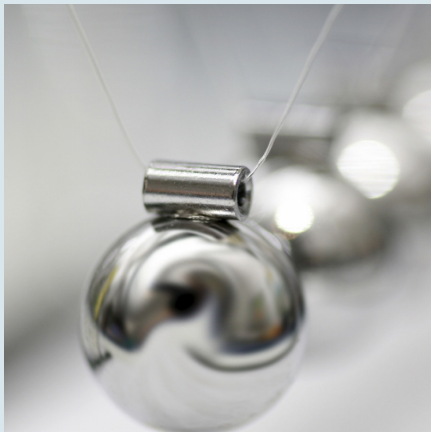


Weekly update



Welcome to the thirteenth 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

Wright v Michael Wright

A case on litigants in person and the court's encouragement for mediation.

Flatman v Germany

Court of Appeal decides whether a claimant's solicitors should have to disclose funding arrangements to the winning defendant, where the claimant had a CFA but no ATE insurance.

Fiona Trust v Skarga

A case on bribery and the applicable law.

Wright v Michael Wright

Litigants in person and the court's encouragement for mediation

<http://www.bailii.org/ew/cases/EWCA/Civ/2013/234.html>

This case involved an appeal from a first instance decision on the basis of alleged procedural impropriety. Sir Alan Ward took the opportunity to make two general points though:

- (1) The courts are facing increasing difficulties in dealing with litigants in person. Judges must try to “bring order to the chaos which litigants in person invariably – and wholly understandably – manage to create”, without having to “micro-manage cases, coaxing and cajoling the parties to focus on the issues that need to be resolved”. He commented that: “It may be saving the Legal Services Commission which no longer offers legal aid for this kind of litigation but saving expenditure in one public department in this instance simply increases it in the courts”.
- (2) His second concern was that “the case shows it is not possible to shift intransigent parties off the trial track onto the parallel track of mediation”. He concluded that it may be time to review the rule in *Halsey v Milton Keynes* [2004] in which Dyson LJ said that “It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court”. Sir Alan Ward appears to suggest that that observation was obiter and possibly wrong. He went on as follows: “Does CPR 26.4(2)(b) allow the court of its own initiative at any time, not just at the time of allocation, to direct a stay for mediation to be attempted, with the warning of the costs consequences, which *Halsey* did spell out and which should be rigorously applied, for unreasonably refusing to agree to ADR? Is a stay really “an unacceptable obstruction” to the parties right of access to the court if they have to wait a while before being allowed across the court's threshold? Perhaps some bold judge will accede to an invitation to rule on these questions so that the court can have another look at *Halsey* in the light of the past ten years of developments in this field”.

As for the appeal itself, the Court of appeal allowed it on the basis that the judge had wrongly conducted the trial on the written information which he had, without allowing the defendants to call live evidence.

Flatman v Germany

Whether claimant's solicitors liable to disclose funding arrangements to winning defendant, where claimant had a CFA but no ATE insurance

<http://www.bailii.org/ew/cases/EWCA/Civ/2013/278.html>

The personal injury claimants in these two unconnected appeals had lost their personal injury claims. They had conducted those proceedings pursuant to a CFA entered into with their solicitors but had not taken out ATE insurance cover. Since the claimants were impecunious, they were unable to pay the costs of the defendants (or their insurers). The insurers sought recovery of those costs from the claimants' solicitors.

The particular issue in this case was whether the insurers were entitled to disclosure of the claimants' funding arrangements. However, as Leveson LJ recognised, the case could have wider implications because, if successful, the insurers would be able to undermine the principle of qualified one-way costs shifting in personal injury cases (which would limit the recovery of costs by insurers in failed personal injury cases). However, the insurers argued that the claimants' solicitors here had stood to make a large profit had the claimants won, with only a limited downside risk. Eady J had ordered the claimants' solicitors to disclose how the claims had been funded (the insurers suspected that the solicitors had paid disbursements on behalf of the claimants) and the solicitors appealed against that decision.

The Court of Appeal held that the Courts and Legal Service Act 1990 “does visualise the possibility that a solicitor might fund disbursements and, in that event, it would not be right to conclude that such a solicitor was ‘the real party’ or even ‘a real party’ to the litigation”. Accordingly, the payment of disbursements, without more, does not incur any potential liability to an adverse costs order.

However, the Court of Appeal went on to find that, on the particular circumstances of the case, an order for disclosure had been justified. The losing claimant in one of the cases alleged that his solicitors pressed on with the litigation without ATE insurance and that was contrary to his express instructions. That “could” (although not necessarily “will”) justify an order for costs against the solicitor and so would also justify disclosure of funding arrangements.

Fiona Trust v Skarga

Bribery and the applicable law

<http://www.bailii.org/ew/cases/EWCA/Civ/2013/275.html>

The issue in this case is whether the tort of bribery was governed by English or Russian law. This was important because if Russian law was applicable, the bribery claim would fail. Section 11 of the Private International Law Act 1998 provides that there is a general rule (in non-personal injury or property damage cases) that the applicable law will be the “law of the country in which the most significant element or elements of those events occurred”. Applying the principles laid down in *VTB Capital v Nutritek* (Weekly Update 05/13), the Court of Appeal held that the applicable law pursuant to section 11 would be Russian law here, because the provision, or arrangements, for the bribes had all been made in Russia.

However, the appellant sought to argue that English law applied pursuant to section 12 of the 1998 Act. Section 12 provides that the general rule in section 11 will be displaced if it appears, in all the circumstances (and after comparing the significance of the factors connecting a tort with that country and the significance of any factors connecting the tort with another country), that it is “substantially more appropriate” for the applicable law to be the law of another country. Here, the appellant sought to rely on the fact that, as a consequence of the bribery, contracts governed by English law were entered into. That argument was rejected by the Court of Appeal. Here, the claim regarding bribery was a free-standing tort claim, unassociated with any claim for breach of a resulting contract. The focus of the conspiracy/bribery had been in Russia, even if the “schemes were played out elsewhere”.

Accordingly, Russian, and not English, law applied to the claim.

Further information

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