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Welcome

FCA business interruption insurance test case and Supreme Court ruling: what's covered?

This webinar will begin at 14:00

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Your hosts

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Susie Wakefield, Partner

susie.wakefield@shoosmiths.co.uk

Paul Eccles, Partner

paul.eccles@shoosmiths.co.uk

Richard Marshall, Partner

richard.marshall@shoosmiths.co.uk

Agenda

We will cover:

- Overview of High Court and Supreme Court Rulings on coverage
- HC Prevention of Access rulings not appealed
- Prevalence / Proof of Covid-19
- Quantifying loss – Legal and practical guidance
- Issues that may yet give rise to disputes
- Reinsurance issues

Overview of Court Rulings

Background – FCA v Arch & others

- Proceedings brought by the FCA under the Financial Markets Test Scheme
- Brought by agreement between the FCA and 8 insurers
- Two Policyholder groups also intervened: Hiscox Action Group and Hospitality Insurance Action Group
- Insurers: Arch, Argenta, Ecclesiastical, Hiscox, MS Amlin, QBE, RSA and Zurich
- Purpose: to bring clarity to both insurers and policyholders and to determine coverage issues in principle on non-damage BI specimen wordings
- 21 sample wordings; 700 other wordings and 370,000 policyholders potentially affected
- High Court Judge (Butcher J) and Court of Appeal Judge (Flaux LJ) – 8 days from 20th July
- Appealed by 6 insurers and FCA directly to Supreme Court – Judgment 15 January. Zurich and Ecclesiastical did not appeal. Outcome: clarity largely achieved; good outcome for policyholders; FCA's appeals substantially allowed; dismissed Insurers' appeals.

Types of Clauses

- Disease clauses – Example: RSA 3: We shall indemnify You in respect of interruption of or interference with the Business during the Indemnity Period following…any…occurrence of a Notifiable Disease within a radius of 25 miles of the Premises… Notifiable Disease shall mean illness sustained by any person resulting from…any human infectious or human contagious disease…an outbreak of which the competent local authority has stipulated shall be notified to them.

- Prevention of Access Clauses - Example: Arch 1: We will also indemnify You in respect of [losses] as insured under this Section resulting from Prevention of access to The Premises due to the actions of a government or local authority due to an emergency which is likely to endanger life or property.

- Hybrid Clauses - Example Hiscox 3: We will insure you for your [financial losses]…resulting solely and directly from an interruption…caused by…your inability to use the [business premises] due to restrictions imposed by a public authority [during the period of insurance] following an occurrence of any human infectious or human contagious disease an outbreak of which must be notified to the local authority.

Disease Clauses

- Interpretation of the Clauses – defining the insured peril - SC construed more narrowly
- These clauses may provide cover for BI in consequence of or arising from the occurrence of a notifiable disease within a specified radius or within the vicinity of the insured premises.
- HC found that disease cover was not confined to the effects only of the local occurrences of a notifiable disease (otherwise there would be no effective cover if a local occurrence was part of a wider outbreak) albeit there must be local appearance of disease to trigger cover – Insurers appealed
- Supreme Court approached the interpretation of the disease clauses very differently
- RSA 3 disease clause
- The Supreme Court questioned how “as a matter of English language, [the High Court] considered that the words “any …occurrence of a Notifiable Disease within a radius of 25 miles of the Premises” can be read as meaning “a Notifiable Disease of which there is any occurrence within a radius of 25 mile of the Premises” [61]

Disease Clauses (cont)

- The Supreme Court said that in interpreting the insured peril as the disease itself, HC had effectively re-written the policy. "No reasonable reader of the policy would understand the words "any…occurrence of a Notifiable Disease within a radius of 25 miles…" to include a occurrence of a Notifiable Disease outside a radius of 25 miles." [61]
- SC: "…an occurrence is something that happens on a particular date" [68]
- "The interpretation which makes most sense, in our view, is to regard each case of illness sustained by an individual as a separate occurrence" [69]
- "…it is not the outbreak nor the disease itself which constitutes a 'Notifiable Disease' but illness sustained by any person resulting from that disease" [70]
- QBE 2 and 3 - HC had held that an "event" was required to trigger cover (the events being any occurrence of a notifiable disease within a radius of X miles of the premises) and the court found no cover because the occurrence of the disease at different times and different places would not constitute the same event and the clause limits cover to the consequence of specified events. FCA appealed. SC found HC had analysed the QBE clauses correctly (and should have interpreted other disease clauses in a similar way)

Disease Clauses (Cont)

The Insured peril is an occurrence of a Notifiable Disease within a specified area.

