Lloyd's List Intelligence

Insurance law in 2023: a review of developments in case law

By Aybüke Naz Durmuş

Brokers – Business interruption – Conflict of laws – Formation – Liability insurance – Marine insurance – Motor insurance – Property insurance – Subrogation – Warranty and indemnity insurance

Insurance law in 2023: a review of developments in case law is published by Lloyd's List Intelligence, 5th Floor, 10 St Bride Street, London EC4A 4AD, United Kingdom. Lloyd's List Intelligence is a premium legal research supplier to practitioners across the globe. Our insurance and reinsurance content is available online via single-user subscriptions or multi-user licences at www.i-law.com/ilaw/insurance.htm

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Maritime Insights & Intelligence Limited is registered in England and Wales with company number 13831625 and address 5th Floor, 10 St Bride Street, London EC4A 4AD, United Kingdom.

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Aybüke is a PhD researcher at the University of Reading and a qualified barrister admitted to the Ankara Bar Association in Türkiye.

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In addition to her experience in practice at leading law firms and the Supreme Court of Türkiye, she also worked as an Associate Lecturer at the University of Reading. Aybüke is continuing her PhD under the supervision of Professor Rob Merkin KC focusing on the insurer's subrogation rights in marine insurance for which she received a scholarship from the Republic of Türkiye Ministry of National Education.

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Insurance law in 2023: a review of developments in case law

By Aybüke Naz Durmuş

Introduction

This review addresses the most important developments in insurance law in England and Wales in 2023.

This year has seen significant insurance cases including *University of Exeter v Allianz Insurance plc*[1] where the Court of Appeal delivered judgment on causation in respect of war risks in relation to a bomb dropped during World War II, and various cases relevant to business interruption policies regarding the application of *Financial Conduct Authority v Arch Insurance (UK) Ltd*[2] (the FCA test case).

There were two judgments, namely *Finsbury Food Group plc v Axis Corporate Capital UK Ltd and Others*[3] and *Project Angel Bidco Ltd v Axis Managing Agency Ltd and Others*,[4] providing useful guidance in respect of warranty and indemnity insurance (W&I) claims which are relatively rare in English case law.

In addition to these, there have been numerous cases involving causation, insurable interest, scope of cover, professional indemnity policies and subrogation.

Formation

In *George on High Ltd and Another v Alan Boswell Insurance Brokers Ltd and Another*[5] the main issue was whether a policy on a hotel covered the operator of that hotel as well or covered only the owner.

The case involved a 16th-century hotel named The George in Rye, Sussex. The freehold of the hotel was owned by The George on High Ltd (GOH), while the business and the restaurant of it was operated by The George on Rye Ltd (GOR). Both companies were indirectly under the common ownership of Mr and Mrs Clarke. The hotel was never operated by GOH who received rent payments from GOR for use of the hotel premises and restaurant business. Insurance covering business interruption, employer's liability, public liability and material damage had been taken out with NIAC through brokers since 2013. The policy named the insured as "The George on High Ltd t/a The George in Rye".

On 20 July 2019 a fire largely destroyed the hotel. The claimants sought compensation from NIAC for the losses incurred due to the fire which encompassed losses of GOH for damage to the building as well as losses suffered by GOR resulting from loss of business and loss of stock and contents. While NIAC accepted liability and made payment for the damage to the hotel owned by GOH, it rejected any compensation to GOR for business interruption and other associated losses on the ground that GOR was not covered under the policy. According to NIAC, the wording "George on High Ltd t/a The George in Rye" did not extend coverage to GOR.

GOR filed a claim against the broker seeking compensation for losses resulting from NIAC's non-payment, alleging that the broker negligently failed to arrange insurance for GOR. In contrast, the broker contended that NIAC

1 [2023] EWCA Civ 1484; [2024] Lloyd's Rep IR Plus 1.
2 [2021] UKSC 1; [2021] Lloyd's Rep IR 63.
3 [2023] EWHC 1559 (Comm); [2023] Lloyd's Rep Plus 81.
4 [2023] EWHC 2649 (Comm); [2024] Lloyd's Rep IR Plus 3.
5 [2023] EWHC 1963 (Comm); [2024] Lloyd's Rep IR Plus 8.

should have made the payment for the insurance claims, and therefore, the broker should not be held responsible. Consequently, NIAC was brought in as a second defendant in the case.

It was held that GOR was insured under the insurance policy. The analysis involved construction of the contract. The judge, by referring to Lord Hoffmann's statement in *Investors Compensation Scheme Ltd v West Bromwich Building Society*,[6] expressed[7] that to ascertain the meaning of the contract there was a need to establish "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". Such ascertainment necessitated the consideration of the background knowledge of the parties rather than the assessment of the subjective intention of the parties.

When evidence from historic claims was examined, it was seen that there were four individual liability claims against GOR between 2014 and 2018 which were handled by Garwyn as NIAC's claims' handlers, and one of the claims was paid under the insurance policy. The judge was of the view that each of those claims contained evidence to reveal that GOR operated the business.[8] The knowledge of Garwyn, as the claims' handlers, was to be imputed to NIAC.

It was concluded that a reasonable person, taking into account that NIAC, GOH and GOR were all aware that GOR operated the business, seeing that the contract contained business interruption and employer's liability as insured risks, knowing that GOR had paid the insurance premiums for the period since 2013, and having all the other available knowledge, would come to the conclusion that the meaning of the "Insured" in the policy meant "George on High Limited and the business operated by GOR t/a The George in Rye".[9] Therefore the judge held that GOR was insured in accordance with the objective meaning of the contract.[10]

The position in respect of rectification was also considered in the event that the analysis of the construction was incorrect, and it was held that the insurance policy would be rectified to identify GOR as the insured in order to reflect the common intention of the parties.[11]

> To ascertain the meaning of the contract there was a need to establish "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract"

With regard to the estoppel argument, the judge was of the view that NIAC should be estopped by convention from denying insurance cover to GOR under the policy.[12]

Having concluded that GOR was insured under the insurance policy, it was held that NIAC was liable to GOR for the insured losses including business interruption, stock and contents. For the period when the hotel was closed due to the fire where GOR was not liable to pay rent to GOH who had insurance against loss of rent for up to £25,000, the broker was held to be liable to GOH in the sum of £776,000 for uninsured loss of rental income.

6 [1998] 1 WLR 896.
7 At para 42.
8 At para 66.
9 At para 80.
10 At para 83.
11 At para 98.
12 At para 114.

Brokers

Infinity Reliance Ltd v Heath Crawford Ltd[13] serves as a useful reminder of the duties of insurance brokers. The court held that the brokers were liable in respect of uninsured loss caused by negligent advice regarding a business interruption ("BI") insurance policy. This case also serves as an example as to the operation of contributory negligence in respect of a broker's liability.

The claimant Infinity operated an online retailer under the name "My 1st Years," selling personalised gifts for babies and children, including items like clothing, toys and blankets. The unique nature of its products required a process where, upon receiving an order, the goods were retrieved from storage and personalised for the buyer – often involving tasks such as embroidering the child's name. Due to the nature of that business model Infinity was unable to rely on a third-party logistics company solely for the tasks of picking, packing, and posting its orders. Instead, it needed a warehouse space where its own staff could personalise the goods before dispatching them. In 2021 Infinity used space within a Northampton warehouse owned and managed by the logistics firm Cygnia who received payment from Infinity for their logistics work. Within the warehouse, Infinity had space where its staff could apply personalised details to the products before dispatching them.

> *Infinity Reliance v Heath Crawford* serves as a useful reminder of the duties of insurance brokers. It also serves as an example as to the operation of contributory negligence in respect of a broker's liability

In May 2021 a fire occurred at Cygnia's warehouse, rendering it unusable for Infinity. This incident disrupted Infinity's operations, leading to a loss in sales until the company could secure alternative premises and fit them out accordingly. The process of finding and fitting out new premises consumed both time and financial resources. Infinity incurred substantial losses amounting to millions of pounds in sales and spent over £2 million in outfitting the new premises.

Infinity was insured with coverage that included BI, and the insurance broker responsible since late 2018 was Heath Crawford Ltd ("Heath Crawford") who recommended the commercial combined policy from Aviva plc which encompassed BI coverage. When the fire occurred, the most recent insurance policy had been renewed at the beginning of November 2020.

Regrettably for Infinity, the coverage was proved to be insufficient. Infinity's BI insurance was calculated based on a forecasted gross profit of £24.9 million over two years. However, in accordance with the policy's terms, the accurate figure should have been higher, approximately £33 million. Consequently, Infinity was underinsured. When settling the claim, Aviva applied the doctrine of average. As Infinity's insured exposure was 26 per cent less than its full exposure, it only received 74 per cent of its adjusted loss, amounting to £9.25 million instead of the anticipated £12.17 million. Furthermore, the costs that Infinity had to incur in order to fit out the new warehouse were only partly insured.[14]

None of the parties disputed that Aviva paid the rightful amount under the policy it had underwritten. Infinity asserted that its broker, Heath Crawford, was responsible for the issue. According to Infinity, had Heath Crawford provided accurate advice, Infinity would have been adequately insured for the loss, and it therefore claimed the shortfall. The particular complaints of Infinity included:

(i) Infinity received a document from Heath Crawford detailing the calculation of the sum insured. However, the document was misleading ultimately causing Infinity to purchase inadequate coverage.

(ii) Heath Crawford should have proposed a different type of business interruption cover (declaration linked cover) which would have resulted in a full recovery.

(iii) Heath Crawford should have recognised that Infinity required extra coverage to address the costs associated with fitting out alternative warehouse space in the event of a fire or a similar incident that rendered Cygnia's warehouse non-operational.[15]

Heath Crawford accepted its contractual duty to Infinity and admitted breaching it by offering a misleading explanation regarding the calculation of the sum insured. While not fully conceding, it admitted breach in respect of failing to recommend the purchase of declaration linked cover. However, Heath Crawford denied Infinity's

13 [2023] EWHC 3022 (Comm); [2024] Lloyd's Rep IR Plus 10.

14 At para 6.

15 At para 8.

third claim.[16] Heath Crawford also argued that there was contributory negligence by Infinity which contributed to its own loss, so a proportionate reduction should be made accordingly.

Heath Crawford was held to be in breach of its duty in those three aspects and the losses were caused by its breach of duty considering the balance of probabilities.[17]

In respect of the contributory negligence, it was held that a 20 per cent deduction would be made from the damages. The calculation of the insured amount was supposed to involve taking the 2020 gross profit and adjusting it for projections from 2021 to 2023. Nevertheless, Infinity opted to follow the provided example in Heath Crawford's guidance document which depicted a company expecting a 10 per cent growth. The court concluded that a reasonable person would not have used that example 10 per cent figure which was manifestly irrelevant[18] considering that had Infinity carried out the correct forecasting exercise, it would have projected growth at 26 per cent for 2021 and at 20 per cent for 2022 and 2023. Consequently, Infinity contributed to its loss by carelessly failing to apply a reasonable methodology, and its damages were reduced by 20 per cent, which resulted in damages of £2,336,842.

