Insurance/ Reinsurance

22 January 2016

Welcome to HFW's Insurance Bulletin, which is a summary of the key insurance and reinsurance regulatory announcements, market developments, court cases and legislative changes of the week.

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2nd MIDDLE EAST INSURANCE INDUSTRY AWARDS 2015
LAW FIRM OF THE YEAR

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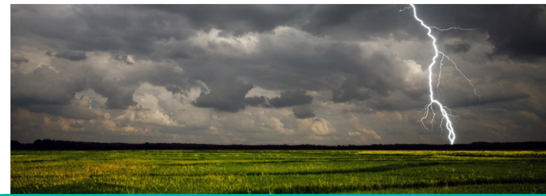

1. Market developments

UK: ABI and BIBA publish Code of Good Practice regarding support for potentially vulnerable motor and household customers at renewal

In November we reported[1] on an announcement by the British Insurance Brokers' Association (BIBA) and the Association of British Insurers (ABI) that they were working on a voluntary Code of Good Practice (the Code) for managing the insurance renewals of potentially vulnerable customers. The Code has now been published and is available here[2].

The Code aims to ensure that any customer who is *"significantly less able than a typical consumer to protect or represent his or her interests"* does not unduly suffer detriment at renewal as a result of this vulnerability. The Code acknowledges that definitions of "vulnerability" may vary, but draws attention to the FCA's February 2015 Occasional Paper on consumer vulnerability[3] which identified several risk factors that may lead to vulnerability in financial services. The factors identified by the FCA include low literacy, numeracy and financial capability skills, a severe or long-term illness and mental health problems.

The Code gives some examples of how this vulnerability could cause customers to suffer a detriment upon renewal of an insurance product, such as a reduced ability to shop around, a heightened trust in the existing product and a reduced ability to compare products and to understand their different features.

The Code sets out practical guidance on how insurers and brokers should communicate with potentially vulnerable customers, and how they can improve their business processes in relation to vulnerable customers. The practical steps include:

- Proactively asking potentially vulnerable customers whether their current policy and renewal offer meets their ongoing needs, and making clear to them that they should review their cover at renewal.
- Considering whether additional communication or a different form of communication would be appropriate compared to the standard approach to customers at renewal.
- Ensuring that communication with potentially vulnerable customers always sets out the options at renewal and how those options can be exercised.
- Ensuring that staff are trained to recognise and understand potentially vulnerable customers, to listen to their needs and to offer options which address those needs.
- Periodically reviewing customers on legacy products and taking proactive steps to ensure that any products held by a potentially vulnerable customer continue to meet his or her needs.

The Code is voluntary and will sit alongside applicable legal and regulatory requirements. The Code is effective from 1 January 2016, but gives insurers and brokers until 1 January 2017 to comply with its commitments. In addition to publishing the Code, the ABI has written to the FCA asking for regulation to improve clarity and transparency at renewal for all home and private motor insurance customers.

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1 http://www.hfw.com/Insurance-Bulletin-12-November-2015#page_4

2 https://www.abi.org.uk/~/media/Files/Documents/Publications/Public/2016/Vulnerable%20customers/ABI%20BIBA%20Code%20Good%20Practice%20support%20potentially%20vulnerable%20motor%20household%20customers%20renewal.pdf

3 http://www.fca.org.uk/static/documents/occasional-papers/occasional-paper-8.pdf

2. Court cases and arbitration

Australia: New Federal Court Insurance List

The Federal Court of Australia recently announced an insurance list as part of the National Court Framework (NCF)[1].

The NCF

The ongoing NCF reforms, run by Chief Justice Allsop, are part of the Federal Court's commitment to promote flexibility, efficiency and cost-effectiveness in the digital era. The major part of the project is to the establish a number of specialist National Practice Areas within the court to facilitate a more tailored approach to case management. There are 20 judges listed in the primary sub area of Commercial Contracts, Banking, Finance and Insurance under the Commercial and Corporations National Practice Area. The insurance list is within the Commercial Contracts, Banking, Finance and Insurance sub-area of the Commercial and Corporations National Practice Area.

The insurance short matters list

The aim of the insurance list is to provide to the insurance commercial community (underwriters, reinsurers, brokers and insureds) a list which caters for the prompt and efficient resolution of legal issues to enable the parties to resolve their disputes without the need for lengthy hearings. The list is not intended to deal with all insurance claims, but principally short matters – matters which can be resolved in a hearing time of no more than two hours, of policy interpretation and matters concerning the operation of insurance legislation.

The list will be held on a regular basis in such registries as have appropriate matters filed for hearing. The list will be called over at 12 noon on a nominated day and will run to 5pm on the following day. If necessary, once called over, matters may be given a special fixture outside the list days.

The list will provide a regular availability of hearing times for short matters. They will be arranged expeditiously before judges of the Commercial Contracts, Banking, Finance and Insurance sub-area of the Commercial and Corporations National Practice Area and will not need to wait a Full Court sitting period.

