INSURANCE BULLETIN
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In this Insurance Bulletin:

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"The cost-of-living crisis means customers will expect claims to be paid faster and will want to feel more in control of the claims process as a whole."

REGULATORY

FCA makes clear its expectations of the insurance sector in the cost of living crisis

The FCA published a Dear CEO letter on 29 September 2022, in which it set out its expectations of insurers with regard to low income households and small and medium sized enterprises (SMEs) struggling with the cost of living crisis and energy costs. The intention is to afford customers greater protection as they navigate increasing financial pressures. The FCA has set out a range of measures and expects firms to have implemented plans for addressing these points by the end of October.

Background

The FCA notes a number of trends and issues of concern, in circumstances where there is the potential for insurance premiums to rise due to supply chain issues and inflationary pressures, amongst other things. The market may also see more customers opting for premium finance insurance payments rather than annual one off-payments in an attempt to spread costs.

These potential issues include consumers and SMEs finding it difficult to meet regular payments or facing difficult choices at renewal. Insureds might opt to reduce or cancel insurance cover, without necessarily fully understanding the implications, leading to under-insurance. For example, an SME might cancel its cyber cover at a time when the risk of hacking and cyber attacks is higher due to current geopolitical and economic instability. The FCA notes in particular that it has seen a rise in the number of "basic" products on offer, with typically lower cover than is standard, and with higher excesses payable.

The FCA also flags that firms in the insurance sector might seek to cut costs in response to financial pressures, which could adversely impact customer service levels. According to findings from the Chartered Insurance Institute (CII)'s Public Trust Index, which were published this month, the cost-of-living crisis means customers will expect claims to be paid faster and will want to feel more in control of the claims process as a whole.

FCA's expectations of firms

The FCA letter includes the following:

- It is noted that the incoming Consumer Duty sets high expectations for the standard of care that firms must provide for consumers in the future[1].
- The FCA sets out that the vulnerability **guidance** remains relevant. It also states that firms should check the COVID insurance and premium finance **guidance**, some of which will be relevant to cost of living pressures, such as: reassessing customer risk profile; considering whether other products better meet customer needs; and working with customers to avoid cancelling necessary cover.
- Given the increased risk of under-insurance and the increased prevalence of "basic" products, firms must ensure that contracts of insurance which they offer meet a customer's demands and needs, and that appropriate information is given, including a summary of cover and main exclusions.
- Premium finance must be considered as part of fair value assessments.
- Firms must consider the impact on customers when taking steps to reduce customer support functions.
- Whilst there may be an increase in fraud, additional processes must not unreasonably delay or potentially decline valid claims, and customers must continue to be treated fairly.

The FCA will continue to monitor these issues, and is considering publishing a further consultation paper later this year on protecting customers who are experiencing financial difficulty.

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Footnotes

1 An article on the Consumer Duty appeared in our previous Bulletin **here** and we are running a Surgery on the Duty – please contact **William Reddie** if you would like to register.

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"The commercial environment has changed dramatically during that period and the Law Commission feels that now is a good time to consider whether any adjustments would be appropriate."

DISPUTES

Law Commission proposes arbitration reform

The Law Commission has published a consultation suggesting some key reforms to arbitration procedure including codifying the position with regards to arbitrator impartiality and disclosure, and introducing a summary disposal procedure.

In this article we discuss some of the proposals in more detail.

Background

The Law Commission has been undertaking a review of the Arbitration Act 1996 (**the Act**) to ensure that it remains state of the art, particularly in view of the fact that other jurisdictions have enacted recent reforms, and to ensure London retains its place as the world's most popular seat of choice for international commercial arbitration.

Following consultation with various stakeholders, the Law Commission has published a paper, seeking views on its proposals by 15 December 2022. Whilst it is clear that the general view is that the Act was, and remains, a very successful piece of legislation it has now been in existence for some 25 years. The commercial environment has changed dramatically during that period and the Law Commission feels that now is a good time to consider whether any adjustments would be appropriate. Some of the proposed changes are set out below.

Independence, impartiality and disclosure

The Act contains no duty of independence, and the Law Commission tentatively considers that this should remain the case, on the basis that it is impartiality which matters, and that it is often very difficult for arbitrators to be completely independent and not, for example, at least professionally acquainted with a party. Some arbitration clauses even call for immersive area expertise and it is common in industries such as the insurance industry for parties to appoint the same small group of arbitrators time after time. As an excellent illustration of this see the Supreme Court's decision in *Halliburton v Chubb* [2020] UKSC 48.

