CLYDE&CO

Weekly Update

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

44/10

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This Week's Caselaw

Emerald Supplies & Anor v British Airways Plc

Court of Appeal decision on criteria for representative actions

http://www.bailii.org/ew/cases/EWCA/Civ/2010/1284.html

The claimants commenced proceedings against BA seeking damages for alleged price-fixing of air freight services. The claimants sought collective redress for consumers of the services and so claimed on their own behalf and as representatives of all other "direct or indirect purchasers of air freight services the prices for which were allegedly inflated by agreements or concerted practices". CPR r19.6 provides that a representative action can be begun or continued by one or more persons who have the "same interest" as any other persons who have that interest. The Chancellor of the High Court (in a decision reported in Weekly Update 15/09) struck out the representative element of the claim and the claimants appealed.

The Court of Appeal has now dismissed the appeal. It held that:

1) The Chancellor said that the more extensive the class, the more clearly the other pre-conditions under CPR r19.6 should be satisfied. However, he did not lay down any distinct condition about the size of the class of persons to be represented.

2) At all stages of the proceedings, and not just at the date of judgment at the end, it must be possible to say of any particular person that he/she has the "same interest" as the claimants. This does not mean that the membership of the group must remain constant and closed throughout. However, the problem here was not about changing membership. It was instead about how to determine whether or not a person is a member of the represented class at all.

3) Judgment on liability would have to be obtained before it could be said that the interests of the persons whom the claimants seek to represent are the same. Furthermore, the members of the proposed class would not have the same interest if a defence is available against some of them but not others. For example, in certain cases, purchasers might have passed on the inflated price to their own customers: "If there is liability to some customers and not to others they have different interests, not the same interest, in the action".

4) As the case fell outside of CPR r19.6, it was not necessary to consider whether the court should have refused to exercise its discretion to strike out the representative claim.

Linklaters v McAlpine & Ors

Scope of duty of care where element of building causes damage to other parts

http://www.bailii.org/ew/cases/EWHC/TCC/2010/2931.html

Clyde & Co (Victor Rae-Reeves and Monique Brostek) for Brit Insurance, the insurers of Southern

Linklaters, the lessee and occupier of a building, contracted with a developer who in turn employed McAlpine as the main contractor to undertake refurbishment works. McAlpine sub-contracted the mechanical and electrical works (which included the insulated pipework for the building's air-conditioning system) to How, who in turn sub-sub-contracted the installation of the insulation works to Southern. Some 10 years after completion of the work, a leak from one of the pipes which served the air-conditioning system led to the discovery of widespread corrosion of those pipes. Linklaters claimed under contractual warranties against McAlpine and How (in two separate proceedings). How, in turn, pursued Southern for damages for an alleged breach of duty of care owed to it. How also sought contribution from Southern pursuant to the Civil Liability (Contribution) Act 1978.

Various issues therefore fell to be decided in this case:

1) On the facts, the corrosion of the pipes was caused by the failure of the insulation around the pipes. McAlpine and How were liable under their contractual warranties to Linklaters but (even assuming it owed a duty of care) it was not proven that Southern had breached any duty.

2) Although not necessary to do so, Akenhead J went on to consider what the legal position would have been had Southern breached its duty of care. He held that:

   (a) The claim against Southern by How would not have been time-barred. Southern's duty of care would have been intended to protect How against the economic loss directly flowing from Southern's breach. The "relevant loss" would have arisen not when the work (including any carelessly executed insulation work) was handed over, but instead when a claim was first intimated against How by Linklaters;

   (b) Linklaters (again, on the facts) had a sufficient interest in the property (ie the pipework) for a duty of care to arise;

   (c) The final argument raised by Southern was based on authority (the House of Lords case of *Murphy v Brentwood* [1991]) that the scope of any duty of care does not cover damage caused "to the thing itself".

