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Insurance law in 2019: a year in review

By Neil Hext QC and Tom Asquith
NEW SQUARE

Construction of policy wording – Insurance Act 2015 – Marine insurance – Notification – Property – Reinsurance – Road Traffic Act 1988 – Third-party costs orders

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Client Services: Please contact Client Services on tel: +44 (0)20 3377 3996; +65 6508 2430 (APAC Singapore), or email clientservices@i-law.com

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AUTHOR PROFILES

Neil Hext QC 4 New Square

Recognised in the directories as a leading silk in insurance and professional negligence, he has been described as "incredibly talented and great to work with", "ferociously bright, with an excellent eye for detail" and "a very effective advocate" who "provides clear and business-focused advice".

Neil is a highly respected trial advocate with an established appellate practice. He is at home in arbitration as he is in court, and also sits as an arbitrator. He is instructed in international arbitration.

Neil's insurance and reinsurance practice covers the full range of coverage and policy issues, from material damage and business interruption claims, to public and professional liability and D&O claims. He has a particular interest in construction related insurance, including coverage under design and build policies for contractors and contractors all risks cover.

Tom Asquith 4 New Square

Tom has experience of acting as both counsel and as a paper arbitrator in coverage matters. He acts for both policyholders and insurers. He is particularly familiar with reinsurance, professional indemnity and property policies. He has completed a secondment in Mayer Brown LLP's insurance department, helping him to understand insurance cases from an instructing solicitor's perspective.

Tom has also spent time at Lloyd's shadowing underwriters. Chambers & Partners says that Tom "commands a lethal mix of being on top of the detail and great at strategy. He's very good in court and his cross-examination was particularly good." "He's a tenacious advocate and is exceptionally easy to work with."

Legal 500 characterises Tom as "Extremely bright, has a charming manner with clients and is a strong advocate." "Technically strong and applies his advice in a practical manner."

4 New Square

4 New Square is a leading commercial set of barristers chambers based in London. Its members are recognised leaders in a wide range of fields, including commercial dispute resolution, construction and engineering, international arbitration, professional liability, offshore disputes, insurance and reinsurance, and civil fraud.

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INTRODUCTION

2019 has been a busy year in the insurance world. It has seen the first decision considering the duty of fair presentation under the Insurance Act 2015. The Court of Appeal's decision in *Euro Pools*[1] has examined the scope of notification in the context of liability insurance. The seemingly never-ending ripples caused by the asbestos litigation have continued, this time dealing with spiking in the context of reinsurance in *Equitas v MMI*.[2] Meanwhile there have been important Supreme Court decisions in the context of constructive total loss in marine insurance (*The Renos*),[3] third-party costs orders against insurers (*Travelers v XYZ*)[4] and road traffic insurance (*R&S Pilling*[5] and *Cameron*).[6]

This review covers what we consider to be the most significant insurance cases of the year, including most of the major appellate decisions in the area, and many of the first instance decisions dealing with important points of principle.

INSURANCE ACT 2015

Young v Royal and Sun Alliance plc[7] is the first authority to consider the duty of fair presentation under section 3(1) of the Insurance Act 2015. This Scottish case concerned a £7.2 million claim relating to a fire in commercial premises in Glasgow. Insurers declined to meet the claim and sought to avoid the policy, on grounds of non-disclosure by the insured of the fact that he had been a director of four companies that had gone into insolvent liquidation.

> The 2015 Act did not seek to innovate on or alter the existing law on what constitutes waiver in the context of insurance contracts, and thus the test for waiver set out in *Doheny v New India Assurance* remained good law

The insured's broker submitted a presentation of the risk to the insurers. However, the sections in this that might have required disclosure of prior insolvencies were garbled such that no representation could be said to have been made on that question. In providing their quote, the insurers in an email dated 24 March 2017 noted that terms had been based on the presentation and on the basis that "adequate Risk Management features" were in place, which included that the insured "has never … been declared bankrupt or insolvent [or] had a liquidator appointed". The insured argued that by restricting this statement to his own personal position, the insurers had waived any requirement to disclose the position in relation to companies of which he had been a director.

Lady Wolffe held that the 2015 Act did not seek to innovate on or alter the existing law on what constitutes waiver in the context of insurance contracts, and thus the

1 *Euro Pools plc v Royal & Sun Alliance Insurance plc* [2019] EWCA Civ 808; [2019] Lloyd's Rep IR 595.
2 *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718; [2019] Lloyd's Rep IR 359.
3 *Sveriges Angfartygs Assurans Forening (The Swedish Club) and Others v Connect Shipping Inc and Another (The Renos)* [2019] UKSC 29; [2019] Lloyd's Rep IR 415.
4 *Travelers Insurance Co Ltd v XYZ* [2019] UKSC 48; [2019] Lloyd's Rep IR 683.
5 *R&S Pilling (trading as Phoenix Engineering) v UK Insurance Ltd* [2019] UKSC 16; [2019] Lloyd's Rep IR 404.
6 *Cameron v Liverpool Victoria Insurance Co Ltd; Motor Insurers' Bureau (Intervening)* [2019] UKSC 6; [2019] Lloyd's Rep IR 230.
7 [2019] CSOH 32; [2019] Lloyd's Rep IR 482, Court of Session (Outer House).

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test for waiver set out in *Doheny v New India Assurance Co Ltd*[8] – namely, whether a reasonable man reading the proposal (or other relevant communication from the insurer) would be justified in thinking that the insurer had restricted his right to receive all material information, and consented to the omission of the particular information in issue – remained good law.[9]

She held that one needed to approach the waiver authorities with a degree of circumspection where one was dealing with something other than a proposal form. Although the presentation had not made relevant representations about moral hazard, the section in which such representations would, had it not become garbled, have been made referred to the insured "personally or in any business capacity". The 24 March email, which was a response to the presentation, was to be construed in a similar way, ie where the email referred to insolvencies of "the insured", that was to be taken as being qualified by the words "personally or in any business capacity". No reasonable reader of the email would, against that background, have regarded the insurers as having waived disclosure of insolvencies amongst companies of which the insured had been a director.[10] Accordingly, the insured's averments of waiver were held to be irrelevant and the case would proceed to trial on the remaining factual issues.

PROPERTY INSURANCE

Sartex Quilts & Textiles Ltd v Endurance Corporate Capital Ltd[11] involved a policy for cover against loss or destruction of or damage to property caused by various perils including fire. After a fire a claim was made. The conditions in the specific reinstatement clause had not been satisfied, so the measure of indemnity was to be on either a reinstatement or market value basis.

The court held that the insured did not have to show that it had continued to have at trial a genuine, fixed and settled intention to reinstate. The question to ask was what was the loss which has been suffered by the insured, and what measure of indemnity fairly and fully indemnified it for that loss. To answer that question a key focus was the position at the time of and immediately before the fire, but subsequent events may affect the position. As pointed out by Judge Coulson QC (as he then was) in *Tonkin v UK Insurance Ltd*,[12] there did not have to be exact reinstatement. On the facts of this case, the reinstatement basis was appropriate. The case reminds lawyers dealing with similar cases to address the evidence relating to intention to reinstate both before the insured peril as well as afterwards.

Manchikalapati and Others v Zurich Insurance plc and Another[13] involved appeals by the policyholders and cross-appeals by the insurers. The case arose out of a development of flats in Manchester which had been found to be defectively built. The claimants owned leasehold interests in the development and had the benefit of 10-year policies to cover various defects. Between them they owned about 30 of the flats with a sister company of the developer (now in liquidation) owning most of the rest of the 104 flats. That sister company, being related to the developer who had built the defective building, could not recover against the insurers.

At trial, the claimants contended that it would cost about £10 million to put right the defects. However, their claim was limited by a maximum liability cap ("MLC") which limited their right to recover to the total purchase price of the claimants' flats, which was £3.634 million (plus interest).

The claimants argued that the "purchase price declared to us" in the MLC meant the total purchase price of all

8 [2004] EWCA Civ 1705; [2005] Lloyd's Rep IR 251.
9 At para 72.
10 At para 92.
11 [2019] EWHC 1103 (Comm); [2019] Lloyd's Rep IR 615.
12 [2006] EWHC 1120 (TCC); [2007] Lloyd's Rep IR 283.
13 [2019] EWCA Civ 2163; [2020] Lloyd's Rep IR 77.

