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Welcome to the latest edition of "Commercially Minded".

This issue starts with us sharing with you what we learned in 2020 from 'talking to our clients a little less and listening a little more'. Next is an analysis of the judgment the FCA'S test case on Covid-19 business interruption insurance amid a perception of insurers replacing bankers as 'public enemy number one'. Our latest webinar report is on the key issues facing insolvency litigators, there is a case study about the successful use of litigation insurance for a breach of contract dispute over gambling domain name, plus your Top 7 'What you Really, Really Want' from commercial dispute resolution litigation funding.



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2020 Vision - A Year On

By Matthew Pascall, Senior Underwriting Manager

In our 2020 February newsletter I said we wanted to talk to our clients a little less and listen a little more. I'd like to think, notwithstanding Covid, we have taken time to listen. In fact, Covid may have helped. Thanks to 'Zoom' and 'Teams', we've probably spoken to more of our clients and potential clients than would otherwise have been the case.

Although we can't wait to actually meet people, meaningful and direct communication has, in some ways, actually been easier than in the past. [Our webinars](#) have been framed to give contributors a chance to tell us how litigation/ATE insurance either works or doesn't work for them and their clients. It has given us useful food for thought - that we have, metaphorically, digested.

Let me explain this with two particular examples: the use of litigation insurance in Scotland and for contentious trusts and probate across the UK.

- **Our Scottish contributors commented that** some litigation insurance providers and intermediaries don't always understand how litigation works in Scotland. Since starting to focus on Scotland we have taken time to develop bespoke policy wordings that are governed by Scots law. As underwriters, we've made a point of familiarising ourselves with as much Scots law and procedure as we can. With each case insured we've learned more and are committed to working harder at this.
- **In our [contentious trusts and probate webinar](#)** I asked if there is a role in providing some adverse costs protection for trusts and trust assets. In practice this may not be a cause for concern but, as I said in the webinar, solicitors should 'throw down a gauntlet'. Present us with the case and the costs risks associated with it and see if we rise to the challenge - writing a policy that gives clients the protection they need.

We're about to roll out a new commercial policy wording that should provide even greater clarity for our insured - and we're doing the same for our coverholder agreements. In both cases, we want these vital documents to work better for the insured. Part of our knowledge-sharing commitment is helping those new to litigation insurance to easily get started with the Temple service experience.

We've also listened to what our clients have said about our pricing structure. Soon you will see new insurance premiums and an easier to understand premium structure. This will provide clients with greater certainty about the amount payable if and when they are successful.

- Do remember that Temple premiums are always deferred and contingent on success. In short - you're covered if you lose, you only pay if you win and there's no upfront premium to be paid.
- If you don't think a litigation insurance premium we propose is going to work for your client, please tell us - we really are here to listen.

Our focus in 2021 is to offer more solicitors the freedom to insure their cases quickly and simply by issuing policies themselves. Many of our client law firms do this already, but we want to give more of you the benefit of using our on-line 'TOPS' system to get cases insured in the time it takes to complete a form on-line and press a button. There's no need to refer cases to an underwriter - solicitors don't need our consent to issue proceedings and to make, accept and reject offers.

And finally, the last 12 months have been challenging for all of us, but Spring is definitely in the air, we have a roadmap out of lockdown and the vaccination scheme is working well. Here at Temple we can't wait to get out and about and meet you all in person as soon as possible.

To find out more about what we can do for you in 2021 with regard to litigation insurance and disbursement funding, please call me on 01483 514428 or email matthew.pascall@temple-legal.co.uk.



COVID-19 - Are insurers really the bad boys?

By Nicholas Ellor, Senior Underwriter

In January the Supreme Court handed down its judgment regarding the Financial Conduct Authority's test case on business interruption claims. I think it fair to say the appellant insurers have received a bad press (some saying 'rightly so') and are probably now in the unenviable position of having replaced bankers as public enemy number one.

