

Weekly update



Welcome to the twenty-second 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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Coles & Ors v Hetherton & Ors

Whether claimant insurer could fully recover the cost of repairs from the defendants' insurers

<http://www.bailii.org/ew/cases/EWHC/Comm/2012/1599.html>

The claimants in this case were drivers whose cars had been damaged by the defendants. The claimants' insurer ("A") indemnified the claimants by paying for the repairs to the car. The insurer then brought subrogated claims against the defendants' insurers ("B") seeking declarations as to their liability. The claimants in this case had all elected to use A's system for repairing their cars. Under this system, A engaged one of its subsidiaries to undertake the repairs but the repairs were actually carried out by subcontractors. B objected because the subsidiary charged higher rates than those paid by it to the subcontractors and the interposition of the subsidiary had the effect of increasing the costs of the work done by around 25%. A responded that the amount charged by the subsidiary was no more than any individual policyholder would have had to pay had he arranged for the repairs himself. Cooke J considered the following issues:

(1) Where a car is negligently damaged, is the measure of the claimant's loss (if the car is not written off) the reasonable cost of repair? Having reviewed prior caselaw, the judge concluded that loss is suffered by the victim as soon as the damage occurs. The usual rule is that the diminution of the value of an asset is measured by reference to the repair cost. However, the victim does not have to have his car repaired and, if he chooses not to, he can instead provide estimates for repair or expert evidence to establish the extent of his recoverable loss. In other words, the wrongdoer must pay the cost of repair even if that cost has never actually been paid. Applying those principles to this case, the judge said: "If he [the victim] can get a knock-down price for repairs by virtue of a particular relationship that he has, it is still open to him to claim the diminution in value of the car by reference to the market cost of repair". He also added: "Nor can it be said that there is a rule of law that where repairs are effected, the cost of repair has to be taken subject to mitigation arguments". Thus A was entitled to claim the reasonable cost of repair - which was not necessarily the repair costs actually incurred.

(2) Where a claimant's insurer arranges the repairs, is the reasonableness of the repair cost to be judged by reference to what a person in the position of the claimant could obtain in the open market or by reference to what his insurers can obtain? Cooke J concluded that the loss was suffered by the policyholder and so there was no room for the argument that the insurer's options fell to be taken into account. Accordingly, it was "neither here nor there whether the insurers put in place a repair company such as [A's subsidiary], which subcontracts to repair garages, or whether they subcontract further to other specialist repairers, or whether [A] contracts directly with a garage or repairs the cars itself. The only issue is the reasonable cost of repair to the individual claimant, which can be established by any form of admissible evidence in a court".

Finally, although not required to decide the point, Cooke J noted the distinction drawn by the authorities between a claim for diminution in value of an asset (eg repairing a car) and a claim for loss of the use of that asset (eg hiring a replacement car). Although the cost of repairing the vehicle "must be treated in the round" (so that an overall figure for the reasonable costs of repair may be justified even if individual items are not reasonable), the judge indicated that an item such as "collection/delivery" of the car may amount to a claim for loss of the use of the car (for which general damages might run).

COMMENT: This case provides useful confirmation that the general principle that a victim can recover the reasonable cost of repair even where those repairs are not actually carried out (for whatever reason), or are carried out for a lower actual cost, applies in an insurance/subrogation context. The practical effect of the decision, though, is that the claimants' insurer (and not the car owner) received, in effect, a windfall from the defendants' insurers.