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flats in the developments, not just the ones they had purchased. The Court of Appeal agreed. The parties' arguments on the detailed language did not particularly sway the court either way, leaving it to focus on the commercial purpose of the policy. As to this, Sir Rupert Jackson noted that whilst the policyholders were only entitled to a *proportionate* share of their costs of repairing "Major Physical Damage to Common parts" in section 3 of the policy, there was no such limitation where there was a present or imminent danger to the health and safety of the occupants. So, a single leaseholder could recover the entire cost of rectifying a present or imminent danger to the physical health and safety of the occupants, for which the court considered there were obvious and sensible reasons.

> The phrase "reasonable cost" in the policy did not refer to a cost which had in fact been incurred, but to an appropriate quantification of sums which the insurers were bound to pay

In their cross-appeal the insurers took various points, all of which failed. One of the arguments, related to the *Sartex*[14] line of authority, was that the claimants could only recover, on the wording of the instant policy, if they had in fact incurred the remedial costs themselves already. Coulson LJ thought that the insurers could, if they wished, limit their liability in that way, but had not done so in this case. The phrase "reasonable cost" in the policy did not refer to a cost which had in fact been incurred, but to an appropriate quantification of sums which the insurers were bound to pay.

Having reviewed the *Sartex* line of authorities Coulson LJ concluded that:

> "The cases show that, depending on the nature and the wording of the insurance policy in question, and depending on the particular facts, the question of intention to rebuild may be a relevant factor when assessing the precise measure of loss."

Sartex is now itself in the Court of Appeal, so it is likely that we have not yet had the last word on this issue.

Palliser Ltd v Fate Ltd and Others[15] raised the question whether the approach established in *Mark Rowlands Ltd v Berni Inns Ltd*[16] applied where it was the landlord which had negligently caused a fire, rather than the tenant. Fate Ltd owned a ground floor restaurant in York Road, London. It also owned the freehold to the building, which included seven flats above the restaurant. The flats were let to Palliser under a 999-year lease. A fire occurred on 1 January 2010, caused by Fate's negligence. Fate insured the building but failed to do so for the full amount, which meant that Palliser had to pick up some of the cost of refurbishment. Palliser sued Fate in negligence, claiming these additional costs together with loss of rent from the flats.[17] Since Fate was by that stage insolvent, Palliser joined the liability insurers and brought a claim against them under the Third Parties (Rights Against Insurers) Act 2010.

Fate argued that the claim should fail on the grounds that, following *Berni Inns*, the parties had put in place a scheme for insurance that was intended to exclude the normal rules of tort and breach of contract. In *Berni Inns*, the Court of Appeal had decided that a tenant was not liable to the landlord notwithstanding that it (the tenant) had negligently caused a fire that had destroyed the building. The basis for that conclusion was that, under the terms of the lease, the landlord was obliged to take out insurance covering the building for which the tenant was to contribute by payment of an insurance rent. Moreover, upon receipt of the proceeds of the insurance, the landlord was obliged to use them to repair the building, and the tenant was exempted from its covenant to repair in respect of damage by an insured risk. The court held that the parties had impliedly excluded any claim that the landlord might otherwise have had against the tenant in respect of damage covered by the insurance on the grounds that they had agreed that any such loss was to be recouped from the insurance monies.

There have been a number of cases following *Berni Inns* since it was decided, but the interesting feature of *Palliser* was that it was the landlord that was being sued rather than the tenant. The judge, Andrew Burrows QC, said that this gave rise to quite a difficult question. Such cases would be rare, he said, because ordinarily it would be in the landlord's interest to ensure that repair to the building took place using the proceeds of the buildings insurance. It would only be cases in which for some reason, such

14 *Sartex Quilts & Textiles Ltd v Endurance Corporate Capital Ltd* [2019] EWHC 1103 (Comm); [2019] Lloyd's Rep IR 615.

15 [2019] EWHC 43 (QB); [2019] Lloyd's Rep IR 341.

16 [1985] 2 Lloyd's Rep 437; [1986] QB 211.

17 It also sought to claim loss of profits on future developments on the hypothesis that, but for the fire, it would have sold the flats and reinvested the proceeds. This claim was dismissed on the facts.

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as underinsurance, the buildings insurance did not pay out in full that the question would arise. Secondly, the underlying practical issue in *Berni Inns* was whether the insurer had subrogated rights against the tenant. That issue did not arise at all where it was the landlord, who ex hypothesi was the insured itself, that had been negligent.

Ultimately he held that it was not necessary to decide the point because he held that, whether it applied in the negligent landlord situation or not, on any view it could not be correct that the parties had agreed to exclude the landlord's liability where the landlord had failed properly to insure the building in the first place. In such a case, the *Berni Inns* defence would not apply to the extent of any underinsurance.

Moreover, the claim against insurers failed (save in respect of about £8,500) for another reason, namely that the liability cover only applied to damage "to property not belonging to [the insured]". Although Palliser was the lessee of the flats, Fate's freehold interest meant that Fate had no liability cover in respect of the vast majority of the damage.

MARINE INSURANCE

What is the position where significant salvage costs have been incurred in recovering a vessel, and the owner subsequently serves a notice of abandonment on insurers with a view to claiming a constructive total loss? Under section 60 of the Marine Insurance Act 1906, a constructive total loss occurs where either the vessel is abandoned because its actual total loss appears to be unavoidable, or because it cannot be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred. In *Sveriges Angfartygs Assurans Forening (The Swedish Club) and Others v Connect Shipping Inc and Another (The Renos)*,[18] the motor vessel *Renos* was seriously damaged by a fire while on a laden voyage in the Red Sea. Salvors were appointed and the vessel was towed to Adabiya and then to Suez. The vessel was insured at an agreed value of US$12 million under a hull and machinery policy. Notice of abandonment was served on insurers on 1 February 2013, while the vessel was at Suez. Insurers rejected the notice, contending that the salvage costs that had already been incurred were to be ignored when calculating the cost of repair for the purposes of an assessment of whether there was a constructive total loss. On the facts of this case, those incurred salvage costs potentially made the difference between a constructive total loss and a partial loss.

Although this question must have arisen in a high proportion of cases, Lord Sumption[19] observed that very little assistance was to be obtained either from the language of the 1906 Act or from authority. Thus, one had to go back to basic principles of insurance law. The first point was that the loss under a hull and machinery policy occurs at the time of the casualty and not when the measure of indemnity is ascertained. A claim on an insurance policy is a claim for unliquidated damages, and the obligation of the insurer is to hold the assured harmless against an insured loss.[20] The ordinary measure of indemnity under an insurance against damage to property is the depreciation in the value of the property attributable to the operation of the insured peril. Where repairs have been carried out these are treated as the measure of the depreciation of the ship's value. Therefore, if the reasonable cost of repairs exceeds the insured value, as the statutory definition of constructive total loss envisages, the value of the ship is nil, and in

[18] [2019] UKSC 29; [2019] Lloyd's Rep IR 415.
[19] With whom Lord Reed, Lord Hodge, Lord Lloyd-Jones and Lord Kitchin agreed.
[20] At para 10.

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financial though not in physical terms the loss is total.[21] Given that the loss is suffered at the time of the casualty, it follows that the damage referred to in section 60(2)(ii) of the 1906 Act is in principle the entire damage arising from the casualty from the moment that it happens. To the extent that the measure of damage was represented by the cost of repair, it did not matter when that cost was incurred.[22] Thus, the cost of repairing the damage for the purpose of determining whether the vessel was a constructive total loss included all the reasonable costs of salving and safeguarding *Renos* from the time of the casualty onwards, together with the prospective cost of repairing her. The incurred salvage costs were therefore to be taken into account.[23]

In contrast, however, costs incurred by salvors in order to remediate the environmental impact of the casualty (the SCOPIC costs) were not to be taken into account in the calculation. These costs reflected costs incurred to protect the shipowner from incurring potential liability for environmental pollution. That was nothing to do with the subject-matter insured, namely the hull and, indeed, was for the account of P&I insurers, rather than the hull insurers. Thus the SCOPIC charges were not part of the cost of repairing the damage for the purposes of section 60(2)(ii) of the 1906 Act and were to be left out of account in assessing whether the vessel was a constructive total loss.[24]

McKeever v Northernreef Insurance Co SA[25] concerned a sailing yacht that ran aground on a reef in the Sulu Sea. The owner of the yacht and her crew were rescued by a fishing vessel and left the yacht where she was, having secured and padlocked the hatches. On their return the following day it was discovered that several windows had been broken and the yacht looted. Significant damage was caused to the yacht by water that had entered through the broken windows and hatches. The owner sought to recover this damage under her marine policy with the defendant insurers. First, she argued that the damage was caused by piracy. However, the judge rejected this on the basis that piracy required the threat or use of force against persons. It was not enough that the water damage had been caused as a result of forcible entry to the yacht carried out by looters. Secondly, she argued that the damage was caused by malicious acts. But this too was rejected on the basis of the narrow interpretation of that phrase adopted most recently by the Supreme Court in *Atlasnavios-Navegação Lda v Navigators Insurance Co Ltd (The B Atlantic)*.[26] "Malice" required a mental element of spite, ill-will or the like in relation either to the property insured or some other property or person. Damage caused to the windows and hatches that was simply a by-product of the looters' desire to steal did not qualify. The final argument was that the damage was caused by a peril of the seas. Ingress of seawater was prima facie to be regarded as such where the cause of the ingress was fortuitous. In the present case, the smashing of the windows and hatches was entirely fortuitous from the point of the view of the claimant, and the loss and damage caused thereby was recoverable on that basis.

