Welcome to the sixth 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

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A decision on discretionary interest on damages - arguments about when it should run from and the rate it should be.

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Aioi Nissay Dowa v Heraldglen & Ors

Whether attacks on Twin Towers were one event or occurrence


The claimant appealed against the decision of a London arbitration tribunal which had held that the terrorist attacks on the North and South Towers of the WTC complex were two, rather than one, loss events. The defendants had sustained losses under 10 inward reinsurance contracts which were eventually settled on a “two event” basis. However, the claimant sought to argue that the attacks were a single event. The 4 outward XL reinsurances issued by the claimant had limits for “each and every loss” which in turn was defined as “each and every loss...or occurrence or series thereof arising out of one event”.

The tribunal had applied the well-known test of the four unities deriving from Mr Michael Kerr QC’s award in the Dawson’s Field arbitration, which was later applied and developed by Rix J in Kuwait Airways Corporation v Kuwait Insurance [1996]. This provides that “an occurrence” (which is not materially different from an event, subject to the policy wording) requires unities of: (i) the circumstances and purposes of the person(s) responsible; (ii) the cause; (iii) the timing and (iv) the location. It is well-established that a plan or conspiracy cannot of itself constitute an occurrence or event. Thus in Kuwait Airways, the seizure of 15 aircraft at Kuwait International Airport when Iraqi forces invaded (and which were flown to Iraq over the following few days) amounted to one occurrence (the occurrence being the invasion of Kuwait).

In this case, the tribunal had held that, in relation to the four unities:

(i) although the hijackings were the result of a co-ordinated plot, that was not enough to constitute an occurrence;

(ii) there were two separate causes here because there were two hijackings of two separate aircraft - each used as a guided missile directed at one of the two Towers;

(iii) it was right to look at the whole period from check-in to the collapse of each Tower, and not just from the time the flight took off. Although there were clear similarities, these were not enough to result in one occurrence; and

(iv) although the Twin Towers were located in close proximity to each other, and were part of a single property complex, that did not give rise to a sufficient degree of unity of location. The Towers were separate structures and did not stand or fall together. The fact that both Towers were destroyed was attributable to the fact there were two successful hijackings directed at separate buildings.

The tribunal concluded that an independent observer watching the hijackings unfold, and then standing at the Twin Towers, would “clearly have in mind two incidents”. Field J held that the tribunal had not erred in reaching this conclusion. He found that the tribunal had been aware that it needed to address the issue from the viewpoint of an objectively independent observer in the position of the (re)insured. He also rejected an “implicit” argument that the tribunal had construed the relevant policy wording too narrowly: “The decision they came to was one which was open to them to reach and in making it they: (i) correctly applied the law; (ii) had regard to all materially relevant matters; and (iii) did not take into account impermissible considerations. The Award accordingly stands ....”.

COMMENT: This is the first publicly available English decision on the aggregation of aviation losses under a whole account excess of loss reinsurance arising from the WTC attacks (although these attacks have been the subject of an earlier New York decision involving property losses arising directly from the loss of the Towers, which also found that there had been two occurrences). It should be noted, though, that this case arises in the context of an appeal under section 69 of the Arbitration Act 1996. Accordingly, the Commercial Court’s role was not to consider the question of law afresh and impose its own conclusion - the court would only interfere if the decision reached by the tribunal was outside the range of permissible decisions open to them in the circumstances. It is suggested that this was a case where the arbitrators could legitimately have decided the matter either way and that if they had found that there had been only one occurrence, the Commercial Court would not have overridden that decision.
Sycamore Bidco v Breslin & Anor

Discretionary interest - arguments about when it should run from and the rate it should be

When a court awards debt or damages, it has a discretion to award simple interest up to the date of judgment under section 35A of the Senior Courts Act 1981. Various arguments regarding the exercise of that discretion arose in this case:

(1) The normal starting date for this interest is the date the cause of action accrued. However, there has been caselaw confirming that a later date might in certain circumstances be appropriate. In BP Exploration v Hunt [1979] Goff J identified certain groups of cases in which the court might depart from the normal position. These included where the defendant’s position would make it unjust to make him pay from the date of the loss eg where he could not reasonably have been expected to know that a claim would be made against him. In this case, the defendant sought to argue that the start date should be delayed because he knew nothing about the likelihood of a claim until he received a letter before action. Mann J rejected that argument.

