Insurance/
Reinsurance

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INSURANCE BULLETIN

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.

In this week's Bulletin:

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

1.1. Towards a legal designation of losses resulting from personal injury? (France)

Pursuant to French law, the assessment of damages resulting from personal injury is carried out by the Courts who may be assisted by a court-appointed expert. The Courts are not bound by any compulsory rules as to the type and amount of damages to be awarded. Compensation may therefore vary considerably depending on the court seized of the dispute.

The French Ministry of Justice has published a draft decree setting out an official designation ("nomenclature") of damages resulting from personal injury. This decree is largely drawn from the unofficial designation that is in practise often used by courts: the "Dintillhac Nomenclature" (Nomenclature Dinthillac). The draft decree provides that its designation would apply not only to court decisions but also to out-of-court settlement agreements.

A public consultation was launched in December 2014 and French insurers have recently declared their strong opposition to this project. The French Federation of Insurance Companies (FFSA) and the Pool of Mutual Insurance Companies (GEMA) argue that the decree would give rise to additional costs of €1Billion mainly due to the additional types of damages which would be indemnified if the decree became binding.

The French Ministry of Justice has not officially taken a decision yet.

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1.2. Going up: Court fees to rise (England and Wales)

On 16 January 2015, the Ministry of Justice (MoJ) published the Government Response to Part 2 of the consultation on reform of Court Fees.

In its written statement, the MoJ highlights that the best way to ensure that access to justice is preserved is to ensure that the courts are properly funded. Although a £375 million investment in the courts is being made over the next five years, the MoJ states that if they are to reduce the costs of the courts to the taxpayer, the only option is to look to those who use the courts to contribute more where they can afford to do so.

The Response introduces a fee to commence proceedings for the recovery of money of 5% of the value of the claim on claims for more than £10,000, subject to a maximum fee capped at £10,000. It also states that by setting the value of claims subject to fees at this level, 90% of cases will not be affected by the fee. The maximum fee to issue proceedings will be £10,000 for a claim over £200,000. These introductions are due to come into force on 1 March 2015.

The MoJ have not proceeded with several of the consultation proposals, including not to implement the proposed increase to the fee for a divorce, or either of the options for charging higher fees for commercial proceedings.

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IRIS VÖGEDING, SENIOR ASSOCIATE

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ANDREW SPYROU, ASSOCIATE

The MoJ also seeks views on proposals for raising fee income from possession claims and general applications in civil proceedings. The deadline for responses to the consultation is 27 February 2015.

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1.3. PRA update on Part VII insurance business transfers (UK)

The Prudential Regulation Authority (PRA) has written to regulated firms to update them on its approach to transfers of insurance business under Part VII of the Financial Services and Markets Act 2000.

The PRA has confirmed that it will continue to progress any transfer which has already been notified to it as long as the appropriate fee has been paid, the firm has expressed an intention to complete the transfer in 2015 and the transfer is on track to do so. However, the timetable for all other transfers will be based on the likelihood of the transfer completing by the end of 2015 and the impact of the transfer on the PRA's statutory objectives.

The PRA has a number of substantial projects to deliver during 2015, including the implementation of Solvency II, and the announcement appears to be aimed at ensuring that sufficient resources are dedicated to all of its projects. A copy of the PRA's letter to firms can be found at: http://www.bankofengland.co.uk/pra/Documents/about/praletter210115.pdf

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2. Market developments

2.1. Indian insurance reforms – Lloyd's entry into India

The Indian government's insurance law reforms, proposed under the Insurance Laws (Amendment) Bill (the Amendment Bill), have been formally proclaimed as an Ordinance. This means that the Amendment Bill has temporary effect as an Act of Parliament, despite not being passed as such.

The general focus of the Amendment Bill is to open up the country's insurance market to increased foreign investment by "foreign companies", principally by permitting foreign investors to hold up to 49% equity in Indian insurance companies. However, "Indian management and control" has been defined to ensure that this remains with Indian companies in relation to insurance.

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LUCINDA RUTTER, ASSOCIATE

A notable amendment is seen in the definition of a "foreign company". This now includes a company or body established under a law of any country outside India. Consequently, Lloyd's of London falls within this definition and its entry into the country's insurance sector is made possible.

We point out that any insurer wishing to conduct insurance business in India must be registered. Public companies, co-operative societies, foreign companies operating through a branch (reinsurance only) and statutory bodies established by acts of Parliament are subject to registration requirements in order to do business in India. To become registered, different types of insurer require different minimum amounts of paid up capital – for life, health and general insurance this is approximately US$16 million and for reinsurance business this is approximately US$32 million. This excludes initial expenses regarding formation and registration of the (re) insurance company.

