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Insurance law in 2018: a year in review

By Alison Padfield QC and Miles Harris

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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.

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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.

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

Insurance law in 2018: a year in review

By Alison Padfield QC and Miles Harris

This review considers the most important and interesting legal developments in the field of insurance and reinsurance law in 2018. Key judgments have been selected for analysis, from first instance decisions through to the Supreme Court and the CJEU. Under examination are cases concerning placement of risk, insurance contracts, double insurance and contribution, claims and subrogation. In a fascinating year for insurance law, particularly considering some significant appellate decisions, 2018 ensured the courts had to deal with a wide range of issues, with the promise of an equally interesting and varied 2019.

LEGISLATION

Third Parties (Rights Against Insurers) Act 1930

In *The Cultural Foundation and Another v Beazley Furlonge Ltd and Others*,[1] the Commercial Court returned to the vexed question of set-off under the 1930 Act. The issue was whether insurers were entitled to set off against claimant defence costs payments which they had made under the contract of insurance which were ultimately greater than the share which they were obliged to pay. The decision is of potential relevance where insurers fund defence costs, the damages awarded ultimately exceed the limit of indemnity, and there is a provision in the policy which results in the defence costs being divided between the insurer and the insured in the proportion which the limit of indemnity bears to the ultimate liability.

In *Murray v Legal & General Assurance Society Ltd*,[2] Cumming-Bruce J decided that a right to recover premia did not arise "in respect of" the insured's liability to the third party within the meaning of section 1(1) of the 1930 Act,[3] and that insurers could not therefore set off unrecovered premia against 1930 Act claimants. In the *Cultural Foundation* case, Andrew Henshaw QC (sitting as a judge of the High Court) disagreed with this reasoning. He acknowledged that section 1 of the 1930 Act transferred to any given claimant only such rights against the insurer as pertained to the insolvent insured's liability to that claimant, but said that it did not follow that the Act restricted the grounds on which the insurer was entitled to say that those rights were themselves limited, whether by way of substantive right of set-off or otherwise.[4]

On this basis, the judge concluded that the question of whether a right against the insurer is affected by a right of set-off is determined by the substantive law relating to set-off (ie whether the insurer was entitled to set off the particular liability against the particular claim) rather than by the Act.[5] The judge concluded that, even if the reasoning in *Murray* was correct, this would not in principle preclude a right of equitable set-

1 [2018] EWHC 1083 (Comm); [2019] Lloyd's Rep IR 12.

2 [1969] 2 Lloyd's Rep 405; [1970] 2 QB 495.

3 The reference to section 1(2) of the 1930 Act at para 396 of *The Cultural Foundation* judgment is an error.

4 At para 399. Andrew Henshaw QC recorded at para 394 that he understood from para 89 of Lord Mance's judgment in *International Energy Group Ltd v Zurich Insurance plc UK Branch* [2015] UKSC 33; [2015] Lloyd's Rep IR 598; [2016] AC 509 that legal set-off, as a procedural rather than a substantive right, did not affect the "rights" of the insured transferred under section 1(1) of the 1930 Act or the "liabilities" of the insurer referred to in section 1(4) (and legal set-off was therefore precluded by the statutory transfer under section 1(1)), and that the position was different in relation to equitable set-off or any other substantive form of set-off such as running account set-off. See also the remarks of Phillips J in *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437, at page 451, col 2.

5 At para 401.

off arising from defence cost payments which had been made in excess of the share ultimately due under the contract of insurance – because the defence costs will have been incurred in the defence of the relevant claim.[6]

The judge also said that the words "Upon a transfer" in section 1(4)[7] did not limit the operation of the provision to the position at the time of the statutory transfer but simply introduced what followed as being the consequences of the transfer having occurred. He therefore rejected an argument that the insurer could not offset against a 1930 Act claimant a right of equitable set-off that accrued only after the statutory transfer had occurred.[8]

Third Parties (Rights Against Insurers) Act 2010

In 2018 there were no significant cases under the Third Parties (Rights Against Insurers) Act 2010. There has, however, been further legislative change in that another problem caused by the 2010 Act has been identified and resolved.[9] In claims under the 1930 Act, claimants have to restore defunct companies to the register in order to obtain judgment against them on liability and quantum, which is a necessary precursor to bringing a claim against liability insurers under the 1930 Act. But under the 2010 Act, an insurer may have to pay a third-party claimant without the insured company being restored to the register. The insurer cannot then exercise its subrogated rights unless it restores the insured company to the register. The insurer can apply to do this, but whereas a restoration application by a personal injury claimant could be made at any time (corresponding to the potentially unlimited extension of the primary time limit under the Limitation Act 1980 for damages for personal injury[10]), an application by insurers was subject to a time limit of six years from dissolution. This problem has been addressed by new Regulations[11] made under the 2010 Act. These amend section 1030(1) of the Companies Act 2006 and allow 2010 Act insurers to apply "at any time" to restore a company to the register in order to bring a subrogated claim in respect of the company's liability for damages for personal injury.

Senior Courts Act 1981

XYZ v Travelers Insurance Co Ltd,[12] a case involving a non-party costs order under section 51 of the Senior Courts Act 1981 made against insurers in unusual circumstances, is considered below under the section entitled "Liability insurance".

Consumer Insurance (Disclosure and Representations) Act 2012 and the Insurance Act 2015

It seems that issues under the Consumer Insurance (Disclosure and Representations) Act 2012 continue to be adjudicated on primarily by the Financial Ombudsman Service: 2018 has therefore generated no significant case law on the 2012 Act.[13] Similarly, the wait continues for judgments on any aspect of the Insurance Act 2015, including on damages for late payment.

6 At paras 406 to 407.
7 Section 1(4) provides: "Upon a transfer under subsection (1) or subsection (2) of this section, the insurer shall ... be under the same liability to the third party as he would have been under to the insured ...".
8 At paras 410 to 415.
9 The delay in implementation of the 2010 Act (until 1 August 2016) was due at least in part to earlier problems in the 2010 Act itself.
10 See sections 11 (primary three-year time limit) and 33 (discretionary exclusion of time limit).
11 The Third Parties (Rights Against Insurers) Act 2010 (Consequential Amendment of Companies Act 2006) Regulations 2018 (SI 2018 No 1162).
12 [2018] EWCA Civ 1099; [2018] Lloyd's Rep IR 636.
13 For a decision in the County Court, see *Ageas Insurance Ltd v Stoodley 2018 WL 02024527* [2019] Lloyd's Rep IR 1, judgment of HHJ Cotter QC dated 6 April 2018.

PLACEMENT OF THE RISK

In *Onley v Catlin Syndicate Ltd as the Underwriting Member of Lloyd's Syndicate 2003*,[14] the Federal Court of Australia considered an extension of cover in the management liability and professional indemnity section of a liability policy. The extension, of a type commonly found in D&O policies, provided for the advancement of defence costs for (among other things) criminal or dishonest conduct until such conduct was established by judgment or adjudication or was admitted by the insured. The insured argued that the extension had the effect of excluding the insurer's right to avoid the policy for fraudulent non-disclosure or to reduce the indemnity payable to nil under the applicable Australian legislation.[15]

The court construed the extension against the background of the policy as a whole, including an exclusion for known claims and circumstances, and held that there was no basis to conclude that the cover provided by the extension was granted to the insured on any basis other than that the insured had complied with its duty of disclosure.[16]

The court went on to say that it would in any event have rejected the insured's claim because it would be contrary to public policy, for the reasons articulated by the House of Lords in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank*,[17] to allow a contract of insurance to exclude the insurer's entitlement to avoid the policy on grounds of the insured's own fraudulent non-disclosure.

THE CONTRACT OF INSURANCE

Construction of policy wording

Engelhart CTP (US) LLC v Lloyd's Syndicate 1221 for the 2014 Year of Account and Others[18] saw an optimistic attempt to shoehorn a claim into the policy wording meet a predictably unsuccessful end.

The claimant agreed to buy a quantity of copper ingots. The same day it agreed to sell the ingots and direct shipment to the onward purchaser was arranged. On delivery the onward purchaser opened the containers to find they contained slag. No copper ingots had in fact been shipped and the bills of lading, packing lists and quality certificate were all fraudulent. Unsurprisingly the onward purchaser refused to pay, prompting a claim by the claimant insured under its Marine Cargo and Storage Insurance policy.

The judge construed the policy as a whole and with regard to its overall purpose, and said that the starting point was to acknowledge that the purpose of all risks marine cargo insurance is to cover loss of or damage to property. As no copper had been shipped, there had been no loss or damage to property; any loss was purely economic in nature. Given that all risks marine cargo insurance was not generally construed as covering loss of this type, it would require clear words for such a policy to do so.

Against this background, the judge construed two particular clauses of the policy on which the insured relied, and concluded that they did not entitle it to an indemnity.

14 [2018] FCAFC 119.
15 Insurance Contracts Act 1984.
16 At para 49.
17 [2003] UKHL 6; [2003] Lloyd's Rep IR 230.
18 [2018] EWHC 900 (Comm); [2018] Lloyd's Rep IR 368.

Exclusion clauses

An exclusion clause was the reason *Atlasnavios-Navegação Lda v Navigators Insurance Co Ltd and Others (The B Atlantic)*[19] reached the Supreme Court, although in the event their Lordships dismissed the appeal on the basis that the loss had not been caused by an insured peril.

The facts are by now well known. The insured was the owner of a vessel that in August 2007 was detained by the Venezuelan authorities after an underwater inspection had discovered 132 kg of cocaine strapped to the vessel's hull. It was assumed that the attempted smuggling had probably been carried out by third-party members of a drug cartel. However, after a trial, in August 2010 the master and second officer were of the vessel were both convicted of offences under Venezuelan law prohibiting the trafficking of drugs and the vessel was confiscated under the same legislation.

