# THE INSURANCE DISPUTES LAW REVIEW

FOURTH EDITION

**Editors**
Joanna Page and Russell Butland

THE LAWREVIEWS

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# PREFACE

We are delighted that this is now the fourth edition of *The Insurance Disputes Law Review*. It is a privilege to be the editors of this excellent and succinct overview of recent developments in insurance disputes across 15 important insurance jurisdictions. We are particularly pleased that in this edition we are welcoming chapters from Greece, Brazil and Turkey.

The first three editions were very well received. They demonstrated both the need for and the very active interest in the legal frameworks for insurance and, in particular, in the insight that the developing disputes arena provides into this fascinating area. This interest has been clearly evident across the globe.

Insurance is a vital part of the world's economy and critical to risk management in both the commercial and the private spheres. The law that has developed to govern the rights and obligations of those using this essential product can often be complex and challenging, with the legal system of each jurisdiction seeking to strike the right balance between the interests of insurer and insured, and also the regulator who seeks to police the market. Perhaps more than any other area of law, insurance law can represent a fusion of traditional concepts (concepts almost unique to this area of law) together with constant entrepreneurial development, as insurers strive to create new products to adapt to our changing world. This makes for a fast-developing area, with many traps for the unwary. Further, as this indispensable book shows, even where the concepts are similar in most jurisdictions, they can be implemented and interpreted with very important differences in different jurisdictions.

To be as user-friendly as possible, each chapter follows the same format – first providing an overview of the key framework for dealing with disputes – and then giving an update of recent developments in disputes.

As editors, we have been impressed by the erudition of each author and the enthusiasm shown for this fascinating area. It has also been particularly interesting to note the trends that are developing in each jurisdiction. An evolving theme in almost every jurisdiction is the increase in protections for policyholders. Much of the special nature of insurance law has developed from an imbalance in knowledge between the policyholder (who had historically been blessed with much greater knowledge of the risk to be insured) and the insurer (who knew less and therefore had to rely on the duties of disclosure of the policyholder). With the increasing use of artificial intelligence to assess data and more detailed scope for analysis across risk portfolios, the balance of knowledge has shifted; it will often now be the insurer who is better placed to assess the risk. This shift has manifested itself in tighter rules requiring insurers to be specific in the questions to be answered by policyholders when they place insurance, and in remedies more targeted at the insurer if full information is not provided. Coupled with these trends, however, is the increasing desire by some jurisdictions to set limits on the questions that can be asked so that, for example in relation to healthcare insurance,

policyholders are not denied insurance for historical matters. In light of the ongoing scourge of covid-19, and the complexity of its effects across the world's economies, this issue continues to be at the forefront of debate.

We can expect that this tussle between the commercial imperative for insurers to price risk realistically and the need to balance consumer protection, government policy and privacy will increasingly be at the heart of insurance disputes.

The effect of covid-19 on economies, and particularly on business interruption insurance, has been a significant theme in the past year. The consequences for credit insurance will no doubt follow through as well. In our home jurisdiction, the courts have faced this challenge by facilitating an important test case, utilising new procedural rules for the first time and reaching the highest UK court, our Supreme Court, in only seven months so as to provide urgent guidance on some key issues. The courts in many other jurisdictions have also sought to provide swift and practical guidance.

It is also fascinating to see how global concerns around climate change and cyber risk are working their way through the legal systems, with jurisdictions, particularly the United States, leading the way in assessing how existing insurance products might respond to these risks.

No matter how carefully formulated, no legal system functions without effective mechanisms to hear and resolve disputes. Each chapter, therefore, also usefully considers the mechanisms for dispute resolution in each jurisdiction. Courts appear to remain the principal mechanism, but arbitration and less formal mechanisms (such as the Financial Ombudsman in the United Kingdom) can be a significant force for efficiency and change when functioning properly. The increasing development of class action mechanisms, particularly among consumer bodies (e.g., in France and Germany) is likely to be an important factor.

We would like to express our gratitude to all the contributing practitioners represented in *The Insurance Disputes Law Review*. Their biographies are to be found in the first appendix and highlight the wealth of experience and learning that the contributors bring to this volume. On a personal note, we must also thank Abigail Witts at our firm, who has done much of the hard work in this edition.

Finally, we would also like to thank the whole team at Law Business Research, who have excelled at bringing the project to fruition and in adding a professional look and more coherent finish to the contributions.

**Joanna Page and Russell Butland**
Allen & Overy LLP
London
October 2021

**Chapter 4**

# ENGLAND AND WALES

*Joanna Page and Russell Butland*[1]

## I OVERVIEW

English insurance law has traditionally been perceived as insurer-friendly and, as a result, England and Wales has been viewed as an insurer-friendly jurisdiction for insurance disputes. To a large extent this is the product of English legal history, with many of the most significant developments in English insurance law taking place in the context of marine insurance or similar overseas risks.[2] Until as recently as 2015, the leading statute in English insurance law remained the Marine Insurance Act 1906 (much of which also applied to non-marine insurance). For those risks, during that period of history, the informational asymmetry between the insured and the insurer was especially acute. To resolve that asymmetry, English insurance law placed onerous duties of disclosure and compliance with warranties on the insured, with potentially drastic consequences for failure, even if entirely innocent.

However, that historic imbalance has recently been partly redressed by the Insurance Act 2015, the most important development in English insurance law since the Marine Insurance Act 1906. The Insurance Act 2015 recasts the insured's duty of disclosure and the ability of insurers to convert pre-contractual representations into warranties, and sets out a new regime of proportionate remedies for insurers. At the time of writing, there have still been very few disputes under the new law and so it remains to be seen precisely how it will be applied. There are also indications that insurers are seeking to contract out of many of the provisions of the Act where possible in commercial policies. The first significant disputes to test the new regime are anticipated in the next couple of years.

## II THE LEGAL FRAMEWORK

### i Sources of insurance law and regulation

English insurance law is a mixture of common law (drawn from cases before the courts) and statute. Many of the principles developed during early insurance disputes, including the duty of 'utmost good faith' were codified in the Marine Insurance Act 1906 (the 1906 Act), which continues to influence insurance law in the United Kingdom (UK), US and Commonwealth jurisdictions. Although the 1906 Act expressly governs marine insurance, many of its sections

1 Joanna Page is a partner and Russell Butland is a counsel at Allen & Overy LLP.

2 Lord Mansfield's celebrated judgment in *Carter v. Boehm* (1746) 3 Burr 1905, 96 ER 342, which established the concept of utmost good faith in English insurance law, concerned an insurance policy taken out on a fort in what is now Indonesia.

and principles are also applicable to non-marine insurance contracts and it was the most significant statute in English insurance law until the Insurance Act 2015 came into force on 12 August 2016.