The perception is they wrongly declined cover on COVID-19 business interruption insurance claims and that, if it hadn't been for the Financial Conduct Authority coming to the policyholders' rescue and taking up their cause, insurers would have been quite content to simply let matters lie; the thinking being that for policyholders to bring an action against them would be prohibitively expensive. Meanwhile policyholders were left fighting to keep their businesses afloat.

If the accusation is this is just another example (albeit on a grander scale) of insurers wriggling out of their contractual obligations, then in the court of public opinion, they are guilty as charged.

There is, however, a defence to be made in support the position they took.

The existence of a healthy and buoyant insurance market is crucial to the commercial world and has been so for many hundreds of years. The London insurance market is admired worldwide for the level of its sophistication and the depth and experience of its professionals. Many billions of pounds of risk is underwritten every year in respect of all aspects of commercial trade.

It will come as no surprise that the wording of the particular risk underwritten, "the insured peril", is absolutely key, both to the insurer and to the insured. Every effort is made by the insurer to describe, with precision, exactly what is covered and what is not.

Many small businesses take out Commercial Combined Policies which cover a multitude of different risks, such as property damage, public liability and business interruption. These are complex contractual documents. Many policyholders who submitted business interruption claims took out these types of policies.

I think it would be fair to say that very few insured took much notice or even knew of the "non-damage" extensions to the "standard" business interruption cover. They would have taken far more notice of the "damage" policy provisions relating to business interruption caused by damage to property and equipment rather than "non-damage" business interruption caused by "infectious diseases", murder or suicide.

The last pandemic was the Spanish Flu in 1918. Severe acute respiratory syndrome (SARS) which took hold in 2003 emerged from China, but its spread was limited, whilst the Middle East Respiratory Syndrome (MERS) in 2012 began in Saudi Arabia and spread only to a few other countries. Both of these were epidemics and not pandemics. No-one foresaw that a coronavirus emerging from a seafood and poultry market in Wuhan, China in December 2019 would spread to virtually every country in the world and cause such economic devastation.

What you don't foresee, or think unlikely, you don't legislate for (from the insurer's perspective) and what you don't think likely (from the insured's perspective) you don't wish to pay for in terms of any increased premium.

This article continues on our website.

[Click here](#) for lots more insight, including what Nick thinks insurers did intend to provide cover for, what the insurers were saying on their interpretation of the policy wording and 'Would the loss have occurred irrespective of the occurrence of the insured peril?'

If you'd like to discuss anything addressed in this article or wish to discuss a particular case you are instructed on, please contact Nicholas Ellor via email to nicholas.ellor@temple-legal.co.uk or call 01483 514815.



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Insolvency Litigation webinar on the key issues facing fee-earners and their clients

By Matthew Pascall, Senior Underwriting Manager

Temple's most recent webinar saw Frances Coulson (Moon Beever), Edward Judge (Irwin Mitchell) and Simon Jacobs (Seddens) join myself and Andy Lyalle (Temple's Senior Business Development Manager) for a timely discussion on insolvency litigation.

Given the strength and experience of our guests, it isn't surprising that the conversation was both lively and stimulating. [Click here](#) to view the webinar video.

Frances, Ed and Simon all have had extensive experience using litigation insurance for insolvency litigation, most of it good to date and some less so. They all felt that this type of insurance cover was necessary and becoming a more common feature of insolvency litigation.

They noted the real and potential effects of the Covid-19 pandemic, such as the probable uncovering of a greater amount of fraud and a need for change in certain areas of the economy. This is in order to adapt to the new economic climate that could make 2021 a challenging year for some businesses. They agreed that 'good news' could be about businesses being saved in the coming years but felt an uptick likely in the volume of insolvency litigation for the longer term.

Our participating insolvency experts also agreed that litigation insurance cover should be entered into as early as possible. Having this cover in a settlement situation was like "having a suit of armour", you wanted to "shout it from the rooftops" and that it can often have the effect of "taking the wind out from the sails of the other side".

