HFW

INSURANCE BULLETIN
NOVEMBER 2023

In this Insurance Bulletin:

REGULATORY

DISPUTES

Editor
WILLIAM REDDIE
Partner, London
T +44 (0)20 7264 8758
E william.reddie@hfw.com

Co-editor
KATE AYRES
Knowledge Counsel, London
T +44 (0)20 7264 8120
E kate.ayres@hfw.com

JAKE WHITFIELD
ASSOCIATE, LONDON

"There is concern that boards are taking insufficient action to ensure positive outcomes for consumers."

REGULATORY

FCA Portfolio Letters Outline Priorities

On 20 September 2023, the FCA published a series of letters to insurance market participants in the context of retail[1], wholesale[2], and life insurance[3] (the "Letters") outlining the FCA's priorities, concerns about specific risks of harm with which it is most concerned, and how firms should address these risks.

In this article we consider the letters further.

General message for the insurance market

In the last 12 months, the FCA has taken regulatory action against firms for a number of failings, some of which include: the continued sale of products which do not provide fair value, discriminatory pricing practices and weak identification of vulnerable customers.

There is concern that boards are taking insufficient action to ensure positive outcomes for consumers. The FCA expects boards to ensure that robust, proactive steps are taken. instead of treating their objectives as compliance exercises or waiting for the FCA to force action.

Market-wide priorities

Embedding the Consumer Duty

The FCA expects firms to assess and address issues with:

- Products & Services;
- Price & Value;
- Consumer Understanding; and
- Consumer Support.

It also expects firms to put the consumer at the centre of their business to ensure that they are providing good consumer outcomes.

The FCA has indicated its willingness to use its range of regulatory tools to assess the implementation of the Consumer Duty, which may include mystery shopping exercises.

Governance and culture

Firms should be able to demonstrate how they are actively working towards having a diverse workforce at all levels in their organisation. While the FCA recognises that there have been encouraging market commitments in this area, it is disappointed with the general lack of progress, particularly in the wholesale market.

Operational resilience and increasing reliance on third parties

The FCA has observed recent incidents where a lack of operational resilience has been detrimental to customers and the wider market, for instance, where there is insufficient contingency planning or oversight in respect of outsourced services.

Firms must scenario test their Important Business Services to identify any vulnerabilities and act on any findings before March 2025, in line with the FCA's Operational Resilience Policy (PS21/3).

Improving oversight of appointed representatives

On 8 December 2022, strengthened rules came into force to give principals more responsibility to ensure the fitness and propriety of their appointed representatives. The FCA expects principals to ensure high standards within their firms and their appointed representative(s), and will be using data and analytics to identify higher-risk principals and to take appropriate action on outlier firms.

Wider regulatory priorities for the next two years

In addition to the above, the FCA will also focus on:

- the Future Regulatory Framework and its impact on the insurance market;
- the new secondary competitiveness objective, with a focus on the wholesale market; and
- climate change risks.

Sector-specific priorities

The FCA has also set out its sector-specific priorities including for retail insurance and wholesale insurance. We set out the key points below:

Personal & Commercial Lines Insurance

- Price and value – firms need to do better at demonstrating how they are delivering fair value to their consumers. The FCA is concerned that some distribution arrangements do not demonstrate how fair value is being delivered, especially where insurance is sold alongside a "primary product".
- Consumer support – firms should consider whether they are doing enough to support customers in financial difficulty. The FCA will monitor compliance with its guidance on supporting customers in difficulty.
- Claims – firms should ensure that consumers are provided with enough information to understand the different claims settlement options available to them. The FCA will also closely monitor whether motor total loss claims are being handled promptly and fairly.
- Access – firms should consider different groups of consumers so that they have access to suitable coverage at a fair price. The FCA will be carrying out an evaluation of the rules in relation to consumers with pre-existing medical conditions.
- Sales practice – firms must ensure that consumers are fully informed and that any products offered to them are consistent with their needs. There is concern that some "essentials" policies offer lower levels of cover, which are not necessarily understood by customers.
- Governance, culture and non-financial misconduct – firms should reflect on their culture and focus on improving diversity, equity and inclusion at all levels. The FCA will hold senior managers accountable for their firm's culture. Since these letters were published, the FCA has published a consultation in this area.

