HERBERT SMITH FREEHILLS

INSURANCE & PROFESSIONAL RISKS

ENGLAND & WALES

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Contents

Introduction

I am delighted to share with you our Insurance & Professional Risks Annual Review of 2022 which looks back over the last 12 months on the key legal cases and developments affecting the insurance sector. Each section includes links to the articles on our blog which provide a more detailed analysis on specific topics: **www.hsfnotes.com/insurance**. For a helpful overview of the cases covered in the Review this year, **The Year in Cases at a Glance** section lists out all the cases with links to our articles.

2022 saw a number of important **insurance cases** handed down by the English courts. In particular, the first case to consider section 13A of the Insurance Act 2015 which gives policyholders the right to claim damages for late payment of an insurance claim. Cases arising from the Covid-19 pandemic also continued following the judgment of the Supreme Court in the FCA's business interruption test case in 2021. The **Covid-19 business interruption claims** section of this Review provides an overview of these decisions as well as what is on the horizon in this space in 2023. There were also decisions on familiar topics such as aggregation, co-insurance and the Third Party (Rights Against Insurers) Act 2010.

Outside the world of insurance, our **Professional liability** section looks at some of the key cases involving legal professionals, on topics including the duties owed to third party non-clients and conflicts of interest. 2022 saw very significant changes in the law governing building safety in the UK – the Fire Safety Act 2021 which came into force in May 2022 and the much-anticipated Building Safety Act 2022. Both new statutes are the result of a comprehensive review of how building safety is regulated following the Grenfell Tower fire in 2017 and are explored in **Health and Safety**. We also consider the first Supreme Court judgment on the trigger for liability under the Consumer Protection Act 1987 in **Product liability**.

Our **General interest** section looks at what 2022 had in store from the perspective of the commercial litigator including the Disclosure Pilot becoming a permanent new Practice Direction and the courts grappling with the new rules on witness statements. Class actions remain a hot topic and I was delighted that the latest edition of the firm's second edition of *Class actions in England and Wales*, written by Herbert Smith Freehills lawyers now includes an entirely new chapter on insurance co-authored by Greig Anderson and Sarah Irons.

We predicted in our Review last year that 2022 would be a busy year from a regulatory perspective and this proved to be correct. Our **Regulatory** section takes you through the government's plans for post-Brexit reform of the regulatory landscape including the Edinburgh Reforms, proposals in the Financial Services and Markets Bill and expected Solvency II reforms. It also looks at the FCA's new Consumer Duty which the FCA published the final rules for in July 2022 and comes into force on 31 July 2023. Unsurprisingly, ESG continues to be high on the agenda with ESG-related transparency set to be the theme for the next 12 months.

For the Insurance and Professional Risks team here at Herbert Smith Freehills in London, our growth continued in 2022 with Antonia Pegden being promoted to partner in the firm's latest round of promotions in May. This recognition and investment builds on the promotion of Fiona Treanor and the return of Will Glassey as partners to the team in London in 2021. Several of our associates were also promoted to Senior Associate in 2022 which is a testament to the bench strength we have as a team. I would like to thank the entire team for their dedication and hard work throughout another busy year.

Thank you also to you our clients and contacts for your continued support.

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Insurance & reinsurance cases

2022 saw a number of important insurance decisions handed down by the English courts. In particular, the first case to consider a policyholder's right under s.13A of the Insurance Act 2015 to claim damages for late payment of an insurance claim. There were also cases on familiar issues such as co-insurance, aggregation and jurisdiction clauses, as well as some decisions relating to the Third Party (Rights Against Insurers) Act 2010. Cases involving Covid-19 business interruption claims are discussed in a separate section of this Review.

Damages for late payment

In *Quadra Commodities S.A. v XL Insurance Company SE and Others* [2022] EWHC 431 (Comm), the court considered for the first time the application of section 13A of the Insurance Act 2015. Section 13A implies a term into every insurance contract made after 4 May 2017 that "the insurer must pay any sums due in respect of the claim within a reasonable time". Breach of this term can give rise to a claim for damages giving policyholders the right to claim compensation in the event of late payment of their insurance claim. There are various elements that a policyholder will need to prove in order to establish a successful claim for damages:

- The insured has a valid claim under the policy;
- The insurer has failed to pay within a reasonable time (including a reasonable time to investigate and assess the claim);
- The insured suffered loss, which was caused by the insurer's breach of the implied term; and
- The loss was foreseeable (ie the loss was in the reasonable contemplation of the parties at the date the contract was entered into).

Further, the insured will not be able to recover any loss which could have been avoided by taking reasonable steps.

In *Quadra*, the court confirmed that the "reasonable time" within which to pay an insurance claim will be judged on a case-by-case basis and found there were two questions to consider:

- What was a reasonable time within which the insurer should have paid the claim? The onus being on the insured to establish this.
- Were there reasonable grounds for insurers to dispute the claim? The onus for this question being on insurers.

While the court found no breach of the implied term in this case, the case provides useful guidance in considering these questions. The judgment also provides some useful clarity as to what constitutes an insurable interest (see First case on the implied term to pay claims within a reasonable time – section 13A Insurance Act 2015.) This case is being appealed.

Co-insurance

The issue of co-insurance arises frequently in insurance disputes and was considered most recently in *The Rugby Football Union v Clark Smith Partnership Limited and FM Conway Limited [2022] EWHC 956* (TCC) (see Subrogation and co-insurance considered again). This judgment considered a number of the well-known authorities in this area including *Co-operative Retail Services Ltd v Taylor Young Ltd* [2002], *Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce* [2008], *Gard Marine & Energy Ltd v China National Chartering Co Ltd* [2017] and *Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd* [2018]. The court in *RFU v Clark Smith* considered the scope of cover provided to a contractor under an All-Risks insurance policy and whether the contractor was able to rely on a co-insurance defence to prevent the insurer from bringing a subrogated action against it. The court found in the insurer's favour and held that while the contractor was insured to some extent under the policy, it was not covered for the damage for which the insurer had indemnified the principal insured (the RFU). The insurer could, therefore, pursue a subrogated action against the contractor.

The case is being appealed but provides a useful reminder that in the context of project wide insurance policies, parties are well advised to ensure that the risk allocation and insurance provisions are fully consistent.

Aggregation

The choice of aggregation wording can have a significant impact on the way limits and deductibles are applied to particular factual scenarios in the context of an insurance claim. Two different forms of aggregation wording were considered by the courts in 2022.

"one source or original cause"

In *Spire Healthcare Limited v Royal & Sun Alliance Insurance Limited* [2022] EWCA Civ 17, the phrase "one source or original cause" was considered in the context of a number of medical negligence claims brought by various patients against a particular surgeon. The Court of Appeal overturned the first instance decision and found that two groups of claims based on the negligent practice of the same surgeon should be aggregated. The first group of patients had required surgery that was performed negligently whereas the second group were the victims of entirely unnecessary surgery. The Court of Appeal found that irrespective of which group the claims fell into, the unifying factor between them was the surgeon's dishonest improper conduct and so the insured could only recover one limit of indemnity. The question of whether the patient did or did not require surgery should have no bearing on the insured's liability for the claims (see Spire and RSA contest aggregation again).

"a single occurrence"

A different (but no less familiar) form of aggregation wording was considered by the court in three cases relating to the covid-19 pandemic: *Stonegate Pub Company v MS Amlin* [2022] EWHC 2548 (Comm), *Greggs PLC v Zurich Insurance PLC* [2022] EWHC 2545 (Comm) and *Various Eateries Trading Ltd v Allianz* [2022] EWHC 2549 (Comm) (see Covid Business Interruption claims – the next instalment).

The wording considered in all three cases was "arises from, is attributable to or is in connection with a single occurrence". Insurers argued that the pandemic was one "occurrence" (or at most a small number) and pleaded what constituted the "occurrence" in various different ways including: any one case of Covid-19 in the vicinity; the initial outbreak of Covid-19 in Wuhan in late 2019; various aspects of the UK Government's decision-making in response; and the numbers of cases of Covid-19 reaching particular levels in the UK that meant an epidemic was likely or inevitable.

Butcher J found that there was a "single occurrence" in the collective decision taken jointly by the four UK governments on 16 March 2020 to advise the public to avoid pubs, restaurants and clubs. He also went on to find that the instructions given to all pubs, bars and restaurants to close on 20 March 2020 was a "single occurrence". In *Various Eateries*, Butcher J also accepted that there were other "occurrences" relating to the UK government response should they be relevant:

- 24 Sept 2020 – implementation of early closing and other restrictions on restaurants
- 14 Oct 2020 – three-tiered system brought into force
- 5 Nov 2020 – imposition of second lockdown

Butcher J felt that these "occurrences" met the unities test as set out in *Kuwait Airways Corp v Kuwait Insurance Co SAK* [1996]. He did not, however, accept that there were separate occurrences when measures were renewed, immaterially changed or relaxed.

Mortgagee Interest Insurance in the spotlight

The issue in *Piraeus Bank A.E. v Antares Underwriting Limited & Ors* [2022] EWHC 1169 (Comm) was whether the prolonged detention of a vessel in Venezuela (a) gave rise to a constructive total loss of that vessel under the owners' War Risks policy and (b) if so, whether a bank, which was the mortgagee of the vessel, could recover in respect of its loss under its Mortgagees' Interest Insurance policy.

