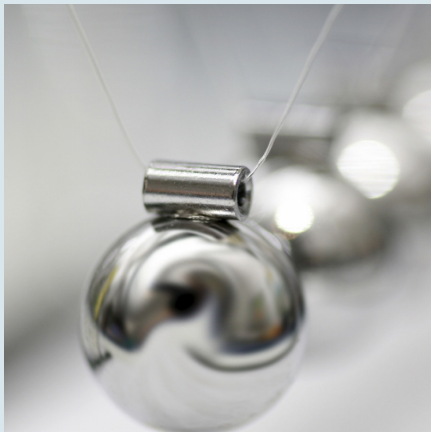


Weekly update



Welcome to the sixteenth 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

Berg v Blackburn Rovers

An application to withdraw an admission demonstrates the new attitude of the courts since the Jackson reforms.

Compton Beauchamp v Spence

Court decides whether an arbitrator's failure to provide reasons automatically amounts to "substantial prejudice".

England and Wales Cricket Board v Kaneria

A case on whether appeal panel proceedings were arbitration proceedings.

Heron v TNT & Anor

The Court of Appeal considers an application for a non-party costs order against solicitors who acted for a client without obtaining ATE insurance.

First Subsea v Balltec

A decision on whether a hearsay notice is required for a witness statement obtained in earlier proceedings.

Williams v Williams (The Estate of)

The Court of Appeal rejects an appeal against a finding of contributory negligence where a child was incorrectly placed on a booster seat.

WHA Ltd & Anor v HMRC

The Supreme Court decides the liability of motor breakdown insurers to VAT.

Berg v Blackburn Rovers

Application to withdraw admission and new attitude of the courts post-Jackson reforms

<http://www.bailii.org/ew/cases/EWHC/Ch/2013/1070.html>

The defendant applied for permission to withdraw an admission (pursuant to CPR r14.1). Pelling QC HHJ noted the radical change to the Overriding Objective since 1 April 2013 – it now places emphasis not merely on the need to deal with cases justly but to do so at proportionate cost, expeditiously, to enforce compliance with the Rules and orders and to allot to each case an appropriate share of the Court’s resources. The judge said that “this amendment of the overriding objective is likely to have a significant impact on the approach to be adopted to applications of this kind, which will now be approached by courts much more rigorously than perhaps has been the practice in the past, particularly where formal admissions are made on behalf of parties represented by experienced and specialist professional advisors”.

The correct approach to this sort of application was to ask whether the defendant had demonstrated that, if permitted to withdraw its admission, it would have a “realistically arguable defence”. Only if that is demonstrated will the court go on to consider the other factors listed in PD14 para 7.2.

In this case, neither of the defendant’s asserted defences were realistically arguable and so the judge held that no useful purpose would be served by permitting the admission to be withdrawn. Accordingly, the application was dismissed.

Compton Beauchamp v Spence

Whether arbitrator’s failure to provide reasons automatically amounts to “substantial prejudice”

<http://www.bailii.org/ew/cases/EWHC/Ch/2013/1101.html>

The claimant challenged an award under section 68 of the Arbitration Act 1996 on the ground of serious irregularity. One of the complaints was that the arbitrator allegedly failed to provide adequate reasons for the award (ie the case fell within section 68(2)(h): failure to comply with the requirements as to the form of the award). Section 68 requires any irregularity to cause “substantial injustice” to the applicant. In the case of *Benaim v Davies Middleton* [2005], Coulson J agreed with textbook commentary that “it is strongly arguable that unless a party knows the reasons for an award, there is automatically substantial injustice to him”. However, in this case, Morgan J said that “I can accept that in many cases there will be substantial injustice where

a party does not know the reasons for an award but I would not be prepared to hold that every failure of reasoning which amounts to an irregularity for the purposes of section 68(2)(h) will automatically give rise to substantial injustice”. For example, if the arbitrator’s reasoning is inadequate on a point of very little substance (even though it is relevant to the outcome), that might give rise to some injustice, but not “substantial injustice”.