16 At para 10.
17 At para 112.
18 At paras 113 to 114.

Conflict of laws

Al Mana Lifestyle Trading LLC and Others v United Fidelity Insurance Co PSC and Others[19] concerned an appeal by the defendants from the decision of Cockerill J[20] on whether the "Applicable Law and Jurisdiction" clause in a series of insurance policies, which were issued by the appellant defendants, included an agreement that conferred jurisdiction on the English courts for claims by the respondent claimants under those policies.

The claimants consisted of 27 entities that were part of the Al Mana Group. They were engaged in business activities within the food, beverage, and retail sectors, primarily operating in the Middle East and Gulf region. Additionally, a small portion of their operations extended to Ireland.

The defendants were insurance companies operating within the Gulf Cooperation Council located in the United Arab Emirates, Qatar and Kuwait. The policies were issued in those locations and they were on materially identical terms covering business interruption under an all risks section as well. They also contained the "Applicable Law and Jurisdiction" clause which stated:

> "[1] In accordance with the jurisdiction, local laws and practices of the country in which the policy is issued. [2] Otherwise England and Wales UK Jurisdiction

19 [2023] EWCA Civ 61; [2023] Lloyd's Rep IR 359.
20 [2022] EWHC 2049 (Comm); [2022] Lloyd's Rep IR Plus 36.

shall be applied, [3] Under liability jurisdiction will be extended to worldwide excluding USA and Canada."[21]

The claimants brought proceedings in England for losses in relation to business interruption resulting from the Covid-19 pandemic in the sum of US$40 million.

The insurers contended that the Applicable Law and Jurisdiction clause should be interpreted as an exclusive jurisdiction clause for the courts in the countries where the policies were issued. They argued that para [1] of the clause explicitly granted exclusive jurisdiction to the courts of the country where the policy was issued and that the applicable law for the policy was that of that particular country. They emphasised that the absence of the term "exclusive" in the clause was not significant. According to the insurers, para [2] was specifically designed to address the scenario where the local court might refuse to accept jurisdiction and should not be interpreted as an exclusive jurisdiction clause favouring England.[22]

The claimants contended that the clause provided an alternative of two jurisdictions namely either the local court or, given the use of the word "otherwise", the English court. The clause did not incorporate anything indicating the English court was to be available only if the local court had declined or would decline jurisdiction.[23]

At first instance Cockerill J dismissed the application of the insurers by expressing that the clause provided for non-exclusive jurisdiction, ie paras [1] and [2] were true alternatives and England should be considered as the forum conveniens.

The Court of Appeal (Andrews LJ dissenting) reversed the decision of Cockerill J and held that the English court did not have jurisdiction. The majority, consisting of Males LJ and Nugee LJ, held that the paragraphs of the clause were not true alternatives, rather the second sentence was only applicable when the jurisdiction of the local court was not available.[24] While the first sentence of the clause contained the primary jurisdiction chosen by the parties, the clause continued in the second sentence with a fallback for English and Wales jurisdiction.[25]

21 At para 3.
22 At para 19.
23 At para 20.
24 At para 35.
25 At para 22.

Liability insurance

In respect of liability insurance, there were three main judgments to consider in 2023.

In *Royal and Sun Alliance Insurance Ltd and Others v Tughans*,[26] which was a professional indemnity insurance case, the Court of Appeal affirmed the first instance decision of Foxton J[27] that a solicitors' firm was entitled to its fees under a solicitors' professional indemnity policy even though there was a breach of duty towards its client.

After the 2008 financial crisis, the Irish government formed the National Asset Management Agency (NAMA) in December 2009 for the acquisition and management of impaired loans held by participating Irish banks. Regarding transactions involving banks in Northern Ireland, NAMA received support from the Northern Ireland Advisory Committee (NIAC) in its activities. Between 13 May 2010 and 7 November 2013 Mr Frank Cushnahan was a member of NIAC. NAMA later decided to sell that part of its portfolio involving Northern Irish property loans ("the NI Loan Book").

In March 2014 solicitors Brown Rudnick LLP ("BR") sent a prospective engagement letter to Cerberus, a potential buyer, regarding its acquisition of the NI Loan Book. According to the terms of the engagement letter BR would be entitled to a fee amounting to £15 million upon the successful completion of the purchase transaction, referred to as the "Success Fee". Irish solicitors Tughans, whose managing partner Mr Ian Coulter orchestrated the introduction, was entitled to 50 per cent of the Success Fee. The letter included a section in which BR provided several representations and warranties with the pertinent one for the present purposes being that BR would not engage in any payments, whether direct or indirect, to any individual in violation of applicable anti-corruption laws. Furthermore, BR would not make such payments to, or for the benefit of, any government official.[28]

On 3 April 2014 NAMA accepted Cerberus's offer to purchase the NI Loan Book for €1.6 billion. On 13 August 2014 Tughans signed a letter of engagement containing provisions for Tughans to receive £7.5 million, a 50 per cent share of the Success Fee, on the same terms applicable to BR's entitlement to the Success Fee. It included essentially identical warranties and

26 [2023] EWCA Civ 999; [2023] Lloyd's Rep IR 657.
27 [2022] EWHC 2589 (Comm); [2023] Lloyd's Rep IR 230.
28 At para 12.

representations that Tughans had provided to BR, mirroring those previously given to Cerberus in the engagement letter between Cerberus and BR.

In November 2017 BR alleged that the statements of Mr Coulter, the managing partner of Tughans, were false and fraudulent since he intended to transfer a portion of the Tughans Fee to Mr Cushnahan. The claims against Tughans were comprised of several types including for damages for fraudulent misrepresentation, for liability to account for the Tughans Fee, and in unjust enrichment commencing from the receipt of the Tughans Fee in breach of fiduciary duty. The damages sought encompassed the fee and the expenses sustained by BR in dealing with the numerous investigations.[29]

Tughans made a claim under its professional indemnity insurance from Royal and Sun Alliance Insurance Ltd (RSA). The insurers denied liability on the grounds that claims did not arise "in respect of any civil liability … incurred in connection with the Practice carried on by or on behalf of the Solicitor" as stated in the policy[30] and Tughans did not suffer any loss given that it never became entitled to the Tughans Fee.

Tughans commenced arbitration against RSA claiming that it was entitled to indemnity under the insurance policy "save for any liability on its part to return any fees …". On 5 July 2021 the arbitrator handed down a Partial Final Award by upholding Tughans' case that the policy should respond and the Success Fee was due and payable to Tughans for the work they had done. In the Final Award delivered on 7 September 2021, the arbitrator ruled that Tughans' claim was within the scope of the "Solicitors' Practice" coverage and RSA was liable to provide indemnity for damages. However, the arbitrator refused to grant a Declaration regarding the Success Fee since no claim had been brought for it, and moreover there was not an indemnity obligation against a claim for restitution in any case.

RSA appealed against the arbitration award on three grounds under Arbitration Act 1996, namely want of jurisdiction under section 67, serious irregularity under section 68, and error of law under section 69. In respect of the claim under section 67, Foxton J held that the arbitrator had the jurisdiction. As for the second claim under section 68, Foxton J held that the decision of the arbitrator to grant the Declaration for damages regarding the Success Fee was a serious procedural irregularity under section 68 and the arbitration award was remitted to the arbitrator in respect of that claim. For the present purposes, the main question concerned the claim regarding the issue of law under section 69 that whether "a professional indemnity insurance covers a claim for repayment of a professional fee on the ground that the firm received the fee as a result of a fraudulent or negligent misrepresentation or otherwise improperly".[31]

Foxton J held that there was no error of law. Tughans was entitled to the Success Fee given that it had performed its obligations under the contract and, therefore, damages for the Success Fee would constitute a loss under a professional indemnity policy. Tughans was entitled to the fee "in substance" even if it was procured by misrepresentation.

> It was not right to treat an earned fee received as a result of misrepresentation as equivalent "in substance" to an unearned fee to which the solicitor was never entitled

RSA appealed by arguing that there was no entitlement to the fee in substance. Since the fee resulted from misrepresentation, Tughans could not retain it; and if it had to return the amount, it meant that it did not suffer a loss as a matter of substance and covering such a claim would be against the principle of indemnity. The judge concluded that if a solicitor had done what was necessary as a matter of contract to accrue a right to a fee, an award of damages in the amount of the fee payable would ordinarily constitute a loss for the purposes of a professional indemnity policy.

The Court of Appeal dismissed the appeal. Tughans earned the Success Fee under the contract and once it was earned, the firm was entitled to it unless and until the contract was avoided. It was not right to treat an earned fee received as a result of misrepresentation as equivalent "in substance" to an unearned fee to which the solicitor was never entitled.[32]

29 At para 22.
30 At para 24.
31 At para 47.
32 At paras 66 to 68.

RSA's argument was contrary to the public interest purpose of compulsory professional indemnity insurance cover for solicitors.[33] Furthermore, the ramifications of the arguments of RSA were not consistent with the commercial and regulatory function of compulsory professional indemnity insurance cover, which was designed to protect partners and employees from their own negligence and the negligent mistakes of their fellow partners and employees, along with from the fraud of those others, in addition to its function to provide protection to its clients.[34] Finally, RSA's argument in respect of the indemnity principle was flawed since it ignored the composite nature of the insurance policy and the fact that the claims were brought by individual assureds.[35]

The second case, *Technip Saudi Arabia Ltd v Mediterranean and Gulf Cooperative Insurance and Reinsurance Co*,[36] provides guidance on the construction of the Damage to Existing Property (DTEP) Exclusion in the standard WELCAR form. The court dismissed a contractor's claim on a construction all risks policy which was written on the form of an amended WELCAR 2001 Offshore Construction Project Policy, since the policy contained an exclusion for existing property owned by a principal assured.

The claimant contractor Technip was a Saudi Arabia-based company specialising in project management, engineering and construction work for the energy industry. Al-Khafji Joint Operation ("KJO") was a joint venture formed by Aramco Gulf Operations Co ("AGOC") and Kuwait Gulf Oil Co ("KGOC") which were oil companies operating in the Arabian Gulf region. The said oil companies owned and operated the Khafji Field, offshore Saudi Arabia, through KJO.

In 2010 KJO undertook the Khafji Crude Related Offshore Projects ("the Project"), that was designed to improve certain production assets in the Khafji Field. In 2010 Technip entered into a contract with KJO. In respect of the work required for the Project, Technip was to perform design, engineering, procurement and fabrication services in the Khafji oilfield operated by KJO. In clause 5.2.3 it was expressly stated that the "contractor shall protect from damage all existing structures, improvements or utilities at or near the work site ..." and, according to clause 12.6, Technip was "fully responsible to company for the acts, negligence, alteration, additions and omissions of all its subcontractors ...".[37]

On 1 December 2014 Technip chartered the vessel *Maridive-43* from Maridive & Oil Services SAE, the registered owners, pursuant to a charterparty on an amended BIMCO SUPPLYTIME 2005 form. Maridive took out P&I cover from Gard P&I (Bermuda) Ltd in respect of liability for loss of or damage to any fixed or floating object resulting from contact between the vessel and such object.

On 16 August 2015 the vessel allided with an unmanned wellhead platform which was a fixed structure owned and operated by KJO and did not constitute a part of the Project.

