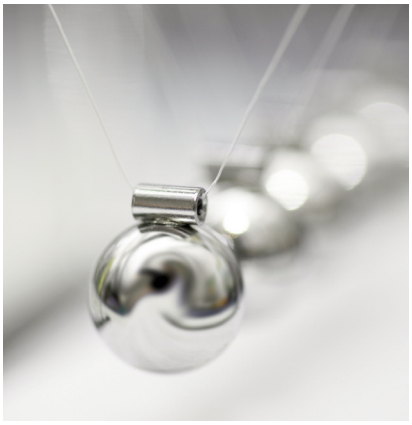

Weekly Update

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

40/11

Contents

Milton Keynes BC v NIG & Ors

Duty to notify and damages for breach of a policy condition

Clyde & Co for claimant

The claimant alleged that a fire at its premises was caused by a Mr Nulty, a self-employed electrical engineer, who was insured by NIG. After a review of the evidence, Edwards-Stuart J concluded that the fire was caused by Mr Nulty's negligence. However, NIG claimed a breach of a notification condition in the liability policy (requiring notification to be made immediately "on the happening of any incident which could result in a claim" under the policy). It was accepted that this was not a condition precedent. The judge considered the following issues:

(1) The effect of "errors" in the declination letter sent by NIG's solicitors (eg it wrongly asserted that the notification condition was a condition precedent). The judge was critical of the NIG personnel's reliance on this letter: "I accept that in matters such as the construction of an insurance policy claims managers would naturally defer to the advice of their solicitors, but both these witnesses were very experienced and could be expected to at least have questioned the basis on which it was proposed to decline cover". However, the errors did not affect NIG's case.

(2) When was Mr Nulty under an obligation to notify NIG? Although no-one had suggested that Mr Nulty was responsible in the week following the fire, Edwards-Stuart J said (as he had found that on a balance of probabilities Mr Nulty was responsible) that Mr Nulty would have appreciated that he might have started the fire (even if he would have wanted to believe that he hadn't). It was held that, in those circumstances, he should have appreciated that an incident had occurred which could result in a claim against him and so he had been under an obligation to notify NIG immediately. Mr Nulty had therefore breached the policy condition.

(3) Had NIG suffered any prejudice as a result of the breach of the notification condition? The judge was doubtful that NIG would have instructed a fire expert to visit the site immediately (indeed, it might have feared that to do so would encourage the claimant to consider a claim against Mr Nulty to have "some merit"). In any event, it was thought that the expert would not have been able to carry out a full site investigation at that time.

    Although the judge thought that NIG's arguments that they had lost the chance to carry out various examinations and interviews were not "very powerful", nevertheless, he considered it "self-evident that a cold trail always puts an investigator at a disadvantage". NIG had been prevented from investigating the claim thoroughly at a much earlier stage and so had lost the chance to prove that there had been another cause of the fire (despite his findings as to Mr Nulty's responsibility, the judge accepted that he could not exclude the possibility that a differently conducted investigation might have persuaded him that he had not been responsible).

(4) NIG's claim for damages should be assessed on the basis of a loss of chance (and the judge did not consider the claim to be too intangible for him to do so). However, a valuation of this loss of chance was "fraught with difficulty". Edwards-Stuart J concluded "largely as a matter of impression" that the prejudice to NIG should be assessed at 15% and this was the amount which could be set off against Mr Nulty's claim for indemnity.

Finally, the judge rejected an argument from the claimant that it was entitled to interest accruing since the date when NIG wrongfully failed to accept its liability to indemnify Mr Nulty. There was no proof that NIG's delays had caused the claimant to delay issuing proceedings.

COMMENT: There have been very few reported cases where an insurer has been able to claim damages as a result of the insured's breach of a "bare" condition (ie not a condition precedent), since it is usually difficult to prove what loss an insurer has suffered as a result, say, of late notification. Indeed, Waller LJ in *Friends Provident v Sirius* [2005] thought that a set-off for damages for a loss of chance was "illusory" because: "by the nature of things it may be difficult if not impossible for the insurer to say whether there were circumstances which would have enabled him to defeat the claim, or what his chances of so doing were". This case is therefore noteworthy as a rare example of damages being awarded for late notification and may encourage insurers to consider running a claim for damages for breach of a notification condition in future cases (not least because the judge did not find any "very powerful" factors to indicate that the insurer had indeed lost any specific investigation opportunity).

