Insurance and reinsurance
02/12

CLYDE&CO

Weekly update

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

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Natas Group v Styles & Wood

Effect of the terms in an ATE insurance policy on a security for costs application

http://www.bailii.org/ew/cases/EWHC/TCC/2011/3464.html

The defendant applied for security for costs. Akenhead J agreed that the threshold test for the exercise of his discretion had been met, given the claimant's financial position. However, the claimant argued that the discretion should not be exercised, in part because it had taken out an ATE insurance policy.

Prior caselaw has established that an ATE insurance policy can, in principle, provide sufficient protection for a defendant, but it will be rare for the policy to be as good security as a payment into court or a bank bond or guarantee. In order for a claimant to be able to rely on an ATE insurance policy (and so resist a security for costs application), there must not be terms which allow the insurer to "readily but legitimately and contractually" avoid the policy (see *Newman v Wenden Properties* [2007]). In this case, there were "genuine concerns and uncertainties relating to the ATE insurance policy", namely:

(1) The policy provided (broadly) for payment only if the insured was ordered to pay the other side's costs after having lost "entirely on all sections or heads of claim". Thus, in theory, the insurer would be under no liability to pay if the claimant insured succeeded on one out of ten heads of claim. Akenhead J said that he "would hope that any decent insurer would not take the point" but "there is no evidence before the Court about the pedigree of this Liechtenstein insurer".

(2) The termination clause in the policy provided that "in cases where the Insurer is informed...of any material development the Insurer may at its absolute discretion withdraw the benefit of this Policy". That was described as a "worrying" clause because of the lack of definition of a "material development".

(3) The policy provided for avoidance (and forfeiture of the premium) in the event of misrepresentation and this was said to have "ramifications in respect of and over which neither the Court nor the Defendant can be aware or have any control".

Despite all these concerns, the judge concluded that there was a real chance that some part of the ATE insurance might be available, and he took this into account when fixing security.

COMMENT: This case may encourage claimants (and their advisers) to examine closely the terms of any ATE insurance policy taken out and possibly to push for potentially "worrying" terms to be removed (in the hope that they will not need to provide security (if an application is made) on top of paying the ATE insurance premium).

North Shore Ventures v Anstead Holdings

Disclosure and the meaning of within a party's "control" where a family trust has been set up

http://www.bailii.org/ew/cases/EWCA/Civ/2012/11.html

North Shore obtained judgment in its favour against the appellants. Prior to judgment, though, the appellants disposed of virtually all their assets to family trusts which they had set up (and in respect of which they were discretionary beneficiaries). Judgment debtors can be compelled to produce at court documents in their "control" (pursuant to CPR r71.2). There is no definition of control in CPR r71.2 but the same term is used in relation to standard disclosure under CPR r31, where it is said that a party has, or has had, a document in its control if the document falls within three categories (eg the document is or was in his physical possession or the party has (or has had) a right to possession of it). North Shore sought disclosure of certain trust documents which had never been in the physical possession of the appellants and which they had no right to possess. At first instance, the judge ordered disclosure and the appellants brought this appeal.

The Court of Appeal has now upheld the disclosure order. It was said that, in determining whether documents in the physical possession of a third party (here, the trustees) are in a litigant's control for the purposes of CPR r31, "the court must have regard to the true nature of the relationship between the third party and the litigant". A right to possession would arise where "the true nature of the relationship was that the litigant was to be the puppet master in the handling of money entrusted to him [ie here, the trustee] for the specific purpose of defeating the claim of a creditor. The situation would be akin to agency." Even if local laws prevented a trustee from handing over documents to a beneficiary, the English courts could still, as a matter of fact, find that the documents were within the control of the beneficiary. Furthermore, (and of more general application), a party can have a document within its control even if the situation does not fall within the three categories listed in CPR r31.

However, the Court of Appeal stopped short of finding that an order could be made under CPR r31 or CPR r71.2 solely on the basis that the litigant is or was a beneficiary under a trust. In most cases such an order could not be justified. On the other hand, it could not be argued that such an order could never be made because the trust document was not in the beneficiary's physical possession.

Bennett v Stephens & Anor

Whether periodical payments order was reasonably secure/arguments raised by MIB

http://www.bailii.org/ew/cases/EWHC/QB/2012/1.html

The claimant suffered serious injuries following a road traffic accident caused by the admitted negligence of the first defendant. The first defendant's insurers and the claimant entered into a settlement agreement which provided for an order for periodical payments to be made. Section 2 of the Damages Act 1996 provides that a court may only make a periodical payments order if it is satisfied that "the continuity of payment under the order is reasonably secure". Mackay J believed that this criterion had been met and granted two orders which (in relevant part) provided that the periodical payments should be paid by the insurer "or, if and to the extent that they are not paid by the Defence Insurer within 7 days of the due date, by the Motor Insurers' Bureau".

