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Court of Appeal dismisses cross border challenge to jurisdiction of insolvent PII insurer in Gibraltar

Rodney Mark Gardner v Lemma Europe Insurance Company Limited (in liquidation) - A2/2014/3496

Article by David Bowden

Court of Appeal dismisses Gibraltar cross border insolvency appeal

The Court of Appeal has heard submissions and dismissed the appeal for reasons it will hand down shortly in writing. HHJ David Cooke sitting as a Judge of the High Court, Chancery division dismissed Mr Gardner's claim against the liquidator of the insurer on 6 October 2014. Both courts held that proceedings before the Solicitor's Disciplinary Tribunal ('SDT') were not claims covered by a solicitor's professional indemnity insurance policy. The insurer was now in liquidation and being incorporated in Gibraltar the insolvency would be dealt with in Gibraltar by its rules. It was not appropriate to grant an application to lift a stay to allow Mr Gardner to attempt to pursue arbitration in England under that insurance policy.

Rodney Mark Gardner v Lemma Europe Insurance Company Limited (in liquidation)
A2/2014/3496 17 May 2016
Court of Appeal, Civil Division (Patten, Kitchin & Floyd LJJ)

What are the facts?
Lemma Europe Insurance Company Limited ('Lemma') is incorporated in Gibraltar. Mr Gardner ('the insured solicitor') had taken out a professional indemnity insurance ('PII') policy with Lemma which provided for arbitration in London in the event of a dispute. Costs were recoverable under the PII policy if, within the policy year, Lemma was alerted to either a 'claim' or of 'relevant circumstances'. These were defined as any incident that might give rise to a civil liability claim.

During the policy year, the insured solicitor had alerted Lemma to the possibility of a negligence claim. This was because a former client had instructed new solicitors who had contacted the insured solicitor demanding disclosure of his file. The new firm also wanted to know the date of completion of a 'right to buy transaction'. The letter from the new firm advised that protective proceedings might be issued to preserve the client's limitation position. Lemma subsequently went into insolvency liquidation. As Lemma is a Gibraltar company that insolvency was conducted under the applicable law in Gibraltar.

What action had the Solicitors Regulation Authority ('SRA') taken?
The SRA brought disciplinary proceedings in respect of five other clients of the insured solicitor who had made similar complaints against him. Although Lemma is insolvent, the insured solicitor would have been able to obtain 90% of the value of his claim for defending the SRA proceedings before the Solicitor's Disciplinary Tribunal ('SDT') from the Gibraltar Financial Services Compensation Scheme ('FSCS'), if the claim was valid. Lemma's liquidator rejected the insured solicitor's proof of debt on the basis that the SRA proceedings were not to be regarded as related to the client's matter and could not be treated as one claim under the PII policy.

Was the proper dispute resolution mechanism in the Gibraltar liquidation or by arbitration in England?
Although the insured solicitor had a right of appeal to the Supreme Court of Gibraltar, he wanted to pursue arbitration. However proceedings in England had been stayed under the Cross-Border Insolvency Regulations 2006 (**SI 2006/1030**). Lemma's liquidator stated that, even if the claim was successful, any award would **automatically** be set-off against the increased premiums that the insurer solicitor would have had to pay.

The issue for both the court at first instance and on appeal was accordingly whether it was 'fair and just' to determine the matter within the liquidation itself or within the arbitration proceedings. The insured solicitor submitted that:

- the circumstances that he had set out to Lemma relating to the former client's case meant that Lemma could have been inferred that his former client already had had sufficient information to be able to plead a case against him alleging negligence,
- the costs of defending the SRA proceedings had arisen from the same acts as were material to his former client's case, so that the transactions were to be regarded as one claim,
- the increased insurance premiums would not have exceeded the value of his claim, and
- an English court should exercise its general discretion to lift the stay because
  - the PII contract was made in England,
  - was governed by English law,
  - covered loss suffered in England, and
  - any application to the Supreme Court of Gibraltar was now out of time.

What ruling did HHJ Cooke give?
On 6 October 2014 Judge Cooke dismissed Mr Gardner's application to lift a stay in proceedings with his professional indemnity insurer. The case is reported here: **[2014] EWHC 3674 (Ch).**

Judge Cooke ruled that in liquidation and insolvency proceedings, the collective interest of the creditors had to be established so as to enable debts to be handled with the least possible costs. The court had to be wary of imposing on liquidators the heavy costs of litigation outside the liquidation proceedings if there were cheaper and easier methods within them. The PII policy's definitions clearly distinguished between:

- a situation in which a solicitor had become aware of a default and had notified Lemma of the circumstances so that he was covered, and
- where a solicitor was aware of a claim and had an obligation to notify Lemma.

In the former, a client needed to have indicated an intention to claim. The communications from the former clients' new solicitors had only stated that proceedings 'might' be issued but had been non-committal. The court needed to be realistic. It was not inconceivable that protective proceedings would be issued on the thinnest of grounds so as to protect a limitation position. Judge Cooke ruled that this alone was sufficient to dispose of the application to lift the stay summarily.

