

# 4 New Square Chambers Insurance Law Review

A review of recent developments, including our pick of the cases in 2022, and a look ahead to some significant appeals in 2023.

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SPRING 2023

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# Overview

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In our spring 2023 insurance law review we look at cases across a range of areas with no standout theme. We review cases ranging from Covid 19 business interruption claims to recovery of professional fees; from reservation of rights to subrogation; from insurable interest to damages for late payment. We look at cases on the Third Parties (Rights Against Insurers) Acts 1930 and 2010, aggregation and exclusion clauses. And we note the continuing lack of significant case law on presentation of the risk under the Consumer Insurance (Disclosure and Representations) Act 2012 and the Insurance Act 2015.

Read on for our review of recent developments, including our pick of the cases in 2022, and a look ahead to some significant appeals in 2023.

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# Presentation of the risk

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We start with the dearth of case law in 2022 on presentation of the risk under the Marine Insurance Act 1906, the Consumer Insurance (Disclosure and Representations) Act 2012, and the Insurance Act 2015.

In 2021, there were two significant Marine Insurance Act 1906 decisions – [Niramax Group Ltd v Zurich Insurance plc](#) [2021] EWCA Civ 590 and [ABN Amro Bank NV v Royal & Sun Alliance Insurance plc & Others](#) [2021] EWCA Civ 1789 – and claims continue to be made under legacy policies governed by the 1906 Act.

Existing case law on the 1906 Act also continues to be relevant under the Consumer Insurance (Disclosure and Representations) Act 2012 and the Insurance Act 2015. This perhaps – at least in part – explains the dearth of notable case law under both the Insurance Act 2015 and the Consumer Insurance (Disclosure and Representations) Act 2012 in 2022. There were however three cases worth noting in 2021, and we recap these briefly here.

[Jones v Zurich Insurance plc](#) [2021] EWHC 1320 (Comm) was a case about the duty of disclosure under [s 2\(2\) of the Consumer Insurance \(Disclosure and Representations\) Act 2012](#). Mr Jones had taken out a home insurance policy with Zurich. He sought to recover £190,000 under this policy for a Rolex watch which he claimed to have lost while skiing in Colorado. The court held that the policy was capable of responding to the loss, but went on to find that Zurich was entitled to avoid the policy because Mr Jones had not disclosed a previous claim concerning a £15,000 diamond.

This non-disclosure amounted to a ‘*qualifying misrepresentation*’ within the meaning of s 4(1) of the 2012 Act. The three key requirements were satisfied: (i) Mr Jones had plainly misrepresented his previous claims history; (ii) the misrepresentation was a clear breach of his duty under s 2(2); and (iii) had it been properly disclosed, Zurich would have refused the risk, not least because the original underwriter had been concerned about jewellery from the outset, and so the previous claim for a diamond would have weighed heavily on any coverage decision.

***Berkshire Assets (West London) Ltd v AXA Insurance UK plc*** [2021] EWHC 2689 (Comm) concerned an insured's duty of disclosure under [s 3 of the Insurance Act 2015](#). The insured company had taken out a Contractors' All Risks and Business Interruption policy with AXA for a property development in west London. Flooding damaged the property, the insured brought a claim, and AXA avoided the policy for breach of the duty of fair presentation of the risk under s 3(1). Specifically, the company had failed to disclose at the time of renewal that one of its directors, a former CEO of Goldman Sachs International, was the subject of criminal charges in Malaysia arising out of the multi-billion-dollar 1MDB fraud.

The court found that these charges amounted to a '*material circumstance*' under s 3(4) which the company should have disclosed. The judge accepted a submission that the 2015 Act had not changed the law on materiality, which was well established by past authorities under the Marine Insurance Act 1906: he noted that

*'[i]n proposing the legislation which became the 2015 Act the Law Commission stated that the concepts of "material circumstance" and "prudent insurer" were intentionally taken from the existing statute and that they would expect the existing case law to continue to be used to interpret them...'*

The pre-2015 Act authorities supported the view that the criminal charges, when considered from the perspective of a reasonably prudent insurer, were a material circumstance. The court further held that, on the issue of inducement, AXA would have declined the risk if the charges had been disclosed. They would have been of real concern to the insurer, and the standard position under its underwriting practice note would have been to refuse cover.

***Kjaergaard v MS Amlin Insurance SE*** [2021] EWHC 2096 was a summary judgment application by the claimant under an insurance policy covering damage to his luxury yacht. The defendant insurer argued that the claimant had misrepresented his claims' history, and that this had induced it to enter into the policy. In refusing to grant summary judgment on various grounds, Cockerill J said that she could not be satisfied that she had before her all the material needed to make a decision of fact on inducement, remarking that, since inducement was a key point, it was exactly the sort of point on which the trial judge might ask for examination-in-chief if the matter proceeded to trial.