Meanwhile, the insured had served a notice of abandonment. It was common ground that if the peril that had materialised was within the scope of the cover provided then this notice was effective to constitute the vessel a total loss.

The insured had a war risks insurance policy on the terms of the Institute War and Strikes Clauses Hulls-Time (1/10/83), which provided:

> "1. PERILS
>
> "Subject always to the exclusions hereinafter referred to, this insurance covers loss of or damage to the vessel caused by:
>
> ...
>
> 1.2 capture, seizure arrest restraint or detainment, and the consequences thereof
>
> ...
>
> 1.5 any terrorist or any person acting maliciously or from a political motive
>
> 1.6 confiscation or expropriation.
>
> ...
>
> 3. DETAINMENT
>
> In the event that the Vessel shall have been the subject of capture seizure arrest restraint detainment confiscation or expropriation, and the Assured shall thereby have lost the free use and disposal of the Vessel for a continuous period of 12 months then for the purpose of ascertaining whether the Vessel is a constructive total loss the Assured shall be deemed to have been deprived of the possession of the Vessel without any likelihood of recovery
>
> ...
>
> 4. EXCLUSIONS
>
> This insurance excludes
>
> 4.1 loss damage liability or expense arising from
>
> ...
>
> 4.1.5 arrest restraint detainment confiscation or expropriation ... by reason of infringement of any customs or trading regulations
>
> ..."

The parties had agreed that the insured's claim was, subject to the exclusion, covered under clause 1.5 on the basis that the loss of the vessel was caused by third parties "acting maliciously". On this basis, the insured argued that clause 4.1.5 was not effective to exclude a claim in respect of a peril that fell within clause 1.5 but only applied to claims in respect of perils covered under clauses 1.2 and 1.6.

However, the Supreme Court took the analysis back a step and asked whether it was right that the vessel had in fact been lost as the act of "any person acting maliciously". In considering the meaning to be given to the phrase "any person acting maliciously" in the policy, Lord Mance[20] started by observing that it had to be seen in context. The clause referred to damage caused by "any terrorist or any person acting maliciously or from a political motive", meaning that the companions in the relevant phrase were terrorists and persons acting from a political motive, from which it appeared the drafters had in mind "persons whose actions are aimed at causing loss of or damage to the vessel, or

[19] [2018] UKSC 26; [2018] Lloyd's Rep IR 448.

[20] With whom Lords Sumption, Hughes, Hodge and Briggs agreed.

it may well be, other property or persons as a by-product of which the vessel is lost or damaged".[21] Applying this to the facts of the case, it could be seen that there was no such aim. Although there was a risk of the drugs being detected, their detection and the loss of the vessel were the "exact opposite of the unknown smugglers' aim".[22]

Lord Mance also held that because clause 1.5 was taken from the Institute War and Strikes Clauses, it had to be read in the context of established authority, particularly at the time it was drafted and, on 1 October 1983, issued. He expressed the view that against those authorities the concept of "any person acting maliciously" in clause 1.5 would have been understood in 1983 and should now be understood as relating to "situations where a person acts in a way which involves an element of spite or ill-will or the like in relation to the property insured or at least to other property or perhaps even a person, and consequential loss of, or damage to, the insured vessel or cargo … In the present case, foreseeable though the vessel's seizure and loss were if the smuggling attempt was discovered, the would be-smugglers cannot have had any such state of mind."[23]

Given the conclusion that clause 1.5 was not apt to cover the loss of the vessel, it was not strictly necessary for the Supreme Court to deal with the arguments on exclusion clause 4.1.5.

However, Lord Mance proceeded to find that even if clause 1.5 had prima facie covered the loss of the vessel, clause 4.1.5 would have been effective to exclude such liability, and in doing so made some remarks of general importance about causation of loss and the interplay between insuring and exclusion clauses in contracts of insurance.

Counsel for the shipowners argued that the malicious act, rather than the infringement of the customs regulations, fell to be regarded as the proximate, effective or real cause of the loss. Lord Mance rejected this submission for several reasons. First, the malicious act was the infringement of the customs regulations: there was no distinction between them.

Secondly, even if there was a meaningful distinction, it did not follow that this gave rise to a binary choice between two competing proximate, real or effective causes of the insured loss. What was required instead was an exercise in construction of the particular wording, giving effect at each stage to the natural meaning of the words in their context. As a matter of construction, the analysis of the clauses fell into three stages. The first stage, if clause 1.5 was capable of applying at all, was that there was a loss caused by someone acting maliciously. Assuming that there was such a loss, the second stage was that the means by which the loss arose was the vessel's consequent detainment and the fact that this lasted for a continuous period of six months. Only on this basis could the insured treat the vessel as a constructive total loss under clause 3. The third stage involved the question of whether such detainment was by reason of any infringement of custom regulations within clause 4.1.5.

> While the general aim in insurance law is to identify a single, real, effective or proximate cause of any loss, the correct analysis in some cases is that there are two concurrent causes, and that this is especially so where an exceptions clause takes certain perils out of the prima facie cover

Lord Mance said: "At each stage, different factors are introduced, and are capable of shifting the focus of attention. In *Royal Greek Government v Minister of Transport (The Ann Stathatos)* (1949) 83 Ll L Rep 228, page 237 col 1 (as I noted in *ENE Kos 1 Ltd v Petroleo Brasileiro SA (The*

21 At para 14.
22 At para 14.
23 At para 22.

Kos) (No 2) [2012] 2 Lloyd's Rep 292; [2012] 2 AC 164, para 43) Devlin J pointed out that the existence of an exceptions clause is itself likely to affect what falls to be regarded as dominant, proximate or relevant; and that this is because 'the whole of what one might call the area naturally appurtenant to the excepted event must be granted to it'. In the present case, it makes it possible that a loss may both be caused by a person acting maliciously within clause 1.5 and at the same time arise from detainment by reason of infringement of customs regulations within clause 4.1.5. The scheme of the Clauses directs attention first to whether there was prima facie a loss by a specified peril and then to whether the same loss arises from an excepted peril. The transition from the question whether there was a loss caused by a malicious act to the question whether the loss arose from detainment by reason of infringement of customs regulations is furthermore inevitable, since owners have to rely on clause 3 to establish any case of constructive total loss at all."

Lord Mance said that while the general aim in insurance law is to identify a single, real, effective or proximate cause of any loss, the correct analysis in some cases is that there are two concurrent causes, and that this is especially so where an exceptions clause takes certain perils out of the prima facie cover.[24] In the present case, if the attempted smuggling constituted a malicious act within clause 1.5 at all, this was at best only one element in the causative events leading to the loss which was relevant under the wording of the policy; detection, detainment and its continuation for a period of time were equally essential contributing causes of any loss. Lord Mance rejected the shipowner insured's argument that the detainment and its continuation were no more than incidents or sequela to the original malicious act, saying that such an approach was unreal as they were by no means bound to occur.

Lord Mance acknowledged that there were cases where one peril will dominate and exclude from relevance a later development which taken by itself might otherwise be seen as engaging an exception, including examples given by Flaux J at first instance, one of which was that a malicious party plants drugs in order to blackmail the owners and when they refuse to pay informs the authorities about the drugs, leading to the vessel's seizure. He also referred to the well-established principle that where an insured loss arises from the combination of two causes, one insured, the other excluded, the exclusion prevents recovery.[25] Here, he said, the two potential causes were the malicious act and the seizure and detainment. The malicious act would not have caused the loss without the seizure or detainment. It was the combination that was fatal. The seizure and detainment arise from the excluded peril of infringement of customs regulations and so the insured owner's claim failed.

Warranties/conditions precedent

In *Wheeldon Brothers Waste Ltd v Millennium Insurance Co Ltd*,[26] Jonathan Acton Davis QC (sitting as a judge of the High Court) construed some phrases commonly debated in claims arising from fire damage. The judge found that a fire at a waste processing plant had been caused by the combustion of waste material that had entered some of the machinery at the plant after a bearing had failed, causing the misalignment of a conveyor belt. Among other lines of defence, insurers asserted that the insured had breached: (i) both a condition precedent requiring "combustible" waste materials to be "stored" at least 6 m from any fixed plant and machinery and a warranty that "combustible" stock and/or wastes would be removed from the plant's picking station and hopper when the business was closed; and (ii) a condition

[24] Referring to *ENE Kos 1 Ltd v Petroleo Brasileiro SA (The Kos) (No 2)* [2012] UKSC 17; [2012] 2 Lloyd's Rep 292; [2012] 2 AC 164 and *Zurich Insurance plc UK Branch v International Energy Group Ltd* [2015] UKSC 33; [2015] Lloyd's Rep IR 598; [2016] AC 509, para 73.

[25] Referring to P *Samuel & Co Ltd v Dumas* [1924] AC 431, page 467 (Lord Sumner) and *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corporation Ltd* [1973] 2 Lloyd's Rep 237; [1974] QB 57.

[26] [2018] EWHC 834 (TCC); [2018] Lloyd's Rep IR 693. The Court of Appeal refused permission to appeal: [2018] EWCA Civ 2403; [2019] Lloyd's Rep IR Plus 2.

precedent requiring machinery maintenance and housekeeping standards, together with "formal records" of the maintenance and "formal contemporaneous records" of the housekeeping, to be recorded in a log book and signed.