Other key statutes regulate risk-specific insurance contracts. For example, the development of life and fire insurance contracts led to the Life Assurance Act 1774 and Fire Insurance Duty Act 1782, key parts of which remain in force today. General consumer legislation, such as the Consumer Rights Act 2015, also applies to consumer insurance contracts.

Firms providing insurance, reinsurance services or insurance intermediation must be authorised to do so under the Financial Services and Markets Act 2000 (FSMA). The Prudential Regulation Authority (PRA) is responsible for the authorisation of such firms. The Financial Conduct Authority (FCA) regulates the conduct of authorised firms and the FCA's Insurance Conduct of Business Sourcebook applies to the sale of general and protection insurance products, outlining expected standards for insurers such as the maintenance of suitable customer information, appropriate product disclosure and fair claims handling. Commercial parties are not required to take out insurance with local providers, although any entities wishing to sell insurance products in England and Wales must be FCA-authorised.

We cover the recent developments in the common law in Section III, but English insurance law has also seen substantial statutory revision (or restatement) in recent years. The four significant recent statutes are:

*a* the Enterprise Act 2016, which for the first time provides policyholders with a potential right to claim damages in the event of a late payment of a claim by an insurer. Prior to the Enterprise Act 2016, policyholders could not recover any additional losses they suffered as a result of undue delay in payment of a claim by an insurer;

*b* the Third Party (Rights against Insurers) Act 2010 (updating the 1930 legislation with the same name) updated and strengthened the regime whereby a third party with a claim against an insolvent insured can, following the insolvency, pursue that claim directly against the insolvent insured's insurers. The insurer continues to have any defences available to the insured in the third party's claim and any defences that the insurers may itself have under the terms of the relevant policy;

*c* the Consumer Insurance (Disclosure and Representations) Act 2012, which applies only to consumer insurance contracts, limits the consumer's duty of disclosure, establishing that an insurer must ask appropriate questions to which the consumer must answer honestly and carefully; and

*d* the Insurance Act 2015 applies to both consumer and business insurance contracts entered into from 12 August 2016. The most significant developments to English insurance law now codified in the Insurance Act 2015 are:

- The Insurance Act 2015 alters the policyholder's duty of disclosure in non-consumer insurance. Prior to the Insurance Act 2015, the insured was under an onerous duty to disclose all known material facts about the risk to be insured. A failure to disclose any material fact would entitle the insurer to avoid the policy (and so avoid paying any claims), if the insurer could show that, if that fact had been disclosed, it would not have written the policy on the terms it in fact did (or not written it all). The ability to avoid arose whether the non-disclosure was fraudulent, negligent or indeed innocent. As a result, insurance disputes in England were often characterised by searches for, and arguments over, alleged non-disclosures. The Insurance Act 2015 replaces that duty with a new duty on

the insured to make a fair presentation of the risk to be insured. The insured must now disclose all material circumstances that it knows or ought to know, or provide sufficient information to place a prudent insurer on notice to make further enquiries. Thus the burden is shifted in part onto the insurer. For policies entered into after 12 August 2016, it will be enough for an insured to disclose sufficient information to place a prudent insurer on notice to make further enquiries. If the prudent insurer's enquiries would have revealed a material circumstance that was not disclosed, but the actual insurer made no such enquiries, the insurer may no longer be able to avoid the policy for non-disclosure. Further, if the insurer can establish a breach of the duty to make a fair presentation of the risk that induced it to write the policy, it will no longer be automatically entitled to avoid the policy. To do so, the insurer will now need to show either that the breach was deliberate or reckless, or that it would not have insured the risk at all if a fair presentation had been made. If the breach is not deliberate or reckless and the insurer can only show that it would have insured the risk on different terms (e.g., for a higher premium), the insurer's remedy is to treat the policy as though it were written on those different terms.

- The Insurance Act 2015 includes new provisions relevant to breach of warranties in insurance policies. Whereas a breach of warranty previously discharged an insurer from liability under a policy from the date of breach, the Insurance Act 2015 introduces proportionate remedies, abolishing any rule of law that causes a breach of an express or implied warranty to result in automatic discharge of the insurer's liability. For example, if the breach is neither deliberate nor reckless and the insurer would still have entered the contract, the insurer is only able to reduce cover on a proportionate basis; if the breach is neither deliberate nor reckless but the insurer would not have contracted, the insurer is able to avoid the contract but must return the premiums to the insured. Any policy terms purporting to convert pre-contractual representations made by the insured into a warranty (known as 'basis of contract' clauses) will no longer have effect.
- The Insurance Act 2015 clarifies the remedies available to an insurer in the event an insured makes a fraudulent claim. If a fraudulent claim is made, the insurer is not liable for any part of that claim and can terminate the policy from the date of the fraud. However, the insurer cannot avoid the policy altogether and remains liable for genuine pre-fraud claims.

### ii Insurable interest

English law has historically maintained that, for an insurance contract to be valid, the insured must have an insurable interest in the subject matter of the policy. An insurable interest is a legal or equitable interest in the subject matter of the insurance, or some interest short of a legal or equitable interest that means the insured would suffer disadvantage or be deprived of an advantage should the risk manifest.

The historic centrality of insurable interest to the concept of insurance in English law means that certain types of derivative contracts, such as credit default swaps, which in many ways economically mirror an insurance arrangement, are not considered (or regulated) as insurance contracts in English law.

Following recent legislative reform, there is uncertainty as to whether an insurable interest is a common law requirement or an indirect statutory requirement. Prior to the

Gambling Act 2005, there was a clear statutory basis for insurable interest. The 1906 Act codified the general rule of law (for marine insurance) into a statutory requirement; the Life Assurance Act 1774 rendered life and contingent insurance contracts void without an insurable interest; and the Gaming Act 1845 created an indirect requirement for an insurable interest in all other contracts of insurance.

