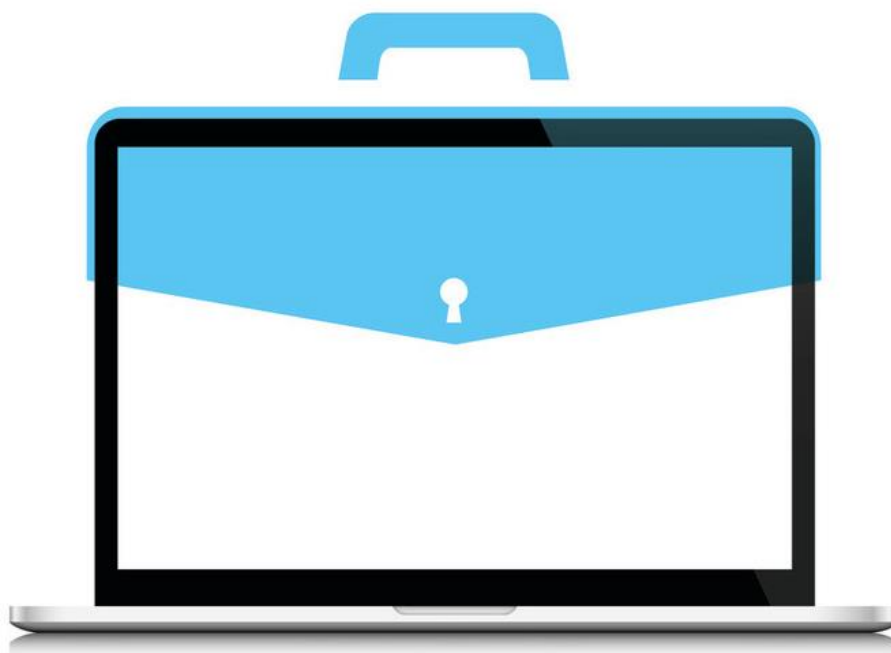


We have got you covered

A Legal and Commercial Update



Welcome

Welcome to the Eversheds Sutherland Insurance Broker Bulletin.

In this edition we look at recent global trends in financial services mergers and acquisitions based on Mergermarket data, and review the growing use of blockchain in the insurance sector.

We also consider the impact of the recent decision in *Young v RSA*, the first reported decision under the Insurance Act 2015, and the Court of Appeal decision in *Europools plc v RSA* on the subject of notification of circumstances.

The Eversheds Global Insurance Group advises insurance brokers and other intermediaries in the insurance sector across the full range of legal and regulatory issues that they face. You can find out more about what we do by clicking on the following [link](#).

Ask the Right Questions: *Young v RSA*

Summary

Following the decision in *Young v RSA* earlier this year in Scotland (which was the first reported decision on the Insurance Act 2015 at the time), we examine the implications for brokers when submitting market presentations in a pro-forma format.

Background

A fire occurred at Mr Young's property and Mr Young then claimed an indemnity from his insurers. The insurer declined Mr Young's claim on the basis that he had failed to disclose material information pursuant to section 3(1) of the Act, namely that:

Mr Young had been a director of four companies which had been dissolved after an insolvent liquidation or had been placed into insolvent liquidation within the 5 year period preceding policy commencement ("the Undisclosed Information").

The Market Presentation

Mr Young's insurance was arranged by his broker by way of a 20-page Market Presentation ("the Presentation"). The Presentation was completed using the broker's software, and identified the insured as Mr Young and Kaim Park Investments Ltd ("Kaim").

The "Details" section of the Presentation contained the following passage, which the judge referred to as the "Moral Hazard Declaration":

"Select any of the following that apply to any proposer, director or partner of the Trade or Business or its Subsidiary Companies if they have ever, either personally or in any business capacity:"[our emphasis underlined]

The Moral Hazard Declaration required the proposer to select from seven options in a drop-down menu. The answer selected was "None". The insurer alleged that the proposer should have selected the drop down option which read "been declared bankrupt or insolvent or been the subject of bankruptcy proceedings".

The insurer emailed the broker on 24 April 2017 in response to the Presentation. This email contained a heading titled "Subjectivity", and stated as follows:

"Insured has never

Been declared bankrupt or insolvent

Had a liquidator appointed

..."

