Insurance Market Conditions & Trends 2015/16: Cases

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In a world of breathtaking change, keeping abreast of legislative, judicial and regulatory developments is essential for managing risk and business planning. Our guide will ensure you have a concise summary of the key legal events from the last 12 months at your fingertips.

1. AIB Group (UK) Plc v Mark Redler & Co Solicitors

Supreme Court decision on lenders' breach of trust arguments against solicitors.

Lenders pursuing claims against solicitors have increasingly adopted breach of trust arguments, attracted by the potential for increased recovery and a way of sidestepping contributory negligence arguments. The number of such claims has inevitably resulted in a honing of the law, which in the latest Supreme Court decision was not in the lender's favour.

In this case, the issue to be decided was whether there was a causation requirement in equitable compensation. Upholding the decision of the Court of Appeal, the Supreme Court held that there was.

A mistake by the lender's solicitors resulted in them releasing the balance of the advance to the borrowers while the first legal charge over the property remained unredeemed. As a consequence, the lender received only a second charge over the property and lost security equivalent to approximately £275,000. The lender sought reconstitution of the trust fund requiring a payment of approximately £2.5 million.

The Supreme Court held that, in the absence of fraud, a beneficiary should not recover a loss that would have been suffered even if the trustee had properly performed his duties. Accordingly, the loss was limited to the difference in the value of the security the lender should have obtained and that which it did receive. Confirmation that solicitors are only liable for the losses actually caused by a breach of trust will be welcomed by insurers.

2. Aspen Insurance UK Ltd v Adana Construction Ltd

Court of Appeal decision on definition of Product

A crane collapse on a building site resulted in numerous claims being made for damages for personal injury and property damage against various defendants including Adana, a construction subcontractor responsible for creating the reinforced concrete pile cap that formed the crane base.

Aspen sought a declaration of non-liability under a combined contractors' liability policy, which was declined at first instance. The Court of Appeal had to decide whether the claim fell within the public liability part of the combined policy or should be treated as a product liability matter. In order to do so it had to consider what constituted a 'Product'. The court held that the term eluded precise definition, but a hallmark of a product, in the context of the construction industry, was that it was something which, at least originally, was a tangible and moveable item that could be transferred from one person to another and not something that only came into existence to form part of the land on which it was created. The fact that Adana's works created something did not mean it was a 'Product'. Accordingly, the judge was correct to hold that the concrete base was not a 'Product'.

Although the decision is based on the wording of this particular policy, it will hopefully provide some guidance on the definition of product for future construction defect cases.

3. Billett v Ministry of Defence

Future loss of earnings capacity

This case shows how the courts are willing to depart from the Ogden tables to achieve a fair outcome in assessing future loss of earnings to compensate a disabled party.

The Claimant suffered pain and loss of sensation in his feet from a non-freezing cold injury while on service with the army, but was still able to work as a heavy goods vehicle driver after leaving the army. The court found that the Claimant narrowly

fulfilled the definition of ‘disabled’, since his symptoms substantially limited his ability to carry out day-to-day activities. The judge found it hard though to think of many other people being classified as disabled who were as fit and able as the Claimant.

Being classified as disabled and applying the Ogden tables strictly significantly impacts on an award for future loss of earnings capacity. However, because the Claimant’s disability was extremely minor, the judge used his judicial discretion to make an adjustment (by increasing the disabled discount factor) in order to avoid an inflated award.

This case illustrates the need for firm evidence on the extent of a claimant’s disability if overcompensation is to be avoided. The use of judicial discretion, however, is expected to be scrutinised shortly, as an application for permission to appeal is currently with the Court of Appeal.

4. Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt

European Court of Justice ruling that a normally functioning product can be defective

Boston Scientific manufactured and sold pacemakers. It identified a defect in some pacemakers that could lead to premature battery depletion without warning and recommended replacement. Two patients underwent replacement surgery but their pacemakers were destroyed without examination to determine if the defect existed. The medical insurer sought compensation from Boston Scientific in respect of the costs of surgery.

The European Court of Justice held that in light of a pacemaker’s function, the particularly vulnerable situation of patients using them and the abnormal potential for damage that a defective pacemaker might cause, the safety requirements which patients are entitled to expect for such products are particularly high. It concluded that such products can be classified as defective under the European Product Liability Directive where they form part of a group of products that pose a risk of failure, without the need to establish that an individual product in that group has the defect.

