HFW

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"The PRA is proposing that a stand-alone ISPV, and a single cell of a PCC, may take on only a single risk, from a single cedant."

1. REGULATION AND LEGISLATION

UK: ISPV regime – PRA proposes updates to its approach, but great changes not expected

The PRA has published a consultation paper which contains proposed updates to its approach and expectations in relation to the authorisation and supervision of insurance special purpose vehicles (ISPVs).

The main points of interest are the clarification of when third party opinions will (or will not) be required by the PRA, of when "roll-over" funding can be used, and of the PRA's expectations on risk transfer requirements.

The consultation paper[1] is informed by the PRA's experience of authorising and supervising ISPVs since the UK's insurance linked securities regime was introduced in December 2017. The PRA is proposing to change its Supervisory Statement 8/17 on the authorisation and supervision of ISPVs[2].

The key changes which the PRA is proposing are:

1. The PRA will understand that final application and transaction documents will not always be available when an application for authorisation is made to the PRA, so the PRA will adjust its expectations regarding documents accordingly.
2. The PRA will generally not expect to see third party opinions (in particular legal opinions), except where it would be difficult for the PRA to assess the application without an opinion, e.g. where the transaction contains complex or novel features.
3. The PRA wants to enable "roll-over" funding mechanisms to be used, although it will not be possible to use funds to meet the funding requirements of two consecutive risk transfer arrangements at the same time.
4. The amended Supervisory Statement will include a section setting out the PRA's expectations on risk transfer requirements. In particular, this will cover the number and type of risk transfer arrangements an ISPV may assume. The PRA is proposing that a stand-alone ISPV, and a single cell of a PCC, may take on only a single risk, from a single cedant.

The consultation will be open until 3 December 2019. The consultation paper sets out the proposed amendments to SS8/17 which will, subject to responses, be adopted upon the consultation closing.

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Footnotes

1. CP19/19, see: https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/consultation-paper/2019/cp1919.pdf
2. see: https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/supervisory-statement/2017/ss817update

2. COURT CASES AND ARBITRATION

England & Wales: Access to court records *Cape Intermediate Holdings v Dring*[1]

In a unanimous decision, the UK Supreme Court has held that non-parties to litigation should be allowed access to certain documents from a trial to which it was not a party.

The Supreme Court held that the court rules do not provide an exhaustive list of the circumstances in which a non-party may access court documents, but stated that courts at all levels have an inherent jurisdiction to allow access in accordance with the guiding principle of open justice.

Relying on CPR 5.4C(2) which provides that a non-party to litigation may, with the Court's permission, obtain from the court records a copy of any document other than a statement of case or judgment (which are available without permission), the Asbestos Victims Support Groups Forum UK (the Forum) applied for access to the trial bundles and other documents used in two cases against Cape plc which settled after trial but before judgment was handed down. The

Forum believed that the documents contained valuable information which would may assist in other asbestos litigation.

In the High Court, Master McCloud held that the Court had jurisdiction to order that the Forum should be given access to the trial bundle. As a result, access was granted to the complete hard copy trial bundle, as well as skeleton arguments and transcripts. Access was not, however, granted to the electronic trial bundle which included all documents disclosed by the parties, whether or not these had been relied on at trial.

Cape appealed to the Court of Appeal, which overturned the order of the High Court. The Court of Appeal limited disclosure to the statements of case, witness statements, expert reports and written submissions. The Court of Appeal ordered that the application for further disclosure should be listed before Master McCloud to decide whether any documents had lost confidentiality as they had been read out in court or by the judge, or whether inspection was necessary to meet the principle of open justice. Cape appealed to the Supreme Court arguing that the Court of Appeal had been too generous, and the Forum cross-appealed to the Supreme Court arguing that the Court of Appeal had been too limited.

The Supreme Court dismissed both appeals. Lady Hale stressed the importance of open justice and held that the default position is that the public should be allowed access not only to the parties' written submissions and arguments but also to documents which had been placed before the Court and referred to during the course of the hearing. Mere reference to the document during the hearing is sufficient, and it is not necessary that the judge be asked to read the document or that the judge does in fact read the document. The Court held that an applicant does not have an automatic right of access, and a non-party seeking access is required to explain why they require access and how granting the application would advance the principle of open justice. The Supreme Court also differentiated between clean copies of the trial bundle and copies that contain annotations made by those involved in the case (the disclosure of which would require the consent of the party in possession of the bundle).

This decision will have some importance to parties who are not party to a case but nevertheless have an interest in the case, and specifically in details which might not otherwise have been available to them by virtue of the fact that they were not included in documents to which a non-party has an automatic right. Whilst this may be of concern to parties to litigation who would rather certain documents and information are not made available to the wider public, it should be noted that there is still a significant threshold to overcome, and the non-party must explain why access is sought and how granting access will advance the principle of open justice. In this regard, the Supreme Court noted that considerations of national security, the protection of privacy interests and trade secrets, and commercial sensitivity were examples of good reasons for denying access.

