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CLYDE&CO

Weekly update

Welcome to the fifth edition of Clyde & Co's (Re)insurance and litigation caselaw weekly updates for 2013.

These updates are aimed at keeping you up to speed and informed of the latest developments in caselaw relevant to your practice.

This week's caselaw

VTB Capital Plc v Nutritek

The Supreme Court decides whether England is the appropriate forum and whether the corporate veil should be pierced.

International Energy Group v Zurich Insurance

A case on an Employers' Liability policy and whether the insurer must cover a mesothelioma claim in full or just in proportion to the total period of exposure.

John Grimes Partnership v Gubbins

A decision on damages and whether a fall in the market is too remote.

Cadogan Maritime v Turner Shipping

Court decides whether arbitrators had power to make an additional award.

Akciné Bendrové Bankas Snoras v Antonov & Anor

An application to discharge a worldwide freezing order on the basis of non-disclosure.

VTB Capital Plc v Nutritek

Supreme Court decides whether England is the appropriate forum and whether the corporate veil should be pierced

http://www.bailii.org/uk/cases/UKSC/2013/5.html

The first instance and Court of Appeal decisions in this case were reported in Weekly Updates 43/11 and 22/12. The Supreme Court has now dismissed the appeal from those decisions. It dealt with the following issues:

(1) Was England the appropriate forum to hear this case? By a majority of 3:2, the Supreme Court held that it was not. Although the trial judge and Court of Appeal had erred in regarding Russian law as the governing law in this case (instead, it was English law) that was not a decisive factor in this case. Generally (all things being equal) a case should be tried in the country whose law applies. That is especially the case if legal issues are likely to be important and there is a difference in the legal principles or rules applicable to such issues in the different countries in contention as the appropriate forum. However, that was not the situation here. The judge could not be faulted on the exercise of his discretion and appellate courts should be wary of interfering with the lower court's decision. In any event, Lord Mance (with whom Lords Neuberger and Wilson agreed) said that he too would have held that Russia was the appropriate forum. The major part of the factual subject matter involved Russia and that is where the key witnesses are situated. Lord Neuberger added that the existence of an non-exclusive jurisdiction clause in favour of England was not a particularly strong factor.

Lord Clarke (dissenting and with whom Lord Reed agreed) said that, although not conclusive in themselves, the fact that (a) English law was the applicable law; (b) the torts were committed in England; and (c) there was an English jurisdiction clause, were all strong factors supporting the view that England was the appropriate forum.

(2) The lower courts had refused to pierce the corporate veil and all the Supreme Court judges agreed with that decision. It was accepted that it could be right for the law to permit the corporate veil to be pierced in order to defeat injustice (although it cannot be invoked merely where there has been impropriety). However, the argument could not succeed in this particular case because it would amount to an extension of the principle as "it would lead to the person controlling the company being held liable as if he had been a co-contracting party with the company concerned to a contract where the company was a party and he was not". There was no prior caselaw to support such an extension of the principle.

(3) Finally, it could now be seen that the respondent had been subject to a worldwide freezing order for some 14 months beyond the time when it was proper for that order to be continued. That was "highly unsatisfactory".

In retrospect, the Court of Appeal should have determined the appellant's appeal against the judge's ruling that the freezing order should be set aside: "One cannot quarrel with the logic behind the conventional continuation of a freezing order pending an appeal... But what turns out to have been the protracted wrongful continuation of the freezing order is another indication of the inappropriateness of a further appeal to this court in circumstances such as the present".

International Energy Group v Zurich Insurance

Employers' liability policy and whether insurer must cover mesothelioma claim in full or in proportion to total period of exposure

http://www.bailii.org/ew/cases/EWCA/Civ/2013/39.html

The claimant employed Mr Carré for 27 years. For the last six years of that period, it was insured under an employers' liability policy issued by the defendant. The relevant insuring clause in the policy provided that "If any person under a contract of service...with the Insured shall sustain any bodily injury or disease caused during any period of insurance and arising out of...his employment with the Insured...[the defendant] will indemnify the Insured against all sums for which the Insured shall be liable".