Other observations of note included:

- They all appreciated a flexible approach on premiums in settlement negotiations and viewed that there was a range of behaviour being exhibited by providers of litigation insurance - with a hardening of position in some areas.
- In their experience some insolvency practitioners have had 'their fingers burnt' in circumstances where their insolvency claim had lost, and no litigation insurance was in place.

Many thanks to Frances, Ed, Simon and Andy for taking their time to share their thoughts.

Temple's presence in the insolvency market is growing, together with our experience of insolvency litigation. Do note the following:

- Our insurance premiums are fully deferred until conclusion and contingent upon success.
- Propose cases to us promptly - as soon as you are reasonably able to assess the merits.
- Temple can insure cases and fund disbursements regardless of the type of CFA/retainer.

We're happy to insure a variety (and volume) of insolvency cases, and can give you an early indication of the litigation insurance premium for you to discuss with your clients. Whenever an insolvency case is insured with Temple, the client(s) is also eligible to apply for disbursement funding.

If you have any questions about our litigation insurance and disbursement funding for insolvency litigation or are interested in attending future webinars hosted by Temple please call Matthew Pascall on 01483 514428 or email matthew.pascall@temple-legal.co.uk.

You may also want to read:

- <https://www.temple-legal.co.uk/news/insolvency-update-move-fast-and-settle-things-ciga-litigation-insurance-and-temple-collaboration-with-r3/>
- <https://www.temple-legal.co.uk/solicitors/commercial-ate/case-types/what-is-insolvency-litigation/>



Litigation Insurance in Action Case Study: Hanger Holdings v Perlake Corporation SA [2021] EWHC 81 (Ch)

Gambling domain name dispute sees a big winner for claimant at trial

By Matthew Pascall, Senior Underwriting Manager

In a judgment handed down on Tuesday 19th January 2021, Simons Muirhead & Burton LLP won a claim to recover the domain name blackjack.com on behalf of the client, Hanger Holdings, from online gambling entrepreneur Simon Croft. SMB Managing Partner Razi Mireskandari and Senior Associate David Phillips acted in the litigation with Jonathan Hill of 8 New Square as counsel.

Area of law:

Breach of contract. Equitable rights and remedies

Below we take a close look at what happened and the important role of Temple's litigation insurance and disbursement funding in this case.

Hanger Holdings entered into an agreement with Uruguayan company, Perlake Corporation S.A, which was owned and controlled by Simon Croft. Under the agreement Hanger Holdings was entitled to commission from users of the gambling website and to see audited financial statements. Little commission was ever paid, eventually this dried up entirely and no audited financial statements were ever provided.

When Hanger Holdings took legal steps to recover the domain Simon Croft produced a loan agreement, claiming it was drafted in 2005, which he said entitled him to transfer the domain to himself.

HHJ Hacon found that the loan agreement was likely to have been created much later, and in any event did not entitle him to transfer the domain name to himself.

A spokesperson for Hanger Holdings said "Blackjack.com was recognised as online gaming site of the year 2 years in a row.

When we didn't receive commission or audited statements as per our agreement it raised concerns. We are happy to have this case behind us and grateful for the diligent work of SMB to rightfully retrieve our domain. The detail and preparation for the trial was unparalleled."

SMB and a spokesperson for Hanger Holdings also commented "We are also grateful to Temple for having provided both litigation insurance and disbursement funding all the way to trial. The disbursement funding was particularly useful to fund mediator fees, court fees and the fees of the experts required which included a Cayman Island lawyer, a Uruguayan lawyer and a forensic IT expert. Temple's integrated assistance helped greatly to bring this matter to a swifter and successful conclusion than might otherwise have been the case. Temple provided a very quick service."

