Insurance/
Reinsurance

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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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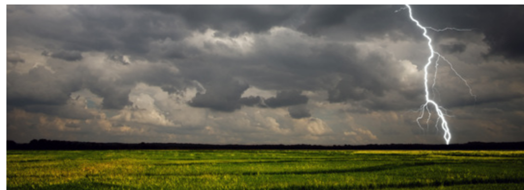

1. Regulation and legislation

EU: Insurance Distribution Directive adopted by the European Parliament

The European Parliament has formally adopted the text of the Insurance Distribution Directive (the Directive). A copy of the European Parliament's legislative resolution adopting the Directive can be found on their website[1].

The Directive will replace the Insurance Mediation Directive and, among other things, will extend the scope of regulation to all persons who sell insurance products directly to customers, introduce stricter rules on the management of conflicts of interest and the conduct of business, and impose specific disclosure requirements.

The Directive was heavily negotiated during its drawn-out passage through the European legislative process. One key development was the amendment from a maximum harmonising Directive, which would have prevented state regulators imposing a higher standard, to a minimum harmonising Directive. As a minimum harmonising Directive, the UK will be free to impose stricter requirements than those contained in the Directive, and it will come as no surprise if the UK takes this approach.

The Directive now needs to be adopted by the Council of the EU, which is anticipated to happen before the end of 2015. If this timeline is met, it should be published in the Official Journal of the EU this month or early next year. The Directive will come into force 20 days after publication, but member states will have a further two years to transpose and implement it. Accordingly, firms will not be required to comply with the Directive, as transposed into the law of the relevant member state, until late 2017 or early 2018. We will report on the UK's proposals for transposition as and when they are published.

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1 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0400+0+DOC+PDF+V0//EN

UK: FCA proposes cut-off for new PPI mis-selling complaints

In what may be regarded as an attempt to draw a line under the PPI mis-selling scandal, the FCA has proposed a two year cut-off for consumers to make new PPI mis-selling complaints against firms or to the Financial Ombudsman Service (the FOS). The FCA cannot set time limits for making a PPI claim in the courts, so consumers would still be able to bring claims before the courts in line with statutory limitation periods.

This proposal has been a long time coming. Since the Supreme Court judgment in *Plevin v Paragon Personal Finance Ltd*[1], on which we reported[2] shortly after it was handed down, the FCA has been considering how it can ensure that firms handle PPI mis-selling complaints in a fair and consistent approach, and how it can take action if it appears that a firm is not handling PPI mis-selling complaints appropriately.

Having gathered evidence and analysed its current approach, the FCA has published a consultation paper[3] which contains a draft set of rules and guidance on the handling PPI mis-selling complaints. However, it is the two year cut-off that is sure to grab headlines. Under this proposal, consumers would be required to make a complaint within two years of the rule coming into force, or else lose their right to have the complaint assessed by the firm in question, or by the FOS.

The FCA expects to publish its final rules in 2016, which would mark the start of the two year period.

WILLIAM REDDIE, ASSOCIATE

The FCA expects to publish its final rules in 2016, which would mark the start of the two year period. Consumers would then have until 2018 to make complaints against firms or to the FOS. In the intervening period, the FCA would lead a communications campaign in order to raise awareness of the deadline. Assuming that the FCA's proposals are adopted, it seems that PPI mis-selling is set to feature highly on the FCA's agenda for a while yet.

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1 [2014] UKSC 61

2 http://www.hfw.com/Insurance-Bulletin-26-November-2014

3 http://www.fca.org.uk/static/fca/documents/consultation-papers/cp-15-39-ppi-complaints.pdf

2. Court cases and arbitration

EU: *Weltimmo v Hungarian Data Protection Authority*: Landmark data protection case on "establishment"

Cyber security breaches are occurring with increasing regularity. In the UK, British Gas was recently forced to contact 2,200 customers warning them that their personal data had been posted online in an unexplained data leak. Prior to that, TalkTalk suffered a "significant and sustained" cyber attack which put the personal details of around four million customers at risk. Around the same time, Marks & Spencer suffered a breach of personal data on its website.

