



Weekly Update

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

42/11

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Quirkco Investments v Aspray Transport

Proving compliance with obligations to note interest on an insurance policy and obtain a waiver of subrogation rights

<http://www.bailii.org/ew/cases/EWHC/Ch/2011/3060.html>

The defendant lessee alleged (amongst other things) that the claimant landlord had breached a term of the lease by failing to use reasonable endeavours to ensure that a note of the lessee's interest was made on the insurance policy (which the landlord was obliged to take out) and to ensure that the insurer waived all rights of subrogation against the lessee. Although not necessary to decide these issues, Keyser J opined as follows:

- (1) The purpose of noting an interest on the policy is to avoid an argument about the existence of an insurable interest on the part of someone other than the insured. Although the lessee's interest had not been formally noted on the policy, the nature of the policy (and endorsements on the schedule to the policy) clearly acknowledged the existence of the lessee. Furthermore, although a renewal of an insurance policy takes effect as a new contract, the judge said that it should be read "in the context of the circumstances in which it was made" - here, the lessee's interest had been noted on the schedule in the previous year (and the insurer knew the identity of the lessee). For these reasons, the landlord had sufficiently complied with the obligation regarding noting.
- (2) The policy had contained a waiver of subrogation rights but, significantly, had excluded damage arising from the lessee's "gross negligence" from the scope of the waiver. Reference was made to the case of *Mark Rowlands v Berni Inns* [1986], in which the Court of Appeal found that the lease showed a clear intention that (in the event of a fire caused by the lessee's negligence) the landlord would have recourse under the insurance policy and would not look to recover from the lessee (and so the insurers could not bring a subrogated claim against the lessee either). Keyser J said that it was "strongly probable" that the position was the same in this case because the provisions in the lease indicated an intention that the landlord should not have a right of action in negligence against the lessee.

However, that did not mean that there had been a waiver of subrogation, as required in the lease. The purpose of a waiver of subrogation is to give added comfort to the lessee that no attempt at all will be made to pursue the lessee for losses to which the insurance relates: "The waiver in the present case did not extend to "gross negligence" and therefore fell significantly short of a complete waiver....If the point had arisen in the light of my decisions on other matters, I should have held that there was a realistic prospect that the claimant had not complied with its obligation to use reasonable endeavours to procure a complete waiver and that the issue should be determined at trial".

COMMENT: This case highlights the difference between an insurer being unable to bring a subrogated claim because the party into whose shoes he is stepping cannot bring that claim and a waiver of subrogation rights (which an insured may have been under a duty to provide). Here, no adequate waiver was given (in compliance with the landlord's duty under the lease) because claims for gross negligence had been excluded from the waiver. Insureds who are under a similar duty to obtain a waiver of subrogation may therefore wish to press insurers to remove any "gross negligence" exclusion from their policy wording. They may also seek to remove the more common exclusion for fraudulent or malicious acts, although no reference was made to this type of exclusion in the case and it is unclear whether this would raise any public policy issues.

Pattni v First Leicester Buses

Court of Appeal determines issues arising out of hire of replacement car following insured accident

<http://www.bailii.org/ew/cases/EWCA/Civ/2011/1384.html>

Following road traffic accidents, the innocent drivers in both these appeals hired replacement cars on credit terms, even though both could have afforded to hire those cars without using credit. The negligent drivers' insurers raised the following arguments which have now been determined by the Court of Appeal:

- (1) Were the negligent drivers' insurers liable to pay the interest which the innocent drivers were contractually obliged to pay under the terms of the car hire agreement? It has been established by prior caselaw that the innocent driver can only recover his reasonable expenditure. If he can afford to hire a replacement car without using credit and by paying in advance, then he will only be able to recover the basic hire rate (sometimes called the "spot rate", although Aikens LJ disapproved the use of that term) of the replacement car. In one of the cases on appeal, the driver was under a contractual obligation to pay interest on the outstanding total credit hire charge for the period between the end of the actual hire until the "claim" (as defined) is finally settled. The Court of Appeal held that that interest was not a recoverable loss (if the hirer is not "impecunious"). Furthermore, although Aikens LJ was prepared to accept that a claimant can recover damages if he proves that he has suffered loss of money by reason of the defendant's tort, on the facts of the case, the innocent driver had not actually incurred any financial cost as he had not had to pay out any interest (for the same reason, the innocent driver was not entitled to an award of discretionary statutory interest).
- (2) How should the basic hire rate be calculated? Once it has been established that the claimant (who was not impecunious) needed to hire a replacement car (and it was reasonable for him to hire the particular type of car actually hired), then the court will need to ascertain the basic hire rate for the model of the car actually hired in the same broad geographical area (and the defendant will only have to pay that basic hire rate). In the case under appeal, the (reasonable) replacement car had been a 2007 Aston Martin. The Court of Appeal found that the trial judge had erred in finding (inter alia) that the claimant had been unreasonable in obtaining comparable figures from "very small scale specialist hirers", since the market for the type of car hired was very specialist (although if appropriate figures were available from a "mainstream" hirer, that would be relevant evidence).

