HFW

# INSURANCE BULLETIN
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In this week's Insurance Bulletin:




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## 1. REGULATION AND LEGISLATION

### **EU:** Important Brexit information for UK (re)insurers with any policyholder now resident or established in France

**The French insurance regulator, the Autorité de Contrôle Prudentiel et de Resolution (ACPR), has indicated that it will require UK (re)insurers to have appropriate permissions to carry out business in France after Brexit in order to service policyholders who were originally resident or established in the UK but subsequently moved to France.**

The ACPR's position is contrary to a recommendation made by the European Insurance and Occupational Pensions Authority (EIOPA) on how European regulators should deal with the consequences of Brexit.

EIOPA's recommendation related to a UK (re)insurer which issued a policy to a policyholder (whether an individual or a legal person) which was resident or established in the UK when the policy was issued, but subsequently moved to an EEA state. The recommendation was for a European regulator to view the UK (re)insurer as not having carried out cross-border business when it issued a policy and, presumably, as not needing permission in the relevant EEA state to service the policy following Brexit. However, the ACPR has formally stated that it does not intend to adopt this recommendation.

The Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) are encouraging UK (re)insurers to consider the risks arising from the ACPR's position, and to take legal advice to ensure that they have the correct permissions in place in France following Brexit. The Insurance teams in HFW's London and Paris offices are well-placed to advise on this issue, having regularly advised (re)insurers and intermediaries on the consequences of Brexit over the last three years.

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## 2. COURT CASES AND ARBITRATION

### **England & Wales:** Loss of chance revisited

**The Supreme Court recently handed down the much anticipated decision in *Edwards on behalf of the estate of the late Thomas Arthur Watkins (Respondent) v Hugh James Ford Simey Solicitors (Appellant)*[1]. This case considered the approach to assessing "loss of chance" claims where the Claimant, Mr. Watkins, had lost the opportunity to pursue a claim against a third party due to the negligence of his solicitor.**

Mr. Watkins worked as a miner for the National Coal Board in Wales from 1964 to 1985. As a result of using vibratory tools, Mr. Watkins developed Vibration White finger ("VWF") which, by way of example, can often lead to a sufferer being unable to carry out routine everyday tasks without assistance.

A group of test cases established that British Coal was negligent in not taking steps to limit the exposure of miners to VWF. As a result, a government scheme was set up in 1999 to provide tariff-based compensation to miners. The Scheme's purpose was to provide quick and efficient compensation and operated in a way which was not akin to a formal piece of commercial litigation. The Scheme provided compensation for: (i) pain, suffering and loss of amenity ("General Damages"); and (ii) for other financial losses such as loss of past and/or future earnings ("Special Damages"). Special damages also included a "services award" for miners who needed assistance in performing routine domestic tasks.

Mr. Watkins instructed Hugh James Ford Simey solicitors to act for him in order to file a claim under the Scheme. A medical assessment supported Mr. Watkins' claim for general damages but also for a services award. He was ultimately made a scheme offer that did not, however, include an allowance for a services award. Mr. Watkins accepted that offer but five years later pursued a claim against his former solicitors in negligence in failing to bring a claim for a services award under the Scheme.

At first instance, the court held that had Mr. Watkins been properly advised, he would have rejected the settlement offer and pursued a services claim. However, a medical expert was appointed who found that if Mr. Watkins' health had been properly evaluated at the time he would not have received any compensation for special damages and a much reduced claim for general damages. His claim therefore failed as he had suffered no loss even though his solicitors had been negligent.

This decision was overturned by the Court of Appeal on two main grounds: (i) the judge should not have conducted a "trial within a trial" to establish the loss which Mr Watkins might have suffered; and (ii) it was wrong to rely upon expert medical evidence which would not have been available at the time the original claim was pursued.

The Court of Appeal's decision was upheld by the Supreme Court. It followed the decision in *Perry v Raleys*[2] (another VWF miners' case), where Lord Briggs said, adopting the leading *Allied Maples*[3] decision on loss of chance claims, "*For present purposes the courts have developed a clear and common sense dividing line between those matters which the client must prove, and those matters which may be better assessed upon the basis of the evaluation of a lost chance.*"

In *Watkins*, the Supreme Court held that there was no reason why a judge could not conduct a detailed analysis at trial of what the Claimant would have done at the time he lost his chance in order to establish whether there had been a breach of duty by his solicitor which had caused the Claimant to suffer loss (i.e. a "trial within a trial"). However, a "trial within a trial" could not be used to establish the quantum of loss as that required an inquiry into the hypothetical response of third parties by way of an evaluation of the prospects of a particular recovery on a percentage chances of success basis.

In that regard, loss of chance claims are assessed across a spectrum of possible outcomes: i) where there is substantial certainty that the Claimant would have received a benefit from the third party, the Claimant could be fully compensated; ii) where there was less than substantial certainty but more than a negligible chance of compensation the loss is assessed on a percentage basis (e.g. a 40% chance of a recovery); and finally, where the Claimant's chances of making a recovery were negligible it would lead to no compensation being awarded at all.

The *Watkins* case did not create new law but importantly re-enforced the decision in Perry. It also found that in this case you could not rely upon medical evidence which was not available at the time the claim was lost to re-assess what recovery might have been achieved had a claim been put into the Scheme.

### Commentary

This decision by the Supreme Court is important because it follows *Perry v Raleys* and re-establishes *Allied Maples* as providing a clear road map for pursuing loss of chance claims with more rigour and clarity which should benefit professionals and their insurers equally. Also, it clarified that the loss of chance principles apply to loss of chance claims in other transactions including those concerning other professionals such as architects, surveyors, brokers etc.


