FARRAR'S BUILDING

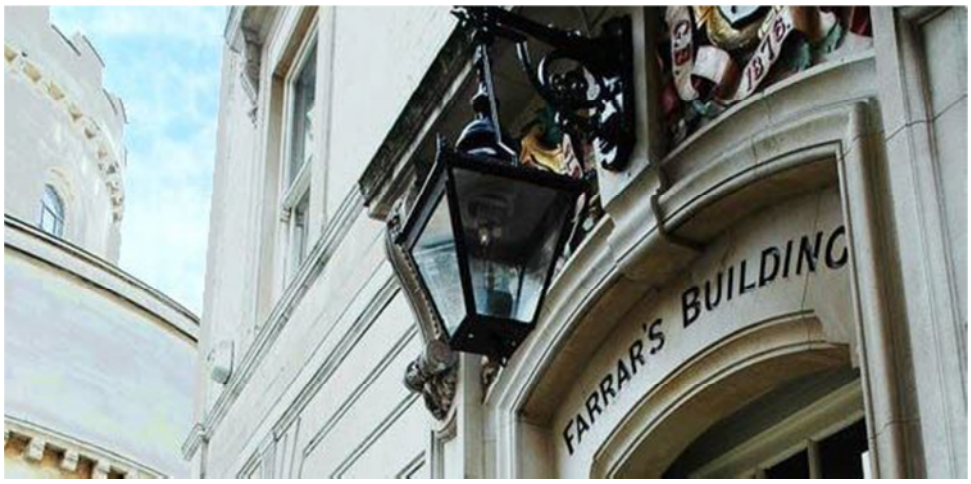
Insurance Update December 2016

Contents:

CHAMBERS OF PATRICK HARRINGTON QC

Farrar's Building
Temple
London
EC4 Y 7BD

www.farrarsbuilding.co.uk



Farrar's Building News

John Meredith-Hardy, Editor

To-date 2016 has been an exciting year for insurance law – six insurance cases have made it to the Supreme Court. **John Meredith-Hardy** analyses two of these, *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* and *Zurich Insurance Co plc v Hayward* that have the common theme of fraud and deceit.

Alan Jeffreys QC, **James Pretsell** and **Hannah Saxena** address the issues of drones in the insurance context and provide an enlightening analysis of this emerging area of social and business activity.

Case summaries are prepared by **Aidan O'Brien, Robert Golin, Jake Rowley, Frederick Lyon** and **Joel McMillan** that chart a number of insurance cases that have found their way before the Supreme Court, the Court of Appeal and at first instance during 2016.

To subscribe to receiving this update, please email **Sehrish Javid.**

Fraudulent claims – the Supreme Court – the give and the take

By **John Meredith-Hardy**

Two Supreme Court judgments handed down within a week each other now set the scene for the definition of a fraudulent claim, and some of the remedies open to an insurer in this event. *Versloot Dredging BV and another v HDI Gerling Industrie Versicherung AG* [2016] UKSC 45 was handed down on 20.7.16 shortly followed by *Zurich Insurance Co plc v Hayward* [2016] UKSC 48 on 27.7.16.

In **Versloot Dredging BV and another v HDI Gerling Industrie Versicherung AG** a ship carrying scrap iron began to take water and the main engine was damaged beyond repair. The cause of the ingress of water was found to have been due to a combination of factors. Unfortunately for the insured, at least until the Supreme Court judgment, a director of the manager of the vessel developed a theory that the bilge alarm had sounded but the crew had been unable to investigate or deal with the leak because of the rolling of the ship in heavy weather. The director pretended that he was told this by members of the crew; this was untrue. The director's reason for acting as he did was due, so he said, to his frustration in the claim not being met by the insurer and he thought that this explanation would speed up the claims process. As it happened, the lie was irrelevant to the merits of the claim and it was found that the insured had a valid claim for €3.24 million.

However, notwithstanding a valid claim Popplewell J found that the use of a "fraudulent device", or a "collateral lie" as Lord Sumption described it in the Supreme Court, was such that the whole claim was forfeit. The Court of Appeal agreed but the Supreme Court reversed the decision with Lord Manse dissenting.

In a typical tour de force, Lord Sumption addressed the fundamental question, what is a fraudulent claim? This issue, of course, is equally prescient now that the Insurance Act 2015 is in force (for contracts after 12.8.16) as the act does not define a fraudulent claim whilst the

consequences of a fraudulent claim are provided for at s.12[1]. Fraudulent claims were posited as a falling into three categories:-

(1) The whole claim is fabricated; nothing more was said – evidently, if the fraud was identified the claim could be repudiated, and, as addressed further below, could in consequence of Zurich Insurance Co plc v Hayward [2016] UKSC result in a recovery of sums paid under a settlement even where there was a suspicion that the claim was false.

(2) There was a genuine claim and the amount had been dishonestly exaggerated. The dishonestly exaggerated claim has a long and distinguished history with the duty of utmost good faith applying not only in the making of a contract of insurance but also in its performance. The principle was that an insured should not be permitted to exaggerate a claim with a possible upside without a corresponding risk of losing something, or as the jurisprudence has developed, everything.

There are many examples of dishonestly exaggerated claims and Versloot does not seek to upset the approach to these claims – if a claim is dishonestly exaggerated, the insured loses everything, including the honestly claimed indemnity. This puts insurance law on a separate footing from the law generally where an exaggerated claim will not generally have this effect apart from where statute has intervened[2].

The justification for insurance claims is that "where a claim has been fraudulently exaggerated, the insured's dishonesty is calculated to get him something to which he is not entitled" and "the reason why the insured cannot recover even the honest part of the claim is that the law declines to sever it from the invented part. The policy of deterring fraudulent claims goes to the honesty of the claim, and both are parts of a single claim" (Lord Sumption para 25). So an insured exaggerates a claim at their peril and risk losing everything.

