

In UK Howden Ruling, A Warning For Forum Shopping Insurers

By **Bibeka Shrestha**

Law360, New York (December 12, 2012, 9:08 PM ET) -- In a sharply worded opinion, a British appeals court refused last week to let Howden North America Inc.'s insurers use an English court to instruct a Pennsylvania federal judge on questions of asbestos coverage, a decision attorneys say delivers a powerful rebuke to insurers eyeing a more sympathetic forum across the Atlantic.

Howden, an industrial air and gas products maker, persuaded the appeals court on Dec. 6 to overturn a decision saying it would be useful to have a British court weigh in on whether English law governed eight excess policies — even though a federal judge in Pennsylvania already held it would be unlikely that English law would apply to Howden's asbestos coverage litigation involving the same policies.

The insurers also asked the U.K. court to set out how British law would treat asbestos claims under the policies. According to the ruling, Pennsylvania law would provide more coverage than English law would for Howden's underlying claims, which run into the tens of millions of dollars.

Lord Justice Richard Aikens, who penned the unanimous opinion, said U.S. District Judge Joy Flowers Conti would have no difficulty in appreciating the differences between English law and Pennsylvania law on the insurers' coverage duties.

"I would regard the idea that the English court should give its unsolicited judgment as 'advice' to a federal judge in the ... Western District of Pennsylvania on elementary principles of English law ... as both presumptuous and condescending," the appeals court opinion said. "It smacks of 'unacceptable hubris.'"

Peter Halprin, an Anderson Kill & Olick PC attorney, said the appeals court looked harshly at the insurers' attempt to forum shop, while showing a respect and appreciation for U.S. courts and processes. According to Halprin, the decision is a positive for policyholders because London market insurers see England as a more favorable forum and often try to obtain legal relief there.

"The spirit of the ruling is to try to prevent forum shopping in the U.K.," Halprin said. "It really is intended to send a strong message to insurance companies that U.K. courts will not tolerate being a place for them to try to get away with things they couldn't get away with in the U.S."

The decision is also helpful because it spells out a standard for determining when carrying out English court proceedings alongside U.S. proceedings would be useful, Halprin said.

According to Andrew Lundberg, the global co-chair of Latham & Watkins LLP's insurance coverage practice, the ruling may have a narrow impact because Howden's insurers were trying to get a U.K. court to decide that English law applied to the policies and to interpret specific coverage questions under English law, rather than trying to litigate the entire coverage dispute in England.

But the decision is still good news for policyholders because it indicates a general attitude of judicial restraint on the part of U.K. courts, Lundberg said.

The appeals court recognized that judges in one country should not be quick to weigh in as a party's "super-expert witness" on a question of foreign law when a judge in another country has already indicated that she would give due regard to that foreign state's law, Lundberg said.

"It's reminiscent of the scene in 'Annie Hall' where Woody Allen pulls Marshall McLuhan out from behind an easel in a movie theater lobby to squelch the comments of a pontificating blowhard in the ticket line," Lundberg said. "The British courts are saying 'We're not going to get into that business.'"

In the appeals court's view, Howden's insurers were trying to get an English court's judgment on the coverage questions as a kind of pre-emptive strike. The U.K. court's ruling on the coverage issues could help the excess insurers later avoid the U.S. judgment in the asbestos coverage dispute because they could argue that the Pennsylvania court's ruling conflicted with an earlier English judgment.

That, under the facts of the case, was not a useful exercise of the U.K. court's jurisdiction, the appeals court said.

Judge Conti in Pennsylvania had already spent six pages of an earlier opinion considering whether English law would govern the policies, even though she hadn't yet made a final ruling on that issue. The U.S. judge has also allowed an expert report on English law principles.

Moreover, the insurers had already been embroiled in coverage litigation with Howden for months or even years before they brought their case in England, the ruling said.

According to Halprin, insurance carriers may hold up that part of the decision and argue that timing is crucial and that similar U.K. actions should go forward if they are filed before a policyholder brings suit in the U.S.

"You may see more of a race to the U.K.," Halprin said. "It is in policyholders' best interests to file promptly to avoid allowing the insurance companies to make those arguments."

Attorneys for Howden declined to comment on the U.K. court's decision, while attorneys for the carriers were not immediately available on Wednesday.

The insurers are represented by Jason Bright of Reynolds Porter Chamberlain LLP, and Suzanne Midlge and Sally Clements of Coughlin Duffy LLP.

Howden is represented by Richard Jacobs QC, as well as Roger Enock, Richard Mattick and William Greaney of Covington & Burling LLP.

The case is Howden North America Inc. v. Ace European Group Ltd. et al., case number A3/2012/2495, in the England and Wales Court of Appeal, Civil Division.

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