i-law.com
Business intelligence | informa

# Insurance law in 2017: a year in review

By Alison Padfield QC and Miles Harris

Available to subscribers of our insurance and reinsurance law package


# CONTENTS

## Insurance law in 2017: a year in review




### Alison Padfield QC

Alison is a Queen's Counsel at 4 New Square, specialising in commercial dispute resolution. She has particular expertise in insurance and reinsurance, professional liability claims and professional regulatory and disciplinary matters. Alison accepts appointments as an arbitrator in insurance and reinsurance disputes. She is a member of the ARIAS panel of arbitrators.

Before taking silk, Alison was twice shortlisted for Insurance Junior of the Year in the Chambers Bar Awards: in 2014 and 2017. She was selected by *The Lawyer* as one of its "Hot 100" in 2014. She took silk in 2018.

Alison is ranked as a leading junior in Insurance and Reinsurance by *Chambers UK*, *Legal 500* and *Who's Who Legal*. *Chambers UK* ranks Alison in Band 1 for Insurance: "Recognised as a go-to junior for insurance claims interpretations and policy questions".

Alison's recent court work before taking silk included appearances in the Supreme Court and the Court of Appeal (with Colin Edelman QC) in *Teal Assurance Co Ltd v W R Berkley Insurance (Europe) Ltd* [2014] Lloyd's Rep IR 56 and [2017] Lloyd's Rep IR 259, a long-running litigation concerning complex reinsurance of professional indemnity risks, and in the Court of Appeal in *Aspen Insurance UK Ltd v Adana Construction Ltd* [2015] Lloyd's Rep IR 511 (with Colin Wynter QC), a claim under a contractors' combined public and product liability policy following a catastrophic tower crane collapse. She also appeared in the Supreme Court without a leader in *O'Connor v Bar Standards Board* [2017] UKSC 78.



### Miles Harris

Miles is a barrister at 4 New Square specialising in commercial dispute resolution. He has particular expertise in insurance and in professional liability and property damage claims. Miles is also an accredited and experienced mediator and arbitrator. He accepts appointments as a mediator and arbitrator in insurance disputes.

*Chambers UK* commented that Miles was "celebrated for his knowledge of insurance-related negligence claims". He has considerable experience of advising and representing clients in insurance disputes involving a wide range of risks including property, D&O, ATE legal expenses insurance, business interruption, life and long-term sickness (PHI).

Miles acts in a wide range of cases within his areas of expertise, instructed on his own and with a leader, from straightforward to complex high-value multi-party disputes. He appears in the County Court, the High Court and the Court of Appeal, and in arbitrations.

Miles's recent court appearances include *IHC v AmTrust Europe Ltd* [2015] EWHC 257 (QB): successfully defending a declinature by ATE insurers on the basis of non-disclosure and/or breach of warranty, and defeating an argument by the claimant that AmTrust was estopped from relying on these defences.

Miles frequently lectures on insurance law and his articles have appeared in *Insurance Law Monthly*.


*Insurance law in 2017: a year in review* is published by Informa Law, Christchurch Court, 10-15 Newgate Street, London EC1A 7AZ. Informa Law is a premium legal research supplier to practitioners across the globe, and a leader in the field of insurance and reinsurance law.
Our insurance content is available online via single-user subscriptions or multi-user licences at https://www.i-law.com/ilaw/insurance.htm.

© Informa UK Ltd 2018. All rights reserved; no part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electrical,mechanical, photocopying, recording, or otherwise without the prior written permission of the publisher, or specific licence.

Client Services: Please contact Client Services on tel: +44 (0)20 7017 7701; +65 65082430 (APAC Singapore), or email clientservices@i-law.com

Copyright: While we want you to make the best use of this publication, we also need to protect our copyright. We would remind you that copying is not permitted. However, please contact us directly should you have any special requirements.

Informa Law is an Informa business, one of the world's leading providers of specialist information and services for the academic, scientific, professional and commercial business communities.

Registered Office: 5 Howick Place, London SW1P 1WG. Registered in England and Wales No 1072954.

While all reasonable care has been taken in the preparation of this publication, no liability is accepted by the publishers nor by the author of the contents of the publication, for any loss or damage caused to any person relying on any statement or omission in the publication.

Informa Law
Business intelligence | informa

# Insurance law in 2017: a year in review

By Alison Padfield QC and Miles Harris

*This review considers some of the more important and interesting developments in insurance law in 2017. The discussion embraces the most significant issues and topics in both legislation and case law in England and Wales. In addition to high-profile developments such as the decisions of the Supreme Court in* AIG v Woodman *and* Gard Marine*, it focuses on particular aspects of a number of cases which may be less well known, and which contain one or more points of real interest or practical use to those involved in the daily application of insurance law.*

## Legislation

### Third Parties (Rights Against Insurers) Acts 1930 and 2010

It took 15 years for the Law Commissions' recommendations for reform of the Third Parties (Rights Against Insurers) Act 1930[1] to be implemented, and the transitional provisions in the Third Parties (Rights Against Insurers) Act 2010 mean that the 1930 Act will continue to govern cases for a long time to come. Schedule 3 to the 2010 Act provides that the 1930 Act continues to apply in relation to cases where both the relevant insolvency event takes place, and the liability is incurred, prior to 1 August 2016. In *Redman v Zurich Insurance plc and Another*,[2] the court confirmed that liability is "incurred" when the cause of action is complete, not when the claimant's rights against the insured are subsequently crystallised by judgment, arbitration award or settlement agreement.[3] This is particularly significant in cases where the underlying claim is for damages for personal injury and the statutory time limits may be disapplied: the 1930 Act will continue to apply to those cases for a long time to come. The Law Commissions said in their report that they were "concerned to ensure that as many third parties benefit from a new Act as possible" and that the transitional provisions had been drafted accordingly.[4] Although the transitional provisions in the 2010 Act are faithful to the Law Commissions' draft wording, a significant body of claims will remain subject to the 1930 Act.

The new procedural mechanisms in the 2010 Act are likely to be tested in various situations over the next few years. In *BAE Systems Pension Funds Trustees Ltd v Royal & Sun Alliance Insurance plc and Others*,[5] the insurer objected to being joined to liability proceedings under section 2 of the 2010 Act. Section 2 provides that a claimant may bring proceedings against the insurer for a declaration as to either or both of the insured's liability, and the insurer's potential liability; and that the claimant may do so where it "claims to have rights under a contract of insurance by virtue of a transfer" under section 1 of the Act. The insurer argued that section 2 was not engaged because it did not provide cover under the policy in respect of

1 *Third Parties – Rights Against Insurers*, Law Com No 272, July 2001. The 2010 Act came into force on 1 August 2016: see the Third Parties (Rights Against Insurers) Act 2010 (Commencement) Order 2016, SI 2016 No 550, article 2.
2 [2017] EWHC 1919 (QB); [2018] Lloyd's Rep IR 45.
3 See *Redman v Zurich Insurance plc*, at para 23.
4 *Third Parties – Rights Against Insurers*, Law Com No 272, at para 3.37.
5 [2017] EWHC 2082 (TCC); [2018] Lloyd's Rep IR 77.

© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

the claim that was the subject of the liability proceedings. O'Farrell J rejected this argument and held that the section was engaged even where there was a potential dispute as to whether or not there was appropriate cover under the policy. She said:

> "I am satisfied that section 2 is engaged wherever the claimant claims that the insured is a relevant person, that the insured has liability to the claimant, that the insured has insurance in respect of that liability and that therefore there is a transfer under section 1 of the 2010 Act. The claimant does not have to establish those rights before section 2 operates. Section 2 provides the machinery for establishing the existence of those rights."[6]

Counsel for the insurer had objected that if section 2 applied where cover was disputed, the claimant could join any insurer into proceedings, or join an insurer who had provided cover for a previous irrelevant period or in respect of a different risk. O'Farrell J said that if a claim were to be made in circumstances where it was "simply unarguable" that any relevant cover was in place, the court could strike out the proceedings as having "no real prospect of success".[7] It follows that a claimant is entitled to bring proceedings against an insurer under the 2010 Act, subject only to the insurer's right to apply to strike out the claim against it, or for summary judgment.[8]

The judge made other interesting observations. She said that, even if there were no cover under the policy as the insurer contended, its joinder meant that it was entitled to make such submissions and call such evidence as it wished in response to the claims by the claimant; and that it was a matter for the insurer to decide whether it wished to conduct any substantive defence to any claim by the claimant, or to simply take no part on the basis that it was satisfied that it had a good defence that there was no cover.[9] The judge did not consider the insurer's right to conduct a substantive defence to the claim while contending that there was no cover under the policy. There is no right to join an insurer under the 1930 Act; whether joinder will be permitted is essentially a question of the court's discretion as a matter of procedural fairness,[10] but, in the light of *AstraZeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd and Another*,[11] an insurer who is joined to the proceedings may be worse off than one who stands on the sidelines as it will be bound by any decision on the insured's liability. It may therefore be to an insurer's advantage to decline to participate. This is illustrated by *Crowden and Another v QBE Insurance (Europe) Ltd*,[12] in which the insurer was given the opportunity to participate in the proceedings against the insured, but declined to do so because it considered that it was under no liability to indemnify the insured under the policy. The judge took the view that being given the opportunity to participate was not sufficient to prevent the insurer from questioning the existence or nature of any liability on the part of the insured to the claimants.[13]

6 *BAE Systems*, at para 17.
7 *BAE Systems*, at para 18.
8 The court may strike out a statement of case under CPR 3.4(2)(a) if it appears to the court that it discloses no reasonable grounds for bringing the claim, and may grant summary judgment on a claim or an issue under CPR 24.2(a)(i) if it considers that the claimant has no real prospect of success. In *BAE Systems*, the insurer had another string to its bow, in the shape of jurisdiction and arbitration clauses, on which it succeeded. O'Farrell J's remarks about section 2 are therefore formally obiter dicta (persuasive but not binding as a matter of precedent).
9 *BAE Systems*, at paras 20 and 21.
10 See *Wood v Perfection Travel Ltd* [1996] LRLR 233, CA; *The Selby Paradigm* [2004] EWHC 1804 (Admlty); [2004] 2 Lloyd's Rep 714; *Chubb Insurance Co of Europe SA v Davies* [2004] EWHC 2138 (Comm); [2005] Lloyd's Rep IR 1.
11 [2013] EWCA Civ 1660; [2014] Lloyd's Rep IR 509.
12 [2017] EWHC 2597 (Comm); [2018] Lloyd's Rep IR 83.
13 *Crowden*, at para 112.


© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

In *Peel Port Shareholder Finance Co Ltd v Dornoch Ltd*[14] the High Court refused to order pre-action disclosure of a solvent insured's insurance policy under CPR 31.16 in circumstances where there was an exclusion clause which insurers said meant that the claim was uninsured, and the claimant submitted that if this were so, the insured would be unable to pay the claim and would become insolvent. Jefford J said that the established practice was not to order disclosure of a solvent insured's insurance policy,[15] and described the statutory and procedural landscape, including that the availability of the statutory disclosure machinery under the 2010 Act demonstrated that Parliament could not have envisaged that CPR 31.16 would or would commonly be used to obtain insurance policies from the insurers of insolvent insureds; that CPR 31.16 could not be used against a solvent insured because a policy of insurance did not meet the test for standard disclosure; and that attempts to deploy other provisions of the CPR to obtain the insurance policy of a solvent insured had failed.[16] She said that, against that background, it would be curious if a claimant could say that because a solvent insured might become insolvent and might then have a claim against insurers, the claimant should have disclosure of the policy under CPR 31.16.[17]

## Consumer Insurance (Disclosure and Representations) Act 2012

There remains a dearth of authority in relation to the Consumer Insurance (Disclosure and Representations) Act 2012. This year saw no significant reported English cases applying the more benign regime of the 2012 Act. However, the Scottish case of *Southern Rock Insurance Co Ltd v Hafeez*[18] illustrates both the more generous provisions of the 2012 Act and a downside to ecommerce for insurers. The Court of Session (Outer House) had cause to consider whether an insurer had proved the insured had made a "qualifying misrepresentation" within the meaning of section 4 of the 2012 Act so as to permit avoidance of a motor policy. The insurers asserted that the insured had deliberately or recklessly stated that he resided at a property that was not in fact his residential address. Lady Paton noted that in assessing whether a representation was made deliberately or recklessly all the circumstances must be taken into account, including the type of communication used, the terms of any question put and the opportunity given to the consumer to qualify or particularise any response or to provide non-standard information. Like many consumers, the insured had obtained his policy online using a price comparison website that transferred him to the particular insurer's website. Lady Paton observed that while this method of obtaining business had advantages, a difficulty it created was that the court had no clear evidence of either the precise wording of questions or corresponding answers on either the comparison website or the particular insurer's website or indeed whether some answers had been auto-filled.[19] She concluded on the evidence that there seemed to be a nuanced position where the insured appeared to be living partly at the address disclosed to insurers and partly at another address, and that in the circumstances it was not possible to say there had been any deliberate or reckless misrepresentation. The insurers had not satisfied the onus of proof resting on them.[20]

14 [2017] EWHC 876 (TCC); [2017] Lloyd's Rep IR 374.
15 *Peel Port*, at para 34.
16 *Peel Port*, at para 32.
17 *Peel Port*, at para 33.
18 [2017] CSOH 127; [2018] Lloyd's Rep IR 207.
19 *Southern Rock*, at paras 75 to 76.
20 *Southern Rock*, at paras 74 and 79 to 81.

© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

### Insurance Act 2015

The wait for substantive decisions on the Insurance Act 2015 continues.[21]

An amendment to the Insurance Act 2015 introduced into English insurance law for the first time a right to damages for late payment of insurance claims available to all insureds. The relevant provisions came into force on 4 May 2017. We consider this further below in relation to claims.

## Placement of the risk

In *AXA Vericherung AG v Arab Insurance Group (BSC)*[22] the Court of Appeal examined the questions a court should ask when considering the consequences of an unfair presentation of the risk, and also made important practical observations concerning the need to plead and prove inducement.

The claimant reinsurer, Axa, purported to avoid two reinsurance treaties for non-disclosure of loss statistics or alternatively misrepresentation to the effect there were no such statistics. At first instance[23] Males J held that neither treaty could be avoided because in his view there was real doubt as to what the underwriter would have done had there been a fair presentation of the risk and therefore inducement had not been proved. In reaching this decision, Males J's judgment suggested that he had taken account of what could, rather than would, have been said to the underwriter in the context of an alternative broke.

**_Axa v Arab_ serves as a warning of the potential risks of not fully setting out a case on inducement in pleadings and/or not supporting that case with sufficient evidence**

Upholding the decision of Males J, Christopher Clarke LJ, giving the judgment of the court, agreed that when considering whether inducement was established as a result of an unfair presentation it was necessary at three stages to have regard to what would, not merely what could, have happened: (1) when considering what should have been said for the presentation to be fair; (2) in determining what a broker would have said in an alternative broke in a fair presentation; and (3) in deciding how the insurer/reinsurer would have responded to that fair presentation and alternative broke.[24] However, he stated that even judges do not always speak with precision in the use of modal verbs and Males J had made clear in refusing permission to appeal that he had indeed asked himself what *would* have happened.[25]

The Court of Appeal also rejected an alternative ground of appeal put on the basis of procedural unfairness. By this ground, Axa asserted that in concluding that

21 For an example of a judge contrasting the position under the law before and after the coming into force of the 2015 Act, see *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2225 (Comm); [2015] 2 Lloyd's Rep 289, below.
22 [2017] EWCA Civ 96; [2017] Lloyd's Rep IR 216.
23 [2015] EWHC 1939 (Comm); [2016] Lloyd's Rep IR 1.
24 *Axa*, at paras 57 to 60.
25 *Axa*, at para 61.


© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

inducement was not established, Males J had assumed a hypothetical broke that he himself had posited, not the reinsured, and that also had not been put to Axa's underwriter properly in cross-examination. In rejecting this ground of appeal, the court emphasised that the relevant events took place 20 years ago, the onus of proving inducement lay on Axa and also held that the underwriter had been given the opportunity to deal with the hypothetical broke.

In the court's view Males J's decision that the onus of proof had not been satisfied was one he was entitled to reach because in the light of all the evidence it was open to him to be left in doubt as to what Axa's underwriter would have done had a fair presentation been made. However, Christopher Clarke LJ did stress that although the insurer/reinsurer had the burden of pleading and proving inducement, it was undesirable for them to be faced for the first time at trial, without prior notice either in a pleading or a witness statement, with arguments as to what an insured/reinsured contended would have happened in the context of an alternative, fair presentation with an alternative broker.[26] He did not say expressly that raising these points late, by way of cross-examination, would always be impermissible, describing such an approach as "a good example of cross-examination as an art form". Nevertheless, the case serves as a warning of the potential risks to both insurers and insureds of either not fully setting out their case on inducement in pleadings and/or not supporting that case with sufficient evidence.

## The contract of insurance

*Ashfaq v International Insurance Company of Hannover plc*,[27] saw the court continuing to grapple with basis of contract arguments connected with a contract of property insurance issued prior to the Insurance Act 2015. The insured was held to be in breach of warranties given by virtue of the incorporation into the contract of statements he had made within his proposal. In this, he falsely stated that he had no pending convictions for non-motoring offences when in fact he was awaiting trial for assault. The proposal stated that: "The proposal or any information supplied by the Insured shall be incorporated in the contract". The Court of Appeal applied the principle described by Jackson LJ in *Genesis Housing Association Ltd v Liberty Syndicate Management Ltd*,[28] namely that where a proposal contains a basis of contract clause the proposal has contractual effect even if the policy itself does not include such a provision. Giving the judgment of the court, Flaux LJ said that the statement in the proposal meant that this principle applied a fortiori.[29] The combined effect of the Consumer Insurance (Disclosure and Representations) Act 2012 and the Insurance Act 2015 is that basis clauses in new policies, including provisions such as that found in the proposal form in *Ashfaq*, are of no effect.[30] Claims are however likely to be made under older policies for some years yet.

26 *Axa*, at paras 137 to 139.
27 [2017] EWCA Civ 357; [2018] Lloyd's Rep IR Plus 10.
28 [2013] EWCA Civ 1173; [2014] Lloyd's Rep IR 318, at para 57.
29 *Ashfaq*, at para 59.
30 Basis clauses have been a dead letter in consumer insurance for over 40 years: they have in effect been unenforceable in consumer insurance since the introduction of ICOB (the precursor to ICOBS) in 2005, but no member of the Association of British Insurers would rely on a basis clause against a consumer after the ABI issued its Statement on General Insurance Practice in 1986. They are now unenforceable in contracts of both consumer and non-consumer insurance entered into from 6 April 2013 and 12 August 2016 respectively: see sections 6 and 12 of the 2012 Act and sections 9 and 22 of the 2015 Act.

© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

## Scope of cover

The claimant's failure in *Cruise and Maritime Services International Ltd v Navigators Underwriting Agency Ltd (The Marco Polo)*[31] illustrates the importance of construing a policy as a whole, and not looking at part of it – even such an important part as the insuring clause – in isolation. *Marco Polo* was a cruise liner whose unfortunate passengers were struck by an outbreak of norovirus during a holiday cruise just two days out of Tilbury. The claimant had contracted with various tour operators to provide the vessel for the cruise and those operators had in turn contracted to provide the cruise to the passengers. In an attempt to make up for curtailment of the cruise, the claimant made payments of money to the tour operators with a view to them passing the money on to the passengers. So far, so unsurprising, but the claimant then ambitiously tried to claim an indemnity in respect of those payments pursuant to a charterers' liability policy that had been taken out by the head charterers of *Marco Polo* under which the claimant had been named as a co-assured. Under the policy insurers agreed to indemnify the assured "in respect of losses, costs and expenses incurred as Charterers for… liabilities to the third parties …" including "Liability to pay damages or compensation" to passengers.

The claim was dismissed. In a short and clear judgment Knowles J held that "on no proper analysis" could the claimant insured say that any liability it might have had to the passengers had been incurred "as Charterers".[32] In fact, the insured had not contracted with the passengers at all, let alone contracted as a charterer. It had contracted with the tour operators. The judge expressed the view that the claimant must have been added to the policy by mistake and endorsed the pithy, common sense submission of counsel for the insurers that: "the cover was what it was … the mere naming of [the claimant] as co-assured does not of itself mean that the alleged liability … fell within the policy."[33] It is always necessary to analyse whether the liability is covered.