[1] 12(1) If the insured makes a fraudulent claim under a contract of insurance (a) the insurer is not liable to pay the claim, (b) the insurer may recover from the insured any sums paid by the insurer to the insured in respect of the claim, and (c) in addition, the insurer may by notice to the insured treat the contract as having been terminated with effect from the time of the fraudulent act.
[2] Criminal Justice & Courts Act 2015, s.57 for personal injury claims in cases of fundamental dishonesty

In terms of differentiating an exaggerated claim from a collateral lie, the exaggerated claim "must at least go to the recoverability of the claim on the true facts. By that test, the fraudulent claims rule applies to a wholly fabricated claim ..." (Lord Sumption para 36).

(3) The claim was as above (genuine) but a collateral lie was told to improve the prospects of recovery but the lie was neither an exaggeration of the claim nor was it relevant to the actual entitlement by the insured to the indemnity claimed – it was truly collateral. Following the Agapitos v Agnew (The Ageon) [2003] QB 556 it had been thought that the law on collateral lies followed that of exaggerated claims – the insured forfeited all. There had to be some objective relevance to the claim i.e. the lie was directly related and intended to promote the claim and "a not insignificant improvement in the insured's prospects"[3] – but that was all.

The approach in The Ageon was subsequently followed in Stemson v AMP General Insurance (NZ) Ltd [2006] Lloyds Rep IR 852 and Beacon Insurance Co Ltd v Maharaj Bookstore Ltd [2014] 4 All ER 418. The point of principle was also referred to by the Supreme Court in Summers v Fairclough Homes Ltd [2012] 1 WLR 2004 though only by analogy. For these reasons Popplewell J felt compelled to find for the insurer in Versloot, and the Court of Appeal similarly.

However, in the Supreme Court it was decided that "The position is different where the insured is trying to obtain no more than the law regards as his entitlement and the lie is irrelevant to the existence or amount of that entitlement. In this case the lie is dishonest, but the claim is not" (Lord Sumption para 26) and "it is disproportionately harsh to the insured and goes further than any legitimate commercial interest of the insurer can justify" (Lord Sumption para 36).

In a powerful dissenting judgment, Lord Mance sought to promote the central importance of the honest pursuit of insurance claims and that "abolishing the fraudulent devices rule means that claimants pursuing a bad, exaggerated or questionable claim can tell lies with virtual impunity" (para 128). For now, however, collateral lies will not prevent a claim for an indemnity; whether by

[3] Agapitos v Agnew (The Ageon) [2003] QB 556 Lord Mance para 38

statute the government will make good the deficiency that insurers may now perceive, as it did after Summers v Fairclough Homes Ltd, will have to be seen.

Whilst the Supreme Court have taken away repudiation by reason of collateral lies, in **Zurich Insurance Co plc v Hayward** the Supreme Court found that where insurers settled with a third party a personal injury claim against an insured they could re-visit the settlement that was subsequently found to have been influenced by dishonest statements.

Zurich v Hayward had a tortuous 18 year history – remarkably, the accident was on 9.6.98, the settlement by way of a Tomlin order for £134,973 on 3.10.03, the discovery of new evidence that would suggest fraudulent misrepresentation in 2005, commencement by Zurich of proceedings for deceit in 2009, a first visit to the Court of Appeal in 2011 over a strike out of Zurich's claim, setting aside of the Tomlin order for deceit in 2012 after a 4 day trial, and a trial on quantum in 2013 that found the claim was really worth £14,720 and that £97,780 plus interest should be re-paid to Zurich. The reduction from £134,973 to £14,720 tells you all you need to know about the claimant's dishonesty. The second visit to the Court of Appeal was in 2015 in which the trial judge's finding on fraudulent misrepresentation was set aside on the basis that the insurer was not induced by the claimant's deception.

In the Supreme Court the issues were agreed-

(1) "In order to set aside a compromise on the basis of fraudulent misrepresentation, to show the requisite influence by or reliance on the misrepresentation: a) must the defrauded representee prove that it was induced into settlement because it believed that the misrepresentations were true; or b) does it suffice to establish influence that the fact of the misrepresentations was a material cause of the defrauded representee entering into the settlement?", and (2) "Under what circumstances, if any, does the suspicion by the defendant of exaggeration for financial gain on the part of the claimant preclude unravelling the settlement of that disputed claim when fraud is subsequently established?" (Lord Clarke para 17).

On (1), questions of 'inducement' were issues of fact and 'belief' was not required. The consideration facing all insurers when settling a claim in circumstances where there is doubt about the truthfulness of the claims is not what the insurer believes, but what the insurer considers in their judgment a trial judge may believe. Therefore, if the fraudulent misrepresentations were "material" to this issue, this is sufficient to prove inducement. The point

was causation, not one of belief. Similarly, the inducement need not be the sole cause for settlement as long as it was a cause. Indeed, Lord Clarke went so far as to say that once it had been found there was a fraudulent misrepresentation, there was a presumption in favour of causative effect that was "very difficult to rebut" (para 37). Further, that "qualified belief or disbelief does not rule out inducement, particularly where those investigations were never going to find out the evidence that subsequently came to light" (para 40). Consequently, on (2) it was difficult for Lord Clarke to envisage any circumstances in which mere suspicion that a claim was fraudulent would preclude unravelling a settlement when fraud is subsequently established (para 48).

Lord Toulson approached the appeal as being "important both as a matter of law and for its practical consequences for insurers and dishonest claimants" (para 50) and "it is possible for a representor to make a false and fraudulent misrepresentation, with the intention of influencing the representee to act on it to its detriment, without the representee necessarily believing it to be true. If the representor succeeds in his object of influencing the representee to act on the representation to its detriment, there will be the concurrence of fraud and deceit in the representor and resulting damage to the representee. In principle, the representee should therefore be entitled to a remedy in deceit" (para 67).

