



Informing Progress - Shaping the Future

FOIL UPDATE 18th November 2021



FOIL President's Conference 2021 (and Gin Tasting)

FOIL CEO **Laurence Besemer** welcomed delegates to the meeting and explained that as there had been no President's Conference last year, due to the pandemic, rather than looking forward to the incoming President's year, this year's conference would look back at FOIL's achievements over the past year, during the presidency of **Jennette Newman**.

CEO's report for 2021 "FOIL - shape, scale and scope"

The shape of FOIL

Laurence presented a slide showing the structure of FOIL. There are four paid officers but all other members of the FOIL Executive Committee are partners at member firms, who give their time voluntarily. Stuart Hardy had just been elected as President, along with the others that form 21/22 Executive Committee.

As part of FOIL UK, there are divisions for lawyers practising in Scotland, Northern Ireland and Ireland, as well as London FOIL and Tomorrow's FOIL. There are also 27 Sector Focus Teams. These small groups (four to nine lawyers) get things done across a broad spectrum of subjects.

For 2021/22, **Gavin Coull** of **Birketts** will be President of the **London FOIL** Executive, with **Ling Ong** of **Weightmans** stepping down from the role after a very successful year.

The President of **FOIL Ireland** is **Michael Corrigan** of **Corrigan & Corrigan**. He has been in that position since 2019 and has led the initiative in Ireland with real energy.

Tomorrow's FOIL has as its President **Rachel Farnworth** of **Clyde & Co**. This division is for lawyers at member firms with less than five years post-qualification experience. In addition to creating awareness of the value of FOIL to young lawyers, this group is designed to liaise with counterpart divisions in other organisations. This has the potential to create career long relationships for those who may reach senior positions in the future.

The scale of FOIL

So far this year, FOIL had hosted 24 roundtable events for members, insurers and brokers. These have covered a variety of topical issues. The attendance of delegates on a virtual basis had probably resulted in better attendance numbers than had they been held in-person.

There had been three meetings of the Trade Bodies Association: a bringing together (quarterly) of the main insurer and risk organisations, including ABI, IUA, LMA, LMG, AIRMIC, BIBA, LIIBA, IRM and MGAA, to discuss issues of common interest.

Since the start of the year, FOIL had sent out 72 Updates and 8 consultation responses and 10 editions each of The Voice, The Digest and the Champions' Bulletin.

Another good example of how FOIL can act as the provider of a platform for discussion has been the 19 meetings of the **Knowledge Exchange Group on Covid-19**. These have covered issues such as new types of claims; how the courts have been coping; and how members firms have adapted to cope with the pandemic.

Eight talks on **product liability** were filmed and broadcast; there were 63 press comments or articles facilitated by FOIL's PR company **Kysen**, with a steady increase in comments from the Sector Focus Teams (rather than just the President) as more specialist input was required.

During the year, nine new members or associate members had joined FOIL. FOIL has 42 full corporate members in the UK and 23 in Ireland and 12 associate members, who are Trade and Industry Partners. Of the 42 UK firms, 32 are represented on at least one Sector Focus Team and a total of 251 lawyers sit on these teams.

Three long-standing sponsors continue to give their support: **39 Essex Chambers, 1 Chancery Lane Chambers** and **Hawkins**.

The scope of FOIL

This was illustrated by reference to an 'insurance law matrix'. The Y axis represented the areas of law covered by FOIL and the X axis the territory or market covered. At the time of the AGM in 2017, FOIL covered claims law in the UK domestic market, with aspirations to move into numerous other areas of law and to expand its territorial and market areas.

By 2018, FOIL had expanded slightly the areas of law covered and had penetrated London, with enquires ongoing in Ireland, the Channel Islands and the Isle of Mann.

2019 saw an expansion into yet more areas of law, particularly in London and FOIL had opened in Ireland.

By 2020, areas of work had expanded both in the UK domestic market and London.

As the end of 2021 drew near, the types of work covered had expanded even further in the UK domestic market, London and Ireland. With this, FOIL was providing business support to its members and their clients over a far wider spectrum of law than in 2017, although there were still some areas of work in which to expand, particularly in Ireland.

The aim over the next two-three years was to provide comprehensive coverage of all relevant areas of insurance law covering the whole of the UK market, London and Ireland.

