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CASE NOTES

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MARINE

Claim struck out for failure to comply with disclosure order

Suez Fortune Investments v Talbot Underwriting (Brillante Virtuoso) [2016] EWHC (Comm) 1085 involved a marine insurance claim for over US$100 million in relation to the constructive total loss of a vessel, in which the underwriters denied cover on the ground, among other defences, that owners were allegedly guilty of wilful misconduct.

The Commercial Court made an order for disclosure which included documents held by or previously held by the vessel's managers (who were part of the same corporate group as the owners). The additional documents which were the subject of the order were not provided within time, owners failed to comply with various extensions of time granted to them and the trial date had to be adjourned. The alleged problem was that there were obstacles to the managers' document archive being provided to the owners' solicitors due to conflicts of interest – it was alleged the material contained documentation concerning a matter in which the owners' solicitors had acted against the claimants in wholly unrelated proceedings. Instead, owners were doing the searches themselves against key words and terms and this, they said, was proving a very slow process. It also transpired that the hard disk containing all the archived documentation had been handed back to the managers by the owners more than once, creating more delay. Allegations were made against the owners that they were fabricating excuses for not disclosing the archive.

Eventually, on the application of the underwriters' solicitors, the court made an 'unless order' for the unredacted archive to be delivered up within seven days. The owners sought to challenge this order. The claim was nonetheless struck out. Immediately before the unless order expired, the owners applied for relief from sanctions, alternatively for an extension of time. Among other things, the owners argued that they could no longer access the managers' archive because the company had been sold to a new owner, who was refusing to hand over the archive and they could not compel him to do so. They could not, therefore, comply with the order. The owners, therefore, also sought to have the unless order varied as there had been a change of circumstances since it was made.

The Court concluded that there was no basis on which to grant a time extension. This would be futile as there was no realistic prospect of compelling the managers' new owner to disclose the archive. There had also been no material change of circumstances since the unless order was made that would justify revocation or variation of the order. Furthermore, on the facts, the owners' case about why they could not comply with their disclosure obligations was a complete invention and fabrication, they had deliberately misled the court and had deliberately put the archive out of their control. They were in *"contumelious breach"* of the unless order. There could be no question of any relief against sanctions in circumstances in which the breach had not been remedied (and could probably not be remedied).

Applying the test for relief from sanctions set out in *Denton v TH White Ltd* [2014] EWCA Civ 906, the Court held that the owners' breach was serious and significant, the default was deliberate, and justice did not require relief from sanctions to be granted. Furthermore, it held, there could be no fair trial between owners and insurers unless there was full and proper compliance by the owners with their disclosure obligations, including handing over the archive.

The case therefore remained struck out.

PROPERTY

Riots Revisited

The Supreme Court has now ruled on the issue of recoverability of compensation for losses suffered following damage to the Sony warehouse in the 2011 London riots, in *The Mayor's Office for Policing and Crime v Mitsui Sumitomo Insurance Co (Europe) Ltd* [2016] UKSC 18.

Decision at first instance

This case, which first came before the Commercial Court in 2013, was concerned with the liability of the Mayor's Office for Policing and Crime (the statutory body responsible for oversight of the Metropolitan Police) under s.2 of the Riot (Damages) Act 1886 to compensate various parties who suffered loss following the looting and burning down of the Sony distribution warehouse in Enfield Lock by a group of youths on 8 August 2011.

Flaux J decided at first instance that the group of youths were *"persons riotously and tumultuously assembled together"* within the meaning of the 1886 Act (as amended). As such, where property in a police area had been stolen or damaged, any person who had suffered loss *"by such injury, stealing or destruction of property"*, or his insurer in his place, was entitled under the 1886 Act to be compensated by the *"police fund of the area"*. That compensation would be limited, however, to physical damage to the property itself and would not include consequential losses, such as loss of profit or loss of rent.

The Mayor's Office appealed against the finding of liability while insurers cross-appealed as to the finding on the extent of that liability. Losses paid out by the insurers of Sony, which occupied the warehouse, and Cresta Estates Ltd, which owned the warehouse, included £9.8 million for loss of profit as a result of the destruction of Sony's distribution equipment and £1.5 million in loss of rent. A third claim relevant to the appeal was made by the owners of some uninsured trading stock stored in the warehouse and destroyed in the riot, in relation to which £3 million was claimed for loss of profit.

Decision of the Court of Appeal

The Court of Appeal agreed with Flaux J that the *"mob violence"* of the group did amount to *"persons riotously and tumultuously assembled together"* and therefore losses were to be compensated under the 1886 legislation.

However, where the Court of Appeal disagreed with Flaux J was the extent of that compensation, which the Court of Appeal felt extended to cover consequential losses.

Heavily influenced by the history behind legislation preceding the 1886 Act, and the case law dealing with that legislation, Lord Justice Dyson emphasised the remedial, as well as penal, nature of riot legislation, and referred to the purpose of that legislation in transferring liability for losses, which prior to the Riot Act 1714 would have been payable by the trespasser himself, to *"the hundred"* (an historical administrative subdivision of a county or shire). He could see nothing in the wording of s.2 to support a proposition that consequential losses were excluded, notwithstanding that the Regulations prescribing the manner in which claims under the 1886 Act are to be presented make no reference to any possibility of claiming such losses.

Supreme Court Decision
The Supreme Court unanimously allowed the Mayor's Office's appeal against the finding that the Riot (Damages) Act 1886 provided a right to compensation for all heads of loss, including consequential loss, proximately caused by physical damage to property for which the trespassing rioter was liable at common law.

The Court noted that the wording of the 1886 Act by itself did not provide a clear-cut answer to the issue. However, the case law on the issue did not support a general principle that *"the hundred"* stood as sureties for the wrongdoer. More importantly, the history of riot legislation showed that there was no broad principle of compensation. In particular, the wording of the Remedies against the Hundred (England) Act 1827 made it clear that the statutory compensation was confined to physical damage to property. When regard was had to the words of the 1886 Act in the context of its legislative history, there was no reason to think that Parliament ever intended that the statutory compensation scheme should mirror the rioters' liability in tort, or should develop as the law of damages for tort developed. The Act, like its predecessors, sets out a self-contained statutory compensation scheme which does not extend to cover consequential losses.

REINSURANCE

In to escrow or out of escrow?

The Court was asked to look at a preliminary issue in the ongoing *Teal Assurance Co v (1) WR Berkley Insurance (2)* Aspen Insurance proceedings, namely, whether the insured's loss occurred when money was paid into an escrow account (set up to pay claims under a settlement agreement) or when the money was drawn down from the escrow account by the third party claimant.

This dispute arose from Black and Veatch Corporation's (BVC, the original insured) layered liability insurance programme, comprised of one base policy underwritten by Lexington, three excess layers underwritten by Teal (the captive insurer of BVC) and a top and drop policy also underwritten by Teal, but reinsured equally by WR Berkley and Aspen (Reinsurers). BVC notified Teal of various claims, with four in excess of $1 million. Two of these were US/Canada claims and two were non-US/Canada claims, brought by Ajman and PPGPL. This was significant because the top and drop policy specifically excluded US or Canadian loses.

