brokers are still on the rise. However, the full impact of *Eurokey Recycling Ltd v Giles Insurance Brokers Ltd* remains to be seen.

To find out more

Visit our Law-Now website at www.law-now.com to read more on the [FCA's Thematic Review into broker conflicts of interest and intermediary remuneration](#) and on the decision in *Eurokey v Giles Insurance*.



Alex Denslow

T +44 (0)20 7367 3050
E alexander.denslow@cms-cmck.com



Cheryl Gibson

T +44 (0)20 7367 2927
E cheryl.gibson@cms-cmck.com



Stuart Treadaway

T +44 (0)20 7367 2541
E stuart.treadaway@cms-cmck.com



Alaina Wadsworth

T +44 (0)20 7367 2722
E alaina.wadsworth@cms-cmck.com

Insurance Law Reform

Key Issues

Following eight years of consultation, the Insurance Bill was finally introduced to Parliament in July 2014. The Bill is following the special procedure for uncontroversial Law Commission bills and is expected to receive Royal Assent before the end of the parliamentary session in March 2015. The majority of the Act's provisions would then come into force 18 months after the date on which it is passed.

To allow the Bill to be considered under the special procedure, a number of the more controversial reforms that had been included by the Law Commissions have been omitted. In its present form the Insurance Bill covers:

- Changes to the duty of fair presentation for non-consumer insurance contracts
- Warranties
- Fraudulent claims
- Amendments to the Third Parties (Rights Against Insurers) Act 2010.

Duty of fair presentation for non-consumer insureds

The changes made by the Bill would apply only to non-consumer contracts (changes to the law governing consumer contracts having been introduced by the Consumer Insurance (Disclosure and Representations) Act 2012).

The Bill imposes a new duty to make a fair presentation of the risk on non-consumer insureds. The obligation will be satisfied if, before entering into the contract, the insured discloses either:

- All material circumstances which the insured knows or ought to know, or
- Sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.

Where the insured is not an individual, what it knows will be what is within the knowledge of its senior management or those responsible for its insurance and it will also have an obligation to carry out a reasonable search for information (either held within the organisation or held by others, including the insured's agents).

The most far-reaching changes are those relating to insurers' remedies for breach of the duty of fair presentation. The insurer will be able to avoid the policy (and retain the premium) if it can show that a non-disclosure was deliberate or reckless, but in all other cases a scheme of proportionate remedies will apply which will depend on what the insurer would have done had a fair presentation been made.

Warranties

'Basis of contract' clauses, whereby pre-contractual information is converted into a warranty, will be prohibited. In addition, breach of a warranty will suspend the cover rather than discharging the insurer from liability. So if the breach is remedied the insurer would be liable to pay valid claims after that date.

Fraudulent claims

The Bill will allow an insurer to choose to terminate the contract from the date of a fraudulent claim (the insurer would be able to recover any sums already paid in respect of the fraudulent claim and would not have to return the premium). The insurer would however remain liable for non-fraudulent claims made in respect of an event occurring before the fraudulent act.

Contracting out

For non-consumer insurance the reforms will generally operate as a 'default regime'. With the exception of the prohibition on 'basis of the contract' clauses (which will be mandatory for all insurance contracts), for non-consumer contracts it will be possible for the parties to contract out and agree their own terms.

Third Parties (Rights Against Insurers) Act 2010

The Insurance Bill also amends the Third Parties (Rights Against Insurers) Act 2010, which is not yet in force. The 2010 Act simplifies the existing procedures under which claims can be brought directly against insurers where an insured has become insolvent or otherwise ceased to exist. The amendments are intended to allow the Act to be brought into force. Although no date is set in the Insurance Bill for the 2010 Act to come into force, the powers granted to the Secretary of State by the

amendments contained in the Bill would come into force two months after the Bill receives Royal Assent.

What's on the horizon?

The Insurance Bill was introduced to House of Lords under the special procedure for uncontroversial Law Commission bills in July. It is currently being considered by a Special Public Bill Committee at which stage amendments may be made to the Bill. It is anticipated

that the Bill may receive Royal Assent by March 2015. The majority of the Bill's provisions will come into force 18 months after the date on which the Act is passed.

To find out more

Visit our Law-Now website at www.law-now.com and read more on the [Insurance Bill](#).