Wholesale insurance

- Competitiveness of the London market – the FCA wishes to support the growth of the London market by reviewing the impact of its current rules and continuing to work with the London market trade bodies when developing future proposals. It expects the market to improve its efficiency and resilience.
- Governance, culture and non-financial misconduct – firms must report instances of serious non-financial misconduct. The FCA has received a concerning number of such reports, particularly in the context of wholesale insurance.
- Operational resilience – firms should evaluate whether they have any weaknesses in their operational resilience processes, take steps to fix these weaknesses and proactively manage any exposure to data loss. Firms should also report any incidents to the FCA in a timely manner.
- Cyber insurance – firms should ensure that cyber insurance policy wordings are clear, meet customers' needs and provide value. The FCA intends to continue monitoring this market.
- Embedding the Consumer Duty – The letter highlights that the Duty applies to all firms in the wholesale market that have material influence over retail consumer outcomes, even if there is no direct relationship. FCA product governance and pricing rules under PROD 4 apply to all insurers (other than where there is an exclusion for example for large risks and reinsurers). The FCA has seen evidence of high commission rates and poor practices in the wholesale market, and firms must do better in justifying how their commission levels are appropriate for the price retail consumers pay.
- Financial crime – firms should have effective and concrete policies and procedures in place to detect, prevent and combat financial crime.
- Prudential risk to debt servicing –firms should (i) undertake stress testing, (ii) regularly review their wind-down plans, (iii) have firm arrangements in place to protect their customers, and (iv) have sufficient financial resources.

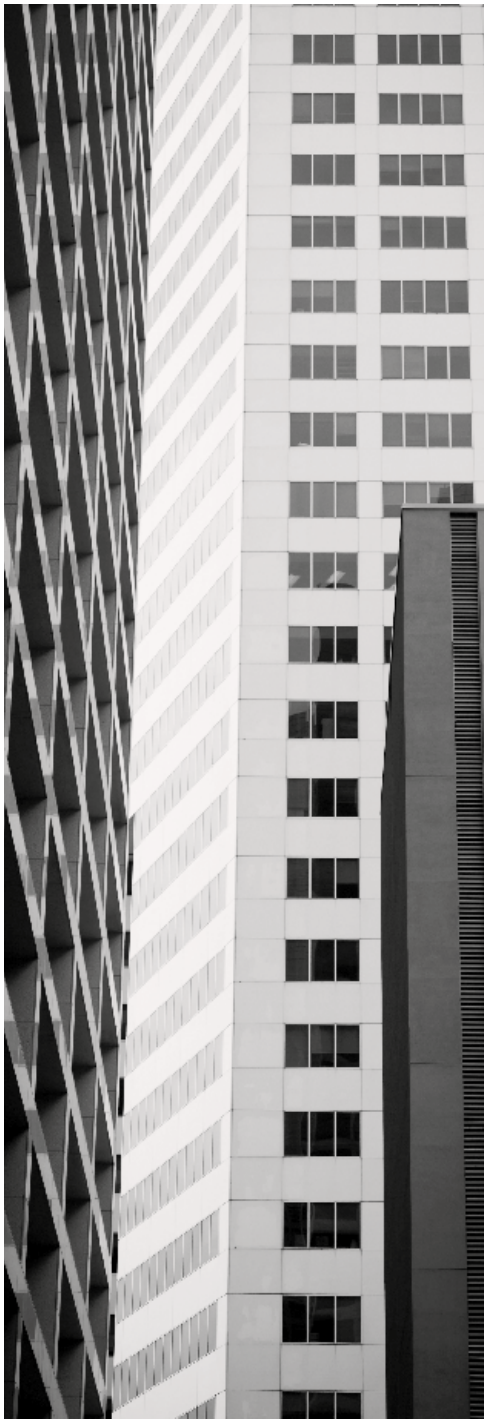
Conclusion

All firms should be aware of the FCA's priorities and continue to take necessary action. The FCA states that a significant part of its activity over the next two years will be to test firms against its priorities and requirements.

JAKE WHITFIELD
Associate, London
T +44 (0)20 7264 8780
E jake.whitfield@hfw.com

Footnotes:

1. https://www.fca.org.uk/publication/correspondence/personal-commercial-insurance-market-priorities-2023.pdf
2. https://www.fca.org.uk/publication/correspondence/wholesale-insurance-market-priorities-2023.pdf
3. https://www.fca.org.uk/publication/correspondence/life-insurance-market-priorities-2023.pdf



KATE AYRES
KNOWLEDGE COUNSEL, LONDON

"We will no doubt see more complainants arguing that insurers have breached the Consumer Duty."