The Commercial Court, Court of Appeal and Supreme Court had all previously held that BVC and its captive, Teal, were not able to choose which claims were met by the lower levels so that the claims remaining were not USA or Canadian claims and therefore possible to pass onto the reinsurers. Click here to read our article on the Supreme Court decision.

The main issue in this round of the litigation was whether BVC suffered a loss, for the purposes of its entitlement to an indemnity under its professional indemnity insurance, when (i) it paid the sums into the escrow account; or (ii) as and when money was drawn out of the escrow account. This was important to Teal - scenario (ii) would be advantageous to it to the tune of over $11million, as the Reinsurers would be liable to indemnify Teal by this method of calculation but not if the date of payment into escrow was the relevant date.

Unsurprisingly, the Reinsurers argued that there was no material difference between an interim payment order and an escrow agreement and that a court order for an interim payment ascertained liability at the time of the interim payment. By analogy, therefore, BVC's loss occurred when it paid monies into the escrow account. This argument was rejected by Eder J, who also noted that BVC had voluntarily entered into the escrow agreement, thus distinguishing it from a court order for an interim payment.

Teal put forward a number of arguments in support of its contention that the payment of money into the escrow account did not mean that liability had been established and ascertained. These were that:

1. the payment into escrow was not a payment to the organisation making the claim (Ajman, in this case);
2. the money held in the escrow account was subject to conditions which meant that it might never be paid to Ajman;
3. the escrow agreement did not determine the insured's liability to the claimant – the claimant had to provide evidence that the reparatory work had been completed.

Eder J rejected the first of Teal's arguments, but agreed that BVC had no liability to make any payments to Ajman unless and until certain conditions were fulfilled. Therefore, BVC did not suffer a loss until Ajman satisfied these conditions and drew money from the escrow account. As a result, the Court held that BVC's loss/liability was only ascertained when Ajman drew down funds from the escrow account, and not when BVC paid into the escrow account.

Inducement in the reinsurance context

The question in *AXA Versicherung v Arab Insurance Group* was whether AXA was entitled to avoid two reinsurance treaties entered into with Arab Insurance Group (ARIG).

AXA's predecessor in title, Albingia Versicherungs-AG, entered into the two reinsurance treaties with ARIG. The first was a facultative/obligatory 'first loss treaty' covering the first US$500,000 of losses for any one accident or occurrence on ARIG's book of inwards marine energy construction risks attaching between 1 January 1996 and 30 June 1997; the second was a renewal of that treaty the following year for a further 12 months.

In 2012, AXA sought to avoid the treaties and recover what it had paid to ARIG under the treaties on the ground of non-disclosure of loss statistics for the risks in question for the years 1989 to 1995 or, alternatively, for misrepresentation that there were no losses. AXA contended that had it known of the loss statistics it would not have entered into the first treaty. AXA sought to avoid the renewal of the treaty on the same grounds and, in addition, for non-disclosure of three incidents which had resulted or were likely to result in a claim under the treaty.

The decision

It was held that AXA was not entitled to avoid the treaties. The Judge held that:

1. There was no misrepresentation. ARIG had not made the alleged representation (that there were no loss statistics for energy construction risks of the type that would be declared to the treaty) to AXA. ARIG's case was preferred on the basis that the statement *"This is a new Treaty for the Reassured and as such does not have a corresponding loss record"* was in relation to the new treaty, not ARIG itself.
2. There was non-disclosure of material facts. There was no doubt that that past loss records were material.
3. However, even if there had been a fair presentation of ARIG's loss statistics, the underwriter would not have declined to write the treaty or would only have done so on different terms – so there was no inducement.

It is unlikely that the outcome of this case would have been any different had it been dealt with under the new Act. Under the Act, just as now, if the reinsurer is to have a remedy for breach of the duty to make a fair presentation, it must show that the underwriter would have done something different had he or she received a fair presentation. The evidence here seems to have been that the risk would still have been written and on the same terms. Accordingly, even though there was a breach of the duty to make a fair presentation, had the new Act applied, the result would in all likelihood have been the same. The case does, however, illustrate the difficulty that underwriters are likely to face in demonstrating, years after the event, in what respect their underwriting decision would have been different had they received a fair presentation. This is one of several reasons why underwriters will be well advised to keep a fuller record of the underwriting process in the future.

POLICY INTERPRETATION

Notifying insurers about likely claims

In *Maccaferri Limited v Zurich Insurance Plc* [2015] EWHC 1708, Mr Justice Knowles held that an obligation on an insured to notify as soon as possible an event which is likely to give rise to a claim as soon as possible does not import a duty on the part of the insured proactively to make enquiries for such events.

Background

In September 2011, a worker suffered a serious eye injury while he was using a Spenax gun. He sued his employer who in turn sued the company that hired the gun to them who in turn sued the claimant, Maccaferri Limited, which had originally supplied the gun. Maccaferri claimed an indemnity from its public and product liability insurer, Zurich.

The accident occurred on 22 September 2011 and Maccaferri was aware of the accident soon afterwards. It was not until 18 July 2013, however, that Maccaferri was notified that a claim was to be brought against it when it received a solicitors' letter of claim. On 22 July 2013, Maccaferri notified its broker of the threatened claim and the broker advised Zurich.

Zurich refused to indemnify Maccaferri on the grounds of late notification. Zurich contended that the Claimant failed to comply with the policy's notice provision, compliance with which was a condition precedent to liability. The relevant clause stated:

> *"The Insured shall give notice in writing to the Insurer as soon as possible after the occurrence of any event likely to give rise to a claim with full particulars thereof. The Insured shall also on receiving verbal or written notice of any claim send same or a copy thereof immediately to the Insurer and shall give all necessary information and assistance to enable the Insurer to deal with, settle or resist any claim as the Insurer may think fit.."*

The first sentence delineates the insured's duty to notify where there is an event that *"is likely to give rise to a claim"*. The second sentence deals with the situation where there is an actual claim.

There was no dispute that Maccaferri had complied with its obligation under the second sentence to notify the insurer immediately on receipt of a claim. Zurich contended, however, that Maccaferri should have given notice under the first sentence in the clause by October 2011 or by July 2012 as they were the points in time which were *"as soon as possible after the occurrence of any event likely to give rise to a claim"*.

Judgment
Zurich contended that the words *"as soon as possible"* in the clause indicated that the obligation to notify arises when an insured could with reasonable diligence discover that an event was likely to give rise to a claim. It argued that this meaning was supported by the obligation to provide *"full particulars"* which imported an obligation for the insured to be 'proactive', or which implies a duty of inquiry.

Knowles J rejected this interpretation. He found that it was necessary to establish that an *"event"* had occurred and that the event must be *"likely to give rise to a claim"*. He held that the phrase *"likely to give rise to a claim"* described an event with at least a 50% chance that a claim would be made. The words *"as soon as possible"* referred simply to the promptness with which the notice in writing was to be given if there had been an event likely to give rise to a claim. Unless expressly provided in the policy, there is no requirement for a *"rolling assessment"* of claim likelihood required of a policyholder.

