



## Weekly Update

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

46/11

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## Shlaimoun & Anor v Mining Technologies

### Use of documents disclosed pursuant to a Norwich Pharmacal order in foreign proceedings/undertaking not to disclose

<http://www.bailii.org/ew/cases/EWHC/QB/2011/3278.html>

Documents were provided by two banks to the respondent pursuant to two *Norwich Pharmacal* orders. The applicant sought an injunction restraining the respondent from using those documents in foreign proceedings (which were started after the documents had been provided). The following arguments were considered by Coulson J:

- (1) Could the *Norwich Pharmacal* orders be set aside? Coulson J said that it would not be appropriate to set the orders aside - the orders had already been complied with in full.
- (2) Were the *Norwich Pharmacal* applications an abuse of process? There is no doubt that a *Norwich Pharmacal* order can be used in order to obtain documents which are subsequently used in foreign proceedings (see *Omar v Omar* [1995]). However, the applicant argued that the use of the *Norwich Pharmacal* procedure had been abusive because it must have been apparent at the time of the application that the documents were to be used in foreign proceedings (and not in any English proceedings) and so the respondent should have used the procedure set out in the Evidence (Proceedings in Other Jurisdictions) Act 1975 instead.

Coulson J rejected that argument. This was not a case where the respondent had always known that the documents would not be used in English proceedings. Even if the respondent had been aware of that, the *Norwich Pharmacal* application could still have been made: "I take the view that, depending on the facts, there is no reason why a *Bankers Trust/Norwich Pharmacal* application should not be made in circumstances where there is the possibility that the ultimate proceedings would be commenced in a foreign jurisdiction". The situation would only be different if foreign proceedings had already been up and running by the time of any possible crossover with the powers of the English court. The *Norwich Pharmacal* procedure is a stand-alone remedy which should not (unless absolutely necessary) be constrained by the more cumbersome process set out in CPR r34 and the 1975 Act (which is more focused on the problems of oral evidence in foreign proceedings).

- (3) Was the respondent bound by the collateral undertaking in CPR r31.22 (which provides that a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed except (inter alia) where the court gives permission)? Coulson J accepted that the documents provided to the respondent had been "disclosed" to it. There is no reported case dealing with the interaction between the collateral undertaking and the use in subsequent proceedings of documents obtained under a *Norwich Pharmacal* order. Textbook commentary on this issue is also not entirely consistent. Coulson J concluded that, where an application for a *Norwich Pharmacal* order is made on the express basis that subsequent proceedings are likely, the court, in making the order, is implicitly giving permission to the applicant to use the documents in those subsequent proceedings. Coulson J said that that result made commercial common sense.
- (4) Finally, Coulson J said that even if the respondent had abused the process/breached the collateral undertaking, he would have granted retrospective permission to the respondent to use the documents in the foreign proceedings. The applicant would not suffer any prejudice if permission was now given and an order banning the respondent from using the documents would be a "punishment out of all proportion to the original (inadvertent) breach".

## Starlight Shipping v Allianz Marine

**Whether there had been a breach of a settlement agreement/jurisdiction clause after insured commenced proceedings overseas**

<http://www.bailii.org/ew/cases/EWHC/Comm/2011/3381.html>

**Clyde & Co** (Mike Roderick and Angela Haylett) for defendants

Following the loss of its vessel, the insured commenced proceedings against its insurers when they denied liability. The insured sought to claim that it was entitled to damages for the insurers' refusal to pay (arguing that it would have purchased a replacement vessel and so had lost an increase in capital and chartering losses). Tomlinson J declined leave to introduce this claim because he said he was bound by the Court of Appeal decision of *Sprung v Royal Insurance* [1992] (which held that damages can never be awarded to compensate for the loss caused by an insurer's wrongful delay or complete failure to pay out on an insurance claim).

The parties then entered into two settlement agreements. Over three years later, the insured commenced proceedings in Greece seeking compensation for loss of hire and loss of opportunity. The insurers commenced proceedings in England alleging, inter alia, breach of the settlement agreements and/or the exclusive jurisdiction clauses in the insurance policies and settlement agreements. Some of the issues considered by Burton J are set out below:

- (1) Under the settlement agreements, the insured agreed to indemnify the insurers against any claim "in relation to" to the loss of the vessel. Claims alleging bad faith by the insurers fell within the scope of that clause. The insured had sought to rely on the statement by Collins LJ in *Satyam Computer Services v Upaid Systems* [2008] that clear and specific language is needed in a settlement agreement to settle claims involving allegations of dishonesty "if they are unknown at the time the settlement was entered into". Burton J said that in this case any fraud was capable of being known at the time of the agreement.
- (2) In one of the settlement agreements, a jurisdiction clause was not expressly said to be "exclusive". Relying on textbook and caselaw authority, Burton J concluded that: "In the absence of any argument that the word exclusive was for some reason ... deliberately left out, I am satisfied that, both by reference to the context, and to the fact that the provision would otherwise be idle, that the parties did ...intend exclusive jurisdiction".
- (3) When the settlement agreements were entered into, the insurers had obtained a stay of the English proceedings by way of a Tomlin Order. Burton J said that the insurers could therefore proceed summarily and without issuing new proceedings because they were seeking to carry into effect the terms agreed in the settlement agreements.
- (4) The judge agreed to "fortify" the indemnity in the settlement agreements by ordering the establishment of a fund to protect the insurers.

