30 October 2019

THE COURT ORDERED that no one shall publish or reveal the name or address of the Respondents who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Respondents or of any member of their families in connection with these proceedings.

PRESS SUMMARY

Travelers Insurance Company Ltd (Appellant) v XYZ (Respondents)
[2019] UKSC 48
On appeal from: [2018] EWCA Civ 1099

JUSTICES: Lord Reed (Deputy President), Lady Black, Lord Briggs, Lord Kitchin, Lord Sumption

BACKGROUND TO THE APPEAL

This appeal is about who should pay the legal costs of 426 claimants who successfully sued a medical group for the supply of defective silicone breast implants. It allows the Supreme Court to review the principles concerning third-party costs orders.

623 claims were brought against Transform Medical Group (CS) Ltd (**"Transform"**), a medical clinic which had supplied implants manufactured by Poly Implant Prothèse (**"PIP"**). Transform had insurance cover with Travelers Insurance Co Ltd (**"Travelers"**) in relation to claims brought against it.

Travelers funded the whole of Transform's defence. It did not disclose until a relatively late stage that a substantial number of claimants were uninsured. The insurance policy only covered the claims of 197 claimants who suffered from a rupture of their implants between 31 March 2007 and 30 March 2011. Transform was uninsured in respect of the claims of the remaining 426 claimants. The uninsured claimants are the Respondents to this appeal.

Transform entered insolvent administration half-way through the litigation. The insured claims were settled by an agreement made in August 2015 and Travelers paid an agreed proportion of the damages and costs attributable to those insured claims. This left the insured claimants in a much better position than the uninsured claimants - who had obtained a judgment but recovered no damages or costs from Transform at all.

The 426 uninsured claimants applied to the court for an order that Travelers pay their costs. Lady Justice Thirlwall, sitting in the High Court, held that Travelers should be ordered to pay them. The Court of Appeal (Lord Justice Lewison and Lord Justice Patten) reached the same conclusion for slightly different reasons. Travelers appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows Travelers' appeal. Lord Briggs gives the main judgment, with which Lady Black and Lord Kitchin agree. Lord Reed and Lord Sumption each give a concurring judgment.

REASONS FOR THE JUDGMENT

The court has a general power to order non-parties to pay costs under section 51 of the Senior Courts Act 1981 **[25]**-**[26]**. In the context of liability insurance, it is important for the courts to apply clear and reasonably detailed principles so that liability insurers can understand their position. It is not enough for the courts to ask whether the case is *"exceptional"* because this would not provide adequate certainty **[33]**; **[51]**.

Broadly speaking, the authorities reveal two approaches to deciding whether a third party should pay costs: (1) whether the third party took control of the litigation and became *"the real defendant"*; and (2) whether the third party engaged in *"unjustified intermeddling"*.

The *"real defendant"* test, as explained by the Court of Appeal in *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12, provides useful guidelines for cases where insurance exists but some part of the claim (including the claim for costs) lies outside the limits of cover **[48]**-**[53]**. However, it is inappropriate in cases like this where the claims are wholly uninsured **[54]**. In such cases, the appropriate question is whether the insurer engaged in *"unjustified intermeddling"* in litigation to which it was not a party. If the insurer has acted within a framework of contractual obligation, it may be very hard to establish that it has *"intermeddled"* **[55]**-**[56]**; **[78]**. It will usually be necessary to establish a causative link between the insurer's involvement and the claimants' incurring of costs **[65]**-**[67]**; **[80]**.

In this case, all the claims were pursued within a single group action by common solicitors. They involved common issues which were being tried together in four test claims (which, as it turned out, comprised two insured and two uninsured claims) **[68]**; **[79]**. Travelers had a legitimate interest in Transform's defence of the insured claims and, consequently, in Transform's defence of the test cases and common issues. Travelers' involvement was the natural result of its status as an insurer and did not amount to unjustified intermeddling **[69]**.

The courts below relied on a number of specific instances of Travelers' conduct. However, none of them crossed the line into unjustified intermeddling:

(1) **Non-disclosure of the limits of cover.** Travelers' and Transform's solicitors advised Transform not to disclose the limits of its insurance cover. However, as the law stands, parties are not legally obliged to disclose the details of their insurance **[59]**. The advice about non-disclosure fairly reflected Travelers' rights relating to the insured claims **[63]**-**[64]**; **[81]**.

(2) **Offers and admissions.** Travelers was involved in Transform's decisions not to make offers of settlement or admissions to the uninsured claimants **[70]**-**[71]**. If necessary, the court would conclude this involvement was justified but in any event, it did not cause the claimants to incur costs. By 2015 the uninsured claimants were determined to pursue their claims to a judgment with costs, and an offer to settle without paying their costs would have made no difference **[73]**-**[74]**.

(3) **Asymmetry of risk.** The Court of Appeal was concerned by the fact that the uninsured claimants faced failing to recover their costs if they won, whereas Transform could have recovered its costs if they had failed **[58]**. However, this *"asymmetry"* was not the product of Travelers' intervention. It resulted from the fact that Transform was insolvent and largely uninsured, and the claimants' liability for costs was several-only (i.e. each claimant was independently liable for a small proportion of the overall costs) **[61]**-**[62]**; **[82]**.

Therefore, the courts below were wrong to order Travelers to pay the uninsured claimants' costs **[83]**.

Concurring judgments of Lord Reed and Lord Sumption

Lord Reed reviews the historical position in England, Australia and New Zealand relating to third-party costs orders **[85]**-**[93]**; **[106]**-**[112]** and compares this to Scotland, where the courts may order

expenses against a third party who has acted as the *"real master of the litigation"*, and where there is no equivalent concept to *"intermeddling"* **[94]**-**[103]**. Lord Reed adds that the suggestion that a costs order must be *"exceptional"* has little, if any, significance **[106]**-**[112]**.

Lord Sumption discusses the *"intermeddling"* and *"real defendant"* approaches. He suggests that cases in which an insurer has engaged in *"intermeddling"* are likely to be rare, and an insurer who acts in good faith in relation to insured claims should not incur liability in costs **[113]**-**[116]**.

References in square brackets are to paragraphs in the judgment.

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
https://supremecourt.uk/decided-cases/index.html