Insurance and reinsurance
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CLYDE&CO

Weekly update

Welcome to the fourth 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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Standard Life v Ace European Group & Ors

Whether payments by the insured to its customers were mitigation costs/apportionment/ interpretation on an aggregation clause

http://www.bailii.org/ew/cases/EWHC/Comm/2012/104.html

The insured operated a fund which suffered a one-day 4.8% fall in value. It subsequently estimated that a majority of its customers would have valid claims against it (essentially for mis-selling). It made certain payments (to customers and into the fund) which it sought to recover under the Mitigation Costs section of its professional indemnity insurance policy. The insurers denied cover. Eder J considered the following issues in this case:

(1) The policy provided cover for Mitigation Costs "reasonably and necessarily incurred by the Assured in taking action to avoid…or to reduce a third party claim". Insurers argued that the payments were not covered because they were made for the (dominant) purpose of avoiding or reducing reputational damage. The judge rejected that argument. The motive behind the payments was immaterial. The insured needed to show that the payments were made in taking action to avoid or reduce a third party claim. It did not matter if one motive of the insured was also to avoid or reduce reputational damage - that did not affect the insured's entitlement to cover.The insured also did not need to show that the payments were made to discharge a particular liability to a particular third party claimant.

(2) On the facts, the payments did fall within the scope of the Mitigations Costs clause. The insured was able to show on the facts that the fall of 4.8% was outside the reasonable expectations of any customers because of some inadequacy in the marketing literature which rendered the insured potentially liable.

(3) Insurers had also sought to argue that if there were two genuine and equally dominant purposes in making the payments (namely, to avoid or reduce reputational damage and also to avoid or reduce potential third party claims) there should be an apportionment of the Mitigation Costs. This was a novel claim in respect of a non-marine liability policy. The judge accepted that the insurers had made "powerful" submissions but rejected the argument for apportionment. He was "at the very least, very doubtful" that there could be a general principle of apportionment in a liability policy, although he saw "much less objection in principle to the possible application of apportionment in the specific context of costs incurred by way of mitigation". However, the issue would turn on the particular wording of the clause in question and there was nothing in the wording of the Mitigation Costs clause in this case to support the apportionment argument. In particular, the words "solely" or "exclusively" did not appear in the clause.

(4) The policy contained an aggregation provision which provided (in relevant part) that "all claims… arising from or in connection with…any one act…or originating cause…shall be considered to be a single third party claim for the purposes of the application of the Deductible". Insurers argued that there was no one originating cause in this case because there was a wide variety of different types of complaints from customers. That argument was rejected by the judge. The aggregation clause in the policy was "very wide wording". There is prior caselaw to support the view that "originating cause" opens up "the widest possible search for a unifying factor" (see *Axa Re v Field* [1996]). Furthermore, the phrase "in connection with" is extremely broad "and indicates that it is not even necessary to show a direct causal relationship between the claims and the state of affairs identified as their "originating cause or source," and that some form of connection between the claims and the unifying factor is all that is required".

The judge said that there was no difficulty here in aggregating the claims - the originating cause was that the fund had been marketed as a safer investment than it in fact was and that had been a continuing state of affairs even though the fund had been marketed in a number of different forms and through a number of different channels over the years.

COMMENT: This appears to be the first case in which an argument has been run for apportionment in the context of a non-marine, non-property insurance policy. It is interesting to note that the judge did not entirely rule out the possibility of apportionment for mitigation costs, depending on the wording of the policy. He appeared to suggest that the use of the words "solely" or "exclusively" might have supported a conclusion that there should be apportionment. In other words, there could be a situation where some items of costs relate solely to mitigation and others relate solely to protecting reputation. In that situation, the mitigation costs alone will be covered (to the extent that they have been reasonably and necessarily incurred).

This also seems to be the first case in which the phrase "in connection with" (in an aggregation clause) has been judicially considered. The case confirms that this phrase is considerably wider than other, more common, wording in aggregation clauses (such as "arising out of or from"/"resulting from"/"originating from") and this should be borne in mind when drafting policies.