This ruling is a significant extension of liability principles. There are concerns that insurers will face claims involving other implanted medical devices where it is argued that, although the product might not result in fatal consequences if defective, it nevertheless gives rise to the need for removal due to the inherent risks – for example, cochlear implants, orthopaedic joints and cosmetic implants.

5. Delaney v Secretary of State for Transport

Court of Appeal decision shows UK domestic law out of kilter with the consolidated EU Motor Directive

Mr Delaney was a passenger in a vehicle involved in a road traffic accident which, at the material time, he knew was being used to transport a large quantity of cannabis for the purpose of drug dealing. He brought a claim for damages against the driver of the vehicle in which he was travelling.

The driver’s insurers obtained a court order that it was entitled to avoid the policy pursuant to section 152(2) of the Road Traffic Act 1988 for failure to disclose relevant medical information, such that the claim came to be dealt with pursuant to the Motor Insurer’s Bureau (MIB) Uninsured Drivers’ Agreement 1999 (albeit the insurers retained conduct under article 75).

The matter came before the Court of Appeal in the case of *Delaney v Pickett*, where it was decided that the driver, Mr Pickett, could not rely on the maxim ‘ex turpi causa non oritur actio’ (‘from a dishonourable cause an action does not arise’) in order to defeat Mr Delaney’s claim, as Mr Delaney’s transportation of drugs was not the cause of the accident, but rather it was Mr Pickett’s negligent driving.

However, Mr Delaney’s claim still failed pursuant to clause 6.1(e)(iii) of the 1999 Agreement, which excludes liability for injuries sustained during the furtherance of a criminal activity – here the transportation of illegal drugs for sale, which Richards LJ found to be incompatible with three EU Motor Directives (since consolidated into the Sixth Motor Directive). Whereas the EU Directive allowed member states to impose limited exclusions in the case of uninsured drivers, the list of permitted exclusions did not extend to that of criminal acts. As such, the 1999 Agreement was in breach of EU law, and Mr Delaney’s only recourse was a claim against the Department for Transport.

Much like the Vnuk case below, this decision exposed the UK government to potential claims for Francovich damages for breach of EU law pending a re-draft of the 1999 Agreement. Following Delaney, a new 2015 Uninsured Drivers’ Agreement was signed on 3 July and will be in force for accidents on or after 1 August 2015. At the same time the 2003 Untraced Drivers’ Agreement is also being amended to remove the exclusion relating to passenger knowledge of use of the vehicle in furtherance of a crime.

6. Gard Marine and Energy Ltd v China National Chartering Co Ltd

Court of Appeal considers subrogation and joint insurance (in a claim for breach of safe port warranty)

The case concerned the total loss of a vessel that left its berth at Kashima, Japan, and headed out to sea in a strong

northerly gale. The court found there was no breach of safe port insurance warranty.

The Court of Appeal went on to comment on joint names cover. It confirmed that where a party insures property jointly for the benefit of another, the insurers will not ordinarily be entitled to pursue rights of subrogation against that other party. However, this will ultimately depend on the terms of the underlying contracts (rather than the terms of the insurance policy). Longmore LJ indicated that the comments of Rix LJ in *Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd* on the importance of the underlying contracts continued to apply, but observed that where a contract

requires a party to jointly insure for another, it will usually be that the parties have agreed to look to insurers for indemnification rather than to each other.

7. Jetivia SA and another v Bilta (UK) Ltd and others

Supreme Court decision that directors cannot profit from their own wrongdoing

Bilta was compulsorily wound up on an HM Revenue & Customs petition, owing £38 million in unpaid VAT. Its liquidators brought a claim against its former directors and a Swiss company, Jetivia, for their dishonest involvement in a fraudulent scheme that caused Bilta to enter transactions constituting VAT fraud. The liquidators relied on section 213 of the Insolvency Act 1986 in bringing their claim for damages.

The Supreme Court held that the directors' fraudulent conduct could not be attributed to Bilta to bar a claim against directors for breach of their duties. It also held that section 213 had extraterritorial effect and permitted a UK court to order an overseas party that participates in a fraudulent scheme to contribute to the insolvent company's assets.