As to the word "combustible", used in the condition precedent and the warranty, the judge held that it was to be given the meaning which would be understood by a layperson without relevant technical expertise. He illustrated this by reference to examples used by the parties' experts, saying that a layperson would not consider diamonds and metals to be combustible. Therefore, even if it might be that some of the wastes were in fact combustible in the light of expert evidence, that did not necessarily mean they were combustible for the purposes of the policy. He stated that "if the underwriters had intended 'combustible' to have a meaning other than that understood by a layperson interpreting the Policy, it was for underwriters to make that express in the Policy".[27]

As to the meaning of "stored" used in the condition precedent, insurers sought to place reliance upon the fact that material would as part of and during the process be placed near the machinery and left there. However, the judge held that storage imported a "degree of permanence and a deliberate decision to designate an area to place and keep material".[28] This was to be contrasted with a process which involved materials being "incidentally placed from time to time and removed from time to time; for example at the beginning of the process, the waste material is placed on the floor near the first shredder and then this is put within the shredder. That is not a storage area, that is just part of the process".[29]

Finally, the judge found that the records that were maintained in the form of daily and weekly checklists for maintenance and housekeeping (supported by a works diary in the former case) were sufficiently formal to comply with the condition precedent, again observing that: "If insurers have required records to be kept in some particular format, it was for them to prescribe that format in their draftsmanship of the Policy".[30] The case is another reminder that insurers must make clear what they require an insured to do in order to comply with a condition precedent or warranty and should not expect any assistance from the court if they do not.

Spire Healthcare Ltd v Royal & Sun Alliance Insurance plc[31] is considered further below in relation to aggregation clauses, but the decision is also of interest as a reminder of some essential principles of construction of insurance contracts. The Court of Appeal[32] said that the starting point was to consider the combined effect of the relevant provisions without giving greater weight to either the schedule or the relevant clause in the policy wording, and that in approaching the issue of construction, the court assumes that a reasonable reader of the policy has the characteristic of a sophisticated assured who is assisted by professional advice, and does not confine his or her reading of the policy to the limits of indemnity contained in the schedule.

The Court of Appeal said, next, that in construing a contract of insurance, the court seeks to give effect to all the words of the policy that bear on the issue, and that doubtless clearer words in the proviso would have put its meaning beyond doubt, but the court construes the contract as it is and not as it might have been drafted: in almost any dispute over contractual terms, a party can argue that a contentious term could have been better expressed to achieve the effect that the other party avows.

Finally, having arrived, by the construction exercise, at the meaning of the relevant provisions, the court said that there was no real doubt or uncertainty, or ambiguity, and therefore no room for the operation against insurers of the principle of construction contra proferentem.

27 At para 86.
28 At para 79.
29 At para 78.
30 At para 125.
31 [2018] EWCA Civ 317; [2018] Lloyd's Rep IR 425.
32 Simon LJ gave a substantive judgment and Sir Geoffrey Vos, Chancellor of the High Court, agreed.

INSURANCE CLAIMS

Aggregation

In *Spire Healthcare Ltd v Royal & Sun Alliance Insurance plc*,[33] the Court of Appeal made short work of an appeal against the first instance decision of HHJ Waksman QC (now Waksman J) in the Commercial Court.[34] The case is considered above in relation to its discussion of principles of contractual construction. In relation to aggregation, the case is unusual because it did not concern the construction of an aggregation clause and its application to the facts, but whether the clause in question was intended to operate as an aggregation clause at all.

The policy schedule provided that the limit of indemnity was £10 million any one claim and £20 million in respect of all damages costs and expenses arising out of all claims during the period of insurance. The schedule therefore expressly addressed the limit of indemnity for one claim (£10 million) and in the aggregate (£20 million). The policy wording included a clause (a proviso) which applied the limit of indemnity to all claims "consequent on or attributable to one source or original cause" but which neither identified which of the two limits of indemnity was to apply, nor did it provide expressly that the result of its application was that multiple claims should be treated as a single claim for the purposes of application of the limit of indemnity.

The Court of Appeal referred to earlier authorities and said that, depending on the circumstances, aggregation clauses may operate in favour of the insured or of the insurer, so that the court does not approach their construction with a predisposition either to confine or to broaden their effect, and that the purpose of aggregation clauses is to enable two or more separate losses covered by the policy to be treated as a single loss for deductible or other purposes when they are linked by a unifying factor of some kind.

As a matter of construction, the court concluded that the words of the proviso were plainly words of aggregation because the "unifying factor" was identified and it linked the claims and stated that the limit of indemnity in respect of such linked claims was not to exceed the limit of indemnity. Although the specific limit of indemnity (£10 million or £20 million) was not referred to, the court said that the two parts of the proviso, read with the schedule, created a coherent scheme for the total amounts payable in respect of three categories of claim: £10 million for a single claim; £10 million for multiple claims which were consequent upon or attributable to one source or original cause (pursuant to the aggregation wording in the proviso); and £20 million for all claims irrespective of their sources or original cause.

The decision of Stevenson J in *Bank of Queensland Ltd v AIG Australia Ltd*[35] in the Supreme Court of New South Wales is of interest because it concerned the application of an aggregation clause to claims in a class action against a bank which arose out of a Ponzi scheme, and a consideration of the meaning of a "series of related" wrongful acts. The insured bank had settled the claims for AUS$6 million, and claimed an indemnity under a liability policy which was subject to a deductible of AUS$2 million each and every claim. The bank was therefore seeking to aggregate the claims so that a single deductible applied. If there were multiple claims, the effect of the application of the deductible would be that the insurers would have no liability to indemnify the bank in respect of the claims.

The policy contained definitions of "claim" and "wrongful act", and an aggregation clause which provided that all claims arising out of, based on or attributable to one or a series of related wrongful acts would be considered to be a single claim, and that where a claim involved more than one unrelated wrongful act, each unrelated wrongful act would constitute a separate claim. The judge referred to this as being an aggregation

[33] [2018] EWCA Civ 317; [2018] Lloyd's Rep IR 425.
[34] [2016] EWHC 3278 (Comm); [2017] Lloyd's Rep IR 118.
[35] [2018] NSWSC 1689; [2019] Lloyd's Rep IR Plus 9.

and (adopting the language of the parties) disaggregation clause, but in practice the second limb of the clause merely confirms the effect of the first, and does not have any independent sphere of operation.

The judge analysed the proceedings and decided that there were 192 claims. He drew on the English and Australian authorities and said that for events to be a "series" they must in a "sufficient degree" be "similar in nature",[36] have more than "mere contiguity of time and place" and share an "integral relationship",[37] and be in "temporal succession" and "be one of a kind or have some characteristics in common".[38] The judge referred to sources including *AIG Europe Ltd v Woodman and Others*[39] and concluded that for the wrongful acts to be "related", "there must be some interconnection"[40] between them, or a "logical or causal connection".[41] He did not grapple with the question of what, if anything, the requirement that the wrongful acts form a "series of related" wrongful acts added to the requirement that they form a "series" or be "related".

The alleged wrongful acts were withdrawals from deposit accounts provided by the bank. Stevenson J concluded that although the claims arose out of a single fraudulent Ponzi scheme, the aggregation clause required the claims to form a series and be related at the level of the alleged wrongful acts, and that this required a connection or link at a level lower than that of the overarching fraudulent scheme. On this basis, he said, it might be possible to aggregate some groups of claims; but this did not assist the bank because it would not result in the aggregated claims exceeding the applicable deductible.

Liability insurance

Claims control clauses

Ramsook v Crossley,[42] an appeal to the Privy Council against a decision of the Court of Appeal of Trinidad and Tobago, is a useful reminder of lawyers' duties when acting for both insurer and insured. A claim against an insured driver substantially exceeded the limit of indemnity under her policy of insurance. Lord Mance, giving the judgment of the Privy Council, said that an insurer was entitled under a claims control clause[43] to take over and conduct the defence and settlement of the claim, to retain an attorney on her behalf for that purpose, and to have full discretion in settlement. But, he added, a claims control clause was not carte blanche to insurers to conduct proceedings in their own interests, without regard to reality or to the insured's account of events or to the fact that the claim was likely severely to affect the insured as well as the insurer, and that that was clear from *Groom v Crocker*[44] as well as from later authority such as *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (Nos 2 and 3)*.[45]

Lord Mance said that, on the face of it, the conduct of the insurer and/or the attorney fell very seriously short in failing to take proper instructions from the insured and failing to keep her informed as to the proceedings which were being conducted in her name and her potentially very large exposure: they ought at least to have ascertained and considered the insured's position, with a view to deciding whether it was appropriate simply to admit liability on her behalf, and they ought also to have kept her informed about the continuing

36 At para 145, referring to *Distillers Co (Bio-Chemicals) (Australia) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1, page 21 (Stephen J).
37 At para 145, referring to *Attorney General v Cohen* [1937] 1 KB 478 (Greene LJ).
38 At para 145, referring to *Ritchie v Woodward* [2016] NSWSC 1715, para 587 (Emmett AJA). Emmett AJA's remarks were themselves based on the remarks of Stephen J as to the meaning of "series" in the *Distillers* case.
39 [2017] UKSC 18; [2017] Lloyd's Rep IR 209. For further, see *Insurance law in 2017: a year in review*.
40 *AIG Europe Ltd v Woodman*, para 22.
41 *American Automobile Insurance Co v Grimes* 2004 US Dist LEXIS 1696, paras 6 to 7.
42 [2018] UKPC 9; [2018] Lloyd's Rep IR 471.
43 The clause provided: "No admission offer promise or payment shall be made by or on behalf of the Insured without the consent of the Company which shall be entitled if it so desires to take over and conduct in the Insured's name the defence or settlement of any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in the settlement of any claim and the Insured shall give all such information and assistance as the Company may require". Similarly-worded clauses are common in English policies of insurance.
44 (1938) 60 Ll L Rep 393; [1939] 1 KB 194.
45 [2001] EWCA Civ 1047; [2001] Lloyd's Rep IR 667; [2001] 2 All ER (Comm) 299.

progress of proceedings which would severely expose her financially. Bearing in mind the insurer and the attorney's actual and apparent authority deriving from the claims control clause, any complaint which the insured had on this score was between her and her insurer and/or the attorney, but could not affect the position of the claimant, who was pursuing proceedings unsuspecting of any such breach of duty.