The FOS, Insurance Claims, and the Consumer Duty

In October, the FOS published its half year complaints data. This indicates that complaints have increased in particular in the banking and insurance sectors, and certain insurance complaints are at a five year high. This is in part due to speed of pay out on claims, whilst contractor availability and the ability to source materials has impacted the speed of repairs.

The insurance market has, of course, faced the pressures apparent in the wider economy, which have made it more difficult to deal with claims. This includes general inflation, issues with labour supply and supply chain difficulties.

Against this background, we consider how complaints going forward might be affected by the Consumer Duty.

Relevance of the duty

Insurers have been required to comply with the Consumer Duty since 31 July 2023, which means that they must achieve a number of high-level outcomes, and adhere to cross-cutting rules. The duty applies to dealings with retail customers. The outcomes include the need for products and services to meet the customer's needs and objectives and be fit for purpose, and for there to be ongoing customer support through the lifecycle of the product.

The FCA has indicated that Senior Managers must demonstrate that they have put customers at the centre of the claims process. The duty will be relevant to the process and time it takes to pay claims in many ways, for example: insurers must ensure customers are easily able to start the claims process in the first place by providing clear information on how to make claims, and the process must be easy to navigate; unnecessary barriers to claims such as requesting an inappropriate amount of information from the policyholder must be avoided; claims handlers must have ready access to all relevant internal information such as policy wordings; and in taking coverage decisions claims handlers must be aware of what it was that the policy was intended to cover. Whilst it is possible that insurers might be concerned about an increase in fraudulent or inflated claims in the cost of living crisis, the FCA has made clear that firms must not unreasonably delay or potentially decline payments for valid claims.

How will the consumer duty feed into FOS complaints?

We will no doubt see more complainants arguing that insurers have breached the Consumer Duty. Dissatisfied customers must first make their complaints to the insurer, which has up to eight weeks to respond, before an FOS complaint can be made. We might therefore expect more significant numbers of complaints of breach of the Duty to start coming through as the year ends, and that this will remain the case going forward.

In June, the Chief Executive and Chief Ombudsman, Abby Thomas, set out the FOS's approach to the Duty. Thomas indicated that the FOS is well-prepared to deal with the Duty because it already decides cases on the basis of what is fair and reasonable. The FOS anticipates that the Duty might lead to an increase in complaints about the use of products and services generally, and around price and value (for example asking why they are paying for a poor claims service or limited coverage). However, notably, Thomas states that the duty does not require that consumers are protected from harm that was not reasonably foreseeable, and many products contain risk that consumers can reasonably understand and accept if firms have followed the necessary requirements.

The FOS will share further information on its approach and feedback once there are further developments. We will be watching this space.

KATE AYRES
Knowledge Counsel, London
T +44 (0)20 7264 8120
E kate.ayres@hfw.com

Feedback on Artificial Intelligence and Machine Learning

The PRA and FCA has published a feedback statement on artificial intelligence (AI) and machine learning, with responses from across the financial services industry, including insurance. This follows a Discussion Paper (DP 5/22) published in October 2022, for the regulators to gain more understanding and deepen dialogue surrounding supervision in this area.

Although the statement does not contain any policy proposals, some of the feedback in the paper is an interesting reflection of the industry's views on this evolving area. Some of the key points include:

- A principles or risk-based approach to AI is likely to be appropriate with a focus on its specific characteristics or risks. The use of high-level principles will give the firms and regulators the ability to adapt to technological developments.
- It is likely that AI capability will continue to change rapidly and regulators will need to be alive to this, for example by maintaining "live" regulatory guidance i.e. regularly updated guidance with real-life examples.
- More coordination and alignment between different regulators, domestic and international, in relation to AI and data risks would be very helpful.
- The key focus of regulation should be consumer outcomes, especially with regard to fairness and other ethical aspects. This would be in line with existing regulation.
- The existing firm governance structures, such as the Senior Managers and Certification Regime are sufficient to address AI risks.