In *Sun Alliance (Bahamas) Ltd and Another v Scandi Enterprises Ltd*,[34] the Privy Council were also at pains to emphasise the pre-eminence of clear contractual wording when determining the scope of cover. The case is a reminder that it is essential to check the scope of construction insurance policies and in particular that there is cover for both the existing building and the works. The insured had taken out a "Contract All Risks" (or "CAR") policy in respect of premises it planned to improve. In one respect the policy was unusual, because the insured intended to carry out the works by directly employing a number of small contractors itself. In all other respects, the terms were standard for a CAR policy. The wording expressly and clearly defined the property insured as the "Contract Works" and associated materials, plant and equipment; the premises themselves were not within the definition. The sum insured was B$700,000.

The premises were subsequently destroyed by fire at a time when some limited renovations (worth no more than B$5,000) had been carried out. The insured claimed B$700,000 asserting that the building was insured (not just the works), that it was a valued policy and that the building was a total loss. The trial judge dismissed the claim, holding that only the contract works were insured and that it was not a valued policy. The Bahamas Court of Appeal reversed him on both

31 [2017] EWHC 843 (Comm); [2017] Lloyd's Rep IR 347.
32 *The Marco Polo,* at para 21.
33 *The Marco Polo*, at para 28.
34 [2017] UKPC 10; [2018] Lloyd's Rep IR Plus 12.


© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

points. In doing so it considered first that the fact that there was no contractor meant that the principles applicable to CAR policies could be ignored and secondly that B$700,000 was too large a sum to have represented the value of just the contract works.

This reasoning was disapproved in the strongest terms by the Privy Council giving its recommendations in a clear and short speech by Lord Sumption: "The Board reiterates that where the express terms of a contract are clear, they must be applied. The Board has the strongest reservations about the admissibility [of the two factors that influenced the Bahamas Court of Appeal] for any purpose of interpretation, let alone for the purpose of contradicting the express language of the insuring clause."[35] The Privy Council also rejected the argument that the policy was a valued policy.

**_Sun Alliance v Scandi_ is a reminder that it is essential to check the scope of construction insurance policies and that there is cover for both the existing building and the works**

The importance of considering the scope of cover provided by a policy was also illustrated by the Court of Appeal in *Channon v Ward*,[36] a negligence claim against an insurance broker arising in remarkably convoluted circumstances. The claimant, Mr Channon, was an accountant who also engaged in property development and persuaded a number of investors to invest in one of his developments in return for promises of both interest and a share of profits. The development was a failure and the investors lost their money, prompting them to make claims against Mr Channon. He presented himself as impecunious, but, in the hope of taking advantage of his professional indemnity insurance, the claimants presented their claims as ones for professional negligence. However, it transpired that Mr Channon did not have cover for the relevant year because of the negligent failure of the defendant insurance broker, Mr Ward. A highly contrived arrangement was agreed between the claimants and Mr Channon by which the latter consented to judgment being entered against him on terms that aimed to protect him from liability but also to allow the claimants to, in effect, seek to recover their losses by way of his right to claim damages in negligence from Mr Ward. However, this ingenious way of reaching into Mr Channon's putative insurance had a clear and fatal flaw: namely the terms of the cover that the parties agreed would have been provided to Mr Channon, had Mr Ward discharged his obligation. The hypothetical policy would have been one for professional indemnity risks, covering liability arising out of the provision of accountancy services, but the claimants' complaints against Mr Channon were in relation to his separate business activities. Further, the hypothetical policy would have included exclusions in respect of both loss arising from a warranty or guarantee relating to a financial return on investments, and loss arising from any trading losses or trading liabilities incurred by any business managed by Mr Channon. Thus, Mr Ward's negligence had caused Mr Channon no loss. Even if cover had been taken out his insurers would not have provided an indemnity against the claimant's claims. Indeed, the Court of Appeal agreed that had they been faced by the claims Mr Channon's insurers would have taken the view that the facts "stank".[37]

35 *Scandi*, at para 6.
36 [2017] EWCA Civ 13; [2018] Lloyd's Rep IR Plus 11.
37 *Channon*, at para 41.

© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

### Exclusion clauses

The decision in *Crowden and Another v QBE Insurance (Europe) Ltd*[38] provides an illustration of the courts' approach to the construction of exclusion clauses after *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd*.[39] An insolvency exclusion clause was inserted into a professional indemnity insurance policy issued to a financial adviser on renewal following the collapse of Lehman Brothers. The exclusion had a potentially broad application, as the insurer recognised: indeed, that was plainly the insurer's intention. The judge[40] summarised the principles:[41] the court must adopt an approach to the interpretation of insurance exclusions which was sensitive to their purpose and place in the insurance contract; it should not adopt principles of construction which are appropriate to exemption clauses – ie provisions which are designed to relieve a party otherwise liable for breach of contract or tort of that liability – because insurance exclusions are designed to define the scope of cover which the insurance policy is intended to afford; that, to this end, the court should not automatically apply a contra proferentem approach to construction; but that if there was a genuine ambiguity in the meaning of the provision, and the effect of one of those constructions was to exclude all or most of the insurance cover which was intended to be provided, the court would be entitled to opt for the narrower construction. The judge said that this could be achieved not only by the contra proferentem approach, but also by the approach adopted by Lord Clarke in *Rainy Sky SA v Kookmin Bank*[42] that, in the case of ambiguity, the court may opt for the more commercially sensible construction; but, as Lord Clarke had recognised, where the parties had used unambiguous language, the court must apply it. In *Crowden v QBE*, the court construed "arising out of or relating directly or indirectly to" the relevant insolvency as requiring that, for the exclusion to apply, the insolvency must be specifically accountable as a cause of the claim, liability or loss: in this sense, the judge said, it must be significant; it must stand out as a contributing factor, at least.[43] The result was that if the relevant claim, liability or loss was caused – even if not proximately – by the insolvency of the firm, business or company with whom the insured financial adviser arranged an insurance, investment or deposit, there was no cover under the policy.[44] The court accepted that, construed in this way, the exclusion might have "a broad effect" but said that it was not of such a nature as to leave the insured without substantial cover.[45]

## Insurance claims

### Aggregation

In March 2017, in *AIG Europe Ltd v Woodman and Others*,[46] the Supreme Court considered the aggregation clause in the solicitors' minimum terms and conditions ("MTC"), and specifically the meaning of "similar acts or omissions in a series of related matters or transactions". Lord Toulson (with whom Lords Mance, Clarke,

38 [2017] EWHC 2597 (Comm); [2018] Lloyd's Rep IR 83.
39 [2016] UKSC 57; [2017] Lloyd's Rep IR 60.
40 Peter MacDonald Eggers QC, sitting as a deputy High Court judge (in the London Circuit Commercial Court – formerly the London Mercantile Court).
41 *Crowden*, at para 65.
42 [2011] UKSC 50; [2012] 1 Lloyd's Rep 34; [2011] 1 WLR 2900.
43 *Crowden*, at para 72.
44 *Crowden*, at para 87.
45 *Crowden*, at para 84.
46 [2017] UKSC 18; [2017] Lloyd's Rep IR 209.


© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

Sumption and Reed agreed) said that by requiring that the acts or matters should have been in a series of related transactions, the scope for aggregation, rather than being so wide as to be almost limitless as it would be if insurers were permitted to aggregate all claims arising from repeated similar acts or omissions arising in different settings, was confined to circumstances in which there was "a real connection" between the transactions in which the acts or omissions occurred, rather than merely a similarity in the type of act or omission.[47] The clause separated the requirement that the acts or omissions giving rise to the claims should be similar and the requirement that they were in a series of matters or transactions which were related, and each limb must be satisfied for the clause to apply. Use of the word "related" implied that there must be some interconnection between the matters or transactions, or in other words that they must "in some way fit together", but the absence of any circumscription of the phrase "a series of related matters or transactions" by any particular criterion or set of criteria – not particularly surprising given the very wide range of transactions which may involve solicitors providing professional services – meant that determining whether transactions were related was therefore "an acutely fact-sensitive exercise".[48] Emphasising this point, Lord Toulson borrowed the language of Rix LJ in *Scott v Copenhagen Reinsurance Co (UK) Ltd*[49] and said that this involved "an exercise of judgment, not a reformulation of the clause to be construed and applied".[50]

There are other points of interest in the decision. Lord Toulson made some general observations about the approach to the construction of an aggregation clause. He began with a reminder that aggregation clauses can work in favour of insurers (by capping the total sum insured), and in favour of the insured (by capping the amount deductible per claim), and were not therefore to be approached with a predisposition towards either a broad or narrow interpretation. He added that there was a further reason for adopting a "neutral" approach in the interpretation of the MTC, which was the fact that the Law Society was not in a position comparable to an insurer proferring an insurance policy, but was a regulator, setting the minimum terms of cover which solicitors must maintain. In doing so, it had to balance the need for reasonable protection for the public with considerations of the cost and availability of obtaining professional indemnity insurance.[51] He also observed that individual words or phrases may not carry the same meaning in different clauses in different policies, and approved Longmore LJ's observation in the Court of Appeal[52] that the word "related" in the phrase "a series of related matters or transactions" in the MTC did not bear the same connotation as the phrase "related series of acts or omissions" which was the subject of the decision of the House of Lords in *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd*.[53]

Lord Toulson also said that there was some debate as to whether the application of the aggregation clause was to be viewed from the perspective of the claimants or of the insured. He said that the answer was that the application of the clause was to be judged not by looking at the transaction exclusively from the viewpoint of one party or another party, but "objectively taking the transactions in the round".[54] Lord Toulson did not cite any authority for this potentially significant observation, and its scope and effect are likely to be the subject of further judicial consideration.

47 *Woodman*, at para 18.
48 *Woodman*, at para 22.
49 [2003] EWCA Civ 688; [2003] Lloyd's Rep IR 696, para 81.
50 *Woodman*, at para 22.
51 *Woodman*, at para 14.
52 [2016] EWCA Civ 367; [2016] Lloyd's Rep IR 289, at para 27.
53 [2003] UKHL 48; [2003] Lloyd's Rep IR 623; *Woodman*, at para 19.
54 *Woodman*, at para 25.

© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

## Liability insurance

In 2017 liability insurance continued to generate interesting decisions on a wide range of issues. In *XYZ v Travelers Insurance Co Ltd*[55] a non-party costs order was made under section 51 of the Senior Courts Act 1981 against liability insurers who not only defended insured claims which were subject to a group litigation order, but also influenced the defence of the uninsured claims, in particular by refusing to allow the insured to disclose that 426 out of 623 claims were uninsured. The judge, Thirlwall LJ, held that this had resulted in those claims being pursued rather than discontinued. As the insurer was liable for claimants' costs under the policy, and the effect of a group litigation order was that the claimants whose claims were insured were entitled to recover from the defendant only a rateable proportion of the common costs, with the balance relating to the uninsured claims falling to the insolvent defendant, this reduced the costs payable by the insurer by about £4 million. The judge held that it was just that the insurer paid the balance of these costs as a non-party. She had case-managed the claims under the group litigation order, and had previously ordered the defendant to disclose information about its insurance position.[56] She was particularly unimpressed by the failure to identify the conflict of interest between the defendant and insurers in respect of the uninsured claims: it was not in the defendant's interest to be facing such a large number of uninsured claims, but despite requests, insurers did not consent to disclosure of the insurance position in relation to these claims. The judge distinguished the authorities in which liability insurers fund unsuccessful defence costs where costs and/or damages exceed the limit of indemnity, holding that it was therefore not necessary for the claimants to establish that the insurer controlled the litigation.

**Whatever the wording of the policy, liability insurers are likely to respond to an interim payment order, particularly if a refusal to do so might plunge the insured into insolvency**

In *W R Berkley Insurance (Europe) Ltd and Another v Teal Assurance Co Ltd (No 2)*,[57] the Court of Appeal declined to consider whether Phillips J was right to decide in *Cox v Bankside Members Agency Ltd*[58] that an interim payment can be regarded as payment on account of and in anticipation of an eventual award of damages, so that liability insurers would be bound to respond to an interim payment order in the same way as they would be bound to respond to a judgment on liability and quantum. Sir Stephen Tomlinson described Phillips J's approach as an essentially pragmatic solution which might protect an insured from insolvency; he observed that whether the policy responded to an interim payment would also depend on the policy wording.[59] In practice, whatever the wording of the policy, liability insurers are likely to respond to an interim payment order, particularly if a refusal to do so might plunge the insured into insolvency and thereby allow a direct claim by the third-party claimant against the insurer under the Third Parties (Rights Against Insurers) Act 1930 or 2010.

55 [2017] EWHC 287 (QB); [2017] Lloyd's Rep IR 269.
56 *XYZ v Various (The PIP Breast Implant Litigation)* [2013] EWHC 3643 (QB); [2014] Lloyd's Rep IR 431.
57 [2017] EWCA Civ 25; [2017] Lloyd's Rep IR 259.
58 [1995] 2 Lloyd's Rep 437.
59 Judgment of Sir Stephen Tomlinson, at para 14.


© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

In *Crowden and Another v QBE Insurance (Europe) Ltd*,[60] the court accepted that the regulatory background was relevant to the construction of the policy (a professional indemnity insurance policy issued to a financial adviser) but rejected the argument that the regulatory requirement in the then FSA Handbook to maintain professional indemnity insurance materially affected the construction of the relevant exclusion clause.[61] The judge's reasons were that there was no indication in the policy itself or the circumstances surrounding the conclusion of the policy that it was intended to discharge the insured's regulatory obligations; that it was incumbent on the insured, not the insurer, to ensure that it obtained sufficient professional indemnity cover; that the regulatory obligation provided that the policy should not exclude any type of business or activity carried out by the insured, but that it did not do so but merely excluded the cause of a claim, liability or loss; that the regulatory obligation explicitly referred to a professional indemnity policy containing exclusions and stated that they should not be unreasonable, but that there was no evidence to suggest that the insolvency exclusion was unreasonable. The judge added that in any event these considerations would not have been sufficient to override the plain meaning of the exclusion. This might be right, but it is hard to see how the judge's approach to construction allowed the regulatory background to play any role at all.

The Supreme Court has granted the insurers permission to appeal in *UK Insurance Ltd v R&S Pilling (trading as Phoenix Engineering)*,[62] one of several recent cases considering the meaning of "use" of a vehicle within the compulsory insurance requirements of section 145(3) of the Road Traffic Act 1988 and the EU Directive on motor insurance.[63] In *UK Insurance*, the owner of a car accidentally set fire to it while repairing it, causing extensive damage to property. The insurers of the property owner brought a subrogated claim against him and the Court of Appeal held that the insured was using the vehicle, and therefore covered under his liability policy, when repairing it. Shortly after the Supreme Court granted permission in *UK Insurance*, the CJEU decided in *De Andrade v Salvador*[64] that the concept of "use of vehicles" in the Directive does not cover a situation in which an agricultural tractor has been involved in an accident when its principal function, at the time of that accident, was not to serve as a means of transport but to generate, as a machine for carrying out work, the power necessary to drive a herbicide sprayer pump.[65] The Supreme Court's guidance in this area, in the light of *De Andrade*, is to be welcomed.

## Arbitration

In *Tonicstar Ltd v Allianz Insurance plc and Another*[66] Teare J granted an application to remove an arbitrator on the basis he lacked the specific experience required by the relevant arbitration clause.

60 [2017] EWHC 2597 (Comm); [2018] Lloyd's Rep IR 83.
61 *Crowden*, para 85.
62 [2017] EWCA Civ 259; [2017] Lloyd's Rep IR 463. The Supreme Court granted permission on 6 November 2017.
63 See article 3(1) of Directive 2009/103/EC of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (codified version).
64 Case C-514/16; [2018] Lloyd's Rep IR Plus 9, judgment of 28 November 2017. This is the latest in a line of decisions of the CJEU on the "use" of vehicles, including *Vnuk v Zavarolvalnica Triglav dd* Case C-162/13 [2015] Lloyd's Rep IR 142, and *Torreiro v AIG Europe Ltd* Case C-334/16 [2018] Lloyd's Rep IR Plus 18.
65 Compare *Wastell v Woodward and Another* [2017] Lloyd's Rep IR 474, in which the insured vehicle was a hamburger van and was parked in a layby for trading. The co-owner of the van adjusted a business sign which he had placed on the grass verge on the opposite side and then stepped out into the road directly into the path of an oncoming motorcycle. The motorcyclist was killed. Master Davidson held that the accident arose out of the use of the van as a hamburger van.
66 [2017] EWHC 2753 (Comm); [2018] 1 Lloyd's Rep 229.

© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

The arbitrator was appointed by the respondent pursuant to clause 15 of the "Joint Excess Loss Committee, Excess Loss Clauses", which had been incorporated into a contract of reinsurance between the parties. Clause 15.5 stipulated that the arbitral tribunal should consist of persons "with not less than 10 years' experience of insurance or reinsurance". The respondent had appointed a barrister who had considerably more than 10 years' experience, but the applicant contended that the clause required the arbitrator to have experience not of the law but of the *business* of insurance or reinsurance. The applicant's challenge relied upon the decision to this effect of Morison J in *Company X v Company Y*[67] where, construing the meaning of this phrase in the Excess Loss Clauses, he had held that the parties had intended a trade arbitration, having adopted a set of clauses drafted by a trade body, the Joint Excess Loss Committee, and so the arbitrator had to have business experience. Teare J acknowledged force in arguments on behalf of the respondent to the effect that the words were sufficiently flexible to allow the appointment of a lawyer. However, he considered that the decision of Morison J was not obviously wrong and there were not sufficiently powerful reasons to depart from it given "(a) the phrase in question was not altered by the Excess Loss Committee in 2003 [after Morison J's decision], (b) that the decision must be fairly well known in the reinsurance market; and (c) the decision has stood unchallenged for 17 years".[68] Perhaps unsurprisingly, given the obvious reservations of Teare J, the Court of Appeal has since upheld an appeal against his decision and, by extension, held that *Company X v Company Y* was wrong.[69]

## Damages for late payment

The late payment provisions added to the Insurance Act 2015 by amendment came into force on 4 May 2017. For the first time, there is a generally available right to damages in English law for late payment of insurance claims.[70] In contracts of insurance entered into on or after 4 May 2017 and variations to those policies, a term is implied that if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time.[71] This includes a reasonable time to investigate and assess the claim, and what is reasonable will depend on all the relevant circumstances.[72] The statute lists some examples of things which may need to be taken into account, including the type of insurance, the size and complexity of the claim, compliance with any relevant statutory or regulatory rules or guidance, and factors outside the insurer's control.[73] The insurer does not

**Provisions added to the Insurance Act 2015 mean that, for the first time, there is a generally available right to damages in English law for late payment of insurance claims**

67 17 July 2000, unreported.
68 *Tonicstar*, para 12.
69 *Tonicstar*, [2018] EWCA Civ 434.
70 There was previously a right to damages under section 138D of the Financial Services and Markets Act 2000 for breach of ICOBS 8.1.1 which includes an obligation to pay claims promptly and fairly. This was available where the insured was a "private person": this means an individual, and any person who is not an individual, unless they suffer the loss in the course of carrying on business of any kind: see see section 138D of the Financial Services and Markets Act 2000 and the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 (SI 2001 No 2256), Regulation 3(1)(a).
71 Section 13A(1), Insurance Act 2015.
72 Section 13A(2), Insurance Act 2015.
73 Section 13A(3), Insurance Act 2015.


© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

breach the implied term merely by failing to pay the claim, or the affected part of it, while the dispute is continuing, but the burden is on the insurer to show that there were reasonable grounds for disputing the claim, and its conduct in handling the claim is a relevant factor.[74]

Insurers cannot rely on legal advice about a dispute without waiving privilege. This has obvious implications for the way in which insurers and their legal advisors record legal advice and claims handling decisions in relation to policies issues and variations made from 4 May 2017 onwards. Contrary to the Law Commissions' intentions and usual practice, the standard limitation period (in this instance, of six years for actions based on simple contract) which applies to any claim for an indemnity under the policy does not apply to a claim for damages for late payment; instead, there is a specific limitation period of one year starting on the date on which the insurer has paid all the sums due in respect of the claim.[75] Two different limitation periods may therefore apply in an action for an indemnity under a policy coupled with damages for late payment of that indemnity, adding further complexity to an already difficult and counter-intuitive aspect of insurance law. In non-consumer insurance, it is possible to contract out of the implied term, save for deliberate or reckless breaches by insurers, subject to the usual transparency requirements.[76] There is as yet no case law on the new implied term.