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**Footnotes**

1 [2019]UKSC 54
2 [2019]UKSC 5
3 *Allied Maples Group Ltd v Simmons & Simmons (a firm)*[1995] 1 WLR 1602

## **England & Wales:** Stolen Insurance Data - *Aviva Insurance Ltd v Oliver* [4]

**In *Aviva Insurance Ltd v David Oliver*, Aviva Insurance Ltd ("Aviva") brought a claim against David Oliver (the "Defendant") following confidential policyholder information being wrongfully obtained. Aviva claimed that the Defendant's action involved: (i) breach of confidence; (ii) inducing a breach of contract; and (iii) unlawful means conspiracy.**

Aviva employed Kirstie Carruthers (the "Employee"). The Employee accessed Aviva's computer systems


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to obtain the personal details of motor insurance policyholders (i.e. policyholder's name, policy number and vehicle registration number). This information was unlawfully sold by the Employee to the Defendant, who in turn sold the details onto claims management companies.

Judge Eyre QC, sitting in the Commercial Court (QBD), found in favour of Aviva on all three causes of action. Aviva was awarded the sum of £108,651.59, being the costs involved in the investigation and remediation necessitated by the Defendant's actions. A further sum claimed on the basis of an account of profits was not awarded by the Judge.

### Breach of Confidence

Judge Eyre QC affirmed the decision in *Coco v AN Clark (Engineers) Ltd*[5] and relied on the principles as set out in this case. It followed that there was liability for a breach of confidence where: (i) the relevant information is confidential in nature; (ii) the information is obtained in circumstances giving rise to an obligation of confidence; and (iii) there is unauthorised use of the confidential information to the detriment of the party communicating it.

The policyholder information was clearly confidential; the Defendant obtained confidential information improperly, thus giving rise to an obligation of confidence; and, the Defendant breached said obligation in making an authorised sale of the information to claims companies.

### Inducing Breach of Contract

Judge Eyre QC held that an inducement to a breach of contract could be committed where a person merely agreed to pay for material that was being sold in breach of contract, even where the actual offer to sell originated from an employee subject to the relevant contract. The Judge considered this test met where the Defendant had known the information was obtained improperly and was being sold in breach of the Employee's contract.

### Unlawful means conspiracy

Finally, Judge Eyre QC asserted that the elements of unlawful means conspiracy included: (i) a combination of action; (ii) unlawful means as part of that action; and (iii) direction of the action towards the victim (regardless of whether an intention to harm is the predominant purpose).

Judge Eyre QC found that there was a combined action between Defendant and Employee, in circumstances where confidential information had been obtained and distributed unlawfully and where the intention was to injure Aviva by making unauthorised use of that information.

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**Footnotes**

4 [2019]EWHC 2824(Comm)

5 [1968] 7 WLUK 2

## 3. MARKET DEVELOPMENTS

### **UK:** Lloyd's Opioid Crisis?

**The opioid crisis in the United States of America (US) has featured extensively in the media in recent months – a scandal that has killed almost 400,000 people in the US since 1999 (or an average of approximately 50 people a day) and costs the US economy US$504bn every year. Recently there have been reports in the international media that four major pharmaceutical companies have agreed to multimillion dollar pay-outs over the drugs scandal that has gripped the US since the 1990s. One of the most widely covered stories relates to Pardue Pharma, owned by the Sackler family, which has been accused of fuelling the deadly opioid crisis in the US and recently agreed to a US$270m settlement with the state of Oklahoma.**

Some estimates suggest that the total cost of all related claims could easily be in the tens of billions of US dollars. The Daily Telegraph newspaper in the UK recently had a piece on the impact of the US opioid crisis on Lloyd's and compared the potential impact to that of the asbestos pay-outs, which had a profound effect on Lloyd's. The liability insurance sector is therefore likely to see a surge of claims and losses on an unprecedented scale, particularly due to the aggressive

ways in which these claims are likely to be pursued and the size of the recent settlements. Thousands of claims have already been made in a number of US states against drug manufacturers, distributors, drug store owners and healthcare providers, which some commentators have suggested may have the same intensity as claims following the 2008 global financial crisis.

D&O claims are even being reported from companies whose management are being sued by shareholders for simply being linked with the opioid crisis. Even though it is early days, E&O, medical malpractice, employers' liability and general liability insurers may have to prepare for potentially big claims, as the first few claims are currently working their way through the US courts and how these claims are dealt with will have a significant impact on how insurers react.

In its "Dear CEO" letter of 5 November 2019 (and its "Dear Chief Actuary" letter of the same day), the UK Prudential Regulation Authority (PRA) set out its priority areas of focus for general insurance firms over the coming year. The PRA said that it sees "*increasing areas of emerging risks particularly in some US casualty lines such as financial and professional lines, medical malpractice and general liability classes*", particularly as liability insurers focussed in the US are worried about the cost of settlements from the US opioid crisis. The PRA is looking to concentrate on reserve adequacy and related governance and controls as it is concerned that insurers are overly optimistic about how much capital they need to cover growing risk from the US and elsewhere. Firms can therefore expect reserving to be an important area of supervisory focus in the year ahead.

For a copy of the Dear CEO letter please visit https://tinyurl.com/yjgfwam3. For a copy of the Dear Chief Actuary Letter please visit https://tinyurl.com/vc9e3d4.

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