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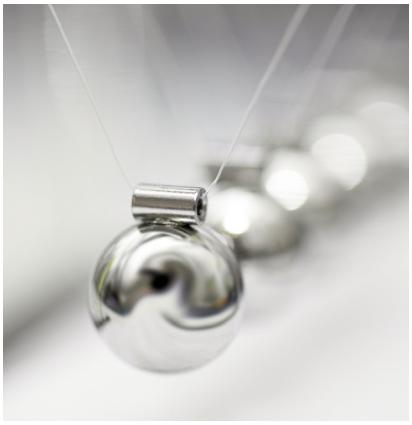

Weekly Update

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

32/11

Contents

This Week's Caselaw

Mobile Telesystems v Nomihold

Whether freezing injunction granted to aid enforcement of arbitration award should include the "ordinary course of business" exclusion

http://www.bailii.org/ew/cases/EWCA/Civ/2011/1040.html

Nomihold obtained an arbitration award against MTSF. The court granted Nomihold's request to register the award as a judgment pursuant to section 66(2) of the Arbitration Act 1996 and also granted a freezing order over MTSF's assets. MTSF applied to set aside the order registering the award as a judgment. It subsequently sought a declaration from the court that it was entitled to pay interest which was due to certain Noteholders who had lent it money. The freezing order which Nomihold had obtained initially contained the usual exception allowing MTSF to deal with or dispose of any of its assets in the ordinary and proper course of business. However, on the return date, Gloster J had removed this exception from the freezing order. Steel J subsequently declined to vary the freezing order to permit payment of the interest and MTSF appealed against that decision. The appeal was heard as a matter of urgency and before a court composed of only two lords justices. The Court of Appeal allowed MTSF's appeal for the following reasons:

(1) MTSF should not be treated as a judgment debtor because a challenge to registration was pending.

(2) A freezing order granted in aid of enforcement of an arbitration award should ordinarily contain an "ordinary course of business" exception.

(3) It could not be said that payment of the interest due to the Noteholders amounted to dissipation of MTSF's assets with the object of denying Nomihold satisfaction of its claim. MTSF was simply seeking to discharge an obligation which had fallen due in the ordinary course of business. The Court of Appeal would not have reached a different conclusion even if it had been shown that MTSF was facing insolvency: "it is not the function of the freezing order jurisdiction to confer a preference for repayment from an insolvent party".

The Court of Appeal exercised its discretion to vary the freezing order and allow payment of the interest. It did not matter that MTSF had not originally appealed against Gloster J's decision. Nor should the court bring pressure on MTSF's parent company to fund its subsidiary as guarantor of the loan to MTSF.

Cadogan Petroleum v Tolley & Ors

Waiver of litigation privilege

http://www.bailii.org/ew/cases/EWHC/Ch/2011/2286.html

The claimants alleged that their former chief operating officer (COO) and former chief executive officer (CEO) had received secret commissions and/or bribes. The COO sought disclosure of documents recording what was said in certain interviews which took place between the claimants' employees and the claimants' solicitors. He accepted that he would not be entitled to see legal advice given in relation to the interviews. However, the claimants argued that litigation privilege applied to the interviews. Newey J said there was no reason to doubt the claimants' solicitor's witness statement in which he asserted that the interviews were carried out for the dominant purpose of litigation. Accordingly, the documents were covered by litigation privilege. However, the COO raised two further arguments:

(1) At the time of the interviews, he was a shareholder of the claimants. A company is not generally entitled to assert privilege against a shareholder. This principle does not apply, though, where the interests of the company and the shareholder are adverse. The COO sought to argue that the interviews were conducted when litigation was contemplated against the CEO and not the COO. Newey J rejected this argument. The claimants now allege that the COO was engaged in a conspiracy with the CEO. Whether or not the claimants knew it at the time, its interests were adverse to those of

the COO: "If a company seeks legal assistance in relation to potential litigation against an individual who has been conspiring with one of its shareholders, it must be entitled to maintain privilege against the shareholder even if the shareholder has up to that point succeeded in concealing his role".

(2) The COO also alleged that the claimants had waived privilege because reliance had been placed on the interviews when the claimants had earlier applied for a freezing injunction. In particular, the claimants' solicitor had sworn an affidavit in support of the application in which reference was made to the interviews. There is prior caselaw to support the argument that where privileged material is disclosed, it may be unfair if the disclosing party does not reveal the whole of the relevant information and is allowed to "cherry pick" material.

