Insurance and reinsurance
21 May 2013

CLYDE&CO

Weekly update

Welcome to the eighteenth 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

Slocom Trading & Anor v Tatik Inc

A court decides the appropriate discretionary rate of interest where an award is in Euros.

United Marine Aggregates Ltd v GM Welding & Novae

An insurer appeals against a judge's decision to award it only 50% of its costs.

Fons HF v Corporal

A case considers the approach of the court to an application to extend time to file witness statements, post-Jackson reforms.

SOCA v Namli & Ors

A decision on whether a civil recovery order could be granted in favour of SOCA where an individual had been acquitted in foreign criminal proceedings.

Slocom Trading & Anor v Tatik Inc

Discretionary rate of interest where award in Euros

http://www.bailii.org/ew/cases/EWHC/Ch/2013/1201.html

One of the issues in this case was the appropriate rate of interest to be awarded pursuant to the court's discretion under section 35A of the Senior Courts Act 1981 for pre-judgment interest, where the judgment is in Euros rather than Sterling. The defendants submitted that it should be 1% over the European Central Bank ("ECB") rate, but the claimant argued that this rate had been so low over the relevant period that it did not represent a commercial rate. The claimant sought to rely on the rate awarded by the Commercial Court for judgments in US Dollars ie 3% over the US Federal Reserve Funds rate. That argument was rejected by Roth J. He held that the practice for US dollar judgments was of little relevance and the claimant had not put in evidence of the borrowing rate for Euros. Moreover, the claimant was an investment vehicle and not a trading entity. Hence, it did not borrow money - what it had lost was the investment potential which its money could have earned. Accordingly, the ECB rate plus 1% was the appropriate rate.

As for post-judgment interest, since the judgment was in a foreign currency, the court has a discretion under section 44A of the Administration of Justice Act to award a different rate from the 8% rate applied to judgments in Sterling. Roth J said that the applicable rate should be the same as that for pre-judgment interest (ie 1% above the ECB rate). He also rejected an argument that the court had the power to award compound interest under section 44A.

United Marine Aggregates Ltd v GM Welding & Novae

Insurer appeals against judge's decision to award it only 50% of its costs

http://www.bailii.org/ew/cases/EWCA/Civ/2013/516.html

The claimant sued the defendant for negligence/breach of contractual duty following a fire at its premises. The defendant sought an indemnity from its public liability insurer (the Part 20 defendant to this action). At trial, it was held that there had been no breach of duty and, furthermore, the defendant would not have been entitled to an indemnity from its insurer because it had breached a warranty in the policy (which required combustible materials in the immediate vicinity of hot work to be covered and protected). Although neither the claimant nor the defendant argued that the insurer should be deprived of any part of its costs, the judge decided to award the insurer only 50% of its costs. He held that the insurer's costs were excessive because, in addition to the "covered and protected" argument, the insurer had also run two other alleged breach of warranty defences, one of which was abandoned and the other was rejected by the judge. The insurer appealed against that decision.

The Court of Appeal has now allowed that appeal. The judge had erred in principle in reducing the proportion of costs which the insurer could recover because of concerns about the level of costs incurred – that was a matter for assessment by a costs judge. Nor had the insurer been given any opportunity to be heard before the reduction was ordered.

The judge had held that the insurer's lengthy cross-examination of one of the defendant's employees "went much further than necessary". Tomlinson LJ accepted that "in a trial in which the principal combatants are competently represented, the intervention of a third party on issues already canvassed can be an irritant". However, the insurer had faced a substantial claim (over GBP 4 million) and was entitled to defend its refusal to indemnify. The insurer had also been entitled to cross-examine the defendant's employees about whether they were aware of a warranty in the policy (because the insurer was entitled to make the point "for what it was worth" that if the employees were unaware of the term, they were unlikely to have planned to comply with it).

Fons HF v Corporal

Approach of the court to an application to extend time to file witness statements, post-Jackson reforms

http://www.bailii.org/ew/cases/EWHC/Ch/2013/1278.html

The parties were ordered to exchange witness statements. Although the claimant was willing and able to do so, it eventually became apparent that the defendant was not in a position to do so. An application was made to court for an extension of time to file the witness statements. Although the action was commenced prior to the reforms to the CPR on 1 April 2013, the application was heard after that date and so the new overriding objective applies. This provides, in relevant part, that "dealing with a case justly and at proportionate costs includes, so far as is practicable... enforcing compliance with rules, practice directions and orders". Pelling HHJ held as follows:

(1) Both parties were in breach of the order. The claimant should have served its witness statements or, at the very least, lodged them at court and either offered them for exchange or provided them to the defendants in escrow in a sealed envelope explaining to the court at the time why that step was taken.

(2) The defendant was more seriously in breach of the order though. The judge said he had come close to refusing an extension to either of the parties given the clear breach of the overriding objective. However, in the end he agreed to extend time because the hearing here had taken place only a very short while after the amendment of the CPR and because the period that had elapsed since the parties agreed an extension between themselves had been relatively short.

However, the judge cautioned as follows: "all parties and the wider litigation world should be aware that all courts at all levels are now required to take a very much stricter view of the failure by parties to comply with directions, particularly where the failure to comply is likely to lead into a waste of the limited resources made available to those with cases to litigate".

SOCA v Namli & Ors

Whether a civil recovery order could be granted in favour of SOCA where an individual had been acquitted in foreign criminal proceedings/ inferences relating to money-laundering

http://www.bailii.org/ew/cases/EWHC/QB/2013/1200.html

The Serious Organised Crime Agency ("SOCA") sought a civil recovery order under the Proceeds of Crime Act 2002 in respect of monies held in a London bank account in the name of a BVI company owned by an individual ordinarily resident in Turkey. Two particular issues which arose in the case are of general interest:

(1) What was the effect of the individual being acquitted of money laundering in Turkish criminal proceedings? Males J reviewed the relevant caselaw and summarised the position as follows: (a) an acquittal, either here or abroad, is not conclusive as to the defendant's innocence; (b) in civil recovery proceedings, the court reaches a conclusion on the balance of probabilities; (c) an acquittal is evidence on which the defendant can rely but the weight to be given to it will depend on the reason for the acquittal (ie whether it was on the merits of the case or because of shortcomings in the prosecution); and (d) in general, the English court should not attempt to find fault with the reasoning of the foreign court.

Here, the court took account of the acquittal but attached more weight to the individual's evidence in these proceedings.

(2) SOCA argued that inferences should be drawn by the court against the individual because he had failed to explain the source of the funds in question. The judge agreed that, if a transaction looks like money laundering and has not been satisfactorily explained by a defendant who ought to be in a position to explain it if there is an innocent explanation, "that is probably what it is".

Further information
If you would like further information on any issue raised in this newsletter please contact:

Nigel Brook
E: nigel.brook@clydeco.com

Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London EC3A 7AR

T: +44 (0)20 7876 5000
F: +44 (0)20 7876 5111