reinsurance law update

newsletter of the reinsurance & insurance group

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CASE NOTES *by Andrew Rose and Matthew Line*

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Our regular update on recent decisions of matters of insurance and reinsurance.

Jurisdiction

Youell v La Reunion Aerienne (2009)

Summary

This case considered the application of EC Regulation 44/2001 in determining the appropriate jurisdiction for a dispute between French insurers and English insurers regarding the alleged grant of authority by the English insurers to the French insurers to settle claims.

Case

French insurers ("FI") appealed against an English Court's decision that it had jurisdiction under Regulation 44/2001 to decide a claim made by English insurers ("EI"). FI and EI were co-insurers for a group of French aeronautical engineering companies. EIs' policy stated that it was "*as and to follow French warranty company* [FI] *with regard to terms (excluding rate), conditions, agreements and amendments*". The FI and EI policies were subject to French law. On behalf of EI, FI settled a third party claim brought against an insured. This was done on the basis of an irrevocable authority allegedly granted by EI to FI under a Co-Insurance Agreement. EI denied that FI had any authority to settle on their behalf and refused to pay their proportion of the settlement.

The FI policy contained an arbitration clause, which required disputes to be referred to arbitration in Paris. However, the dispute between EI and FI arose out of the separate alleged authority granted to FI by the Co-Insurance Agreement. Arbitration proceedings were issued in France by FI. EI then applied in England for a declaration as to non-liability. FI argued that the dispute had to be arbitrated because of the arbitration clause in the policy, so the English Court did not have jurisdiction.

The Judge at first instance held that Article 5(1)(a) of Regulation 44/2001 (which states that a person domiciled in a Member State may, in another Member State, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question) applied despite the fact that EI denied that there was any such agreement. The fact that the FI policy contained an arbitration clause did not allow Article 1(2)(d) (which states that the Regulation shall not apply to arbitration) to be used to deprive the English Court of its jurisdiction under Article 5(1)(a).

The Court of Appeal dismissed the appeal. If a claim was subject to an arbitration agreement that did not deprive the English Court of its jurisdiction under the Regulation. The nature of the claim was the key to determining the appropriate jurisdiction. The authority allegedly granted to FI was separate from the policy, so the dispute between the parties was not a claim under the FI policy. This meant that the claim was not covered by the arbitration clause, so the dispute fell within the Brussels Regulation. The Court at first instance had already determined that it had jurisdiction because the place of residence of the alleged debtor was in England.

National Navigation Co ("NNCO") v Endesa Generacion Sa ("Endesa") (2009)

Summary

The Commercial Court's decision in this case may limit the impact of the European Court of Justice's ("ECJ") ruling in the West Tankers case. In West Tankers, the ECJ stated that anti-suit injunctions issued by the Courts of EU member states in support of arbitration agreements where proceedings are pending in another EU master state are precluded by Council Regulation 44/2001.

Case

Endesa was an electricity company incorporated in Spain, which purchased coal from its co-subsidiary. The coal was transported on a ship owned by NNCO.

The bill of lading stated that it incorporated all of the terms of the relevant charterparty. There were several charters. The head charter contained an English law and London arbitration clause. The voyage charter also contained a London arbitration clause.

The ship was damaged while the coal was on board and Endesa suffered losses as a result. Endesa issued proceedings against NNCO in Spain. On the same day, NNCO brought proceedings in England for a declaration of non-liability. NNCO's argument was that the Court first seised with the dispute was the English Court, so it should determine whether it had jurisdiction. Endesa disagreed, so NNCO took three steps. The first was the commencement of London arbitration proceedings. The second was to apply for a declaration from the English High Court that the bill of lading incorporated the London arbitration clause from the voyage charter. The third was to apply for an anti-suit injunction against Endesa.

According to the Spanish Court, the bill of lading had not incorporated an arbitration clause from any charter party because the Spanish law requirements for that had not been complied with. The Spanish Court also decided that, by bringing the Commercial Court proceedings, NNCO had waived any right to arbitrate or dispute the Spanish jurisdiction. NNCO appealed, so the Spanish proceedings were stayed pending the English Court's decision on its jurisdiction.

