Insurance and reinsurance
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CLYDE&CO

Weekly update

Welcome to the sixth 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. Please follow this link for further details of the following recent cases:

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Sherdley v Nordea Life

Whether English court had jurisdiction to hear insureds' claim

http://www.bailii.org/ew/cases/EWCA/Civ/2012/88.html

The claimants were domiciled in the jurisdiction (Wales) when they entered into a unit-linked life insurance policy with the defendant, a Luxembourg entity. When their investment went disastrously wrong, they claimed that they were forced to sell up and move to Spain. They then commenced proceedings against the defendant in this jurisdiction.

Regulation 44/2001 provides that defendants should be sued in the courts where they are domiciled. However, Article 9 of the Regulation provides that an insured can also sue its insurer in the country where the insured is domiciled.

Insureds are protected against attempts by insurers to remove that advantage from them under Article 13. Article 13.2 provides that the general position can be departed from only by an agreement which allows the insured to bring proceedings in another court. Article 23 provides that if the parties have agreed in writing that the courts of a member state shall have jurisdiction (exclusive or permissive), then that court shall have jurisdiction (exclusive unless the parties have agreed otherwise), in which case the court selected has "additional" jurisdiction. The Court of Appeal has held as follows:

(1) Article 23 is of "less relevance" since "any agreement for the exclusive jurisdiction of one jurisdiction would necessarily run foul of Article 13.2's protection of the choice of jurisdictions sanctioned in article 9". Thus none of the exclusive jurisdiction clauses set out in the various documents between the parties "survived" Article 13.2.

(2) In any event, (and obiter to the decision) the Court of Appeal noted that "An insurance contract is a contract of the utmost good faith, and I do not think it is consistent with that required good faith that an insurer should present to an insured an alteration in the previously agreed law and jurisdiction provisions of their proposed contract without making that clear to the insured".

(3) The judge at first instance had found that the claimants' domicile was now in Spain. It could not be argued that the change of domicile to Spain had been only temporary. Nor could it be argued that what counted was the claimants' domicile at the time the relevant contract was entered into. The Court of Appeal concluded that the English courts did not have jurisdiction to hear the case. It did not matter that the claimants were therefore unable to take advantage of a conditional fee agreement which they could have entered into with their solicitors in England and which would not be available to them in Spain or Luxembourg: "the costs advantage available here to the [claimants] was neither a relevant nor a legitimate reason for departing from the strict requirements of the Judgments Regulation".

Ball v Secretary of State for Energy and Climate Change

Assessment of damages for mesothelioma and duration of symptoms

http://www.bailii.org/ew/cases/EWHC/QB/2012/145.html

The claimant was diagnosed with mesothelioma when he was in his nineties. At the onset of symptoms he had been in reasonably good health but was virtually housebound and led a somewhat isolated life. He brought a claim against his previous employers and judgment was entered in his favour with damages to be assessed. The issue in this case was the appropriate award for pain, suffering and loss of amenity.

Reference was made in the case to the "Guidelines for the assessment of general damages in personal injury cases" (the JSB Guidelines). The seventh edition introduced a bracket (or range) of awards for mesothelioma. It was stated that "the duration of pain and suffering" accounted for the variations within the bracket. A later edition of the JSB Guidelines contained the controversial statement that "in cases of unusually short periods of pain and suffering lasting 3 months or so, an award of £25,000 may be appropriate". This did not appear to take into account the views of Master Whittaker in *George Smith v Bolton Copper* Ltd [2007], to the effect that all factors should be taken into account in mesothelioma cases and that even where the duration of pain and suffering is very short, treatment was likely to be invasive and very unpleasant. The controversial statement was removed in a later edition of the JSB Guidelines but the lower end of the bracket was reduced from £52,500 to £35,000.

In this case, Swift J agreed with Master Whittaker. The duration of symptoms is only one of many factors to be taken into account. The level of symptoms was likely to be a key factor and the courts should bear in mind that a person of any age would suffer a good deal of distress by being informed that he has mesothelioma. The judge also noted that the lowering of the bottom end of the bracket would tend to depress the level of damages awarded in an "average" case of mesothelioma and that would not be consistent with the pattern of awards by judges in the past.

As far as this particular claimant was concerned, the judge said that "despite his age, his disease has had a devastating effect on his life". She held that the appropriate award of damages was £50,000.

Simcoe v Jacuzzi UK Group

Date when interest on costs runs from/winning party entered into a CFA

http://www.bailii.org/ew/cases/EWCA/Civ/2012/137.html

The claimant entered into a CFA with his solicitors. Proceedings were commenced in the county court and subsequently compromised by way of a consent order, with the defendant agreeing to pay a certain amount in damages, with costs to be assessed. Detailed assessment proceedings were initiated but the claimant subsequently agreed a sum. The issue in this case was the date from which interest on those costs should run - should it run from the date of the order for costs or should it run from the date on which the sum is agreed between the parties or assessed

CPR r40.8 provides that, where interest is payable on a judgment, "the interest shall begin to run from the date that judgment is given", unless the court orders otherwise. In this case, the Court of Appeal held as follows:

(1) CPR r40.8 does not apply in the county court, owing to the absence of any concurrence by the Treasury. However, the effect is that the County Court (Interest on Judgments Debts) Order 1991 applies instead and article 2 of that Order provides that interest runs from the date on which judgment is given.

(2) Even if CPR r40.8 were to apply in the county court, the effect would still be that interest generally runs from the date of judgment. It made no difference that the claimant had entered into a CFA: "The effect of the claimant not paying anything to his solicitors until after the costs have been recovered from the defendant is that those solicitors have been 'financ[ing] their clients' litigation', and... they should not be expected to continue to do so until the costs are agreed or assessed".

Eitzen Bulk v TTMI Sarl

Effect of delay in applying for reasons for an award

http://www.bailii.org/ew/cases/EWHC/Comm/2012/202.html

Clyde & Co for defendant

As mentioned in last week's update, section 70(4) of the Arbitration Act 1996 provides that, where there is an application or appeal under sections 67, 68 or 69 of the Act, if it appears to the court that the award does not contain the tribunal's reasons or does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal, the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.

Although section 70 provides for a 28-day time limit for bringing an application or appeal, no specific time limit is laid down for an application under section 70(4). In this case, the application was made some 6 months after the date of the award and almost 6 weeks after the order granting leave to appeal.

Eder J said that "In principle, it seems to me that such application was... out of time, although the Court no doubt retains a jurisdiction to order the Tribunal to state further reasons of its own motion under s.70(4) of the 1996 Act". In any event, though, the application was hopeless and so the court should as a matter of discretion decline to order further reasons because it would have been an entirely futile exercise.

Further information
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