The Parties' positions

The insurer alleged that Mr Young failed to disclose the Undisclosed Information, and, had he done so, it would not have entered into the insurance on any terms.

Mr Young argued that the Presentation was not a breach of the duty to make a fair presentation, as neither he, Kaim, nor any director of Kaim had ever been insolvent (you will recall that the Undisclosed Information was that Mr Young had been a director of 4 insolvent companies). Further, by referring to "the insured" in the email of 24 April 2017, Mr Young said that the insurer had waived any entitlement to disclosure of prior insolvencies or bankruptcies experienced by anyone other than the insured themselves.

The decision – was there a breach of the duty of fair presentation?

The starting point was that Mr Young owed an obligation to make a fair presentation of the risk pursuant to section 3(1) of the Insurance Act 2015, namely to disclose every material circumstance which the insured knows or ought to know under section 3(4)(a). This case did not involve an assessment of whether disclosure fell within the alternative limb of section 3(4)(b) so we do not consider that further here.

Because this was a debate (a process in Scotland which is similar to a preliminary issue trial in England and Wales), the materiality of the Undisclosed Information was to be determined at a later point.

Was there a waiver?

The Judge firstly referred to the pre-Act case law, which established that an assured seeking to establish waiver could do so in one of two ways: (1) where an insured submitted information which contained something which would prompt a reasonably careful insurer to make further enquiries, but the insurer fails to do so; and (2) where an insurer asks a "limited" question such that a reasonable person would be justified in thinking that the insurer had no interest in knowing information falling outside the scope of the question. This case concerned the latter.

In considering the issue, the Judge noted that the term "*any business capacity*" was capable of including other entities with which the insured was involved. The difficulty for the insurer, however, was that the Moral Hazard Declaration was incomplete; although the insurer had seen the answer of "*None*", it did not know what the "*None*" referred to.

The Judge held that the email of 24 April 2017 was aimed at clarifying Mr Young's answer to the Moral Hazard Declaration, which it achieved by stipulating the specific moral hazards that needed to be addressed. Further, the judge held that the reference to "*the insured*" in the email was not limited to Mr Young and Kaim, but also covered the longer formulation contained in the Moral Hazard Declaration. So, read in this context, the judge was satisfied that no reasonable reader would have understood the email as waiving the part of the Moral Hazard Declaration relating to "*any business capacity*" in which Mr Young might have acted. Accordingly, the judge held that there was no waiver.

Comments

A number of points arise from this judgment which are of relevance to insurance brokers.

Firstly, the judgment illustrates the potential drawbacks of using bespoke software to complete market presentations and place insurance. The Court did not make a finding that there had been a breach of the duty under section 3(4)(a), and we do not know from the judgement how the presentation came to be submitted but, nevertheless, one can readily appreciate how the format of the software used to create the Market Presentation may have been a factor in the dispute arising. Arguably, the proposer correctly answered the question as to whether Mr Young or the proposing company had ever been insolvent in any business capacity. However, from the insurer's point of view, one can also see how they could legitimately argue that they would have wanted to know that Mr Kaim had been the director of other insolvent companies.

The obvious points arising out of this from the broker's point of view are to ensure that any software which is used in creating presentations cannot lead to arguments that full disclosure has not been made. Ideally, the use of pro-forma answers would be avoided altogether, or at least the format of the presentation and the software used should be approved by the insurer (which would increase an insured's chances of demonstrating that an insurer had waived the right to know about certain information). Further, any presentations generated should ideally include a "sweep up" question asking whether the insured has any other information to disclose, and the insured should be asked to sign off on the final presentation.

The judgment also demonstrates that formulations such as "*any business capacity*", may, in some circumstances, be broad enough to extend to any company with which an individual insured was involved.