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# Covid 19 business interruption insurance litigation

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Following [\*The Financial Conduct Authority v Arch Insurance \(UK\) Ltd\*](#) [2021] UKSC 1 (the FCA Test Case) in the Supreme Court, there is a raft of Covid 19 business interruption insurance litigation and [the Commercial Court is seeking to actively manage suitable sets of cases](#).

The post-FCA Test Case litigation began in 2021 with [\*Rockliffe Hall v Travelers Insurance Co Ltd\*](#) [2021] EWHC 412 (Comm). Cockerill J made short shrift of the insured's argument that Covid 19 fell within the Infectious Disease Clause in the policy in question, which listed various specific diseases which would be covered but did not include Covid 19. The claim was struck out and summary judgment granted.

In [\*Corbin & King Ltd v AXA Insurance UK plc\*](#) [2022] EWHC 409 (Comm), Cockerill J addressed the construction of a Denial of Access (Non Damage) Clause in the light of the Supreme Court's decision in the FCA Test Case, and whether there was a single limit of £250,000 in respect of all premises for any one claim, or whether there was a limit of £250,000 for each set of premises. In respect of the second issue, the parties agreed that one limit of liability of £250,000 was available for each of the three lockdowns which fell within the period of insurance, and the issue was whether this applied per premises. The judge decided that the limit applied per premises, drawing on the composite nature of the policy, and the wording used. Permission to appeal was granted, but no appeal will be pursued. This left some insurers unhappy, and the decision is now the subject of sideways challenge in *Gatwick Investment Ltd v Liberty Mutual Insurance Europe SE*. A five-day hearing in the Commercial Court is listed for October 2023. This will also consider policy limits and credit for furlough payments. Other cases raise similar issues and may be heard together – see the Commercial Court website for further details.

In 2022, Butcher J heard preliminary issues arising in three further cases, each involving a wording known as the 'Marsh Resilience' wording. Each case concerned claims under business interruption insurance policies by the owners and operators of a number of hospitality venues. Three separate judgments were handed down: [\*Stonegate Pub Company Ltd v MS Amlin Corporate Member\*](#)

*Ltd* [2022] EWHC 2548 (Comm), *Various Eateries Trading Ltd v Allianz Insurance plc* [2022] EWHC 2549 (Comm) and *Greggs plc v Zurich Insurance plc* [2022] EWHC 2545 (Comm). Issues of general application included aggregation, which we consider below, and whether it was necessary for the insured to give credit for sums received under the furlough scheme and/or as business rate relief. Butcher J decided that it was.

Permission to appeal has been granted in the *Stonegate* trio of cases on certain issues and the appeal is due to be heard this year. One significant issue – credit for furlough payments – also arises in the *Gatwick Investment Ltd v Liberty Mutual* case, so Butcher J’s judgment is unlikely to be the last word.

We will return to these issues as and when future decisions bring much-needed clarity, or further complexity, for policyholders and insurers – and their advisers.

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# Insurable interest and damages for late payment

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In March 2023, the Court of Appeal heard the appeal against the decision of Butcher J in [Quadra Commodities SA v XL Insurance Company SE](#) [2022] EWHC 431 (Comm). A decision is awaited.

There are two aspects of interest in Butcher J's judgment: whether Quadra had an insurable interest in the misappropriated goods; and whether the defendant underwriters had breached the duty to pay claims within a reasonable time implied by s 13A(1) of the Insurance Act 2015, entitling Quadra to damages for late payment.

The case involved a fraud known as the Agroinvestgroup fraud. Although precise details of the fraud are unknown, the issue in relation to insurable interest arose in the following way. It appears that warehouses owned by Agroinvestgroup, a loose association of companies involved in the production, storage and processing of agricultural products issued multiple receipts (in some cases as many as five or six receipts) in respect of the same goods to multiple buyers. As a result, there were insufficient goods to satisfy buyers when delivery of the goods was demanded. A subsequent investigation by the Ukrainian Asset Recovery and Management Agency, the Ukrainian National Police and the Ukrainian Grain Association concluded that 18 trading companies had been affected by the fraud, claiming losses of 276,000 MT of grain valued at approximately US\$80–120 million.

In March 2019 Quadra commenced legal proceedings in the Odessa Commercial Court seeking delivery up of its cargoes. In decisions dated 7 June 2019, 27 June 2019 and 1 July 2019 the Odessa Commercial Court held that Quadra was entitled to use and dispose of the vast majority of the cargoes. GAFTA Arbitrations were also commenced but no substantive progress was made.

Quadra claimed under the policy on the basis that the subject matter of the insurance was either the entire adventure consisting of the storage, transportation and delivery of the cargoes, or the cargoes themselves.