The Gambling Act 2005, which was intended to regulate new types of gambling activities, removed the 1845 Act's indirect requirement for insurable interest. As the Act did not intend to affect insurance, the impact of the 2005 Act on insurable interest may be limited. However, uncertainty now exists as to the exact legal basis of insurable interest and proposals by the Law Commission of England and Wales to include a statutory definition of insurable interest in the Insurance Act 2015 were rejected. Nevertheless, the English and Welsh and Scottish Law Commissions are continuing to consult on a draft Insurable Interest Bill, confined to life and life-related insurance, to introduce a statutory definition of insurable interest.

### iii Fora and dispute resolution mechanisms

Insurance disputes with a value greater than £100,000 will generally be heard at first instance in the High Court. The Commercial Court, a specialist court within the Business and Property division of the High Court, has specialist judges with insurance experience and will be the most common forum for large insurance disputes. If a claim is greater than £50 million and raises issues of general importance to financial markets, it may be heard on the 'Financial List', a specialist cross-jurisdictional list established to handle claims related to the financial markets. At first instance the dispute will be heard by a single judge.

The procedural rules of the Financial List also provide a specialist expedited procedure known as the Financial Markets Test Case Scheme for claims that raise issues of general importance in relation to which immediately relevant authoritative English law guidance is needed. Business interruption insurance claims arising out of the covid-19 pandemic were the first (and so far only) use of this specialist procedure.

Appeals from the High Court are heard in the Court of Appeal, usually by a panel of three Lord Justices of Appeal. To appeal to the Court of Appeal, the appellant will need to obtain the court's permission and to obtain this will need to show that, where the appeal is a first appeal (i.e., the decision being appealed is not itself an appeal from a lower court), the appeal would have a real prospect of success or there is some other compelling reason for it to be heard. Where the appeal to the Court of Appeal is a second appeal (i.e., the decision being appealed is itself an appeal from a lower court), the appellant will need to show that the appeal would have a real prospect of success and either it raises an important point of principle or practice, or there is some other compelling reason for it to be heard.

Appeals from decisions of the Court of Appeal are heard in the UK Supreme Court (the UK's highest court), usually by a panel of five Justices of the Supreme Court. Again, the appellant will need to obtain permission to appeal, which will only be granted if it can be shown that the appeal raises an arguable point of law of general public importance that ought to be considered by the Supreme Court.

Claims with a value less than £100,000 will be heard in the relevant county court (which is usually the local county court of the defendant). The Financial Ombudsman Service (FOS) can also independently review and settle non-contentious complaints between an insured and insurer. The FOS is primarily designed to deal with complaints by individual consumers, but complaints can also be brought by, or on behalf of, small businesses who, as

customers, use financial services. To qualify, the business making the complaint must have an annual turnover of less than £6.5 million and fewer than 50 employees or a balance sheet total of less than £5 million. Decisions of the FOS are binding on insurers and can only be challenged by judicial review.

The English courts encourage alternative dispute resolution (such as mediation) both before and during arbitral or litigation proceedings. An unreasonable failure to engage in alternative dispute resolution may lead to the refusing party being required by the court to pay more of the other party's legal and other costs of pursuing the claim (or receiving less of their own costs if successful). Mediation is the most widely used form of alternative dispute resolution in insurance disputes, but other alternatives include expert determination, adjudication and early neutral evaluation.

It is common for English law-governed insurance contracts to contain a London-seated arbitration clause. The QMUL 2018 International Arbitration Survey identified London as the most popular choice of seat for arbitration and the London Court of International Arbitration as the most popular institution after the International Chamber of Commerce's International Court of Arbitration. London also remains a popular choice of seat for arbitrations arising out of Bermuda Form excess liability insurance policies. Bermuda Form policies often achieve a transatlantic balance between the perceived insurer-friendly laws of England and the perceived insured-friendly laws of New York by providing for the policy to be governed by New York law, but for disputes to be resolved in London-seated arbitration (and thus in accordance with English procedural law).

Under the Arbitration Act 1996, an arbitral award issued by a London-seated tribunal can only be challenged in the English courts on the basis:

*a* that the arbitral tribunal did not have substantive jurisdiction;[3]

*b* of a serious irregularity affecting the tribunal, the proceedings or the award and that has caused or will cause substantial injustice.[4] The types of serious irregularity are set out in Section 68(2) and range from the tribunal exceeding its powers to the failure of the tribunal to deal with the issues that were put to it; and

*c* of a question of law.[5] To challenge an award on this basis requires leave to appeal from the court (which is not required for a challenge under Section 67 or Section 68), which will only be given if the decision of the tribunal on the question of law is obviously wrong or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt.

While it is common for London-seated arbitral agreements to exclude appeals on the grounds of a question of law, it is not possible to exclude appeals regarding substantive jurisdiction or serious irregularity.

## III RECENT CASES

There have been a number of significant cases in the English courts since the previous edition. Perhaps the most high-profile case was the Supreme Court's decision on whether the most common forms of non-damage business interruption policies provided cover for businesses

3 Section 67.

4 Section 68.

5 Section 69.

interrupted by the covid-19 pandemic. The Supreme Court has also been called on to consider non-party costs orders against insurers and the application of the Brussels Regulation (Recast) 1215/2012 (the Recast Brussels Regulation), and the Court of Appeal considered the statutory provisions governing the transfer of insurance business for the first time in the 150-year history of those provisions. We summarise below these and other key recent cases, including important decisions on English law in areas including the interpretation of policy terms, non-disclosure, the quantum of an insured's loss, subrogation, jurisdiction, and Brexit and retained EU law. We also cover a case in the Scottish Appeal Court, which is the first case in the UK to consider aspects of the new duty of fair presentation of the risk in the Insurance Act 2015.

### i Business interruption and covid-19

While business interruption cover is typically bought by policyholders as an extension to property damage policies, and primarily responds in cases of property damage, non-damage extensions to cover also exist in the market providing cover for losses caused by disease or the response of public authorities to disease. There has been a deluge of claims against such policies as a result of covid-19 and the national lockdowns in the UK, and considerable uncertainty as to whether such policies respond. The key legal issues to resolve that uncertainty have now been addressed by the Supreme Court in the first-ever case using the Financial Markets Test Case Scheme (the Test Case) under the Civil Procedure Rules (the CPR). The Test Case was brought by the regulator, the Financial Conduct Authority, on behalf of policyholders and with the consent and cooperation of eight insurers seeking to promote greater clarity on the legal issues arising in certain policies thought to be representative of the types of wordings available in the market. The Test Case commenced during the first lockdown in the UK in June 2020 and was heard remotely over two weeks by the High Court in late July 2020. There were two main types of non-damage business interruption coverage clauses at issue:

*a* disease clauses that insured loss caused by an occurrence of a notifiable disease within a specified area around the insured's business (typically a 25-mile or one-mile radius); and

*b* hybrid clauses that insured loss caused by specific consequences of a notifiable disease – typically an inability to use, enforced closure of or prevention of access to the insured's business premises as a result of government action directed at the business.

