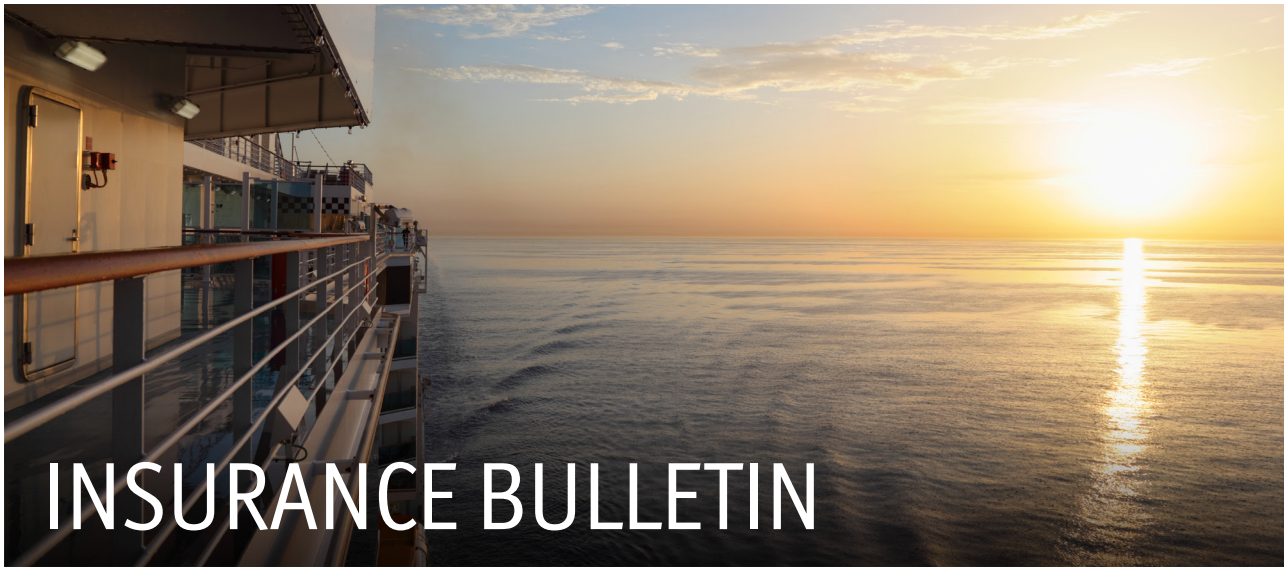
Insurance/ Reinsurance

4 May 2017



INSURANCE BULLETIN

Holman Fenwick Willan is deeply saddened to announce the death of James Clibbon, an Insurance Partner in the firm's London office, on 24 April.

James, who specialised in professional practices work, spent much of his career acting in professional indemnity matters and was a well known personality in the insurance market. He joined the firm in 2012 from Streathers Solicitors where he was a Partner, having previously been with Barlow Lyde and Gilbert's Professional Indemnity and Commercial Litigation department (1997-2006). James originally qualified as a Barrister (1994) and re-qualified as a solicitor in 1997.

Our thoughts and condolences are with James's family and friends at this very sad time.

In this week's Insurance Bulletin:

Andrew Bandurka, Partner, andrew.bandurka@hfw.com

MENAIR INSURANCE AWARDS 2017 WINNER

UK CAPTIVE 2017 SERVICES AWARDS WINNER LAW FIRM HOLMAN FENWICK WILLAN

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1. Regulation and legislation

UK: Enterprise Act 2015 – provisions on damages for late payment of insurance and reinsurance claims come into force

The Enterprise Act 2015 comes into force on 4 May 2016. It will, unless specifically excluded, introduce a new clause into all commercial insurance and reinsurance contracts, requiring the payment of valid claims within a reasonable time. The policyholder's remedy for breach will be damages for the resulting loss which it suffers, over and above an award of interest. The occasions are probably quite rare on which late payment of a claim by a reputable insurer would cause the type of loss which would be compensable in damages, all the more so in reinsurance, but this will not relieve the pressure on insurers to ensure their claims-handling practices will withstand scrutiny. Time will tell whether a claim for late payment damages becomes a "must-have" add-on to insurance coverage claims, and whether the courts will give unmeritorious claims short shrift.