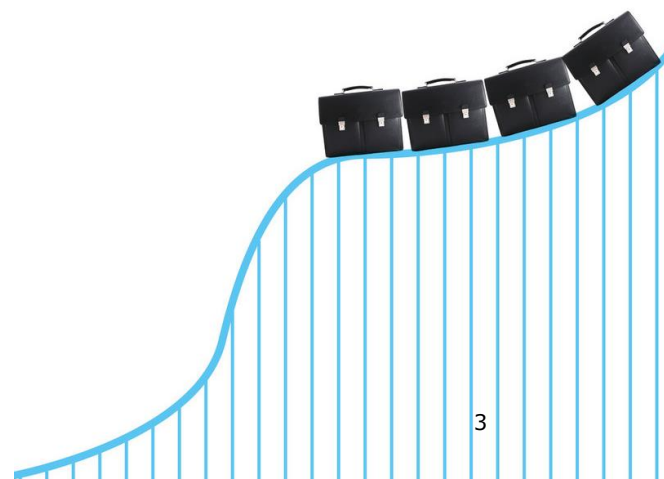
Finally, by its email of 24 April 2017 the insurer was seeking to confirm its understanding of the risk, and this arguably gave the insured and broker another opportunity to disclose additional information (even though the policy was on risk by this point).

We frequently see subjectivities listed in policy schedules where it is not clear what their intended effect is supposed to be, sometimes appearing to impose ongoing obligations on the insured when the policy is on risk (which begs the question as to whether they are intended to be conditions, conditions precedent to liability or warranties) and sometimes appearing to amount to a confirmation of the insurer's understanding of the scope of the fair presentation. In either case, absolute clarity as to what subjectivities mean is paramount from the point of view of all parties, with the schedule and other policy documents all being consistent as to this meaning.



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Blockchain

Blockchain developments in the insurance industry

Blockchain technology has the potential to help insurance companies create transparent operations built on trust and stability. In particular, Blockchain can be useful in:

- | **improving security** through the elimination of suspicious and duplicate transactions through the logging of each transaction. Its decentralized digital repository can verify the authenticity of customers.
- | **automating third party transactions** through the automated verification of claims and payment data from third party transactions, which can reduce administrative costs.
- | **estimating reinsurance** by providing accurate reserve calculations based on current contracts, which can aid insurers in knowing how much capital they have available as they pay claims. This can ensure that exposures are accurately rebalanced against specific risks.

Blockchain is having two principal impacts on the insurance industry. Firstly, we are seeing FinTech companies buying insurance in order to given comfort to customers that there is some buffering in the event of a claim / potential insolvency. This has required insurers and intermediaries to consider issues such as cyber-theft, which certain companies, e.g. those holding cryptoassets in custody, are at greater risk of and we have worked alongside companies and intermediaries helping them understand the exposure and the insurance coverage.

Part of calculating the risk of blockchain ventures involves also a consideration of the local regulatory attitude to the technology. As many Blockchain use-cases involve cryptocurrencies, Eversheds Sutherland has launched a **heat map** displaying the attitudes of financial regulators towards cryptoassets and cryptocurrencies in over 100 countries, to assist insurers and insurance brokers in gaining an understanding of the legality of cryptoassets in different jurisdictions.

Secondly, we are seeing insurance firms using blockchain as part of product delivery, with some recent projects including the following:

- | **marine insurance:** EY and Guardtime have launched 'Insurwave', which is a Blockchain-enabled marine insurance. The platform integrates and secures streams of disparate data sources involved in insuring shipments around the world
- | **travel insurance:** AXA has launched a travel insurance product built on Ethereum called Fizzy, which offers direct and automatic compensation claims to policyholders whose flights are delayed. Where a flight is more than two hours late, Fizzy will issue a reimbursement automatically
- | **life insurance:** A MetLife subsidiary in Singapore recently began building a Blockchain-based application to help loved ones determine if a deceased was covered by a life insurance policy and automate the subsequent claims
- | **pension deals:** UK insurer Legal & General has teamed up with Amazon Web Services to establish a Blockchain system for corporate pension deals



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Boom or Bust: *Europools Plc v RSA*

Summary

The Court of Appeal has recently handed down a decision concerning the issue of notification of circumstances to professional liability insurers.

Factual Background

Euro Pools specialised in the installation of swimming pools. It entered into two professional indemnity policies with RSA for the periods 2006-07 and 2007-08.