Technip was insured by Medgulf, an insurance and reinsurance company located in Saudi Arabia, by an amended WELCAR 2001 Offshore Construction Project Policy. The policy identified Technip, AGOC, KGOC, and KJO as principal assureds. The insurance provided the insured interest as "All works and operations connected with [the Project]", covered liability for "Third Party Legal Liability and/or Contractual Liability as Welcar 2001, including Damage to Existing Property".[38]

The policy also contained the Existing Property Exclusion clause by which "any claim for damage to or loss of use of any property for which the principal assured ... owns that is not otherwise provided for in this policy" was excluded from the insurance coverage. There was an Existing Property Contractual Exclusion Buy-Back clause under which the Exclusion did not apply to claims relevant to certain structures listed in the schedule so those identified structures and assets were covered.[39] It was common ground that this did not incorporate the damaged Platform.[40]

Medgulf denied liability by relying on the Existing Property Endorsement. Technip and KJO entered into a settlement under which Technip agreed to pay US$25 million without admitting any liability. Technip claimed that sum from Medgulf under the insurance policy.

Jacobs J dismissed Technip's claim and held that Medgulf was not liable under the insurance policy as a result of the Existing Property Endorsement. Given that the issue

33 At para 69.
34 At para 70
35 At para 71.
36 [2023] EWHC 1859 (Comm); [2023] 2 Lloyd's Rep 371; [2023] Lloyd's Rep IR Plus 33.
37 At para 51.
38 At para 47.
39 At para 49.
40 At para 120.

arose as to a liability policy governed by English law, a claim for recovery could only be made if Technip's liability had been established by judgment or settlement.[41] Furthermore, under English law, if the policyholder settled its liability to a third party, and sought to make a claim under its liability policy, merely establishing the reasonableness of the settled amount was not sufficient for the policyholder to succeed. The policyholder had to prove first that it was in fact legally liable, and secondly that the sum for which the policyholder would have been liable if the issue had gone to court was at least as much as the amount paid under the settlement.[42]

It was held that Technip was liable to KJO under the contract given that the damaged platform was near the worksite and the allision occurred during Technip's performance of the work. Technip was not prevented from claiming indemnity even though it had not obtained Medgulf's consent to the settlement since US$25 million in the Settlement Agreement could be regarded as "compensatory damages" under the policy. Even if there had been a need for Medgulf's consent, Medgulf could not have relied on the lack of consent given that it had informed Technip that there would be no insurance coverage for liability, and advised Technip to act as a prudent uninsured. Due to the Existing Property Endorsement, Medgulf's liability under the policy was excluded. Had it been required to determine the quantum, Technip could not have relied upon the settlement amount and the reasonable cost of repairs would have been US$10,377,059.

> Furthermore, under English law, if the policyholder settled its liability to a third party, and sought to make a claim under its liability policy, merely establishing the reasonableness of the settled amount was not sufficient for the policyholder to succeed

The third case was *Discovery Land Co LLC and Others v AXIS Specialty Europe SE*[43] where the court considered the meaning of "condonation" of dishonesty as well as the operation of an aggregation clause in solicitors' professional indemnity insurance policy.

The defendant provided the primary layer of solicitor's professional indemnity insurance to Jirehouse Partners LLP (solicitors), and to two private limited companies, Jirehouse and Jirehouse Trustees Ltd ("JTL") (together, "the Jirehouse Entities") which were controlled by Stephen Jones.

Claims under the insurance policy emanated from dishonest and fraudulent acts, errors and omissions committed by the Jirehouse Entities through Mr Jones. Having undertaken numerous investigations, the Solicitors Regulation Authority made an intervention to the legal practice.

The main issues before the court were, first, whether Mr Jones was the only director of the limited companies and the sole member of the limited liability partnership that constituted the Jirehouse Entities, or whether Mr Vieoence Prentice was likewise a director and member, and if so, whether he condoned the acts of Mr Jones.

The claimants obtained judgments against the Jirehouse Entities with regard to two claims concerning the misuse of client money provided in connection with the purchase of Taymouth Castle. The "Surplus Funds Claim" concerned Mr Jones using dishonestly and without authority the sum of US$14,050,000 which was paid to the account of JTL by the first claimant for the purchase of Taymouth Castle. The "Dragonfly Loan Claim" involved Mr Jones dishonestly and without authority arranging and drawing down the sum of £4,980,470 from Dragonfly Finance as a loan against security over Taymouth Castle, and then removing that sum from the client account of the Jirehouse.

The Jirehouse Entities did not satisfy the judgments and had become insolvent. The claimants pursued against AXIS which was Jirehouse Entities' liability insurer and provider of the primary layer of £3 million per claim. The insurance policy was concluded in accordance with rules established by the Solicitors Regulation Authority. There were two limitations on the insurance cover. First, in accordance with the exclusions in the policy for which the insurer would not be liable, clause 2.8. stated that:

> "any claims directly or indirectly arising out of or in any way involving dishonest or fraudulent acts, errors or omissions committed or condoned by the insured, provided that:
>
> ...
>
> (b) no dishonest or fraudulent act, error or omission shall be imputed to a body corporate unless it was committed or condoned by, in the case of a

41 At para 6.
42 At para 7.
43 [2023] EWHC 779 (Comm); [2024] Lloyd's Rep IR 17.

> company, all directors of that company, or, in the case of a Limited Liability Partnership, all members of that Limited Liability Partnership."[44]

Secondly, the aggregation clause 5.2. allowed the aggregation of two claims on the condition that they arose from "one series of related acts or omissions" or "similar acts or omissions in a series of related matters or transactions".[45]

At first instance, Knowles J held that AXIS could not rely on the fraud clause. There was no evidence that the appointment of Mr Prentice as a partner was a sham. Therefore Mr Prentice had been a director of Jirehouse and a member of Jirehouse Partners LLP.[46] Even though his standards had fallen below those required in his profession, Mr Prentice had not condoned Mr Jones acting dishonestly or fraudulently.[47] In respect of the aggregation, it was held that there were two separate claims. The Surplus Funds Claim and the Dragonfly Loan Claim did not constitute "one series of related acts or omissions" under clause 5.2(c) given that those were separate thefts. Moreover, the two claims were not "similar acts or omissions in a series of related matters or transactions" under clause 5.2(e) as well. Even though both claims were related to Taymouth Castle, the Surplus Funds Claim pertained to the theft of a client's purchase monies under a proposed purchase transaction which was independent of a loan; the Dragonfly Loan Claim involved the theft of monies lent to a client under a secured lending transaction arranged later. [48] Consequently, the two claims were not to be aggregated into a single claim.

AXIS appealed the decision. The Court of Appeal[49] dismissed the appeal and held that the judge was entitled to reject AXIS's case on condonation.[50] The aggregation argument was also rejected given that even though both claims resulted from the dishonest behaviour of Mr Jones, the Surplus Funds Claim and the Dragonfly Loan Claim were in substance about two very different things.[51]

44 At para 15.
45 At para 154.
46 At paras 149 to 151.
47 At paras 144 to 145.
48 At paras 157 to 158.
49 [2024] EWCA Civ 7; [2024] Lloyd's Rep IR Plus 7.
50 At para 72.
51 At paras 85 and 90.

Property insurance

Brian Leighton (Garages) Ltd v Allianz Insurance plc[52] was an appeal by BLG against the decision of Clare Ambrose, sitting as a Deputy Judge of the High Court[53] which held that the defendant insurers did not have liability to BLG under a motor trade policy. The main issue was whether a pollution exclusion clause applied where pollution or contamination was the proximate cause of damage.

BLG operated a garage business engaging in the trade and repair of vehicles, along with managing a 24-hour petrol filling station. The respondent was its insurer under a "Motor Trade Policy" which covered numerous risks. BLG brought a claim in respect of material damage and business interruption arising out of a fuel leak at the garage in June 2014. The fuel leak was attributed to the pressure of a sharp object on a pipe and movement from the weight of the concrete slab under the forecourt. The leak contaminated the forecourt, yard, paved area and forecourt pad and ducting along with the lower parts of the floors, walls and skirtings of the adjacent shop building ultimately reaching electrical conduits connecting the pumps to the building and creating an immediate risk of fire or explosion. Consequently, the business had to be closed for safety reasons.[54]

Under section 1 of the insurance policy damage was defined as "accidental loss, destruction or damage to Property Insured". Exclusion 9 stated that the policy did not cover "damage caused by pollution or contamination", however:

> "We will pay for Damage to the Property Insured not otherwise excluded, caused by:
>
> (a) a pollution or contamination which itself results from A Specified Event,
>
> (b) any Specified Event which itself results from pollution or contamination."[55]

And specified events were defined as "fire, lightning, explosion, ..., flood, escape of water from any tank apparatus or pipe or impact by any road vehicle or animal".[56]

The insurers relied upon the exclusion and denied liability. BLG brought proceedings against the insurers. Clare Ambrose, by concluding that the damage was within

52 [2023] EWCA Civ 8; [2023] Lloyd's Rep IR 380.
53 [2022] EWHC 1150 (Comm).
54 At para 4.
55 At para 9.
56 At para 10.

the scope of exclusion, dismissed the claim. She was of the view that Allianz's argument that the damage was caused by pollution and contamination better reflected the ordinary meaning of Exclusion 9. BLG's argument that the exclusion was only applicable to environmental contamination of subsoils and groundwaters was dismissed. BLG appealed the decision by arguing that the loss was caused by a process of contamination or pollution as part of the causative chain, but that the proximate cause of the loss was the sharp object rupturing the pipe that was not itself pollution or contamination.[57] Allianz argued that the expression "caused by" connoted something looser than proximate cause.[58]

> It was a general principle of insurance law that the insurer was only liable for losses proximately caused by a peril covered by the policy

The Court of Appeal held by a 2:1 majority that the policy responded and allowed the appeal. It was a policy for an enterprise whose business included a petrol filling station, and the risk of leakage of fuel was among the most apparent risks resulting from such an operation, and one against which the business would logically want to cover[59]. There was no basis for any presumption that Exclusion 9 was to be narrowly construed or construed against the insurer. The exclusion was part of the definition of the scope of cover rather than exemptions from liability for cover which would otherwise exist.[60] It was a general principle of insurance law that the insurer was only liable for losses proximately caused by a peril covered by the policy.[61] The proximate cause of the loss was the puncturing of the pipe by the stone or sharp object. Therefore, it was crucial to the outcome whether the exclusion was concerned with pollution or contamination as a proximate cause or simply as an intermediate process in the chain of causation.[62] In respect of the write-back in Exclusion 9, clause (a) wrote back cover where pollution or contamination was the proximate cause but a specified event was a more remote cause in the chain of causation. Clause (b) covered the possibility of two concurrent proximate causes.[63] Consequently, it was the intention of the parties that Exclusion 9 applied to pollution or contamination as a proximate cause. Therefore, Exclusion 9 had no effect on the claim for the damage.[64]

In *University of Exeter v Allianz Insurance plc*[65] the Court of Appeal upheld the first instance decision of HHJ Bird[66] that the University of Exeter could not claim damage to property resulting from the controlled detonation of a bomb dropped during World War II because of a war risks exclusion under the insurance policy.

In 1942 Exeter suffered numerous bombing raids. The bomb in the present appeal was dropped during one of those raids and fell onto farmland on the outskirts of the city, in an area adjacent to what are now some of the University of Exeter's halls of residence. The bomb did not explode.

