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In this week's Insurance Bulletin:

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1. REGULATION AND LEGISLATION

UK: More possible reporting requirements for insurers

The FCA has published a consultation paper on proposals requiring firms to report General Insurance value measures data to the FCA and to use the value measures data as part of the monitoring and governance of their insurance products.

The FCA's aim is to address poor product value and quality and to reduce the risk of unsuitable GI products being bought or sold. The consultation follows on from an earlier and narrower pilot scheme that covered only home, home emergency, personal accident and cover for lost keys. The FCA found the pilot had a positive impact and improved transparency and awareness of different indicators of product value. The expanded scheme will cover more types of insurance including motor, travel, dental and pet insurance.

By requiring more complaints data about individual insurance products to be published, the intention is to encourage insurers to improve their terms. This is part of an increasing focus for the FCA on overall product value, which the FCA sees as an important aspect of product governance for firms when considering whether customers are being treated fairly.

The FCA is welcoming comments on the proposal; the consultation period is open for 13 weeks and firms must submit any comments to the FCA by Tuesday 30 April 2019. The full consultation paper can be found at: https://www.fca.org.uk/publication/consultation/cp19-08.pdf#page=3.

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France: HARD BREXIT – Clarification on the servicing of insurance contracts covering French risks

Ordinance n°2019-75 published on 6 February 2019 which will come into force in case of a Hard Brexit confirms that British insurers operating in France under a European passport will be able to service contracts made prior to Brexit even if they lose their passporting rights upon Brexit being effective.

Enacted pursuant to the law of 19 January 2019, which enables the French government to enact measures in preparation for the withdrawal of the UK from the EU without an agreement being reached under article 50 of the European Union Treaty, the ordinance confirms that these insurers can continue to perform any such insurance contracts. However, insurers will not be able to renew these policies nor issue new premiums: any renewed contracts would be void. Interestingly, this nullity cannot be relied upon against the policyholder, the insured, or a beneficiary of the policy.

The ordinance therefore protects insureds against the effects of the loss of the European Passport as underlined in the Report to the President of the French Republic in support of the Ordinance: *"the ordinance validates the mere performance of contracts that does not involve the issuance of premiums"*.

The text also clarifies the powers of the French Regulatory body (ACPR) in relation to acts committed before Brexit by entities falling within the scope of its powers at the date of the infringement. ACPR proceedings will not be invalid for the sole reason that the entity's licence is no longer recognised in France. The ACPR may also initiate sanction proceedings post-Brexit for acts committed before Brexit.

Finally, the ordinance specifies that the ACPR remains in charge of ensuring, after Brexit, compliance with French rules by contracts concluded before Brexit under the freedom to provide services or the freedom of establishment where

performance of these contracts continues after Brexit, in so far as French rules are applicable (bearing in mind that the main supervisory role lies with the British regulatory bodies).

This ordinance therefore provides useful clarification in anticipation of a Hard Brexit, on an issue that was strongly debated on the basis of the existing provisions of the French insurance code. It will also give UK insurers some comfort that they will not be breaking French law by continuing to service insurance contracts written in favour of French insureds.

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2. COURT CASES AND ARBITRATION

England & Wales: Court approves Brexit Part VII transfer

Royal London Mutual Insurance Society Limited v In the Matter of Royal London Insurance D.A.C. **[2019] EWHC 185 (Ch)**

This case concerned an application made by The Royal London Mutual Insurance Society Limited ("Royal London") under Part VII of the Financial Services and Markets Act 2000 ("FMSA") to transfer its EEA insurance business to a newly formed Irish subsidiary, Royal London Insurance D.A.C. ("RLI"). The proposed transfer was intended to ensure that Royal London would be in a position to continue to service its EEA policyholders in the event of a "no-deal" Brexit.

The proposed transfer scheme ("the Scheme") involved three blocks of Royal London's business: (i) approximately 446,000 policies written in Ireland by Royal Liver, Irish Life, Caledonian Insurance Company and GRE Life Ireland (all admitted subsidiaries of Royal London); (ii) approximately 55,000 policies sold through Royal London's Irish branch; and (iii) approximately 1,300 bonds sold in Germany under the Scottish Life International brand.

