Insurance/
Reinsurance

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INSURANCE BULLETIN





In this week's Insurance Bulletin:

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MENAIR INSURANCE AWARDS 2017 WINNER

UK CAPTIVE 2017 SERVICES AWARDS WINNER LAW FIRM HOLMAN FENWICK WILLAN

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1. Court cases and arbitration

England and Wales: Beware exemption clauses

The recent Court of Appeal judgment in Persimmon *Homes v Ove Arup & Partners* provides important guidance on the application of the contra proferentum rule to exemption clauses in commercial contracts.

This case concerned a failure by the defendant engineers to advise the claimants, a consortium of developers, about the existence of asbestos at a site under development. The defendants sought to rely on a clause which excluded liability for any claim in relation to asbestos. At a preliminary issue hearing, the judge's view was that the clause did operate to exclude liability for the claims, on the basis that it amounted to an agreed allocation of risk between the parties.

On appeal, the claimants argued that the judge had failed properly to apply the contra proferentem rule, namely, that the exemption clause should be construed against the party seeking to rely on it and therefore in favour of the claimants. The Court of Appeal considered that, in commercial contracts involving parties of equal bargaining position, the contra proferentem rule has a very limited role in interpreting exemption clauses and is more relevant to indemnity clauses.

This should serve as a warning to commercial parties when negotiating contracts, particularly in the construction context. It is clear that, where the parties are of equal bargaining power, the courts will seek not to interfere on the basis that it is open to the parties to agree an appropriate allocation of risk. Where interference is necessary, it seems that the courts will seek to apply the natural meaning of the words of an exemption clause, without recourse to the contra proferentem principle.

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England and Wales: Claimant sued "driverless" car

In *Cameron v Hussain and Liverpool Victoria*, the Court of Appeal held that a claimant is able to sue and subsequently obtain judgment against a party by description rather than name.

In this case, the claimant's stationary vehicle was hit by a car insured by Liverpool Victoria. The car did not stop but the number plate was obtained by a witness. Investigations revealed that Liverpool Victoria insured neither the owner nor the registered keeper of the car, the risk address was bogus, and the policy had been taken out fraudulently. The claimant brought proceedings against the insured and the insurer. The insured refused to provide the driver's details. The claimant admitted, during the course of proceedings, that the identity of the driver was unknown and Liverpool Victoria obtained summary judgment against the claimant on the grounds that the driver could not be identified and so judgment could not be obtained against an identified party. The claimant's application to amend the defendant to *"the person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration KG03 ZIZ on 26 May 2013"* was refused.

The Court of Appeal considered that there is no distinction between cases where insurers (under section 151 of the Untraced Driver's Agreement (UTDA)) routinely have to satisfy judgments against wrongdoers who, although their identities are known, can no longer be traced and bringing a claim/obtaining judgment for damages against an unnamed defendant. Under section 151, insurers would be under a duty to satisfy the judgment and so the claimant should be permitted to bring the claim. Further, the Court of Appeal considered that an identified

insurer's liability under section 151 written in respect of a specific vehicle and a specific named insured, should not depend on whether, at the date of issue of court proceedings, or thereafter, the claimant can identify the driver by name. Finally, the Court of Appeal considered this to be a case where it should exercise its powers in accordance with the overriding objective to allow the claimant to bring a claim against an unnamed defendant driver to obtain a judgment which an identified insurer is liable to meet.

Whilst this may appear to "open the floodgates" in terms of claims against unidentified defendants, the scope of the case is specifically limited to circumstances where the vehicle is insured and the insured and registered owner of the vehicle are identifiable. Further, to proceed against an unnamed party can only be permitted where to do so is consistent with the overriding objective.

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England and Wales: Importance of complying with notification conditions and recoverability of damages for "negative feelings"

In *Amlin Corporate Member v (1) Baby Basics (2) Vital Innovations (2017)*, the court considered the extent of cover provided in respect of "bodily injury" under a product and public liability policy and whether an insured had complied with notification requirements.

The insured, first defendant, was a manufacturer and supplier of baby products, including spoons. The second defendant sold these baby products in Israel and provided the spoons to a local retailer. In September 2015 the Israeli authorities decided that the spoons did not meet Israeli safety standards and in January 2016 a notice to recall the spoons within Israel was issued. Following this, both the second defendant and the retailer to whom it had supplied the products were the subject of two class actions. The claimants in these actions sought damages for "negative feelings".