On 26 February 2021 contractors working on a construction site discovered the unexploded bomb. The emergency services established a safety cordon of 400 m radius. University halls of residence falling within the safety cordon had to be evacuated.

57 At para 22.
58 At para 22.
59 At para 25.
60 At para 26.
61 At para 27.
62 At para 34.
63 At para 43.
64 At para 53.
65 [2023] EWCA Civ 1484; [2024] Lloyd's Rep IR Plus 1.
66 [2023] EWHC 630 (TCC); [2023] Lloyd's Rep IR 370.

An Explosive Ordinance Disposal team from the Royal Logistics Corps determined that the bomb had to be dealt with on site given its condition, the uncertainty as to whether it was booby trapped or not, and the impracticability of moving the bomb through built-up areas to a disposal site.[67] The team's intention was to carry out a "Low Order Technique" to blow open the casing of the bomb without actually setting off the high explosive. Instead the detonation gave rise to the high-order detonation of the bomb and the consequent release of its full explosive load, unavoidably damaging the University's halls of residence.[68]

The University's insurance policy issued by Allianz had a war exclusion clause in respect of:

> "Loss, destruction, damage, death, injury, disablement or liability or any consequential loss *occasioned by war*, invasion, acts of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power."[69]

The University made a claim under the insurance policy regarding the physical damage to the halls of residence and the business interruption resulting from the need to rehouse its students. The insurer declined the claim on the ground that the loss fell within the scope of the war exclusion clause, being loss and damage occasioned by war.

At first instance HHJ Bird gave judgment for Allianz. He held that the dropping of the bomb was the proximate cause of the loss and given that dropping the bomb was an act of war, the loss was excluded from the insurance cover. If that analysis was wrong, he ruled that the dropping of the bomb was a concurrent proximate cause and the damage was caused by the combined effect of the detonation and the presence of the bomb; therefore, by operation of the concurrent proximate causes rule, the exclusion applied.

The University appealed by arguing that the only direct cause for the damage was the controlled detonation and it was not plausible that the parties had objectively intended that war exclusion clause applied to "long-ended historic wars". The insurer submitted that the dropping of the bomb was the proximate cause; and if it was not, it was a concurrent proximate cause of the damage and therefore the loss was excluded.

The Court of Appeal dismissed the appeal. The usual rule was that an insurer was only liable for loss proximately caused by a peril covered by the insurance policy.[70] Proximate cause did not mean the last in time, rather it meant proximate in efficiency; the important matter was the dominant, effective or efficient cause of the loss.[71] The "but for" test was not always helpful because it could return countless false positives.[72] Where there were concurrent causes of approximately equal efficiency one of which was an insured peril and the other was excluded by the policy, the exclusion would usually prevail.[73] The fact that some time passed between the dropping of the bomb and detonation of it, almost 80 years in the present case, made no difference and the war exclusion applied.

The usual rule was that an insurer was only liable for loss proximately caused by a peril covered by the insurance policy. Proximate cause did not mean the last in time, rather it meant proximate in efficiency; the important matter was the dominant, effective or efficient cause of the loss

In *Gueterbock and Another v MacPhail and Another; Henderson Court Ltd v Allianz Insurance plc*[74] the court considered whether the trespass was accidental, and thus, covered under the insurance policy.

The claimants, Mr and Mrs Gueterbock, owned 28 Henderson Road, London, a semi-detached house which did not have a basement or a cellar. The neighbouring house of the defendants, Number 30, was built for the MacPhails by Henderson Court. The two houses were separated at ground floor level by

67 At para 5.
68 At paras 7 to 8.
69 At para 10.
70 At para 18.
71 At para 19. *Reischer v Borwick* [1894] 2 QB 548, *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society* [1918] AC 350, *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* (1942) 73 Ll L Rep 1, *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] Lloyd's Rep IR 63, *Brian Leighton (Garages) Ltd v Allianz Insurance plc* [2023] Lloyd's Rep IR 380, applied.
72 At para 22.
73 At para 26. *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corporation Ltd* [1973] 2 Lloyd's Rep 237 and *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] Lloyd's Rep IR 63, applied.
74 [2023] EWHC 1035 (Ch); [2024] Lloyd's Rep IR 77.

a passageway of about 90 cm across. Number 30's basement extended below the 90 cm pathway to the line of the flank wall of Number 28.

Mr and Mrs Gueterbock brought proceedings against Mr MacPhail claiming that the basement of Number 30 encroached on their property and constituted a nuisance and trespass. The dispute was settled by an agreement dated 29 April 2021.

Mr MacPhail claimed against Henderson Court arguing that, since it had built Number 30, it should be responsible for the consequences of failings in that building. The trial judge, HHJ Parfitt, concluded that the boundary between two houses ran down the centre of the original passageway, Henderson Court owed a contractual duty to build Number 30 with reasonable skill and care, and that duty was breached in the present case.[75] Mr MacPhail's claim against Henderson Court succeeded.

Henderson Court sought indemnity from its liability insurers under a policy covering "legal liability to pay compensation and claimants' costs and expenses in respect of accidental … nuisance, trespass …". The policy contained an extension entitling Mr MacPhail to make a claim under the policy, even though he was not an insured. The trial judge held that the trespass was not accidental but rather reckless and therefore the insurer Allianz was not liable under the policy to indemnify Henderson Court and Mr MacPhail.[76]

Mr MacPhail appealed, and Marcus Smith J upheld the ruling of the judge. It was held that the judge applied the correct legal test[77] and was entitled to reach the conclusion that there was a high degree of recklessness, and consequently that the claim under the insurance policy was not accidental.[78]

Sky UK Ltd and Another v Riverstone Managing Agency Ltd and Others[79] addressed numerous significant issues related to a construction all risks (CAR) policy, such as the meaning of damage, the effects of co-insurance, the period of coverage, and retained liability.

Sky's global headquarters building, known as "Sky Central", was located in London. The building was constructed by Mace Ltd in 2014 to 2015 under a JCT Design and Build contract. Mace sub-contracted the design, supply and construction of the Sky Central roof to Prater Ltd, and Prater in turn sub-contracted the manufacture, supply and installation of the cassette system within the roof structure to B & K Structures Ltd ("BKS").

When installation of the roof took place, the cassettes were designed to be coated with a permanent weatherproof membrane. However, during the installation and until the application of the weatherproof membrane, the cassettes were exposed to weather and rainwater was found to have entered some of the cassettes. The exposure to the weather could have been prevented by use of a temporary roof structure, but no such structure was installed.

The claimants argued that replacement of the roof was needed and they pursued their insurers who denied liability, claiming that their liability under the policy was confined to the period of insurance and, moreover, the relevant damage to each cassette was a separate event which would attract the £150,000 deductible.

> For the claimants to show that physical damage occurred during the period of cover, they had to show a tangible physical change had occurred to the property (regardless of whether that was visible or not) which had decreased the property's commercial value

Sky was insured under a construction all risks policy which defined the "Insured" as Sky, Mace and all other contractors and/or sub-contractors each for their respective rights and interests. The period of insurance was 1 February 2014 to 15 July 2017, comprising a construction period between 1 February 2014 to 15 July 2016 and a maintenance period of insurance which ran from 15 July 2016 to 15 July 2017.[80] The policy further provided that the insurers would "… indemnify the Insured against physical loss or damage to Property Insured, occurring during the Period of Insurance, …" and the basis of settlement was "the full cost of repairing, reinstating or replacing property lost or damaged".[81]

75 At para 17.
76 At paras 13 to 20.
77 At para 26.
78 At para 40.
79 [2023] EWHC 1207 (Comm); [2023] Lloyd's Rep IR Plus 28.
80 At para 27.
81 At para 28.

Under the design exclusion clause, the insurance covered in respect of a claim for the cost of replacing or repairing any insured property that was damaged as a result of a defect in design, plan, specification, materials or workmanship, with a deductible of £150,000 for each event.[82]

The court held that Sky was entitled to recover from the defendants by stating as follows.

> (1) Mace was insured under the policy. The scope of the insurance cover for the third-party insured depended on the parties' intention to be gathered from the terms of the policy and the terms of the contract between the contractual assured (Sky) and the relevant third-party insured (Mace).[83] Since the parties were insured for their respective rights and interests and the relationship between Sky and Mace was contractual, their relationship was to be found in the construction contract to which both were parties, rather than the policy to which Mace was not a party.[84] The JCT contract required Sky to insure on behalf of Mace for the period up to practical completion, and accordingly, the parties intended Mace to be insured regarding the loss or damage in the period while it had a possessory interest in the building, ie for the period up to practical completion.[85]
>
> (2) The insurance cover was for the loss and damage that occurred during the period of insurance. There would be no cover for loss and damage suffered after the expiry of the period of cover.[86]
>
> (3) For the claimants to show that physical damage occurred during the period of cover, they had to show a tangible physical change had occurred to the property (regardless of whether that was visible or not) which had decreased the property's commercial value.[87] The entry of water into the cassettes during the period of insurance was a tangible physical change to the cassette provided that the presence of the water would have an effect on the structural stability, strength or functionality or useable life of the cassettes during the period of insurance or would do so if it was not remedied.[88]
>
> (4) The word "event" in the policy meant something that happened at a particular time, at a particular place and in a particular way.[89]
>
> (5) It was concluded that the decision to design the Sky Central roof without the temporary roof until waterproofing had occurred was an event which caused the damage. The sums recoverable by Sky under the policy were subject to a single deductible of £150,000 instead of a deductible for each damaged cassette of the roof.[90]

In *Atta v HDI Global Specialty SE*[91] the insurer appealed against a decision by Mr Recorder Berkley that it was liable to indemnify a company in respect of liabilities which had been incurred by the respondent homeowner.

In November 2013 Heatwave Energy Solutions Ltd installed cavity wall insulation at the claimant's property. The particular product was not suitable for the house, and the insulation work had voids causing the house to be more exposed to damp and mould. The installation had therefore been performed negligently and in breach of contractual and tortious duties of care. Heatwave became insolvent and went into liquidation. The claim therefore could not be brought against Heatwave directly, but was instead brought under the Third Parties (Rights Against Insurers) Act 1930 against HDI, the liability insurers of Heatwave until 27 July 2014. The judge held that HDI was liable for all the relevant damage that happened during the period of cover. HDI appealed.

Jacobs J dismissed the appeal. While the product itself was not defective, the installation of it was negligent and the claim would be covered by the words of the insurance policy stating "arising out of or in connection with any Product". Consequently, the claim fell within the products liability section of the policy.[92] In respect of liability for the cost of removing the insulation, it was held that it could be recoverable under the insurance policy given that for there to be proper repairs to the house, the cavity wall insulation which had caused the damage by reason of its installation in the first place, had to be removed.[93] The third ground of appeal was factual and it was held that there was no basis for disputing the factual finding of the judge that all of the relevant loss occurred during the HDI policy.

82 At paras 29 to 31.
83 At para 38.
84 At para 42.
85 At para 59.
86 At para 75.
87 At para 86.
88 At para 117.
89 At para 100.
90 At para 181.
91 [2023] EWHC 2028 (KB); [2024] Lloyd's Rep IR Plus 11.
92 At paras 45 to 51.
93 At para 70.

Business interruption

2023 has seen numerous business interruption cases, mainly concerning losses resulting from the Covid-19 pandemic.

