



In this week's Insurance Bulletin:

1. REGULATION AND LEGISLATION

UK: Insurance special purpose vehicles (ISPVs):
Updates to authorisation and supervision

UK: Lloyd's notification strategy for its Brexit Part VII
transfer receives High Court approval

2. COURT CASES AND ARBITRATION

England & Wales: Update on the FCA test case on the
validity of COVID-19 Business Interruption claims

Scotland: Appeal Court considers waiver of the
Insurance Act 2015 duty of fair presentation

3. HFW PUBLICATIONS AND EVENTS

HFW Briefing: Australian Parliamentary Inquiry into
the Class Action Industry



WILLIAM REDDIE
SENIOR ASSOCIATE, LONDON

“Firms who wish to apply for, or have obtained authorisation as ISPVs and (re)insurers seeking to use ISPVs as a risk mitigation will need to comply with these rules.”

1. REGULATION AND LEGISLATION

UK: Insurance special purpose vehicles (ISPVs): Updates to authorisation and supervision

The PRA recently published a Policy Statement (PS13/20)¹ on its approach to the authorisation and supervision of ISPVs. The Policy Statement also provides feedback to the PRA’s Consultation Paper (CP 19/19)² and sets out its final policy.

The changes are primarily to update Supervisory Statement 8/17 ‘*Authorisation and supervision of insurance special purpose vehicles*’.³ The main changes, effective from 22 May 2020, are:

- 1 the ‘**documentation requirements**’ section provides that whilst the PRA understands that some outstanding commercial terms may only be finalised post-approval, this must be communicated in the documentation prior to approval being granted. Independent third-party opinions will not always be required, but may be necessary where they would assist the PRA in assessing the conditions for authorisation;
- 2 the ‘**funding arrangements**’ section describes the PRA’s expectations where there may be changes to an ISPV’s risk and/or funding (e.g. ‘roll-over’ mechanisms). Notably, when ‘roll-over’ funding is used, it will not be possible to use the same funds to meet the funding requirements of two consecutive risk transfer arrangements simultaneously.
- 3 the ‘**risk transfer requirements**’ section elaborates on the PRA’s expectations on risk transfers. Importantly, a stand-alone ISPV, and a single cell of a PCC, may only take on a single contract for risk transfer from a single cedant.

- 4 greater readability and detail on how the Scope of Permission (SOP) may be used in practice; how similar ‘repeat’ transactions will be treated to minimise duplication; and a reminder that the PRA may require an accounting consolidation assessment where an ISPV is consolidated into a group.

Firms who wish to apply for, or have obtained authorisation as ISPVs and (re)insurers seeking to use ISPVs as a risk mitigation will need to comply with these rules. The PRA has stated that it intends to keep the Policy Statement under review amidst changes in the UK regulatory framework.

WILLIAM REDDIE

Senior Associate, London
T +44 (0)20 7264 8758
E william.reddie@hfw.com

Additional research by Amalia Tzima (Trainee Solicitor, London)

UK: Lloyd’s notification strategy for its Brexit Part VII transfer receives High Court approval

The High Court has approved Lloyd’s notification strategy for the transfer of its EEA business to its Belgian subsidiary, Lloyd’s Insurance Company SA.

The transfer concerns non-life EEA insurance business written in the Lloyd’s market from 1993 to 2020 and represents about 8% of the total gross premium written in that time. The Society of Lloyd’s proposed the transfer as its members will soon lose their passporting rights once the UK exits the European Union. The proposed scheme will enable the transferee to continue to service EEA policies after Brexit.

Regulation 3 of the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirement on Applicants) Regulations 2001

¹ PS 13/20, see <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/policy-statement/2020/ps1320.pdf?la=en&hash=9FEF5F84E3840F347F948A70835BED0994CF769D>

² CP19/19, see: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/consultation-paper/2019/cp1919.pdf>

³ SS 8/17, see <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/supervisory-statement/2017/ss817update-may-2020.pdf?la=en&hash=3BC472FCB4A2C6CD698742C396A917D913D910CD>

(the “Regulations”) imposes certain notification requirements on transfers of insurance business. Lloyd’s had sought waivers of the requirements for notices under the Regulations to be published in the Gazette (and other newspapers), and to be sent to every policyholder. Instead, it proposed to email all the managing agents, brokers, coverholders and third party administrators identified as having written or serviced EEA business to ask that they: i) notify any policyholders that would be affected by the transfer scheme; ii) publish a message about the transfer prominently on their customer-facing websites; and iii) inform policyholders who made new claims to the scheme.

The court was satisfied that the transfer would not negatively affect policyholders as the risks were reinsured back to the Lloyd’s market via quota share reinsurance. The independent expert indicated that the proposed communications strategy was adequate and proportionate and both the FCA and PRA agreed to the suggested waivers. Consequently, the High Court granted the application and made the order dispensing with the notification requirements which Lloyd’s had requested be waived.