In both **Versloot** and **Zurich** the court had to grapple with the difficulties faced by insurers in dealing with fraudulent claims. Causation in both was central to the court's determination and in Versloot, the absence of sufficient causative potency of the deceitful actions denied the insurer a substantive remedy in consequence of the disproportionate outcome. Whether statutory intervention will reinstate the position is to be seen. Certainly for now, insurers will suffer the risk of being strung along by non-causative lies without a substantive remedy other than in costs. Meanwhile, the deceitful claimant whose claim is settled can never sleep easily – if he or she is found out the settlement can be set aside, and no doubt for personal injury claims issued after 13.4.15, the whole of the claim dismissed for being fundamentally dishonest pursuant to the Criminal Justice and Courts Act 2015, s.57.

Drones and Insurance

By **Alan Jeffreys QC, James Pretsell and Hannah Saxena**

In April a British Airways jet flying at 1,700 feet above Richmond in South West London struck an object that was widely reported at the time to have been a drone. A number of issues were highlighted: who was flying it and how could the culprit be traced; should there be a register of drone owners; how frequent are near-misses between drones and aircraft;[1] and, what are the potential consequences for those in the air and on the ground should a collision occur.

It is clear that the potential consequences could be catastrophic. A jet falling out of the sky following a collision is, of course, the nightmare scenario. However the consequences may be no less fatal for the innocent bystander in a local park who is struck by a malfunctioning drone being flown for recreational purposes.

That the offending drone above Richmond is likely in fact to have been a plastic bag does not detract from the immediacy of these issues, especially for the insurance lawyer. The use of drones - whether commercially or recreationally - entails substantial risk and exposure for those insurers providing an indemnity for this type of activity. This article sets out the framework for the regulation of drone operation and insurance, some specific instances of coverage in the domestic setting and considers the risks and issues likely to be faced by insurers.

Drones and the law

This is not intended to be a comprehensive statement of the law,[2] but in general:-

a) The person in charge of a small unmanned aircraft must satisfy himself that the flight can safely be made, must maintain direct unaided visual contact with the drone sufficient to monitor its flight path in order to avoid collisions, must not cause any article to be dropped from the drone, and must not fly the drone for aerial work without permission

[1] 40 were reported in 2015 to the air safety organisation, the UK Airprox Board.
[2] For which see the Air Navigation Order 2009 as amended at articles 138,166, 167, and 255.

from the Civil Aviation Authority ("CAA"). Additional rules apply to a drone which has a mass exceeding 7Kg (15.4 lbs) including restrictions on flying in specified airspace, within aerodrome traffic zones, and a height ceiling of 400 feet above the surface.

b) Additional rules apply to unmanned surveillance aircraft, a description which embraces any drone equipped with a camera. Without CAA permission, such a drone may not be flown over or within a congested area, over or within 150 metres of an organised open air assembly of more than 1,000 persons, within 50 metres of any vessel, vehicle or structure, or within 50 metres of any person. Exemptions apply to the person in charge of the drone, and to persons under his control. By the beginning of June 2016 The CAA had granted permissions to 1,769 persons and organisations. The majority sought permission for sub 7kg surveillance drones.

Do people operating drones need insurance?

It may seem obvious that given the potential for accidental damage and injury, insurance would be a prerequisite to cover the drone operator. However, it appears that many recreational drone operators are not aware of the possible consequences of being uninsured.

The CAA is the organisation responsible for ensuring compliance with any insurance requirements of aircraft carriers or aircraft operators.[3]

They have guidance on their website for the operation of drones that includes a short guide video and a drone aware two page leaflet (http://www.caa.co.uk/droneaware). As summarized above, the guidance makes it clear that the operator is legally responsible for the safe conduct of each flight and responsible for any collisions. It also sets out that if the operator is intending to use the drone for any kind of commercial activity then a Permission needs to be obtained from CAA. The CAA website explains the procedure for an application for a Permission and indicates that *"An adequate level of insurance will need to be obtained by an operator before a Permission is granted. Applicants should discuss these requirements directly with insurance providers"*. The downloadable application form which must be completed and submitted to the CAA (SRG1320) for the

[3] Regulation 3(1) of The Civil Aviation (Insurance) Regulations 2005

purpose of obtaining a Permission for an exemption to fly an unmanned aircraft under 20kg, or an aerial work Permission, or a small unmanned surveillance aircraft Permission requires various documents to be submitted after the signed declaration including "*Copy of Insurance Details (where applicable)*".

What about recreational use?

The CAA's detailed guidance in respect of drones is contained in 'Unmanned Aircraft System Operations in UK Airspace – Guidance (CAP 722)', 24th March 2015. The guidance on insurance appears at §2.21, providing that:-

> "EC Regulation 785/2004 came into force on 30 April 2005 requiring most operators of aircraft, irrespective of the purposes for which they fly, to hold adequate levels of insurance in order to meet their liabilities in the event of an accident"

There is little further guidance in CAP 722 or on the CAA website about whether drones would be an aircraft for the purposes of the EC Regulation 785/2004 ("the EC Insurance Regulations") and whether their operators need to obtain insurance, so it is necessary to look at the EC Insurance Regulations and the Civil Aviation (Insurance) Regulations 2005 to determine exactly who is required to hold insurance.

The EC Insurance Regulations

The EC Insurance Regulations require all air carriers and aircraft operators falling within the scope of the EC Insurance Regulations to be insured "as regards their aviation-specific liability in respect of passengers, baggage, cargo and third parties" – Article 4(1).