How sought to argue that the duty of care extended to damage to the pipework caused by careless insulation work, because the pipework was "other property". Southern countered that the insulation and the pipework together constituted one installation and thus damage to the pipework was damage "to the thing itself". Akenhead J acknowledged that there is little direct authority on this topic. Drawing an analogy from US caselaw, he concluded that the insulated pipework was essentially one "thing" for the purposes of tort. The insulation was a key component, but a component nonetheless.

Although the result of this conclusion was that Linklaters had no cause of action in tort against Southern, the judge said that that was not an unreasonable result – Linklaters could (and in fact did) protect itself by obtaining contractual warranties from the key contractors. (Furthermore, even if Southern had been held to have been negligent, How should bear the “lion’s share” of responsibility since it was responsible for the design and management decisions relating to the insulation).

COMMENT: Southern applied for summary judgment earlier on in these proceedings (see Weekly Update 20/10). Akenhead J rejected that application and, in so doing, (whilst acknowledging a "floodgates" argument) commented that he saw little or no obvious conceptual difference between this case and that where flood or fire damage is caused to other parts of a building by a carelessly designed or installed boiler. (In *Murphy v Brentwood*, Lord Jauncey accepted that defects in ancillary equipment, such as boilers, could give rise to a duty of care if the defect gave rise to damage to other parts of a building). In this latest decision, Akenhead J appears (after further consideration of the relevant caselaw) to have reversed his opinion. That demonstrates the difficulty which courts often face when determining on which side of the line a particular set of facts fall.

Stellar Shipping v Hudson Shipping

Endorsement of agreement and incorporation of arbitration clause

http://www.bailii.org/ew/cases/EWHC/Comm/2010/2985.html

The claimant challenged an arbitration award in favour of the defendant on the basis that the tribunal lacked substantive jurisdiction because it had not entered into an arbitration agreement with the defendant. The defendant had entered into a Contract of Affreignment ("CoA") with a third party ("P"). The CoA contained an arbitration clause. The claimant agreed to guarantee the obligations of P under the CoA. Rather than entering into a separate letter of guarantee, the claimant instead endorsed the terms of the CoA.

Hamblen J held that, by endorsing and signing up to each of the terms of the CoA, the claimant was agreeing that if any obligation was not performed by P then it would be performed by the claimant. However, that made little sense in the context of an arbitration clause: "If [P] fails to perform its obligations under the arbitration clause [the claimant] cannot perform those obligations since they are personal to [P]. [The claimant]'s endorsement of the arbitration clause can only have meaningful effect if it involves [the claimant]'s own agreement to arbitration in respect of any dispute concerning their own obligations".

Hamblen J held that this approach accorded with the assumption in *Fiona Trust v Privalov* [2008] that rational businessmen intend all disputes to be decided by the same tribunal. It would be surprising if the parties here agreed that the CoA would be subject to arbitration but that they wished any dispute under the linked guarantee to be determined by an unspecified court. This was not a "two contract" case, where clear and express words of incorporation must be used. Although there were two contractual relationships, these were entered into in the context of a single commercial relationship. Nor was this a case where an arbitration agreement was inferred- the claimant expressly agreed to endorse the CoA, including its arbitration clause, as part of its contract of guarantee.

Starglade Properties v Nash

Test for dishonesty, where some people would not consider conduct to be dishonest

http://www.bailii.org/ew/cases/EWCA/Civ/2010/1314.html

The claimant assigned its claim against a third party to Larkstone. Larkstone agreed to hold all monies received from the third party on trust and to pay half of such monies to the claimant. However, it breached that agreement. The claimant initially claimed against Larkstone but after Larkstone was dissolved, it claimed against its sole director (Mr Nash) for having dishonestly assisted in the breach of trust by Larkstone. At first instance, the judge held that Mr Nash had not been dishonest, even though he admitted deliberately preferring other creditors in order "to frustrate" the claimant. The judge said that there may be cases in which different views could reasonably be held: "some might think the conduct dishonest, others not. In such a case, in my view, the defendant is not liable for dishonest assistance". The claimant appealed from this part of his decision.