"Malice" required a mental element of spite, ill-will or the like in relation either to the property insured or some other property or person. Damage caused to the windows and hatches that was simply a by-product of the looters' desire to steal did not qualify

Suez Fortune Investments Ltd and Another v Talbot Underwriting Ltd and Others (The Brillante Virtuoso) (No 2)[27] concerned events on a laden motor tanker in the Gulf of Aden in July 2011. A small boat containing armed and masked men arrived alongside the vessel and took the crew hostage. During the course of the hijack a fire was started, the pirates duly fled and the crew abandoned ship. The fire eventually engulfed the vessel and caused it to become a constructive total loss.

However, all was not what it seemed. Insurers contended that the "piracy" was in fact a charade orchestrated by the owner to conceal the fact that the vessel, whose value had decreased dramatically in the financial crash, was being scuttled. After a lengthy trial, extraordinary as it sounded, the judge agreed. He concluded that the whole escapade was the result of a sophisticated conspiracy to which the owner, the master and the engineer of the vessel, salvors who had come to the scene, and various members of the Yemeni coastguard were party.

21 At para 11.
22 At para 13.
23 At para 19.
24 At paras 25 and 27.
25 2019 WL 02261376; [2019] Lloyd's Rep IR 535.
26 [2018] UKSC 26; [2018] Lloyd's Rep IR 448.
27 [2019] EWHC 2599 (Comm); [2020] Lloyd's Rep IR 1.

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Any claim by the owner against insurers, therefore, would inevitably have failed.[28] But what about that of the bank, which had lent significant sums of money secured against the vessel? It was insured, together with the owner, under a war risks policy. It argued, correctly, that that was a composite policy. Therefore, it was not disabled from recovering an indemnity by reason of the wilful misconduct of the owner.

That claim was nevertheless dismissed. It was necessary for the bank to show that an insured peril had arisen. There was no act of piracy here, because the so-called pirates had been allowed onto the vessel with the owner's connivance and pursuant to a pre-arranged plan. Nor could it be said that the loss had been caused by "persons acting maliciously". That required there to have been spite or ill-will or the like in relation to the vessel. The vessel was damaged, but not because of the perpetrators' ill-will towards it. Their motive was the prospect of making a profit by fraud.

The loss could not be regarded as having been caused by vandalism or sabotage. The violence used was not wanton or senseless, and there was no desire to frustrate the use of the vessel for its intended purpose. And there was no "capture, seizure, arrest, restraint or detainment" because at all material times the "pirates", crew and salvors were acting in accordance with the owner's instructions. There was no loss by an insured peril here and, as a result, the bank's claim failed.

For good measure, the judge also found that the vessel was outside the navigational limits of the policy, and that the insurers had been entitled to avoid an agreement that might have permitted the vessel to cross those limits because of misrepresentation by the owner. An argument that the insurers had affirmed that agreement by failing to plead avoidance when they pleaded their case on wilful misconduct also failed: the fact that the insurers had had enough information to plead that case did not mean that they had enough knowledge for the purposes of affirmation.

LIABILITY INSURANCE

In *Euro Pools plc v Royal & Sun Alliance Insurance plc*,[29] the Court of Appeal considered an appeal by the defendant ("RSA") in relation to two policies of professional indemnity insurance. Euro Pools had incurred costs remedying various faults that had occurred in swimming pools it had installed for third parties. The question for the court was whether the costs incurred in installing a new hydraulic system to power moveable "booms" in several pools were incurred to mitigate potential claims arising from circumstances notified under the first policy of insurance (as RSA contended) or from circumstances notified under the second policy (ie the following year), such that the indemnity payable would be subject to the separate limit under that policy. The significance of the difference lay in the fact that the first policy year had already paid out £4.3 million of the £5 million limit of indemnity in relation to other matters.

The policies were claims made policies and provided cover for both liabilities to third parties and the costs of remedial works intended to mitigate the risks of claims by third parties. During the first policy year, the insured notified RSA that a problem had arisen in relation to the booms, which at that stage incorporated stainless steel tanks that contained air. The insured said that it proposed to fix the problem with inflatable bags of air, but that it wanted the matter logged on a precautionary basis in case there were "future problems". Halfway through the next policy year, it became apparent that installing inflatable bags of air would not work, and insurers were notified that the new plan was to replace the system with a hydraulic mechanism.

> Where a notification is made of a problem in general terms, the insurance will cover claims which have some causal connection to the problem notified

At first instance the judge had found that the original notification had been limited to a problem affecting some but not all of the steel tanks installed in Euro Pools' booms. It was not a valid notification of circumstances in relation to the mitigation costs incurred in installing

[28] Such a claim had originally been brought, but had earlier been struck out.

[29] [2019] EWCA Civ 808; [2019] Lloyd's Rep IR 595.

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a hydraulic system, not least because the insured had not even been aware at that stage of the fault that ultimately caused them to look at installing that system. Thus, those costs arose from the second notification, rather than the first.

The Court of Appeal disagreed. The requirement for notification that the insured be aware of a circumstance that may give rise to a claim set a deliberately undemanding test. The insured was entitled to notify events, or concerns, or even a "can of worms" or "hornet's nest", the exact scale and consequences of which were not yet known. The requirement for knowledge prior to notification did not mean that the insured needed to know or appreciate the cause, or all of the causes, of the problems that had arisen, or the consequences which might flow from them. Where a notification is made of a problem in general terms, the insurance will cover claims which have some causal connection to the problem notified.[30]

What Euro Pools had notified in the first policy year was that the booms were not rising and falling properly. The fact that they did not know at that stage what was the fundamental cause of the problem did not make a difference. As Akenhead J had said in *Kajima UK Engineering Ltd v The Underwriter Insurance Co Ltd*,[31] a notification of circumstances will normally be taken to cover the defects causing and the symptoms and consequences of the circumstances notified. It was not, in this case, appropriate to over-analyse the problem by dissecting every potential cause of the problem as a different "notifiable" circumstance.[32]

In those circumstances, there was a causal connection between the third-party claims which Euro Pools had sought to mitigate and the circumstances originally notified in the first policy year. The claims which had been mitigated arose from the circumstances which had been notified.

This was of course an unusual example of an insurer being incentivised by the limit of indemnity to persuade the court to take a broad view of a notification of circumstances. Though the result was unfortunate for the insured in this case, the analysis makes it clear that it is possible for an insured to make a notification of considerable breadth. The less certain the position is, the wider the notification may turn out to be.

30 At para 39.
31 [2008] EWHC 83 (TCC); [2008] Lloyd's Rep IR 391, at para 111(c).
32 At para 47.

ROAD TRAFFIC

In *R&S Pilling (trading as Phoenix Engineering) v UK Insurance Ltd*,[33] the Supreme Court revisited the meaning of "the use of the vehicle on a road or other public place" in the compulsory motor insurance provisions of section 145(3)(a) of the Road Traffic Act 1988. It also considered what causal link is envisaged by the phrase "caused by or arising out of," a phrase commonly in use in a diverse range of different types of cover. Thus the case has implications going beyond the context of motor insurance.

One of the claimant's employees had a vehicle that had failed its MOT. He asked his employer if he could use a loading bay at its premises to carry out work to repair the vehicle. While he was carrying out the work, a fire started, which caused significant damage to the claimant's premises as well as those of a neighbour. The claimant's insurers, having paid out in respect of the damage, brought a subrogated claim against the employee, whose only source of indemnity was his motor policy. His motor insurer, UKI, sought a declaration that it was not liable for the loss.

