Court of Appeal endorses the making of an NPCO against an insurer

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Dispute Resolution analysis: In what circumstances can a court make a non-party costs order (NPCO) against an insurer under section 51 of the Senior Courts Act 1981 (SCA 1981)? David Bowden, freelance independent consultant, comments on the judgment in Legg and others v Sterte Garage Ltd and another and talks to Alex Bagnall, associate and costs advocate of Just Costs Solicitors. In addition, Rod Dutton, head of litigation at Jacobs and Reeve, who acted for the claimants in both courts, and one of the claimants, Mrs Legg, offer their thoughts on the decision.

Original news

Legg and others v Sterte Garage Ltd and another [2016] EWCA Civ 97

The Court of Appeal has handed down its unanimous reserved judgment in this case. Claims were made against Sterte Garage alleging environmental damage caused by oil leaks from its premises. Initially Aviva provided cover to the garage. The claims were amended, Aviva declined to provide further cover and the garage went into liquidation. The Court of Appeal has upheld the lower court's ruling in which an NPCO in favour of the claimants against Aviva was made.

What is the background to this decision?

For further details of the background to this litigation, see News Analysis: Non-party costs order against insurers)

What submissions did the insurers make on the appeal?

DB: The insurers had two grounds of appeal:

- the judge below was wrong to exercise his discretion to make an NPCO, and
- construing the policy, the right of indemnity under TP(RAI)A 1930 did not arise

The insurers made six submissions on this appeal. These were that:

- the insurers made clear the policy only covered a single unintended incident
- the insurers only participated in the defence because the claim was originally pleaded solely on the basis of the 1997 leak which, if established, would fall with the policy
- the defence of the single incident leak was substantially successful
- the judge should have decided on the facts that the damage was not caused by the 1997 leak
- the insurers acted in the interests of Sterte Garage (as well as their own)
- there was no choice but to defend a claim which on its face fell within the policy cover

What prior authorities on non-party costs orders did the Court of Appeal consider?

DB: Although the leading case on NPCOs—*Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2005] 4 All ER 195—was cited in argument it is not referred to. Instead, Richards LJ refers to three prior Court of Appeal decisions.

In *TGA Chapman Ltd v Christopher* [1997] EWCA Civ 2052, [1998] 2 All ER 873, Phillips LJ said five features justified the exceptional course of making an NPCO against an insurer. These were where:

- the insurer determined that the claim would be fought
- the insurer funded the defence of the claim
- the insurer had the conduct of the litigation
- the insurer fought the claim exclusively to defend their own interests, and
- the defence failed in its entirety

In *Cormack v Excess Insurance Co Ltd* [2002] Lloyd's Rep IR 398 (not available in Lexis®Library), it was held that it was not an appropriate case to make an NPCO against an insurer because the insurers had acted in the interests of the defendant as well as in their own interests.

Finally, in *Palmer v Palmer* [2008] EWCA Civ 46, [2008] All ER (D) 71 (Feb), Rimer LJ said that a critical issue was whether the insurers were 'motivated either exclusively or at least predominantly, by a consideration of its own interest in the manner in which it conducted the defence of the litigation'.

What did the Court of Appeal rule on SCA 1981, s 51?

DB: In giving the sole judgment, Richards LJ approached the matter in a slightly different way. Although he dealt with the insurer's submissions, he first reviewed the authorities which led him to the conclusion that there were no grounds to interfere with the decision of the judge below as it was properly made by him in the exercise of his discretion.

David Richards LJ ruled:

> 'There was no doubt that the claimants' property had been damaged by the presence of the diesel oil and no real grounds for doubting that it was caused by leakages from Sterte's property.'

Because of this he ruled that the 'only reason for the conduct of the defence by the insurers, and their only interest in it, was to avoid a claim falling within the cover provided by the policy'. He ruled that the residents had never abandoned their claim based on the 1997 single incident leak. He found that Sterte Garage was in a 'precarious financial position' and there was no foundation for the submission that if the insurer had not funded the defence then Sterte would have done so. In the light of this finding, David Richards LJ ruled that there 'can be no serious doubt that the conduct of the defence by the insurers was causative of those costs'. He noted that all the reports attributed damage to the 1997 incident.

To challenge the exercise of the discretion under SCA 1981, s 51 to make an NPCO, the insurer had to show the judge below:

- had regard to irrelevant considerations
- failed to take into account relevant considerations, or
- reached a decision which was not justified on the materials before him

David Richards LJ was clear that there was no ground to interfere in saying:

> 'In my judgment, the insurers are unable to demonstrate that the judge's exercise of his discretion was flawed in any way. On the contrary, there was in my judgment ample material to justify the order which he made.'

What did the Court of Appeal rule on the policy interpretation?

DB: DDJ Coppen ruled that the insurer was liable under the insurance policy to indemnify the Sterte Garage against its liability for costs to the residents and, as a result of its liquidation, the residents succeeded to its rights under TP(RAI)A 1930.

The insurers submitted that their liability to indemnify Sterte Garage arose only if an 'insured event' had occurred. The insurers said that the residents' judgment was not binding as between the insurer and Sterte as to whether the contamination was caused by non-gradual pollution. The insurer raised a technical point on the construction of the policy pointing out that General Condition 11 dealt with 'Subrogation'. Section E, however, defined 'costs and expenses' and the insurer said that the words 'in connection with any event which is or may be the subject of indemnity under the Section' governed only paragraph 3 of the definition. The insurer relied on the lay out of the policy wording in support of its submission.