The insurers denied liability on the grounds that Quadra had no insurable



interest in the cargoes because the warehouses in which the cargoes had been purportedly stored were at (or were approaching) capacity at the time of purported delivery, Quadra's only loss was a financial loss against which it was not insured, and there was no misappropriation of any goods covered by the policy.

Butcher J rejected Quadra's argument that the subject matter of the policy was the whole 'adventure' and found that on its proper construction the Policy principally provided property insurance, and did not provide cover in circumstances where no property had existed and thus had not been lost or damaged.

'Adventure' has a particular meaning in insurance law. [Section 5\(1\) of the Marine Insurance Act 1906](#) says:

*'Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure'*

Section 5(2) then goes on to say that in particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure, or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage to it, or by the detention of it, or may thereby incur liability. As the 1906 Act was a codification of the common law, its general principles such as in relation to insurable interest apply to all types of insurance, not just marine.

Butcher J accepted Quadra's alternative case that goods corresponding with the cargoes were held in the warehouse at the time that the warehouse receipts were issued and that it had an insurable interest in the cargoes. He then concluded that Quadra's loss was caused by the misappropriation of the cargoes and was therefore within the scope of a misappropriation insuring clause in the policy wording. However, the loss was not covered by a fraudulent documents insuring clause because the physical loss of the cargoes was not caused by Quadra's acceptance of fraudulent warehouse receipts.

The second aspect of the judgment which is of interest is the claim for damages for late payment. Quadra notified its broker of its losses on 13 February 2019. The broker sent the notices of loss to the defendant insurers the

following day. Quadra issued proceedings against the insurers on 20 May 2020 which included a claim for damages for late payment in breach of the term implied by [s 13A\(1\) of the Insurance Act 2015](#).

Quadra alleged that the insurers' investigation of the claim had been unnecessarily or unreasonably slow. The insurers denied that they had acted unduly slowly and said they were not in breach because there were reasonable grounds for them to dispute the claim.

Butcher J referred to the Law Commissions' recommendations underpinning s 13A and the Explanatory Notes to the Enterprise Act 2016 (which inserted s 13A into the Insurance Act 2015). Applying the factors listed in s 13A(3) of the 2015 Act, the judge concluded that a reasonable time to investigate and pay the claim was not more than a year from the date of notification. He clarified that he meant that that would have been a reasonable time for insurers properly to have investigated and evaluated the claim and to have paid it, assuming that the investigation had indicated no reasonable grounds for disputing it or part of it.

The judge considered separately whether the insurers had reasonable grounds for disputing the claim, and concluded that they had. Importantly, he said that the fact that he had found that those grounds were wrong did not indicate that they were not reasonable.

The judge also said that there was some force in Quadra's contention that investigations were too slow. In particular, the investigation was unduly protracted given the number of hours actually spent on it, there was unnecessary delay in a report being released to Quadra, the loss adjuster could have been instructed sooner, and legal advice could and should have been taken before it was. But as these features of the insurers' handling of the claim occurred within what the judge considered overall to have been a reasonable time for payment of the claim, and as there were throughout this period reasonable grounds for disputing the claim, he concluded that there was no breach of the s 13A implied term.

Butcher J's approach gives primacy to his initial decision as to the overall reasonableness of the period of insurers' investigations, and less significance to the speed or efficiency of its constituent parts. Other judges might take a different view.

As we have said, a decision on the appeal is awaited.

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# Reservation of rights

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We turn now to a shipping case. This is of interest in an insurance context for what it says about reservations of rights, and whether some conduct is so inherently affirmatory that a reservation of rights is ineffective to prevent subsequent conduct constituting an election:

*SK Shipping Europe Ltd v Capital VLCC 3 Corp (The C Challenger)* [2022] EWCA Civ 231.

In their judgments, both Foxton J at first instance ([2020] EWHC 3448 (Comm)) and Males LJ in the Court of Appeal (Phillips and Carr LJJ agreeing) approved the memorable quip of Long Innes J in the New South Wales Supreme Court in *Haynes v Hirst* (1927) 27 SR (NSW) 480 and 489 that

*‘a man can only elect once, and when once he has elected he is bound by his election and cannot again avail himself of his former option, merely because he claimed in the first instance to exercise his election without prejudice. A man, having eaten his cake, does not still have it, even though he professed to eat it without prejudice.’*

The claimant owner of a number of oil tankers elected, in late 2016, to offer the carriers for charter, and made a series of statements about the vessels’ speed and fuel consumption in a circular provided to the market. One of the vessels was The C Challenger. The charterparty which was entered into with the defendant repeated the statements on speed and fuel consumption as warranties. The charterparty proved to be a very good deal for the owner, as spot hire rates for such tankers fell dramatically in 2017 to less than a third the day rate charged in the charterparty.