BNP Paribas v Open Joint Stock Co & Anor

Issues relating to an anti-suit injunction against a non-party to an arbitration agreement/service out of the jurisdiction

<http://www.bailii.org/ew/cases/EWHC/Comm/2011/308.html>

The French claimant bank entered into an agreement with the first defendant, a Russian company. That agreement contained an arbitration clause (in favour of arbitration in London). Following a dispute, the claimant commenced arbitration proceedings. Some months later, the second defendant (another Russian company, related to the first defendant), commenced proceedings in Russia against the claimant (and the first defendant) seeking the invalidation of the agreement which the claimant had entered into with the first defendant. The claimant sought an anti-suit injunction restraining the pursuit of the Russian proceedings. Various jurisdictional and procedural issues arose. Some of the issues considered by Blair J were as follows:

- (1) Does the English court have jurisdiction to hear the application for interim relief against the second defendant, who is not a party to the arbitration agreement? The claimant argued that the second defendant was engaged in the unconscionable pursuit of litigation intended to prejudice the arbitration agreement. The judge held that the claim against the second defendant fell within the "gateway" of CPR r62.5(1)(b). This provides that the court can give permission to serve an arbitration claim form out of the jurisdiction if the claim is for an order under section 44 of the Arbitration Act 1996. The court can grant an interim injunction if (pursuant to section 44(3)) "the case is one of urgency" and on the application of a party to the arbitral proceedings, such order is necessary to preserve evidence or assets. Blair J acknowledged that section 44(3) is a

narrow gateway but held that it encompassed the contractual right to have disputes referred to arbitration (even if the application is made against a non-party to the arbitration agreement).

- (2) Should service on the first defendant be retrospectively validated under CPR r6.15(2) (which provides that the court can order that steps already taken to bring the claim form to the defendant's attention by an alternative method amount to good service)? In this case, the claimant served the first defendant's English solicitors in the mistaken belief that service was covered by a process clause (which had, in fact, been "repealed"). The judge held that this should be deemed to be good service. It did not matter whether that service was legal under Russian law as service on the foreign defendant took place in England. In this case, it was clear that the solicitors for the first defendant knew the arbitration claim form was coming and no limitation issues arose.
- (3) Had the second defendant been validly served in Russia? CPR r6.40(3) provides that service can be made "by any other method permitted by the law of the country where it is to be served". Although domestic proceedings can be served by registered post in Russia, Russian is a party to the Hague Convention and it has made a reservation in relation to service directly by post. Accordingly, only service through "official channels" is permitted where (as here) the claim form originates from a Hague Convention signatory country. In this case though, service of the claim form on the second defendant was made by delivery by hand to its lawyers in Moscow and by registered post in Moscow, after an English judge had given permission for service by alternative methods.

CPR r6.40(4) provides that nothing in r6.40(3) authorises "any person to do anything which is contrary to the law of the country where the claim form...is to be served". The second defendant argued that service by post or in person is "contrary" to Russian law and so the English judge had not been justified in making his order. That argument was rejected by the judge: "Alternative service in Russia in person or by post is not permitted, but neither is it illegal". The court could properly order service by alternative means on the second defendant in Russia.