Page & Anor v Hewetts Solicitors & Anor

Limitation argument where claim form allegedly lost by court office

<http://www.bailii.org/ew/cases/EWCA/Civ/2012/805.html>

The first instance decision in this case was reported in Weekly Update 36/11. The limitation period for a claim expired at the end of January 2009. Although the claim form which was issued by the claimant was dated 17 February 2009 (and hence outside the limitation period) the claimant's solicitor claims that the claim form was received by the court office no later than 5 December 2008. He alleges that the court office either lost or mislaid that claim form and so he had to send a fresh claim form to the court for issue. Both the Master and the judge held that the claimant could not rely on PD 7A (which provides that "where the claim form was received by the court office on a date earlier than the date on which it was issued by the court, the claim is "brought" for the purposes of the Limitation Act. on that earlier date") because PD 7A requires the same piece of paper to be received and issued. The claimant appealed and the Court of Appeal has now held that the Master and judge applied the wrong test.

The Court of Appeal held that in order to determine when an action is "brought" for the purposes of the Limitation Act, it is necessary to look at the Act and not the CPR. It was held (applying *Barnes v St Helens MBC* (see Weekly Update 34/06)), that an action is brought once the claimant has delivered his request for the issue of a claim form to the court office. Furthermore, there are sound policy reasons behind that decision: a claimant should not bear the risk of the court failing to process his request in time (for whatever reason, including losing the claim form).

Accordingly, if the claimant could prove that the claim form was delivered in due time to the court office, accompanied by a request to issue and the appropriate fee, the action would not be time-barred. The Master and judge had also been wrong to hold that the claimant needed to prove this on a “balance of probabilities” - this was an application for summary judgment and so the question was only whether the claimant had had no real prospect of showing that the documents arrived at the court office. It should also not be assumed that the systems which should have been followed by the court office were in fact followed: “On this application we must approach the question on the footing that there is a real prospect that the claimants will show that documents put into the DX were delivered at least as far as the court’s post room, and perhaps as far as the Registry”.

COMMENT: This decision seems a sensible one. PD 7A can be relied on where a court office is slow to issue a claim form and so it is difficult to see why the position should be any different where the court office instead loses or mislays a claim form. The decision therefore gives some comfort to solicitors (and their professional liability insurers). However, it should be noted that it will still be necessary for a solicitor to prove the fact of delivery of the relevant documents and fee to the court office in the first place. Where a claim form is to be issued close to the expiry of a limitation period, it may still be prudent to go to the court office in person and obtain a dated receipt if the documentation cannot be processed immediately.

Stych v Dibble (1) Tradex Insurance Co Ltd

Whether defendant’s insurer liable to pay where claimant was a passenger in a car taken without authority

The claimant was seriously injured when he was a passenger in a car being driven by his friend (“A”). The car belonged to a customer of the garage where A worked. A was driving the car without the owner’s permission or authority and was not insured to drive the car. However, the car was insured by the owner with the defendant insurer. That policy covered third party risks and the claimant sought a declaration that the insurer was liable to meet the judgment which he obtained against A, pursuant to section 151 of the Road Traffic Act 1988. In this case, the insurer sought to argue that A’s liability was an “excluded liability” under the Act. Section 151(4) of the Act defines “excluded liability” as “a liability in respect of...bodily injury to...any person who, at the time of the use which gave rise to the liability...was allowing himself to be carried in...the

vehicle and knew, or had reason to believe, that the vehicle had been stolen or unlawfully taken...”. Stadlen J made the following general comments regarding section 151(4):