It soon emerged that The C Challenger was capable of nothing like the speed and fuel consumption rates warranted. From early 2017, the charterer made payment ‘under protest’, and deducted the sums paid for hire to reflect the defective performance. Further deductions and complaints were raised throughout 2017, and in June 2017 the charterer communicated to the owner that it wished to reserve its rights generally. Thereafter, the charterer stopped

paying altogether for the charter, and accused the owner of intentionally misdescribing the vessel. The owner undertook investigations and alleged that the reasons for the fuel consumption problems might be newly-emerging mechanical issues. Then in July 2017, while still complaining about the vessel's performance, the charterer fixed the vessel for a journey from Suffolk to Malaysia. Ultimately, in October 2017 the charterer purported to rescind the charterparty for misrepresentation or repudiatory breach of warranty, while the owner responded by purporting to terminate on the grounds of the charterer's renunciation of the contract.

Much of the judgments of Foxton J at first instance and Males LJ on appeal are devoted to a discussion of whether, in the context of what the market must have known about the calculation of vessel speeds and consumption averages, the statements made regarding The C Challenger could properly amount to actionable representations. But both the judge at first instance and Males LJ on appeal also considered whether, regardless of whether or not the charterer had a right to rescind or terminate the charterparty, the charterer had in fact affirmed the charterparty in July 2017 notwithstanding its general reservation of rights in June 2017.

At first instance, Foxton J said that

*'while ... a reservation of rights will often have the effect of preventing subsequent conduct constituting an election, this is not an invariable rule. In the final analysis, the issue of whether there has been an election requires the court to have regard to all the material, including any reservations which have been communicated. Where conduct is consistent with the reservation of a right to rescind, but also consistent with the continuation of the contract, then an express reservation will preclude the making of an election ... However, where a party makes an unconditional demand of substantial contractual performance of a kind which will lead the counterparty and/or third parties to alter their positions in significant respects, such conduct may be wholly incompatible with the reservation of some kinds of rights, even if the party demanding performance purports at the same time to reserve them'*

The judge's view, endorsed by the Court of Appeal, was that in the circumstances the decision to use the vessel for the voyage to Malaysia was 'so inherently affirmatory' that it outweighed the 'general reservation of rights given in earlier correspondence', especially since no further or more specific reservation was reiterated at the same time.

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# Construction, causation and exclusion clauses

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In *Brian Leighton (Garages) Ltd v Allianz Insurance plc* [2023] EWCA Civ 8 the Court of Appeal addressed the construction and application of an exclusion clause and made remarks of wider application in relation to the construction of insurance contracts.

The insured ran a garage business until a fuel leak so permeated the garage's forecourt that it was at immediate risk of fire or explosion, leading to the closure of the business. The insured claimed under its Motor Trade Policy. The insurer rejected claims under the Policy's section 1 (all risks cover for material damage) and section 8 (cover for business interruption in consequence of damage insured under section 1).

Clare Ambrose KC, sitting as a Judge of the High Court, gave reverse summary judgment in favour of the insurer, holding that the damage to the garage was 'caused by pollution or contamination' so as to be excluded under the policy's Exclusion 9. Central to the analysis of the case was the fact, assumed for the purposes of the summary judgment application, that the leak originated from a pipe connecting underground fuel tanks to the forecourt pumps and was caused by a sharp object – such as a sharp stone adjacent to the pipe – breaching it under the pressure of the forecourt slab.

In a split decision, the Court of Appeal's majority (Popplewell and Nugee LJJ) and minority (Males LJ) gave careful consideration to the 'exclude and write-back' structure of Exclusion 9:

*'This Policy does not cover*

*...*

**9. Pollution or Contamination**

*Damage caused by pollution or contamination, but We will pay for Damage to the Property Insured not otherwise excluded, caused by:*

*a) pollution or contamination which itself results from a Specified Event*

*b) any Specified Event which itself results from pollution or contamination.'*

It was common ground that no ‘*Specified Event*’ (as defined in the policy) had occurred. The focus of the argument before the Court of Appeal was on whether the phrase ‘*caused by*’ in Exclusion 9 should be construed as incorporating the presumption, codified in [s 55 of the Marine Insurance Act 1906](#), that absent contrary indication in the wording of a policy, the parties intended the insurer to be liable only for losses of which the proximate or dominant cause is an insured risk.

Where there are concurrent proximate causes, one an insured peril and the other excluded, the exclusion prevails: *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corpn Ltd* [1974] QB 57.

If ‘*caused by*’ meant ‘proximately caused by’, the policy responded because the proximate cause of the leak was physical damage to the garage’s pipework. If not, and the clause applied where, as here, pollution contamination was some part of the causal chain (if not the proximate cause), the policy would not respond.

