

Weekly update



Welcome to the fifteenth edition of Clyde & Co's (Re)insurance and litigation caselaw weekly updates for 2012.

These updates are aimed at keeping you up to speed and informed of the latest developments in caselaw relevant to your practice.

Contents

SA v ENE Kos 1

Supreme Court determines the scope of an indemnity clause and what the causation test should be

Aizkir Navigation v Al Wathba National Insurance Co

A case on whether a clause in an insurance policy was a jurisdiction clause and the meaning of "settlement"

Tibbles v SIG PLC

Applying to the court to vary an order where a provision of the CPR had been overlooked

Hughes v The Estate of Williams

A case involving a contribution claim where a child had been placed on booster seat rather than a child restraint seat

Cawdery Kaye Fireman & Taylor v Minkin

A decision on whether solicitors had wrongfully terminated their retainer and entitlement to their outstanding fees

SA v ENE Kos 1

Supreme Court determines scope of indemnity clause and causation issues

<http://www.bailii.org/uk/cases/UKSC/2012/17.html>

One of the issues in this case was the scope of an indemnity clause which provided that charterers would indemnify the owners of a vessel "against all consequences...that may arise ..from the master complying with the agents' order". In this case, the master had been ordered by the charterers to load a vessel. The vessel was subsequently withdrawn by the owners and the cargo was still on board. The owners sought an indemnity for discharging that cargo.

At first instance and in the Court of Appeal, it was held that that the owners' claim for an indemnity was too remote from the original order to load the vessel and that the true cause of loss was the owners' withdrawal of the vessel.

The Supreme Court allowed the appeal. Lords Sumption, Walker and Clarke all agreed that, as long as the order to load was an "effective cause", it did not matter that it was not the only cause. There can be more than one effective cause. Lord Sumption (with whom Lord Walker agreed) used the expression "effective cause" rather than a "but for" cause "which does no more than provide the occasion for some other factor unrelated to the charterers' order to operate. If the charterers' order was an effective cause in this sense, it does not matter whether it was the only one". Nor was the claim too remote from the order to load - once loaded, the cargo had to be discharged somewhere and the withdrawal of the vessel did not break the chain of causation.

Lord Mance disagreed though. He thought that for indemnity clauses it was necessary to identify the "proximate" cause (in theory it might be possible to have two causes which are so closely matched that they are both proximate causes) and that the majority had gone too far in "stretching" the scope of the clause (thus encouraging ever more ambitious claims). He thought that the necessary "direct" or "unbroken" causal link between the charterers' orders and the loss had been broken. Finally, Lord Phillips did not see this as a case of two competing causes - instead, where a charter comes to an end before cargo has been discharged, any consequences "fall naturally within the scope of the indemnity clause".

COMMENT: This is a generous decision for the owners, although it is not clear whether, in reaching their decision, the Supreme Court believed that an "effective" cause (of which there may be several) was any different from a "proximate" cause (certainly Lord Clarke used the two terms interchangeably). Might the decision be relied on in an insurance context, given that contracts of insurance are contracts of indemnity? Neither Lord Sumption nor Lord Walker referred to insurance. Both Lord Mance

and Lord Clarke did refer to insurance, though, Lord Clarke concluding that "As I see it, the question in each case, whether under a contract of insurance or under a contract of indemnity, is whether an effective cause of the alleged loss or expense was a peril insured against or an indemnifying event".

Aizkir Navigation v Al Wathba National Insurance Co

Whether clause in insurance policy was a jurisdiction clause/meaning of "settlement"

The insured, an Egyptian company, issued proceedings in England against the its insurer which is based in the UAE. The insurer applied to set aside the order permitting service of the claim form out of the jurisdiction. The insurer sought to argue that the policy contained a jurisdiction clause in favour of the UAE. The relevant clause read as follows: "Claims: In the event of claim arising under this policy of insurance, it is agreed that it shall be settled in accordance with English law and practice and shall be so settled in Abu Dhabi (UAE)".

Mackie HHJ held that this clause did amount to a jurisdiction clause in favour of the UAE. Although the insured was able to refer to prior caselaw in which the word "settlement" was used in the context of settlement of claims rather than determination of disputes, "it is plain that in an insurance context the word settlement is used to mean two things, sometimes in the same context". In reaching this conclusion, the judge bore in mind that English was almost certainly not the first language of either party. Furthermore, the reference to "practice" in the clause was also an indication that this was intended to be a jurisdiction clause.

