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In this week's Insurance Bulletin:

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1. REGULATION AND LEGISLATION

UK: Unfair pricing practices? FCA launches market study into the retail home and motor markets

The FCA has launched a market study which aims to determine the fairness of pricing practices in the retail home and motor markets.

The market study follows the FCA's thematic review into the pricing practices of household insurance firms, which suggested that people who stay with their home insurance provider for a long time pay significantly more than newer customers. The FCA now wants to understand whether the pricing practices which lead to this outcome are unfair, and in particular whether pricing practices unduly affect vulnerable customers.

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The terms of the reference of the market study have been published for consultation, and can be commented on until 3 December. The FCA intends to publish an interim report next summer, and a final report by the end of 2019.

The terms of reference can be found here: https://www.fca.org.uk/publication/market-studies/ms18-1-1.pdf, and the results of the FCA's thematic review into household insurance pricing practices can be found here: https://www.fca.org.uk/publications/thematic-reviews/tr18-4-pricing-practices-retail-general-insurance-sector-household-insurance

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2. COURT CASES AND ARBITRATION

England & Wales: Court of Appeal considers policy interpretation in the context of a TCC appeal – *Wheeldon Brothers Waste Limited v Millennium Insurance Company Limited*

The Court of Appeal has refused permission to appeal a Technology and Construction Court (TCC) judgment concerning property insurance coverage[1].

Following a fire at a waste processing plant owned by Wheeldon Brothers Waste Limited (Wheeldon), Wheeldon's insurers, Millennium Insurance Company Limited (Millennium), refused to indemnify Wheeldon's losses on the basis that a number of the policy's conditions precedent had been breached.

However, the TCC disagreed with Millennium's assessment; and the Court of Appeal has now refused Millennium's application for permission to appeal that decision, ruling that Millennium's grounds for appeal all related to TCC findings founded upon factual and expert evidence in respect of which there was no basis to support interference by the appellate court.

Restating general principles regarding appeals, the Court of Appeal explained that it would only interfere with first instance findings of fact if the decision could not reasonably be explained or justified (for example, if a critical finding was unsupported by evidence); because expert evidence is likely to be closely connected to a wider evaluation of factual matters, an appellate court would also be reluctant to intervene in decisions based upon such evidence; and it would be particularly difficult to justify reopening TCC judgments, which consider complicated and technical factual and expert evidence.

But it is the Court of Appeal's application of these general principles to Millennium's appeal, particularly when discussing the appeal grounds relating to interpretation of the conditions precedent that is likely to be of most interest to those involved in coverage disputes. The

Court of Appeal found that, although the TCC's interpretation of the conditions precedent was a matter of law, given the presumption that every underwriter is presumed to be acquainted with the practice of the trade he insures, the factual background to the policy is also relevant to questions of policy interpretation. Accordingly, the Court of Appeal refused to grant Millennium permission to appeal the TCC's reading of the conditions precedent because the interpretation exercise was a question of law that could not be divorced from the factual matrix.

The Court of Appeal may well have taken a different approach had it not also in fact agreed with the TCC's construction. Nonetheless, the remarks regarding the hybrid nature of policy interpretation suggest that it would be prudent for a party to a coverage dispute, particularly in respect of appeals against decisions involving factual findings and expert evaluation, to attempt to demonstrate that its interpretation of a disputed term is the one that is both legally correct and reasonable in light of the factual background to the policy.

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1 *Wheeldon Brothers Waste Ltd v Millennium Insurance Company Ltd [2018] EWCA Civ 2403* https://www.bailii.org/ew/cases/EWCA/Civ/2018/2403.html

Australia: Multiple deductibles for a single class action? – *Bank of Queensland Ltd v AIG Australia Ltd*

The recent decision in Bank of *Queensland Ltd v AIG Australia Ltd*[1] is a reminder to carefully consider insurance policy wordings and aggregation clauses where there is a possibility of exposure to multiple related claims or class actions.