## Liberty v Argo

**Potential claim for return of premium following a breach of warranty**

<http://www.bailii.org/ew/cases/EWCA/Civ/2011/1615.html>

Following the decision last week in this case, the Court of Appeal considered various costs issues. The insured argued that the question of whether it should pay the costs of the appeal should await the outcome of its application to amend its pleadings to claim a return of premium under section 84 of the Marine Insurance Act 1906. The Court of Appeal rejected the argument that it should await the outcome of the application for permission to amend.

COMMENT: The insured wishes to claim a return of the premium on the basis that the breach of warranty in this case occurred the moment the policy was issued and so the consideration for the payment of the premium had failed. The insurer accepts that it is arguable that this is a good claim. It will be interesting to see how a court will decide the issue (if permission to amend is given). There is little recent caselaw on this issue, although there is 18th and 19th century caselaw to support the view that if a risk never attaches because of a breach of warranty, the insured is entitled to a return of the premium (in the absence of fraud on the part of the insured). However, the Law Commission's Second Issues Paper on Warranties said that there would only be an entitlement to a return of the premium if the breach "and the acceptance of the breach" has occurred before cover started.

## Solomon v Cromwell Group

### Court of Appeal confirms that Part 36 applies where offer made and accepted before proceedings commenced

<http://www.bailii.org/ew/cases/EWCA/Civ/2011/1584.html>

Weekly Update 25/11 reported the High Court decision in *Thompson v Bruce* in which it was held that the Part 36 costs consequences set out in CPR r36.10 apply where a Part 36 offer is both made and accepted before proceedings are commenced. There had been some doubt about the point prior to *Thompson*. In this case, concerning a Part 36 offer to settle a claim for damages following a road traffic accident, the Court of Appeal confirmed that *Thompson* had been correctly decided. It would have been unlikely that the Rules Committee would have overlooked the position of a Part 36 offer being made and accepted prior to the issue of proceedings.

The Court of Appeal also held that although Part 36 contains rules of general application, Section II of Part 45 governs the cases to which it applies (ie "fixed costs" in "costs-only" proceedings arising out of a road traffic accident case).

## Sayce v TNT (UK) Ltd

### Whether claimant driver should have accepted replacement car/consequences of failing to mitigate

<http://www.bailii.org/ew/cases/EWCA/Civ/2011/1583.html>

Burges Salmon for appellant, Pollard Bower for respondent

The Court of Appeal decision in *Copley v Lawn & Ors* was reported in Weekly Update 22/09. The Court of Appeal had held that a claimant driver will only act unreasonably in failing to accept the offer of a "free" replacement car if he is aware that his refusal will increase the ultimate burden on the defendant. It was also held that even if the claimant has unreasonably failed to mitigate, that does not mean that he cannot recover anything at all.

In this case, Harris J had declined to follow the decision in *Copley v Lawn* because he considered that it was inconsistent with several previous decisions of the House of Lords and Court of Appeal. The claimant appealed and the Court of Appeal has now held as follows:

- (1) The judge had erred in deciding the case on a basis which had not been argued before him and had not given the parties an opportunity to address this issue. For that reason alone the appeal should be allowed.
- (2) The judge was not entitled to disregard the ratio of *Copley v Lawn* (namely, that a claimant acts unreasonably in rejecting the defendant's offer only if he is aware that he will increase the burden on the defendant). No findings had been made in this case as to whether it was unreasonable for the claimant to refuse the offer of a free car once she had been told that it would only cost the defendant £14 a day to provide it.
- (3) The principle that a claimant can still recover something even if he has unreasonably failed to mitigate did not form part of the ratio of *Copley v Lawn* and so did not have to be followed. Moore-Bick LJ said that "I can understand why some find it difficult to see why the claimant should be entitled to recover anything from the defendant in respect of the loss of use of his own car, since it was a loss that he could, and ex hypothesi should, have avoided". However, no final view was adopted by the Court of Appeal on this point.

Accordingly, the appeal was allowed because of procedural irregularity and because the judge should have followed *Copley v Lawn*. Permission to appeal to the Supreme Court was refused. It is worth noting that the Supreme Court also refused permission to appeal the decision in *Copley v Lawn* and so it remains doubtful whether a claimant in these circumstances can still recover where he has unreasonably failed to mitigate his loss.