The High Court gave judgment on 15 September 2020 and much of that judgment was appealed by both the FCA and six of the eight insurers directly to the Supreme Court under the 'leapfrog' procedure (which enables an appeal in exceptional circumstances to bypass the Court of Appeal). The Supreme Court heard the appeals over four days in mid-November 2020 and gave judgment on 15 January 2021.

Both the High Court and the Supreme Court held that the majority (although not all) of the clauses at issue provided cover for business interruption losses resulting from the covid-19 pandemic, and the judgments determined the meaning of concepts such as 'notifiable disease', 'infectious disease', 'inability to use', 'prevention of access', 'interruption' and 'restriction imposed by a public authority', on which the scope of the cover in the representative clauses at issue turned.

The Test Case also raised fundamental issues as to the application of the 'but for' causation test in cases of concurrent, competing causes. The disease clauses raised the question of whether, when the loss was caused by a government response to a pandemic (i.e., to the

disease everywhere), the cases of the disease within the relevant specified area that are insured can be said to be a cause of the loss. The hybrid clauses raised questions as to whether the insured suffered loss (as a result of the particular type of government action insured against) when the same loss would also be likely to be caused by other government actions (such as the restrictions on freedom of movement) or the public response to the virus, which were not insured. Both these questions turned on how the but-for test should – or should not – be applied where there are two independent causes of the relevant loss, neither of which alone would satisfy the but-for test.

The Supreme Court's answer to these questions lay in the doctrine of proximate causation – a rule of English insurance law that requires the insured risk to have been the dominant or effective cause of the loss but not necessarily the only cause. Previous cases[6] had established that where two causes are sufficiently interlinked and of sufficiently equal efficacy such that one cannot be distinguished as the sole proximate cause, and if one is insured and one uninsured – but not excluded, the policy covers the entirety of the loss. Conversely, if one cause is insured and the other excluded, then the policy does not cover any of the loss.

The line of reasoning from these cases had previously only been applied in cases of interdependent concurrent causes – causes where each alone is necessary but not sufficient to bring about the loss (and thus both satisfy the but-for test). The Supreme Court extended the application of that line of reasoning to instances of independent concurrent causes – although neither cause alone satisfied the but-for test. Thus, in relation to the two types of clause, it held that:

*a* cases of the disease within the relevant radius should be treated as a concurrent proximate cause with all cases of the disease outside the radius – and so the policyholder should recover all its loss; and

*b* the government action closing the insured's premises was held to be a concurrent proximate cause with all other government and public actions in response to the virus, and so the policyholder should recover all its loss.

In addition to the FCA Test Case, there have already been two other significant decisions in this area and at least three further cases are currently before the High Court.[7] In *TKC London Ltd v. Allianz Insurance Plc*,[8] TKC sought to claim under its standard form business interruption policy, which was written on an all risks basis but did not contain any disease clause or relevant denial of access extension of the type in the Test Case. The policy provided cover for 'business interruption by any event', with 'event' defined as 'accidental loss or destruction of or damage to property'. The issue for the court was whether TKC could claim under the policy on the basis that the enforced closure and loss of use of a café constituted an insured 'loss of property'. The court accepted the insurer's submission that the policy did not

6 *Wayne Tank and Pump Co Ltd v. Employers Liability Assurance Corpn Ltd* [1974] QB 57; *JJ Lloyd Instruments Ltd v. Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1987] 1 Lloyd's Rep 32; *Midland Mainline Ltd v. eagle Star Insurance Co Ltd* [2004] EWCA Civ 1042; *ENE Kos 1 Ltd v. Petroleo Brasiliero SA (No. 2)* [2012] UKSC 17; and *Atlasnavios-Navegacao, LDA v. Navigators Insurance Co Ltd (The B Atlantic)* [2018] UKSC 26.

7 *Corbin & King Ltd and another v. AXA Insurance UK PLC*, case number CL-2021-000235; *Various Eateries Trading Limited v. Allianz Insurance PLC*, case number CL-2021-000396; and *Stonegate Pub Company Limited v. MS Amlin Corporate Member Limited, Liberty Mutual Insurance Europe SE and Zurich Insurance PLC*, case number CL-2021-000161.

8 [2020] EWHC 2710 (Comm).

respond to mere temporary loss of use and was only triggered by the physical loss of property. Neither the losses resulting from the business interruption nor the loss or destruction of stock as a result of the forced closure were recoverable under the terms of the policy.

Similarly, in *Rockliffe Hall v. Travelers Insurance Company Ltd*,[9] a golf course and hotel sought to recover losses resulting from covid-19 under its business interruption insurance cover. Unlike the notifiable-disease clauses considered in the FCA Test Case, Rockliffe's policy provided cover for business interruption caused by an outbreak of any of 34 specified 'infectious diseases' (which did not include covid-19). The court held that the reasonable person would have understood the contracting parties to have intended the list of diseases to be exhaustive or closed and that:

> *while a 'catch-all' 'Notifiable Disease' clause is (depending on the wording) likely to be inclusive of diseases which are added (after the time of contracting) to the statutory list of 'Notifiable Diseases', a defined list of diseases is not.*[10]

### ii Part VII transfers

Part VII of the FSMA provides a court-sanctioned procedure for the legal transfer of insurance policies between insurers. The court is required to consider a report on the viability of the transfer by an independent expert, along with submissions from the FCA and PRA and any objections made by policyholders (or any other person who alleges they are adversely affected by the proposed transfer). The rejection by the High Court[11] of the proposed transfer of approximately £12.9 billion in annuity liabilities from the Prudential Assurance Company Limited to Rothesay Life in 2019 was thought to signal a more interventionist approach to Part VII applications than the industry had previously seen, with a greater weight being given to the subjective expectations and concerns of policyholders. However, following Prudential and Rothesay's successful appeal and the Court of Appeal's[12] restatement of the principles for the exercise of the court's discretion, the focus remains the objective question of whether the transfer will have a material adverse effect on the receipt by policyholders of their benefits.

