

# Weekly update



Welcome to the sixteenth 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.**

## Contents

### PHI Group v Robert West Consulting

The Court of Appeal considers whether an offer was a Part 36 offer and whether an earlier offer had been withdrawn.

### Bitumex (HK) v IRPC

A case on service out of the jurisdiction and a retrospective order for service in an arbitration claim.

### Alfa Laval v Separator Spares

Court considers Article 6.1 of EC Regulation 44/2001 (suing a defendant where a co-defendant is domiciled) and limitation issues.

### Les Laboratoires Servier v Apotex

A cross-undertaking in damages and an illegality defence - the Court of Appeal examines *ex turpi causa*.

### Shawe-Lincoln v Neelakandan

A case on the inference to be drawn where a claimant cannot prove causation because of the defendant's negligence.

### CVB v MGN Ltd

Applying for an order from the court to leave out the claimant's name on the claim form-whether there is a need to give notice.

## Other News

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 received royal assent on 1 May 2012. It will not be fully in force until April 2013.

## PHI Group v Robert West Consulting

### Court of Appeal considers whether offer was a Part 36 offer and whether earlier offer had been withdrawn

<http://www.bailii.org/ew/cases/EWCA/Civ/2012/588.html>

The claimant made an offer purporting to be a Part 36 offer which the defendant failed to better at trial. The judge held that the offer was not a Part 36 offer and that it should not have the costs consequences of a Part 36 offer because it had, in any event, been withdrawn. The Court of Appeal has now held as follows:

(1) The judge was correct to find that this was not a valid Part 36 offer, even though it was headed as such and made repeated references to Part 36. The claimant had failed to comply with CPR r36.2(2)(c) which provides that a Part 36 offer must “specify a period of not less than 21 days within which the defendant will be liable for the claimant’s costs... if the offer is accepted”.

Although there has been prior caselaw which has held that there is no requirement to state expressly that the period specified in the letter is the period “within which the defendant will be liable for the claimant’s costs”, it is a requirement that a period of at least 21 days be specified. If an offer were to refer to 21 days as “the relevant period” that would probably suffice too. However, in this case, there was no period specified at all.

The Court of Appeal added that the fact that the offer had referred to CPR r36.14(2) (which relates to defendants’ offers) rather than CPR r36.14(3) (which relates to claimants’ offers) would not in itself have been sufficiently serious to prevent this being a valid Part 36 offer.

(2) There is prior caselaw to the effect that an offer which is clearly intended to be a Part 36 offer, but which fails to be a valid Part 36 offer because of a technical error, should be given substantially the same effect as a Part 36 offer by the court exercising its general discretion as to costs under CPR r44.3 (see *Huntley v Simmonds* (Weekly Update 10/09)). As mentioned above, at first instance the judge declined to apply this principle because he held that the offer had been withdrawn when the claimant made a further offer to the defendant. The Court of Appeal found that the judge had erred in this respect.

The offer took effect as a contractual offer which, on normal principles, could be withdrawn at any time before acceptance, and could be withdrawn without any particular formality having to be observed. However, just because the later offer was not consistent with the earlier offer, that did not necessarily mean that the earlier offer had been withdrawn. There is no reason in principle why a party can’t make different offers successively, leaving it open to the other side to choose which (if either) to accept.

## Bitumex (HK) v IRPC

### Service out of the jurisdiction and retrospective order for service in an arbitration claim

The claimant gave notice of arbitration but the defendant (a Thai company) refused to agree the appointment of an arbitrator so the claimant applied to court for appointment of an arbitrator. The claimant was given permission to serve out. There is no bilateral agreement for service between the UK and Thailand. The claimant sought to serve by retaining Thai lawyers to hand deliver the arbitration claim form at the registered office of the defendant. The defendant contends that that was not valid service under Thai law because physical service must be carried out by an officer of the Thai court. Mackie HHJ declined to decide whether valid service had taken place under Thai law but agreed to assume that it had not.