Sanity has prevailed. Insolvency practitioners can bring claims against fraudulent directors and co-conspirators who have, through their fraud, contributed to the insolvency of the company, and directors' and officers' insurers will not be asked to fund technical 'illegality defences' for directors accused of participating in a fraudulent scheme.

8. Knauer v Ministry of Justice

Measure of loss in fatal accident claims

The Claimant brought a claim under the Fatal Accident Act 1976 following the death of his wife from negligent exposure to asbestos, causing mesothelioma. The particular issue between the parties was whether the multiplier should be assessed at the date of death, or at the date of the trial.

The settled position from case law is that the multiplier in fatal accident claims is assessed at the date of death. However, this has been universally criticised, not least by the Law Commission, as being less precise as it tends to undercompensate a claimant.

The judge said that he would have assessed the multiplier as at the date of trial if he had been able to, but was bound by earlier case law to adopt the date of death approach. However, the judge also gave 'leapfrog' permission to appeal directly to the Supreme Court. When heard, we expect the Supreme Court to change the law and adopt the date of trial approach. While this will give greater precision to assessing loss in fatal accident claims, it will also increase the level of damages payable. In this claimant's case, altering the date would have increased the claim by £50,000.

9. Mohamud v WM Morrison Supermarkets Plc

Awaiting Supreme Court hearing on the test for vicarious liability

In February 2014 the test for establishing vicarious liability adopted in *Lister v Hesley Hall Ltd* and subsequent cases was considered by the Court of Appeal following an assault on a member of the public by an employee. The two-stage test requires the court to consider first whether the relationship between the primary wrongdoer and the person alleged to be liable is capable of giving rise to vicarious liability and second whether there is a sufficiently close connection between the wrongdoing and that relationship. Here, where an employee of Morrisons verbally abused and then physically assaulted a customer, the court had no difficulty in finding that the first stage of the test was satisfied. In relation to the second stage, the mere fact that the employment presented the opportunity, setting, time and place for the assault was not sufficient. The Claimant was required to prove that the employee's actions were in furtherance of Morrisons' aims, were akin to tasks for which he had been granted authority or were inherent in the employment.

The mere fact of contact between the employee and customers, which Morrisons had authorised, was not sufficient to fix the employer with vicarious liability for an unprovoked assault. There was no close connection between the employment and the assault and the claim therefore failed.

The Claimant has appealed this judgment to the Supreme Court, which is to hear the case later this year.

10. Montgomery v Lanarkshire Health Board

Supreme Court decision on consent for treatment and duty of care

This case is of interest for all medical practitioners (and their medical malpractice insurers) where advice is given to patients on the benefits and risks of a particular treatment.

The Claimant was not informed of a 9-10% risk of her son suffering from shoulder dystocia during birth. She claimed that had this been explained, she would have asked to undergo a caesarean section.

The Supreme Court held that a doctor is under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment and of any reasonable alternative treatments. Whether a risk is 'material' depends on whether a reasonable person in the patient's position would be likely to attach significance to the risk or whether the doctor is (or should reasonably be) aware that the particular patient would be likely to attach significance to it.

For medical malpractice insurers, we expect a period of flux while the courts test exactly what is meant by a material risk. In the meantime, insured medical professionals may be concerned at the prospect of finding out everything about a patient in order to judge whether that particular patient will attach significance to a risk.

11. R (on the application of Bluefin Insurance Services Ltd) v FOS & Wayne Lochner/R v FOS & Ian Robinson

FOS successfully challenged on jurisdiction

The Financial Ombudsman Service (FOS) exists to resolve complaints relatively quickly and informally between regulated firms and consumers or microenterprises. In this case, the FOS decided that a former company director complaining in relation to a directors' and officers' (D&O) policy was a consumer. In the first successful judicial review of the FOS for over ten years, this decision was overturned, on the basis that a D&O policy will almost invariably be taken out in connection with the complainant's trade, business or profession. The wider principle, that the courts ultimately determine the FOS's jurisdiction, not the FOS itself, was then upheld in Robinson.