Several recent applications for sanction of a Part VII transfer have also had to consider issues raised by Brexit. Courts have frequently found themselves in the situation of having to balance:

> *the inevitable prejudice to a large body of EEA policyholders of their policies not being able to be serviced or paid after the end of 2020 if the scheme were not to be sanctioned, against any potential risk of prejudice to individual policyholders or reinsurers under the scheme's terms.*[13]

In two recent cases, insurers have transferred policies to businesses in the EU, either to another business[14] or to a subsidiary located outside the UK.[15] While the courts have still

9 [2021] EWHC 412 (Comm).

10 ibid. at paragraph 84.

11 *The Prudential Assurance Company Limited and Rothesay Life plc* [2019] EWHC 22455 (Ch).

12 *The Prudential Assurance Company Limited and Rothesay Life plc* [2020] EWCA Civ 1626.

13 Snowden J in *Re AIG Europe Ltd and another* ([2018] EWHC 2818).

14 *Rothesay Life Plc, Re* ([2020] EWHC 2185).

15 *Society of Lloyd's, Re* ([2020] EWHC 3266).

been careful to consider the interests of policyholders, they have shown that they are prepared to approve a scheme despite some elements of prejudice to policyholders where the transfer is in response to an external circumstance, such as Brexit.[16]

### iii Interpretation of policy terms

The terms of an English law-governed insurance policy are to be interpreted in accordance with the ordinary principles of the English law of contractual interpretation, which requires the words used in the contract to be given the meaning they would convey to a reasonable person with all the background knowledge available to the parties. Those principles were most recently restated in *Wood v. Capita*,[17] which emphasised that contractual interpretation is a unitary exercise in which the court must engage in an iterative process of balancing the indications given by the factual background, including commercial or business common sense, and a close examination of the relevant language.

Where parties have used unambiguous language, the court must apply that language,[18] but the English law of contractual interpretation gives the English courts the flexibility to resolve cases where a policy term cannot sensibly be given its literal meaning. In *Hongfa Shipping Co Ltd v. MS Amline Marine NV*,[19] the insurers denied the charterers' insurance claim arising from damage that had occurred to cargo on board the vessel that they had chartered. The insurers argued that a policy exclusion applied, which provided that there would be no entitlement to recovery where the claim or dispute arose in circumstances where:

> *the Assured recklessly or intentionally employed or caused the Insured Vessel to be employed in an unlawful or unduly hazardous or improper trade or voyage or that the Cargo carried and/or the method of its securing or unsecuring, carriage, loading, discharging, inspection, maintenance, treatment or lack thereof during the voyage was unduly hazardous, patently inappropriate or improper*

The issue for the Commercial Court was whether the 'recklessly or intentionally' qualification in the exclusion applied only to the employment of the insured vessel (as the insurer contended) or also applied to the remainder of the clause, including the carrying and securing of the cargo in an unduly hazardous manner (as the charterer contended). The Court considered that the clause at issue was 'incoherent',[20] and so recourse was to be had to 'the terms of the document as a whole, its commercial purpose and the context in which the policy was written as well as to commercial common sense' in reaching the conclusion that the words 'recklessly or intentionally' were not restricted to the first part of the clause. Accepting the charterer's arguments, it held that the commercial purpose of the contract was to provide the charterer with cover for damage to a vessel and cargo; there was no commercial logic in treating losses in an unlawful or inappropriate voyage more narrowly than if the cargo or method of discharge was unduly hazardous, patently inappropriate or improper.[21]

16 *Rothesay Life Plc, Re* at paragraph 23.

17 [2017] UKSC 24.

18 *Rainy Sky SA & Ors v. Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, per Lord Clarke, JSC, at paragraph 23.

19 [2021] EWHC 999.

20 At paragraph 22.

21 At paragraph 23.

Conversely, in *ABN Amro Bank NV v. Royal & Sun Alliance Plc*,[22] it was emphasised that commercial common sense should not be invoked retrospectively to rewrite policy terms if the wording of the policy is clear.[23] The fact that the inclusion of a transaction premium clause in the policy was unusual did not mean that the background should be considered, given that the language of the clause was sufficiently clear. The insurers' argument that it would make no commercial sense for a marine cargo underwriter to offer credit risk cover did not outweigh the construction of words that the parties had chosen to use.

In interpreting insurance policies, English courts may imply terms into the policy that are not expressly included in its wording. In *UK Acorn Finance Limited v. Markel (UK) Ltd*,[24] an unintentional non-disclosure clause made the insurer the decision-maker in respect of the question of whether any non-disclosure was innocent. Applying *Braganza v. BP Shipping Ltd*,[25] the court held that 'neither party can be treated sensibly as having intended to permit the defendant to make decisions that were arbitrary, capricious or irrational',[26] and the clause was therefore held to be subject to an implied term that the insurer would not exercise its decision-making powers under the clause in such a manner.

*Hiscox Dedicated Corporate Member v. Weyerhaeser Co*[27] also illustrates the importance of consistency in policies within a tower of insurance when it comes to dispute resolution clauses. The service of suit clause in the excess policy in question was different from that in the lead policy, but the choice of law and jurisdiction clause was stated as being 'as per the underlying policy'. It was held that using a different service of suit clause did not mean that the parties did not intend to incorporate the wording from the underlying policy.

### iv Non-disclosure and fair presentation of the risk

The Court of Appeal held in *Zurich Insurance Plc v. Niramax Group Ltd*[28] that it was necessary for the insurer to show that the non-disclosure was an effective cause of the underwriter writing the insurance on less onerous terms than would have been the case had the disclosure been made, to avoid the policy. If that standard is not fulfilled, 'it is not sufficient merely to establish that the less onerous terms would not have been imposed *but for* the non-disclosure'[29] (emphasis added). It was noted, by reference to *Financial Conduct Authority v. Arch Insurance (UK) Ltd*,[30] that the effective cause test can exceptionally be satisfied where the but-for test is not. On the facts, the insurer had taken no account of the insured's attitude to risk, which was what the undisclosed facts consisted in, and so the non-disclosure could not have caused the renewal being written on cheaper terms than if the disclosure had been made.