## Procedural conditions

*Zurich Insurance plc v Maccaferri Ltd*[77] saw the Court of Appeal grappling with the extent to which an obligation to notify circumstances to a liability insurer can be triggered by matters an insured appreciates long after the event from which its liability arises. It also serves as an example of the need for notification conditions to be clear if insurers wish to rely upon them to reject otherwise valid claims.

Zurich insured Maccaferri Ltd in respect of product liability. Its policy wording contained a condition requiring notification "as soon as possible after the occurrence of an event likely to give rise to a claim". The point of interest in the case was whether this condition required the insured to notify when it realised or ought to have realised a claim was likely, despite a claim having appeared unlikely at the time of the event.

Maccaferri sought an indemnity in respect of a claim arising from an injury to a construction worker employed by Drayton Construction Ltd ("Drayton"). The employee injured his eye when picking up a Spenax "gun" manufactured by Maccaferri; the "gun" was used to bind steel wire mesh cages. The injury was sustained in September 2011, but Maccaferri only learned of it in January 2012 and it did not suspect that a claim against it was likely until it was joined as a Part 20 defendant by Drayton, which had been sued by the employee. This was after expiry of the period for which Zurich had provided cover.

Zurich contended that in these circumstances the insured had acted in breach of the notification condition, arguing that even if it was unaware of the event when it happened, the wording obliged the insured to notify as soon as possible whenever it knew or ought to have known both of the event and that it was likely to give rise to a claim, and that the fact this might be months later was irrelevant. The Court

74 Section 13A(4), Insurance Act 2015.
75 Section 5A(1), Insurance Act 2015.
76 Sections 16A and 17, Insurance Act 2015.
77 [2016] EWCA Civ 1302; [2017] Lloyd's Rep IR 200.

© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

of Appeal accepted that the wording made it possible to construe the condition in the way Zurich contended, but described that construction as strained and erroneous, upholding Knowles J's judgment in favour of the insured. In doing so, it emphasised that the condition had the potential to exclude liability in respect of an otherwise valid claim commenting that "if Zurich wished to exclude liability it was for it to ensure that clear wording was used to secure that result. It has not done so."[78] In the court's view the proper meaning of the wording was at the least "far from clear … and given the nature of the clause the ambiguity must be resolved in favour of Maccaferri. Clauses such as these need to be clear if they are to have effect."[79] It was also influenced by the fact that the effect of Zurich's construction would be to impose an ongoing obligation to carry out a rolling assessment as to whether a claim was likely, which one would expect to have been spelled out. In the court's view, the issue was therefore simply whether at the time the employee was injured a claim was likely, which depended on whether, in the light of the actual knowledge Maccaferri at the time possessed, a reasonable person in its position would have thought that it was at least 50 per cent likely that a claim would be made. On this point, the court concluded that Knowles J was perfectly entitled to take the view that when the accident occurred there was not at least a 50 per cent chance of a claim.[80]

In *Ted Baker plc and Another v Axa Insurance UK plc and Others*[81] the policy wording was sufficiently clear, but insurers were estopped from relying upon a breach by the insured because they owed the insured a "duty to speak". The claim failed on other grounds, so the remarks on the "duty to speak" point were obiter (ie not necessary to the court's decision and therefore not binding precedent). If as seems likely they are applied in other cases, they represent a significant shift in favour of the insured in the courts' approach to the application of procedural conditions precedent.

Ted Baker claimed an indemnity in respect of business interruption losses it alleged it suffered over five years because of thefts of stock by a former employee. The policy included a condition requiring delivery to insurers of financial information reasonably required for the purpose of investigating or verifying a claim. In December 2008 loss adjusters asked Ted Baker to provide seven categories of information in connection with the claim, the last of which was copies of both profit and loss and management accounts ("the category 7 information"). Ted Baker provided some headline details regarding its claim but omitted to provide the accounting information after insurers gave it the impression that its provision could be delayed. Subsequently, in May 2009 and while the category 7 information was still outstanding, insurers declined on the basis that the thefts were not covered, a contention rejected in a preliminary issue trial.[82] Despite this preliminary victory, at the substantive trial, Eder J dismissed Ted Baker's claim on the basis that its failure to provide the category 7 information had amounted to a breach of the condition precedent and that there was no evidence that it had suffered a loss of gross profit as a result of the thefts. This latter finding was upheld by the Court of Appeal and so Ted Baker's appeal failed. However, the case is of interest because the Court of Appeal held that insurers were estopped from relying on Ted Baker's breach of the condition.

78 *Maccaferri* at para 32.
79 *Maccaferri* at para 33.
80 *Maccaferri* at paras 39 to 40.
81 [2017] EWCA Civ 4097; [2017] Lloyd's Rep IR 682.
82 [2012] EWHC 1406 (Comm); [2013] Lloyd's Rep IR 174.


© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

Giving the judgment of the court on this point Sir Christopher Clarke reviewed the principles for estoppel by reason of silence/acquiescence endorsed by the House of Lords in *The Indian Endurance*[83] and more recently considered in *ING Bank NV v Ros Roca SA*[84] and *Starbev GP Ltd v Interbrew Central European Holdings BV*.[85] These cases confirmed a general principle, not confined to insurance law, that a party could be estopped from relying on its rights if it prejudiced the counterparty by remaining silent and not correcting the counterparty's misunderstanding of those rights in circumstances when a reasonable person acting "honestly and responsibly" would speak up to make the position plain: "... [s]uch an estoppel is a form of estoppel by acquiescence arising out of a failure to speak when under a duty to do so."[86] Although the reference to "honesty" in this context does not require an estopped party to have acted fraudulently, the issue is whether there has been dishonesty in the equitable sense.[87]

Applying these principles to the insurance context of *Ted Baker*, Sir Christopher Clarke acknowledged a number of relevant considerations weighing against such an estoppel having arisen. First, an insurer is, generally speaking, under no duty to warn an insured as to the need to comply with policy conditions. Secondly, there was no suggestion that insurers in this case had acted in bad faith or sought to hoodwink Ted Baker. Thirdly, while insurers had agreed to delay the provision of some of the categories of information its loss adjuster had requested, this agreement had not extended to the category 7 information. Nevertheless, it was still possible for an estoppel by acquiescence to arise and in the circumstances of this case Ted Baker had been entitled to expect that if insurers regarded the category 7 information as outstanding, due and updated, then, insurers acting honestly and responsibly would tell them so. Not to do so was misleading. "If [insurers] had done so the documents would no doubt have been supplied. Since they did not it would be unjust and unconscionable to allow them to escape any liability on the ground of non-compliance with a condition precedent in relation to the Category 7 material."[88]

**A reservation of rights is "an obstacle to finding an unequivocal communication of a decision" to cover a claim or affirm a policy**

Sir Christopher Clarke emphasised that he did not regard this outcome as dependent upon the contract being uberrimae fidei and so found it unnecessary to decide the extent to which, if at all, such a contract might enlarge the circumstances in which the duty to speak arises. However, he acknowledged that it was "clear that the fact that the contract is of such a nature will, if it does anything, increase the likelihood of a party having a duty to speak".[89] A reservation of rights is "an obstacle to finding an unequivocal communication of a decision" to cover a claim or affirm a policy.[90] Insurers had reserved their rights in the *Ted Baker* case, but after the

83 *Republic of India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No 2)* [1998] 1 Lloyd's Rep 1; [1998] AC 878, page 913.
84 [2011] EWCA Civ 353.
85 [2014] EWHC 1311 (Comm).
86 *Ted Baker*, at para 82.
87 *Ted Baker*, at paras 75 and 88.
88 *Ted Baker*, at para 88.
89 *Ted Baker*, at para 89.
90 See *Involnert Management Inc v Aprilgrange Ltd and Others* [2015] EWHC 2225 (Comm); [2015] 2 Lloyd's Rep 289, para 179 (Leggatt J).

© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

issue of the category 7 information had been "parked". Sir Christopher Clarke did not refer to the reservation of rights in his analysis and conclusion, and it appears therefore that he did not consider that it prevented a "duty to speak" from arising, or (perhaps) was even significant in that context. This aspect of the decision is likely to be explored further in future cases.

## Consumer insurance, including the Financial Ombudsman Service

In *Ashfaq v International Insurance Company of Hannover plc*,[91] the insured sought to avoid the strictures of the common law by trying to arguing that he was a "consumer" within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999[92] and the Insurance Conduct of Business Sourcebook ("ICOBS"). Unsurprisingly this argument was rejected and the Court of Appeal upheld the summary judgment granted below. Giving the judgment of the court, Flaux LJ held that the purpose of taking out the insurance was to protect a house the insured was using for the business of letting to students for rent, and so the purpose was related to his "trade, business or profession" of property letting, meaning he had no real prospect of establishing he was a consumer for the purpose of the 1999 Regulations.[93] The fact that an insured might also be a director of a company carrying on an unrelated business or another profession was irrelevant.[94]

The jurisdiction of the Financial Ombudsman Service ("FOS") and the basis on which it can decide complaints was helpfully reviewed by Jay J in *R (Aviva Life & Pensions (UK) Ltd) v Financial Ombudsman Service*[95] a judicial review of a decision of the FOS against the background of some extremely sad facts. The complaint was in respect of a life insurance policy that had been avoided by Aviva on the basis of misrepresentation; the policy had been taken out shortly after a long-standing prior policy of life insurance, also with Aviva, had been cancelled. When applying for the new policy, the consumer had declared that he had not been advised to have any investigations, scans or blood tests and he was not awaiting any test or investigation other than for a hernia. In fact, he had been undergoing tests for what was subsequently diagnosed as a rare, early-onset form of dementia. The FOS upheld the consumer's complaint and directed that the insurer should reinstate the new policy and consider the consumer's claim under it for payments that would in the event total £500,000.

Aviva challenged the decision on the basis it was irrational. The application was, in the event, not contested, but Aviva pressed for a narrative judgment which it hoped would influence the FOS when reconsidering the insureds' complaint. It was common ground that Aviva had followed all relevant law, guidance and practice and Aviva maintained that in those circumstances it could not rationally be concluded by the FOS that it had done anything wrong. Thus, it was said, any subsequent decision in favour of the consumer must be capable of being quashed for irrationality. It was also said that the FOS had no jurisdiction to make a direction that would entail payments of over £150,000, a point that was conceded.