PizzaExpress Group Ltd and Others v Liberty Mutual Insurance Europe SE and Another[94] concerned a claim brought by PizzaExpress Group against its insurers for Covid-19-related business interruption losses, and dealt with the application of an aggregation clause.

PizzaExpress, a restaurant group, was insured by the defendant insurers under an Aon Trio Property and Business Interruption policy covering the period between 1 July 2019 and 30 June 2020. PizzaExpress claimed for business interruption losses suffered between March and November 2020 in its 475 restaurants caused by the Covid-19 pandemic.

There were two extensions in the business interruption section of the policy, extending cover beyond what might be regarded as an ordinary type of business interruption loss arising from physical damage to a policyholder's premises to that covering notifiable disease, and prevention of access.

The related terms of the policy regarding limits and sub-limits were in the Schedule to the policy. Section 1 of the Schedule was headed "Property Damage" and provided limits of liability for buildings, stock, machinery and plant. Section 2 was titled "Business Interruption", and presented a table which included a "Limit of Liability" column. At the end of this section it was stated "NB Additional limits and/or sub-limits apply – these are listed later in this Schedule", followed by "Sub-limits", which stated:

> "Sub-limits
>
> – Sub-limits form part of the Limit of Liability and do not apply in addition to it;
>
> – all Limits of Liability apply any one Occurrence ;
>
> – limits are inclusive of the Excess;
>
> unless otherwise stated. If more than one Sub-limit applies to the same loss, the Insurer's liability will be limited to the lesser Sub-limit."[95]

Following that, there were individual sub-limits for sections 1 and 2. As to section 2, there were sub-limits, which were £250,000 for each of "Notifiable disease" and "Prevention of Access & Loss of Attraction".[96]

"Occurrence" was defined as "any one loss or series of losses arising out of and directly resulting from one source or original cause".[97]

The insurers denied coverage under both extensions, arguing that the cover provided by the extensions was "localised cover" which did not respond to business interruption losses resulting from the central government action responding to a nationwide public health emergency.[98] They furthermore submitted that on any reasonable reading of the Schedule, all limits of liability, including the sub-limits were applicable to "any one Occurrence" unless otherwise stated.[99] The main question was whether the aggregation clause applied to sub-limits. If the aggregation clause applied, PizzaExpress would be limited to £250,000 per occurrence, and there were three occurrences at most. If the aggregation clause did not apply, the sum recoverable could lead up to millions of pounds.

Jacobs J resolved the issue in favour of the insurers and held that, as a matter of ordinary language, a sub-limit was a limit of liability.[100] The present case concerned the sub-limits for notifiable disease and prevention of access, and there was nothing "otherwise stated" regarding those limits. Consequently, the "any one Occurrence" wording was applicable to those particular sub-limits.[101] Any claim made under the extensions was subject to a limitation of £250,000 any one occurrence.

London International Exhibition Centre plc v Royal & Sun Alliance Insurance plc and Others[102] provided further clarity as to Covid-19 business interruption claims. HHJ Jacobs heard six expedited test cases on business interruption losses resulting from the Covid-19 pandemic. The insurance policies were similar, and the common issue was on causation. The court considered whether *Financial Conduct Authority v Arch Insurance (UK) Ltd*[103] (the FCA test case) in respect of proximate causation was applicable to "at the premises" (ATP) cover as well.

The claimants were involved in various businesses and asserted that due to the Covid-19 pandemic they suffered

94 [2023] EWHC 1269 (Comm); [2023] Lloyd's Rep IR 447.
95 At para 11.
96 At para 11.
97 At para 15.
98 At para 6.
99 At para 26.
100 At para 30
101 At para 37.
102 [2023] EWHC 1481 (Comm).
103 [2021] UKSC 1; [2021] Lloyd's Rep IR 63.

significant business interruption losses. There were several insurers involved and, although the policy wordings were different from each other, they contained similar ATP cover. In *Excel*, the lead test case, the policy wording ("the RSA Infectious Disease Extension") was as follows:

> "The word Damage is extended to include closure of the Premises or part thereof on the order or advice of any local or governmental authority as a result of an outbreak or occurrence at the Premises of ... any human contagious or infectious disease other than Acquired Immune Deficiency Syndrome (AIDS) or any AIDS related condition, an outbreak of which is required by law or stipulated by the governmental authority to be notified."[104]

Even though the policy wordings in the six test cases were different to each other, they shared a common feature by referring to occurrences (or some other events) "at the Premises" and to notifiable diseases. Covid-19 became a notifiable disease which was required to be reported to the authorities in the United Kingdom.[105]

To show that business interruption loss was proximately caused by one or more occurrences of illness resulting from Covid-19 it was sufficient enough to prove that the interruption resulted from government action taken in response to cases of disease that comprised of at least one case of Covid-19 within the geographical area covered by the policy

The main question in all the test cases was regarding causation, namely, whether "at the premises" or "ATP" disease cover entailed the same approach to proximate causation and the causation test was satisfied where the losses arose out of the closure of the premises because of both an outbreak on the premises and also the wider national outbreak as considered by the Supreme Court's FCA test case. In the FCA test case, where the central issue was whether losses resulting from restrictions imposed in response to the national pandemic were covered, the court held that the disease clauses only provided cover for the effects of infectious diseases within a radius of 25 miles of the relevant premises. In respect of causation it was held that there were concurrent causes of loss, namely, the individual outbreak within the policy radius and the cases outside the policy radius.

The Supreme Court held that, by explaining that the "but for" test of causation could be sometimes inadequate, each of the individual cases of illness that had occurred by the date of any government action was a separate and equally effective cause of that action, and to show that business interruption loss was proximately caused by one or more occurrences of illness resulting from Covid-19 it was sufficient enough to prove that the interruption resulted from government action taken in response to cases of disease that comprised of at least one case of Covid-19 within the geographical area covered by the policy.

In *London International Exhibition Centre v Royal & Sun Alliance* the insurers claimed that the reasoning applicable to the radius clauses in the FCA test case should not extend to ATP clauses. Jacobs J held as follows.

> (1) There was no fundamental distinction between ATP clauses and radius clauses. There was no substantial discussion in the FCA test case regarding the size of the radius because the same causation approach applied whatever the size was. Moreover, the radius provision was designed to define the territorial scope of the coverage, and so had no impact on causation.[106]
>
> (2) The Supreme Court's fundamental objection to the proposed alternative causation approach that it "sets up cases of disease occurring outside the territorial scope of the cover in competition with the occurrences of disease within its scope", was equally applicable to "at the premises" clauses.[107]
>
> (3) In the FCA test case the Supreme Court considered that the "but for" test gave rise to intractable counterfactual questions, and it was appropriate to adopt a clear and simple approach. In the present dispute the insurers presented some examples applying the "distinct" cause test of causation, and the proposed test was not as simple and clear as the Supreme Court's concurrent cause approach.[108] Consequently the causation approach of the Supreme Court was equally applicable to the present clauses.[109]

104 At para 3.
105 At para 5.
106 At paras 203 to 205.
107 At paras 207 to 208.
108 At para 210.
109 At para 211.

(4) The Excel policy had a NDDA (non-damage denial of access) clause under the title "Denial of Access (Non-Damage) – Extension" which stated that the cover was available if the business interruption was a consequence of "access to the Premises being hindered or prevented as a result of the actions or advice of a government or local authority due to an emergency arising which is likely to endanger life or property at or in the immediate vicinity of the Premises", but excluded "any consequence of … infections or contagious diseases …".[110] It was held that each extension should be considered separately. The exclusions or limitations expressed in the NDDA clause could not be relied upon as restricting the coverage in the Infectious Diseases Extension, which was to be considered and interpreted on its own terms, or the causation analysis.[111]

(5) In accordance with the policies, the disease had to be notifiable at the time of occurrence or outbreak.[112] Covid-19 became a notifiable disease in England on 5 March 2020. Consequently, occurrences of Covid-19 before it became a notifiable disease giving rise to loss was outside the insurance cover.

(6) Two of the policies applied to closures "on the advice or with the approval of the Medical Officer of Health for the Public Authority". It was held that public authority had a broad meaning including national governments. The ordinary meaning denotes every type of authority exercising public functions, whether local or national. Any ordinary reader of the policies would have such an understanding.[113]

(7) Where a policy provided cover for "losses arising from the closure of the Premises by a competent authority due to an human notifiable infectious disease or food poisoning suffered by any visitor or employee", the word "suffer" in the context of illness or disease could be used synonymously with the word "sustain" or "occur"; therefore, there was no need for a person to have the subjective experience which was sufficiently bad to mean that the person was "suffering".[114]

In *World Challenge Expeditions Ltd v Zurich Insurance Co Ltd*[115] estoppel by convention arose by reason of the insurer's handling of previous claims under the policy during the earlier four years.

110 At para 79.
111 At para 244.
112 At para 273.
113 At para 315.
114 At paras 353 to 358.
115 [2023] EWHC 1696 (Comm).

The claimant World Challenge Expeditions Ltd ("WCE") was a specialised travel company registered in the UK providing expeditions worldwide for school students ("Challengers"). Challengers would sign up for a trip 18 to 24 months prior to the anticipated departure date. They would pay an initial deposit of £100 to £250 on signing up which was followed by monthly or quarterly instalments and a final payment (known as the "balloon payment") of around 60 per cent of the price that would generally be paid around 60 days prior to the departure date. The timing of the balloon payments coincided with the obligations of WCE regarding payments for flights, accommodation and other costs. Under WCE's terms and conditions, if WCE had to cancel a trip or could not run it to the scheduled destination at the scheduled time, customers would be entitled to a full refund.[116]

In late 2019 to early 2020 Covid-19 emerged. In February 2020 WCE sought clarification of the insurance cover from the defendant. In March 2020 WCE made an internal decision to cancel all expeditions departing up to the end of May. Trips which were due to depart afterwards would be reviewed in April since there was still a clarification needed in respect of the insurance. On 20 April 2020 WCE decided to cancel all trips up to the end of August, even though the insurer had not yet given its position statement. WCE repaid around £10 million to its customers, which was received by way of deposits and advance payments.

> The claimant experienced the loss of goodwill and alienation of customers which had the capability to adversely impact its business and that was sufficient detriment for these purposes

WCE had insurance from Zurich since 2016, and the policy in the present dispute was in force from 1 April 2019 to 31 March 2020. The "Insured" under the policy was WCE, and the "Insured Persons" were Challengers, expedition leaders, school leaders, and WCE's own employees and directors. In respect of cancellation the policy provided that cover was available for deposits and advance payments, charges for transport, charges for accommodation and sustenance, and any other charges payable under contract and not otherwise recoverable.[117]

There was a "Cancellation/Curtailment Limit" of £100,000 with regard to all claims "for loss and expense arising out of one event". "Event" was defined as a "sudden, unforeseen and identifiable occurrence".[118]

WCE brought a claim in respect of irrecoverable payments made to third parties and returned deposits. The defendant contended that the policy only indemnified the claimant for irrecoverable costs paid out to third-party suppliers and it was entitled to indemnity of less than £150,000.

Dias J held as follows.