Impartiality is the idea that arbitrators are neutral with regard to the parties, and the Act does provide that arbitrators must act fairly and impartially. The Law Commission proposes codifying common law and that the Act should provide that an arbitrator is under a continuing duty to disclose any circumstances that may give rise to justifiable doubts as to their impartiality. It also asks whether the Act should specify the state of knowledge required for an arbitrator to make a disclosure, and if so whether an arbitrator should be required to make disclosure based on their actual knowledge or on a requirement to make reasonable inquiries.

Summary disposal

The issue here is whether arbitrators should be able to resolve issues obviously without merit on a summary basis.

The ability to apply for summary judgment to deal with a claim that has no merit is often cited as an advantage in favour of resolving matters in court rather than in arbitration. It is noted that s33(1)(b) of the Act, which gives an arbitral tribunal power to adopt procedures to avoid unnecessary delay and expense, likely includes the power to adopt a summary procedure, similar to a summary judgment application before the courts. However, the evidence received by the Law Commission suggests that arbitrators may be reluctant to adopt such a procedure, for fear of their ruling being challenged in court for failing to adhere to due process.

The Law Commission therefore proposes that the Act should provide explicitly that a summary procedure may be adopted on the application of one of the parties, but that this should not be possible on a tribunal's own initiative and that the parties should be free to opt out of this in the arbitration agreement.

The Law Commission suggests that the Act should expressly stipulate the threshold test for success in the summary procedure (for consistency) and that there are two main options: either the issues are "manifestly without merit" or that there is "no real prospect of success" and "no other compelling reason" for the issue to proceed to trial (as is adopted by the courts). The Law Commission suggests the latter on the basis that it has a settled meaning in case law. The arbitrator would be free to reject a request for summary disposal if they take the view it is not appropriate, or perhaps that an expedited procedure is more appropriate.

Immunity

The Law Commission has noted that, although an arbitrator is not liable for anything done in the discharge of their functions as arbitrator unless done in bad faith (s29(1) of the Act), this does not apply in two situations. Firstly, where an arbitrator resigns they may be potentially liable for breach of their agreement to arbitrate (unless they apply to court for immunity) and secondly, where a party makes an application to court that impugns an arbitrator he or she can be liable for the costs of the application, even if the challenge is unsuccessful.

The Law Commission seeks views on whether arbitrators' liability should be strengthened to prevent parties from pursuing satellite litigation and to support an arbitrators' impartiality: so that they are not concerned about making decisions that a disapproving party may challenge leading to personal liability.

Other reforms

There are a number of other proposals or questions including: to protect the diversity of arbitral appointments; to provide that s67 of the Act which relates to a challenge to the arbitral jurisdiction before the courts should be an appeal not a rehearing; amending s44 of the Act to make it clear that the court can make orders against third parties; and around emergency arbitrators. There are also a number of areas which the Law Commission has considered but proposes no amendment to the Act, including in relation to confidentiality, where it thinks the law is best developed by the courts.

Deadline for responses

The Law Commission aims to publish final recommendations by mid-2023.

HFW was a contributor in the earlier rounds of the consultation, and we are preparing our response to the current consultation, please do let us know if you would like to discuss the proposed reforms.

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Pre-Judgment interest rate considered in *Harrington Scott Ltd v Coupe Bradbury Solicitors Ltd* [2022] EWHC 2275 (Ch)

This matter concerned the appropriate rate of interest in a professional negligence claim, and whether pre-judgment interest could be claimed at the post-judgment rate of 8% per annum.

This case concerned a professional negligence claim brought by a recruitment agency, Harrington, against its litigation solicitors. Harrington sought to pursue claims against a mining group for breach of recruitment contracts and non-payment of sums. It was alleged the defendant solicitors negligently caused an order for permission to serve outside the jurisdiction to be set aside, causing Harrington to lose the opportunity to pursue its claims against the third party. At issue was whether the underlying claim would have succeeded in any event, and what sums would have been awarded at the notional trial, including interest.

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"Whereas pre-judgment interest is intended to compensate a claimant for sums of which they have been deprived, post-judgment interest is a sanction on debtors incentivising them to pay promptly."

The claim was struck out for lacking any real prospect of success on the basis Harrington had grossly and knowingly exaggerated the value of its claims.

The interesting aspects of the judgment relate to Judge Hodge KC's comments on the award of pre-judgment interest.