- "...it is right that the language of the disease clause in RSA3 does not confine cover to business interruption which results only from cases of a notifiable disease within the 25 mile radius, as opposed to other cases elsewhere. That is an important point when considering questions of causation. But it does not follow that cases of disease occurring outside the specified radius are themselves part of the peril insured against by the disease clause. On the contrary, it is clear from the words that they are not." [72]
- "We conclude that the disease clause in RSA 3 is properly interpreted as providing cover for business interruption caused by any cases of illness resulting from Covid-19 that occur within a radius of 25 miles from which the business is carried on. The clause does not cover interruption caused by cases of illness resulting from COVID-19 that occur outside the area" [74]
- But, the Supreme Court's ruling on causation still leads to a favourable outcome for policyholders.

Prevention of Access Clauses

- These types of clauses may provide cover where there has been a prevention or hindrance of access as a consequence of government or authority or action
- They were in some cases construed more narrowly (than disease clauses) by the HC where they said they relate to specific local events rather than a UK wide region.
- While the High Court found certain denial of access clauses do provide cover (eg. Arch 1), it depends on the exact wording and how exactly the business was affected by the government measures.
- High Court found no cover under a number of wordings inc. e.g., Hiscox POA and MSA 1 POA – which use "incident" and "vicinity" language. Vicinity here held to mean narrow, localised form of cover. Incident here means an event, not an emergency or danger.
- FCA did not appeal the "local effect" of the these POA clauses - that there is unlikely to be cover for these prevention of access clauses unless the Insured can demonstrate the risk/existence of Covid-19 was within a specific locality rather than the whole of the UK
- But the FCA did appeal certain aspects pertinent to hybrid clauses too

Hybrid Clauses

- These are clauses which link cover for business interruption to a combination of disease and denial of access.
- The High Court decision was favourable for policyholders and found that occurrences did not have to be only local and specific to the relevant insured premises
- HC accepted that in this case the restrictions/ denial of access necessarily followed a broader national outbreak
- In relation to the disease elements of the hybrid clauses, the SC reached the same conclusion as it did for disease clauses.
- FCA appealed certain other aspects of the HC ruling

Prevention of Access/Hybrid

- High Court ruled that the certain government announcements were advisory rather than mandatory.
- This was appealed by the FCA – together with the question as to whether partial closure was sufficient.
- Supreme Court found that:
  - government instruction does not have to have the force of law – it may amount to a "restriction imposed" if it carried the immediate threat of legal compulsion or indicates that compliance is required without recourse to legal powers.
  - There may be cover where the business interruption is caused by a policyholder's "inability to use" the premises for a discrete business activity (e.g., selling books to walk in customers) or is unable to use a discrete part of the premises for its business activities (e.g., dept store required to close all but the pharmacy).
  - No material difference between "inability to use" and "prevention of access" wordings.

Causation – the pandemic will not be a competing cause when establishing causation

Causation

- High Court found that “issues as to causation largely answer themselves.”
- High Court’s preferred analysis: that the cause of the business interruption “is the Notifiable Disease of which the individual outbreaks form indivisible parts” [111 HC]
- High Court’s alternative analysis was that each of the individual occurrences of the disease was a separate but equally effective cause of the business interruption. [112 HC]
- Supreme Court: “We have concluded that the clauses cover only the effects of cases of covid-19 occurring within the specified radius of the insured premises. On this basis, the question of what connection must be shown between any such cases of disease and the business interruption loss for which an insurance claim is made becomes critical.” [161]
- Considered “but for” test but found nothing in principle which precludes “an insured peril in combination with many other similar uninsured events brings about a loss -with sufficient degree of inevitability- from being regarded as…a proximate cause of the loss, even if the occurrence of the insured peril is neither necessary nor sufficient to bring about the loss by itself.”

