



Weekly Update

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

30/11

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This Week's Caselaw

JSC BTA Bank v Solodchenko

Application for disclosure of contact details/assets against a firm of solicitors

<http://www.bailii.org/ew/cases/EWHC/Ch/2011/2163.html>

Hogan Lovells for claimant, **Clyde & Co** for respondent (Julian Connerty, Gail Brent and Alexandra Saj)

A defendant to an action failed to comply with the disclosure requirements of a freezing order which had been made against him. The defendant was then held to be in contempt of court and sentenced, in his absence, to 18 months' imprisonment. However, the defendant has not yet been apprehended and it is considered most unlikely that he is anywhere in the jurisdiction. The defendant is in "intermittent contact" with his solicitors though. The claimant therefore applied for an application against the solicitors for disclosure of the defendant's (a) contact details (b) assets (as required under the freezing order) and (c) assets used to pay the solicitors' legal costs. Henderson J said that this application raised some "novel issues" for solicitors acting for clients who are in contempt of court/in breach of asset disclosure orders. Henderson J held as follows:

- (1) As a starting point, there is a very strong public interest in people having free and unfettered access to legal advice. The order sought did not involve the disclosure of legal advice but, nevertheless "in general I can think of few things more likely to inhibit the exercise by a client of his fundamental right to seek legal advice than an order requiring his solicitor to disclose to an adverse party contact details which were supplied to the solicitor in strict confidence and for the sole purpose of enabling the client to communicate with the solicitor".
- (2) Nevertheless, the court does have power to order the disclosure of contact details if it is just and convenient to do so in order to ensure the effectiveness of an earlier order. Taking into account all the different factors in this case, Henderson J concluded that the balance came down in favour of ordering disclosure of the contact details in order to aid enforcement of the committal order: "In my view the committal order makes all the difference".
- (3) However, Henderson J refused to order the assets disclosure. Any information about the defendant's assets will have been given by the defendant to his solicitors in the context, and for the purpose, of obtaining legal advice. An order for disclosure would inhibit the defendant's right to seek legal advice and place the solicitors in an "impossible situation". More generally, the judge had a real concern that if an order for disclosure of this information was made, it would become standard practice for claimants in whose favour unsatisfied disclosure orders have been made to make similar applications against the solicitors of the defaulting party: "That is a prospect which I can only view with dismay".
- (4) Finally, the judge also refused to order disclosure of how the defendant had funded his defence. The bank suspected that a third party had paid his legal costs and so was considering an application for a costs order against that non-party. However, the evidence revealed no basis for the bank to seek information about third party funding of the proceedings at this stage.

Omni Laboratories v Eden Energy

Application for specific disclosure at pre-trial review

<http://www.bailii.org/ew/cases/EWHC/TCC/2011/2169.html>

Clyde & Co for claimant (David Leckie, Sarah Hargrave and Georgina Jacobs), Berwin Leighton Paisner for the defendants

In the words of the judge, the defendants applied "at the 11th hour" to add two applications (one for specific disclosure and one to strike out parts of witness statements served by the claimant) to the pre-trial review for the case. Akenhead J said that "I cannot emphasise enough to practitioners that it is wholly inappropriate to seek to use the pre-trial review,

unless there is more than adequate time, to tack on important applications which one or other party wishes to make... I wish very much to encourage practitioners and parties who use this Court to take out specific applications with specific application times for their applications to be heard and not try to tack them onto the pre-trial review". As for the applications themselves:

- (1) The practice of seeking to strike out parts of a witness statement is broadly discouraged by the notes in the CPR. Parties should give "serious consideration" to not making such an application because "time can best be used simply getting on with the case". In any event, it was agreed that this application should be adjourned to the first day of the trial.
- (2) Specific disclosure: The defendants had sought an order that a search be run for documents containing a certain keyword. The claimant had run such a search initially and this had produced almost 40,000 documents (many of which were likely to be irrelevant). The number of documents was then halved by a de-duplication exercise. Akenhead J rejected the defendants' argument that the claimant should manually review the documents. The claimant had instead acted proportionately by searching those documents as against other keywords or custodians. It would also be a "fishing expedition" to require the claimant to search again a witness's hard drive (certain parts of the hard drive were unreadable).

The application was therefore dismissed.

New Cap Re v Grant & Ors

Liquidator's attempt to enforce an Australian judgment against a Lloyd's syndicate in England/applicable statute

<http://www.bailii.org/ew/cases/EWCA/Civ/2011/971.html>

After an Australian reinsurance company went into liquidation, the liquidator brought proceedings in New South Wales to set aside and recover payments made by the company to a Lloyd's syndicate by way of commutation of its liabilities. The syndicate took no part in the proceedings and the liquidator succeeded in obtaining the requested order. The liquidator then sought to enforce the judgment in England. At first instance, Lewison J held that the Insolvency Act 1986 applied and he made orders for payment as requested by the New South Wales court (the 1986 Act provides for assistance to be afforded by the UK courts exercising insolvency jurisdiction to the courts of (inter alia) Australia). The judge also held that the Foreign Judgments (Reciprocal Enforcement) Act 1933 (which provides for the reciprocal enforcement of judgments between England and (inter alia) Australia) did not apply to orders made in insolvency proceedings. The syndicate appealed and the Court of Appeal has now held as follows:

- (1) The 1933 Act did apply to money judgments issued in insolvency proceedings. If the liquidator had registered the New South Wales order under the 1933 Act, the syndicate believed that it could have applied to have that registration set aside on the basis that the courts of New South Wales had no jurisdiction. The Court of Appeal held, however, that pending an appeal to the Supreme Court in the case of *Rubin v Eurofinance* (see Weekly Update 30/10), that ground was not open to the syndicate.
- (2) The 1986 Act could also be used to seek assistance with a view to the enforcement of a money judgment issued in foreign insolvency proceedings. That was not excluded by the 1933 Act (although the 1933 Act did prevent the liquidator from enforcing the judgment by bringing an action on it at common law).

Lewison J's decision was therefore upheld and the Court of Appeal ordered that the judgment was capable of registration under the 1933 Act and that such registration would not be liable to be set aside.

Consolidated Contractors v Masri

Privy Council rejects application to set aside registration of an English judgment in Bermuda

<http://www.bailii.org/uk/cases/UKPC/2011/29.html>

The respondent registered certain English judgments in his favour in Bermuda. The appellant applied to set aside the registration on the ground that the English judgments had been "obtained by fraud". The alleged fraud was that the respondent had only succeeded in establishing jurisdiction against the appellant by lying about his belief that the appellant was a party to a certain agreement. The Privy Council rejected the appellant's argument. The respondent's stated belief was held to have been irrelevant to the English court's decision that it had jurisdiction. Furthermore, even if the English court had obtained jurisdiction on a "false basis", that did not mean that there had been fraud. Instead, the case that the appellant was a party to the agreement (which had been held to be appropriately arguable) had, on full argument, failed.

It was also the case that the appellant, as a judgment debtor "is a proven contemnor in relation to the enforcement of the English judgments against it". As Clarke J stated in related contempt proceedings against the appellant: "It is clear that [the appellant has] no intention of paying anything unless forced to do so". Indeed, the Bermudian registration was only necessary in the first place because the appellant (by its contempts and conduct) had hampered enforcement of the judgments in England. The Privy Council found that it was "not credible" that the appellant had any intention of paying even if the Bermudian registration stood. Accordingly, the appellant's application should be struck out as an abuse of process.

Further information

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