Euro Pools identified defects in the operation of pool equipment, which it notified to RSA in 2006-07 as concerning problems with steel tanks which would be remedied using air bags. During the policy period 2007-08, Euro Pools notified RSA of a new proposed remedial scheme, namely the use of a hydraulic system rather than air bags.

The remedial works fully eroded the limit of indemnity under the 2006-07 policy. RSA argued that the new remedial works arose from the circumstance notified in the 2006-07 policy period, such that Euro Pools was not entitled to a further indemnity. Euro Pools argued that the need for more extensive remedial works was not known at the time of the 2006-07 notification and the costs of those works was therefore a new issue notified under the 2007-08 policy period which, if correct, would have given Euro Pools another limit of indemnity.

At first instance, the Court found that:

- the defects had not arisen at the relevant time for the notification of a circumstance under the 2006-07 policy year
- Euro Pools did not have the requisite knowledge of the defects, and accordingly, could not notify something of which it was not aware
- Euro Pools was therefore entitled to a further £5,000,000 indemnity under the 2007-08 policy year

RSA appealed on the basis that the Court was incorrect in finding that there was no causal link between the remedial works required and the circumstances notified under the 2006-07 policy.

The Court of Appeal found that the Court at first instance had erred, and that it was not necessary to consider whether Euro Pools could have been aware of the fundamental flaw in 2007. Euro Pools faced potential claims from numerous third parties arising from problems notified under the 2006-07 policy. It was not appropriate to “over-analyse the problem by dissecting every potential cause of the problem as a different notifiable circumstance” and the issue was whether, objectively speaking, the potential claims from third parties arose from the circumstances notified in the first policy period. The technical reason for the problem would not have mattered to the third party claimants and there was therefore no need for the Court to assess the technical aspects as to the cause of the problem or whether it was known to the parties at the time of the notification.

The Court then considered whether there was a causal link; did the claim arise from the circumstance notified? The answer was yes, because all that was required was a connection that was other than “purely co-incidental”, and the Court of Appeal concluded that the first notification encompassed the possibility that the proposed remedial scheme may not work, in which case other remedies would need to be considered.

The Court of Appeal therefore found that the entirety of the remedial works fell within the scope of the circumstance notified under the 2006-07 policy, and that Euro Pools was not entitled to cover under the 2007-08 Policy.

Impact on Insurance Brokers

The case is unusual in that it was the insured who was arguing that the original notification should be construed narrowly, so that the circumstances subsequently notified would fall to be covered under a new limit of indemnity; frequently, it is the insurer who argues that subsequent circumstances are not within the scope of the original notification so that it is not liable for subsequent issues.

Nevertheless, the case reaffirms principles set out in *HLB Kidsons v Lloyds* [2008], in which Eversheds Sutherland acted, in particular that it is possible for an insured to notify a “hornet’s nest” of issues.

Whether subsequent claims arise out of the notified circumstances will invariably be a fact specific exercise, but generally speaking this decision encourages insured parties to (i) submit notifications early and (ii) to draft them so they are as broad as possible in order to try to capture subsequent claims.

This can be best achieved by brokers having a regular dialogue with insureds throughout the course of a project, so that informed discussions can take place as what may amount to notifiable circumstances. Brokers will want to participate in the preparation of notifications, and ensure they are drafted with the aim of capturing subsequent issues.

An important caveat to that is to keep in mind that there may be circumstances when an insured does not want future issues to be captured by an earlier notification – as in this case – where the insured was seeking to attain the benefit of a second limit of indemnity. This plays into another issue for brokers which is the importance of documenting the decision making process around the limits of indemnity which clients choose to purchase.



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M&A: Broking Sector Analysis

Data in detail - Financial services M&A global trends

Based on Mergermarket data, 2018 saw a slight dip from the levels of activity seen in 2017 in the global FS M&A markets,

although there were still pockets of high activity. 2018 was again hallmarked by a small number of mega-deals, including, for example, the acquisition of JLT by Marsh.

Coming into 2019, we expect to see fewer larger deals in the insurance market, where significant consolidation in the P&C/non-life market has already happened. However, we expect to see continued consolidation in the medium and smaller end of the broker market. See [link](#) for the full report.