The judge found insufficient evidence to support the argument that a judge in the UAE would not apply English law (the governing law of the policy). Nor was the absence of particular litigation procedures in the UAE court system (eg there is no automatic disclosure in the UAE courts) a factor of any great weight.

In *Antec v Biosafety USA* [2006], Gloster J held that "the general rule is that the parties will be held to their contractual choice of English jurisdiction unless there are overwhelming, or at least very strong, reasons for departing from this rule..." The judge found no reasons to depart from the rule in this case. Even if he was wrong on that, the UAE was still the more appropriate forum to hear the case. There was to be settlement of claims following Lloyd's practice, but otherwise no London Market connection and no other connection with England.

Tibbles v SIG PLC

Applying to the court to vary an order under CPR r3.1(7) where a provision of the CPR had been overlooked

<http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2012/518.html&query=tibbles&method=boolean>

CPR r3.1(7) allows the court to vary an order which has already been made. There have been several recent cases discussing the scope of this rule. In this case, the Court of Appeal noted that, although an exhaustive list of all the circumstances in which the court's discretion should be exercised was not possible, it should normally only be exercised where (a) there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.

In this case, though, it was argued that the original judge had misled himself because a particular CPR rule was not drawn to his attention by counsel (and so the case did not fall within (a) or (b) above). The Court of Appeal held that CPR r3.1(7) could still apply to such a case: "it may well be that there is room within CPR 3.1(7) for a prompt recourse back to a court to deal with a matter which ought to have been dealt with in an order but which in genuine error was overlooked (by parties and the court) and which the purposes behind the overriding objective, above all the interests of justice and the efficient management of litigation, would favour giving proper consideration to on the materials already before the court".

This would involve considering the issue for the first time and so would not allow a party a "second bite of the cherry". However, it is essential that the applicant acts promptly. In this case, there had been a long delay in making the application to vary and so it was refused.

Hughes v The Estate of Williams

Contribution claim where child was placed on booster seat rather than child restraint seat

<http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2012/1078.html&query=hughes&method=boolean>

The claimant is a child injured in a crash for which the defendant was liable. The defendant claimed a contribution from the claimant's mother because she had placed the child on a booster seat rather than a 5-point harness child restraint seat. The mother sought to argue that she was entitled to use her judgment as to which seat was the more suitable, and disregard the stated limits for use of the booster cushion if that was the judgment she made. That argument was rejected by the judge.

Although "manufacturers' instructions should not be blindly treated as determinative of liability questions", it was held to be clear in this case that the claimant was too small for the booster seat. It was held that, had the claimant been placed in the child seat, her injuries would largely have been avoided.

The judge also found that this was not a case in which "the whole scale of reduction, because of the lesser blameworthiness, should to an extent be less". Although the claimant was on a booster seat "the appropriate safety restraint, namely the child seat, was not used at all". Accordingly, a contribution of 25% was ordered.

Cawdery Kaye Fireman & Taylor v Minkin

Whether solicitors wrongfully terminated retainer/entitlement to outstanding fees

<http://www.bailii.org/ew/cases/EWCA/Civ/2012/546.html>

The Costs Judge in this case had held that a firm of solicitors had not been entitled to suspend or terminate its retainer because of non-payment of its fees. He found that the client had had reasonable justification in not paying the bill because it had exceeded the firm's estimate. The appeal from that decision was dismissed and so a further appeal was made to the Court of Appeal. It allowed the appeal on the following grounds:

- (1) The solicitors had clearly used the language of suspension (rather than termination) when they advised the client that they were not prepared to act "until" outstanding monies had been paid. Under their terms of business, they could not suspend their services "without reasonable justification". However, in this case, there was justification. It did not matter that the client had complained promptly. It was clear that under the agreement estimates were not intended to be fixed or binding - and the client's case had become unexpectedly more complicated and expensive.
- (2) The retainer was eventually ended when the client advised that he had lost confidence in the solicitors' ability properly to represent him. Nevertheless, the client was still obliged to pay the costs properly incurred to that date.

Further information

If you would like further information on any issue raised in this newsletter please contact:

Nigel Brook

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 2012

www.clydeco.com