



Insurance Update

This update includes recent cases and developments on waiver of privilege, claims for economic loss and jurisdiction disputes.

Waiver of privilege

Quinn Direct Insurance Ltd v The Law Society of England and Wales

[2010] EWCA Civ 805 <http://www.bailii.org/ew/cases/EWCA/Civ/2010/805.html>

The Court of Appeal upheld Peter Smith J's decision that Quinn was unable to have access to its insured's files and ledgers where a claim had not yet been made against the insured. Privilege in a solicitor's file belongs to the client and only he can waive it. When the client makes a claim against his solicitor, he is taken to have waived privilege in respect of documents relating to that claim (*Lillicrap v Nalder*). The Court of Appeal accepted (tacitly) that the implied waiver also enables insurers to use confidential material from the file in a coverage dispute between them and the insured solicitor arising out of the claim. The court refused to accept that the waiver has this effect where there is as yet no claim but the solicitor needs to notify circumstances.

This leaves the solicitor in an awkward position. Unless his client agrees to waive privilege over the file for this purpose, he may be unable properly to notify circumstances to his insurer, potentially leaving himself without cover for a subsequent claim.

The Chancellor, Sir Andrew Morritt, acknowledged this problem but offered no solution to it. In his words: "...if the client will not waive his privilege to enable proper disclosure to be made, the consequence of the resulting conflict of interest will be that the insurance is vitiated or the notification inadequate but that is the problem of the solicitor not the client ...The solicitor's duty of disclosure cannot override the entitlement of the client."

For further details of the decision, see our briefing at <http://www.mills-reeve.com/files/Publication/58317ec9-cd6b-4597-a99d-40428495e228/Presentation/PublicationAttachment/23da0435-ff94-445f-8b6e-49ec4f1177d9/QuinnvLawSociety%2015Jul10.pdf>.

Comment

This decision has created a headache for solicitors and their professional indemnity insurers and requires a completely new approach to notification of circumstances and the handling of the insured's client's file. Insurers are going to find it difficult to investigate allegations of fraud, a particular problem at the moment given the number of lender claims and widespread mortgage fraud, of which the present case is an example. Solicitors will be concerned about making a proper notification of circumstances - not necessarily a straightforward matter as the decision in *HLB Kidsons v Lloyd's Underwriters* illustrated.

The obvious solution is for the insured solicitor to obtain the client's consent to the file being used for the notification of circumstances but this may not be possible. The client may refuse to waive privilege over the file for this purpose or it may be impossible to contact the client, such as the borrower in a lender claim. Where there is strong prima facie evidence that the client was involved in a fraud, the problem doesn't arise as the solicitor will be released from his duty

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of confidentiality. Where privilege remains a problem, the insured's best option will be to make an anonymous notification concealing the identity of the client, keeping their fingers crossed that it will be effective.

By contrast, in earlier cases where the insured's client's privilege has not been in issue, the courts have usually decided privilege issues favourably for insurers. For example, in *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* (1987) the Court of Appeal held that a letter from a firm of architects notifying a claim to its professional indemnity insurers was protected by litigation privilege. The so-called "dominant purpose" test appeared not to be satisfied because the insured's purpose in sending the letter was to comply with the condition in the policy requiring notice of claims to be given. The court held, however, that the purpose of the letter had to be determined by reference to the intentions of the insurers who procured its genesis. So viewed, the dominant purpose was "to produce a letter of notification which would be used in order to obtain legal advice or to conduct or aid in the conduct of litigation which was at the time of its production in reasonable prospect" and the letter was therefore privileged.

Claims for economic loss

Network Rail Infrastructure Ltd v Conarken Group Ltd

[2010] EWHC 1852 (TCC) <http://www.bailii.org/ew/cases/EWHC/TCC/2010/1852.html>

Network Rail brought claims against the employers of heavy goods vehicle drivers who negligently caused physical damage to a bridge over a railway line and to electrical equipment at a level crossing. The defendants admitted liability and agreed that they should pay damages for the costs of and occasioned by the repairs. They took issue, however, with Network Rail's claim for damages in relation to sums which it paid or allowed to train operating companies (TOCs) for periods of time when the railway lines were unavailable after the accidents.