Lord Mance did not elaborate on the nature of the insured's potential claim against the insurer, which did not arise for decision, but a breach of the duty of good faith does not give rise to damages but only to the right to avoid the policy of insurance.[46] The only realistic possibility of damages would therefore be in a claim against the attorney, subject to proof of causation and quantum in the usual way.

Notification of circumstances

In *Euro Pools plc v Royal and Sun Alliance Insurance plc*,[47] Moulder J considered whether a claim arose out of a circumstance which had been notified to an earlier policy. The judge referred to *Kajima UK Engineering Ltd v The Underwriter Insurance Co Ltd*[48] and decided that although the insured had known of a problem at the date of the earlier notification, it had not at that stage known, and had therefore not been able to notify to insurers, its cause or extent. A later notification once the cause and extent of the problem was known did not therefore arise out of the first notification. This meant that different aspects of the problem were notified to different policies, and that the insured had the benefit of the £5 million limit of indemnity under each policy. The Court of Appeal granted permission to appeal against this aspect of the decision, which was fixed for hearing in January 2019.

In *The Cultural Foundation and Another v Beazley Furlonge Ltd and Others*,[49] Andrew Henshaw QC (sitting as a judge of the High Court) considered the unusual situation of a claims made policy which did not exclude previously notified circumstances. He decided that, provided that proper pre-contractual disclosure was made, the insured was able to place cover on a claims made basis for a later year and rely on such cover if claims were then made during that later year.

> *The Cultural Foundation v Beazley Furlonge* reviews the authorities on the meaning of terms in claims made policies which require that a claim "arises out of" a notified circumstance, or that the circumstance "gives rise to a claim", in order for a later claim to relate back to the notification and thereby attach to the earlier policy

The judgment also contains a useful review of the authorities on the meaning of terms in claims made policies which require that a claim "arises out of" a notified circumstance, or that the circumstance "gives rise to a claim", in order for a later claim to relate back to the notification and thereby attach to the earlier policy.

D&O insurance

In *Onley v Catlin Syndicate Ltd as the Underwriting Member of Lloyd's Syndicate 2003*,[50] the Federal Court of Australia considered an extension of cover, in the management liability and professional indemnity section of a liability policy, of a type commonly found in D&O policies. The case is considered above under the section entitled "Placement of the risk".

46 See *Banque Financière de la Cité SA (formerly Banque Keyser Ullman SA) v Westgate Insurance Co Ltd* [1990] 2 Lloyd's Rep 377; [1991] 2 AC 249.
47 [2018] EWHC 46 (Comm); [2018] Lloyd's Rep IR 575.
48 [2008] EWHC 83 (TCC); [2008] Lloyd's Rep IR 391.
49 [2018] EWHC 1083 (Comm); [2019] Lloyd's Rep IR 12.
50 [2018] FCAFC 119.

Costs against non-parties under section 51 of the Senior Courts Act 1981

In *Travelers Insurance Co Ltd v XYZ*,[51] the Court of Appeal upheld an order for costs made against a liability insurer as a non-party under section 51 of the Senior Courts Act 1981. Orders for costs are sometimes made against liability insurers and the principles which apply are relatively well-established, but the circumstances here were unusual. The order was made against the background of a Group Litigation Order ("GLO") in the PIP breast implant litigation. The insured went into insolvent administration and was therefore unable to pay any adverse costs bill for uninsured claims. The effect of the GLO was that the more uninsured claims which were pursued, the lower the proportion which the insurer would have to contribute to the insured's liability for common costs. This "asymmetry" was the core reason why the Court of Appeal ordered the insurers to pay costs as a non-party. But the Court of Appeal also said that the principle that non-disclosure of the insurance position is not a reason to order the insurer to pay costs under section 51,[52] did not apply, for several reasons.

First, it was not alleged in *Cormack v Excess*, the case which established that principle, that the failure to disclose the cover limit had any causative effect on costs, whereas in *Travelers v XYZ* the judge was satisfied that, if the lack of insurance had been disclosed, costs would not have been incurred. Secondly, the non-disclosure in *Cormack v Excess* was the cover limit, whereas the non-disclosure in *Travelers v XYZ* was the non-existence of any insurance at all. And finally, the policy itself and the applicable pre-action protocols in *Travelers v XYZ* required any response to a letter of claim to include details of the insurance policy.

These points all rely implicitly on the existence of the GLO: without the GLO, they would not have applied. The GLO gave rise to the asymmetry in relation to the recoverability of costs, which was the factor on which the court relied most strongly; and it also gave rise to a conflict of interest between insurers and the insured about the desirability of disclosing the fact that some of the claims were uninsured, and in turn to flawed advice given to the insured by the legal team not to disclose that fact. The GLO formed the basis for the trial judge's case management decision that the insured should provide her with information about its insurance position. The GLO also resulted in the common issues of both insured and uninsured claims being tried together, so that the insurers were funding the costs of defending all the claims, including the uninsured claims.

The Court of Appeal said that, against this background, although the information about the insurance position provided to the judge was not disclosed to the parties, it must have been obvious to the insured and to insurers that the perception of the uninsured claimants was that all of the underlying claims were insured. In these circumstances, it is unsurprising that the Court of Appeal decided that "on balance" the flawed advice given by the legal team appointed by the insurers in relation to the disclosure of the insurance position was relevant to the insurers' liability for costs, although not decisive, and that it was not unjust for the insurers to bear some responsibility for the advice given under the joint retainer.[53]

On 13 December 2018 the Supreme Court heard argument in *UK Insurance Ltd v R&S Pilling (trading as Phoenix Engineering)* on the vexed question of the meaning of "use" of a vehicle under the compulsory insurance requirements of section 145(3) of the Road Traffic Act 1988 and the EU Directive on motor insurance.[54] In *UK Insurance*, the owner of a car accidentally set fire to it while repairing it, causing extensive damage to property. The Court of Appeal held

51 [2018] EWCA Civ 1099; [2018] Lloyd's Rep IR 636. The Supreme Court has granted permission to appeal and a hearing is listed for 11 June 2019.

52 See *Cormack v Excess Insurance Co Ltd* [2002] Lloyd's Rep IR 398, page 406 col 2 (Auld LJ).

53 *Travelers*, at para 45 (Lewison LJ; Patten LJ agreeing).

54 [2017] EWCA Civ 259; [2017] Lloyd's Rep IR 463. 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).

that the insured was using the vehicle, and was therefore covered under his liability insurance, while repairing it.[55] Shortly before the hearing in the Supreme Court, the CJEU decided in *BTA Baltic Insurance Co AS v Baltijas Apdrošināšanas Nams AS*[56] that a passenger opening a car door and causing damage to another parked car in a supermarket car park was "use" of the vehicle within the meaning of the Directive.

Arbitration

In *Tonicstar Ltd v Allianz Insurance plc and Another*,[57] the Court of Appeal overturned Teare J's decision[58] that a barrister was not qualified for appointment as an arbitrator of a reinsurance dispute on the basis the individual did not have "not less than 10 years' experience of insurance or reinsurance" as required by the Joint Excess Loss Committee Clauses ("JELC Clauses").

The Court of Appeal held that the JELC Clauses did not impose any restriction on the way in which the experience of insurance and reinsurance had to be acquired and in particular did not impose any requirement that it had to be gained from working in the industry and could not be acquired from providing legal or other professional services.

In *Halliburton Co v Chubb Bermuda Insurance Ltd and Others*,[59] the Court of Appeal upheld Popplewell J's dismissal[60] of an application to remove an arbitrator pursuant to section 24(1)(a) of the Arbitration Act 1996. The Court of Appeal gave guidance on the application of principles of apparent bias in the context of the acceptance by an arbitrator of appointments in overlapping arbitrations where there was only one common party.

The court accepted that this could give rise to a legitimate concern: the arbitrator could be influenced by submissions and argument in one arbitration without the other party having any knowledge of that, let alone any opportunity to argue against them. The court did not accept that the mere fact of the arbitrator's appointment of these references justified an inference of apparent bias:

> "Arbitrators are assumed to be trustworthy and to understand that they should approach every case with an open mind. The mere fact of appointment and decision making in overlapping references does not give rise to justifiable doubts as to the arbitrator's impartiality. Objectively this is not affected by the fact that there is a common party. An arbitrator may be trusted to decide a case solely on the evidence or other material before him in the reference in question and that is equally so where there is a common party."[61]

Nevertheless, although the 1996 Act sets out no requirements in relation to disclosure, the Court of Appeal held that, like judges,[62] arbitrators should give early disclosure of circumstances which would or *might* lead the fair minded and informed observer, having considered the facts, to conclude there was a real possibility that the tribunal was biased (or, in the language of section 24 of the 1996 Act, give rise to justifiable doubts as to the arbitrator's impartiality).

