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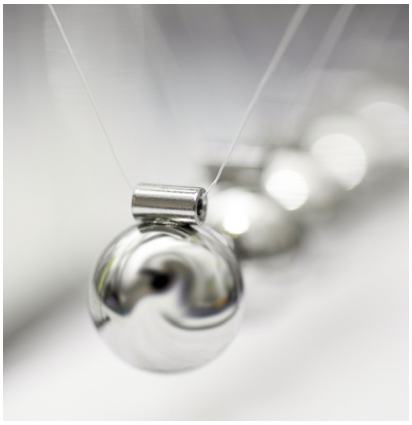

Weekly Update

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

19/11

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This Week's Caselaw

Arash Shipping v Groupama

Sanctions Clause and whether notice of cancellation was valid

http://www.bailii.org/ew/cases/EWCA/Civ/2011/620.html

A marine insurance policy contained an Iran Sanctions Clause which provided (in relevant part) that "Insurers hereon may, on such notice in writing as the Insurer may decide, cancel the Insurer's participation under this Policy in circumstances where the Assured has exposed or may, in the opinion of the Insurer, expose the Insurer to the risk of being or becoming subject to any sanction,.....in any form whatsoever against Iran by.... the European Union..." A 12-month extension to the policy was agreed, subject to the assured's claims history. Five months after inception, Council Regulation (EU) No 961/2010 ("the Regulation") came into force. This, amongst other things, prohibited the provision of (re)insurance to an Iranian entity. It was accepted that the appellant in this case was an Iranian entity.

The key article in the Regulation for the purposes of this case was Article 26(4), which prohibits the extension or renewal of (re)insurance agreements concluded before the entry into force of the Regulation but "it does not prohibit compliance with agreements concluded before that date".

Two months after the Regulation came into force, the insurers served a notice of cancellation (this was withdrawn but subsequently re-served after the appellant had commenced proceedings). The appellant argued that the insurers were not entitled to cancel. At first instance, Burton J held that the notice of cancellation had been valid. The Court of Appeal has now rejected the assured's appeal. Two of the arguments raised by the assured had been as follows:

(1) The wording of the Sanctions Clause required the assured to expose the insurer to the specified risk and this, in turn, required an act or omission by the assured.This argument was rejected by the Court of Appeal. Sanctions are imposed not necessarily because of what the specific entity has done but because of who it is.

(2) The notice of cancellation was not given in good faith and was given unreasonably. The key issue was whether the provision in Article 26(4) allowing compliance with agreements concluded before the Regulation came into force included contractual extensions or renewals.

The appellant argued that this was a case of automatic extension and that amounted to an agreement concluded before the Regulation came into force. The Court of Appeal held that this was not a case of automatic extension (the assured's entitlement to the extension depending on its claims history). In any event, both HM Treasury and the European Commission had rejected the appellant's interpretation in relation to automatic extensions: they had formed the view that the Regulation did not provide a carve-out for automatic renewals. There was therefore no scope to argue that insurers had acted unreasonably.

In view of its conclusion on the point, the Court of Appeal held that it was unnecessary to decide whether the insurers had been entitled to serve the notice of cancellation. Although the issue was said to be of general importance to the insurance market, Burnton LJ stated that the court should be cautious before deciding on the effect of legislation, especially where the proceedings were taking place in the absence of submissions from the relevant prosecution authority. Furthermore, the court of final decision on the issue would be the European Court of Justice, and so the decision of the English courts would not be binding on all of the insurers subscribing to the policy. However, Tomlinson LJ expressed the view that Article 26(4) did not exempt an extension which can be said to amount to no more than the compliance by underwriters with an agreement they have made before the operative date: "It is also my present view that the word "agreements" as last used in Article 26(4) means .... a contract of insurance. Insofar as underwriters may be contractually obliged to extend the existing policy, that as it seems to me is compliance with an agreement which is not itself a contract of insurance or an "insurance agreement" but rather a contract to provide a contract of insurance or "insurance agreement".

