Insurance/ Reinsurance

12 June 2015

Welcome to HFW's Insurance Bulletin, which is a summary of the key insurance and reinsurance regulatory announcements, market developments, court cases and legislative changes of the week.

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Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin, or your usual contact at HFW.

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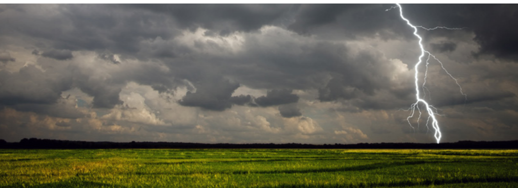

1. Regulation and legislation

England and Wales: Professional indemnity insurer liable for repayment of loans taken out for client disbursements. *Impact Funding Solutions Ltd v Barrington Support Services Ltd*[1]

The Court of Appeal recently considered whether professional indemnity insurers are obliged to indemnify solicitors who are liable to reimburse loans made to their clients to settle disbursements incurred by those clients.

Impact Funding Solutions Ltd (**Impact**) provided loans to claimants covering the costs of disbursements (e.g. for expert reports) in respect of industrial deafness claims brought by the claimants' solicitors, Barrington Support Services Ltd (**Barrington**). The claimants also entered into a conditional fee agreement (CFA) with Barrington.

Under a Disbursements Funding Master Agreement (**DFMA**), Barrington undertook to pay to Impact all sums payable by the claimants under the loans from either damages received or, if the claim was lost, under any relevant insurance policy in place. In breach of the DFMA and its CFAs with its clients, Barrington failed to properly assess the merits of a large number of claims made which led to their abandonment. Further, Barrington had used the loans provided by Impact to pay referral fees rather than for genuine disbursements incurred by the claimants.

Impact successfully sued Barrington for recovery of the loans and obtained judgment in the sum of £581,353.80, although Barrington went into liquidation before the judgment debt was settled.

Barrington failed to properly assess the merits of a large number of claims made which led to their abandonment. Further, Barrington had used the loans provided by Impact to pay referral fees rather than for genuine disbursements incurred by the claimants.

JONATHAN GOULDING, ASSOCIATE

At first instance, Impact brought a claim against Barrington's professional indemnity insurers, under the Third Parties (Rights Against Insurers) Act 1990. Barrington was insured in accordance with the Minimum Terms and Conditions required by the Solicitors' Indemnity Insurance Rules. The insurer relied on clause 6.6(b) of those terms which excluded liability for *"Any...breach by any insured of the terms of any contract or arrangement for the supply to, or use by, any insured of any goods or services in the course of the Insured Firm's Practice..."*.

His Honour Judge Waksman QC agreed with the insurer and held that Impact was providing a service to Barrington and that Barrington's liability arose from the breach of the DFMA for the service it provided. Impact appealed.

The Court of Appeal allowed the appeal. In the leading judgment, Lord Justice Longmore said that the purpose of clause 6.6(b) of the Minimum Terms and Conditions was to exclude personal liabilities of a solicitor as opposed to liabilities arising from his professional obligations to his or her clients. So a solicitor would not be covered for personal liabilities incurred, say, to a photocopier supplier, or obligations under a lease or mortgage. However, obligations arising out of loans made to cover disbursements for intended litigation *"are essentially part and parcel of the obligations assumed by a solicitor in respect of his duties to his client rather than obligations personal to the solicitor"*. Therefore clause 6.6(b) of the Minimum Terms and Conditions did not apply.

The insuer was ordered to pay Barrington's outstanding debt to Impact.

The case will be of significant interest to solicitors' professional indemnity insurers whose clients use litigation funders that operate in a similar manner to Impact, and who may

1 [2015] EWCA Civ 31

potentially face similar claims for unpaid loans. The case also provides clarity on what debts or liabilities are considered personal to the solicitor which would be excluded from the Minimum Terms and Conditions.

For more information, please contact Jonathan Goulding, Associate, on +44 (0)20 7264 8573, or jonathan.goulding@hfw.com, or your usual contact at HFW.

England and Wales: Non-executive director's failure to disclose conflicts of interest results in ban from holding a regulated financial role. *Angela Burns v The Financial Conduct Authority*[1]

In November 2012, the Financial Conduct Authority (FCA) imposed on Angela Burns a financial penalty of £154,800 and a prohibition order preventing her from performing any function in relation to any regulated activity. Ms Burns denied the FCA's allegations and referred the matter to the Upper Tribunal (Tax and Chancery Chamber).

In December 2014, the Tribunal found that Ms Burns had "failed to act with integrity" in the performance of her CF2 controlled function as a non-executive director of the mutual societies MGM and Teachers, by seeking to solicit a position as a non-executive director with Vanguard, a US asset manager that she had worked for previously, and by notifying Vanguard of potential business opportunities with the mutual societies. The Tribunal upheld four and dismissed six of the allegations brought against Ms Burns, concluding that she had breached APER Principle 1 and was not a "fit and proper person" to carry out the CF2 function.

At a more recent hearing, the Tribunal was asked to determine what action was appropriate for the FCA to take against Ms Burns. Notwithstanding that six out of the ten allegations the FCA had made against Ms Burns were dismissed by the Tribunal, the FCA had sought to impose its original sanction of a total prohibition order and a financial penalty of £154,800. The Tribunal decided that the appropriate action for the FCA to take was to make a prohibition order preventing Ms Burns from carrying out a CF2 function in relation to any regulated activity and to impose a penalty of £20,000.