Abuja International v Meridien

Whether there was a valid arbitration agreement/applicable law

http://www.bailii.org/ew/cases/EWHC/Comm/2012/87.html

The parties entered into a contract which was governed by Nigerian law. The contract contained an arbitration agreement providing for ICC arbitration in London. Following an arbitral award in favour of the defendant, the claimant challenged that award under section 67 (and section 68) of the Arbitration Act 1996. One of the arguments raised by the claimant was that the arbitration agreement was null and void under Nigerian law.

Hamblen J rejected that argument. The issue of whether there was a valid arbitration agreement fell to be considered in accordance with English law, being the law governing the arbitration agreement (because the seat of the arbitration was in England). Nigerian law was therefore irrelevant to the validity of the arbitration agreement. The judge rejected an argument that the fundamental and mandatory nature of the Nigerian Constitution "trumps" any application of English law. Nor did the case of *Ralli Brothers v Compania Naviera* [1920] apply to this case. *Ralli* had held that an English court will not enforce a contract (even if it is lawful by its governing law) if its performance is unlawful by the law of the country where it has to be performed. In this case, the arbitration agreement did not fall to be performed in Nigeria.

COMMENT: This is the second time in as many weeks in which this issue has arisen (see *Sulamerica v Enesa* last week). The judges in both cases have upheld the principle that the governing law of an arbitration agreement can be (and was in both cases) different from the governing law of the underlying contract in which it is found. It is therefore an important principle to bear in mind when drafting a contract.

PGF II v OMFS

Meaning of "information" in Part 36/whether defendant had unreasonably refused to mediate

http://www.bailii.org/ew/cases/EWHC/TCC/2012/83.html

In January 2012, the claimant accepted a Part 36 offer which the defendant had made in April 2011. Part 36 provides that where an offer is accepted after the end of the relevant period (as happened here), the defendant must pay the claimant's costs up to the end of the relevant period, and thereafter the offeree must pay the offeror's costs up to the date of acceptance of the offer. However, the court has a discretion to make a different order. When the court considers whether to make a different order, it can take into account (amongst other things) "the information available to the parties at the time when the Part 36 offer was made" and the "conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated". The judge, Furst QC, held as follows:

(1) "Information" in this context means factual information only. Thus, in this case, the proper interpretation of a lease did not fall within the meaning of "information" and, in any event, had been available to the claimant at all times by simply reading the relevant documentation. It did not matter that the defendant had only put forward his argument at the last moment.

(2) The defendant had unreasonably refused to take part in a mediation by not responding to a suggested mediation. The judge said that "it is clear that the courts wish to encourage mediation and whilst there may be legitimate difficulties in mediating or successfully mediating these can only be overcome if those difficulties are addressed at the time". Thus a party should be deprived of its reasonable costs where there are real obstacles to mediation which might reasonably be overcome but these are not addressed because the refusing party does not raise them at the time. The judge also confirmed that the impact on costs following a refusal to mediate takes effect from the date when the party unreasonably refuses and not from the date when the putative mediation would have taken place.

Wharton v Bancroft

Part 36 and tactical offers/rate of interest

http://www.bailii.org/ew/cases/EWHC/Ch/2012/91.html

One of the issues in this case was the effect of a Part 36 offer. The claimant's Part 36 offer was rejected by the defendants and she went on to beat her offer at trial. However, the defendants argued that the usual costs consequences should not be ordered because her offer had not been a genuine attempt to settle and had, instead, been a "tactical" offer. Reference was made to the case of *Huck v Robson* [2002], where Parker LJ suggested that a Part 36 offer must present a genuine and realistic attempt by the offeror to resolve the dispute by agreement (as opposed to making a offer which created no real opportunity for settlement but was merely a tactical step designed to secure the benefit of the incentives provided by Part 36). Tuckey LJ agreed that if an offer was merely a tactical step (eg an offer to accept 99.9% of the full value of the claim), the judge would have a discretion to refuse indemnity costs.

