Insurance and reinsurance
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CLYDE&CO

Weekly update

Welcome to the tenth 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.

Consumer Insurance (Disclosure and Representations) Act 2012:

Following the publication of the Consumer Insurance (Disclosure and Representations) Act 2012 (Commencement) Order 2013, it has now been confirmed that the Act will come into force on **6 April 2013**:
http://www.legislation.gov.uk/uksi/2013/450/contents/made

This week's caselaw

Hyundai Merchant Marine v Americas Bulk Transport

Whether a section 67 challenge involves a full rehearing in relation to the arbitration agreement only.

Geophysical Service v Dowell Schlumberger

A security for costs application where the claimant has an ATE insurance policy.

Euro-Asian Oil v Abilo & Ors

Court decides whether an extension of time to serve a claim form in Switzerland should be set aside.

AJ Building v Turner & Ors

A case on whether an insured, rather than the insurer, should pay contractors.

Brumder v Motornet Service

A decision on whether a company (and its insurers) were liable to a sole director injured at work.

Billingham v John Barnsley

A case on mesothelioma and what employers could be expected to know in the 1960s – of possible interest to employers' liability insurers.

Hyundai Merchant Marine v Americas Bulk Transport

Whether section 67 challenge involves full rehearing re arbitration agreement only

http://www.bailii.org/ew/cases/EWHC/Comm/2013/470.html

The claimant applied to court to challenge an arbitration award on the ground that the arbitrators lacked substantive jurisdiction (pursuant to section 67 of the Arbitration Act 1996). It was common ground that the challenge would involve a full rehearing. However, the defendant sought to argue that the rehearing should be limited to the jurisdiction issue, i.e. it should consider whether the parties had agreed an arbitration agreement and should not look at the wider issue of whether the parties had entered into any contract at all. It sought to rely on the decision in *Fiona Trust v Privalov* (see Weekly Update 40/07), in which the House of Lords had held that an arbitration agreement can only be void or voidable on grounds which relate directly to the arbitration agreement and not to the agreement as a whole (because of the principle laid down in section 7 of the 1996 Act that arbitration clauses are separable from the rest of an agreement which has been found to be invalid).

Eder J rejected that argument. Here, the submission was that there had been no consensus at all between the parties and this would not only have prevented any contract from coming into existence but also any arbitration agreement from coming into existence too: "There is no evidence or other material in the particular circumstances of the present case that the parties intended here that any alleged arbitration agreement was intended to have effect independently of the existence of the proposed [contract]". Since the alleged arbitration agreement and the alleged contract were said to be contained in the same document, the submission that there was no binding contract necessarily meant that there was no arbitration agreement either.

Eder J also distinguished this position from the "provisional" view adopted by Gross J in *UR Power v Kuok Oils and Grains* (see Weekly Update 29/09) that section 7 applies even though the underlying contract never came into existence. He did so on the basis that there was no evidence in the particular circumstances of the present case that the parties intended that any alleged arbitration agreement would have effect independently of the existence of the proposed contract. Accordingly, whether there was both a binding contract and a binding arbitration agreement should be decided in a full rehearing. The judge concluded that there had been no binding arbitration agreement and so the award should be set aside.

COMMENT: The *Fiona Trust* decision can be difficult to apply in practice since parties do not often consider whether an arbitration agreement has been concluded separately from the rest of the contract in which it is found. The position may be different where it is alleged that the parties never agreed any contract at all (and so the purported arbitration agreement in that contract necessarily failed to come into existence as well). Eder J's decision that, unless it can be specifically shown that the parties in such a case wanted an alleged arbitration agreement to have independent effect, it will stand or fall with the rest of the contract in which it is found, may be a practical one in cases such as that, but it is arguably difficult to square with the *Fiona Trust* decision. However, there is some prior caselaw support for this decision. In *Harbour Assurance v Kansa General* [1993], the Court of Appeal did accept that "there will obviously be cases in which a claim that no contract came into existence necessarily entails a denial that there was any agreement to arbitrate" (although it went on to caution that "there is no reason why every case of initial invalidity should have this consequence" and it is still necessary to consider the validity of the arbitration agreement separately).

Geophysical Service v Dowell Schlumberger

Security for costs application where the claimant has an ATE insurance policy

http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/TCC/2013/147.html&query=title+(+geophysical+and+dowell+)&method=boolean

The defendant applied for security for costs on the basis that the claimant is a company and there was reason to believe that it will be unable to pay the defendant's costs if ordered to do so (CPR r25.13(2)(c)). The issue in this case was whether the claimant could rely on an ATE policy of insurance which it had taken out to argue that there is no basis to say that there is reason to believe it will be unable to pay. The same issue arose in *Michael Phillips Architects v Riklin* (see Weekly Update 16/10). In that case, Akenhead J concluded that the ATE insurance policy did not provide real security for the defendant's costs because of various policy conditions which would allow the insurer to cancel the policy or to refuse an indemnity.