Notably, *Zurich Insurance Plc v. Niramax* dealt with a contract pre-dating the Insurance Act 2015, which replaced the insured's duty to disclose all known material facts about the

22 [2021] EWHC 442.
23 At paragraph 177.
24 [2020] EWHC 922.
25 [2015] UKSC 17.
26 At paragraph 63.
27 [2019] EWHC 2671.
28 [2021] EWCA Civ 590.
29 At paragraph 30.
30 [2021] UKSC 1.

risk to be insured with a new duty to make a fair presentation of that risk, and it remains to be seen whether the same result would be reached under the new regime. Section 8(1) of the Insurance Act 2015 provides that:

> *The insurer has a remedy against the insured for a breach of the duty of fair presentation only if the insurer shows that* but for *the breach, the insurer –*
> *(a) would not have entered into the contract of insurance at all, or*
> *(b) would have done so only on different terms.* (emphasis added)

It could therefore be open to insurers to contend that the but-for language of Section 8 supports a different approach being taken from that of the Court of Appeal in *Zurich Insurance Plc v. Niramax*. However, the Explanatory Notes to Section 8 state that it 'reflects the current law on inducement following the decision in *Pan Atlantic Insurance Co Ltd v. Pine Top Insurance Co Ltd'*, which was relied on by the Court of Appeal in reaching its decision in *Zurich Insurance Plc v. Niramax*.

In an appeal to the Scottish Appeal Court,[31] which upheld the first-instance decision of the first case to be decided under the Insurance Act 2015, it was held that the Insurance Act 2015 did not alter the law's position on waiver by the insurer of the duty of disclosure. The judge at first instance had 'held that the Insurance Act 2015 had shifted the burden of identifying what is material to the insured',[32] but the appeal court stated that there was no basis for inferring any legislative intention of this kind from the Insurance Act 2015. Section 3(1) imposes a duty to make to the insurer a fair presentation of the risk before the contract is entered into, but an insurer can waive this duty in the ways established in the case law preceding the Insurance Act 2015.

### v Quantum

In *Endurance Corporate Capital Limited v. Sartex Quilts & Textiles Limited*,[33] the Court of Appeal confirmed that an insured is generally entitled to be indemnified by the insurer for property damage on a reinstatement basis, regardless of whether the insurer intended to reinstate the property after the occurrence of the insured event. It was common ground that no costs of reinstatement had been incurred, but the insurer's argument – that it was essential for the insured to show that it had a genuine, fixed and settled intention to reinstate the property if it wanted to be indemnified on the reinstatement basis – was unanimously rejected.

### vi Subrogation

Subrogation enables an insurer to recoup all or some of the money from a third party that caused or contributed to a loss for which the insurer has indemnified the insured. In *Arag Plc v. Jones*,[34] two co-tenants brought a claim for disrepair against their landlord. The co-tenants' solicitors took out 'after the event' insurance, but only in the name of one of the co-tenants. When their claim failed and they were ordered to pay the landlord's costs, the insurer paid

31 *Young v. Royal and Sun Alliance Insurance Plc* ([2020] CSIH 25).
32 At paragraph 21.
33 [2020] EWCA Civ 308.
34 [2020] EWHC 3484.

these costs and then pursued the uninsured tenant for a 50 per cent contribution. It was held that the insured tenant had discharged her own costs liability by means of the indemnity and the insurer was therefore entitled to be subrogated to the right of the 50 per cent contribution.

The Supreme Court has also provided clarity on when an insurer might expect to face third-party costs orders in *Travelers Insurance Company Ltd v. XYZ*.[35] Travelers had funded the defence of its insolvent insured against over 600 claims for the supply of defective silicone implants. At a late stage in the proceedings, the insured disclosed that two-thirds of the claimants' claims were in fact uninsured. Travellers agreed to pay the costs of insured claimants only and the uninsured claimants sought a third-party costs order.

The Supreme Court confirmed that there are two bases upon which an insurer might be subject to a third-party costs order: by 'intermeddling' or 'becoming the real defendant'.[36] The principles applying to the 'real defendant' basis were set out by the Court of Appeal in *TGA Chapman Ltd v. Christopher*.[37] However, the Supreme Court held that those principles only applied where insurance exists but some part of the claim is outside the scope of cover. Where claims are wholly uninsured, the principles do not apply. A third-party costs order can be made on the intermeddling basis if it is shown that the insurer has engaged in unjustified intermeddling in litigation to which it was not a party and that the insurer 'caused the incurring by the claimants of the relevant costs'.[38] The Supreme Court held that Travelers had a legitimate interest in the defence of the insured claims and its involvement in the litigation was a natural result of its status as an insurer of some of the claims and therefore did not amount to unjustified intermeddling.

### vii Asbestos litigation

In a decision that only applies to policies underwritten before 1997, the High Court held in *R (Aviva Insurance Limited) v. Secretary of State for Work and Pensions*[39] that the Secretary of State's scheme for the recovery of state benefits from insurers in asbestos-related claims was incompatible with the insurers' right under Article 1 of the First Protocol of the European Convention on Human Rights. The Social Security (Recovery of Benefits) Act 1997 (the 1997 Act) and regulations made under it require a negligent employer (and, by extension, their insurer) in personal injury litigation to reimburse the Compensation Recovery Unit in respect of benefits received by claimants. The Court found that, to the extent that it requires payments to the state that do not correspond to the insured's real contribution to the injury, the 1997 Act does not strike a fair balance between the rights of the state and those of the claimants. However, the UK government obtained permission to appeal in January 2021, so it remains to be seen whether the Court of Appeal's decision will stand.

### viii Jurisdiction

Two recent cases have considered the application of the Recast Brussels Regulation in matters 'relating to insurance'.

35 [2019] UKSC 48.

36 At paragraph 53, citing *TGA Chapman Ltd v. Christopher*.

37 [1998] 1 W.L.R. 12.

38 At paragraph 56.

39 [2021] EWHC 30.

In *Aspen Underwriting Ltd v. Credit Europe Bank NV*,[40] a marine insurer sued a Dutch-domiciled assignee of, and loss payee under, the issued marine insurance policy, for misrepresentation in relation to a settlement of a claim under the policy between the insurer and the insured assignor. The Supreme Court held that the insurer could not rely on the English court jurisdiction clauses in either the policy or the settlement agreement to establish jurisdiction in England, as the Dutch assignee was not a party to nor seeking to assert third-party rights under either contract. Overturning the decision of the Court of Appeal, the Supreme Court also held that the English courts had no jurisdiction over the claims. While the Supreme Court agreed with the Court of Appeal that the dispute was a 'matter relating to insurance' within the meaning of Chapter II of Section 3 of the Recast Brussels Regulation that would otherwise require the insurer to sue the assignee in the Netherlands, it disagreed with the Court of Appeal's finding that, as professional ship financier, the assignee was not within a class of persons that merited the protection of those special rules such as to preclude the English court taking jurisdiction. Instead, the Supreme Court found that a person categorised as a policyholder, insured or beneficiary is entitled to the protection of Section 3 of the Regulation, whatever its economic power relative to the insurer.