The Commercial Court in England dismissed NNCO's anti-suit injunction application because, as decided by the West Tankers case, EC Regulation 44/2001 ("the Regulation") prevented it from making such an Order. However, the Court granted NNCO's application for a declaration that certain disputes between the parties were referable to the London arbitration. The Commercial Court granted this particular application even though jurisdiction had not been declined by the Spanish Court. The Spanish Court's decision had been based on the finding that the arbitration clause had not been validly incorporated and that the Claimant had waived its right to arbitration by issuing proceedings in England. The English Court held that although the Spanish judgments fell within the Regulation they did not have to be recognised in proceedings in another member state if the proceedings in that other member state were not within the Regulation.

Whether the arbitration clause was incorporated in the bill of lading should be decided by English law. No matter which charterparty was referred to in the bill of lading, there was an express or implied English law clause and an arbitration clause applied. The Regulation was not incompatible with the declaration requested by NNCO because the arbitration came within the Article 1(2)(d) exclusion to the Regulation. The Commercial Court in England accepted that the decision may sometimes cause conflicting judgments on arbitration issues in different Member States.

Additional Parties to proceedings

Dunlop Haywards (DHL) Ltd ("Dunlop") and another v Erinaceous Insurance Services Limited ("Erinaceous") (2009)

Summary

An insured claimed against its broker for allegedly failing to secure the cover requested. The broker applied to join the insurers to the proceedings. The Court of Appeal considered whether the case against the insurers was sufficiently strong for it to be "*desirable*", within the meaning of CPR 19.2(2), to join the insurers.

Case

Dunlop was a property consultant and undertook commercial property management, surveying and valuations. Dunlop had a primary and an excess professional indemnity policy, which had been obtained by Erinaceous as broker. The excess cover for Dunlop was limited to the "*assured's commercial property management activities only*". This was a restriction that had not appeared in the earlier documents passing between the parties leading up to the slip.

Claims were made against Dunlop alleging negligent and/or fraudulent valuations by one of their employees. The excess insurers denied liability because the claims arose out of valuations, which they said were not commercial property management activities. Dunlop sued Erinaceous for failing to place the excess cover that they had requested. Erinaceous argued that liability arising from valuations was within the excess cover because the words "*commercial property management*" in the limiting condition referred to the insured, so the excess cover was limited to the insured's activities which included valuations. Erinaceous also argued that commercial property valuation activities were included in the words "*commercial property management*". Another argument raised by Erinaceous was that the excess policy should be rectified so that the limiting condition was restricted to the activities of the insured.

Erinaceous applied to join the excess layer insurers to the proceedings that had been brought by Dunlop, so that they would have to provide disclosure, give evidence and be bound by the court's decision. The excess insurers did not wish to be joined and argued that the rectification and construction arguments made by Erinaceous were so weak that it would not be (in the word of CPR 19.2(2)) "*desirable*" to join them.

The Judge at first instance held that the rectification argument was so weak (because the slip had replaced the earlier documents so there was no basis for rectification of the wording) that the excess insurers should not be joined. Even if it was assumed that the construction arguments had a real prospect of success, the Judge decided that it was undesirable for underwriters to be joined in the proceedings regarding those claims because it was uncertain when, or even if, those claims would be made. If those claims were made, then they could be tried swiftly in separate proceedings at a relatively low cost.

The Court of Appeal disagreed and considered it unsatisfactory for the construction issues to be argued without the excess insurers contributing to the proceedings (so that the issues could be fully investigated) and being bound by their outcome. The Court of Appeal considered there to be at least a good arguable case that the brokers had shown a common intention that all of Dunlop's activities should be covered and that that intention was contained in the policy. It was, therefore, "*desirable*" for the excess insurers to be joined.

Dornoch v Westminster International (2009)

Summary

The Court considered its power to order a person to be added as a new party to a claim in the context of the EC Regulation on Jurisdiction (Council Regulation Number 44/2001) ("the Regulation").

Case

A collision rendered a hopper dredger a constructive total loss. The assured and the underwriters could not agree on the realisation of the value of the wreck. The vessel's hull and machinery insurance had a primary and an excess layer. The primary layer was underwritten by seven insurance companies and six of them were incorporated in the Netherlands. English law governed the policy to which those underwriters subscribed, but it also contained a Dutch exclusive jurisdiction clause. The excess policy was governed by English law.

The excess layer applied to join the primary layer as additional Defendants on the basis that they had a right to do so under articles 6(1) and 24 of the Regulation. The excess layer made the application because they wanted all of the insurers to be bound by the Court's determination. The primary layer insurers also wanted to be joined into the proceedings.

The existing Defendants included the insured owner of the vessel. They objected to the primary insurers being joined on the basis that the primary policy was governed by a Dutch exclusive jurisdiction clause, which would be circumvented by the addition of the primary insurers to the English proceedings.

