Insurance and reinsurance
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CLYDE&CO

Weekly update

Welcome to the eighth 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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West African Gas Pipeline Co Ltd v Wilbros Global Holdings

Wasted costs order following failures in a party's disclosure exercise

http://www.bailii.org/ew/cases/EWHC/TCC/2012/396.html

Various problems arose in relation to the claimant's disclosure exercise. Various disclosure orders were made at a CMC in October 2011 and an order for "costs in the case" (whereby the party in whose favour the court makes an order for costs at the end of the proceedings is entitled to his costs of the part of the proceedings to which the order relates) was also made. The reasons for the disclosure problems then became apparent and at a further CMC the defendant applied for a wasted costs order (because the claimant's disclosure failures had caused its solicitors and their litigation support experts to incur additional costs). Ramsey J held as follows:

(1) Although the costs order made in October 2011 included a "liberty to apply", the court would need good grounds to vary or revoke that costs order. In this case, the deficiencies in disclosure which had since become apparent did not mean that the October 2011 costs order had been made on an erroneous basis. However, in relation to the second CMC, the defendant should have its costs of the applications for that CMC in any event (ie the defendant was entitled to its costs in respect of the disclosure application, whatever other costs orders are made in the proceedings).

(2) The defendant was not entitled to a wasted costs order because of the claimant's failure to provide reasonable OCR versions of each PDF document which it disclosed. Ramsey J said that OCR copies are never perfect and there was no evidence here that the problem was greater than might be expected with the quality and type of documents in this project. (This view is supported by PD31B para 34 which provides that "if OCR versions are provided, they are provided on an 'as is' basis, with no assurance to the other party that the OCR versions are complete or accurate"). Nor would a wasted costs order be made in relation to a corrupted or missing field in a database - once the problem had been identified it had been quickly rectified.

(3) However, the defendant was entitled to a wasted costs order in relation to the following three problems with the disclosure exercise:

(a) A failure to de-duplicate properly: "Whilst I accept that de-duplication of electronic documents has a number of technically complex facets, if appropriate software is properly applied it can remove multiple copies of the same or similar documents. In this case, the extent of the failure of de-duplication ...indicates that there was a serious failure in the de-duplication process. Where that happens, I consider that it is a case where the Court should properly exercise its discretion to deal with the costs wasted by that error".

(b) A failure to carry out an adequate initial review and to gather together (or "harvest") a consistent and complete set of electronic data for the purpose of electronic disclosure: "This was not a case where there are particular complexities in the important initial process of identifying the repositories of electronic documents, contacting custodians and identifying relevant folders and sub-folders so as to ensure that a comprehensive compilation of electronic documents is obtained".

(c) A failure properly to review documents which were located in the searches of the electronic database. The review had been carried out by a litigation support company based in India and documentation had been mistakenly marked as not being disclosable (although the original review had been supervised by the claimant's lawyers who had provided initial briefings and established escalation procedures).

Joyce v West Bus Coach Services

Deemed service and whether Part 36 offer can be accepted after claim struck out

http://www.bailii.org/ew/cases/EWHC/QB/2012/404.html

The claimant was ordered to serve a standard disclosure list by 4pm on 10 September 2010. If it failed to do this, the order provided that "the claim will be struck out without further order". The list was posted first class on Thursday 9 September. CPR r6.26 provides that the deemed date of service is the second day after it is posted (or the next business day thereafter). Accordingly, the list was deemed to be served on Monday 13 September (ie 3 days late). The document was in fact received, though, on 10 September and the defendant acknowledged its receipt. Parker J has held as follows:

(1) Applying Godwin v Swindon BC [2002], the deemed date of service is not rebuttable by evidence. It was not possible to distinguish Godwin on the basis that service followed an unless order or that this case did not involve service of a claim form. Nor could an express agreement between the parties to extend the relevant time limit to 13 September be effective and "there is simply no room under CPR r6.26 for any "estoppel" arising from conduct rather than by express agreement".

