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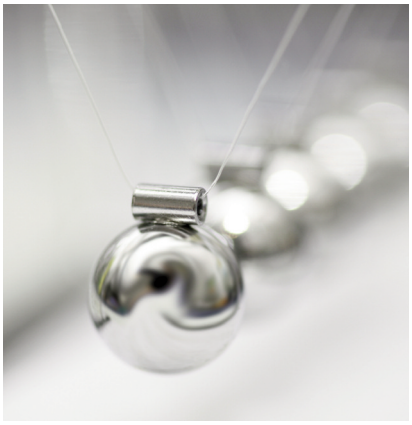

Weekly Update

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

31/11

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This Week's Caselaw

SCB v Ceylon Petroleum

Interest rate on a foreign currency judgment

The claimant was awarded a judgment sum of US$ 166m (approx.). Section 17 of the Judgments Act 1838 provides for an interest rate of (currently) 8% on all judgment debts. However, where the judgment is expressed in a currency other than sterling, the court has a discretion under section 44A of the Administration of Justice Act 1970 to vary the statutory rate (no such discretion arises where the judgment is expressed in sterling). Various issues arose in this case:

(1) What was the effect of a contractual clause entitling the claimant to a certain rate of interest both before and after judgment? It is well-established that where a contract fixes the rate of interest to be paid up to judgment, the court cannot override that contractual provision. In relation to post-judgment interest, Hamblen J held that, absent a special provision, a contractual right to interest merges into a judgment. However, where (as here) the contract preserves a right to interest post-judgment, the creditor will be entitled to a higher rate than 8% if that is what the contract provides for. Conversely, if the contractual rate of interest is lower than 8% (as it was in this case), the creditor will still receive 8% under the Judgments Act.

(2) Should the court exercise its discretion to vary the rate of interest on this US dollar judgment? Hamblen J held that the inclusion of an English jurisdiction clause in the contract was not a sufficient reason for the court to refuse to exercise its discretion. Of particular significance in this case was the fact that the difference between US Prime Rate (the appropriate rate - see *Kuwait Airways Corp. v Kuwait Insurance Co* [2000]) and the Judgments Act rate was significant (US Prime Rate is currently 3.25%) and that difference was not due to rapidly fluctuating or highly variable factors: "a much lower US dollar interest rate has been established for some time and is likely to continue for the immediately foreseeable future and [the claimant] has no relevant or sufficient "concern with sterling"".

    Accordingly, Hamblen J held that the appropriate rate in this case should be US Prime Rate.

(3) Should the Judgments Act rate of interest payable on the claimant's costs (which are in sterling) be deferred? Hamblen J accepted that the court should not routinely make an order postponing the date from which interest post-judgment will start to run. However, there were sufficient factors in this case (the costs were large and there may well be real issues of proportionality and reasonableness on taxation) to justify a 4 month postponement (in this case, on a disputed balance above the 50% payment on account made by the defendant).

Inframatrix Investments v Dean Construction

Argument that defendant had waived right to rely on limitation defence

http://www.bailii.org/ew/cases/EWHC/TCC/2011/1947.html

The contract entered into between the parties provided that no proceedings could be brought after 1 year from a specified date. The court found that a claim against the defendant in this case had become time-barred by January 2010 (whereas proceedings were not commenced until December 2010). However, the claimant sought to argue that the defendant had, by its conduct, waived its right to rely on the limitation clause in the contract. The claimant pointed out that the parties had negotiated for 16 months before mention was made in February 2011 of the limitation period. It argued that by failing to refer to the clause, the defendant should be taken to have waived its right to rely on it.

Reference was made to the case of *CWS v Chester le Street* [1998], in which there were protracted negotiations between the parties. The court held that, in the circumstances, it would be unconscionable for one of the parties to rely on the limitation period having regard to the way in which it had conducted the negotiations (for example, by stating that reference should be made to the Lands Tribunal only as a last resort). Behrens J held that CWS was "very much a case that turned on its own facts". In this case, there was no question of a waiver by election since the defendant did not have to choose between

alternative rights which were inconsistent with each other. Nor was there a waiver by estoppel: "To my mind it is not realistically arguable that the without prejudice negotiations including the meeting and the limited offers made by [the defendant] amounted to a representation by conduct that [the defendant] would not rely on [the limitation clause]. Equally I do not think it unconscionable to prevent them from doing so."

Pioneer Freight Futures v TMT

Whether court should hand down judgment after the parties have reached a settlement

http://www.bailii.org/ew/cases/EWHC/Comm/2011/1888.html

Following summary judgment, the defendant was given permission to appeal. The parties then settled their dispute. Nevertheless, the parties asked for a formal judgment still to be handed down (after which they would formally withdraw the proceedings). This was because similar issues in this case arose in another Commercial Court case (in the event, judgment was handed down in that other case before the judgment in this case could be given). Gloster J considered whether it would be appropriate for her to give judgment.

She accepted that she had discretion to do so, since she had heard argument on the relevant issues and they are "of such obvious concern to the market". However, she had to bear in mind the that the court's resources should be deployed as effectively as possible and to consider the overriding objective of the Civil Procedure Rules. Of particular relevance here was the fact that two of the issues were likely to be determined by the Court of Appeal later this year. The utility of a further Commercial Court judgment on these issues was therefore questionable (although if she disagreed with other earlier decisions, that might be a useful negotiating tool for the claimant). She therefore declined to express a view on these two issues (although she did determine a third issue in the case).

Trebor Bassett & Anor v ADT Fire

Failings by the parties' experts

http://www.bailii.org/ew/cases/EWHC/TCC/2011/1936.html

This case involved a dispute about whether the defendant was liable for the spread of a fire at the claimant's factory. The case is therefore fact-specific but Coulson J's criticism of the parties' experts is of general interest. The parties were given permission to call two experts. It appears that there were difficulties with the conduct of the experts' meetings (ordered by the court) - the experts "fell out" and, as a result, no joint statement (as required by CPR r35.12 and as ordered by the court in this case) was prepared. Also the experts (and the parties) failed to agree a list of issues.

Coulson J was highly critical of the experts: "Bluntly, I have to say that experts appointed in civil litigation have no business to "fall out" and to fail to comply with the orders of the court. Experts are there to provide evidence on technical matters in order to assist the court, and for no other purpose. If they take matters of personal disagreement to such a level, they are failing to provide that service". The parties should have gone back to court for help as soon as there was a problem between them. As a result of the experts' approach to the case, the judge found that "large swathes of the expert evidence are, for a variety of different reasons, unreliable and unhelpful" and he was dubious about the reliability of all of the expert evidence that was presented to him: "This is emphatically not a case where the court is able to prefer one expert over another and let that approach dictate the result".

One further issue was that the claimants had sought to claim privilege over a contemporaneous report and notes of interviews which were made by a fire expert appointed by the claimant's insurers (who sat in on those interviews). Coulson J said it was plain that the expert had been appointed by the claimant's insurers to investigate the cause of the fire. In those circumstances, it could not be said that litigation was the dominant purpose of his investigation. As a result, his report and notes were disclosable.

Further information

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