A preliminary issue was put before the Court as to whether the primary insurers had a right to join the proceedings as additional Defendants, or whether the Court had a discretion as to whether to join them or not. The Court held that CPR 19.2 granted it discretion as to whether to join the primary insurers to the proceedings. The Court did not think that the Regulation required it to join the primary insurers. The Court exercised its discretion and decided not to join the primary insurers because it had not been shown that it was necessary to do so. The primary and excess insurers could just agree between themselves to follow the Court's decision, so the primary insurers did not have to be joined into the proceedings.

Insanity

Porter v Zurich Insurance Co (2009)

Summary

The Court considered the test for conditions that could deprive an insured of legal responsibility for his actions and that may, therefore, allow him to recover under his insurance even though he had deliberately damaged the insured property.

Case

The Claimant had suffered various personal and professional difficulties culminating in him drinking heavily and attempting to commit suicide by setting fire to his home. The Claimant changed his mind during the fire and escaped, but the house and its contents were damaged. The house was uninhabitable due to the fire damage and was boarded up. The house was burgled three times. Claims were made on the home and contents insurance for the damage caused by the fire ("the damage claims"). The Claimant argued that his mental illness prevented him from being legally responsible for starting the fire and that he had not started it deliberately, wilfully or maliciously. The Claimant also submitted claims to the insurer for property that had been stolen after the fire ("the theft claims"). The loss adjusters appointed to deal with the theft claims were unable to arrange any meetings with the Claimant, so no inspections of the property could be carried out and no statements could be taken.

The insurer's defence to the theft claims was that the Claimant was in breach of the co-operation condition in the policy and that this prevented him from making a claim. The Court held that the Claimant had failed to co-operate and was in breach of the condition. However, the breach did not prevent him from recovering for the thefts. For the Claimant to be prevented from making a recovery, the insurer would have to prove that if it had been able to investigate the theft claims they would have been rejected or that it was now impossible to investigate (due to changes in circumstances over the passage of time). The inability to conduct an investigation at the time of the thefts did not automatically lead to a loss for the insurer. It had caused difficulties, but it did not mean that the theft claims were bound to fail. The precise consequences of the breach would have to be assessed at the quantum hearing.

The insurer had four defences to the fire damage claims. The first was that liability for wilful or malicious acts by a family member was excluded. The second defence was that a Claimant could not deliberately, wilfully or maliciously bring about the event upon which the insurance was payable because the policy only covered fortuitous perils. The third argument was that the Claimant could not recover for, or benefit from, his crime (the crime would have been arson because the house was mortgaged and subject to charges) or civil wrong. The insurer's final argument was that the Claimant had breached the policy condition requiring the insured to take all reasonable steps to safeguard against loss, damage, accident or injury.

The Court held that, to defeat the above defences, the Claimant would have to prove that he was not legally responsible for his actions at the time of the fire. The M'Naghten rules on insanity, which are the criminal law tests for legal responsibility should be applied. The Claimant would have to establish that he did not know what he was doing, or that he did not know that what he was doing was wrong.

The Court found that the Claimant had suffered from a mental disorder and depression, but he was not insane at the time of the fire. The Claimant's evidence showed that at the time of the fire he knew what he was doing and that it was wrong. The claim for the damage arising from the fire was, therefore, dismissed.

Exclusions

Global Process Systems Inc, Global Process Systems (Asia Pacific) Sdn Bhd v Syarikat Takaful Malaysia Berhad (2009)

Summary

The Court decided that damage caused to an oil rig during transportation was excluded by an inherent vice exclusion in an "All Risks" policy.

Case

The Claimants' oil rig was being transported by a barge from Texas to Malaysia when three of its legs were lost at sea. The bending of the legs with the movement of the barge during the journey had caused fatigue cracking. The Claimants asserted that the loss was an accident and that it was covered by Institute Cargo Clauses A, which was the cover provided by the Defendant against all risks. The policy required the insured to prove that the loss had occurred as a result of an accident or casualty, without having to specify the exact nature of the accident. The Claimants submitted that the proximate cause was inadequate repairs carried out at a stop during the journey.

The insurer argued that the proximate cause was actually the inability of the legs to withstand the ordinary incidents of the voyage and that the loss was caused by an inherent vice. The policy's inherent vice exclusion clause stated that there was no liability for loss caused by an inherent problem (or vice) with the insured property, as opposed to a loss caused by a "*peril of the sea*". The insurer also argued that the loss was inevitable because the condition of the rig meant that it would not be able to withstand the journey that was being undertaken. The "All Risks" policy only covered risks and not certainties, so according to the insurer the loss was not covered.

