Insurance and reinsurance
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CLYDE&CO

Weekly update

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

A summary of recent developments in insurance, reinsurance and litigation law.

This week's caselaw

Michael v Middleton

An application for relief from sanctions and the new rule CPR r3.9.

National Museums and Galleries v AEW Architects

A decision on whether the Late Payment of Commercial Debts Act applied and varying a costs management order.

BNP Paribas v Anchorage & Ors

A case on whether an anti-suit injunction should be granted and whether a jurisdiction clause was exclusive.

SC Johnson v Hillshire Brands

A decision on whether the court should order a party to conduct an arbitration against a third party with reasonable expedition.

Michael v Middleton

Application for relief from sanctions and the new rule CPR r3.9

The claimant's former solicitors failed to comply with an order for service of witness statements (for tactical reasons) and with an unless order for service of a list of documents. The claim was therefore struck out and the claimant (who has since instructed new solicitors) applied for relief from sanctions under CPR r3.9. Cooke J held as follows:

(1) The new version of CPR r3.9 applies where the application is made after 1 April 2013. It does not matter if (as here) both the breach occurred and the sanction was imposed before 1 April.

(2) The intention behind the new rule is that it introduces a "more restrictive regime".

(3) Although the checklist of relevant considerations has been removed from the new rule, it continues to be relevant, although the court does not have to deal with each and every consideration.

(4) It was highly relevant in this case that the claimants were still not in a position to remedy the default which had led to the striking out order. The original trial date had been missed because of this default and it would give "the wrong impression" to allow a defaulting party to overcome that problem by simply setting a new timetable. That consideration was more important than the other factors relied on by the claimant, such as: the fact that the default had been caused by his former solicitors (the judge said that an action could be brought against those solicitors and although it would be for the loss of a chance, rather than the full amount potentially recoverable from the defendant, sometimes a loss of chance can be more valuable where the original action might have failed); and the fact that the issues between the parties can and probably will be litigated and are unlikely to be time-barred or subject to an abuse of process argument.

National Museums and Galleries v AEW Architects

Whether the Late Payment of Commercial Debts Act applied and varying a costs management order

http://www.bailii.org/ew/cases/EWHC/TCC/2013/3025.html

The parties agreed that the claimant was entitled to interest on the costs and expenses which it incurred in dealing with the damage caused by the defendant. The issue, though, was what was the appropriate rate of interest on those costs?

The defendant argued it should be the usual 0.5% above base rate (the discretionary rate of interest on debt or damages awarded by the court). However, the claimant sought to argue that the 8% prescribed by the Late Payment of Commercial Debts (Interest) Act 1998 applied because this was a liability for damages for a breach of contract. That argument was rejected by Akenhead J. Under the Act a qualifying debt relates to "an obligation under a contract... to pay the whole or any part of the contract price". Thus a distinction is drawn between payment of the contract price and liability for damages for breach of contract.

The claimant also sought an interim payment on account of costs. The defendant argued that such payment should relate to the last formally approved budget (this being a case in which a costs management order had been made) and not to a later increased costs estimate which the court had not approved. Reference was made to the case of *Elvanite v AMEC* (see Weekly Update 23/13) and the comments there that a party wishing to amend a CMO must make a proper application and this should be done "immediately it becomes apparent that the original budget costs have been exceeded by more than a minimal amount".

Akenhead J observed that there is no requirement in PD 51G (which applies to the TCC pilot scheme) for a formal application to be made and the court may of its own motion approve a revision. However, this case differed from *Elvanite* in any event because here there had simply been an "oversight" by both parties and there had been insufficient time for the court to deal with this issue previously. For those reasons, a substantial upward departure from the approved budget was acceptable.

BNP Paribas v Anchorage & Ors

Whether an anti-suit injunction should be granted and whether a jurisdiction clause was exclusive

http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Comm/2013/3073.html&query=title+(+paribas+and+anchorage+)&method=boolean

Having decided that the English court did have jurisdiction, Males J went on to consider whether an anti-suit injunction should be granted to prevent the defendant pursuing proceedings already commenced in New York. The parties disputed whether the jurisdiction clause in question was exclusive or non-exclusive. It read as follows: "you [*the defendant*] irrevocably submit to the jurisdiction of the English courts in respect of any matter arising out of this Agreement". The judge said that a discussion about transitive (i.e. submitting a dispute to the jurisdiction) and intransitive (i.e. a party submitting to a jurisdiction) clauses "is so elusive that it escapes me altogether". Instead, the question was whether the commencement and pursuit of foreign proceedings was something which a party had promised not to do.

Here, only the defendant had promised to submit to English jurisdiction. In that sense the clause was non-exclusive. However, since the claimant wished to exercise its right to litigate in England, the defendant was breaking its promise to submit to the English courts. As a matter of "common sense" the parties could not have intended the defendant to be allowed to litigate in New York where the claimant had exercised its right to litigate in England: "on the contrary, they would rightly have regarded it as a procedural nightmare". Since the other court was outside the EU, the English court will normally exercise its discretion to restrain foreign proceedings which are brought in breach of contract.

Accordingly, the anti-suit injunction was granted.

SC Johnson v Hillshire Brands

Whether court should order a party to conduct an arbitration against a third party with reasonable expedition

http://www.bailii.org/ew/cases/EWHC/Ch/2013/3080.html

In a contract entered into between the parties, the defendant agreed to procure the transfer of certain rights. It subsequently commenced arbitration against a third party in order to comply with this obligation. However, the claimant sought the following orders for interim relief from the English court (the contract between the parties providing for English law and jurisdiction):

(1) An order that the defendant provide regular updates on the arbitration. Roth J recognised that it would be "wholly exceptional" to make such an order without informing the other party to the arbitration and refused to make the order. Instead, the defendant agreed to provide, as far as possible and on a voluntary basis, bi-monthly updates, subject to confidentiality issues.

(2) An order that the defendant use its best endeavours to prosecute the arbitration with reasonable expedition. Roth J refused to make this order, accepting that it would give the defendant "serious problems in understanding precisely what is required in order to comply".

(3) An order restraining the terms on which the arbitration can be settled. This order was also refused. It was clear that the arbitration was not straightforward and the judge did not think that it was appropriate for the court to seek to control the way the defendant conducted those proceedings.

Further information
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