Non-Party Costs Orders after Travelers Insurance and Willers v Joyce

This talk addresses two recent cases on NPCOs. The principles underlying these orders are of the first importance to commercial litigators not only in giving advice to their clients about costs risks to litigation funders, but also in deciding themselves whether there is a costs risk to their firm in taking on certain litigation.

Those cases are the recent decisions of the SC in XYZ v Travelers Insurance and of Rose LJ at first instance in Willers v Joyce

Previous jurisprudence

Aiden Shipping v Interbulk decided that under SCA s 51 costs could be awarded against a non-party, but left it to the rules and appellate courts to lay down the principles (T[3])

the appellate courts have struggled to identify principles applicable across the board to the exercise of the jurisdiction to make a costs order against a non-party, save at the very highest level of generality, although some attempt has been made, for example by Lord Brown of Eaton-under-Heywood giving the opinion of the Judicial Committee of the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] 1 WLR 2807*. He pointed out that costs orders against non-parties are to be regarded as exceptional; but in this context that means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order.

In Travelers the majority referred to the decision of the CA in *TGA Chapman v Christopher* and found the following principles to be a useful

guide to the circumstances in which insurers could he considered real parties.

(1) The insurers decided that the claim should be fought
(2) The insurers had the conduct of the litigation
(3) The insurers fought the claim exclusively to defend their own interests.

XYZ v Travelers Insurance (SC October 2019)

Conclusions **[76]-[83]**

(1) Real Party or intermeddling is fundamental
(2) Chapman principles are useful guidelines
(3) Where issue is whether insurers crossed the line by becoming involved in uninsured claims, test is unjustified intermeddling
(4) In this case the close connection between insured and uninsured claims meant T's involvement was justified
(5) Causation not established.
(6) Non-disclosure of the limits of cover is not relevant conduct
(7) Asymmetry is not enough on its own to justify a NPCO

Willers v Joyce

Facts were as follows. The Claimant Mr Willers was sued by the company of which he was director for a breach of director's duty in involving the company in ultimately unsuccessful litigation. His defence was that he was following the instructions of Mr Gubay, previously the owner of the group of which the co formed part, and now discretionary beneficiary of a trust which owned it. Sols and Counsel acted under a CFA as Mr Willers was impecunious. The case was withdrawn just before trial and the co ordered to pay costs.

The costs assessment was settled after a number of hearings at a substantial discount to the amount owed under the CFA.

Mr Willers then brought proceedings against Mr Gubay for malicious prosecution. He retained the same legal team. A large part of the damages claimed consisted of the extra costs in the previous action, ie

those still unpaid. The action was unsuccessful and costs were awarded against Mr Willers. He was unable to pay and the Ds (executors for Mr Gubay who had died) applied for an NPCO against Mr Willers' sols and counsel on the ground that

(1) Their interest in the damages claim meant that they were acting on their own behalf;

(2) They controlled the action.

In her Judgment handed down on 8 August Rose LJ dismissed the application.

The key question was whether the fact that the damages claimed in the MP action included a substantial sum owed to sols and counsel makes a difference, ie whether that circumstance means that they crossed the line to be acting outside the role of legal representative.

Rose LJ decided on balance not. Her reasons were:

(1) The additional interest which the lawyers had was also recovery of fees for legal services;

(2) In a MP claim the claimant will always have been the successful defendant in previous proceedings and it would be in his interest to instruct the same legal team;

(3) Legal reps need to know when they take on a client whether they are exposing themselves to a NPCO;

(4) Following *Medcalf v Mardell* she had to assume, in the absence of waiver of privilege, that the legal team gave honest and independent advice;

Not right to carve out another exception against lawyers because MP actions are not the only instance in which this position can arise [63]. Claims for sols negligence can include previous legal costs as damages.

Theme

The important theme of both these cases is that insurers and solicitors are given a measure of protection by the Courts, for two reasons:

(1) because they are under a contractual obligation to act and because there is a public policy interest in allowing them to do so without facing risk of NPCO.

(2) because a sol needs to be able to know at the outset whether there is a risk of facing an application.

Hugo Page QC
Enterprise Chambers

Hugo has extensive experience in all aspects of commercial law, appearing regularly both in court and in arbitration. Whilst a busy advocate, Hugo is commonly instructed for his pragmatic and client friendly advisory work, with a particular emphasis on commercial agreements, banking transactions, civil fraud and asset recovery. Hugo has conducted a large number of commercial arbitrations given him a wealth of experience and knowledge to pass onto clients.

Hugo also specialises in Insolvency and company law cases involving issues of non-disclosure, duty to account, breach of director's duties and fiduciary duties and shadow directorship.

His cases often have an international dimension he is currently working on several international legal disputes, involving foreign states and offshore companies. He has also acted as leading counsel in cases involving marine insurance, banking and aviation, and has conducted a large number of commercial arbitrations.

Most recently Hugo appeared as leading Counsel for the Defendant in a legally and factually complex action for breach of a company director's duties and fiduciary duties. After the successful conclusion of that action he acted for the same client as Claimant in the first English trial for malicious prosecution of civil proceedings, in modern times. It involved an application to the Supreme Court to establish the existence of the tort.