12. Rendlesham Estates Plc and others v Barr Ltd

Meaning of dwelling under the Defective Premises Act 1972

Under the Defective Premises Act 1972, an occupier has a right of action against a person who carried out "work in connection with the provision of the dwelling" if it is not fit for habitation. The claimants were 120 owners of apartments in two blocks. Defects within the apartments and to the common parts made the apartments unfit for habitation. The claimants sought to recover against the contractor the cost of substantially rebuilding the external envelope of the building and rectifying defects within the apartments, which came to £14 million.
The court held that a 'dwelling' is a place where a household lives to the exclusion of another household. The dwelling was therefore the individual apartment together with, possibly, those parts of the building to which an apartment's occupiers had exclusive access but not the common parts or the whole block. However, the judge held that a duty was owed under the Act in respect of the common parts as the work to the structural and common parts of both blocks was work done "in connection with the provision" of each of the apartments. Further, the owners each had a financial responsibility for the maintenance of the common parts. The judge held that each claimant's loss in respect of a defect in the common parts was not limited to his proportion of the service charge covering the repairs. The full cost of repairs could be awarded to each claimant, but on the basis that the judgment could only be enforced once against the contractor.

Any application of the Act will be very fact specific but the decision provides helpful guidance as to when a contractor can become liable to the owner or occupier of a dwelling with whom it has no contractual relationship.

13. SPL Private Finance IC Ltd and others v Arch Financial Products LLP/ Robin Farrell

First judgment arising from the collapse of the Arch Cru collective investment scheme

Arch Financial Products LLP (Arch FP) was the investment manager of the Arch Cru funds which comprised 22 Guernsey-incorporated cell companies. Arch FP entered into identical investment management agreements (IMAs) with each cell, providing Arch FP with discretion in the cells' investment mandate.

Eighteen cells brought a claim against Arch FP and its chief executive, Robin Farrell, arising from Arch FP's investment of £20 million in a student housing business on their behalf. The High Court found that this investment was motivated by Arch FP's interest in obtaining illegitimate payments of £6 million rather than proper consideration of the investment's merits and the interests of the investors.

The court granted judgment in favour of the cells and held that Arch FP acted in breach of its fiduciary duty, contract and its duty to act with reasonable skill and care when managing the cells' assets. Mr Farrell is seeking to appeal the finding that he dishonestly assisted Arch FP to breach its fiduciary duties and induced its breaches of the IMAs.

The case provides insurers with a useful illustration of the duties owed by investment managers and the basis on which liability can be imposed.

14. Stevens v Equity Syndicate Management Ltd

Credit hire

This Court of Appeal decision confirms that the rate awarded to a non-impecunious claimant should be the "lowest reasonable rate quoted by a mainstream supplier" in the Claimant's geographical area for the type of car actually hired on credit hire terms.

Handing down the leading judgment, Kitchin LJ stated that the court's approach to analysis of rates evidence "must be directed to stripping out the irrecoverable costs from the basic hire rate the Claimant has agreed to pay".

The decision has, perhaps not surprisingly, resulted in an increase in the number of claims where impecuniosity is alleged on behalf of the Claimant notwithstanding a lack of financial documentation to support the contention.

Paragraph 36 of the judgment states that in the absence of a mainstream supplier, the lowest rate quoted by a local reputable supplier will suffice. It is presently open to interpretation what constitutes a mainstream basic hire rate company, or indeed what makes a local company reputable.

Claimants may argue that the rates evidence provided by the defendant are not for the type of car actually hired. However, there is nothing in the judgment to suggest the law surrounding the burden of proof in relation to equivalency has changed. As such, if the need for a like-for-like vehicle has not been established, insurers should maintain a rate for a suitable replacement vehicle in the Claimant's geographical area.

Another obvious argument for claimants is that any rates evidence obtained (and any rate awarded by the court) must be subject to a nil excess. This point is, however, limited to the specific facts of the case. The recent appeal case of *Lawson v Mullen* has also confirmed that a claimant "does not have an inalienable right to hire a vehicle with a full excess waiver". As with this case, where there is a gross disparity between what the credit hire company charged and the basic hire rate, with the only additional advantage being the waiver of a £500 excess, it may well be unreasonable for the Claimant to obtain that additional cost.

While there is an obvious risk of satellite litigation in the short term, and the risk that some insurers may choose to exit the Association of British Insurers' General Terms of Agreement, this judgment will save millions of pounds for insurers defending credit hire claims, and will reduce the number of claims proceeding to trial on the issue of rate.