Notifications will be sent out from the middle of June and will include a letter that will outline the details of the transfer. The letter will also provide links to a dedicated website, which is now live: www.lloyds.com/brexittransfer.

This website will provide customers with;

- an explanation of the proposed transfer;
- the Scheme document (and a summary of it);
- the Independent Expert’s report (and a summary of it) on the impact of the Part VII on policyholders;
- the formal Legal Notice of the proposed transfer, which will be publicised in UK and EEA newspapers;
- a set of Frequently Asked Questions; and
- details of how policyholders can contact Lloyd’s.

The Brexit transfer website, and the key documents contained within, will also be available in German, Spanish, French, Italian and Dutch. Further, customers will be able to ask questions and raise any objections they may have up to the date of the sanctions hearing, currently scheduled for 1 October 2020.

REBECCA HUGGINS

Professional Support Lawyer, London

T +44 (0)20 7264 8120

E rebecca.huggins@hfw.com

Additional research by Rhys Durbin (Trainee Solicitor, London)

2. COURT CASES AND ARBITRATION

England & Wales: Update on the FCA test case on the validity of COVID-19 Business Interruption claims

The FCA has published updates¹ on the progress of its court action on business interruption (BI) insurance policies to claims arising out of COVID-19.

Since its original announcement on 1 May, which we reported on here², the FCA has approached 56 insurers and reviewed more than 500 relevant policies. It has identified a representative sample of 17 policy wordings – which can be found here³ – capturing the majority of key issues that could be in dispute.

The FCA’s web page update includes a (non-exhaustive) list of insurers which were invited by the FCA, and which have agreed, to participate in the proceedings, as well as the policy wordings they use. One important point which the FCA has made is that policyholders should not assume that inclusion of their policy wording in the test case will mean that their policy covers losses suffered as a result of Covid-19.

The FCA filed its claim on 10 June⁴ and the first Case Management Conference took place on 16 June. At this hearing, Mr Justice Butcher ordered that the case should be heard on an expedited basis, that the Financial Markets Test Case Scheme will apply, and that further hearings will be live-streamed. Insurers are due to file their Defences on 23 June,



REBECCA HUGGINS

PROFESSIONAL SUPPORT LAWYER,
LONDON

“The court was satisfied that the transfer would not negatively affect policyholders as the risks were reinsured back to the Lloyd’s market via quota share reinsurance.”



COSTAS FRANGESKIDES
PARTNER, LONDON



WILLIAM REDDIE
SENIOR ASSOCIATE, LONDON

“The FCA has clarified that it is seeking a judgment that will provide greater clarity on which BI policies respond to the pandemic.”

and a second Case Management Conference will take place on 26 June.

The substantive hearing is scheduled to take place over eight days from 20 July and will be heard by Mr Justice Butcher and Lord Justice Flaux.

The FCA has clarified that it is seeking a judgment that will provide greater clarity on which BI policies respond to the pandemic. The FCA reiterated that, as most SME insurance policies focus on property damage, at least in the majority of cases insurers will not be obliged to pay claims relating to COVID-19.

Alongside these updates, the FCA has published Finalised Guidance⁵ setting out the FCA's expectations of firms handling BI claims and any related complaints during the test case, and a Feedback Statement summarising the feedback received on the draft guidance published on 1 June. It has also asked insurers to check their policy wordings to see if they will be impacted by the test case's outcome and to write to all policyholders who have made a claim arising out of COVID-19 to confirm whether or not their claim is affected by the test case.

COSTAS FRANGESKIDES

Partner, London

T +44 (0)20 7264 8244

E costas.frangeskides@hfw.com

WILLIAM REDDIE

Senior Associate, London

T +44 (0)20 7264 8758

E william.reddie@hfw.com

Footnotes

- <https://www.fca.org.uk/news/press-releases/update-fca-test-case-validity-business-interruption-claims>
- <https://www.hfw.com/FCA-seeks-Court-rulings-on-COVID-19-coverage-under-industry-Business-Interruption-insurance-wordings>
- <https://www.fca.org.uk/publication/corporate/preliminary-list-affected-insurers-policies.pdf>
- <https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-particulars-of-claim.pdf>
- <https://www.fca.org.uk/publications/finalised-guidance/business-interruption-insurance-test-case>

Scotland: Appeal Court considers waiver of the Insurance Act 2015 duty of fair presentation

The recent appellate decision in the Scottish case of *Young v RSA*¹ considered the question of waiver in the context of the duty of fair presentation. In finding there had been no waiver, the Court held that no reasonable person would consider the insurer had restricted its right to receive all material information, and was it therefore entitled to avoid a policy of insurance.