The Court held that the Defendant insurer was not liable. The proximate cause test was based on the common sense of the ordinary businessman or seafarer. Whether the oil rig could withstand the ordinary incidents of a voyage was the appropriate test to determine whether the rig suffered from an inherent vice. The Court did not accept that the proximate cause had been inadequate repairs because there had been no attempt to adjust the fatigue life of the legs. The proximate cause had been the inherent inability of the legs to withstand the ordinary incidents of the voyage including the weather which could have been expected. The Court also confirmed that it is not a rule of evidence that if exceptional weather conditions did not occur during the trip, then the loss had to be due to inherent vice, i.e. the proximate cause needs to be determined in every case.

John Reilly ("JR") v National Insurance & Guarantee Corporation Ltd (2008)

Summary

The Court of Appeal considered whether a sole trader's liability insurance claim (for damage caused by the failure of a fire suppression system that he had installed) was excluded by an efficacy exclusion in his tradesman insurance policy. The Court's decision confirmed that policies for products can exclude the efficacy risk and still cover other product risks.

Case

JR was a sole trader who supplied and installed fire suppression systems. During a fire at a client's premises, part of JR's system failed to operate resulting in damage. JR had a tradesman insurance policy, which included cover for public liability. Products supplied by JR were excluded from the cover, but there was also an extension for accidental damage caused by products supplied. An exception to the extension applied to any claim arising out of "*the failure of any fire or intruder alarm switchgear control panel or machinery to perform its intended function*" ("the efficacy exclusion"). The insurer rejected JR's claim on the basis that it was subject to the efficacy exclusion clause.

The client sued JR and the insurer. JR settled the claim with his client for £2m and they agreed that the client could claim, in JR's name, against the insurer for the cover under the policy. The insurer raised numerous coverage defences.

The preliminary issue before the Court of Appeal was whether the efficacy exclusion applied. Such exclusions are usually intended to prevent liability arising from a product not functioning correctly. Products intended to prevent injury or damage (eg a fire suppression system) create a particular risk due to the potential consequences if they fail to operate properly.

It was not disputed that the failure of the fire suppression system was caused by insufficient pressure in the main C02 cylinder. The lack of pressure could have been because it had not been filled, or because of a leak, or because a piston failed.

The Court of Appeal had to decide whether the words "*fire or intruder alarm*" meant that the exclusion applied only to the switchgear, control panels and machinery of such alarms, or whether the exclusion contained a list of distinct items so that it applied not only to fire alarms and intruder alarms, but also to switchgear, control panels and machinery that were nothing to do with fire or intruder alarms (but were instead part of, for example, fire suppression systems like JR's).

The Court of Appeal held that the exclusion contained a list of items and that there was no commercial sense in construing the clause as requiring a distinction between different components of an alarm when the alarm had failed and caused damage. The key concern was whether the alarm worked. If the alarm did not work, then it did not matter which part of it malfunctioned. The exception was not limited to fire and intruder alarms and any switchgear, control panels and machinery associated with them.

The Court of Appeal decided that the fire suppression system as a whole could not be referred to as "*machinery*", but it did contain some "*machinery*". For example, the master cylinder valves and actuators (which were designed as a single mechanical unit) could be machinery because of their complex nature and moving parts. By contrast, the cylinders and the pipework were not machinery. Despite being physically connected, they were still separate components that would not usually be described as machinery.

If the system failure was as a result of a piston in the actuator mechanism not operating properly, then there was a machinery failure and the claim was excluded. If the malfunction was due to insufficient pressure in the master cylinder, then that was not a machinery failure so the claim would not be excluded. If the whole system failed because it had been incorrectly filled or pressurised, then that was not due to a failure of the cylinder to function so the claim would not be excluded. If the system failure was caused by a lack of pressure in the master cylinder due to a leaking discharge valve of the master cylinder, the claim would not be excluded. Evidence of these matters was not before the Court so the issue was deferred for a later hearing.

Damages

Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) (2009)

Summary

The House of Lords considered the application of the remoteness of damage test to losses which had greatly increased due to fluctuations in the market rate for the chartering of a bulk carrier.