Norris J said that this concept was not easy to apply since, in a sense, Part 36 offers are always tactical: "A low offer in a case where the offeror considers that the offeree's position has no merit cannot be written of as self evidently "merely a tactical step"". In any event, the judge held that the offer here had not been derisory or tactical. He also ordered interest at a rate of 8% on the claimant's costs from the end of the relevant period. The rate had to comfortably ensure that the claimant was not out of pocket for her expenditure on costs and must replace any investment income (or growth) which she had lost by having to use her savings.

COMMENT: Although not referred to in this case, as recently as last year in *AB v CD* (see Weekly Update 12/11) the court advised that a Part 36 offer must "contain some genuine element of concession". This judgment (although obiter since the Part 36 offer was not said to be tactical) therefore provides some comfort to offerors that a low offer might be justifiable in certain circumstances. It suggests that the weaker the other side's case, the lower the offer that can be made.

Bennett v Stephens & Anor

Can party withdraw consent to a Periodical Payment Order?

http://www.bailii.org/ew/cases/EWHC/QB/2012/58.html

The judgment in this case was reported in Weekly Update 02/12. The defendant's insurers and the claimant entered into a settlement agreement which provided for an order for periodical payments (PP) to be made. That order was made and the MIB's appeal against the order was dismissed. The insurers were concerned, though, that their liability could be capitalised (notwithstanding that they were regularly paying and were able to continue paying) if the MIB ceased to exist in its current form. They objected to this uncertainty and sought to withhold their consent to the PP Order. The order had been made subject to the terms of a Security Order and that had not stated what was to happen in the event of the MIB making an application to the court. Accordingly, it was argued by the insurers that there was no binding order.

That argument was rejected by Tugendhat J. There was no need for the Security Order to refer to what would happen should the MIB make an application to the court but the court remained satisfied that the continuity of payments under the order was reasonably secure. It was obvious or implicit that the PP order would remain binding in those circumstances. Nor does the court give advisory opinions or rulings on hypothetical questions. The court decided the application from the MIB in this case on the basis that the parties had otherwise consented to the making of the order.

Patel v UNITE

Whether court can allow an expert access to a party's database/compliance with *Norwich Pharmacal* order

http://www.bailii.org/ew/cases/EWHC/QB/2012/92.html

The claimant alleged that libellous statements had made about him on an internet forum owned and operated by the respondent. The claimant obtained a Norwich Pharmacal order from the court which required the respondent to carry out a reasonable search to locate information which would help the claimant identify the anonymous users of the forum who were responsible for the relevant posts. The respondent responded to the order by claiming that it was unable to identify IP addresses from a back up copy of the forum (the forum itself had been taken down). The claimant then sought a further order from the court requiring the respondent to allow an independent expert to access its database and to permit that expert to make an image of the database in order to prepare a report.

Parkes HHJ accepted that such an order would be "undoubtedly intrusive" and that there has been no prior domestic caselaw supporting such an order. However, there is a suggestion in the textbook Matthews & Malek on Disclosure that, where it is not appropriate to allow a party access to another party's computer, the court may permit inspection and interrogation of the computer system by an independent expert (who would be subject to undertakings necessary to protect the interests of the disclosing party).

The judge concluded that "it must be open to the court, where there is reason to believe that a previous order of the court has not been fully complied with for reasons of lack of technical understanding, to make such further order as is necessary and proportionate to enable and assist the respondent to comply and to ensure that the earlier order is not frustrated by an innocent failure to understand the technical issues". Accordingly, the order was made.

Revenue & Customs v GKN

Court of Appeal guidance on interim payment orders

http://www.bailii.org/ew/cases/EWCA/Civ/2012/57.html

CPR r25.7(1) provides that the court may order an interim payment where a defendant has admitted liability or a claimant has obtained judgment or "it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money". It is that last provision which was in issue in this case. The appellant appealed against an interim payment order and the Court of Appeal gave the following guidance:

(1) A judge must put himself in the hypothetical position of being the trial judge and pose the question: "would I be satisfied (to the civil standard) on the material before me that this claimant would obtain judgment for a substantial amount of money from this defendant". It is not enough that the judge thinks it "likely" that the claimant would either obtain judgment or a substantial amount of money.

