The merged firm of Clyde & Co and Barlow Lyde & Gilbert

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Weekly Update

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

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JSC BTA Bank v Ablyazov & Ors

Test for extending time for service of a claim form and service by an alternative method

http://www.bailii.org/ew/cases/EWHC/Comm/2011/2988.html

The claimant applied for, and was granted, permission to extend the time for service of the claim form on the second defendant (a Russian national who had not instructed his London solicitors to accept service). The claimant was also given permission for alternative service (on the London solicitors). The second defendant applied for those orders to be set aside. Teare J considered the following issues:

(1) Permission to extend the time for service. In Cecil v Bayat (see Weekly Update 08/11), Burnton LJ stressed that a claimant must, at the very least, show that he has taken "reasonable steps" to serve. Teare J held that in this case it was arguable that the claimant had not taken "reasonable steps" (for example, it had delayed taking preparatory steps (ie preparing notarised translations) and the fact that without prejudice discussions between the claimant and the second defendant were taking place was not a reason to delay starting those preparatory steps). However, this delay had been for only a month or so, whereas the evidence from the Foreign Process Section was that service in Russia under the Hague Convention would normally take between 1 and 2 years. This was therefore a good reason to extend time for service.

Did that good reason "surmount" the fact that the defendant might lose certain limitation defences if the time for service was extended? Teare J held that it did. Once it became clear that the London solicitors were not instructed to accept service, an extension of time for service in Russia would inevitably have been required: "Were that reason not sufficient to "surmount" the limitation issues time could never be extended for service in Russia where there were limitation issues".

(2) Permission for alternative service. Although the observations by the Court of Appeal in Cecil v Bayat as to how the jurisdiction to permit alternative service out of the jurisdiction should be exercised were strictly obiter dicta, Teare J said they were of very persuasive authority. It was therefore necessary to note that the mere fact that service by an alternative method would be quicker than under the Hague Convention was not sufficient in itself to justify an order. However, the claimant in this case did not rely upon a "mere desire for speed". Instead, there were grounds for believing that the second defendant might refuse to accept service in Russia (and there was risk, though not a great risk, that the disposal of the action (which involved seven other defendants) might be impeded). In particular, the second defendant had made it clear that he did not wish to defend this action before another action which had been brought against him had been concluded.

COMMENT: This case offers a sensible, practical solution for claimants faced with service in a jurisdiction where the service procedure is notoriously slow (and certainly will usually take more than the 6 months allowed under the CPR). In such circumstances, it will be possible to apply for an extension of time from the court (once it is clear that service cannot be made on the defendant's English/EEA lawyers) without having to first take "reasonable steps" to try to effect service. The court can be asked to grant an extension for as long as is likely to be needed - in this case, the extension was given until 2013.

Berry v Ashtead

Interim payment application and whether all defendants must be insured

http://www.bailii.org/ew/cases/EWCA/Civ/2011/1304.html

The claimant issued an application against one of the defendants for an interim payment to fund the high cost of his current care. CPR r 25.7(1)(e) provides that (in a claim against two defendants) an order for an interim payment will only be made if (i) the court is satisfied that if the claim went to trial the claimant would obtain a substantial judgment against at least one of the defendants and (ii) "all the defendants" are insured (or satisfy certain other criteria). At first instance, the judge held that both conditions were satisfied and, in relation to criterion (ii), the judge said that he thought that "all the defendants" meant all the defendants against whom the application for an interim payment is made (and not all the defendants in the case). That was relevant in this case because one of the defendants (against whom no application had been made) was uninsured.

The Court of Appeal has now found that criterion (i) was not satisfied in this case and so allowed an appeal against the judge's decision. However, had it been necessary to decide the point, it would have been inclined to agree with the judge on his interpretation of criterion (ii): "it is difficult to believe that the framers of the rule ... intended to refuse relief if it was the case that a defendant, who was not being asked to make an interim payment at all, happened to be uninsured".

IB v CB

Whether disclosure to judge is a waiver of privilege

The parties entered into a settlement whereby the defendant's insurers offered the claimant a choice between a one-off lump sum payment or a lower lump sum together with periodical payments for the duration of the claimant's life. The claimant obtained two reports from an expert financial adviser to assess which offer was more advantageous to him. The approval of the court was required for the settlement and so a draft consent order was sent to the court. In order to explain the claimant's choice between the two offers, the expert's reports were also sent to the court. The defendant argued that the claimant had therefore waived privilege in the report and so the court should order copies of the reports to be forwarded to the defendant.

Maddison J rejected that argument. The court benefitted from seeing the report and a claimant should not feel inhibited from presenting all relevant materials to the judge. Moreover, it would make no sense if (as was accepted) privilege is retained when counsel sets out in his opinion, in quotation marks, full extracts from a report, yet privilege would be lost if the report itself is submitted.

Further information

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