CLYDE&CO

Weekly Update

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

06/11

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This Week's Caselaw

Ground Gilbey Ltd & Anor v JLT UK Ltd

Whether broker liable for loss incurred by insured in settling a claim early

http://www.bailii.org/ew/cases/EWHC/Comm/2011/124.html

The defendant insurance broker acted for the claimants in placing property insurance for Camden Market. A fire broke out at the market in February 2008 after a gas portable heater set fire to clothing on a stall. Various risk improvements had been sent to the insured from 2006 onwards concerning removal of the heaters. In the latest risk improvement, sent in October 2007 to the broker, insurers had pressed for a solution to this fire hazard. However, that risk improvement had not been passed on to the insured at the time. Furthermore, the policy renewal schedule sent out in April 2007 had included a Survey Condition which provided that cover was conditional upon (inter alia) satisfaction of all requested risk improvements within timescales stipulated by the insurers. This was also not passed on to the insured by the brokers.

The claimants argued that, after the fire, their position as regards their insurers was "vulnerable" and hence they reached an early settlement. The brokers countered that neither the risk improvement nor the Survey Condition had provided the insurers with any real defence and the claimants' real intent had been to achieve a quick settlement and to claim the shortfall from their brokers.

It was uncontested between the parties that a broker owes a client a (continuing) duty to take reasonable steps to obtain a policy which clearly meets his client's needs and to not expose his client to an unnecessary risk of legal disputes with the insurer. Blair J held that the broker ought to have advised the claimants about the risk improvement and the Survey Condition and that (given the clear intention to use the heaters to heat the market) the broker ought to have realised that the policy did not meet the claimants' needs.

However, the broker raised various defences:

1) The claimants already knew about earlier risk improvements and had failed to take any action - therefore, had they been advised of the October 2007 risk improvement, this would have made no difference. Blair J said that imposition of the risk improvement had a "material and potentially deleterious effect on the insurance cover" (see *HIH Casualty v JLT* [2007]) and advice should have been given to the claimants. The judge did accept, on the facts, that the claimants (had they been informed) would not have immediately removed the heaters. However, they would probably have entered into a dialogue with the insurers to find an alternative and so, following the fire, "the dynamics of the negotiations *[between the claimants and the insurers]* would have been different";

2) The Survey Condition was not a warranty nor a condition precedent and so did not provide insurers with any reasonable defence to the claim under the policy. Blair J rejected the argument that he should form an objective conclusion on this issue. Instead, since a settlement had been concluded with insurers, he said that he should adopt the approach of Colman J in *BP v Aon (No 2)* [2006] and only ask whether the settlement arrived at was "at a figure within the range of what would have been reasonable". Blair J said that the claimants had reached a reasonable settlement. Insurers had raised the Survey Condition as a defence and it was "at least arguable that the Survey Condition did mean that they were not entitled to an indemnity". T his was because the insurers had made it clear that they wanted the heaters removed and that this had remained a "live concern" for insurers right up until the fire. Accordingly the claimants had found themselves with "doubtful or uncertain rights".

Furthermore, Leading Counsel had endorsed a settlement at just under 70% of the value of the claim. Blair J also rejected an argument that the brokers should have been consulted about the Survey Condition defence before the settlement was concluded.

The claimants were therefore entitled to the difference between what they had actually recovered from insurers and what they would have recovered had the brokers not been negligent. The judge did accept that, as both the claimants and the insurers had wanted an early cash settlement, they would have had to reach a deal based on the information available to them at the time (and not the information which would have become available had a reinstatement claim been pursued instead).

COMMENT: This case highlights the dangers of brokers failing to pass on all insurers' concerns to their clients. Although the judge accepted that the insured in this case was unlikely to have taken steps which would have prevented the fire had it been alerted to the insurers' (latest) concerns, the mere fact that a discussion might have taken place between the insurers and the insured on the issue was enough for the insured to succeed in its claim against its broker.