Case

A bulk carrier's time charter was to end on 2 May 2004. On 20 April the shipowners were given advance notice of the return of the carrier. On 21 April, the owners negotiated a charter to commence on 8 May at a daily rate of $39,500 for about six months. This rate was high as a result of market conditions. The previous charterers returned the carrier late on 11 May because they had completed an extra voyage. The owner's failure to deliver the carrier by 8 May breached the new charter, so they had to renegotiate the terms of the new charter. By the time of the renegotiation the market had fallen, so the owners had to accept a lower daily rate of $31,500.

The owners claimed against the previous charterer for their loss of profits of $8,000 per day. The previous charterer argued that they were only liable for the use of the ship for the days that it was redelivered late at the market rate at that time.

The majority of the arbitrators, and the Court of Appeal, found for the owners. They considered that the owner's losses were clearly foreseeable and that the higher daily rate was recoverable for the whole period of the new charter. The House of Lords disagreed.

Lord Hoffmann explained that foreseeability was founded upon the presumed intention of the parties. Parties could be presumed to have assumed responsibility for matters they could have foreseen, but that presumption was rebuttable. The main question was the responsibility that the Defendant could reasonably have thought he was undertaking. It was a question of law whether a party had assumed responsibility for a loss and it required the interpretation of the contract as a whole against its commercial background.

The owner obviously had knowledge of, and could control, the new charter, but the previous charterer was not aware of the new charter and had no control over it. The owner could have refused to sanction the extra voyage by the previous charterer, if an over-run had seemed likely. Losses relating to the new charter were outside the responsibility assumed by the previous charterer.

Lord Rodger's judgment relied on the rule of foreseeability. His Lordship stated that the loss had been the result of unforeseeably volatile market conditions, so he did not consider it necessary to assess the assumption of responsibility question that had been posed by Lord Hoffman.

The House of Lords decided that the parties were not contracting on the basis that the charterer would be liable for any loss, however large, caused by a delay in returning in circumstances where the charterer had no knowledge of, or control over, the next charter. The differing reasons provided in their Lordships' judgments have created some uncertainty as to how the remoteness of damage test should now be applied.

Warranties

Allianz Insurance Company of Egypt ("Allianz") v Aigaion Insurance Company SA ("Aigaion") (2008)

Summary

A slip failed to record a warranty that had previously been agreed by the parties to a reinsurance contract. The Court of Appeal was asked to consider whether a reinsurance contract had been concluded and, if it had been concluded, whether the warranty was included.

Case

We reported on this case in our last update, but an appeal has since been heard.

Aigaion, the appellant reinsurer, appealed the decision that it was liable to Allianz for its share of a loss. Aigaion was based in Greece and Allianz was based in Egypt. The parties had communicated by email regarding the terms of the reinsurance, but they had not communicated directly. The parties' emails went through a broker in Cyprus. Aigaion asked Allianz's broker to forward a slip to Allianz recording the agreement. The slip was forwarded, but it omitted a warranty that Aigaion had stated had been agreed with Allianz. Aigaion failed to notice the omission and responded with an email to the broker stating that cover was bound "*as we had quoted*".

One of the questions before the Court of Appeal was whether Aigaion's final email agreed to provide the cover with or without the warranty. Aigaion asserted that the email exchanges did not result in a contract because there had been no agreement between the parties. They argued that the offer had been made on the basis that the clause was not included, but the alleged (but unsuccessful) acceptance was on the basis that the clause was included.

The Court of Appeal decided that the warranty was not included because it had not been expressed in the slip. A "*reasonable reader*" of the emails would have concluded that Allianz was agreeing to the terms in the slip, on the basis that that was what Allianz had quoted. Aigaion in its "*as we had quoted*" email agreed to the terms in the slip even though it did not know about the difference between the slip and the terms that were previously agreed. The Court of Appeal decided that there was a contract, but that it did not include the warranty.

Notification Requirements

Aspen Insurance UK Ltd v Pectel Ltd (2008)

Summary

The Commercial Court considered whether Pectel's delay in notifying a possible claim entitled the insurer to reject Pectel's claim regarding several million pounds worth of fire damage to tunnels that Pectel had been working on.

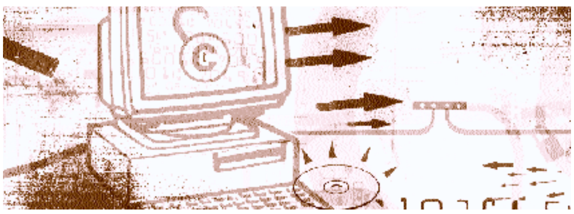
Case

Pectel specialised in removing asbestos and in February 2004 they were contracted by Amec to strip two tunnels for BT. Preparatory work was suspended in March 2004. A fire on 29 March 2004 caused about £15m worth of damage. Pectel's insurers were not notified until 22 March 2007.