In this case, Knowles J found that at the time of the accident there was not at least a 50% chance that a claim would be brought against Maccaferri. It was a possibility that the accident had been caused by the fault of the Spenax gun but it was also a possibility that there was fault in the way the gun was used, or that there was no fault at all. The accident was serious, but that seriousness did not increase the likelihood of an allegation that there was a fault in the gun. The likelihood of a claim could not be inferred from the happening of an accident and a mere possibility of a claim was not enough to require notification under the clause.

When the accident occurred in September 2011 Maccaferri had not been blamed so there was not an event *"likely to give rise to a claim"*. Therefore, there was no failure on the part of Maccaferri to comply with the condition precedent to liability – it had notified the insurers immediately when it was aware of the claim being made against them and it was held that Zurich was obliged to indemnify its insured under the policy.

Comment
Apart from the factual nicety of whether there was a likely claim, this decision shows that the courts will not require of a policyholder a continuing or *"rolling assessment"* of claim likelihood when the policy does not provide for it.

Meaning of "attended"

In *Milton Furniture Ltd v Brit Insurance Ltd* ([2015] EWCA Civ 671 the Court of Appeal opined on both the approach to take to construing clauses that cover similar grounds in the same document and what *"attended"* means in the context of a property policy.

The facts
In April 2005 a fire destroyed most of the furniture in the Claimant's warehouse.

Milton submitted a claim under its Commercial Combined Insurance policy taken out with Brit Insurance Ltd. The policy contained two terms that came under particular scrutiny: Protection Warranty 1 (PW1) and General Condition 7 (GC7).

PW1 provided:

> *"It is a **condition precedent** to the liability of the Underwriters in respect of loss **caused by Theft** and/or attempted Theft that the Burglar Alarm shall have been put into **full and proper operation whenever the premises... are left unattended** and that such alarm system shall have been maintained in good order throughout the currency of this insurance policy under a maintenance contract with a member of NACOSS" [emphasis added].*

GC7 stated:

> *"The whole of the protections including any Burglar Alarm provided for the safety of the premises **shall be in use at all times out of business hours or when the Insured's premises are left unattended** and **such protections shall not be withdrawn or varied** to the detriment of the interests of Underwriters without their prior consent" [emphasis added].*

On the night of the fire, two individuals were sleeping at the premises. The burglar alarm, which had been monitored by SECOM until February 2005 when monitoring ceased due to non-payment of invoices, was not set. Brit rejected Milton's claim on the basis that it had failed to comply with GC7, which Brit claimed was a condition precedent.

Interaction between PW1 and GC7
Milton argued that PW1 (which did not itself apply as the damage in question was not caused by *"Theft and/or attempted Theft"*) was an individually agreed special condition and, as such, GC7, which was a standard policy term, must be subordinate to it.

On this question, the Court of Appeal confirmed that when there are two contractual provisions which cover similar ground, the task of the court is to give effect to each, save insofar as they are actually inconsistent. The burglar alarm served two purposes: to reduce the risk of theft and also to protect against the risk of an intruder who could damage the property by fire. Since the loss was caused by fire and not theft, it was clear that the requirements of GC7 applied.

Breach of GC7
The Court held that Milton was in breach of both requirements in GC7. Business hours ended at 20.30 on the evening of the fire but the fire alarm was not set in the part of the complex

that suffered the fire. The fact that two people were sleeping in different, but linked, parts of the complex did not prevent Milford from setting the alarm in the part where the fire occurred, as was its duty under the policy and as Milford had done in the past.

The Court went on to hold that although two people were sleeping at the premises, the premises were in fact *"unattended"*. It refused to follow Jay J's construction at first instance that *"unattended"* was broadly akin to *"unoccupied"*. Instead, it held that *"attended"* was akin to *"under observation"* and thus the two sleepers could not in any meaningful sense be held to be *"attending"* at the building.

Milton was also held to be in breach of the second limb of GC7. By failing to pay SECOM's invoices and permitting the monitoring service to end, apparently without Milton's knowledge, Milton was in breach of a strict obligation to avoid the withdrawal or variation of a protection that benefitted underwriters.

Comment
The Court of Appeal took a strict approach to the construction of the relevant terms and found against Milton on every point, including those where Jay J had found for it. There was no hint of Jay J's reluctance at the decision he came to at first instance that recovery under the policy was not possible. In commercial insurance at least, insurers can continue to rely on the protections they design for themselves in their policies as long as those protections are clear.

The Court of Appeal's comments on the meaning of *"attended"* are of general application to property insurance and will be welcomed by insurers.

Would the case have been decided differently under the Insurance Act 2015? We do not think that it would. Section 11 of the Act prevents an insurer from relying on the insured's breach of any contractual provision (including conditions precedent) which is intended to reduce the risk of a loss of a particular kind or at a particular time or place if the insured can prove that its breach could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred. In this case, Milton may well have sought to argue that its breaches of the alarm warranty could not have increased the risk of loss by fire. In response, Brit would no doubt have pointed out that while the cause of the fire was unknown, it was thought to have been started by an intruder and that the breach of the burglar alarm condition precedent could have increased the risk of loss because, if the alarm had been working, the arsonist may have been detected at an early stage.

Meaning of "deliberate or fraudulent non-disclosure"

The issue in *Mutual Energy Ltd v Starr Underwriting Agents Ltd* [2016] EWHC 590 (TCC) was whether the words *"deliberate or fraudulent non-disclosure"* in a non-disclosure clause in an insurance policy meant that an element of dishonesty by the insured was required before insurers could avoid the policy.

The defendant insurers were two of five who insured Mutual Energy Ltd (MEL) in respect of the Moyle Interconnector, which provides a link between the electricity systems of Scotland and Northern Ireland. MEL was the owner and operator of the Moyle Interconnector. The insurance policy modified MEL's duty of utmost good faith as set out in sections 17 to 20 of the Marine Insurance Act 1906 by way of the following clauses:

Clause 5: Scope of Disclosure

> *"The Insurers acknowledge that (i) they have received adequate information in order to evaluate the risk of insuring the Company in respect of the risks hereby insured on the assumption that such information is not materially misleading, (ii) there is no information which has been relied on or is required by Insurers in respect of their decision to co-insure the Co-Insured Parties or their directors, officers, employees or agents, and (iii) no person has been authorised to make any representation on behalf of any of the Co-Insured Parties or their directors, officers, employees or agents in relation to their becoming or being co-insured under this policy. Non-disclosure or misrepresentation, negligence or breach by any one insured (or its agent) shall not be attributable to any other insured party who did not directly and actively participate in that non-disclosure or misrepresentation knowing it to be such."*

Clause 6: Non-disclosure, misrepresentation and breach. This clause provided, in part, that notwithstanding any other provisions in the policy:

> *"(a) the Insurers agree not to terminate, repudiate, rescind or avoid this insurance as against any Insured, or any cover or valid claim under it, nor to claim damages or any other remedy against any Insured or any agent of any Insured, on the grounds that the risk or claim was not adequately disclosed, or that it was in any way misrepresented, or increased, or that any term, condition or warranty was breached, or on the ground of negligence, unless deliberate or fraudulent non-disclosure or misrepresentation or breach by that Insured is established in relation thereto."*

Following a loss of power flow caused by two failures of the insulation around a conductor, MEL made a claim under the policy. Three of its insurers agreed to indemnify MEL but the defendant insurers did not, alleging that MEL had deliberately failed to disclose certain facts, including that there had been problems with the cables. The issue for the Court was whether the reference to *"deliberate"* in Clause 6 of the policy meant that the contract could be avoided in circumstances where MEL had honestly but mistakenly decided not to disclose a particular document or fact (as contended by insurers) or whether it

meant that avoidance was only available if there had been a deliberate decision not to disclose a particular document or fact which MEL knew was material, such that its non-disclosure involved an element of dishonesty (as contended for by MEL).

