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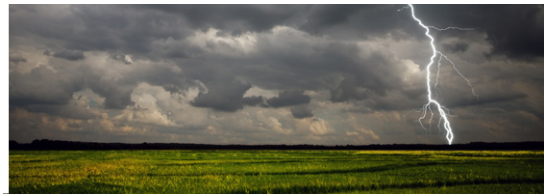
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AWARDS 2017  
**WINNER**

**UKCAPTIVE**  
2017  
SERVICES AWARDS  
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## **hfw** 1. Regulation and legislation

### **UK: FCA Update on Part VII insurance business transfers**

**In May 2017, the Financial Conduct Authority (FCA) published a consultation paper (Proposed Guidance on the FCA's Approach to the Review of Part VII Insurance Business Transfer, GC17/5) which contains draft guidance on how the FCA proposes to review applications for transfers of insurance business under Part VII of the Financial Services and Markets Act 2000 (Part VII Transfer).**

It also sets out the FCA's expectations of the parties and the independent expert (Consultation Paper). The draft guidance is intended to be read alongside Chapter 18 of the Supervision Manual in the FCA's Handbook and also the Prudential Regulation Authority's (PRA) April 2015 statement of policy setting out the PRA's approach to insurance business transfers.

The Consultation Paper was published in order to assist practitioners, insurers and independent experts to understand the FCA's approach to and requirements for a Part VII Transfer. The FCA acknowledges that the PRA takes the lead in Part VII Transfers (in accordance with the Memorandum of Understanding between the FCA and PRA) but recognises that both regulators have specific roles in the process. The PRA leads the process and has responsibility for approving the appointment of an independent expert, approving notices and issuing the necessary certificates; the FCA, however, has an active role in the process and must be consulted by the PRA at all stages, including court hearings, where it provides its own

## Applicants are expected to contact the FCA and the PRA at an early stage.

assessment of the Part VII transfer to the Court. The FCA acknowledges that each Part VII Transfer has to be considered on its own merits and expects to take a proportionate approach in its assessment of an application.

The draft guidance covers the following: (i) matters which need to be addressed at the initial application stage; (ii) appointment of the independent expert; (iii) the FCA's role, approach and key considerations; (iv) details of the key documents; and (v) factors which are taken into account when applications are made for dispensations from certain requirements in Part VII Transfers.

Applicants are expected to contact the FCA and the PRA at an early stage. The nominated independent expert must demonstrate independence, sufficient skills, experience and resources. The FCA will also address the business rationale for the transfer of business including due consideration of regulatory and competition issues, changes affecting policyholders and other unresolved issues.

The Consultation period is open until 15 August 2017. A link to the Consultation Paper can be found at: <https://www.fca.org.uk/publication/guidance-consultation/gc17-05.pdf>.

For more information, please contact **Nazim Alom**, Associate, London, on +44 (0)20 7264 8760, or [nazim.alom@hfw.com](mailto:nazim.alom@hfw.com), or your usual contact at HFW.

## **hfw** 2. Court cases and arbitration

### **Australia: MetLife Insurance Ltd v RGA Reinsurance Company of Australia Ltd**

**The decision in *MetLife Insurance Ltd v RGA Reinsurance Company of Australia Ltd*<sup>1</sup> considered the 'back to back' presumption in facultative proportional reinsurance and demonstrates the need for parties to take care with the language used when drafting reinsurance contracts.**

#### **Background**

MetLife Insurance Ltd (MetLife), formerly Citicorp Life Insurance Ltd, purchased a contract of reinsurance (Original Treaty) from RGA Reinsurance Company of Australia Ltd (RGA) in June 2003 for reinsurance of its group life insurance policies. Although it was called a 'treaty', the contract contained a facility for the parties to agree facultative reinsurance.

MetLife subsequently issued a group life insurance policy covering death or total and permanent disablement of members of the New South Wales Police Force (Blue Ribbon policy), and RGA reinsured MetLife facultatively in respect of the Blue Ribbon policy.

The terms of the reinsurance were documented by way of a sloppily drafted Addendum to the Original Treaty (Addendum). Both the Blue Ribbon policy and the reinsurance commenced with effect from 1 July 2005.