In *The FCA Test Case*, the Supreme Court said that the overriding question was how the words of the contract would be understood by a reasonable person, and in the case of an insurance policy sold principally to small and medium sized businesses, this meant not a pedantic lawyer but an ordinary policyholder who, on entering into the contract, was taken to have read through the policy conscientiously in order to understand what cover they were getting.

There is a tension between this principle and the application in *The FCA Test Case* in the Supreme Court of technical case law on the meaning of ‘*occurrence*’.

The Commercial Court has since squared this circle by clarifying that a policyholder is taken to have the assistance of a broker in understanding the policy (in [Corbin & King Ltd v AXA Insurance UK plc](#) [2022] EWHC 409 (Comm) and in [Stonegate Pub Company Ltd v MS Amlin Corporate Member Ltd](#) [2022] EWHC 2548 (Comm)); and the Court of Appeal took the same approach in *Brian Leighton (Garages) Ltd v Allianz Insurance plc*, so that a policyholder is taken to be familiar with the basic principles of insurance law and the meaning which has been put on phrases used in insurance contracts by consistent judicial authority.

This meant that the policyholder was taken to understand that the parties to

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an insurance contract are presumed, absent contrary indication in the wording or structure of the contract, to have incorporated the doctrine of proximate causation, and that phrases such as ‘caused by’ generally denote proximate cause. Finally, as the scope of cover afforded by the policy’s material damage section was defined, in this instance, by the insuring clause, Exclusion 9 and its write back, there was no scope for recourse to *contra proferentem* interpretation.

Ultimately the case turned on differences in emphasis between the judgments, respectively, of Popplewell and Males LJ, which led to differing conclusions as to whether the presumed incorporation of proximate causation was rebutted by the structure of the policy. As Nugee LJ agreed with Popplewell LJ, his was the view that prevailed.

In [\*Allianz Insurance plc v The University of Exeter\*](#) [2023] EWHC 630 (TCC), HHJ Bird sitting as a Judge of the High Court decided that damage caused by the deliberate detonation of a World War II bomb unearthed during building works in 2021 was ‘*occasioned by war*’. The parties had agreed that this meant proximate cause.

The judge considered the authorities and said that, applying the guidance set out in *The FCA Test Case*, the test of proximate cause was ‘*a matter of judgment based on common sense rather than over-analysis*’.

He considered that, as between the dropping of the bomb in 1942 and its detonation in 2021, the former was the (alternatively, a) proximate cause of the damage, so that the war exclusion applied.

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# Aggregation

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Recent judgments have explored the interpretation and application of aggregation clauses. These follow on from *Baines v Dixon Coles & Gill* [2021] EWCA Civ 1211, [2021] Lloyd's Rep IR 410, in which the Court of Appeal decided that claims arising from a solicitor's various acts of theft from different clients did not constitute 'a series of related acts', and did not therefore aggregate, because a greater nexus between the acts was required.

2022's principal case in this area was *Spire Healthcare Ltd v Royal & Sun Alliance Insurance Ltd* [2022] EWCA Civ 17, which concerned the interpretation of an aggregation clause in a combined liability insurance policy. Spire's claim for indemnity under the policy was triggered by a number of personal injury claims arising from the serial misconduct of the notorious breast surgeon Ian Paterson, who had operated on patients without their informed consent over the course of roughly fourteen years.

There were two categories of case: (1) instances where a mastectomy was clinically indicated, but the surgeon failed to remove all breast tissue, exposing patients to unnecessary risk of recurrence; and (2) instances where there was no clinical indication, and the surgeon nonetheless conducted unnecessary surgical procedures, including mastectomies. The judge below found that these two categories did not aggregate.

The aggregation clause stated that

*'the total amount payable by [the insurer] in respect of all damages costs and expenses arising out of all claims during any Period of Insurance consequent on or attributable to one source or original cause... shall not exceed the Limit of Indemnity stated in the Schedule'* (emphasis added).

The Limit of Indemnity referred to was £10 million. The sole issue on appeal was whether the aggregation clause allowed liability to be capped at £10 million, contrary to the decision at the first instance.

In giving the leading judgment, Andrews LJ noted that the aggregation clause was widely drawn, and re-stated the relevant principles:



- Aggregation clauses are to be construed in a balanced fashion, taking a neutral approach.
- Because the aggregation clause contained familiar, standard wording, it was appropriate to consider other cases and construe the wording consistently with those cases.
- Aggregation clauses referring to occurrences '*attributable to one source or original cause*' intend to achieve the widest possible effect.
- There is no distinction between wordings referring to an '*original cause*' and an '*originating cause*', nor is there a distinction between the words '*cause*' and '*source*'.
- '*Original cause*' did not mean proximate cause, nor did it mean sole cause, thus allowing a loose causal connection to qualify, though some such causal link was still necessary.

