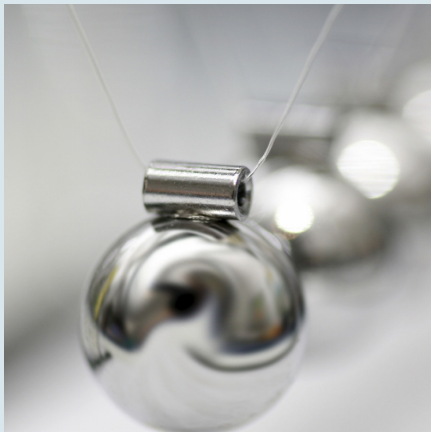


Weekly update



Welcome to the twenty-second 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

Gleeson Group v Axa Corporate Solutions

Court decides whether an extension to a public liability policy was a stand-alone insuring clause and the meaning of a "claim" against the insured.

AES LLP v JSC

The Supreme Court upholds a court's power to grant an anti-suit injunction to restrain foreign (non-EU) proceedings brought in breach of an arbitration agreement.

Crawford Adjusters v Sagicor

The Privy Council recognises the tort of malicious prosecution of civil proceedings.

Group Seven v Allied Investment

A case on the scope of a freezing order and whether it extends to assets in a company owned by a sole shareholder/director.

Atrium Trading v Connor Williams

Court decides whether an extension of time to comply with disclosure obligations should be granted.

Euromark v Smash Enterprises

A decision on whether the English court should uphold an exclusive jurisdiction clause in favour of Australia.

Al Saud & Anor v Apex Global Management

A case on the scope of sovereign immunity for family members "forming part of his household".

Other News

The FCA confirms that firms which may have actual or potential Employers' Liability insurance claims must conduct effective searches.

Gleeson Group v Axa Corporate Solutions

Whether an extension to a public liability policy was a stand-alone insuring clause/the meaning of a “claim” against the insured

The insured, the main contractor on a development, sought a declaration that it was entitled to an indemnity. Insuring Clause 1 of the Public Liability section of its policy provided cover, in the usual way, for sums which the insured became legally liable to pay for (inter alia) “damage to property”. The insured had taken out additional cover for the defective workmanship of its sub-contractors under the Public Liability section. This extension was worded as follows: “This Section of the Policy extends to indemnify the insured in respect of legal liability arising from the defective workmanship of their subcontractors... provided that 1) a claim is first made against the Insured or notification given...by the Insured of circumstances which might lead to a claim during the Period of Insurance”. Raynor QC HHJ considered the following issues:

- (1) Did the extension require damage to property or was it a stand-alone insuring clause? The judge considered *Tesco Stores v Constable* (see Weekly Updates 36/07 and 16/08), but concluded that it was of little assistance in this case because the policy there had been an entirely conventional Public Liability policy, whereas here the extension “provided cover considerably more extensive than that provided by a conventional Public Liability policy”. He held that the extension was not intended to be a self-contained insuring clause.

The wording “This Section of the Policy extends to indemnify” indicated that the extension was to be governed by Insuring Clause 1. The judge’s view was reinforced by the use of the words “The Company [ie insurer] will indemnify” for other policy extensions (that wording being apt to show that those extensions were not to be governed by Insuring Clause 1). It made no difference that there was no express reference to “damage to property” in the relevant extension. Furthermore, it would have been “extraordinary” for the extension to effectively guarantee the workmanship of the sub-contractors, and clear wording would have been needed to achieve that effect (and even, possibly, “some other description of the cover” (as per Tuckey LJ in the *Tesco* judgment)).

- (2) The insured had received a letter from an agent of the funder of the development (rather than the property owner) which referred to various problems with the development (and enclosing a report detailing the alleged defects) and requesting comments on the report “together with your proposals for rectifying these apparent deficiencies”. The judge concluded that, although the letter constituted more than a mere request for information - and was also an expression of discontent - it did not amount to a “claim” against the insured. Crucially, there was no assertion of a right to relief (see the first instance decision in *Thorman v New*

Hampshire [1988]). However, the letter did amount to “circumstances which might lead to a claim”. Whether a claim actually ensued was depended on the insured’s response to the letter.