Marine and non-marine insurance

The list will cover marine as well as non-marine insurance matters commenced in the Federal Court or matters within the court's jurisdiction, which extends to marine insurance pursuant to the court's admiralty and maritime authority, and to non-marine insurance disputes where an element of the claim arises under Commonwealth legislation such as the Insurance Contracts Act 1984 (Cth).

Once the matter is in federal jurisdiction, any question in the matter can be heard in the Federal Court, including any question such as the construction of an insurance policy that does not itself raise any issue of a federal statute.

Commencement of the list

The list will commence on 10 and 11 March 2015 in Melbourne and be called over in the following cities on the following dates:

Sydney: 21 and 22 March

Perth: 5 and 6 April

Brisbane: 19 and 20 April

Adelaide: 26 and 27 April

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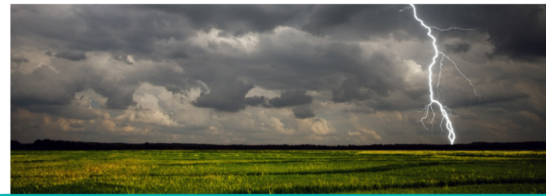
1 http://www.fedcourt.gov.au/law-and-practice/national-court-framework/insurance-list

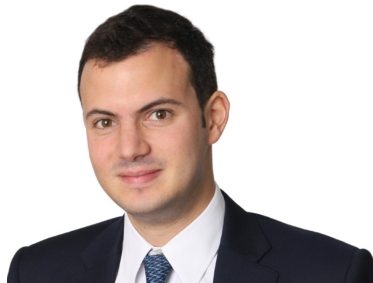


England and Wales: Abuse of process when issuing claims – reducing the value of a claim to pay a lesser court fee: *Lewis & others v Ward Hadaway*[1]

The defendant failed in an application to strike out several claims brought against it on the grounds that there had been an abuse of process by the claimants for not paying the appropriate issue fees when bringing the claims in 2012-2013. The defendant alternatively, and successfully, applied for summary judgment in some of the claims on the grounds that they were time barred.

The claimants in question had paid court fees reflective of claims valued significantly lower than the values referred to in pre-action correspondence. However, following the issue of proceedings but before service, each of the claim forms was amended, increasing the value of the claims, with the balance of the court fees being paid. The claimants acted in this way to reduce the fees initially paid to the court.

The court made it clear that the claimants had used the court process for a purpose or in a way which was significantly different from the ordinary and proper use of that process, and so held it was an abuse of process to understate the value of a claim so as to pay a reduced court fee and to stop the limitation period from running. However, as the conduct only caused limited harm to the defendant, but considerable prejudice to the claimants, about £9 million worth of whose claims would be statute-barred, the court concluded that the misconduct was not sufficiently serious to strike out the claims.



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Nevertheless, summary judgment was granted in relation to 11 of the 31 claims on the grounds that they were time barred. It was held that these 11 claims, which were only to be regarded as "brought" once the claim form is delivered to the court with the "appropriate fee" (as per *Page v Hewetts Solicitors [2012] EWCA Civ 805*), could not be deemed "brought" until the balance of the court fees were paid.

The judge, Mr John Male QC, sitting as a Deputy Judge, stated that he could foresee circumstances in which payment of a lesser fee at the outset could be acceptable, e.g. where a "financially strapped" claimant informs the defendant of imminent receipt of substantial funds, seeks agreement from the defendant to pay the court fees in "instalments", and informs the court of what he is doing. In other words, it might be acceptable where there is "complete transparency" and the agreement of both the defendant and the court.

Although the claims were made before the recent substantial increase in court fees, this decision comes in its wake, and serves as an important reminder to claimants to utilise the court process in a way which does not differ from its proper use, valuing claims at genuine amounts and paying court fees as appropriate.

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England and Wales: When a TPA contract can be terminated early: repudiatory breaches – *C&S Associates UK Limited v Enterprise Insurance Company Plc.*[1]

Many of the facts of this decision on preliminary issues have not been decided, but the principles may be relevant to any company with a Third Party Claims Handler/ Administrator (TPA). It considers when a TPA contract may be terminated, by repudiatory breach.

The claimant TPA, C&S, contracted to handle UK motor claims for insurer Enterprise. C&S' role included

1 [2015] EWHC 3503 (Ch)

1 [2015] EWHC 3757 (Comm)

reviewing policies, investigating liability and quantum of claims, reserving, defending claims and negotiating settlement, and reporting to Enterprise.

The relationship broke down when Enterprise arranged for a law firm, Ozon, to carry out an impromptu audit of every open file. Each paper file would be sent off-site. A transfer of more than 2,000 files took place. Enterprise had concerns about the rising cost of claims, inefficient claims handling and erroneous reserving by C&S. The audit allegedly identified breaches of duty by C&S.

Enterprise explained that Ozon would handle all the files already transferred. C&S' request for a meeting to discuss this was deferred by Enterprise, who requested transfer of a further 1,500 files. C&S refused to do this until the meeting took place, but instead offered for the audit to take place at their premises. C&S argued that Ozon's retention of files caused disruption and loss of revenue, and the transfer of another 1,500 files would exacerbate this. Enterprise then ended the TPA contract on the ground that C&S' refusal to release the files was a repudiation of the contract.