Contacts



Stephen Netherway

T +44 (0)20 7367 3015

E stephen.netherway@cms-cmck.com



Stephen Tester

T +44 (0)20 7367 2894

E stephen.teste@cms-cmck.com



Cheryl Gibson

T +44 (0)20 7367 2927

E cheryl.gibson@cms-cmck.com



Alaina Wadsworth

T +44 (0)20 7367 2722

E alaina.wadsworth@cms-cmck.com



Monica Lesny

T +44 (0)20 7367 2873

E monica.lesny@cms-cmck.com

Pensions Professionals

Key Issues

SIPP professionals in the spotlight

It has been a busy year for SIPP professionals. After the scrutiny of the October 2013 SIPP Operator Thematic review by the Regulator, the Financial Conduct Authority, SIPP operators were subject to a 'Dear CEO' letter from the FCA in August 2014. The Regulator said that the issues about which it raised concerns in its 2013 review remained and SIPP operators were not playing their part in preventing scams and pension fraud on investors.

In last year's paper, the FCA commented that SIPP operators were to have some responsibility for the "quality" of the SIPP business they administer. It suggested operators should undertake due diligence on investments investors sought to introduce to their SIPPs - and for Unregulated Collective Investment Schemes (UCIS) - that responsibility was "enhanced". The 'Dear CEO' letter refers not to UCIS but 'non-standard assets': *those which would incur additional time and cost should they need to be transferred to another operator* which asset classes it listed definitively in its 4 August 2014 Policy Statement. The FCA's Dear CEO letter also appears more forceful. Rather than suggesting operators consider certain due diligence, such as collecting management information on investments introduced to SIPPs and measuring against benchmarks, it now wants operators to ensure investments are:

- Not a scam or linked to fraudulent activity, money laundering, or pensions liberation;
- Capable of independent valuation;
- 'Safe and secure' (which the FCA appears to consider as being subject to a binding contract); and
- Not 'impaired' (the FCA gives an example that previous investors in the same asset have previously received the income expected from it).

The FCA's views are oft-quoted by investors whose SIPP investments have not performed well and who seek to claim against the operator. However, the FCA's current concern appears to be that operators assist with detecting pension fraud rather than ensuring a SIPP investment is suitable for an investor per se. Unhelpfully then, later in August, the Financial Ombudsman Service determined the *Mr A v Berkley Burke* case. Mr A

complained that his SIPP operator had unreasonably accepted a pension investment in a potential unregulated investment scheme, Agro Energy. Deeming it had jurisdiction to hear the complaint, the FOS upheld it. The Ombudsman noted that the investment was *unusual and esoteric* and the operator should have been aware that the investment and the SIPP were potentially unsuitable for the client. The Ombudsman referred extensively to the July 2009 SIPP Thematic Review paper which referred, amongst other things, to identifying anomalous investments to enable the firm to *seek appropriate clarification of the suitability of what was recommended* to the client. This FOS decision is believed to be the first of its kind and is out-of-kilter with decisions from the Pensions Ombudsman Service which, to date, has expected only limited duties of due diligence on operators.

However, in a most unusual development, the FOS' decision has recently been removed from its website amidst criticism from the pensions industry. It is said the decision is "under review".

Enhanced Transfer Value pension transfers

At the end of July, the FCA published the findings of its review into ETV pension transfers. The focus of the review was on the suitability of bulk transfer advice provided by financial advisers where employers offered an enhancement to the transfer value available to incentivise current and former employees to leave their existing defined benefit schemes. The FCA found a divergence in the approach and quality of advice given. It found that some financial advisers had not complied with the contemporaneous requirements and guidelines. In particular it found cases where: (1) the recommendations made were not suitable for the member's desired risk profile, in some cases, because the adviser failed adequately to establish how much risk the member was willing to take, (2) generic templates were inadequately tailored to specific member circumstances, (3) advice was focussed solely on critical yield analysis, (4) uncompetitive charging structures were used, and (5) there was limited consideration of the member's means or tax implications.

The FCA is now working with individual firms to address unfair outcomes. All financial advisers who provide pension transfer advice should consider the FCA requirements and findings and review their arrangements accordingly. The FCA has also made plain that senior management must ensure that firms deliver fair customer outcomes. The above said, the FCA has recognised that there is not necessarily any immediate risk to many of the affected customers.