The War Risks policy contained a deeming provision which provided that if the vessel was detained for more than 12 months, the owners would be deemed to have been deprived of possession without any likelihood of recover (ie there would have been a constructive total loss). However, there was also an exclusion for any loss "*arising out of action taken by any state or public or local authority under the criminal law of any state or on the grounds of any alleged contravention of the laws of any state.*"

The court found that the vessel was detained because of an alleged contravention of Venezuelan law, namely that the vessel had been used to smuggle fuel illegally. The exclusion in the War Risk policy applied and there was no insured loss under the War Risks policy. The bank, therefore, had no entitlement to an indemnity as assignee and loss payee under the War Risks policy.

The court then considered if the bank had cover for its loss under its Mortgagee Interest Insurance policy and held that it did not. The purpose of such a policy was to protect the bank against the risk of non-payment under the owners' policy if, for example, insurers denied liability by reason of the owners' misconduct such as non-disclosure or breach of warranty. The court found that the Mortgage Interest Insurance was not intended to, and did not, cover losses which would not have been covered by the owners' War Risks policy in any event.

Jurisdiction

Our 2021 Review included the case of *AIG Europe SA v John Wood Group Plc* [2021] where the High Court interpreted a jurisdiction clause in an excess liability insurance policy as granting exclusive jurisdiction to the English courts, despite the clause not containing express words to that effect (see Jurisdiction clause in insurance policy confers exclusive jurisdiction despite no express words to that effect). This decision was appealed (see [2022] EWCA Civ 781) and the appeal was dismissed for substantially the same reasons given by the first instance judge.

The decision of the Court of Appeal confirms that the English court is likely to find that a jurisdiction clause is exclusive unless it is explicitly stated to be non-exclusive, particularly if there is also a choice of English law. The result was far from ideal from a practical perspective because it meant that there may be proceedings relating to the insurance coverage in both England and Canada under different layers of the policy. It is a useful reminder of the practical consequences of having policies structured over primary and excess layers which do not have identical jurisdiction provisions and the need to try and avoid this by considering such clauses carefully at the placement stage.

Third Parties (Rights Against Insurers) Act 2010

The Third Parties (Rights Against Insurers) Act 2010 (the 2010 Act) was the subject of two cases of note in 2022. By way of recap, the 2010 Act replaced the 1930 Act of the same name and simplified the position for a third party claimant seeking to satisfy a judgment against an insolvent but insured defendant. Under the 2010 Act, a claimant can now bring a single set of proceedings to establish liability both against the insured and the insurer. With the current economic climate, there may be an increase in third party claimants looking to utilise this procedure.

In *Rashid v Direct Savings Ltd* [2022] 8 WLUK 108, the court considered for the first time in a reported decision the issue of limitation under the 2010 Act and whether time continued to run after insolvency of the insured (see Limitation under the Third Parties (Rights Against Insurers) Act 2010). In contrast to the position under the 1930 Act, the court found that under the 2010 Act time did continue to run in claims against the liability insurers of an insolvent insured. Since the 2010 Act permits a direct claim against the insurer without the insolvent insured having to be joined as a party, the court found that the reason for suspending the limitation period on insolvency of the defendant, namely to enable the liquidator to collect the company's assets and distribute them fairly without having to deal with litigation from the company's creditors, does not apply in a 2010 Act claim.

The 2010 Act was also under consideration in case involving a mesothelioma claim. The issue in *Keegan v Independent Insurance* [2022] EWHC 1992 (QB) was whether the 2010 Act applied as the Act only applies where liability was incurred after 1 August 2016 (the commencement date of the 2010 Act). The court had to consider when the claimant's cause of action was complete and the liability of the former employer incurred. The claimed negligence occurred well before 2016 but the issue was whether the claimant sustained actionable damage before then. The court held that:

> "It is only when the mesothelioma manifests itself by radiological changes and/or symptoms that actionable damage occurs. Until then, the claimant is not appreciably worse off either physically or economically."

The court found on the evidence that there was no actionable damage until long after the commencement date of the 2010 Act and therefore the claimant was entitled to rely on the 2010 Act to bring proceedings directly against the insurer without having first established the liability of the employer.

Subrogation and assignment

The end of 2022 brought a case concerning a contractual prohibition on assignment and whether such a prohibition encompassed a transfer of subrogation rights to an insurer by operation of Japanese insurance law: *Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd* [2022] EWHC 3287 (Comm). The judge reached her conclusions with "an unusual degree of hesitation" and noted that the case gave rise to an "interesting point". Ultimately the court found that the broadly drafted contractual prohibition in a sale contract did render ineffective the transfer of subrogation rights to an insurer (see Court considers whether contractual provision prohibiting assignment can prevent insurers' subrogation rights). It is perhaps not surprising given the judge's hesitant conclusion that permission to appeal to the Court of Appeal has been granted for this case.

Looking ahead

The economic and geopolitical uncertainty the world faces has and will continue to impact the insurance sector and have a knock-on effect on the types of claims and disputes we see going forward.

A number of actions have already begun in the courts involving claims on insurance policies relating to the loss of aircraft detained in Russia following the country's invasion of Ukraine in 2022. The Commercial Court is looking at whether it needs to take any case management steps in relation to these cases in the same way that it pro-actively approached case management of the Covid-BI cases.

As companies continue to navigate issues such as rising interest rates and inflation, and supply chain issues, we may see an increase in insurance claims in areas such as political and credit risk with corresponding disputes. And we must not forget that there are still a number of outstanding issues to be determined in the Covid-19 business interruption cases as we explore in **Covid-19 business interruption claims**.

Covid-19 business interruption claims

Since the Supreme Court's judgment in the Covid-19 business interruption test case in 2021 – *The Financial Conduct Authority v Arch and Others* [2021] (the FCA Test Case) – the FCA reports that insurers have paid out over £1.5 billion in over 36,000 claims.[1] However, outstanding issues and disputes remain as not all policy wordings were considered or issues resolved by the FCA Test Case. Our 2021 Review reported on a number of subsequent cases and the run of Covid-19 related business interruption claims before the courts has continued into 2022. This section gives an overview of decisions handed down in 2022 that arose out of the loss of revenue suffered by businesses during the pandemic. It also explores what may be ahead in 2023.

Prevention of Access clauses revisited

The first decision of 2022 came in *Corbin & King v AXA Insurance Plc* [2022] EWHC 409 (Comm) in which the High Court considered the scope of insurance cover provided by a 'prevention of access' extension for Covid-19 business interruption losses. While the Divisional Court in the FCA Test Case had generally found that Prevention of Access clauses did not provide cover for losses resulting from the pandemic, the court in *Corbin & King v AXA* was able to distinguish the clauses considered previously so that the wording in the case could be looked at afresh.

The prevention of access clause here provided cover for business interruption losses where access to premises was restricted or hindered by: "*the actions taken by police or any other statutory body in response to a danger or disturbance at your premises or within a 1 mile radius of your premises*".

The court found that Covid-19 was a "danger" and that the prevention of access clause in the case provided localised cover but, importantly, cover that was capable of extending to a disease such as Covid-19 if there were cases within the radius. Adopting the Supreme Court's approach to causation in the FCA Test Case, the prevention of access clause did provide cover for the business interruption losses suffered as a result of the pandemic (see Prevention of Access clauses revisited). Permission to appeal to the Court of Appeal was granted but no appeal is being pursued.

How many limits?

Three preliminary issues hearings were heard by Butcher J during 2022 and managed in a co-ordinated way as they concerned the same policy wording and dealt with common and overlapping issues:

- *Stonegate Pub Company v MS Amlin* [2022] EWHC 2548 (Comm)
- *Greggs PLC v Zurich Insurance PLC* [2022] EWHC 2545 (Comm)
- *Various Eateries Trading Ltd v Allianz* [2022] EWHC 2549 (Comm)

The judgments looked at some important issues not previously considered in the FCA Test Case including the issue of aggregation and whether policyholders could recover multiple limits of liability as well as whether any government support received by the insured should be taken into account for the insurers' benefit when calculating what sum was recoverable under the policy (see Covid Business Interruption claims – the next instalment for our full analysis).

The aggregation issue was a central issue in each of the cases, being in short whether the claimed business interruption loss "*arises from, is attributable to or is in connection with a single occurrence*" and should be considered a Single Business Interruption Loss and subject to a single Limit of Liability. In summary, after considering the different formulations of "occurrence" put forward by both sides, Butcher J found that there was a "single occurrence" in the collective decision taken jointly by the four UK governments on 16 March 2020 to advise the public to avoid pubs, restaurants and clubs and found other "occurrences" relating to subsequent responses by the UK government. He was not persuaded by the argument made by some of the policyholders for a 'per premises' approach to aggregation. The basic premise that a government ruling is capable of being an occurrence (and presumably therefore an event) capable of aggregating multiple otherwise covered claims is likely to have wide implications.

On government support, Butcher J distinguished the Australian decision of *Star Entertainment Group Limited v Chubb Insurance Australia Ltd* [2021] and found that payments received by the insured should be taken into account for the insurers' benefit when calculating any sums recoverable under the policy.

These three cases have been eagerly anticipated by many stakeholders in the insurance market given the significant impact on quantum that the application of aggregation wording can have. Permission to appeal has been granted in relation to certain of the issues decided and so it may be some time before there is final clarity on some aspects of the case.

