Insurance and reinsurance
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CLYDE&CO

Weekly update

Welcome to the eleventh 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

Nelson's Yard Management & Ors v Eziefula

A Court of Appeal case on discontinuance and departing from the presumption that the claimant must pay the defendant's costs.

Sycamore Bidco v Breslin

A decision on making a Part 36 offer to two defendants and the costs consequences where there is a CFA.

Challinor & Ors v Bellis & Anor

A **Clyde & Co** case on the appropriate discretionary interest rate where a commercial claimant does not depend on credit.

Taylor v A.Novo

A case on whether a "secondary victim" could claim even though not present at the scene of the accident - of possible interest to liability insurers.

Nelson's Yard Management & Ors v Eziefula

Discontinuance and departing from the presumption that the claimant must pay the defendant's costs

http://www.bailii.org/ew/cases/EWCA/Civ/2013/235.html

The claimants appealed against a decision that there was no justification in this case to depart from the presumption under CPR r38.6 that they should pay the costs of the defendant against whom they had discontinued their proceedings. The Court of Appeal referred to the decision in *Teasdale v HSBC* (see Weekly Update 12/10), which it accepted represented the correct approach in relation to costs on discontinuance. This case was primarily concerned with the following principle set out in *Teasdale*: no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant, which in all the circumstances provides a good reason for departing from the rule.

The Court of Appeal confirmed that, just because a claimant has already achieved almost all he could reasonably hope to achieve from the proceedings (and wishes to avoid a trial which would only be about costs), that does not justify a departure from the ordinary rule. Furthermore, once there is to be no trial, it is not for the court (when considering costs) to decide whether or not the claim would have succeeded. Where a defence has no real prospect of success, the claimant should apply for a strike out or summary judgment and not for a disapplication of the rule under CPR r38.6.

However, in this case, the defendant had also failed to respond to the claimants' pre-action correspondence. Although that correspondence had failed to specify a date by which a reply was required (as set out in the Practice Direction on pre-action conduct), the protocols "are not to be followed slavishly but reasonably". Here, the defendant had shown no willingness to set out his position, to narrow the issues, or to discuss mediation or settlement. The court could take all that into account.

The Court of Appeal set aside the first instance decision and held that, taking into account the failure of the defendant to respond to the pre-action correspondence, and the reasonableness of the claimant in starting proceedings, that justified a departure from the normal rule. However, it would be inappropriate in this case to order the defendant to pay the claimants' costs of the action.

Sycamore Bidco v Breslin

Making a Part 36 offer to two defendants/costs consequences where there is a CFA

http://www.bailii.org/ew/cases/EWHC/Ch/2013/583.html

Various costs issues arose in this case, including the following:

(1) What was the position where the claimant made a Part 36 offer to two defendants covering two claims, but beats its offer only in relation to one of the defendants? Here, the claimant had sent a Part 36 offer to both defendants offering to accept £5.5 million. Mann J confirmed that it would have been open to one or other of them to accept it and pay £5.5 million in full. As such, the offer to one of the defendants was to settle for that amount and given that he was eventually found liable to pay a lesser amount, the claimant had not beaten its Part 36 offer to him. As the judge pointed out, this result could have been avoided by "the Part 36 offer splitting out the two separate liabilities and expressing itself as being two separate offers".

(2) The other defendant was held liable to pay an amount which was greater than the Part 36 offer though. He sought to argue that it would be unjust to apply the usual Part 36 costs consequences to him, though, for various reasons. These were rejected by the judge. For example, the judge did not think the fact the claimant had entered into a CFA "whose uplift was likely to get in the way of settlement" justified a departure from the ordinary Part 36 costs consequences. Nor was it enough that the defendant had not unreasonably refused to negotiate and that the claimant had not quantified its claim until late in the action.

COMMENT: There is prior caselaw (decided before the Part 36 rule change in 2007) to support the argument that, where a claimant has the benefit of a CFA (and has therefore not had to fund the costs of the proceedings) the court may not order enhanced interest on costs, even if the Part 36 offer is beaten. Even after Part 36 was amended, in *Jones MP v Associated Newspapers* (see Weekly Update 26/07), interest at an enhanced rate was said to not be appropriate where the claimant was not out of pocket and the solicitors were to receive, in any event, a 100% uplift on recoverable costs. However, it was said that that would not necessarily apply in all CFA cases and judges must consider what is just on the particular facts of the case before them. The amount of the uplift in this case was not disclosed.

Challinor & Ors v Bellis & Anor

Appropriate discretionary interest rate where commercial claimant does not depend on credit

http://www.bailii.org/ew/cases/EWHC/Ch/2013/620.html

Clyde & Co for defendants

One of the issues in this case was the appropriate rate of discretionary interest in a commercial claim. Hildyard J said that the prior caselaw distinguished between two cases: (1) where money has been lost and the claimant company has had to borrow funds to maintain the business; and (2) where no money has been lost – instead the award increases the claimant's funds (eg a personal injury case). In the first case, the court adopts a broad brush approach to apply a rate approximating to the cost that a claimant in that line of business would have incurred in borrowing money. In the second case, the court seeks to identify an appropriate rate to represent the minimum return which the claimant would have achieved had the money been placed on deposit at the date of the event giving rise to the claim.

However, this case fell into a third category: the claimant was not running a business which depended on credit (ie the presumption of the need for credit was weak or non-existent), and so its loss of money might only deprive it of other opportunities. In such a case, neither a minimum investment nor a proxy borrowing cost basis was appropriate. Instead the appropriate rate was "such rate as is reasonable to assume that persons in the position of the Claimants would have had to pay for monies for geared investment". In this case, the judge expected rates lower than unsecured lending rates to have been available to these borrowers because they plainly had surplus available assets and any borrowing would not have been to fund trading activities but instead to fund a geared investment strategy.

Hildyard J concluded that the appropriate rate to compensate the claimants for being kept out of their money was 3% above base rate.

Taylor v A.Novo

Whether "secondary victim" could claim even though not present at scene of accident - of possible interest to liability insurers

http://www.bailii.org/ew/cases/EWCA/Civ/2013/194.html

An employee was injured in an accident at work, caused by the admitted negligence of her employer. She died suddenly, 21 days after the accident, due to deep vein thrombosis caused by her injuries. Her death was witnessed by her daughter (who had not witnessed the accident itself). As a result, the daughter suffered significant post-traumatic stress (a psychiatric injury). At first instance, the judge held that she was entitled to claim damages as a "secondary victim" of the accident. The employer appealed, arguing that one of the requirements for recovery as a secondary victim had not been met in this case: namely, that she was either present at the scene of the accident which caused the death or was involved in its immediate aftermath. The Court of Appeal has now upheld that appeal.

In secondary victim cases, there is a need for "proximity" in the relationship between the claimant and the defendant and also for physical proximity in time and space to an event. These "control mechanisms" are intended to limit the number of persons who can claim damages. In this case, there had been one event (the original accident) which had had two consequences – the initial injury and the employee's death. If the judge's decision had been correct, the daughter would have been able to recover damages even if the death had occurred months, or even years, after the accident. The Court of Appeal said that that was stretching the concept of proximity too far, and that only Parliament should extend the scope of liability to secondary victims in this manner.

Further information
If you would like further information on any issue raised in this newsletter please contact:

Nigel Brook
E: 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