What's on the horizon?

The March 2014 budget marked major pensions reform, followed in September by the Chancellor's announcement that he is abolishing 'death tax' on pensions and the announcement in October that the tax free element of a pension need not be taken in one lump sum. Perhaps most significantly, from April 2015, individuals will be permitted to take the *whole* of their pension as a lump sum from aged 55. They may invest it outside of their, say, workplace Defined Contribution scheme in a sound investment portfolio they will only access several years later. However, there is nothing to prevent individuals spending the lump sum in its entirety or investing it all in the sort of non-standard assets about which the FCA has raised so many concerns and for which there may be no, or only limited, Financial Services Compensation Scheme protection. As the Financial Services Consumer panel's chair said, "*the new freedom will mean people are exposed to vital and complex choices*".

There has been much debate about what advice will be available to individuals regarding where to invest. The current proposal is that the government-run Citizens Advice Bureau and The Pensions Advisory Service give guidance (but not advice) to individuals. In July, the FCA proposed pension providers and scheme trustees give individuals relevant information about their pension savings and benefits including the size of their pot, then "*clearly point them to the guidance service*". Exactly what information or warning should be given by providers and trustees currently remains unclear, just 5 months before the changes take effect.

Many fear the current proposals to assist consumers are insufficient given, for example, the degree of investment choice available. Accordingly, and depending on the FCA's attitude, there may be scope in the future for IFAs to offer limited advice on pensions' investment. That, however, probably requires additional 'conduct' rules in circumstances where the existing rules on pension drawdown are already outdated.

Additionally, we have already seen software products in the pipeline, designed to forecast the pension income required and how that might be obtained. At the same time, annuities are rendered an increasingly unattractive option: individuals need not buy one aged 75 now and, if they instead have a private pension, the capital will pass on their death with the beneficiaries only paying tax at their marginal rate. This is likely to spawn alternative pension products that offer an element of guaranteed income, as annuities do, but with some provision for capital. How secure those products are and their benefit to investors is, of course, all to be seen.

Claims trends

The FOS appears to be showing an increased willingness to consider complaints against pensions administrators and trustees. This is notwithstanding that the Memorandum of Understanding between the Pensions Ombudsman Service (POS) and the FOS provides that the POS deals with complaints regarding (mal) administration and, ordinarily, FOS deals with complaints regarding investments' sale and advice.

In recent complaints to the FOS regarding pensions professionals, we have argued that it is the POS which has jurisdiction. The FOS has accepted that the POS may be 'better placed' to consider the complaint and therefore recommend it is transferred. However, the FOS has suggested that it cannot force a complainant to have his/her complaint determined at the POS. In another FOS case of which we are aware, the Adjudicator has suggested that he can consider a complaint against an Occupational Pension Scheme Trustee where it concerns *regulated business*. Further again, the FOS website now suggests that it can consider complaints regarding Small Self-Administered Pension Schemes (SSASs) although SSASs currently remain unregulated.

The prospect of a time-pressed tribunal most accustomed to PPI and bank-related complaints like the FOS dealing with complaints against pensions professionals will be a source of concern to many. As the *Berkley Burke* case mentioned above (currently) suggests, the FOS may be more willing to adopt an approach which leads to what it considers to be a just result, rather than applying the law. It may be that judicial review is required to ascertain when, if at all, the FOS can hear a pensions case against an administrator and/or trustee. This clarity should prevent claimant solicitors 'tribunal shopping' between the FOS and POS as suits their case.

Contacts



Ed Foss

T +44 (0)20 7367 2313
E ed.foss@cms-cmck.com



Daniel Shaw

T +44 (0)20 7367 3203
E daniel.shaw@cms-cmck.com



Simon Garrett

T +44 (0)20 7367 2786
E simon.garrett@cms-cmck.com



Caroline Hall

T +44 (0)20 7367 2578
E caroline.hall@cms-cmck.com



Neil Smith

T +44 (0)20 7367 3848
E neil.smith@cms-cmck.com



Alaina Wadsworth

T +44 (0)20 7367 2722
E alaina.wadsworth@cms-cmck.com



Zoe Burge

T +44 (0)20 7367 2353
E zoe.burge@cms-cmck.com



John Enoch

T +44 (0)20 7367 2432
E john.enoch@cms-cmck.com



Emma Morris

T +44 (0)20 7367 2474
E emma.morris@cms-cmck.com



Amit Tyagi

T +44 (0)20 7367 3578
E amit.tyagi@cms-cmck.com

Property

Key Issues

Compensation for consequential losses from riot damage and proposed reforms

In a landmark decision this summer the Court of Appeal ruled that consequential losses are recoverable under the Riot (Damages) Act 1886.