Jurisdiction of the English courts to hear Covid claims

In 2022, the High Court considered the jurisdiction of the English court to hear a Covid-19 business interruption claims and had to construe a poorly drafted jurisdiction clause: *Al Mana Lifestyle Trading LLC & Ors v United Fidelity Insurance Company PSC & Ors* [2022] EWHC 2049 (Comm). The court at first instance found that the jurisdiction clause was non-exclusive and that the English court had jurisdiction but the Court of Appeal allowed the appeal and found that that the English court did not have jurisdiction to hear the claims (see Court of Appeal considers jurisdiction of the English court to hear covid claim).

Lockdown rent arrears

In our 2021 Review, we referenced the High Court decision in *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2021] which, whilst not an insurance dispute, considered insurance in the context of looking at whether various rent cesser clauses were engaged where premises had to be closed for extended periods due to Covid-19 restrictions. The tenants had argued that the rent cesser clauses were activated by non-physical damage to the premises such that the landlords were unable to sue them for sums which could be recovered (or should have been recoverable) under insurance. On the facts, the landlords had taken out insurance which included loss of rent resulting from business interruption following an outbreak of disease at the premises or within a 25 mile radius of it. It was common ground between the parties that the judgment in the FCA Test Case meant that the insurance did afford cover against the loss of rent to some extent. The court held that the rent cesser clauses were not triggered by the UK Government lockdown because the rent cesser clauses in terms only applied where the premises were physically destroyed or damaged. They did not apply where a non-physical damage event had triggered an insurance policy taken out by the landlord.

1. Data as at 5 September 2022: https://www.fca.org.uk/data/bi-insurance-test-case-insurer-claims-data

This decision was appealed in 2022 and the Court of Appeal upheld the grant of summary judgment to the landlords for payment of accrued rent (see Court of Appeal upholds summary judgment for rent accrued during Covid closures of commercial premises, rejecting arguments based on implied terms and "failure of basis"). The Court of Appeal maintained that the rent cesser clause only operated in the event of physical damage or destruction. In addition, none of the implied terms contended for by the tenants satisfied either the business efficacy test or the obviousness test. The decision is a reminder of the high threshold for implying contractual terms, and illustrates that a claim based on unjust enrichment (such as here for total failure of consideration, or "failure of basis") will not be available where this is inconsistent with the express terms of the contract.

Looking ahead

"At the premises" clauses

"*At the premises*" clauses require a notifiable disease at the insured premises. These clauses were not tested in the FCA Test Case (which looked at disease clauses triggered by the occurrence of a notifiable disease within a specified radius of the insured premises) or in any of the subsequent court decisions. A hearing of preliminary issues will take place in the first half of 2023 in a number of cases which concern causation in the context of "at the premises" cover. The lead case is *London International Exhibition Centre PLC v Royal & Sun Alliance PLC*, CL-2022-000528.

It will be interesting to see what approach the courts take. The key issue under consideration is likely to be whether the focal nature of an "at the premises" clause means that the broader lockdown effects were not intended to be covered or whether the concurrent cause analysis preferred by the Supreme Court applies where the covered cause was so narrow. A number of decisions of the Financial Ombudsman Service post the FCA Test Case have considered this and found in favour of the policyholder in holding that there was cover.

Damages for late payment

There have been no decisions on section 13A of the Insurance Act 2015 in the Covid-19 business interruption cases decided to date but following the first decision on this legislation in *Quadra Commodities v XL Insurance Company* [2022] EWHC 431 (Comm) (see First case on the implied term to pay claims within a reasonable time – section 13A Insurance Act 2015), it will be interesting to see if there are further decisions in the context of claims arising out of the pandemic.

Impact on reinsurance

The reinsurance market will continue to watch closely the decisions of the courts in Covid-BI claims as they monitor developments to assess exposures at a reinsurance level. It seems inevitable that as issues are determined and claims settled at the direct insurance level, there will be disputes arising at the reinsurance level. It remains to be seen how many of these will be decided in the courts and how many will be resolved behind closed doors in confidential arbitration.

Professional liability

Duties to third party non-clients

Zacaroli J considered the duties of a barrister to third party non-clients in *McClean & Others v Thornhill* [2022] EWHC 457 (Ch) (see High Court finds no duty owed to investors by barrister advising scheme promoter). Mr Thornhill QC had advised the promoters of a film finance tax scheme, and the promoters permitted the investors in the scheme to see Mr Thornhill's advice. Applying the leading recent authority on the duties of lawyers to non-party clients – *NRAM Ltd v Steel* [2018] UKSC 13 – the Court held that that Mr Thornhill owed the investors no duty of care, because the only circumstances in which they were permitted by the promoters to see his advice was if they had signed up to an agreement with the promoters whereby they warranted that they had taken their own advice. In any event, in a detailed review of the relevant tax law principles applicable when the advice was given, Zacaroli J decided that the advice given was not negligent.

The investors sought also to argue that the terms of the agreement to which they had been asked to sign up with the promoter before seeing Mr Thornhill's advice amounted to notices excluding or restricting Mr Thornhill QC's liability for negligence, and were thus subject to s.2 of the Unfair Contract Terms Act 1977 (UCTA). The judge held that those terms were not terms which excluded or limited liability: instead, they described one party's primary obligations to another and thus UCTA did not apply. Further, had UCTA applied, the terms would have passed the statutory reasonableness test.

The Court of Appeal gave permission for the decision to be appealed, and the Court of Appeal hearing is in March 2023. Herbert Smith Freehills are continuing to represent Mr Thornhill KC and his insurers in the case.

Claims against barristers

Continuing the theme of claims concerning barristers, in *Percy v Merriman & White* [2022] EWCA Civ 493, the Court of Appeal considered a contribution claim by a solicitors' firm against counsel. The decision provides helpful (albeit perhaps not surprising) guidance on what a claimant in a contribution claim must prove against the defendant.

A solicitors' firm, Merriman White, and barrister, Mr Mayall, advised a client in connection with a dispute with a fellow shareholder in a deadlocked company. Their client originally brought negligence proceedings against both Merriman White and Mr Mayall, alleging that they had incorrectly advised him to pursue a derivative action in connection with the dispute, and had failed to advise him to accept a settlement offer made by his co-shareholder at a mediation. The client later dropped the claim against Mr Mayall on the basis he had not been asked to advise on the settlement offer, but Merriman White, having settled with the client, then pursued a contribution claim against Mr Mayall in similar terms to the client's original negligence claim against him.

Merriman White sought to argue that the effect of s.1(4) Civil Liability (Contribution) Act 1978 was that (i) once it was accepted that Merriman White was liable to the client, it followed that Mr Mayall was also liable; and (ii) the court was precluded from enquiring into whether Mr Mayall was negligent or whether that negligence had caused loss. Perhaps surprisingly, at first instance, the judge accepted that argument.

It was, however, overturned on appeal. The Court of Appeal held that the shortcut to liability provided by s.1(4) concerned only the liability of the first defendant (or contribution claimant); it did not relate to the second defendant's liability. The decision reiterated that a contribution claimant *must show that a contribution defendant was liable to the original claimant*.

The Court of Appeal also found that the judge at first instance had wrongly found that Mr Mayall was not permitted to argue that another judge hearing the client's derivative action might have allowed permission for the derivative claim. The Court of Appeal held that it was open to Mr Mayall to make this argument and indeed a defendant needs only to show that their advice fell within a range of reasonable opinions.

Conflicts of interest

There was also a helpful reminder in 2022 of the approach that the courts will take to assessing whether a solicitor has acted in conflict of interest to one of its clients. In *Bank of London Group v Simmons & Simmons LLP* [2022] EWHC 2617, Simmons & Simmons were instructed by Bank of London and The Middle East Plc (BLME) to send a letter before action on a passing off claim against the Bank of London Group Ltd (BLG) relating to the use of the name "Bank of London". BLG sought an injunction restraining Simmons & Simmons from acting for BLME on the grounds that Simmons & Simmons were conflicted from doing so because they had previously provided some regulatory advice to BLG. BLG also sought to restrain Simmons & Simmons from the misuse of allegedly confidential information in Simmons & Simmons' possession relating to the BLG business which it had obtained when BLG was a client.

The judge rejected BLG's argument that confidential information concerning details of the internal operation of, and technology used in, BLG was relevant to the passing off claim. The judge's view was that the degree of particularity of the confidential information in question was relevant and he was not satisfied that the claimant had identified, other than in the broadest of terms, the confidential information which was said to be relevant to the passing-off claim.

Further, whilst the burden was upon Simmons & Simmons to demonstrate, based on clear and convincing evidence, that any information barriers were sufficient to eliminate the risk of disclosure or misuse of confidential information, the judge was satisfied that they had done so. Of importance to that decision was the witness evidence of the solicitors involved in both files, and the fact that the IT department set up an information barrier around the claimant's file such that only those individuals identified on the request form could access it.

The decision serves as a reminder of the importance of proper governance around the running of conflict checks and implementation and maintenance of appropriate information barriers.

Insurance coverage decisions relevant to liability

Finally there have been a couple of decisions of note in the realm of insurance coverage for liability claims.

In *Spire Healthcare Limited v Royal & Sun Alliance Insurance Limited* [2022] EWCA Civ 17, the Court of Appeal held that two groups of claims based on the negligent practice of the same surgeon should be aggregated. The unifying factor between the claims was the surgeon's dishonest and improper conduct (see Spire and RSA contest aggregation again). In short, the dispute concerned an aggregation provision which aggregated claims "*consequent on or attributable to one source or original cause*". The Court of Appeal provided a helpful reminder of the principles applicable to construction of an aggregation clause: "one source or original cause" wording necessitated a wide search for a unifying factor, but one should not go so far back in the causal chain that one enters the realm of coincidental/remote causes that provide no meaningful explanation for what has happened. Significantly, the negligence of one individual *can* (but won't always) be an originating cause even if his/her negligence may take different or multiple forms. In this case the claims were all based upon "deliberate and dishonest conduct with a cavalier disregard for welfare".