Coulson J held that the words *"deliberate or fraudulent non-disclosure"* in Clause 6 meant that an element of dishonesty by MEL was required before the insurers could avoid the policy for non-disclosure.

The Judge agreed with MEL's contention that the word *"deliberate"* meant that insurers could only avoid the policy if there had been a conscious decision by MEL not to disclose something which MEL knew it should disclose to insurers and did not involve an honest mistake. An element of dishonesty was required. In his view, both words had utility, but both involved an element of dishonesty.

Coulson J referred to the various authorities on the interpretation of contracts and held as follows:

- With the definition of *"deliberate"* in the Oxford English Dictionary in mind, the expression *"deliberate or fraudulent non-disclosure"* in Clause 6 suggested a situation where MEL intentionally failed to disclose something to insurers which MEL knew it should disclose. It required MEL to know that what it was doing was wrong.
- There was plenty of authority to the effect that the use of the word deliberate in the context of a breach or default meant an intentional act (see, for example, *De Beers UK Ltd v ATOS* [2010] EWHC 3276 (TCC)). There was no logical distinction to be drawn between a deliberate breach on the one hand and a deliberate non-disclosure on the other. In Clause 6, non-disclosure meant inadequate disclosure in breach of well-known and understood insurance obligations under the MIA 1906. Accordingly, deliberate non-disclosure incorporated an element of dishonest wrongdoing, just like deliberate breach.
- Insurers' best point was that the presumption against surplusage meant that *"deliberate"* had to have a different meaning from fraudulent. The presumption, however, was not a hard-edged rule and the court must guard against giving such a rule too much prominence in circumstances where some surplusage is often found in commercial contracts.
- In any event, he was not persuaded that the words deliberate and fraudulent meant the same thing. Conduct could be deliberate and dishonest but not fraudulent. For example, a breach of contract could be deliberate and made in the knowledge that it was a breach, but might not be fraudulent.
- Guidance from the Financial Ombudsman Service, which was helpful although not binding, stated that it is possible deliberately to non-disclose without being fraudulent. While dishonesty is one of the essential criteria for fraud, there also had to be deception.
- Looking at Clauses 5 and 6 together, it was clear that the words *"unless deliberate or fraudulent non-disclosure or misrepresentation or breach"* were a carve-out from insurers' agreement to forego a range of remedies which would ordinarily be available to them. Clauses 5 and 6 were wide and it was clear that the carve-out had to be construed narrowly.
- That MEL be penalised for dishonesty but not for an honest mistake accorded with commercial business sense.
- The decisions of the Court of Appeal and the House of Lords in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank & Ors* [2003] UKHL 6, did not cast any light on the meaning of the words *"deliberate or fraudulent non-disclosure"* as the courts in that case were not concerned with the interpretation of those words. The views expressed by the judges on the meaning of fraudulent non-disclosure were not determinative of the issues in that case.

The decision is of interest because, while there are several decisions on the meaning of the word *"deliberate"* in the context of a breach of contract, there are no reported decisions on the meaning of the phrase *"deliberate or fraudulent non-disclosure"* in an insurance context. The Insurance Act 2015 retains the right for insurers to avoid a policy where the insured acts *"deliberately"* and so Coulson J's interpretation will continue to have relevance once the Act has come into force.

LIABILITY

Avoidance: materiality and inducement

In *Brit UW Limited & F&B Trenchless Solutions Limited*, the insurer Brit was held to have validly avoided the policy on the grounds that it was induced to enter into the contract as a result of F&B's (the insured's) material non-disclosure and misrepresentation.

Background

F&B, a specialist tunnelling sub-contractor, entered into a contract with Brit for employers' liability, product liability and public liability insurance for its work of building micro-tunnels for cables underground railway tracks in Nottingham. Brit did so on the basis that the works would settle the ground between 2-4mm (which was less than the 5mm limit determined by the relevant rail authority (Network Rail) and agreed to by the head contractor, Morgan), and on the basis of F&B's statement that the works would at no point in time take place underneath an active railway.

Before contracting with the insurer, the insured knew of an actual ground settlement of up to 15-18mm and the creation of a visible void in the ground in the vicinity of the works. The insured was also undertaking works under an active railway line.

Eight days after the insurance contract had been entered into, a freight train derailed when passing over a level-crossing above the insured's construction site. The derailment was determined to have been caused by severe settlement of the railway tracks as a result of the insured's works. The main contractor filed a claim against F&B which in turn attempted to claim an indemnity from Brit.

Brit sought a declaration that it had validly avoided the policy on the grounds of non-disclosure of the actual ground settlement

of which the insured was already aware and misrepresentation concerning the undertaking of works below active railway lines, both being material circumstances.

What is material?
In determining whether the difference between the expected settlement of 2-4mm and actual settlement of 15-18 mm, as well as whether conducting works around active railways, was 'material' information that ought to have been disclosed by the insured, the court noted that it was a question of fact from the objective perspective of a 'prudent' insurer. The issue was whether knowledge of the actual facts would, on the balance of probabilities, have influenced the decision of a prudent insurer to enter into the policy or alter its terms. If the answer is in the affirmative, then the information is sufficiently material to raise the question of inducement into a contract.

Circumstances of inducement
The question of whether there was inducement depends on whether the information not disclosed and/or misrepresented was a *substantial* cause of the underwriter's decision to write the risk on the terms on which he or she did. The increased settlement and undertaking of works under active railways were held to be *"matters which would clearly influence the judgement of a prudent insurer"*. The Judge accepted the underwriter's evidence that had he been told about the settlement and the void, in the lead up to writing the risk, he would have excluded the site from the policy and asked F&B what it would do to prevent similar issues arising in the future.

Affirmation?
It was alleged against the insurer that it had affirmed the policy by not avoiding when all the matters relied upon for avoidance were known, five months before it actually sought to avoid. It was held that the issuance of policy documentation and its endorsement during that five month period did not amount to an affirmation of the policy, since these acts did not unequivocally represent a waiver of the right to avoid. The Judge also concluded that *"A period of 4 to 5 months to carry out investigations, take legal advice and the decision to avoid cannot be said to have been unreasonable."*

Impact
This case does not change the duties of both the insurer and insured in terms of conducting due diligence and making a fair presentation when entering into an insurance policy. While all cases are fact specific and the five month period cannot be considered as applicable in every case, this decision does reaffirm the legitimate interests of an insurer in conducting adequate enquiries before it is deemed to have waived its right to avoid a policy.