In the case of *Mitsui Sumitomo Insurance Co (Europe) Ltd v The Mayor's Office for Policing and Crime (MOPAC)* (2014) it was held at first instance that compensation payable under the Act was limited to physical damage and did not extend to consequential losses. MOPAC's appeal against the original decision was dismissed and the claimants successfully cross-appealed to be awarded their consequential losses on the basis that the Act covers all heads of loss compensable under English law for damage and there was no specific exclusion for consequential loss.

The court noted that when fixing the level of compensation the compensating authority should give consideration as to what is "just" and can also take into account the conduct of the person whose property has been damaged, stolen or destroyed.

The decision is positive news for the insurance industry as insurers will be able to recover damages for consequential losses which were indemnified as a result of the 2011 London riots.

Critics of the ruling say that the ruling will simply lead to spiralling costs to the Police Authorities that provide compensation under the Act, which in turn may lead to more disputed claims against the Police Authorities (either by insurers or uninsured victims). The Authorities may choose to take a stringent view of what a claimant is entitled to by arguing over whether the compensation due is "just".

The Court of Appeal has commented that while the broad application of the Act may seem unfair against the Police Authorities it is for Parliament, not the courts, to amend it or remove it altogether. Parliament appears to have heeded this comment and on 5 June 2014 the Government announced a consultation on reform of the Act. Early indications are that any draft Bill will exclude cover for consequential losses. Of even greater potential significance are proposals that limit who could make a

claim. The current proposal is that only businesses with an annual turnover of less than £2 million would be able to make a claim. The original consultation period closed in August.

The ABI has criticised the proposed reforms claiming that the cap would leave only the smallest businesses able to claim compensation following a riot. The ABI estimated that for every £10 paid in compensation following the 2011 riots only £1 would be paid under the reformed Act. The Home Office has responded by stating that no final decisions have been taken and responses to the consultation are being considered before deciding which proposals to take forward.

Flood Re update: response to consultation and tender for retrocession broker

Flood Re has published its response to the Department of the Environment Food and Rural Affairs' consultation on the scheme's regulations. Flood Re was due to go live in summer 2015 but that target date is expected to be pushed back to Q4.

The published response acknowledges the good work undertaken to date by both industry and Government in partnership towards implementing the scheme. We have previously reported that Flood Re was intended to exclude properties in council tax Band H, all commercial properties and any properties built after 2009. The response proposes that Band H properties are included in the scheme, which would simplify its operation and reflect the political will to include all properties. However, it seems that the exclusion of commercial properties and new build housing will remain part of the final scheme.

The response also raises various other concerns over the scheme's administration and proposes several changes that it says will improve the running of the scheme. These include changes to the way additional funds can be raised and/or repaid as well an enhanced ability to borrow to allow the scheme to operate as efficiently and effectively as possible.

Flood Re will work with the Government to reach agreement on these issues before the scheme is launched next year.

Flood Re has also published a tender for the services of a retrocession broker. The tender invites bidders to apply for an initial 4-year contract, extendable by Flood Re for further periods so that the term may be up to 7 years in total. The broker will provide Flood Re's advice on retrocession and/or other protection together with catastrophe modelling services. In addition the broker will procure and place outwards reinsurance and/or other protection on behalf of Flood Re.

Subrogation – insurers do not always have the right

The cases of *Gran Marine v China National Chartering Co* (2013) and *Rathbone Brothers Plc v Novae Corporate Undertaking* (2013) were mentioned in the last edition of Insurance Issues as decisions of particular importance in the context of subrogated recovery claims. In November the Court of Appeal handed down its decision in the *Rathbone* case which confirmed that, in some specific circumstances, insurers' right to subrogation may be impliedly excluded by virtue of the parties' intention.