Section 145(3)(a) of the 1988 Act requires a policy of motor insurance to insure the relevant person for injury or damage "caused by, or arising out of, the use of the vehicle on a road or other public place in Great Britain". Lord Hodge[34] rejected the submission that the section should be read down to comply with the requirement under the EU Sixth Motor Insurance Directive[35] for cover for use of vehicles whether in a public place or not as to do so would go against the grain and thrust of the legislation.[36]

The language of the section required there to be a causal link between the use of the vehicle on a road (or in a public place) and the relevant damage. An accident in which a pedestrian was run over on a zebra crossing would be caused by the use of the vehicle on a road. So too would an accident caused when a vehicle skidded off the road and injured a pedestrian on the pavement.

33 [2019] UKSC 16; [2019] Lloyd's Rep IR 404.
34 With whom Baroness Hale, Lord Wilson, Lady Arden and Lord Kitchin agreed.
35 Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009. And see also *Vnuk v Zavarovalnica Triglav dd* Case C-162/13; EU:C:2014:2146; [2015] Lloyd's Rep IR 142, *Rodrigues de Andrade v Salvador* Case C-514/16; EU:C:2017:908; [2018] Lloyd's Rep IR 164 and *Núñez Torreiro v AIG Europe Ltd, Sucursal En España* Case C-334/16; EU:C:2017:1007; [2018] Lloyd's Rep IR 418.
36 At para 40, affirming *RoadPeace v Secretary of State for Transport* [2017] EWHC 2725 (Admin); [2018] Lloyd's Rep IR 478 and *Lewis v Tindale* [2018] EWHC 2376 (QB); [2019] Lloyd's Rep IR 324.

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But it would not be enough of a causal link simply to say that the vehicle had been driven on a road in order to reach the (private) location of the accident.[37] The well-known case of *Dunthorne v Bentley*,[38] in which a driver who had exited a stranded vehicle and caused an accident while crossing the road to seek help was held to have been covered because the accident arose out of the use of the vehicle on the road, was close to the line but on the right side of it.[39]

> The carrying out of significant repairs to a vehicle on private property did not entail the "use" of the vehicle. In ordinary language one would not speak of a person who is conducting substantial repairs to a stationary vehicle as "using" that vehicle

Although the insuring clause in the policy did not provide the width of cover required under the 1988 Act, it was to be construed as if it did because the certificate of insurance said that the cover was intended to do so. In so construing the policy, it was important to ensure that that which was to be added to correct the omission from the policy was that which was needed to make the cover comply with the Act and no more.[40] It was not therefore enough, as the Court of Appeal had held, that an accident had occurred that involved the vehicle.[41]

The carrying out of significant repairs to a vehicle on private property did not entail the "use" of the vehicle. In ordinary language one would not speak of a person who is conducting substantial repairs to a stationary vehicle as "using" that vehicle (although in contrast the presence of a vehicle on a road or other public place while the owner was carrying out such repairs would fall within the section).[42] The mere fact that the repair was the result of use, or was a precursor to getting the car back on the road, was not enough because the causal connection between the use on the road and the damage was too remote. The fire was caused by and arose out of the allegedly negligent repair of the car by the use of grinders and welders without taking any precautions with regard to flammable materials in the car itself.[43] Accordingly, UKI was entitled to a declaration that it was not liable.

Cameron v Liverpool Victoria Insurance Co Ltd; Motor Insurers' Bureau (Intervening)[44] concerned the question how to sue a driver at fault for an accident when his identity could not be established. The claimant was injured in an accident when her car collided with a Nissan Micra. The driver of the Micra was responsible for the accident but did not stop. The registered keeper of the vehicle, himself not the driver, declined to identify the driver and was convicted of failing to do so. The car was insured under a policy issued by Liverpool Victoria Insurance to a Mr Nissar Bahadur, whom the company believed to be a fictitious person.

The claimant originally sued the registered keeper of the vehicle and joined Liverpool Victoria for a declaration that it was obliged to indemnify that person. But the insurers put in a defence saying that the claimant was not entitled to a judgment against the keeper because he was not the driver at the relevant time. The claimant then applied to amend the claim form and particulars of claim so as to substitute for the keeper "the person unknown driving [the Micra] who collided with [the claimant's vehicle] on 26 May 2013".

The Supreme Court held, reversing the Court of Appeal,[45] that it was not possible in these circumstances to sue a person unknown. There were cases in which such a claim could be made, but these were generally cases in which the defendants, although anonymous, were identifiable (eg squatters illegally occupying a building), and could therefore be served. Where, as in this case, the defendant was not only anonymous, but could not be identified, it was not conceptually possible to serve him. It would be contrary to fundamental principles of justice to make a person subject to the jurisdiction of the court without having such notice of the proceedings as would enable him to be heard.[46]

It was possible that there might be exceptions to this general rule where insurance was required pursuant to a statutory scheme designed to protect the public, but that was not the case here where compensation for damage caused by unidentified drivers could be sought from the

37 At paras 42 to 43, affirming *Romford Ice and Cold Storage Co Ltd v Lister* [1955] 2 Lloyd's Rep 325; [1956] 2 QB 180.
38 [1999] Lloyd's Rep IR 560.
39 At para 44.
40 At para 49.
41 At paras 50 to 52.
42 At para 53.
43 At paras 54 to 55.
44 [2019] UKSC 6; [2019] Lloyd's Rep IR 230.
45 *Cameron v Hussain* [2017] EWCA Civ 366; [2017] Lloyd's Rep IR 487.
46 At para 17.

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Motor Insurers' Bureau ("MIB").[47] Likewise, it might be appropriate to dispense with service where the defendant was evading service but, again, that was not this case. The application to substitute the defendant for a person unknown was dismissed, and summary judgment was entered for Liverpool Victoria.

In *Motor Insurers' Bureau v Lewis*,[48] the Court of Appeal had to consider the liability of the MIB regarding a collision which had taken place on a field. Mr Tindale had not been insured. Was the MIB obliged to pay given the accident was on private land?

As regards any obligation arising under the 1988 Act, the answer was "no" because that statute only makes insurance mandatory for driving on roads or in public places. But was the MIB (a private law body) for these purposes an emanation of the state, such that it was subject to Directive 2009/103/EC? Article 3 of this Directive made the government responsible for ensuring that civil liability in respect of the use of motor vehicles on private land was the subject of a scheme of compulsory motor insurance. Article 10 made the government responsible for a coextensive obligation to assign responsibility for meeting that liability to a compensation body.

Flaux LJ answered that question affirmatively. The UK government had allocated the article 10 task to the MIB, and the MIB had special powers pursuant to the 1988 Act allowing it to collect monies from authorised motor insurers. Further, articles 3 and 10 of the 2009 Directive had direct effect, notwithstanding the MIB's argument that they could not, because article 3 was conditional on the state taking steps itself.

The MIB had argued that its liability under the 2009 Directive could not be broader than under the 1988 Act, because its purpose was not to be a primary compensator. It had a residual function, which only arose if there was a compulsory insurance obligation. The court held that did not prevent the MIB from being liable under the broader Directive wording.

The 2009 Directive also played centre stage in the case of *Colley v Shuker and Others*.[49] C had been injured whilst a passenger in a car driven by S. C had known S had no valid licence or insurance. The car had been insured by the second defendant ("D2") pursuant to a policy issued to S's father, but D2 had successfully avoided the policy on the grounds of misrepresentations (including that only S's father and the father's partner would be the drivers of the car) and obtained a declaration from the court to that effect. C nevertheless sued S, D2 and the MIB. D2 applied to strike out the claim.

The apparent effect of section 152 of the Road Traffic Act 1988 was that it relieved D2 of any obligation to pay in light of the declaration it had obtained. But C argued that section 152 was incompatible with the 2009 Directive and should be construed purposively so as not to conflict with C's directly effective rights under EU law. Such purposive interpretation would require the implication of a residual discretion on the part of the court to require an insurer to compensate under section 151 notwithstanding the avoidance of a policy. The judge rejected this argument in light of the clear wording in section 152. Nor, she held, could these articles of the 2009 Directive be relied upon against D2 directly, since an insurer was a private individual and not a state authority. Accordingly, the strike-out application succeeded.

47 At paras 21 to 22.
48 [2019] EWCA Civ 909; [2019] Lloyd's Rep IR 390.
49 [2019] EWHC 781 (QB); [2019] Lloyd's Rep IR 503.

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CONSUMER INSURANCE

Friends Life Ltd v Miley[50] demonstrates that, at least in the consumer context, the *Economides*[51] approach to construction is alive and well. The case concerned a claim on an income protection policy, which insurers disputed on grounds that certain misrepresentations and non-disclosures had been made. The policy provided:

> "If in connection with the happening or purported happening of any event insured by this Policy, the Member makes an untrue statement of a Material Fact or omits to disclose a Material Fact, the cover provided by the Policy in respect of that Member will immediately become void …"

On the face of it, the obligation to disclose material facts, and not to misstate them, was unqualified. However, the definition of "Material Facts" in the policy stipulated that the questions that insurers would ask in connection with a claim would cover the Material Facts commonly relevant to the claim. And the questions that insurers in fact asked of the insured all came with a declaration that the answers were given "to the best of [the insured's] knowledge and belief".