On the facts of the case, it was held that the arbitrator’s reasoning was poor but “just about enough to explain the conclusions reached”. Furthermore, there was no irregularity/unfairness because, for example, the arbitrator had ordered the sequential exchange of expert’s reports.

England and Wales Cricket Board v Kaneria

Whether appeal panel proceedings were arbitration proceedings

<http://www.bailii.org/ew/cases/EWHC/Comm/2013/1074.html>

On this application for a witness summons under section 43 of the Arbitration Act 1996, Cooke J was required to first decide whether proceedings before the appeal panel of The England and Wales Cricket Board Limited were arbitration proceedings (or, instead, were an internal disciplinary procedure). The judge held that many of the factors set out in *Walkinshaw v Diniz* [2000] were satisfied in this case. For example, the “arbitrators” did not receive unilateral communications from the parties, there were proper and proportionate procedures for the provision of evidence, the tribunal’s decision was binding, the tribunal was chosen by the parties (or by a method to which they had consented) and the agreement of the parties to refer their disputes to the tribunal was intended to be enforceable in law.

The judge rejected the defendant’s argument that the obiter comments in *Walkinshaw* were not the correct test. The defendant had sought to argue that *Stretford v The Football Association* (see Weekly Update 12/07) was the governing authority but that argument was rejected. Cooke J said that *Stretford* had considered a different question and “There can be no basis for saying that there has to be an express reference to the word “arbitrator” or “arbitration” in order for an arbitration agreement to arise. Equally there can be no basis for any need for the express mention of finality. This court sees many agreements which amount to arbitration agreements where informality is the key. The word “arbitration” or some abbreviation will usually be found but often nothing more than that”. Nor was there any requirement that, for proceedings to be seen as “arbitral” in nature, there should be a clear agreement to private resolution of the dispute and a waiver of Article 6 rights (the right to a fair and public hearing).

Heron v TNT & Anor

Application for non-party costs order against solicitors who acted for a client without obtaining ATE insurance

<http://www.bailii.org/ew/cases/EWCA/Civ/2013/469.html>

In this case, employers' insurers sought a non-party costs order against the solicitors who had acted for the unsuccessful employee. The insurers alleged that the solicitors had failed to obtain ATE insurance, even though they knew that the employee would not be able to meet an adverse costs order against him without the benefit of such insurance. It is also alleged that the solicitors failed to admit that failure to the employee and had pursued the litigation with a direct financial interest in concealing their negligence (in order to secure their own costs, whilst at the same time causing the insurers to incur irrecoverable costs).

At first instance, the judge rejected the insurers' application and the Court of Appeal has now dismissed the appeal from that decision. Leveson LJ confirmed that a non-party costs order is "exceptional" and a failure to obtain ATE insurance for a client, whilst that might give rise to a breach of duty, would not suffice to demonstrate that the solicitor has become a "real party" to the litigation, the person with the "principal interest" in its outcome, or that he was acting "primarily for his own sake". A solicitor is entitled to act on a CFA for an impecunious client who he knows or suspects will be unable to pay own (or other side's) costs, if unsuccessful. Similarly, if a solicitor negligently fails to obtain ATE insurance to protect his client (and such insurance would have been available), that will only have an impact if it "demonstrably provable" that costs would not otherwise have been incurred. In this case, the appropriate forum to determine the extent to which the solicitors may be liable to compensate the employee for any costs which he will have to pay his employers' insurers would be professional negligence proceedings brought by the employee.

COMMENT: This case may be contrasted with the recent case of *Flatman v Germany* (see Weekly Update 13/13) in which the Court of Appeal held that a non-party costs order "could" be justified against a solicitor who had pressed on with litigation without ATE insurance, where that was contrary to the express instructions of the client (in this case, though, there had allegedly been no discussion at all of the need to take out ATE insurance, and that may possibly account for the different approach here).