The fire started in a light fitting that had been damaged by Pectel. The damage had been increased by flammable polythene sheets used by Pectel to limit the spread of asbestos dust. The sheets did not meet the required specification, although Pectel was unaware of this at the time. BT and Amec investigated the fire and tested Pectel's equipment. Lawyers for BT and Amec interviewed Pectel's employees. Pectel asked Amec whether it should be worried and Amec said no. Six months later BT obtained a report condemning Pectel's materials. In November 2006 BT informed Amec that a claim was imminent. Amec's lawyers wrote to Pectel suggesting that they notify their insurers, but Pectel did not do so. In March 2007 BT served a letter of claim on Amec blaming Pectel for the fire. On 9 March 2007 Pectel provided the letter to their broker. The broker informed Pectel's insurers two weeks later.

Pectel had public liability cover with Aspen and their insurers. The policy required "*immediate*" written notice to brokers of any occurrence which may give rise to indemnity under the insurance. The insurers' liability was also conditional upon compliance with all of the policy's terms and conditions. The insurers rejected the claim due to Pectel's failure to comply with the policy requirements. Pectel challenged the decision, relying on Amec's previous statement that Pectel had nothing to worry about.

The Commercial Court pointed out that the cause of the fire had not been identified when Amec made their statement to Pectel. The Court considered that Pectel should not have relied solely on Amec's statement because it did not allow Pectel to close their eyes to everything else that was going on. A reasonable man could not have disregarded the possibility that Pectel's work may have been connected with the fire. There was a real possibility that a claim might be brought, so Pectel should have given written notice of the fire immediately or at the latest by November 2004 when it was clear that the materials used by Pectel were under investigation. The Commercial Court also held that notification was a condition precedent to liability because the purpose of the requirement was to provide the insurers with early notification of any event which could lead to a claim. However, the breach did not affect the policy as a whole just this claim.



Non-Party Costs Orders

Grecoair Inc v Tilling (2009)

Summary

The Commercial Court considered a reinsurer's application for an order for oral evidence to be given by the respondent regarding an application for a non-party costs order against the respondent.

Case

The underlying insured company ("the Company") had brought proceedings against the applicant reinsurers. The claim was unsuccessful and the Company was ordered to pay the reinsurers' costs. An interim costs order of £225,000 was made, but only £25,000 was recovered (which was the amount that the Company had been ordered to pay as security for costs during the proceedings).

The reinsurers applied (under section 51 Supreme Court Act 1981) to enforce the costs order against the respondent. The reinsurers alleged that the respondent had funded the Company and the litigation. It was also alleged that the respondent had controlled the Company at all material times and that after the judgment the Company had started to dispose of its assets. The respondent was not willing to attend the hearing of the reinsurers' application.

The Commercial Court held that it had jurisdiction on a section 51 application to make an order under CPR 32 to hear oral evidence in chief or in cross-examination. Third party costs procedure would ordinarily be a summary procedure by way of evidence in writing, but the Court considered that in exceptional cases it would be appropriate for evidence to be given orally and for witnesses to be cross-examined. If the Court could not order that evidence should be given orally on a section 51 application, then witnesses giving evidence in writing would know that their evidence could never be tested by cross-examination. The Court set out three considerations to be taken into account when deciding whether to make an order that evidence should be given orally: (i) section 51 proceedings are ancillary and should not be allowed to spin out of control into satellite litigation; (ii) proportionality; and (iii) section 51 applications should usually consist of a summary process.

The respondent was ordered to give oral evidence in the trial of the application, failing which his witness statement would be his evidence and the judge could draw such inferences and attribute such weight to it as he considered appropriate in all the circumstances.

Binding Authorities

Temple Legal Protection Limited v QBE Insurance (Europe) Ltd (2009)

Summary

The Court of Appeal considered whether a binder between Temple and QBE provided Temple with the right to manage certain run-off business even though QBE no longer wished Temple to do so.

Case

Temple was an insurance broker for after the event legal expenses insurance. Temple provided insurance through solicitors. These solicitors entered into conditional fee agreements with their clients, which limited the financial risk for clients in bringing legal proceedings. However, the clients were still at risk of having to pay the other side's legal costs if their claims were unsuccessful and insurance cover was required to deal with the risk.