The Court of Appeal held that the judge at first instance had applied the wrong test. In seeking a 'single effective cause' of all the claims, he had embarked upon an unnecessarily complicated analysis, despite having recognised the common factors between them. He should have instead followed precedent and asked whether there was a factor 'behind the whole problem' which unified the claims.

Andrews LJ said that, as a matter of ordinary language, and applying the principles applicable to aggregation clauses expressed in these wide terms, it seemed to her to be plain that

*'any or all of (i) Mr Paterson [the consultant], (ii) his dishonesty, (iii) his practice of operating on patients without their informed consent, and (iv) his disregard for his patients' welfare can be identified either singly or collectively as a unifying factor'.*

The claims could therefore be aggregated.

The decision that the deliberate and dishonest behaviour of a single 'rogue consultant' was a clear unifying factor is unsurprising. But the same cannot be said of the suggestion that the consultant himself – rather than his behaviour, or an aspect of it – could be a unifying factor.

The significance of both the policy wording and its application to the facts was also highlighted in [\*Stonegate Pub Company Ltd v MS Amlin Corporate Member Ltd\*](#) [2022] EWHC 2548 (Comm), [\*Various Eateries Trading Ltd v Allianz Insurance plc\*](#) [2022] EWHC 2549 (Comm) and [\*Greggs plc v Zurich Insurance plc\*](#) [2022] EWHC 2545 (Comm) (also considered above in relation to Covid 19 business interruption insurance). The disease cover and prevention of access cover contained limits per ‘*single business interruption loss*’, which was defined as all business interruption losses ‘*that arise from, are attributable to or are in connection with a single occurrence*’. Butcher J considered that the causation language was wide, and in particular ‘*in connection with*’ denoted only a relatively loose link, though it still required causation.

The judge also considered whether individual lockdowns or changing restrictions constituted a single ‘*occurrence*’. In confirming that this assessment was to be conducted from the perspective of an informed observer placed in the position of the insured, Butcher J clarified two further principles.

First, this exercise requires reference to the informed observer’s position at ‘*the earliest time after the commencement of loss at which a reasonable person in the position of the insured would seek to decide whether there was one relevant occurrence*’.

knowledge which a reasonable person in the position of the insured would have as at the date when the judgment as to whether there is an aggregating occurrence is to be made’.

On this footing, instances of the disease (whether in the UK or Wuhan, and whether an individual instance or tantamount to a pandemic), were not a relevant occurrence, but government decisions could be.

Secondly, the informed observer should be taken to possess ‘*all the knowledge which a reasonable person in the position of the insured would have as at the date when the judgment as to whether there is an aggregating occurrence is to be made*’.

On this footing, instances of the disease (whether in the UK or Wuhan, and whether an individual instance or tantamount to a pandemic), were not a relevant occurrence, but government decisions could be.

As noted above, appeals are outstanding in the *Stonegate* trio of cases.

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# Professional Indemnity Insurance

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In *Royal & Sun Alliance Insurance Ltd v Tughans* [2022] EWHC 2589 (Comm), Foxton J considered the circumstances in which a law firm was entitled to an indemnity in respect of a success fee under the SRA Minimum Terms and Conditions (MTCs).

This was a complex coverage dispute concerning a success fee paid to the Northern Irish law firm Tughans for its role in facilitating the sale of a property loan book held by a US private equity firm. The firm's US lawyers agreed to share the £15 million fee payable to them on completion with Tughans, under terms of engagement that required Tughans to provide warranties in respect of the firm's compliance with anti-corruption conditions.

After payment of the success fee, it was discovered that Tughans' managing partner had diverted most of the firm's share of the fee to his own benefit. The US lawyers sued the firm (in their own right and as assignee of their client); Tughans notified RSA, the provider of its professional indemnity policy.

The insurers denied cover, arguing that Tughans had suffered no loss because, in view of the falsity of the firm's representations as to its compliance with the anti-corruption conditions, it had never been entitled to the success fee.

Foxton J reviewed the authorities on the indemnity principle and reiterated that professional indemnity policies cover claims for compensation or damages rather than restitution or unjust enrichment; the latter categories involve the loss of sums to which the insured was never entitled.

On the facts, however, Foxton J found that Tughans did have a contractual right to the success fee, such that the firm was entitled to an indemnity in respect of the award of damages against it. Although he said he had found the arguments 'finely balanced', the judge took the view that while Tughans was required to provide the anti-corruption representations under the letter of engagement, those representations did not have to be true for a contractual right to payment to arise.

