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Third Party Costs Orders Against Insurers - Where Do things Stand After Travelers?

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Introduction

- When will a liability insurer be liable to a non-party costs order?
- This question will seldom arise.
- In the usual case, the costs of a successful Claimant will simply be met by the Defendant's insurer as part of its contractual liability to indemnify its insured.
- Even where there is a coverage problem which means that the insurer is not liable to do so, the insured will still be liable for those costs.
- But what happens if the insured can't pay them?

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- That is the subject matter of today's talk.
- In particular, what is the scope for obtaining a third-party costs order against an insurer, whether under s51 of the Senior Courts Act 1981, or under the court's inherent jurisdiction?
- Today we are concerned with costs liabilities, not liabilities to satisfy orders to pay damages.

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Other Avenues

There might be other ways that an insured could attempt to get at the insurer:

1. Under the **Third Party (Rights Against Insurers) Act 2010**;

2. By seeking appointment of a receiver by way of equitable execution under CPR Part 69, where a receiver would stand in the shoes of the insured and be able to enforce the insurer's liability to pay out under the policy.

These routes to recovery have their limitations. The insurers will only be liable to the extent that they have an obligation to indemnify in respect of costs under the policy. They might have no liability because the limit of cover has been exceeded, or they have some other defence under the terms of the policy.

Yet the insurer's very participation in the case might unnecessarily have driven up costs, by causing a case to be fought which otherwise would have gone unopposed, or by increasing costs significantly by taking many points, many of which were bad or indifferent.

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What we are concerned with today is the court's power to order costs against a non-party under s51, rather than the power to order costs which depend simply upon the rights under the policy.

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The statutory power

Section 51 of the 1981 Act:

"(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings …

shall be in the discretion of the court.

(2) …

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

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The historical perspective

- The judgment of Lord Reed in the Supreme Court in ***XYZ v Travelers Insurance Co*** [2019] 1 WLR 6075 at paras 85-93 demonstrates that historically in England, both in equity and at common law, courts were prepared to make costs orders against non-parties who had intermeddled in the disputes of others, or where they were real parties to the litigation.

- However, from around the time the Judicature Acts in the last three decades of the 19th century, the courts in England held that there was no jurisdiction to order a non-party to pay costs. That approach was disapproved by the House of Lords in ***Aiden Shipping Co Ltd v Interbulk Ltd*** [1986] AC 965, thereby firmly reinvigorating the jurisdiction.

- In Scotland the jurisdiction to award costs against a non-party who was the *dominus litis*, or "master of the litigation" never appears to have been doubted.

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Classic applications of the power

The power has been exercised in many different types of case including:

- **Against a person who uses another as a puppet for bringing a claim, where the former has control of the litigation**;

    - ***In re Jones*** (1870) LR 6 Ch App 497 (solicitor giving indemnity to client to pursue an action);
    - ***Koza Ltd v Koza Altin Isletmeleri*** [2020] EWHC 1092 (Ch), controller of company liable for costs where company litigation was directed for his benefit.

- **Against litigation funders who stand to share in the proceeds of litigation** so that they may be seen as real parties to the litigation. As Lord Brown put it in ***Dymocks Franchise Systems (NSW) Pty Ltd v Todd Associated Industrial Finance Pty Ltd*** [2004] 1 WLR 2807, PC, at [25]

    - "Where, however, *the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them*, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs." (emphasis added)

    But as litigation funder cases demonstrate, the power does not need to be exercised on an all or nothing basis; though engaged, as a matter of policy or discretion it may be exercised as to part only of the costs; see ***Arkin v Borchard Lines Ltd*** [2005] 1 WLR 3055, CA.

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The jurisdiction generally

- However, the sheer range of circumstances in which a non-party might become sufficiently connected with proceedings to engage the non-party costs jurisdiction has prevented the development of general rules.

- The courts have cautioned against the jurisdiction becoming "over-complicated by authority" (see eg ***Deutsche Bank AG v Sebastian Holdings Inc*** [2016] 4 WLR 17)

- Cases such as ***Symphony v Hodgson*** [1994] QB 179 and ***Dymocks Franchise Systems*** [2004] 1 WLR 2807 have set out guidelines, but the exercise of the general jurisdiction is fundamentally subject only to the principles of "exceptionality" and "justice".

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Insurers

- Liability insurers are of course serial funders of the litigation of others.
- Prior to the decision of the Court of Appeal in ***XYZ v Travelers*** their position in relation to non-party costs orders was thought to be subject to specific principles developed and applied in a number of cases including:
  - ***TGA Chapman Ltd v Christopher*** [1998] 1 WLR 12;
  - ***Citibank NA v Excess Insurance Co Ltd*** [1999] 1 Lloyd's Rep IR 122;
  - ***Cormack v Excess Insurance Co Ltd*** [2002] Lloyd's Rep IR 398;
- These appeared to establish that a liability insurer would be liable under s 51 in either of 2 situations:
  - Where it unjustifiably interfered in a dispute between others in which it had no interest ("**intermeddling**").
  - Where it was interested in the outcome and controlled and funded the proceedings in its own rather than the insured's interest ("**real defendant**")