The *Rathbone* case involved a relatively unusual arrangement whereby the individual insured benefitted from a policy of insurance held by his former employer and a separate indemnity agreement entered into with his former and present employer (a subsidiary of his original employer) each of which would have met his claim. The Court of Appeal elected to imply terms into the policy which prevented insurers from being able to pursue a subrogated recovery claim against one co-insured under the policy in respect of an indemnity payment made to another. The court also implied a term into the indemnity agreement that it should only apply where the claim against the insurance company had been exhausted as that was clearly the intention of the parties. The Court of Appeal was at pains to emphasise that the case was fact specific and it would not readily imply terms to contracts but that on this occasion it was warranted.

Permission to appeal the subrogation issue was reserved and it may be that this important issue is heard again in the near future. This case highlights the importance to co-insureds of carefully considering the arrangements

between them if they want to prohibit the insurer from pursuing a subrogated claim against one of the co-insureds; it is unlikely that co-insureds will regularly benefit from the court's discretion to imply terms into a policy excluding subrogation.

What's on the horizon?

The Energy Act places restrictions that prohibit the letting of properties that do not conform to energy performance standards. Although the Act does not come into effect until April 2018 insurers need to start considering how to handle its effect now, including any changes they may need to make to their underwriting procedures and policy wordings. There is a concern within the market that the stringent restrictions may lead to an increase in unoccupied properties and reduce rental stock leading to overcapacity in the market.

Claims trends

Global natural disaster costs have grown to \$200 billion/year. The average cost of natural disasters has quadrupled over the last three decades from \$50 billion/year in the 1980s to \$200 billion in the last decade. In three of the last four years costs have exceeded \$200 billion. Research has shown that every dollar spent on prevention brings at least \$4 in saving on damage. While prevention is certainly better than cure there is a sense within the market that insureds are developing more sophisticated insurance programmes to better manage their risk and that is part of the reason for the high levels of losses. We expect insureds to continue to better manage their risks and for losses to remain high.

A growing awareness of broader environmental liabilities and the increased attention being paid to 'green' construction and manufacturing is spurring new product development and additional premium volume for mainstream and specialty insurance.

To find out more

Visit our Law-Now website at www.law-now.com and read more on the decision in *Mitsui Sumitomo Insurance Co (Europe) Ltd v The Mayor's Office for Policing and Crime*.

Contacts



Simon Kilgour

T +44 (0)20 7367 2152

E simon.kilgour@cms-cmck.com



Simon Garrett

T +44 (0)20 7367 2786

E simon.garrett@cms-cmck.com



Alex Denslow

T +44 (0)20 7367 3050

E alexander.denslow@cms-cmck.com



Monica Lesny

T +44 (0)20 7367 2873

E monica.lesny@cms-cmck.com



Stephen Tester

T +44 (0)20 7367 2894

E stephen.testler@cms-cmck.com



Amit Tyagi

T +44 (0)20 7367 3578

E amit.tyagi@cms-cmck.com



Belinda Schofield

T +44 (0)20 7367 3053

E belinda.schofield@cms-cmck.com

Reinsurance

Key Issues

Construction of warranty

In the recent decision in *Amlin v Oriental Assurance*, the Court of Appeal agreed with the trial judge's conclusion that the reinsurance policy was avoided on the grounds that a typhoon warranty had been breached. The typhoon warranty prohibited a vessel from sailing from a port with a typhoon warning, or to sail when the destination or possible route was in the path of an announced typhoon. The Court of Appeal found that the words of the warranty should be given their ordinary meaning and that there was no intention of the warranty other than to protect reinsurers from any possible encounter with a typhoon. As a matter of fact the Court of Appeal also found the vessel took its usual intended route and sailed into the area subject to a weather bulletin.

This case serves as a reminder of the importance and advantage to reinsurers of securing an English law and jurisdiction clause within the insurance policy. It gave Amlin the advantage of English law on policy construction and on the effect of a breach of warranty within a reinsurance contract. It also gave Amlin a platform to secure an early resolution of facultative reinsurance claims without having to wait for lengthy underlying proceedings to be resolved.

Follow the settlements

An *ICA v Scor* type 'follow settlements' clause requires the reinsured to prove that (1) the claim falls within the reinsurance as a matter of law, and (2) that it took all reasonable and businesslike steps in settling its inwards claim.

