June 2019

Nexus Claims: Q2 Update

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CLAIMS TEAM NEWS

New Joiners / Leavers

Allan Perkins CIP
Allan joined Nexus in April 2019 as a Claims Adjuster who is responsible for the PI, FI & D&O claims portfolio. Allan has over 10 years' experience, working previously in Canada at IPG, ClaimsPro, and more recently AXA XL in London.

Rory Macaskill & Mark Aizelwood
We say au revoir to two of our secondees – Rory Macaskill (ASL), and also Mark Aizlewood (CPB). Their adjusting and legal expertise was invaluable to our team, and we look forward to working with them again at their respective firms.

Alex Gabriel
We say hello to Alex Gabriel, who joins the team in July 2019 on secondment from Simmons & Simmons. Alex qualified in 2018, having also trained at the same firm. Alex will be working specifically on our PI, FI & D&O account, while providing assistance to the rest of the team.

British Claims Awards 2019

We were delighted to be shortlisted for two awards at the prestigious British Claims Awards 2019 – **MGA of the Year** and also **Claims Team of the Year**.

On the night we were thrilled to win **MGA of the Year**, which was a testament to the sterling efforts of our claims team and as we strive to provide excellent service to our customers, brokers and stakeholders.

Rise in FOS Awards

From 1 April 2019, the FOS can now make awards of up to £350,000 – an increase of £200,000 from the original sum of £150,000 in respect of complaints about actions by firms on or after that date. The maximum award for any complaints to the FOS that relate to actions prior to 1 April 2019 will be £160,000 – a small increase of £10,000.

Meet the Team: Nexus Trade Credit Claims

Nexus CIFS and Equinox Global are now known as Nexus Trade Credit, and below is our team who handle these claims:

Roxanne Thornhill (Senior Claims Adjuster) leads the claims offering for Trade Credit, handling high value/complex claims. She has over 18 years' claims handling experience and is ACII/Dip CILA qualified, having previously worked at Cunningham Lindsay. **FUN FACT**: Through coincidence, when Roxie first moved to England, she ended up living in the same street as her childhood best friend from Northern Ireland.

Mark Raffety (Claims Adjuster) is also a Trade Credit Claims specialist, handling high value/complex claims, having worked in this class for the past 10 years and 18 in total. **FUN FACT**: Mark is a history enthusiast and is currently studying a degree in Classical Studies in his spare time.

Charlotte Bates (Junior Claims Adjuster) joined Nexus after graduating from the University of Reading with a BA in Philosophy. She initially worked as a Claims Administration Assistant, quickly progressing to becoming a Junior Claims Adjuster and now handles the volume claims. **FUN FACT:** Charlotte just passed her first insurance exam – IF1.

THE SAAMCO PRINCIPLE – MEASURING DAMAGES IN PROFESSIONAL NEGLIGENCE CLAIMS

Nick Colman examines a recent Court of Appeal decision which finally clarifies what SAAMCO means and how it is to be applied

In the 1990s, there was a slew of professional negligence cases up and down the country against negligent property valuers, surveyors and conveyancing lawyers. One of the most ground-breaking was the House of Lords' 1997 decision in *South Australia Asset Management Corporation v. York Montague Ltd ("SAAMCO"),* which has remained the go-to test for damages in professional negligence cases.

The brilliance of Lord Justice Hoffman's distinction between the provision of 'negligent advice' and 'negligent information' has come to the rescue of many Insureds and their Carriers but in the 20 years since, the *SAAMCO* principle has often been questioned, misunderstood and misinterpreted. At last, with the Court of Appeal's January 2019 judgment in *Manchester Building Society v. Grant Thornton UK LLP*, we have real clarity as to its understanding and applicability that will greatly assist Insurers and their Insured professionals alike.

What is the SAAMCO principle?