The judge reviewed the authorities and concluded that there is no reason in principle why loss of use, loss of profit or loss of revenue cannot be recovered as damages, subject to causation being established and provided that it is demonstrably consequential upon, and closely associated with, the physical damage. The fact that the loss of use, profit or revenue arises because a contract between the claimant and a third party makes the claimant liable to pay or allow it to the third party does not stop it from being recoverable.

Since the Rail Regulator had approved and endorsed many of the rates payable, the defendants were unable to argue that the sums paid to the TOCs, even though some payments included incentives, represented a penalty or were unreasonable or did not represent anything other than a best assessment basis of the loss to the TOCs of the use of the rail tracks for the periods in question. Had they been, the outcome might have been different. The claims were allowed.

Comment

The recovery of damages for economic loss has always been a vexed topic. The present claimant did not have the usual problem - a lack of physical damage to its property - because Network Rail owned the damaged bridge and equipment. Nor was there a problem about foreseeability because it was clearly foreseeable that a loss of use and revenue would result if the defendants damaged bridges and electrical cable.

What made this case more complicated was the fact that the allowances paid to the TOCs for their loss of use of the track included sums which the TOCs could not themselves have claimed in negligence against the defendants. The TOCs could not have made the claims themselves because no property of theirs was physically damaged. The judge held that this was immaterial. If this were to affect Network Rail's entitlement to sue for consequential losses, an innocent party would not be able to recover its loss incurred directly in consequence of a defendant's negligence.

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Another complexity was introduced by the methods used to calculate the sums paid to the TOCs. Under the contracts with the TOCs, a liquidated damages rate was determined by what the judge called “ a somewhat complex formula for determining the value or cost for the non-provision of the rail track”. The judge said that the defendants too often in their arguments confused the losses actually suffered by the TOCs with the losses actually suffered by Network Rail. Central to his decision was the finding that the TOCs’ real losses were substantially immaterial in the context of a claim brought by Network Rail.

This is good news for owners of property seeking to recover all of their consequential loss under various contracts with third parties following damage to their property. Conversely, it is bad news for liability insurers since it appears that the courts will not be interested in working out whether the third parties have perhaps been overcompensated for their actual loss or whether they could have recovered that loss directly from the tortfeasor.

What matters is whether the owner of the damaged property has suffered the loss in question under contracts negotiated at arm’s length and that the type of loss of profit or revenue was foreseeable. Ownership of the damaged property was a potential problem in the Buncefield litigation but in their judgment earlier this year, the Court of Appeal allowed Shell’s claim for loss of profit even though it was only the beneficial owner of the relevant fuel pipelines and storage facilities (*Shell UK Ltd v Total UK Ltd*). The approach taken in these decisions suggests that the quantum of consequential loss claims will increase in future.

How Engineering Services Ltd v Southern Insulation (Medway) Ltd

[2010] EWHC 1878 (TCC) <http://www.baillii.org/ew/cases/EWHC/TCC/2010/1878.html>

This is the latest development in litigation arising from the installation of air conditioning pipework at Linklaters’ offices in 1995. Sir Robert McAlpine Ltd was the main contractor for the development and it subcontracted the mechanical and electrical work to How Engineering Services Ltd. How sub-sub-contracted the job of insulating the steel pipework for the air conditioning to Southern Insulation (Medway) Ltd. Problems emerged with the pipework in 2006 and it was replaced at a cost of about £3.5m.

In 2009 Linklaters began proceedings against McAlpine which had provided the firm with a written collateral warranty. How and Southern subsequently became party to those proceedings. How issued the present proceedings against Southern alleging that it owed it a concurrent duty of care in tort alongside the sub-sub-contract between them. Southern applied to strike out the claim.

How and Southern accepted for the purpose of the strike out application that collateral warranties were common practice on commercial property development projects in 1995. The judge held that a sub-sub contractor in Southern’s position would foresee that, if it did work badly, it would have to pay up the line for the cost of repair. It could probably be said to be within the reasonable contemplation of the parties that How and McAlpine would provide collateral warranties to the end user Linklaters.

