HERBERT SMITH FREEHILLS

INSURANCE AND REINSURANCE DISPUTES

ANNUAL REVIEW 2021

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Introduction

Our Insurance Annual Review looks back at the last 12 months and brings together the various articles that we have produced on key cases and developments during the course of 2021.

As many of you will know, we have produced this publication for many years for our clients and contacts with an interest in the UK insurance and reinsurance market. This year we have taken a slightly different approach to the publication recognising the benefit of online and electronic resources, particularly as most of us are working from home for more of the time. Rest assured that you will still find the same content on key cases and developments from the past 12 months but we have also included additional commentary putting these updates in context with links to our articles for more detailed analysis on our blog: **www.hsfnotes.com/insurance**. For those of you interested to see an overview of the cases we have covered this year, we have included a section called '**The Year in Cases at a Glance**', with links to our articles on each decision.

2021 began with a bang for our team and from an insurance law perspective with the judgment of the Supreme Court in the Financial Conduct Authority's (**FCA**) Covid-19 business interruption test case handed down on 15 January. This was the most significant insurance case of the last decade. While the case brought clarity to thousands of business policyholders, some outstanding questions on some claims remained. Although a few decisions were handed down during the course of 2021, others are still going through the courts. Our section here on **Covid-19 business interruption claims** gives an overview of the developments in 2021 and the current state of play.

Elsewhere, the courts were kept busy on numerous insurance disputes determining issues such as **policy construction** (including aggregation and jurisdiction clauses), as well as **non-disclosure**. Indeed, 2021 brought us one of the first avoidance judgments for breach of the duty of fair presentation under the Insurance Act 2015. **Professional liability** was also in focus this year with the Supreme Court revisiting the SAAMCO principle and the courts looking closely at an insurance broker's duties at placement.

Outside the insurance world, 2021 was a big year for developments relating to class actions with particularly significant decisions relating to transnational torts, competition and data class actions. We also saw the introduction of the new rules relating to the preparation of witness statements and an extension and amendments to the Disclosure Pilot. Our **General Interest** section explores these developments and others in more detail. Our **Health & Safety** section looks at the implications of two significant rulings in which the Sentencing Council's Definitive Guideline was used and a Supreme Court decision on the burden of proof for verdicts of unlawful killing in inquests.

2021 was a year of upheaval for the UK insurance sector from a regulatory perspective and there seems little prospect of 2022 being any quieter. The FCA has embarked on an ambitious transformation programme, putting consumer protection at the heart of its focus. In line with this is the introduction of a new Consumer Duty. ESG remains a hot topic for firms globally with increasing engagement at Board and senior executive level on a range of issues and COP26 ensured that climate change remained top of the agenda. Other areas of focus have been the government's post-Brexit review of the regulatory framework for financial services, the operational resilience of firms and the PRA and FCA's focus on diversity and inclusion in the financial services sector. Our **Regulatory** section looks at some of the key regulatory developments that have taken place in 2021 and considers the outlook for 2022.

For the Insurance and Professional Risks team at Herbert Smith Freehills in London, 2021 has been a successful one on many fronts. We were delighted that **Fiona Treanor** was promoted to partner in the firm's latest round of promotions in May. We also welcomed back **Will Glassey** as a partner to the team in London to strengthen our successful solicitors' professional indemnity and regulatory practice, as well as our professional negligence offering more broadly.

The team was also recognised for our work for the FCA on the Covid-19 business interruption test case receiving three awards: Litigation and Dispute Resolution team of the Year at the British Legal Awards, Insurance Team of the Year at the Legal Business Awards and Innovation in Dispute Resolution at the FT Innovative Lawyer Awards. Thank you to the team for all their hard work and thanks also to our clients and contacts for your continued support.

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Non-disclosure

Disputes around non-disclosure issues are nothing new and this year was no different with the courts examining issues such as materiality and inducement. However, a novel feature of some of the decisions handed down in 2021 is that those issues have been examined in the context of the Insurance Act 2015 (**2015 Act**). It has taken almost five years since the 2015 Act came in to force in August 2016 for these cases to reach judgment, reflecting the time it can take for new legislation to be tested.

Even those decisions not decided under the 2015 Act offer a useful insight into the way in which the courts will approach particular issues under the new legislation. One such case is *Ristorante Limited T/A Bar Massimo v Zurich Insurance Plc* [2021] (see What's on the menu? Insurers must ask the right questions at placement). Here the court considered the interpretation and legal effect of a question asked by an insurer to a prospective insured around prior insolvency issues. The adequacy of disclosure of previous matters connected to insolvency is an issue that comes before the courts regularly. In this case, the court considered whether the insured's answer to the question amounted to a misrepresentation of material facts and whether the insurer had limited its right to disclosure in respect of other persons or companies. While the insured in this case was ultimately successful, it is a useful reminder to insureds and their brokers to take great care in providing this information to insurers prior to inception. The takeaway for insurers concerned to know about specific insolvency matters is that the questions asked must clearly state the information being sought.

First avoidance judgment under the 2015 Act

2021 brought one of the first avoidance judgments for breach of the duty of fair presentation under the 2015 Act (see Non-disclosure of criminal charges – first Insurance Act 2015 avoidance). *Berkshire Assets (West London) Ltd v AXA* [2021] considered the non-disclosure of criminal charges against an innocent insured and found that an insurer could avoid a policy under the 2015 Act. The insurer in this case was assisted by an internal practice note which showed the underwriter did not have authority to write the risk had they been told about the non-disclosure at the time of placement. Under the 2015 Act an insurer has to demonstrate what it would have done had it been provided with a fair presentation of the risk and it will be interesting to see, in the context of different policies and different insurers, whether such internal underwriting guidelines (as was relevant in this case) are commonly used and relied upon. Those that do not will face greater challenges in proving what they would have done had a fair presentation of the risk been made.

It is worth mentioning in this context the case of Jones v Zurich [2021]. While this was a consumer case and so considered the interpretation and application of the Consumer Insurance (Disclosure and Representations) Act 2012 (**the CIA 2012**), it is a useful example of the courts considering the factual evidence of an underwriter together with expert evidence to determine what the insurer in a particular case would have done if a non-disclosure/misrepresentation had not been made. Under the CIA 2012, the insured consumer is under a duty to take reasonable care not to make a misrepresentation to the insurer and there are a range of remedies available to an insurer for breach of this duty depending on (i) whether the misrepresentation is careless or deliberate/reckless; and (ii) what the insurer can establish it would have done had the insured complied with its duty. This approach is similar to (and paved the way for) the approach found in the 2015 Act. This case concerned an alleged misrepresentation by the insured in respect of his claims history. Unlike *Berkshire Assets v AXA*, there was no underwriting manual for the insurer to rely on but the court found that the particular would have declined cover for the risk had the insured's prior claims history been disclosed and the insurer was entitled to avoid the policy. The case provides an insight into how the courts might interpret the provisions in the 2015 Act.

Inducement

The Court of Appeal considered the test for inducement in its decision in *Zurich Insurance plc v Niramax Group Limited* [2021] (see Court of Appeal rules on test for inducement pre-Insurance Act 2015). Although a decision under the 'old' law, the Court of Appeal's careful scrutiny of the conduct and decision-making of individual underwriters is instructive for any analysis of an alleged breach of duty of the fair presentation under the 2015 Act. It is well established that in order for an insurer to have a remedy for breach of the pre-contract duty of disclosure (under the old law or under the 2015 Act), the insurer must show that the misrepresentation or non-disclosure was a real and substantial cause of his/her entry into the contract on terms that they would not have accepted if they had been apprised of the truth. The Court of Appeal held that the insured's non-disclosure of material facts had not induced the insurer in this case. In finding there was no inducement, the Court of Appeal found that the insurer's process for rating the risk for the purposes of calculating the insurance premium took no account of attitude to risk, which was what the undisclosed facts went to. Non-disclosure could not therefore have been an efficient cause of the renewal being written on cheaper terms than would have occurred if disclosure had been made. The case seems to reflect an underlying point of principle that an insurer should not be entitled to a windfall where breach of the duty of fair presentation has not had any influential effect on the mind of the insurer or played any part in her/his underwriting judgment.

The question of inducement and the evidence required by the court was also considered in *Kjaergaard v MS Amlin* [2021] where the insured sought summary judgment against the insurer following damage to a yacht (see Court finds summary judgment not suitable for determining issue of inducement). Here the court again recognised the importance of evidence as to the insurer's decision-making process. The case concerned alleged misrepresentation by the insured of its claims history and the insured sought summary judgment on grounds that the insurer's case on inducement was unsustainable and bound to fail. In recognising that the issue of inducement is a question of hypothetical fact or counterfactual, the court did not consider the case suitable for summary judgment. The judge noted the policyholder's submission that, in effect, both disclosure and the witness evidence were not going to be of any assistance to the court in resolving the issue and rejected that case – such matters will typically require ventilation at trial.

Looking ahead

There have been just a handful of decisions under the 2015 Act to date, and even fewer that have considered substantive new aspects of the duty of fair presentation introduced by the 2015 Act. It will be interesting to see going forward not only how the courts determine such issues, but how parties prove their cases on issues such as what constitutes a reasonable search in a particular context, or what an insurer would have done had a fair presentation been made to it.

