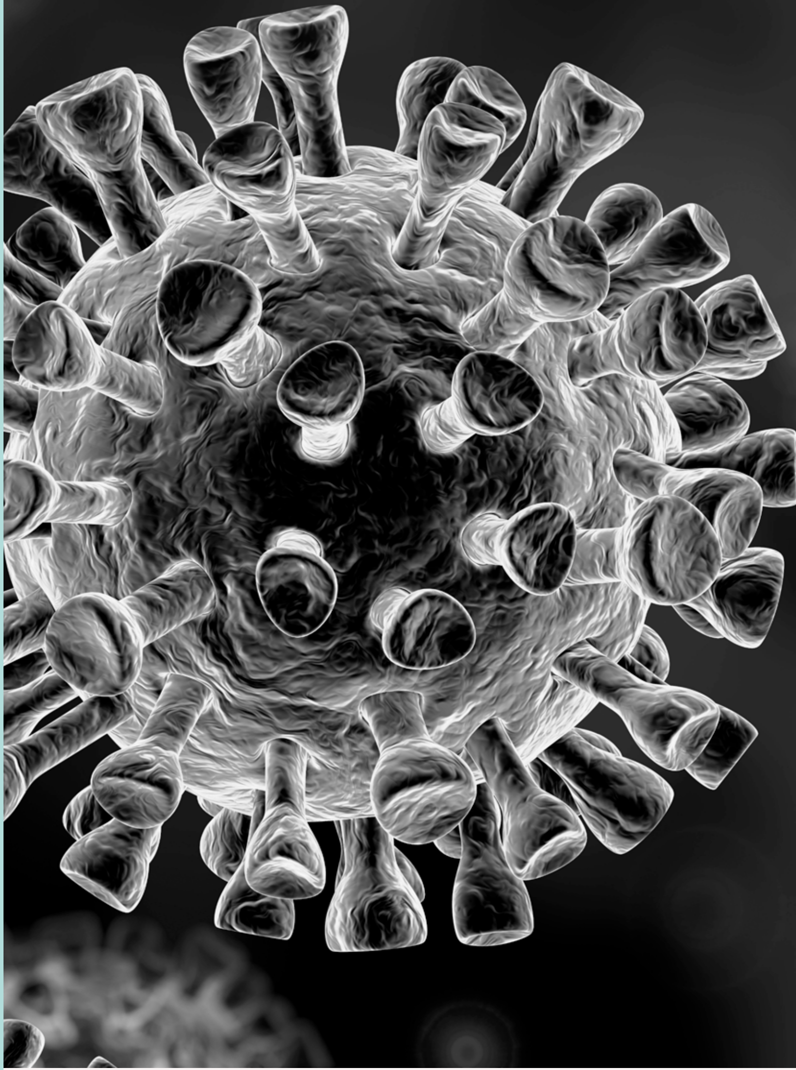
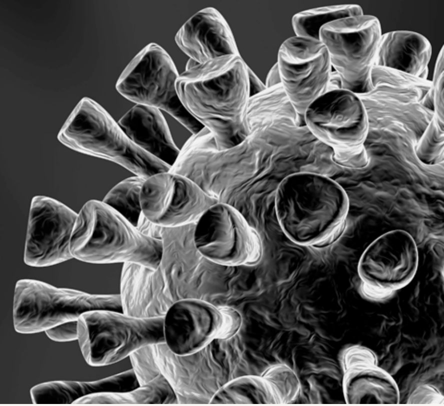

INSURANCE BULLETIN
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"Firms will need to consider the requirements, characteristics, and objectives of customers at every stage of the customer journey."

REGULATORY

FCA introduces new Consumer Duty

Following its second Consultation Paper[1] on the proposed new Consumer Duty (the Duty), in July 2022 the FCA published policy statement PS22/9 and finalised guidance FG22/5 setting out the scope of the Duty. The Duty is aimed at providing greater protection to customers by firms in the financial services sector.

The new rules comprise:

a. A new Consumer Principle;

b. Cross-cutting rules; and

c. Four "outcomes", relating to products and services, price and value, customer understanding, and customer support.