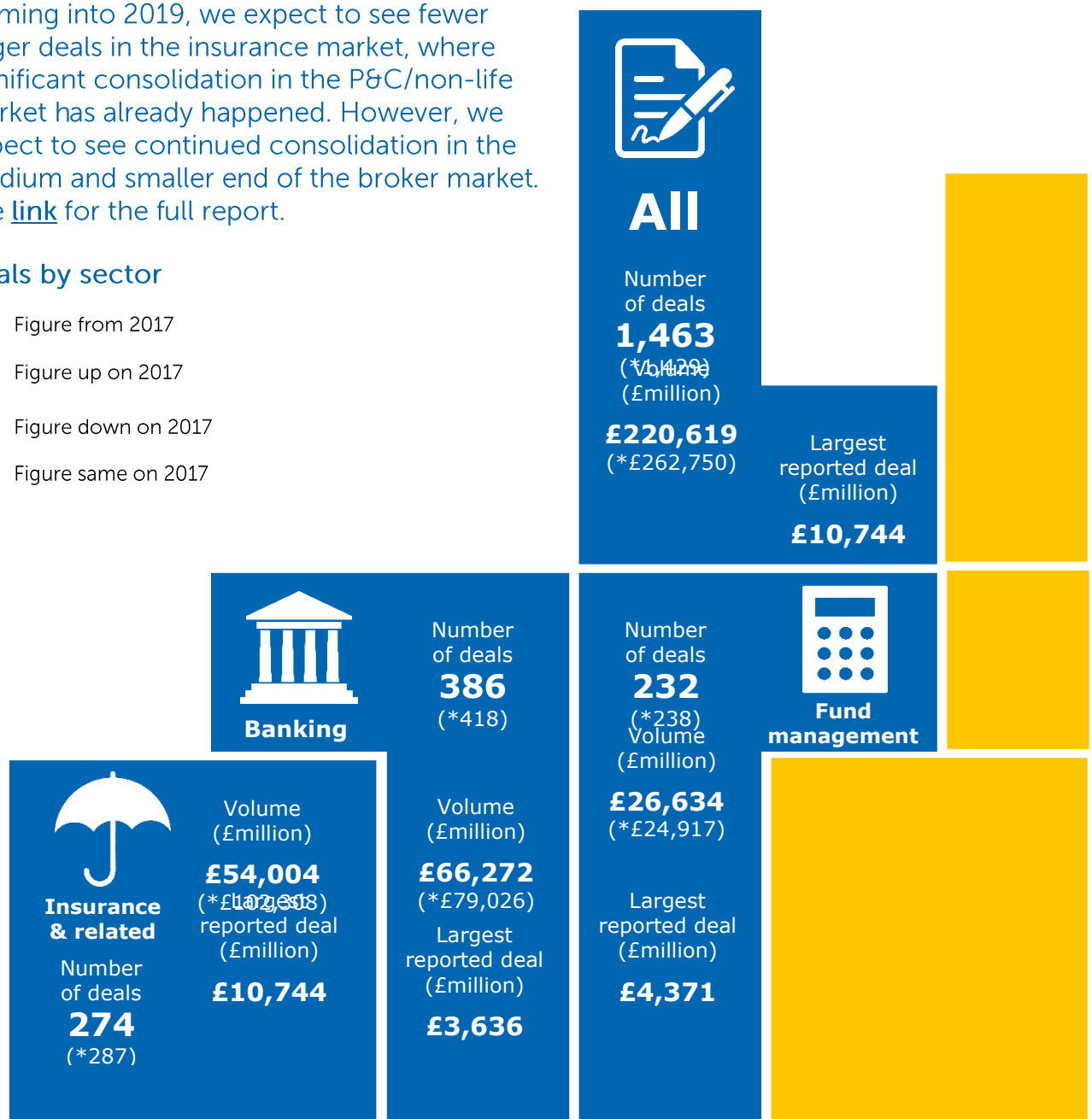
Deals by sector

* Figure from 2017

↑ Figure up on 2017

↓ Figure down on 2017

= Figure same on 2017





Investment Banking

Volume (£million)
↓ £1,709
(*£3,836)

Number of deals
↓ 29
(*30)