COMMENT: Insurers are likely to welcome the Court of Appeal's decision that they acted reasonably in cancelling the policy. However, it should be borne in mind that the decision (based on the particular wording of the policy in question) in essence concerned the reasonableness of the insurers' decision and did not reach a binding conclusion on the correctness of the decision itself (although Tomlinson LJ, at least, clearly felt that the cancellation had been correct).

Chen & Ors v Chui & Ors

Freezing injunction post judgment

http://www.bailii.org/ew/cases/EWHC/Ch/2011/1276.html

The claimants in this action were ordered to pay one of the defendants (D) his costs. Those costs remained unpaid. Furthermore, shortly after the order was made, the claimants transferred the title in their home to their son. They then unsuccessfully appealed the order. D then applied for a freezing injunction over specified assets held, or previously held, by the claimants (including the home). Since the son was not a party to the original order, he argued that under CPRr 19.4 he would not become a party until an amended claim form had been served on him. That in turn would require amended particulars of claim setting out the case against him.

Barker J rejected that argument: "At this stage of the proceedings, what is required is an intention to apply to join the non-party ... and an explanation of the reason for seeking to join the non-party and, coupled with that, a proximate deadline for the formulation and issue of any application". He agreed that the grant of a freezing injunction cannot be allowed to become an end in itself though. Accordingly he required an application notice to be issued, served and filed on the claimants and the son, stating any challenge to the property transaction, promptly after the provision of witness statements.

Mumtaz Properties Ltd, Re

Definition of a de factor director - of possible interest to D&O insurers

http://www.bailii.org/ew/cases/EWCA/Civ/2011/610.html

An individual who was never appointed as a director (or whose appointment was defective) yet who acts as a director will be a de facto director. In principle, de facto directors could insure their potential liability under a Directors' and Officers' insurance policy although some policies exclude them. Of issue in this case was whether a judge had erred in finding that the appellant was a de facto director of a company and hence was liable to replace monies owing to the company on a director's loan account.

The Court of Appeal noted that it is a serious matter for a person to be found liable on the basis that he was a de facto director. It must be shown that the individual undertook functions in relation to the company which could properly be discharged only by a director - in other words, he must exercise "real influence" in the corporate governance of the company. It is not necessary to prove that he has been held out as a director.

In this case, the individual had not held himself out as a director but he had been permitted to have a director's loan account. He dealt with suppliers and made contracts with the local authority. He had also changed his tax return to indicate hat he was a director or employee (and not self-employed).

The Court of Appeal held that these factors did not in themselves make him a director. However, when the evidence was looked at as a whole, it was found that the judge had not erred in concluding that he was (in the words of Arden LJ) "one of the nerve centres from which the activities of the company radiated".

Fiona Trust v Privalov

Judgments Act interest and deferring start date

http://www.bailii.org/ew/cases/EWHC/Comm/2011/1312.html

After judgment is received, interest normally accrues automatically on the full amount of the judgment debt at a rate of 8% from the date of the judgment (see the Judgments Act 1838). However, the court has a discretion to order interest to run from an earlier or later date. In this case, the claimants applied to defer the date from which Judgments Act interest should run for 6 months.

Smith J commented that Judgments Act interest should not be deferred simply because it is at a considerably higher rate than current commercial rates. There must be something about the circumstances of a case to justify a departure from the normal rule and this will typically be that the application of the rule is so unjust to the debtor that justice requires a departure. For example, Smith J said justification might arise from the fact that "a large amount of costs is likely to be outstanding for a particularly long period and the applicant cannot be expected to avoid this by assessing what costs he will have to pay and making (or tendering) a substantial payment on account".

The judge added that he did not consider that it is in itself a sufficient justification that the costs are likely to be unusually large. In this case, though, the claimants argued that the complexity of the case meant that significant questions of reasonableness and proportionality were bound to arise on a detailed assessment of costs. Smith J said that there were no particular difficulties in this case in determining whether costs had been properly incurred and he dismissed the application. He also rejected a defendant's application for payment on account. There was no evidence of a pressing need for such a payment - he had funded the litigation by loans from a related company and any sums which he received would be used to repay those loans.