Consistent with *Economides*, the Court of Appeal held that the insured's obligation was limited to an obligation to ensure that the statements that he made were true to the best of his information and belief, and to disclose only those material facts that were known to him. Thus, where a statement about his income was genuinely believed by him to be true, it would not have been a relevant mis-statement even if in fact it had been false.

50 [2019] EWCA Civ 261.
51 *Economides v Commercial Union Assurance Co plc* [1998] Lloyd's Rep IR 9; [1998] QB 587.

REINSURANCE

Equitas Insurance Ltd v Municipal Mutual Insurance Ltd[52] concerned whether an insurer which settles a claim for liability for mesothelioma arising under employers' liability ("EL") insurance policies which span several years of exposure to asbestos can claim an indemnity for its full loss under whichever annual reinsurance policy within this period it chooses in order to maximise its reinsurance recovery.

The question arose because of the special rules of causation that allow claimants suffering from mesothelioma as a result of exposure to asbestos to recover damages even though it is not possible to prove which of two or more employers was responsible. A combination of the decision in *Fairchild v Glenhaven Funeral Services Ltd,*[53] section 3 of the Compensation Act 2006 and the Supreme Court's decision in *IEG v Zurich*[54] means that any employer who has exposed a victim to asbestos in breach of duty, for however short a period, is liable in full to a victim of mesothelioma, while any EL insurer of such an employer is liable in full to indemnify the employer, again regardless of the period for which it has provided insurance and received premiums.[55] The effect of these rules is that, provided that there is at least one solvent employer or solvent EL insurer, the victim will have a remedy against a defendant who is good for the money.[56]

MMI provided EL insurance to local authorities and other public bodies for the period 1950 to 1981. Numerous claims for asbestos exposure were made against the insureds and, as long as MMI provided cover for some of the period of alleged exposure and the underlying claim could be proved, it paid those claims without attempting to apportion claims to individual policies or years.

MMI reinsured its liabilities through annual excess of loss policies. The reinsurers for these policies differed over time, as did the level of retention. Initially, MMI presented its claims to reinsurers on the basis of a time on risk allocation, so that each loss was divided pro rata between the years of reinsurance in which each employee claimant was exposed to asbestos. However,

52 [2019] EWCA Civ 718; [2019] Lloyd's Rep IR 359.
53 [2002] UKHL 22; [2003] 1 AC 32.
54 *International Energy Group Ltd v Zurich Insurance plc UK Branch* [2015] UKSC 33; [2015] Lloyd's Rep IR 598; [2016] AC 509.
55 An EL insurer paying such a claim in full might have rights of contribution against other employers and/or insurers (and even against the insured itself, where there had been a relevant period of no insurance).
56 At paras 1 to 5.

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a time came when it changed its method of presentation so that it presented the whole claim to a single year of reinsurance of its choice, in a process known as "spiking". In doing so it sought to avoid the need to present a claim to a year in which one of its reinsurers was insolvent.

The Court of Appeal held, consistent with the decision in *IEG*, that MMI's inwards claims were settled on an unallocated basis by which each and every policy year was 100 per cent liable and those liabilities were discharged; that there was a 100 per cent liability ascertained under each and every policy year; that there was an undivided ultimate net loss for each year; and that as a matter of construction of the reinsurance contracts MMI was prima facie entitled to present the whole of its loss to any reinsurance year of its choice.[57]

However, this right to choose was not untrammelled. There was an implied term in the reinsurance that, when dealing with a *Fairchild* liability, as a matter of good faith, the insurer's right to present its reinsurance claims was to be exercised in a manner which was not arbitrary, irrational or capricious.[58] In that context rationality required that they be presented by reference to each year's contribution to the risk,[59] normally measured by reference to time on risk unless in the particular circumstances there were good reasons (such as intensity of exposure) for some other basis of presentation.[60] In other words, spiking at the reinsurance level was not permitted.

While that meant that there was a difference between the approach taken at the insurance level (where the insured's right to choose was unrestricted) and that taken at the reinsurance level (where there was such a restriction), this was justified by the fact that the rules applicable at the insurance level were designed to ensure full compensation to victims. That policy consideration no longer applied at the reinsurance level.[61]

Munich Re Capital Ltd v Ascot Corporate Name Ltd[62] illustrates the difficulties that can arise in the context of Construction All Risks cover at the boundaries between the construction phase of the project and the maintenance period. The case concerned the reinsurance of risks arising out of the construction of an extended Tension Length Platform, an oil and gas drilling facility in the Gulf of Mexico. Both insurance and reinsurance were provided under a modified WELCAR 2001 form and were intended to be back-to-back. However, apparently as a result of an oversight, while the underlying cover was extended by insurers three times to take account of delay to the project, reinsurers were never asked to extend the period of the reinsurance. When losses occurred in 2015, several months after the expiry of the original period of insurance, the insurers were obliged to pay out, but found themselves facing reinsurers who declined indemnity.

> A reasonable person familiar with the workings of the offshore construction all risks market would ordinarily expect the Project Period to cover all operations up to the completion of construction

The issue turned on whether, notwithstanding the failure to extend the period of cover, insurers were nevertheless entitled to indemnity under the limited maintenance cover provided for under the reinsurance policy. That cover kicked in "for a further 12 months from expiry date of the Project Period" and, in a change to the standard WELCAR form, "Project Period" was defined as being continuous "until 23:59 30th March 2014 but not beyond 23.59 30th September 2014". Insurers argued that as a result, the maintenance cover came into force at the end of the day on 30 September 2014 even though at that date the project was far from complete.

Carr J disagreed. This was a case involving contractual interpretation in changed factual circumstances. It had always been contemplated by the parties that the two policy periods, ie that of the underlying cover and that of the reinsurance, would mirror each other at all times. This expectation had been defeated by the oversight in failing to secure an extension to the reinsurance cover when extensions to the underlying policy had been agreed. The commercial context was that a reasonable person familiar with the workings of the offshore construction all risks market would ordinarily expect the Project Period in such a policy to cover all operations up to the completion of construction. In the event of delay

57 At para 101.

58 Applying the principles set out in *Braganza v BP Shipping Ltd (The British Unity)* [2015] UKSC 17; [2015] 2 Lloyd's Rep 240; [2015] 1 WLR 1661.

59 Leggatt LJ put the implied term as follows: "MMI may claim under reinsurance policies covering a particular year only such share of its ultimate net loss as reflects the extent to which exposure to asbestos in that year contributed to the risk which arose during periods covered by MMI's policies of the victim contracting mesothelioma as a result of the insured employer's wrongdoing": para 161.

60 At paras 114 and 131.

61 Victims would always be assured of either a solvent employer, a solvent insurer or, in the worst case, a statutory or industry compensation scheme: see paras 92, 116 and 168.

62 [2019] EWHC 2768 (Comm); [2020] Lloyd's Rep IR 115.

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to the project, such a person would expect an extension to the Project Period to be sought; in contrast the general rationale for maintenance cover in such a policy was to provide limited cover during an additional period of post-completion maintenance.

The insurers' position could only be tenable on a highly literal reading of the clause providing maintenance cover. However, other features of the cover strongly militated against an intention to provide maintenance cover at any time until the project had itself completed. First, on the face of the clause, the Policy Period was to terminate on a range of dates, suggesting that actual completion of the project was intended. Secondly, the term "Maintenance" suggested cover for a completed project. And the clause itself contained references, such as to "the acceptance certificate", that clearly addressed a post-handover situation. Accordingly, on a proper construction of the reinsurance policy, at the expiry of the Project Period there was no completed project to which the maintenance cover could attach and the claim against reinsurers failed.

ARBITRATION CLAUSES

Hiscox v Weyerhaeuser[63] involved parallel proceedings in the UK and the US about whether or not the parties to a dispute were compelled to arbitrate. Weyerhaeuser (the insured) sought an indemnity from liability insurers in respect of claims made against it in the US regarding allegedly faulty joists installed in newly-built residential homes.