Causation (Cont)

- “We conclude that, on the proper interpretation of the disease clauses, in order to show that loss from interruption of the insured business was proximately caused by one or more occurrences of illness resulting from Covid-19, it is sufficient to prove that the interruption was a result of Government action taken in response to cases of disease which included at least one case…within the geographical area covered by the clause.”
- “The basis for this conclusion is the analysis of the court below, which in our opinion is correct, that each of the individual cases of illness resulting from covid-19 which had occurred by the date of any government action was a separate and equally effective cause of that action (and of the response of the public to it)”
- Our conclusion does not depend on the particular terminology used in the clause to describe the required causal connection between the loss and the insured peril and applies equally whether he term used is “following” or some other formula such as “arising from” or “as a result of”. It is a conclusion about the legal effect of the insurance contracts as they apply to the facts of this case.” [212]

Trends Clauses/Pre-Trigger Losses

- Trends clauses look to factor in and limit the loss by that which would have incurred in any event due to the wider downturn
- High Court ruled that trends clauses may be applied to non damage policies and found that loss should not be limited by any part of that insured peril (Orient Express not applied)
- Supreme Court agreed that insurers should not be able to adjust claims downward. Found that the aim of the trends clause was to arrive at the results that would have been achieved but for the insured peril and circumstances arising out of the same underlying originating cause
- The Supreme Court also ruled that pre-trigger trends should not reduce insured losses (FCA appealed the HC ruling that a decline in income prior to cover being triggered because of the pandemic could be taken into account)

Orient Express

- A case that concerned BI losses arising out of hurricane damage to a hotel in New Orleans – SC held it was wrongly decided and should be overruled.
- Insurers had successfully argued that cover did not extend to BI losses which would have been sustained anyway as a result of the damage to the city – even if the hotel itself had not been damaged.
- Supreme Court found that "In such a case when both the insured peril [damage to the hotel] and the uninsured peril [damage to the broader city] which operates concurrently with it arise from the same underlying fortuity (the hurricanes), then provided that damage proximately caused by the uninsured peril…is not excluded, loss resulting from both causes operating concurrently is covered. In the Orient Express case the tribunal and the court were therefore wrong to hold that the business interruption loss was not covered by the insuring clause to the extent that it did not satisfy the "but for" test.

Prevention of Access – High Court Ruling Not Appealed.

The High Court Decision

- It is important not to think of the Supreme Court decision as a one-stop shop for answering all COVID-19 business interruption claims.
- The FCA did not appeal the entirety of the High Court decision. Some parts remain relevant.
- However, trying to decipher what remains relevant isn't necessarily a straightforward task, given that some of what the Supreme Court decided directly contradicts the rationale of the High Court's logic.
- The High Court considered 21 lead sample wordings from 8 insurers. Findings were generally policy specific.
- Key theme: High Court largely closed door on claiming under "Prevention of Access" clauses in many policies. Not directly challenged on appeal.

Prevention of Access Clauses

- The High Court found the meaning of “incident” and “event” in Prevention of Access clauses was “*something which happens at a particular time, at a particular place, in a particular way*”. (HC para 404).
- High Court found that a pandemic in the context of Prevention of Access was “*too geographically dispersed, variegated, prolonged and non-specific to amount to an incident*” (HC para 405).
- High Court fortified its rationale by noting geographical restrictions in many Prevention of Access Clauses such as “radius” or “vicinity” (HC paras 406, 436, 444 & 466).
- Compare the above to treatment of “incident” in a disease clause that an occurrence of a disease would constitute an “incident” (SC para 93).
- In a nutshell, HC persuaded that Prevention of Access clauses are often drafted with the intention of covering incidents such as police cordons or gas leaks.

Prevention of Access

No Cover Found	Cover Found
Hiscox 1	**RSA 4**
We will insure you for your financial losses and other items specified in the schedule, resulting solely and directly from an interruption to your activities caused by: **3. an incident occurring during the period of insurance within a one mile radius of the insured premises which results in a denial of access or hindrance in access to the insured premises, imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 consecutive hours;**	**In the event of interruption or interference to the Insured's Business as a result of:** **i...xii. Prevention of Access – Non Damage during the Period of Insurance where such interruption or interference is for more than eight (8) consecutive hours;** **...within the Territorial Limits, the Insurer agrees to pay the Insured the resulting Business Interruption Loss.**
Hiscox 2	
We will insure you for your financial losses and other items specified in the schedule, resulting solely and directly from an interruption to [your business][your activities] caused by: **...3. an incident during the period of insurance within the vicinity of the business premises which results in a denial of or hindrance in access to the business premises imposed by the police or other statutory authority**	

High Court Decision: Hybrid Clauses

- Some policies contain “hybrid clauses” which are blend of “Disease” and “Prevention of Access” cover. HC found hybrid clauses will generally still activate given that they are not just focussed on specific local events (unlike most Prevention of Access clauses).