Comment: In reaching his decision about the scope of the policy extension, the judge took into account the commercial context in which the policy was placed. Although insurance against the defective workmanship of sub-contractors, without the need to show property damage, is available in the market, it can only be obtained from a small, specialist sector and “usually at a substantial premium”. It is therefore a useful reminder that reference can be made to commercial matters when construing the terms of a policy.

AES LLP v JSC

Supreme Court upholds court’s power to grant anti-suit injunction to restrain foreign (non-EU) proceedings brought in breach of an arbitration agreement

<http://www.bailii.org/uk/cases/UKSC/2013/35.html>

The earlier decisions in this case were reported in Weekly Updates 15/10 and 20/11. The parties entered into a contract which contained an arbitration agreement which was governed by English law and which provided for disputes to be settled by arbitration in London. When the appellant commenced proceedings in Kazakhstan, the respondent obtained an anti-suit injunction from the English courts (the prohibition laid down in the *West Tankers* case (see Weekly Update 06/09) for anti-suit injunctions in support of arbitration being inapplicable here, since the court first seised was not an EU court).

The unusual feature of this case was that the respondent had not commenced arbitral proceedings yet (and, in fact, had no intention of doing so, because it believed that it was for the appellant to bring its claim in arbitration). At first instance and on appeal to the Court of Appeal, it was held that the English courts had power to grant the anti-suit injunction. The Supreme Court has now unanimously rejected an appeal from those decisions. Lord Mance, delivering the leading judgment, held as follows:

- (1) The “negative aspect” of an arbitration agreement is that neither party will seek relief in any other forum. This negative aspect is a “right enforceable independently of the existence or imminence of any arbitral proceedings” under section 37 of the Senior Courts Act 1981 (which allows the High Court to grant an injunction if it is just and convenient to do so).
- (2) The Arbitration Act 1996 does not contain any provision which overrides the position in (1) above. The drafters of the Act “were not attempting a complete code of arbitration law” and the Act does not solely determine all jurisdictional issues in all situations. Section 1(c) of the Act provides that “the court should not intervene except as provided by this Part”. The use of the word

“should” was a deliberate departure from the more prescriptive “shall” appearing in article 5 of the UNCITRAL Model Law. It implies a need for caution, rather than a complete prohibition, before any court intervention.

- (3) Various provisions in the Act dealing with the issue of whether the arbitrators can rule on their own jurisdiction and challenging the jurisdiction of the arbitrators did not apply in this case because no arbitration was on foot or contemplated.
- (4) Section 44 of the Act grants the court the power to grant an interim injunction in support of arbitral proceedings. It was argued by the appellant that the careful drafting of this section militated against the existence of a general power to injunct foreign proceedings under section 37 of the 1981 Act. In *Starlight Shipping v Tai Ping* (see Weekly Update 31/07), Cooke J held that he could grant an anti-suit injunction under both section 44 of the Act and section 37 of the 1981 Act. The Supreme Court has now held that “the better view” is that the source of the power to restrain foreign proceedings brought in breach of an arbitration agreement is to be found not in section 44 but in section 37 instead

The Supreme Court concluded that: “The general power provided by section 37 of the 1981 Act must be exercised sensitively and, in particular, with due regard for the scheme and terms of the 1996 Act when any arbitration is on foot or proposed”.

Crawford Adjusters v Sagikor

Privy Council recognises tort of malicious prosecution of civil proceedings

<http://www.bailii.org/uk/cases/UKPC/2013/17.html>

The claimant is a loss adjuster retained by the defendant insurer to adjust a claim arising from damage in the Cayman Islands following Hurricane Ivan. Following his appointment, Mr Delessio joined the insurer as Senior Vice President. He and the loss adjuster knew each other and were “not fond of each other”. At Mr Delessio’s instigation, the insurer brought civil proceedings against the adjuster claiming damages for deceit and conspiracy. This claim was based on the findings of two expert reports which erroneously claimed that the adjuster had approved inflated invoices. The trial judge found that Mr Delessio was aware that the expert reports were wrong and that he had set out to destroy the adjuster’s career. After judgment was entered in favour of the adjuster (following discontinuance by the insurer), he commenced proceedings against the insurer for damages for malicious prosecution and/or abuse of process.