In *Cole and Others v. IVI Madrid SL and Zurich Insurance Plc*,[41] the High Court has referred several questions on Article 13(3) of the Recast Brussels Regulation to the Court of Justice of the European Union (the CJEU). The parties agreed that the English courts had jurisdiction to hear the direct claims against the insurer, but it was not agreed whether Article 13(3), which states that 'if the law governing such direct actions provides that the policy holder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them', allowed the claimants to sue the insured (a Spanish company) in England as a claim 'parasitic' upon the claim against the insurers brought under Article 13(2). In particular, the questions referred are:

> *Is it a requirement of Article 13(3) of the recast Judgments Regulation 1215/20121 that the cause of action on which the injured person relies in asserting a claim against the policy holder/insured involves a matter relating to insurance?*
>
> *If the answer to (a) is yes, is the fact that the claim which the injured person seeks to bring against the policy holder/insured arises out of the same facts as, and is being brought in the same action as the direct claim brought against the insurer sufficient to justify a conclusion that the injured person's claim is a matter relating to insurance?*
>
> *If the answer to (a) is no, is it sufficient that the joining of the insured to the direct action against the insurer is allowed by the law governing the direct action against the insurer?*

This has not yet been considered by the CJEU[42] at the time of writing.

### ix Brexit and retained EU law

Only three months after the UK's exit from the EU, the High Court was faced with an issue caused by the new lack of ability to make referrals to the CJEU. The European Union (Withdrawal) Act 2018 converted EU law as it previously applied into domestic law and,

40 [2020] UKSC 11.

41 [2019] QBD (unreported).

42 Case C-814/19.

under Section 6, English courts are required to interpret retained EU law in accordance with retained principles of EU law. In *Covea Insurance Plc v. Greenaway*,[43] a 16 year-old boy crashed his father's car, which he had taken without permission. The insurer could, on the face of it, rely on Section 151(4) of the Road Traffic Act 1988 to escape the obligation to indemnify the owner of the car if the owner knew or had reason to believe that the car had been unlawfully taken or stolen, but the claimants argued that Section 151(4) was not compliant with Directive 2009/103/EC as it required that the claimants knew that the vehicle had been unlawfully taken, not merely taken. The court was unable to make a reference to the CJEU on the meaning of 'stolen' as translated in the Directive and how it was implemented across the EU, and so the insurer was permitted to adduce evidence from four experts on the translation of the meaning of the word 'stolen'.

The practical implications of the 'nightmare'[44] position in which English courts find themselves in trying to interpret retained EU law have yet to be fully seen, but it is clear that an increase in foreign law expert evidence and a greater burden on English courts are inevitable consequences of losing the ability to make a reference to the CJEU.

## IV THE INTERNATIONAL ARENA

The rules that will be applied by the English courts to determine where insurance disputes between international parties are heard depend on where the insurer and the insured are domiciled. Prior to Brexit, if both were domiciled in EU Member States, jurisdiction was determined in accordance with the Recast Brussels Regulation. If one party was domiciled in an EU Member State and another in an EEA Member State, then jurisdiction was determined in accordance with the Lugano Convention. After 31 December 2020 (Brexit Transition Day), the Recast Brussels Regulation and the Lugano Convention no longer apply where English courts have been selected in commercial contracts, unless the claim form in the dispute was issued before Brexit Transition Day, in which case, and in any case where the defendant is domiciled outside the EEA, the jurisdiction of the English courts is determined by Part 6 of the CPR. Domicile is determined as at the date of issue of the proceedings.

At the time of writing, the UK is seeking, but has not been permitted, to accede to the Lugano Convention, which in relation to insurance disputes is materially the same as the Recast Brussels Regulation. The Recast Brussels Regulation contains specific, insured-friendly rules (in Articles 10 to 16) on the determination of jurisdiction over insurance disputes (although these rules do not also apply to reinsurance disputes or contribution claims). Those rules provide that:

*a* the insured has the option of suing in the jurisdiction where they are domiciled[45] or in the jurisdiction where the insurer is domiciled;[46] but

*b* insurers are restricted to suing an insured in its country of domicile.[47] However, Article 14.2 clarifies that this rule does not affect the insurer's ability to bring a counterclaim if sued by the insured in a country other than that of its domicile.

43 [2021] EWHC 1506.

44 *Covea v. Greenaway* at paragraph 44.

45 Article 11(1)(b).

46 Article 10.

47 Article 14.

There are also specific rules for insurance of real property and liability insurance,[48] which allow the insured also to sue in the place where the harmful event to the property occurred or the harmful act resulting in liability occurred. Articles 15 and 16 of the Recast Brussels Regulation restrict the ability of insurers to remove the benefit of the rules in Articles 10 to 14 by including exclusive jurisdiction clauses in policies. However, those restrictions do not apply to large commercial risks, which encompass most risks insured by any company with a balance sheet total of at least €6.2 million, a net turnover of at least €12.8 million and an average 250 or more employees. For any company that equals or exceeds these metrics, an exclusive jurisdiction clause in an insurance policy will still be effective to determine where any disputes are heard.

The UK is also currently party to the Hague Convention on Choice of Court Agreements 2005 (the Hague Convention). The Hague Convention requires contracting state courts (including all EU Member State courts) to respect exclusive jurisdiction clauses in favour of other contracting state courts and to enforce related judgments.

Where the defendant (which in insurance disputes is usually, although not always, the insurer) is domiciled outside the EEA (or is domiciled within the EEA but proceedings are commenced after Brexit Transition Day and prior to any accession of the UK to the Lugano Convention), Part 6 of the CPR provides that the English court will have jurisdiction over a dispute if the claimant has the right to serve the claim form on the defendant and the English court is satisfied that it is appropriate for the case to be heard in England. A claimant will have the right to serve the claim form on a defendant without the court's permission if the defendant is present in England (even if only temporarily and habitually resident overseas) or has nominated a solicitor or process agent in England who is authorised to receive service. Often in insurance policies with an English jurisdiction clause, the broker will be nominated as the process agent for service for all the insurers and so service issues are relatively uncommon in insurance disputes.