The court said that the test for apparent bias is the same for arbitral tribunals, and the practical advantages of early disclosure are just as important, as in court proceedings. If disclosure of this kind is not made then it will be a factor to take into account when considering an issue of apparent bias, since failure to disclose

55 [2017] EWCA Civ 259; [2017] Lloyd's Rep IR 463. For further on this judgment see *Insurance law in 2017: a year in review*.
56 Judgment of the CJEU on 15 November 2018, Case C-648/17; [2019] Lloyd's Rep IR Plus 10.
57 [2018] EWCA Civ 434; [2018] Lloyd's Rep IR 221.
58 [2017] EWHC 2753 (Comm); [2018] 1 Lloyd's Rep 229. For further on this judgment see *Insurance law in 2017: a year in review*.
59 [2018] EWCA Civ 817; [2018] Lloyd's Rep IR 402.
60 [2017] EWHC 137 (Comm).
61 *Halliburton* (CA) at para 51.
62 See *Almazeedi v Penner* [2018] UKPC 3.

something that should have been disclosed will mean an arbitrator has not displayed the badge of impartiality, and an inappropriate response to a suggestion that disclosure ought to have been made could have the same effect. However, the Court of Appeal emphasised that non-disclosure of a fact or circumstance which should have been disclosed but did not in fact, on examination, give rise to justifiable doubts as to the arbitrator's impartiality cannot in and of itself justify an inference of apparent bias; "something more" was required.[63] On the facts of *Halliburton v Chubb*, the Court of Appeal held that "something more" was not present.

In *Haven Insurance Co Ltd v EUI Ltd (trading as Elephant Insurance)*,[64] the Court of Appeal confirmed the approach to the test under section 12(3)(a) of the Arbitration Act 1996 for an extension of time for bringing arbitral proceedings. Section 12(3)(a) of the Act provides that: "The court shall make an order only if satisfied (a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time". It was common ground that the approach to section 12 was that laid down by Waller LJ in *Harbour & General Works Ltd v Environment Agency*:[65]

> "[T]he section is concerned not to allow the court to interfere with a contractual bargain unless the circumstances are such that if they had been drawn to the attention of the parties when they agreed the provision, the parties would at the very least have contemplated that the time bar might not apply – it then being for the court finally to rule as to whether justice required an extension of time to be given".

The court said that "reasonable contemplation" in section 12(3)(a) means "not unlikely".[66]

The Court of Appeal said that the section 12(3)(a) test was prospective and not retrospective: it was framed in terms of the parties' mutual "contemplation", to be assessed at the time "when they agreed the provision in question"; the test is broad and forward looking.[67] The Court of Appeal also referred to the finding made by Knowles J that, while the party serving the late notice knowingly took "some risk", it did so against the "backdrop" of the Motor Insurers' Bureau's widely accepted custom and practice, and that it was therefore just in all the circumstances to extend time, and said that this was a conclusion which the judge was entitled to reach on the particular facts and evidence before him.[68]

Payment of claims

In *Mamancochet Mining Ltd v Aegis Managing Agency Ltd and Others*,[69] Teare J interpreted and applied the Sanction Limitation in the standard wording developed by the Joint Hull Committee and adopted by the Joint Cargo Committee. A claim under a policy arose from theft of two cargoes of steel billets from bonded storage in Iran. It was common ground that payment of the claim would be prohibited as a matter of US law after 23.59 EST on 4 November 2018 due to the re-imposition of US sanctions against Iran.

The defendant insurers resisted the claim on the basis of the Sanction Limitation which provided that: "No (re)insurer … shall be liable to pay any claim … hereunder to the extent that … payment of such claim … would expose that (re)insurer to any sanction prohibition or restriction under … trade or economic sanctions, laws or regulations of the European union, United Kingdom or the United States of America …" In particular, before Teare J some of the insurers contended that they were unable to pay because if they did so then they

63 *Halliburton* (CA) at para 76.
64 [2018] EWCA Civ 2494; [2019] Lloyd's Rep IR 128.
65 [2000] 1 Lloyd's Rep 65, page 81 col 1; [2000] 1 WLR 950, page 960G.
66 *Haven* at para 35, approving *SOS Corporación Alimentaria SA v Inerco Trade SA* [2010] EWHC 162 (Comm); [2010] 2 Lloyd's Rep 345, para 65 (Hamblen J).
67 *Haven* at para 47.
68 At para 61.
69 [2018] EWHC 2643; [2018] Lloyd's Rep IR 655.

were at risk of sanction by the Office of Foreign Assets Control, part of the US Treasury Department. They also maintained that for the purposes of the Sanction Limitation it was sufficient for them to demonstrate that they were merely at risk of such a sanction and that this was what was meant by "exposure" to any sanction in the words of the Sanction Limitation.

With crisp reasoning, Teare J concluded that it was not sufficient for insurers to demonstrate that they were merely at risk of sanction, and that this was not what was meant by "exposure" to any sanction. The language and context of the clause showed that the meaning of the clause which would be conveyed to a reasonable person was that the insurer was not liable to pay a claim where payment would be prohibited under one of the named systems of law and thus "would expose" insurers to a sanction.

Teare J also held that even if payments had been prohibited, the Sanction Limitation only had a suspensory effect, meaning that if the relevant regulations were repealed payment could still be required of insurers.

Fraudulent claims

Insurers are increasingly using civil claims to combat insurance fraud, and 2018 saw two interesting claims for damages. In *UK Insurance Ltd v Gentry*[70] insurers were awarded damages for the tort of deceit after paying out on a road traffic collision claim. After paying out around £100,000 in damages to settle Mr Gentry's claim against their insured, insurers discovered that the two men were friends. Having reviewed the authorities on the standard of proof, Teare J said that the improbability of a person acting fraudulently in the manner alleged against Mr Gentry made it "appropriate to apply a standard not far short of the criminal standard" and that "in order to discharge the burden of proof the Claimant [insurer] must be able to exclude any substantial, as opposed to fanciful or remote, possibility that the collision was genuine. The court must have a very high level of confidence that the Claimant's allegation is true …"[71]

Teare J said that there was rarely direct evidence of fraud, and that where there was no direct evidence of fraud, it can only be inferred from circumstantial evidence. This made it necessary to have regard to all the relevant evidence and the story as a whole, and then to stand back and consider whether the alleged fraud had been made out to the required standard. Having done this, Teare J found for the insurers, going so far as to say he was left in no doubt that the accident had been staged and both Mr Gentry and the insured had then taken steps to hide their friendship lest that gave the game away.

In *Axa Insurance UK plc v Financial Claims Solutions Ltd and Others*,[72] the Court of Appeal allowed an appeal by insurers against a refusal by the first instance judge to award them exemplary damages in respect of what it described as "cynical" and "outrageous" conduct and "abusive behaviour" by "cash for crash" fraudsters. The scheme was certainly audacious. The respondent fraudsters had purported to act for five individuals said to have been involved in accidents caused by the claimant insurer's insureds.

The fraudsters obtained judgment in default and then a writ of execution, after falsely informing the court, first, that proceedings had been served and not answered, and then that enforcement proceedings had been served and not answered. After first learning about the claims when bailiffs attended its premises insurers carried out investigations that revealed the fraud and, after striking out the original claims brought by the fraudsters, obtained an award for compensatory damages against them for deceit and unlawful means conspiracy, based upon the costs insurers had incurred putting things right. However, the first instance judge, HHJ Keyser QC, declined to award exemplary damages, and the insurers appealed.

70 [2018] EWHC 37 (QB).

71 At para 21.

72 [2018] EWCA Civ 1330.

In allowing the insurers' appeal, the Court of Appeal took care to emphasise that exemplary damages remain anomalous and that, therefore, it would be inappropriate to extend the three categories identified by Lord Devlin in *Rookes v Barnard*.[73] However, giving the judgment of the court, Flaux LJ held that this was a paradigm case within the second category identified by Lord Devlin, which encompassed cases where the defendant's conduct was calculated to make a profit for himself which might well exceed the compensation payable to the claimant. Here, the respondents' object was to extract large sums from insurers through fraudulent claims in circumstances where, if the fraud was discovered before it succeeded, any compensatory damages would be limited to the costs of investigating the fraud, which would in all probability be a much lesser sum.

The judge ought to have analysed the matter prospectively by reference to the time when the tort was committed, at which point the tortfeasor was not guaranteed to achieve his objective. This was why in *Broome v Cassell*[74] the House of Lords was quoted to have spoken of "the chances of economic advantage" outweighing "the chances of economic penalty", reflecting what Lord Devlin said about the wrongdoer calculating that the profit "will probably exceed the damages at risk".[75] Further, if the fraud had succeeded then insurers would have paid the claims and the monies would have disappeared, meaning that even if the fraud had been subsequently uncovered, in practice any compensation awarded would be nothing like the profit the fraudsters had achieved.

Unsurprisingly, the Court of Appeal did not calculate damages in a mathematical way. However, it said that in determining the amount of exemplary damages, the sum must be principled and appropriate. Given the need to deter and punish the outrageous conduct and abusive behaviour, the principled basis was to make a punitive award. As the respondents had chosen not to place before the court any evidence as to their means, it was not appropriate to limit the amount of any award by reference to ability or inability to pay. "Given the seriousness of the conduct of the respondents and the need to deter them and others from engaging in this form of 'cash for crash' fraud, which has become far too prevalent and which adversely affects all those in society who are policy holders who face increased insurance premiums …",[76] the Court of Appeal considered that the appropriate award of exemplary damages was that each of the three respondents should be liable to pay £20,000.

The Court of Appeal also held that the existence of criminal proceedings and, in particular, confiscation proceedings, does not affect the award of exemplary damages if otherwise appropriate; nor should the availability of contempt of court proceedings adversely affect the award of exemplary damages if it is otherwise appropriate.