(2) The claimant purported to accept the defendant's Part 36 offer (made in September 2009) on 17 September 2010. By that date, the defendant's solicitors had written to the court inviting it to strike out the claim. The strike out which the court made took effect from 10 September. Could the claimant accept a Part 36 offer after the claim had been struck out?

The claimant conceded that a Part 36 offer cannot be accepted after a claim is dismissed. The judge held that the situation was the same where a claim had been struck out. In both situations, the claim is to all intents and purposes at an end. CPR r36.11(1) provides that if a Part 36 offer is accepted "the claim will be stayed", and the judge decided that this meant that there needs to be an extant claim which can be stayed.

Various Claimants v News Group Newspapers

Whether non-parties had right to see certain court records/whether documents were "statements of case"

http://www.bailii.org/ew/cases/EWHC/Ch/2012/397.html

Two non-parties applied for an order under CPR 5.4C for permission to obtain certain documents. CPR r5.4C(1) provides (broadly) that a non-party may obtain a copy of a statement of case from the court records without the court's permission. CPR r 5.4C(2) provides that a non-party can obtain any other document on the court records if the court gives permission. A "statement of case" is defined in CPR r2.3 as "a claim form, particulars of claim where these are not included in a claim form, defence, Part 20 claim, or reply to defence; and.. includes any further information given in relation to them voluntarily or by court order under rule 18.1".

Vos J carried out an extensive review of caselaw authority and the background to CPR r5.4C and held as follows:

(1) The definition of statements of case includes amendments to the documents mentioned in the rule. It was accepted at the time the rule was drafted that the statements of case might well continue to evolve as issues are refined up to the time of the trial.

(2) A Notice to Admit and the Response to it were not "statements of case". Although they were in the nature of a pleading, the only documents covered by CPR r5.4C(1) are those expressly mentioned in CPR r2.3: "It would have been easy enough for the Rules Committee to include some general words such as "and other like documents" had it meant so to provide".

(3) There is a presumption that a non-party can have access to a statement of case under CPR r5.4C(1) and the reason why he/she wants to see it is "of little or no importance". However, where a non-party seeks to rely on CPR r5.4C(2), the court must look at the reasons why the document is sought. In both cases, it will be a powerful factor if it can be shown (as was unsuccessfully argued here) that disclosure would prejudice the fair trial of any criminal charges subsequently brought against a party to the proceedings.

(4) Full disclosure was ordered in this case because it was in the public interest that the decision-making process in this case be scrutinised. It was also of relevance that the Notice to Admit and Response had earlier been referred to in open court.

Merchant International v Naftogaz

Whether English court judgment should be set aside because foreign judgment on which it was based had been set aside

http://www.bailii.org/ew/cases/EWCA/Civ/2012/196.html

The claimant obtained a judgment in its favour against the defendant in Ukraine. It sought to enforce that judgment in England and, since England has no reciprocal enforcement regime with Ukraine, the claimant brought a fresh action under common law. It obtained judgment in England. However, the Supreme Commercial Court of Ukraine ("SCCU") then set aside the Ukrainian judgment. The issue in this case was whether the English court should, as a result, set aside the judgment obtained in England. At first instance, Steel J refused to set aside the judgment and the defendant appealed. The Court of Appeal has now dismissed that appeal. It held as follows:

(1) The English judgment had been properly obtained and the subsequent judgment of the SCCU offended against the principle of legal certainty which the English courts regard as a fundamental part of the rule of law and the European Court regards as an integral part of Article 6 of the European Convention on Human Rights (to which Ukraine is a party). The facts raised by the defendant in its appeal to the SCCU had been known to it during the original litigation in Ukraine and should have been advanced then.

(2) "An English judgment is a form of property which may have real value." There may be injustice to both the judgment creditor and third parties if a properly obtained judgment is set aside. Therefore the court has to consider the question of what is just. The judge's refusal to set aside the English judgment in this case had been just.

Further information
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