The Addendum contained a sentence which gave rise to the dispute between MetLife and RGA, as follows:

*"For a claim to be eligible for consideration under the reinsurance*

1 [2017] NSWCA 56





*arrangement the initial event leading to or contributing to that claim must occur after the date of effect of the treaty”*

The parties referred to this provision as the ‘Initial Event Sentence’. The Initial Event Sentence formed part of the Addendum which dealt with claims handling limits. The dispute concerned whether the reinsurance extended to claims by police officers which arose in part out of events occurring before 1 July 2015.

### Issues

Two issues arose for determination:

- The principal question was whether (as contended by RGA) the Initial Event Sentence qualified RGA’s obligation to provide cover under the reinsurance, rather than merely qualifying the claims handling limits within which RGA was obliged to follow MetLife’s settlement decisions.
- If RGA were correct and the Initial Event Sentence qualified the reinsurance coverage, then a subsidiary question arose as to whether (as contended by RGA) *“the initial event leading to or contributing to that claim”* was a reference to the initial event leading to the death or incapacity of the police officer, or was instead the event leading to the claim being made under the MetLife policy (death or a qualifying period of total and permanent disablement.)

At first instance, the judgment on both issues was in favour of RGA.

The NSW Court of Appeal dismissed MetLife’s appeal as follows:

On the principal question, MetLife argued that the meaning and operation of the Initial Event Sequence related to claims handling, rather than

it being an exclusion. In the alternative, MetLife also argued, relying on the English cases of *Vesta v Butcher*, *Groupama v Catatumbo* and *Wasa v Lexington*, that the Initial Event Sentence was insufficiently clear to displace the back-to-back presumption which was to be applied when construing facultative proportional reinsurance contracts.

The court did not accept MetLife’s arguments that a narrow meaning should be given to the words *“consideration under the reinsurance arrangement”* in the Initial Event Sentence and stated that MetLife’s arguments would be considerably stronger if this sentence had used words with a narrower connotation than *“reinsurance arrangement”*.

In respect of MetLife’s argument that the presumption of back to back cover had not been rebutted, the court noted that a large part of the Addendum was directed to replicating provisions from the Blue Ribbon policy, supporting an inference that the parties intended to create a free-standing document.

The Court of Appeal held that the Addendum was not a “slender” or “short form” document like a traditional reinsurance slip, which especially calls for the presumption in order to fix its legal meaning. Rather, the parties had sought in the Addendum to restate the terms of the reinsurance contract, both where it diverged from the underlying insurance, and where it replicated the underlying insurance so that no recourse to the underlying policy was needed. Accordingly, the back-to-back presumption had no significance in the construction of the Addendum.

On the subsidiary question, MetLife argued that the words *“leading to or contributing to that claim”* directed attention to the event leading to the claim being made under the MetLife policy (for example, the death or total



**This ruling throws interesting new light on the application of the back to back presumption, and again highlights the need for thoughtful contract drafting.**

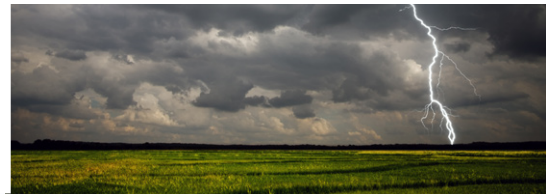
BRENDAN MCCASHIN, SPECIAL COUNSEL

and permanent disablement of the police officer, rather the underlying events leading to these conditions, which may have occurred much earlier).

The Court of Appeal disagreed and upheld the trial judge’s finding that the words *“or contributing to”* naturally encompassed a cause which, although it may not be the immediate or proximate cause of the claim, nonetheless contributed, in some way that was not *de minimis*, to the occurrence of the condition that led to the making of the claim.

This ruling throws interesting new light on the application of the back to back presumption, and again highlights the need for thoughtful contract drafting.

For more information, please contact **Brendan McCashin**, Special Counsel, Melbourne on +61 (0)3 8601 4527 or [brendan.mccashin@hfw.com](mailto:brendan.mccashin@hfw.com), or your usual contact at HFW.