In reaching its decision, the Tribunal was in "wholesale disagreement" with the FCA's assessment of the seriousness of the proven breaches and found that the financial penalty it sought to impose was "wholly excessive". The Tribunal was critical of the FCA and found a number of its allegations to be "unsatisfactory and unpersuasive". For example, the FCA had painted a picture of misconduct by Ms Burns over a period of two years, rather than isolated instances over three days in 2009 and one day in 2010. The FCA also misinterpreted the Tribunal's decision for failing to make proper disclosure, as a decision that Ms Burns misused her position to benefit herself.

Ultimately the Tribunal agreed with Ms Burns that a prohibition of the CF2 function, rather than the total prohibition sought by the FCA, would be more appropriate. However, the Tribunal noted that it did not have the jurisdiction to limit the time period of the prohibition order and considered that it was difficult for the FCA to consider any application for the prohibition order to be lifted whilst Ms Burns maintained her denial that she was in breach of the proper standards of conduct. The financial penalty imposed of £20,000 reflected "the limited extent to which the allegations against Ms Burns were upheld, and [contained] a discount in recognition of the burden upon her and prejudice suffered through facing substantial allegations which ... were unfounded".

A number of lessons can be taken from this case. Firstly, the case serves as a useful reminder to directors of the consequences of failing to make up-to-date declarations of interest, particularly in financial services sectors which are subject to strict regulation. Secondly, the case highlights the overzealous approach taken by the FCA in its approach to enforcement against Ms Burns and also demonstrates that, in such an event, the Tribunal will not shy away from overturning the FCA's decisions.

For more information, please contact Jonathan Goulding, Associate, on +44 (0)20 7264 8573, or jonathan.goulding@hfw.com, or your usual contact at HFW.

Australia: High Court clarifies scope of proportionate liability regime in misleading or deceptive conduct claims

In a case of great importance to insurers underwriting risks in the financial services sector, the High Court in *Selig v Wealthsure Pty Ltd* has confirmed that the proportionate liability regime contained in Div 2A of Part 7.10 of the Corporations Act 2001 (Cth) applies solely to contraventions of s1041H (that is, claims of misleading or deceptive conduct in the provision of financial products or services), and does not extend to other claims arising from the same facts.

1 [2015] UKUT 252 (TCC)

...the case operates as a reminder that a non-party may be ordered to pay costs where they played an active part in the conduct of, and had an interest in the subject of, the litigation.

SUSANNAH FRICKE, ASSOCIATE

This decision has wide reaching ramifications as plaintiffs will often plead a claim under s1041H as an alternative to other causes of action. As a result of Selig, if a plaintiff is also successful in claiming the same damages on the same facts pursuant to an alternative cause of action where proportionate liability does not apply (such as contravention of other statutory provisions in the Corporations Act), then the damages awarded will not be apportioned.

Without the application of proportionate liability, a plaintiff is entitled to obtain payment of the entire judgment sum from a "deep pocket" defendant (such as an insurer). It would then be incumbent on that defendant to seek contribution from any other defendants. In Selig, this course was not feasible as some of the other defendants were insolvent or bankrupt.

Further, the case operates as a reminder that a non-party may be ordered to pay costs where they played an active part in the conduct of, and had an interest in the subject of, the litigation. Here, Wealthsure's professional indemnity policy provided cover to a maximum of US$3 million for any one claim inclusive of legal costs. The insurer decided to attempt to better its position by appealing the first instance judgment. In so doing, funds that it would otherwise have contributed to the judgment sum were diverted to meet the costs of the appeals, at the expense of the plaintiffs. In these circumstances, the Court found it appropriate to award costs against the insurer itself.

A full copy of this decision can be found at: http://www.austlii.edu.au/au/cases/cth/HCA/2015/18.html

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2. HFW events

Latin America: HFW present IUA market briefing on the perils of underwriting Latin American risks and handling claims in Latin America

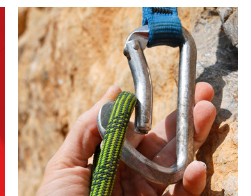
On 19 May, HFW Partners Jonathan Bruce and Geoffrey Conlin presented the IUA's market briefing on the perils of writing Latin American business and handling claims in Latin America. The briefing covered the trends in the laws of Latin American countries, the issues which underwriters and claims handlers should consider, and some suggestions for risk control and damage limitation.

For more information on the issues that may arise for international insurers operating in the Latin American market, please contact Jonathan Bruce, Partner on +44 (0)20 7264 8773, or jonathan.bruce@hfw.com or Geoffrey Conlin, Partner on +55 (11) 3179 2902, or geoffrey.conlin@hfw.com, or your usual contact at HFW.

London: HFW UAE/MENA Regulatory Environment Update Workshop

HFW, Friary Court
23 June 2015
Presenting: Carol-Ann Burton, Tanya Janfada and Richard Spiller.

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



3. News

United States of America: Texas flood losses set to exceed US$1 billion

It is likely that insured losses caused by the devastating storms which hit Texas and Oklahoma two weeks ago, which saw thousands of homes and vehicles submerged by flood water, will cost the industry over US$1 billion in motor losses alone according to the Insurance Council of Texas. Property damage in Oklahoma is yet to be calculated.

The scale of flooding has led to comparisons with the 2001 tropical storm, Allison, which resulted in US$1.1 billion in insured losses.

Aon Benfield Impact Forecasting has said it is still too early to accurately predict the final insured loss total, however, it does anticipate this sum will surpass the US$1 billion mark. It added that overall insured losses caused by severe US storms had climbed to US$3.1 billion by mid-May but were likely to spike upon factoring in recent south-central storms and flooding.

For more information, please contact Lucinda Rutter, Associate, on +44 (0)20 7264 8226, or lucinda.rutter@hfw.com, or your usual contact at HFW.

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