(2) The fact that there has already been a trial of certain issues (but not all those that would lead to a judgment for damages) is no bar to an interim payment order.

(3) A "substantial" amount of money has to be judged in the context of the total claim made.

(4) The fact this was a Group Litigation Order action and that the case raised difficult questions of law were not reasons for the court to refuse to exercise its discretion.

(5) Once the test in CPR r25.7(1) has been satisfied, the court must not order an interim payment of more than a "reasonable proportion of the likely amount of the final judgment". The Court of Appeal clarified that that means the court's assessment of the likely amount of the judgment and not the claimant's calculation of its entitlement. In this case, 75% was a reasonable proportion.

Coogan v News Group

Criticism from the Master of the Rolls of the privilege against self-incrimination

http://www.bailii.org/ew/cases/EWCA/Civ/2012/48.html

There is a long-established common law rule that no-one is bound to answer any question in civil or criminal proceedings if the answer is reasonably likely or tends to expose him/her to any criminal charge, penalty or forfeiture. That rule was re-stated in section 14 of the Civil Evidence Act 1968. However, a number of disparate statutory provisions have cut down the scope of the privilege.

In this case, the Master of the Rolls referred to a number of recent judicial observations criticising the appropriateness of the privilege in modern circumstances. He added: that "I would take this opportunity to express my support for the view that PSI has had its day", although he did call for a safeguard along the lines that where a person is required to answer questions put to him/her, that answer will not be admissible in proceedings against him/her for any related offence. Furthermore, he recognised that it is for Parliament, and not the courts, to further reduce, or even remove, the privilege.

This case concerned the interpretation of one existing statutory exception to the privilege. Section 72 of the Senior Courts Act removes the privilege in relation to certain types of proceedings - broadly, relating to the infringement of intellectual property (which includes "commercial information") rights. Two individuals alleged that their phones had been hacked by a private investigator and the investigator sought to rely on the privilege in order to resist swearing an affidavit. The Court of Appeal concluded that information in the phone messages did mostly fall within the definition of commercial information and hence the investigator could not rely on the privilege against self-incrimination.

O'Farrell v O'Farrell

Urgent applications and the need to give notice (in the context of a freezing injunction)

http://www.bailii.org/ew/cases/EWHC/QB/2012/123.html

Alternative Family Law for claimant, Stockdale & Reid for defendant.

The respondent applied for the discharge of a freezing injunction against him. Tugendhat J made (inter alia) the following observations:

(1) The judge said that he was "shocked at the number of spurious ex-parte applications that are made in the Queen's Bench Division..in these days of mobile phones and emails it is almost always possible to give at least informal notice of an application". If needs be, the judge can communicate with both parties either in a three-way telephone call or by a series of calls (or exchanges of email). This is the second time in a year that a High Court judge (Mostyn J being the other judge) has expressed real concern that parties have not given notice to the respondent in urgent applications. In this case, Tugendhat J held that it was difficult to see why there would have been a risk of dissipation if the respondent had been given notice (since he was not going to receive a particular payment until after the hearing).

(2) The judge also advised that there "is much to be said for parties agreeing what is a reasonable sum for the ordinary living expenses of a Respondent to a Freezing injunction and a reasonable sum for legal advice". In default of an agreement or an application to the court "it is for the Respondent to a Freezing Injunction to make at his own risk decisions as to what is the reasonable expenditure which a Freezing Injunction cannot preclude him from making".

COMMENT: Despite the judge's concerns regarding the lack of notice to an intended respondent, it is worth bearing in mind that applications for freezing injunctions will often need to be made without notice because of the risk of dissipation (and, indeed, a freezing injunction may not be granted if advance notice has been given to the other side - see, for example, *Irish Response v Direct Beauty* (Weekly Update 05/11)). This case emphasises that it is important to analyse the risk of dissipation on each application and not to assume that an application for a freezing injunction must always be made without notice.

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

Nigel Brook
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