The technical side of FOIL – Shirley Denyer – Technical Director

Looking back over the last 12 months, FOIL's priority had been to provide its members with practical help, with the civil justice system changing nearly every day. The focus was on information and measures to keep the claims process moving. In the first six months, 33 updates on Covid issues were published by FOIL. An early success for FOIL was in persuading the Court Funds Office for the first time to accept deposits electronically and without a 'wet' signature.

There was also work with APIL, including a best practice agreement, which was updated on several occasions and, later, with separate versions for Scotland and Northern Ireland. There was also lobbying of various government departments to assist them to make the system work as well as it could.

An ongoing issue is the late adjournment of trials, while recognising that the court system is under huge pressure. There have been hundreds of reports of multiple adjournments with wasted costs (including counsels' fees), due to a lack of judges. FOIL has gathered data and contacted every designated civil judge to highlight the problem.

FOIL's second focus has been looking ahead at the long-term impact of Covid. FOIL has responded to the government consultation on this topic and has also developed its own plans for the future, looking at what should be in any future regime and what should be dropped.

As ever, FOIL has concentrated on the detail, taking soundings from members at roundtable events and within the SFTs and has produced its own blueprint for the civil justice system post-Covid. FOIL has tabled 28 proposals ranging from rules on service to remote rehabilitation, sharing these views with the relevant organisations to which they relate and other stakeholders. It is believed that FOIL is the only organisation to deal with this issue in so much detail.

FOIL continues to work with APIL to address the post-Covid situation and to continue to remove areas of friction and reduce costs.

Not all of the attention has been on the pandemic. Members of FOIL have also sat on the CJC working group looking at Low Value Personal Injury Claims; the clinical negligence SFT is engaged with the health and social care committee inquiry into NHS litigation reform; and there has been engagement in Northern Ireland on the setting of the discount rate and civil justice reform. FOIL members have also been engaged in Northern Ireland on reviewing pre-action protocols

FOIL's costs SFT has had another busy year dealing with the review of guideline hourly rates (GHR) and the extension of fixed recoverable costs (FRCs). FOIL responded to both of the consultations on those issues, with contact being made with senior members of the judiciary and the MOJ. Across these and a raft of other costs issues, FOIL is determined to have the defendant voice heard

Fixed recoverable costs for NIHL cases is a particular focus and FOIL's views have been noted in the MOJ consultation response. A new FOIL NIHL working group is looking at issues such as the accreditation of audiologists; and the development of standard directions.

There has also been work on every aspect of e-scooters, with responses to consultations; a roundtable event; and a detailed briefing paper.

The volume of material created on these issues shows how long it can be for reform to take place, as illustrated particularly by the Official Injury Claim portal(OIC). FOIL has and will continue to be involved with the detail of the implementation and working of the OIC, including rehabilitation.

What is coming next? The Master of the Rolls is passionate about online civil justice. FOIL has been involved in the pilot of the Damages Claims Portal, which has now been extended to include defendant representatives.

There has also been involvement in the consultations relating to ADR and the review of pre-action protocols.

In the post-Brexit era, there have been issues relating to cross-border litigation, including the unravelling of *Vnuk*.

Various SFTs are working on issues which will extend into 2022: the Sports SFT: dementia; the Product Liability SFT: Covid related issues; the Public Sector and Blue Light SFT: climate change; the Abuse SFT: the outcome of the enquiries.

It's always difficult to make predictions but, whatever arises whoever is making the decisions will be well aware of FOIL's views.

Jennette Newman (JN) – Immediate Past President

Jennette welcomed the three guests taking part in today's discussion- '**The G (governance) in ESG**'.

Jennette began the discussion by commenting that ESG is very topical at the moment, with COP 26 in Glasgow going on at the moment but with the E and the S currently taking precedence. Today's discussion would focus on whether or not the G was important. There is a tendency for people to view the G as being about the rules and compliance and what the regulators want us to do. In fact, the G is far wider and more important than that.

The panel: **Julia Graham (JG), CEO of AIRMIC**. Prior to assuming the CEO role, Julia served as deputy CEO and technical director of AIRMIC from October 2015. She is also a former chair of both AIRMIC and FERMA, the Federation of European Risk Management Associations.

