CONTENTS

IRB Brasil v CX Reinsurance
A case on whether arbitrators had correctly applied the law in a reinsurance dispute

Levicom v Linklaters
A Clyde & Co Court of Appeal case involving the causation test in a solicitors’ negligence case

Kingsway Hall Hotel v Red Sky
An application to withdraw an admission

GE Money v HC Wolton
An application to change the name of the claimant after the end of the limitation period

TNT v Axa
A case on whether the rules in a convention override EC Regulation 44/2001

Astrazeneca v Albermarle
A case on jurisdiction clauses and service out

This Week’s Caselaw

IRB Brasil v CX Reinsurance
Whether arbitrators correctly applied law in a reinsurance dispute


The reinsured was one of a number of insurers who settled various US liability insurance claims against it. It then sought to recover from the claimant, who had participated in an excess of loss reinsurance programme protecting the reinsured’s casualty book of business. After the claimant reinsurer refused to pay, the dispute went to arbitration and the arbitrators found in favour of the reinsured. The claimant then sought to challenge the award on the ground that there had been an error of approach in law by the arbitrators (the parties being agreed on what the correct legal position was).
Three particular issues were raised:

1) The reinsurance policy contained a "double proviso" "follow settlements" clause - i.e. all loss settlements by the reinsured would bind the reinsurers provided such settlements were within the conditions of the original policies as well as within the terms of the reinsurance. Gross J in Equitas v R&Q [2009] concluded that both provisos had to be proven on the balance of probabilities. Burton J decided that although the arbitrators had referred in some parts of the award to arguability rather than a balance of probability, they were expressing themselves to be satisfied on the balance of probabilities that the arguable claims which were settled fell within the terms of the insurance and reinsurance policies. Thus they had applied the law correctly.

2) In relation to an issue regarding allocation, Burton J held that the failure of the arbitrators to refer expressly to the case of Municipal Mutual v CSEA [1998] did not mean that they had adopted an approach which was inconsistent with that case.

3) The "each and every loss" clause in the reinsurance policy referred to a loss or series of losses arising out of one event. In the award, the arbitrators did "commit what might be termed a "howler"" by referring to whether "the loss each year stemmed from a single cause". As Lord Mustill held in Axa Re v Field [1996], "cause" and "event" are "not at all the same". Nevertheless, Burton J said that he was clear that the arbitrators had in fact meant to say "event" instead of "cause".

**Levicom v Linklaters**

**Causation test in a solicitors' negligence case**


Clyde & Co for respondents

This case involved a claim for negligence against the claimants' former solicitors. It was alleged that, relying on the defendants' advice, the claimants did not settle the dispute but brought arbitration proceedings and thereafter concluded a settlement on unsatisfactory terms. At first instance, the judge found that there had been some negligent advice but ordered only nominal damages because the claimants had failed to show that they would have reached a more favourable settlement in the absence of the solicitors' advice. The Court of Appeal has now reversed that finding. Burnett LJ said that there would be no point in the claimants seeking and paying for the solicitors' views if they were not to influence their conduct of the dispute: "One has to ask why a commercial company should seek expensive City solicitors' advice (and do so repeatedly) if they were not to act on it". According to Jacob LJ, when a solicitor gives advice that his client has a strong case to start litigation rather than settle, and the client then does just that, "the normal inference is that the advice is causative" and so the judge at first instance should have approached the case on the basis that the evidential burden had shifted to the solicitors to prove that their advice was not causative.

On a procedural note, the appellants had incorrectly omitted from the grounds of appeal a distinct point which they wished to argue and had instead set it out in their skeleton argument. That was a breach of paragraph 3.2 of PD 52. However, the Court of Appeal agreed that in this case, no prejudice was caused by this procedural error (partly because the skeleton argument and the points of appeal were prepared at the same time and served together). Lloyd LJ stressed, though, that the fact that the Court of Appeal allowed the point to be argued "should not be taken as justifying an argument that, if the point is in the skeleton argument, it does not matter whether it is in the grounds of appeal".
Kingsway Hall Hotel v Red Sky

Application to withdraw admission


A party who makes an admission either before or after the commencement of proceedings can apply to withdraw it. One of the issues in this case was whether the court should allow the withdrawal of an admission. In the case of Braybrook v Basildon and Thurrock [2004], the judge set out certain matters to be considered: (1) the reasons for the application; (2) the balance of the prejudice to the parties; (3) the prospects of success of an issue arising from the withdrawal; and (4) public interest. In this case, Toulmin J said that these matters were only considerations and should not be construed as if they were a statute. He also added a further consideration: whether the application to withdraw has been made reasonably promptly after the factual position is known. It is also the case that where an application is made close to the trial date, the court should be particularly vigilant to ensure that the withdrawal doesn't put the parties on an unequal footing or places an unfair burden on the other side in preparing for trial.