## Delaney v Pickett

### Whether liability excluded under the Motor Insurers' Bureau Agreement

<http://www.bailii.org/ew/cases/EWCA/Civ/2011/1532.html>

The claimant suffered catastrophic injuries when the car in which he was a passenger crashed. His claim under the provisions of the Uninsured Drivers' Agreement (the driver's insurers having avoided his motor insurance policy) failed at first instance because the purpose of the car journey was found by the judge to be the collection and transportation of illegal drugs (cannabis) for subsequent re-sale. The judge held that liability was excluded under clause 6(1)(e)(iii) of the Motor Insurers' Bureau Agreement which excludes claims where the relevant vehicle is "being used in the course or furtherance of a crime". The claimant appealed.

Ward LJ, dissenting, held that the use of the vehicle in this case was "not heinous enough" to be the kind of crime covered by the clause. However, both Richards LJ and Tomlinson J disagreed. The designated insurers had accepted that the clause did not apply to any crime, however minor, but argued that it does apply where the conduct is "so reprehensible that it deserves public condemnation". The majority of the Court of Appeal accepted that argument.

## Abela v Baadarani

### Court of Appeal decides whether permission to serve by alternative means should have been given

[http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2011/1571.html&query=title+\(+abela+and+baadarani+\)&method=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2011/1571.html&query=title+(+abela+and+baadarani+)&method=boolean)

The first instance decision in this case was reported in Weekly Update 05/11. Rather than going through consular/judicial channels, the claimant had served the defendant's lawyer in Lebanon. The judge held that CPR r6.15(2) (which allows a court to retrospectively validate service by an alternative method or at an alternative place) applies to service out of the jurisdiction and he decided to exercise his power under CPR r6.15(2) to retrospectively validate service. The defendant appealed and the Court of Appeal has now held that the judge was wrong to have retrospectively validated service.

The power under CPR r6.15 must be exercised cautiously. It will usually be inappropriate to validate retrospectively a form of service which is not good service under local law: "The fact that CPR 6.40(4) expressly states that nothing in any court order can authorise or require any person to do anything contrary to the law of the country in which the document is to be served does not mean that it can be appropriate to validate a form of service which, while not itself contrary to the local law in the sense of being illegal, is nevertheless not valid by that law". The Court of Appeal found that, as the lawyer did not have authority to accept service, service on him did not constitute good service under Lebanese law. There was no "very good reason" for the judge to retrospectively validate service. Service through consular/judicial channels had become impossible because of the "dilatatory" way in which the claimant had pursued the English claim: "They were asking for trouble by only issuing their claim form shortly before the limitation expired".

COMMENT: This case reflects the finding in *Amalgamated Metal Trading v Baron* (see Weekly Update 02/11) that just because local law does not expressly prohibit a certain method of service, that does not mean that service by that method is permitted under CPR r6.40(3)(c) (which allows "any other method permitted by the law of the country in which it is to be served").

## Lanes Group v Galliford

### Allegation of apparent bias: Court of Appeal comments on the “fair-minded observer test”

<http://www.bailii.org/ew/cases/EWCA/Civ/2011/1617.html>

This was an appeal against a finding of apparent bias by an adjudicator. The Court of Appeal reversed that finding on the facts but the case is of interest because of certain observations by Jackson LJ. The House of Lords decision in *Porter v McGill* [2001] formulated the test for apparent bias as “whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”. Jackson LJ criticised the “elaboration” of this test in recent years (eg he or she must be assumed to be neither complacent nor unduly sensitive or suspicious): “There are conceptual difficulties in creating a fictional character, investing that character with an ever growing list of qualities and then speculating about how such a person would answer the question before the court. The obvious danger is that the judge will simply project onto that fictional character his or her personal opinions”. However, Jackson LJ recognised that he was bound to follow this approach and would do his best to avoid that pitfall.

## RFU v Viagogo

### Norwich Pharmacal orders and data protection

<http://www.bailii.org/ew/cases/EWCA/Civ/2011/1585.html>

At first instance, the judge decided to grant a Norwich Pharmacal Order in favour of the applicant. This required the respondent to disclose the identity of persons selling tickets which were advertised on the respondent's website. One of the grounds of appeal was that the judge ought to have had regard to the EU Data Protection Directive. This directive provides that disclosure of personal data can be made where disclosure is required by law or the order of a court (eg the NPO).