Not only does the decision clarify the court's approach to construction of aggregation clauses; it has potential implications for any professional liability claims arising from the conduct of individuals. Whilst claims arising from the negligence of one individual will not necessarily always be aggregated under wide aggregation wording, they may be where the negligence arose from a unifying factor such as the individual's approach to his/her work.

Finally, of particular interest to solicitors, *Royal & Sun Alliance Insurance Limited v Tughans (a firm)* [2022] EWHC 2589 (Comm), which was an appeal of an arbitral decision, establishes that solicitor firms may in certain circumstances be able to recover lost success fees, and professional fees, under their professional indemnity policies.

Tughans had entered into an engagement letter with another solicitors' firm, Brown Rudnick LLP, whereby they agreed to share a success fee payable to Brown Rudnick in the even that a particular transaction went ahead. The transaction went ahead and Tughans received its portion of the success fee. However, it came to light that the managing partner of Tughans had made certain misrepresentations.

Brown Rudnick sued Tughans seeking to recover the portion of the success fee it had passed onto Tughans (and other amounts).

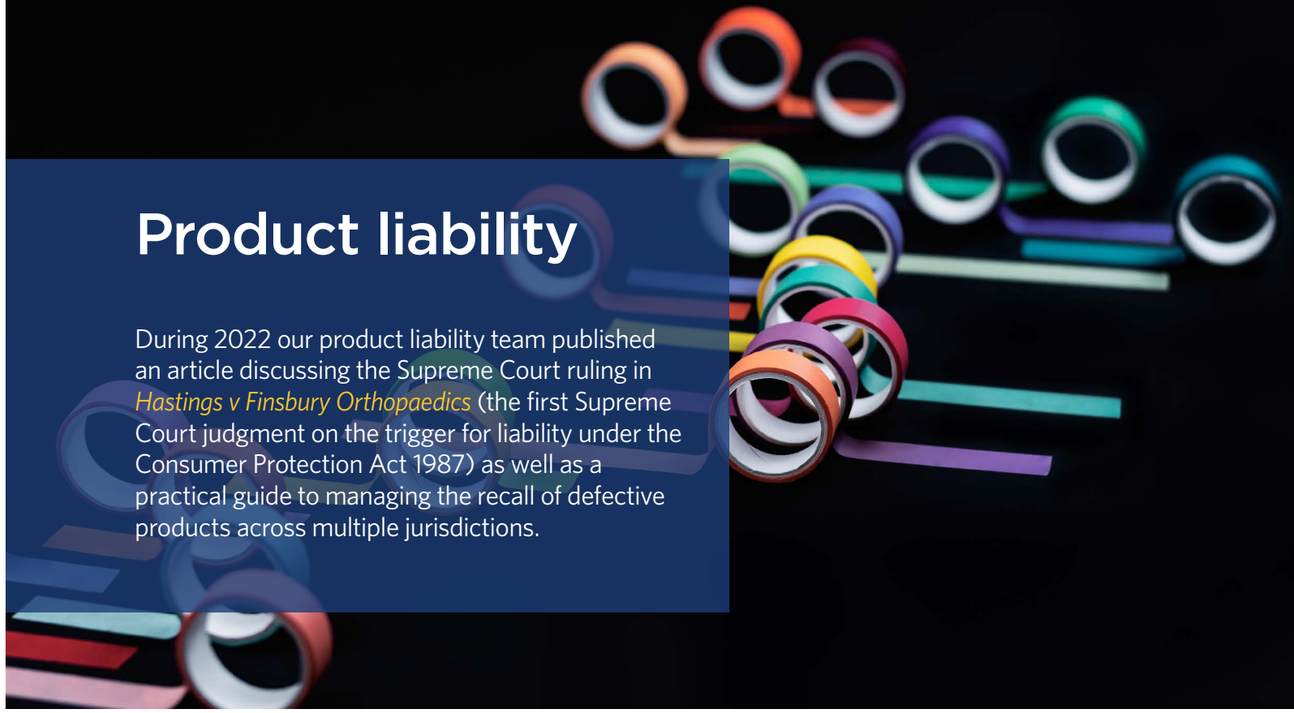
The question was whether RSA, Tughans' professional indemnity insurer, was obliged to indemnify Tughans for its liability to pay back to Brown Rudnick its portion of the success fee.

Tughans' PI policy provided cover "in respect of any civil liability... incurred in connection with the Practice carried on by or on behalf of the Solicitor".

The judge found that RSA was obliged to cover Tughans' liability to repay the success fee. Central to this decision was the fact that Tughans had a contractual right to the success fee. They had committed the time to do the work and a contractual right to the fees had accrued.

Importantly, contrary to RSA's position, the warranties which it was said by RSA had been breached by Tughans were not pre-conditions to payment of the fee (had they been, no contractual right to the success fee would have arisen).

The decision will be welcomed by practitioners. Plainly however whether cover will be available to a solicitors' firm for its liability to a client for wasted fees will turn on the terms of the engagement letter, whether on the facts it was contractually entitled to the fees, and whether the services were in fact delivered.



Product liability

During 2022 our product liability team published an article discussing the Supreme Court ruling in *Hastings v Finsbury Orthopaedics* (the first Supreme Court judgment on the trigger for liability under the Consumer Protection Act 1987) as well as a practical guide to managing the recall of defective products across multiple jurisdictions.

Hastings v Finsbury Orthopaedics: "No entitlement to an absolute level of safety"

The Supreme Court handed down its judgment in the Scottish case of *Hastings v Finsbury Orthopaedics Ltd and another* [2022] UKSC 19. This is the latest in a series of cases in which claimants have sought to establish that different types of prosthetic hip replacements were "defective" within the meaning of the Consumer Protection Act 1987 (the Act). We have written previously about:

- *Wilkes v DePuy* [2016] (see High Court provides guidance on the interpretation of "defect" under the Consumer Protection Act 1987); and
- *Gee v DePuy* [2018] (see Pinnacle Metal Hip Litigation: further judgment of the High Court on the interpretation of defect under the Consumer Protection Act 1987)

In *Hastings*, the Supreme Court upheld the judgments at first instance and on appeal, finding that the prosthetic hip was not defective. Importantly, this is the first time the Supreme Court has ruled on the meaning of "defective": the trigger for liability under the Act. The judgment is not limited to medical devices but applies to all types of product and will therefore be of significant interest to businesses involved in designing, manufacturing and supplying products (see Supreme Court rules for the first time on the threshold for liability under the Consumer Protection Act 1987)

The Supreme Court's ruling is consistent with a line of first instance judgments on the meaning of "defective" under the Act. It does not therefore represent any change in the law. It is, nonetheless, significant as the first judgment on this issue at the Supreme Court level. The judgment confirms a number of important points:

- The Act provides for strict liability only if the claimant can prove that the product is defective. There is no relaxation of the normal burden of proof – the claimant must prove the existence of a defect on the balance of probabilities.
- The question of defect will be assessed by reference to the evidence available to the court at trial. The fact that a product was withdrawn from the market and that safety concerns were expressed by regulators and medical professionals at the time may be "powerful" indicators of the existence of a defect but they are not determinative if it can be shown that the concerns were misplaced.
- The applicable test is one of "entitled expectation" (ie the question is not what level of safety do consumers and society actually expect but what level of safety they are objectively entitled to expect).
- In applying this test, the courts will, where appropriate, compare the allegedly defective product against other comparable products. In the present case, the question was how the specific type of prosthetic hip performed relative to other types.
- There is "no entitlement to an absolute level of safety". The propensity of metal-on-metal hips to shed debris which will, in some cases, cause injury is not in itself a defect. The correct test to be applied was whether the product had an abnormal tendency to result in damage or harm, as compared with appropriate comparator products.

Defective Products: Managing a Product Recall in the UK and Beyond

Our product liability team published a guide to managing the recall of defective products across multiple jurisdictions. This was published as one of the Expert Analysis Chapters in the 20th edition of the International Comparative Legal Guide – Product Liability 2022. The guide sets out the legal framework governing product safety and recall in the UK and provides practical guidance on managing a recall across multiple jurisdictions so as to minimise legal liability and reputational damage (see Defective Products: Managing a Product Recall in the UK and Beyond).

Health and Safety

2022 saw very significant changes in the law governing building safety in the UK.

The Fire Safety Act 2021 came into force in May and the much-anticipated Building Safety Act 2022 was passed into law in April, with a programme for its extensive provisions to come into force gradually during 2022-2023. Both new statutes are the result of a comprehensive review of how building safety is regulated following the Grenfell Tower fire in 2017.

Fire Safety Act

The Regulatory Reform (Fire Safety) Order 2005 requires those responsible for certain types of building to take steps to ensure fire safety. The Order does not extend to private dwellings but it does cover the common parts of multi-occupation residential buildings. The Fire Safety Act makes clear that the common parts of multi-occupation buildings include the structure, external walls and flat entrance doors. This means that those parts of the building must be included in fire risk assessments carried out by a responsible person under the Order.