Had this case been decided in accordance with the proportionate remedies regime set out in the Insurance Act 2015 for breach of the duty to make a fair presentation, it is likely that the claim would not have been recoverable because the site would have been excluded from the policy (though the insured would still have had the benefit of cover for its remaining operations). This is because the underwriter's evidence was that had he received a fair presentation (namely, one without the misrepresentation and non-disclosure) he probably would have been prepared to write the risk but with an exclusion in respect of the Nottingham site.

Liability for a negligent investment

In *ARC Capital Partners Limited v Brit Syndicates Limited & Anor* [2016] EWHC 141 (Comm), an investment fund (the Fund) alleged that ARC, an investment management company, had made a negligent investment on the Fund's behalf in 2010 as a result of agreements made in 2008. The Fund sent a letter to ARC in April 2013 reserving the Fund's right to pursue a claim against ARC. The Fund wrote another letter to ARC in January 2014, this time detailing the basis of the Fund's claim and enclosing draft Particulars of Claim. ARC notified its professional indemnity insurers two days later. In August 2014 the Fund commenced Commercial Court proceedings against ARC for professional negligence.

ARC had professional indemnity insurance for the period October 2013 to October 2014. This was provided by five insurers in various tranches, including the defendants to the instant action who insured the second excess layer. The same insurers had entered into consecutive annual contracts of insurance on similar terms for periods prior to the relevant cover starting in June 2009. They also entered into contracts of insurance on similar terms for the period October 2014 to October 2015. On each occasion the second excess policy incorporated the terms of the primary policy (save as otherwise set out).

The policy provided indemnity for *"claims first made against the Assured during the period of insurance"*. It contained a 'Retroactive Date Clause' providing that the policy:

> *"shall not indemnify the Assured against any claim or claims arising from or in any way involving any act, error, or omission committed or alleged to have been committed prior to 5 June 2009." [emphasis added]*

It also contained a clause requiring, as a condition precedent to coverage, that a claim be notified to insurers as soon as practicable and another extending cover to claims that should have been notified under the prior year's policy, if the policy had been renewed.

The defendant insurers took issue in relation to the coverage under the second excess layer, which gave rise to three questions for the Court:

1. Whether, on a true construction of the Retroactive Date Clause in the 2013/2014 policy, the Fund's claim against ARC was a claim within the meaning of the clause;
2. Whether the Fund's letter of April 2013 contained or constituted *"a written demand for monetary damages or non-pecuniary relief"* within the definition of *"Professional Services Claim"* in the insuring clause of the policy and was thus a claim for the purposes of that policy; and

3. If it was a claim for the purposes of the policy, whether ARC had breached the notification clause, or whether the extension clause applied to the claim.

Retroactive Date Clause
In determining the degree of causal connection between a claim and a prior *"act, error or omission"* for the purposes of the Retroactive Date Clause, Cooke J held that the words *"arising from"* (which the parties agreed meant proximately or directly caused by) did not have the same meaning as the words *"in any way involving"*. The latter term should be taken to mean *"indirectly caused by"*. Accordingly, in order for a claim to be rejected on basis of the retroactive date, the clause required a causal connection, either direct or indirect, between a wrongful act committed prior to 5 June 2009 and the claim made in the policy period for which ARC was liable. Causation was a key element of the exclusion; it was not enough that circumstances arose prior to that date and that a wrongful act took place thereafter. That was merely the historical context. For the exclusion to apply, there had to be an act, error or omission which could give rise to liability, occurring before the retroactive date and which was genuinely part of a chain of causation leading to liability for the claim in question. All the Fund's complaints about ARC's acts, errors or omissions related to steps taken or not taken in 2010; the earlier factors in 2008 did not have any causal connection. Accordingly, the claim was not excluded by the Retroactive Date Clause.

The April 2013 letter
Cooke J held that the April 2013 letter was not a *"written demand"* against ARC. It was expressly a letter reserving the right to pursue a claim against ARC and its principal purpose was to attempt to agree a protocol for the recovery of sums from a third party. In contrast, the January 2014 letter could not be seen as anything but a *"written demand"*.

Notification and extension clauses
Finally, it was held that even if the April 2013 letter had constituted a demand, the extension clause would apply. The purpose of the extension clause was to extend cover in circumstances where there had been a breach of the notification condition precedent in the previous policy year. It was intended to grant coverage to claims notified late, as long as the continuity of cover requirements were satisfied.

Establishing causation in mesothelioma claims

Mr Heneghan died from lung cancer. He had been exposed to asbestos by multiple employers, who admitted breach of duty. The claimant in *Heneghan v Manchester Dry Docks Limited & Ors* [2016] EWCA Civ 86 (the deceased's son) argued that each defendant was liable in full on the basis that each had materially contributed to the cancer. At first instance the Court applied the principle in *Fairchild v Glenhaven Funeral Services Ltd* [2002] All ER 305 and awarded damages against each defendant in proportion to the increase in risk for which it was responsible. The claimant appealed.

In *Fairchild*, it was held that a defendant to a mesothelioma claim is liable if the negligent exposure *"materially increased the risk"* of the claimant developing the disease. This is an exception to the usual common law rule that a claimant must show that, but for the defendant's negligence, the claimant would not have suffered the disease. This exception was developed to overcome the evidential difficulty for claimants in mesothelioma cases in identifying the source of the asbestos fibres which triggered the disease. This case is the first time that the Court of Appeal has considered whether the *Fairchild* exception applies to a case of multiple exposures to asbestos leading to lung cancer, rather than to mesothelioma.

The Court of Appeal confirmed that there are three ways of establishing causation in disease cases:

1. The 'but for' test. It was accepted by the claimant that the deceased failed this test against all the defendants.
2. The 'material contribution' test. This was the test in *Bonnington Castings Ltd v Wardlaw* [1955] CLY 1075: in cases of cumulative exposure the defendant is liable where the breach made a material contribution to the injury. The claimant argued that this was the appropriate test for lung cancer cases.
3. The *Fairchild* exception.

The Court of Appeal held that the *Fairchild* exception should apply, for the following reasons:

1. Lung cancer and mesothelioma are legally indistinguishable diseases, which made it logical to follow the approach taken in *Fairchild.*
2. The *Bonnington* test applied to 'divisible' diseases, such as pneumoconiosis, where severity increases with increased exposure. The aetiology of lung cancer is different, since not every asbestos fibre is implicated in the disease process.
3. The epidemiological evidence on which the claimant relied did not support the argument that the exposure by each defendant contributed to the causation of the deceased's cancer.
4. The claimant was mistaken to equate the creation of a material risk of injury with making a material contribution to the injury.
5. The *Bonnington* test only applied where the court was satisfied on the scientific evidence that the exposure for which the defendant was responsible had in fact contributed to the injury. Where scientific evidence does not permit such a finding, then the *Fairchild* exception should be applied.

