Insurance and reinsurance
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CLYDE&CO

Weekly update

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

Contents

Thewlis v Groupama Insurance

A case on whether an offer was a valid Part 36 offer.

Harvey v MIB

A case on the grounds for appealing under section 69 of the Arbitration Act 1996.

Astrazeneca v International Business Machines Corpn

A decision on the effect of a contractual term on the recovery of costs following judgment.

Other News

Details of the European Commission's guidance on the effect of the Test-Achats case on insurers and their practices.

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

Thewlis v Groupama Insurance

Whether offer was a valid Part 36 offer

http://www.bailii.org/ew/cases/EWHC/TCC/2012/3.html

The defendant applied for a stay of proceedings because it claimed that it had accepted a valid Part 36 offer from the claimant shortly before trial. The claimant (unusually) argued that its offer, which had been headed "offer made pursuant to Part 36", was not in fact a valid Part 36 offer.

Behrens HHJ agreed with the claimant. The offer had failed to comply with the requirement that it "state on its face that it is intended to have the consequences of" Part 36. Although this defect could be seen as a technical one (especially since the letter did refer to Part 36 twice), the judge held that there is prior caselaw authority (most notably, Akenhead J's decision in *Carillion v Phi Group* (see Weekly Update 24/11) to support the stance that technical defects will prevent an offer being a Part 36 offer.

Although the offer here referred to some of the consequences of Part 36, it did not refer to them all. Behrens HHJ noted the observation by the Court of Appeal in *C v D* (see Weekly Update 20/11) that an offer presented as a Part 36 offer must "otherwise comply with its form" in order to be treated as such, and that was not the case here.

Although not necessary to do so, the judge also expressed his view on the construction of the offer. It had advised that the offer would remain open for 21 days and "thereafter it can only be accepted if we agree the liability for costs or the Court gives permission". It was held that that, as a result, the offer did not remain open after 21 days for the defendant to accept and, accordingly, it was inconsistent with a Part 36 offer. The defendant's argument that this clause was "surplusage" (on the ground that the author had misunderstood the effect of Part 36) was rejected. The clause had left open the possibility of the claimant seeking costs on an indemnity (rather than a standard) basis and this was not permissible under Part 36.

COMMENT: This case bucks a recent judicial trend of rejecting purely technical challenges where it is clear that the offeror intended to make a Part 36 offer. In this case, not only did the offer not expressly state that it was intended to have the consequences of Part 36, it also failed to specify all the consequences of a Part 36 offer. The case therefore highlights the need for careful drafting of Part 36 offers in order to ensure that they are treated as such by a court.

Harvey v MIB

Grounds for appealing under section 69 of the Arbitration Act 1996

Weekly Update 39/11 referred to the case of *House of Fraser v Scottish Widows*, in which Smith J agreed that it was no longer permissible to argue that there had been an error of law because an arbitrator had failed properly to consider the evidence. Smith J had referred, though, to the case of *Guardcliffe Properties* [2003] in which Etherton J had suggested that an arbitrator's decision which was based on no evidence at all could be a ground for appealing under section 69 of the Arbitration Act 1996. In this case, Hegarty J said "I very much doubt if even a total absence of any evidential basis for a finding of fact can give rise to a question of law for the purposes of section 69…though it might conceivably amount to a serious irregularity under section 68(2)(a)". The judge was, however, prepared to accept that a question of law for the purposes of section 69 might arise if, on the basis of the facts found by the arbitral tribunal, the conclusion which it reached "was outside the range which could properly have been arrived at by a tribunal which had properly directed itself as to the applicable law". However, "it must still be possible to conclude that the error arises from some misapprehension or misapplication of the law".

Here, the claimant was dissatisfied with the compensation awarded to her by the Motor Insurers' Bureau and appealed to arbitrators (pursuant to the terms of the Untraced Drivers' Agreement 2003). The arbitrators held that she was not entitled to any compensation at all. The claimant appealed, arguing that the facts had given rise to an evidential burden on the MIB to refute an inference that the untraced driver had breached his duty of care.

Hegarty J held that the MIB was not subject to such a burden. The maxim *res ipsa loquitur* does not enshrine a rule of law under which the ordinary civil burden of proof on any particular issue shifts to the defendant. It simply allows the court to draw a factual inference in order to justify a finding of negligence in the absence of proven facts. Accordingly, an argument that the arbitrator had failed to approach the evidence in accordance with the maxim did not amount to an error of law.

Furthermore, no fundamentally different approach should be adopted by the court on the basis that the arbitration was conducted by Queen's Counsel rather than a lay arbitrator. Nor did it matter that there was no contract between the parties providing for arbitration - by applying for compensation under the Untraced Drivers' Agreement, the claimant was taken to have accepted the arbitration provisions of that Agreement and no different approach should be adopted by the court towards the claimant.

Astrazeneca v International Business Machines Corpn

Effect of contractual term on recovery of costs following judgment

http://www.bailii.org/ew/cases/EWHC/TCC/2011/3373.html

Following judgment in this case, in which the claimant was substantially (but not entirely) successful, the claimant sought to recover its costs on an indemnity basis. It relied on a clause in the contract which it had entered into with the defendant ("IBM") which provided (in relevant part) that IBM would indemnify "all Defence Costs incurred by [the claimant] in connection with any Dispute in which judgment is given in [the claimant]'s favour". Ramsey J held as follows:

(1) The use of the term "Defence Costs" in the agreement should be read in context and would cover fees and disbursements incurred in both the pursuance or defence of a claim.

(2) The agreement provided for the payment of fees and disbursements "calculated on a solicitor-own client basis". The judge held that this equated to the indemnity (rather than the standard) basis (ie costs incurred would be allowed except any which have been unreasonably incurred or are of an unreasonable amount).

(3) Here, the claimant could seek to recover costs either under the terms of the agreement or by the exercise of the court's general discretion regarding costs. Ramsey J held that, whilst in principle there might therefore be two alternative bases for obtaining costs "it is clear that in exercising its discretion under CPR 44.3, the court should ordinarily exercise that discretion so as to reflect the contractual right".

Other News

On 22 December 2011, the European Commission published guidance on the application to insurance of Council Directive 2004/113/EC (the Gender Directive), in light of the *Test-Achats* ruling (see Weekly Update 09/11). The guidelines aim to facilitate compliance with the ruling at national level (albeit without prejudice to any interpretation the ECJ may give to Article 5 in the future). The guidelines include clarification that the ECJ's decision only applies to new contracts concluded for the first time as from 21 December 2012 and any agreements concluded as from that date to extend contracts that would otherwise have expired. The guidelines provide examples of agreements which should be considered "new contracts" and examples of agreements which are not caught by the ruling.

In addition, the guidelines state that the collection, storage and use of gender status or gender-related information remains permissible where insurers are using gender as a risk-rating factor in general, in order to calculate premiums and benefits at the aggregate level (and not to calculate individual premiums and benefits). It also remains possible to use factors other than gender which might put persons of one sex at a particular disadvantage, provided those factors are "true risk factors in their own right". For example, price differentiation based on the size of a car engine would remain possible even though statistically men drive cars with more powerful engines. The use of age and disability as a risk-rating factor also currently remains permissible.

The EC will report on the implementation of the Test-Achats ruling in national law and insurance practice in 2014. A link to the guidance can be found below:

A link to the guidance can be found **here**.

Further information
If you would like further information on any issue raised in this newsletter please contact:

Nigel Brook
nigel.brook@clydeco.com

Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London EC3A 7AR

T: +44 (0)20 7876 5000
F: +44 (0)20 7876 5111

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