- (1) The insurer has the burden of proving that the victim knew that the vehicle was stolen.
- (2) The Act is wider than Article 2(1) of the EU Second Motor Insurance Directive, which requires the insurer to prove that the victim “knew” the vehicle was stolen. The parties in this case agreed that “knew or had reason to believe” in section 151(4) meant either actual knowledge, or “blind eye” knowledge ie the victim had information from which he actually drew the conclusion that the vehicle was stolen (or might well be stolen) but that, suspecting that it was, he deliberately refrained from asking questions so as to avoid confirmation that it was. The judge said the parties had been right to agree that test. The insurer has also been right to concede that there can be no blind eye knowledge of a fact “where the relevant mind has not been applied to the question whether the fact exists or is true or not”. In addition to the suspicion, there must be a desire not to know.
- (3) The insurer accepted that the vehicle was not “stolen” within the meaning of section 1 of the Theft Act 1968. Instead, the driver did not have permission to take the car and the accident occurred during a joy ride. The insurer argued that the words “or unlawfully taken” were apt to include a vehicle that is taken without permission but it then conceded that the words were to be construed in light of the Second Directive (which referred only to a vehicle being “stolen”). In the end, the matter did not need to be decided by the judge, but he indicated that, if it had have been necessary, he would have needed to hear further argument, since it was not obvious to him that the word “stolen” in the Second Directive is to be interpreted so as to include unlawful taking or taking without permission. He said that “proportionality requires that a high degree of personal fault must exist before it would be right for an injured passenger to be deprived of compensation”. It is clear that Parliament has considered that theft involves a considerably higher degree of personal fault than unlawful taking.

On the facts, Stadlen J concluded that the insurer was unable to rely on the exclusion in section 151(4).

VTB Capital v Nutritek International Corp

Piercing the corporate veil/proving a risk of dissipation for a worldwide freezing order

<http://www.bailii.org/ew/cases/EWCA/Civ/2012/808.html>

The claimant bank alleged that it had been induced to enter into a loan because of misrepresentations. It alleged that certain defendants (who were said to have control over the borrower) were jointly liable and asked the court to pierce the corporate veil. At first instance, Arnold J refused to do so and held that the case of *Antonio Gramsci Shipping Corp v Stepanovs* [2011] had been wrongly decided. In *Gramsci*, Burton J had considered that, in order to justify piercing the veil, it was unnecessary for the wrongdoing to be “dehors” (i.e. outside) the company because, in that case, the company had been set up for the very purpose of perpetrating the wrongdoing. However, Arnold J concluded that the true basis on which the courts have pierced the corporate veil was that the puppet company was being used by its controller in an attempt to immunise himself from liability for some wrongdoing that existed “dehors” the company. The Court of Appeal has now dismissed the appeal against Arnold J’s decision. In doing so, it held that the principle of “veil piercing” is a limited one, which has been developed pragmatically for the purpose of providing a practical solution in particular factual circumstances. Furthermore, there is no basis for the proposition that the puppeteer of a company should be treated as having always been a party to a contract which he was not actually a party to. The Court of Appeal also found that Arnold J had been correct to set aside an earlier order granting permission to serve the proceedings out of the jurisdiction because the claimant had failed to show on the facts that England was clearly the most appropriate forum to hear the case.

Given these conclusions, it was unnecessary for the Court of Appeal to decide whether to continue the worldwide freezing order granted in favour of the claimant. However, it did comment on one point which may be of wider relevance: When deciding whether there was a risk of dissipation by the defendants, Arnold J had commented that that it was common for international businessmen to use offshore vehicles for their operations, particularly for tax reasons, and that this may make it difficult to enforce a judgment, but that claimants “have to take defendants ...as they find them”, the use of offshore companies not being sufficient evidence of a risk of dissipation. Although the Court of Appeal agreed with the statement in general: “the factor of a good arguable case as to fraud against the person in question, and the use of a web of offshore companies in connection with the fraud, could properly provide a basis for taking this into account in favour of the grant of an injunction”.

Furthermore, although an allegation of dishonesty may not in itself justify an inference of a risk of dissipation, where (as here) the alleged dishonesty is at the heart of the claim against the defendant, the court may well be able to draw such an inference. Thus: “it would have been right for the judge to take into account a finding of a good arguable case that Mr Malofeev had been engaged in a major fraud, and that he operated a complex web of companies in a number of jurisdictions, which enabled him to commit the fraud and would make it difficult for any judgment to be enforced. We would regard such factors as capable of providing powerful support for the case of a risk of dissipation”.