Pursuant to s.35A of the Senior Courts Act 1981 (and s.69 of the County Courts Act 1984) the court has discretion to award simple interest on any damages awarded to a claimant. The court can decide the rate of interest and the period for which it should be awarded.

The backdrop to this is s.17 of the Judgments Act 1838 which provides that judgment debt should carry interest at the rate of 8% per annum (the Judgments Act rate). Claimants have often sought to argue that the court should use its discretion to award the Judgments Act rate of 8% rather than commercial rates of interest. In our experience, the Commercial Court often awards interest with reference to the prevailing base rate, such as 1% above base rate.

In its Particulars of Claim Harrington pleaded that for a specific pre-judgment period, interest should be awarded at a rate of 8% per annum. Thereafter Harrington contended interest should be awarded as the court deemed fit pursuant to s.35A of the 1981 Act.

The defendant solicitors argued that claiming interest on damages at the judgment debt rate of 8% pa was bad in law as the judgment rate has no bearing on an award of pre-judgment interest under the 1981 Act. They emphasised that Harrington had not produced any evidence to justify an interest rate of 8% pa which could have been evidenced by the interest rate on the cost of borrowing, or the interest that would have been earned on investments.

The Court of Appeal in *Pinnock v Wilkins & Sons*, The Times, 29 January 1990 upheld the decision of the trial judge to award interest on damages for breach of duty by a solicitor at the judgement debt rate. Similar decisions were reached in *Watts v Morrow* [1991] 1 WLR 1421 and *Perry v Raleys Solicitors* [2017] EWCA Civ 314.

Judge Hodge KC refused on a standalone basis to strike out Harrington's claim for statutory interest. His reasoning was that in light of the Court of Appeal decisions, an argument that the claim for an award of interest of 8% pa was bad in law could not be maintained. It was held that the appropriate rate of interest was a matter to be decided at trial at the court's discretion, which could take into account matters such as the defendant's conduct prior to and in the course of proceedings.

Comments

Judge Hodge KC's reasoning is consistent with the Court of Appeal authorities by which he was bound. Nevertheless, this point is likely to be revisited in due course in circumstances where the Bank of England base rate had not exceeded 1% since 2009 until this year.

Circumstances pre- and post-judgment are different in principle and in many cases should be treated as such. Whereas pre-judgment interest is intended to compensate a claimant for sums of which they have been deprived, post-judgment interest is a sanction on debtors incentivising them to pay promptly.

As Jackson and Powell notes, the Judgments Act rate "is only an option and should not be applied without considering whether some other, more flexible rate is more appropriate".

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"The judgment makes clear that despite earlier case law on the lack of effectiveness of the use of the reference to the Quarantine Act to exclude COVID-19 related losses, each case will very much turn on its own wording."

AUSTRALIA

Conformity is Key

In *Dural 24/7 v Certain Underwriters at Lloyds*[1] the Full Court of the Federal Court of Australia found that in a policy providing business interruption disease cover for diseases, an exclusion from cover for diseases declared quarantinable under the Quarantine Act 1908 (Cth), coupled with the effect of a "Conformity" clause, did exclude COVID-19 related loss.

The case was distinguished from *HDI Global Specialty SE v Wonkana No.3 Pty Ltd*[2] (the first Australian BI test case) and *LCA Marrickville Pty Ltd v Swiss Re International SE*[3] (the second Australian BI test case). The first and second Australian BI test cases are discussed in our December 2021 and March 2022 bulletins **here** and **here**. Importantly, on 14 October 2022, the High Court of Australia denied special leave to appeal the second Australian BI test case. This consolidates the position in favour of insurers making it difficult for most policyholders to successfully claim under business interruption insurance policies for COVID-19 related losses in Australia. However, as can be seen from the Dural 24/7 case, each claim will turn on its own facts and policy wording.

Facts

The insured, which carried on the business of yoga and fitness franchising, held a policy including business interruption cover, and sought to recover losses arising from the COVID-19 pandemic.

The policy included an extension of cover for (b) the outbreak of human infectious or contagious disease occurring within a 20 kilometre radius of the insured property and for (c) closure or evacuation by order of government, public or statutory authority consequent upon an organism likely to result in human infectious or contagious disease at the property.

This cover was subject to an exclusion which read as follows:

> "Cover under b. and c. under this extension of cover does not apply in respect of Highly Pathogenic Avian Influenza in Humans **or other diseases declared to be quarantinable diseases under the Australian Quarantine Act 1908.**" (emphasis added)

The policy also contained a "Conformity" clause, which was mainly directed at simplifying and clarifying drafting (such as indicating that words in the singular included the plural, and so forth) and included at the end the words **"References to a statute law also includes all its amendments or replacements"**.