Newey J noted that, in this case, the solicitor had not merely stated that the interviews had taken place. Instead, he had referred in some detail to the content of what the interviewees had said. Moreover, this was done to advance the claimants' position. It made no difference that the solicitor had not put in evidence or relied on the interview notes themselves. The judge concluded that privilege in the interviews had been waived. Without full disclosure, it was impossible to know whether the solicitor's references to what the interviewees had said represented a fair "distillation" of their accounts. However, the claimants would be allowed to redact anything containing the note-taker's own thoughts or comments (either in words or by means of underlining, ringing or symbols). The judge would also wish to hear further argument before allowing disclosure of any documents which might have referred to the interviews (for example, letters from the solicitors to their clients).

Wilky Property Holdings v London & Surrey Investment

Whether a dispute resolution clause was an expert determination or an arbitration clause/application for a stay of proceedings

The parties entered into an agreement which provided (under Clause 22) that if there was any dispute as to the meaning of the terms in the agreement, either party could "refer any such dispute to an independent expert" (but in the event that the parties could not agree such appointment, the president of the Royal Institution of Chartered Surveyors would be asked to appoint an expert to determine the dispute). The expert's decision was to be binding on the parties. Following a dispute, the president of the RICS appointed an expert. Thereafter, the claimant commenced proceedings in the High Court and the defendant sought a stay of those proceedings. The stay was sought on two grounds:

(1) Under section 9 of the Arbitration Act 1996 (pursuant to which a stay is mandatory). However, to succeed on this ground, the defendant had to show that Clause 22 was an arbitration clause (and not, as the claimant argued, an expert determination clause).

Snowden J accepted that the way in which a dispute resolution clause is labelled by the parties is not conclusive, but the language used can provide an important indication of the nature of the process they intended. Here, the parties had expressly chosen to refer disputes to an expert and so should not, prima facie, be taken to have intended a reference to arbitration. Nor did it matter that the parties had not expressly provided that the expert was appointed to act "as an expert and not as an arbitrator" (see *Barclays Bank v Nylon Capital* [2010]).

The defendant referred to the case of *David Wilson Homes v Surrey Services* [2001], in which a condition in an insurance policy providing for any dispute to be referred to a QC was held by the Court of Appeal to be an arbitration clause. However, Snowden J held that this case was not authority for the general proposition that a process that provided for the binding determination of a dispute that had already arisen was an arbitration rather than an expert determination. Instead, a number of other factors should be taken into account. Here, the clause in question covered only disputes about the interpretation of the agreement (and not, for example, whether there had been a breach of the agreement). Furthermore, in this case, the references to determination by an expert were clear. Accordingly, the clause in question was not an arbitration clause.

(2) The defendant also sought a stay pursuant to the court's inherent discretion under its case management powers (CPR r3.1). Snowden J referred to recent caselaw approving the comments by Hoffmann LJ in *Mercury Communications* [1994], in which he stated that "in questions in which the parties have entrusted the power of decision to a valuer or other decision-maker, the courts will not interfere either before or after the decision" (unless the decision-maker goes outside the limits of his decision-making authority). A hearing was set in this case for the judge to hear further argument as to whether to exercise his discretion to stay the claim.

British Arab Commercial Bank Plc v NTC of the State of Libya

Bank seeks declaration after receiving conflicting instructions

http://www.bailii.org/ew/cases/EWHC/Comm/2011/2274.html

Clyde & Co for respondent, Stephenson Harwood for applicant

The issue in this case concerned the control of the accounts of the Libyan embassy in London which were held with the applicant bank. Until 27 July 2011, the recognised government of Libya was that led by Muammar Muhammad al-Qadhafi and the Libyan embassy in London was known as the People's Bureau. The Bureau was a long-standing client of the bank. On 27 July, the Foreign Secretary announced that the UK recognises and will deal with the National Transitional Council ("NTC") as the sole governmental authority in Libya (a certificate to that effect (dated 24 August and signed by the Foreign Secretary) was subsequently provided to the court).

When the bank received instructions from the Bureau, it brought an application for a declaration from the court that it is entitled to act on the instructions of the embassy established by the NTC. Blair J noted commentary in the White Book that claims for a declaration alone are unusual and that it is also unusual for a court to grant a declaration as to the scope of a bank's mandate. Nevertheless, this was an appropriate case for declaratory relief.

The judge went on to find that the Foreign Secretary's certificate was conclusive and the bank was entitled to the declaration which it sought. There was no need to adjourn the hearing to allow the Qadhafi regime to be present. Following the Foreign Secretary's certificate, it would not be possible for the Qadhafi regime to argue that it remained the lawful government of Libya and it has been established that an unrecognised state cannot sue or be sued in an English court (*City of Berne v Bank of England* (1804)).