The courts will look to the nature of the advice given and the Insured's conduct in giving it to determine just how much of the losses suffered by the claimant the Insured should be liable for. To do this, we must ask whether the Insured provided negligent advice or negligent information to the claimant:

- As the provider of 'advice', it will have been left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction, and he will be responsible for guiding the whole decision-making process. In such a case, the adviser will have assumed responsibility for the decision to enter the transaction and will be liable for all the foreseeable financial consequences of so doing.
- As the provider of 'information', the adviser has not assumed responsibility for the whole transaction and will only be responsible for the foreseeable financial consequences of the information provided being wrong. Only losses which would not have been suffered had the information been correct are recoverable.

The decision in *Manchester Building Society v. Grant Thornton UK LLP* [2019]

Between 2004 and 2009, *MBS* issued a number of fixed-rate lifetime mortgages, which released equity to homeowners on terms that the mortgage was not repayable until the owner either entered a care home or died. In order to hedge the risk involved in only charging fixed rates to the borrowers, when it had paid possibly higher variable rates of interest to acquire the funds, *MBS* bought long-term interest rate swaps (swapping its paid variable rates with a fixed-rate payment instead from another company, thereby equalising out the interest received and paid).

In 2005, the accounting rules changed requiring *MBS* to include the current market price (aka its fair value) of the swaps on its balance sheet. This immediately rendered *MBS's* financial position volatile caused by the movement in the fair value of the swaps. In April 2006, *MBS's* auditor, *GT*, advised that *MBS* could apply hedge accounting rules ("HAR") to partially offset the changes in the swaps' fair value which would reduce the accounting volatility. Relying on this advice, *MBS* issued further mortgages and entered into further swaps.

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However, in 2013, it became apparent that *MBS* was not entitled to use the HAR which immediately exposed MBS to significant volatility, exacerbated by the decline in variable interest rates caused by the financial crisis. Furthermore, *MBS's* accounts no longer disclosed sufficient regulatory capital it was obliged to hold and was ordered by the regulator to stop new lending and 'close out' its swaps. *MBS* did this and the swaps were broken at their fair value in June 2013 at a loss of £32,700,000.
MBS sued *GT* for these losses as a 'provider of advice' under *SAAMCO* and therefore liable to *MBS* for all the foreseeable consequences of *MBS* entering into the swaps in reliance on that advice. Alternatively, it was claimed *GT* was a 'provider of information' and therefore liable because the losses would not have been incurred had the advice regarding the HAR been correct.

In the Commercial Court in 2018, the judge rejected the *SAAMCO* 'Advice v. Information' distinction; instead preferring to question whether *GT* had assumed responsibility for the losses. The judge held that *GT* had not, and that the losses suffered by *MBS* flowed from market forces for which *GT* had no responsibility. Accordingly, *GT* was liable for only the transaction costs of breaking the swaps of £285,460, and not for the £32.7m mark-to-market loss. *MBS* appealed to the Court of Appeal.

The Court of Appeal in 2019, unanimously dismissed *MBS's* appeal, finding:

1. The Commercial Court was wrong to dismiss the *SAAMCO* principle and apply, instead, the 'assumption of responsibility' test.

2. Under *SAAMCO, GT* was not a 'provider of advice': they gave accounting advice only and were not involved in *MBS'* commercial decision to hedge its risk by buying swaps. *GT* had not determined what matters were to be taken into account in deciding whether to enter the transactions, neither had it guided the whole decision-making process. Consequently, *GT* had acted as a 'provider of information'.

3. The Commercial Court was wrong to find that had the 'information' provided been correct, the losses would not have incurred. Had the swaps been 'in the money' (and not in a dire negative value) at the time the negligent advice was discovered, the swaps would probably still have been closed out (although without any resulting loss). So, while *MBS* incurred a liability to pay their negative value, it also obtained the benefit of removing a liability from its balance sheet. The fact that the swaps were 'out of the money' in 2013 was the result of market forces and closing them down in June 2013 crystallised that loss but did not create it.

