INSURANCE BULLETIN
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In this week's Insurance Bulletin:

Jonathan Bruce, Partner, jonathan.bruce@hfw.com
Costa Frangeskides, Partner, costa.frangeskides@hfw.com
Rebecca Huggins, Professional Support Lawyer, rebecca.huggins@hfw.com

CIARA JACKSON
ASSOCIATE

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1. REGULATION AND LEGISLATION

UK: Agreement between UK and Switzerland on insurance

Whilst there remains a certain level of uncertainty as to how UK insurers will be able to operate in EU member states following the UK's withdrawal from the EU, the position as between the UK and Switzerland has been clarified.

The UK and Swiss governments recently signed the UK-Swiss Direct Insurance Agreement at the World Economic Forum in Switzerland. The agreement will come into force when the EU-Swiss Direct Insurance Agreement ceases to apply to the UK, and replicates the effect of the existing EU/Swiss arrangement. The agreement provides mutual recognition of the UK and Switzerland's insurance and solvency regulations, and the effect of it will be to enable insurers in both countries to continue trading freely following Brexit.

CIARA JACKSON
Associate, London
T +44 (0)20 7264 8423
E ciara.jackson@hfw.com

2. COURT CASES AND ARBITRATION

England & Wales: A question of belonging - Palliser Ltd v (1) Fate Ltd (in liquidation) and others

The claimant in this case[1] (Palliser) had a 999-year lease for the three upper floors of a building containing seven flats, which it was letting out. Fate was the freehold owner of the building. In 2010, the building was destroyed by fire, which was caused by the negligence of Fate. Fate had taken out an insurance policy (the Policy) with the second defendant (which was subsequently transferred to the third defendant).

Palliser commenced proceedings against Fate, which were settled with judgment entered against Fate with damages to be assessed. However, Fate went into liquidation and the claim continued under the Third Parties (Rights against Insurers) Act 2010 (the Act). Under the Act (i) where an insured (Fate) has a liability to a third party (Palliser); and (ii) the insured is covered by insurance with an insurer against that liability (i.e. there is liability insurance); and (iii) the insured is insolvent; then (iv) the third party can claim directly against the insurer.

By section 6 of the Policy, headed *"Public and Products Liability"*, cover was provided in the event of: *"…. (b) Accidental Damage to* ***Property not belonging to you*** *or in Your charge or under Your control or that of any Employee"* [emphasis added].

By section 9, headed *"Buildings"*, which provided Fate with cover for damage to *"buildings at the premises"*, insurers paid made a payment of £610,000 to Fate.

Palliser sought indemnification under section 6 of the Policy for: (i) refurbishment costs; and (ii) "lost gains" including loss of rental income, and loss of development profits (as Palliser intended to sell the seven flats and reinvest the proceeds.

Although there were several issues in the case, the main question to consider was whether Fate's ownership of the freehold meant that the upper floors were property that **did** belong to Fate, meaning that any damage to them would not be covered under section 6.

Applying the law on contractual interpretation and "common sense", the Judge held that while Palliser owned a lease of the upper floors, Fate was the freehold owner of the whole building. Consequently, the upper floors were property that did belong to Fate, and section 6 did not provide coverage. This interpretation was consistent with how insurers dealt with the incident – paying out to Fate for damage to the upper floors under section 9.

Palliser's claims therefore failed in their entirety, although £8,500 of refurbishment costs were allowed for fixtures and fittings that clearly had not belonged to Fate.

ED BROWN-HUMES
Associate, London
T +44 (0)20 7264 8093
E ed.brown-humes@hfw.com

1 *Palliser Ltd v (1) Fate Ltd (in liquidation) (2) The National Insurance & Guarantee Corporation (3) UK Insurance Ltd* [2019] EWHC 43 (QB)

Australia: Insolvent but not excluded - *Kaboko Mining Limited v Van Heerden (No 3)*

The decision in *Kaboko Mining Limited v Van Heerden (No 3)*[1] highlights the importance of considering carefully both the pleaded causes of action, as well as the underlying facts of a claim, to determine whether it 'arises out of, is based upon or attributable to' a particular event or circumstance that could trigger an exclusion.