Consumer Principle

The new Consumer Principle, Principle 12, provides that "*a firm must act to deliver good outcomes for retail clients*"[2], and as such must design products and services which are focussed on the customer's best interests and strengthening of the firm-customer relationship. The intention is for firms to think more about customer outcomes and prioritise customers' interests, and to consider what standards are expected of them. Principle 12 sets a higher standard than Principles 6 (treating customers fairly) and 7 (communications with customers) and replaces them for retail business[3]. The FCA aligns the scope of the Duty with the existing scope of the FCA Handbook. For insurance, the Duty will follow the position in ICOBS, i.e. the Duty will apply to all policyholders or prospective policyholders.

Cross-cutting rules

The Consumer Principle includes three cross-cutting rules, requiring firms to:

a. Act in good faith towards retail customers;

b. Avoid causing foreseeable farm to retail customers; and

c. Enable and support retail customers to pursue their financial objectives.

The cross-cutting rules also help firms interpret the four outcomes. For example, one way for a firm to know a product does not offer fair value, would be if it were to lead to foreseeable harm.

The cross-cutting rules also help define the overarching standards of conduct firms should follow in areas not explicitly dealt with through the four outcomes, so compliance with the four outcomes would not be exhaustive of what the Principle or cross-cutting rules require.

However, the FCA makes it clear that firms are not responsible for protecting customers against harms that are not reasonably foreseeable or risks inherent to certain financial products or services. The FCA expects firms to interpret the draft rules and non-Handbook guidance in line with the standard that could reasonably be expected of a prudent firm (i) carrying on the same activity in relation to the same product or service and (ii) with the necessary understanding of the needs and characteristics of its customers. The aim is to ensure customers are well-informed and supported in making their financial decisions.

Outcomes

The cross-cutting rules inform and are supported by the four outcomes, which set out more detailed rules in key areas of the customer relationship. The outcomes are:

a. Products and services being specifically designed for the needs of customers, and sold to those whose needs they meet;

b. The price and value of products and services which must represent fair value;

c. Informing customers' understanding so that communications (i) meet the information needs of customers, (ii) are likely to be understood by the

average customer and (iii) equip customers to make effective, timely and properly informed decisions about financial products and services;

d. Supporting customers by enabling them to use the product as reasonably anticipated and ensuring that they do not face unreasonable barriers in doing so.

These outcomes relate to the main factors affecting customers in their decision-making process and the conditions for achieving fairness in the firm-customer relationship. Firms will need to consider the requirements, characteristics, and objectives of customers at every stage of the customer journey.

Looking ahead

By 31 October 2022 the FCA expects firms to have agreed on implementation plans to meet the Duty standards. The FCA might request implementation plans, board papers and minutes as evidence that firms are able to comply with the Duty. Firms should also nominate a "Consumer Duty champion" on their boards who will manage the implementation process. The Duty will come into force on 31 July 2023 for all new products and services and all existing products and services that remain on sale or open for renewal. From 31 July 2024 the Duty will apply to all closed products and services.

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Footnotes

1 Please refer to our January 2022 insurance bulletin titled: "*UK: Consumer Duty – FCA publishes further proposals and guidance*".

2 This new principle amends the Senior Managers and Certification Regime by disapplying the existing individual conduct Rule 4, which requires conduct rules staff to "pay due regard to the interests of customers and treat them fairly".

3 However, Principles 6 and 7 would continue to apply to conduct outside the scope of the Duty e.g. certain SMEs and wholesale business.

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"The Judge considered that if the legislature that enacted the transitional regulations had intended for the sanction order and the effectiveness of the scheme to be rolled into one, it would have said so in much clearer terms."

Court clarifies grey area in relation to Part VII transitional insurance business transfers following Brexit

***Re Phoenix Life Ltd*[1] confirms that the transitional provisions relating to Part VII transfers between the UK and the EEA do not require the transfer to have been completed by 31 December 2022. While an order must have been made by that date, it is permissible under the legislation for the order to come into effect after 31 December 2022.**

Background

As is well known, a number of insurers have undertaken restructuring exercises using Part VII transfers as a result of Brexit, in order to continue writing and/or servicing insurance contracts in the EU. Part VII of FSMA previously allowed business to be transferred between the UK and the EEA but, from 31 December 2020, an insurance business transfer ("IBT") ceased to qualify under FSMA if it included business carried on in an EEA state.

However, transitional provisions permit the sanction of a Part VII transfer scheme from the UK to the EEA after this date if it qualifies as a transitional IBT scheme, and require an order for the IBT to be made by 31 December 2022.