(1) On the true construction of the policy, it only indemnified WCE for irrecoverable third-party costs up to the amount of the refunds it was obligated to make to Challengers.[119]

(2) Zurich's claim that WCE's decision on 20 April 2020 to cancel all forthcoming trips could be regarded as an aggregating event was rejected and WCE's claim that the aggregation provision did not operate in that case was accepted. The cancellations did not arise out of a relevant "event", but rather arose from the overall situation which was not an occurrence for those purposes.[120]

(3) There was an estoppel by convention in favour of WCE regarding the cancellations of trips departing after 31 May 2020. There was a common assumption, stretching back nearly four years, that the policy extended to customer refunds. WCE established detrimental reliance in respect of the trips departing after 31 May 2020 which were cancelled by the 20 April 2020 decision. WCE had wished to make the cancellations in mid-March, but delayed the decision since it needed to receive the consent of the insurer to cancel more than 60 days in advance of departure. If WCE had cancelled in mid-March, it would have had more options so as to preserve customer goodwill. Rather, WCE experienced the loss of goodwill and alienation of customers which had the capability to adversely impact its business and that was sufficient detriment for these purposes.[121]

DC Bars Ltd and Another v QIC Europe Ltd[122] concerned an application to stay a claim resulting from a business interruption policy in relation to Covid-19 on the grounds that the parties had an arbitration agreement.

116 At para 16.
117 At para 19.
118 At para 198.
119 At para 233.
120 At paras 330 to 331.
121 At paras 281 to 287.
122 [2023] EWHC 245 (Comm); [2023] Lloyd's Rep IR 225.

The claimant DC Bars Ltd (DCB) owned and operated numerous restaurants and bars in the UK. DCB had business interruption cover under the insurance policy issued by the defendant for the period 31 December 2019 to 30 December 2020. The related "Infectious Diseases Extension" provided indemnification:

> "in respect of interruption of or interference with the Business during the Indemnity Period following … any … occurrence of a Notifiable Disease within a radius of 25 miles of the Premises …"[123]

The extension further provided the maximum indemnity period as three months.[124] The policy contained an arbitration clause stating that:

> "If any difference shall arise as to the amounts to be paid under this Policy (liability being otherwise admitted) such difference shall be referred to an arbitrator …"[125]

The insurers initially paid a claim for DCB's losses after the first Covid-19 lockdown, but denied liability for three further claims based on further lockdowns on the basis that the maximum three-month indemnity period had expired.

DCB brought proceedings and QIC sought a stay under the arbitration clause. Sir Nigel Teare dismissed the application for a stay of proceedings. The issue was whether the difference between the parties was "as to the amounts to be paid under this Policy (liability being otherwise admitted)".[126] That difference was not only a difference regarding the payable amount under the policy, but rather was regarding the liability of the insurer in respect of the business interruption losses caused on the second, third and fourth occasions. Therefore, the difference between the parties had not been agreed to be submitted to arbitration.[127]

The court in *Bellini (N/E) Ltd v Brit UW Ltd*[128] held that when the policy expressly required the business interruption to be caused by physical damage to the property, the policy did not provide cover in the absence of such damage.

Bellini operated a restaurant in Sunderland and made a claim against its insurer Brit, pursuing recovery for business interruption loss caused by the Covid-19 pandemic.

Clause 8 of the policy dealt with business interruption. In this regard, the policy provided cover for business interruption if there was damage to the property (clause 8.1), in respect of:

> "interruption of or interference with the business caused by damage, as defined in clause 8.1, arising from … any human infectious or human contagious disease … an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the premises or within a twenty five (25) mile radius of it …". (Clause 8.2.6.)[129]

The insurer denied liability arguing that the cover was dependent upon physical damage to the premises or property which had not occurred.

When the policy expressly required the business interruption to be caused by physical damage to the property, the policy did not provide cover in the absence of such damage

It was held that clause 8.2.6 expressly stated that the insurer would only provide indemnification for business interruption caused by damage. Under clause 18.16.1 damage was defined as "physical loss, physical damage, physical destruction". When ordinary meaning was given to clause 8.2.6, there would be no cover in the absence of such physical loss, damage or destruction.

Damage was in bold terms and under the express terms of the policy (clauses 1.2, 18, and 18.16) it was given a defined meaning, namely physical loss, damage or destruction. On the ordinary meaning of clause 8.2.6, it provided no cover in the absence of such physical loss, damage or destruction. It was common ground that there was no physical loss of or damage to the claimant's premises or property, and therefore, on its proper construction of the policy, there could be no cover.[130]

123 At para 4.
124 At para 5.
125 At para 12.
126 At para 24.
127 At para 26.
128 [2023] EWHC 1545 (Comm); [2023] Lloyd's Rep IR 573.
129 At para 5.
130 At paras 23 to 33.

Subrogation

F M Conway Ltd v The Rugby Football Union and Others[131] was an appeal by F M Conway Ltd (Conway) against the decision of Eyre J,[132] in which it was held that Conway could not rely on the insurance policy as a defence to a claim resulting from its own defective work.

Prior to the 2015 Rugby World Cup the Rugby Football Union ("RFU") decided to undertake a major refurbishment of Twickenham Stadium. The refurbishment consisted of installation of high-voltage power cables. RFU engaged Clark Smith Partnership Ltd ("CSP") to design ductwork and Conway to install it.

On 19 June 2012 RFU sent Conway a Letter of Intent. The letter stated that it was intended that the form of contract used on the project would be the JCT Standard Building Contract Without Quantities 2011. It also incorporated the provision that the letter superseded any previous instructions, correspondence or other discussions.[133]

RFU took out an all-risks insurance policy where Royal & Sun Alliance Insurance plc (RSA) was the principal insurer. The policy was written on 17 July 2012 and backdated to 16 July 2012. The policy identified "the Insured" as RFU as the principal and its associated and subsidiary companies, contractors, and sub-contractors, "each for their respective rights and interests". The "Interest Insured" included "permanent works, materials ..., temporary works, equipment, machinery, supplies ...". Furthermore, the policy provided that "Insurers hereby agree to waive all rights of subrogation which they may have or acquire against any insured party ...".[134]

The parties entered into the contract on 19 October 2012. The insurance clause in the JCT contract stated that RFU would take out and maintain a "Joint Names" policy in respect of the existing structures for the full cost of reinstatement, repair or replacement of loss or damage resulting from any of the specified perils. It further provided that in respect of the works, RFU would take out and maintain a "Joint Names Policy for All Risks Insurance".[135]

RFU alleged that there were defects in the design and installation of the ductwork causing damage to the cables when they were pulled through. RFU claimed that it suffered loss in the amount of £4,440,909.45 consisting of £3,334,405.26 ("relevant loss") for replacing the damaged cables, and £1,106,504.19 for rectifying the ductwork itself. RSA indemnified RFU for the replacement costs of £3,334,405.26.

On 1 March 2021 RFU commenced subrogated proceedings against CSP and Conway who denied negligence. On 19 March 2021 Conway commenced separate proceedings against RFU and RSA by seeking declarations to the effect that Conway had the benefit of the policy; that RFU could not make a claim against Conway under the policy; and that RSA could not exercise the rights of subrogation against Conway since the loss and damage was covered under the policy.[136]

There were two preliminary issues for consideration.

(1) Whether the insured losses in the amount of £3,334,405.26 were irrecoverable because RSA could not exercise subrogation rights and/or because on a proper interpretation of the project policy and/or the project policy and the JCT contract RFU and/or RSA were not entitled to claim the insured losses.

(2) If the answer was that RFU could not recover the insured losses from Conway, would that prevent CSP from claiming a contribution from Conway under the Civil Liability (Contribution) Act 1978 for any liability of CSP regarding the insured losses?

At first instance, Eyre J[137] held that the insured losses were recoverable from Conway.

(1) The insurance arrangement in the JTC contract did not provide a common fund recourse which would be the sole redress of RFU in respect of the loss resulting from breaches by Conway.

(2) When the Letter of Intent, the policy, and the JCT Contract were read according to their terms, even though both Conway and RFU were insured under the policy, they were not insured to the same extent for the same risk. Particularly, they were not co-insured in respect of the losses suffered by RFU due to damage to the cables resulting from defects in the ductwork.

(3) Conway could not rely upon the subrogation waiver clause under the policy because the waiver only extended to matters in respect of which Conway was insured under the policy.

The Court of Appeal dismissed the appeal for the following reasons.

131 [2023] EWCA Civ 418; [2023] Lloyd's Rep IR 336.
132 *The Rugby Football Union v Clark Smith Partnership and Another* [2022] EWHC 956 (TCC); [2023] Lloyd's Rep IR 315.
133 At para 7.
134 At para 4.
135 At para 25.
136 At para 7.
137 [2022] EWHC 956 (TCC); [2023] Lloyd's Rep IR 315, at paras 125 to 130.

(1) There are three conditions that need to be satisfied for cover taken out by A to cover the interest of B in circumstances where A is required or authorised by B to insure a risk on behalf of both: the authority of A must extend to making the relevant insurance contract; A must have intended to cover B's interests when taking out the policy; and the terms of the policy must not preclude the extension of coverage to B.[138]

> A composite insurance policy meant that each co-insured was to be treated as if they had their own policy. Consequently, the fact that Conway and RFU were insured under the same insurance policy was insufficient to allow the co-insurance defence

(2) The judge applied the correct test. He was aware that it was a composite insurance policy, meaning that each co-insured was to be treated as if they had their own policy. Consequently, the fact that Conway and RFU were insured under the same insurance policy was insufficient to allow the co-insurance defence. Secondly, when considering authority and intention, the judge was correct to consider the Letter of Intent (together with the subsequent building contract) as the starting point. In considering authority and intention in the co-insurance context, the examination would start with the underlying contractual arrangements. Accordingly, there was no authority or intention to create a fund which would be the sole remedy for loss.[139]

(3) The judge was not wrong in relying on the JCT Contract. He had regard to the JCT Contract to consider the issues of authority and intention. Furthermore, taking into account the contractual scheme between the parties, when the policy was written, the Letter of Intent meant that there was already a binding contract between the parties. The Letter of Intent made it clear that the JCT terms were applicable to any work undertaken pursuant to the instructions in that letter. The court consequently concluded that the underlying contract between the parties was to the effect that the insurance cover would be in the form of Option C and nothing else. If Conway required a cover more than the scope of the Option C under the contract, or if it wanted to make certain that the earlier understandings of its representatives were reflected in the final agreement, then that could be arranged.[140]

(4) Conway argued that it was not an undisclosed principal but was identified or identifiable as a co-insured at the time of the inception of the policy, that any issue regarding intention was irrelevant and all that mattered was the nature and scope of the authority of RFU. The court stated that there was no authority for the proposition that the condition relating to intention (ie party A must have intended to cover party B's interests when taking out the policy) was somehow removed if party B was specifically named (or was identifiable) as an insured.[141] The court expressed the view that there was no issue that Conway was insured. The issue was the scope of the cover and, for that, it was necessary to look at authority and intention.[142]

(5) Conway's alternative argument, that if it was not identified in the policy then it participated as an undisclosed principal, was also rejected. The pivotal point was the contract that the agent (RFU) intended to effect on behalf of its principal (Conway). Therefore, it was always required to analyse the insurance that RFU intended to procure for Conway regarding the rights and interests of Conway. The judge correctly evaluated that by considering all the evidence, and particularly the terms of the Letter of Intent and the Option C of JCT Contract.[143]

(6) In respect of Conway's reliance on the subrogation waiver clause, the court held that the clause did not assist Conway. First, it would be contrary to commercial common sense: if Conway was not insured against losses resulting from its own default, then it would be an extraordinary result for them to achieve the effect of that cover by the back door because of a subrogation waiver clause.[144] Secondly, it would be contrary to the law.[145] Thirdly, the definition of the insured included the words "each for their respective rights and interests". Consequently, the insurance cover was limited to the respective rights and interests of each of the co-insured. The rights and interests of Conway did not extend to their own default because that was not included in Option C. Accordingly, the waiver of the subrogation clause could not affect that claim.[146]

138 At para 52.
139 At paras 64 to 67.
140 At paras 75 to 79.
141 At para 91.
142 At para 95.
143 At para 100.
144 At para 104.
145 At para 105. Particularly contrary to the approach adopted *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582.
146 At para 109.