Article 2 of the EC Insurance Regulations sets out its scope as being for "all air carriers and to all aircraft operators flying within, into, out of, or over the territory of a Member State to which the Treaty applies" and provides various exceptions:-

> "(a) State aircraft as referred to in Article 3(b) of the Convention on International Civil Aviation, signed at Chicago on 7 December 1944;
> (b) model aircraft with a Maximum Take Off Mass ('MTOM') of less than 20 kg;
> (c) foot-launched flying machines (including powered paragliders and hang gliders);
> (d) captive balloons;
> (e) kites;
> (f) parachutes (including parascending parachutes);
> - are used for non-commercial purposes, or

- are used for local flight instruction which does not entail the crossing of international borders,
in so far as the insurance obligations under this Regulation relating to the risks of war and terrorism are concerned."

Article 3 provides the following definition of aircraft operator:-

"means the person or entity, not being an air carrier, who has continual effective disposal of the use or operation of the aircraft; the natural or legal person in whose name the aircraft is registered shall be presumed to be the operator, unless that person can prove that another person is the operator"

There is no definition of what a model aircraft is for the purposes of the EC Insurance Regulations.

If it is assumed that a model aircraft would encompass a drone then an operator is highly likely be exempt from the insurance requirement under the EC Insurance Regulations since drones that are used for non-commercial purposes invariably weigh less than the threshold MTOM of 20 kgs.

The Civil Aviation (Insurance) Regulations 2005

The Civil Aviation (Insurance) Regulations 2005 makes it an offence for failing to comply with the insurance requirements of the EU Insurance Regulations (Reg 4(1)). They adopt the definitions provided by the EC Insurance Regulations and do not provide any further insight into whether or not insurance is a requirement for drone operators.

What is a non-commercial purpose?

Commercial operation is defined as follows by Article 3 of the EC Insurance Regulations:

"means an operation for remuneration and/or hire".

Therefore any purpose which could generate income must be a commercial purpose and require the drone operator to hold insurance.

In terms of the use of drones by the general public the following uses are identified on the Drones Public Dialogue set up by the Government to consult on drones policy (http://dronespublicdialogue.co.uk/uses-of-drones/):-

- Hobbyist that "likes to build / buy equipment" and "might be part of a club and participate in competitions e.g. drone racing with others"

- Leisure users that buy or are given a drone as a gift and might "take photos/video e.g. on holiday", "use to film adventure sports" and "fly in garden or in park for leisure"

Most commercial uses will be obvious especially if the drone is being used by a company or organisation. However, there are likely to be a number of grey areas where it is not clear whether the purpose is non-commercial or not. For example the following uses could be deemed commercial:-

- Those who use their drone to race in competitions where there is a prize; or

- Those filming adventure sports or something from holiday intending to put the films on YouTube.

Commercial uses of drones

Commercial use of drones is expanding into a number of different sectors and their current uses are said to include aerial photography and videography, inspecting planes and bird scaring at airports, accessing and inspecting oil rigs, surveying of buildings and other structures, inspecting power lines and rail tracks, agricultural uses including crop monitoring, and assisting in search and rescue. The scope of commercial drone use is likely to expand further. By way of illustrative innovation, many wedding photographers are embracing the technology in order to obtain good shots / videos of the whole wedding party from a height.

From a cursory search on the internet it is evident that there are specific drone insurance policies to cover drone operators, as is necessary where there is a commercial purpose. As drones are used more and more for commercial uses, as well as for uses that fall within a grey area, the number of companies offering drone insurance will surely increase and may provide a niche for the astute insurer.

Home Insurance Coverage for Drone Use

Certain home insurance policies potentially provide some form of cover for liability arising out of the recreational use of drones. Almost invariably the nature of the coverage provided will be found in the Contents section of the Home Insurance Policy; specifically, the cover provided - and its exclusions- will normally be described in the section dealing with coverage for personal liability for accidental bodily injury or damage to property under public liability.

The definitions of the nature of the coverage and, perhaps more interestingly, the exclusions vary widely. Here are two examples of exclusions from coverage for personal liability drawn from the current policies of two large UK insurers:

> Insurer 1: 'We will not cover liability in connection with… aircraft other than pedestrian controlled toys or models'; and,
>
> Insurer 2: 'What is not covered: Any liability resulting from you or your family owning or using… c) Watercraft, hovercraft or aircraft including drones'.

These two major UK insurers have adopted a stark difference in approach to exclusions. Insurer 2 excludes from coverage any liability arising from the use of drones. Insurer 1's approach is the more interesting not least because the policy does not mention the word 'drone' preferring the phrase 'pedestrian controlled toy or model'.

Let us focus on the use of the word 'toy'. A toy is ordinarily defined as 'a plaything' or 'an object to be played with usually by a child'. A toy is therefore defined by reference to its intended or usual use. In most instances, there is little difficulty in establishing whether an object is a toy since its purpose is exclusively to be played with. A water pistol, a doll or a teddy bear have little to no practical purpose other than to be played with.

This is not however the case for a drone equipped with visual recording equipment. A drone of this type clearly has a variety of potential commercial uses. Indeed it may be marketed as such. If a parent gives a drone of this type as a gift to a teenage child who then injures somebody while filming himself and his friends in the local skateboard park, is Insurer 1 entitled to refuse indemnity on the ground that this drone is not a toy? Does the fact that the drone is being used

recreationally albeit that is marketed as an item of commercial equipment mean that it falls within the definition of 'toy' and so Insurer 1 is contractually bound to indemnify?

These are difficult questions of construction that could perhaps be easily avoided by focusing on the commercial or recreational use of the drone rather than defining the exclusion by reference to the word 'toy'. Insurers may be better advised to exclude cover for the use of drones for commercial as opposed to recreational purposes.

Recreational or Commercial Use

Focusing on the use to which a drone is put in order to establish coverage may also generate some difficulties of interpretation. The distinction drawn by the CAA is between commercial and recreational use. This distinction can become blurred rather rapidly if the footage captured by the drone is uploaded to YouTube.

The use of drones recreationally tends to involve recording video footage. That footage is almost invariably shared on a variety of social media platforms. YouTube is by some margin the most popular platform for sharing video footage.