It was further significant that the US firm itself had brought a claim for damages against the firm, rather than seeking to rescind the letter of engagement itself.

Foxton J granted the insurers permission to appeal and the case is due before the Court of Appeal this autumn.

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# Subrogation

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In *FM Conway Ltd v The Rugby Football Union* [2022] EWHC 956 (TCC), Eyre J held that an insurer could bring a subrogated claim against a contractor where that contractor was an identifiable co-insured under an all risks policy obtained by an employer, and the policy contained an express waiver of the right to bring subrogated claims. The Court of Appeal has given permission to appeal, and a decision is awaited.

In brief outline, the claim arose from damage to high voltage cables during works at Twickenham Stadium in preparation for the 2015 Rugby World Cup. It was common ground at trial that the law did not allow an action between two or more persons who were insured under the same policy against the same risk. The key question was whether the contractor was insured in respect of the damage to the cables.

Citing the Supreme Court's decision in *Gard Marine & Energy Ltd v China National Chartering Co Ltd* [2017] UKSC 35, [2017] 1 WLR 1793, Eyre J said that the starting point for determining whether a policy effected by an employer applies to a contractor in respect of particular risks is the terms of the contractual arrangement between the employer and the contractor. In particular, the judge considered whether the parties had agreed that the policy would be the sole remedy for loss suffered by the employer as a consequence of breach or other default by the contractor.

On the facts, Eyre J concluded that the employer and contractor had reached no such agreement where the cover which the employer was required to obtain for the contractor under the JCT Contract between those parties expressly excluded, among other things, the cost of repairing site material damaged as a result of the contractor's defective workmanship.

The contractor also relied on a subrogation waiver in the policy. This provided that insurers waived

*'all rights of subrogation which they may have or acquire against any insured party...'*

Eyre J rejected the contractor's argument. He held that the waiver could not assist the contractor because (as he had previously decided) it was not co-insured with the employer to the extent of the relevant losses.

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# Third Parties (Rights Against Insurers) Acts 1930 and 2010

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The Court of Appeal decided in *Irwell Insurance Company Ltd v Watson* [2021] EWCA Civ 67 that an employment tribunal was a ‘court’ within the meaning of [s 2\(6\) of the Third Parties \(Rights Against Insurers\) Act 2010](#) such that its jurisdiction took precedence over any arbitration clause in the policy. Since then, there have been two further cases of note relevant to the 2010 Act.

*Keegan v Independent Insurance Co Ltd* [2022] EWHC 1992 (QB) considered the date of accrual of the cause of action in a mesothelioma claim resulting from occupational exposure to asbestos. The claimant’s employer was a company which had been dissolved; and the claimant therefore brought his claim directly against the defendant insurers.

The claimant had worked for his employer in the period between 1972 and 2016. Until 1984, no precautions were taken by his employer to protect him from exposure to asbestos. The first manifestation of the claimant’s mesothelioma was a tiny pleural effusion visible on a CT scan in October 2020. The claimant was asymptomatic at the time. Symptoms attributable to mesothelioma did not come on until January 2021.

The central issue was whether liability was incurred pursuant to [s 1\(1\) of the 2010 Act](#) before or after 1 August 2016 (the commencement date of the Act). This required the court to determine when the claimant’s cause of action was complete. The decision in *Keegan* followed an earlier strike out application on similar facts in *Brooks v Zurich Insurance plc* [2022] EWHC 1170 (QB) which had been refused on the basis that the law in this area was ‘*uncertain and developing*.’

In *Keegan*, Yip J expressed agreement with the view of Lord Reid in *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 that:

*‘It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury, and therefore to raise any action’.*

However, she noted that the 2010 Act allowed for its application only if liability

was incurred; it did not provide for its application where the cause of action was complete before the relevant date, but where the claimant's date of knowledge was later.

Yip J considered the analysis in the *Employers' Liability Insurance 'Trigger' Litigation (BAI (Run Off) Ltd v Durham)* [2012] UKSC 14, [2012] 1 WLR 867 where the Supreme Court concluded that a disease could be said to have been 'sustained' or 'contracted' when it was caused or initiated, even though it only developed or manifested itself subsequently. However, this decision involved the interpretation of certain policy clauses, rather than determining the point at which actionable damage was sustained by a claimant. In this context, Yip J thought it was entirely logical to look backwards and consider when the process which ultimately led to the employees developing mesothelioma began.

Yip J considered it was not logical to apply the same principles to determining when a claimant's cause of action accrued. Without the benefit of hindsight it could not be said that the claimant has suffered injury or disease until the mesothelioma had developed. The fact that changes may be going on in the body and that such changes may eventually result in mesothelioma does not allow a claimant to look forwards and identify any damage for which he could bring a claim for compensation. Yip J found 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.