Limitation of actions

In *Euro Pools plc v Royal and Sun Alliance Insurance plc*,[77] Moulder J held that the limitation period for a claim for mitigation costs under a policy of liability insurance runs from the date on which the costs were incurred by the insured. Any action by the insured to recover mitigation costs will therefore be time-barred six years from the date those costs, or any part of them, was incurred. The judge also decided that interim payments made by the insurer on account of mitigation costs had not been validly appropriated by the insured to the time-barred mitigation costs, because it was too late to do so once proceedings had been brought. This carries with it an implication that the interim payments could have been appropriated by the insured prior to issue of proceedings. The judge also held (accepting an argument put forward by counsel for insurers as a secondary case) that any interim payments made within the limitation period should be allocated pro rata between the mitigation costs incurred before and after that date.

73 [1964] AC 1129.
74 [1972] AC 1027.
75 *Axa*, at para 27.
76 At para 35.
77 [2018] EWHC 46 (Comm); [2018] Lloyd's Rep IR 575.

Neither of these steps in the judge's analysis seems correct. The first step in the analysis must be to determine the nature of the interim payments. Were they made without prejudice to the insurers' decision on liability, so that they did not satisfy the cause of action, which was accruing incrementally as mitigation costs were incurred? If so, the insured's cause of action was time-barred, but so was the insurer's right to recover interim payments made more than six years before proceedings were issued.[78]

Alternatively, if the insurer had accepted that it was liable to indemnify the insured and the payments were interim in the sense that the final amount of the indemnity could not yet be calculated while costs continued to be incurred, the interim payments discharged the insured's cause of action as it accrued, save perhaps if a specific element of mitigation costs was approved and paid by insurers out of sequence. The analysis adopted by the judge results in the interim payments being treated as though they were not subject to a limitation period, while the insured's right to an indemnity was subject to a limitation period: this is illogical.[79]

In *R&Q Insurance (Malta) Ltd and Others v Continental Insurance Co*,[80] HHJ Waksman QC (now Waksman J) applied section 29(5) of the Limitation Act 1980[81] to an acknowledgement of a claim under a policy of reinsurance. The judge considered the authorities and concluded that the question under section 29(5) was whether the amounts owing could be ascertained by extrinsic evidence assuming there was an acknowledgement of outstanding indebtedness[82] generally, and that for this purpose an entry in the books of the debtor party could be sufficient. On this basis, there had been acknowledgements within the limitation period which meant that recovery of the sums in question was not statute-barred.

In *RSA Insurance plc v Assicurazioni Generali SpA*,[83] the court had to decide whether section 1(1) of the Civil Liability (Contribution) Act 1978[84] applies to a claim for contribution by one insurer against another – an issue which divided Lords Mance and Sumption in *International Energy Group Ltd v Zurich Insurance plc UK Branch*[85] in obiter (non-binding) remarks. HHJ Rawlings concluded that it does, and that the time limit for bringing such a claim was therefore two years from the date on which the right to contribution accrued.[86] Permission to appeal has been granted, and the appeal was heard in February 2019. One way or another, the issue which divided Lords Mance and Sumption seems destined to reach the Supreme Court for decision – but this time in their absence.[87]

78 See Goff & Jones, *The Law of Unjust Enrichment* (9th Edition, 2016), paras 33-07 and 33-08.

79 Although the Court of Appeal has granted the insured permission to appeal against another aspect of the decision (see "Procedural conditions" above), we understand that this aspect of the judgment is not subject to appeal.

80 [2017] EWHC 3666 (Comm).

81 Section 29(5) provides so far as material: "... where any right of action has accrued to recover (a) any debt or other liquidated pecuniary claim ... and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of the acknowledgment or payment".

82 A claim for an indemnity under a contract of insurance or reinsurance is a claim for damages, and the judge's reference to a debt is no more than convenient shorthand for the wording in section 29(5)(a): "any debt or other liquidated pecuniary claim".

83 [2018] EWHC 1237 (QB).

84 Section 1(1) provides, so far as material: "... any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)".

85 [2015] UKSC 33; [2015] Lloyd's Rep IR 598; [2016] AC 509.

86 See section 10(1) of the Limitation Act 1980. Section 10(2) to (4) make provision for determining the date on which the right accrued: either the date of any judgment or award holding the person liable in respect of the damage (section 10(3)), or the date on which the amount to be paid is agreed (section 10(4)).

87 See "Concluding observations", below.

SUBROGATION

Haberdashers' Aske's Federation Trust Ltd and Another v Lakehouse Contracts Ltd and Another[88] is an important decision of Fraser J.[89] The case involved an application of last year's Supreme Court decision in *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)*,[90] together with legal analysis of whether and how multiple subcontractors become parties to Contractors' All Risks ("CAR") insurance.

The claim arose out of a project to refurbish and extend the existing Victorian buildings of a school run by Haberdasher's Aske's Federation Trust Ltd ("Haberdashers"). To that end, a Local Education Partnership ("LEP"), entered into a Design and Build Contract with the local council under which the LEP was required to carry out the project, and the LEP in turn entered a Design and Build Sub-Contract with a main contractor, Lakehouse Contracts Ltd. LEP's contract with the council required it to take out and maintain project-wide insurance ("the Project Insurance") that: (i) named both the LEP and Haberdashers as insureds; and (ii) contained a subrogation waiver clause in favour of LEP, Haberdashers "and their respective employees and agents, acting properly in the course of their employment or agency". The Project Insurance listed the insured as including Lakehouse and its subcontractors.

To perform the Design and Build Sub-Contract, Lakehouse employed a number of subcontractors including Cambridge Polymer Roofing Ltd ("CPR"). However, CPR's sub-contract ("the Roofing Sub-Contract") expressly provided that it was to indemnify Lakehouse against liability in respect of damage to property due to the act or default of CPR, and CPR was required to obtain its own third-party liability insurance, which it duly did in the sum of £5 million.

"Hot work" carried out by CPR resulted in a fire that caused extensive damage to the buildings, and the Project Insurers pursued a contribution claim against CPR in the name of Lakehouse. CPR maintained that it was a co-insured under the Project Insurance and so entitled to the benefit of the subrogation waiver in that insurance.

CPR argued that it had become a co-insured under the Project Insurance in one of three ways: agency, acceptance of a standing offer or acceptance by conduct. With regard to agency, CPR argued that it had become a co-insured because the Project Insurance had been concluded by Lakehouse acting for CPR as undisclosed principal. Fraser J said there were two important problems with approaching the case before him using the rules of agency. First, it would require CPR to have been capable of being ascertained at the time the Project Insurance was required. Secondly, how could CPR validly ratify if it had no insurable interest at the time the Project Insurance was concluded?

> Insurance policy wording which provides cover to members of a class not ascertainable at the time of contracting is a standing offer made by the insurer to insure persons who are subsequently ascertained as members of a defined grouping

He accepted that the second of these difficulties might be capable of being surmounted on the basis that the relevant date at which an insurable interest must exist is the date of loss. However, he could not see a way around the first of these difficulties, particularly as CPR had an express obligation to provide its own insurance.

88 [2018] EWHC 558 (TCC); [2018] Lloyd's Rep IR 382.
89 The Court of Appeal granted CPR permission to appeal, but the appeal settled before the hearing.
90 [2017] UKSC 35; [2017] Lloyd's Rep IR 291. For further on this judgment see *Insurance law in 2017: a year in review*.

Fraser J held that the correct legal analysis was that insurance policy wording which provides cover to members of a class not ascertainable at the time of contracting is a standing offer made by the insurer to insure persons who are subsequently ascertained as members of a defined grouping. This, he noted, avoids the difficulty of ratification arising from the agency analysis.

However, this did not assist CPR because, applying *Gard Marine*, its agreement to obtain its own insurance under the Roofing Sub-Contract meant there was no scope of saying that it joined the groups defined by the Project Insurance, at least so far as insurance arrangements were concerned, and there was no scope for saying it was an implied term of the Roofing Sub-Contract that CPR would be covered by the Project Insurance. Just like the agency approach, the standing offer approach required one to have regard to the intention of the parties and it was clear from the Roofing Sub-Contract that it was intended that CPR have its own insurance and should not rely on the Project Insurance. Fraser J quoted from Lord Toulson's judgment in *Gard Marine*:[91]

> "The question in each case is whether the parties are to be taken to have intended to create an insurance fund which would be the sole avenue for making good the relevant loss or damage … Like all questions of construction, it depends on the provisions of the particular contract: see for example, *Cooperative Retail Services v Taylor Young Partnership* …"

In the present case, however one approached the matter, the central crux of the case was the clause in the Roofing Sub-Contract by which CPR agreed to obtain its own insurance cover.

Finally, CPR's argument that there had been acceptance by conduct was advanced on the basis that the relevant intention concerning who should be covered by the Project Insurance was that of LEP and the Project Insurers. Fraser J said that this could not be correct because it elevated the intention of LEP and the Project Insurers above the express agreement of Lakehouse and CPR that CPR should obtain its own insurance.

In *Euro Pools plc v Royal and Sun Alliance Insurance plc*,[92] Moulder J considered whether terms should be implied into a policy that, if the insurer brought a subrogated claim, as it was entitled to do pursuant to an express term,[93] the insurer would indemnify the insured for any costs or expenses the insured incurred in relation to such proceedings and in respect of any adverse costs orders made against the insured in the proceedings.

The judge decided that it was not necessary to imply a term that the insurer would indemnify the insured for any costs or expenses incurred because the insurer would discharge the costs. This ignores the fact that the solicitors in the subrogated claim are acting for the insured, albeit subject to the insurer's instructions, and are on the record for the insured. In these circumstances, it is likely that the insured is liable for the solicitors' costs,[94] and the fact that the insurer will, in the normal course of events, discharge the costs so that the insured is never called upon to pay does not mean that a term should not be implied that the insurer will indemnify the insured.

