INSURANCE BULLETIN
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In this week's Insurance Bulletin:

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1. COURT CASES AND ARBITRATION

England & Wales: *Woodward v Phoenix:* all's fair in love and war?

The Court of Appeal has recently addressed the question of whether a solicitor has a duty to point out a mistake by his opponent, in circumstances where not doing so could deprive a claimant of its claim altogether[1].

On 19 June 2017, the appellant's solicitors issued a claim form on behalf of their clients. On 17 October 2017, shortly before the claim form expired, the appellant's solicitors purported to serve it on the respondent's solicitors, by which time the relevant limitation periods had expired. Whilst the solicitors had exchanged correspondence on behalf of their respective clients, the respondent's solicitors had never confirmed they were authorised to accept service. The day after the claim form expired, the respondent's solicitors wrote to the appellant's solicitors pointing out the error and that the claim form had not been served in time, which was fatal to the claim.

The appellant applied to the court for an order that the steps taken on 17 October had been good service; alternatively, that, in the light of those steps, service be dispensed with; and in the further alternative, that the court should validate the purported service on the respondent on 20 October by granting an appropriate extension of time. The Master who heard the application, in a judgment praised but reversed by the Court of Appeal, held that service of the claim form was defective, but that in the circumstances of the case ought to be deemed to be good service. He found that doing so promoted the overriding objective required by the CPR to deal with cases justly and at proportionate cost, and criticised the respondent's solicitors for engaging in technical game-playing by not pointing out the error.

After the Master had drafted his judgment, but before it was handed down, the Supreme Court gave its decision in *Barton v Wright Hassall LLP*[2], which dealt with very similar circumstances. He was asked to reconsider his judgment in light of that case, which he did, but opted not to change his decision. The respondent appealed to the High Court, which reversed the Master's decision, finding that there was no good reason to validate service of the claim form.

The Court of Appeal upheld the High Court's decision, relying heavily on Barton, which it found to be almost indistinguishable. Most significantly for solicitors, the Court of Appeal found that there was no duty to inform an opponent of an error, and that the respondent's solicitors' conduct in not doing so did not amount to "technical game playing". It also found that the existence of a limitation defence did not affect the duty.

There are a number of technical administrative requirements to comply with when serving a claim form and this case confirms that solicitors should not expect any help from their opponents if they fail to follow the required steps. Particular care needs to be taken when the end of a limitation period looms on the horizon.

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Footnotes

1. Woodward and Anor v Phoenix Healthcare Distribution Ltd [2019] EXCA Civ 985
2. [2018] 1 WLR

Australia: Insolvent but still not excluded

The appeal decision of the Full Federal Court in *AIG Australia Limited v Kaboko Mining Limited*[1] confirmed that an insolvency exclusion in a D&O policy was not triggered where a cause of action by a company against its former directors did not contain allegations of insolvency, notwithstanding that the directors' actions arguably led to the company's insolvency.

Background

The matter concerned an appeal from a Federal Court decision on a preliminary issue in a claim brought by a mining company (mining company) against its former directors. The mining company alleged the directors breached various duties owed to it, resulting in the mining company suffering loss and damage. The directors made claims under a Directors' & Officers' (D&O) liability insurance policy in respect of their potential liability.

The preliminary issue was whether the D&O insurer could rely on the following insolvency exclusion endorsed to the policy:

"The Insurer shall not be liable under any Cover or Extension for any Loss in connection with any Claim arising out of, based upon or attributable to the actual or alleged insolvency of the [mining] Company or any actual or alleged liability of the [mining] Company to pay any or all of its debts as and when they fall due."

The insurer argued that the directors' breaches led to a demand on the mining company to repay advances made to it by a resources company (who had agreed to purchase manganese ore from the mining company) which in turn led to the mining company's insolvency.

At first instance, the insurer was unsuccessful in establishing that the exclusion was triggered and it appealed to the Full Federal Court.

Appeal

On appeal, the insurer focused on the terms 'Loss' and 'Claim' in the exclusion. The insurer argued that in the absence of reference to the nature of the liability or to the act, error or omission that may give rise to a claim, it was unnecessary to consider particular allegations of breach made in the proceedings. Rather, the correct approach was to consider whether there was any Loss in connection with any Claim 'arising out of, based upon or attributable to' insolvency. It argued that a requisite insolvency connection with bringing the Claim or the nature of the Loss was sufficient, irrespective of whether the liability/cause of action depended on demonstrating insolvency.

The mining company (which would stand to benefit from a responsive D&O policy in respect of the claims against the directors) argued that the exclusion only applied if the merits of the claim itself or the 'causal pathway' for the loss claimed in the proceeding depended on demonstrating insolvency.

