

Insurance/
Reinsurance

12 May 2017



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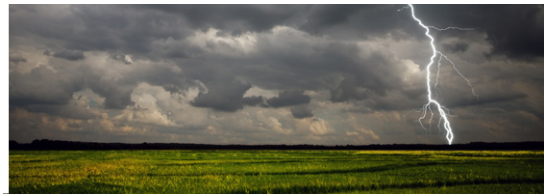
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hfw 1. Court cases and arbitration

England and Wales: *Peel Port Shareholder Finance Company Ltd v Dornoch*

***Peel Port v Dornoch* concerned an application for pre-action disclosure under CPR 31.16 of a public liability insurance policy issued by the defendant insurers to their insured.**

Under CPR r.31.16, the court has the power to order a potential party to proceedings to disclose documents on the application of another potential party to those proceedings, where the following requirements are met:

1. The respondent is likely to be a party to subsequent proceedings.
2. The applicant is also likely to be a party to those proceedings.
3. If proceedings had been started, the respondent's duty by way of standard disclosure would extend to the documents in respect of which disclosure is sought.
4. Pre-action disclosure is desirable in order to dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings, or to save costs.

The claimant's warehouse was damaged by fire allegedly caused by the insured which had taken out public liability insurance with the defendant insurers. The insurers denied liability on the basis of breach of a condition precedent which they alleged had been endorsed to the policy. The terms of the endorsement in question were set out in correspondence with the claimant, but the policy was not disclosed.

The claimant sought pre-action disclosure of the policy, arguing that the insured had no defence to the £1million claim against it which would likely succeed, and the insured would be unable to pay the claim and would be wound up. The insurers accepted that the CPR r.31.16 criteria at (1) to (3) above had been met, and the arguments centred around whether the test in (4) above had been met and whether the court should exercise its discretion to order pre-action disclosure.

The claimants argued that the test had been met because if disclosure was allowed and the claimant was satisfied that the endorsement was valid, it would not pursue the insured and the insurers, therefore avoiding litigation and the associated costs. The insurers argued that the court should not exercise its discretion as to do so would ignore the provisions of the Third Parties (Rights Against Insurers) Act 2010 which provides claimants with pre-action rights to insurance information (not disclosure) where an insured defendant is insolvent. If the claimants could obtain such information through the CPR, these provisions of the Act would be redundant. Further, the Act only requires the provision of information, and so to order disclosure of documents would be inconsistent with the Act.

The court dismissed the claimant's application for pre-action disclosure of the insured's public liability insurance policy on the basis that the circumstances of the case were not sufficiently exceptional to require disclosure of a solvent insured's insurance policy contrary to established practice. It would be unusual to allow disclosure of an insurance policy to a potential third

party claimant on the basis that the solvent insured might become insolvent and might enable the claimant to proceed against the insurers. The judge agreed that both CPR r.31.16 and the 2010 Act are relevant. She noted that the regime set out in the Act was recommended by the Law Commission in circumstances where it was considered to be uncertain whether the court would order pre-action disclosure of a liability policy in relation to anticipated proceedings against the insurers of an insolvent insured. Here, as the insured was not insolvent, the judge considered that the application could only have been made under CPR 31.16, but that established practice meant that the application could not succeed.

This judgment supports the general rule that a court will not order disclosure of a solvent insured's insurance information or policies unless they are relevant to the issues in dispute between the claimant and the defendant insured. This is the case even where there is a real possibility that the claim against the insured defendant will succeed and enforcement of the claim will lead to the defendant's insolvency.

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hfw 2. Market developments

England and Wales: Cyber assets at risk of being under insured

According to a recent report published by the Ponemon Institute and Aon, a significant number of large corporations believe their cyber assets are more valuable than plant, property and equipment. However, the 2017 Cyber Risk Transfer Comparison Global Report has revealed that companies are four times more likely to spend budget on insurance for physical assets than for cyber assets.

On average the companies surveyed insured an average of 59% and self-insured 28% of plant, property and equipment, but only insured an average of 15% and self-insured 59% of cyber risks. Yet the majority of companies surveyed spent considerably more on fire insurance premiums than on cyber insurance, despite the fact that the risk of any particular building burning down is significantly lower than 1%, and despite disclosing in publicly filed documents that the majority of an entity's value is attributed to intangible assets.

The majority of companies surveyed had found cyber insurance to be inadequate for the needs of the organisation, too expensive and contained too many exclusions. However, 46% of those surveyed reported a cyber risk event in the form of a data breach in the last two years, which had caused an average financial impact costing some US\$3.6 million.

It is forecast that 65% of companies expect their cyber risk exposure to increase in the next two years.



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LAURA STEER, SENIOR ASSOCIATE

Despite the lack of budget applied to cyber risk insurance, the 2017 Cyber Risk Transfer Comparison Global Report has found that cyber risk is a major concern for many businesses in the USA and globally. Companies are therefore increasingly introducing measures to identify their cyber risks, but whilst it is recognised as a significant threat, it is often not managed properly and can have a considerable financial impact.