Yip J considered that if it had been necessary to determine whether the cause of action accrued at the time the pleural effusion became manifest (October 2020) or rather at the time symptoms developed (January 2021), the decision would have been difficult and finely balanced. However, it was not necessary for her to decide this point. On either basis, Yip J was satisfied that there was no actionable damage until long after the commencement date of the 2010 Act.

In *Rashid v Direct Savings Ltd* in the Leeds County Court in August 2022, HHJ Gosnell addressed the impact of the decision in *Financial Services Compensation Scheme Ltd v Larnell (Insurances) Limited (in liquidation)* [2005] EWCA Civ 1408, [2006] 1 WLR 808 on claims brought under the 2010 Act.

In *Larnell* Lloyd LJ concluded that the *General Rolling Stock* principle (by which the limitation period is paused when a winding up order is made) applied to claims under the Third Parties (Rights Against Insurers) Act 1930 against an insurer. In

*Rashid*, the court had to determine whether the changes brought about by the 2010 Act meant that the decision in *Larnell* should be distinguished, such that time would continue to run against the insurer notwithstanding that the insured had entered insolvency.

HHJ Gosnell considered that the crucial issue was whether the claim against the insurer under the 2010 Act was made ‘within’ or ‘outside’ the liquidation. Given that the 2010 Act permits a direct claim against the insurer without the insolvent insured having to be joined as a party, he thought the answer to the question seemed obvious. It was clear that in *Larnell* a very important factor was that under the 1930 Act the claim had to be established against the insured first. However, if 1930 Act. In *Miller*, the claimant brought a claim against the defendant solicitors in respect of their conduct of personal injury proceedings. a claimant was making a direct claim against the insurer under the 2010 Act the same logic did not apply. The normal reason for suspending the limitation period on insolvency (to enable the liquidator to collect in the company’s assets and distribute them fairly without having to deal with litigation from the company’s creditors) did not apply where a claimant makes a direct claim against an insurer under the 2010 Act. It follows that the principle in *Larnell* ought not to affect claims under the 2010 Act; and the usual limitation rules apply. ought not to affect claims under the 2010 Act; and the usual limitation rules apply.

*Miller v Irwin Mitchell LLP* [2022] EWHC 2252 (Ch), [2023] PNLR 1 makes clear that the established principles are still relevant to cases which are brought under the 1930 Act. In *Miller*, the claimant brought a claim against the defendant solicitors in respect of their conduct of personal injury proceedings. The claimant had sustained serious personal injuries at a hotel in Turkey, for which she alleged her tour operator was liable. The defendant solicitors notified the tour operator of the claim, which it passed on to its insurer. The insurer declined to indemnify the tour operator on the basis that it had failed to make a notification within the time period required by the policy. The tour operator also entered into administration. The claimant sued the defendant for negligence, alleging fault in failing to notify the tour operator of her claim at an earlier date. She contended that had the tour operator been notified in time; it would in turn have notified its insurer, who would have provided cover for the claim.

HHJ Cadwallader (sitting as a Judge of the High Court) concluded there

was a 100% chance that the policy would have responded had the insurer been notified at the earlier date. However, a question arose as to whether General Condition 4 of the policy relating to the payment of excess operated as a condition precedent to the obligation to indemnify. General Condition 4 provided that insurers would not make any payment until such time as the insured had paid and exhausted the excess. The claimant argued that since the purpose of the 1930 Act was to ensure that upon an insolvency event a third party could enforce an insured's rights to claim an indemnity under a policy (even though the insured could not pay the excess) General Condition 4 would frustrate the purpose of the Act, and indirectly alter the rights of the tour operator and the insurer in such a way as to be ineffective under s 1(3) of the Act.

HHJ Cadwallader considered that this point had already been taken, and rejected, in *Firma C-Trade SA v Newcastle P & I Association (The Fanti and*

*The Padre Island)* [1991] 2 AC 1, HL. The reasoning in *Firma C-Trade* was that if the insured could not discharge its liability to a third party and was therefore unable to obtain an indemnity in respect of it, that was not because of any *alteration of its rights and its contract of insurance*, but because of its inability, by reason of insolvency, to *exercise* those rights. The same reasoning applied on the present facts to the insolvency of the tour operator.

In coming to this conclusion, HHJ Cadwallader noted that – in contrast – by [\*ss 9\(5\) and \(6\) of the 2010 Act\*](#), Parliament had provided that transferred rights would not be subject to a condition of the insurance contract 'requiring the prior discharge by the insured of the insured's liability to the third party' (albeit the enforceability of such clauses was preserved in certain cases). That provision was not retrospective and accordingly the established principles under the 1930 Act applied. The Court of Appeal will hear an appeal against HHJ Cadwallader's decision later this year.



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# Disclaimer

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