Insurance and reinsurance
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CLYDE&CO

Weekly update

Welcome to the tenth 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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The merged firm of Clyde & Co and Barlow Lyde & Gilbert

MoD v AB & Ors

Personal injury claims and limitation/what "knowledge" must the claimant have/can knowledge be acquired after proceedings commenced? of possible interest to liability insurers

http://www.bailii.org/uk/cases/UKSC/2012/9.html

The appellants were, broadly, veterans who had been involved in experimental explosions of thermonuclear devices in the South Pacific in the 1950s. They claim to have suffered personal injuries as a result of their involvement and commenced proceedings in 2004. It had been uncertain, though, whether they had been exposed to radiation, until a report was produced in 2007 supporting the belief that they had been. (It was also uncertain whether this exposure had caused their injuries).

The Limitation Act 1980 provides that, in the case of personal injury, a claim will become time-barred more than 3 years from the date on which the cause of action accrued or the date of the claimant's knowledge (if later) that (inter alia) the injury was attributable to the alleged negligent act. The Supreme Court considered the following issues in this case:

(1) Is knowledge (of attributability) the same as belief? By a majority of 4:3, the Supreme Court held that it is. The dissenting judges believed that, although the appellants may for a long time have believed that their injuries were attributable to the exposure, they did not have knowledge of attributability until the 2007 report (and hence time had not start running until then). That position was rejected by the majority though - they endorsed the view of Lord Donaldson MR in *Halford v Brookes* (1991) that a claimant is likely to have acquired knowledge of (inter alia) attributability when he first came reasonably to believe it. It cannot be said that he lacks knowledge until he has the evidence with which to substantiate his belief in court. Thus it was concluded that the appellants had had the requisite knowledge more than 3 years prior to the commencement of proceedings and so the claims were time-barred.

(2) As stated above, the appellants had (unusually) sought to argue that they only acquired knowledge of attributability after they had commenced their proceedings. The majority held that it is a legal impossibility for a claimant to lack knowledge of attributability after he has issued his claim - "by that date, he must in law have had knowledge of it" (as *per* Lord Wilson).

(3) Finally, it was held that the Supreme Court should not interfere with the exercise by the Court of Appeal of its discretion under section 33 of the 1980 Act and its refusal to allow the time-barred claims to proceed.

Woodland v Essex County

Court of Appeal decides whether school owes non-delegable duty of care to its pupils - of possible interest to liability insurers

http://www.bailii.org/ew/cases/EWCA/Civ/2012/239.html

Weekly Update 38/11 reported the first instance decision in this case. The claimant schoolgirl suffered suffered personal injury whilst attending a swimming lesson during the school day. The lesson took place at premises owned by the local council and neither the lifeguard nor the swimming teachers were school employees. At first instance, the judge held that the claim was bound to fail because it could not be said that the school owed a non-delegable duty to ensure that third parties take reasonable care of their children during the school day. The Court of Appeal, by a majority of 2:1, has now dismissed the appeal from that decision.

Tomlinson LJ and Kitchin LJ agreed that the imposition of a non-delegable duty would have a "chilling effect on the willingness of education authorities to provide valuable educational experiences for their pupils". Furthermore, "the general rule which recognises that the duty to take reasonable care may be discharged by entrusting the performance of a task to an apparently competent independent contractor is an important feature of the law of negligence; and any departure from the general rule must be justified on policy grounds". There was no such justification in this case.

However, Laws LJ, dissenting, had sought to argue (relying on Australian caselaw) that a non-delegable duty should be imposed where a defendant accepts responsibility for a group of persons who are particularly vulnerable or dependent (usually a school or a hospital), provided that the injured child or patient is (a) generally in its care and (b) is receiving a service which is part of the institution's mainstream function of education or tending to the sick.

Procter & Gamble v Svenska & Anor

Whether a court will imply a fixed exchange rate into a contract

http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2012/498.html&query=title+(+procter+and+svenska+)&method=boolean

The parties entered into a contract which provided for the supply of goods at fixed prices expressed in Euros, but payable in sterling. The issue was whether the contract (either expressly or impliedly) provided for a fixed exchange rate or whether the buyer had to pay however much sterling was required to cover the fixed Euro price.