The claimant's appeal was therefore dismissed and the apportionment of damages stood.

Brokers' liability

In *Ocean Finance & Mortgages Ltd & Anor v Oval Insurance Broking Limited* [2016] EWHC 160 (Comm), Ocean Finance was a company that sold secured loans and payment protection insurance (PPI). It retained Oval as its broker for the placement of professional indemnity cover. Oval acted as producing broker and appointed SWIL as its placing broker (SWIL was a Lloyd's broker with expertise in the placement of PI cover). Neither broker had experience of PPI.

The insurance for the year 31 October 2008 to 31 October 2009 was in the form of a primary layer policy with a limit of £1.7 million from CNA and excess layer policy with a limit of £3.3 million from Hiscox. It was renewed for the period 31 October 2009 to 31 October 2010. The policies were on a claims made basis and required Ocean Finance to notify *"circumstances that may give rise to a claim"*. Oval gave a block notification of potential PPI claims to both CNA and Hiscox in 2010. CNA paid but Hiscox asserted that the notification should have been made in 2009 and that cover was excluded from the 2010 policy by reason of an exclusion for circumstances notifiable in a previous policy year. Oval admitted that it had been negligent in failing to advise Ocean Finance to give a block notification of PPI claims in 2009 and a settlement was reached with Ocean Finance of £1.85 million plus £700,000 in respect of Ocean Finance's costs. It was not disputed that the settlement was reasonable. In this case Oval sought indemnity or contribution from SWIL as the specialist placing broker.

Cooke J noted the issues in deciding whether and when to make a block notification under a PII policy. On the one hand, delaying notification might amount to a non-disclosure of material facts, thus affecting the validity of any renewal and the possibility of declinature of future claims under a *"prior knowledge"* exclusion clause or a notification clause. On the other hand, premature or vague notification might be found to be invalid. Cooke J noted that the balancing of these risks could be a very difficult exercise, involving complex questions of fact and law. He noted that expert evidence showed *"a market awareness of the unwillingness of underwriters to accept block notifications"*. He also accepted that there had been a risk that Hiscox would have rejected a block notification under the 2008-9 year. Notwithstanding that, he held that a reasonably competent broker would have seen the risk of non-notification of circumstances as greater than any risk involved in notification. Whatever difficulties surrounded the making of such a notification and the decision to make it, no competent broker would have failed to consider notifying and recommending to the insured that it should, subject to taking legal advice, take such action.

He held, therefore, that both Oval and SWIL had breached their duties by failing to give the block notification (notwithstanding that in its discussions with SWIL, Oval may have downplayed certain risks regarding systemic defects in Ocean Finance's selling practices, which leaned in favour of earlier block notification of circumstances). Adopting a broad brush approach, he found that SWIL's liability for Ocean Finance's loss was 30% and Oval's 70%. This apportionment reflected Oval's superior knowledge of the facts which should have led to an earlier block notification.

Supreme Court rules on vicarious liability

The cases of *Cox v Ministry of Justice* [2016] UKSC 10 and *Mohamud v WM Morrison Supermarkets* [2016] UKSC 11 were heard together by the Supreme Court. *Cox* concerned the sort of relationship which has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual. The question in *Mohamud* was how the conduct of the individual has to be related to that relationship in order for vicarious liability to be imposed on the defendant.

In *Cox*, the claimant was a catering manager at HM Prison Swansea. She was injured when one of the prisoners dropped a 25kg sack of rice on her back. She brought a claim for personal injury against the Ministry of Justice (MoJ), claiming that it was vicariously liable for the acts of prisoners. At first instance the judge found that the prisoner had been negligent but dismissed the claim on the basis that the prison service, which is an executive agency of the MoJ, was not vicariously liable as the relationship between the prison service and the prisoner was not akin to that between an employer and an employee. The Court of Appeal reversed that decision, finding that the prison service was vicariously liable for the prisoner's negligence.

The Supreme Court unanimously dismissed the MoJ's appeal. In *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56 Lord Philips cited five factors which make it fair, just and reasonable to impose vicarious liability on a defendant, where the defendant and the tortfeasor are not bound by a contract of employment. In *Cox*, Lord Reed, giving the leading judgment, gave guidance as to the significance of each of the five factors. He stated that the first factor, namely that the defendant is likely to be insured and therefore to have the means to compensate the survivor, was unlikely to be of independent significance in most cases. The fifth factor, namely that the tortfeasor must be under the direct control of the defendant, no longer has the significance it was once considered to have. The Supreme Court recognised that in modern life it was not realistic to expect an employer always to be able to direct an employee as to how the employee should perform his duties.

The Supreme Court re-emphasised the importance of the following three, inter-related, factors:

1. The tort will have been committed as a result of activity being taken by the tortfeasor on behalf of the defendant;
2. The tortfeasor's activity is likely to be part of the business activity of the defendant; and
3. The defendant, by employing the tortfeasor to carry on the activity, will have created the risk of the tort committed by the tortfeasor.

The Supreme Court has re-emphasised that a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an

individual who carries on activities as an integral part of the defendant's business and for its benefit, and where the commission of a wrongful act is a risk created by the defendant by assigning those activities to that individual. Lord Reed noted that a wide range of circumstances could satisfy these requirements and that a defendant could not avoid vicarious liability on the basis of erroneous arguments about the employment status of the tortfeasor.

The Supreme Court also recognised that the defendant need not be a commercial organisation and it need not make any profit from the tortfeasor's activities: it was sufficient that a defendant organisation was carrying on activities in the furtherance of its own interests.

In *Mohamud*, an employee of Morrison's, working at one of their petrol stations, racially abused the claimant after he asked for assistance. The employee ordered the claimant to leave and then followed the claimant to his car and physically assaulted him. The claimant brought a claim against Morrison's on the basis that it was vicariously liable for the actions of its employee. At first instance the judge dismissed the claim, finding that there was an insufficiently close connection between what the employee was employed to do and his tortious conduct in attacking the claimant. The Court of Appeal upheld the decision. The claimant appealed, challenging whether the 'close connection' test was the appropriate test to apply and submitting that his claim should have succeeded in any event.

The Supreme Court unanimously allowed the appeal. Giving the leading judgment, Lord Justice Toulson provided a comprehensive review of the authorities up to and including the case of *Lister v Hedley Hall* [2001] UKHL 22, in which the House of Lords set out the 'close connection' test. He then reviewed the cases that have applied the test and determined that there was nothing wrong with the test as such. Restating the test in the simplest terms, there were two questions for the court:

What function or field of activities had been entrusted by the employer to the employee (i.e. what was the nature of his job)? This was to be viewed broadly;

Was there a sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable?

Applying that test to the facts, the Supreme Court noted that the employee's job was to attend customers and respond to their enquiries. Therefore interacting with customers was within the field of activities assigned to him by Morrison's. What followed, said the Supreme Court, was an *"unbroken sequence of events"* and it would not be right to regard the employee as having *"metaphorically taken off his uniform the moment he stepped back from behind the counter"*. It drew attention to the fact that, throughout the attack, the employee was giving the claimant an order to leave and, in giving such an order, was purporting to act about his employer's business.

