

Pollyanna Deane's insurance column: June 2019

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In her column for June 2019, Pollyanna considers cultural changes in the insurance industry, the duty of good faith and the open pensions initiative.

Culture – more of it

Everyone will recall the much-trumpeted announcement that Lloyd's of London was looking to ban alcohol for the market and that it then appeared that this was only going to affect back-office staff. Yet more headlines tell us about a further initiative. Lloyd's has, it would appear, called in the banking standards body to launch a big cultural review of the insurance sector. "Lloyd's call in watchdog to clean up; Insurance Market seeks help to ditch 'laddish' image" (I refer to the Sunday Times article on 12 May). Given that this review looks to the banks and banking standards, it may be less than palatable to the insurance industry. The Lloyd's initiative looks at implementing their review through the Banking Standards Board (BSB) questionnaire – a copy of which can be found here: <https://www.bankingstandardsboard.org.uk/annual-review-2018-2019/>.

At the time the BSB annual review came out there were reports in the press that:

- Bank whistleblowers were concerned their complaints were not being heard. The review found that of 63% of staff reporting concerns only 42% say they are listened to.
- Despite continuous investment in time and resources, UK banks' collective efforts to improve firm culture showed little change since 2018. The review, which involved 72,000 employees across 26 banks, found that women working in investment banks were more negative in their responses than their male colleagues.

The insurance industry is talking about this - at least in their HR teams - and the emphasis on culture that the FCA and PRA have been making shows that the gods of cultural reform are not intending to leave the insurance industry unscathed.

Duty of Good Faith – again

I had thought that this duty had been parked and, similarly, looking at the proposal that the FCA put forward on introducing a further duty of care, I did

think that we had put that to bed. Certainly, the market believes that consumers are adequately protected under the existing legislation and regulation (see *submission* by the London Market Association, for example). The duty of good faith and the impact of the Insurance Act 2015 meant that I was interested to see the *Equitas* case once again flying the flag for the duty of good faith. This involved not consumers, but an insurer and reinsurance company.

In *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd [2019] EWCA Civ 718*, the Court of Appeal examined how the reinsurance market should deal with mesothelioma claims settled under employers' liability insurance policies and determined that the practice of "spiking" (whereby insurers were entitled to present their reinsurance claims to any policy year of their choice) should not extend to a reinsurance context. A good faith term was to be implied so that insurers' rights to present a reinsurance claim had to be exercised in a manner which was not arbitrary, irrational or capricious. Rationality required that reinsurance claims be presented by reference to each year's contribution to the risk, which would normally be measured by reference to time on risk. "Spiking" was inconsistent with the parties' presumed intentions and reasonable expectations at the time of concluding the contract, and was contrary to the underlying statistical reality that employees' critical exposures would not all have occurred in the same year.

It was interesting to see that the duty of good faith is thus reinforced for dealings with reinsurers. Judgments in the case referred, particularly in the case of Leggatt LJ, to the case of *International Energy Group Ltd v Zurich Insurance Plc (2017) 80 MLR 1150*. This case was concerned with asbestos claims, where the court was undoubtedly influenced by the fact that they feared that if they didn't find a solution the Government would impose one and, hence, entered a judgment which, while the insurance market argued for it, was arguably unfavourable to the insurers. Lord Mance commented:

"(a) It is contrary to principle for insurance to operate on a basis which allows an insured to select the period and policy to which a loss attaches. This is

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elementary. If insureds could select against insurers in this way, the risks undertaken by insurers would be entirely unpredictable. (b) It is anomalous for a liability insurance underwritten for a premium covering losses arising from risks created during its particular period to cover losses about which all that can be said is that they arise from risks extending over a much longer period, in respect of which no premium has, or could have, been assessed or received by the insurer."

Lord Sumption who eventually dissented, giving the main minority judgment, agreed that these consequences "are not just remarkable in themselves, but are directly inconsistent with the language of the ... policies and the fundamental characteristics of insurance." As Leggatt LJ said, Sumption considered that the rational response of the law to the situation in which the insurer's liability is triggered in more than one policy year is not to assign the whole of the loss to a policy year of the insured's choice. Rather, it is to prorate the loss between every policy year during which the insured employer exposed the victim to asbestos. It is interesting to see the about face which has occurred for the *Equitas* case, where the Sumption view has been backed and Leggatt LJ was careful to distinguish why the Sumption approach should be adopted here. Going through the reasons, some appear a bit fortuitous – along the lines of the point wasn't raised in that case, so we can distinguish it. But it did occur to me that the working of the insurance market and, in particular, the relationship between insurers and reinsurance companies is crucial. If there isn't a duty of good faith between them, then there ought to be ...

Open Pensions

I have been fortunate to be talking to the ABI and various other insurance industry participants about the Open Pensions initiative (also known as the Pensions Dashboard project) and its use in the current pensions environment. While there are still issues to be ironed out, the idea of being able to access all your pensions data in one place, with a regulated third party chosen by the consumer, which holds it securely and accounts for numerous small funds which have

been accumulated over the years, is a much-needed tool in the management of retirement costs. We should I think be supporting this proposal, and finding the solutions which are currently holding it up, largely driven by data security.

Given the above reference to a Court making its decision in *IEG* through fears that the government would otherwise legislate, it is fair to say that the only way in which change may be implemented without legislation is generally slowly. It apparently took the Danes 20 years to get their own Pensions Dashboard project to completion when leaving it to a voluntary option. Instead, the UK government backed the Pensions Dashboard in 2016, with the Pensions Minister announcing that the Department for Work and Pensions (DWP) would be taking forward the project at pace in October 2017. As they say, I'd hate to see what "at leisure" would have meant. So far we have a consultation published in December 2018 with a government *response* in April 2019.

That government response sets out a sustainable costs model and suggests that legislation will be introduced when Parliamentary time allows. The hold ups largely relate to the security concerns around the repository, but the implementation can't come too soon, with the ABI having suggested that there is currently £20 billion in lost DC pots alone, the average value of these pots is £12,000 and the DWP estimates that the number of lost or dormant pots could well reach 50 million in the coming years. Customers are increasingly requiring digital solutions, which Open Pensions would help to provide. There is an appetite for consolidation in the pensions market, which when multiple small pots could be combined, makes life more efficient and hopefully economical. Digitalisation may drive change and the pensions industry provides a fertile market with DC schemes. (Thus, apparently, Alexa is able to update you on your pension pot!) However, currently there is no evidence that the support necessary is being accessed, with the advice gap failing to narrow and fully automated advice proving harder to implement in the current regulatory environment. Nevertheless, the initiative is to be welcomed, following as it does on the heels of Open Banking. Open Insurance, anyone?

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