However, if the defendant cannot be served in the jurisdiction, then the permission of the English court is needed to serve proceedings on the defendant where it is domiciled out of the jurisdiction. To obtain permission, the claimant needs to satisfy the court that: (1) it has a good arguable case that one of the jurisdictional 'gateways' in CPR Practice Direction 6B apply; (2) there is a serious issue to be tried; and (3) England is the forum where the case should properly be tried. The jurisdictional gateways of most relevance to insurance disputes are the gateway for a claim for an injunction (which is the relevant gateway for commencing proceedings for an anti-suit injunction if one party is threatening or commences proceedings in breach of the policy's jurisdiction or arbitration clause) and the gateway for a claim made in respect of a contract that is governed by English law or contains a jurisdiction clause in favour of the English courts. In practice, where an insurance policy contains an English court jurisdiction clause, the English courts are highly likely to assert jurisdiction. Conversely, if an insurance policy contains a jurisdiction clause in favour of another jurisdiction, the English courts are likely to respect that choice and decline jurisdiction.

The English courts will also respect the parties' choice of arbitration as their chosen dispute resolution mechanism and decline jurisdiction where there is a validly incorporated arbitration clause in a policy. It is not uncommon for an insurance policy to contain both an English court jurisdiction clause and a London-seated arbitration clause. Although

48 Article 12.

those clauses are on their face inconsistent, the settled approach of the English courts is to interpret the clauses as providing for disputes to be resolved by arbitration, subject only to the supervisory jurisdiction of the English court.

For all insurance policies entered into after 17 December 2009, the English courts will continue to determine the applicable law in accordance with European Parliament and Council Regulation 593/2008, as it forms part of English law by virtue of the European Union (Withdrawal) Act (2018) (the UK Rome I Regulation).

In addition to where the dispute will be heard, and under what law, one further issue of importance for the arbitration of international insurance disputes is which arbitrators will hear the dispute. This is a matter of choice for the parties, with a mechanism usually provided by either the arbitration clause or a set of institutional rules to appoint a sole or third arbitrator in the event of disagreement. In *Halliburton v. Chubb*,[49] the Supreme Court recently considered whether an arbitrator may accept appointment in multiple arbitration proceedings in relation to the same subject matter but with only one common party, or whether doing so gave rise to an appearance of bias. Both Halliburton Company and Transocean Holdings LLC commenced separate arbitration proceedings against Chubb Bermuda Insurance Limited to recover losses arising out of the explosion on the Deepwater Horizon oil rig in the Gulf of Mexico. The same arbitrator was appointed to both tribunals, but the appointment in the Transocean arbitration was not disclosed to Halliburton. Under the Arbitration Act 1996, an arbitrator can be removed by the court for a lack of independence if it gives rise to justifiable doubts of impartiality. The test for whether justifiable doubts of impartiality are present is the same as the test for apparent bias in a judge in the English courts, namely whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias. The Supreme Court held that the courts should apply that objective test to the facts of the particular case and with regard to the particular characteristics of international arbitration, including its (typically) private nature and any customs and practice in the relevant field of arbitration. Arbitrators have a legal duty under English law to disclose matters that might reasonably give rise to justifiable doubts about the arbitrator's impartiality and a failure to disclose relevant matters is a factor to be taken into account in considering apparent bias. The Supreme Court concluded that the arbitrators had breached their duty of disclosure in failing to disclose their appointment in the Transocean arbitration. However, on the facts of this case, non-disclosure would not have led the fair-minded and informed observer to conclude that there was a real possibility of bias.

## V TRENDS AND OUTLOOK

As in last year's edition, covid-19 and the challenges deriving from the pandemic have been a dominant theme in insurance disputes this year. England and Wales was one of the first jurisdictions to examine, at speed, the issues of recovery of losses for business interruption as a result of the covid-19 pandemic. The first use of the Financial Markets Test Case Scheme by the regulator, the Financial Conduct Authority, for this purpose has meant that precedential clarity was obtained swiftly from the UK's highest court on the most common forms of policy in the market, meaning that in 2021 insurers could focus on resolving the deluge of claims against such policies resulting from covid-19 and the national lockdowns in the UK.

49 [2020] UKSC 48.

However, inevitably, the Test Case did not resolve all issues, or deal with all policy wording variants and, as we have covered above, the follow-on litigation on issues not resolved by the Test Case is beginning to emerge.

Leaving aside that very topical subject, we should also mention that although the Insurance Act 2015 has come into force, it remains to be seen precisely how its provisions will be applied. The Act potentially represents a major rebalancing of rights and obligations between insureds and insurers (in favour of insureds), but early indications are that insurers are seeking to contract out of many of the provisions of the Act where possible in commercial policies.

There also remains a good deal of uncertainty as to how damages for late payment of insurance claims will be approached by the courts and the first case where an insured claims such damages is awaited with interest. This issue was not considered by the Supreme Court in the Test Case, but may well be examined in one or more of the subsequent covid-19 business interruption claims now before the English courts.

Warranty and indemnity insurance and cyber insurance are two of the fastest developing policy markets in England and the terms of both types of policy are becoming increasingly standardised. There have only been a limited number of significant disputes in relation to these types of policies, although we anticipate that will change in the next few years, especially as cyberattacks are becoming an increasingly common experience for businesses.

The coming into force of the General Data Protection Regulation has also generated interest in the extent to which the risks of failing to comply with the Regulation are insurable. The position is likely to be that insurance will not be available for any fines imposed under the Regulation or under the related Data Protection Act 2018 (either because English law prohibits the insurance of fines or because policies will specifically exclude them). However, insurance may be available for the costs of participating in an investigation by the Information Commissioner's Office and defending any subsequent proceedings. Insurance disputes arising out of data protection breaches may also be a developing area in the coming years. Disputes relating to a failure to appreciate the effect of artificial intelligence also look likely to be a developing area.

The use of after the event insurance to cover costs risks in English litigation has also increased significantly in recent years, both as a result of reduction in availability of legal aid at one end of the scale and the increased importance of litigation funding in English disputes at the other end.

In addition to these areas of potential development, climate change remains an area where claims must surely begin to rise. There are no claims in this area as yet, but all eyes are on that space.

**Appendix 1**

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