Mr Carré was exposed to asbestos dust during the whole of his employment with the claimant and contracted mesothelioma. Shortly before his death he issued proceedings against the claimant and a settlement was reached, for which the claimant sought an indemnity from the defendant. At first instance, it was held that the claimant could only recover from the defendant a contribution in the proportion which the policy period bore to the whole period of Mr Carré's exposure by the claimant (ie 6/27ths) (see Weekly Update 03/12). That decision was handed down before the Supreme Court delivered its judgment in the *Trigger Litigation* case (see Weekly Update 12/12).

The Court of Appeal has now allowed the claimant's appeal from the first instance decision. It held that:

(1) Applying *Trigger Litigation*, mesothelioma was "sustained" when the pathological process was initiated and not when the disease manifested itself. The policy wording required mesothelioma to be "caused" during the policy period. Lord Mance observed in *Trigger Litigation* held that "for the purposes of the insurance, liability for mesothelioma following upon exposure to asbestos created during an insurance period involves a sufficient 'weak' or 'broad' causal link for the disease to be regarded as 'caused' within the insurance period". Thus, here, Mr Carré's mesothelioma was "caused" during the policy period.

(2) The insurers had sought to argue that although a proportionate contribution would be inappropriate where an employer was unable to pay the balance, that could not arise in the case of a solvent employer (such as the claimant in this case). The Court of Appeal rejected that argument. There was a sufficient causal link for the claimant to be legally liable for causing the disease and the claimant "has a contractual right of indemnity under the policy against that liability". It was irrelevant that his exposure to asbestos for the other 21 years was also an effective cause of the disease: "The policy would require a special clause to limit the scope of the indemnity in such circumstances, and such a limitation would on its face be incompatible with the Employers' Liability (Compulsory Insurance) Act 1969". Aikens LJ added that the policy provided that the insurer would pay "all sums" for which the insured shall be liable in respect of any claim for mesothelioma.

COMMENT: At first instance, there had been an emphasis on the fact that the insured's liability to the victim was governed by the law of Guernsey and hence the Compensation Act 2006 did not apply. That Act had reversed the decision in *Barker v Corus* [2006] and so that decision still applied in this case (broadly, *Barker* had held that an employer was only liable for his proportion of loss where more than one employer had exposed an employee to asbestos). However, the Court of Appeal has now held that the position under Guernsey law was irrelevant – application of the principles established in the *Trigger Litigation* were sufficient to decide the case.

John Grimes Partnership v Gubbins

Damages and whether a fall in the market is too remote

http://www.bailii.org/ew/cases/EWCA/Civ/2013/37.html

At first instance, the judge held that the defendant engineer, whose breach of contract with the claimant had resulted in a delay in the completion of a development, was liable for loss sustained as a result of a fall in the property market prior to completion. The defendant appealed, arguing that that loss was too remote and that he had had no control over market movements. The Court of Appeal has now dismissed that appeal.

It is well-established that some types of loss caused by a breach of contract may be regarded as too remote for the contract-breaker to be held liable, despite there being a causal link between the breach and the loss. The defendant had sought to rely on the case of *The Achilleas* [2008] but the Court of Appeal held that that case had only stressed that there could be particular circumstances which demonstrated that the parties could not have intended the defendant to bear the liability for a particular kind of loss, even if it was reasonably foreseeable.

In applying those principles to this case, it was clear that the engineer had known that the property market could go up or down and he also knew what the claimant intended to do with the development. Accordingly, the loss resulting from the fall in the market was not too remote and it could reasonably be considered that the engineer had assumed responsibility for that type of loss. There was no general understanding in the property world that a defendant would not assume responsibility for losses arising from movement in the property market. Nor did it matter that the defendant had no control over the market: "But that is the case with all markets, and there are many decided cases where delay in delivery of goods has been held to give rise to damages for loss suffered through a change in the market price". The Court of Appeal also rejected an argument that the scale of the loss was disproportionate to the fee which the defendant had charged: "It may not infrequently be the case that the breach of a contract of modest size gives rise to a substantial claim in damages".