Re Phoenix Life considered whether an order could be made under s111 of FSMA by 31 December 2022, sanctioning a scheme that would otherwise qualify as a transitional IBT, but which would only come into effect after 31 December 2022.

Judgment

The Judge considered the wording of the relevant schedule, noting that it was clear that the making of an order by a court sanctioning a scheme is a separate concept from the scheme itself coming into effect. The Judge considered that if the legislature that enacted the transitional regulations had intended for the sanction order and the effectiveness of the scheme to be rolled into one, it would have said so in much clearer terms.

However, the Judge did note that the judgment was not a final determination binding on all parties, on the basis that it would be wrong to grant a declaration which is binding on policyholders before they have had a chance

to exercise their rights under s.110 of FSMA to advance arguments as to why the Court should not sanction the Scheme. Therefore, it would be open to policyholders to argue the judgment was wrong at the sanction hearing, which is scheduled for October 2022.

The Judge also concluded that s112 FSMA ancillary orders could be applied for and made after 31 December 2022, if the order has been made before that date.

Although the relevance of this judgment is unlikely to be long-lasting, given that 31 December 2022 is fast approaching, and many insurers will already have completed transfers they needed to make, the judgment will be of use to others still undergoing transitional IBTs.

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Footnotes

1 [2022] 6 WLUK 195 (15 June 2022)

DISPUTES

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Court of Appeal considers tenants' obligations to pay rent during COVID restrictions

On 27 July 2022, the Court of Appeal handed down judgment in *BNY Mellon v Cine-UK Ltd*[1]. The judgment concluded that, where a lease provides for rent to be suspended in certain named circumstances, the tenant remains obliged to pay rent where the tenant is unable to use the premises in other circumstances including the periods when the cinemas could not be operated due to COVID-19 restrictions.

Background

This case concerned two defendant tenants who operate cinemas, and who argued that their obligation to pay rent to the claimant landlords was suspended during periods of lockdown when they were unable to operate their cinemas.

The Defendants argued that they were not required to pay rent for the lockdown periods because they could not lawfully operate as cinemas during that time. They did not have insurance cover that responded to the particular losses suffered due to the COVID-19 related closure of their businesses, and so were seeking relief by pointing to various provisions of their leases. They appealed on the following grounds:

1. The rent cesser clause in the lease means that the tenants are relieved from the obligation to pay rent.
2. It was an implied term of the lease that the tenants should be relieved of their obligation to pay rent where they could not lawfully use the premises as a cinema.
3. The Government restrictions imposed as a result of the Covid-19 pandemic caused a total failure of basis because the tenant could not lawfully use the premises as a cinema during this period.

Summary

The Court of Appeal found that, where a lease provides for suspension of rent in certain circumstances, the parties had clearly envisaged the possibility that the tenant would be unable to use the premises and made provision for allocation of the risk of such circumstances occurring. In the leases under consideration, the rent cesser clause provided for suspension of rent in cases of physical damage to or destruction of the premises. Accordingly, other risks, including non-damage prevention of access, which are not provided for in the rent cesser clause, are borne by the tenant.

"The judgment concluded that, where a lease provides for rent to be suspended in certain named circumstances, the tenant remains obliged to pay rent where the tenant is unable to use the premises in other circumstances."

The fact the lease contains an insurance rent clause and obliges the landlord to insure the property against the defined insured risks does not change the interpretation of the rent cesser clause. Even in circumstances where the landlord had insurance cover for pandemics, the rent cesser clause was to be interpreted by its ordinary meaning, such that suspension of rent would only be triggered where there has been physical damage to the premises which renders the property unfit for occupation.

The Court considered that this allocation of risk was clear and dismissed arguments that there was an implied term that where a tenant is prevented from using premises for the permitted use in the lease, the tenant would be relieved of its obligation to pay rent. Such a term would be contrary to the express terms of the lease.

The Court went on to find that the ability of tenants to use the premises for the permitted purpose at all times during the 35-year leases was not a fundamental basis of the contract and the Court dismissed arguments that the Covid-19 restrictions caused a total failure of basis.