Brown & Ors v Innovator One Plc

Whether a claim should be struck out because privileged documents had been reviewed

The defendant applied for strike out of the claims against him on the ground (inter alia) that the claimants (and/or their solicitors) had seen privileged documents. The defendant was the "controlling mind" of a company in liquidation. The liquidator had provided documents on a hard drive to the claimants' solicitors. The documents had been copied onto an electronic document management system and then undergone a "Tier 1" review by the solicitors. This involved a preliminary review by paralegals and junior fee earners (some of whom had since left the firm) in order to eliminate completely unrelated or irrelevant documents. The Tier 1 review did not interrogate to any extent the substantive content of any document. Hamblen J accepted that as a result there was no basis for striking out the claim. There was no evidence that "significant or indeed any use of the prima facie privileged documents has been made in formulating or putting forward the Claimants' case". Any knowledge of the documents was said to be confined to the paralegals and junior fee earners and neither the claimants nor the solicitors' case handlers had knowledge of the documents. This case could therefore be contrasted with *Ablitt v Mills & Reeves* [1995], where a firm of solicitors were restrained from continuing to act in a case where the main casehandlers had read highly confidential and privileged documents.

Separately, the defendant had breached CPR r16.5(2) which requires a defendant to do more than simply deny an allegation in his defence. However, Hamblen J ruled that he should be given a further opportunity to comply since he had recently been imprisoned in Denmark and had no current access to a computer or documents.

Minkin v Cawdery Kaye Fireman & Taylor

Whether solicitors can refuse to undertake further work unless paid outstanding fees

http://www.bailii.org/ew/cases/EWHC/QB/2011/177.html

During the course of litigation, a firm of solicitors refused to undertake further work and terminated their retainer when the client failed to pay outstanding fees. The master held that this amounted to a repudiation of the contract which meant that the firm was not entitled to any fees once the client accepted the repudiation. The firm appealed. Cranston J conducted a thorough review of the caselaw on termination of a retainer.

He concluded as follows:

1) A contract of retainer can be an entire contract, but it might also be divisible, with each staged payment conditional upon the completion of certain work;

2) Solicitors can terminate a retainer for good reason and on reasonable notice. At common law, it is not a good reason that a client has not paid part of the costs as an ordinary claim proceeds. If solicitors wrongly terminate, they cannot sue for outstanding fees;

3) Solicitors can require payment on an interim basis. If they tender an interim statutory bill, they can sue for non-payment. For contentious business, a solicitor can ask for a reasonable amount on account and can terminate the contract if the client does not pay within a reasonable time (section 65(2) of the Solicitors Act 1974). However, in this case, the judge agreed with the master that the solicitors had not requested payment on account; and

4) Instead, Cranston J referred to the firm's standard business terms. One clause provided that termination for non-payment must be with reasonable notice and must be reasonable. There was no justification for termination in this case. The invoice issued by the firm exceeded the earlier estimate given to the client by a considerable margin. The estimate had been important as the client had limited funds and no advance warning had been given that the estimate had been exceeded (despite a requirement to do that under the retainer letter). As a result, the firm did not have a contractual right to terminate its retainer and was in breach of contract.

KBL v HB

Application to extend time to serve particulars of claim/whether English court still "seised"

HB (a Greek company) was alleged to have supplied contaminated tahini to KBL in England, who then supplied it on to KFF. Various proceedings were brought by the parties. The English court was first seised of a claim by KBL against HB (HB subsequently commencing a claim against KBL in Greece). One of the applications in this case was by KBL, seeking an extension of time to serve Particulars of Claim in the English proceedings. It had issued a claim form in November 2008 (which was served in Greece in April 2009) but some 18 months had elapsed between the date when it should have served its Particulars of Claim (ie 14 days after service of the claim form) and the date of its application for an extension of time. This was as a result of a deliberate decision to allow the proceedings to "lapse" (because KBL intended to join HB to proceedings about to be brought against it by KFF). HB argued that, as a result, the English court was no longer "seised" by the time the Greek proceedings were issued (in December 2009).