Insurers and brokers ought to take a keen interest in these issues for two reasons. First, because the rise to prominence of cyber issues is likely to lead to greatly increased demand for cyber insurance products. And second, because insurers and brokers themselves are constantly acting as "data controllers" for the purposes of the Data Protection Act 1998 as they collect enormous amounts of personal data about their clients, particularly at the underwriting and claims stages of their business. The penalties for getting it wrong can be severe. Two of the largest ever fines for data breaches were imposed by the Financial Conduct Authority on insurance businesses, with respective fines of £2.25 million and £3 million imposed for mishandling personal data. In this regard, the recent European Court of Justice (ECJ) preliminary ruling of *Weltimmo v Hungarian Data Protection Authority*[1] should particularly interest insurers doing business in the EU.

In *Weltimmo*, the European Court of Justice (ECJ) ruled that if a company offers services in the native language of a country and has representatives in that country, it is accountable to that country's national data protection agency even though it is not actually headquartered in that country. Weltimmo were a Slovakia-based property advertising website who operated in Hungary. Weltimmo breached Hungarian data protection laws by passing user information to debt collection agencies, causing the authorities to impose a fine on Weltimmo. The crux of the case is the extension of the definition of "establishment" under Article 4(1)(a) of the EU Data Protection Directive 95/46, which is now no longer limited to a company's country of registration. Instead, if that company has what the court called "stable arrangements" in another EU country, that other country's data protection laws will apply. Many UK insurers and brokers have operations within other EU countries, and vice versa, such as representatives registered in that country, bank accounts and offices.

According to the ECJ, these are all potentially "stable arrangements" which mean that those insurers or brokers may also be subject to local data protection regulations.

The ECJ's approach in *Weltimmo* is aligned with that of the European "passporting" regime, under which an insurer or broker which has authorisation to carry on insurance business in one EEA member state is able to carry on insurance business in other member states pursuant to the EU principles of freedom of services and freedom of establishment. Under this regime, an insurer which is registered in one member state will have an "establishment" in another member state if it has a stable and lasting presence in that other member state.

Insurers are likely to benefit from the rise of ever increasing impact of data protection issues, which extend worldwide beyond this landmark EU case. In particular, the cyber insurance market is set to expand considerably over the next few years. It is predicted to triple in size by 2020 and according to the Association of British Insurers, cyber insurance products will become "as common a purchase for UK businesses as property insurance" by 2025. In writing these and other risks, insurers must themselves be very careful to comply with data protection regulations when they collect and handle customer data. After Weltimmo, they must be aware that they may become subject to the data protection regime of other EU countries. The legal, commercial and reputational cost of failure is too high to be ignored.

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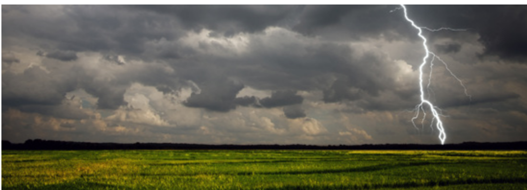
1 http://curia.europa.eu/juris/document/document.jsf?text=&docid=168944&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=182564



England & Wales: Professional Indemnity: Loss of chance to achieve a better outcome in commercial negotiations: *Harding Homes (East Street) Ltd. & Ors v Bircham Dyson Bell (a firm) & Ors.*

Claims against professional advisors in which the client alleges that the advisor's negligence has caused him to lose an opportunity have become commonplace. This case[1] is notable for its consideration of who bears the burden of proof in the context of a claim for a lost opportunity to obtain a more favourable outcome from a commercial negotiation.

The case

The claimants were property developers who borrowed £9.458 million from GMAC-RFC Property Finance Limited (GMAC) to finance construction of a development in Colchester. They instructed a solicitor at Bircham Dyson Bell, the defendant, to prepare the loan agreement.

Two of the claimant's shareholders agreed to give limited personal guarantees of the loan to GMAC. However the defendant solicitor mistakenly failed to spot that the version of the document which was signed contained a much wider clause than was intended. The effect was that, instead of being limited to overrun costs and interest, the guarantee was an "all monies" guarantee which covered the full sum owed to GMAC.

Due to the credit crunch the claimant company fell into default under the loan agreement. The claimant and GMAC commenced negotiations with a view to finding a solution which would enable the development to be completed and the claimants to buy out GMAC. During the negotiations, GMAC decided to invoke the guarantee and served a demand for the full sum owed.

