

Weekly update



Welcome to the seventh edition of Clyde & Co's (Re)insurance and litigation caselaw weekly updates for 2012.

These updates are aimed at keeping you up to speed and informed of the latest developments in caselaw relevant to your practice. Please follow [this link](#) for further details of the following recent cases:

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Progress Bulk Carrier v Tube City

Whether settlement agreement was voidable for duress

<http://www.bailii.org/ew/cases/EWHC/Comm/2012/273.html>

The owners of a vessel were in repudiatory breach of a charter. They made a “take it or leave it” offer, which in part required the charterers to waive all claims for damages in respect of the repudiatory breach. The charterers agreed to this waiver in a settlement agreement but subsequently claimed in an arbitration that they did so because they had been placed under economic duress by the owners. They claimed that the agreement was therefore voidable and the arbitrators agreed.

The owners appealed under section 69 of the Arbitration Act 1996, arguing that the arbitrators had been wrong in law because economic duress only operates where there has been unlawfulness and they had merely taken advantage of market forces. That argument was rejected by Cooke J.

The parties agreed that there are two necessary elements for economic duress: (1) “illegitimate pressure”; and (2) causation (ie the illegitimate pressure caused the “victim” to enter into a contract). Having reviewed the relevant caselaw, Cooke J concluded that “illegitimate pressure” can be constituted by conduct which is not in itself unlawful (although it will be an unusual case where that is so, especially in a commercial context). Past unlawful acts, as well as the threat of a future unlawful act, can also amount to “illegitimate pressure”.

In this case, the judge said that the owners’ “repudiatory breach was the root cause of the problem ..and their continuing conduct thereafter was...designed to put the charterers in a position where they had no option but to accept the settlement agreement... The charterers had no realistic practical alternative but to submit to the pressure and they did protest at the time”. In other words, the repudiatory breach had been unlawful and the owners’ subsequent attempts to take advantage of the position created by that unlawfulness gave the arbitrators sufficient grounds to find that there had been illegitimate pressure in this case.

Broadside Colours & Chemicals Ltd, Re

Whether claim form validly served and the meaning of “last known” residence

<http://www.bailii.org/ew/cases/EWHC/Ch/2012/195.html>

Where the defendant has not given an address for service (and the claimant does not wish to effect personal service), CPR r6.9 provides that, in the case of an individual, service must be made at “his usual or last known residence”. (CPR r6.9(3) provides that were the claimant has reason to believe that that address is no longer “his usual or last known residence”, he must take reasonable steps to ascertain the address of the defendant’s current residence).

In this case, “service” of an application notice and points of claim was made in October 2010 by sending the documents by first class post to an address in Leeds. That address had been obtained by the applicants carrying out a search at Companies House. That search revealed that a director had lived at the Leeds address in 2004. However, the applicants did not realise that the director had left that address in 2009 (his wife still remained in the house), and that his mail was not being forwarded to him.

Behrens HHJ, relying on the decision in *Collie v Williams* [2006], agreed that there was an important distinction to be made between belief and knowledge: “knowledge in this context refers to the serving party’s actual knowledge or what might be called his constructive knowledge, ie knowledge which he could have acquired exercising reasonable diligence”.

In this case, the applicants should be able to treat the information from Companies House as “knowledge” rather than “belief”. The director had consented to his address being sent to Companies House and the applicants had had no reason to believe that the director was no longer resident at the Leeds address (and so did not come under any obligation to make further enquiries). Accordingly, there had been valid service.

COMMENT: This appears to be a generous decision for the applicant since the address discovered by the search at Companies House had been supplied more than 6 years before service was effected. It may be considered surprising that the judge did not believe that any further steps needed to be taken by the applicant to ascertain whether the director still lived at the address. It may be recalled that in 2010 the Court of Appeal in *Varsani v Relfo* (see Weekly Update 21/10) suggested that the CPR Committee should consider various issues relating to the meaning of “last known residence”.

West Country Renovations v McDowell

“Low value” claims and the Technology and Construction Court (“TCC”)

<http://www.bailii.org/ew/cases/EWHC/TCC/2012/307.html>

This case involved a relatively straightforward building claim worth around £150,000. The claim was started in the TCC in the High Court in London but at the first CMC the judge, Akenhead J, decided to transfer the case to the Central London County Court. The claimant had wanted to stay in the TCC because of the TCC's success in being able to secure reasonably early trial dates for a 3 day trial (and it was uncertain whether the county court could achieve the same procedural outcome). Akenhead J noted that a Practice Direction could not readily be given and so advised that his judgment will have to suffice as the likely new practice in the TCC.

He noted the current pressures on the TCC High Court judges and said that “There is thus a real risk that the progress made and efficiency established by the TCC over the last 7 years could be impacted by having to handle an excessive number of low value claims”.

Accordingly, from now, claims which are for less than £250,000 should generally be commenced in the county courts or other High Court centres outside London which have TCC-designated judges. There will be some exceptions to this practice, including: cases involving enforcement or arbitration; international cases (involving non-resident parties or foreign projects); cases involving new or difficult points of law; Part 8 claims and claims for injunctions.

From a practical point of view, a claimant will still be able to issue a claim in any court, but he/she will run the risk that the court will of its own motion (or on application) transfer it elsewhere. The TCC does not intend to transfer cases which are already well under way in the court.

Stanford International Bank v Director of the SFO

Whether leave required to appeal a POCA restraint order following a foreign request

<http://www.bailii.org/uk/cases/UKSC/2012/3.html>

The Proceeds of Crime Act 2002 (“POCA”) allows the court to make a restraint order over property where a criminal investigation is under way. POCA provides that an appeal can be made from the Court of Appeal to the Supreme Court in relation to a restraint order, but only if the Court of Appeal, the Supreme Court or the Secretary of State gives leave and certifies that a point of law of general public importance is involved.

The issue in this case was whether the same requirements for leave and certification apply where a restraint order has been made following a request by a foreign body (in this case, the United States Department of Justice). That situation is currently governed by a 2005 Order but a 2012 Order is due to come into force on 29 February 2012.

The Supreme Court has held in this case that permission to appeal from the Court of Appeal order was not required under the 2005 Order. However, from 29 February 2012 onwards, leave (and certification) to appeal will be required (but this requirement will not have retroactive effect).

Other News

There has been a small amendment to the Consumer Insurance (Disclosure and Representation) Bill: where an insurer asks a consumer to confirm or amend particulars previously given, it should act proportionately (bearing in mind the likely benefit from that request). It has also been stated that the Treasury will carry out a review within 1 year from the commencement of the Act on the availability and cost of consumer insurance (including for young drivers and flood risk areas):

<http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0274/amend/psc2741602a.1.html>

Further information

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