Suneeta Padda (SP), Managing Director of Padda Consulting has moved from an initial role with the FCA to a number of regulatory/compliance engagements within the insurance sector. Suneeta now runs a consultancy providing compliance support to the insurance industry. [Padda Consulting \(padda-consulting.co.uk\)](http://padda-consulting.co.uk)

Brendan McCafferty (BM) is an experienced Chair and CEO of regulated insurance businesses for both large corporates and most recently for private equity. He has also worked at the most senior levels between government and the insurance industry.

Q & A

To the speakers: what does the G in ESG mean to you and why is it important to your membership?

JG: Risk is about effective uncertainty on objectives: how you can achieve what you want to do strategically – the effects can be positive and negative. . The balance is therefore between allowing and not preventing actions and trying to ensure a positive outcome. However, organisations tend not to invest in the resources necessary to manage the sort of risks we are facing at the moment:

the high impact/low probability risks, which tend to be seen as somebody else's problem. Risks also have a habit of dipping down the list of risk priorities when they are not centre stage: a pandemic was fourth on a list of possible risks in the 2020 Airmic survey but is now seventh in the 2021 survey. Pandemic risk is still there, but just has lower board and top management visibility. There are also emerging risks, which can be defined as largely unknown risks where there is no accessible body of knowledge about them – these risks can wrong-foot even the best prepared organisations and countries. The value of intangible assets has also increased substantially over the past few years but particularly during the pandemic. Even where organisations had prepared for a pandemic, the speed at which Covid-19 developed and the scale of where it spread to, took many by surprise. The organisations that reacted most effectively were generally those that had learned from past experience of diseases. This makes it imperative that organisations are able to respond to events, with adaptability and agility, which are two of the most important principles or pillars of resilience.

In the context of the pandemic, the four key features of resilience were leadership, communication, focus and the avoidance of allocation of blame. Lessons learnt during the pandemic must be consolidated if organisations are going to seize the opportunities presented by that risk, before engaging with stakeholders in redesigning their processes and harnessing the potential of technology. Organisations must concurrently challenge their purpose: why do they exist? Given the speed of change, the frequency of challenging purpose must keep pace with change. The risk for insurers is of lagging behind the world and their customers, leaving the door open for others to seek opportunities.

Governance means boards giving and maintaining the support for a resilient approach to risk: encouraging forward looking behaviour, and avoiding becoming risk averse which can be a tendency when times are especially challenging.

Laurence Besemer had noted comment in the press that good governance was the key to and underpinned ESG.

Brendan McAfferty was asked how he viewed the G in ESG from his corporate experience and why is it taking centre stage now.

There is a need to have trust by way of verification or scrutiny. That is the role that governance has played historically, but it is evolving rapidly now. Increasingly governance is not sufficient by itself: it is a proxy for culture. How a business behaves, the character it shows under trying circumstances are the reality of what sets the contract in society. Regulators are effectively trying to understand the expectations of society and to reflect that in the way they approach their work. The test for any business is what are the expectations of society and how are those being met by the firms trading in that environment? The advent of ESG is a necessary symptom of that, with tolerance reduced and expectations increased. Governance is the codification of these newer expectations driven by events such as the global financial crises, the pandemic and the advances in technology.

What people now want is fulfilment through feelings of belonging, having worthwhile work and knowing what that work is for, all of which are enabled by governance. This brings about transparency and understanding; what firms are really about; and accountability. In a crisis what needs to be clear is the direction of travel for the firm. Companies need to demonstrate what contribution they are making to the wider world, with a purpose that enables them to show that they have a sustainable business. Decisions must be centred around something.

Businesses will be forced to change their forms of governance, even if they do not wish to do so, if they are to remain viable and attract investment. There are already examples of major investors expecting clear evidence of purpose if they are to continue to invest in businesses.

Governance is an enabling mechanism.

JN commented that these speakers clearly see governance in a much wider context than perhaps many lawyers.

Suneeta Padda was asked whether from her background she agreed with the previous speakers and what was her take on governance. How was her business supporting clients?