91 At para 139 of Lord Toulson's judgment.

92 [2018] EWHC 46 (Comm); [2018] Lloyd's Rep IR 575.

93 The term provided as follows: "The Company shall be entitled to take over and conduct in the name of the Insured the defence or settlement of any Claim or to prosecute in the name of the insured for its own benefit any Claim and shall have full discretion in the conduct of any proceedings and in the settlement of any Claim".

94 See *Ghadami v Lyon Cole Insurance Group Ltd* [2010] EWCA Civ 767 and the authorities considered by the Court of Appeal. Solicitors had been appointed by insurers under a professional indemnity insurance policy to defend negligence proceedings against the insured, and the solicitors sent a client care letter to the insurers but not the insured. The Court of Appeal held that the insured was nonetheless a client of the solicitors and was liable for the solicitors' costs.

The judge also decided that it was necessary to imply a term that the insurer would indemnify the insured in respect of any adverse costs orders made against the insured in the proceedings but only while the insurer was prosecuting the recovery action and that if the insured terminated its authority to do so, its obligation to indemnify the insured ceased with retrospective effect.

> The fact that the insurer will, in the normal course of events, discharge costs so that the insured is never called upon to pay does not mean that a term should not be implied that the insurer will indemnify the insured

The implication of the term seems correct, but otherwise the reasoning here is difficult to follow. The termination by the insured of the insurer's authority to prosecute the recovery action will either be a breach of contract or it will not. If it is a breach of contract, the relevant question is whether the insurer is entitled to damages for breach of the express term allowing it to prosecute the proceedings. If the termination by the insured is not a breach of contract, there is no reason why any adverse costs order in respect of the costs incurred up to that point should not be paid by insurers.[95]

DOUBLE INSURANCE AND CONTRIBUTION

In *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd*,[96] the Court of Appeal gave reinsurers permission to appeal against a decision of Flaux LJ sitting as a judge-arbitrator.[97] The dispute raises important questions concerning the treatment of mesothelioma claims for the purposes of certain contracts of employers' liability ("EL") reinsurance: (1) whether the insurer is entitled to present each outwards reinsurance claim to any single triggered reinsurance contract of its choice (ie whether it may "spike" the claims); and (2) if so, how the resultant rights of recoupment and contribution, arising from the Supreme Court decision in *Zurich Insurance plc UK Branch v International Energy Group Ltd*[98] are to be calculated. The appeal is fixed to be heard in March 2019.

The decision of Flaux LJ is not public, but according to Gloster LJ in the Court of Appeal, Flaux LJ concluded that the insurer was entitled to "spike" the claims, subject to equitable contribution and recoupment to iron out unfairness and anomalies; and that the decision of the majority in the *Zurich* case demonstrated that the *Barker v Corus (UK) Ltd*[99] apportionment exercise did not come into play in determining the liability of the insurers under the inwards contracts of insurance, and that if the *Barker* apportionment did not affect the joint and several liability of the insurers under each triggered inwards contract, there was "no principled basis for concluding that it should nonetheless dictate the issue of the liability of the reinsurers and, indeed, every principled basis for concluding that it should not".[100]

Reinsurers sought permission to appeal on three questions:[101]

95 Although the Court of Appeal has granted the insured permission to appeal against another aspect of the decision (see "Procedural conditions" above), we understand that this aspect of the judgment is not subject to appeal.

96 [2018] EWCA Civ 991; [2018] Lloyd's Rep IR 377.
97 See section 93 of the Arbitration Act 1996.
98 [2015] UKSC 33; [2015] Lloyd's Rep IR 598; [2016] AC 509.
99 [2006] UKHL 20; [2006] AC 572.
100 *Equitas*, at para 7.
101 See para 17.

"(i) In the event of an insured employee being tortiously exposed to asbestos in multiple years of EL insurance, and the EL insurer settling the employer's claim without allocating the loss to any particular year of exposure, is the EL insurer obliged (in the absence of specific provision for this situation in the corresponding reinsurances) to present any outwards claim in respect of that loss on a pro rata, time on risk basis for the purpose of calculating reinsurance recoveries, either because:

(a) the contribution to the settlement of each engaged policy must by necessary implication be treated as having been on that basis ('question 1'); or

(b) the doctrine of good faith requires the claim to be presented on that basis ('question 2')?

(ii) If the EL insurer is not so obliged, and may present the claim to a single year of his choice, how are the rights of recoupment and contribution acquired by the reinsurers of that year to be calculated ('question 3')?"

Granting permission to appeal, the Court of Appeal was persuaded that the criteria in section 69 of the Arbitration Act 1996 were satisfied in respect of all three questions, including that they were questions of law of general public importance and that the decision of the tribunal on each was open to serious doubt.

Gloster LJ said that, in relation to question 1, she was persuaded that there was a seriously arguable case for treating the insurance and reinsurance positions differently; and that, in relation to question 2, there was force to the submission that, if it was determined that *Fairchild v Glenhaven Funeral Services Ltd*[102] and *Zurich* mean the courts have given the insurer/reinsured a choice as to how to allocate its losses to its reinsurers, there could be some basis for a duty of good faith in order to restrain the manner of exercise of the freedom of choice, which this novel principle has created within this unique reinsurance context and that, contrary to Flaux LJ's determination, this could require the reinsured to allocate his losses in line with the *Barker* principles and the normal common law approach.

In relation to question 3, Gloster LJ identified three potential problems with the tribunal's determination on this issue, and concluded that reinsurers had presented a "strong prima facie case" to support a different method of calculating recoupment and contribution from that determined in the award.

First, as Flaux LJ accepted in his award, there was nothing in the existing authorities, and specifically *Zurich*, which assists on the issue of retentions. This was the major point of dispute in the two alternative methods proposed by the parties. Secondly, there was a strong argument that the position, when it comes to recoupment and contribution in insurance and reinsurance, is different within the *Fairchild* enclave. Thirdly, it was arguable that Flaux LJ was wrong in his conclusion that there is no principled basis for the "top down" approach advocated for by reinsurers. Gloster LJ said that she saw considerable force in the submission that the higher layers of reinsurance in subsequent years should be made good first in any contribution and recoupment process, on the basis that they should always be furthest from the risk.

For an interesting and potentially highly significant case in relation to time limits for a claim for contribution, see *RSA Insurance plc v Assicurazioni Generali SpA*[103] – considered above under "Limitation of actions".

The Australian case *Foster v QBE European Underwriting Services (Australia) Pty Ltd as managing agent for Lloyd's Syndicate 386*[104] is a useful decision on competing "excess" clauses in a situation of double insurance. Each of two policies contained a clause which rendered the insurer liable to indemnify the insured only in excess of the amount not indemnified by the other. Rothman J in the Supreme Court of New South Wales considered

102 [2002] UKHL 22; [2003] 1 AC 32.

103 [2018] EWHC 1237 (QB); [2019] Lloyd's Rep IR Plus 11.

104 [2018] NSWSC 440.

two key English decisions on double insurance, *Gale v Motor Union Insurance Co Ltd*[105] and *Weddell v Road Transport and General Insurance Co Ltd*,[106] and concluded that the competing excess clauses cancelled each other out because "applying the principle outlined in the judgment in *Weddell*, each of those excess clauses creates an absurdity which, when taken together, and giving each policy its ordinary, grammatical and commercial interpretation, requires a construction that the 'other insurance' must be operative and not contain a similar 'excess clause'".[107]

REINSURANCE

In *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd*,[108] the Court of Appeal gave reinsurers permission to appeal in a dispute raising important questions concerning the treatment of mesothelioma claims for the purposes of certain contracts of employers' liability reinsurance: see "Contribution and dual insurance", above.

In *R&Q Insurance (Malta) Ltd and Others v Continental Insurance Co*,[109] HHJ Waksman QC (now Waksman J) heard oral evidence about the placing of contracts of reinsurance more than 35 years earlier, and held that this evidence, together with such documentary evidence as still existed and could be located, proved that a reinsurer had agreed to reinsure 100 per cent of certain risks under a fronting arrangement.

CONCLUDING OBSERVATIONS

Some of the decisions in this review are already under appeal to the Court of Appeal or the Supreme Court. Others will no doubt also be appealed. 2019 promises to be another interesting year in insurance law.

The last few years have yielded a number of Supreme Court decisions with a significant impact on insurance and reinsurance law. But has this been a golden era which is about to come to an end? Lord Mance, Deputy President of the Supreme Court, retired from the court in June 2018, followed by Lord Sumption in December 2018. For the first time, the Supreme Court has no former Commercial Court judge among its members. This contrasts with the four former Chancery Division judges and three former Family Division judges among the eight members of the Supreme Court drawn from the judicial system of England and Wales.

In recent years, the judges for an insurance case before the Supreme Court might have included Lord Mance, Lord Clarke and Lord Toulson, all former Commercial Court judges, and Lord Sumption, who was of course appointed straight to the Supreme Court, but who had extensive experience in Commercial Court cases.[110]

The lack of any former Commercial Court judge on the Supreme Court is unfortunate. If this is not addressed, it may mean permission to appeal is granted in fewer insurance cases and, unless the Supreme Court calls on members of the Supplementary Panel,[111] it will mean judgments at the highest level being reached without the benefit of the legal and practical expertise of judges with experience of practising insurance law as advocates and trying insurance cases at first instance.