Policy construction

The scrutiny of insurance policy wordings has once again kept the courts occupied this year with general issues of policy construction, as well as aggregation and jurisdiction clauses, being the subject of a number of decisions.

Policy interpretation

The principles of policy construction are well known and were helpfully summarised by the Supreme Court in its judgment at the beginning of this year in the FCA's Covid-19 Business Interruption test case (*The Financial Conduct Authority v Arch and Others* [2021]):

> "The core principle is that an insurance policy, like any other contract, must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. Evidence about what the parties subjectively intended or understood the contract to mean is not relevant to the court's task."

This may sound simple but as a number of this year's decisions demonstrate, applying these principles can be difficult in practice. Indeed, two cases on this issue reached the Court of Appeal and the Supreme Court respectively.

In *ABN Amro Bank N.V. v Royal & Sun Alliance Insurance plc and others* [2021], the Court of Appeal had to construe an "unusual" and "unprecedented" clause in an all risks marine cargo policy. The insured argued that the relevant clause provided credit risk cover. Insurers, on the other hand, argued that the clause simply defined the amount recoverable under the policy in the event of a physical loss or damage. In rejecting the insurers' arguments, the Court of Appeal found that the words used in the clause were clear. This clear language prevailed over the arguments made by insurers regarding the factual matrix (see Court of Appeal holds insurers to clear terms of the policy). While the decision is consistent with long-established principles of policy interpretation, this judgment serves as an important reminder that language of the policy is of paramount importance in construing its meaning.

The Supreme Court had to consider the interpretation of the phrase "deliberate act" in an exclusion in a public liability policy in *Burnett v International Insurance Company of Hanover Ltd* [2021]. The case concerned a death caused in the business of door security. The Supreme Court found that the phrase "deliberate act" required an intention to cause the type of liability insured in the policy (in this case, the intention to cause injury). However, there was no need for the injury caused to have been of the type or severity intended.

The court rejected an attempt by insurers to imply recklessness into the term "deliberate act" in the absence of any policy language to support such a construction. The court found that recklessness was a well-known term which has been subject to much legal interpretation and analysis – had the parties intended 'deliberate' to include 'recklessness', this would have been achievable by the means of clear language in the contract. The court in this case carefully followed the established principles of policy interpretation and, in doing so, had regard to the commercial realities underpinning the insurance cover – namely that the policyholder was a door security company. To follow insurers' arguments on reading recklessness into the 'deliberate act' exclusion would be to denude the policyholder of much of its cover. The case also confirms the courts' general approach to construing exclusions narrowly (see Supreme Court judgment on the meaning of 'deliberate act' in public liability insurance).

In *Hongfa Shipping Co Ltd v MS Amlin Marine NV* [2021], the focus was on the proper interpretation of an exclusion in a Marine Liability policy. There was a debate about whether all parts of the exclusion were subject to a qualification that it only applies where the insured acted "*recklessly or intentionally*". The court emphasised that exclusions must be construed in a manner that is consistent with and not repugnant to the purpose of the insurance contract. The exclusion in this case was not well drafted, but there was no commercial reason to limit the qualification to only parts of the exclusion (see Court looks to the purpose of the contract when construing an exclusion).

Jurisdiction

The courts have grappled with the interpretation of jurisdiction clauses in an insurance context in two decisions this year.

In *Axis Corporate Capital UK II Ltd v ABSA Group Limited* [2021], the court had to construe conflicting jurisdiction clauses across different layers of a reinsurance contract. The end result was that proceedings brought by the insured and its captive insurer against reinsurers in South Africa under the primary layer reinsurance were allowed to continue, while proceedings involving essentially the same parties under the excess layer reinsurance were restrained as they were in breach of an exclusive English jurisdiction clause (see Inconsistent jurisdiction clauses across primary and excess layers result in proceedings in different jurisdictions for reinsurance claims).

It is obviously not ideal for parties to be involved in two sets of proceedings in different jurisdictions given the additional expense and risk of inconsistent judgments. The case is a stark reminder of the importance of ensuring that governing law and jurisdiction clauses, and dispute resolution provisions more generally, are given the attention they deserve at placement. Policyholders should ensure that, in so far as possible, there is consistency in the dispute resolution provisions applicable to different (re)insurers and on different layers of a (re)insurance programme to ensure that any disputes are handled as efficiently as possible.

One aspect of the decision in *Axis v ABSA* was that the court found that one of the jurisdiction clauses under consideration took effect as an exclusive jurisdiction clause despite the fact that the word "exclusive" was not used. The same decision was taken in another insurance case, *AIG Europe SA (formerly AIG Europe Ltd) v John Wood Group Plc* [2021], where the High Court interpreted a jurisdiction clause in an excess liability insurance policy as granting exclusive jurisdiction to the English courts, despite the clause not containing express words to that effect (see Jurisdiction clause in insurance policy confers exclusive jurisdiction despite no express words to that effect). These decisions suggest that an English court is likely to find that a jurisdiction clause is exclusive unless it is explicitly stated to be non-exclusive, particularly if there is also a choice of English law. They are also a reminder that clear words should be used when drafting a jurisdiction clause (whether the intention is for the clause to be exclusive or non-exclusive) in order to avoid uncertainty and disputes at a later stage.

These cases follows in the footsteps of a number of earlier decisions in a non-insurance context which have interpreted jurisdiction clauses as being exclusive, even though the word "exclusive" was not used (see *Global Maritime Investments Cyprus Limited v O.W. Supply & Trading A/S* [2015] and *BNP Paribas SA v Anchorage Capital Europe LLP and others* [2013]).

Aggregation

Aggregation is a familiar issue for dispute in an insurance context and this year was no exception.

The phrase "series of related acts or omissions" was considered by the Court of Appeal in *Baines & Anor v Dixon Coles & Gill (A Firm) & Ors* [2021] in the context of the Law Society's minimum terms and conditions for solicitors' professional indemnity insurance. The case concerned claims brought against a law firm by clients whose funds had been misappropriated by one of the firm's partners who had dishonestly made unauthorised payments from client accounts.

Insurers argued that each of the thefts constituted a "series of related acts or omissions" because they all formed part of an extended course of dishonest conduct on multiple occasions over many years. The Court of Appeal rejected this argument relying on the reasoning given by Lord Hoffman in the House of Lords in *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd* [2003]. The Court of Appeal found that for a series of acts or omissions to be "related", a unifying factor must be identified, expressly or impliedly, in the wording of the clause. In the clause in this case, the unifying factor was that the claims had to "arise from" one series of related acts or omissions. As the Court of Appeal explained:

"If there is a series of acts A, B and C, it is not enough that act A causes claim A, act B causes claim B and act C causes claim C. What is required is that claim A is caused by the series of acts A, B and C; claim B is also caused by the same series of acts; and claim C too."

The fact that the dishonest partner stole from client X and then from client Y did not mean that the corresponding claims arose from a sufficiently unified "series of related acts". Instead, it would have been necessary for each claim to arise from a combination of the same thefts, before aggregation would occur. As such, the Court of Appeal decided that the claims could not be aggregated (see Aggregation considered in Court of Appeal under the Minimum Terms and Conditions for solicitors' professional indemnity insurance). The Court of Appeal stressed in *Baines v Dixon Coles* that applying aggregation language is a fact-sensitive matter.

Policy documentation

In cases of genuine mutual mistake where the policy terms do not reflect what was agreed between the parties, the court will step in to rectify the contract. In *Markel Bermuda Ltd v Caesars Entertainment Inc* [2021], the court granted an anti-suit injunction restraining an insured from bringing a claim for indemnity against an insurer in the courts of Nevada, USA on the basis that this was in breach of a London arbitration agreement contained in the policy. The policy wording did not, in fact, include a London arbitration agreement as the relevant endorsement has been mistakenly omitted from the policy wording as issued. The insurer argued that this was an obvious mistake that did not reflect the intention of the parties. After a careful analysis of events leading up to the conclusion of the contract of insurance, the court agreed and granted the injunctive relief sought by the insurer (see Court steps in to remedy mistake in policy documents).

One point of interest in this case is the fact the court found that the contract of insurance (and arbitration agreement) were concluded before the policy incepted and the policy wording was issued. The court therefore had to consider the interaction between the contract of insurance and the policy wording issued subsequently, considering the well-known decision of *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Company* [2001].

Looking ahead

With the market currently harder than it has been in recent years and disputes on claims increasing, policy wordings are under great scrutiny as points of construction are examined more closely. This looks set to continue in 2022.

If we have learnt one thing over the past 18 months, in the context of business interruption claims at least, it is that when policy wordings are scrutinised, they can be unintelligible to users. The FCA test case gave rise to hundreds of pages of judgments in order to establish principles applicable to business interruption cover on a selection of wordings. Might this be a catalyst to re-set expectations on contract certainty? To improve the shared understanding between insurer and insurance buyer as to what a particular policy will do, what risks are transferred and what risks are retained? We will have to wait and see. What is clear for now is that, as discussed elsewhere, the scrutiny of non-damage business interruption wordings will continue in 2022 with aggregation likely to be a key issue in a number of cases set to be before the courts.