Largest reported deal (£million)
£630



Investment Broking

Volume (£million)
↓ £8,420
(*£8,645)

Number of deals
↑ 57
(*49)

Largest reported deal (£million)
£2,402



Other



Securities commodities & broking

Number of deals
30
(*29)

Volume (£million)
↓ £1,597
(*£1,656)



Principal Finance

Number of deals
↑ 104
(*95)

Volume (£million)
↓ £9,064
(*£11,369)

Largest reported deal (£million)
£1,582

Volume (£million)
£51,739

Largest reported deal (£million)
£10,549



Private Equity

Number of deals
↑ 22
(*18)

Volume (£million)
↓ £1,126
(*£1,434)

Largest reported deal (£million)
£385

Top ten global deals in financial services

	Target company	Acquirer	Region	Value (£million)
1	XL Group Ltd	AXA SA	USA (Bermuda)	10,744
2	Ant Financial Services Group	Consortium	Asia	10,549
3	Jardine Lloyd Thompson Group Plc	Marsh & McLennan Companies, Inc.	Europe	5,105
4	OppenheimerFunds Inc.	Invesco Ltd.	USA	4,371
5	Nex Group Plc	CME Group Inc	Europe	4,070
6	Validus Holdings, Ltd.	American International Group Inc.	USA (Bermuda)	3,998
7	Alawwal Bank	Saudi British Bank	Middle East	3,636
8	MB Financial Inc	Fifth Third Bancorp	USA	3,395
9	Vebnet (Holdings) plc; Standard Life Assurance Limited	Phoenix Group Holdings Limited	Europe	2,930
10	Quilter plc	Old Mutual plc	Europe	2,487

Note: These are the largest deals based on Mergermarket's announced deal values. There may have been larger deals where the value was not disclosed.



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Looking out for your client's interests

Our Insurance
Coverage Disputes team



What we can do for your clients?

We are a leading international Insurance team, recognised in the major directories for our excellence in insurance dispute resolution.

We have considerable experience advising on insurance coverage issues acting for insured clients. Many lawyers in our team also have significant experience of advising insurers which has given us a valuable insight into insurers' approach to coverage disputes.

When a coverage issue arises, as the broker you may frequently be in the firing line if a claim is declined. It is therefore in your interests, and those of your client, that they are properly represented in order that claims are paid promptly in full.

We will only accept referral instructions from you on the basis that the insured client agrees that we will not bring contribution claims against you.

We are able to consider a number of alternate fee structures, ideally suited to disputes where access to capital may be limited because an insurer is refusing to pay a significant claim. The benefits of these fee structures can include:



a litigation funder providing access to capital to fund claims



clients paying no legal costs throughout the case



clients having no exposure or risk to the other party's costs



clients paying nothing if the claim fail

Technology

We have invested in a number of litigation technology solutions which, can reduce the cost of litigation, e.g.

- electronic management of large disclosure exercises;
- use of new Eversheds Sutherland technology such as CaseShare and Propel

Track record

- advising a construction company on a range of complex issues following the insolvency of Carillion, including its rights under the project policy and bringing claims against Carillion's professional liability insurers
- advising on the availability of cover under public liability and marine freight covers following +\$300m of damage to an oil rig
- advising the owner of a power plant in relation to a £100m business interruption claim
- acting for a developer in bringing a £10m claim against its title insurers following enforcement of restrictive covenants by neighbouring property owners
- we are regularly instructed in relation to the negotiation of insurance products in relation to a range of complex and high value transactions, including international construction projects, transactional liability policies in M&A deals, environmental liability policies, scheme/group issues, title/no search products for lenders and other insured parties and cyber policies

What happens next?

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What do our clients say?

"Eversheds Sutherland's first-class practice advises on a range of matters involving insurance brokers, construction professionals and accountants, and is excellent in complex disputes. Clients include companies both within and outside of the insurance market."

- Legal 500

"They have a commercial and pragmatic approach to disputes, provide excellent technical advice and get results. In addition, their people seek to build genuine relationships by providing added value – leveraging against their industry relationships, taking an innovative approach to fee arrangements and using their global reach to provide any support I may require."

- A leading multinational financial services company



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