Some curious consequences have flowed from the YouTube business model of 'monetisation' whereby an uploader is able to generate income from views of footage once a certain threshold of views has been passed.

The intimately domestic scene of a young child biting his older sibling's finger has been viewed over 800 million times. The clip has generated a significant income for the family. However the clip was originally uploaded for the sole purpose of sharing it with the boys' godfather who lived in the United States. When the footage was taken there was no commercial use intended nor indeed was any commercial use intended when it was uploaded. However the subsequent 'monetisation' of the clip means that it is undoubtedly now being put to commercial use.

Footage from a drone of an incident where that drone has caused personal injury or property damage will appeal to the ghoulish fascination that seems to be at the root of a substantial

amount of internet traffic. Such footage, if uploaded, may well receive sufficient views to enable the uploader to derive some income. Some interesting questions follow.

If the drone was being put to recreational use at the time that the injury or damage was caused, would the operator lose the benefit of coverage if he were subsequently to receive income from the footage taken from the drone? Can monetisation of a clip after the event alter the nature of the use to which the drone was being put at the time of the event? Could an insurer refuse to indemnify on this basis? This article is not the place to attempt a definitive answer.

Other areas of potential dispute may arise from the recreational and commercial use of drones. Overflights, trespass, noise, and privacy are all foreseeable sources of litigation. By way of example, the current Air Navigation Order Article 167 is intended to prevent the flight of any small unmanned surveillance aircraft within 50 metres of any person. However, small camera technology is advancing apace and current cameras are probably already capable of taking high resolution pictures of individuals and their activities at a greater distance than 50 metres.

From the insurer's viewpoint when contemplating household policies, decisions will need to be taken as to what drone activity – if any - is and is not an area in which they wish to provide coverage, and to carefully draft policy wording accordingly. For the insurer who wishes to enter the niche market, particularly for the commercial drone operator, some care will need to be taken as to precisely what is and what is not covered, and what limit of indemnity is to be offered.

Some assistance may be gained by looking at the picture in the USA. Until recently the Federal Aviation Authority required commercial operators to hold a pilot's licence to fly drones, and to apply for permission on a case by case basis. This will change with effect from this August, and similar rules to those imposed by the CAA in the UK will apply, with the addition that the drone must carry lights visible from a substantial distance. It can be assumed that insurers within the USA are looking at similar issues to some of those set out above.

FARRAR'S BUILDING

Insurance Update December 2016

Case Law Update


Aidan O'Brien


Robert Golin


Jake Rowley


Frederick Lyon


Joel McMillan

Impact Funding Solutions Limited v AIG Europe Insurance Ltd (formerly known as Chartis Insurance (UK) Ltd) [2016] UKSC 57 (26.10.16)
(Lord Mance, Lord Sumption, Lord Carnwath, Lord Toulson, Lord Hodge)

Significance: The appeal raises a legal question of general public importance both because it concerns a term of an insurance policy, which is, or is similar to, terms in all professional indemnity insurance policies for solicitors in England and Wales, and also because it is important to the business model by which many solicitors currently fund litigation.

Facts: Impact Funding Solutions ("Impact") entered into a disbursements funding master agreement ("DFMA") with solicitors, Barrington Support Services Ltd ("Barrington"), by which Impact, by entering into loan agreements with Barrington's clients, provided funds to Barrington to hold on behalf of its clients and to use to make disbursements in the conduct of its clients' litigation in pursuit of damages for industrial deafness.

Barrington failed to perform its professional duties towards its clients in the conduct of the litigation by not investigating the merits of their claims adequately and through the misapplication of funds provided by Impact, breached their duty of care to them and Barrington put itself in breach of a warranty in its contract with Impact.

Barrington's clients were not able to repay their loans. Impact sought to recover from Barrington the losses which it suffered on those loans by seeking damages for the breach of the warranty. On 30 March 2013, the High Court awarded Impact damages of £581,353.80. On Barrington's insolvency, Impact sought to recover these losses from Barrington's professional indemnity insurers AIG Europe Ltd ("AIG"), under the Third Parties (Rights against Insurers) Act 1930.

The issue in the appeal concerned the construction of an exclusion clause in Barrington's professional indemnity policy ("the Policy") and whether the DFMA fell within the scope of an exclusion clause, and as a result, the Policy excluded cover in relation to Impact's cause of action.

On 13 December 2013, the High Court held that Impact's claim against AIG for an indemnity failed. In a judgment dated 3 February 2015 the Court of Appeal allowed Impact's appeal. AIG appealed to the Supreme Court.

Held: The Supreme Court allowed AIG's appeal by a majority of 4 to 1. The general doctrine that exemption clauses should be construed narrowly had no application to the relevant exclusion in this Policy. The extent of the cover in the Policy was to be ascertained by construction of all its relevant terms without recourse to a doctrine relating to exemption clauses.

The boundaries of AIG's liability were to be ascertained by construing the broad statement of cover and also the broad exclusions in the context of the regulatory background. Two questions arise: (i) whether the contract between Impact and Barrington was a contract by which Impact supplied services to Barrington in the course of Barrington's provision of legal services; and (ii) whether it is necessary to imply a restriction into the relevant Policy exclusion clause limiting its effect in order to make it consistent with the purpose of the Policy.

The DFMA and the resulting loans to Barrington's clients were a service which Impact provided to Barrington Therefore, the DFMA was a contract for the supply of services to Barrington. That conclusion accords well with the essential purpose of the Solicitors' Indemnity Insurance Rules 2009 to protect the section of the public that makes use of the services of solicitors, the relevant clause in the 2009 Rules being substantially the same as the exclusion clause.

There was no basis for implying additional words into the exclusion in order to limit its scope. Impact's cause of action under the DFMA was an independent cause of action. Excluding such a claim created no incoherence in the Policy. Indeed, it would be consistent with the purpose of the Policy of ensuring that protection was provided to the clients of solicitors if such a claim were excluded.