Covid-19 business interruption claims

2021 began with the Supreme Court handing down its judgment in the Covid-19 business interruption insurance test case – *The Financial Conduct Authority v Arch and Others* [2021] (the **FCA Test Case**). The judgment brought highly anticipated guidance on the proper operation of cover under certain non-damage business interruption insurance extensions, namely:

- **Disease wordings**: provisions which provide cover for business interruption in consequence of or following or arising from the occurrence of a notifiable disease within a specified radius of the insured premises.
- **Prevention of access/public authority wordings**: provisions which provide cover where there has been a prevention or hindrance of access to or use of the premises as a consequence of government or other authority action or restrictions.
- **Hybrid wordings**: provisions which are engaged by restrictions imposed on the premises in relation to a notifiable disease.

See Supreme Court hands down judgment in FCA's Covid-19 business interruption insurance test case for our full analysis.

While the decision brought positive news to policyholders that had suffered business interruption losses as a result of the Covid-19 pandemic, some issues remained unanswered.

This section gives an overview of the decisions handed down during 2021 which clarified some of these issues and explores what may be ahead in 2022.

Exhaustive disease clauses

In *Rockliffe Hall Ltd v Travelers Insurance Company Ltd* [2021], a policy included an Infectious Disease extension. The policy defined 'Infectious Disease' by reference to a list of over 30 illnesses which included 'Plague' but not Covid-19. The court held that the list was a closed list. It was not indicative of the kind of diseases that were included; it was exhaustive. As Covid-19 was not specified, cover was not triggered (see High Court dismisses Covid-19 business interruption claim under 'closed list' disease wording).

The insured sought to argue that Covid-19 was covered by the word 'Plague' which appeared in the list because its meaning was not only the specific illness caused by Yersinia pestis (the most notorious of which is bubonic plague) but also a general infectious disease which spreads rapidly and lethally. The court rejected this argument on the basis that the plain and dictionary meaning of the word referred to Yersinia pestis-caused illness. 'Plague' did not mean "a plague".

Fundamentally, in the court's view, these types of clauses – with 'closed lists' – operated very differently from the disease clauses considered in the FCA Test Case. The clauses in the FCA Test Case clearly incorporated an externally-maintained and dynamic list of illnesses which were regularly updated (eg 'notifiable disease'). In *Rockliffe*, the policy's approach was to adopt a static, limited list which did not have any mechanism for external update.

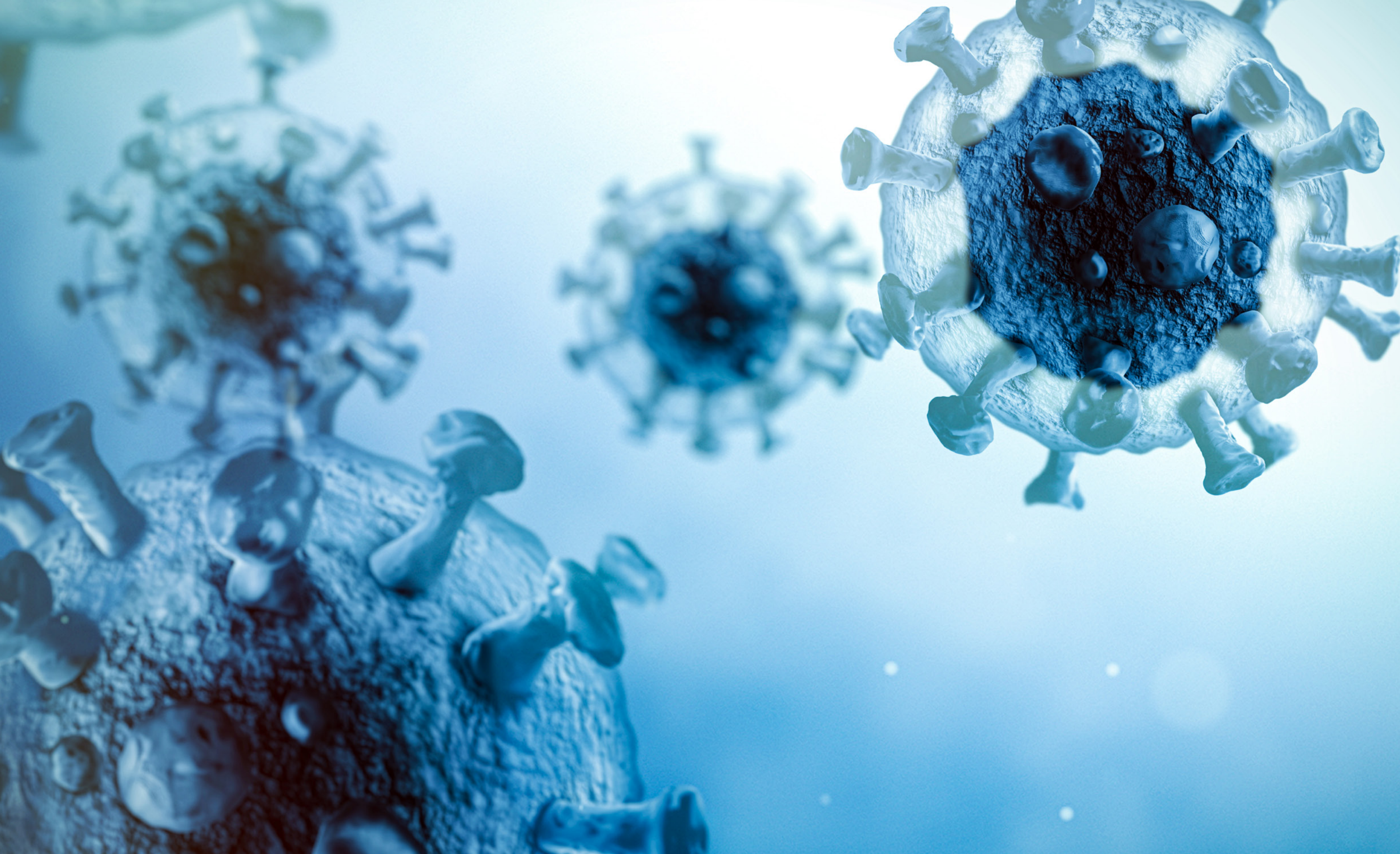
Prevention of access wordings – 'competent local authority'

In a public arbitration award, *Certain Policyholders v China Taiping Insurance (UK) Co Ltd* [2021], Lord Mance (sitting as sole arbitrator) found that a denial of access extension did not provide cover for business interruption losses caused by the UK central government's Covid-19 lockdown measures on the basis that the UK central government was not a "competent local authority" (see Arbitrator dismisses Covid-19 business interruption claim on basis UK Government is not a "competent local authority" in the context of denial of access extension).

The relevant policy extension provided business interruption cover in consequence of:

"1b..the closing down or sealing off of the Premises or property in the vicinity of the Premises in accordance with instructions issued by the Police or other competent local authority..or..1c the actions or advice of the Police or other competent local authority due to an emergency threatening life or property in the vicinity of the Premises" (emphasis added)

Lord Mance accepted the insurer's construction of the policy. As the policy referred to a local, as opposed to central or countrywide, authority it followed from the natural meaning of the policy that the closure of premises as a result of the national lockdowns imposed by the UK Government was not covered under the extension. The award gives the phrase 'competent local authority' a much narrower meaning than the High Court did at first instance in the FCA Test Case when it considered similar wording used in an Ecclesiastical policy wording. It was noted in this regard that the Ecclesiastical policy concerned a clause covering specified diseases occurring within a 25 mile radius of the premises which thus made it more likely that a central governmental response was contemplated in that specific policy context. By contrast, China Taiping's wording did not share any of these features. While the award is not binding on the English courts, it may still be viewed as persuasive given Lord Mance's standing as a former Deputy President of the UK Supreme Court.



Notwithstanding a positive outcome for insurers, a number of aspects of Lord Mance's reasoning were potentially favourable to policyholders to the extent they have similar denial of access wordings that are wide enough to cover action by central government. Most notably, Lord Mance's view was that the broad "*all risks*" wording used in Extension 1b ought not to be read down generally to limit the scope of cover to purely local events in the absence of "*competent local authority*" language. Further, in light of the Supreme Court's expansive approach to causation, Lord Mance also observed that there may be scope to revisit the High Court's earlier conclusions in the FCA Test Case regarding the limited scope of cover provided under wordings similar to Extension 1c (eg RSA 2.1 and 2.2).

Lockdown rent arrears

There are quite complex issues concerning cover for landlords and tenants under responsive business interruption policies. Where landlords are looking to claim, in some instances they are being met by arguments that the policies only respond if a tenant was contractually relieved from paying rent (eg because the Rent Cessor clause was engaged) as opposed to simply not paying. Recoveries by landlords for matters such as loss of turnover rent or car parking or other revenues may be more straightforward.

Whether various Rent Cessor clause were engaged was in issue in *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2021]. The tenants had argued that the Rent Cessor clauses were activated by non-physical disadvantage to the premises and the landlords were unable to sue them for sums which could be recovered (or should have been recoverable) under insurance. On the facts, the landlords had taken out insurance which included loss of rent resulting from business interruption following an outbreak of disease at the premises or within a 25 mile radius of it. It was common ground between the parties that the judgment in the FCA Test Case meant that the insurance did afford cover against the loss of rent to some extent. The court held that the Rent Cessor clauses were not triggered by the UK Government lockdown because the Rent Cessor clauses in terms only applied where the premises were physically destroyed or damaged. They did not apply where a non-physical damage event had triggered an insurance policy taken out by the landlord. The court concluded that since the Rent Cessor clause was not triggered the Policy did not apply either for the benefit of the tenants.