Hiscox 4: Hybrid Clause (Cover Found)

“We will insure you for your financial losses and any other items specified in the schedule, resulting solely and directly from an interruption to your business caused by:

…[7.][9.] your inability to use the business premises due to restrictions imposed by a public authority during the period of insurance following:

…b. an occurrence of a notifiable human disease within one mile of the business premises”

Prevalence / Proof of Covid-19

Introduction

- Presence of Covid-19 in a particular "vicinity, location, place and time" – Court could not do this but indicated acceptable methods.

- Relevance of Prevalence - Key ingredient/requirement for policy cover to trigger.

- Issue of prevalence not appealed (paragraph 46 of the Supreme Court judgment) / Section H of High Court decision.

- Questions asked by the Court:-

  - "*The type(s) of proof which could be sufficient to discharge the burden of proof upon the insureds;" and*
  - *"On the assumption that the matters pleaded by the FCA represent the best evidence available, whether it is sufficient as a matter of principle to discharge the burden of proof*" (Para 539 HC and List of Agreed Issues).

Types of Proof – The First Question

- Good deal of consensus between the parties.

- Starting point to determine presence of Covid-19:-
  - Within a particular distance zone or radius (collectively 'Relevant Policy Area')
  - That such presence has an impact on the policyholder.
  - The occurrence of a notifiable disease

- Four categories with most agreement between the parties:-
  - Specific Evidence;
  - NHS data on deaths due to Covid-19;
  - Office of National Statistics; and
  - Reported cases.

- Note: Other methodologies areas of disagreement:
  - Geographical distribution methodology
  - Uplifting or undercounting– lack of reliable data during first lockdown so requires adjustment

Note on Vicinity – Disease clauses - helpful

- RSA4 disease clause definition:-
  - *"An area surrounding or adjacent to an Insured Location in which events that occur within such area would be reasonably expected to have an impact on an insured or the insured's business."*

- The Court found that Covid-19 occurred within the vicinity of:
  - All premises in England and Wales on the 31 January 2020.
  - Northern Ireland on the 11 January 2020.
  - Scotland on the 28 February 2020.
  - See High Court Declaration 4.
  - Note this applies in the context of disease clauses with this type of definition and so in some but not all cases, may be helpful.

Specific Evidence – First Category of Evidence

- Specific evidence of case or cases in a particular location within the relevant policy area. Not much guidance from the Court (Para 541 HC)
  - Examples:-

  - Specific knowledge within the business/workforce
  - Evidence provided by third parties/local knowledge
  - Social media – people love to share!
  - Media reports and local newspapers.
  - Local authority websites.
  - Note the position of cases of proof requiring a 'manifestation at the premises'. A common question but not addressed by the Court. Would certainly require specific proof.

NHS Deaths Data – Second Category of Evidence

- The Court said this:-
  - *"The parties were agreed that if there was at least 1 death in an NHS Hospital Trust, where there was only 1 hospital in that NHS Hospital Trust, and the hospital was within the relevant policy area, this would show the death of a person or persons who previously tested positive for Covid-19 within the relevant policy area"*. (Para 543 HC)

ONS Deaths Data – Third Category of Evidence

- The Court said:-
  - *"The insurers accept that an insured can prove the presence of at least 1 case of Covid-19 within a relevant policy area in a particular week if the ONS deaths data showed at least 1 death during that week within the local authority or health board, and that local authority or health board was entirely within the relevant policy area".*
- Note, however:-
  - Insurers did not accept that the ONS data could, on its own "show the presence of Covid-19 within the policy area on any particular day of that week". (Para 545 HC)

Reported Cases – Fourth Category of Evidence

- This was a category that the High Court felt was quite obvious and that was public data as to the number of laboratory confirmed positive tests of Covid-19 across the UK. The Court noted:-
  - *"The most granular breakdown of daily and cumulative reported cases is at the level of lower tier local authorities, of which there are 317 in England"*. (Para 550 HC)
- Note: There is excellent draft guidance on all of these categories of proof in the draft FCA Guidance and List of Agreed Issues on prevalence as to how to utilise the various tools to locate reported cases/data across the UK - particularly good source of practical know-how for insurers and policy holders alike.