Background

A fund brought a class action in the Federal Court of Australia (on its behalf and on behalf of 191 other group members) against a bank and its fund administrators for breaches relating to misappropriation of funds by a financial planner. The financial planner made various withdrawals from multiple bank deposit accounts to operate a "Ponzi" scheme.

The class action settled for A$12 million and the bank brought an action in the Supreme Court of New South Wales against its insurers, seeking to recover under a policy of insurance the amounts its paid towards settlement.

Issues

The issue was whether the bank was required to pay a single A$2 million deductible or multiple deductibles under the policy.

The questions before the Court were:

1. Did the class action constitute multiple "Claims" as defined in the policy?
2. Did the "Claims" arise out of, or were they based upon or attributable to a "series of related" wrongful acts, such that they would aggregate to be a single "Claim" for the purposes of the policy?
3. If there was a single "Claim", did it involve more than one unrelated wrongful act (with the result that each unrelated wrongful act would constitute a separate "Claim")?

Decision

The Court held that the class action was a single "Claim", but that 192 Class Member Registration Forms which made written demands constituted multiple "Claims".

The Court found that although many of the withdrawals were *"similar in nature"* and had *"some characteristics in common"*, some of them were separate acts, made in response to different and separate requests from the financial planner, committed on different occasions and from different accounts.

The Court considered various authorities to conclude that some of the transactions did not *"have a 'sufficient degree' of similarity nor an 'integral relationship' such as to constitute them a 'series' of transactions, nor the necessary 'causal' or 'logical' 'interconnection' to constitute them being a 'series of related' wrongful acts."*[2] The fact that

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they were made as part of a broader, more remote scheme of fraud was not enough to aggregate the Claims.

As a result, the bank was required to pay multiple deductibles, the value of which exceeded the amount it sought to recover under the policy.

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1 [2018] NSWSC 1689
2 ibid at [168].

3. HFW PUBLICATIONS AND EVENTS

HFW contributes to Latin Lawyer's Insurance and Reinsurance Reference 2018

HFW Partners **Jonathan Bruce** and **Geoffrey Conlin** have contributed the Introduction to Latin Lawyer's Insurance and Reinsurance Reference 2018. To read their overview of the insurance and reinsurance market in the region, and the issues it currently faces, please go to: https://latinlawyer.com/reference/1175936/introduction

HFW Rankings in Chambers and Legal 500

We are delighted to announce our rankings in the new edition of the Legal 500:

- Insurance and reinsurance – Tier 2
- Insurance litigation: for policyholders – Tier 3
- Corporate and regulatory – Tier 4
- Professional negligence – Tier 3

Congratulations to **Adam Strong** for being ranked for the first year for insurance and reinsurance litigation. A seasoned negotiator of complex issues, with 'a very good understanding of client requirements'. Congratulations also to **Andrew Bandurka** who is an inaugural member of the Legal 500 inaugural "Hall of Fame", which is for "individuals who have received constant praise by their clients for continued excellence" and who are "at the pinnacle of the profession", having been recognised as a market-leading lawyer for many years and to **Rupert Warren**, Senior Associate who has been highly recommended for the first year.

We are also delighted to announce our rankings in Chambers 2019:

- Insurance and reinsurance - Band 2
- Corporate and regulatory - Band 4

Congratulations to **Chris Foster** who is listed for the first time for insurance claims. He is "excellent and very sharp lawyer" who is "able to assimilate a huge amount of information very quickly and see all sides of the issue." Clients say **Andrew Bandurka** "Is an excellent lawyer who always provides a speedy yet comprehensive service that delivers good results, and he is smart and creative. I'm always glad he's on my side" and congratulations to **William Reddie** who was named as an 'associate to watch' for Insurance non-contentious. "He knows his industry inside and out," one client comments, while another adds: "He offers good, clear advice and is always willing to find a solution to a problem."

To view the firm's full rankings please go to www.legal500.com and https://chambers.com.

HFW has over 550 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our Insurance/reinsurance capabilities, please visit http://www.hfw.com/Insurance-Reinsurance-Sectors

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