Aggregation clause in Minimum Terms and Conditions

Each year the Law Society makes rules under s.37 of the Solicitors Act requiring solicitors to arrange insurance with 'Qualifying Insurers'. Such policies must comply with the Minimum Terms and Conditions of Professional Indemnity Insurance for Solicitors and Registered European Lawyers in England and Wales (the MTC). The MTC are therefore in the nature of delegated legislation but are, in effect, incorporated into the policies issued by the Qualifying Insurers.

The first instance decision in this case was the first judicial authority on the proper construction of the aggregation clause in the MTC. The Court of Appeal has now remitted the case to the Commercial Court for re-trial *(AIG Europe Limited v OC320301 LLP & Ors* [2016] EWCA Civ 367).

Background

Midas International Property Development PLC (Midas) was a UK company which wished to develop holiday homes in Turkey and Morocco. It offered opportunities to invest in these holiday homes. Midas instructed the International Law Partnership LLP (ILP) to advise it on all international property law aspects of the transactions.

A scheme was devised with a view to protecting the interests of the investors and thereby encouraging them to invest. Each investor became party to an escrow agreement with ILP as escrow agent to whom the investors' monies were paid. The investor also became a beneficiary of a deed of trust and the trust was to hold security over the land to be purchased. Pursuant to the loan and purchase agreements, the monies received from investors were not to be paid over by ILP to Midas until the promised level of security was in place. The deed of trust contained an express provision for the test which the original trustees had to apply prior to the release of any money from the escrow account. This was known as the 'cover test'. If it was met the original trustees were entitled to authorise the release of monies from the escrow account for the purchase of land or to finance the development generally.

Midas was unable to complete the contracts for the purchase of the land and both the Turkey and Morocco developments failed. Midas was wound up. The trustees, representing 214 investors, commenced proceedings against ILP. The investors' case was that by the time Midas was wound up, all of the invested monies held in escrow had been paid out to the local Midas companies and that, had ILP put in place an effective form of security and/or applied the cover test properly, the investments would have been protected or would never have been released from the escrow account.

ILP was insured with AIG under a policy which incorporated the MTC. Under the policy, the maximum sum insured for any one claim was £3 million. The aggregation clause of the MTC was entitled 'One Claim' and provided that:

"(a) all Claims against any one or more Insured arising from:

i. one act or omission;

ii. one series of related acts or omissions;

iii. the same act or omission in a series of related matters or transactions;

iv. similar acts or omissions in a series of related matters or transactions

and

(b) all Claims against one or more Insured arising from one matter or transaction

will be regarded as One Claim."

AIG submitted that the claims brought by the investors arose from similar acts or omissions in a series of related matters or transactions and were to be treated as one claim, with the result that AIG's limit of liability was £3 million. The trustees' case was that the claims did not so arise, with the result that the losses (expected to exceed £10 million) could be recovered.

Decision at first instance
At trial, Mr Justice Teare held that the most natural meaning of the phrase *"a series of related matters or transactions"* in the context of a solicitors' insurance policy was a series of matters or transactions that were in some way dependent on each other. It was common ground on the pleadings that the individual transactions were not dependent on each other. Teare J concluded that the underlying claims were not to be aggregated as one claim. He held that, although the underlying claims arose from *"similar acts or omissions"*, the acts or omissions were not in a *"series of related transactions"* because the terms of the transactions were not conditional or dependent on each other.

Court of Appeal decision
The Court of Appeal considered the meaning of the term *"series"*. In combination with the term *"related"*, it held, it was clear that there had to be a connection between the transactions. The question was how that connection was to be established and what degree of connection was required. The Court held that the true construction of the words *"in a series of related matters or transactions"* was that the matters or transactions had to have an intrinsic relationship with each other, rather than just an external common factor (such as the transactions being conducted by the same solicitor or relating to the same geographical area). In so finding, the Court accepted the submission of the Law Society (acting in its regulatory capacity as the Solicitors Regulatory Authority), which had been given permission to intervene (and rejected the submissions of both the trustees and AIG as to the true construction of the wording).

It followed that Teare J had been wrong to find that the matters or transactions had to be dependent on each other. There could be an intrinsic connection, short of the transactions being dependent on each other, which would satisfy the test. The Court observed that in the case of payments out of an escrow account that should not have been made, any intrinsic connection would depend on the circumstances of the payment and was fact specific.

The Court of Appeal remitted the entire case to the Commercial Court for re-trial, noting that it was in no position to make any findings of fact because it had not seen or had detailed submissions on the contracts between ILP and the investors or the terms on which escrow accounts were set up on behalf of the investors. The aggregation clause would have to be construed in the context of those findings of fact.

It is worth noting that the published history of the origin of the aggregation clause in the MTC (including a contemporaneous article in the Law Society Gazette) was part of the matrix against which the clause had to be construed and was held to be a legitimate aid to construction. Interestingly both parties had sought to rely on it, AIG submitting that it showed that Teare J's construction was impermissibly narrow and the trustees submitting that it showed the parties had well in mind the reasoning in the House of Lords' decision in *Lloyds TSB General Insurance Holdings Limited & Ors v Lloyds Bank Group Insurance Co* [2003] UKHL 48 to the effect that there were available wider words if the aggregation clause was to have a wide construction and that such words had not been chosen.

JURISDICTION

Location, location, location

It was held in *XL Insurance Company SE v AXA Corporate Solutions Assurance* [2015] EWHC 3431 (Comm) that a contribution claim between insurers is neither a matter relating to a contract nor a matter relating to a tort within the meaning of Article 7 of the Recast Brussels Regulation 1215/2012.

AXA Corporate Solutions Assurance disputed the jurisdiction of the English court to hear and determine the contribution claim bought by XL Insurance Company SE, instead asserting that AXA should be sued in France, where it is domiciled. This application concerned questions of jurisdiction governed by the recast Brussels Regulation 1215/2012. The key relevant provisions of the recast Brussels regulation are in Article 7 of the Recast Brussels Regulation:

> *"A person domiciled in a Member State may be sued in another Member State:*
>
> *(1)(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;*
>
> *..*
>
> *(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;"*

By way of background XL and AXA were co-insurers of a US company called Connex. On 12 September 2008 in Chatsworth, California there was a serious collision between a freight train and a passenger train operated by Connex and 24 people died whilst many more were injured. A Fund of US$200 million was established for the victims, into which XL contributed US$65 million. AXA refused to contribute to the Fund on the basis that its coverage was in excess and thus was not triggered. XL claimed that this was a case of double insurance and sought a contribution from AXA.

AXA's case was that a contribution claim of the kind made by XL was a matter relating to a contract within article 7(1), namely the underlying insurance contracts between XL and AXA and their insureds respectively. If so, the place of performance of the obligation in question is not England. AXA contended that if the claim was not a matter relating to contract, the claim was not a matter relating to tort, delict or quasi-delict within Article 7(2) either. If it was within Article 7(2), on any view the place where the relevant harmful event occurred was not England. AXA maintained that AXA must be sued in France under the Article 4 general rule (defendant must be sued in the Member State in which they are domiciled).

