REINSURANCE ROUND UP

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There have been a number of insurance and reinsurance cases decided in the courts over the last year. Some, for example the Aioi Nissan Dowa decision that the 9/11 attack on the World Trade Centre constituted two losses under the reinsurance contract in question, have been high profile; others less so. The following is a selection of decisions that we hope will be of interest to those involved in the reinsurance marketplace.

- **Teal Assurance Co Ltd v WR Berkley Insurance (Europe) Ltd [2013] UKSC 57 - The insured or reinsured was not entitled to arrange the order in which losses are submitted so as to maximise the benefit of the cover provided.**

Teal, a captive insurer, provided its parent with a US$60m tower of professional indemnity insurance. Teal also provided excess insurance to its parent, in the form of a top and drop cover. This contained a limit of £10m sterling and excluded American claims (which the underlying tower did not). This excess policy was reinsured by WR Berkley and others.

Claims arose such that if non-American claims were allocated to the tower first, American claims would fall under the top and drop, but as they were excluded would not be recoverable from reinsurers. Teal therefore argued that the American claims should be allocated first; it had chosen to discharge them first and the policy wording required the insured to have “paid” prior to the insurer indemnifying the insured.

The Court of Appeal found against Teal. The Court relied on the proposition that, in the case of liability cover, the obligation of the insurer and the reinsurer arises at the point that the liability of the insured is established (not discharged) and the amount of the liability has been ascertained, whether by litigation, arbitration or settlement. The Court rejected the proposition that the reinsured had freedom of choice in the ordering of losses because this could not readily “be reconciled with the basic philosophy that insurance covers risks lying outside an insured’s own deliberate control”. It was held that the claims became due in the order that Teal became liable by way of judgment or admission and not in the order in which it decided to discharge them.

- **Aioi Nissan Dowa Insurance Company v Heraldglen and Advent Capital (No 3) Limited [2013] EWHC154 (Comm) - An arbitration Tribunal was entitled to conclude that the attack on the twin towers constituted two losses.**

An arbitration Tribunal decided that, under a reinsurance contract which defined a loss as constituting one or more occurrences or series of occurrences "arising out of one event", the World Trade Centre losses constituted two occurrences, arising from two events. In reaching its conclusion, the Tribunal applied the 'unities' doctrine set out in Kuwait Airways Corporation v Kuwait Insurance Co SAK [1996] 1 Lloyd's Rep 664, (and originally laid down by Michael Kerr QC in the Dawson's Field Arbitration (1972)). On this basis the primary factors to be considered in deciding the number of events were whether there was unity of time, unity of location, unity of cause and unity of intent.

On appeal the reinsured argued that it was one loss (s69 of the Arbitration Act 1996 gives very limited rights, with leave of the court, to appeal an arbitration award on a point of law).

The Commercial Court found that the Tribunal had accurately summarised the law, and that, having applied the correct law, the Tribunal was "entitled… to find that there were two separate causes for the insured losses because there were two successful hijackings of two aircraft" and that it was "entitled to find for the reasons they gave that there was no sufficient unity of time or location to have arisen out of one event, notwithstanding that the Twin Towers were part of an overall complex and notwithstanding the relative closeness in time between the commencement of each flight and the subsequent crashes."

The court concluded that the Tribunal had accurately identified the applicable law and made "no error of law". Hence the decision was one that it was open to the Arbitrators to make and in making it they (i) correctly applied the law; (ii) had regard to all materially relevant matters; and (iii) did not take into account impermissible considerations.

However, the Judge gave no indication of whether he would have reached the same conclusion had he heard the original case himself. Although he found that it was open to the Tribunal to decide that the attack was two events, he did not comment on whether, applying the same principles of law and having regard to the same factors, a Tribunal might equally conclude that it was a single event. Accordingly, another tribunal or Court could reach a different conclusion as to the number of events, although clearly this tribunal's decision would be persuasive (it is not binding) in respect of the wording it dealt with. Furthermore, a different wording could lead to a different result, especially as the words "loss", "occurrence", "cause" and "event" are not always used consistently in reinsurance wordings.

- **AstraZeneca Insurance Company Limited v XL Insurance (Bermuda) Limited [2013] EWHC 349 (Comm) - Coverage under a "Bermuda Form" policy subject to English law requires the insured to have legal liability.**

Bermuda form contracts are usually subject to New York law (with contractual modifications) and provide for arbitration in London. Unusually, the applicable law under this contract was stated to be English law and the parties agreed to waive arbitration in favour of proceedings in the English Commercial Court.

The captive claimed that in order to recover from reinsurers payments that it had made on the original policy, all it had to do was show that it settled an arguable liability under that policy. In addition, the captive asserted that there was coverage for its insured's defence costs, even where no actual liability on the part of the insured was established.

Mr Justice Flaux in the Commercial Court found there to be a consistent and well established line of English authority which provides that, absent clear policy wording to the contrary, an insured is required to establish that it was under actual legal liability, not just an arguable liability, to a third party before it is entitled to an indemnity under the policy. This decision reiterates the established view of what has to be proved in order to establish cover under a liability policy and, in the absence of a follow the settlements provision, under a reinsurance.