By a majority of 3:2, the Privy Council has now allowed his claim for malicious prosecution and therefore, in the words of Lord Wilson given “renewed recognition” of this tort in the context of the prosecution of civil (rather than just criminal) proceedings. The claim for abuse of process was rejected, though, on the basis that there was no proof that the insurer/Mr Delessio had not intended to bring the action to trial.

It was held that the rationale behind earlier curbs on the ability to bring a malicious prosecution claim in relation to civil proceedings (ie that the bringing of a civil action could not damage a defendant’s reputation because pleadings were private) no longer applied. Furthermore, Lord Kerr said that “for every injustice there should be a remedy at law” and that principle overrode other objections (eg the possible “chilling effect” on parties bringing civil claims and further claims being made at the end of a case).

Accordingly, the claimant was able to recover his foreseeable economic loss (beyond out-of-pocket expenses), because he had established the 4 elements of the tort: (a) prior proceedings determined in his favour; (b) allegations of fraud and conspiracy made against him without reasonable cause; (c) allegations made maliciously; and (d) substantial financial loss suffered as a result of the allegations.

Group Seven v Allied Investment

Scope of freezing order and whether it extends to assets in a company owned by a sole shareholder/director

<http://www.bailii.org/ew/cases/EWHC/Ch/2013/1509.html>

The claimant obtained a freezing order against an individual (Mr S). Mr S was the sole director and shareholder of a company which was owed a debt by a third party. When Mr S settled that debt at an undervalue, the claimant sought to commit him for contempt on the basis that he had disposed of an asset, in breach of the freezing order.

The freezing order contained the following wording which is included in the standard form freezing order annexed to PD25A: "For the purpose of this order the Respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions". Hildyard J held as follows:

- (1) This standard wording does not cover assets owned by a company of which the respondent is the sole director and shareholder. Although he recognised that this might dilute the efficacy of the standard CPR form of freezing order, he said that "to my mind, there is no escape from it", applying settled principles of company law. In reaching the settlement here, Mr S was not telling the company what to do, "he was acting in right and on behalf of the company. He was the means whereby the company, as an artificial creation, acted".
The judge recognised that the use of wholly owned and controlled companies, not as a trading vehicle but as a "convenient wallet or pocket", is not uncommon and may justify an extension of the ordinary form of order. Nevertheless, he cautioned that such an extension would be justified only in exceptional circumstances.
- (2) The judge also held that it did not matter that in this case the claimant had failed to effect personal service. He dispensed with personal service on the basis that the respondent and his advisers had been fully aware of the freezing orders and the consequences of any breach.
- (3) Although an application notice for committal should give clear and fair notice of the breach alleged and the basis of the allegation (and ordinarily any defect cannot be cured by reference to the supporting affidavit or skeleton argument), in this case, it sufficed that Mr S and his advisers were aware of the allegations made against him.

Atrium Trading v Connor Williams

Whether an extension of time to comply with disclosure obligation should be granted

<http://www.bailii.org/ew/cases/EWHC/Ch/2013/1562.html>

The respondents applied for an order for disclosure in "unless" form, following a "long and troubled" disclosure exercise by the applicants, who, in turn, sought an extension of time for complying with their disclosure obligations.

The application was made before the end of the period specified in an earlier disclosure order, and so this was not a case where the court has to consider whether the conditions for relief from sanctions under CPR r3.9 are satisfied. Instead, the respondents sought to rely on the new overriding objective and the emphasis on "enforcing compliance with rules, practice directions and orders".