Although, the Amendment Bill permits greater foreign investment in the Indian insurance sector, with some insurers already signalling their intention to increase investment in joint ventures with local insurance companies, it should be borne in mind that the decree remains temporary in status and unless approved by Parliament within six weeks, it will no longer operate.

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3. Court cases and arbitration

3.1. Court settles dust disease debate (Australia)

The Full Court of the South Australian Supreme court recently considered section 8(2) of the *Dust Diseases Act 2005* (SA) in the case of *BHP Billiton Limited v Van Soest*[1]. In short, section 8(2):

- Creates a rebuttable presumption in favour of a plaintiff in relation to the element of foreseeability in a dust disease action. The plaintiff must prove that a risk was foreseeable in order to establish a defendant's liability.
- Establishes a presumption that, absent contrary proof, a defendant who carried on a prescribed industrial or commercial process that could have resulted in a plaintiff's exposure to asbestos dust knew, at the relevant time, that such exposure could result in a plaintiff contracting a dust disease.

Amongst other things, the Full Court of the South Australian Supreme Court rejected a Defendant's arguments that section 8(2) does not establish the element of foreseeability in negligence; and does no more than create a presumption of a defendant's "generalised knowledge" of the dangers of exposure to asbestos.

The Court held that section 8(2) creates a presumption of knowledge on the part of the defendant that a plaintiff may develop a dust disease merely upon proof that a defendant conducted a prescribed industrial or commercial process that could have resulted in a plaintiff's exposure, but not a given level of exposure, to asbestos.

This case provides guidance on a statute that aids a plaintiff's case in a dust disease action.

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MIKAELA STAFRACE, SPECIAL COUNSEL

1 [2014] SASCFC 135

3.2. Sugar Hut: Part 36 offers and their impact on costs (England and Wales)

This costs hearing followed a successful negligence claim by the Sugar Hut Group (Sugar Hut) against their insurance broker, AJ Insurance, for business interruption (BI) losses that Sugar Hut failed to recover from insurers. One issue debated at the hearing was the impact of an offer compliant with Part 36 of the CPR (a Part 36 offer) by AJ Insurance for £250,000 (which was based on a figure for lost profit of £600,000).

Eder J accepted that, as AJ Insurance's Part 36 offer did not "beat" Sugar Hut's award at trial, the automatic cost consequences in favour of AJ Insurance did not apply. However, Eder J did consider it was open to the Court to assess all the circumstances including the conduct of all the parties (CPR 44.2(4)(a)) and whether it reasonable for a party to pursue or contest a particular allegation or issue (CPR 44.2(5)(b)).

Eder J considered it was unreasonable for Sugar Hut to pursue an amount for loss of profit higher than the figure the Part 36 offer was based on, and denied that his decision would support or reintroduce the "near-miss" principle by "the back door". Ramsey J warned against its application in *Hammersmatch Properties (Welwyn) Ltd v Saint Gobain Ceramics & Plastics Ltd*[1] where the Claimant failed to successfully argue that as their Part 36 offer nearly beat the amount awarded to the Defendant, it was appropriate to penalise the Defendant on costs. Eder J considered that his decision had distinguishable features from *Hammersmatch*, and would not reintroduce the principle as it was not based on a "near-miss" analysis, nor did it speculate on the negotiations which were clear from the correspondence. Instead, it was based on the fact that Sugar Hut had unreasonably insisted on a higher figure for BI losses (in response to the Part 36 offer).

In considering the "unreasonableness", he noted (i) the case was "a paradigm example" of one where the overall claim and certain individual components were exaggerated, (ii) Sugar Hut's approach to disclosure was slow and on a piecemeal basis causing AJ Insurance difficulties in protecting its position, and (iii) BI profits were the main issue that divided the parties. For these reasons, AJ Insurance was awarded costs from 21 days after the Part 36 offer on a standard basis.

This Judgment is an important example of how other factors, including Part 36 offers and negotiations, can be taken into account by the Court when considering the conduct of the parties when using their discretion to decide on the costs award.

A copy of the judgment can be found here: http://www.bailii.org/ew/cases/EWHC/Comm/2014/3775.html.

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4. HFW publications

4.1. New corruption convictions in the UK and the USA (UK and USA)

Following HFW's Briefing of 19 December 2014, which can be found here, HFW has published a briefing on two further convictions obtained by the SFO and some recent convictions under the extra-territorial legislation of the USA, where we see an example of a company's global liability and the reach of national regulators.

A copy of the Briefing can be found here: http://www.hfw.com/New-corruption-convictions-in-the-UK-and-the-USA-January-2015

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1 [2013] EWHC 2227 (TCC)