On the facts of this case, the judge refused permission to withdraw the admissions. The application had been made only a few days before trial and it would have placed an unfair burden on the other side to have to consider a fundamental change to the claimant's case.

GE Money v HC Wolton

Application to change name of claimant after end of limitation period

http://www.bailii.org/ew/cases/EWHC/Ch/2010/1011.html

This case concerns alleged professional negligence by a surveyor who produced a valuation report which the lender relied on when advancing funds. The claim form was issued a few days before the limitation period expired. It named Money Home Lending as the lender, but it later transpired that the lender was Money Mortgages. An application was made to amend the name of the claimant after the expiry of the limitation period. Glentworth DJ ordered substitution of the claimant and the lender appealed. In this decision, Behrens J allowed the appeal. He applied the reasoning in "the Sardinia Sulcis" [1991] case - it was possible to identify the intending claimant or defendant "by reference to a description which was more or less specific to the particular case...If the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise". This case was clearly a mistake as to name and not as to identity.

However, this was a case where the court should exercise its discretion not to allow the amendment because the defendant had plainly not known the identity of the correct claimant until well after the limitation period had expired. This was not a case where the defendant was aware of the proceedings and of the mistake so that no injustice was caused by the amendment.

TNT v Axa

Whether rules in a convention override EC Regulation 44/2001


TNT entered into a contract for the carriage of goods by road from the Netherlands to Germany. The goods were lost in transit. TNT commenced proceedings in the Netherlands for a declaration that it was not liable and the the insurer of the owner of the goods then commenced proceedings against TNT in Germany. TNT sought to argue that Art 31 of the Convention on the Contract for the International Carriage of Goods by Road ("the CMR") applied, so that the German court lacked jurisdiction to hear the case. It was clear that the dispute fell within both the CMR and EC Regulation 44/2001.
The Grand Chamber of the ECJ was therefore asked to interpret Article 71 of EC Regulation 44/2001 which, broadly, provides that Regulation 44/2001 does not prevent a court of a Member State, which is a party to a convention on a particular matter, from assuming jurisdiction in accordance with that convention.

The ECJ concluded that Article 71 of EC Regulation 44/2001 must be interpreted as meaning that the rules governing jurisdiction, recognition and enforcement that are laid down by a convention on a particular matter, such as the *lis pendens* rule and the rule relating to enforceability set out in Article 31 of the CMR apply provided that they are highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimised and that they ensure, under conditions at least as favourable as those provided for by the regulation, the free movement of judgments in civil and commercial matters and mutual trust in the administration of justice in the European Union. However, the ECJ did not have jurisdiction to interpret Article 31 of the CMR.

**Astrazeneca v Albermarle**

**Jurisdiction clauses and service out**


The English claimant brought an action against the two defendants (companies incorporated in Virginia, USA) and the defendants applied for an order that the English court had no jurisdiction to hear the proceedings or that the English proceedings should be stayed pending resolution of proceedings before the courts in the US. Much of the case turns on its particular facts but Hamblen J did reach certain conclusions which might have a wider application:

1) Although there is conflicting caselaw on the point, the burden of proof lies on a defendant who wishes to dispute the grant of permission to serve out on the grounds of a jurisdiction clause in favour of the courts of another country. The defendant must therefore establish the existence of the jurisdiction agreement.

2) There was a dispute between the parties as to whether, in relation to the law applicable to issues of separability, this is a procedural matter (governed by the law of the forum) or whether this is a substantive issue (governed by the law which governs or would govern the jurisdiction agreement). The judge concluded that the issue of the validity of a jurisdiction clause is to be determined by the law by which the agreement would be governed if it were valid, unless the alleged ground of invalidity offends some mandatory law of the law of the forum.

3) One of the jurisdictional "gateways" for service out is that there is a claim for restitution where the defendant's alleged liability arises out of "acts" committed within the jurisdiction (PD3.1(16). In this case, the defendant sought to argue that alleged non-deliveries of stock were omissions and so did not fall within the gateway. That argument was rejected by the judge. He adopted the view taken in Briggs and Rees on Civil Jurisdiction and Judgments (5th edn) that: "As to whether an omission to perform an act within the jurisdiction – such as the failure to pay contractual consideration – would suffice to bring the claim within the paragraph, principle suggests that it should, if the act complained of as not done was one which was required to be done within the jurisdiction".