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Footnotes

1. [2019] UKSC 38]; http://www.bailii.org/uk/cases/UKSC/2019/38.html

Australia: New South Wales Court of Appeal Reconsiders Aggregation

The New South Wales Court of Appeal has overturned an earlier decision of the NSW Supreme Court in *Bank of Queensland Limited v AIG Australia Limited* [1]. We reported the Supreme Court decision in our bulletin of November 2018[2].

The claim concerned a class action against the Bank of Queensland (the **Bank**) alleging a failure by the Bank to protect investors' interests in the face of a fraudulent Ponzi scheme. There were around 200 members of the class, and the Bank ended up settling for a total of AUD6m. The Bank's insurance policy contained a "*per claim*" deductible of AUD2m and each individual claim within the class action fell well below this level.

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"The Court of Appeal disagreed, deciding that the claims were sufficiently similar so to have arisen from a series of related wrongful acts."

The Bank claimed on its insurance policy on the basis that the claims within the class action were a single claim or, failing that, that they should be deemed to be one claim by virtue of the aggregation clause. The Supreme Court rejected both of these arguments, finding that each member of the class had their own individual claim and, more controversially, that the claims did not aggregate. The Court of Appeal upheld the first finding but overturned the second.

The aggregating language in the policy provided that "*all Claims arising out of, based upon or attributable to one or a series of related Wrongful Acts shall be considered to be a single Claim*". The Supreme Court found that the claims did not aggregate on the grounds that each fraudulent withdrawal from an investor's account, which gave rise to a claim, was a fresh wrongful act, unrelated to withdrawals from other investors' accounts.

The Court of Appeal disagreed, deciding that the claims were sufficiently similar so to have arisen from a series of related wrongful acts. The unifying factor was the knowledge of fraud allegations in the class action pleadings. One relevant factor was that the court had permitted the claims to be heard as a class action due to the considerable common ground between the claims.

This decision brings the Australian position more into line with the recent English Supreme Court decision in *AIG v Woodman*[3], which was referred to by the NSW Court of Appeal.

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Footnotes

1. [2019] NSWCA 190
2. http://www.hfw.com/Insurance-Bulletin-November-2018-Edition-2
3. [2017] UKSC 18; https://www.supremecourt.uk/cases/docs/uksc-2016-0100-judgment.pdf

New Zealand: Aggregation not shaken: *Moore v IAG New Zealand Ltd* [1]

In a recent judgment, New Zealand's High Court has considered whether two earthquakes had a common cause and were therefore one event for the purposes of an insurance policy.

Mr. Moore, the insured, took out a home insurance policy with IAG New Zealand Ltd (**IAG**) for the period 13 November 2010 to 13 November 2011. The policy contained a clause limiting IAG's liability to NZ$2,500,000 in respect of "*any loss (or any series of losses caused by one event)*". "*Event*" was defined in the policy as "*a single event or a series of events which has the same cause*".

On 22 February 2011, an earthquake struck Christchurch, causing substantial damage to Mr. Moore's house. Further damage was caused to the property by another earthquake, which happened on 13 June 2011. The cost of repairing the property far exceeded the policy's limit of indemnity, however, Mr. Moore sought to argue that each earthquake was a separate event and therefore the limit of indemnity applied in respect of each event.

IAG's position was that the wording "*series of losses caused by one event*" in effect provided for aggregation, and so losses caused by the earthquakes of February and June 2011 should be aggregated together as these earthquakes were aftershocks of a previous major earthquake in September 2010.

Dunningham J found in IAG's favour. On the facts, the September 2010 earthquake was highly likely to have triggered the later earthquakes. Accordingly, the earthquakes of February and June 2011 were single events with the same cause. Aggregation applied and Mr. Moore was restricted to one limit of indemnity despite the fact that damage had been caused by both earthquakes.

Dunningham J noted that the phrase "*series of losses*" was wide and did not in itself imply that the losses need to be directly connected in order to be aggregated together. Similarly,

aggregation cases is that sometimes it can be in insurers' interests for the claims to aggregate and in others it is not. It all depends on the structure of the policy and number and severity of the underlying losses.

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Footnotes

1. [2019] NZHC 1549

3. HFW PUBLICATIONS AND EVENTS

Hong Kong Insurance Briefing: New Regime for Hong Kong Insurance Intermediaries

As the Insurance Authority of Hong Kong takes over the regulation and supervision of all insurance intermediaries in the jurisdiction, Rosie Ng (Consultant, Hong Kong) provides an overview of the new regime. Please click here or visit http://www.hfw.com/Hong-Kong-Insurance-Briefing-September-2019 to read this briefing.

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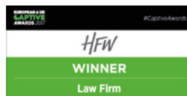
"This judgment follows a number of other judgments in which the High Court of New Zealand has found in favour of aggregation."



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