91 [2017] EWCA Civ 357; [2018] Lloyd's Rep IR Plus 10. Also discussed in "The Contract of Insurance", above.
92 With effect from 1 October 2015 the 1999 Regulations were repealed and replaced by the Consumer Rights Act 2015. This case concerned a contract concluded when the 1999 Regulations were still in force.
93 *Ashfaq*, at para 46.
94 *Ashfaq*, at para 58.
95 [2017] EWHC 352 (Admin); [2017] Lloyd's Rep IR 404.


© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

After carefully analysing the substance of the complaint Jay J concluded that he was not driven to conclude that it would be outrageous to hold an insurer to its contract and, therefore, a decision against insurers would not necessarily be irrational, as long as the decision was made by an Ombudsman properly directing itself, although careful reasons would need to be given.[96] In reaching this decision he followed the Court of Appeal's decision in *R (Heather Moor & Edgecombe Ltd) v Financial Ombudsman Service*[97] which held that the FOS was free to depart from relevant law, but that if he did so then he should say so and explain why he was taking that course.[98] The problem in *Aviva* was that the FOS had done neither.

Nevertheless, despite rejecting Aviva's arguments, in remarks which will resonate with many practitioners, Jay J expressed "personal concerns about a jurisdiction such as this which occupies such an uncertain space outside the common law and statute. The relationship between what is fair and reasonable, and what the law lays down. is not altogether clear … It might be said that this jurisdiction is penumbral because its shadows cannot be illuminated".[99] The judge also stated that while the limit of liability under a FOS award was £150,000 it was good practice for the FOS to spell this out in any decision rather than leaving it implicit.[100]

*Berkeley Burke SIPP Administration LLP v Charlton and Another*[101] saw an unsuccessful attempt to challenge a decision of the FOS by a highly unorthodox route, namely challenge pursuant to section 69 of the Arbitration Act 1996.

The FOS decided a complaint in favour of a consumer who had lost his personal pension, which he had invested in scheme administered by Berkeley Burke SIPP Administration LLP ("BBSA"). BBSA threatened to apply to judicially review the decision of the FOS and in the face of that threat the consumer agreed to have the complaint remitted for reconsideration by the FOS, a course to which both the FOS and BBSA agreed. However, after reconsidering, the FOS again upheld the complaint against BBSA, prompting it to apply not for judicial review but for permission to appeal pursuant to section 69 of the 1996 Act.

Dismissing the application, Teare J held that the agreement to remit to the FOS for reconsideration was not an arbitration agreement and that therefore the FOS decision was not an award pursuant to such an agreement. He considered that while there was no express power for an ombudsman to reconsider a complaint, such a power was "part and parcel of FOS's duty to consider a complaint which has been properly brought before it".[102] The complaint therefore always remained part of the FOS scheme and could not be seen as an arbitration agreement since BBSA, as a provider of financial services, was bound to comply with the FOS scheme as a matter of statute. Consequently, a complaint accepted by the complainant was binding on BBSA in the usual way, and the only avenue of challenge was judicial review.

96 *Aviva*, at para 70.
97 [2008] EWCA Civ 642.
98 *Heather*, at paras 36 and 49.
99 *Aviva*, at para 73.
100 *Aviva*, at para 71.
101 [2017] EWHC 2396 (Comm); [2018] Lloyd's Rep IR Plus 17.
102 *Berkeley*, at para 10.

© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

## Legal expenses insurance

In *Re Enterprise Insurance Co plc v Ozon Solicitors Ltd*,[103] Newey J considered the meaning of Regulation 3(3) of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 (SI 1990 SI 1159). Regulation 6 of the 1990 Regulations allows an insured under a before the event (or "BTE") policy of legal expenses insurance the freedom to choose its own lawyer once proceedings have begun, but Regulation 3(3) provides that the Regulations do not apply to "anything done by a person providing civil liability cover for the purpose of defending or representing the insured in an inquiry or proceedings which is at the same time done in the insurer's own interest under such cover". The judge observed that Regulation 3(3) was not as clear as it might be, but that it was apt to apply to an indemnity insurer taking steps in litigation to defend the policyholder and, hence, to limit the insurer's own exposure.[104] The conclusion is unsurprising, but the case is noteworthy as the first decided case on the meaning of Regulation 3(3). Although the context was motor insurance, the reasoning applies to any type of liability insurance, and is therefore of significance to liability insurers generally.

**_Re Enterprise v Ozon_ is noteworthy as the first decided case on the meaning of Regulation 3(3) of the Insurance Companies (Legal Expenses Insurance) Regulations 1990. The reasoning applies to any type of liability insurance**

*RBS Rights Issue Litigation*[105] is the latest decision[106] to consider the relationship between the court's case management powers, and in particular the impact of a group litigation order ("GLO"), and its ability or willingness to order disclosure of a claimant's after the event (or "ATE") policy of legal expenses insurance or information about its ATE cover. In the *RBS* case Hildyard J ordered the claimants to disclose information about their third-party funders, but stopped short of ordering them either to disclose their ATE policy or (as sought by the defendants if the policies were not disclosed) to disclaim any reliance on the existence of ATE cover as grounds for opposing any application for security for costs which the defendants might make.

The judge rejected a submission that ATE policies were by their nature privileged, although he accepted that some appropriate reductions might be justified and necessary to preserve legal advice privilege if they were ordered to be disclosed.[107] He also said that he agreed that such policies did not usually fall within the ordinary ambit of disclosure under CPR Part 31, but pointed to the claimants' previous deployment of the ATE cover they asserted was in place as making it difficult for them to argue that the ATE policy was entirely irrelevant in the context of case management.

103 3 February 2017, unreported.
104 *Enterprise*, at paras 24 to 27.
105 [2017] EWHC 463 (Ch); [2017] 1 WLR 3539.
106 See also *Barr v Biffa Waste Services Ltd and Another* [2009] EWHC 1033 (TCC); [2010] Lloyd's Rep IR 428; *XYZ v Various (The PIP Breast Implant Litigation)* [2013] EWHC 3643 (QB); [2014] Lloyd's Rep IR 431.
107 *RBS*, at paras 11 to 113 and 119.


© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

The claimants had invoked the ATE cover in two ways: first, to encourage the court to make a GLO, and to provide under the GLO for several and not joint liability for costs; and, secondly, to justify their status as a lead group in the litigation. In those circumstances, the judge said, the claimants were not like ordinary litigants whose funding arrangements are a private matter: they had put forward those arrangements to obtain procedural advantages.[108] Specifically, Hildyard J expressed concern about a "somewhat unsettling uncertainty" revealed in correspondence as to the basis on which existing claimants were participating and further claimants were being invited to participate, and what they might perceive their potential costs exposure to be,[109] and the basis on which the court was proceeding, given earlier assurances as to ATE cover and the funding arrangements in place.[110] Consequently, while refusing to make the order sought, Hildyard J said that he thought it appropriate and necessary that there should be more transparency as to the funding position and ATE cover, and he invited submissions as to what might be done to address the concerns.[111]

## Subrogation

*Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)*[112] is a case which at first sight seems baffling and even irrelevant to those whose work does not involve maritime law. On closer analysis, the aspect of the decision which deals with co-insurance has significance for the availability of a subrogated remedy in any situation in which a contract requires one party to the contract to obtain insurance for the benefit both of itself and another.[113] Lord Toulson, who was in the majority (of three to two[114]) on the co-insurance issue, said that the relevant distinction, as described by Lord Hope in *Cooperative Retail Services Ltd v Taylor Young Partnership Ltd*,[115] was between a provision for insurance which curtails the means of recovering loss whether or not it was caused by a contracting co-insured's default, and a provision which backs the other party's other obligations with an insuring obligation but leaves the other obligations enforceable against the other party by other means.[116] His view was that the insurance arrangements under the relevant contractual scheme "provided not only a fund but the avoidance of commercially unnecessary and undesirable disputes between the co-insured".[117] Lord Mance agreed with Lord Toulson, and added some supplemental reasons of his own. He drew attention to various features of the contractual arrangements, and concluded that the contractual scheme was clearly intended to cater comprehensively for repairs and total loss[118] and that the implied understanding arising from the co-insurance scheme was that there would be no liability for the hull value in the event of a total loss, whether or not the insured value had yet been disbursed.[119]

108 *RBS*, at para 120.
109 *RBS*, at para 130.
110 *RBS*, at para 129.
111 *RBS*, at para 133.
112 [2017] UKSC 35; [2017] Lloyd's Rep IR 291.
113 A curiosity of the *Gard Marine* case is that the insurance policy itself was not disclosed, and was not therefore considered by the Supreme Court.
114 Lord Hodge agreed with both Lord Toulson and Lord Mance without giving reasons of his own.
115 [2002] UKHL 17; [2002] Lloyd's Rep IR 555, at paras 39 to 40.
116 *Gard Marine*, at para 143.
117 *Gard Marine*, at para 144.
118 *Gard Marine*, at paras 109 to 114 and 120.
119 *Gard Marine*, at para 122.

© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

It will be a matter of construction of the relevant contractual scheme in each case, but these observations can be readily carried across to other situations in which a contract requires co-insurance such as construction projects – indeed, this was the context of the *Cooperative Retail* decision, and Lord Toulson referred to the approval of the House of Lords in that case of the reasoning of Mr Recorder Jackson QC in *Hopewell Project Management Ltd v Ewbank Preece Ltd*,[120] where he described as "nonsensical" the idea that those parties who were jointly insured under a contractors' all risks policy would make claims against one another in respect of damage to the contract works.

One notable feature of the judgments of both the majority and the minority in *Gard Marine* is the lack of attention paid to the remarks of Rix LJ in *Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd*[121] in the Court of Appeal. Rix LJ had suggested that, in the absence of an express waiver of the right of subrogation, if the underlying contract envisaged that one co-insured might be liable to another for negligence even within the sphere of the cover provided by the policy, he was inclined to think that there was nothing in the doctrine of subrogation to prevent the insurer suing in the name of a co-insured to recover insurance proceeds, at least in cases where the joint names insurance was really a bundle of composite insurance policies which insure each insured for his respective interest. These remarks were obiter but nonetheless were regarded as authoritative and widely applied, yet they barely merited a mention. They cannot stand with *Gard Marine*, and should no longer be relied upon.