Matthew Pascall, Senior Underwriting Manager, commented "This was a case with twists and turns and I am delighted that we were able to assist the client promptly so that their quest for resolution has been brought to a successful conclusion at trial. The use of Temple's litigation insurance and disbursement funding in this case proved to be helpful and effective."

The full judgment is available [here](#)



Your Top 8 'What you Really, Really Want' from Commercial Dispute Resolution Litigation Funding?

By Andy Lyalle, Senior Business Development Manager

I speak to many solicitors (not in the flesh for about a year or so) but during this time Zoom, Teams and a 'phone have enabled me to make and maintain contact with existing and prospective solicitor partners; in particular to ask them what it is they want - what they really, really want from litigation funding for their commercial dispute resolution clients and cases.

The answer was not "Ziggzag ah" and they did not "go wasting my precious time" but they gave me some very good feedback which I share with you below.

1. **'With several litigation funding providers** it can be difficult to see exactly what is being provided and at what cost.' At Temple we try to keep things as simple, transparent and straightforward as possible.
2. **'We as solicitor know the case and the client best** so they would like to get on with it.' We give full delegated authority to our coverholders so that you can embark on a case and run it without our prior authority and issue proceedings, incur disbursements, reject an offer of settlement or proceed to trial as you see fit.
3. **'We want competitive pricing** but we do not want to lose our freedom of choice to instruct our own experts or have an extra cost built into the insurance premium or funding and ultimately passed on to the client.' We agree.
4. **'We would like the litigation insurance premium and disbursement funding** to be fully deferred until case completion and, if the case is unsuccessful, know that the client does not pay anything.' This is the position at Temple.

5. **'We would like to have a quick process** for the litigation insurance and disbursement funding. Dealing with separate insurers and funders can lead to delays and different views on a case between insurance underwriters and a funder's investment committees.' At Temple you will be dealing with litigation insurance and disbursement funding 'all under the same roof' and where 'two become one'...; your client gets automatic access to our disbursement funding facility once they have taken out the insurance policy. We think this is particularly important in the current uncertain financial climate. Clients are wary of committing their money to a case without insurance in case it goes wrong but also find the built-in disbursement funding option attractive, even if they have the funds available themselves.
6. **'There is a variety of interest rates** depending on which type of case we are looking to source disbursement funding for.' We pride ourselves on tailoring a bespoke insurance solution but the interest rate for our disbursement funding is 10% whatever the case and this does not affect the size of the insurance premium.
7. **'We work with Temple because we can approach** an underwriter directly and discuss a case in advance of putting in a proposal.' Our team includes solicitors, barristers and insurance experts; alongside that we'll give you a non-binding indicative premium price to take back to your client and discuss.
8. **'We are concerned about minimum volumes** and only certain commercial areas being entertained.' Temple will happily look at bespoke, one-off cases and there is very little that we do not have an appetite for - experience counts.

And here's two more from us

9. **If you have a delegated authority coverholder scheme** with Temple, the TOPS online policy system is straightforward and allows firms to issue policies, request funding and make claims.
10. **Temple is FCA regulated** and our litigation insurance is A Rated. Peace of mind as some solicitors became nervous after the recent demise of an insurance provider.

The above wish list is the result of my discussions with many commercial dispute practitioners. Some were Posh, some Sporty, some Scary, a couple of Gingers and many younger than me but not a Baby... If your provider is not providing the above wish list please contact me on 07936 903767 or via email to andy.lyalle@temple-legal.co.uk



Walking the Talk for our Charities in 2021

Here at Temple we remain committed to our charitable endeavours and despite 2020 'not working out as planned' we are finalising plans support our chosen charities in 2021. Read on to find out what we did and what we have in mind.

There is no doubt that numerous charities are facing cuts to services and a significant loss of income as a result of the pandemic. It is therefore vital that businesses such as ours redouble their efforts to support charitable organisations during these tough times, as without this support it is hard to see how many of them can continue their essential and worthwhile work.