Hildyard J rejected the argument that an annotation at the foot of the document (for a £/Euro exchange rate of 1.49) was an express term mandating that exchange rate. This was a contract drafted with the help of legal firms and, given the size and complexity of the transaction, was a carefully worded document. As a result, it would be "uncharacteristic" to leave such an important provision as an annotation without any further elaboration.

Nor would the court imply into the agreement a fixed exchange rate. The risk of currency fluctuation would have been foreseen by the parties and the issue fundamentally affected the allocation of risk between the parties. If they had wanted to provide for fixed sterling prices, they could have done so unequivocally. The contract was not unworkable or even difficult to operate in the absence of the implied term. Nor did the approach in *Rainy Sky v Kookmin* (see Weekly Update 39/11) that a court should adopt a construction which is consistent with common sense support an argument for implication: "I cannot think that this requires or permits a court simply to imply or interpolate terms that it happens to consider would be fairer".

Accordingly, there was no term (either express or implied) to dislodge the ordinary rule that the Euro prices are to be converted into sterling at the market rate applicable when payment is due.

An alternative argument for rectification of the contract was also rejected: "The presumption that the parties have recorded their true agreement is not easily to be rebutted. It seems to me that the task may be the more difficult where the parties have agreed an "entire agreement clause". The fact that one side had an erroneous perception was not sufficient to justify rectification in this case.

COMMENT: This case will be of particular interest given the ongoing uncertainty in the Eurozone. Where a direct insurance policy had not made any provision for significant currency fluctuations, this case clarifies that the courts will not readily imply into the policy a fixed exchange rate provision. It is therefore worth giving this issue some thought when drafting new policies - for example , reinsurance contracts do commonly contain a "Currency Conversion Clause" which aims to avoid the reinsured making an exchange gain or loss.

Osmium Shipping Corp v Cargill International

Contract interpretation following act of piracy and the importance of a comma!

http://www.bailii.org/ew/cases/EWHC/Comm/2012/571.html

Clyde & Co for defendant

The claimant owners appealed against an arbitration award which had held that a vessel which was hijacked by pirates off the coast of Somalia had been "off-hire" under the terms of the charterparty. The off-hire clause in the charterparty read as follows: "Should the vessel put back whilst on voyage by reason of any accident or breakdown, or in the event of loss of time … or by reason of the refusal of the Master or crew to perform their duties, or oil pollution even if alleged, or capture/seizure, or detention or threatened detention by any authority including arrest, the hire shall be suspended from the time of the inefficiency until the vessel is again efficient in the same or equidistant position in Charterers' option, and voyage resumed therefrom" (emphasis added).

The key issue was whether, as the owners sought to argue, the vessel would only be off-hire if the capture or seizure was made "by any authority" or whether (as the charterers argued) it was a stand-alone and unqualified provision. Cooke J agreed with the charterers: "In my judgment, the wording used, the structure of the clause, its punctuation and its grammar all clearly support the Charterers' submissions". It was clear from the use of the word "or" and the positioning of the commas in the clause that it was only "detention or threatened detention" which was qualified by the expression "by any authority". As the judge put it: "Whilst it is right to say that there is not total consistency or uniformity in the use of commas, since there is no comma after the passage in parenthesis, it cannot be said that the commas are insignificant".

The owners had sought to rely on the Privy Council case of *Sammut v Manzi* [2009] as a warning against reliance on the significance of punctuation in a word processed document. Cooke J rejected that argument - his conclusion did not turn simply on a comma, but upon the whole language of the clause, its grammatical form, and the usage of the word "or" throughout it, "in a purposeful manner".

Other news

The Consumer Insurance (Disclosure and Representations) Bill received Royal Assent on 8 March 2012 and so has now been passed. It will be recalled, however, that the Act provides for a (minimum) one-year gap between the date the Act is passed and the date it comes into force:

http://www.publications.parliament.uk/pa/ld201212/ldhansrd/text/120308-0001.htm#12030888002388

Further details of the Act can be found in Weekly Update 19/11.

Further information

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