The lead policy on the excess liability programme stated that all disputes were to be determined in London under the Arbitration Act 1996. An endorsement to this policy – "the Service of Suit" endorsement – stated that insurers would submit to the jurisdiction of any US court "Solely for the purpose of effectuating arbitration, in the event of the failure of the Company to pay any amount claimed to be due hereunder". The insured's policy with the insurers expressly followed the lead policy as regards choice of law and jurisdiction but also referred to its own service of suit clause, which was in slightly differing terms to that found in the lead policy. In particular, it did not restrict the use of the US courts to "the purpose of effectuating arbitration".

The procedural background was involved, with multiple proceedings and applications being issued in various courts. In short, however, the insured wished matters to proceed in the US courts and the insurers sought the assistance of the English Commercial Court to enforce the alleged arbitration agreement.

So it was that an application for an interim anti-suit injunction came before Knowles J. The question was whether the term in the lead policy requiring arbitration of any disputes was incorporated into the insured's policy. He found that it was incorporated because of the clear reference to the policy being on the same terms as the lead policy as regards choice of law and jurisdiction. The insured argued that that interpretation ignored the clear wording of the service of suit clause in the policy. The judge disagreed, saying there was no issue so long as it was recognised that the service of suit clause was restricted in scope to enforcing any arbitration award. By contrast, the insured's argument would ignore the words "As per Lead Underlying Policy". Whilst focusing on the specific facts of the case, the judge noted that "it is not unusual for the role of a service of suit clause to centre on enforcement". The absence of the introductory words "Solely for the purposes …" did not make the difference contended for by the insured.

[63] *Hiscox Dedicated Corporate Member Ltd as Representative of Syndicate 33 at Lloyd's Starr Managing Agents Ltd (t/a Syndicate CVS 1919) v Weyerhaeuser Co* (QBD (Comm Ct)) [2019] EWHC 2671 (Comm); [2020] Lloyd's Rep IR Plus 8.

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DOUBLE INSURANCE

A double insurance issue arose following a road traffic accident in the Australian case of *Allianz Australia Insurance Ltd v Certain Underwriters at Lloyd's of London Subscribing to Policy Number B105809GCOM0430*.[64] Mr D was seriously injured when hit by a car in the course of employment. He had been employed by a subcontractor to B. B was insured by: (1) a policy issued by Allianz to the Roads and Traffic Authority of New South Wales, for which B was a contractor; and (2) a policy issued by the Lloyd's Underwriters to Bilfinger and its subsidiaries, of which B was one.

It was agreed that both policies covered Mr D's accident, subject to their respective double insurance provisions, which both in substance purported to exclude an indemnity where cover was provided by another policy. Allianz indemnified B and then sought a contribution from Lloyd's Underwriters. The dispute arose because the Allianz policy also contained a difference in conditions clause that, on one view, reinstated cover that would otherwise have been taken away by the separate double insurance clause.

> The dispute arose because the Allianz policy contained a difference in conditions clause that, on one view, reinstated cover that would otherwise have been taken away by the separate double insurance clause

The claim failed at first instance but was allowed on appeal. The majority in the Court of Appeal held that, on a close analysis, the difference in conditions clause did not apply. It depended upon being able to describe the Lloyd's Policy as "Underlying Insurance" within the meaning of the Allianz policy, but that was not possible in this case because of the Lloyd's Policy's own double insurance provision. Once it was clear that the difference in condition clause was not in play, one was left with two competing double insurance provisions with the usual circular effect. Applying *Weddell v Road Transport and General Insurance Co Ltd*,[65] those provisions cancelled each other out, meaning both insurers were liable. Accordingly, Allianz was entitled to a contribution from the Lloyd's Underwriters.

THIRD PARTY RIGHTS AGAINST INSURERS

Watson v Hemingway Design Ltd and Others[66] concerned the question whether a claimant bringing an employment claim against an insolvent employer and its insurer under the Third Parties (Rights Against Insurers) Act 2010 was bound by an arbitration clause in the policy. The conventional wisdom under the Third Parties (Rights Against Insurers) Act 1930 was that a claimant bringing a claim standing in the shoes of an insolvent insured would be bound by the arbitration clause in the policy, just as the insured would have been. That approach appears to have been replicated in section 2(7) of the 2010 Act. However, Kerr J considered that that was not the case in the context of a claim of this kind.

The claimant was employed by Hemingway as a product administrator. He resigned and claimed unfair constructive dismissal and disability discrimination in the employment tribunal. Hemingway had liability insurance covering the claims. In due course, Hemingway went into liquidation and the claimant joined the liability insurers claiming under the 2010 Act. Insurers resisted on the grounds that the tribunal had no jurisdiction to deal with that claim. In that context they raised the point that the policy contained an arbitration clause.

Kerr J held that the employment tribunal was a "court" within the meaning of section 2(6) of the 2010 Act. Therefore, it had jurisdiction to deal with the claim under the Act. Moreover, although he did not decide the point, because it was not formally before the court, Kerr J considered that giving effect to a clause requiring the claimant as statutory transferee to submit his claim to arbitration would limit the operation of the provisions of the Employment Rights Act 1996 and the Equality Act 2010, and the clause would thus be void.

The decision is a controversial one and will no doubt be revisited in the future. For present purposes, however, it seems unlikely that it would alter the orthodox approach to arbitration clauses outside of the context of the Employment Rights Act or the Equality Act.

64 [2019] NSWCA 271; [2020] Lloyd's Rep IR Plus 11.
65 (1931) 41 Ll L Rep 69; [1932] 2 KB 563.
66 [2019] UKEAT 0007; [2020] Lloyd's Rep IR Plus 12.

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THIRD PARTY COSTS ORDERS

In *Travelers Insurance Co Ltd v XYZ*,[67] the Supreme Court overturned an order made against a liability insurer under section 51 of the Senior Courts Act 1981. The facts were unusual. The case concerned group litigation brought in the wake of the PIP breast implant scandal. One of the unusual features (although perhaps not so unusual in the context of a Group Litigation Order ("GLO")) was that each claimant was only responsible for her own slice of the common costs incurred in the litigation, as opposed to all being jointly liable for those costs. The result was that, in accordance with the indemnity principle, successful claimants could only recover from the defendant that individual slice. That ought not to have caused a significant problem save for the fact that one of the main defendants was only insured in respect of certain years, and without insurance was itself financially unable to meet its responsibilities. As a result, a large number of claims were uninsured and the relevant claimants were faced with an insolvent defendant.

All the claims succeeded, whether by way of settlement or by a summary or default judgment. Insurers had funded the whole of the defendant's defence costs, most of which comprised the costs of dealing with common issues relating to four test claims. The claimants on the uninsured claims sought costs orders against insurers under section 51 of the Senior Courts Act 1981. That claim succeeded at first instance[68] and in the Court of Appeal,[69] the principal rationale being that insurers had engaged in litigation in which their costs risk was asymmetric. Had the defendant won, insurers would have had a right to recover in respect of all their costs, including all of the common costs. In the event the defendant lost but, by reason of the terms of the GLO, insurers only had to cover those slices of common costs referable to insured claims.

> There were two bases upon which a liability insurer might become exposed to non-party costs liability. The first was on the grounds of "intermeddling"; the second was where the insurer could be regarded as "the real defendant"

The Supreme Court held that there were two separate bases upon which a liability insurer might become exposed to non-party costs liability. The first was on the grounds of "intermeddling"; the second was where the insurer could be regarded as "the real defendant". Where a claim falls within the scope of the insurance, whether or not subject to limits of cover, the real defendant test will usually be the appropriate one to apply. But in the present case, there was no such cover in respect of the uninsured claims. In those circumstances, only the intermeddling principle applied.[70]

This created a high bar to a section 51 order. Where all the insurer had done was to exercise its rights and obligations under its policy in a way consistent with the constraints established in *Groom v Crocker*,[71] liability as an intermeddler might be "very hard to establish".[72] The asymmetry of the costs risks was not relevant to this evaluation. Nor was the fact that, for a time, the insurers had refused to disclose the extent of the cover in respect of the claims. On the facts, the defendant was contractually entitled as against the insurers to have the defence of the common issues funded, regardless of whether they arose in insured or uninsured claims. Insurers' participation in the litigation on those common issues, even where they related to uninsured claims, was not unjustified intermeddling in litigation in which insurers had no legitimate business.[73]

Moreover, even where intermeddling could be established (which it could not in this case), a claimant would also have to show a causative link between the conduct of the non-party relied upon and the incurring by the claimant of the costs sought to be recovered. And in this context, the non-disclosure of limits of cover by the defendant at the request of the insurer is unlikely to amount to relevant conduct, for as long as the law continues to make that non-disclosure legitimate.[74]

Foskett J had to deal with a different application against insurers for a non-party costs order in *Various Claimants v Giambrone and Law (A Firm) and Others*.[75] This case, which preceded the Supreme Court's decision in *Travelers*, concerned whether an insurer that had funded the defence of claims against its insured, but had relinquished control of the defence to the insured

67 [2019] UKSC 48; [2019] Lloyd's Rep IR 683.
68 [2017] EWHC 287 (QB); [2017] Lloyd's Rep IR 269.
69 [2018] EWCA Civ 1099; [2018] Lloyd's Rep IR 636.
70 Paragraph 52 per Lord Briggs (with whom Lady Black and Lord Kitchen JJSC agreed).
71 (1938) 60 Ll L Rep 393; [1939] 1 KB 194.
72 At para 55.
73 At para 69.
74 Lord Briggs' judgment contains a helpful summary of the relevant principles in a liability insurer case at paras 76 to 82 of his judgment.
75 [2019] EWHC 34 (QB); [2019] 4 WLR 7.