15. Tokio Marine Europe Insurance Ltd v Novae Corporate Underwriting Ltd

Missed opportunity to clarify 'follow the settlements'

The widely anticipated appeal in this case which the reinsurance market was hoping would bring clarity to the interpretation of 'follow the settlements' did not happen. The parties agreed a settlement out of court.

Hundreds of Tesco's properties were affected by the Thai floods in 2001. Its operations were insured under a global programme arranged by ACE Europe (ACE), which was reinsured under a facultative proportional reinsurance, of which Tokio Marine had a 12.5% line. Tokio Marine had in turn bought a facultative excess-of-loss reinsurance from Novae.

The claim for £125 million was settled by ACE for £82.5 million. One of the issues ACE raised with the insured was whether all or some of the losses aggregated. Tokio paid ACE under the reinsurance and sought a recovery from Novae. Novae took issue with the aggregation of losses, but was subject to a follow the settlements clause in the retrocession.

The reinsurance and the retrocession were written 'as original'. In the retrocession, Novae agreed to "follow the settlements ... made by original insurers arising out of and in connection with the original insurance... ".

One issue was whether the settlements Novae had agreed to follow were the settlements of ACE or Tokio Marine. Novae argued it was required by the follow the settlements clause to follow the settlements of its reinsured and contractual counterparty. However, the court concluded the references to 'original insurers/insurance' were references to ACE.

A further issue was whether Tokio Marine was obliged to demonstrate that the basis of the claim as recognised by the settlement 'arguably' fell within the terms of the retrocession, or did so on the more onerous balance of probabilities test. The court concluded the lower 'arguability' standard applied and this is the interpretation that stands following the withdrawal of the appeal.

16. Toombs v Bridging Loans Ltd

Limitation in tort

Following a valuation of a property by Mr Toombs, the Claimant lent to the borrower on 3 November 2006. The borrower

failed to repay on 2 May 2007 and ignored a letter giving until 27 May 2007 for payment. A loss was sustained on sale of the security.

On 16 May 2013 the Claimant issued proceedings alleging negligent overvaluation. The six-year contractual limitation period had expired but the Claimant argued it was in time in tort as loss was not suffered until after 27 May 2007.

On appeal HHJ Seymour QC agreed with Mr Toombs. The fact that the borrower defaulted on 2 May 2007, having made no payment, was sufficient evidence that the covenant to repay was inadequate absent evidence to the contrary, which the Claimant had not provided. Loss therefore arose on 2 May 2007 so the claim was time barred on issue.

While limitation issues will always be fact specific, this decision prevents creep and anchors time in tort to terminal default. How far defendants might push this back remains to be seen and will depend on the extent of the alleged overvaluation. But with lenders likely to struggle to adduce hard evidence of covenant value, this case may create more opportunities to refute claims on limitation grounds in the future.

17. Versloot Dredging BV and another v HDI Gerling and others

Court of Appeal confirms effect of fraudulent devices

At first instance, the dispute about the proximate cause of the damage to the main engine of the vessel by ingress of water was determined entirely in the insured's favour, the loss being caused by a peril of the sea. However, the claim failed on grounds of fraud as the insured had adduced a false account of the facts around the sounding of the bilge alarm with the intention of distancing themselves from any fault. Ironically, it was a case they did not need to advance, in light of the court's finding on proximate cause. However, having put forward 'an untruth told recklessly in support of the claim' (a fraudulent device), the effect was to defeat the claim entirely, a decision reached by the trial judge with evident reluctance.

The Court of Appeal was not concerned that treating a fraudulent device in the same way as a fully fraudulent claim was too harsh. It was the draconian effect of the rule that created the deterrent and therefore gave the rule its justification.

While the decision in the earlier case of The Aegeon was merely obiter, and therefore not technically binding, the Court of Appeal said there were good reasons to treat it as such, not least that it had subsequently been cited without disapproval in a number of legal texts and by the Law Commission.

It was also held that there was no infringement of the right to peaceful enjoyment of possessions under the European Convention on Human Rights. The insured had crossed a moral red line and once it was accepted that deterrence of such conduct was itself a legitimate aim, the sanction was not disproportionate.