Comments on the risks of AI included that: the speed and scale of AI could lead to potential new systemic risks, such as the emergence of new forms of market manipulation; the use of deepfakes for misinformation; third-party AI models resulting in convergent models including digital collusion or herding; and AI could amplify flash crashes or automated market disruptions. It was also noted that a risk for firms is insufficient skills and experience within firms to support the level of oversight needed to ensure risk management. Novel challenges from AI might include: the risk of its use for fraud and money laundering; the difficulty in determining whether AI models have been compromised by cyber attacks; and that the risks of generative AI are not properly understood but consumers may nevertheless rely on GenAI as a source of financial information.

WILLIAM REDDIE
Partner, London
T +44 (0)20 7264 8758
E william.reddie@hfw.com

WILL REDDIE
PARTNER, LONDON

"It is likely that AI capability will continue to change rapidly and regulators will need to be alive to this."

DOMINIC PEREIRA
ASSOCIATE, LONDON

"...the new requirements will not apply to commercial leaseholders or commercial policy stakeholders."

Multi-occupancy Building Insurance - FCA Publishes Feedback and Final Rules

In September, the FCA published a Policy Statement (PS23/14)[1] regarding its proposed rule changes to address leaseholder harms identified in the multi-occupancy building insurance market. Of particular interest, the Policy Statement clarifies that the proposed new rules will not apply to commercial leaseholders or commercial policy stakeholders.

Background

In 2022, in response to a request from the government, the FCA published a report on insurance for multi-occupancy buildings. It found that there was a risk of poor outcomes for leaseholders, who bear the costs of increasing premiums, but have little influence over the choice of broker or insurer.

Following the report, the FCA consulted earlier this year[2] on its proposed remedies to address these issues in the multi-occupancy building insurance market. The proposals focussed on transparency, product design and remuneration practices.

In response to the feedback it received, the FCA published Policy Statement PS23/14, which sets out the final relevant rules and provides various further explanations and clarifications.

Application to commercial leaseholders

In particular, the FCA has acknowledged that the proposed new rules (as drafted in the earlier consultation paper) would capture commercial leaseholders as well as residential. However, the FCA has now stated that this was not its intention.

As such, the FCA has amended the final rules to reflect that the new requirements will not apply to commercial leaseholders or commercial policy stakeholders. In other words, they will only capture residential leaseholders/ policy stakeholders.

A high-level summary of the clarified scope of the new requirements is set out below:

1. **New disclosure rules for multi-occupancy building insurance (ICOBS 6A.7):** the FCA has confirmed that the new disclosure rules will now only apply in relation to residential leaseholders (i.e. firms will not need to provide disclosures intended for commercial leaseholders). The new Handbook Glossary definition of "leaseholders" and guidance at the start of ICOBS 6A.7 will be amended accordingly.
2. **Amendments to product governance (PROD 4), customer's best interests (ICOBS 2.5) and remuneration (SYSC 19F.2) rules:**
   - As well as clarifying that the "leaseholder" definition only covers residential leaseholders (see point 1 above), the FCA has also confirmed that commercial entities (including commercial leaseholders) will not be considered policy stakeholders. The new Handbook Glossary definition of "policy stakeholders" will be amended accordingly.
   - The effect of this is that the requirements under PROD 4, ICOBS 2.5 and SYSC 19F.2 (which originally may have captured commercial leaseholders and/or policy stakeholders) will now only apply to (i) residential leaseholders or (ii) those in a similar position to residential leaseholders who are paying for and have an interest in the subject matter of an insurance policy. In other words, those requirements will not apply to commercial entities (including commercial leaseholders).

Application to contracts of large risks

The FCA has also clarified the proposed application of the new rules to contracts of large risks, as summarised below:

1. **PROD 4 product governance requirements:** The FCA has confirmed that the product governance requirements

under PROD 4 will not apply to contracts of large risks that exclusively cover commercial policyholders and commercial policy stakeholders. In other words, where all policyholders and policy stakeholders (including leaseholders) are commercial persons (i.e. they are not retail consumers), the contract of large risks exclusion may still be available in respect of the PROD 4 requirements.

2. **ICOBS 6A.7 disclosure requirements:** The FCA has confirmed that the new disclosure requirements under ICOBS 6A.7 will apply to a firm distributing a contract of large risks for a commercial customer where the risk is located within the UK. In other words, the new disclosure rules apply to policies in respect of commercial customers even where is a contract of large risk. By way of example, this would cover the situation where the freeholder/ landlord constitutes a commercial customer covered by a contract of large risks, but the individual leaseholders do not (the FCA's view is that a leaseholder should be afforded the benefit of the new requirements whether or not the landlord's policy is considered a contract of large risks).