He said that, if the defendant’s argument was accepted, the “exception” would apply in so many cases that it would cease to be an exception. “Mere ignorance” was not enough. Something more exceptional is needed (eg the legal position is unclear and a Supreme Court judgment would be needed). He also accepted that the situation where an insurer needs a limited time to investigate a claim would also fall within the exception.

However, here, the defendants knew they had an exposure to liability, at least in theory. Nor did it matter that the amount of a potential claim had not been made clear - the defendants could have formed some idea themselves.

(2) Mann J also confirmed that the end date for discretionary interest is the date of judgment and not the final order which ties up all outstanding matters.

(3) The appropriate rate of interest in light of the recent financial crisis has been the topic of some discussion in recent cases. Here, it was appropriate to look at the class of persons to which the defendant belongs. Mann J held that the presumption of 1% over base rate had been displaced here because the defendant (a company) was the member of a class which would have to borrow at rates greater than 1% above base. The actual rate of borrowing for the defendant had been 3% above base rate and so this was the appropriate rate for discretionary interest (dropping to 2% above base when interest rates were significantly reduced from February/March 2009).

Mann J also dismissed an argument that the presumption of 1% above base rate should be displaced only for small businesses.
For a claim to litigation privilege to succeed, it must be proven that a communication was made for the sole or dominant purpose of obtaining legal advice in relation to, or conducting, litigation which is pending or in contemplation. Prior caselaw has confirmed that a claim would be denied if the litigation purpose was just one of several purposes of equal or similar importance. An affidavit claiming privilege will be sworn by a party’s legal adviser or (as here) the party itself. The affidavit is normally conclusive but if the court is minded to go behind that affidavit, it has four options. It can: (i) conclude that the evidence in the affidavit does not establish that the document is privileged; or (ii) order a further affidavit; or (iii) inspect the documents; or (iv) cross-examine the deponent of the affidavit (see West London Pipeline v Total (Weekly Update 30/08).

In this case, the defendant provided an affidavit claiming litigation privilege over reports produced for it by a third party. That third party had initially been retained to carry out an investigation but it was claimed that from December 2011 onwards it was retained to help with the preparation of potential claims against the claimant.

Akenhead J, noting that affidavits should be as specific as possible without disclosing the very matters that the claim for privilege is designed to protect, ordered further witness evidence to be provided. He has now held that he could not attach much weight to that further evidence. Although the defendant’s director was honest, it did not appear that the defendant’s solicitors had “been asked to verify and confirm the basis of the claim for privilege”. The judge therefore looked at the documents which had been disclosed (ie the reports provided by the third party prior to December 2011).

These reports had grouped together “Claims and Commercial” matters. The judge held that there was no discernible weighting between these two matters and hence it was correct that the defendant could not assert privilege over those reports. Crucially, though, there was no evidence that further written instructions had been sent to the third party shortly prior to December 2011, “which it might reasonably be expected there would be if there was to be a departure from its previous retainer”. There was therefore no evidence to support the claim that reports produced from December 2011 onwards fell into a different category than the earlier reports.

Akenhead J also declined to look at the reports produced from December 2011. This was because the onus was on the defendant to establish the dominant purpose behind those reports and because the defendant had been given a further opportunity to put in further evidence: “One could have a more sympathetic understanding of [the defendant’s] position if it had simply and frankly explained that it was only by the Court looking at the document that it could be seen that its dominant purpose obviously involved contemplated litigation; however that is not really suggested. In any event... it is properly accepted by [the defendant’s] Counsel that inspection by the Court is generally to be adopted where the Court feels unable to reach a decision based on the evidence alone; the Court can reach a decision on the evidence here”.