Court's Conclusions on The Types of Sufficient Proof

- Summary :-

  - "*The insurers have conceded that the categories of evidence pleaded, that is, specific evidence, NHS deaths data, ONS deaths data and reported cases, are in principle capable of demonstrating the presence of Covid-19. They also accept that other types of statistical evidence could be used, as long as they are reliable. The issue between the parties are really to do with what inferences can be drawn from the available types of evidence…*".(Para 569 HC)

    [Note the word "*reliable*" - our emphasis, and a point consistently argued by insurers particularly in relation to geographical and 'Uplifting' methodologies where there was more disagreement.]

Continued…Types of Sufficient Proof

- No dispute that cases of Covid-19 reported on a particular date could be used to show the presence of Covid-19. (Para 572 HC)

- Presence on a particular date -NHS:-
  - *"The issue when considering the question of prevalence, is whether it can reliably be inferred from a death or deaths on a particular date that the disease was present in that NHS Hospital Trust area at a particular prior date. It is not possible for the Court, without evidence either way, to determine what a death on a particular date says about when the disease was present in the relevant NHS Hospital Trust area…" "Inferences can clearly be drawn, and it appears to us likely that the relevant interest may be more obvious in some cases than others".* (Para 572 HC)

- In the case of ONS data:-
  - *"The parties were agreed that the deaths in a particular week show the presence of the disease in the particular local authority or health board area in the period "immediately prior" to that week".* (Para 571 HC)

Satisfying The Burden of Proof – The Second Question

- Very helpfully, the Court said this (Para 579 HC):-
  - *"The disagreement between the parties on this question was limited to the use of the methodologies of averaging and under counting. It was not suggested by the insurers that the particular types of underlying data pleaded by the FCA (specific evidence, NHS deaths data, ONS deaths data and reported cases) would not discharge the burden of proof if they were best available evidence in a particular case."*

"The real issues between the parties were as to the reliability of the particular methodologies introduced by the FCA.....the concessions which have been made by the insurers are important. It is our hope and expectation that in the light of them insurers will be able to agree on any issues of prevalence which actually arise and are relevant to particular cases. Further than that, however, we are not able to go."

Quantifying Loss

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Quantifying Loss in Covid-19 Business Interruption Claims

- To understand how a Business Interruption claim is quantified, it is first important to look outside the High Court and Supreme Court decisions.

- Claim quantification follows well established principles of business interruption.

- However, as we shall see, the SC decision has turned some of the established approaches to the scope of claimable business interruption damages on its head. This has resulted in a more “policyholder friendly” approach.

Loss Entitlement: The Basics

- Most Business Interruption policies provide for the calculation of loss by adjustment of the results of business' financial performance in the previous year.
- This information will often have been provided by the business at the outset of the policy.
- The calculation will typically also account for trends or other circumstances affecting it, to estimate results which would have been achieved if the insured peril hadn't occurred.
- Measure of loss: Different underwriting approaches, e.g.:
  - Loss of Income
  - Loss of gross profit
- Extent of cover
  - No universal application. Policy specific – will depend on policy wording.
- Indemnity period
- Inner limits on sums insured.

Proving Loss in Covid-19 claims

- Useful sources of evidence:-
  - The company's books
  - Accountant / forensic accountant
  - Loss assessor (policyholder) or loss adjuster (insurer)
  - Witness evidence
- Partial loss – this may be thorny.
- Precision as to quantum is not a bar to recovery nor is there a formal burden of proof that must be met : see *Equitas v R&Q* [2009] EWHC 2787 (Comm) as per *Ted Baker Plc & Anor v Axa Insurance UK Plc & Ors* [2014] EWHC 3548 (Comm). See further Section H of HC decision.
- The Court will make a finding based on the evidence before it. This will often be imperfect.