However Judge Cooke said there was nothing in the PII policy which said that all claims arising from the same circumstances were to be treated as being one claim. If the insured solicitor's business model had led to a claim by a former client in the policy year, but other claims on that same business model came in later years, there was nothing in the policy that required those claims to be treated as the same as unless the insured solicitor had notified Lemma of the circumstances surrounding those transactions. Judge Cooke ruled that the insured solicitor's claim was not genuinely arguable.

Judge Cooke noted that it could not be assumed that PII premiums would have been as high as the value of the claim. Although Lemma's liquidator had a discretion when assessing such matters, that discretion was not limited and required it to conduct a proper assessment.

Judge Cooke said little weight could be given to the fact that the insured solicitor was out of time to pursue an appeal in Gibraltar, otherwise a litigant would always find it easy to tilt the scales in his favour by causing delay. There was nothing to indicate that the issues could not be decided in either forum. The construction of the PII policy was the main issue, which could be dealt with relatively quickly and with minimal oral evidence. A litigant's personal preference was to be given low weight.

Judge Cooke concluded that the insured solicitor's claim against his insolvent PII provider had been correctly assessed by the liquidator as being invalid. The application to lift the stay was dismissed and the insured solicitor was also ordered to pay Lemma's liquidator's costs.

What had the Solicitor's Disciplinary Tribunal decided?
The SDT determined the SRA's allegations against the insured solicitor on 10 and 11 September 2013 where he was represented by Mr Stephen Jourdan QC. Even though this was not his first appearance before the SDT (previous SDT Case number: **5645/1989** – fined £500 because **'***he acted unprofessionally in contentious business'*), it declined to strike him off and fined him £5000 – see SDT Case No. **11088-2012.**

He was also ordered to pay the SRA's costs of £40,000 to be paid in instalments over 3 years. The SDT found that '*he was potentially taking advantage of vulnerable people'*. The SDT also found that '*in creating the false quotation which he submitted to the local authority the Respondent had behaved in a way which was likely to compromise or impair his integrity'*.

What were the issues the Court of Appeal was asked to address?
Mr Gardner had 3 grounds of appeal before the Court of Appeal. These were whether:

- 'claims' were made to Lemma under the PII policy,
- that 'claim' represented claims arising from the same or similar acts or omissions, and
- the Court of Appeal should over-ride the discretion exercised by Judge Cooke below.

What does the respondent insurer say?
It had prepared and served a skeleton argument. It was represented at the appeal hearing by the junior counsel, Miss Charlotte Cooke, who appeared below before Judge Cooke. However after rising for a few minutes at the conclusion of the appellant's counsel's submissions, Lord Justice Patten said he did not need to be addressed by them at the hearing. Lemma's liquidator's solicitors below were Stephenson Harwood LLP, (and they dealt with the initial stages of the appeal) they handed over conduct of the appeal to Go-Law Solicitors of Wilmslow.

Are there any prior authorities of any relevance?
Judge Cooke below noted that a court has the power to lift the stay or vary its terms. It was accepted before him that the effect of the court's jurisdiction and the way it is to be exercised is very similar to that which would apply in purely domestic insolvency proceedings under s130 of the Insolvency Act 1986.

Judge Cooke refers to these 3 authorities in reaching his judgment:

- *Fennell v Halliwells LLP* (HHJ Hodge QC) **[2014] EWHC 2744 (Ch),**
- *Cosco Bulk Carrier Co Ltd v Armada Shipping SA* (Briggs J) **[2011] EWHC 216 (Ch)**, and
- *Bourne v Charit-Email Technology Partnership* (Proudman J) **[2009] EWHC 1901 (Ch).**

Remarkably none of these authorities were referred to by the appellant at the Court of Appeal hearing. In fact no authorities were referred to by the appellant at all at the hearing (other than a passing mention of *Saffron Estates* that had been employed to obtain permission to appeal at an oral hearing).

What does the applicant solicitor say?
It says on all the 3 grounds of appeal the judge below was wrong and the Court of Appeal should over-ride the exercise of the judge's discretion in refusing to grant the application to lift the stay.

What lessons can insolvency practitioners learn from this case?
It will be interesting to see the reserved judgement of the Court of Appeal to see if it makes any observations of its own on the wider issue of cross-border insolvency. All 3 judges were unimpressed with the suggestion that courts in Gibraltar were somehow unable to resolve these sorts of issues which resolved to contractual interpretation.

When will a written judgement appear?
Lord Justice Patten said written reasons will appear within the next 21 days as to why this appeal was dismissed at the conclusion of the hearing. However, Patten LJ said that a draft judgment would be circulated to counsel for both sides so that any typographical errors can be corrected in the usual way.

What about costs?
After hearing representations from the appellant's counsel, Lemma's liquidator's costs of the appeal were assessed by Lord Justice Patten at £20,341 + VAT. Patten LJ said ordinarily costs would be payable within 14 days of the date of the order. Patten LJ said the appellant could make short written submissions when his counsel returns the draft judgement. When judgment is handed down, the Court of Appeal will make any order for time to pay it considers appropriate.

20th May 2016