

Weekly update



Welcome to the fourteenth 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.

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Whether court should order that the provision of a claim form on English lawyers should be treated as good service

<http://www.bailii.org/ew/cases/EWHC/Comm/2012/1023.html>

The claimant served its claim form on the defendant's lawyers in Russia. Following the Court of Appeal's decision in *Abela v Baadarani* (see Weekly Update 46/11) it is now accepted that that could not be good service. Accordingly, the claimant sought to rely on its earlier provision of the claim form to the second defendant's English lawyers. However, when the claim form was provided to them, they were not yet instructed by the second defendant.

CPR r6.15(2) provides that the court can "order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service." The claimant therefore applied for an order under CPR r6.15(2).

Teare J held that the claim form had come to the attention of the defendant on the date the English lawyers were instructed. He accepted that the court should proceed cautiously when asked to validate retrospectively a form of service which was not authorised by an order of the court when it was effected. He also agreed that the mere fact that the claim form had been brought to the second defendant's attention was not in itself a good reason for making the order. Nevertheless there were good reasons to make the order in this case, namely:

- (1) The claimant is seeking an anti-suit injunction to protect an English arbitration and so the trial needs to take place promptly;
- (2) The evidence before the court was that it will take a considerable amount of time to serve in Russia under the Hague Convention and so the projected early trial may be put at risk.
- (3) These factors were "facts relating to the proceedings", as required by the Court of Appeal in *Cecil v Bayat* (see Weekly Update 08/11): "They are also considerations resulting from a long period of delay in service which Rix LJ recognised might require flexibility where litigation could be prejudiced".
- (4) The fact that the claimant might be able to apply for an order for prospective alternative service under CPR r6.15(1) was not a good reason to refuse to make the order under CPR r6.15(2).

Nor did issues of comity arise, since the court was being asked to validate steps taken in England, not Russia.

COMMENT: This is the second time in the last 6 months that the English court has helped an English claimant avoid the problems of serving in a jurisdiction where service is notoriously slow (in *JSC BTA Bank v Ablyazov & Ors* (see Weekly Update 41/11) the claimant was also trying to serve in Russia). Although it is encouraging that the English courts are prepared to offer practical solutions to this problem, it should not be assumed that alternative forms of service will always automatically be approved by the

court and claimants should act promptly in applying to the court where they anticipate problems.

Nestor Maritime v Sea Anchor Shipping

Application for extension of time to challenge arbitral award

<http://www.bailii.org/ew/cases/EWHC/Comm/2012/996.html>

Clyde & Co for defendant

The claimant applied under section 80(5) of the Arbitration Act 1996 for an extension of time to bring a challenge under section 68 of the Act against an award (alleging that the award had been obtained by fraud). Section 73 of the Act provides that "If a party to arbitral proceedings takes part...in the proceedings without making.. any objection ... (d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part ... he did not know and could not with reasonable diligence have discovered the grounds for the objection". Eder J rejected the application. Some of the reasons given by the judge were as follows:

- (1) It cannot be a "complete answer" for the applicant to argue that it cannot be criticised for being too slow in identifying that a sophisticated fraud had been perpetrated. The applicant must still bring itself within the exception in section 73.
- (2) On the facts, the sellers could not satisfy the burden on them to show that the alleged fraud could not, with reasonable diligence, have been discovered.
- (3) Even if that was wrong, the court should not exercise its discretion to grant the extension of time. The delay in bringing the application was a particularly important factor. The judge accepted that it is "over-simplistic" to refer to the length of delays in other cases. However, the delay of over 6 months in bringing the application in this case could not be ignored. It was irrelevant that related proceedings in Greece had been delayed by an even longer amount of time. Whilst the applicant had not "sat on his hands" and had pursued other lines of enquiry, the alleged fraud could have been discovered much earlier. Furthermore, once the applicant thought it had discovered a fraud, a delay of 4 weeks in bringing the application was too long.
- (4) The judge was prepared to accept that keeping a commercial party out of its money can amount to "at least some irreparable prejudice" but he was prepared to assume that in this case there had not been any irreparable prejudice.

In any event, the judge found that, on the facts, the applicant's allegation of fraud was "at best, extremely weak".

Lombard North Central v GATX

Stay of proceedings where part of dispute referred to arbitration/meaning of “inoperative” in section 9(4) of the Arbitration Act

<http://www.bailii.org/ew/cases/EWHC/Comm/2012/1067.html>

The parties disputed the scope of the arbitration agreement which they had entered into. The claimant started proceedings in the High Court and the defendant applied for a stay of these proceedings pursuant to section 9(1) of the Arbitration Act 1996. This provides that a party can apply for a stay where legal proceedings have been brought “in respect of” a matter which under an arbitration agreement was to be referred to arbitration. Smith J held as follows:

- (1) The court should not just look at the formulation of the claim by the claimant but should also consider what questions will foreseeably arise for determination in the proceedings.
- (2) Legal proceedings as a whole may be “in respect of” a matter which is to be referred to arbitration (a “referred matter”) even if the proceedings concern other matters as well.
- (3) Proceedings will be “in respect of” a referred matter even if they are not mainly or principally intended to resolve the referred matter.
- (4) It does not matter that it might be inconvenient or costly to stay the legal proceedings pending resolution of the referred matter by the arbitral tribunal: “where, as here, the parties have certainly agreed to refer to arbitration only certain disputes that might arise from their relationship...the risk of proceedings before both the courts and an arbitral tribunal is inherent in the agreement”.
- (5) It might be appropriate to stay the proceedings only in relation to the referred matter and to continue the legal proceedings in relation to other matters which have been raised: “It does not follow that, wherever legal proceedings involve a dispute about a referred matter, the defendant will necessarily be able to have them stayed however peripheral the referred matter might be to the proceedings as a whole. It might be that, while the referred matter is stayed for determination in arbitration, the proceedings could otherwise proceed”. However, in this case, the legal proceedings were wholly stayed.
- (6) Section 9(4) of the Arbitration Act 1996 provides that the court should not grant a stay where (inter alia) the arbitration agreement is “inoperative”. Smith J held that an arbitration agreement is not inoperative just because a dispute does not fall within its scope, even if no referred matter could any longer arise. Examples of where an arbitration agreement will be inoperative include the following: (a) the party seeking to rely on the arbitration agreement has waived the right to invoke it;

(b) the arbitration agreement has been terminated by an accepted repudiation; and (c) the arbitration will not be enforced by the court (eg because the arbitrator is actually or apparently biased).

Guntrip v Cheney Coaches

Court considers discretion to permit claimant to rely on a different expert

The claimant applied for permission to rely on the evidence of an expert where the original order permitting the claimant to rely on an expert’s report had named a different expert. At first instance, permission was refused by the District Judge but it was then allowed on appeal by Judge Crotie. The defendant then appealed to the Court of Appeal which held as follows:

- (1) Judge Crotie had overlooked justice to the defendant when he had decided that, because the claimant’s case would fail unless he was permitted to change experts, this took the case outside the ambit of previous authority: “It is part of justice that unfounded claims should fail just as much as that meritorious claims should succeed” (as per Lewison LJ).
- (2) Judge Crotie was wrong to criticise the district judge’s consideration of the content and value of the new expert’s evidence. The district judge had been entitled to compare the old case and the new case that the claimant wished to advance and, in particular, to take into account the fact that the new expert’s first report had been falsified by subsequent events. It was not enough to say that further reasons might come out subsequently - a party who wishes to change experts must put forward all the expert material on which he wishes to rely and “not leave it to be elicited by further questioning”.

Finally, the principle that a heavy onus lies on a party seeking to make a late amendment to a statement of case to justify it applies equally to a late change of expert. The Court of Appeal also approved the comment by Jackson LJ in his report on civil litigation costs that courts at all levels have become too tolerant of delays and non-compliance with orders.

Accordingly, the claimant was not given permission to rely on the second expert’s report.

Chandler v Cape PLC

Whether parent company owes duty of care to subsidiary's employees - of possible interest to liability insurers

<http://www.bailii.org/ew/cases/EWCA/Civ/2012/525.html>

This issue in this case was whether a parent company owed a direct duty of care to an employee of its subsidiary to ensure a safe system of work. It was undisputed that the employee had contracted asbestosis as a result of working for the subsidiary. The subsidiary no longer existed and the relevant employer's liability insurance policy which it had had in place excluded pneumoconiosis (which Rix J in *Cape plc v Iron Trades* [2004] held included a claim for asbestosis). Accordingly, the claimant sought to claim against the parent company. The Court of Appeal held as follows:

- (1) A duty of care will not be imposed on a company just because it is a parent company - it is a separate legal entity from its subsidiary and the courts will not "pierce the corporate veil".
- (2) There is no prior caselaw to support the suggestion that a duty of care will only exist if the parent company has absolute control of the subsidiary. Instead, the courts will examine whether the parent company took on a direct duty to the subsidiary's employees.
- (3) In this case, there were sufficient reasons to impose on the parent company responsibility for the health and safety of its subsidiary's employees. It was not necessary to show that the parent company intervened in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely - for example, if the parent intervened in the trading operations of the subsidiary (eg production and funding issues).

Also, in this case, the group's medical adviser had carried out research into the link between asbestos and lung disease and had become an international authority in this field. For that reason, the parent company had "superior knowledge" and so knew, or ought to have known, that the subsidiary or its employees would rely on that superior knowledge.

WestLB AG v Nomura

Assessment of loss and the valuation of a portfolio following the financial crisis

<http://www.bailii.org/ew/cases/EWCA/Civ/2012/495.html>

A portfolio of assets held in a fund fell to be valued on 30 September 2008 (a few weeks after the bankruptcy of Lehman Brothers and the ensuing financial crisis). At first instance, the judge valued the fund as at that date as worthless. The claimant appealed against that decision. It sought to rely, in part, on prior caselaw to the effect that difficulties of assessment should not prevent a court from doing the best it can to assess a loss: "Is the plaintiff to recover nominal damages only because he cannot prove against either defendant what part of the depreciation in value was due to his acts?...I think that in such a situation the court is bound to do the best that it can do" (as per Devlin J in *Biggin v Permanite* [1951]).

The Court of Appeal rejected the argument that that was the position in this case though. Rix LJ said that "There are, however, other cases in which the court simply has to say that it is for a claimant to prove its loss and that he fails to do so". That was the position here because:

- (a) On the facts, the decision maker (as to the value of the fund) was the defendant and not the court (and the defendant had an absolute discretion when reaching its decision); and
- (b) Unlike the position in the prior caselaw, it could not be assumed in this case that the fund had any value at all: "It is one thing to say that the mere fact that there is no "market" for damaged goods does not mean that they may not be presumed to have some value which the court has to assess....However, it is quite another thing to assume that a portfolio of mainly unquoted and exotic stocks and shares, at a time of a historic "credit crunch" in world markets, has any value (other than at most a 5% hope value)."

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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