As to what amounts to "reasonable and businesslike steps", the Commercial Court decision in *Tokio Marine Europe Insurance Limited v Novae Corporate Underwriting Limited* suggests that a settlement is likely to be upheld if the reinsured has achieved a 'good deal' from a commercial standpoint. In particular, a reinsurer is unlikely to be able to challenge the steps taken by the reinsured unless it can demonstrate that, if the reinsured acted differently, it would have achieved a materially better settlement.

What's on the horizon?

After a quiet hurricane season, downwards pressure on reinsurance rates for property catastrophe business is likely to continue, with many major buyers looking to reduce their reinsurance spend in 2015 by simplifying their programmes or retaining additional exposures net. Meanwhile non-traditional capital continues to compete with traditional reinsurers, and many overseas reinsurers are seeking a foothold in the London market by buying into existing Lloyd's Managing Agencies or establishing new Special Purpose Syndicates.

The big question for the market in 2015 is likely to be how resilient reinsurance programmes prove to be in the event of major catastrophe. During the Napa Valley earthquakes in August 2014 there were ongoing aftershocks for several days after the main quake on 24 August 2014 which emphasised the interconnectivity of seismic activity. A series of major earthquakes with a pattern of intermediate aftershocks, similar to the Canterbury earthquake sequence in New Zealand in 2010-11, repeated in California, would test the resilience of many reinsurance programmes.

Historically, the Excess of Loss market's approach to the causation and aggregation of earthquake losses has tended to focus on the applicable 'hours' clauses (typically either 72 hours or 168 hours for earthquake), a fairly arbitrary approach which pays little regard to the causative connections between earthquakes. Alternative clauses seeking to apply a more scientific approach have been current in the market for some time, but are susceptible to differing interpretations. Whereas windstorm exposures tend to arise at relatively predictable times of year (the 'hurricane season' for example), earthquakes can occur at any time of year, and straddle reinsurance policy periods.

Another area of concern would be the reaction of the local courts and politicians following a major catastrophe such as a Californian earthquake (or a series of related earthquakes). Assumptions based on previous catastrophes several decades ago will not necessarily be borne out.

Disputes in the reinsurance market have been fewer in number in recent years, but the scope for an increased number of disputes arising from a major catastrophe remains, particularly in circumstances where many reinsurance programmes have not been fully tested in recent years.

Claims trends

The soft reinsurance market has caused many commentators to report rate reductions as much as 15-20 per cent for 1 June 2014 renewals. As well as low premiums, we are seeing broader terms and conditions in favour of the reinsured, which in turn increases the risk of disputes. Some examples of broader terms include the change in variation in an hours clause from 72 to 168 hours, 'Sole Judge' clauses (which allow the reinsured to dictate what constitutes an event for the purposes of aggregation), and the adoption of local law and jurisdiction instead of English law.

A soft market presents risk and reward for underwriters. There is a danger that underwriters will write risks the very nature of which they do not fully understand. This carries an obvious risk for the reinsurer, and presents an increased risk of litigation for the reinsured and the broker. However, if underwriters can maintain profitability by ensuring they understand as fully as possible the risks being insured, it can provide them with a platform to compete with rivals on price. Risks can be limited by either the reinsured or reinsurers by creating and maintaining an evidential trail of negotiation, paying particular attention to clarity in wordings given the soft market.

To find out more

Visit our Law-Now website at www.law-now.com and read more on the decision in [Tokio Marine v Novae](#).

Our monthly Reinsurance Bulletins discuss issues relevant to the reinsurance market. To be added to our email list please contact Alex Denslow.