The judge held that it doesn’t matter whether the claim comes down through a chain of collateral warranties or through contract - the route through which it comes doesn’t alter the kind of loss. He therefore rejected Southern’s argument that it could not be responsible for How and McAlpine voluntarily undertaking to be liable to Linklaters through the collateral warranties where no liability would exist at common law. Southern’s strike out application was dismissed.

Comment

Both sets of proceedings are due to be tried together in October 2010 and it is already apparent that several important issues will be determined if a settlement isn’t reached before then. Looking at this decision together with the Buncefield

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and Network Rail claims discussed above, the courts do not appear to be well-disposed towards technical defences to tortious claims for economic loss.

One argument raised by Southern in the present application, and despatched in short order by the judge, concerned limitation. Linklaters, McAlpine and How entered into a standstill agreement in 2008, twelve years after the work was carried out. Southern is not party to, and did not know about, the agreement. Southern argued that it couldn't owe How a duty of care in respect of the claim made pursuant to that agreement. The judge said (fairly) that the claim isn't being made pursuant to the agreement which merely froze limitation – the claim is made through the collateral warranties.

Southern argued that it was unfair for it to face a liability in tort for something which happened more than 14 years ago (any claim in contract being long since time-barred). As it was accepted that limitation will be in issue at the trial, the judge did not need to comment but he did note that the 15 year "long stop" will apply to the claim. In his view, a party in Southern's position can be taken to know the law on limitation and therefore of the need, by insurance or otherwise, to guard against the risk that it might be sued in negligence for a period up to 15 years after the work was done.

Jurisdiction disputes

Royal & Sun Alliance Insurance Plc v Rolls-Royce plc

[2010] EWHC 1869 (Comm) <http://www.bailii.org/ew/cases/EWHC/Comm/2010/1869.html>

The defendant Rolls-Royce applied to stay proceedings brought against it by the claimant insurers in favour of proceedings brought by Rolls-Royce against the insurers in the Florida courts.

In the Florida proceedings, filed on 8 April 2009, Rolls-Royce sought declaratory relief that it was entitled to an indemnity from the defendant insurance companies in respect of claims made against it concerning the Mermaid Pod, a self-contained marine propulsion device which is attached to the bottom of ships to steer and propel them. In June 2009, before being served with the Florida proceedings, the insurers issued and served the English proceedings seeking a negative declaration.

The claimant insurers argued that, as Rolls-Royce was an English company, the English courts' jurisdiction was mandatory under the Brussels Regulation following the European Court of Justice decision in *Owusu v Jackson*. In *Owusu* the ECJ held that, where jurisdiction is conferred by Article 2 because the defendant is domiciled in a member state, the court cannot decline jurisdiction on the ground that the court of a non-member state would be a more appropriate forum.

Rolls-Royce argued that the Brussels Regulation did not apply where earlier proceedings have been commenced in a non-member state. It accepted that that the granting of a stay was a matter of judicial discretion but submitted that under the doctrine of *forum non conveniens* the US was the more appropriate forum.

The judge considered the *forum non conveniens* arguments and concluded that England was the appropriate forum. He did not therefore need to consider the *Owusu* argument. The factors which ensured that English jurisdiction was appropriate included the following:

- all the insurers were registered in the UK or wrote the policies from branches in London;
- the insurance policy was written in the English market through an English broker and the law of the contract was English;

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- the claims under the policies were presented in London;
- Rolls-Royce is an English company;
- the claims raise issues about notification, construction and the scope of cover of the different excess layers which require the specialist experience of the English Commercial Court.

Comment

This decision is reassuring for London market insurers, upholding as it does the importance of English policy disputes being resolved before the Commercial Court which has the appropriate expertise to deal with them. They can apply for negative declarations which are permissible (even if used aggressively to secure a particular forum) where they result in the useful determination of issues and are not used to achieve jurisdiction improperly (see *Travelers Casualty & Surety Co of Europe Ltd v Sun Life Assurance Co of Canada (UK) Ltd*) and they will also have a good chance of winning a *forum non conveniens* argument.

However, the need to waste costs arguing about the appropriate forum could disappear entirely if the *Owusu* argument succeeds in circumstances where there are already proceedings underway in the courts of a non-member state. Although this crucial issue was not decided by the judge, he usefully gathers together the conflicting first instance decisions on the point - *Catalyst Investment Group Ltd v Lewinsohn* in favour of no jurisdiction to stay in these circumstances and *JKN v JCN* reaching the opposite conclusion. *Winnetka Trading Corp v Julius Baer International Ltd* held on a related issue that *Owusu* did not prevent the stay of proceedings in England where there is a jurisdiction clause in favour of a non-member state.