As to the coverage of defence costs, AstraZeneca's claim was based on the words "and shall include the defence costs", which were included in the definition of damages. As damages were only recoverable if there was actual legal liability, AstraZeneca Insurance could not recover defence costs for which it had not been liable to its insured.

- **Beazley Underwriting and Others v Al Ahleia Insurance Co and Others 2013 (Commercial Court) - A claims control clause operates as an exemption clause, so must be clear for reinsurers to rely on it.**

A Claims Control Clause ("CCC") provided as a condition precedent that reinsurers (through the slip leaders) had the right to control all negotiations, adjustments and settlements in connection with losses which may give rise to a claim under the reinsurance, and that no settlement or compromise should be made or admitted without reinsurers' prior approval.

In the context of a wider dispute, reinsurers argued that they were not liable in respect of a claim submitted under the reinsurance of risks arising from the construction of crude oil storage tanks for the Kuwait Oil Company on the grounds that the reinsured had failed to allow reinsurers to control negotiations and had compromised the claim without reinsurers' prior approval.

In deciding against reinsurers, the court held that the CCC operated as an exemption clause, such that reinsurers could only rely on it if the words were clear on a fair construction of the clause.

On that basis, reinsurers could not escape liability where the reinsured and underlying insured had merely engaged in discussions falling short of what was meant in the CCC by the term "negotiations". To the extent that what could be described as the first step in negotiations took place, the reinsured was merely obliged to give notice of such negotiations promptly or within a reasonable time thereafter. That said, there could be an obligation to notify negotiations being held unilaterally on behalf of one reinsurer to the other reinsurers.

Similarly, there was no obligation to notify matters which were properly to be characterised as nothing more than a variation of the underlying insurance as it applied to a particular claim, rather than as a settlement or an admission of liability.

- **Ace European Group v Standard Life Assurance [2012] EWCA Civ 1713 - Apportionment of Mitigation Costs**

The Court of Appeal upheld the Commercial Court's decision that, where the costs of mitigating loss are recoverable under a professional indemnity insurance, there is no principle of law entitling insurers to apportion costs where these can be said to have been incurred for dual purposes, such as (a) minimising the likelihood of professional negligence claims, this being an insured risk, but also (b) protecting the insured's reputation, this being an uninsured risk. The court held that there is no place in liability insurance for the principle of apportionment.

- **Re Digital Satellite Cover Limited [2013] UKSC 7 - The UK is not restricted to the scope of the First Non-Life Directive in the classes of business that it regulates**

In one of the few Court decisions concerning what is included in the definition of "contracts of insurance" under the UK regulatory regime, the Supreme Court held unanimously that so-called extended warranty contracts providing repairs and replacement of satellite equipment in the case of specified damage, breakdown or malfunction, are contracts of insurance under the UK legislation. Moreover, the Court confirmed that the UK is free to regulate business beyond the scope of the First Non-Life Directive in that whilst the relevant First Non-Life Directive specified certain categories of non-life insurance business, the Court recognised that it was open to Member States to regulate further or wider categories of insurance under their national laws.

- **Aspen Insurance UK Limited v Adana Constructions Limited [2013] EWHC 1568 (Comm) - Expert evidence must go to industry practice, not just the expert's interpretation of the wording.**

This recent Commercial Court decision acts as a warning to parties to ensure that if expert evidence is called on industry practice, it must be on the point to be relevant and admissible, particularly where it might stray into contract interpretation and the straightforward corroboration of one party's understanding of the policy terms. Mackie J roundly dismissed as inadmissible the Claimant's expert evidence where the expert admitted that his view stemmed from his interpretation of the policy wording rather than standard practice in the industry.

- **Instituto Nacional de Seguros v Hemispheric Reinsurance Group and Howden Insurance Brokers (Case No. 10-33653 CA 04 (Fla. Cir. Ct. Apr. 10, 2013)) - The Florida Court found Florida law applied to claims in tort by Costa Rican insurers against both Florida brokers and London brokers.**

Although a Florida case, we have included it here as it relates to London market broking activities.

INS, a Costa Rican insurer, retained HRG, a Miami broker, to place reinsurance of a property account. HRG, in turn, retained Howden to place it in the London market, which Howden did. INS later brought proceedings in Florida against HRG and Howden. The assertions included claims in tort for negligence and breach of fiduciary duty. INS argued that the parties' relationship began in Florida and that the centre of their relationships remained Florida, through which the relevant funds flowed. On this basis, INS asserted that the law of Florida should apply to the claims for negligence and breach of fiduciary duty.

Howden argued that English law should apply to those claims, since Howden's conduct took place entirely in England. Howden argued there could be no "centre" of the relationship, as there was no direct relationship between itself and INS.

The Court found in favour of INS, holding that Florida law applies to INS' tort claims against Howden under Florida's "most significant relationship" test.

Stephen Carter
Partner
T: 0203 697 1902
M: 07887 645262
E: stephen.carter@cpblaw.com

Bernadette Bailey
Partner
T: 0203 697 1903
M: 07887 645263
E: bernadette.bailey@cpblaw.com