Implementation timetable

The new rules will come into force on 31 December 2023.

DOMINIC PEREIRA
Associate, London
T +44 (0)20 7264 8194
E dominic.pereira@hfw.com

Footnotes:

1. FCA Policy Statement PS23/14 can be accessed here: https://www.fca.org.uk/publication/policy/ps23-14.pdf.
2. FCA Consultation Paper CP23/8 can be accessed here: CP23/8: Multi-occupancy building insurance (fca.org.uk). The consultation period opened on 21 April 2023 and closed on 9 June 2023.

BARRY VITOU
PARTNER, LONDON

ANNE-MARIE OTTAWAY
PARTNER, LONDON

The Economic Crime and Corporate Transparency Act Receives Royal Assent – What Can We Expect?

On 26 October 2023, the long-awaited Economic Crime and Corporate Transparency Act (ECCTA) received Royal Assent after a protracted period of Parliamentary ping-pong.

The ECCTA contains key changes, which include a new "failure to prevent fraud" offence and statutory footing for attributing corporate liability (the identification principle). The ECCTA also widens the powers given to various prosecuting bodies regarding investigating and enforcement related to economic crime.

The ECCTA is discussed in more detail here.

BARRY VITOU
Partner, London
T +44 (0)20 7264 8050
E barry.vitou@hfw.com

ANNE-MARIE OTTAWAY
Partner, London
T +44 (0)20 7264 8054
E anne-marie.ottaway@hfw.com

ECCTA: What's Coming and How it Will Affect Companies – Part 1 Reform to the Identification Principle

Barry Vitou and Anne-Marie Ottaway are holding an in-person seminar on Thursday 7th December 2023 covering these reforms. Amongst other things Barry and Anne-Marie will:

- Discuss what companies should be considering in advance of the new corporate attribution provisions coming into force on 26th December 2023 to ensure they are protected.
- Horizon scan and flag some additional changes coming into force next year in particular the new failure to prevent fraud offence.
- Provide tips and recommendations.

Date: Thursday 7th December 2023

Venue: HFW, 8 Bishopsgate, London, EC2N 4BQ

Time:
4.15pm – Arrival
4.30pm – Seminar begins
5.30pm – Seminar ends with drinks, nibbles and networking to follow

Please register here.

KATE AYRES
KNOWLEDGE COUNSEL, LONDON

"The matter went as far as the Supreme Court because it was a test case, with around 26,000 active cases of a similar nature."

DISPUTES

Supreme Court rules on limitation and deliberate concealment in PPI case

In *Canada Square Operations Ltd v Potter*[1] the Supreme Court reviewed the law on s32 Limitation Act 1980, and found that prior case law had taken a wrong turn. The Court considered the meaning of "*deliberate concealment*" in a decision that will be significant for PPI matters as well as professional negligence and other types of claim.

Background

In July 2006, the claimant entered into a loan agreement with the defendant lender and insurance intermediary. The agreement comprised a loan and a payment protection policy (PPI). Over 95% of the amount described as the PPI premium was the defendant's commission on the policy, but the defendant did not inform the claimant that it would receive or retain a commission.

In November 2014, the Supreme Court gave judgment in *Plevin v Paragon Personal Finance* (2014) in which it held that the non-disclosure of a very high commission was "*unfair*" within the meaning of S140A of the Consumer Credit Act 1974. Following this decision, on 14 December 2018 the claimant commenced proceedings to recover the amounts paid in respect of her PPI policy.

Since it was more than six years since the end of the credit relationship, and the primary limitation period had therefore expired, the issue before the court was whether the claim was time-barred, or whether the limitation period could be extended under s32 of Limitation Act 1980.

Section 32 provides:

" (1) where in the case of any action for which a period of limitation is prescribed by this Act, ...

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; ...

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

The matter went as far as the Supreme Court because it was a test case, with around 26,000 active cases of a similar nature.

At Court of Appeal level it had been held that applying s32, limitation had not expired and the claim could proceed.

Supreme Court judgment

The issue for the Supreme Court was firstly the meaning of "*deliberately concealed*" within s32(1)(b)

Lord Reed giving judgment (with which the other Judges agreed) considered the development of the law on s32, and concluded that previous analyses of the section had been confusing and had taken a wrong turn.