Despite the numerous restrictions through most of last year, Temple was still able to support a number of fundraising activities. These included the [London Legal Support Trust](#) where we took part in and socially distanced walks and online quizzes.

In addition, a number of our staff also took part in 'The 2.6 challenge' to raise money - this involved us participating in events connected to the number 26, such as 26 press ups or walking 2.6 miles and provided a welcome respite to the struggles of lockdown.

The Queen Elizabeth Foundation and the Brain and Spinal Injury Centre are two other charities we are hoping to work closely with again in 2021. For more details on the support these charities provide please visit their websites www.qef.org.uk and www.basiccharity.org.uk/.

As well as organising fundraising events for our chosen charities, Temple is also keen to take part in 2021 conferences arranged by charities. With that in mind we are proud to be present at the virtual Child Brain Injury Trust (CBIT) conference being held on 20th and 21st April 2021 - and delighted to welcome attendees to our virtual stand. For more information on the work carried out by CBIT, please visit their website <https://childbraininjurytrust.org.uk/>.

We're also proud to have had a number of staff who engaged in their own charitable efforts throughout 2020 to raise money for good causes, many of which are charities close to their own hearts. This included exhausting marathon challenges and 'Santa's on the run' - and have more planned for 2021 that we will report on in future newsletters.

If you would like to know more on the charitable work that Temple undertake or get involved with any of the great charities mentioned above, then please don't hesitate to contact me on 01483 514872 or via an email to lisa.fricker@temple-legal.co.uk

COMMERCIALLY MINDED

A solicitor update on litigation insurance and funding from Temple Legal Protection

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Always Deferred and Contingent: why we offer this, and why it matters



Deferred and contingent is at the heart of Temple's litigation insurance. In short, there is nothing to pay if the claim fails and, if you win, nothing to pay until your client has received their damages.

Temple has always believed that deferring premiums until the conclusion of a case and making them contingent on success works best for the client.

Other insurers may charge an up-front, non-contingent premium and say this can reduce the overall cost of the insurance. But the premium still has to be paid for and, in cases with a large limit of indemnity, that is a big-ticket expense that has to be funded at the outset of the case. And, if the claim fails, that early non-contingent premium might not look as if it had been a wise investment.

Temple's approach works. At no initial cost, the client has the peace of mind and protection they need throughout the life of the case. If things don't work out, we step in and pick up the tab. If the claim is successful, only then will your client have anything to pay.

Contacts:

Matthew Pascall

Senior Underwriting Manager

Matthew was called to the Bar in 1984 and before leaving to join Temple was a Legal 500 Tier 1 barrister. He leads the commercial litigation insurance team and his wide-ranging knowledge experience of the commercial legal sector is invaluable to our client law firms.

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Andy Lyalle

Senior Business Development Manager

Andy has 25 years' experience in the legal services sector, working in technical and managerial roles. Based in our Bristol office, Andy works predominantly with the Commercial team, meeting with existing and potential clients nationwide and is always ready to discuss your litigation insurance and disbursement funding requirements.

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Amy Edgington

Underwriting Support Manager

Amy provides underwriting support for the Commercial team as well as managing our underwriting assistants. Committed to providing the highest levels of service, her role includes the swift and efficient creation of quotes, issuance of policies and fielding of enquiries.

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Nicholas Ellor

Senior Underwriter

Nicholas has twenty years' experience working as a solicitor on both contentious and non-contentious company commercial and corporate matters. Having been a practitioner, he is fully aware of the pressure and time constraints a commercial litigator has to operate under.

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Take part in our ATE insurance survey

"But I'm not a customer of yours - why does what I think about ATE insurance matter?"

Perhaps it's exactly that - If you're not a customer, we want to see how we can make a difference.

Asking for feedback via a newsletter may seem a little impersonal, but if you haven't done so yet we really would value your thoughts. It takes 2 minutes and you could win a £50 Amazon voucher. [Click here](#) to take part.



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