Marine insurance

Quadra Commodities SA v XL Insurance Company SE and Others[147] provides useful guidance in respect of establishing insurable interest under a policy.

Quadra was a trading and logistics company. Between November 2018 and January 2019 Quadra entered into contracts to purchase grain from Linepuzzle, which was a Ukrainian company in the Agroinvest group, then to sell them to Agri Finance. The purchase contract provided that: "The title of ownership for the Commodity is transferred from the Seller to the Buyer at the moment when the Commodity is accepted at the Place of Delivery".[148] Under the contracts the cargo was to be transported to and weighed at various Elevators (terminals), and payment was to be made upon being presented with warehouse receipts. Quadra made payments for the grain upon presentation of warehouse receipts, but did not receive all that it had made the payment for.

> *Quadra Commodities v XL Insurance* provides useful guidance in respect of establishing insurable interest under a policy

The scheme turned out to be fraudulent. The Elevators owned or operated by the Agroinvest group issued multiple warehouse receipts regarding the same goods to different buyers, and when the time of the physical deliveries arrived there was not enough grain to be delivered.[149]

Quadra had insurance under a Marine Cargo Open Policy incorporating the Institute Cargo Clauses A dated 2009. The policy had two additional clauses, one titled Fraudulent Documents, which provided that:

> "This policy covers physical loss of or damage to goods and/or merchandise insured hereunder through the acceptance by the Assured and/or their Agents and/or Shippers of fraudulent shipping documents, including but not limited to Bill(s) of Lading and/or Shipping Receipts and/or Messenger Receipt(s) and/or Warehouse Receipts and/or other shipping document(s)."[150]

The other was titled Misappropriation, and provided that:

> "This insurance contract covers all physical damage and/or losses, directly caused to the insured goods by misappropriation … The above clause is limited to US$10,000,000 any one loss …"[151]

Quadra pursued its insurers for the amount of US$5,728,343.51 in addition to suing and labouring costs. Furthermore, Quadra claimed for damages for breach of the implied term under section 13A of the Insurance Act 2015 for late payment.

The insurers denied liability, arguing that Quadra did not have insurable interest in the lost grain.

At first instance, Quadra's claim for the loss regarding cargoes and suing and labouring expenses were allowed, but the claim for late payment was dismissed. Butcher J expressed that, on a balance of probabilities, Quadra successfully showed that goods corresponding in quantity and description to the cargoes were physically present at the Elevators when the Warehouse Receipts were issued.

In terms of the insurable interest, three grounds were considered. First, Quadra paid the price under the purchase contracts. Secondly, under Ukrainian law, Quadra had an immediate right to possession of the goods. Thirdly, Quadra did not have a proprietary title to the goods because the cargo was not ascertained or part of a sufficiently identified bulk for the purposes of section 20A(1) of the Sale of Goods Act 1979.

Consequently, it was held that Quadra had an insurable interest by virtue of payments and immediate right to possession, in that the loss resulted from an insured peril, namely misappropriation rather than the fraudulent documents clause, and so Quadra was entitled to the market value of the goods on 14 February 2019 and sue and labour expenses. However, it was not entitled to damages for late payment under section 13A of the Insurance Act 2015.

The insurers appealed, and the Court of Appeal upheld Butcher J's decision. It was held that there was sufficient evidence for Butcher J to conclude that on a balance of probabilities, goods were physically present in the

147 [2023] EWCA Civ 432; [2023] Lloyd's Rep IR 455.
148 At para 6.
149 At para 49.
150 At para 7.
151 [2022] EWHC 431 (Comm); [2023] Lloyd's Rep IR 26 at para 7.

Elevators at the time when the Warehouse Receipts were issued.[152] The second ground of the insurer's appeal that Quadra did not possess an insurable interest in the cargoes where they did not form part of a sufficiently identified bulk was fundamentally unsound. That point of the insurers confused the concept of an insurable interest as between insured and insurer with that of a proprietary interest as between buyer and seller. Section 20A of the Sale of Goods Act 1979 was not applicable to insurable interest. The *Cumberland Bone*[153] principle should be accepted as a principle of English law, and establishing an insurable interest did not depend on the goods being ascertained or part of a sufficiently identified bulk.[154]

> The *Cumberland Bone* principle should be accepted as a principle of English law, and establishing an insurable interest did not depend on the goods being ascertained or part of a sufficiently identified bulk

The judge was right to conclude that payment for the goods conferred a sufficient insurable interest on Quadra. He was also right to reach the conclusion that Quadra had an additional reason to have an insurable interest in that it had an immediate right to possession of the goods under Ukrainian law.[155]

Warranty and indemnity insurance

The following judgments provide useful guidance in respect of warranty and indemnity insurance (W&I) claims which are relatively rare in English case law.

Project Angel Bidco Ltd v Axis Managing Agency Ltd and Others[156] serves as a helpful direction regarding construction of exclusion clauses under W&I insurance policies.

In November 2019 the claimant (PA) agreed to acquire from the vendors the entire issued share capital of Knowsley Contractors Ltd (trading as King Construction) ("Target"), which provided civil engineering and general construction services to local authorities and principally to Liverpool City Council.

A share and purchase agreement ("SPA") provided numerous warranties including that Target was not engaged in "... any litigation, arbitration, mediation, prosecution or other legal proceedings or alternative dispute resolution or in any proceedings or hearings before any Authority ...", and neither Target nor any of its officers, directors, employees, or any other person performing services for or on behalf of it committed any offence under the Bribery Act 2010.[157]

PA was insured under a W&I insurance policy which provided indemnification for losses other than the ones arising out of "ABC Liability", which was defined as "any liability or actual or alleged non-compliance by any member of the Target Group or any agent, affiliate or other third party in respect of Anti-Bribery and Anti-Corruption Laws" under clause 1.1 of the policy.[158] The limit of liability under the insurance policy was £5 million.

152 At para 118.
153 *Cumberland Bone Co v Andes Insurance Co* 64 Me 466 (1874).
154 At paras 125 to 127.
155 At para 129.
156 [2023] EWHC 2649 (Comm); [2024] Lloyd's Rep IR Plus 3.
157 At para 3.
158 At para 8.

PA claimed that the vendors were in breach of the warranties which caused it loss and damage. PA argued that it paid around £16.65 million for the shares in Target but the true value was at most £5.2 million. PA brought a claim under the policy and the main preliminary issue was whether the exclusion was applicable to the claim.

HHJ Pelling KC held that the exclusion applied. First, the policy was construed conventionally by taking into account what a reasonable person, with all the background knowledge would have understood. The phrase in the ABC Liability definition that "any liability or actual or alleged non-compliance" was meant to be understood as it was written and not as "any liability for actual or alleged non-compliance". The clause contemplated that loss might be suffered either directly by PA or as a result of Target's third-party liabilities. The exclusion clause was to be construed in the same manner as that involving direct loss suffered by PA as well as third-party liabilities.[159] Secondly, witness evidence of negotiations leading to the policy was inadmissible.[160]

> *Project Angel Bidco v Axis Managing Agency* serves as a helpful direction regarding construction of exclusion clauses under W&I insurance policies

The conclusions reached by the judge made it unnecessary to consider the estoppel claim; however, it was held that if the insurers had failed on construction, they would not have succeeded on estoppel by convention. The alleged common assumption asserted by the insurers was that the risk *should be* excluded rather than it *was* excluded.

Even if that common assumption that ABC liability should be excluded was recognised, it would raise the question whether the liability had been excluded. In other words, it did not add anything to the construction issues that had already been considered.[161]

Finsbury Food Group plc v Axis Corporate Capital UK Ltd and Others[162] constitutes an important example on the operation of W&I policies.

Ultrapharm Ltd manufactured gluten free ("GF") baked goods and sold them to Marks & Spencer plc, where the goods were sold under the M&S brand. On 31 August 2018 Ultrapharm's shareholders agreed to sell the company to Finsbury under a sale and purchase agreement ("SPA") for £20 million.

The SPA contained two key warranties. Under the Trading Conditions Warranty (TCW) Ultrapharm provided that, since 31 December 2017:

> "... there has been no material adverse change in the trading position of any of the Group Companies or their financial position, prospects or turnover and no Group Company has had its business, profitability or prospects adversely affected by the loss of any customer representing more than 20% of the total sales of the Group Companies ..."[163]

Under the Price Reduction Warranty (PRW) Ultrapharm warranted that it had not offered or agreed to offer:

> "ongoing price reductions or discounts or allowances on sales of goods relating to its business or any such reductions, discounts or allowances that would result in an aggregate reduction in turnover of more than £100,000."[164]

The Warranties were subject to a Buyer Knowledge Exception under which it was stated that:

> "The Warrantor will not have any liability in respect of any Warranty Claim to the extent that the Buyer as at the date of this Agreement had (i) actual knowledge of the circumstances of such Warranty Claim and (ii) is actually aware that such circumstances would be reasonably likely to give rise to a Warranty Claim."[165]

At the same time as entering into the SPA, Finsbury insured Ultrapharm's liability under the SPA for breach of the warranties under a buyer-side W&I policy. The policy provided indemnity for Finsbury in respect of loss including the amount which Finsbury was legally entitled to claim against Ultrapharm for a breach. The insurer's indemnity was subject to certain exclusions including losses arising out of a breach known by a "Transaction Team Member" in Finsbury prior to 31 December 2017. [166]

In June 2017 Ultrapharm agreed and implemented changes to recipes and also agreed price reductions

159 At paras 35 to 36.
160 At para 25.
161 At para 49.
162 [2023] EWHC 1559 (Comm); [2023] Lloyd's Rep Plus 81.
163 At para 6.
164 At para 6.
165 At para 7.
166 At paras 7 to 10.

with M&S, with effect from 2 January 2018. Finsbury claimed that Ultrapharm breached warranties in the SPA giving rise to a loss of £3,194,370, and that the relevant breaches were covered by the policy.

The judge dismissed Finsbury's claim against its insurers since it could not establish that Ultrapharm breached a warranty in the SPA.