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hfw 3. Other/international

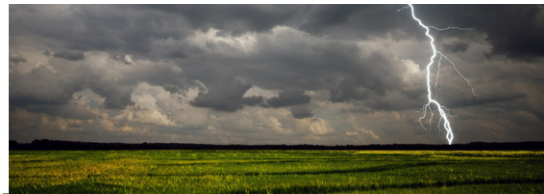
Hong Kong: Challenges ahead for Hong Kong insurance sector

In March 2017, the Hong Kong Financial Services Department Council (FSDC) issued a report entitled "Turning Crisis into Opportunities: Hong Kong as an Insurance Hub with Development Focuses on Reinsurance, Marine and Captive". The FSDC seeks to highlight some of the challenges facing Hong Kong in terms of keen competition from markets such as Singapore and the need to stem the flow of business away from Hong Kong. It also addresses the need to nurture and foster talent within the industry in order to secure future growth.

Reinsurance

The FSDC advocates, amongst other matters, the following changes:-

1. Under the China Risk Orientated Solvency System (C-ROSS) which was implemented in 2016, Hong Kong is classified as "off-shore". Under that regime, higher capital charges are imposed upon PRC insurers who cede risks to "off-shore" reinsurers. FSDC proposes that in order to stimulate business in the Hong Kong reinsurance market, Hong Kong reinsurers should be re-classified as "on-shore". The geographical proximity of Hong Kong lends itself to being "a natural platform" for the reinsurance of PRC business as well as that of Japan, South Korea and Taiwan.
2. Further tax incentives and concessions should be offered by the Hong Kong Government together with the need to accelerate Double Taxation Agreements with key countries.



3. The FSDC acknowledges the potential and/or future role of Insurance-Linked Securities (ILC) in the Hong Kong market. These products are, at present, under-developed in Hong Kong.

Marine insurance

The FSDC focuses on the need to maximise opportunities given that Hong Kong is a leading international maritime hub with a world class transportation and logistics network and infrastructure. It recommends the following:

1. Closer collaboration between the FSDC and the Hong Kong Maritime Port Board in setting up and promoting business initiatives between Hong Kong insurers and ship owners with a view to developing marine insurance.
2. The China Insurance Regulatory Commission should confer preferential/special status upon Hong Kong insurers.
3. Tax incentives and/or tax exemptions should be offered to Hong Kong insurers and brokers who underwrite and place marine risks respectively in Hong Kong.

Captive insurance

This is a highly under-developed market in Hong Kong. The aim is to establish a captive domicile in Hong Kong by 2020, for 5 - 20 captives to be licensed each year and for 50 authorised to operate by 2025. The FSDC further invites the Insurance Authority to play a more active role in promoting a captive market in Hong Kong, for example, by offering more incentives and concessions, whether tax or otherwise.



The FSDC highlights the need to attract and foster talent within the industry and to promote technical expertise.

ROSIE NG, CONSULTANT

Training and education within the industry

The FSDC highlights the need to attract and foster talent within the industry and to promote technical expertise. It urges the Government and industry bodies to set up educational funds, provide industry-related courses at a tertiary level and provide enhanced continuing education programmes.

Commentary

The Insurance Authority is due to take over the Office of Commissioner's role on 26 June 2017. The FSDC report addresses concerns which are already recognised within the industry and it remains to be seen the extent to which these recommendations will be followed through by the new regulatory body.

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hfw 4. HFW publications and events

Who's Who Legal 2017 Insurance and Reinsurance – six HFW partners named

HFW is delighted to announce that six partners in the Insurance/Reinsurance group (Andrew Bandurka, Chris Cardona, Chris Foster, Richard Spiller, London; Guillaume Brajeux, Paris; Geoffrey Conlin, Sao Paolo) have been listed in the Who's Who Legal 2017 publication. Click [here](#) to view the list.

Lloyd's Rugby 7s

Members of the HFW Insurance, Shipping and Aviation teams will be attending the Lloyd's Rugby 7s on 18 May at Richmond Athletic Ground. HFW will be fielding a team captained by Adam Strong (Partner, London) and welcoming clients and contacts to our marquee for refreshments throughout the day, as well as Bath 1st team captain Guy Mercer.

HFW to present at the Aqaba Conference 2017 in Jordan

John Barlow (Partner, Dubai), Costas Frangeskides (Partner, London) and Yaman Al Hawamdeh (Partner, Dubai) will be speaking at the Aqaba conference in Jordan on 17 May. John and Costas are also meeting with other clients in the region and will be speaking on reinsurance issues and sanctions.

HFW at IRLA Congress

On 10 May, Richard Spiller (Partner, London) sat on the European Regulation and Brexit Panel at the IRLA Annual Congress in Brighton, UK.



**HFW briefing: The *OCEAN VICTORY*
– the final word on the safety of
Kashima Port, May 2017**

In a shipping judgment handed down this week, the Supreme Court considered whether provisions for joint insurance in a contract would preclude claims against third party co-insureds. This decision could have wider implications for other contracts with insurance-backed solutions. For more information, please read the full article by Jean Koh (Partner, London) and Alex Andreou (Associate, London) [here](#).

Lawyers for international commerce

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