For further information, please see the articles in our Insurance Bulletins of 1 October 2015 and 21 October 2016.

For more information, please contact Andrew Bandurka, Partner, London, on +44 (0)20 7264 8404, or andrew.bandurka@hfw.com, or your usual contact at HFW.

2. Court cases and arbitration

England and Wales: Court considers Financial Ombudsman Service's jurisdiction

The jurisdiction of the Financial Ombudsman Service (FOS) in determining complaints, and the manner in which this should be exercised when the Ombudsman departed from strict law, was examined on an application by an Insurer for judicial review of an FOS decision.

The FOS

The FOS's jurisdiction derives from Part XVI of the Financial Services and Markets Act 2000 (FSMA 2000). Pursuant to section 225 of FSMA 2000, the FOS provides an independent and informal complaint resolution service for the financial services industry, designed to avoid the need to revert to the courts.

In this case, which involved an exercise of the FOS's compulsory jurisdiction, section 228(2) of FSMA applied, provided that:

"A complaint is to be determined with reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case."

The rules governing complaints handling by the FOS are set out in the FSA Handbook under the section entitled "Dispute Resolution: Complaint" (DISP). DISP 3.6.4 R provides that in considering what is fair and reasonable, the Ombudsman will take into account:

1. Laws and regulations.
2. Regulators' rules, guidance and standards.
3. Codes of practice.

What he considers to have been good industry practice at the relevant time, where appropriate.

The background

The application concerned claims against the Insurer under two life policies issued to a Mr and Mrs M. These were a joint policy, which had been cancelled by the Ms prior to the claim arising, and a single policy issued to Mr M, which had been avoided by the Insurer on the basis of a misrepresentation.

By its application, the Insurer challenged an FOS Ombudsman's decision that (i) the Insurer had done nothing wrong by refusing to reinstate the cancelled joint policy but that (ii) on the basis that Mr M's representation had been innocent, the joint policy should be reinstated and the claim considered.

The decision

It was common ground that the Ombudsman's decision was flawed for the inadequacy of the reasons which were given. The Court quashed the decision, so the M's complaint fell to be re-determined. The court emphasised that in particular it was incumbent upon the Ombudsman to explain why she had departed from the relevant law, guidance and practice in holding that the innocent character of Mr M's misrepresentation were grounds for reinstating the policy – this being irrelevant as a matter of strict law.

However, in view of the importance of the point, the court also considered the Insurer's second argument, which was that the Ombudsman's decision had been "Wednesbury unreasonable" or in other words so unreasonable that no reasonable authority could ever have


come to it[1]. This involved considering the FOS's jurisdiction in determining complaints.

The court held that the question for the Ombudsman was not solely whether the Insurer had followed the relevant law, guidance and accepted practice, but whether the Insurer had acted fairly and reasonably in all the circumstances of the case. This was not a process of review or examination of the Insurer's decision, but of the Ombudsman reaching her own evaluative assessment of the decision reached.

It was not enough for the Insurer to show that it had followed the relevant law, guidance and accepted practice, an approach which had previously been rejected by the Court of Appeal[2]. Instead, the enquiry may be wider, because the Ombudsman may decide that the insurer did not act fairly and reasonably despite its adherence to sound legal principle, guidance and practice.

On this basis, the court was not persuaded that it would be outrageous to hold an insurer to its contract in the circumstances of a case such as this. The Wednesbury unreasonableness test was not therefore met. The court did however stress that careful reasons would need to be given for any lawful decision upholding the Ms' complaint.

Comment

The case helpfully describes the exercise in which the FOS is engaged when determining complaints under section 228 of FSMA 2000. It is therefore of interest not only to insurers, but to other financial institutions which are subject to this regime.

The case is also noteworthy for the reservations expressed by the court over a jurisdiction expressed in these terms. In particular, Mr Justice Jay commented as follows:

"I do have personal concerns about a jurisdiction such as this which occupies an uncertain space outside the common law and statute. The relationship between what is fair and reasonable, and what the law lays down, is not altogether clear. [...] Who, or what, defines the contours and content of fairness and reasonableness? [...] It might be said that this jurisdiction is penumbral because its shadows cannot be illuminated."