Savings and mitigation during COVID-19

- Mitigation as a policy requirement
  - “Reasonable Steps”
  - “All practicable steps”
- Some thorny topics:
  - Failure to adapt
  - Failure to utilise Furlough or overreliance on it?
- Some businesses will have made savings as a result of Covid-19
- A contentious area has been around government support.
  - See further Dear CEO Letter dated 25 January 2021 and
  - ABI letter to HM Treasury (August 2020) in which 12 insurers confirmed they would not deduct Local Authority Grants / Small Business Grant / Leisure/Retail/Hospital Grant.
- In the absence of substantive answers, look to guiding principles
  - Reasonableness of business decision in current environment, not hindsight
  - Principle 6 of the FCA sourcebook: “A firm must pay due regard to the interests of its customers and treat them fairly”. January 2021 *“Dear CEO”* letter
- “Other circumstances” clauses
  - E.g., declining oil prices (geopolitical)

Losses In Scope: Impact of SC Decision (1)

- SC confirmed that pre-trigger losses can be claimed cf: *New World Harborview Hotel Co. Ltd & Ors v ACE Insurance Ltd & Ors* (2012) 15 HKCFAR 120.

- As previously mentioned, SC is further authority that a “trend clause” must be interpreted to decontextualize the assessment of trends from the insured event. In other words, an insurer cannot say that the insured peril did not exacerbate loss, because the business would have lost profit due to the wider economic effects of COVID-19 anyway.

Losses In Scope: Impact of SC Decision (2)

- SC directly overruled *Orient-Express Hotels Ltd v Assicurazioni General* [2010] EWHC 1186.

- Insurers may feel aggrieved given that the protection offered by trend clauses may have formed part of their exposure analysis and, in turn, the level of premium set.

- Insurers may still have remedies to reduce. In particular, we expect that Covid-19 claims will shine a light on poor presentation of risk on expected turnover for SMEs – particularly those without the assistance of a broker.

Issues that may yet give rise to disputes

So, what has been resolved?

- Disease clauses: Cover confirmed
- Prevention of Access Clauses: cover in some but not all cases – depends on wording
- Hybrid Clauses (and POA): Cover may be triggered more readily following SC ruling
  - Cover may also be available for partial closure of business/ premises
  - Cover may be available for 'mandatory' closure where the order was not necessarily legally binding
- Trends - Claims should not be reduced b/c the loss would have resulted, in any event, from the pandemic – matters inextricably linked to, or the source of, the insured peril
- FCA Dear CEO letter – insurers to promptly reassess claims affected by the test case
  - Expect insurers to take a pragmatic, transparent and consistent approach to their interactions with policyholders over remaining evidence and loss adjusting processes – including in relation to proving presence of Covid for disease clauses.
  - Valid claims should be paid in full asap; will coordinate with Ombudsman.

Unresolved Issues – potential disputes

- Wordings not considered by the Court – e.g., “at the premises” wording
- Proper application of limits – each event / per premises etc
- Multiple government orders; multiple claims
- Deduction for government grants – depends on policy / facts
- Higher scrutiny on presentation of the risk at the time of underwriting – proposal forms, estimated turnover etc
- Implications for brokers

Reinsurance Issues

Aggregation

- Under a reinsurance treaty a Loss Occurrence may be defined to mean “each and every loss or series of losses arising out of one event/ originating cause”
- SC – “event” is synonymous with “occurrence” – something that happens at a particular time, at a particular place, in a particular way (Axa v Field)
- “A disease that spreads…is not something that occurs at a particular time and place and in a particular way; it occurs at a multiplicity of different times and places and may occur in different ways involving different symptoms of greater or less severity. Nor for that matter could an “outbreak” of disease be regarded as one occurrence, unless the individual cases of disease described as an “outbreak” have a sufficient degree of unity in relation to time, locality and cause.” [69]
- Where the aggregation language is “one event”, there is an argument for reinsurers that aggregation is not appropriate – but query whether the same analysis would apply under reinsurance where the causation test may be different
- Where the aggregation language is “originating cause” this may open the door more readily to aggregation of claims for presentation to reinsurers

Allocation

- Allocation of losses to the appropriate policy year
- Three different periods of lockdown
- Scope for allocation of 2021 losses to the prior treaty year – depends on wording?
- Aggregate losses from three lockdowns to attach all losses to prior year?

Contact Us

Susie Wakefield

Partner

T: 02072 057 012

E: susie.wakefield@shoosmiths.co.uk

Paul Eccles

Partner

T: 03700 868 741

E: paul.eccles@shoosmiths.co.uk

Richard Marshall

Partner

T: 03700 865 806

E: richard.marshall@shoosmiths.co.uk

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