Section 104 of FSMA provides that no insurance business transfer scheme is to have effect unless an order sanctioning it has been made by the court. Section 111 of FSMA sets out the conditions which must be satisfied before the court may make an order sanctioning such a scheme. The conditions are that all of the appropriate certificates and authorisations to conduct the transferring business shall have been obtained from the relevant regulators (section 111(2)) and that the court considers that, in all the circumstances of the case, it is appropriate to sanction the scheme (section 111(3)).

It is well established[1] that section 111(3) confers upon the court an absolute discretion as to whether or not to sanction a scheme, but that this discretion must be exercised by giving due recognition to the commercial judgment entrusted by the company to its directors. One of the factors which the court must take into account in this regard is whether a policyholder, employee or other interested person or any group of them will be adversely affected by the scheme. However, the possibility that individual policyholders or groups of policyholders may be adversely affected does not in itself mean that the scheme has to be rejected by the court.

In the current case, the Royal London Scheme raised the possibility that approximately 22% of the transferring policyholders would lose the protection of the UK's Financial Services Compensation Scheme ("FSCS") in the event of the insolvency of Royal London. Ireland does not have an equivalent compensation scheme.

Referring back to one of his previous decisions on these issues[2], Mr Justice Snowden noted that the current uncertainty over Brexit means that there may be no perfect solution for the holders of the policies being transferred. The fundamental question is whether the proposed Scheme, as a whole, is fair as

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between the interests of the different classes of persons affected.

On the evidence, RLI was duly authorised, and had the benefit of reinsurance and security from Royal London to enable it to carry on the business to be transferred to it in Ireland. There were a detailed and comprehensive series of reports from the Independent Expert that the Scheme would cause no material prejudice to transferring or non-transferring Royal London policyholders, or to the existing policyholders of RLI. In particular, Mr Justice Snowden regarded the potential loss of FSCS protection for some transferring policyholders as being largely theoretical, as against the very real prejudice that all EEA policyholders would face in the event of a "no-deal" Brexit if the Scheme were not implemented.

Mr Justice Snowden accordingly concluded that the statutory requirements had been met, and having regard to all the circumstances, was satisfied that Scheme should be sanctioned.

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Footnotes

1 See *Re AXA Equity & Law Life Assurance Society plc and AXA Sun Life plc* [2001] 1 All ER (Comm) 1010 at 1011-1012

2 See *Re AIG Europe Limited* [2018] EWHC 2818 (Ch)

England & Wales: *Perry v Raleys Solicitors* [2019] UKSC 5

In *Perry v Raleys Solicitors*[1], the Supreme Court has set out the correct approach in assessing loss of chance in professional negligence claims.

Background

Mr Frank Perry, a retired miner, brought a claim against his former solicitors for the loss of opportunity to claim domestic assistance under a compensation scheme (known as a Services Award) following a condition he sustained in the course of his employment. Mr Perry alleged that his former solicitors failed to advise him in relation to the Services Award within the available timeframe and that he had therefore lost the chance to bring a claim.

Trial

At first instance, the former solicitors admitted that they had breached a duty of care in failing to properly advise Mr Perry, but argued that their failure had not caused him any loss. The trial judge heard evidence from Mr Perry and his family, and from experts concerning his condition. The trial judge held that, had Mr Perry been properly advised, he would not have made an honest Services Award claim, as he would have failed to establish an inability to carry the relevant domestic tasks.

Court of Appeal decision

On appeal, the Court of Appeal held that the trial judge had erred in conducting a *"trial within a trial"* as to whether Mr Perry would have brought an honest Services Award claim, and by imposing a burden upon Mr Perry to prove this fact on the balance of probabilities (which the Court of Appeal considered was contrary to authority on causation in professional negligence cases). The Court of Appeal also held that the trial judge erred in analysing the evidence in support of Mr Perry's claim. As a result, the decision of the trial judge was reversed.

Supreme Court decision

The Supreme Court, in overturning the Court of Appeal's decision, unanimously held that the trial judge adopted the correct approach[2] which required Mr Perry to prove, on balance, that he would have made an honest Services Award claim. The Supreme Court also held that the trial judge was correct in conducting a detailed examination as to whether Mr Perry would have required domestic assistance as a result of his condition (and whether he therefore could have honestly made a claim).