Building Safety Act

The Building Safety Act comprises a radical reform of building safety regulation. It introduces safety assessment and reporting regimes which seek to strengthen accountability and responsibility for safety at every stage of design/construction and throughout the life of a building.

We commented on the wide-ranging provisions of the Act in three detailed briefings published in 2022.

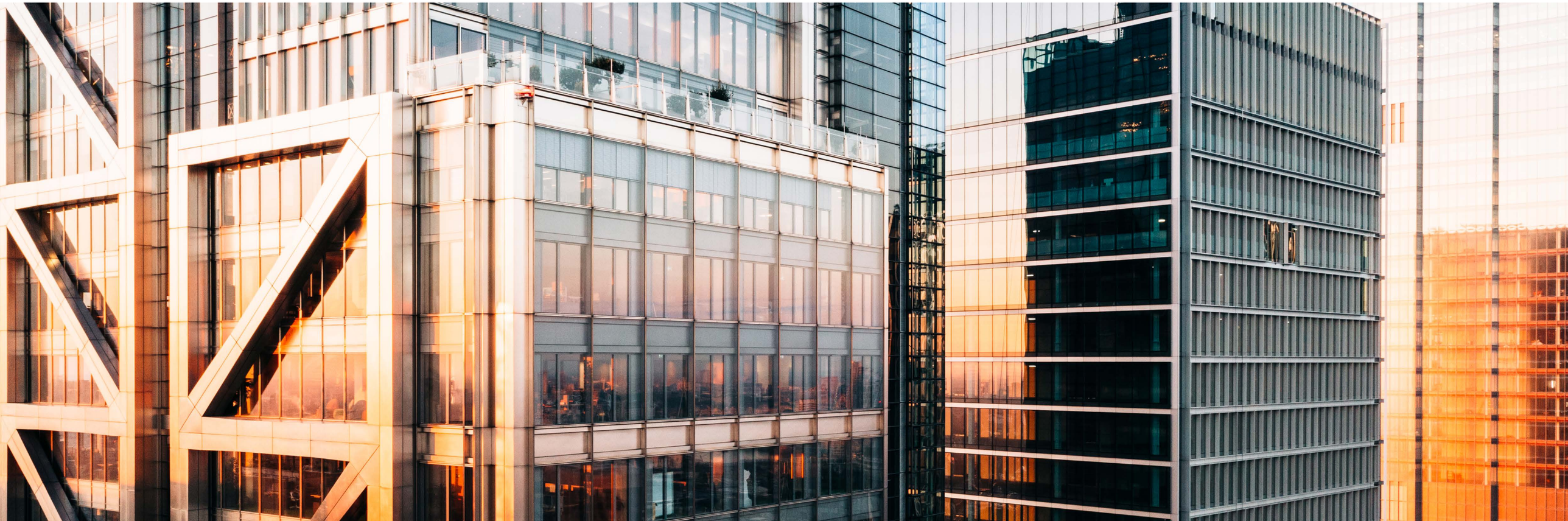
The first briefing looks at the aspects of the Act that impact the design and construction phase of a development project, including a discussion of the role and powers of the new Building Safety Regulator (see Building Safety Act 2022 – Reforming building safety – Development and construction).

The second briefing focuses on the building safety management measures applying to 'higher-risk' buildings, and the new building safety charges regime that will apply once the building is occupied. This briefing also covers the Fire Safety Act (discussed above) (see Building Safety Act 2022 – Reforming building safety – Operational considerations).

The third and final briefing addresses the various new and extended causes of action created by the Building Safety Act which have the potential to encourage increased numbers of claims against landlords, developers and others (as well as their group companies) by homeowners and leaseholders who may have suffered damage due to defective construction works (see Building Safety Act 2022 – Reforming building safety – Extension of liability).

In each briefing we seek to identify the new responsibilities that are likely to fall on developers, designers, contractors, owners and managers of developments, and the impact that they are likely to have on the construction, occupation and ongoing management of these buildings.

Much of the Act is not expected to take effect until later in 2023 but some provisions are already in force or will commence shortly. As such, anyone involved in the development of buildings will need to familiarise themselves not only with their own future obligations, but also the future obligations of those they appoint during the development cycle now, in order to ensure that when the Act takes effect in its entirety they are operating within the new regulatory framework.



Regulatory

2022 proved to be as busy for insurance firms and regulators as we predicted last January. Yet further change can be expected in 2023.

In Brexit-related news, the Treasury is taking forward plans to change the UK's Solvency II regime. Its announcement coincided with the Autumn statement, signifying the importance attributed to Solvency II reforms within the government's wider post-Brexit plans for the economy.

Solvency II reforms are just one of a series of regulatory changes proposed by the government in its flagship Financial Services and Markets Bill (FSM Bill). In tandem with the FSM Bill, the Treasury has announced a series of reforms, the Edinburgh Reforms, which are similarly aimed at driving growth and competitiveness in the financial services sector post-Brexit (see What you need to know about the Edinburgh Reforms and our recent webcast series for more details.)

Meanwhile, the FCA has published final rules and guidance on the new Consumer Duty. The challenge for firms to meet implementation deadlines remains considerable. Other developments during 2022 include changes to the Appointed Representatives regime which came into effect in December (see FCA publishes policy statement on improvements to the Appointed Representative regime) and proposals to introduce a new regulatory gateway for authorised firms wishing to approve the financial promotions of unauthorised firms (see FCA consults on gateway for firms approving financial promotions for unauthorised persons).

Unsurprisingly, ESG continues to be another key focus, with ESG-related transparency set to be the theme for the next 12 months. In early January, the PRA's statement of supervisory priorities in 2023 confirmed its continued focus on the financial risks that climate change presents for the sector.

Other priorities include consulting on the introduction of a resolution framework for insurers and on a new regulatory framework for diversity, equality and inclusion (DEI).

Post-Brexit reform of UK regulation

Central to the government's aims for post-Brexit economic success are its plans to tailor the current financial services regulatory framework to better fit UK markets. The Future Regulatory Framework (FRF) Review was established in June 2019 to consider how this could be done.

The results of the FRF review were published on 20 July, outlining the government's plans for regulatory reform. The government is legislating for these reforms through the FSM Bill which, with the Edinburgh Reforms, will drive the regulatory agenda for the foreseeable future.

Post-Brexit regulatory framework

One of the consequences of Brexit was that much of the EU legislation that defined the regulatory regime for financial services ended up in UK legislation (known as retained EU law or REUL).

The approach the FSM Bill takes is to move the detailed requirements out of legislation into the regulators' rulebooks. This is intended to enable the PRA and FCA to maintain detailed and up-to-date rules and guidance without the need for statutory reforms. The government will continue to work closely with the PRA and FCA on any significant rule changes. A case in point is the Solvency II review, which has been spearheaded by the government as one of its flagship policies for creating a vibrant post-Brexit economy.

Controller regime

More controversially, perhaps, the FSM Bill proposes changing the FSMA controller regime to enable the regulators to impose conditions on a new controller. This means that the PRA/FCA could potentially reject a proposed controller even if that controller satisfies all of the prudential criteria currently set as a pre-condition to approval. Again, this is a change that can only be made now that the UK is no longer constrained by EU law.

Critical Third Parties (CTPs)

The FSM Bill includes a statutory framework for the Treasury to designate providers to the financial services sector as "critical third parties" (CTPs). This is a key area of focus because many firms are heavily reliant on CTPs for material services, meaning that failure or disruption of these arrangements could have a systemic impact across the financial sector. Third parties who are designated as "critical" will be subject to a range of new rules in order to mitigate these risks (see A new regime for critical third party providers to UK financial services firms is on the horizon).

Looking ahead to 2023

The FSM Bill is expected to complete its passage through Parliament in the Spring.

The government has not given a formal deadline for completion of its review of REUL but it expects the process to take a number of years. However, significant progress is expected to be made on Solvency II reforms by the end of 2023.

Reforms to the Senior Managers and Certification Regime

Announced as part of the Edinburgh Reforms, the Treasury intends to commission a review of the Senior Managers and Certification Regime (SMCR). The government will look at the higher-level legislative framework that underpins the regime, while the FCA and PRA will examine the detailed rules.

Looking ahead to 2023

The review of the SMCR will begin in Q1 2023 when the government will launch a Call for Evidence. For now, it is unclear what has triggered the decision to look at the regime.

Prudential regulation - Solvency II

On 17 November 2022, the Treasury confirmed its intention to make changes to the Solvency II regime. A reassessment and loosening of certain aspects of the current regulatory framework are expected to release significant amounts of capital, enabling insurers to invest in illiquid assets in the real economy.

A reassessment and loosening of certain aspects of the current regulatory framework are expected to release significant amounts of capital, enabling insurers to invest in illiquid assets in the real economy (see HM Treasury announces final reform package following review of Solvency II).

However, it is important to note that, whilst the government has decided to make some targeted changes to the new Solvency II regime, this does not represent the total rewrite of the UK regime that some have suggested.

Plans to reform elements of Solvency II are also currently underway in the EU. The changes focus on improving aspects of the regime related to proportionality, quality of supervision, reporting, long-term guarantee measures, macro-prudential tools, sustainability risks, and group and cross-border supervision.

Looking ahead to 2023

UK and EU Solvency II reforms look set to introduce significant differences between the two regimes for the first time. There is still some way to go before either sets of reform are finalised although, as stated above, the Treasury envisages making significant progress on Solvency II reforms by the end of 2023. The PRA has confirmed that it will seek to engage constructively with industry on the technical detail of the reforms, in advance of formal consultation.