This is good news for Insurers and their Professional Insureds

We now have a clear and unmuddled analysis of the SAAMCO distinction regarding what constitutes 'advice' versus 'information'. This will better inform Insurers of the realistic losses their Insureds might face, against the fantastical values of the claims made. Insurers can make better, more informed decisions on the reserves to hold and financial advisers (accountants, auditors and tax lawyers) can consider with more clarity the implications of the risks associated with their advice and involvement.

This article was written by Consilium Law

CONSILIUM LAW

BODY LANGUAGE NONSENSE: PART 1

In the first of two articles, Phillip R. Maltin, reports exclusively on the aspects of body language that can reveal so much within a claims investigation

The field of body language is packed with junk science, some of which is delightfully funny. Consider the photo below. Some in the body language community insisted that, during the 2017 G20 meeting, Donald Trump and Vladimir Putin displayed sexual symbols with their hands. One "expert" concluded that Putin was dominating Trump given the emblem or symbol each makes with his hands. The body language genus did this by comparing Trump's "feminine" gesture (called "inverted steepling" by the body language community) with Putin's purported "penetration" symbol. While science can be entertaining, here, science is absent, as it is in most of the claims popularly made about body language and deception. Still, people search for behavior that will secretly betray a liar. Science has uncovered none, though the mythology linking behavior to dishonesty persists. The desire to determine by behavior alone when a person is lying is nothing less than the will to read minds.

In this article I will discuss the pseudo-science and limits of body language interpretation. In next quarter's *Nexus Claims Q3 Update*, I'll survey techniques that insurance professionals can use to increase their chances of uncovering dishonesty in claims examination, negotiations and personal interactions.

The folklore claiming liars have universal "tells" or dishonesty signals is difficult to overcome. Consider something called Neuro-Linguistic Programming or "NLP." Created in the 1970s, NLP combines unproven theories of language and behavior to create an ineffective therapy for psychological conditions. NLP followers insist that NLP unlocks the secret to deception detection. One widely circulated technique is by eye-movement: The direction a person's eyes supposedly reveals whether the person is lying. According to NLP, when someone looks up and to the right (to an observer's left), the subject is constructing new visual images for use in the future—in short lying.

In contrast, NLP claims that when a person is looking up and to the left (to an observer's right), the person is accessing memory—in short telling the truth. Local and federal law enforcement in the United States have used NLP for decades. As Wikipedia reports, NLP is widely used in the United Kingdom.

A few years ago, psychologist Richard Wiseman and his distinguished research team from England, Scotland and Canada discredited the NLP myth finding no link between dishonesty and eye-direction. (Richard Wiseman, Caroline Watt, Leanne ten Brinke, Stephen Porter, Sara-Louise Couper, Cal Rankin, *The Eyes Don't Have It: Lie Detection and Neuro-Linguistic Programing,* [July 11, 2012].) "It's madness," Wiseman said. "You might as well just toss a coin, and if it comes up heads, you're going up against a liar."

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The “undeniabl[e]” conclusion is that “NLP represents pseudoscientific rubbish, which should be mothballed forever.” (Joseph Stromberg, *Myth Busted: Looking Left or Right Doesn’t Indicate If You’re Lying,* smithsonian.com, July 12, 2012.) Do not use eye direction as a dishonesty cue. It does not work.

Recently, the manufacturers of commercial voice stress analyzers have made exaggerated claims about the accuracy by which their devices can detect deception through shifts in voice pitch and micro tremors in the laryngeal muscles. These businesses begin with a false premise: the stress of dishonesty is the only reason for changes the sound and quality of a person’s voice. In 2016, an international team of researchers determined that operators using these devices accurately identified liars at “about chance levels.” Neither the system nor the operator can know, based on sound alone, whether the person talking is lying. If the system accurately identifies changes to the person’s voice, it could be because the person (i) is anxious because she is lying, and afraid of being caught, (ii) is telling the truth and is afraid of being disbelieved, or (iii) has markers indicating stress for other reasons.