He then considered the claimant’s application under CPR r6.15 for an order that steps already taken to bring the claim form to the attention of the defendant by an alternative method amounted to good service (the claimant having also sent the arbitration claim form by registered mail to the defendant’s registered office). The judge held as follows:

- (1) Retrospective service is an exceptional measure and it is not enough that service would be quicker using the alternative method.
- (2) As there is no bilateral agreement between the UK and Thailand, no direct obligations between the two countries would be overlooked if retrospective service was allowed in this case.
- (3) A further factor was that the Foreign Process Section had advised that service through judicial authorities in Thailand (under CPR r6.42) would take around 12 months.
- (4) Of crucial importance in this case, though, was the fact that this was an arbitration case. This was not a case where the English court was presuming to try the underlying dispute itself - it was merely assisting an international arbitration in London which the defendant was deliberately trying to delay unnecessarily. That made this case “exceptional” and justified an order for retrospective service.

## Alfa Laval v Separator Spares

### Court considers Article 6.1 (suing a defendant where a co-defendant is domiciled) and limitation issues

<http://www.bailii.org/ew/cases/EWHC/Ch/2012/1155.html>

The basic rule under EC Regulation 44/2001 is that a defendant should be sued in the country where he is domiciled (absent an express jurisdiction clause or a special rule). Article 6.1 of the Regulation provides that the defendant may also be sued “where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and to determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.” Briggs J made the following observations in relation to this article:

- (1) (Applying the recent ECJ decision in *Painer v Standard Verlags GmbH*), there is no need for the case against the defendant and the other defendants to have the same legal basis. All that is required is a sufficiently close factual connection between the claims to give rise to a sufficient risk of irreconcilable judgments.
- (2) The court must assess the degree of connection and then apply a value judgment as to the expediency of hearing both actions together (if possible). An argument that the defendant sued in England was little more than a “nominal” defendant (although it was not suggested that he had been sued merely as a vehicle for ousting Polish jurisdiction against certain other Polish defendants) was not said to be significant: “The language of Article 6.1 suggests that it is primarily to the closeness of the connection that the court looks when carrying out its value judgment. Questions such as whether a particular defendant will mount an active defence or whether the claim may be or has been allowed for a time to become dormant against a particular defendant do not seem to me to go to the heart of the analysis”.
- (3) The Limitation Act provides that, where a new claim is added to an ongoing action, that new claim is deemed to have been commenced on the same date as the ongoing action. In this case, that was prejudicial to the Polish defendants because they had an arguable case under Polish law that the claim against them was now time-barred. In *Welsh Development Agency v Redpath* [1994], it was held that in such a situation, permission to introduce the new claim should be refused and the claimant should bring the claim by separate proceedings (thus preserving the defendant’s right to raise a limitation defence). Although there should be no risk of irreconcilable judgments in a domestic context (as a result of good case management), Briggs J noted that an application of the *Welsh* rule in an international context could give rise to difficulties because Article 6.1 could arguably require all the defendants to be defendants in the same proceedings. However, the Court of Appeal in *Masri v The Consolidated Contractors* [2005] has held that Article 6.1 should not be construed in such a limited manner.

The claimant had suggested a different approach to this issue: to add the Polish defendants to the ongoing action but to require the claimant to undertake not to pursue that claim if it appeared, at trial, that it would have been statute-barred if commenced now. Although “sorely tempted” to approve that solution, in the end, the judge was not persuaded to do so.

## Les Laboratoires Servier v Apotex

### A cross-undertaking in damages and an illegality defence - the Court of Appeal examines *ex turpi causa*

<http://www.bailii.org/ew/cases/EWCA/Civ/2012/593.html>

The maxim *ex turpi causa* provides that no action can arise from an illegal or immoral act. In this case, the claimant had obtained an injunction against the defendant. That injunction was subsequently discharged and the defendant sought to claim on the cross-undertaking for damages provided by the claimant. The claimant sought to rely on the *ex turpi causa* rule, arguing that the injunction had prevented the defendant from manufacturing goods which would have breached a patent which was enforceable in Canada. At first instance, the judge held that the defendant’s claim was barred and the defendant appealed. The Court of Appeal allowed that appeal. It held as follows:

- (1) There is no principle that, where a claimant obtains an injunction but subsequently fails in the action, it cannot rely on facts which it knew at the time of the injunction to defend a claim on the cross-undertaking.
- (2) The illegality principle should not be applied too inflexibly. Certain policy considerations underlie the principle and one or more of these must apply in a case in order to justify the application of the principle (although just because they do apply it does not automatically follow that a party can rely on the principle). The policy considerations are as follows: (a) consistency; (b) the claimant should not profit from his own wrong; (c) deterrence; (d) maintaining the integrity of the legal system; and (e) furthering the purpose of the rule which the illegal conduct has infringed.
- (3) It makes no difference if the act is illegal under foreign law. Nor is the illegality defence aimed at achieving a just result between the parties - the rule cannot “be founded on a discretionary power to give effect to the public conscience”. The defence may not arise where the unlawful act is “merely trivial” or the result of an inadvertent breach of a law or regulation.
- (4) It is necessary to consider whether the unlawful conduct caused the damage or was merely the occasion for it. The unlawful act in this case was sufficiently causative of the defendant’s claim to engage, in principle, the illegality defence. However, weighing up the facts in this case, the Court of Appeal concluded that the defence did not apply. For example, the unchallenged evidence was that the defendant had acted honestly.

## Shawe-Lincoln v Neelakandan Other News

### Inference to be drawn where claimant cannot prove causation because of defendant's negligence

<http://www.bailii.org/ew/cases/EWHC/QB/2012/1150.html>

In the Court of Appeal case of *Keefe v Isle of Man* the dismissal of the claim based on the claimant's failure to prove negligence was reversed on the basis that the difficulty in obtaining proof had been caused by the defendant's breach of duty.

In this case, the defendant admitted a negligent breach of duty as a result of failing to admit the claimant into hospital. The defendant argued that the principle in *Keefe* should apply to his case because the defendant had deprived him of the medical records which he would have obtained had he been admitted. Lloyd Jones J pointed out that *Keefe* is not concerned with a reversal of the burden of proof - it is, instead, concerned with the weight which is to be attached to evidence and the circumstances in which the court may draw inferences.

The benevolent principle established in *Keefe* did apply to cases concerning causation as opposed to just negligence cases. However, even adopting a benevolent approach here, the judge rejected the claimant's argument on this point because (inter alia) the defendant had been under no duty to take the measurements which were lacking and because other evidence produced in the case supported the defendant's case.

## CVB v MGN Ltd

### Applying for an order from the court to leave out claimant's name on claim form - whether need to give notice

[http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2012/1148.html&query=title+\(+cvb+and+mgn+\)&method=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2012/1148.html&query=title+(+cvb+and+mgn+)&method=boolean)

PD 16 provides that the claim form must include the full name of each party. However, the intending claimant can apply to court for a dispensation from that requirement. One of the issues in this case was whether the intending claimant had to give notice of that application. Tugendhat J held that he does not.

The order from the court is not an injunction (and if the identity of the claimant is subsequently disclosed by the defendant or anyone else, they will not be committing a contempt of court - although if the disclosure amounts to eg the tort of misuse of information, they will not be able to rely by way of defence on the fact that the identity of the claimant is a matter of public record). As a result, the order is not made "against" the defendant or anyone else and so there is no requirement under CPR r23 or the Human Rights Act to give notice to an intended defendant or anyone else. However, any person affected by the order can apply to have it discharged.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 received royal assent on 1 May 2012. It is expected to be fully in force by April 2013 (although there have been suggestions that the Act may be implemented in stages prior to that date). Key changes include: (1) in relation to Conditional Fee Arrangements, success fees and ATE insurance premiums will no longer be recoverable (and in personal injury cases will be subject to a maximum percentage of damages); (2) solicitors will be able to enter into Damages-based Agreements (or contingency fees), payable if the client wins and calculated by reference to the amount recovered by the client; (3) a ban on referral fees by a "regulated person" (as defined in the Act); and (4), in relation to Part 36 offers, the Act provides for rules of court to be adopted to allow for the payment of "an additional amount" if a defendant fails to better a claimant's offer - that additional amount is likely to be 10% of the damages awarded to the claimant. A copy of the Act can be found below:

<http://www.legislation.gov.uk/ukpga/2012/10/enacted>

<http://services.parliament.uk/bills/2010-11/legalaidsentencingandpunishmentofoffenders.html>

#### Further information

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