The PRA's January statement of its regulatory priorities for 2023 confirms that its focus will be on financial resilience, risk management, implementing financial reforms, reinsurance risk and operational resilience, It also notes that many insurers have still not made any plans to ensure that they can exit the market in an orderly manner should the need arise. This is despite the requirement in Fundamental Rule 8 that requires firms to prepare for resolution. The PRA will, therefore, publish proposals in 2023 to require insurers to prepare exit plans, setting more specific expectations as to what insurers need to do. Where a firm proposes that it would transfer a book of business to other firms, this would include, for example, making sure that both they and their proposed acquirer fully understand the risks embedded within those books.

Conduct of business reforms

Consumer Duty

The FCA published final rules for a new Consumer Duty in July 2022 (see FCA consults on the new consumer duty and FCA confirms final rules for new Consumer Duty and gives firms more time to comply). The duty is designed to address current shortfalls in consumer protection and "fundamentally shift the mindset of firms".

Since July, the FCA has published further guidance on a range of issues, including clarification on terminology and on the application of the duty to distribution chains. It is also currently consulting on clarificatory amendments to the duty.

Looking ahead to 2023

Given the complexity of the implementation process, the FCA has introduced a number of deadlines for firms.

The duty will come into force on 31 July 2023 for new products and services, and existing products and services that remain on sale or open for renewal. The final deadline for closed products or services is 31 July 2024.

Implementing the duty in time to meet these deadlines will inevitably involve a significant challenge for many firms.

Appointed Representatives regime

On 3 August 2022, the FCA released final changes to the Appointed Representatives (AR) regime following widespread concern that the current regime does not offer adequate consumer protection (see FCA publishes policy statement on improvements to the Appointed Representatives regime). The new regime introduces more rigorous standards for principals' oversight of ARs.

Changes include new requirements for firms to provide information on the business of their ARs, including their regulated activities and non-regulated financial services activities. Another new requirement is the introduction of an annual review and a self-assessment document in which principals must detail how they are meeting their responsibilities in relation to their ARs.

Looking ahead to 2023

The FCA's changes took effect on 8 December 2022. Principal firms also have until 28 February 2023 to respond a Section 165 request asking them to provide information about their ARs as part of improved reporting requirements.

Other areas that remain under review and may yet see further change include:

- concern about "regulatory hosting" arrangements;
- concerns where smaller principals have larger ARs or overseas ARs; and
- new or enhanced prudential standards for principals.

Other Reforms

Financial promotions regime

Following a consultation in July 2020, the Treasury is introducing a new regulatory gateway (or "s21 gateway") for authorised firms wishing to approve the financial promotions of unauthorised firms (see FCA consults on gateway for firms approving financial promotions for unauthorised persons). Changes to the financial promotions regime giving effect to these reforms are currently being considered in Parliament as part of the FSM Bill. The FCA is also consulting on proposals to operationalise the new gateway (CP22/27). One important exemption proposed by the FCA is that the gateway would not apply to firms approving the financial promotions of an unauthorised person within the same group.

Looking ahead to 2023

It expects to publish final rules in the first half of 2023.

A separate FCA consultation (CP22/23) proposes the introduction of an application fee of £5,000, to contribute towards the cost of resourcing and operating the new gateway

ESG

Regulators' priorities

The government and regulators remain committed to developing stronger rules and regulations around green and sustainable finance, with the ultimate aim of supporting the UK's transition to a net-zero economy by 2050. The regulators recognise that this transition must be managed correctly and supported by an "*appropriate regulatory foundation and adequate guard-rails*". In its new ESG strategy, the FCA details how it plans to deliver on the ESG-related outcomes set out in its Business Plan 2021/22.

Data and ratings providers have been identified as important areas for focus. In November, the FCA announced the formation of an independent group to develop a Code of Conduct for ESG data and ratings providers. That announcement followed a feedback statement in which the FCA expressed the need for greater transparency and trust in the market for ESG data and ratings services. The PRA

highlighted a similar issue in its report on the Climate Biennial Scenario (CBES) (2022).

Looking ahead to 2023

The first meeting of the FCA's independent group was scheduled for the end of 2022. Since the FCA, PRA and other relevant regulators and government departments will sit as active observers of the group, we can expect updates from them on the activities of the group in due course.

Whilst the Code may take a while to finalise, we expect to see progress made and further announcements to come in 2023.

The PRA has also indicated that it will consult on proposals to introduce a new regulatory framework for DEI in the financial sector during 2023.

Climate-related financial disclosures and transition

The FCA has also adopted recommendations of the Taskforce on Climate-Related Financial Disclosures (TCFD) regarding the implementation of mandatory climate-related financial disclosures. These new disclosure requirements follow the broad direction of travel set by mandatory climate-related disclosures under the UK Listing Rules. Additionally, the UK government has introduced new regulations which mean that certain other large companies (including insurance companies) will be required to include climate-related disclosures in their strategic reports for accounting periods starting on or after 6 April 2022. (See Mandatory climate-related reporting by UK listed companies – what you need to know and Mandatory climate-related reporting by UK private companies and LLPs – what you need to know).

The government has also set up a Transition Plan Taskforce (the TPT), which has been charged with developing a "gold standard for transition plans". The TPT is currently consulting on its proposed disclosure framework for private sector climate transition plans, which aims "to assist entities to disclose credible, useful, and consistent" transition plans. This work can be expected to run for quite some time.

On the disclosures related to investment products, the FCA's proposals to tackle 'greenwashing' are currently being consulted on, with the results scheduled to be released by mid-2023. These rules appear to be targeted at funds and portfolio managers, though it would be surprising if they were not extended to insurers in the future.

Looking ahead to 2023

Disclosure requirements for the largest in-scope firms came into force on 1 January 2022. Smaller firms above the £5 billion exemption threshold had until 1 January 2023 to comply. Life insurers will be among those with obligations.

The first public disclosures must be made by 30 June 2023. Subsequent disclosures are to be made by 30 June each calendar year.

These deadlines represent a further step in the UK's plans to apply TCFD-aligned disclosure requirements across the entire economy by 2025. In addition, the TPT's consultation on the disclosure framework for transition plans is open until 28 February 2023.

General interest

This section looks at the legal and procedural developments that took place in 2022 relevant to all those who litigate in the English courts or fund or insure such litigation. There have been a number of significant changes to court practice prompted by the Covid-19 pandemic. For example, although the courts have returned to in-person hearings, remote hearings continue to be used for shorter hearings and there is also greater encouragement to the practice of witness evidence being given remotely. Parties and their legal representatives are also encouraged to minimise the use of paper with bundles for hearings and trials now filed only electronically, unless a hard copy bundle is specifically requested.

Class actions

Class actions have continued to be a hot topic in 2022, with continued steady growth in many areas. There has been a particular explosion in growth in competition class actions under the Collective Proceedings Order (CPO) regime in the Competition Appeal Tribunal, which was introduced in 2015. As an illustration, there were 11 applications for a CPO in 2022 alone, compared to 27 in total since the regime was introduced in 2015.

A second edition of our textbook *Class actions in England and Wales*, written by Herbert Smith Freehills lawyers and published by Sweet and Maxwell was published in 2022 with an entirely new chapter on insurance (see Herbert Smith Freehills launches new edition of Class Actions in England and Wales). Insurance cover may be available to cover the liability and defence costs of a defendant in certain class actions. Such cover will be of interest to both sides, not only from a financial perspective, but also because the involvement of insurers in the landscape of a class action will affect the way the action is handled.

In what is believed to be the largest action ever brought in an English court, in terms of the number of claimants, the Court of Appeal in July 2022 held that claims brought by over 200,000 claimants arising out of the 2015 collapse of the Fundão Dam in Brazil could proceed, overturning the High Court's decision which had struck out the claims as an abuse of process in light of concurrent proceedings and compensation schemes in Brazil. The decision suggests that the English courts remain willing to take jurisdiction over claims relating to actions of a subsidiary company in a foreign state, if there is a serious issue to be tried as to whether an English parent company owes a direct duty of care (see Court of Appeal overturns decision striking out class action arising from 2015 collapse of Fundão Dam in Brazil).

Witness evidence

In 2022 we saw a number of cases in which the courts have been called on to apply Practice Direction (PD) 57AC governing the preparation of trial witness statements in the Business and Property Courts signed on or after 6 April 2021. The general theme is that the courts have been very willing to make parties go back and redraft witness statements to remove offending passages where they contain speculation, or mere commentary on the documents, or argument (see for example High Court orders witness statements to be redrafted due to serious non-compliance with PD 57AC).

A number of decisions illustrate that, where a party wants to raise issues regarding an opponent's non-compliance with the PD, it should raise its concerns with the opponent promptly and in detail before raising the matter with the court (see Another decision regarding a failure to comply with the new requirements for trial witness statements under PD 57AC and High Court decision suggests party alleging witness statement fails to comply with PD 57AC must identify specific failures).

The cases also show the need for parties to take a common sense approach in considering how to respond to an opponent's non-compliance. A decision in June 2022 emphasised that the PD "should not be used as a weapon for the purpose of battering the opposition". In that case, the defendant's conduct in pursuing numerous complaints, many of which the judge considered to be "petty or pointless", resulted in an order to pay 75% of the claimants' costs on the indemnity basis – despite the application having succeeded in a number of respects (see Party penalised in costs for disproportionate application to strike out witness evidence for non-compliance with PD 57AC).