Looking ahead

The FCA Test Case was based on a representative sample of policy wordings. Other clauses were not tested and there are a number of cases currently in the courts (yet to be determined) that are examining some of these issues not addressed by the Supreme Court's judgment.

"At the premises" clauses

"*At the premises*" clauses require a notifiable disease at the insured premises. These clauses were not tested in the FCA Test Case which looked at disease clauses triggered by the occurrence of a notifiable disease within a specified radius of the insured premises. It will be interesting to see what approach the courts take regarding the objective intention of an "*at the premises*" clause which references a notifiable disease which has the potential to spread.

One decision of the Financial Ombudsman Service[1] post the FCA Test Case has been resolved in favour of policyholders. The key issue in debate for "at the premises" clauses was expected to be whether the focal nature of the clause meant that the broader lockdown effects were not intended to be covered or whether the concurrent cause analysis preferred by the Supreme Court would apply where the covered cause was so narrow. The Ombudsman held that there was cover.

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Aggregation

Quantification is another issue the Supreme Court did not address and, in particular, how particular aggregation wording will affect the application of limits and deductibles under a policy. It is easy to see how issues of aggregation can arise in this context where an insured may have multiple locations or premises affected by the pandemic, or where a particular location was impacted by several lockdowns at different points in time. There are several cases in the English courts[2] where the issue of aggregation is in dispute. Of course, the issue of aggregation is not only relevant at the insurance level but will be particularly relevant at the reinsurance level given the level of non-damage business interruption claims that insurers have paid. According to data published by the FCA at the start of 2022, insurers have paid out over £1.2 billion in interim and final settlements on Covid-19 business interruption claims.

Damages for late payment

We may also see the first cases on section 13A of the Insurance Act 2015 as a result of some of the Covid-19 business interruption cases being brought in the courts. Section 13A implies a term into every insurance contract made after 4 May 2017 that "*the insurer must pay any sums due in respect of the claim within a reasonable time*". Breach of this term can give rise to a claim for damages giving policyholders the right to claim compensation in the event of late payment of their insurance claim. There are various elements that a policyholder will need to prove in order to establish a successful claim for damages:

- The insured has a valid claim under the policy;
- The insurer has failed to pay within a reasonable time (including a reasonable time to investigate and assess the claim);
- The insured suffered loss, which was caused by the insurer's breach of the implied term; and
- The loss was foreseeable (ie, the loss was in the reasonable contemplation of the parties at the date the contract was entered into).

Further, the insured will not be able to recover any loss which could have been avoided by taking reasonable steps.

It will be interesting to see to what extent any of these issues are ultimately resolved by the English courts in 2022.

Some international perspectives

Given the global nature of Covid-19 and its impact on business across jurisdictions, business interruption insurance disputes are not unique to the English courts. In the US, for example, there are very large numbers of Covid-19 business interruption claims in dispute. Most cases appear to be being brought under physical damage policies and the trend of decisions to date have been in insurers' favour.

In Australia, two decisions of the Australian courts in 2021 have favoured insurers although there is a significant appeal judgment awaited at the time of writing. In the Australian test case of *Swiss Re International Se v LCA Marrickville Pty Limited* [2021], the court considered a variety of non-damage businessinterruption clauses (as the FCA Test Case did). There were two key findings in favour of insurers – one legal and one factual:

- Legal finding – that it would be "incongruent" to read prevention of access clauses as being applicable to actions in response to diseases where the policy also contains a clause specifically extending cover for diseases. As most of the policies considered by the Australian court contained a disease (or hybrid) clause, the practical impact of this finding was that only claims based on the disease (or hybrid) clause could be considered as potentially applicable.
- Factual finding – that while it is possible that there had been a local "outbreak" of the disease within the relevant radius of the insured premises as contemplated by the disease/hybrid clauses, it could not be said on the facts of the test cases before the court that the local outbreak of Covid-19 cases was a proximate cause of the government orders interrupting the business or the loss of revenue. The court observed that the outbreak in the UK was "so widespread" and considered that to be an important part of the reasoning in the FCA Test Case, providing a basis for distinguishing the key (different) factual finding in the Australian context. This factual finding meant that the "concurrent causes" reasoning which allowed UK policyholders to recover was not applicable in Australia.

However many of the subsidiary issues were decided in favour of policyholders, which will be particularly important if the incongruence finding is overturned, in particular that (i) the clauses need to be considered without pre-conceptions as to cover for pandemics one way or the other; (ii) the trends clauses could not operate so as to adjust for the circumstances involving the same cause of loss as the insured peril; (iii) a single case in a community setting may suffice for the requirement of an "outbreak"; and (iv) a partial closure may suffice to satisfy a requirement of "closure". See Covid-19 business interruption insurance – round one of second ICA test case to insurers for our Australian team's full analysis of this decision.

Also in Australia, in *Star Entertainment Group Limited v Chubb Insurance Australia Ltd* [2021], the court had to consider whether a claim for business interruption losses caused by the pandemic was covered by a policy covering loss resulting from or caused by "any lawfully constituted authority in connection with or for the purpose of retarding any conflagration or other catastrophe". The court held while Covid-19 was a "catastrophe" in the ordinary meaning of the term, the reference to "other catastrophe" in this context was limited to insured perils capable of causing physical damage. There was therefore no business interruption cover (see Insurers win round one in Star Casino claim based on loss resulting from action by authorities). This decision is being appealed as part of the appeal in *Swiss Re v LCA Marrickville* and judgment is awaited.

2. See, for example, *Greggs Plc v Zurich Insurance Plc*, *Various Eateries Trading Ltd v Allianz Insurance Plc* and *Stonegate Pub Company Limited v MS Amlin Corporate Member Ltd & Ors*

Professional liability

There have been a number of developments in the professional liability field during the course of 2021 and some of the key ones are highlighted here.

SAAMCO revisited

A Supreme Court decision in June clarified the proper approach to determining the scope of a professional adviser's duty of care, whether in contract or in tort. The case of *Manchester Building Society v Grant Thornton UK LLP* [2021] is now the leading authority on the application of the so-called SAAMCO principle (established in *South Australia Asset Management Corpn v York Montague Ltd* [1997]).

By way of reminder, the SAAMCO principle provides that where a professional adviser is responsible only for providing information on which a decision will be taken, rather than advising on the merits of a transaction overall, the adviser will be responsible only for the consequences of the information being wrong and not all the financial consequences of the transaction.

This Supreme Court decision moves away from the traditional classification of such cases into "information" and "advice" cases. Instead, the court's focus should be on the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice is being given (see Supreme Court clarifies proper approach to determining scope of duty of care owed by a professional adviser).

The Privy Council has since had the opportunity to consider this decision of the Supreme Court in the context of a claim brought by a bank against a valuer, seeking damages in respect of a negligent valuation report for land representing the bank's security. The Board of the Privy Council allowed an appeal by the valuer on the basis that the losses claimed did not fall within the scope of the duty of care owed by the valuer to the bank. Following *Manchester Building Society*, the Board emphasised that in determining the scope of the duty of care, it is particularly important to consider the purpose of the advice or information being given (and therefore the risk being guarded against), and that the SAAMCO counterfactual test will not necessarily be applied in all cases, especially where to do so would be unhelpful (see Privy Council considers reformulated test for determining scope of duty of care owed by professional advisers).

An insurance broker's duties at placement

The duty on a broker to protect its client from the unnecessary risk of litigation (as per *FNCB Ltd v Barnet Devanney (Harrow) Ltd* [1999] and more recently *Standard Life Assurance Ltd v Oak Dedicated Ltd* [2008]) was considered in *ABN Amro Bank N.V. v Royal & Sun Alliance Insurance plc*. This case concerned an "unusual" and "unprecedented" clause (the **TPC**) in an all risks marine cargo policy which was held (both at first instance and by the Court of Appeal) to provide credit risk cover. It was the first instance decision which considered the scope of a broker's duty at placement and this was not revisited by the Court of Appeal because of the findings the Court of Appeal reached on others issues in the case (see Court finds credit risk cover in marine policy and considers a broker's duties at placement).

The insured argued that its broker was in breach of various duties including:

- broking a clause the broker did not understand or for a client whose insurance needs the broker did not understand;
- failing to use in-house expertise and advise the client to seek specialist advice where necessary; and
- failing to take all reasonable steps to ensure that the effect of the cover obtained was clear.

In particular, the insured argued that the broker had not understood the TPC, had failed to explain its intended effect to insurers and, if the broker had acted competently, ultimately the insured would have received advice that credit risk cover was available from the credit risk market.

In its defence, the broker sought to argue that if the TPC did not provide the cover the client wanted; this was because of the way in which it had been drafted by external lawyers. The broker argued that there was no duty on it to highlight and explain to insurers the client's subjective understanding or intention about the policy. This would be a "duty to nanny", putting the broker in a difficult position.

The court found that the broker had responsibilities as a market expert and adviser, and the engagement of external lawyers did not negate the client's reliance on its broker. The court further considered that the broker fell below the standard of a reasonably competent broker in omitting to advise its client that the credit risk market was the appropriate market in which to place the cover. Considering that the wrong market was being approached, it was all the more important for the broker to explain to the insurers what the TPC was intended to address. The court stressed that this was not because the clause was unclear but because the clause was unusual and unprecedented in the market in which the cover was being placed. Placement of cover without discussion with the insurers exposed the client to the unnecessary risk of litigation.