In December 2005, Temple entered into a binder with QBE. Section 1 of the binder stated that Temple was appointed as QBE's agent to write legal expenses insurance on its behalf and to provide certificates of insurance to policyholders for cover in respect of insurances entered into under the agreement. The binder was for three years unless terminated in accordance with the terms of the binder. Section 10 stated "*Upon and following the giving of any notice of termination…[Temple] shall have authority to extend insurances already bound (or which may be bound during the period of such notice). Upon termination…[Temple] shall immediately cease and shall have no further authority either to bind or offer to bind insurances or to renew any insurances but shall have authority to cancel, extend, amend or alter any insurances already bound*".

In August 2006, Temple served notice to terminate the binder. Temple and QBE agreed that this termination took effect in December 2006 at the latest. In January 2007, QBE wrote to Temple that it would assume all claims handling functions for the policies it had underwritten including the run off ("the January letter"). QBE wrote to coverholders requesting them to correspond directly with them, rather than through Temple.

Temple disputed QBE's authority to manage the run off. The dispute went to arbitration where it was held the January letter had ended Temple's authority to manage the run-off. Temple asserted that, under the terms of the binder and its associated contracts, it had the right to manage the run-off whether QBE wanted it to or not. QBE contended that although the binder obliged Temple to manage the run-off, the binder did not provide Temple with a right to do so. QBE claimed that it could withdraw Temple's authority and release Temple from the binder's obligations. The Judge at first instance upheld the decision that had been reached at the arbitration, so Temple appealed.

The Court of Appeal considered that it would be strange, and uncommercial, for a principal who had employed an agent to manage part of his business to be forced to allow that agent to continue to act on his behalf when the principal no longer trusted, or had no confidence in, the agent. At the very least, clear language in the binder would be necessary to bring about such an outcome. There was no clear language in this binder to show that Temple had a right to continue to act for QBE after termination. Temple's obligation to manage the run-off did not have to continue if QBE decided not to require Temple to perform that obligation.

An appeal is pending to the House of Lords.

Non-disclosure

Laker Vent Engineering Limited v Templeton Insurance Company Limited (2009)

Summary

Templeton appealed against a decision that it was bound to indemnify Laker under a legal expenses insurance policy. Templeton argued that the claim should fail due to Laker's non-disclosure of an ongoing dispute with a third party prior to the renewal of the policy.

Case

Laker was an engineering contractor with a legal expenses policy from Templeton. A claim was made for legal expenses incurred by Laker in a construction dispute with a third party. Laker intended to submit the dispute to arbitration. Templeton declined the claim because Laker had failed to disclose the escalating dispute with the third party before the policy was renewed. Templeton also alleged that Laker had breached the policy's requirement for immediate notice to be given in writing when Laker became aware of any cause, event, or circumstance which had given, or was likely to give, rise to a construction claim (the policy contained a partial definition of "*construction claim*"). Templeton also argued that compliance with the notification requirement was a condition precedent to liability. At first instance, the Court rejected Templeton's defences so Templeton appealed.

The Court of Appeal held that the Judge's decision on the facts could not be challenged. The Judge had concluded that, despite delays and differences of opinion, the relationship between Laker and the third party had been amicable prior to the renewal of the policy. Templeton could not successfully challenge the Judge's finding that the dispute was not a material circumstance.

The Judge had been correct to hold that, in legal expenses insurance, the prudent underwriter would regard as material features of a relationship which, objectively, showed a real risk of escalation to the point of formal dispute resolution procedures beyond the ordinary risks of a complex construction contract. The Judge had not been obviously wrong in deciding that the dispute had not been at a point where its disclosure was required. Templeton produced no evidence from their underwriters, so they had been unable to demonstrate inducement.

The Court of Appeal interpreted the policy's partial definition of "*construction claim*" as meaning that a bona fide construction claim could not arise until the insured had applied for payment, or asserted a defence, under the relevant contract and the application, or assertion, had been rejected twice in writing by the other party. The Court of Appeal considered that the Judge had correctly concluded that a construction claim would only be likely if it had reached the stage when adjudication, arbitration or litigation was likely to be required. The wording "*has given or is likely to give rise to a construction claim*" stipulated an objective test. The Judge had been entitled to find that at the time of the renewal the dispute had not reached a point at which Laker should have given notice.