Decision

The Full Federal Court considered the terms Loss and Claim in the context of the exclusion and held that:

1. The definition of Loss incorporated the term Claim;
2. The definition of Claim was concerned with the occurrence of an event (i.e. a demand or civil proceeding), not the reasons why the event occurred.
3. To the extent that the definition of Claim referred to a demand or a proceeding it was not simply defined as the demand or proceeding as a whole, but referred to a demand or proceeding 'for a specified act, error or omission'.

The key question was whether the subject matter of the Claim required an insolvency link, or whether by reason of the underlying circumstances that led to the claim, it could be said that the Claim 'arises out of, is based upon or is attributable to' the actual or alleged insolvency of the mining company.

The Court held that the definition of Claim and the insolvency exclusion were not concerned with the reasons why a Claim had been brought, but rather the alleged acts, errors or omissions and the subject matter of the Claim itself. As the mining company's claims against the former directors did not contain allegations of insolvency, the insolvency exclusion did not apply[2].

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Footnotes

1. [2019] FCAFC 96.
2. It is noteworthy that the loss claimed by the mining company for the costs of receivers and managers and the administrator of the mining company was found the fall within the insolvency exclusion, however the mining company conceded this before the primary judge.

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2. MARKET DEVELOPMENTS

UK: Key strategic issues facing the insurance and long-term savings sectors – ABI keynote speech

At the JPMorgan European Insurance Conference on 18 June 2019, the Director General of the Association of British Insurers (ABI), Huw Evans, delivered a keynote speech on the strategic issues facing the insurance and long-term savings sectors, against the backdrop of a looming Brexit, new Prime Minister, and potential General Election in the not too distant future.

The Director General discussed the following key issues:

Loyalty Pricing

"Loyalty pricing" is currently under the spotlight and has been vilified by the Secretary of State for Business, Greg Clark MP, and by the Chair of the Competition and Markets Authority (CMA), the Rt. Hon. Lord Andrew Tyrie. Based on current market conditions, loyalty pricing seems to benefit new customers more than existing customers. The Director General reminded the audience that the ABI and British Insurance Brokers' Association (BIBA) jointly launched a set of guiding principles in respect of general insurance pricing and that ABI members do not support excessive price differences between existing and new policyholders. The CMA will soon publish its interim report on the issue of loyalty pricing, with the final report due out in early 2020.

Pricing and (Big) Data

90% of all the data in the world has been created in the last two years. Much of it is thought to be pointless but is nevertheless collated and stored. There are now more connected electronic devices in operation than there are people on the planet, and it is estimated that this could rise from 20 billion devices to 50 billion in the next decade, particularly with the advent of 5G and artificial intelligence. The Director General noted that not all of this data will be pointless as it will likely contain personal data. With that in mind the ABI has commissioned a major research project in order to understand consumer appetite in this area and will use the findings to inform the ABIs approach to premiums and long-term savings.

Green Initiatives and Sustainable Finance

Like loyalty pricing, green initiatives and sustainable finance are also currently under scrutiny from regulators, politicians and the media. Insurers in the UK manage approximately US$1.9 trillion of investments, which need to be transitioned into cleaner assets and could therefore be heavily impacted by any inaction in this area. It is estimated that, by 2025, we will require a tenfold increase in the amount of GDP per equivalent unit of carbon emitted. The Director General welcomed the increased regulatory focus and the European Insurance and Occupational Pensions Authority's (EIOPA) consultation on this issue on 3 June and suggested that more could be done to highlight opportunities for investments into renewable energy infrastructure.

Solvency II

The Director General took a thinly veiled swipe at Solvency II, but noted that it was broadly fit for purpose. The review of Solvency II provides an opportunity to refine what works and what doesn't work or isn't necessary. The general consensus is that the European insurance industry is adequately capitalised so there are not likely to be any changes to aggregate capital levels. The "ridiculous" reporting and disclosure requirements in Pillar 3 are what the Director General considered needs to be looked at most. There is evidence to suggest that policyholders were not reading the compulsory annual disclosures that firms are required to make on their websites and that the Solvency and Financial Condition Report does not actually provide a suitable view of the firm's solvency or financial condition. He suggested that this called for an overhaul of the reporting and disclosure requirements, particularly the burdensome reporting obligations of the regulator and EIOPA, the costs of which are significant for smaller firms.

The Director General reiterated, however, that public policy and financial regulation constantly evolve and underpin the work of the ABI and that the key issue facing these two sectors was the imminent threat of a no-deal Brexit, which he believes would be an act of immense self-harm that damages the UK economy, its reputation and international relationships.

To read this speech in full please visit https://www.abi.org.uk/news/speeches/2019/speech-by-director-general-huw-evans-addresses-the-jpmorgan-european-insurance-conference-june-18th-2019/

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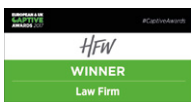

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