Les Laboratoires Servier v Apotex

Discretionary rate of interest: base rate or interbank rate

http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Patents/2011/1318.html&query=title+(+servier+and+apotex+)&method=boolean

The defendant was ordered to pay the claimant £17.5 million plus interest. The claimant argued that interest should be awarded at a rate of EURIBOR or LIBOR plus 1%, whereas the defendant asked for interest at base rate plus 1%. Arnold J said that, as there is no EURIBOR sterling rate, and as the currency of the award in this case was sterling, LIBOR was to preferred. The choice then was between LIBOR (the rate at which banks are prepared to lend to each other) and the lower base rate (the rate at which prime banks can borrow from the Bank of England).

Although the conventional rate in commercial cases is base rate plus 1%, the court has a discretion to consider the general characteristics of a recipient. In this case, Arnold J departed from the conventional rate. He accepted the statement from the claimant's forensic accountancy expert that (1) commercial lending rates are much more commonly set with reference to interbank lending rates; and (2) a company like the claimant (a private company in the pharmaceutical sector with significant assets) would be likely to have been able to borrow the sums involved at the relevant time at a rate close to LIBOR plus 1%.

Stribog v FKI

Stay of related actions where issue only introduced later on

http://www.bailii.org/ew/cases/EWCA/Civ/2011/622.html

The appellant (S) commenced proceedings against the respondent (FKI) in Germany in September 2009. FKI commenced proceedings in England against S in January 2010. S then introduced into the German Action a new issue which resulted in the English and the German action then becoming related actions. Under Article 28 of Regulation 44/2001, "where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings". S applied for a stay of the English proceedings and this was refused by Burton J, who held that the English court was first seised within the meaning of Article 28 because the relevant issue had not been raised in the German action until after the English court was seised.

The Court of Appeal agreed that, in the absence of related proceedings, no question of a stay would arise since there would be no risk of irreconcilable judgments. However, as the proceedings were related by the time the application for the stay was made, the fact that they were not related when the English action was commenced did not affect the result that the German court had been first seised. Although the Court of Appeal decision was unanimous, Rix LJ and Mummery LJ had slightly different reasoning, summed up by Wilson LJ as follows: "The only difference which I can detect in my Lords' judgments is that, whereas Mummery LJ... prefers to ask "which court was first seised of a pending action?" before asking "are the actions related?" Rix LJ ..... prefers to ask the questions in the reverse order. I do not see why the order matters; but Rix LJ seems to have the terminology of Article 28 on his side".

Other News

Consumer Insurance (Disclosure and Representations) Bill:

This bill was introduced to the House of Lords on 16 May and it is following the procedure for uncontroversial Law Commission Bills (which will speed up its passage because certain stages can be carried out in committee). The bill only relates to consumer insurance contracts (ie contracts entered into by individuals for purposes unrelated to the individual's trade, business or profession). In its current form, the bill provides for a one-year gap between the date the bill is passed and the date it comes into force.

The main points of the bill are as follows:

(1) Consumer insurance contracts will no longer be contracts of utmost good faith and there will be no requirement for the consumer to volunteer information to the insurer. Instead, the consumer must take reasonable care when answering the insurer's questions;

(2) If a consumer has taken reasonable care, there can be no avoidance and any claim must be paid;

(3) If the consumer makes a careless misrepresentation, the insurer's remedy will be based on what it would have done had the consumer not breached its duty. That may result in the insurer being able to avoid the contract or to impose different terms or to reduce proportionately the payment to the consumer (because a higher premium would have been charged);

(4) If the misrepresentation was deliberate or reckless, the insurer can void the contract and keep any premium (unless it would be unfair to the consumer to keep it).

(5) "Basis of the contract" clauses will be abolished and it will not be possible to contract out of the terms of the Act (insofar as any contract term purports to put the consumer into a worse position);

(6) The bill also provides rules for determining whether a broker (or other agent) is acting as the agent for the consumer or for the insurer. A link to the bill can be found here:

http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0068/2012068.pdf

Further information

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