The case involved a claim under a policy of insurance in respect of commercial property in Glasgow. The policy covered the insured against various perils including fire. On 22 March 2018, the premises were damaged by fire and the insured made a claim under the policy for £7.2m. The insurer declined the claim and sought to avoid the policy on the basis that the insured failed to disclose that he had been a director of companies that were subject to insolvent liquidation (the information).

Placement

The insured's broker presented the risk to the insurer by way of a digital template Market Presentation dated 13 February 2017. The Market Presentation included a "moral hazard declaration" which directed the insured to "Select any of the following that apply to any proposer, director or partner of the Trade or Business or its Subsidiary Companies if they have ever, either personally or in any business capacity." The response was "None".

By email dated 24 March 2017, the insurer offered terms based on the Market Presentation and noted that the insured had never "[b]een declared a bankrupt or insolvent" or "[h]ad a liquidator appointed". The insured's broker confirmed the accuracy of the email and the policy subsequently inception.

First instance decision

At first instance, the issue was whether the failure to disclose the information was a breach of the duty of fair presentation under the Insurance Act 2015 (the Act). Section

3 of the Act requires an insured to make a fair presentation of the risk, meaning disclosure of every material circumstance which the insured knows or ought to know. Section 7(3) of the Act provides a material circumstance is one that would influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what terms.

The insured conceded that it did not disclose the information, but argued the insurer was not entitled to avoid the policy on grounds that the information was something as to which the insurer waived disclosure (the insured abandoned its contentions that the non-disclosure was not material and there had been no inducement of the insurer in accepting the risk).

The judge found that the insured's arguments on waiver were irrelevant.

Appeal

The insured appealed, arguing that the Commercial Judge should have construed the 24 March 2017 email as waiving any entitlement to disclosure of the information. The insured's position was that the email was limited to confirmation that the insured *himself* had never been declared bankrupt or insolvent or had a liquidator appointed.

The Court of Session Inner House held that a reasonable reader of the 24 March 2017 email would consider that the insurer was concerned with the insured's wider experience in insolvency. Further, the email went beyond the stage of enquiry and the insurer had already assessed and priced the risk on that basis. The Court rejected the insured's argument that the insurer waived its entitlement to the information by confirming that there would be no cover in the event that the insured had a direct (as opposed to indirect or wider) experience of insolvency.

PHIL KUSIAK

Senior Associate, London

T +44 (0)20 7264 8384

E phil.kusiak@hfw.com

Footnotes

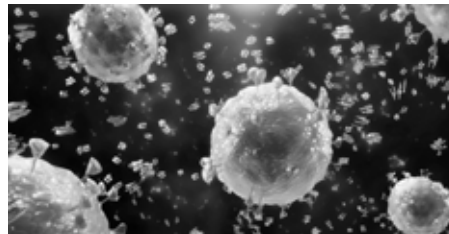
¹ *Young v Royal and Sun Alliance Insurance Plc* [2020] CSIH 25

3. HFW PUBLICATIONS AND EVENTS

HFW Briefing: Australian Parliamentary Inquiry into the Class Action Industry

Class actions financed by litigation funders loom large in the Australian legal landscape. On 5 March 2020, the Morrison government announced a wide-ranging inquiry into the regulation of class actions and the litigation funding industry. In this briefing, Sophy Woodward (Special Counsel, Melbourne) considers this parliamentary inquiry as well as new regulatory requirements and what these mean for litigation funders in Australia.

<https://www.hfw.com/Australian-parliamentary-inquiry-into-the-class-action-industry>



We are working with clients across our international network to help them minimise the impact of COVID-19 on their business and to prepare for what's next. To find out more, visit our dedicated Covid-19 hub: www.hfw.com/covid-19 or speak to your usual HFW contact. We are aware that this is a challenging time for our clients, and we have a number of legal training sessions that we can deliver remotely to our clients. We have a flexible approach so we can provide appropriate content in a format that works for your team. Please get in touch with your usual HFW contact or with our Professional Support Lawyer, **Rebecca Huggins**, or our Client Training Partner, **Adam Strong**, if you would like to see a list of topics or discuss a tailored session to look at issues relevant to your team.



PHIL KUSIAK

SENIOR ASSOCIATE, LONDON

“The Court rejected the insured’s argument that the insurer waived its entitlement to the information by confirming that there would be no cover in the event that the insured had a direct (as opposed to indirect or wider) experience of insolvency.”

HFW has over 600 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our Insurance/reinsurance capabilities, please visit www.hfw.com/Insurance-Reinsurance-Sectors



hfw.com

© 2020 Holman Fenwick Willan LLP. All rights reserved. Ref: 002190

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice. Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please email hfwenquiries@hfw.com

Americas | Europe | Middle East | Asia Pacific