(1) There was no breach of the TCW. For there to be a breach, a material adverse change exceeding 10 per cent of the total group sales of Ultrapharm was needed.[167] There had not been such an adverse change in the present case. In any event, the TCW was applicable only to events after 31 December 2017, but the recipe change was agreed in June 2017 and baked goods with the new recipe were being manufactured from 29 December 2017.[168] Finally, recipe changes were part of the ordinary course of the business of a bakery and did not fall within the scope of the TCW.[169]

(2) There was no breach of the PRW. The price reductions were agreed by the parties in October 2017 and came into effect after 31 December 2017. The PRW was aimed at the date upon which the price reduction was agreed and not the date upon which it actually became effective.[170] Furthermore, even if there was a breach of warranty, the Knowledge Exception applied, given that one of the named individuals in Finsbury had sufficient information.[171]

(3) In respect of causation the judge concluded that, even with the relevant breaches of warranties, Finsbury would have proceeded with the purchase of Ultrapharm at the agreed price of £20 million.[172]

Motor insurance

In *Ali v HSF Logistics Polska SP zoo*[173] the claimant appealed Mr Recorder Charman's decision that rejected his claim for credit hire charges on the ground that the damaged car in question did not have a MOT certificate.

The claim arose from a road traffic accident where the defendant's lorry struck the claimant's parked car. The claimant hired a replacement car while his own car was repaired. Mr Recorder Charman disallowed a claim regarding credit hire charges incurred by the claimant for a replacement vehicle while his car was being repaired.

The claimant's car MOT certificate expired around four months prior to the accident, and so at the time of the accident there was no valid MOT certificate. Mr Recorder Charman found that there was no plausible excuse for the claimant failing to obtain a new MOT certificate and that, while the claimant might not be positively aware the certificate had lapsed, he was "careless" and "not greatly concerned". Even though there was no evidence indicating that the car was unroadworthy, there was also no evidence that the claimant had any intention to acquire a MOT certificate in the near future.[174]

The judge rejected the defendant's argument based on ex turpi causa[175] in that disallowing the claim by reason of not having a valid MOT certificate would be disproportionate. However, the judge accepted the defendant's causation argument that since the claimant could not lawfully drive his car on the public highway at the time of the accident, it was not a reasonable act of mitigation of loss to hire a replacement car.

The court dismissed the appeal and stated that there were two forms of illegality. The first form was ex turpi causa which was an extreme defence involving a consideration of proportionality and affecting the claim as a whole. The second, more targeted, form of illegality related not to the whole action but to a particular aspect of the claim. That type of illegality did not involve considerations of public policy or proportionality. With the application of the doctrine of causation, where the claimant's use of his vehicle was unlawful, the accident could not be said to have caused the loss of use and the defendant was not required to compensate the claimant.[176]

167 At para 124.
168 At para 127.
169 At para 129.
170 At para 138.
171 At para 149 to 150.
172 At para 158.

173 [2023] EWHC 2159 (KB); [2024] Lloyd's Rep IR 1.
174 At para 3.
175 By applying the decision in *Patel v Mirza* [2016] UKSC 42; [2016] 2 Lloyd's Rep 300; [2016] Lloyd's Rep FC 435.
176 At paras 17 to 20.

Aviva Insurance Ltd v McCoist and Another[177] considered the issue of whether the owner granted permission to his son to drive the car which was subsequently involved in an accident.

In January 2016 Mr McCoist bought a car for the use of his son. Mr McCoist owned and remained the registered keeper of the car. The insurers cancelled the insurance policy when they discovered the car was being driven at 65 mph in a 30 mph limit. Mr McCoist forbade his son from driving the car, but his son continued to do so while uninsured. Mr McCoist insured the car in August 2016, and repeatedly told his son he was not allowed to drive it.

> With the application of the doctrine of causation, where the claimant's use of his vehicle was unlawful, the accident could not be said to have caused the loss of use and the defendant was not required to compensate the claimant

On 21 November 2016 his son removed the car from a garage where it was undergoing repairs, and continued to drive it even though he was not insured. In December he collided with a pedestrian on a pedestrian crossing, causing serious injury to the pedestrian who incurred damages of £244,000. The insurers were not under an obligation to pay damages to the pedestrian under the terms of their policy with Mr McCoist, but rather they were obligated to do so under sections 145 and 151(2) of the Road Traffic Act 1988.[178] Having made the payment, the insurers sought recovery from Mr McCoist and his son jointly and severally under section 151(8) of the Road Traffic Act 1988 on the basis that Mr McCoist had caused or permitted the use of the car.

The court found that there was nothing in the evidence which came up to the statutory test of permitting, and therefore the insurers failed to meet the statutory test for imposing liability on Mr McCoist under section 151(8) of the 1988 Act.[179]

177 [2023] CSOH 62; [2024] Lloyd's Rep IR Plus 12.
178 At para 11.
179 At paras 77 to 78.

Conclusion

It is important to note that some of the decisions examined in this review are under appeal and may be subject to change. 2024 has already proved to be an interesting year.

The Supreme Court in *Herculito Maritime Ltd and Others v Gunvor International BV and Others (The Polar)*[180] has considered the general average recovery and the scope of subrogation in respect of war risks and kidnap and ransom policies.

The Court of Appeal in *Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd*[181] has examined the scope of non-assignment clauses, and the Court of Appeal in *Various Eateries Trading Ltd v Allianz Insurance plc*[182] has upheld the first instance decision[183] on the operation of causation in business interruption cases.

Finally, in *AXIS Specialty Europe SE v Discovery Land Co LLC and Others*[184] the Court of Appeal has affirmed the first instance decision[185] discussed above.

2024 already seems to be a quite promising year for insurance case law.

180 [2024] UKSC 2; [2024] Lloyd's Rep IR Plus 5.
181 [2024] EWCA Civ 5; [2024] Lloyd's Rep IR Plus 6.
182 [2024] EWCA Civ 10; [2024] Lloyd's Rep IR Plus 13.
183 [2022] EWHC 2549 (Comm); [2024] Lloyd's Rep IR 60.
184 [2024] EWCA Civ 7; [2024] Lloyd's Rep IR Plus 7.
185 [2023] EWHC 779 (Comm); [2024] Lloyd's Rep IR 17.

APPENDIX: JUDGMENTS ANALYSED AND CONSIDERED IN THIS REVIEW

2023 judgments analysed

Al Mana Lifestyle Trading LLC and Others v United Fidelity Insurance Co PSC and Others (CA) [2023] EWCA Civ 61; [2023] Lloyd's Rep IR 359

Ali v HSF Logistics Polska SP zoo (KBD) [2023] EWHC 2159 (KB); [2024] Lloyd's Rep IR 1

Atta v HDI Global Specialty SE (KBD) [2023] EWHC 2028 (KB); [2024] Lloyd's Rep IR Plus 11

Aviva Insurance Ltd v McCoist and Another (CSOH) [2023] CSOH 62; [2024] Lloyd's Rep IR Plus 12

AXIS Specialty Europe SE v Discovery Land Co LLC and Others (CA) [2024] EWCA Civ 7; [2024] Lloyd's Rep IR Plus 7

Bellini (N/E) Ltd v Brit UW Ltd (KBD (Comm Ct)) [2023] EWHC 1545 (Comm); [2023] Lloyd's Rep IR 573

Brian Leighton (Garages) Ltd v Allianz Insurance plc (CA) [2023] EWCA Civ 8; [2023] Lloyd's Rep IR 380

Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd (CA) [2024] EWCA Civ 5; [2024] Lloyd's Rep IR Plus 6

DC Bars Ltd and Another v QIC Europe Ltd (KBD (Comm Ct)) [2023] EWHC 245 (Comm); [2023] Lloyd's Rep IR 225

Discovery Land Co LLC and Others v AXIS Specialty Europe SE (KBD (Comm Ct)) [2023] EWHC 779 (Comm); [2024] Lloyd's Rep IR 17; (CA) [2024] EWCA Civ 7; [2024] Lloyd's Rep IR Plus 7

F M Conway Ltd v The Rugby Football Union and Others (CA) [2023] EWCA Civ 418; [2023] Lloyd's Rep IR 336

Finsbury Food Group plc v Axis Corporate Capital UK Ltd and Others (KBD (Comm Ct)) [2023] EWHC 1559 (Comm); [2023] Lloyd's Rep Plus 81

George on High Ltd and Another v Alan Boswell Insurance Brokers Ltd and Another (KBD (Comm Ct)) [2023] EWHC 1963 (Comm); [2024] Lloyd's Rep IR Plus 8

Gueterbock and Another v MacPhail and Another; Henderson Court Ltd v Allianz Insurance plc (Ch D) [2023] EWHC 1035 (Ch); [2024] Lloyd's Rep IR 77

Herculito Maritime Ltd and Others v Gunvor International BV and Others (The Polar) (SC) [2024] UKSC 2; [2024] Lloyd's Rep IR Plus 5

Infinity Reliance Ltd v Heath Crawford Ltd (KBD (Comm Ct)) [2023] EWHC 3022 (Comm); [2024] Lloyd's Rep IR Plus 10

London International Exhibition Centre plc v Royal & Sun Alliance Insurance plc and Others (KBD (Comm Ct)) [2023] EWHC 1481 (Comm)

PizzaExpress Group Ltd and Others v Liberty Mutual Insurance Europe SE and Another (KBD (Comm Ct)) [2023] EWHC 1269 (Comm); [2023] Lloyd's Rep IR 447

Project Angel Bidco Ltd v Axis Managing Agency Ltd and Others (KBD (Comm Ct)) [2023] EWHC 2649 (Comm); [2024] Lloyd's Rep IR Plus 3

Quadra Commodities SA v XL Insurance Company SE and Others (CA) [2023] EWCA Civ 432; [2023] Lloyd's Rep IR 455

Royal and Sun Alliance Insurance Ltd and Others v Tughans (KBD (Comm Ct)) [2022] EWHC 2589 (Comm); [2023] Lloyd's Rep IR 230; (CA) [2023] EWCA Civ 999; [2023] Lloyd's Rep IR 657

Sky UK Ltd and Another v Riverstone Managing Agency Ltd and Others (KBD (Comm Ct)) [2023] EWHC 1207 (Comm); [2023] Lloyd's Rep IR Plus 28

Technip Saudi Arabia Ltd v Mediterranean and Gulf Cooperative Insurance and Reinsurance Co (KBD (Comm Ct)) [2023] EWHC 1859 (Comm); [2023] 2 Lloyd's Rep 371; [2023] Lloyd's Rep IR Plus 33

University of Exeter v Allianz Insurance plc (KBD (Comm Ct)) [2023] EWHC 630 (TCC); [2023] Lloyd's Rep IR 370; (CA) [2023] EWCA Civ 1484; [2024] Lloyd's Rep IR Plus 1

Various Eateries Trading Ltd v Allianz Insurance plc (CA) [2024] EWCA Civ 10; [2024] Lloyd's Rep IR Plus 13

World Challenge Expeditions Ltd v Zurich Insurance Co Ltd (KBD (Comm Ct)) [2023] EWHC 1696 (Comm)

Judgments considered

Al Mana Lifestyle Trading LLC and Others v United Fidelity Insurance Co PSC and Others (QBD (Comm Ct)) [2022] EWHC 2049 (Comm); [2022] Lloyd's Rep IR Plus 36

Brian Leighton (Garages) Ltd v Allianz Insurance plc [2022] EWHC 1150 (Comm)

Cumberland Bone Co v Andes Insurance Co 64 Me 466 (1874)

Financial Conduct Authority v Arch Insurance (UK) Ltd [2021] UKSC 1; [2021] Lloyd's Rep IR 63

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