Western Trading Ltd v Great Lakes Reinsurance (UK) Plc [2016] EWCA Civ 1003 (11.10.16)
(Laws LJ; Lewison LJ; Christopher Clarke LJ)

Significance: When there has been destruction by fire, reinstatement has *not* occurred and the policy provided for an indemnity only where reinstatement *had* occurred, what is the remedy? The CA approved a declaration that if the insured reinstated the property there was an entitlement to an indemnity.

Facts: An insurer appealed against a declaration that the insured company was entitled to be indemnified in respect of losses it had suffered as a result of a fire up to the limits of indemnity in the insurance policy.

At trial, the insurer unsuccessfully attempted to avoid the policy by asserting that the company had no insurable interest in the property and that the policy was avoidable for misrepresentation, non-disclosure, and breach of warranty. The property was insured for rebuilding costs of over £2 million, although the market value was around £75,000 based on its existing condition and user. The insuring clause of the policy was subject to a memorandum that restricted cover to reinstatement costs that had already been incurred. The judge granted a declaration giving the

company the right to be indemnified up to the limit of indemnity for the cost of reinstating the building, if it did in fact reinstate it.

The insurer appealed and argued that reinstatement of the listed building would impede development and reduce the market value of the site for redevelopment so that the company had suffered no actual loss.

Held: Appeal allowed in part. Where real property was destroyed the measure of indemnity to which the insured was entitled would depend on the terms of the policy; the interest of the insured in the property, and the facts including the intention of the insured. As no reinstatement had taken place, no costs had been incurred and it was necessary to consider what would have been payable under the policy if the memorandum had not been incorporated.

Where an insured was obliged to replace the property, for example in the case of a tenant with an obligation to reinstate or repair, the indemnity was to be assessed by reference to the value of the property to the insured at the time of the peril. Normally the loss was the cost of reinstatement. However, it might be different if the insured was trying to sell the property, or intending to destroy it anyway. An insurer who paid out had no redress if the money was not used in reinstatement and it was therefore open to the court to decline to make an immediate award of damages and instead either give declaratory relief, or postpone assessment of the extent of indemnity.

The advantage of a declaration was that any dispute about whether what had been done amounted to reinstatement could then be resolved in the light of the facts. The power of the court to make a declaration was discretionary and was not circumscribed by any statute or rule. However, it had been wrong to make the declaration with the wording originally put forward by the company as it had not made clear that if reinstatement was carried out the insurers would be required to indemnify the company in respect of the cost up to the limits of the policy. A change in the wording remedied that defect.

Moreno v The Motor Insurers' Bureau [2016] UKSC 52 (3.8.16)
(Lord Mance, Lord Clarke, Lord Sumption, Lord Toulson and Lord Hodge)

Significance: When assessing damages due to a claimant under The Motor Vehicles (Compulsory Insurance) (Information Centre and Compensatory Body) Regulations 2003 ("the 2003 Regulations"), such damages are to be assessed according to the law of the state in which the accident occurred. The cases of *Jacobs v MIB* [2010] EWCA Civ 1208, and *Bloy v MIB* [2013] EWCA Civ 1543, are expressly overruled in relation to their interpretation of the meaning of Regulation 13(2) (b) of the 2003 Regulations.

Facts: The appellant suffered serious injuries when she was struck by an uninsured driver whilst on holiday in Greece. She brought her claim against the MIB under Regulation 13 of the 2003 Regulations. At first instance, Gilbart J was bound by the authority in *Jacobs* and *Bloy* to hold that the applicable law, so far as the measure of compensatory damages was concerned, was English law. Gilbart J saw very considerable force in a contrary conclusion and granted a "leapfrog" appeal to the Supreme Court under s. 12 of the Administration of Justice Act 1969.

Held: The appeal allowed. There was no suggestion in the 2003 Regulations, the Explanatory Note, or elsewhere, of any intention on the domestic legislator to do anything other than faithfully implement and give effect to the Directives.

Two issues arose on the appeal: (i) whether the Directives prescribe any particular approach to the scope or measure of recovery applicable in a claim against a compensation body under Article 7 of the Fourth Directive; and (ii) if they did, whether the language of Regulation 13(2) (b) of the 2003 Regulations reflected that approach, or mandated some different approach, whatever the Directive may have required.

The consistent aim of the scheme was to improve the prospects of ease with which injured parties could recover compensation to which they were entitled. The inference was, irrespective of which provision of the Directive the victim of a motor accident might have recourse to, that the compensation to which he was entitled remained the same – it was the same compensation

as that to which the victim was entitled as against the driver responsible, or his insurer, or failing that, as against the guarantee fund of the state of the accident.

The analysis of the Court of Appeal in *Jacobs* would mean that the measure of compensation could vary according to the happenchance of the route to recovery which the victim chose or was forced to pursue: if the victim pursued the responsible driver or brought a direct action against his insurer or a claim against the insurer's local claims representative, the measure of damages would be that applicable in the state of the accident, normally measured in and under the law of the state of the accident. If, however, no insurer or vehicle could be identified, the victim could recover whatever might be the measure of compensation provided by his local law.

It would not be consistent with the scheme, or the precursor Green Card System, or with the scheme of the series of EU Directives and associated agreements from 1972 onwards, for the compensation body established and acting under the Fourth Directive to provide compensation other than in accordance with the law of the state of the accident. The scheme of the Directives was clear – they do not leave it to individual member states to provide for compensation in accordance with any law that such states may choose; they proceed on the basis that a victim's entitlement to compensation will be measured on a consistent basis, by reference to the law of the state of the accident.

The Court of Appeal was wrong in *Jacobs* to draw a distinction (based on the common law) between liability and heads of damage on the one hand, and measure of compensation on the other, and to find such a distinction present in Regulation 13(2) (b) of the 2003 Regulations. *Jacobs* and *Bloy* would be overruled in relation to their interpretation of Regulation 13(2) (b). The respondent's damages would be assessed in accordance with Greek law.