On the other hand, as a decision in September 2022 illustrates, any legitimate concerns raised by an opponent should be taken seriously (see Indemnity costs awarded against party who dismissed complaints about witness statement non-compliance as "nit-picking").

Disclosure

The big news in 2022 relating to disclosure was that the Disclosure Pilot under PD 51U, which began in January 2019, was finally incorporated into the CPR as a permanent new Practice Direction, PD 57AD, with only minor amendments (see Disclosure Pilot Scheme to take effect as permanent new Practice Direction from 1 October 2022, with no substantial changes). This was despite concerns expressed by many practitioners as to whether the Disclosure Pilot in fact led to any costs savings, particularly in complex disputes. In announcing the permanent adoption of the pilot rules, the Chancellor recognised that the pilot had resulted in a front-loading of costs, but stated that it has also led to a dramatic decline in specific disclosure applications and a "far more focused and efficient approach to the disclosure process generally".

Privilege

2022 did not see any dramatic change in the law of privilege, but there were a number of decisions worth noting including the following:

- A decision in February 2022 shows that where a party anticipates a claim in relation to one matter, it should not assume that litigation privilege will necessarily be available for an exercise to investigate other potential claims or counterclaims. The court is likely to look carefully at whether litigation was in reasonable prospect in respect of *those* matters at the relevant time: if it finds that the party had mere suspicions, a claim for litigation privilege is unlikely to succeed (see High Court finds no litigation privilege where expert instructed to try to find backing for potential counterclaim).
- A decision in March 2022 shows that, where a party has lawfully obtained documents in a foreign state which (as a matter of English law) are obviously privileged, that does not necessarily mean they will be available for use in litigation in England – particularly where the documents in question were obtained from a third party rather than the party entitled to assert the privilege and without notice to that party (see Privilege not lost despite opponent obtaining copies of documents in foreign proceedings).
- A decision of the Competition Appeal Tribunal in July 2022 considered without prejudice privilege and when there is a dispute sufficient to give rise to the application of the rule. The test is whether, assessed objectively, the parties "have contemplated or might reasonably have contemplated litigation if they did not agree" which may be a lower threshold than for when litigation is in "reasonable contemplation" for the purposes of litigation privilege (see Competition Appeal Tribunal considers when there is a dispute sufficient to give rise to without prejudice privilege).
- A decision in August 2022 shows that the court may refuse to grant an injunction to protect privileged material where the material reveals some sort of wrong on the part of the disclosing party – in this case a potential serious breach of court guidance relating to the preparation of experts' joint statements – whether or not there is sufficiently serious misconduct to mean that the material was not privileged in the first place under the "iniquity principle" (see High Court refuses injunction to prevent use of privileged material disclosed in error, where it revealed potential serious breach of court guidance).
- An Employment Appeal Tribunal decision in September 2022 shows that there are limits to the well-established principle that a document will be privileged to the extent that it betrays the content or the trend of legal advice. In particular, the Tribunal rejected the submission that a non-privileged document could later acquire privileged status simply

because it had become the subject of legal advice and a comparison with the final version would allow the content of the advice to be inferred (see No privilege for original version of document simply because comparison to final version would reveal legal advice).

- In November 2022 the Court of Appeal held that the identity of those instructing lawyers on behalf of a corporate client are not generally protected by litigation privilege – unless disclosure might tend to reveal something about the content of the communication with the lawyer or the litigation strategy being discussed, and therefore inhibit candid discussion with the lawyer and the client's ability to prepare its case. The decision is of interest in particular in rejecting the notion that litigation privilege protects all information falling within a "zone of privacy" around a party's preparation for litigation (see Court of Appeal confirms identity of those instructing lawyers not generally protected by litigation privilege).

Jurisdiction and enforcement

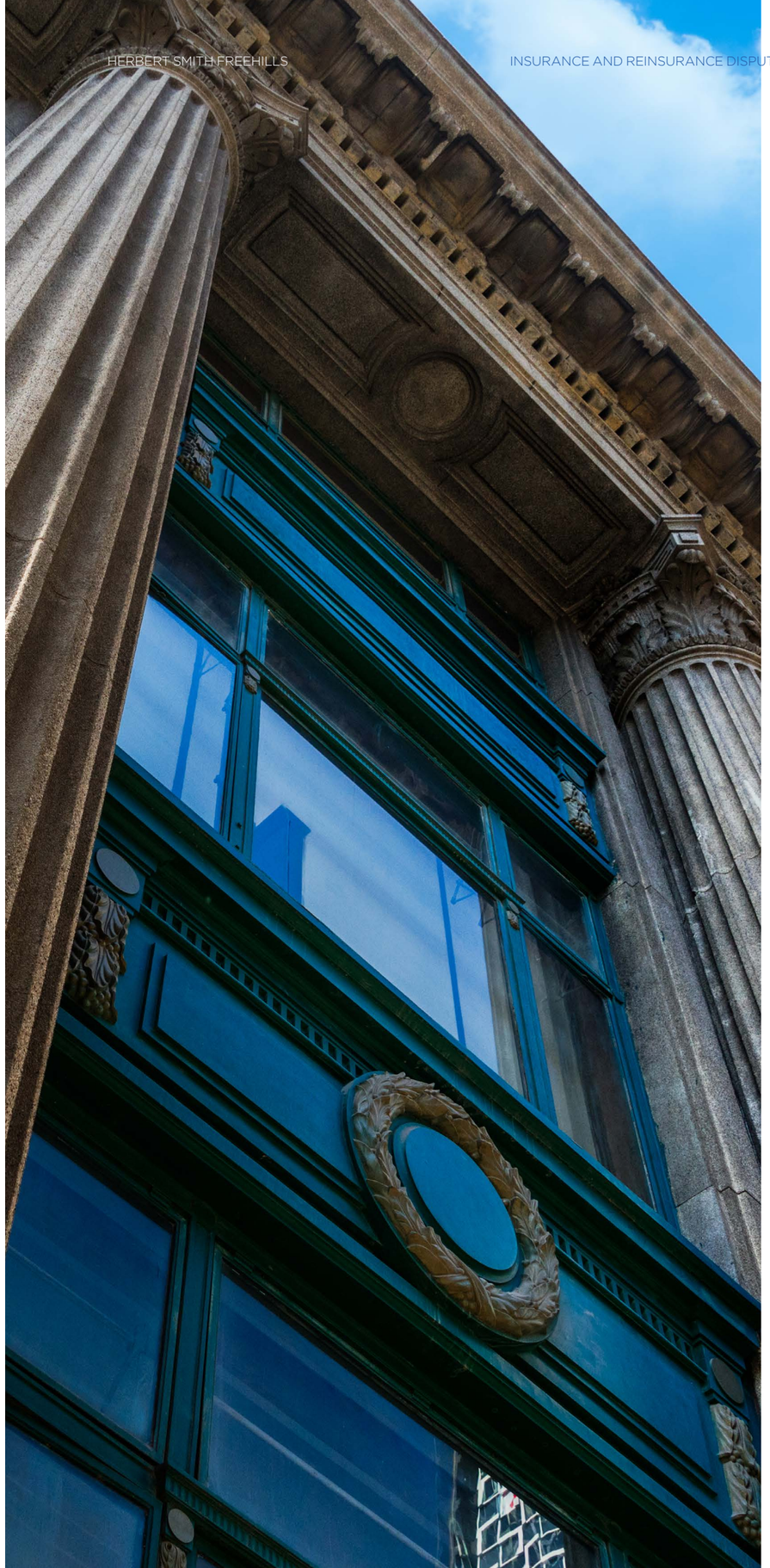
Three years on from the UK's departure from the EU in January 2020, and two years from the end of the transition period established by the Withdrawal Agreement, it seems unlikely that the EU will consent to the UK rejoining the Lugano Convention any time soon. The UK's accession to Lugano would largely have restored the pre-Brexit regime for jurisdiction and enforcement of judgments between the UK and the EU/EFTA states. In its absence, questions of jurisdiction and enforcement between the UK and the EU/EFTA states, in circumstances where the 2005 Hague Choice of Court Convention does not apply, are a matter for domestic law – which means, in England and Wales, the common law rules and in some cases statute.

The Brussels/Lugano regime does however apply in transitional cases, where proceedings were started before the end of the transition period on 31 December 2020. As confirmed by a High Court decision in July 2022, this means that the English court may be obliged to stay its proceedings under the "lis pendens" provisions of that regime where proceedings were started in an EU member state before the end of 2020 and parallel English proceedings were started only after that date. The decision also confirmed that where proceedings were commenced before the end of 2020, and further claims or defendants are sought to be added after, the regime continues to apply to determine whether the court has jurisdiction over the new claims and defendants (see High Court considers when recast Brussels Regulation continues to apply in transitional cases).

One important implication of the end of the Brussels/Lugano regime, so far as the UK is concerned, is that the English court can once again grant an anti-suit injunction in respect of proceedings in the EU/EFTA. This was previously prohibited as contrary to the Brussels/Lugano regime. The English court has exercised this renewed power in a couple of decisions in 2022 (see Anti-suit injunction granted restraining proceedings in an EU member state).