The final settlement achieved with GMAC was approximately £5.922 million. However the claimants alleged that they could have settled for around £2-3 million, and achieved higher profits on the development, had the all monies clause not been included.

The defendant admitted breach of duty, which left the court to decide whether the claimants had suffered a real loss and, if so, whether there was a causal link between the breach and the damages alleged to have been suffered.

The law

In loss of opportunity cases the court has to consider the probability of success and other contingencies and determine on the balance of probabilities the value of what has been lost.

There is ample developed case law on how to approach a claim where a solicitor's mistake (such as missing a time bar) has resulted in the loss of an opportunity to bring or pursue legal proceedings. The claimants argued that the same principles, derived from the leading case of *Mount v Barker Austin*[2], should be applied here.

The first step is for the claimant to prove that the claim had a real and substantial chance of success. Anything above 10% is generally considered to be "real and substantial".

The next stage is to consider whether the solicitor's mistake caused the litigation to fail. In a claim for loss of chance to pursue litigation, the burden of proof shifts to the defendant because there is a presumption that, in acting for the client, the defendant solicitors consider that litigation has value. Therefore it is right that the evidential burden should be on the solicitors to prove that it would have failed anyway, regardless of their mistake. It also follows that the client should be given the benefit of the doubt.

> The solicitor's file will doubtless contain evidence as to his opinion of the strength of his client's position, but is it right that the burden of proof should be reversed so readily?
>
> THOMAS COOMBS, ASSOCIATE

Here, the defendants argued that the same analysis should not be applied to a lawyer acting for a client in a commercial negotiation. Nothing about the merits of the negotiating position can be inferred from the simple fact that the solicitor is representing the client; both the solicitor and client may be well aware all along that the client is in a weak bargaining position. Accordingly, it is not appropriate to shift the burden of proof on to the solicitor. Rather, the claimants should have to prove that they could have achieved a better outcome but for the solicitor's mistake.

1 [2015] EWHC 3329 (Ch)
2 [1998] EWCA Civ 277

Mrs Justice Proudman rejected this argument but found on the evidence that the claimants had failed at the first hurdle. Even when given the benefit of the doubt according to the Mount principles, they had not succeeded in demonstrating they had lost a real and substantial change to negotiate a different resolution, which would have resulted in higher profits. Therefore Bircham Dyson Bell were not ultimately required to prove that the negotiation would have failed anyway.

The case turned on a very detailed examination of the documentary and witness evidence and much was made of the credibility of the claimants. There was little doubt that the demand served under the guarantee was used by GMAC as a negotiating tool, and that the claimants would have conducted the negotiation differently if the mistake had not been made. Crucially this decision was because GMAC's offer did not vary substantially when uninfluenced by the all monies clause. GMAC were also in a weak position even with the all monies clause as they would have incurred the risks of appointing a receiver, they wished to leave the UK unrestricted by the development, and GMAC never intended to rely on it but use it to apply pressure.

Therefore, despite Bircham Dyson Bell's unequivocal admission of negligence, the claimants recovered only nominal damages.

Commentary

This case suggests that the principles in *Mount* are applicable to all scenarios where a solicitor's mistake results in a loss of opportunity, including those concerning commercial negotiations. It also demonstrates that although the claimants had the benefit of doubt, if the evidence is clear, and the claimants are unable to prove a real and substantial prospect of success, this type of claim will fail.

It is unfortunate that the judgment does not address in any detail the question of whether litigation and commercial negotiation should be considered separate concepts in the context of loss of chance claims. It is hard to dispute that it is not easy to apply the principles in *Mount* to a case concerning negotiations. In particular, the presumption that the burden of proof is on the defendant solicitor to prove the negotiations had no value and would be unaffected by the breach of duty implies that the defendant solicitor thought they did. This cannot always be the case. The solicitor's file will doubtless contain evidence as to his opinion of the strength of his client's position, but is it right that the burden of proof should be reversed so readily?

It remains to be seen whether these principles can really be applied effectively considering that there may be a wide range of reasons for commercial negotiations, and not all may be expected to succeed, and that the defendant solicitor may have little involvement in the negotiations.

Link to the case: http://www.bailii.org/ew/cases/EWHC/Ch/2015/3329.html

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Our next weekly Insurance Bulletin will be published in January. HFW extends Season's Greetings to all of our readers with our best wishes for 2016.

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