In this case, Smith J held that the judge's reasoning in *Riklin* did not compel or guide him to reach the same conclusion. *Riklin* had relied on earlier authority which in turn had been decided when the ATE market was considerable less mature than it is now. In the absence of evidence to

the contrary: "the court's starting position should be that a properly drafted ATE policy provided by a substantial and reputable insurer is a reliable source of litigation funding" and so an ATE policy can suffice to prevent CPR r25.13(2)(c) from applying. The court had to form a view as to the likelihood of the particular policy being "readily, legitimately and contractually avoided". He found that there was no more than a "theoretical chance" here that the insurers would seek to avoid or cancel the policy. In particular:

(1) The facts here did not support a finding that the underlying claim being brought by the claimant was fraudulent (and so would justify cancellation by insurers). There is a "world of difference" between a finding that the claimant's account is not true (ie incorrect) and a finding that an account is fraudulent.

(2) Even if the insurer were to cancel the ATE policy here, it would still be "liable to meet the cost of any disbursements together with your opponent's legal costs incurred up to the date of cancellation". Smith J held that it was very unlikely that a court would accept an argument that costs which the defendant had incurred, but which were not yet subject to a court order at the date of cancellation, were not to be indemnified. Such a conclusion would be contrary to the obvious commercial purpose of the policy.

(3) A further factor which the judge "weighed in the balance" was the long-standing commercial relationship between the ATE insurer and the claimant's solicitor, which he said made it much less likely that the insurer would seek to avoid on spurious or tenuous grounds.

Finally, the fact that the defendant was not a party to the policy and so could not enforce the contract directly (in the absence of the claimant's insolvency) was not enough to alter the judge's conclusion. He added that CPR r72 (which allows a judgment creditor to obtain payment of money from a third party which it owes to the judgment creditor) would provide a measure of protection should the defendant obtain a costs order against the claimant.

COMMENT: There has been speculation as to what impact the end of recoverability of ATE premiums is likely to have on insurers who write this line of business. However, where cover is provided for higher value commercial litigation, this case could provide an incentive to claimant companies facing financial difficulties to take out an ATE policy on the basis that it could save them from tying up cash following a security for costs application (especially if insurers are prepared to continue to allow the deferred payment of the premium).

Euro-Asian Oil v Abilo & Ors

Whether extension of time to serve claim form in Switzerland should be set aside

http://www.bailii.org/ew/cases/EWHC/Comm/2013/485.html

The second defendant applied to set aside an order allowing an extension of time for service of the claim form on it in Switzerland. The first argument raised by the claimant was that the application to extend time had been made on notice and so the second defendant could not seek to set aside the extension now – instead it could only appeal the order (such an appeal now being out of time). Burton J rejected that argument. The claimant had notified a London firm of solicitors (who had previously acted for the second defendant) that it intended to make the application (on paper) and had sent a letter to the court commenting on objections raised by those solicitors. However, those solicitors had repeatedly told the claimant that they were not instructed to accept service and were not on the record for the second defendant. Burton J held that "at the highest" the application to extend time had been ex parte on notice and it is well established that in such a case, if a defendant chooses to attend court and speak, having been given only short notice, that does not amount to a waiver of the defendant's right to apply to set aside an order. In this case, the second defendant had not even attended court.

As for the application to set aside the order, Burton J reviewed prior caselaw and noted that the relevant limitation period was not about to expire here and that the second defendant had been given notice of the proposed claim. However, the claimant could not show a good reason for an extension of the time to serve. The judge observed that "waiting, certainly waiting for so long as to take up all or the majority of the generous periods of time for service of the writ, in seeking to persuade the proposed Defendants to instruct solicitors or to put forward a substantive defence or to make an offer in settlement, is not to be regarded as a good reason, but it is indeed rather to be treated as a bad reason or as negligence or incompetence; and the obtaining of further information or the thinking up of fresh or different causes of action before finalising Particulars of Claim and/or service of the Claim Form would be regarded as a *serious error of judgment*". The claimant had also committed the "real error" of taking steps to serve the claim form out of the jurisdiction on another defendant without taking similar steps at the same time to serve on the second defendant.

Nor was the judge prepared to exercise his discretion to exceptionally grant an extension. He referred to the strictness of the regime and the fact that the need for the issue of fresh proceedings had been caused by the claimant's behaviour. Nor could the second defendant be criticised for choosing not to instruct the London solicitors to accept service of the claim form.

