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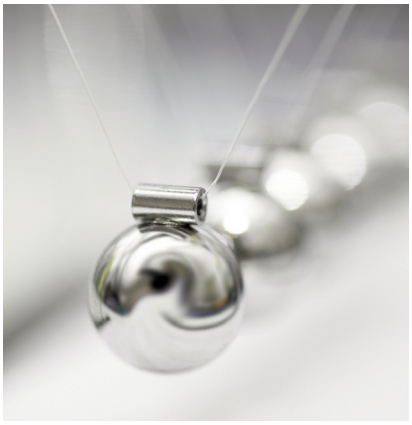

Weekly Update

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

21/11

Contents

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This Week's Caselaw

Barnes & Anor v Black Horse

Fiduciary duty arguments in PPI mis-selling case

http://www.bailii.org/ew/cases/EWHC/QB/2011/1416.html

The claimants bought a payment protection insurance policy from the defendant lender when it entered into a loan arrangement with the defendant. When the defendant offered the policy, it was acting on behalf of certain insurers (one of which was a member of the lender's group of companies). It was the only product which the lender had to offer. It was not pleaded that the defendant offered any advice to the claimants on the product. The claimants alleged (amongst other things) that the defendant breached its fiduciary duty.

Although lenders do not generally have any fiduciary duties to borrowers in this sort of situation, the claimants alleged that this case was exceptional for the following reasons:

(1) One of the insurers was, at the relevant time, a member of the General Insurance Standards Council ("GISC"). It was claimed that, as the defendant acted for the insurer, it was bound by the GISC's voluntary Private Customer Code and that this gave rise to a fiduciary duty. Waksman J described this argument as "absurd": "In a context where no advice or recommendation is given I cannot see how any such assumed voluntary obligations can possibly give rise to fiduciary obligations". Furthermore, the code had not been incorporated into the PPI policy. Wording at the bottom of the second page of the terms and conditions of the policy which referred to the fact the insurer "adheres to" the code did not amount to a contractual term. The code itself also made it clear that it did not give third parties (ie policyholders) contractual rights under the Contracts (Rights of Third Parties) Act 1999.

(2) It was also claimed that the defendant was, in truth, the agent of the claimants and not the insurer. This argument was also rejected by the judge: "The fact that there might arise some specific agency relationship between the [claimants] and [the defendant] further down the line, for example in relation to handling a claim under the policy, does not, in my judgment, establish any agency relationship at the critical time which is when this policy was being offered to the [claimants]".

Chiu v Wates

Relief from sanctions agreed in a consent order

The solicitors for all parties agreed a consent order which provided, inter alia, that unless the second defendant exchanged witness statements with all the other parties within 14 days of the date of the order, then its defence would be struck out. The effect of the order was that (unintentionally) the last day for compliance was Good Friday (a bank holiday). The second defendant's solicitor mistakenly thought that he could rely on the rule set out in CPR r2.8(5) to serve the witness statements on the next business day. However, that rule only applies to an act which requires filing at the court office.

Although the court does have the ability to extend time or grant relief from sanctions in relation to an agreed order made in a consent order, it will be slow to do so. However, Ramsey J decided to grant relief in this case. The circumstances were sufficiently unusual to make it just to grant relief. One factor was that the failure to comply was caused by the second defendant's solicitor and not the party itself. Although the act or omission of a solicitor will be treated as that of the party, this was a factor which weighed in favour of the party. Furthermore, there was no evidence that any party had needed to work on the case over the Easter weekend.

Wilson & Partners v Emmott

Challenge to arbitration award/defective pleading in the claim form

http://www.bailii.org/ew/cases/EWHC/Comm/2011/1441.html

This case concerns an application under sections 68 and 69 of the Arbitration Act 1996 in relation to an award. The following are two issues which arose in the case:

(1) The defendant argued that the claimant's pleading in the claim form for the applications was defective and did not properly plead any claim under section 68 or section 69. For example, the form did not mention (let alone specifically identify) any substantial injustice which had been caused by the alleged irregularities (under section 68) and many complaints under section 69 had not properly identified a question of law. Smith J agreed but held that, although these deficiencies had hampered the efficient determination of the applications, that did not in itself justify him refusing them.

(2) Smith J also saw no proper basis for the defendant's argument that "there is no legal principle which would permit the imposition of an alternative remedy on the basis which the Tribunal ordered or on any other basis". He held that "equity affords to the Tribunal discretion as to the form in which they should direct that the deficiency be made good".

Langsam v Beachcroft

Solicitors' negligence claim/interpretation of CFA

http://www.bailii.org/ew/cases/EWHC/Ch/2011/1451.html

The claimant sought damages for professional negligence against his former solicitors. He alleged that the solicitors were unduly pessimistic when they advised him on settling a professional negligence claim against his accountants. The case raised the issue of reliance on advice from counsel. Roth J summarised the caselaw on that issue: there is no blanket defence for solicitors irrespective of what error counsel may commit - a solicitor must still apply his mind to the advice received. In this case, the solicitors agreed that they had held themselves out as having special expertise and experience in professional negligence litigation. On that basis, it was submitted that they were subject to a higher burden as regards advice from counsel. Roth J held as follows: " the independent judgment which the solicitor should apply when considering whether the advice of counsel is "obviously or glaringly wrong" is a judgment informed by his or her specialist expertise. But subject to that test, I hold that where the advice is given by appropriate counsel specialised in the field who has been properly instructed, even an experienced and specialised solicitor is entitled to be guided by counsel's advice".

On the facts, the judge held that the solicitors had not been negligent.

The claimant had received £1 million from the accountants pursuant to a Tomlin Order. He argued that a CFA (entered into before the CFA Regulations 2000 were revoked in 2005) which he had agreed with the solicitors was unenforceable. The CFA had provided, inter alia, that "if your opponent is ordered or agrees to pay your costs, you pay our basic charges and disbursements". It was argued that, as the Tomlin Order provided "no order as to the costs of ...this Action", this clause was not triggered. Roth J rejected that interpretation as too literal: the accountants were not ordered to pay the claimant's costs because they had agreed to pay a sum that was inclusive of costs and so the condition for the solicitors to recover their costs was satisfied. However, the solicitors had breached their duty properly to explain the effect of the CFA in a material respect (that there were no caps on their basic charges). That made the CFA unenforceable. (The judge added that although the fact the CFA had been back-dated was wrong, that did not in itself render it unenforceable).

Further information

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