The product and public liability insurance underwritten by the claimant insurer did provide cover for "bodily injury". However, the claimant insurer sought a declaration from the court (which was not defended) that it was not liable to indemnify the defendants in respect of the claims because the claims were not for "accidental bodily injury" or "accidental damage to property". Further, the insured had not complied with the notification condition, which provided that notification of a claim should be made as soon as reasonably practicable after an incident that might give rise to a claim, and full information in writing should be provided within 30 days. Notice had not been given to the insurer until April 2016, two months after the class actions and nearly three months after the product recall.

Sir Jeremy Cooke held that there was an unanswerable case that the policy condition on notification had been breached. Accordingly, there was no cover. In addition, the policy did not provide cover in respect of "negative feelings". While "nervous shock" would fall within "bodily injury", that required a serious mental disturbance resulting in a recognisable psychiatric disease, and not negative feelings, anxiety or fear.

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2. Market developments

UK: Director of the ABI gives speech on changes in the insurance industry

On 31 May 2017, the director of the Association of British Insurers (ABI), James Dalton, gave a speech on changes in the UK general insurance industry.

Dalton commented that cyber will play a very important role in the future of the insurance industry. One of the biggest challenges and opportunities will be how insurers respond to the digital revolution and to a customer base with changing needs and expectations. For example, mobile technology can help insurers put in place customer solutions in real time. Dalton predicts a greater shift in the industry from being purely about financial risk to being about preventing claims from arising in the first place. He considers this is a reason why the industry has played such a central role in facilitating the use of driverless cars in the UK. Dalton focused on the importance of data protection in light of the European General Data Protection Regulation and stressed that issues such as the WannaCry ransomware attack in May were tough reminders of the importance of effective cyber security. Cyber insurance can assist in managing these risks and insurers are gradually seeing the benefits of collaborating and investing in technology companies in tackling these risks.

Dalton also considered the impact of Brexit. In his view, there are two key challenges for the industry arising out of Brexit. First, the industry needs to address the issue of what to do with existing contracts that have long-term liabilities beyond any phased process of implementation. The payment of a

claim can only be legally done if you are authorised to operate in many EU markets. Currently, this can be achieved through passporting. Post-Brexit, insurers could be left in a position where they have contractual obligations to customers in jurisdictions where they are not authorised. The second challenge is dealing with the policy issues raised by the Great Repeal Bill. Due to the complexity and number of issues involved, completing the great repeal process by March 2019 may be tough. There are a number of significant policies to get right, including the need for a standalone prudential insurance regulatory regime and the extent to which this should be allowed to deviate from Solvency II. Finally, the insurance market requires a post-Brexit regulatory relationship with the EU and it is important for regulators to maintain a close and engaged relationship with their European counterparts to bring this about.

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3. HFW publications and events

Hong Kong: HFW presents to Gard (HK) Ltd

On 27 June 2017, Peter Murphy (Partner, Hong Kong) and Rosie Ng (Consultant, Hong Kong) are leading a seminar for Gard (HK) Ltd on the Insurance Act 2015 and the Enterprise Act 2016.

Panama: HFW sponsors LatAm Ports Forum

On 28 and 29 June, HFW is sponsoring the 2nd Latin American Ports Forum in Panama. Alex Kyriakoulis (Partner, London) will be taking part in a panel on Financial & Risk Management in a New Environment and Francisco Gross (Legal Assistant, Sao Paolo) will be attending.

London: HFW presentation on Texas' Insurance Landscape

On Friday 23 June, Jerry Kimmitt and Jacob Esparza (Partners, Houston) will be giving a lunchtime presentation on recent developments in Texas Insurance Landscape at HFW's London office. They will provide an in-depth discussion on recent opinions from the Texas Supreme Court concerning bad faith claims and attorneys fees, the soon-to-be-effective Chapter 542A of the Texas Insurance Code affecting weather-related property claims/handling and the impact of these developments on past and future litigation in Texas.

If you are interested in attending this session, please contact events@hfw.com.

UK: Marine Insurance Week

HFW is pleased to be hosting its first Marine Insurance Week on 26 – 30 June 2017 in London. The week long programme of events is designed for those involved in marine insurance claims and includes a variety of seminars relevant to all lines of marine insurance, including hull, cargo, ports & terminals and liability.

A copy of the full programme can be found by clicking here.

If you have any queries regarding this event, or to register your interest in attending, please contact us at events@hfw.com.

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