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under an agreement designed to protect its (the insurer's) aggregation position, should be liable under section 51 of the Senior Courts Act 1981 for part of the claimants' costs.

The judge held that insurers should pay half of those costs. The quid pro quo for resolving the aggregation position with the insured had been that insurers had promised to provide defence costs notwithstanding the exhaustion of the limit of indemnity, subject to a somewhat restrictive exception. As a result, insurers became bound to bankroll the pursuit of defences to the claim when there were significant concerns that those defences would fail. Their power to control the defences was conceded as part of a commercial arrangement with the insured and they were not entitled to rely upon that lack of control to resist the section 51 order. But for their funding, the claimants' costs of pursuing the claims would have been substantially reduced, which hypothetical reduction the judge assessed at 50 per cent. *Giambrone* is now on appeal and, given that Foskett J relied at least in part on the decision of the lower courts in *Travelers*, it will be interesting to see what, if any, effect the Supreme Court's decision in the latter case will have.

AFTER THE EVENT INSURANCE

Whilst the recoverability of After the Event ("ATE") premiums between the parties has generally been removed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"), an exception was made for clinical negligence proceedings as regards the obtaining of expert reports. This was due to the difficulty of pursuing clinical negligence claims without an expert's report, which reports could be expensive.

In *West v Stockport NHS Foundation Trust*,[76] the Court of Appeal considered the recoverability of the relevant part of Ms West's ATE insurance policy (ie the element referable to obtaining an expert's report). The amount in issue was £5,088 out of a total costs sum of £31,714.44. Her claim had settled for £10,000. Her policy was block-rated, not bespoke. At the same time the court considered the case of Mr Demouilpied who also sought £5,088 in relation to a similar policy. His claim had settled for £4,500 and his total costs were £18,376.36.

When permission to appeal was granted, two assessors, Kerr J and Master Leonard, were asked to produce a report addressing the nature of the policies and premiums in issue in these types of cases, the operation of the ATE market, and the impact of any reduction in recoverability on the availability of policies. The report was designed as a general tool to assist other parties dealing with ATE premium disputes.

After reviewing the relevant case law (*Rogers,*[77] *Kris Motor Spares*[78] and *Callery*[79]) the court concluded that disputes about the reasonableness and recoverability of ATE premiums were not to be decided on the usual case-by-case basis, with reference to specific facts, but rather on a macro basis. First instance judges did not have the expertise to judge the reasonableness of a premium except in very broad-brush terms. It would imperil the ATE market if they considered themselves better qualified than the underwriter to rate the financial risk faced by the insurer.

Where an ATE policy was bespoke, the grounds of challenge could be relatively wide. A paying party might be able to show the risk had been wrongly assessed.

[76] [2019] EWCA Civ 1220; [2019] 1 WLR 6157.
[77] *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134; [2006] Lloyd's Rep IR 759; [2007] 1 WLR 808.
[78] *Kris Motor Spares Ltd v Fox Williams LLP* [2010] EWHC 1008 (QB); [2010] 4 Costs LR 620.
[79] *Callery v Gray (No 2)* [2001] EWCA Civ 1246; [2001] Lloyd's Rep IR 765; [2001] 1 WLR 2142.

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But in the case of block-rated policies, most changes would have to relate back to the market in one way or another. It would not suffice simply to lodge with the court evidence that a cheaper policy was available. An expert's report would be required to show the policies were directly comparable. Even if that was done, a paying party may have the difficulty of showing that policy was in fact available given the potential existence of contract terms between the claimant's solicitors and ATE insurers.

On the question of proportionality, where there was a block-rated policy, the premium for which had been assessed as reasonable, that premium could not be challenged as disproportionate. That was because, being block-rated, the premium had no connection to the value of the claim. Further, ATE insurance was critical to access to justice in clinical negligence claims. As a result, such fixed and unavoidable costs should in fact be taken out of account when the court considers the proportionality of costs claimed overall.

Herbert v H H Law Ltd[80] involved the consideration of whether or not ATE premiums should be part of the bill of costs in solicitor-client assessments. The Court of Appeal agreed with the solicitors that the judges below[81] had been wrong to treat the ATE premium as a solicitor's disbursement as opposed to an item incurred on behalf of and as agent for the client, and therefore properly shown in the cash account. The court held that:

> "a disbursement qualifies as a solicitors' disbursement if either (1) it is a payment which the solicitor is, as such, obliged to make whether or not put in funds by the client, such as court fees, counsel's fees, and witnesses' expenses, or (2) there is a custom of the profession that the particular disbursement is properly treated as included in the bill as a solicitors' disbursement."

An ATE premium was not something which the solicitor was obliged to pay, irrespective of whether they had been put in funds by a client. Nor was there any evidenced custom of such premiums being treated as solicitors' disbursements to be included in bills of costs presented to clients. It was therefore not a disbursement to go in a bill of costs. The result, as the court acknowledged, is that clients cannot conveniently challenge ATE premiums in a solicitor-client assessment.

[80] [2019] EWCA Civ 527; [2019] 1 WLR 4253.
[81] [2018] EWHC 580 (QB); [2018] 2 Costs LR 261.

CONTEMPT OF COURT

In *Zurich Insurance plc v Romaine*,[82] Mr Romaine brought proceedings against an insured and another party for noise-induced hearing loss. The defendants had picked up references in his medical notes to his being a professional singer and a motorcyclist, both of which activities might be considered relevant to a hearing-related claim. Questions were asked of Mr Romaine but the responses made it very clear that he had never been a professional singer and did not ride a motorcycle. They also said he had no hobbies or activities which might have contributed to hearing issues. These documents had his electronic signature on them.

The defendants uncovered evidence showing Mr Romaine had in fact ridden motorcycles and was a member of a live rock and roll band. Zurich applied to strike out the claim and the claim was then discontinued. Zurich then issued committal proceedings against the claimant.

Its application for permission to commence contempt proceedings was dismissed at first instance.[83] However, the appeal was allowed. The court ruled that Goose J had been wrong to place such reliance as he had on the absence of a warning that committal proceedings would be brought:

> "In practice, the absence of a warning is unlikely to be of any relevance where the alleged contemnor is himself the claimant in an underlying personal injury claim … and where the allegedly false statements are contained in claims documents prepared by himself or his solicitors and signed with a 'statement of truth'."[84]

Moreover, the first instance court was wrong to have placed so much weight on the fact that Mr Romaine had discontinued the proceedings. The court accepted that discontinuance was likely to be relevant in most cases. However, it should not be seen as a strategy by unscrupulous claimants or their lawyers to protect themselves from dishonest conduct. The judge should have weighed in the balance the need to discourage this modus operandi.

The sentencing phase of contempt proceedings was considered in *Liverpool Victoria Insurance Co Ltd v Zafar*.[85] Dr Zafar was a GP who also had a private medico-legal

[82] [2019] EWCA Civ 851; [2019] 1 WLR 5224.
[83] [2018] EWHC 3383 (QB).
[84] At para 47.
[85] [2019] EWCA Civ 392; [2019] 1 WLR 3833.

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practice. He routinely saw a large number of claimants and produced about 5,000 medico-legal reports a year. In the case of Mr Iqbal, he produced an original report which stated that all symptoms from the index accident had ended. He then produced a revised report which said they were ongoing, stating that the pain in the wrist, neck and shoulder would fully resolve between six to eight months from the accident. Due to the accidental inclusion of the original report in the trial bundle, the discrepancies between the two came to light and investigations commenced.