## Concluding observations

In addition to two Supreme Court decisions, there have been a number of Court of Appeal and High Court decisions in 2017 which have developed the law of insurance. We can expect the same in 2018: we should begin to see more decisions on the Third Parties (Rights Against Insurers) Act 2010, perhaps with some early decisions on the Insurance Act 2015, and we should see the Supreme Court in action at least twice. Having considered the relationship between insuring clauses and exclusion clauses in *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd*,[122] the Supreme Court has returned to this question in *Atlasnavios-Navegação Lda v Navigators Insurance Co Ltd and Others (The B Atlantic)*;[123] and it is also likely to hear the appeal in *UK Insurance Ltd v R&S Pilling (trading as Phoenix Engineering)*[124] in the course of 2018.

What else might the future hold? When judgments on the Insurance Act 2015 start to come through, the apparently clear divide between the old law and the new may begin to blur as the harshness of the old is illuminated by the contrast with the new. In *Involnert Management Inc v Aprilgrange Ltd and Others*,[125] insurers were induced by non-disclosure to insure a yacht for €13 million rather than €8 million. Leggatt J described the insurers' right to avoid a policy in these circumstances,

120 [1998] 1 Lloyd's Rep 448, page 458.
121 [2008] EWCA Civ 286; [2008] Lloyd's Rep IR 617.
122 [2016] UKSC 57; [2017] Lloyd's Rep IR 60.
123 On appeal from [2016] EWCA Civ 808; [2016] Lloyd's Rep IR 565.
124 See above, "Liability insurance".
125 [2015] EWHC 2225 (Comm); [2015] 2 Lloyd's Rep 289.

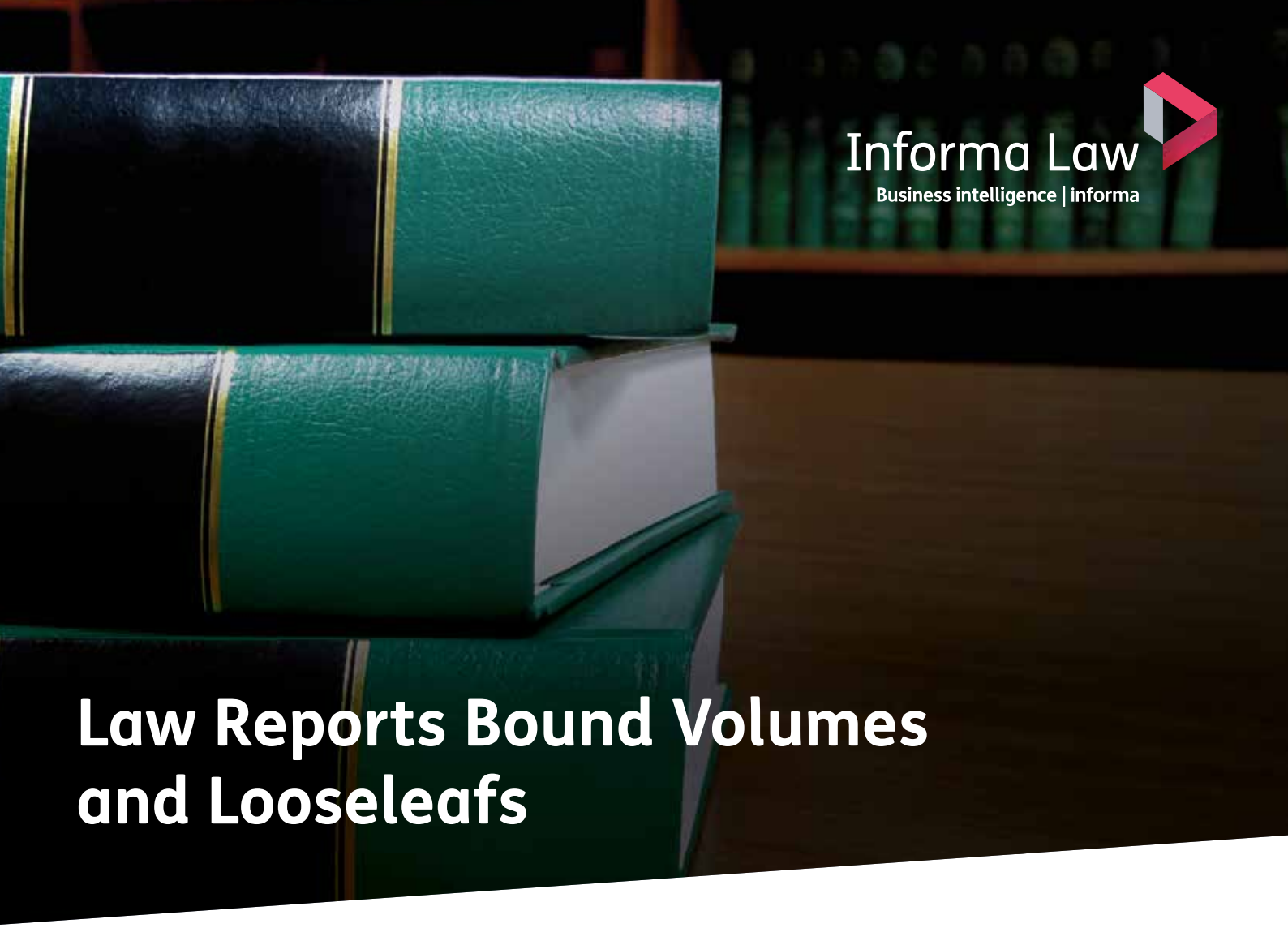

© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

escaping liability for the €8 million for which they would have insured the yacht had full disclosure been given, as "a blot on English insurance law".[126] This remark was made in 2015, in the shadow of the new Act, and, as time goes on, there may be a growing reluctance on the part of the judges, and perhaps also some insurers, to apply the pre-Act remedies with their full vigour. Conversely, in cases under the 2015 Act, where the result will be a proportionate remedy rather than avoidance, judges and insurers may in some instances be more willing to find for an insurer.

Other changes may affect the development of insurance law in 2018. In 2017 three former Commercial Court judges retired from the Court of Appeal: Christopher Clarke, Tomlinson and Longmore LJJ, and two former Commercial Court judges retired from the Supreme Court: Lord Toulson, who died suddenly and unexpectedly all too soon afterwards, and Lord Clarke. In 2018, Lord Mance too will retire, as will Lord Sumption: thus, four of the five Justices who heard the appeals in *AIG v Woodman* and *Gard Marine* in 2017 will have retired by the end of 2018. This will leave the Supreme Court with no former Commercial Court judge on its Bench, unless – as is very much to be hoped – they feature amongst the newly appointed Justices.

126 *Involnert*, at para 186.

© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com



Informa Law
Business intelligence | informa

# Law Reports Bound Volumes and Looseleafs

Informa Law is a specialist publisher in the field of commercial law. Our Bound Volume collection dates back to 1919 and includes the iconic Lloyd's Law Reports series, as well as bound volumes for our leading review journals.

## Bound Volume Series
available as full sets, small bundles and individual units

**Make sure your legal library is complete**
Each volume contains fully headnoted, verbatim judgments. Each new printed Bound Volume collects the most noteworthy legal decisions reported within the year.

- Access cases and precedents across the full print archive.
- Carefully crafted headnotes crystallise the most significant cases from the world-renowned commercial courts of England and Wales.
- Recent volumes include the most influential cases from overseas jurisdictions.
- Our distinguished editors include high court judges, eminent professors, the Immediate Past Chair of the Bar Council, and leading QCs.

**Annual editions of our leading Journals are also available in Bound Volume format.**
*Lloyd's Maritime and Commercial Law Quarterly*
*International Construction Law Review*

## Looseleafs

Our collection of Looseleafs are updated throughout the year and cover all the latest legislative developments in your practice area ensuring you are armed with all the facts and information you need.

- Our looseleafs are the major reference works in the fields of **Insurance Law**, **Arbitration Law** and on the **Ratification of Maritime Conventions**
- Your purchase includes the current edition of the publication, as well as a year's worth of updates.

## Contact us today to complete your collection and to receive our special rates.

lawsales@informa.com about.i-law.com +44 20 7017 7565 (EMEA) 65 6508 2428 (APAC)

# Appendix

## Judgments analysed and considered in this article

### 2017 cases analysed:

*AIG Europe Ltd v Woodman and Others* (SC) [2017] UKSC 18; [2017] Lloyd's Rep IR 209
*Ashfaq v International Insurance Company of Hannover plc* (CA) [2017] EWCA Civ 357; [2018] Lloyd's Rep IR Plus 10
*Aviva Life & Pensions (UK) Ltd) v Financial Ombudsman* Service, see *R (Aviva Life & Pensions (UK) Ltd) v Financial Ombudsman Service*
*AXA Vericherung AG v Arab Insurance Group (BSC)* (CA) [2017] EWCA Civ 96; [2017] Lloyd's Rep IR 216
*BAE Systems Pension Funds Trustees Ltd v Royal & Sun Alliance Insurance plc and Others* (QBD (TCC)) [2017] EWHC 2082 (TCC); [2018] Lloyd's Rep IR 77
*Berkeley Burke SIPP Administration LLP v Charlton and Another* (QBD (Comm Ct)) [2017] EWHC 2396 (Comm); [2018] Lloyd's Rep IR Plus 17
*Channon v Ward* (CA) [2017] EWCA Civ 13; [2018] Lloyd's Rep IR Plus 11
*Crowden and Another v QBE Insurance (Europe) Ltd* (QBD (Comm Ct)) [2017] EWHC 2597 (Comm); [2018] Lloyd's Rep IR 83
*Cruise and Maritime Services International Ltd v Navigators Underwriting Agency Ltd (The Marco Polo)* (QBD (Comm Ct)) [2017] EWHC 843 (Comm); [2017] Lloyd's Rep IR 347
*De Andrade v Salvador* (CJEU) Case C-514/16; [2018] Lloyd's Rep IR Plus 9
*Enterprise Insurance Co plc v Ozon Solicitors Ltd, Re* 3 February 2017, unreported
*Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] UKSC 35; [2017] Lloyd's Rep IR 291
*Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* (SC) [2016] UKSC 57; [2017] Lloyd's Rep IR 60
*Marco Polo*, The, see *Cruise and Maritime Services International Ltd v Navigators Underwriting Agency Ltd*
*Ocean Victory*, The, see *Gard Marine & Energy Ltd v China National Chartering Co Ltd*
*Peel Port Shareholder Finance Co Ltd v Dornoch Ltd* (QBD (TCC)) [2017] EWHC 876 (TCC); [2017] Lloyd's Rep IR 374
*R (Aviva Life & Pensions (UK) Ltd) v Financial Ombudsman Service* (QBD (Admin)) [2017] EWHC 352 (Admin); [2017] Lloyd's Rep IR 404
*RBS Rights Issue Litigation* (Ch D) [2017] EWHC 463 (Ch); [2017] 1 WLR 3539
*Redman v Zurich Insurance plc and Another* (QBD) [2017] EWHC 1919 (QB); [2018] Lloyd's Rep IR 45
*Southern Rock Insurance Co Ltd v Hafeez* (CSOH) [2017] CSOH 127; [2018] Lloyd's Rep IR 207
*Sun Alliance (Bahamas) Ltd and Another v Scandi Enterprises Ltd* (PC) [2017] UKPC 10; [2018] Lloyd's Rep IR Plus 12
*Ted Baker plc and Another v Axa Insurance UK plc and Others* (CA) [2017] EWCA Civ 4097; [2017] Lloyd's Rep IR 682
*Tonicstar Ltd v Allianz Insurance plc and Another* (QBD (Comm Ct)) [2017] EWHC 2753 (Comm); [2018] 1 Lloyd's Rep 229
*UK Insurance Ltd v R&S Pilling (trading as Phoenix Engineering)* (CA) [2017] EWCA Civ 259; [2017] Lloyd's Rep IR 463
*W R Berkley Insurance (Europe) Ltd and Another v Teal Assurance Co Ltd (No 2)* (CA) [2017] EWCA Civ 25; [2017] Lloyd's Rep IR 259
*Wastell v Woodward and Another* (QBD) [2017] Lloyd's Rep IR 474
*XYZ v Travelers Insurance Co Ltd* (QBD) [2017] EWHC 287 (QB); [2017] Lloyd's Rep IR 269
*Zurich Insurance plc v Maccaferri Ltd* (CA) [2016] EWCA Civ 1302; [2017] Lloyd's Rep IR 200

© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

## 2017 cases considered:

*AIG Europe Ltd v Woodman and Others* (CA) [2016] EWCA Civ 367; [2016] Lloyd's Rep IR 289
*AstraZeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd and Another* (CA) [2013] EWCA Civ 1660; [2014] Lloyd's Rep IR 509
*Atlasnavios-Navegação Lda v Navigators Insurance Co Ltd and Others (The B Atlantic)* (CA) [2016] EWCA Civ 808; [2016] Lloyd's Rep IR 565
*AXA Vericherung AG v Arab Insurance Group (BSC)* (QBD (Comm Ct)) [2015] EWHC 1939 (Comm); [2016] Lloyd's Rep IR 1
*B Atlantic*, The, see *Atlasnavios-Navegação Lda v Navigators Insurance Co Ltd and Others*
*Barr v Biffa Waste Services Ltd and Another* (QBD (TCC)) [2009] EWHC 1033 (TCC); [2010] Lloyd's Rep IR 428
*Chubb Insurance Co of Europe SA v Davies* (QBD (Comm Ct)) [2004] EWHC 2138 (Comm); [2005] Lloyd's Rep IR 1
*Company X v Company Y* (QBD (Comm Ct)) 17 July 2000, unreported
*Cooperative Retail Services Ltd v Taylor Young Partnership Ltd* (HL) [2002] UKHL 17; [2002] Lloyd's Rep IR 555
*Cox v Bankside Members Agency Ltd* (CA) [1995] 2 Lloyd's Rep 437
*Genesis Housing Association Ltd v Liberty Syndicate Management Ltd* (CA) [2013] EWCA Civ 1173; [2014] Lloyd's Rep IR 318
*Hopewell Project Management Ltd v Ewbank Preece Ltd* (QBD) [1998] 1 Lloyd's Rep 448
*Indian Endurance and The Indian Grace*, The, see *Republic of India v India Steamship Co Ltd*
*ING Bank NV v Ros Roca SA* (CA) [2011] EWCA Civ 353
*Involnert Management Inc v Aprilgrange Ltd and Others* (QBD (Comm Ct)) [2015] EWHC 2225 (Comm); [2015] 2 Lloyd's Rep 289
*Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd* (HL) [2003] UKHL 48; [2003] Lloyd's Rep IR 623;
*PIP Breast Implant Litigation*, The, see *XYZ v Various (The PIP Breast Implant Litigation)*
*R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* (CA) [2008] EWCA Civ 642
*Rainy Sky SA v Kookmin Bank* (SC) [2011] UKSC 50; [2012] 1 Lloyd's Rep 34; [2011] 1 WLR 2900
*Republic of India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No 2)* (HL) [1998] 1 Lloyd's Rep 1; [1998] AC 878
*Scott v Copenhagen Reinsurance Co (UK) Ltd* (CA) [2003] EWCA Civ 688; [2003] Lloyd's Rep IR 696
*Selby Paradigm*, The (QBD (Admlty Ct)) [2004] EWHC 1804 (Admlty); [2004] 2 Lloyd's Rep 714
*Starbev GP Ltd v Interbrew Central European Holdings BV* (QBD (Comm Ct)) [2014] EWHC 1311 (Comm)
*Ted Baker plc and Another v Axa Insurance UK plc and Others* (QBD (Comm Ct)) [2012] EWHC 1406 (Comm); [2013] Lloyd's Rep IR 174
*Tonicstar Ltd v Allianz Insurance plc and Another* (CA) [2018] EWCA Civ 434
*Torreiro v AIG Europe Ltd* Case C-334/16 (CJEU) [2018] Lloyd's Rep IR Plus 18
*Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd* (CA) [2008] EWCA Civ 286; [2008] Lloyd's Rep IR 617
*Vnuk v Zavarolvalnica Triglav dd* Case C-162/13 (CJEU) [2015] Lloyd's Rep IR 142
*Wood v Perfection Travel Ltd* (CA) [1996] LRLR 233
*XYZ v Various (The PIP Breast Implant Litigation)* (QBD) [2013] EWHC 3643 (QB); [2014] Lloyd's Rep IR 431


© Informa UK plc 2018. No copying or sharing of this document is permitted. Enquiries: clientservices@i-law.com

# Our Insurance and Reinsurance Law subscription package

Insurance & Reinsurance on i-law.com is the premium online research resource, combining essential insurance law publications such as *Lloyd's Law Reports: Insurance & Reinsurance* and *Insurance Law Monthly*. We help our customers meet the demands of their clients anywhere in the world, with our combination of intuitive technology and user-friendly functionality. i-law brings you every insurance law report, major reference works and essential books you need in one place to help you make business-critical decisions, minimise risk and win more cases.

**Interact with information in entirely new ways**

- Get instant access to all the key insurance judgments in one place
- Fully searchable and mobile-friendly content
- Save time trawling through irrelevant information


**Key:** Online Email

## Bi-weekly

### Lloyd's Insurance Law Reporter

Court reporting service of important new judgments. *Lloyd's Insurance Law Reporter* service is available online and for email delivery, and includes "early headnotes" on new decisions handed down.

## Monthly

### Lloyd's Law Reports: Insurance & Reinsurance

Published continuously since 1991, *Lloyd's Law Reports: Insurance & Reinsurance* is the most established and authoritative set of insurance law reports available. Specially selected cases are collected together with commentary from leading industry and legal experts. The full archive of over 26 years of reports on key decisions is digitised in our i-law service.

### Insurance Law Monthly

We guide you through complex cases and legislation, allowing you to identify the key issues and potential impact of court decisions on your organisation. *Insurance Law Monthly* includes key cases plus updates about EU directives, new regulations and current legislation.

### Liability, Risk and Insurance

*Liability, Risk and Insurance* allows you to foresee where your company would stand on legal issues, helps you develop business strategies and aids financial planning by referring to the outcome of similar cases. It offers essential advice on managing liabilities and coping with legal exposure effectively. *Liability, Risk and Insurance* is your comprehensive monthly guide to all the key legal topics affecting the insurance industry, providing you with one dependable source to rely on for all developments affecting your business.

## Twice yearly

### Insurance Broking Practice and the Law

A comprehensive reference source for anyone who needs to understand the role and responsibilities involved in insurance broking. *Insurance Broking Practice and the Law* is a major reference work produced in conjunction with the Insurance and Reinsurance Group at CMS Cameron McKenna.

### Professional Negligence and Liability

Edited by Mark Simpson QC, *Professional Negligence and Liability* brings you step-by-step guidance and analysis on all the legal and practical issues associated with professional negligence, making it an essential part of your library. It provides practical assistance to everyone involved in professional negligence litigation whether as a claimant, defendant, legal advisor or insurer.

### The Law of Insurance Contracts

Providing you with an exhaustive guide to insurance contract law. This includes: coverage of all non-marine insurance contracts from proposal to expiry stage, detailed notes that you can cite in court and full coverage of the UK, plus other major common law jurisdictions. Widely regarded as the premier source on insurance contract law, *The Law of Insurance Contracts* allows you to uncover essential information in minutes in a highly readable, fuss-free manner.

### Reinsurance Practice and the Law

Updated by Clyde & Co LLP, *Reinsurance Practice and the Law* is the definitive reference guide on this subject, designed to offer you sound advice and explanation in every area of reinsurance. Written by specialist reinsurance lawyers from the perspective of the practitioner, *Reinsurance Practice and the Law* concentrates throughout on how the law relates to actual market practice.

## Annually

### *Insurance law in 2017*: a review of developments in case law

This annual review summarises and explains some of the must-know legal developments in insurance and reinsurance law from the past year. Includes key information on developments in relevant legislation, contracts, placement of risk and claims.

To supplement your subscription with print editions, please contact lawsales@informa.com

**Find out more about our best-value bespoke subscription packages:**

about.i-law.com lawsales@informa.com
+44 20 7017 7565 (EMEA) or +65 6508 2428 (APAC)
@maritimelegal

i-law.com
Business intelligence | informa

# Achieve more with Insurance and Reinsurance on i-law.com

i-law.com is your essential online legal companion, combining user-friendly functionality with our quality insurance and reinsurance law content. Our exclusive law library, including Lloyd's Law Reports: Insurance and Reinsurance dating back to 1991, provides the information you need at the right time, anywhere in the world.

Discover the power of i-law.com today at **about.i-law.com**