The key issue in this case was this: If the insurer defaulted or failed, what were the claimant's prospects of making the MIB liable to make the periodical payments instead? Mackay J agreed that MIB would not remain liable to the claimant "whatever might happen in the future" but nevertheless found that the continuity of payment was reasonably secure.

Tugendhat J has now dismissed the appeal against that finding. Although the agreement between the MIB and the Secretary of State might be terminated in the future, the judge said that "I regard the risk of the Claimant having no legally enforceable claim against either MIB, or an equivalent institution or body, as so remote as to be capable of being discounted entirely for present purposes". Should the MIB in future cease to be liable to the claimant, though, that would be a breach of the order.

However, Tugendhat J cautioned that if the insurer was unable to procure payment by the MIB, the insurer (and not the MIB) would be in default. The judge concluded: "In the event that any similar order referring to the MIB is to be drafted in the future, in a case where MIB is not a party, those preparing the draft may wish to consider adopting a form of words which will not give rise to concerns on the part of MIB of the kind that have arisen in this case".

RBS v Revenue & Customs

Chargeability to VAT of commission payments following transfer of insurance business

http://www.bailii.org/ew/cases/EWHC/Ch/2012/9.html

Prudential transferred its general insurance business to companies within the Winterthur group. Under the terms of the agreement, Prudential received a capital sum plus payments, described as commissions, on renewal. The issue in this case was whether those commission payments were chargeable to VAT.

Prudential sought to rely on two exemptions:

(1) The first exemption applies to payments for sales of a business as a going concern. Mann J agreed with the Tribunal's decision that the payments did not come within this exemption on the facts of the case.

(2) The second exemption applies to payments for insurance brokerage and insurance agency services. The Tribunal held that this exemption did not apply because Prudential did not bring Winterthur and the insured together: "Any bringing together (or introduction) of Prudential and the insured has happened in the past and may have been performed by a broker at the time". Nor had Prudential carried out any preparatory work or assisted in the administration and performance of the contracts. Mann J considered prior caselaw on the meaning of "insurance broker" and "insurance agent" and agreed with the findings of the Tribunal. Prudential merely passed on renewal information to the Winterthur group and this did not "amount to bringing the parties together, or amount to introducing them, as a broker does".

Accordingly the payments were chargeable to VAT.

Global 5000 v Wadhawan

Whether collateral contract can found claim in England

http://www.bailii.org/ew/cases/EWCA/Civ/2012/13.html

PD 6B para 3.1(6)(c) provides that a claim form can be served out of the jurisdiction with the permission of the court if "a claim is made in respect of a contract where the contract....is governed by English law". This was a "two contract" case, whereby the claimant sought to claim under a guarantee (which did not contain an English law clause) and that guarantee was collateral to a separate contract which contained an English law clause. After reviewing the relevant caselaw, Rix LJ concluded that there were 4 possible tests for what has to be shown to prove that a claim is "in respect of" a contract. He concluded that in this case, the relevant contract in respect of which the claim was made was the guarantee. This was "the contract under or pursuant to which the claim is made.....If it were otherwise, then an application to serve out which could not succeed if reliance were placed on the real contract which founds the claim might be able to succeed if some merely collateral contract were relied on. That would make no sense at all". It would also be anomalous if jurisdiction could be obtained against a defendant outside the jurisdiction by reference to a contract to which he was not a party.

The Court of Appeal therefore concluded that the English court did not have jurisdiction to hear the claim.

Other News

The House of Commons Transport Committee has published a second report on the cost of motor insurance. Although the Legal Aid, Sentencing and Punishment of Offenders Bill is expected to be on the statute book by spring, implementation of the ban on the receipt of referral fees is likely to come later on and the committee recommends the government prioritising the ban following enactment of the Bill. It suggests considering whether the legal costs of low value claims processed using the pre-action protocol and online portal are reasonable. The committee also recommends raising the bar to receiving compensation in whiplash cases (and possibly, in future, legislating to requiring objective evidence of the injury or its impact on a claimant's life). The government should also send a clear message to the insurance industry that data protection legislation must be fully respected - with stricter penalties for breaches being recommended. The government is also asked to investigate cold-calling intended to generate personal injury claims. Further details can be found below:

http://www.publications.parliament.uk/pa/cm201012/cmselect/cmtran/1451/1451.pdf

Further information
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