ED&F Man Sugar v Belmont Shipping

Whether arbitrators have duty to tell a party about a point it has missed

<http://www.bailii.org/ew/cases/EWHC/Comm/2011/2992.html>

The claimant applied pursuant to section 68 of the Arbitration Act 1996, challenging an arbitration award on the ground that the tribunal had failed to act fairly (pursuant to their duty under section 33 of the Act). In view of the modest sums involved in the dispute, the arbitration had been conducted on documents alone. The claimant had made a concession during the arbitration. However, the arbitrators appreciated that it was arguable that this concession need not have been made. They referred, in their award, to a case which the claimant had not relied on and said "so the potential consequences of that decision have not affected our conclusion".

The claimant sought to rely on a comment made by Waller LJ in the *Magdalena Olendorf* [2008] that "If an arbitrator appreciates that a party has missed a point then fairness requires the arbitrator to raise it so that the party can deal with it". However, Teare J said that it was necessary to understand the context in which this observation had been made. Waller LJ had been referring to a point which was in issue and which was required to be dealt with. By contrast, in this case the relevant point had not been in issue and the arbitrators were under no duty to point out an argument to enable the claimant to decide whether to withdraw its concession: "Arbitrators are not barred from asking a party whether it has considered raising a different case from that which it has advanced but section 33 of the Arbitration Act 1996 does not oblige them to do so". In other words, the duty to allow a party a reasonable opportunity to put its case does not require the arbitrators to give a party an opportunity to put a case different from that which it has chosen to put. Teare J noted that in cases such as the present, where the parties are keen to keep costs to a minimum, it is understandable that a tribunal would be reluctant to ask a party whether it wishes to run a different case.

Bethell Construction v Deloitte & Touche

Whether “protective” claim form had been served/arguments regarding estoppel

<http://www.bailii.org/ew/cases/EWCA/Civ/2011/1321.html>

The claimants sent the defendant a copy of the claim form which it had issued but advised that this was a protective claim form (issued to prevent the claim becoming time-barred). The claim form was not sent by way of service and the parties thereafter agreed various extensions of time for service of the claim form. Some months later, the claimants served their particulars of claim on the defendant. The defendant’s solicitors replied advising that they were giving 14 days’ notice “of determination of the stay”. However, the claim form was not served by the end of that period. The defendant objected when the claimants later attempted to serve the claim form (and argued that the claim had now become time-barred). The claimants applied to the court for various orders (all of which were rejected at first instance). The claimants appealed and the Court of Appeal has now held as follows:

- (1) It could not be argued that, since particulars of claim cannot be validly served until the claim form has been served, it should be implied that the claim form originally sent by the claimants had now been validly served. A claimant cannot unilaterally choose a method of service of the claim form which is not authorised by the CPR.
- (2) Whilst the defendant’s solicitors should have referred to the termination of an extension of time rather than a stay, it was clear, in context, what they had meant and the letter should be given the legal effect it was clearly intended to have.
- (3) Generally, silence will not give rise to an estoppel, unless it can be shown that there was a duty to act or speak. In this case, the defendant’s solicitors must have realised that the claimants’ solicitors (who had taken over the case at a later stage) had wrongly assumed that the claim form had in fact already been served. The defendant’s solicitors were not under a duty to reply, but if they did, this should have been a full reply. Their failure to do so had set a “trap” for the claimants’ solicitors and could have amounted to a waiver of proper service. However, crucially, the defendant’s solicitors had given notice to terminate the extension of time agreement and this had triggered time for service of the claim form. Accordingly, this letter “does not constitute a positive representation that [*the defendant*] accepted that the claim form had been duly served or waived their entitlement to require its proper service”.
- (4) Nor did the letter from the defendant’s solicitors constitute a “good reason” to justify service by an alternative method under CPR r6.15. Even if the defendant has set a trap, the mistake of the claimants’ solicitors did not justify denying the defendant the benefit of the time bar argument. Equally, there were no “exceptional circumstances” to justify the court dispensing with service of the claim form under CPR r6.16. Accordingly, the claimants’ claim was now time-barred.

Finally, the claimants accepted that they should pay the defendant its costs of this application. However, they disputed the jurisdiction to order them to pay the defendant’s costs of the action. The Court of Appeal held that there was such a jurisdiction in this case because there are “proceedings” once the claim form has been issued: “There is nothing...to exclude the costs of proceedings in cases where the claim form has not been served”.