The court did not consider this to be an imposition of a "duty to nanny" (the insurer). Ultimately the question is what is required on the facts in order to fulfil a broker's duty not to expose their client to unnecessary risk of litigation. That may (and in this case did) require a broker to give information to insurers which would protect the position of their client, in order to avoid potential problems in the future. The judge was clear that this is not a duty to protect insurers, but flows from the duty to protect the broker's client.

Whilst it may surprise some that the broker was also under an obligation to explain to the insurers what the TPC was intended to address, the judge was clear that this was in the context of the clause being unusual and unprecedented in the particular market in which the cover was being placed. The judgment did not set out any clear rules which delineate what a broker should or should not do in order to procure cover that clearly meets its client's requirements and does not expose it to an unnecessary risk of litigation, and instead said that it must depend on the particular facts and circumstances of the case

Aggregation of claims against solicitors

The courts have again had to consider the aggregation wording in the Minimum Terms and Conditions (**MTC**) for solicitors' professional indemnity insurance. In *Baines & Anor v Dixon Coles & Gill (A Firm) & Ors*, the Court of Appeal had to determine whether claims brought by clients against a law firm following the misappropriation of money by a partner of that firm over a series of years could be aggregated. Adopting a narrow interpretation of the aggregate provision in the MTC, the court found that they could not be aggregated. It held on the facts of the case that an extended course of dishonest conduct committed by the same person was insufficient to satisfy the requirement that the acts or omission are "related" (see Aggregation considered in Court of Appeal under the Minimum Terms and Conditions for solicitors' professional indemnity insurance).

In effect, the Court of Appeal in *Baines v Dixon Coles* has re-affirmed the approach to be taken in applying the MTC aggregation clause (as was spelled out in *AIG Europe Limited v Woodman and others* [2017] – see Supreme Court construes aggregation provision in minimum terms and conditions of professional indemnity insurance), that establishing the required connection for the purposes of aggregation is a fact-sensitive matter.

Health and Safety

Sentencing very large organisations

2021 saw two significant rulings in which judges used the Sentencing Council's Definitive Guideline (the **Guideline**) to calculate appropriate fines for very large corporate defendants.

The Guideline has been in force since February 2016 and applies to Corporate Manslaughter, health and safety offences and food safety offences. It requires judges to follow a multi-staged approach to determine an appropriate fine by reference to factors including the extent of the offending company's culpability, the nature of the harm caused (or risked) by the offence and the financial size of the company.

The stated aims of the Guideline included increasing the level of fines imposed on larger companies and increasing consistency, so that defendants had greater certainty as to the level of fine they might face. In practice, the Guideline has led to higher fines but it is not clear that it has provided any greater certainty, particularly not for larger companies.

One particular issue is that the Guideline allows judges to "*move outside*" the set range of fines when the defendant is a Very Large company (ie one with a turnover that "*very greatly exceeds*" £50 million). The Guideline does not make clear precisely what turnover will qualify a company as Very Large, nor how much higher a fine should be for a Very Large company.

We commented on the implications of *R v Places for People Homes Ltd* [2021] and *Birmingham City Council v Tesco Stores Ltd*. (see Sentencing very large organisations for health and safety and food offences).

In *R v Places for People Homes Ltd* the defendant (a company with a turnover of around £250 – £350 million) was fined £600,000 for health and safety failings after a number of its maintenance staff suffered vibration-related injuries. The importance of the case is not the size of the fine but the fact that the sentencing judge made clear that it was approximately double the amount she would have imposed on a company that was merely Large rather than Very Large. She said this was necessary to "*have a real economic impact*" and "*bring home to both management and shareholders the need to comply with health and safety legislation*". On appeal, the fine was reduced to £400,000, primarily in recognition of the quasi-charitable functions of the company and the risk of a large fine prejudicing those who relied on its services. The Court of Appeal did not, however, doubt the sentencing judge's right to double the size of the fine to take account of the company's Very Large turnover.

In *Birmingham City Council v Tesco*, the supermarket was ordered to pay £7.56 million after a range of its products were found to have passed their sell by date. This was by far the largest fine ever imposed for an offence of this kind. To put the figure in context, it was nearly 50 times more than Tesco itself had recently been fined for a similar offence (£160,000) and more than 7 times more than the next highest fine ever imposed for a food safety offence (£1 million). Whilst the case had certain unique features, the main reason for the size of the fine was, according to the sentencing magistrate, the need for it to be "*sufficient for* [Tesco – a Very Large company, with a turnover of £50 billion] *to feel it and ensure it does not happen again*" and to "*bring the message home to the defendant company and to others in the food business*".

Supreme Court reduces burden of proof for verdicts of unlawful killing in inquests

The main function of an inquest is to determine how the deceased died. Coroners (and juries when they are involved) can describe the cause of death in a brief factual narrative or use one of a number of recognised short form conclusions (eg 'accident/misadventure', 'natural causes', 'unlawful killing' etc.).

It had long been accepted that for most causes of death coroners and juries need only be certain to the civil standard of proof (balance of probabilities) but that for findings of suicide and unlawful killing they must be certain to the higher criminal standard (beyond all reasonable doubt). This was reversed by the Supreme Court in *R* (on the application of Maughan) (Appellant) *v Her Majesty's Senior Coroner for Oxfordshire* (Respondent) [2020]. Following that case, the lower civil standard of proof applies for all causes of death.

Whilst this decision might, at first glance, appear to be a dry and technical change in the law, it in fact has significant implications, particularly for employers in the event of work-related deaths. In such cases, verdicts of unlawful killing are (incorrectly, but perhaps inevitably) often seen by the public as a finding against the employer (or against an individual director or employee who was involved in the events leading up to the death). By lowering the standard of proof, the Supreme Court has made such findings more likely. This will be a cause of concern for employers who may face negative publicity following inquests in which they are involved and, potentially, a greater risk of criminal prosecution (as prosecuting authorities may feel under greater pressure to prosecute following verdicts of unlawful killing). We examine the implications of the decision further in our article Supreme Court reduces burden of proof for verdicts of unlawful killing in inquests.

Regulatory

After a year of upheaval for the UK insurance sector in 2021 from a regulatory perspective, there seems little prospect of 2022 being any quieter. 2021 began with the end of the Brexit transition period. And while firms operating in UK insurance markets have been insulated from the full impact of Brexit during 2021, this is set to change in 2022. **PRA** and **FCA** concessions to firms whose authorisation status changed with Brexit will stop from 31 March 2022 and firms that are currently in the Temporary Permissions Regime will need to transition to full authorisation status over the next two years. Solvency II reforms can now also be introduced in the UK without regard to the constraints of EU membership. We can expect to see change on this front in 2022.

Meanwhile, the FCA has embarked on an ambitious transformation programme, putting consumer protection at the heart of its focus on becoming a "*more assertive, innovative, and adaptable*" regulator. Recent proposals to introduce a Consumer Duty represent a step change in how financial sector firms are expected to behave and build on the FCA's work in other areas, including recent general insurance pricing reforms. Other developments include proposals to improve regulated firms' oversight of Appointed Representatives.

ESG remains, of course, high on the agenda of firms and regulators, with increasing engagement at Board and senior executive level on a range of issues. Notably, COP26 brought climate change into sharp focus, with both the PRA and FCA confirming their role in ensuring that firms manage climate change risk. The regulators are also looking to "*accelerate the pace of meaningful change*" in diversity & inclusion (**D&I**) in the financial services sector.

We consider below some of the key regulatory developments that have taken place in 2021 and look forward to 2022.

Financial Services Future Regulatory Framework Review

In June 2019, the UK government launched a review of whether the regulatory framework is fit for the future, in particular, in the light of Brexit. HM Treasury's (**HMT**) consultation paper, published in December 2021, proposes a number of changes (see our summary: HMT publishes a second consultation paper on the Financial Services Future Regulatory Framework Review).

One welcome aspect of the proposals is to address shortcomings in how EU legislation that previously applied directly in the UK has been "on-shored". The approach initially taken means that many EU regulations now sit in UK legislation when they should really appear in the PRA/FCA rulebooks.

Taking Solvency II as an example:

- the Solvency II Directive, which sets out the high-level framework of the regime, was primarily implemented through the PRA rulebook and, as such, can be changed with relative ease;
- but the Solvency 2 Delegated Regulation and Solvency II technical standards, which contain more detailed rules, appear in UK legislation and can only be changed by Parliament.

This is illogical. The broader regulatory framework should be set out in legislation leaving the detail to the regulators' rulebooks. The technical expertise that is needed to determine how insurers should be regulated sits primarily within the PRA, but it has little power to effect change without calling on Parliament to help. This can be difficult given pressures on Parliamentary time.

Unfortunately, any return to coherence is expected to take place "over a number of years" so it will be some time before the current position is put right.

Changes in prudential regulation

Solvency II reform – UK

Both the UK Government and the PRA have expressed their support for targeted reforms of the Solvency II regime for a number of years. Some limited reforms were introduced prior to Brexit on the basis that this could be done while remaining compliant with EU legislation and guidance.