Dr Zafar initially stated the changes had been made to the original report without his knowledge. He then said that was wrong – he had made the change because the original report had only related to acute statements. The trial judge hearing the committal proceedings found Dr Zafar had been so busy that he did not care whether the revised report was true and just did what he had been asked by his solicitors. He also found that his initial excuse (that changes had been made without his knowledge) was a deliberate lie, and was the most serious of his acts of contempt of court. Later assertions that the revised report was in fact correct were also recklessly false. Dr Zafar was committed to prison for six months, but that sentence was suspended for two years. The insurer appealed on the basis of undue leniency.

> Although the court considered the judge's sentence to be unduly lenient, it did not impose a more severe sentence, on the basis that authoritative guidance on sentencing in this type of situation had not hitherto been available

Allowing the appeal, the Court of Appeal gave general guidance on sentencing in the context of contempt of court comprising the making of false statements in a document verified by a statement of truth. Generally, the deliberate or reckless making of a false statement of this sort would lead to a prison sentence. In the case of an expert witness, the absence of a motive would not detract from this starting point because of the reliance placed on them by courts, and because of their duties to the court. However, although the court considered the judge's sentence to be unduly lenient, it did not impose a more severe sentence, on the basis that authoritative guidance on sentencing in this type of situation had not hitherto been available.

CONCLUDING OBSERVATIONS

Some of these decisions are subject to appeal. It will be interesting to see what the Court of Appeal makes of the section 51 order made in the *Giambrone* case in the light of the Supreme Court decision in *Travelers*.

Sartex, dealing with the proper approach to reinstatement in property damage policies, is also currently in the Court of Appeal with judgment awaited. And the courts are now starting to see some cases on the Insurance Act 2015, as well as the Third Parties (Rights Against Insurers) Act 2010 (finally brought into force in 2016). 2020 promises to be another fascinating year.

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APPENDIX: JUDGMENTS ANALYSED AND CONSIDERED IN THIS REVIEW

2019 judgments analysed

Allianz Australia Insurance Ltd v Certain Underwriters at Lloyd's of London Subscribing to Policy Number B105809GCOM0430 (NSWCA) [2019] NSWCA 271; [2020] Lloyd's Rep IR Plus 11

Cameron v Liverpool Victoria Insurance Co Ltd; Motor Insurers' Bureau (Intervening) (SC) [2019] UKSC 6; [2019] Lloyd's Rep IR 230

Colley v Shuker and Others (QBD) [2019] EWHC 781 (QB); [2019] Lloyd's Rep IR 503

Equitas Insurance Ltd v Municipal Mutual Insurance Ltd (CA) [2019] EWCA Civ 718; [2019] Lloyd's Rep IR 359

Euro Pools plc v Royal & Sun Alliance Insurance plc (CA) [2019] EWCA Civ 808; [2019] Lloyd's Rep IR 595

Friends Life Ltd v Miley (CA) [2019] EWCA Civ 261

Herbert v H H Law Ltd (CA) [2019] EWCA Civ 527; [2019] 1 WLR 4253

Hiscox Dedicated Corporate Member Ltd as Representative of Syndicate 33 at Lloyd's Starr Managing Agents Ltd (t/a Syndicate CVS 1919) v Weyerhaeuser Co (QBD (Comm Ct)) [2019] EWHC 2671 (Comm); [2020] Lloyd's Rep IR Plus 8

Liverpool Victoria Insurance Co Ltd v Zafar (CA) [2019] EWCA Civ 392; [2019] 1 WLR 3833

Manchikalapati and Others v Zurich Insurance plc and Another (CA) [2019] EWCA Civ 2163; [2020] Lloyd's Rep IR 77

McKeever v Northernreef Insurance Co SA 2019 WL 02261376; [2019] Lloyd's Rep IR 535

Motor Insurers' Bureau v Lewis (CA) [2019] EWCA Civ 909; [2019] Lloyd's Rep IR 390

Munich Re Capital Ltd v Ascot Corporate Name Ltd (QBD (Comm Ct)) [2019] EWHC 2768 (Comm); [2020] Lloyd's Rep IR 115

Palliser Ltd v Fate Ltd and Others (QBD) [2019] EWHC 43 (QB); [2019] Lloyd's Rep IR 341

R&S Pilling (trading as Phoenix Engineering) v UK Insurance Ltd (SC) [2019] UKSC 16; [2019] Lloyd's Rep IR 404

Sartex Quilts & Textiles Ltd v Endurance Corporate Capital Ltd (QBD (Comm Ct)) [2019] EWHC 1103 (Comm); [2019] Lloyd's Rep IR 615

Suez Fortune Investments Ltd and Another v Talbot Underwriting Ltd and Others (The Brillante Virtuoso) (No 2) (QBD (Comm Ct)) [2019] EWHC 2599 (Comm); [2020] Lloyd's Rep IR 1

Sveriges Angfartygs Assurans Forening (The Swedish Club) and Others v Connect Shipping Inc and Another (The Renos) (SC) [2019] UKSC 29; [2019] Lloyd's Rep IR 415

Travelers Insurance Co Ltd v XYZ (SC) [2019] UKSC 48; [2019] Lloyd's Rep IR 683

Various Claimants v Giambrone and Law (A Firm) and Others (QBD) [2019] EWHC 34 (QB); [2019] 4 WLR 7

Watson v Hemingway Design Ltd and Others [2019] UKEAT 0007; [2020] Lloyd's Rep IR Plus 12

West v Stockport NHS Foundation Trust (CA) [2019] EWCA Civ 1220; [2019] 1 WLR 6157

Young v Royal and Sun Alliance plc (CSOH) [2019] CSOH 32; [2019] Lloyd's Rep IR 482

Zurich Insurance plc v Romaine (CA) [2019] EWCA Civ 851; [2019] 1 WLR 5224

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Judgments considered

Atlasnavios-Navegação Lda v Navigators Insurance Co Ltd (The B Atlantic) (SC) [2018] UKSC 26; [2018] 2 Lloyd's Rep 1

Braganza v BP Shipping Ltd (The British Unity) (SC) [2015] UKSC 17; [2015] 2 Lloyd's Rep 240; [2015] 1 WLR 1661

Callery v Gray (No 2) (CA) [2001] EWCA Civ 1246; [2001] Lloyd's Rep IR 765; [2001] 1 WLR 2142

Cameron v Hussain (CA) [2017] EWCA Civ 366; [2017] Lloyd's Rep IR 487

Doheny v New India Assurance Co Ltd (CA) [2004] EWCA Civ 1705; [2005] Lloyd's Rep IR 251

Dunthorne v Bentley (CA) [1999] Lloyd's Rep IR 560

Economides v Commercial Union Assurance Co plc (CA) [1998] Lloyd's Rep IR 9; [1998] QB 587

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

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

Herbert v H H Law Ltd (QBD) [2018] EWHC 580 (QB); [2018] 2 Costs LR 261

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

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

Kris Motor Spares Ltd v Fox Williams LLP (QBD) [2010] EWHC 1008 (QB); [2010] 4 Costs LR 620

Lewis v Tindale (QBD) [2018] EWHC 2376 (QB); [2019] Lloyd's Rep IR 324

Mark Rowlands Ltd v Berni Inns Ltd (CA) [1985] 2 Lloyd's Rep 437; [1986] QB 211

Núñez Torreiro v AIG Europe Ltd, Sucursal En España Case C-334/16 (CJEU) EU:C:2017:1007; [2018] Lloyd's Rep IR 418

RoadPeace v Secretary of State for Transport (QBD (Admin Ct)) [2017] EWHC 2725 (Admin); [2018] Lloyd's Rep IR 478

Rodrigues de Andrade v Salvador Case C-514/16 (CJEU) EU:C:2017:908; [2018] Lloyd's Rep IR 164

Rogers v Merthyr Tydfil County Borough Council (CA) [2006] EWCA Civ 1134; [2006] Lloyd's Rep IR 759; [2007] 1 WLR 808

Romford Ice and Cold Storage Co Ltd v Lister (CA) [1955] 2 Lloyd's Rep 325; [1956] 2 QB 180

Tonkin v UK Insurance Ltd (QBD (TCC)) [2006] EWHC 1120 (TCC); [2007] Lloyd's Rep IR 283

Travelers Insurance Co Ltd v XYZ (QBD) [2017] EWHC 287 (QB); [2017] Lloyd's Rep IR 269; (CA) [2018] EWCA Civ 1099; [2018] Lloyd's Rep IR 636

Vnuk v Zavarovalnica Triglav dd Case C-162/13 (CJEU) EU:C:2014:2146; [2015] Lloyd's Rep IR 142

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

Zurich Insurance plc v Romaine (QBD) [2018] EWHC 3383 (QB)

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