First Subsea v Balltec

Whether hearsay notice is required for witness statement obtained in earlier proceedings

The claimant wished to rely on evidence which a witness had given in earlier proceedings (in support of the defendant). His statement had been disclosed to the claimant and was then included in a bundle hearing. One of the issues in this case was whether the claimant had to give notice of its intention to rely on the witness statement (ie a notice in relation to hearsay evidence to be adduced at trial pursuant to CPR r33). The claimant sought to argue that there was no need to give notice because it could instead rely on PD32 para 27 which provides that "all documents contained in bundles which have been agreed for use at the hearing shall be admissible at that hearing as evidence of their contents".

Norris J rejected an argument that PD32 para 27 "trumps" CPR r33. Although the claimant referred to two prior Court of Appeal judgments in which it was suggested that PD32 para 27 might have that effect, the judge said that he would be reluctant to lay down a general rule and "whatever the Practice Direction may literally say", it had to be read in the context of the CPR as a whole. He held that it would not be "just" in many cases to rely on PD32 para 27 as relieving a party of the obligation of giving fair and proper notice of the matter in issue. In this case, the evidence was being adduced to prove an issue which was central to the establishment of liability, and so reliance on para 27 would not be acceptable.

In any event, though, the claimant had made a late application to extend time for serving the Civil Evidence Act notice. Although it could not be said that the court had no power to exclude the hearsay evidence in such circumstances, the judge was prepared to admit the evidence (since this was not "one of those rare cases where a party is, for example, reversing a conscious tactical decision").

Williams v Williams (The Estate of)

Court of Appeal rejects appeal against finding of contributory negligence where child incorrectly placed on booster seat

<http://www.bailii.org/ew/cases/EWCA/Civ/2013/455.html>

The first instance decision in this case was reported in Weekly Update 15/12. The claimant is a child who was injured in a crash for which the defendant was liable. The defendant claimed a contribution from the child's mother on the basis that she had placed the child on a booster seat, when the manufacturer's instructions indicated that the child was too small for the seat. At first instance, the judge accepted the defendant's argument and ordered a contribution of 25%. The Court of Appeal has now rejected an appeal from that decision. It held that:

- (1) The judge had not given too much weight to the manufacturer's instructions. The judge had been entitled to conclude that, given the explicitness of the instructions, it was difficult to see how the seat used could be said to have been appropriate. In placing her child in the seat, it had been reasonably foreseeable to the mother that her child would be injured.
- (2) The mother had sought to argue that the judge should have had regard to the fact that there had been no evidence that a child who did meet the manufacturer's criteria ("the hypothetical child") would have been safe in the same seat. Black LJ said that causation issues cannot "be considered in a vacuum in this way: The actual circumstances are what matter". The judge had been right to reject an inquiry into what would have happened to the hypothetical child.
- (3) Nor did it matter that the defendant had been more blameworthy than the mother, or that it had not been compulsory for children to be strapped in with a child restraint at the time of the accident. The judge had been entitled to follow the guidance in *Froom v Butcher* [1975] and impose a share of responsibility on the mother, who was in no way to blame for the accident and who honestly believed her child would be safe on the booster seat.

WHA Ltd & Anor v HMRC

Supreme Court decides liability of motor breakdown insurers to VAT

<http://www.bailii.org/uk/cases/UKSC/2013/24.html>

A supply of insurance is exempt from VAT. Accordingly, insurers do not charge VAT on premiums and nor can they deduct the amount of VAT which they have paid from any VAT which they have received. This case concerned a scheme devised by certain motor breakdown insurers to allow them to deduct the VAT which they had paid to garages which had repaired their insured's vehicles (the inability to deduct VAT as input tax is perceived by such insurers as putting them at a competitive disadvantage relative to businesses such as car dealers which offer uninsured warranties under which they contract to repair vehicles).

In short, the scheme involved a UK member of the insurer's group supplying claims handling services to a Gibraltar-based member of the group with which most of the risk under the policies was ultimately reinsured. The garages invoiced the UK company which then invoiced the Gibraltar company (thus resulting, it was hoped, in the UK company recovering the VAT charged by the garage but not having to charge VAT on its onward supply of claims handling services).

The Supreme Court has now held that the scheme does not work. This was primarily because it was held that there was no supply of repair services by the garages to the UK company (as well as or instead of a supply of services to the insured). The interposition of reinsurers did not alter that position.

Further information

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