Revenue & Customs v Cozens & Ors

Freezing orders and inferring that the defendant does not have assets

http://www.bailii.org/ew/cases/EWHC/Ch/2011/2782.html

The defendant applied to discharge a freezing order against him. One aspect of the basis for granting a freezing order is whether the defendant has assets on which the order will bite (the court does not want to run the risk of acting in vain). The evidence adduced by the claimant to obtain the order had not shown that the defendant owned any assets at all. The claimant argued that he must have some assets and that a "double inference" should therefore apply. In *Dubai Islamic v PSI Energy* [2011], a security for costs case, the Court of Appeal had held that it many cases it may be appropriate for the court to draw a double inference "which is to the effect both that there are undisclosed assets and also that the failure to disclose them leads to the inference that they have been put out of reach of creditors".

Floyd J held that that dicta did not mean that the court can dispense with the need for there to be some material from which to infer the existence of assets. Care should also be taken in applying the double inference in the context of an application for a freezing order - the position was different in security for costs applications where "The court is accepting the defendant's evidence of no assets, not rejecting it, and using it to confirm the criterion in the rule" (ie that the claimant has taken steps with his assets to make it difficult to enforce a costs order against him).

Floyd J concluded that the evidence suggested that, to the extent that the defendant has any assets, there was a real danger of dissipation. Further, there was actual evidence of assets belonging to the defendant.

The claimant had also argued that, if the defendant did not have assets, he would not suffer any prejudice by continuation of the freezing order. Floyd J held that that was not a sufficient reason in itself for granting the order (see *Flightwise Travel Service v Gill* [2003]). However, once it was established that there are some assets to be caught by the order, and there is evidence of a risk of dissipation, then the absence of serious prejudice to the defendant is a factor to be taken into account.

The judge also held that a claimant's delay in making an application is seldom a bar to relief (although it will cast doubt on whether there really is any perceived danger of dissipation of assets). Finally, the fact that the freezing order will only secure a small part of the claimant's claim was not a ground for refusing its continuation.

Accordingly, the judge ordered the continuation of the freezing order.

Ravjel v Bestville Properties

Jurisdiction to grant freezing order in support of a security for costs order

Security for costs were ordered against the claimant company's owners (Mr and Mrs Bhuva) (who were also ordered to pay £15,000 on account of the defendant's costs). The Court of Appeal decided that provision of that security should be stayed pending an application to appeal (although the costs remained payable and the claimant is in breach of that order). During this impasse, Mr Bhuva sought to charge the one property which he owned. The defendant therefore applied for a freezing order in respect of this property. Coulson J decided as follows:

(1) He did have jurisdiction to order a freezing order in support of (or in any other way to assist) the operation of the rules relating to security for costs. Normally, the defendant will not seek such an order because payment will have to be made by the claimant pursuant to a security for costs order (and if the money is not provided, the claim will be stayed). However, in this case, there was not going to be any payment - instead security was to be provided by a charge over the property. Relying on section 37 of the Senior Courts Act, the judge held that it was appropriate to grant the freezing order in this case. There was a very real risk that the property would no longer be unencumbered without the order. The defendant was entitled to be concerned that the claimant was seeking to avoid the provision of security (especially as Mr Bhuva had recently set up a number of new companies in an apparent attempt to move assets around and avoid giving security).

(2) Although Mr Bhuva was the subject of the order in relation to costs, he and his wife are not parties to the proceedings. However, the judge held that he was entitled to grant a freezing order against them because they are the sole owners of the property "and therefore they are the people who should be the subject of the injunction preventing the dissipation of assets below a certain figure".

Servaas Incorporated v Rafidain Bank & Ors

Scope of "commercial purpose" exception in State Immunity Act 1978

http://www.bailii.org/ew/cases/EWCA/Civ/2011/1256.html

The first instance decision in this case was reported in Weekly Update 47/10. The claimant obtained judgment against the Republic of Iraq ("Iraq") 20 years ago. Over US$ 34m remains outstanding. The claimant sought to execute (by way of a third party debt order ("TPDO")) against distributions due imminently to Iraq because it has an admitted claim in the scheme of arrangement for Rafidain Bank (a state-controlled Iraqi bank).

The issue in this appeal was whether Iraq is entitled to state immunity in respect of this imminent payment. Section 13(2)(4) of the State Immunity Act 1978 provides (broadly) that a party can apply for enforcement in respect of "property which is for the time being in use or intended for use for commercial purposes". It was common ground that the payments were not intended to be used for a commercial purpose. However, the claimant argued that the current use of its right to payment could only be ascertained from the underlying commercial transaction which led to the payment of the debt by the bank. It submitted that the right to a payment under the scheme was being used for the final working out of a debt purchase transaction by which Iraq had bought the commercial claims of various commercial creditors against the bank. It was therefore "in use for commercial purposes" That argument was rejected at first instance.

Burnton LJ and Hooper LJ agreed that, at the time of the TPDO application, the debt due to Iraq was not being used at all and there was no evidence to support the proposition that the current use was for a commercial purpose. The fact that the debt was a commercial debt was not relevant. (Rix LJ, dissenting, said that he was inclined to find that the property in question (ie the admitted claim) is currently being used for the purposes of a commercial transaction and that it was only its intended use which was not for a commercial purpose. He thought the exception was a wide one and the property did have a current use ("it is in use in order to secure the scheme dividend")).