Atlasnavios – Navegação LDA v Navigators Insurance Company Limited [2016] EWCA Civ 808 (1.8.16)
(Lord Justice Laws Lord Justice Christopher Clarke and Sir Timothy Lloyd)

Significance: The interpretation of standard war risks clauses, where coverage is excluded for detention due to drug smuggling and the vessel owner is not complicit in the smuggling; the interpretation of policy terms and exclusion in particular, are of general application to insurance contracts.

Facts: 132 kg of drugs were found strapped to the hull of the vessel in Venezuela. Pursuant to Venezuelan law, the vessel was seized and confiscated. Although the ship's master and chief officer were convicted of complicity the parties agreed that their convictions were unsafe. The policy excluded loss and damage arising from "arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations". There was a trial of an issue (Hamblen J) and a further hearing (Flaux J) and it was found that the exclusion did not apply as, inter alia, malicious acts were not excluded (and were expressly included). The insurers appealed.

Held: By reference to first principles, coverage was not extended to the loss as it arose from one of the matters excluded by the policy. And "put ... simply" "The concealment of the drugs was the malicious act. It was also an infringement of the regulations. Concealment carried with it the risk of discovery and, thereafter detention. The malice of the smugglers lay in their reckless indifference to the consequences to the vessel of the discovery of what they had concealed on the vessel. The loss was caused by the combination of (i) the initial concealment and (ii) the subsequent detention. That detention was by reason of the concealment, which constituted the infringement. The argument of the owners is designed to remove infringement as a proximate cause because it duplicates the malicious act which constituted the infringement. But that is to jettison the wrong thing. The second cause was the detention, which undoubtedly occurred by reason of the concealment which constituted the infringement. Hence the owners' need to exclude, as a matter of construction or implication, from the operation of clause 4.1.5 an infringement consisting of the relevant malicious act, which, for the reasons that I have given, does not appear to me to be justified"

Campbell v Peter Gordon Joiners Ltd [2016] UKSC 38 (6.7.16)
(Lady Hale, Lord Mance, Lord Reed, Lord Carnwath, Lord Toulson)

Significance: Whether an employee could pursue the director of the employer company for a failure to have insurance in place for a work place accident.

Facts: In June 2006, C sustained injuries whilst operating an electric circular saw. In 2009 the company went into liquidation. At the material time, the company had the benefit of employers' liability insurance; however, the policy excluded claims arising from the use of electric woodworking machinery. The company's failure to have appropriate insurance was a breach of the Employers' Liability (Compulsory Insurance) Act 1969 s.1 (1). C sought damages against G for the company's failure to provide adequate insurance cover.

Held: The Supreme Court dismissed the appeal (Lady Hale and Lord Toulson dissenting).

Section 5 of the Employers' Liability (Compulsory Insurance) Act 1969, did not impose a duty to insure on a director, nor any civil liability for failure to do so. The Section 5 duty rested on the corporate employer. As a general rule, where a statute imposed an obligation, and a criminal penalty for failure to comply, there was no civil liability. Parliament had recognised that a director or officer could bear some responsibility for the failure to insure, but had dealt with it by a specific and closely defined criminal penalty linked to the criminal liability of the company.

The language of Section 5 was deliberately chosen, and was specifically directed at criminal liability. It was difficult to infer an intention to impose by implication a more general liability of which there was no hint in its actual language.

Wigley-Foster v Wilson [2016] EWCA Civ 454 (16.5.16)
(Lady Justice Gloster, David Richards LJ and Sir Robin Jacob)
Significance: The judgment confirms the entitlement of RTA victims of accidents in EU countries but domiciled in the UK to claim against the MIB where the local insurer has become insolvent.

Facts: C was injured in a RTA in Greece whilst a passenger in a Greek rental car insured by a Greek insurance company. The insurer became insolvent resulting under Greek law to an entitlement to compensation from the "Greek Auxillary Fund". C approached the MIB who denied liability. On a preliminary issue the judge (HHJ Simon Brown, QC) found for the MIB. C appealed.

Held: A claim could be brought against the MIB and the insurer's insolvency did not mean that the Fourth Motor Insurance Directive did not apply.

Mitsui Sumitomo Insurance Co Ltd. v Mayor's Office for Policing and Crime [2016] UKSC 18, [2016] 2 WLR 1148 (20.4.16)

(Lord Neuberger PSC, Lord Clarke, Lord Hughes, Lord Toulson, Lord Hodge JJSC)

Significance: Statutory compensation under the Riot Damages Act 1886 was limited to damage to property, in particular no consequential losses are recoverable. The case, while currently good law, is due to become of historical interest following the introduction of the Riot Compensation Act 2016 which repeals the Riot Damages Act. Royal assent has been received but the relevant sections of the Riot Compensation Act are not yet in force at the time of writing.

Facts: The claim arose out of the riots which occurred in London in 2011. A large amount of property was damaged as a result of the civil unrest. The Riot Damages Act 1886 allows for compensation to be paid by the state for damages caused during riots. On 8th August 2011 a number of rioters broke into the Sony DADC warehouse in Enfield, they stole goods and also started a fire which ultimately destroyed the building and the stock. Inevitably the owners suffered consequential losses including loss of business, loss of profits and loss of rent. Claims were brought against the MOPC for property damage and consequential losses. It was eventually conceded that the MOPC would compensate the uninsured individuals and the insurance companies who had paid out on their policies however the MOPC's liability to compensate consequential losses remained in issue.

Held: Whether claims for consequential losses could be made was a matter of statutory construction which could be resolved by looking at the Riot Damages Act 1886 and the prior legislative history. The Riot Damages Act did not provide any compensation for personal injury or damage to property in the streets; accordingly it only provided partial compensation on any reading.