Many clients face regulation around risk and reliance. Trust is a major factor in the G. Companies have all of the systems necessary to comply with the regulations that govern them and enable them to meet the needs of external stakeholders. However, over the past few years, SP's company has seen an increase in the number of board effectiveness reviews and the scope of those is changing to look at and review different components. One of these is culture review, which clearly sits within the G as it identifies where the gaps are within a company, such as diversity and inclusion and how the management of the company operates. This extends to how in practice a company's social responsibility statement operates: e.g., is there a tension between allowing staff time in which to go out into the community and pressure to meet targets that prevents that? This touches on BM's point about verification. Companies need to step back from just complying with regulation to focus also on repurposing: who are you; what are you about; what is your direction of travel and how are you going to get there? This is also reflected in how remuneration is distributed at board and lower levels.

G is not just the boring bit: there is so much more to it. For insurers and other financial services companies, this is important as rating agencies are now taking notice of ESG.

JN asked: but what about P for profit in all of this?

BM responded that profit is clearly the life blood of a business, but the issue here was having a better business. It is short term gain against long-term sustainability, aligning the business with the interests of its staff, its clients and its suppliers (and investors). Purpose is a galvanising affect, assisting people to understand their role, and alongside the economics, what their contribution is. Resignations are often based on 'I don't want to do this anymore' which relates to a lack of flexibility; a lack of trust; and a lack of meaningful work. The person resigning did not know what their contribution was.

JG commented that AIRMIC had done a lot of work on purpose and had found that where purpose was considered, the company had to mean it, believe in it and then cascade it to every part of the organisation.

'Doing the right thing' might cost a business in profits. For example, one insurer had pulled out of an area of business that did not fit its purpose but it was then downgraded by the rating agencies: it did the right thing but at a cost.

BM agreed but these adjustments were necessary as a company recalibrated to remain sustainable in the longer term.

JN asked where this debate was likely to go in the next three-five years, with law firms particularly in mind.

SP The regulators have just published their ESG strategy and within that there are five core themes. There is also a consultation paper, aimed at all regulated entities.

One area is the need for transparency in all aspects of ESG. Particularly with the speed of developments in technology (including AI and social media), trust becomes a major issue (encompassing the risk of fraud). New skill sets may be needed, particularly where AI replaces traditional roles. In five years' time the financial services industry will probably look very different from today.

BM agreed and commented that it is already happening. There were examples of unintended discrimination in pricing algorithms. The management of margin was also becoming AI based. He foresees changes in the Companies Act and companies will need to state how they propose to remain sustainable and achieve purpose. The various committees on governance will need to change, as will management. For example, boards had suddenly had to understand cyber risk: there will be similar events to which they will need to adjust. Delivering for customers and clients will become central.

JG A lot of this change is driven by financial services organisations because of the way they are regulated. Other regulated sectors will go down the same route, leading the way, because they have to. However, these sectors will inevitably drag those in their supply chain along with them by compelling compliance.

It is a difficult time to be a director in any business. For example, how does a director know what a company is doing on AI and how AI is delivering data to be relied on? There is a need to have awareness of so many different things. To an extent this concern has been reflected in increased D&O premium rates. Boards need to be suitably informed and have access to relevant information.

A copy AIRMIC's report "Roads to Repurposing - Boardroom Edition" published in October can be found here www.airmic.com/technical/library/roads-repurposing-boardroom-edition

Stratos Gatzouris (FOIL secretary) asked how trust is demonstrated.

SP responded that from the top (the board down) it was about the integrity of the ESG labelling of what the organisation was doing. The board must show that it is doing what it says it will do. Employee surveys reveal areas where trust is lacking, including HR departments; line managers; and the board. At the same time, the managers are trusting employees to provide them with the necessary information to run the business effectively.

BM was of the view that specific things were not done to generate trust. It is about generating an environment in which people can thrive. Ignorance about what is going on and anxiety about the future do not generate trust. The pandemic has shown that demonstrating that a company cares for the welfare of its employees and offers choices, goes a long way to building trust.

JG closed by saying that she agreed with these comments but returned to the question of purpose: why does an organisation exist and how will it achieve that purpose – this is key to the creation of trust. And trust is like reputation – it can take years to build but can be quickly destroyed. However,

companies must only reset purpose if there is genuine intent by top management, supported by mechanisms to demonstrate that performance can be measured.

BM commended delegates to the website of the charity **Blueprint for Better Business** [Home | A Blueprint for Better Business \(blueprintforbusiness.org\)](https://blueprintforbusiness.org) where some relevant guidance may be found.

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