105 (1926) 26 Ll L Rep 65; [1928] 1 KB 359.
106 (1931) 41 Ll L Rep 69; [1932] 2 KB 563.
107 *Foster*, at para 97.
108 [2018] EWCA Civ 991; [2018] Lloyd's Rep IR 377.
109 [2017] EWHC 3666 (Comm).
110 For example, in *AIG Europe Ltd v Woodman and Others* [2017] UKSC 18; [2017] Lloyd's Rep IR 209 and *Teal Assurance Co Ltd v W R Berkeley Insurance (Europe) Ltd* [2013] UKSC 57; [2014] Lloyd's Rep IR 56, the constitution included Lords Mance, Clarke, Sumption and Toulson; in *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* [2016] UKSC 57; [2017] Lloyd's Rep IR 60, the constitution included Lords Mance, Sumption and Toulson; and in *Zurich Insurance plc UK Branch v International Energy Group Ltd* [2015] UKSC 33; [2015] Lloyd's Rep IR 598; [2016] AC 509, the original constitution included Lords Mance and Sumption, and Lord Clarke joined the expanded constitution for the reconvened hearing before seven justices.
111 Section 39 of the Constitutional Reform Act 2005 provides for the appointment of a Supplementary Panel upon which the Supreme Court can call when additional judges are needed to form a panel of the requisite number. Members cease to be on the panel after five years of ceasing to hold a qualifying office or (if earlier) when 75 years old. At present, the Panel includes Lords Thomas and Sumption.

Appendix: judgments analysed and considered in this Review

2018 judgments analysed

Ageas Insurance Ltd v Stoodley (Bristol CC) 2018 WL 02024527 [2019] Lloyd's Rep IR 1

Atlasnavios-Navegação Lda v Navigators Insurance Co Ltd and Others (The B Atlantic) (SC) [2018] UKSC 26; [2018] Lloyd's Rep IR 448

Axa Insurance UK plc v Financial Claims Solutions Ltd and Others (CA) [2018] EWCA Civ 1330

Bank of Queensland Ltd v AIG Australia Ltd (NSWSC) [2018] NSWSC 1689; [2019] Lloyd's Rep IR Plus 9

BTA Baltic Insurance Co AS v Baltijas Apdrošināšanas Nams AS (CJEU) Case C-648/17; [2019] Lloyd's Rep IR Plus 10

Engelhart CTP (US) LLC v Lloyd's Syndicate 1221 for the 2014 Year of Account and Others (QBD (Comm Ct)) [2018] EWHC 900 (Comm); [2018] Lloyd's Rep IR 368

Equitas Insurance Ltd v Municipal Mutual Insurance Ltd (CA) [2018] EWCA Civ 991; [2018] Lloyd's Rep IR 377

Euro Pools plc v Royal and Sun Alliance Insurance plc (QBD (Comm Ct)) [2018] EWHC 46 (Comm); [2018] Lloyd's Rep IR 575

Foster v QBE European Underwriting Services (Australia) Pty Ltd as managing agent for Lloyd's Syndicate 386 (NSWSC) [2018] NSWSC 440

Haberdashers' Aske's Federation Trust Ltd and Another v Lakehouse Contracts Ltd and Another (QBD (TCC)) [2018] EWHC 558 (TCC); [2018] Lloyd's Rep IR 382

Halliburton Co v Chubb Bermuda Insurance Ltd and Others (CA) [2018] EWCA Civ 817; [2018] Lloyd's Rep IR 402

Haven Insurance Co Ltd v EUI Ltd (trading as Elephant Insurance) (CA) [2018] EWCA Civ 2494; [2019] Lloyd's Rep IR 128

Mamancochet Mining Ltd v Aegis Managing Agency Ltd and Others [2018] EWHC 2643; [2018] Lloyd's Rep IR 655

Onley v Catlin Syndicate Ltd as the Underwriting Member of Lloyd's Syndicate 2003 (FCAFC) [2018] FCAFC 119

Ramsook v Crossley (PC) [2018] UKPC 9; [2018] Lloyd's Rep IR 471

RSA Insurance plc v Assicurazioni Generali SpA (QBD) [2018] EWHC 1237 (QB); [2019] Lloyd's Rep IR Plus 11

Spire Healthcare Ltd v Royal & Sun Alliance Insurance plc (CA) [2018] EWCA Civ 317; [2018] Lloyd's Rep IR 425

The Cultural Foundation and Another v Beazley Furlonge Ltd and Others (QBD (Comm Ct)) [2018] EWHC 1083 (Comm); [2019] Lloyd's Rep IR 12

Tonicstar Ltd v Allianz Insurance plc and Another (CA) [2018] EWCA Civ 434; [2018] Lloyd's Rep IR 221

Travelers Insurance Co Ltd v XYZ (CA) [2018] EWCA Civ 1099; [2018] Lloyd's Rep IR 636

UK Insurance Ltd v Gentry (QBD) [2018] EWHC 37 (QB)

Wheeldon Brothers Waste Ltd v Millennium Insurance Co Ltd (QBD (TCC)) [2018] EWHC 834 (TCC); [2018] Lloyd's Rep IR 693; (CA) [2018] EWCA Civ 2403; [2019] Lloyd's Rep IR Plus 2

XYZ v Travelers Insurance Co Ltd (CA) [2018] EWCA Civ 1099; [2018] Lloyd's Rep IR 636

Judgments considered

AIG Europe Ltd v Woodman and Others (SC) [2017] UKSC 18; [2017] Lloyd's Rep IR 209

Almazeedi v Penner (PC) [2018] UKPC 3

American Automobile Insurance Co v Grimes 2004 US Dist LEXIS 1696

Attorney General v Cohen (CA) [1937] 1 KB 478

Banque Financière de la Cité SA (formerly Banque Keyser Ullman SA) v Westgate Insurance Co Ltd (HL) [1990] 2 Lloyd's Rep 377; [1991] 2 AC 249

Barker v Corus (UK) Ltd (HL) [2006] UKHL 20; [2006] 2 AC 572

Broome v Cassell (HL) [1972] AC 1027

Cormack v Excess Insurance Co Ltd (CA) [2002] Lloyd's Rep IR 398

Cox v Bankside Members Agency Ltd (CA) [1995] 2 Lloyd's Rep 437

Distillers Co (Bio-Chemicals) (Australia) Pty Ltd v Ajax Insurance Co Ltd (HCA) (1974) 130 CLR 1

ENE Kos 1 Ltd v Petroleo Brasileiro SA (The Kos) (No 2) (SC) [2012] UKSC 17; [2012] 2 Lloyd's Rep 292; [2012] 2 AC 164

Equitas Insurance Ltd v Municipal Mutual Insurance Ltd 7 April 2017, Flaux LJ

Fairchild v Glenhaven Funeral Services Ltd (HL) [2002] UKHL 22; [2003] 1 AC 32

Gale v Motor Union Insurance Co Ltd (KBD) (1926) 26 Ll L Rep 65; [1928] 1 KB 359

Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (Nos 2 and 3) (CA) [2001] EWCA Civ 1047; [2001] Lloyd's Rep IR 667; [2001] 2 All ER (Comm) 299

Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory) (SC) [2017] UKSC 35; [2017] Lloyd's Rep IR 291

Ghadami v Lyon Cole Insurance Group Ltd (CA) [2010] EWCA Civ 767

Groom v Crocker (CA) (1938) 60 Ll L Rep 393; [1939] 1 KB 194

Halliburton Co v Chubb Bermuda Insurance Ltd and Others (QBD (Comm Ct)) [2017] EWHC 137 (Comm)

Harbour & General Works Ltd v Environment Agency (CA) [2000] 1 Lloyd's Rep 65; [2000] 1 WLR 950

HIH Casualty and General Insurance Ltd v Chase Manhattan Bank (HL) [2003] UKHL 6; [2003] Lloyd's Rep IR 230

Impact Funding Solutions Ltd v AIG Europe Insurance Ltd (SC) [2016] UKSC 57; [2017] Lloyd's Rep IR 60

Kajima UK Engineering Ltd v The Underwriter Insurance Co Ltd (QBD (TCC)) [2008] EWHC 83 (TCC); [2008] Lloyd's Rep IR 391

Murray v Legal & General Assurance Society Ltd (QBD) [1969] 2 Lloyd's Rep 405; [1970] 2 QB 495

P Samuel & Co Ltd v Dumas (HL) (1924) 18 Ll L Rep 211; [1924] AC 431

R&Q Insurance (Malta) Ltd and Others v Continental Insurance Co (QBD (Comm Ct)) [2017] EWHC 3666 (Comm)

Ritchie v Woodward (NSWSC) [2016] NSWSC 1715

Rookes v Barnard (HL) [1964] AC 1129

SOS Corporación Alimentaria SA v Inerco Trade SA (QBD (Comm Ct)) [2010] EWHC 162 (Comm); [2010] 2 Lloyd's Rep 345

Spire Healthcare Ltd v Royal & Sun Alliance Insurance plc (QBD (Comm Ct)) [2016] EWHC 3278 (Comm); [2017] Lloyd's Rep IR 118

Teal Assurance Co Ltd v W R Berkeley Insurance (Europe) Ltd (SC) [2013] UKSC 57; [2014] Lloyd's Rep IR 56

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

Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corporation Ltd (CA) [1973] 2 Lloyd's Rep 237; [1974] QB 57

Weddell v Road Transport and General Insurance Co Ltd (KBD) (1931) 41 Ll L Rep 69; [1932] 2 KB 563

Zurich Insurance plc UK Branch v International Energy Group Ltd (SC) [2015] UKSC 33; [2015] Lloyd's Rep IR 598; [2016] AC 509