Eder J held as follows:

1) The arguments that the English court was no longer seised (and/or that the English proceedings no longer existed) were "intricate and delicate" but it was unnecessary for the judge to decide them. Eder J was prepared to assume (although he had grave doubts on the issue) that he had power under CPR r3.10 to extend time for service because there had been an "error of procedure"; and
2) He decided to decline to exercise his power under CPR r3.10. This was for various reasons, including: (a) as a matter of principle, a party should not be allowed to "warehouse" a claim, "particularly where there are serious jurisdiction issues"; (b) to allow the application would risk derailing a trial due to take place in Greece a week later and so risked offending the principles of comity; (c) the application had not been made promptly; and (d) there was no good explanation for the delay. Nor did it matter that the failure to comply had been caused by KBL's legal representatives.

Eder J concluded that "HB will be severely prejudiced if KBL is now, out of time, allowed in effect to revive the [*English*] action so as to seek to trump and thereby to undermine and to disrupt the Greek Proceedings".

Liberty Syndicate Management & Anor v Campagna Ltd

Whether technical auditor breached duty to insurer

http://www.bailii.org/ew/cases/EWHC/TCC/2011/209.html

The claimant insurer underwrote latent defects cover, mainly for residential property (the "Premier Guarantee Scheme"). Originally launched in the UK, the scheme was later extended to new build properties in Ireland. The defendant was engaged by the insurer to provide it with technical audit services and to issue Certificates of Approval in respect of property prior to the issue of an insurance policy. The insurer claims that the defendant's checks and inspections of the properties were below standard and a breach of contract. The case therefore largely turns on its particular facts. However, there were some general points made by Edwards-Stuart J:

1) Caselaw supports the view that a court should be careful to avoid reaching the conclusion that because a defect has been found to exist, the person responsible for checking the work must have been at fault. Nor is it unjustified for a technical auditor to place some trust in a contractor. In this case, the insurer had been aware from the outset that not every defect would be noticed and had decided the extent and frequency of the inspections (based on how much it was prepared to pay for them); and

2) The scope of the defendant's duty and the standard of care required must be determined in the context of the defendant's retainer. Generally, though, the judge felt that technical auditors cannot be characterised as either building control officers or building surveyors - instead, they combine these two roles. A technical auditor is not expected to be a master of the minutiae of local building regulations, but he must be familiar with standard building techniques in the country where he is operating. He is not expected, however, to find every defect in every house during his intermittent inspections.

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Green Island Organics v QBE

Scottish Court of Session rules that sea lice falls within definition of "disease" in an insurance policy

http://www.bailii.org/cgi-bin/markup.cgi?doc=/scot/cases/ScotCS/2011/2011CSOH15.html&query=title+(+green+and+island+and+organics+)&method=boolean

The insured fish farmers took out an insurance policy in respect of the mortality and physical loss of their Atlantic salmon. Insured Peril 3 (covering physical damage by predators) expressly excluded cover for sea lice. Insured Peril 8 (covering disease) did not contain an express exclusion for sea lice and the Disease Extension Clause defined disease as "the presence of a pathogen...shown to have a primary causative relationship to the mortality of the insured fish". The policy also contained a warranty that all medication for the treatment of (inter alia) sea lice should be applied in accordance with the manufacturer's instructions. The insureds claimed under their policy after their salmon suffered an infestation of sea lice.

The insurers argued that fish damaged by sea lice are not diseased - instead, they may sustain a physical disability. Lord Menzies of the Court of Session (Outer House) rejected that argument. He held that:

1) It could not be argued that, just because sea lice was excluded in Insured Peril 3, it was excluded from all other Insured Perils. The exclusion related only to Insured Peril 3;

2) Although in "everyday parlance" it might be accepted that there is a distinction between disease and the cause of a disease, the parties here had chosen to define disease as including pathogens which cause disease. It was also relevant that the warranty referred to sea lice. Nor did this construction of the contract flout business common sense; and

3) Looking at the surrounding circumstances, it was said to be generally assumed in insurance practice that mortality of fish due to sea lice was covered by disease insurance.

Further information

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