Manning & Anor v King’s College Hospital

Recoverability of ATE premium

<http://www.bailii.org/ew/cases/EWHC/QB/2011/2954.html>

Clyde & Co (BLG) for respondent

This case involved the appeal from a Master’s decision to refuse relief from sanctions which had been imposed because the claimant had failed to provide information about a funding arrangement. Spencer J held that that decision had been flawed. As a result a further argument, that the premium for an ATE policy taken out by the claimant was irrecoverable, became redundant. Nevertheless, the judge addressed the point because it raised a point of construction of CPR r44.3B “of some potential importance”. CPR r44.3B provides that “unless the court orders otherwise, a party may not recover as an additional liability...(c) an additional liability for any period during which that party failed to provide information about a funding arrangement”. An “additional liability” is defined in the rules as (*inter alia*) “the insurance premium...as the case may be”.

The Master gave relief from sanctions for the claimant's failure to serve a copy of the insurance certificate. However, because he refused to grant relief from sanctions relating to the claimant's failure to provide information about his funding arrangement (for a 17 month period), he reasoned that CPR r44.3B precluded recovery of the insurance premium as an "additional liability" during that 17 month period.

Spencer J held that the Master was wrong because "the rule is not intended to impose a disproportionate blanket penalty rendering irrecoverable every additional liability for the period of default, but applies only to the specific additional liability which is the subject of the default, here the success fee in the CFA agreements". The claimant was therefore entitled to to recover his ATE insurance premium.

Wilky Property Holdings v London & Surrey Investments

Whether court or expert should determine the scope of expert's authority in an expert determination

<http://www.bailii.org/ew/cases/EWHC/Ch/2011/2888.html>

Weekly Update 27/11 referred to the Court of Appeal decision in *Barclays Bank v Nylon Capital*, in which it was said that, in the interests of justice and convenience, the court should determine the scope of the expert's jurisdiction (under an expert determination clause) and the court should not defer that decision until after the expert has determined whether he has jurisdiction. A similar issue arose in this case, where there was a dispute between the parties as to whether a certain issue could be included in an expert determination (which was already considering other issues). Snowden J said that the Court of Appeal had not intended to lay down a prescriptive rule that the court should decide that issue now. In the circumstances of this case, it was important first to clarify whether (and if so, on what basis) the claimant intended to run the point: "I think that the obvious and convenient forum for that to occur is in the expert determination by Mr. Pye. Mr. Pye, who is an experienced dispute resolver, has indicated his intention to hold a directions meeting with the parties as a first stage in the process leading to his expert determination".

Once that issue has been clarified, the expert could decide what steps to take next and the parties would have a wide range of procedural options available to them. For example, in *Barclays Bank v Nylon Capital*, it was suggested that the parties could agree whether the expert's decision on the point will be treated as final and binding and whether the disappointed party could then refer the issue to the court. Snowden J rejected the argument that this approach might give rise to an undesirable form of "hokey-cokey" in which the parties would move in and out of litigation and expert determination. The expert here was definitely seized of the main issue and his views as to how that issue could best be resolved were likely to be of some relevance to the court. By contrast, if the court was to decide to proceed to a determination of the issue, that might cause further delay to the expert determination of the main issues "and risks allowing a presently undefined tail to wag the dog".

Other News

A final version of the [voluntary code of conduct for third-party funders](#) has been published by the Civil Justice Council. Some of the requirements of the code are as follows: Promotional literature must not be misleading and the funder must maintain the confidentiality of documents which it receives; the funder must take reasonable steps to ensure that the litigant has received independent legal advice on the terms of the funding agreement (this can be from the solicitor instructed in the dispute); the funder must maintain adequate financial resources to meet its obligations at all times; the funder will not have a discretionary right to terminate the funding agreement in the absence of certain agreed criteria (set out in the funding agreement) - these can be that the funder reasonably ceases to be satisfied about the merits of the case or reasonably believes that the dispute is no longer commercially viable. The code also sets out the provisions which must be included in the funding agreement (including whether the funder can provide input to the litigant's decisions in relation to settlements). A link to the code is set out below:

<http://www.judiciary.gov.uk/NR/rdonlyres/75D4F49E-BDC6-40BC-B379-B5A1DA82BED9/0/CodeofConductforLitigationFundersNovember2011.pdf>

Further information

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