Apparently English academic opinion is in favour of the existence of a discretion to stay but that is unlikely to have much sway when this issue finally reaches the ECJ. In *Goshawk Dedicated Ltd v Life Receivables Ireland Ltd* the Irish courts decided that the court retains and must exercise a jurisdiction conferred on it by Article 2, even though there may be proceedings in a non-member state which are first in time. On appeal, this question was referred to the ECJ but the case was resolved prior to the reference being heard. It seems likely that, when the issue is decided by the ECJ, the English court will lose the discretion to stay proceedings brought against an English defendant in favour of a non-member state.

In brief

Avoidance of ATE cover

Following proceedings in which the successful defendant Persimmon was awarded indemnity costs against the claimant company, which was subsequently wound up, Persimmon sought to recover the costs from the claimant's after the event insurers under the Third Parties (Rights against Insurers) Act 1930. The insurers were held to have been entitled to avoid the policy following a misrepresentation of the risk and non-disclosure and the claim against them was dismissed (*Persimmon Homes Ltd v Great Lakes Reinsurance (UK) plc* <http://www.bailii.org/ew/cases/EWHC/Comm/2010/1705.html>).

Defamation and scope of retainer

A person may choose to respond to a disparaging newspaper article through their solicitor. The solicitor is protected by qualified privilege in respect of a publication on behalf of a client, providing that privilege would have attached to the same publication if made by the client and providing that the solicitor was acting within the scope of his authority. If the terms of his retainer are sufficiently wide, the solicitor does not have to show that the client specifically instructed him to

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make that communication or authorised the precise words used. The judge had been correct to strike out the claim of slander against the solicitor (*Khader v Aziz and Davenport Lyons* <http://www.bailii.org/ew/cases/EWCA/Civ/2010/716.html>).

Execution of documents by solicitors

Where a solicitor executed the signature page of a loan agreement and subsequently agreed to completion on the telephone, he was signifying his unequivocal agreement to be bound by the terms of the agreement, its schedules and appendices, in the forms last exchanged in emails between the parties. The fact that he had never printed out the documents did not matter. The decision in *R (on the application of Mercury Tax Group) v HMRC*, which held that a person can only validly execute a document as a deed if the document which the person executes is complete and whole at the time of execution, was held not to preclude this conclusion (*Chapman v Wilson* <http://www.bailii.org/ew/cases/EWHC/Ch/2010/1746.html>).

Insurance Contract Law reform

The Law Commissions have published two further issues papers. Responses are requested for Paper 7 *The Insured's Post-Contract Duty of Good Faith* by 10 October and for Paper 8 *The Broker's liability for premiums: should section 53 be reformed?* by 19 October 2010. Whilst the Consumer Insurance (Disclosure and Representations) Bill was published in draft at the end of last year, it was not included in the Queen's Speech. A final report on business insurance is not expected until 2013 with an Insurance Bill to follow after that. See http://www.lawcom.gov.uk/insurance_contract.htm for details.

Solicitors' retainers

Whilst the normal position is that the paying party is liable for the costs borne by the receiving party's insurer as well as for any costs paid out by the receiving party himself, this is subject to any agreement to the contrary between the receiving party and his solicitor. In this case, since the receiving party Lyon Cole was in the insurance business, it was deemed to have understood the position as between insurer and insured in relation to costs, even though it had not received a client care letter from its solicitor. The unsuccessful claimants were required to pay Lyon Cole's insurer's costs (*Ghadami v Lyon Cole Insurance Group Ltd* <http://www.bailii.org/ew/cases/EWCA/Civ/2010/767.html>).

Third party claim against consultant

The court struck out a claim by the defendant firm Penningtons against Jacqueline Webb, a rehabilitation costs consultant. She was entitled to assume that the firm would take appropriate action before trial to appoint a case manager to address the claimant's needs she had identified. It was material that none of the three barrister third parties nor the claimant sought to make a claim against her (*Warner v Penningtons*).



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