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Footnotes

1 [2022] EWCA Civ1021

Court considers whether to hear COVID-19 insurance claims in England or the Middle East

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Judgment has recently been handed down in the matter of *Al Mana Lifestyle Trading LLC & Ors v United Fidelity Insurance Company PSC & Ors.*[1] Mrs Justice Cockerill, sitting in the Commercial Court, confirmed the Court's jurisdiction to hear claims for COVID-19-related business interruption losses of around US $40 million, made under multi-risk insurance policies issued in the Middle East. In her judgment, the Judge also made reference to the English Commercial Court's extensive experience in dealing with both COVID-related business interruption claims and issues of foreign law.

The facts

The Claimants all form part of the Al Mana Group, which operates in the food, beverage and retail sectors, predominantly in the Middle East and Gulf regions. In May 2021, they commenced English court proceedings, bringing claims under a suite of seventeen multi-risk insurance policies underwritten by the Defendants (the "Policies"). The Claimants sought an indemnity totalling around US $40 million for business interruption losses arising from the COVID-19 pandemic.

The Defendants are insurers headquartered in the United Arab Emirates, Qatar, and Kuwait respectively, and the Policies were issued in those jurisdictions.

The Defendants challenged the English Court's jurisdiction to hear the claims.

The policy

Each of the Policies contained the following wording (the "Applicable Law and Jurisdiction Clause"):

> *"APPLICABLE LAW AND JURISDICTION:*
>
> *In accordance with the jurisdiction, local laws and practices of the country in which the policy is issued. Otherwise England and Wales UK Jurisdiction shall be applied,*
>
> *Under liability jurisdiction will be extended to worldwide excluding USA and Canada."*

> **"Mrs Justice Cockerill, sitting in the Commercial Court, confirmed the Court's jurisdiction to hear claims for COVID-19-related business interruption losses of around US $40 million, made under multi-risk insurance policies issued in the Middle East."**

Both parties acknowledged that this clause was "*not a model of drafting*", but disagreed on how the clause should be interpreted.

The Claimants argued that the Applicable Law and Jurisdiction Clause permitted proceedings to be brought in either:

(a) the courts of the country where each of the Policies was issued (the UAE, Qatar and Kuwait in this case); or

(b) the courts of England and Wales.

The Defendants, by contrast, argued that the Applicable Law and Jurisdiction Clause should be interpreted as an exclusive jurisdiction clause in favour of the courts of the country where the Policies were issued. On this basis, the Defendants invited the Court to set aside the service of the claim form, which they argued was wrongly served outside of the jurisdiction without permission.

In the alternative, the Defendants argued that, in the event that the Court decided that the Applicable Law and Jurisdiction Clause was a non-exclusive jurisdiction clause, the Court should decline jurisdiction on the grounds of *forum non conveniens*. In other words: the local courts would be better suited to hear the Claimants' claims. The Defendants made various points in support of this argument, including that (a) none of the parties were located in England; (b) none of the losses were sustained in England; (c) the documentary and witness evidence would be located in the Middle East; (d) the Policies were governed by the local laws in the countries in which they were issued; and (e) none of the Policies were placed in England.

The principal issue

The key question for the Court was whether the Applicable Law and Jurisdiction Clause entitled the Claimants to bring their claims before the English courts.

The decision

The Court found that the Applicable Law and Jurisdiction Clause was *not* exclusive, and permitted proceedings to be brought *either* in the country where the policy was issued (in this case the UAE, Qatar or Kuwait), or in the courts of England and Wales.

In analysing the wording of the Clause, Mrs Justice Cockerill emphasised the importance of giving consideration to every word, and of viewing each word in its place in the clause, rather than in "*the slightly overfocussed context*" of the parties' submissions.

The Court found that there was only one possibility for the applicable law: the relevant local law. The Court also recognised that this was a factor in favour of the Defendants' contention that the courts of the countries where the policies were issued should have jurisdiction. However, ultimately, the Judge agreed with the Claimants that the words "*in accordance with*" could not be seen as synonymous with "*subject to*"; the former is less mandatory and imperative than the latter. The Judge also considered that the use of the word "*otherwise*" in conjunction with "*in accordance with*" suggested a natural balancing which is more suggestive of a non-exclusive jurisdiction clause.