The judge said of the TPA contract that, although Enterprise retained ownership of information in the files, and had unrestricted access, it was only entitled to examine the files at C&S' office during business hours. Enterprise gave C&S the right, and the duty, to handle claims on its behalf, so C&S was entitled to possession of the files to fulfil the TPA contract. "Unrestricted access" did not allow Enterprise to insist the files be transferred off-premises; so there was no breach by C&S in "refusing" this.

Although there was no breach, the judge considered whether, if there were such a breach, it would have been repudiatory. The bar for repudiation is high, and the circumstances in question should go to the "root of the contract". It is also relevant to consider what benefit Enterprise was intending to obtain through the TPA, and the effect of breach on the injured party, for example, whether it caused financial loss.

It was held that refusing to send the files alone could not be repudiatory. The benefit to Enterprise was efficient handling of claims, including being able to audit, so an outright refusal of an audit would be serious. But C&S refused to transfer on the condition the scheduled meeting took place first, and at the same time offered unrestricted access to the files at their premises. The only effect of the breach was a short delay, and personnel could have been sent to C&S' offices if necessary. The judge had no doubt, if there had been a breach, it was not repudiatory.

Separately, it was also alleged C&S had systems and procedures that were fundamentally flawed and it repeatedly acted incompetently. If that was the case, it would have had the effect of depriving Enterprise of substantially the whole benefit of the TPA contract.

C&S' responses to this either failed or were not decided.

- The first response arose from the fact Enterprise did not expressly rely on defective performance of the TPA contract when purporting to terminate it. Although under general principles, Enterprise might later justify the termination if facts in existence at the time supported it, they could not do that if, as C&S argued, the point taken could have been rectified by C&S (Heisler v Anglo-Dal Ltd). However, it was held the Heisler qualification applies only to situations where a future (anticipatory) breach can be avoided, and Enterprise's case was that breaches had already occurred. Assuming the Heisler qualification could apply when the breach had already occurred, there would have to be a real prospect that C&S could improve its performance and C&S' case on this was vague. It was not possible to decide this factual matter at this stage, and this would turn on the facts found at trial.
- Second, C&S argued that the TPA contract provided a period of time to remedy any "material" breach, and therefore, if it was capable of being remedied, a material breach could not amount to a repudiation. The judge did not accept this: notwithstanding that material breaches were capable of being remedied, a "sufficiently serious" breach could still amount to a repudiation.
- Third, C&S argued the alleged breaches could not amount to a repudiation. Although the judge accepted that whilst each breach alone could not do so, the cumulative effect could, particularly if they revealed systemic failings on the part of C&S. Whether they did would depend on the facts found at trial.

This case reaffirms the principles for establishing a repudiatory breach. It must be "sufficiently serious" in the circumstances. Assessment requires a factual analysis of the benefit of the contract and effect of the breach.

Having a watertight contract with a TPA is important, and it should include a clear process for checking compliance and for termination. This often includes stating specific remedies (including termination) for common breaches, but this case makes it clear that other (unspecified) conduct, if sufficiently serious when viewed in isolation or cumulatively, may also allow termination of the TPA contract. It is sensible for a principal not to

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enter into a contract with a TPA for a long period without a break clause to allow the option of changing provider.

If the contract with a TPA does not expressly provide a remedy for dissatisfaction which has arisen, then audits continue to provide the most useful tool for assessing whether conduct is systemic and sufficiently serious to be regarded as repudiatory. Whether the conduct can easily be remedied will also be relevant.

The case can be found here: http://www.bailii.org/ew/cases/EWHC/Comm/2015/3757.html

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3. HFW news, publications and events

HFW publishes briefing on the top 10 things to consider regarding the partial lifting of Iran sanctions

HFW has published a briefing[1] on the top 10 things to consider regarding the partial lifting of Iran sanctions. Some restrictions do remain in place, so the briefing identifies some of the key points which need to be considered by anyone who is looking to re-engage in trade with Iran. In particular, it is worth nothing that there will be almost no changes to the US domestic sanctions. Anyone who is considering conducting business in or with Iran/Iranian entities should continue to seek legal advice to ensure that transactions comply with the remaining sanctions requirements.

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HFW cements Middle East presence with launch of three new Associations

HFW has expanded its specialist Middle East legal offering with the launch of three new Associations in Riyadh, Beirut and Kuwait City. The move significantly extends the firm's geographical footprint across the Middle East region, now with offices in Dubai, Riyadh, Beirut, Kuwait and Abu Dhabi, and further strengthens and diversifies the capabilities of the existing team, taking the total number of lawyers working across the region to 40.

For full details, please see: http://www.hfw.com/HFW-cements-ME-presence-with%20three-new-Associations

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1 http://www.hfw.com/Lifting-of-Iran-sanctions-top-10-things-to-consider-January-2016

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