Given that the Brussels/Lugano regime no longer applies as between the UK and the EU, and (as noted above) is unlikely to do so at least in the short term, the question of whether the UK will join the 2019 Hague Judgments Convention is a matter of some significance. Both the EU and Ukraine joined the Convention on 29 August 2022, which means the Convention will come into force as between them on 1 September 2023 and will apply to the enforcement of judgments in proceedings commenced after that date (see 2019 Hague Judgments Convention comes into force in September 2023 but (for now) only between EU and Ukraine. If the UK were to join, the Convention would then apply to enforcement as between the UK and the EU/Ukraine (save where the relevant court took jurisdiction under an exclusive jurisdiction clause, in which case the 2005 Hague Choice of Court Convention would generally take precedence). The UK government is considering its position on the 2019 Convention, and it seems likely that it will consult soon on possible accession.

As for jurisdiction, which is not covered by the 2019 Hague Judgments Convention, as noted above the common law rules on jurisdiction now apply in cases involving EU and EFTA defendants, as well as defendants domiciled elsewhere. The main focus of those rules is on whether a claimant can obtain the court's permission to serve proceedings on the defendant outside the jurisdiction, which depends (in part) on whether the case falls within an applicable head of jurisdiction or "gateway" set out in



Practice Direction 6B to the Civil Procedures Rules. The gateways have been expanded considerably with effect from 1 October 2022 (see Article published – Expansion of jurisdiction gateways coming soon) and we are starting to see cases coming through in which the court's jurisdiction has been established under the new gateways, including relating to proceedings for contempt of court and for information orders under the *Bankers Trust* or *Norwich Pharmacal* jurisdictions.

Alternative Dispute Resolution (ADR)

The English courts have long supported ADR and encouraged parties to engage in it. That encouragement has become all the more pronounced over the past 12 months, with debate as to whether and to what extent there should be compulsion rather than mere encouragement, either at the discretion of judges on a case-by-case basis or as a standard procedural step.

In July 2022, the Ministry of Justice launched a public consultation on increasing the use of mediation in the civil justice system, seeking views on a government proposal to introduce mandatory mediation for all defended Small Claims in the County Court, and whether there is a need for increased regulation and oversight of the mediation industry, such as through accreditation of mediators, formalising standards of conduct and/or establishment of an industry regulator (see UK government proposes mandatory mediation in small claims and consults on increased regulation of the mediation industry).

This sits alongside a parallel workstream launched in April 2022 by the Department of Business, Energy and Industrial Strategy regarding ADR of consumer disputes outside the court system (such as through Ombudsmen and other ADR schemes), which is examining the role of compulsion in such schemes as well as introducing measures to strengthen the accreditation framework for consumer ADR providers (see UK government announces reforms to consumer ADR services).

The government has also consulted on whether the UK should sign the Singapore Convention on mediated settlements, which came into force in September 2020 and provides a framework for a global enforcement regime for settlement agreements resulting from mediation of international commercial disputes. The consultation closed in April 2022 and the government's response is awaited, although the government is thought to be in favour of signing the Convention (see UK government consults on whether to sign the Singapore Convention on mediated settlements).

Other relevant decisions

This year has also seen a number of significant by the higher courts in areas relevant to insurance:

- Of relevance to those with an interest in D&O cover is a much-anticipated Supreme Court judgment on directors' duties. This case clarified the position as to when directors owe obligations to consider the interests of creditors. The duty is engaged where the directors know, or ought to know, that the company is insolvent or bordering on insolvency or that an insolvent liquidation or administration is probable (see Key Supreme Court insolvency ruling clarifies stance on creditor duties).
- A Court of Appeal decision on the calculation of damages for breach of warranty under a share purchase agreement will be of interest to those operating in the field of Warranty & Indemnity insurance. This case shows that the court will not generally reduce damages for a breach of warranty under a share purchase agreement on the basis that a contingency that reduced the value of the shares as at the transaction date (here the fact that a purchaser would have paid less for the company if it had been aware of the risks of reputational damage posed by the defendants' misconduct) did not in fact occur. The court recognised that the position may be different for anticipatory breaches of contract, where subsequent events can be taken into account in considering what would have happened had the contract been performed, but said that had no application to a case of actual breach (see Court of Appeal considers approach to damages for breach of warranty and deceit in context of share sale).
- In November 2022, the Supreme Court held that the Civil Liability (Contribution) Act 1978 does not have overriding effect and therefore applies only where domestic conflict of laws rules indicate that the contribution claim in question is governed by English law (see Supreme Court finds Civil Liability (Contribution) Act 1978 applies only where contribution claim governed by English law).

The Year in Cases at a Glance

Al Mana Lifestyle Trading LLC & Ors v United Fidelity Insurance Company PSC & Ors [2023] EWHC 2049 (Comm)

Court of Appeal considers jurisdiction of the English court to hear covid claim

Bank of New York Mellon (International) Ltd v Cine-UK Ltd [2022] EWCA Civ 1021

Court of Appeal upholds summary judgment for rent accrued during Covid closures of commercial premises, rejecting arguments based on implied terms and "failure of basis"

BTI v Sequana [2022] UKSC 25

Key Supreme Court insolvency ruling clarifies stance on creditor duties

Corbin & King v AXA Insurance Plc [2022] EWHC 409 (Comm)

Prevention of Access clauses revisited

Curtiss v Zurich Insurance Plc [2022] EWHC 1514 (TCC)

Party penalised in costs for disproportionate application to strike out witness evidence for non-compliance with PD 57AC

Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd [2022] EWHC 3287 (Comm)

Court considers whether contractual provision prohibiting assignment can prevent insurer's subrogation rights

Ebury Partners Belgium SA/NV v Technical Touch BV, Jan Berthels [2022] EWHC 2927 (Comm)

Anti-suit injunction granted restraining proceedings in an EU member state

Greencastle MM LLP v Payne [2022] EWHC 438 (IPEC)

High Court orders witness statements to be redrafted due to serious non-compliance with PD 57AC

Hastings v Finsbury Orthopaedics Ltd and another [2022] UKSC 19

Supreme Court rules for the first time on the threshold for liability under the Consumer Protection Act 1987

Kyla Shipping Co Ltd v Freight Trading Ltd [2022] EWHC 376 (Comm)

High Court finds no litigation privilege where expert instructed to try to find backing for potential counterclaim

Loreley Financing (Jersey) No 30 Ltd v Credit Suisse Securities (Europe) [2022] EWCA Civ 1484

Court of Appeal confirms identity of those instructing lawyers not generally protected by litigation privilege

McClean & Others v Thornhill [2022] EWHC 457 (Ch)

High Court finds no duty owed to investors by barrister advising scheme promoter

McKinney Plant & Safety Ltd v The Construction Industry Training Board [2022] EWHC 2361 (Ch)

Indemnity costs awarded against party who dismissed complaints about witness statement non-compliance as "nit-picking"

MDW Holdings Limited v James Robert Norvill, Jane Rosemary Norvill and Stephen John Norvill [2022] EWCA Civ 883

Court of Appeal considers approach to damages for breach of warranty and deceit in context of share sale

Municipio de Mariana v BHP Group (UK) Ltd [2022] EWCA Civ 951

Court of Appeal overturns decision striking out class action arising from 2015 collapse of Fundão Dam in Brazil

Pickett v Balkind [2022] EWHC 2226 (TCC)

High Court refuses injunction to prevent use of privileged material disclosed in error, where it revealed potential serious breach of court guidance

Primavera Associates Ltd v Hertsmere Borough Council [2022] EWHC 1240 (Ch)

High Court decision suggests party alleging witness statement fails to comply with PD 57AC must identify specific failures

Prime London Holdings 11 Ltd v Thurloe Lodge Ltd [2022] EWHC 79 (Ch)

Another decision regarding a failure to comply with the new requirements for trial witness statements under PD 57AC

Quadra Commodities S.A. v XL Insurance Company SE and Others [2022] EWHC 431 (Comm)

First case on the implied term to pay claims within a reasonable time – section 13A Insurance Act 2015

Rashid v Direct Savings Ltd [2022] 8 WLUK 108

Limitation under the Third Parties (Rights Against Insurer) Act 2010

Simon v Tache [2022] EWHC 1674 (Comm)

High Court considers when recast Brussels Regulation continues to apply in transitional cases

Spire Healthcare Limited v Royal & Sun Alliance Insurance Limited [2022] EWCA Civ 17

Spire and RSA contest aggregation again

Sportradar AG v Football Dataco Ltd [2022] CAT 29

Competition Appeal Tribunal considers when there is a dispute sufficient to give rise to without prejudice privilege

Stonegate Pub Company v MS Amlin [2022] EWHC 2548 (Comm), *Greggs PLC v Zurich Insurance PLC* [2022] EWHC 2545 (Comm) *Various Eateries Trading Ltd v Allianz* [2022] EWHC 2549 (Comm)

Covid Business Interruption claims – the next instalment

Suppipat v Siam Commercial Bank Public Company Ltd [2022] EWHC 381 (Comm)

Privilege not lost despite opponent obtaining copies of documents in foreign proceedings

The Rugby Football Union v Clark Smith Partnership Limited and FM Conway Limited [2022] EWHC 956 (TCC)

Subrogation and co-insurance considered again

The Soldiers, Sailors, Airmen and Families Association – Forces Help v Allgemeines Krankenhaus Viersen GmbH [2022] UKSC 29

Supreme Court finds Civil Liability (Contribution) Act 1978 applies only where contribution claim governed by English law

University of Dundee v Chakraborty [2022] EAT 150

No privilege for original version of document simply because comparison to final version would reveal legal advice

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