

## Weekly Update (01/08)

10 March 2008

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

### This Week's Caselaw

#### Wasa v. Lexington

##### Follow the settlements/back to back reinsurance

Lexington insured an American company, Alcoa, under a policy which covered loss or damage to property. The policy period ran from noon 1 July 1977 to noon 1 July 1980. Lexington entered into a reinsurance contract with Wasa and AGF and the policy period was identical to that of the underlying direct policy. The reinsurance policy contained a clause which stated: "Being a reinsurance of and warranted same gross rate, terms and conditions as and to follow the settlements of the [reinsured]" and was governed by English law.

Environmental damage was sustained at Alcoa sites from 1942 until 1986 (and therefore damage was sustained during the policy period). Alcoa brought proceedings against Lexington in America and in 2002 the Washington Supreme Court held, as a matter of Pennsylvania law, (and as a result, arguably, of a false analogy with earlier US asbestos decisions) that the direct insurance policy was to be construed as rendering Lexington jointly and severally liable for the clean-up costs at the various sites, irrespective of whether the damage was sustained before, during or after the policy period. Lexington then settled with Alcoa and sought an indemnity from Wasa. Wasa sought a declaration that it was not liable and won at first instance, on the basis that as a matter of English law reinsurers could only be liable for the costs of remedying damage which occurred during the policy period (and not before or after).

The Court of Appeal has now overturned the judgment at first instance. The reinsured argued that the parties had known when they entered into the reinsurance that it was likely disputes would be decided according to the law of the state where the insured was based. The reinsurers argued that they had not contracted to indemnify the reinsured against any liability which it might incur under the insurance policy and instead had reinsured Lexington for a three year period (and not a fifty year period).

The Court of Appeal held that the parties here intended the definition of the policy period in both policies to have the same meaning (indeed, the same or equivalent wording should generally be given the same construction unless there are clear indications to the contrary). That definition (following the House of Lords case of *Vesta v Butcher* (1989) was governed by Pennsylvania law and it was sufficient that there is a way to ascertain the meaning of a term. In this case, any competent Pennsylvania lawyer could take a view as to the meaning of the period clause (or, failing that, a court could decide) and that was enough to render the meaning ascertainable. Also, reinsurers here had to take the risk that the local law might change (as it in fact did, and not in a way that could reasonably have been anticipated by either the reinsurers or the reinsured at the time they entered into the reinsurance policy) - the period clause meant the same in both contracts, whatever that meaning might be. This decision therefore went further than the *Vesta* case, since in that case the relevant term was clear and fixed at the date the reinsurance policy was concluded.

Longmore LJ indicated in his judgment that a way around this problem would be for reinsurers to use the Bermuda Form. He also acknowledged that it could be suggested that the meaning of the same words could be ascertained under English law where the reinsured was a captive local insurer.

(One further point in the judgment: the retention was expressed to be \$1,675,000, the policy limit was \$20m "each occurrence". Longmore LJ confirmed that that meant a single retention, not a retention per occurrence).

Permission to appeal has been refused by the Court of Appeal and it is not yet known whether permission to appeal will be sought or obtained from the House of Lords.

## **Kosmar Villa Holidays v. Trustees of Syndicate 1243**

### **Waiver of breach of condition precedent/Reservation of Rights**

In the first instance decision in this case, it was undisputed that an insured had breached a condition precedent to notify its liability insurers immediately after the occurrence of any injury or damage, although notification of the third party claim was given promptly. However, Gross J ruled that the insurer had elected to accept the claim because it had communicated to the insured that it would consider the claim. The issue on the appeal was whether an insurer can waive the breach of a condition precedent as a matter of irrevocable election (which requires the insurer to know all the facts before electing) or if it can only be waived because of estoppel caused by *reliance* on a representation (without any need for knowledge on the part of the insurer). Also in issue was whether there had been an unequivocal communication (a requirement for both election and estoppel).

Rix LJ, giving the leading judgment, held that there was no scope for election following the breach of a condition precedent - only waiver by estoppel can arise (where it would be inequitable for the insurer to go back on his representation because of reliance by the insured). Election arises in a "much more limited field" (e.g. the acceptance of repudiation or the avoidance of contracts): "they are concerned with contracts in the course of their execution, not with the pathological treatment of claims". Accordingly, an insurer who begins to deal with a claim (even assuming that he represents that he thinks the claim, if good, will fall to be indemnified under the policy) is not required for all time to continue dealing with the claim. Some dealing with the claim does not lead to an irrevocable election to accept liability (although Rix LJ stressed that his comments related to the breach of a "merely procedural" condition precedent and not, for example, to the insurer's right to avoid for non-disclosure).

In any event, on the facts, the communications by the insurer to the insured were "far from unequivocal". The insurer had not said that it was waiving the need for immediate notification or that it was accepting liability under the policy. Although the insurer had given the appearance that it was willing to deal with the claim, it had not indicated that it would cover the third party's claim and had requested further answers from the insured regarding the circumstances of the accident. There was "no urgent need" for a decision about the consequences of the breach of the condition precedent - nothing had been taken out of the insured's hands yet. The insurer "was in any event entitled to a reasonable time to get to grips with this serious and lately notified occurrence". That said, insurers should not equivocate for so long that they give the plain impression that they are treating a claim as covered under the policy. Rix LJ went on to assert that where an insurer is awaiting details of an occurrence (in answer to its questions) there is **no** need for a reservation of rights (even if a RoR may be "practical and wise"). A RoR is only needed where "otherwise it might be held that something unequivocal had occurred".