The wording of prior legislation including The Remedies against the Hundred (England) Act 1827 and the Malicious Damages Acts of 1812 and 1816 made it clear that the statutory compensation had historically been confined to physical damage to property, this restriction had not been removed by the 1886 act. Accordingly it was held that there could be no claim for statutory compensation in respect of losses consequential on property damage caused during riots.

Howe v Motor Insurers' Bureau [2016] 1 W.L.R. 2707 (22.3.16)
(Stewart J)

NB – a separate judgment (citation [2016] 1 W.L.R. 2751) deals with an important QOCS point. For further details, please see the case law update in our July 2016 Personal Injury Update (link here). An appeal is currently outstanding on the QOCS point.

Significance: In relation to the limitation period in a statutory claim against the MIB under Reg. 13(1) (b) of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 ("the Regulations", link here), it was not an ingredient of the cause of action to make a request for information from the MIB under Reg. 9(2) of the Regulations.

Facts: Mr Howe (H) was rendered a paraplegic following an accident in France in March 2007. The blameworthy vehicle, its driver and insurer could not be identified. In September 2007, H wrote to the MIB to inform it of the accident with an untraced driver. However, it was not until much later, in November 2014, that H wrote to the MIB to request disclosure of relevant information under Reg. 9 of the Regulations. Over 7 years post-accident, in December 2014, H brought a claim for compensation against the MIB under Reg. 13(1) (b) of the Regulations. The Court tried the issues of limitation and the MIB's liability to compensate H as preliminary issues.

Held: The Court rejected the MIB's argument that that its liability to compensate H was dependent upon the similar fund in France, the Fonds de Garantie (the FDG), being liable to compensate H. The Court found that it was bound by Jacobs v MIB [2011] 1 All ER 844 and Bloy v MIB [2013] All ER (D) 344 (Nov). In particular, Bloy stated that Reg. 13(2) (b) was a deeming provision, meaning that the assessment of compensation was governed by British law (see paras. 45-48).

As to limitation, H's cause of action was a statutory cause of action arising under Reg. 13 of the Regulations. Therefore, under s.9 of the Limitation Act 1980 the limitation period was six years from the accrual of the cause of action. In claims involving untraced motorists, the requirement in Reg. 13(1) (b) that the injured party had made a request for information under Reg.9 (2) was not a necessary ingredient of the cause of action. Accordingly, time ran from the date of the accident and not from the date on which H requested information from the MIB. The claim was therefore statute barred under English law (see paras. 82–87, 106, 108, 109).
As to H's argument that the MIB was estopped from relying on a limitation defence, the Court found for the MIB. The MIB had not made an unequivocal or unambiguous promise or representation that it did not intend to enforce its legal rights. Further, H had not relied upon, or altered his position in respect of, any alleged promise or representation.

UK Insurance Ltd v Holden [2016] 4 W.L.R. 38 (19.2.16)
(Judge Waksman QC)

Significance: A car insurance policy that provided cover for property damage caused during 'use' of a vehicle did not extend to property damage caused during repairs to the vehicle. Importantly, Vnuk v Zavarovalnica Triglav was considered and *obiter*, the limited scope of compulsory motor insurance in English law pursuant to s. 145(3) of the Road Traffic Act 1988 ('the Act') was incompatible with the requirements under EU law.

Facts: The First Defendant (H) was an employee of the Second Defendant (A). H undertook repairs to his car in A's loading bay. While welding, he accidentally ignited some flammable material, which led to extensive damage to A's premises and the adjoining premises. A's insurer

paid A and the owner of the adjoining premises, and brought a subrogated claim against H for an indemnity.

H's insurance policy ('the policy') included cover for an individual who had an *'accident in your vehicle'* which killed or injured someone or caused damage to *'their property'* or *'their vehicle'*. The policy stated that it provided the minimum cover required under UK and EU law.

The Claimant, H's insurer (UKI), sought a declaration that the policy did not cover the damage to the premises.

Held: A declaration was granted in favour of UKI.
(1) The policy was poorly worded as it implied that damage to property was only covered if it belonged to someone who had been killed or injured in the accident. Pursuant to the minimum requirements under s. 145(3) (a) of the Act, the policy should be read to cover liability for damage *'caused by or arising out of the use of* [the] *vehicle'*.

(2) While the minimum requirement under the Act was that cover is provided for vehicles when on a road or other public place, there was no such express limitation in the policy. The policy could be construed to be more generous than the minimum requirements under the Act: British Waterways v Royal & Sun Alliance Insurance [2012] Lloyd's Rep. I.R. 562 applied. The policy therefore covered the accident location.

(3) Had it been necessary to decide, the provision in s.145 (3) of the Act limiting compulsory insurance cover to a road or other public place was incompatible with the required cover under art. 3(1) of Directive 72/166: Vnuk v Zavarovalnica Triglav (C-162/13) [2016] R.T.R. 10 applied.
(4) The definition of 'use' suggested some function performed by the car in its capacity as a vehicle. It was not the usual activity of a vehicle to be repaired. The car was not being operated in any way and was partly off the ground. The policy did not therefore cover the claim.

FARRAR'S BUILDING

Insurance Update February 2016

FARRAR'S BUILDING INSURANCE LAW GROUP

Alan Jeffreys QC
Ian Ridd
John Meredith-Hardy
Andrew Arentsen
Huw Davies
James Pretsell
Andrew Wille
Guy Watkins
Howard Cohen
James Plant
Emma Sole
Bonike Erinle
Changez Khan
Hannah Saxena
Joshua Hedgman
Aidan O'Brian
Robert Golin
Jake Rowley
Frederick Lyon
Joel McMillan
Rajiv Bhatt

Telephone: 020 7583 9241 **Fax: 020 7583 0090** **E-mail: chambers@farrarsbuilding**