Cadogan Maritime v Turner Shipping

Whether arbitrators had power to make an additional award

http://www.bailii.org/ew/cases/EWHC/Comm/2013/138.html

Section 57 of the Arbitration Act 1996 provides that a tribunal may, on its own initiative, "make an additional award in respect of any claim....which was presented to the tribunal but was not dealt with in the award". The claimant alleged that the tribunal in this case has had no power to make an additional award regarding accrued interest because that claim had never been "presented to the tribunal".

Hamblen J held that no particular formality was required for a claim to be "presented" to the tribunal: "Provided that the claim is before the tribunal and would reasonably be expected to be determined it does not matter how the claim has been placed before the tribunal. It does not, for example, have to be a claim set out in written pleadings or submissions". He added that arbitration is a less formal process than litigation and the focus is on substance rather than form. Thus it was sufficient for a claim to be made for "all sums" or for "further or other relief".

The judge also held that the claim had not already been dealt with in the award. In reaching that conclusion he noted that it was important to look at the whole of the award – both the dispositive part and the written reasons which also form a part of the award. (He also added that if he was wrong on these points, the award ought to be set aside even though he agreed the challenge was unmeritorious and the tribunal had reached the right decision).

Akciné Bendrové Bankas Snoras v Antonov & Anor

Application to discharge worldwide freezing order on basis of non-disclosure

http://www.bailii.org/ew/cases/EWHC/Comm/2013/131.html

The defendant applied to discharge a worldwide freezing order granted in favour of the claimant bank on the basis that there had been a material non-disclosure by the claimant. Having reviewed the evidence, Gloster J found that the claimant had failed to disclose the existence of a UK Restraint Order obtained by the CPS over certain assets owned by the defendant. The defendant argued that the existence of this order would have been relevant to the court's consideration of the risk of dissipation. Gloster J agreed that the non-disclosure was material and that not only could the claimant have discovered it by searching the UK Land Registry, the claimant's solicitors had in fact known about it but the relevant solicitor had forgotten about it when the application for the freezing order was made. It has been established by prior caselaw that the fact that a party or his legal advisor has forgotten a material fact affords no defence to an allegation of non-disclosure (see *Dubai Bank v Galadari* [1990]).

However, Gloster J concluded that, taking into account all the circumstances of the case, it would not be appropriate to discharge the freezing order. Her reasons included the following: (i) it would not have made a difference to the judge's decision to grant the order; and (ii) the UK Restraint Order only attached certain assets in the UK and did not relate to assets in other jurisdictions. The judge also concluded that a risk of dissipation had still been proven, taking into account the alleged underlying wrongdoing which formed the basis of the bank's claim. The defendant was said to be "a sophisticated operator who remains clearly able to give instructions in relation to transactions affecting his worldwide assets".

The defendant had also sought an order relieving him from the obligation to disclose his current assets. He feared that information provided by him would be passed to the Lithuanian Prosecutor and would be used to assist in a criminal investigation against him. This application was rejected by the judge. There is no right to withhold disclosure of assets on the basis of a risk of incrimination in relation to actual or threatened criminal proceedings abroad. The court has a discretion to grant protection against the risk of incrimination which in turn depends in part on the risk of prejudice to the defendant. Lithuania is an EU member state and signatory state to the European Convention on Human Rights, which guarantees the right to a fair hearing. It should be assumed that Lithuania would therefore comply with the requirements of the Convention. The claimant and its legal advisers would be subject to the usual undertaking that they will not, without the court's permission, use the information disclosed by the claimant for any purpose other than the English civil proceedings. However, the judge accepted that the information disclosed by the claimant could inadvertently be communicated to the Lithuanian prosecutors. The risk of this, though, could be adequately addressed by imposing further safeguards eg forbidding dissemination beyond a limited number of named members of the claimant's legal team.

Further information
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