The appeal was dismissed.

JGE v English Providence of Our Lady

Examining relationship required to establish vicarious liability

http://www.bailii.org/ew/cases/EWHC/QB/2011/2871.html

The preliminary issue in this case was whether the defendant might be vicariously liable for the alleged torts of a priest. The relationship between the defendant and the priest was significantly different from a contract of employment in that the defendant exercised no real element of control or supervision over him, did not pay his wages and there was no formal contract between them. The key issue was therefore whether these differences prevented the defendant from being vicariously liable for the priest's actions.

MacDuff J conducted a review of the relevant caselaw. Most of the earlier caselaw has centered on whether an individual was deemed to be an employee or whether the relationship in question was "akin" to employment. However, the judge referred to a decision of the Supreme Court of Canada, which held that "the relationship between the tortfeasor and the person against whom liability is sought must be sufficiently close". Although that case was not binding on him, the judge said that he thought this approach "struck a chord" with the reasoning in decided English cases and should be adopted. Relationships other than an employer and employee could satisfy the first stage of a test for vicarious liability (the second stage being whether there is a close connection between the particular act and the purpose and nature of the employment/appointment). Although it will be hard to define what constitutes a close connection, the test was satisfied in this case, where the defendant was appointed by the defendants in order to do their work and was given free rein to act as representative of the church.

Accordingly, permission to appeal was refused.

Germany v Flatman

Third party costs order sought against solicitor acting under a CFA

http://www.bailii.org/ew/cases/EWHC/QB/2011/2945.html

The defendant successfully defended a personal injury claim but the claimants are without funds and so there is no real prospect of their paying the defendant's costs. The defendant (and his insurers) are therefore considering a costs order against the claimants' solicitors (with whom the claimants entered into a CFA which, if the claimants had won, would have resulted in a 100% uplift for the solicitors). As a result, the claimant sought an order for disclosure in order to find out more about the funding arrangements.

At first instance, the judge expressed concern that an order for costs against a solicitor in circumstances such as this case might undermine "or perhaps even destroy" the workings of the CFA system. On appeal, though, Eady J has now held that the requested information should be disclosed. In this case, the defendant was only going to make an application for a third party costs order if it was shown that the solicitors had stepped outside the "normal role" of a solicitor (including the normal role of a solicitor involved in CFA litigation). That is the test approved in prior caselaw. Accordingly, the judge found that the judge at first instance had "overestimated the consequences of the Defendants' applications for the day to day working of the CFA regime as a whole. He may have allowed himself, therefore, to be unduly influenced by a public policy consideration that did not actually arise."

Pacific Basin v Bulkhandlin

Interpreting the meaning of "may be, or are likely to be" (in a charterparty)/duty to make reasonable enquiries

http://www.bailii.org/ew/cases/EWHC/Comm/2011/2862.html

A term in a charter provided (broadly) that a vessel should not be required to continue to take a route if it appeared "in the reasonable judgment of ... the Owners" that the vessel and her cargo "may be, or are likely to be" exposed to certain defined War Risks (including piracy). The owners refused to proceed via Suez and the Gulf of Aden on account of a risk from pirates. An arbitral tribunal held that the charterer should bear the extra costs of that decision and the charterer appealed pursuant to section 69 of the Arbitration Act 1996 (ie an appeal on a point of law). Two of the issues considered by Teare J were as follows:

(1) The meaning of "may be or are likely to be". This phrase does not clearly state what the degree of risk must be. The judge said that in this context, "may be" was to be understood to have the same meaning as "likely to be". Bearing in mind that it is a key right for a charterer to be able to give directions as to the employment of a vessel, the phrase did not mean that it must be more likely than not that the vessel would be exposed to acts of piracy. Instead, "a real likelihood" was required and this can include an event which has a less than an even chance of happening (it is also the same as "a serious risk"). In this case, the award should be remitted to the arbitrators to determine whether a 1 in 300 chance of being hijacked by pirates was a serious risk of exposure to piracy.

(2) The charterer argued that where a contract allocates to one party a power to make decisions under the contract which may have an effect on both parties, a term will generally be implied that the power will be exercised honestly, rationally and not arbitrarily and after making any necessary enquiries (see Socimer v Standard Bank [2008]). The judge said that the line of authority supporting that proposition did not apply in the present context because the clause expressly provided that the owners' judgment must be "reasonable". Accordingly, the owners would carry out such enquiries as they considered to be sufficient and they will not be held to be unreasonable if they fail to make all necessary enquiries (provided that their judgment is objectively reasonable anyway).

Further information

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