AJ Building v Turner & Ors

Whether insured should pay contractors instead of insurer

http://www.bailii.org/ew/cases/EWHC/QB/2013/484.html

The defendants' houses suffered damage and they claimed on their property insurance policies. The insurer instructed a company ("A") to carry out remedial works and that company in turn instructed a contractor (the claimant) to do the works. The insurer paid A, but it then went into administration, leaving the claimant unpaid. The claimant sought to recover under a "Works Authority & Mandate" which was provided to, and signed by, each defendant. The mandate was on the claimant's notepaper and provided (in relevant part) that: "I/We understand that I/we remain responsible for payment of any policy excess or any monies due for work authorised by me/us, which is not paid by my/our insurer" (emphasis added). Keyser QC HHJ held as follows:

(1) In the absence of the mandate, there would be no implied contractual obligation on the defendants to pay for the full cost of the works. Both the claimant and defendants knew that the insurer was to pay for the works and the defendants had no idea of the cost of those works. Furthermore, the defendants had paid their policy excess to A and not to the claimant.

(2) The mandate should be interpreted in accordance with the usual principle of contractual interpretation as well as regulation 7(2) of the Unfair Terms in Consumer Contracts Regulations 1999, which provides that if there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail. The judge held that this was no different from the *contra proferentem* rule and did not mean that the usual principles of construction no longer applied (as the defendants had sought to argue).

(3) The judge concluded that it was "perfectly possible" (and consonant with the commercial common sense of the situation) to interpret the mandate as meaning that, although the insurer will be responsible for paying the cost of the insured losses, the householder will remain liable for all other costs, namely the policy excess and any works not covered by insurance. The mandate did not amount to a guarantee of the insurer's obligation to pay – nor did it pass to the defendants the risk of A "disappearing" with the payment from the insurer.

Brumder v Motornet Service

Whether company (and its insurers) were liable to its sole director injured at work

http://www.bailii.org/ew/cases/EWCA/Civ/2013/195.html

The claimant, the sole director and shareholder of a company, suffered personal injuries at work. The company was in breach of its statutory obligation to maintain work equipment. This is an absolute duty. However, it was also found at trial that the claimant had not given any consideration to health and safety matters and so had breached his duty as a director to exercise reasonable care (a duty which he owed to the company). The issue in this case was whether the claimant could recover damages for his injuries or whether the company (and its insurers) could rely on the defence established in *Ginty v Belmont Building* [1959] that an employer who is absolutely liable for the breach of statutory duty can set up a defence that he was not in any way in fault and the claimant was alone to blame.

In the past, the cases where that defence has been raised have arisen where the employer and the claimant breached the same statutory duty or when claimant disobeyed express instructions from the employer, and that disobedience was itself a breach of statutory duty.

The Court of Appeal has now held that, for policy reasons, the defence could be relied on by the company here. In particular:

(1) The claimant here was a wrongdoer and so, in accordance with common law principles, cannot derive any advantage from his own wrong.

(2) If the claimant was entitled to recover damages from the company, the company would be able to argue that the claimant had breached a duty which he owed to it and so it was entitled to recover the damages which it had to pay the claimant from the claimant. Thus there would be circuity of action.

(3) Allowing the company to rely on the *Ginty* defence would not, in these circumstances, involve an impermissible lifting of the corporate veil.

Billingham v John Barnsley

Mesothelioma and what employers could be expected to know in the 1960s – of possible interest to employers' liability insurers

http://www.bailii.org/ew/cases/EWHC/QB/2013/520.html

The claimant brought proceedings on behalf of the estate of an employee who died of mesothelioma in 2008. The second defendants had employed him during the tax years 1968/9 and 1969/70. They sought to argue that it had not been reasonably foreseeable to them (at the time) that the employee would be likely to be exposed to the risk of contracting mesothelioma when he worked on their premises.

Employers' knowledge of the risk from exposure to asbestos fibres has developed over time. A link between asbestos exposure and mesothelioma was recognised in 1965. In March 1970 the HM Factory Inspectorate published a technical note (TDN 13) containing guidance on exposure to asbestos dust. TDN 13 was referred to by the Court of Appeal in *Williams v University of Birmingham* (see Weekly Update 39/11). There, Aikens LJ said that the best guide as to what, in 1974, was an acceptable level of exposure to asbestos generally was that contained in TDN 13 and the defendant in that case "was entitled to rely on recognised and established guidelines such as those in Note 13".

The claimant sought to argue that the *Williams* case was inconsistent with earlier authority if it held that the levels of exposure set out in TDN 13 amounted to a "safe" level of exposure and that the Court of Appeal had held in *Maguire v Harland and Wolff* [2005] that in 1965 it began to be appreciated that "there could be no safe or permissible level of exposure" to asbestos dust.

Bean J held that if an employer in 1970 had no reason to think that the TDN 13 levels of exposure would be exceeded, then injury from asbestos fibres was not reasonably foreseeable. Furthermore, if TDN 13 was the best guide in 1970 of what was regarded as an acceptable level of exposure,"it is hard to see that such a level would have been regarded as unacceptable in 1968 or 1969". In any event, though, the defendants here had every reason to think that the levels in TDN 13 would be exceeded for short periods and so their employees would be exposed to a foreseeable risk of injury.

Further information
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