



Weekly Update

A summary of recent developments in insurance, reinsurance and litigation law

18/11

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This Week's Caselaw

Bacon v Automattic Inc

Service out of the jurisdiction by alternative means

[http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2011/1072.html&query=title+\(+bacon+and+automattic+\)&method=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2011/1072.html&query=title+(+bacon+and+automattic+)&method=boolean)

There has been some recent debate by the judiciary as to whether the court can allow service of a claim form out of the jurisdiction by an alternative method. In this case, the claimant applied to serve a defendant domiciled in the USA by email. The claimant wished to thereby avoid delay which might result in data being deleted (due to the defendant's document retention policy). Tugendhat J said that it is preferable: "if solicitors writing letters asking for information to be provided (if necessary pursuant to a Norwich Pharmacal order) should specifically ask defendants such as these whether service of the claim by e-mail is a method permitted by the law of the country in question, and if so, for their consent to service by e-mail".

Following a review of the recent caselaw, the judge concluded (following the Court of Appeal decision in Bayat Telephone Systems v Cecil (see Weekly Update 08/11) that he did have power to order service on the defendant in the USA by email at the email addresses which it had notified to the claimant's solicitors (or by its website): "But in future claimants should put before the court evidence as to whether that method is permitted by the law of the country in which the claim form is to be served (or a good reason for not doing so), since if it is, service by an alternative method will be unnecessary".

Carboex SA v Louis Dreyfus Commodities

Meaning of delay caused by strike in a charterparty

<http://www.bailii.org/ew/cases/EWHC/Comm/2011/1165.html>

The claimant appealed under section 69 of the Arbitration Act 1996 following an arbitral award. Of issue was the interpretation of a clause in the charterparty which provided that the charterers of a ship would pay demurrage if discharge of the cargo was delayed but that: "In Case of strikes, lockouts, civil commotions or any other causesbeyond the control of the Charterers....which prevent or delay the discharging, such time is not to count unless the vessel is already on demurrage". In this case, discharge was delayed because of congestion at the port which in turn was due to a strike which had ended by the time the vessel had berthed. The claimant charterers argued that the discharge was delayed by reason of the strike. The owners countered that it was only delay suffered once the vessel had berthed by reason of a strike then in progress that was excluded under the charterparty.

After a thorough review of caselaw, Field J concluded that the clause was wide enough to cover delay in discharging caused by congestion due to the after effects of a strike that had ended. It would also cover delay in discharging (caused by congestion due to a strike) where the vessel had only arrived after the strike had ended. Accordingly, the tribunal had erred in law.

Landmark Brickwork v Sutcliffe

Adequacy of cross-undertaking in damages

<http://www.bailii.org/ew/cases/EWHC/QB/2011/1239.html>

When a party applies for an interim order, such as an injunction, it is usually required to give a cross-undertaking in damages, because the order is made before the court has considered the merits of the underlying case. Accordingly, the applicant must undertake to compensate the respondent if it subsequently transpires that the applicant was not entitled to the interim order. In this case, the respondent argued that, as the latest draft accounts for the applicant had shown a significant loss, and as no other guarantee had been offered, the applicant could not provide adequate assurance that the cross-undertaking in damages would be met.

Slade J rejected that argument. In reaching her decision she noted that the claimant is an established company that has been trading for a number of years and engages over two hundred workers. Turnover for the prior year had been over £8 million with pre-tax profit of over £200,000.

FSA v Sinaloa Gold

Whether solicitors had a retaining lien over monies held in a client account

<http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2011/144.html&query=sinaloa&method=boolean>

The FSA applied to freeze the defendant's assets. It sought to vary the standard cross-undertaking in damages so that it extended only to the costs which a third party might incur as a result of the freezing order and not to any liability which the third party might incur. In so doing, the FSA sought to rely on the "dispensation rule" which provides that where an applicant is a public body, acting to enforce the law, the court may not require a cross-undertaking in damages. That rule conflicts with the general position that innocent third parties (who are either served with an order or who may be affected by it) should be protected when a freezing order is granted.

After hearing lengthy argument on the issue, Hodge J identified the real issue as "whether the potential costs which may fall upon a third party of a statutory body exercising its law enforcement functions should, in the general run of cases, and admitting that there may be particular exceptions in individual cases, fall on a wholly innocent third party or whether they should fall on the public purse from which the enforcement authority receives its costs and resources". The judge concluded that, as a matter of course, the law enforcement body should give the usual third party undertaking as to damages.

Perry v SOCA

Proceeds of Crime Act and assets outside the jurisdiction

<http://www.bailii.org/ew/cases/EWCA/Civ/2011/578.html>

Part 5 of the Proceeds of Crime Act grants a power to the courts of England and Wales, Scotland and Northern Ireland to make orders enabling the relevant enforcement authority (in this case,

the Serious Organised Crime Agency) to recover, in civil proceedings, property obtained through unlawful conduct. If a court is satisfied that any property is recoverable, it must make a recovery order vesting the recoverable property in the trustee for civil recovery. The issue in this case was whether the court could make a recovery order in respect of property (moveable or immoveable) which was outside the jurisdiction.

The Court of Appeal concluded that it could: "In my view it is clear that the effect of Part 5 of POCA is to vest in the trustee for civil recovery property wherever situate and whether owned by foreigners or not and wherever the unlawful act took place" (as per Hooper LJ).

Further information

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