Iqbal v Mansoor

Witness immunity and the need for reference to the subject matter of the proceedings

http://www.bailii.org/ew/cases/EWHC/QB/2011/2261.html

The claimant alleged libel against a firm of solicitors and its partners. The documents which he complains about included witness statements. It is well established that witnesses have immunity from suit not just in respect of evidence given in court but also proofs of evidence, affidavits and witness statements. However this immunity is not unlimited. In *Smeaton v Butcher* [2000] it was held that the contents of an affidavit will be absolutely privileged "unless they have no reference at all to the subject matter of the proceedings". In that case, the Court of Appeal rejected the test of "no real relevance" proposed by the Court of Appeal in *Samuels v Coole & Haddock* [1997]. In this case, Parkes J said that "it follows that any allegations which, although not on analysis relevant to the application or proceedings, nonetheless have some reference, however tenuous, to the proceedings in question, ought to be protected. It is plainly not desirable that litigants should be vulnerable to defamation claims if they misjudge, or lack the understanding to appreciate, the true ambit of the matter in dispute, and make allegations or include averments in the course of proceedings which are irrelevant to the issues but nonetheless have reference to the proceedings. Even malicious allegations must be protected, because otherwise honest witnesses would potentially be vulnerable to baseless litigation".

In this case, one of the allegations is that the witness described the claimant's alleged professional misconduct in the course of an application by the claimant for discretionary relief - this could not be said to have no reference at all to the proceedings and so the witness was entitled to immunity from suit.

Deutsche Bank v Tongkah Harbour

Arguments that court proceedings should be stayed under section 9 of the Arbitration Act 1996

http://www.bailii.org/ew/cases/EWHC/Comm/2011/2274.html

The defendants applied under section 9 of the Arbitration Act 1996 for a stay of court proceedings brought by the claimant, on the basis that the claimant had also commenced arbitration against the defendants. The parties had entered into various agreements. Under one set of contracts, the English courts had jurisdiction but the claimant had the option to refer a dispute to arbitration. The claimant accepted that, having exercised its right to arbitration, it could not also bring separate proceedings in the English court in respect of the same dispute. However, it argued that a different dispute had been referred to arbitration. Blair J found, on the facts, that although different remedies were being claimed by the claimant, the claims arose out of the same breach of the same contractual arrangements. Accordingly, having referred the dispute to arbitration, the statutory stay applies as regards the court proceedings.

Under another contract, there was no arbitration agreement and the parties agreed that the courts would have jurisdiction. Blair J rejected the defendant's argument that it would now be prepared to enter into a further written agreement to enable a reference to arbitration to be made. The question must instead be decided by reference to the bargain which the parties had actually entered into. Furthermore, the claimant was entitled to enforce a guarantee regardless of its claim against the principal debtor:"it is possible and commercially rational to allow the claim to proceed even though this may result in a degree of fragmentation in the resolution of the overall dispute" (see *Sebastian Holdings v Deutsche Bank* (Weekly Update 33/10)).

Hi-Lite v Wolseley

Argument that liability should be apportioned because of causation and not the liability of another party

http://www.bailii.org/ew/cases/EWHC/TCC/2011/2153.html

The owner of a hair salon obtained judgment against Hi-Lite, the electrical contractor which had installed a pump at the salon which caused a fire at the premises. Hi-Lite then started proceedings against Wolseley, which had supplied the pump to Hi-Lite. Ramsey J found, on the facts, that Hi-Lite's claim against Wolseley failed (it could not be shown that there was a manufacturing defect in the pump). It was not necessary for the judge to consider certain other arguments raised by Wolseley, but he chose to do so. One of these arguments was that even if Wolseley had have been liable for the fire, then the fire was also caused by Hi-Lite because of its failure to install a circuit breaker. On that basis it argued that there should be an apportionment of liability. Wolseley sought to rely on previous caselaw which has held that there can be an apportionment of liability even though there is no reciprocal liability between the parties (ie Hi-Lite owed no duty of care to Wolseley but it had breached its duty to the hair salon). The effect of such an apportionment would be similar to the effect (under the Civil Liability (Contribution) Act 1978) of the hair salon buying the pump directly from Wolseley and contracting with Hi-Lite for its installation.

Ramsey J rejected that argument. There is no ground for apportionment based on causation rather than liability: "Absent apportionment under the Law Reform (Contributory Negligence) Act 1945 or the Civil Liability (Contribution) Act 1978, I do not consider that there is any other general ability to apportion damages between two parties".

Further information

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CC000136- September 2011