### England and Wales: *Plevin v Paragon Personal Finance Ltd*: Effects of LASPO 2013 on pre-existing CFAs and ATE insurance

**In this significant ruling, the Supreme Court has addressed the effect of the transitional provisions of the Legal Aid, Sentencing and Punishment of Offender Act 2012 (LASPO). The court's decision highlighted the need to preserve vested rights and expectations in spite of the arrangements that were abrogated by LASPO regarding Conditional Fee Agreements (CFA) and After the Event (ATE) Insurance.**

In 2008 the claimant entered into a CFA which covered all proceedings up to and including the trial and all steps taken to seek an appeal thereafter. Alongside this, ATE insurance was taken out to cover the cost of the litigation. On 1 April 2013, LASPO came into effect and provided that ATE insurance policies and success fees under CFAs which were taken out or entered into on or after that date could not be recovered as costs from an opponent. Nonetheless, the claimant extended the CFA by way of deeds of variation entered into in 2013 and 2014 to cover the progress of the dispute in the Court of Appeal and Supreme Court. The ATE insurance was similarly "topped up" twice during this period.

The Supreme Court was required to consider two points. First, whether the post-LASPO deeds of variation of the CFA constituted new agreements which would not be recoverable under the rules introduced in 2013. Secondly, whether the hearing of the case in the Court of Appeal and later the Supreme Court were part of the same proceedings. If they were then the ATE insurance would cover the entire course of litigation and would thus be recoverable as costs from the opponents.

## The ATE premium could be recovered in line with the expectations of the claimant when they took out the original policy prior to LASPO.

On the first point it was held that, provided the deeds of variation did not discharge the original CFA and replace it, the success fees in the CFAs could legitimately be included in the claimant's recoverable costs. It was further held that the transitional provisions of the LASPO rules were not limited to a particular stage of litigation and that the claimant could therefore benefit from them at every stage of the case's progress through the courts. Thus, the ATE premium could be recovered in line with the expectations of the claimant when they took out the original policy prior to LASPO.

This decision provides that success fees under CFA and ATE cover may properly be included in the costs order for the trial to entitle the claimant to benefit from the transitional provisions in section 44(6) and section 46(3) LASPO. This provides much-needed clarity in cases that have in place agreements which pre-date LASPO.

The judgment is available at: <https://www.supremecourt.uk/cases/docs/uksc-2014-0037a-judgment.pdf>.

For more information, please contact **Simon Banner**, Associate, London, on +44 (0) 20 7264 8289 or [simon.banner@hfw.com](mailto:simon.banner@hfw.com), or your usual contact at HFW.

Research conducted by Matt Rickett, Paralegal.

## **hfw** 3. HFW publications and events

### **UK: HFW to host a private screening of Lions v Auckland Blues**

The HFW Insurance/Reinsurance and Shipping teams are hosting a private screening of the Lions v Auckland Blues match on 7 June with breakfast from 8am. For more information, please contact us at [events@hfw.com](mailto:events@hfw.com).

### **Brazil: HFW presenting at the IBA LatAm Maritime and Transport Law Conference**

**Geoffrey Conlin**, Partner, São Paulo is speaking on Ports and Terminals at the IBA LatAm Maritime and Transport Law Conference on 8 June.

### **UK: HFW presenting at IRLA Breakfast Briefing on the General Data Protection Regulation**

**Felicity Burling**, Associate, London is speaking at the IRLA Breakfast Briefing on 9 June 2017 on "Learning to Live with the General Data Protection Regulation". Felicity will be speaking alongside Dr. Yalini Pathy and Craig Skinner of PwC. They will consider the scope and application of the GDPR, how Brexit could affect compliance with and enforcement of the GDPR, and practical steps that companies can take now to aid compliance with the GDPR.

### **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). Marine Insurance Week 2017 will cover topics



including the impact of the Arab Spring on insurers; managing claims in Latin America; detention and confiscation by authorities; polar navigation and the Polar Code; and the impact of supply chain insolvencies in the insurance market. **Jonathan Bruce**, Partner, London will be speaking on “True or false – potentially suspicious hull claims and how to approach them” together with **Alex Kemp**, Senior Associate, London.

A copy of the full programme can be found at <http://www.hfw.com/downloads/HFW-Marine-Insurance-Week-June-2017.pdf>.

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

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