The argument for further change now that the UK is no longer constrained by EU membership is that the current rules do not always work well for the UK market. The EU's refusal to recognise the UK regime as "equivalent" (even at present, while on any objective basis such a recognition should be granted) arguably also makes it easier to justify further reform.

In October 2020, HMT published a CfE, inviting stakeholders to make the case for further change. In its July 2021 response, HMT noted that there was "*extensive evidence that many aspects of Solvency II are overly rigid and rules-based*". It would work with the PRA to establish a more proportionate and flexible regulatory regime.

Important dates:

A proposed package of reforms of the UK's Solvency II regime is expected to be published in early 2022.

PRA definition of "insurance holding company"

An early change to the UK's Solvency II regime, the PRA's proposed new definition of "insurance holding company" (CP17/21) means that some companies that are currently regarded as "mixed-activity insurance holding companies" would probably be reclassified as insurance holding companies for the purposes of group supervision (see PRA Seeks to Clarify Meaning of "Insurance Holding Company"). This would bring with it a higher burden than at present in terms of how a group is supervised.

The new definition will only apply to future determinations of insurance holding company status. Existing groups are, however, likely to be reassessed on the occurrence of a "trigger event", including an acquisition or disposal. Concern has been expressed that future M&A activity may be stymied if the future regulatory status of a group is uncertain.

Important dates:

The PRA's consultation closed on 6 December 2021. The new guidance is expected to come into force on 28 February 2022.

Solvency II reform – EU

EU reform of the Solvency II regime is also not far away. On 2 September 2021, the EU Commission adopted a proposed directive amending the Solvency II Directive. It aims to improve a number of aspects of the current regime, while enhancing the sector's capacity for making long-term investments in line with the EU's political priorities.

Any changes that are made to the EU Solvency II regime will no longer, of course, apply directly to UK-incorporated (re) insurers. The PRA may, however, adopt similar changes to the extent consistent with the PRA's overall objectives for Solvency II reform.

Other EU developments include a proposed new directive establishing a recovery and resolution framework for EU (re) insurers and insurance groups. In its Business Plan 2021/22, the PRA indicated that it would be developing its approach to recovery and resolution planning for insurers during 2021 but it has not to date published those plans. HMT did, however, publish proposals in August 2021 to amend insolvency rules applying to insurers (see HM Treasury Consults on Amendments to Insurer Insolvency Regime).

Important dates:

The deadline for comments on the draft amending directive is 13 January 2022. Final changes will only take effect once they have completed the EU legislative process and then been implemented by Member States.

FCA – Conduct of business reforms

The FCA's first Business Plan to be published since Nikhil Rathi became Chief Executive sets out its key priorities for transforming the FCA. It is determined to build a culture that embraces risk, is more inquisitive, and acts decisively to tackle harmful behaviour as soon as it comes to light.

> "We need to change the way we do things, and in some cases what we do. We are becoming a different organisation."
>
> FCA, BUSINESS PLAN 2021/22

General insurance pricing practices

FCA reforms announced in May 2021, and which have now come into force, address problems identified in its market study looking at pricing practices in home and motor insurance markets (see our at a glance guide). "Price walking", a practice which means that existing customers can pay considerably more at renewal of their policies than new customers for the equivalent cover, has been banned.

Other remedies included:

- extending existing product governance rules to all general insurance and pure protection products regardless of when they were manufactured and introducing new rules requiring firms to ensure their products offer "fair value";
- addressing barriers to switching in contracts that are set to auto-renew; and
- introducing new reporting requirements in home and motor insurance.

Consumer Duty

The FCA considers that the introduction of a new Consumer Duty will "fundamentally shift the mind-set of firms" and establish an appropriate level of care to consumers (for an overview, see FCA consults on new Consumer Duty).

> "The Consumer Duty aligns with our own transformation and our focus on being more assertive, innovative, and adaptable in our regulatory approach."
>
> FCA, "A NEW CONSUMER DUTY", CP21/36

Proposed rules and guidance published in December 2021 (see CP 21/36) are familiar from those previously consulted on in May 2021 (CP 21/13). They include a new Consumer Principle (Principle for Businesses 12) that would replace Principles 6 and 7 for retail business: "*A firm must act to deliver good outcomes for retail clients*". This new principle is supported by three cross-cutting rules and four outcomes the FCA expects the new rules to achieve.

The FCA's cost benefit analysis highlights the likely impact of this change on firms. Total one-off direct costs the FCA considers that firms may incur to comply with the Consumer Duty could be up to £2.4bn.

Important dates:

The consultation is open until 15 February 2022 and the FCA expects to confirm any final rules by the end of July 2022. The new duty is expected to apply from April 2023.

Appointed Representatives regime

The FCA is concerned about the harm that may be caused to consumers and markets by the use of the AR regime. This is a model used by around 3,600 principals and 40,000 ARs across a wide range of financial services markets. To address some of its concerns, the FCA is consulting on changes to its rules (CP 21/34) and HMT has published a CfE.

The proposals focus on clarifying and strengthening existing arrangements rather than bringing wholesale change (see Appointed Representatives reforms – 'strengthening' of existing regime for now but more fundamental changes likely). More change should, however, be expected as both the FCA and HMT develop their thinking.

Important dates:

The response date for both CP21/34 and the CfE is 3 March 2022. The FCA plans to publish final rules in H1 2022. HMT will decide whether amendments to the Financial Services and Markets Act 2000 are required once it has considered responses to its CfE.

Environmental, social, governance (ESG)

Unsurprisingly, the focus of both firms and regulators on ESG remains undiminished as we move into 2022. A number of key announcements were timed to coincide with COP26, which took place in November 2021. Notably, the FCA published its Strategy for Positive Change, describing its target outcomes for "E", "S" and "G" and actions it expects to take to deliver those outcomes.

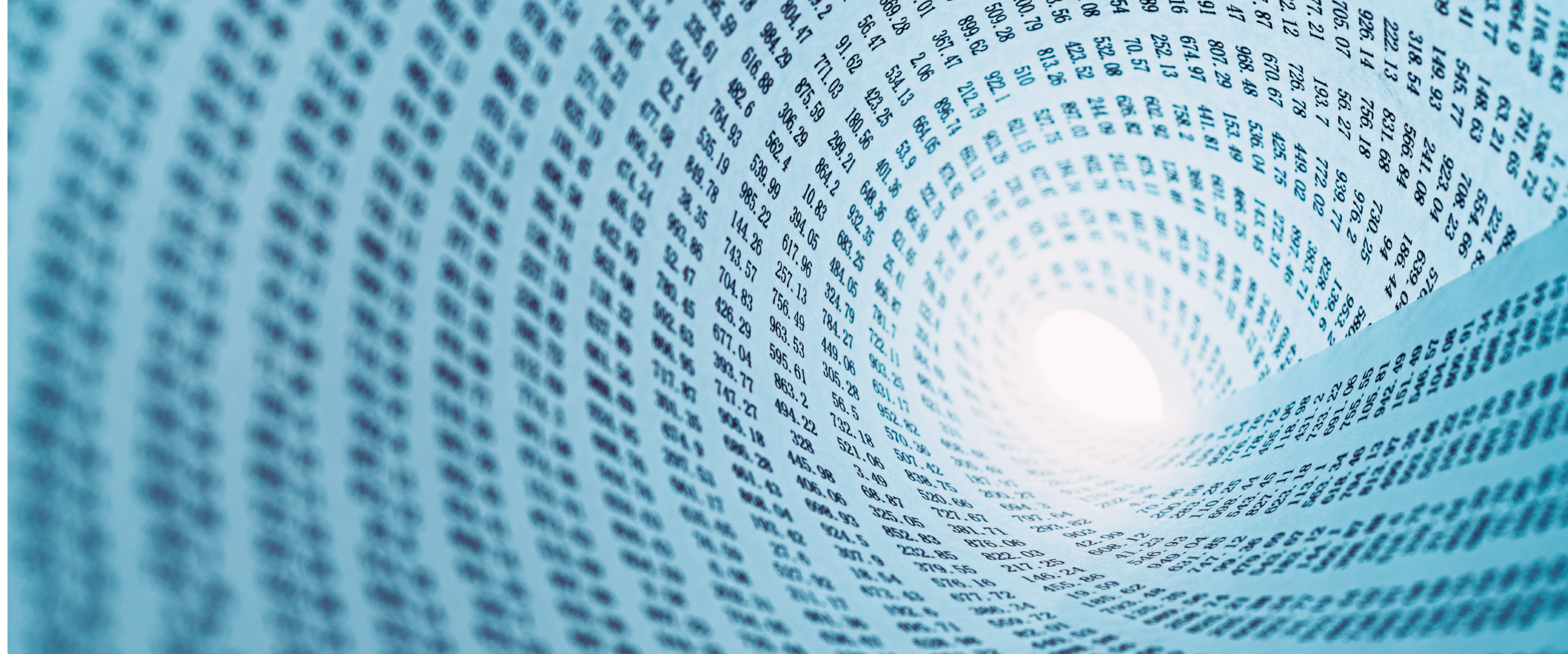
The Bank of England's response to climate change reflects is overriding objective "*to play a leading role, through our policies and operations, in ensuring the macroeconomy, the financial system, and the Bank of England itself are resilient to the risks from climate change and supportive of the transition to a net-zero economy*".