Whilst acknowledging that courts will scrutinise an application for an extension now more vigorously than it might have done prior to 1 April, Henderson J advised that "On the other hand, I think it is important not to go to the other extreme, and not to encourage unreasonable opposition to extensions which are applied for in time and which involve no significant fresh prejudice to the other parties. In cases of that nature, ...the wider interests of justice are likely to be better served by a sensible agreement, or a short unopposed hearing, than by the adoption of entrenched positions and the expenditure of much money and court time in preparing for and dealing with an application that could have been avoided".

Furthermore, "there are some orders relating to the completion of specified stages in preparation for trial (such as disclosure, the exchange of witness statements or a timetable for expert evidence) where there may still be so many imponderables when the order is made that the date for compliance cannot sensibly be regarded as written in stone". Based on the circumstances of this case, the judge agreed to extend time but also granted that extension on "unless" terms.

Euromark v Smash Enterprises

Whether the English court should uphold an exclusive jurisdiction clause in favour of Australia

<http://www.bailii.org/ew/cases/EWHC/QB/2013/1627.html>

The parties entered into a contract which provided for the exclusive jurisdiction of the Australian courts. The claimant alleges that the defendant wrongfully repudiated the contract (because it was commercially convenient for it to do so) and the defendant accepted that it did, at least initially, purport to terminate the contract without proper grounds. The claimant obtained permission from the English court to serve its claim form out of the jurisdiction and the defendant sought to discharge that order.

Coulson J has now held that the order should be discharged (on the basis that the case should be heard in Australia). In reaching that conclusion he noted as follows:

- (1) Where there is an exclusive jurisdiction clause (particularly if it selects the “home” court of one of the parties), foreseeable questions of convenience are irrelevant. It will be necessary instead to show a factor which could not have been foreseen when the contract was made. In this case, it was foreseeable that one of the parties might have repudiated the contract.
- (2) Only in rare cases will a party be able to rely on the interests of justice eg the foreign court may not afford a fair trial or may, in some other way, be potentially unreliable or unjust. It did not matter that the claimant here might have a very strong claim.
- (3) Although the case might involve further claims against third parties, Coulson J relied on textbook commentary in *Dicey and Morris* which states that it will not be enough if the claimant merely asserts that it is contemplating joinder or additional claims, but has not yet commenced such claims. Furthermore, the risk of different proceedings in different places is generally insufficient in itself.

Al Saud & Anor v Apex Global Management

Scope of sovereign immunity for family members “forming part of his household”

<http://www.bailii.org/ew/cases/EWCA/Civ/2013/642.html>

Section 20 of Part III provides immunity to a sovereign or other head of state and “members of his family forming part of his household”. The issue in this case was whether that definition was wide enough to cover members of the family of the present King of Saudi Arabia who lived separately from the King and had their own business activities.

The Court of Appeal held that the meaning of the phrase in section 20 was no wider in relation to heads of state than it is for diplomats. For diplomats, the central criterion for extension of personal immunity to family members is “dependence, rather than the performance by any such persons of diplomatic duties or functions on the diplomat’s behalf”. Accordingly, the family members here did not qualify for the immunity.

Article 31(1)(c) of the Vienna Convention on Diplomatic Relations (which has been incorporated into UK law) provides diplomatic immunity from a state’s civil jurisdiction except in the case of “an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions”. The alleged commercial activities here took place outside the UK. At first instance the judge held that the requirement in Article 31(1)(c) for the commercial activities to take place in (here) the UK should be removed as “a necessary modification”. That view was rejected by the Court of Appeal (although it was not required to decide the point).

Other News

The FCA confirms new rules on employers’ liability (EL) insurance. This means that firms which may have actual or potential EL insurance claims must conduct effective searches of their historical policy records when they receive a request from individuals, their representatives, employers, insurers, intermediaries or a qualifying tracing office: <http://www.fca.org.uk/static/documents/policy-statements/ps13-02.pdf>

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

Further advice should be taken before relying on the contents of this summary. Clyde & Co LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary.

No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co LLP.

Clyde & Co LLP is a limited liability partnership registered in England and Wales. Authorised and regulated by the Solicitors Regulation Authority.
© Clyde & Co LLP 2013