"Concealed"

Lord Reed held that the meaning of "*concealed*" in ordinary language was to keep something secret by taking active steps to hide it, or failing to disclose it, whether there is an obligation to disclose it or not. There was no requirement therefore that the concealment must be in breach of a duty, whether a legal duty or arising from "*utility and morality*". There was also no requirement that the defendant knew that the fact concealed was relevant to the right of action (or was reckless about that).

"Deliberately"

Lord Reed rejected the argument that "*deliberately*" in this context can mean "*recklessly*". Concealment must

be the intended result of the act or omission of the defendant.

Therefore in summary the requirement of s31(1)(b) was that the claimant must show some fact relevant to his right of action had been concealed by a positive act of concealment or the withholding of information, in either case with the intention of concealing the facts.

Turning to s32(2), the Court of Appeal had already found that the creation of an unfair relationship under s140A of the 1974 Act was a breach of duty for the purposes of this section and that the defendant had been reckless as to whether it was in breach of that duty. There was no appeal against these findings.

Lord Reed held that the meaning of "*deliberate*" within s32(2) also did not include "*recklessness*" which has a different legal meaning. Nor did it require awareness that the defendant is exposed to a claim. The requirement is that the defendant knows that he or she is committing a breach of duty.

Application to the facts

Applying the law to the facts the Supreme Court found that the existence and amount of PPI commission were relevant to the claimant's right of action as she could not plead her claim without those facts. The defendant deliberately concealed those facts by consciously deciding not to disclose the commission and therefore the requirements of s32(1)(b) were met. The claim was not barred by expiry of limitation on this basis.

However, the requirements of s32(2) were not met. Although it was conceded that the defendant deliberately decided not to disclose the commission when it was aware there was a risk that this would make the relationship unfair, it had not been shown that the defendant knew or intended that the non-disclosure would have that effect.

KATE AYRES
Knowledge Counsel, London
T +44 (0)20 7264 8120
E kate.ayres@hfw.com

Footnotes:

1. [2023] UKSC 41

SAM WAKERLEY
PARTNER, DUBAI

LUKE GARRETT
SENIOR ASSOCIATE, DUBAI

UAE Insurance Claims; A Jurisdictional Conundrum

In *Union Insurance PJSC v International Precious Metals Refiners LLC* CFI 064/2022 (15 September 2023), the DIFC Court has re-affirmed its jurisdiction over insurance disputes subject to jurisdiction clauses which refer to the "*Courts of the UAE*."

This is the latest in a number of decisions in which the DIFC Courts have expanded their jurisdiction into the heavily regulated area of insurance.

The decision and the implications are discussed further here.

SAM WAKERLEY
Partner, Dubai
T +971 4 423 0530
E sam.wakerley@hfw.com

LUKE GARRETT
Senior Associate, Dubai
T +971 4 423 0510
E luke.garrett@hfw.com

Key coverage update: Developments in (re)insurance law you need to know

Please join us at our breakfast seminar, where our speakers, from HFW's (Re)insurance Disputes Team, will provide an update on the implications of the most important coverage developments in (re)insurance law over the last year.

This will be relevant across business lines and for both insurance and reinsurance.

Topics covered will include:

- **Aggregation –** developments in the law of aggregation – what's occurring?;
- **Causation and exclusion clauses –** where we are now following *Brian Leighton v Allianz* and other matters, as well as recent developments in exclusion wordings;
- **Claims handling issues –** a number of cases, such as *Technip v Medgulf* have illustrated some key points insurers must be aware of when handling claims and deciding on coverage

The seminar will be an in-person event chaired by the Head of Insurance and Reinsurance, Chris Foster, and partners Rupert Warren, Adam Strong, Mark Meyer and Jonathan Bruce will be speaking.

Date, Location & Time:

31 January 2024

HFW London office - 8 Bishopsgate, London, EC2N 4BQ

8:20am - breakfast and registration

8:50am - seminar begins

10:00am - seminar promptly ends

If you would like to register please click here. For more information, please contact events@hfw.com.

HFW has over 600 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our Insurance and reinsurance capabilities, please visit www.hfw.com/Insurance-Reinsurance-Sectors.

Americas | Europe | Middle East | Asia Pacific