Key areas of ESG focus include the following:

- **Climate change disclosure** – On 17 December 2021, the FCA published policy statement (PS21/24) on enhancing climate-related disclosures by asset managers, life insurers and FCA-regulated pension providers. Disclosure in financial statements will become mandatory (on at least a "comply or explain" basis) for an increasing number of companies (including life insurers) over the coming years.
- **Management of risk associated with climate change** – The PRA issued climate-related supervisory expectations for regulated firms in 2019, with a deadline for firms to have embedded them as far as possible by end-2021. In October 2021, the PRA and the FCA each published a climate change adaptation report, looking at how the financial services industry is adapting to climate change set against the broader context of each organisation's role as a regulator and its statutory objectives
- **Diversity and Inclusion** – A joint discussion paper (DP21/2) published by the PRA and FCA in July 2021 sought to kick-start a discussion on how to "*accelerate the pace of meaningful change*" in improving D&I in financial services firms.

> "Lack of diversity at the top raises questions about firms' ability to understand the different different needs"
>
> NIKHIL RATHI, FCA CEO, MARCH 2021

General interest



In this section, we look back at 2021 to discuss legal and procedural developments relevant to all those who litigate in the English courts or fund or insure such litigation. There have been a number of significant changes. In these uncertain times, the Business and Property Courts have proved to be remarkably resilient in the face of the pandemic, with business continuing pretty much as usual – albeit remotely – throughout lockdown. There has since been a return to in-person hearings, but with continued use of remote or hybrid hearings in appropriate cases.

Class actions

2021 was a big year for developments relating to class actions in many areas, with particularly significant decisions relating to transnational torts, competition and data class actions, in addition to the Supreme Court's judgment in the FCA's Covid-19 Business Interruption Test Case discussed above:

- In February 2021, the Supreme Court unanimously allowed the claimants' appeal in a high profile jurisdictional challenge relating to group claims brought against Royal Dutch Shell Plc and its Nigerian subsidiary in connection with alleged pollution in the Niger Delta. The decision is significant for UK domiciled holding companies, particularly those with businesses entailing environmental risks. The decision emphasises that, at the jurisdictional stage, the judge should not be drawn into a mini-trial to evaluate the factual evidence adduced – which presents obvious challenges for defendants seeking to contest jurisdiction on the basis that the parent company did not owe an arguable duty of care for the alleged acts and omissions of its subsidiaries abroad (see Okpabi v Shell: Supreme Court allows appeal in jurisdictional challenge relating to parent company duty of care).
- The Supreme Court's decision in the *Merricks* case – regarding the certification of an opt-out competition collective action seeking £14 billion in damages against Mastercard – was handed down just before the end of 2020, confirming a relatively liberal approach to the grant of certification for collective actions in the Competition Appeal Tribunal (CAT). That paved the way for the CAT's decision in August 2021 to grant the application for a collective proceedings order (CPO) in that case – the first under the competition class action regime introduced in 2015 (see First competition CPO granted by the CAT in Merricks). Various other CPO applications were awaiting the Supreme Court decision in Mastercard and have now been able to progress, so further decisions are expected in the coming months.
- In November 2021, the Supreme Court overturned the Court of Appeal's controversial decision in the *Lloyd v Google* case, which would have opened the floodgates for class actions for compensation for loss of control of personal data to be brought on behalf of very large numbers of individuals without identifying class members. The decision does not however close the door completely, as the Supreme Court recognised that data breach and other claims could potentially be brought using a "bifurcated process" in which the representative action procedure is used to determine common issues (such as whether there has been an actionable breach), leaving any individual issues to be dealt with subsequently (see Supreme Court finds claim for compensation under data protection legislation cannot proceed on "opt-out basis" in high profile Lloyd v Google case). The question for claimants, and their litigation funders, will be whether it is economically viable for claims to be brought on that basis. We examined the implications of the decision from an insurance perspective: Lloyd v Google: a relief for insurers and policyholders alike but not the end of the story.

Witness evidence

The big news this year relating to witness evidence has been the introduction of a new Practice Direction (PD 57AC) governing the preparation of trial witness statements in the Business and Property Courts signed on or after 6 April (see Witness evidence reforms: final versions now published and will apply from 6 April). The key aims of the reforms are to refocus witness evidence on the areas where it is actually needed, rather than as a vehicle for setting out a party's case by reference to the documents, and to reduce the potential for a witness's recollections to be influenced by the process of taking the statement itself. For more detailed discussion of the reforms, see our posts on Practical Law's Dispute Resolution blog here and here.

Disclosure

The Disclosure Pilot under PD 51U, which had been due to finish at the end of 2021, has been extended to the end of 2022 and the rules have been streamlined to some extent, in particular as to the process for agreeing lists of issues for disclosure and associated disclosure models. There have also been amendments to introduce new flexibility for multi-party cases and a new regime for less complex claims (see Disclosure Pilot to be extended for a further year and the procedures streamlined).

We expect this is likely to be the last extension to the pilot, with a decision being taken before the end of 2022 as to the final version of the disclosure rules. In advance of that decision, we understand that there will be further consultation with the judiciary and with court users, including in order to assess whether and to what extent the pilot saves costs.

Another issue that has received a lot of attention this year is the extent to which documents held by a third party may be within a party's "control" for the purposes of disclosure – including, in a number of cases, work-related documents on the personal devices of employees or ex-employees. That is clearly an important issue, given the increasing prevalence of "bring your own device" policies. Interesting decisions on "control" during the year include:

- A Court of Appeal decision in February 2021 which upheld an order requiring the employer to request its employees and ex-employees to deliver up their devices for inspection by the employer's IT consultants (see Court of Appeal orders defendants to request their employees and ex-employees to produce personal devices for inspection to identify documents in defendants' control).
- A High Court decision in April 2021 which found that documents held by the claimants' parent companies, and individuals connected with those entities, were within the claimants' "control" – continuing a line of first instance decisions which have held that an arrangement or understanding giving a party practical control of documents is sufficient, even without an enforceable legal right to obtain the documents (see Parent companies' documents found to be in subsidiaries' control for disclosure purposes).
- A High Court decision in April 2021 which found that the court had no jurisdiction to order a party to use its "best endeavours" to obtain data held on the mobile telephones of two of its ex-employees, where the data was not in the employer's control for disclosure purposes – though the decision suggests the data would likely have been in the employer's control if the employment relationships had been governed by English rather than Saudi law (see High Court finds there is no power to order a party to use its "best endeavours" to obtain and disclose documents that are not within its control).

Privilege

In 2021 we launched our new legal privilege client tool, which is a web-based app designed to help in-house counsel quickly navigate the complexities in determining which documents are likely to be privileged, or not. The app can be accessed both on a mobile phone and via a desktop.

One decision worthy of note for this publication is a rare example of the Court of Appeal considering questions of joint privilege, which arises where two parties jointly retain the same solicitor. For example, if an insured and its liability insurer jointly engage the same solicitor to act on their behalf in relation to insured third party claims. The decision helpfully summarises the relevant principles, including that neither party can assert privilege as against the other in respect of documents created pursuant to the joint retainer, but either can assert privilege as against any third party. The privilege can only be waived jointly and not unilaterally. On the unusual facts of the case, where one of the joint clients had assigned to

a third party its claims against the jointly retained solicitors, the Court of Appeal confirmed that the assignee (and its solicitors) were entitled to access the joint retainer file in order to pursue those claims, regardless of the other joint privilege holder's objections. It did not matter that meant disclosure to the solicitors who were on the other side of long-running litigation (see Court of Appeal confirms one joint privilege holder could not prevent disclosure of privileged material to assignee of other joint client).

Alternative Dispute Resolution (ADR)

In a report published in July 2021, the Civil Justice Council recommended a greater use of compulsory ADR within the civil courts, concluding that court-mandated ADR is not incompatible with Article 6 of the European Human Rights Convention (right to a fair trial) and is therefore lawful (see Civil Justice Council recommends court-compelled ADR).

This represents a clear shift away from the established position for over a decade, following the Court of Appeal's seminal judgment in *Halsey v Milton Keynes* [2004], that the courts should encourage parties to engage in ADR (including by the threat of costs sanctions for unreasonable refusal to engage) but must stop short of compelling unwilling parties to do so.

The CJC's report was welcomed by the Master of the Rolls, who has repeatedly emphasised that there is nothing "alternative" about ADR.

Costs and funding

January 2021 saw an important Court of Appeal decision on Damages-Based Agreements, or DBAs, which clarified that a DBA can include a clause providing for payment on some basis other than a share of recoveries (for example, hourly rates) if the DBA is terminated – a matter which had previously been unclear. The decision also appears to pave the way for at least some forms of "hybrid" DBA, which combine a percentage share of recoveries on success with some other form of payment, eg reduced hourly rates as the case proceeds (see Court of Appeal confirms regulations governing Damages-Based Agreements (DBAs) do not preclude terms providing for payment of time costs on termination, nor do they preclude hybrid arrangements).

Efforts to reform the much-criticised regulations governing DBAs appear to have stalled, however. Proposals were published in October 2019 (see this post published on Practical Law's dispute resolution blog) and a supplementary report was expected, but to date it has not materialised.