However, the respondent argued that the directive should be read subject to ECJ jurisprudence which provides that any interference with, or disclosure of, individuals' personal data could only occur if both “strictly necessary” and “proportionate”. The Court of Appeal accepted that that was the correct position but held that it had been necessary and proportionate to make the order in this case. There had been no plausible suggestion as to how else the applicant could have obtained the required information and there had been arguable wrongdoing by unidentified individuals: “There can be no reasonable expectation of privacy in respect of data which reveal such arguable wrongs and [the respondent]’s own conditions of business point out to their customers that there may be circumstances in which their personal data will be passed on to others” (although the Court of Appeal stopped short of finding that this amounted to a waiver of confidentiality in their personal data). Furthermore, only names and addresses would be revealed.

## Ali v Esure Services

### Which court should hear application for a committal order made by an insurer

<http://www.bailii.org/ew/cases/EWCA/Civ/2011/1582.html>

A driver (“Mr A”) commenced proceedings in a county court against another driver following a road traffic accident. The defendant's insurers were also joined to the proceedings. The insurers asserted that the claim was dishonest and an attempt to defraud it. Mr A discontinued the proceedings but they were resurrected by the insurers who wanted to seek an order for the committal of Mr A for contempt of court under CPR r42.14 (false statements). The matter was transferred to the High Court Queen's Bench Division, Huddersfield District Registry, where a single High Court judge held that he had jurisdiction to hear the application for a committal order. Mr A appealed against that decision, arguing that two judges sitting in the Divisional Court of the High Court should have heard the application.

The Court of Appeal dismissed that appeal. Jurisdiction to punish a contempt of court is allocated to the Divisional Court. However, an order for committal may be made by a single judge in the High Court where “contempt of court is committed in connection with any proceedings in the High Court”. Here, there was only one set of proceedings and the transfer of the case from the county court to the High Court did not mean that the chain of causation between the statement of truth (made in the county court) and the resurrected proceedings in the High Court had been broken.

## Other News

The Law Commission has published a further consultation paper on Post-contractual Duties and other issues. The CP sets out proposals for reform of the law in the following areas:

- 1) It is proposed that an insurer who unreasonably delays or wrongfully repudiates a claim would be in breach of a new duty on an insurer to pay valid claims after a reasonable time. Insurers will be given sufficient time to fully investigate a claim and to review and consider the claim. A breach of this duty will result in the insurer being liable to pay damages for proven and foreseeable losses. It will be possible to exclude this liability in business insurance policies (but not consumer insurance policies). However, a "shield" of good faith is proposed to protect policyholders from an insurer seeking to rely on an exclusion clause in a business insurance policy (ie the insurer will have to explain any delay/decision to repudiate a valid claim). As a result of these proposals, it is suggested that time to commence legal proceedings against an insurer will not start running until the insurer has had a reasonable time to investigate and assess a claim. It is also proposed that damages for distress, inconvenience or discomfort should be made available to the consumer.
- 2) It is proposed that a fraudulent claim should not avoid the contract from the start but that instead the fraudster should forfeit the whole claim (as is the current position under common law) and all subsequent claims (and that the insurer should be able to claim damages for investigating the claim). In consumer insurance, an insurer would not be allowed to add to these remedies. However, in business insurance, an insurer could vary these remedies. Special provisions will be introduced to deal with fraud by members of a group scheme;
- 3) It is proposed that there will be a statutory restatement confirming that the requirement of an insurable interest applies to all forms of insurance (and in the absence of which, the policy will be void). For contingency insurance (where the amount of the payment is set at the time of the contract) the insurable interest must be present at the time the contract is made. In other cases, it would be sufficient to have an interest at the time of the loss;
- 4) There is a proposed abolition of the need for a formal marine policy (section 22 of the Marine Insurance Act 1906). Reform of section 53(1) of the 1906 Act (which makes a broker liable to pay premiums to the insurer) is also proposed. It is suggested that the policyholder will be liable to pay premium to the insurer and the broker will act as the policyholder's agent. The issue of whether the broker is liable to pay the premium to the insurer should be a matter of agreement between the broker and the insurer. Marine brokers should be liable for paying premiums though, unless they contract out. It is also proposed that section 53(2) of the 1906 Act should be amended (in relation to both marine and non-marine insurance) to give the broker a general lien over all property of the insured that has lawfully come into the broker's possession in its capacity as broker (and should give brokers the right to retain any funds held on behalf of the insured to settle the insured's outstanding debts in respect of premiums or charges).

The consultation will close on 20 March 2012. Further details can be found in the link below:

[http://www.justice.gov.uk/lawcommission/consultations/post\\_contract\\_duties.htm](http://www.justice.gov.uk/lawcommission/consultations/post_contract_duties.htm)

Copies of all past Law Commission papers on the reform of insurance contract law can be found in the Current Awareness section of the Insurance pages on the intranet:

<http://intranet/ClientPartner/app.asp?emailLink=NID%3D%26PID%3DP%7BFF157446%2DB112%2D4D35%2DB532%2D4A383E158C92%7D>

### Further information

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