The Court of Appeal allowed the appeal. It has been established that for a finding of dishonesty, it must be shown that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that the defendant himself realised that by those standards his conduct was dishonest (see *Twinsectra Ltd v Yardley* [2002]). The Court of Appeal rejected a suggestion that the standard of dishonesty is flexible or determined by any one other than by the court on an objective basis. It is irrelevant that there may be a body of opinion which regards the ordinary standard of honest behaviour as being set too high. In this case, the deliberate removal of the assets of an insolvent company so as entirely to defeat the just claim of a creditor is not in accordance with the ordinary standards of honest commercial behaviour "however much it may occur".

Mortgage Express v Sawali

Express waiver of privilege by borrower in a conveyancing transaction

http://www.bailii.org/ew/cases/EWHC/Ch/2010/B23.html

The claimant sought delivery up of files from the predecessor firm of the defendants. The predecessor firm had acted for both the claimant (who was a lender) and its borrowers in a number of mortgage transactions. The defendant accepted that the claimant was entitled to production of documents created in the course of the claimant's retainer but argued that the claimant was not entitled to see documents belonging to the borrowers as these were protected by legal advice privilege. It was accepted by the parties that there were two separate retainers with the lender and borrower and that the Solicitors' Code of Conduct prevented the solicitors from sending the whole file to the lender absent the consent of the borrower.

However, the claimant relied on a term of the agreement between it and the borrower, whereby the the borrower expressly agreed to authorise the solicitor to provide the entire file to the lender, if requested to do so.

The defendants argued that there was no direct communication between the borrower and the predecessor firm and that the authorisation did not extend to privileged material. That was rejected by Brown J. The clause was unambiguous and binding on both the lender and the borrower. Furthermore, the clause is essential in the context of a mortgage transaction - without such a clause, the lender cannot "police" the transaction.

Star Reefers Pool v JFC

Permission to serve application for anti-suit injunction out of the jurisdiction

http://www.bailii.org/ew/cases/EWHC/Comm/2010/3003.html

The claimant applied to continue an anti-suit injunction preventing the defendant from continuing proceedings in Russia. One argument raised by the defendant was that the court lacked power to permit the service of the application for an interim anti-suit injunction out of the jurisdiction because it was not "any other document in the proceedings" within the meaning of CPR r6.37 or 6.38 (the CPR rules governing service out of the jurisdiction in a country other than a Member State or Convention territory). The defendant relied upon the Court of Appeal judgment in *Masri v Consolidated Contractors* [2008], which referred to ancillary orders "in protection of its [the English court's] jurisdiction and its processes, including the integrity of its judgments". The defendant argued that the anti-suit injunction did not fall within that definition. That argument was rejected by Teare J.. The claim form had been properly served and the application for an anti-suit injunction was a "document in the proceedings". It also fell within the definition in *Masri* because "the grant of the injunction prevents any risk of issues in the English proceedings being resolved by an issue estoppel arising out of the Russian proceedings and without regard to the principles of English law which is the applicable law" in this case.

SAS Institute v World Programming

Power of court to vary or revoke an order

http://www.bailii.org/ew/cases/EWHC/Ch/2010/3012.html

The claimant applied to amend the wording of questions which the judge ordered to be referred to the ECJ. CPR r3.1(7) confers on courts a power to vary or revoke their own orders. The Court of Appeal has considered the proper exercise of that power in *Collier v Williams* [2006] and *Roult v North West Strategic Health Authority* [2009]. It concluded that the applicant must show some material change of circumstances or that the judge who made the earlier order was misled in some way (whether innocently or not) as to the correct factual position. The claimant argued that the Court of Appeal had left open the possibility that it might be proper to exercise the power under CPR r3.1(7) in other circumstances too. Arnold J left open that question, instead holding that he was doubtful that he had jurisdiction to vary the order in this case (but in any event, he chose to exercise his discretion to refuse the application).

Further information

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