The Quarantine Act was repealed in 2016 and at that time the Biosecurity Act 2015 (Cth) came into force replacing it as the Commonwealth's primary biosecurity legislation. Unlike the Quarantine Act the Biosecurity Act does not refer to "quarantinable diseases" but instead to "listed human diseases". For obvious reasons therefore, COVID was never declared a "quarantinable disease" but was made a "listed human disease" in January 2020.

The issue

The Court of Appeal of New South Wales in *Wonkana* held that policy exclusions that exclude loss for "quarantinable diseases" under the Quarantine Act do not exclude loss from "listed human diseases" under the Biosecurity Act 2015. The Federal Court in *LCA Marrickville* also held that whilst the Biosecurity Act was successor legislation dealing with the same subject matter, it was too different to be a re-enactment[4].

Against this background, the question was whether the Conformity clause in this policy changed the position, so that the exclusion clause was to be interpreted so that it did refer to listed diseases under the Biosecurity Act 2015. Insurers sought a declaration from the Court on this issue.

The primary judge, Judge Jagot, found in favour of insurers, that COVID-19 loss was excluded, and the insured appealed.

Insured's case

It was argued on behalf of the insured that the language of the Conformity clause was not directed to qualifying the list of diseases that had been declared quarantinable under the Quarantine Act. The effect of the Conformity clause could only be to amend the reference to the statute i.e., the Quarantine Act itself. Therefore, the exclusion was effectively amended by the Conformity Clause to refer to diseases declared to be quarantinable under either the Quarantine Act or the Biosecurity Act, and no diseases were declared quarantinable under the latter.

On the insured's construction, the exclusion as amended by the Conformity clause should be read as follows:

> "Cover under b. and c. under this extension of cover does not apply in respect of Highly Pathogenic Avian Influenza in Humans or other diseases declared to be quarantinable diseases under the Australian Quarantine Act 1908 **or the Biosecurity Act 2015 (Cth)**" emphasis added)

Federal Court appeal judgment

The Full Federal Court found that the Conformity clause was concerned with construction and interpretation of the policy, which was important: it was directed to the various Acts mentioned in the policy and their places and context within it. Its purpose was (in part) to keep the wording of the policy and references to statutes current.

Although noting that there was some force in the insured's arguments, the Court held that the reference to the Quarantine Act had to be interpreted within its context, and the purpose of the reference was to declare certain quarantinable diseases as not within the scope of cover. The Biosecurity Act plainly, in everyday parlance, replaced the Quarantine Act, and although they have some important differences, the purpose of examining them was to keep the policy, and scope of the exclusion up to date.

The Court considered whether the effect was that the exclusion clause should be amended so as to refer to both the Quarantine and the Biosecurity Act or if the reference to the Quarantine Act should drop out. The Court on balance preferred the latter approach noting that ultimately this did not affect the outcome of this matter, but the Court noted it may be relevant and would be considered in another case, and it would also be necessary then to have regard to the terms of the repealing or amending statute. It was also noted that where the Conformity clause was operating in a legislative landscape altered by a replacing statute during the policy period it may be there should be no reading out of the Quarantine Act, as it was relevant for part of the time insurers were on risk.

The Court further rejected the argument that use of the word "replacements" in the Conformity clause required equivalence: the statute law that had been replaced had a particular context in the policy that certain diseases that attract Commonwealth power do not fall within the extension. There was also nothing in the wording used to allow the Court to conclude that "replacements" was limited to the repeal of statutes in force at the date of policy inception.

Therefore, in conclusion the Court rejected the appeal, and upheld the conclusion that COVID-19 related losses were excluded from the policy.

Conclusion

The judgment makes clear that despite earlier case law on the lack of effectiveness of the use of the reference to the Quarantine Act to exclude COVID-19 related losses, each case will very much turn on its own wording.

It is also important to note the importance of careful drafting, including considering how seemingly innocuous standard clauses can make a significant difference to policy cover.

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Footnotes

1 [2022] FCAFC 147

2 [2020] NSWCA 296

3 [2022] FCAFC 17

4 In the context of argument that s61A of the Property Law Act 1958 (Vic) operated such that exclusions which purported to exclude cover through reference to the Quarantine Act remained effective in the State of Victoria.

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