XL's case was that its claim did not fall within article 7(1) but instead fell within Article 7(2) as to which, the place where the harmful event occurred is England, since that was where XL should have received contribution from AXA (see *Dolphin v Sveriges* [2009] 2 Lloyd's Rep 123). If the claim was not within Article 7(2) then (as a long stop argument) XL argued that if the claim was within Article 7(1), the place of performance of the relevant obligation was England.

Matter relating to a contract (Article 7(1)(a))?
The Judge found that it was not a matter relating to a contract and so Article 7(1) was not engaged. He said that for Article 7(1) to be engaged at all, the defendant must have an obligation bound in contract to render a performance of some kind to the claimant, and the claimant must be seeking that performance or compensation for the lack of it. He referred to the decision of the ECJ in *Handte* in which the court held that Article 5(1) (now Article 7(1)) did not cover a situation where *"there is no obligation freely assumed by one party to another"*. The Judge noted that AXA had no contractual obligation to make contribution to XL at all. AXA had sought to avoid this problem by arguing that it had a contractual obligation to indemnify its insured which it failed to discharge. The Judge noted that XL was not suing on that obligation. He concluded that it was not enough for Article 7(1) to show that there is a contract with freely assumed obligations which is *"somewhere in the background"* – it must be the basis for the obligation actually relied upon by the claimant as against the defendant.

There had been two recent developments concerning contribution claims and whether these were matters relating to a contract. The Judge referred to the recent decision in *Iveco* handed down on 17 November 2015 which fortified his decision. This case concerned contribution claims made by the claimants under the 1978 Act. The Judge held that there were no contracts between the relevant parties and the fact that there was a contract *"somewhere along the line"* was not enough. The Judge also referred to the recent opinion of the Advocate General given on 24 September 2015 in the case of *ERGO Insurance,* with which he disagreed. This case actually involved a co-insurer's claim for contribution following payments to the insured and whether this fell within the Rome I Regulation (which deals with the applicable law in contractual matters). The Attorney General said that the centre of gravity of the obligation to indemnify the insured is the insurer's contractual obligation and that for the purposes of applicable law the co-insurer's claim would fall under Rome I.

Matter relating to a tort (Article 7(2))?
The Judge said that the question of whether the claim was within Article 7(2) turned fundamentally on the true scope of the words *"matters relating to tort, delict or quasi-delict"*. He identified the starting point as the decision of the ECJ in *Kalfelis*. In that case it was held that the concept of matters relating to tort, delict or quasi-delict must be regarded as an autonomous concept and that, in order to ensure uniformity in all of the Member States, it must be recognised as covering *"all actions which seek to establish the liability of a defendant and which are not related to a contract within the meaning of Article 5(1)"* (now 7(1)(a)).

The Judge held that the word *"liability"* in *Kalfelis* means more than the claimant simply obtaining some award or relief as against the defendant, otherwise the term in context is devoid of any real meaning. The requirement for a liability should be allied to the requirement for a harmful event. He thought that there must be some event which is caused by some act or omission on the part of the defendant which causes damage to the claimant as a result of which the defendant becomes liable to the claimant. The Judge concluded that XL's entitlement to contribution arose by operation of the law (once it had overpaid the insured) but it was very difficult to characterise this as a harmful event. Indeed the right to contribution does not even depend on a prior request/refusal to contribute so it is very hard to characterise the right to contribution as being founded on AXA's liability for an event causing damage to XL. Accordingly the fact that AXA can now be said to be *"liable"* to contribute to XL is not sufficient to engage Article 7(2).

The Judge considered *obiter* where the damage may have occurred if Article 7(2) was engaged. If the harmful event had been Axa's refusal to contribute then the Judge agreed with XL that the damage occurred where the payment should have been made, England. He also postulated that if the event was the overpayment by XL into the Fund or where the underlying train incident occurred, then it seemed to him that the damage occurred in California and the fact that the effect of those events was felt by XL (in its bank account) in England was not enough to say the damage occurred here – but he did not decide this point.

Anti-suit injunctions

In *Axa Corporate Solutions Assurance SA v Weir Services Australia Pty Limited* [2016] EWHC 904 (Comm), Weir Services, an Australian subsidiary of a Scottish parent company, entered into a contract with a Philippines company, under which Weir was to refurbish equipment used by the Philippines company in gold mining operations. Four years later the equipment malfunctioned. Arbitration proceedings were commenced against Weir for the sum of US$68 million.

Weir was insured by AXA under a global liability policy issued in England and a so-called *"broadform"* liability policy issued in Australia. The global policy provided cover on a DIC/DIL (difference in conditions/difference in limits) basis, so that it applied where there was either no local policy or no coverage under the local policy. Under the insurance programme, Weir was to look to the broadform policy for cover first, and then to the global policy. Both policies covered legal costs. The global policy provided that it was to be governed by English law unless the parties agreed otherwise and there was no contrary agreement. There was no choice of law clause in the broadform policy but it was common ground that the policy was governed by the law of New South Wales. Neither policy contained a jurisdiction clause.

AXA brought proceedings in England for a declaration that it was not liable to Weir under the global policy and permission to serve Weir in Australia was obtained in January 2016. In March 2016, as soon as it became aware of the English action, Weir commenced proceedings against AXA in New South Wales seeking indemnity under the global and broadform policies and service was effected on AXA's branch in Australia. AXA sought an anti-suit injunction in respect of the Australian proceedings insofar as they related to the global policy. Weir applied to set aside the order for service on it out of the jurisdiction on the basis that the appropriate forum was New South Wales. The effect was that AXA wanted the claim under the global policy to be determined first by the court in England, to be followed by a determination by the court in New South Wales under the broadform policy if relevant. Weir wanted all matters determined by the court in New South Wales. The claim was primarily for legal costs.

Blair J held that England was the appropriate forum to hear the claim under the global policy, since the global policy stood at the *"apex"* of the insurance arrangements between the parties. He noted that, *"In a relatively balanced debate, the point that seems to me decisive is that the global policies are subject to what is in effect a choice of English law. Further, they stand at the apex of the worldwide, integrated liability insurance programme which AXA at the material time provided for the Weir group, with local policies in various different countries coming in beneath. Further and importantly, the evidence is that this form of global policy is widely used by AXA and in general such policies are governed by English law."* He drew support for this approach from prior case law and textbook commentary, including an extract from Dicey and Morris' Conflict of Laws stating that *"In cases concerned with insurance written on the London market and governed by English law, there is a strong tendency for the court to consider England as the natural forum"*.

The judge, however, declined to grant an anti-suit injunction, holding that no good grounds had been shown to justify it. It was insufficient, he held, that the commencement of the Australian proceedings had been *"tactical"*, designed to derail the English action. Since AXA was liable under the global policy only to the extent that there was no coverage under the broadform policy, he stayed the English proceedings on case management grounds pending the outcome of the Australian proceedings.

These case notes were prepared by members **of Ince & Co's Insurance & Reinsurance Business Group.**

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