## **Olafsson v. Gissurarson**

### **Service out of the jurisdiction**

The defendant was resident in Iceland. The claimant issued proceedings against him and the proceedings were purportedly served personally on the defendant at an address in Reykjavik by a member of staff of the British Embassy in Iceland. However, simple personal service, no matter by whom it is effected, is not a permitted method of service in Iceland and a failure to obtain a written receipt from the defendant meant that the defendant had not been validly served (CPR 6.24(1)(a) allows service by any method permitted by the law of the country in which it is served).

After judgment was ordered in favour of the claimant, the defendant applied to set aside that judgment and the claimant applied for relief under CPR 3.10, which allows a court to remedy an error of procedure (such as a failure to comply with a rule or practice direction). The Master exercised his discretion under CPR 3.10 to correct the error in respect of service and the defendant appealed. Mackay J allowed the appeal, concluding that CPR 3.10 cannot be used to correct an error in service in another jurisdiction which had resulted in no valid service at all. However, in a subsequent judgment, Mackay J exercised his discretion to make an order dispensing with service of the claim form under CPR 6.9 and the defendant appealed.

The Court of Appeal held that there was no reason to interfere with Mackay J's conclusion. This was an exceptional case - there was no point in making the claimant go through the motions of a second attempt to serve when the defendant accepted that he had received the claim form before the end of the permitted period of service. The defendant would suffer no prejudice as a result of the court dispensing with service (other than the ability to take advantage of the rules). As the claimant had acted reasonably and used a reasonable method of service, it would be unjust to refuse the relief sought.

Nor was the position altered by the fact that the claimant had failed to serve the defendant in Iceland in accordance with Icelandic law (the English court having jurisdiction by virtue of the Lugano Convention) - CPR 6.9 could still apply to this case.

## **Watson & Anor v. Jones Maidment Wilson**

### **Limitation periods and professional negligence claims**

The appellants sought damages from the respondents for negligent advice which led them to 1) enter into a contract on disadvantageous terms in April 1998 and to 2) subsequently waive certain rights under that contract should their builder fail to complete the relevant works by 31 August 1998. The appellants argued that had they not lost those rights, they would at some point have exercised those rights and their dispute with the builder would have been resolved more quickly and economically.

Under the Limitation Act 1980, claimants have 6 years to bring a claim for negligence and the limitation period only starts to run when the damage has occurred - often when the claimant relies on the negligent advice.

In the case of *Nykredit* (1997), Lord Hoffmann held that the loss was suffered only when the claimant could show he was on balance worse off than he would have been had he not entered into the transaction. In this case, it was argued that the financial benefits of the contract concluded in April 1998 exceeded the financial burdens and the position only became disadvantageous to the claimant at a later date. However, the Court of Appeal held

that this case was not comparable to *Nykredit* - here, had the negligent advice not been given, the claimant would have had the chance of negotiating a better agreement and that chance had a measurable value at the time the contract was concluded. Accordingly, the claims based on the April 1998 contract were time-barred.

In *Sephton* (2006), the House of Lords held that where breach of a duty resulted in a party being subject to a contingent liability, damage only arose when the contingency occurred. Here, it was argued by the appellants that the loss of their rights under the contract exposed them to a contingency, namely that the builder would fail to complete the works on time and hence the limitation period only began to run when the loss was actualised. The Court of Appeal agreed with the judge at first instance that the fact that the lost rights could only have been used after 31 August 1998 did not mean that they did not have a value prior to that date. The limitation period had started to run when the appellants waived their rights and hence the appellants' claim was time-barred.

## **M&J Polymers v. Imerys Minerals**

### **Take or pay clauses/penalty clauses**

The contract between the parties contained a "take or pay" clause, i.e. the buyers were obliged to order a minimum amount of product and, if in breach, "the Buyers collectively will pay for the minimum quantities of Products....even if they together have not ordered the indicated quantities". The buyers argued that this was a penalty clause and hence was unenforceable.

Despite the "take or pay" clause being a common term in a contract, this is apparently the first case to consider this issue. Burton J was satisfied that, as a matter of principle, the rule against penalties could apply. However, he went on to find that the clause was commercially justifiable, did not amount to oppression, was negotiated freely between parties of comparable bargaining power and did not have the predominant purpose of deterring a breach of contract. Hence the clause did not offend against the rule against penalties.

## **Research in Motion UK v. Visto Corporation**

### **Regulation 44/2001 and related actions**

Regulation 44/2001 covers civil proceedings within the EU. Article 28 of the Regulation provides that where related actions are pending in the courts of different Member States, any court other than the one first seised may stay its proceedings. Actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments. This case involved a patent dispute, but the Court of Appeal also gave its opinion as to how Article 28 ought to be interpreted. It was held that an assessment of the degree of connection was required, as well as a value judgment as to the expediency of hearing the two actions together. It did not mean that any possibility of inconsistent judgments means that the actions are inevitably related. It was open to the courts to acknowledge a connection or risk of inconsistent judgments but to say that the connection was not sufficiently close or the risk is not sufficiently great to make the actions related for the purposes of the Article.

## Other News

The FSA has published an update on its treating customers fairly initiative, as the March 2008 deadline approaches - click [here](#) or paste the following address into your web browser: <http://www.fsa.gov.uk/Pages/Doing/Regulated/tcf/progress/index.shtml>

***Case summaries are for guidance only and full text of cases should be reviewed before reliance is placed on cases referred to in this publication***

## Further information

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