Contacts



Simon Kilgour

T +44 (0)20 7367 2152
E simon.kilgour@cms-cmck.com



Alex Denslow

T +44 (0)20 7367 3050
E alexander.denslow@cms-cmck.com



Stephen Netherway

T +44 (0)20 7367 3015
E stephen.netherway@cms-cmck.com



Ed Foss

T +44 (0)20 7367 2313
E ed.foss@cms-cmck.com



Neil Beighton

T +44 (0)20 7367 3017
E neil.beighton@cms-cmck.com



Kate Murphy

T +44 (0)20 7367 2869
E kate.murphy@cms-cmck.com



Scarlett West

T +44 (0)20 7367 2652
E scarlett.west@cms-cmck.com



Hayley Stevenson

T +44 (0)20 7367 3346
E hayley.stevenson@cms-cmck.com



Sophie Newman

T +44 (0)20 7367 3659
E sophie.newman@cms-cmck.com



Carly Enkin

T +44 (0)20 7367 3034
E carly.enkin@cms-cmck.com

Solicitors' PI

Key Issues

Clarification of the court's approach to relief from sanctions

This summer saw the Court of Appeal issue its judgment in *Denton v TH White Ltd, Decadent Vapours Ltd v Bevan, Utilise TDS Ltd v Davies* (2014) concerning three appeals from decisions regarding applications for relief from sanctions pursuant to CPR rule 3.9. The Court of Appeal restated the approach that should be applied to relief from sanctions applications – the new guidance is in the form of a three stage test which replaces the *Mitchell* guidelines (the judgment in *Mitchell* has been “misunderstood and is being misapplied by some courts”, albeit the Court of Appeal reiterated that the guidance in *Mitchell* “remains substantially sound”). The court should:

1. identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court direction. If the breach is not serious or significant, then relief from sanctions should usually be granted;
2. consider why the failure or default occurred, and whether there was good reason for it. Where there is good reason for a serious and significant breach, relief is likely to be granted;
3. consider all the circumstances of the case to enable it to deal with the application justly, including the need (a) for litigation to be conducted efficiently and at proportionate cost and (b) to enforce compliance with rules, practice directions and orders. The effect of the breach, the conduct of the defaulting party and the promptness of the application should be considered.

Significantly, the Court of Appeal discouraged parties and their lawyers from taking advantage of mistakes made by opposing parties and acting unreasonably in opposing applications for relief from sanctions. A non-defaulting party should only contest an application for relief from sanctions in exceptional cases and the court will be more ready in future to penalise opportunism and unreasonable refusals to agree extensions for deadlines.

There has already been a reduction in satellite litigation; the 12-month period between the *Mitchell* and *Denton* judgments saw over 65 relief from sanctions decisions; the period since *Denton* has seen around 5. Further information is available on these other decisions upon request.

Breach of trust and equitable compensation

The recent Supreme Court decision in *AIB Group (UK) Plc v Mark Redler & Co Solicitors* (2014) has clarified the equitable compensation available for breach of trust, with particular regard to commercial trusts seen between lenders and their solicitors. The defendant solicitors acted for the claimant in a re-mortgage transaction. In error and in breach of trust, the defendant solicitors failed to discharge a charge held by Barclays over the property by paying Barclays £300,000 less than the amount owed. The claimant then took a second charge and Barclays agreed to limit its charge to the £300,000. The property was subsequently repossessed and the shortfall on the claimant's charge was £4 million. The issue was whether the claimant was entitled to compensation for breach of trust in the amount of the loss suffered (the £4 million shortfall) or whether the Court of Appeal was correct to limit the claimant's remedy to the amount of Barclay's charge.

The Supreme Court has rejected the claimant's appeal because, as set out by Lord Toulson:

- there was consensus across a range of common law jurisdictions that *Target Holdings Ltd v Redfems* (1995) (which established that equitable compensation could be based on the link between the breach and the loss actually suffered by the beneficiary) provided the correct approach to assessing equitable compensation for breach of trust and it would be a “backward step” for the Supreme Court to reinterpret this approach;

- where there is a breach of trust, the purpose of any remedy is either to:
- put the beneficiary in the same position as if the breach had not occurred; or
- provide the beneficiary with any profit the trustee made via the breach;
- a monetary award that reflected neither loss caused nor profit gained by the solicitors “would be penal”; and
- to say the solicitors caused a loss of £2.4 million, despite the fact that most of that sum would have been lost had the firm properly applied the monies in the way the claimant had instructed, would be “to adopt an artificial and unrealistic view of the facts”; although the language of some historical case-law referred to the breach of trust entailing a “debt” obligation of the trustee (fixed at the time of the breach), this was not the correct legal analysis. Proper application would have resulted in the solicitors paying Barclays the full amount to redeem the two accounts and the claimant therefore obtaining security for an extra £300,000 of its £3.3 million advance.

What’s on the horizon?

Judicial consideration and review of the Jackson reforms is ongoing with Mr Justice Ramsey leading the implementation of the reforms.

One change already seen, however, is that the costs management provisions have applied automatically to all Part 7, multi-track claims issued in any court on or after 22 April 2014, except for those claims where the amount claimed is £10 million or more. Even where an exception applies, the court can order that the costs management rules must be followed in any event.