In claims investigation, in negotiation, in the workplace, in personal life, “body movements [generally] cannot be translated as directly as verbal behavior.” (Jinni Harrigan, Robert Rosenthal, Klaus Scherer (2008).) I think professor Harrigan uses the word “generally,” because some behavior may signal dishonesty. For example, “hotspots” of behavior indicating dishonesty exist. For example, liars often appear nervous. (DePaulo, et. al 2003.) Liars also use less hand movements to illustrate language (perhaps a sign of discomfort). They take up less of the conversation, make less sense and appear less likable. (Id.) These cues are generally weak, though they are useful when combined with good questioning techniques.

I teach an observation and questioning system I call “READ,” with each letter referring to a necessary step in the process of getting the best information of the highest quality during investigations and questioning. The best way to uncover a lie is to (i) Research—prepare, know what happened and know your witness; (ii) Examine—question well, strategically revealing significant information the target is unaware that you know, (iii) Analyze—evaluate answers for illogic and behavior for “hotspots” of emotion or seemingly meaningful clusters of behavior; gently press to understand what’s behind them; and (v) Doubt—question to uncover information, not to confirm preconceptions; conclude a person is lying only when substantial evidence supports that conclusion.

People who rely on body language during claims investigation (and at other times) may be questioning people with the goal of reinforcing a bias. That means people who rely on body language often use behavior to confirm preconceived ideas about whether a person is telling the truth. Remember, hotspots of dishonesty mark the beginning of the inquiry, not the unshakeable end. I discuss how to use hotspots and how to question people in next quarter’s *Nexus Claims Q3 Update*.

This article was written by Raines Feldman LLP

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LOSS OF CHANCE: PERRY V RALEYS

Mark Aizlewood reports that the Supreme Court has gone 'back to basics' to redress the public policy Court of Appeal decision on loss of chance claims

The Supreme Court has reiterated the approach the courts must take when considering causation in loss of chance cases. The decision makes it clear what has to be proved in cases where the question for the court depends on what a claimant would have done (which the claimant must prove 'on the balance of probabilities') against what third parties would have done (assessed on a loss of chance basis).

Background

Mr. Perry (a retired miner) instructed Raleys Solicitors to pursue a claim for Vibration White Finger ("VWF"). The VWF compensation scheme allowed both general and special damages. A claimant was entitled to claim compensation in respect of tasks that he could not carry out without assistance because of his injury (a Services Award). Mr. Perry's claim for general damages was successfully settled, but no claim was made for Services. Mr Perry subsequently brought proceedings against Raleys, claiming that he had lost the opportunity to claim a Services Award due to their negligent advice.

Court of Appeal

Gloster LJ (overturning the 1st instance decision) ruled that the Judge at first instance had wrongly carried out a determination on the balance of probabilities as to whether Mr Perry would have succeeded in his Services claim. In what was an undoubtedly outspoken and pro-claimant judgment, Gloster LJ stated that there were "sound public policy reasons" behind her decision holding that claimants should not have to prove in a professional negligence claim against solicitors (where breach is accepted) that they would have succeeded in making such a claim against the third party.

The decision of The Supreme Court

Much to the relief of professionals and insurers, the Supreme Court reversed the Court of Appeal's decision, reinstated the judgment at first instance, and reaffirmed that causation is for a claimant to prove. The Supreme Court stated that the correct approach is that set out in Allied Maples Group Ltd, which identified a *"clear and common-sense dividing line"* between:

1. Those matters which a claimant must prove on the balance of probabilities: where the question of whether the claimant would have been better off depends on what he / she would have done had they been properly advised; and

2. those which should be assessed on the basis of a lost chance: where the alleged beneficial outcome depends on what others would have done (involving hypothetical counter-factual and/or future scenarios).

Applying these principles, the Supreme Court held that as the question to be determined (i.e. could he have brought an honest claim for a Services Award) turned on his conduct, Mr Perry's claim was a "balance of probabilities" type case. As such Raleys were entitled to challenge the claim without limitation.