The claim for litigation privilege was therefore rejected.

COMMENT: This case demonstrates the need to clearly specify the reasons why a claim for privilege is being advanced. Although the best course of action would normally be to show the court the document in question, there may be tactical or commercial reasons why the party claiming privilege would not want to adopt that stance.
In the Matter of Digital Satellite Warranty Cover Ltd

Supreme Court decides whether an extended warranty falls within classes listed in Regulated Activities Order

http://www.bailii.org/uk/cases/UKSC/2013/7.html

The earlier decisions in this case were reported in Weekly Updates 05/11 and 43/11. The FSA sought the winding up of two companies on the basis that they had entered into contracts of general insurance without obtaining the requisite authorisation for this regulated activity. The companies had sold and carried out extended warranty cover plans for Sky Satellite TV equipment. Under the warranty, the companies were obliged to repair or replace equipment but there was no obligation to pay money for repair/replacement costs. The judge had found that these warranties were “contracts of insurance” under common law and there was no appeal from that finding. Instead, the companies sought to argue that, even if the warranties were contracts of insurance, they were not of a kind which required their business to be authorised under the Financial Services and Market Act 2000.

Both the judge and the Court of Appeal had held that the warranties fell within Class 16 of the Regulated Activities Order 2001 (“Miscellaneous Financial Loss”). This Order was enacted to give effect to certain EC Council Non-Life Directives. The Supreme Court has now unanimously rejected the appeal from those earlier decisions.

It held that whether or not the warranties fell within Class 16 was something which may well only finally be resolved by a reference to the Court of Justice. The Supreme Court agreed with the judge that a contract which provides only for repair or replacement could fall within Class 16 since the risk covered is essentially the same as an indemnity for the costs of repair/replacement.

In any event, though, the EC Directives did not preclude Member States from regulating further or wider categories of business under their national law: “It is in my view clear that the First Directive is concerned only to prescribe what kinds of business national law must regulate and not what other kinds of business it may regulate” (as per Lord Sumption, who delivered the leading judgment). There was no rational reason why the EU legislator would have wanted to prevent Member States from imposing their own authorisation regime on insurance business outside the standard classes. Otherwise, those wider classes of business could still be written, but without any regulatory protection for consumers.
Other News

**JACKSON REFORMS:** The Civil Procedure Rules 60th update has been published (and is due to come into force on 1 April). The update implements various changes introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The following points are worth noting:

1. The changes to Part 36, which provide for an uplift of (broadly) 10% where a defendant fails to beat a claimant’s offer, will only apply to **Part 36 offers made on or after 1 April 2013.**

2. The new “menu” of disclosure orders which a judge in a multi-track case can choose from (including the option to dispense with disclosure altogether; an order for disclosure on an issue by issue basis; the “Peruvian Guano” test of disclosure; disclosure of documents on which a party relies plus any specific disclosure from another party; or any other order which the court considers appropriate) will only apply to cases where the **first CMC takes place on or after 16 April 2013.** In cases meeting that criterion, there is a new requirement that, not less than 14 days before the first CMC, each party must file and serve a report, verified by a statement of truth, which briefly describes which relevant documents exist/may exist, where they are located, how they are stored, and an estimate of the broad range of costs that could be involved in giving standard disclosure (and include the Electronics Document Questionnaire, if this has been used). The parties must also (at a meeting or by telephone) discuss and seek to agree proposals in relation to disclosure, which meet with the overriding objective, at least 7 days before the first CMC (and whenever else the court directs).

3. If an application for permission to rely on expert evidence is made on or after 1 April 2013, it must include an estimate of the costs of the proposed expert evidence and set out the issues which the expert evidence will address.

4. The limit for the small claims track will rise from £5,000 to £10,000 on 1 April 2013.

5. Details of costs budgeting and Damages-Based Agreements are also included in the update. However please note that costs budgeting does not, at present, apply to Commercial Court cases.

For a copy of the 60th update, please email publications@clydeco.com
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