The case of *Godiva Mortgages Limited v Willmott Solicitors* concerns the aggregation wording in the

applicable Minimum Terms and Conditions and its construction in the context of mortgage fraud and various resulting lender claims. The quantum of the claims against the firm - it is understood - exceed £40m, whereas the firm’s insurers, Travellers and RSA, have capped cover at £10m on the basis the claims aggregate. The firm is now in liquidation and its partners are largely bankrupt. The Law Society (in its representative capacity and “its regulatory capacity as the Solicitors Regulation Authority”) intervened in the action. The trial was due to take place in November, however, it is understood that Godiva has recently settled its claim in these proceedings. As such, we understand that the proceedings have been stayed while both Travelers and the Law Society write to “concerned parties” to invite them to apply to be joined as claimants and re-commence proceedings. It remains to be seen whether any new claimants come out of the woodwork. If the case does proceed to judgment, it will be of considerable importance, as the existence of arbitration clauses in solicitors’ PI wordings have contributed to a paucity of judgments on aggregation to date.

To find out more

See our publication *Solicitors’ Claims: A Practical Guide*. For further details go to [Sweet & Maxwell’s page for the Guide](#).

Visit our Law-Now website at www.law-now.com and read more on the Supreme Court’s decision in *A/B v Redler*.

Contacts



Anna Crew

T +(0)20 7367 2591

E anna.crew@cms-cmck.com



Stuart Treadaway

T +44 (0)20 7367

E stuart.treadaway@cms-cmck.com



Zoe Burge

T +44 (0)20 7367 2353

E zoe.burge@cms-cmck.com



Estelle Duxbury

T +44 (0)20 7367 2366

E estelle.duxbury@cms-cmck.com



Belinda Schofield

T +44 (0)20 7367 3053

E belinda.schofield@cms-cmck.com



Sophie Newman

T +44 (0)20 7367 3659

E sophie.davies@cms-cmck.com



Harriet Munro

T + 44 (0) 131 220 8993

E harriet.munro@cms-cmck.com



Mexico City



Rio de Janeiro



Aberdeen

Glasgow

Edinburgh

Bristol

London

Utrecht

Amsterdam

Paris

Luxembourg

Lyon

Milan

Ljubljana

Lisbon

Madrid

Seville

Casablanca

Algiers

Barcelona

Rome

Hamburg

Berlin

Leipzig

Duesseldorf

Cologne

Frankfurt

Prague

Stuttgart

Munich

Strasbourg

Zurich

Geneva

Ljubljana

Vienna



Law-Now™

CMS Cameron McKenna's free online information service

Receive expert commentary and analysis on key legal issues affecting your business.

Register for free email alerts and access the full Law-Now archive at www.law-now.com

CMS Cameron McKenna LLP
Mitre House
160 Aldersgate Street
London EC1A 4DD

CMS Cameron McKenna LLP
80 Leadenhall St,
London EC3A 3DH

CMS Cameron McKenna LLP
2 College Square,
Anchor Road,
Bristol BS1 5UE

CMS Cameron McKenna LLP
Saltire Court,
20 Castle Terrace,
Edinburgh EH1 2EN

T +44 (0)20 7367 3000

F +44 (0)20 7367 2000

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.

CMS Cameron McKenna LLP is a limited liability partnership registered in England and Wales with registration number OC310335. It is a body corporate which uses the word "partner" to refer to a member, or an employee or consultant with equivalent standing and qualifications. It is authorised and regulated by the Solicitors Regulation Authority of England and Wales with SRA number 423370 and by the Law Society of Scotland with registered number 47313. It is able to provide international legal services to clients utilising, where appropriate, the services of its associated international offices. The associated international offices of CMS Cameron McKenna LLP are separate and distinct from it. A list of members and their professional qualifications is open to inspection at the registered office, Mitre House, 160 Aldersgate Street, London EC1A 4DD. Members are either solicitors or registered foreign lawyers. VAT registration number: 974 899 925. Further information about the firm can be found at www.cms-cmck.com

© CMS Cameron McKenna LLP

CMS Cameron McKenna LLP is a member of CMS Legal Services EEIG (CMS EEIG), a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices. Further information can be found at www.cmslegal.com