Background

A mining company (mining company) raised a preliminary point in a claim brought against its former directors for breach of statutory and general duties to act in the best interests of the mining company and for a proper purpose (alleged breaches). The preliminary point concerned the question of whether the mining company's Directors' & Officers' liability insurer was required to indemnify the former directors in respect of the mining company's claim.

The insurer relied on an insolvency exclusion that excluded liability for any claim *"arising out of, based upon or attributable to the actual or alleged insolvency of the [mining] Company or any actual or alleged inability of the [mining] Company to pay any or all of its debts as and when they fall due."*

The insurer argued that the alleged breaches led to a demand for repayment of advances made by a resources company, who had agreed to purchase manganese ore from the mining company, which in turn led to the mining company's insolvency. Accordingly, the insurer argued that the loss claimed arose out of the mining company's insolvency or its actual or alleged inability to pay its debts.

Decision

The Court set out the relevant principles of interpreting insurance policies and their exclusion clauses including the meaning of the words 'arising out of' and 'attributable to', and considered whether it was necessary to look beyond the pleaded causes of action to the underlying facts of the claim.

The Court held that:

1. While it was not disputed that the alleged breaches ultimately led to the mining company's insolvency, the loss as pleaded, and established by the underlying facts, was the 'loss of the mining company's opportunity to exploit a valuable commercial opportunity to develop certain mining projects'. An 'ancillary connection' to insolvency was therefore not sufficient to engage the insolvency exclusion.

2. The commercial purpose of the policy was to insure against the precise class of risk as those contained in the alleged breaches (i.e. breach of statutory and general duties to act in the best interests of the company and for a proper purpose);

3. The insurer's approach would result in the exclusion of any claim where the conduct of directors also plays some part in the eventual or alleged insolvency of the mining company. This would, in the words of Barker J in *Ashmere Cove Pty Ltd v Beekink* 'substantially defeat the indemnity granted by the policy and render the policy *"practically illusory"*'.[2]

4. The mining company's concession that the pleaded loss relating to costs of its receivers, managers and administrators 'arose out of' was 'based upon' or 'attributable to' the mining company's insolvency meant that the insolvency exclusion was triggered in respect of that particular head of loss.

Accordingly, the former directors were entitled to indemnity in relation to the mining company's claims, other than the claim for costs of the external controllers.

PHIL KUSIAK
Senior Associate, London
T +44 (0)20 7264 8384
E phil.kusiak@hfw.com

1. [2018] FCA 2055.
2. [2009] FCA 564 at [104].

PHIL KUSIAK
SENIOR ASSOCIATE

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3. MARKET DEVELOPMENTS

EU: Insurability of GDPR breaches

The EU General Data Protection Regulation (the GDPR), which came into force in May 2018, allows the UK Information Commissioner's Office (ICO) to impose fines of up to €20 million or 4% of global turnover (whichever is higher) on organisations that breach the GDPR.

An important question which arises is whether GDPR fines can be covered by insurance, a question which has been highlighted recently following on from the announcement of the €50 million imposed on Google by the French data regulator.

The issue of whether or not businesses can obtain insurance cover for regulatory fines generally depends on the local law. Many English law policies say that they will insure against fines and penalties provided that these are insurable under the law of the policy. As a matter of UK law, it is not generally possible to obtain cover for fines imposed of criminal or quasi-criminal conduct for public policy reasons.

The Global Federation of Insurance Association has asked the Organisation for Economic Cooperation and Development for guidance to clarify the confusion as to the insurability of fines and penalties for the benefit of consumer and insurer contract certainty. The OECD has agreed that it will look at the issue, and it is hoped that guidance will be issued in the near future.

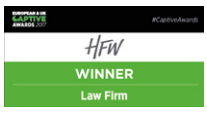
CIARA JACKSON
Associate, London
T +44 (0)20 7264 8423
E ciara.jackson@hfw.com

4. HFW PUBLICATIONS AND EVENTS

Middle East: HFW wins Law Firm of the Year at MENA IR Awards

We are delighted to announce that our Middle East insurance team has been named Insurance Law Firm of the Year at the MENA IR Insurance Awards for the third consecutive year.

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 http://www.hfw.com/Insurance-Reinsurance-Sectors



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