Lewis v Norwich Union Healthcare Limited (2009)

Summary

The Court considered whether the claimant's failure to disclose a pre-policy visit to his GP entitled the insurer to avoid a health insurance policy for non-disclosure, even though the GP appointment had nothing to do with the illness that was the subject of the claim. The Court also considered what evidence would be required for the insurer to justify its avoidance.

Case

Lewis took out permanent health insurance with Norwich Union. He claimed that incontinence and two back injuries led to him being dismissed by his employer for incapacity. He submitted a claim, but Norwich Union avoided the policy because he had not disclosed a pre-policy visit to his GP about knee pain. The preliminary issues before the Court were as follows.

i Would Lewis's GP visit have influenced a prudent insurer's decision as to whether to accept the insurance proposal or the terms of the insurance?

The parties agreed the visit was material as a fact that a prudent underwriter would have taken into account. The effect on the prudent underwriter did not have to be decisive, just an influence.

ii Did the contents of the documents that Norwich Union sent Lewis, as to what information to disclose, mean that Norwich Union had waived Lewis's disclosure obligation regarding the visit?

The Court considered what a reasonable man would have understood from carefully reading the documents. The Court found that the documents did not limit the disclosure required and did not waive Lewis's obligation to disclose the visit.

iii If the GP visit had been disclosed, would Norwich Union have rejected the proposal or accepted it on different terms?

For Norwich Union to prove that they were entitled to avoid the policy, they had to prove on the balance of probabilities that they were induced to provide the policy by the material non-disclosure or misrepresentation. There was no presumption of law that Norwich Union would have been induced by a material non-disclosure or misrepresentation, but it might be possible to infer this from the facts. Norwich Union had to show that the non-disclosure or misrepresentation was an effective cause of their decision to provide the policy on the terms that they did. Lewis should have disclosed his GP visit because it would have been material to a reasonably prudent underwriter, but that did not turn the non-disclosure into an actual influence on any, or on the actual, underwriter. The actual underwriter had not given evidence; instead Norwich Union had submitted the evidence of another underwriter and evidence of their general practice. The Court decided that it could not be inferred from the evidence produced that if Lewis had made the disclosure, then the actual underwriter would have declined the cover without more, or would have made further inquiries. If inquiries had been made, then, on the balance of probabilities, the terms would not have been affected, on the basis that, despite considering it necessary to consult his GP, there was nothing wrong with Lewis's knee. Norwich Union had not proved that it had been induced by the non-disclosure to provide the policy on the terms that it did.

iv Did the policy incorporate the Association of British Insurers' ("ABI") statements of general insurance practice (i.e. that an insurer will not repudiate liability to indemnify a policyholder because of non-disclosure of a material fact which a policyholder could not reasonably have been expected to disclose, or because of a misrepresentation that was not deliberate or negligent)?

It was not necessary for the court to determine this issue. However, the Court stated that the policy did not incorporate the ABI's statements of general insurance practice. Unless such statements were actually incorporated in the policy, they did not have the force of law and policyholders could not rely on them in order to bring claims.

General

In **Brent London Borough Council v Risk Management Partners Limited (2009)**, the Court of Appeal brought, to an end the attempt to set up a local authorities mutual insurer, on the basis that the procurement process followed was not in compliance with the Public Contracts Regulations 2005. In any event, setting up a mutual was outside the powers given to local government under the Local Government Acts 1972 and 2000.

The High Court sanctioned the transfer under Part VII Financial Services & Markets Act, 2000 of 1992 and previous years liabilities of Lloyd's to a new company to be named Equitas Insurance Ltd, thus finally removing the liabilities of the Names for those underwriting years. The run-off is now being dealt with under the auspices of Berkshire Hathaway.

The House of Lords has heard argument in the case of **Wasa v Lexington**. Judgment is expected later in the year.

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OUR NEWS

Adam Bogdanor has joined the firm as a partner in the Corporate Finance Department. He has experience of a broad range of corporate insurance transactions, including mergers and acquisitions, demutualisations and business transfers.

Nic Fletcher, an expert in international commercial arbitration has joined the firm as a partner in the Litigation and Dispute Resolution Department. He is also qualified as a New York attorney and sits as an arbitrator.

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SEMINARS

Our next update seminars will be on the evening of Tuesday 22 September and the morning of Wednesday 23 September.

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The senior team is supported by 20 specialist insurance and reinsurance lawyers at the firm with expertise ranging from reinsurance and insurance arbitration and litigation to regulatory, corporate and advisory work for Insurers, Reinsurers and Brokers.

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