18. Vidal-Hall and others v Google Inc

Court of Appeal decision advances growing trend for privacy breach compensation claims

In March 2015, the Court of Appeal granted permission to three claimants to sue Google for compensation for their distress caused by Google's breach of the Data Protection Act 1998 (DPA) and misuse of their private information.

The case concerned Google's alleged unlawful monitoring of Apple Safari users through the use of cookies that circumvented Safari's privacy settings in 2011/12. The claimants state that this caused them distress and are seeking financial compensation. Quite what distress was caused is unknown (the claimants' pleadings are confidential). The claimants are also seeking an account of profits that Google made in targeted advertising from its unlawful use of their personal data.

Before this case, claimants had to prove a direct financial loss before they could claim compensation for distress. The Court of Appeal's view is that claimants should not be restricted in this way and should be entitled to claim compensation for distress alone.

For insurers, this case is truly groundbreaking and may spur interest in cyber risk policies. The decision should also act as a caution to review any liability policy that indemnifies a breach of the DPA or an 'invasion of privacy'. It is also notable that the Court of Appeal has allowed the claimants to sue a US-domiciled company for its UK DPA breaches and misuse of UK citizens' data.

Google has appealed the decision to the Supreme Court.

19. Vnuk v Zavarovalnica Triglav

Incompatibility of UK road traffic laws with EU motor directives

Mr Vnuk, a Slovenian farmworker, suffered injury when the ladder he was standing on in the confines of a farmyard was struck by the trailer attached to a reversing tractor, and he brought a claim for damages against the insurers of the tractor. Mr Vnuk's claim failed in the Slovenian courts, as under domestic Slovenian law compulsory insurance for motor vehicles extended to cover the use of the tractor as a means of transport, but not its use as a 'machine or propulsion device' as was

the case here.

The European Court of Justice disagreed, finding that the ‘use of vehicles’ in article 3(1) does in fact cover any use of a vehicle that is consistent with the normal function of that particular vehicle. The court made no specific reference to the fact that the tractor was being used on private property (in this case a farmyard) and it is therefore apparent that the duty to insure extends to all manner of motorised vehicles being used other than on the road.

As in Delaney, this ruling is incompatible with domestic UK legislation. While it remains to be seen what steps the government will take, it is now likely to consider amendments to the domestic legislation to avoid claims for Francovich damages. This could have major implications for motor insurers, with the need to extend cover for road-going vehicles to include accidents off-road, as well as the need to offer new products for motorised vehicles not designed for use on the road, such as ride-on lawnmowers.

20. Zurich Insurance Plc UK Branch v International Energy Group Ltd

Supreme Court decision on indemnity under an employers’ liability policy

International Energy Group (IEG) employed Mr Carré for 27 years, during six of which it was insured by Zurich. The employers’ liability insurance policy contained a standard indemnity for all sums incurred by IEG in respect of damages claims by employees who sustained an injury or disease caused during any period of insurance in the course of their employment with IEG.

After settling Mr Carré’s claim for mesothelioma (he was exposed to asbestos through the whole of his employment period), IEG sought to recoup all of its outlay under its indemnity with Zurich.

The Court of Appeal, relying on the Supreme Court’s decision in *Durham v BAI (Run off) Ltd*, found that there was a sufficient ‘weak’ or ‘broad’ causal link between Mr Carré’s exposure to asbestos during the years when IEG was insured by Zurich and his contraction of mesothelioma for IEG to be legally liable for causing his disease within the insurance period. For that reason and by virtue of the ‘all sums’ wording appearing in Zurich’s insurance contracts, Zurich was liable to indemnify IEG’s outlay in full.

Zurich appealed to the Supreme Court, the case itself relating to an appeal from the courts in Guernsey where the Compensation Act 2006 has not been implemented.

The Supreme Court’s judgment confirmed that the common law rule of proportionate compensation still applies under Guernsey law, and that IEG should only be indemnified for 22.08% of the damages and costs payable to the claimant.

The implementation of the Compensation Act 2006 in the UK does not change the fact that Zurich would be entitled to claim pro-rata contributions toward the damages and costs payable to the claimant, albeit Zurich would be required to indemnify and pay the claim in full and then recover contributions for the 21 years when it was not on risk.

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