Recognising that the insurer was grasping at straws, Richards LJ roundly dismissed this submission. 'MacGillivray on Insurance Law' notes that:

> 'However other forms of clauses are expressed more broadly, so as to permit recovery of costs where the third-party claim is unsuccessful, or does not fall within the scope of the liability insurance.'

'Lewison: The Interpretation of Contracts' states that the layout of a contract is 'only a factor to be taken into account and its effect may well be displaced by the context or sense of the clause in question'. Richards LJ observed that if the insurers were right on their submission, this would mean they were not liable to pay the costs and that this 'would produce an extraordinary result in a typical case'. He said that 'it is highly unlikely, looking at the matter objectively, that the parties could have intended this result'. Accordingly, he ruled that:

> 'Sterte was entitled to be indemnified by the insurers against the costs order in favour of the claimants and, by reason of the 1930 Act, that right vested in the claimant.'

What practical points can you bring out from the facts of this case as to why an NPCO was granted?

DB: It had not helped here that the defence alleged 'vandalism' and that everything else was a change in position. Gloster LJ at the hearing interjected that the insurer was not seeing off the claim. Here the evidence of Sterte's position from its filed accounts was clear that it could not have afforded to have defended the claim without support from its insurer. The expert evidence was also clear as to how the pollution was caused.

Are there any wider implications in the judgment for those seeking or resisting NPCOs?

DB: While SCA 1981, s 51 confers an unfettered and broad discretion on a court in relation to costs, the difficulties in obtaining an NPCO under SCA 1981, s 51(3) should not be underestimated. An applicant will need to make out all five factors laid out in *TGA Chapman,* including showing that an insurer had acted 'exclusively to defend their own interests'.

It does show an incline towards a greater willingness to make NPCOs. In previous cases, NPCOs have been made against ATE insurers or professional indemnity insurers—this is perhaps a first case at Court of Appeal level where an NPCO has been made against a casualty insurer. Finding evidence of another party's 'motivation' is also not going to be easy to make out objectively in every case in which an NPCO is sought. Finally, it should be remembered the need to show that the conduct of a non-party has been causative of costs to be incurred which would not otherwise have been incurred.

Alex Bagnall: In an earlier article considering this litigation (see News Analysis: Non-party costs order against insurers) I indicated I would be surprised if the Court of Appeal was to deliver a decision which caused insurers to become a guarantor of an insolvent party's costs. In my view, the Court of Appeal has not done this. The finding that the conduct of the insurer was causative of the costs is crucial. This is entirely consistent with previous decisions on NPCOs—the insurer litigated the case for its own benefit and at its own expense and it controlled the litigation.

Although the specific facts of this case are unlikely to be seen too regularly, it reinforces the established principles on NPCOs. While the authorities indicate that 'exceptional circumstances' are required in order to countenance making an NPCO, 'exceptional in this context means no more than outside the ordinary run of cases where parties litigate for their own benefit and at their own expense' (as per Lord Brown in *Dymocks*). Courts are increasingly willing to find that such exceptional circumstances exist so as to avoid injustices to innocent parties who incur legal costs as a result of the conduct of non-parties.

The judgment is likely to cause insurers to review their procedures for defending claims in similar circumstances to this matter.

NPCOs can be a useful tool in avoiding pyrrhic victories when faced with insolvent or impecunious opponents. Where there is any indication that litigation is being controlled by someone or some entity other than the opponent, investigations into whether an application for an NPCO would be viable should be undertaken.

Rod Dutton (RD): The Court of Appeal has refused the insurer's application for permission for a final appeal to the Supreme Court.

Any final thoughts on this case now it is finished?

RD: It's a great relief to see a difficult and long-running case come to a successful conclusion. The claimant residents had laid everything on the line to resist this appeal and it's very satisfying to read the court's judgment. Let's just hope that Aviva leave things there—it was a unanimous judgment and the Court of Appeal has refused permission to appeal. Geoffrey Weddle, junior counsel, of 1 Chancery Lane Chambers has been instructed on the case from the beginning. He has been a great support throughout. John Ross QC, head of chambers at 1 Chancery Lane, did a great job for the clients in the Court of Appeal.

DB: It may be the insurers renew their application for permission to appeal before the Supreme Court itself. It would seem unlikely that the Supreme Court would grant permission for an appeal on an NPCO point. Both courts below were unanimous in their conclusions—it's a matter of discretion for a trial judge and the issue has quite recently been considered by the Privy Council in *Dymocks*. Until we have a decision from the Supreme Court on permission though, we cannot yet regard this case as finished.

Do the claimants feel they have got justice? What has surprised them the most about this case? With the benefit of hindsight would they have done anything differently?

Mrs Valerie Legg: I am pleased with the outcome but we have waited for 15 years to get to this point. I don't really feel we have got justice. We have all lost a lot of money as our houses are each now worth £40,000 less. We won't be able to recover this from the garage as it is insolvent. We had to pay for an insurance premium to cover the costs if we had lost the appeal. It has cost us a lot of money. I am surprised by the length of time this case has taken. I can't understand why the insurer appealed our local court decision. We still have diesel contamination under our houses—it will always be there. Our local council was very good in helping clean up the contamination—there was a power station near our houses for several months while it was sucking up most of the diesel spillage. The insurer said it was caused by 'vandalism' but there was no crime report in our local paper about this—August is a quiet month and ordinarily the local press would have picked this up if such a crime had been reported. Jacobs and Reeve have been very good throughout, they have been helpful and kept us all fully informed. We have had a good service from Mr Weddell our barrister who has been on this case throughout.

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