Komal & Ors v Litt Corporation & anor

Duties of an applicant when applying for a freezing order/proof of the risk of dissipation

The claimants sought the continuation of a freezing order. Wyand J considered the following issues:

- 1) Had the claimants proved that there was a risk of dissipation of assets? They had relied on the fact that a property belonging to the defendants was about to be sold and an allegation that the defendants had ignored the claimants’ solicitors’ letters (if the property was not about to be sold, the allegations about the correspondence would have been less important). The claimants also alleged that the defendants’ financial arrangements were extremely complicated but the judge did not consider that to be sufficient. Instead, there was a more serious allegation that the defendants had failed to file accounts with Companies House for the last 2 years (because, it was claimed, the defendants were in dispute with their accountants). The judge described this as giving rise to “very serious concerns as to the financial management” of the defendants, which justified the granting of a freezing order.
- 2) Should the freezing order be discharged because of irregularities in the application? The application for the freezing order had been supported by witness statements rather than an affidavit (and the witness statements were not subsequently sworn as affidavits). However, the judge did not consider this to be an important factor when considering whether to continue the freezing order. More serious were allegations concerning the claimants’ disclosure when making the application - they had made inaccurate statements regarding the sale of the property and errors in the quantum which they were claiming. Nevertheless, the judge concluded that they were entitled to a continuation of the freezing order (albeit for a lesser sum than that previously granted).

Moloobhoy v Kanani

Service of a claim form and the meaning of “usual residence”

<http://www.bailii.org/ew/cases/EWHC/Comm/2012/1670.html>

If a defendant has not given an address for service and personal service cannot be carried out (and no business address of a solicitor has been given either), then a claim form must be served in accordance with CPR r6.9. This provides, broadly, that service should take place at the defendant’s “usual or last known residence”. It was not suggested in this case that the property where the claim form was left constituted a “last known residence”. Instead, the issue was whether it was a “usual residence”. This issue was considered by the Court of Appeal in *Varsani v Relfo* (see Weekly Update 21/10), from which Males J drew the following points:

(a) the claimant must establish that it has much the better argument that a property is the usual residence; (b) a person can have more than one “usual residence” at any given time (so the fact the defendant’s principal residence here was in Dubai was not determinative); (c) the key issue is the “quality” of the defendant’s use and occupation of a property as a home; (d) to determine if a property is a “usual” residence, it is necessary to look at the defendant’s settled pattern of life (and, in particular, whether the defendant’s use of the property has a degree of continuity and permanence); and (e) it is not enough to just look at the duration of periods of occupation - just because a defendant spends only a limited amount of time at a property does not mean that it cannot be his “usual” residence.

In this case, the defendant’s practice was to make 3 or 4 trips to London every year (sometimes staying for up to 2 months). The property was unoccupied for the rest of the time, so that it would be available when the defendant chose to visit. The visits were part of his settled pattern of life. Accordingly, there was a good arguable case that the property was his “usual” residence, and so he had been validly served.

Having determined that England was the appropriate forum to hear this dispute, the judge held that this was one of the “very rare cases” in which the court should exercise its power to determine the claimants’ summary judgment application at the same time as dealing with the defendant’s challenge to jurisdiction. This was because it was said to be clear that the defendant had no defence to the underlying claim (and knew that he did not have any defence). The defendant’s stance was motivated only by “the desire to put off the evil day when he must pay the claimants the money to which they are entitled”. Also, this was not a “typical” foreign defendant (since he is resident, and has assets, here) and any judgment against him would be enforceable regardless of whether it is a default judgment.

COMMENT: This case highlights that the key issue when identifying a “usual residence” for service is whether the property in question is used as a home, even though CPR r6.9 makes no express reference to a “home”. So where a defendant owns properties in several countries and use a property in England only sporadically and for a single day at a time (ie it is used more like a hotel), that property will not meet the “usual residence” test. However, where, as here, there is more of a tie between the property and the defendant, that is more likely to indicate that it is a “usual residence”.

Further information

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