Insurers may share Mr Justice Jay's concerns, it appears that their actions are subject to review by the FOS, even where they have adhered to sound legal principle, guidance and practice.

For more information, please contact Ben Atkinson, Senior Associate, London, on +44 (0)20 7264 8238, or ben.atkinson@hfw.com, or your usual contact at HFW.

England and Wales: The *MARCO POLO* – insurance goes viral

In the case of *Cruise and Maritime Services International Limited v Navigators Underwriting Agency Limited* (the *MARCO POLO*), a holiday sales agent failed to recover under a marine liability policy on a number of grounds.

The *MARCO POLO* was a cruise ship which been chartered and then sub-chartered to Transocean Tours Touristik GmbH. Transocean entered into a sales agency agreement with the claimant, CMS, in order to market and sell cruises on the vessel. CMS subsequently contracted with a number of tour operators which marketed cruises to passengers.

When the *MARCO POLO* was struck by an outbreak of norovirus two days into a cruise, the cruise had to be cancelled and a number of passengers became ill. CMS paid compensation to passengers in respect of personal injury and ruined holidays and sought to recover an indemnity from the marine liability policy purchased by the head charterer, which named CMS as a co-insured. The court rejected CMS' claim on the following grounds:

1. Its liability to the passengers was said to be pursuant to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. However, the Athens Convention only provided for claims made by passengers against entities with whom the passengers had entered into a contract of carriage (carriers). In this case, CMS had not contracted with the passengers, but with the individual tour operators who were the carriers for the purposes of the Athens Convention.

2. Although named as a co-insured, the policy did not respond to claims made against CMS. The interest under the policy was described as 'charterers liability' and the conditions provided the insurance was "to cover Charterers Liability per Clause MM.No. 1416". The court found that CMS could not, on any view, be regarded as a charterer. The addition of CMS' name to the policy made no difference – no additional premium was charged and no indication of what might be covered was given. Thus, "the mere naming of the claimant as co-assured does not itself mean that the alleged liability in respect of which this claim is advanced fell within the Policy".

1 See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1, at para 230

2 See *R (Heather Moor & Edgecomb) v FOS* [2008] EWCA Civ 642

3. The court did not need to reach a conclusion on whether CMS had in fact been negligent but commented that the mere outbreak of norovirus was not enough to so establish.

Following the decision on second point, parties hoping to rely on policies in which they are named as a co-insured need to be careful that the policy actually responds to the type of loss they may suffer.

For more information, please contact Rupert Warren, Senior Associate, London, on +44 (0)20 7264 8478, or rupert.warren@hfw.com, or your usual contact at HFW.

3. HFW publications and events

HFW participate in Falconbury Conference on Advanced Reinsurance Wordings

Andrew Bandurka (Partner, London) chaired the Falconbury Conference on Advanced Reinsurance Wordings at the Rembrandt Hotel, London on 26 April 2017, with Christopher Foster (Partner, London) and Ben Atkinson (Senior Associate, London) speaking.

HFW presents at the IBA Annual Litigation Forum

Sara Sheffield (Associate, Dubai) presented at the IBA Annual Litigation Forum Conference in Zurich on 3 May.

HFW to attend IRLA Conference

Andrew Bandurka (Partner, London), Costas Frangeskides (Partner, London) and Edward Rushton (Senior Associate, London) will attend the IRLA Annual Congress in Brighton, UK on 8 and 9 May.

HFW shortlisted for International Law Firm of the Year in the Middle East Legal Awards 2017

HFW is delighted to announce that it has been shortlisted for the International Law Firm of the Year in the Middle East Legal Awards 2017. Rula Dajani Abuljebain (Partner, Dubai) will be attending the awards on 11 May at the Ritz-Carlton JBR, Dubai.

HFW to present at the Aqaba Conference 2017 in Jordan

John Barlow (Partner, Dubai) and Yaman Al Hawamdeh (Partner, Dubai) will be speaking at the Aqaba conference on 17 May. Costas Frangeskides (Partner, London) and Rami Al Tal (Partner, Dubai) will also be attending the conference.

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