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Commentary

The decision is beneficial to those representing professionals in such cases and redresses "the Court of Appeal pro Claimant decision". It makes it clear that the restrictions on a 'trial within a trial' does not prevent professionals and their insurers challenging a claimant's case on what they would have done if correctly advised in order to resist causation. The Supreme Court has sent out a clear message to the courts below that the Court of Appeal's public policy based decision was entirely wrong, and has reaffirmed that it is for a claimant to establish causation on the balance of probabilities.

This article was written by Carter Perry Bailey

Carter Perry Bailey

W&I: DIMINUTION IN VALUE REAFFIRMED

Felix Zimmermann & Olivia Darlington report on a recent High Court case which reaffirmed that the measure of contractual damages for breach of warranty is the diminution in value of the target company

This decision arises out of the purchase by Oversea-Chinese Banking Corporation Limited (the Purchaser) of ING Asia Private Banking Limited (the Target) from ING Bank NV (the Seller) for $1.466 billion in 2010. Following the purchase, it emerged that the Target had, at the time of sale, had a contingent exposure to Lehman losses, which later crystallised at $14.5m. The Purchaser sued the Seller for damages in that sum, alleging that the Seller's failure to provide for the contingent Lehman exposure in the accounts constituted a breach of warranty. In circumstances where the Purchaser accepted that any such breach had not affected the value of the company, the issue was whether the Purchaser was entitled to recover the $14.5m liability as damages.

The Purchaser submitted that "diminution in value" (ie the difference between the value of the Target as warranted and the true value) was only a "prima facie" rule about the measure of damages from which the Courts could depart in appropriate circumstances. It argued that if it could show that, had the accounts contained provision for the contingent Lehman exposure, it would have obtained an indemnity in the SPA in the event that a liability should crystallise, then the Purchaser should obtain damages based upon that hypothetical indemnity.

The Judge, Moulder J, disagreed. She held that neither the authorities nor the textbooks supported the proposition advanced by the Purchaser, namely that in respect of a claim for breach of warranty of quality on a share sale, the measure of damages could be the amount which could have been claimed under a hypothetical indemnity. A claimant is entitled to be put in the position it would have been in had the contract been performed or, in other words, to recover damages for its "loss of bargain" as a result of the breach. In the event that the breach has had no impact upon the value of the target company, the purchaser has suffered no loss of bargain. Although it was not necessary in this case, Judge, Moulder J, contemplated that, when considering the "loss of bargain" it may be necessary to adjust the valuation methodology used to determine the value of the target, but that does not mean that an entirely different measure of damages for breach of warranty should apply. Therefore the Purchaser did not recover any of the $14.5m loss.

Continued…

Commentary

The Court in the *Oversea-Chinese Banking* case did not cite the SPA. Therefore, it is not clear whether "loss" was defined in the SPA at all. We infer that, if it was, the definition was along the lines "damages/loss to which the Buyer is contractually entitled a result of the Sellers' breach of warranty". SPAs governed by English law often leave damages "at large" in this way; in other words, the contract leaves it to the common law to determine the measure of damages recoverable by the purchaser for a breach of warranty by the seller. The *Oversea-Chinese Banking* case confirms that such damages are restricted to diminution in value (ie even if it is recognised that a purchaser has suffered a loss as a result of the seller's breach of warranty, as in the case of *Oversea-Chinese Banking*, in the event that that breach has had no negative impact on the value of the target company, such loss is not recoverable as part of the contractual measure of damages).

By contrast, it is standard US practice to include in the SPA a more expansive definition of "Loss", perhaps along the lines "any and all damages, losses, actions, proceedings, causes of action, obligations, liabilities…." Such a definition would include not only damages for diminution in value caused by a breach of warranty, but also a host of consequential losses and liabilities which would not be recoverable as a matter of English common law. Had such a definition of "Loss" been included in the SPA in the *Oversea-Chinese Banking* case, it may be inferred that the $14.5m in dispute might have been recoverable by the Purchaser.

This article was written by Simmons & Simmons

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