Litigation funding has continued to be a major driver of English litigation, with funders particularly active in supporting class actions in various sectors, but there have not been a lot of legal developments relating to funding.

There was however an interesting Court of Appeal decision in January 2021, which will make it difficult for claimants – and especially funders – to argue that a defendant should have to provide a cross-undertaking in damages as a condition of obtaining security for costs. The court indicated that cross-undertakings will be required only in "rare and exceptional cases" and, where the claimants are funded by a commercial litigation funder, "even rarer and more exceptional cases" (see Court of Appeal clarifies that cross-undertakings should rarely be required as a condition of security for costs).

Jurisdiction and enforcement

Although the UK left the EU in January 2020, the real impact of Brexit was not felt until after the transition period established by the Withdrawal Agreement came to an end on 31 December 2020. The key practical implications of Brexit for disputes and dispute resolution clauses were outlined in this post in January 2021: Brexit: key practical implications for disputes and dispute resolution clauses.

At the time of publishing that post, it was not clear whether the EU would consent to the UK's accession to the Lugano Convention, which would to a great extent have restored the pre-Brexit regime for jurisdiction and enforcement of judgments between the UK and the EU/EFTA states. Since then it has become clear that the European Commission is set against the UK's membership of Lugano, which means that the UK is unlikely to be able to accede, at least in the short term (see European Commission notice to Lugano Depositary states EU not in a position to consent to UK accession).

The Commission's position is that the Hague Conventions provide the appropriate framework for matters relating to civil judicial cooperation with countries outside the internal market, including the UK. It is therefore significant that the Commission has adopted a proposal for the EU to accede to the 2019 Hague Judgments Convention, an international treaty which allows enforcement of judgments in much broader circumstances than the 2005 Hague Convention on Choice of Court Agreements (see Proposal for EU to join 2019 Hague Judgments Convention). If the EU accedes to the Convention, and assuming the UK also signs up in due course, it could significantly streamline the enforcement of judgments between the UK and the EU in the medium term.

Now that the UK is no longer subject to EU rules on jurisdiction and enforcement of judgments, the common law rules in this area are of even broader application than pre-Brexit. This year has seen a significant development in the circumstances in which those rules allow the English courts to take jurisdiction over an action in tort relating to a wrongful act committed abroad. In October 2021 the Supreme Court confirmed, in the context of a personal injury claim, that proceedings can be served out of the jurisdiction where actionable damage has been suffered within the jurisdiction (subject to also establishing that there is a real issue to be tried and the English court is the appropriate forum) – ie there is no requirement that "direct" damage was suffered in England and Wales (see Supreme Court confirms wide interpretation of "damage" for the purposes of the common law jurisdictional gateway for tort claims and clarifies when English law may apply to foreign law claims).

Also of interest is a High Court decision in July 2021 which found that the "necessary or proper party" common law gateway for service out of the jurisdiction does not apply when the anchor defendant has voluntarily submitted to the court's jurisdiction (see High Court finds common law "necessary or proper party" gateway for service out of the jurisdiction does not apply when the anchor defendant has voluntarily submitted to the court's jurisdiction).

The Year in Cases at a Glance

Insurance and Reinsurance

ABN AMRO Bank N.V. v Royal and Sun Alliance Insurance Plc & Ors [2021] EWCA Civ 1789

Court of Appeal holds insurers to the "clear terms" of the policy

AIG Europe SA (formerly AIG Europe Ltd) v John Wood Group Plc [2021] EWHC 2567 (Comm)

Jurisdiction clause in insurance policy confers exclusive jurisdiction despite no express words to that effect

Axis Corporate Capital UK II Limited v ABSA Group Ltd & Ors [2021] EWHC 861 (Comm)

Inconsistent jurisdiction clauses across primary and excess layers result in proceedings in different jurisdictions for reinsurance claims

Baines & Anor v Dixon Coles & Gill (A Firm) & Ors [2021] EWCA Civ 1211

Aggregation considered in Court of Appeal under the Minimum Terms and Conditions for solicitors' professional indemnity insurance

Berkshire Assets (West London) Ltd v AXA Insurance UK Plc [2021] EWHC 2689 (Comm)

Non-disclosure of criminal charges – first Insurance Act 2015 avoidance

Burnett or Grant (Respondent) v International Insurance Company of Hanover Ltd (Appellant) (Scotland) [2021] UKSC 12

Supreme Court judgment on the meaning of 'deliberate act' in public liability insurance

Hongfa Shipping Co Ltd v MS Amlin Marine NV [2021] EWHC 999 (Comm)

Court looks to the purpose of the contract when construing an exclusion

Irwell Insurance Co Ltd v (1) Neil Watson (2) Hemingway Design Ltd (in liquidation) (3) Darren Draycott [2021] EWCA Civ 67

Employment Tribunal's jurisdiction extends to claims brought against insurers under the Third Parties (Rights Against Insurers) Act 2010

Kjaergaard v MS Amlin Insurance SE & Anor [2021] EWHC 2096 (Comm)

Court finds summary judgment not suitable for determining issue of inducement

Markel Bermuda Ltd v Caesars Entertainment Inc [2021] EWHC 1931 (Comm)

Court steps in to remedy mistake in policy documents

Ristorante Ltd (t/a Bar Massimo) v Zurich Insurance Plc [2021] EWHC 2538 (Ch)

What's on the menu? Insurers must ask the right questions at placement

Rockliffe Hall Ltd v Travelers Insurance Company Ltd [2021] EWHC 412 (Comm)

No Covid? No cover: High Court dismisses Covid-19 business interruption claim under 'closed list' disease wording

The Financial Conduct Authority v Arch & Ors [2021] UKSC 1

Supreme Court hands down judgment in FCA's Covid-19 Business Interruption Test Case

Various Policyholders v China Taiping Insurance (UK) Co Ltd

Arbitrator dismisses Covid-19 business interruption claim on basis UK government is not a "competent local authority" in the context of denial of access extension

Zurich Insurance Plc v Niramax Group Ltd [2021] EWCA Civ 590

Court of Appeal rules on test for inducement pre-Insurance Act 2015

Professional Liability

ABN Amro Bank N.V. v Royal & Sun Alliance Insurance plc & Ors [2021] EWHC 442 (Comm)

Court finds credit risk cover in marine policy and considers a broker's duties at placement

Baines & Anor v Dixon Coles & Gill (A Firm) & Ors [2021] EWCA Civ 1211

Aggregation considered in Court of Appeal under the Minimum Terms and Conditions for solicitors' professional indemnity insurance

Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20

Supreme Court clarifies proper approach to determining scope of duty of care owed by a professional adviser

General interest

Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd [2021] EWHC 849 (Ch)

Parent companies' documents found to be in subsidiaries' control for disclosure purposes

FS Cairo (Nile Plaza) LLC v Brownlie [2021] UKSC 45

Supreme Court confirms wide interpretation of "damage" for the purposes of the common law jurisdictional gateway for tort claims and clarifies when English law may apply to foreign law claims

ID v LU and BZ [2021] EWHC 1851 (Comm)

High Court finds common law "necessary or proper party" gateway for service out of the jurisdiction does not apply when the anchor defendant has voluntarily submitted to the court's jurisdiction

Lloyd v Google LLC [2021] UKSC 50

Supreme Court finds claim for compensation under data protection legislation cannot proceed on "opt-out basis" in high profile Lloyd v Google case

Mr Nigel Rowe & Ors v Ingenious Media Holdings & Ors [2021] EWCA Civ 29

Court of Appeal clarifies that cross-undertakings should rarely be required as a condition of security for costs

Okpabi & Ors v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd [2021] UKSC 3

Supreme Court allows appeal in jurisdictional challenge relating to parent company duty of care

Phones 4U Ltd v EE Ltd [2021] EWCA Civ 116

Court of Appeal orders defendants to request their employees and ex-employees to produce personal devices for inspection to identify documents in defendants' control

Travelers Insurance Company Ltd v Armstrong [2021] EWCA Civ 978

Court of Appeal confirms one joint privilege holder could not prevent disclosure of privileged material to assignee of other joint client

Various Airfinance Leasing Companies v Saudi Arabian Airlines Corporation [2021] EWHC 2904

High Court finds there is no power to order a party to use its "best endeavours" to obtain and disclose documents that are not within its control

Walter Hugh Merricks CBE v Mastercard Incorporated & Ors [2021] CAT 28

First competition CPO granted by the CAT in Merricks

Zuberi v Lexlaw Ltd [2021] EWCA Civ 16

Court of Appeal confirms regulations governing Damages-Based Agreements (DBAs) do not preclude terms providing for payment of time costs on termination, nor do they preclude hybrid arrangements

Health & Safety

Birmingham City Council v Tesco Stores Ltd (unreported, 19 April 2021)

Sentencing very large organisations for health and safety and food safety offences

R v Places for People Homes Ltd [2021] EWCA Crim 410

Sentencing very large organisations for health and safety and food safety offences

R (on the application of Maughan) (Appellant) v Her Majesty's Senior Coroner for Oxfordshire (Respondent) [2020] UKSC 46

Supreme Court reduces burden of proof for verdicts of unlawful killing in inquests

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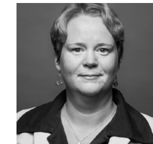

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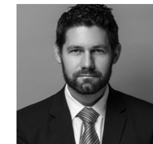

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