Mrs Justice Cockerill also rejected the Defendants' arguments that the Court should nevertheless decline jurisdiction on the basis that England was not the most convenient forum to hear the claims. The presence of the non-exclusive jurisdiction clause in favour of the English Court provided a strong *prima facie* case that this chosen forum was a convenient forum. It was for the Defendants to show a "*strong reason*" why the English Court should not exercise its jurisdiction, and that was a heavy burden which the Defendants had failed to meet.

Comment

In the first instance, this case serves as a helpful reminder of the importance of clearly-worded policy provisions, and in particular jurisdiction clauses. In the event a claim is made, unclear wording in a jurisdiction clause increases considerably the risk of a dispute arising as to jurisdiction. Such a dispute

inevitably serves to increase the time and money that both insurers and policyholders are required to devote to proceedings before a resolution of the underlying claim can be reached.

It is also interesting to note that, in the process of reaching a decision on the Defendants' *forum non conveniens* argument, the Judge pointed to the fact that the English Commercial Court "*is particularly well-versed in the issues relating to claims for indemnity for Covid-related business interruption losses [and] is also highly experienced in dealing with issues of foreign law, where they arise.*" This counted as a "*positive factor in favour of England*" in circumstances where the alternative approach would have required the Claimants "*to commence separate proceedings in relation to essentially the same dispute, raising the same issues*" in each of the UAE, Qatar and Kuwait.

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Footnotes

1 [2022] EWHC 2049 (Comm).

Third Parties Act 2010: limitation point clarified

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In *Rashid v Direct Savings*[1], the Leeds County Court considered whether the limitation period in respect of a claim against insurers by a third party ceased to run when the insured entered an insolvency procedure, and concluded that it was not suspended.

Background

The Third Parties (Rights Against Insurers) Act 2010 (the "2010 Act") replaced the Third Parties (Rights Against Insurers) Act 1930 (the "1930 Act") with a commencement date of 1 August 2016. The 1930 Act allowed a third party to bring a claim against a liability insurer directly and enforce policy coverage, where the third party had established liability against an insured that had entered into an insolvency procedure. Under the 1930 Act it was necessary for the third party to first bring proceedings against the insured and establish its substantive liability, and then it could step into the shoes of the insured and enforce the policy against insurers in a second claim. Under the 2010 Act, which provides for a similar transfer of the insured's policy rights to the third party, but aims to make the procedure more straightforward, the third party can now claim against insurers (with or without joining the insured) seeking a judgment on both the substantive claim and the policy coverage issues at the same time.

> "Under the 2010 Act, a claim can be brought directly against insurers, an entity outside and not subject to the insolvency (without joining the insolvent insured), to enforce rights against an asset that was not available to the other creditors."

Limitation and insolvency

The normal position is that claims cannot be issued against an insolvent company, whilst the insolvency practitioner applies the company property to its debts *pari pasu* in accordance with the statutory regime. Therefore, with certain exceptions where claims are outside the liquidation, the limitation period in respect of claims against the company is effectively suspended during the period of the insolvency event (*Re General Rolling Stock*). In *FSCS v Larnell*[2] it was held that this principle applied to claims where the 1930 Act was in operation. Until the third party had established the insured's liability it could not enforce policy rights against insurers. The first step was to bring the substantive claim against the insured in the usual way, and the liability seeking to be established was one being administered within the insolvency. Therefore, the limitation period in respect of that claim was suspended and *Re General Rolling Stock* applied.

Decision in Rashid

The issue here was whether *Larnell* continued to apply in relation to a claim against the insurers under the 2010 Act. Gosnell J in the Leeds County Court (agreeing with a number of prior unreported county court judgments) has recently held that it does not.

Under the 2010 Act, a claim can be brought directly against insurers, an entity outside and not subject to the insolvency (without joining the insolvent insured), to enforce rights against an asset that was not available to the other creditors. This must necessarily be outside the insolvency, and the reason for suspending the limitation period – to allow the insolvency practitioner to collect in and distribute the assets fairly without dealing with litigation, did not apply. Therefore *Larnell* could be distinguished, and there was no suspension of the limitation period in the 2010 Act claim against insurers.

Conclusion

This makes the position on limitation in these circumstances clear (although note that as a county court decision the judgment is not binding). It makes it more likely that insurers may be able to defend claims, where third parties have delayed proceedings on limitation grounds.

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Footnotes

1 [2022] 8 WLUK 108

2 [2005] EWCA Civ 1408

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