The Supreme Court noted that if Mr Perry could establish that, on balance, he would have made an honest Services Award claim, then the question of whether he would succeed at trial or settle the claim was to be assessed on a loss of chance basis.

The Supreme Court also held that the Court of Appeal did not satisfy the *"very stringent requirements"*[3] to interfere with the trial judge's fact-

finding as, unlike the trial judge, it did not have the benefit of hearing from and assessing witnesses' credibility.

This is the second recent high profile judgment dealing with causation in claims against professionals and when loss of a chance is the relevant test, as to which, see our briefing on the case of Dalamd v Butterworth Spengler at http://www.hfw.com/Dalamd-Limited-v-Butterworth-Spengler-Commercial-Limited-Causation-and-Some-Limited-Relief-for-Brokers-Oct-18

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Footnotes

1. [2019] UKSC 5.
2. As laid down by the Court of Appeal in *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR.
3. Establishing that either there was no evidence to support a challenged finding of fact, or the finding was one that no reasonable judge could have reached.

3. MARKET DEVELOPMENTS

UK: Terrorist attacks and business interruption cover – Pool Re's scope expanded

A change to the law means that Pool Re's business interruption cover can now include losses which result from terrorist attacks, even if there has been no physical damage to property.

The Counter-Terrorism and Border Security Act 2019 received Royal Assent on 12 February 2019, and amended the Reinsurance (Acts of Terrorism) Act 1993 to expand the scope of Pool Re's cover. This amendment corrects a technicality that has seen businesses left without cover where they have been unable to trade as a result of terrorist incidents, but have suffered no property damage on which to hang their claim for business interruption.

This was a particular problem for businesses following terrorist incidents such as the attack on London Bridge in June 2017, which left Borough Market closed, and traders without income, for nearly two weeks. Many of the traders and businesses affected had not suffered any damage to their property, so were left without cover by policies which covered business interruption only where it was associated with damage to property.

While we hope that this change to the law becomes a footnote in legal history, and that no business ever needs to rely on it, the amendment will be very welcome to business owners in the event of further terrorist attacks.

The Counter-Terrorism and Border Security Act 2019 can be found here: http://www.legislation.gov.uk/ukpga/2019/3/pdfs/ukpga_20190003_en.pdf

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UK: New insurtech cargo consortium launched by Ascot and Beazley

Ascot and Beazley are leading a new consortium known as 'A2B', aimed at SME cargo business. According to Ascot, the idea behind the launch is to enable brokers to provide a more cost effective approach to risk and claims management for their SME clients through the use of insurtech.

Insurtech devices, such as an electronic cargo monitoring, would be available to insureds. Such devices could, for example, gather data relating to cargo accumulation and feed back to insureds. They have already been developed by Parsyl, an insurtech firm spawned from the Lloyd's Lab programme.

Tim Turner, Head of Marine at Beazley Group highlighted that the development of A2B was an illustration of London's insurance market being able to adapt to the changing needs of the marine sector and commented that the "*new consortium shows how the London market can come together to combine underwriting expertise and cutting-edge technology for the benefit of our customers*" [1].

CEO of Ascot Group, Andrew Brooks, was equally enthusiastic about the new consortium and its impact for the future of the cargo market, calling it "*transformative for insureds, their brokers and Lloyd's carriers*", adding

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that it showed *"how Syndicates can come together in a subscription market to provide coverage in a cost efficient way for smaller premium business"* [2].

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Footnotes

1. See https://ascotgroup.com/ascot-and-beazley-launch-50m-insurtech-linked-cargo-consortium
2. See https://ascotgroup.com/ascot-and-beazley-launch-50m-insurtech-linked-cargo-consortium

4. HFW PUBLICATIONS AND EVENTS

Australia: Watson Oldco – A timely reminder of the consequences of building professionals' uninsured exposure to cladding claims

Watson Oldco's fate is a timely reminder of the consequences of not having professional indemnity (PI) insurance that covers exposure to combustible cladding claims.

Andrew Dunn (Partner, Sydney) and Sophy Woodward (Special Counsel, Melbourne) look at the implications for policyholders in this briefing.

http://www.hfw.com/Watson-Oldco–A-timely-reminder-Feb-19

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