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XYZ v Travelers

- ***XYZ v Travelers*** was a product liability case involving 600+ claims, subject to a GLO, against Transform, a manufacturer of breast implants.
- 197 claims of those Transform claims were insured by Travelers but 426 were not.
- The fact that there was no insurance was not disclosed to those claimants until a late stage in the proceedings. (Indeed, the defendant had been advised not to disclose that fact at an earlier stage).
- The trial of preliminary issues was ordered in 4 sample cases. 2 of the sample cases were, as it turned out, uninsured claims.
- The GLO provided that
  - costs incurred in dealing with common issues were to be shared equally between all GLO claimants – insured or uninsured.
  - liability for and entitlement to costs was several rather than joint.

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Travelers

- Expert evidence adverse to the claimants' claims led Travelers to settle the *insured* claims by paying a proportion of their damages and costs.

- The proportion of the common costs attributable to the insured claims was calculated by dividing the amount of those costs by the number of insured claims relative to the total number of claims.

- Travelers thus paid *c* 20% of the common costs.

- Transform had entered administration and the uninsured claimants obtained default judgment against it.

- Their individual costs were very small, but the costs for which they were potentially liable under the GLO were their proportion of the common costs of the 4 sample cases; these were not recovered (or realistically recoverable) from Transform

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Travelers

- They therefore applied for a non-party costs order against Travelers.
- This application succeeded before the judge (who was much influenced by her finding that had the uninsured claimants known the true insurance position at an earlier stage they would not have continued with their claims) - [2017] EWHC 287 (QB)
- Her decision was upheld by the Court of Appeal, albeit for slightly different reasons - [2018] EWCA Civ 1099
- At both stages, Travelers relied on the “insurer” non-party costs cases.

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Travelers

- Travelers argued that these showed that
    - a liability insurer funding an unsuccessful defence by its insured will only be liable if it is established that it controlled the litigation in its own interest without proper regard to any inconsistent interest of its insured;
    - only in such a case was it appropriate to regard the insurer as the real party such that an order under section 51 can properly be made.
    - Otherwise, no order should be made.
- The Court of Appeal did not consider that it was constrained by the facts and outcomes of these "insurer" non-party costs cases – they were guidance rather than rules and conditions.

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Travelers

- The Court of Appeal took the view that Travelers both
  - funded the defence and
  - stood to benefit from a successful outcome
- it was therefore squarely within the principle in ***Dymocks***.

- The Court of Appeal also considered that the principle of "reciprocity" required Travelers to pay the uninsured claimants' costs in circumstances where, if Travelers had become entitled to its costs it would have expected to be paid its costs by uninsured as well as insured claimants.

- It was a matter of accident that the test cases comprised a mixture of insured and uninsured cases, whereas Travelers' expectation when concluding the contract of insurance would have been that it would be liable to pay all of the adverse costs of an unsuccessful defence.

- Travelers appealed to the Supreme Court, of which more anon…

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Various Claimants v Giambrone [2019] 4 WLR 7

- In ***Giambrone,*** hundreds of British and Irish claimants had paid money to purchase holiday properties at a development on the Calabrian coast – "Jewel of the Sea" **("JOTS")**.

- It was never completed and was seized by the Italian financial police on the alleged grounds that the developer was a creature of the local Mafia (N'Drangheta)

- The claimants sued the Italian lawyers (practising in England and Italy) who had acted
- for them in these transactions.

- The Claimants succeeded at first instance and in the Court of Appeal.

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Giambrone

- Giambrone's insurers, AIG, paid neither damages/equitable compensation nor costs arguing that it was entitled to aggregate JOTS claims and had already paid out the total sum insured under the policy in respect of "any one claim".
-
- The Claimants applied for a non-party costs order against AIG under s 51 of the Senior Courts Act 1981.
-
- Mr Justice Foskett (the trial judge) ordered AIG to pay half of the Claimants' costs of the proceedings.

- He refused AIG a "leapfrog" certificate permitting an application to appeal directly to the Supreme Court in order to seek conjoinder with the appeal in ***XYZ v Travelers***.

- The Court of Appeal then gave AIG permission to appeal.

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Giambrone

- In ***Giambrone***, the key features identified by the Judge were that
    - AIG had settled all previous JOTS cases.
    - A dispute as to aggregation then arose between AIG and Giambrone. Given the number of claims still in the pipeline, this obviously raised the prospect of uninsured losses.
    - Once the limit of indemnity was finally eroded, AIG would have no liability to indemnify Giambrone against the costs of defending further claims.

- However, prior to the erosion of the indemnity limit, AIG and Giambrone entered into Heads of Terms (the "**HOTS**") which had 2 material effects:

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Giambrone

- First, it agreed a compromise basis of aggregation which made more money available to settle further claims, but not nearly enough substantially to compensate the many more claims which were already being made.

- Secondly, AIG agreed to fund the defence of claims even after the exhaustion of the (revised) indemnity limit (unless it reasonably considered that there was no realistic prospect of defending the claims).

All of the claims in ***Giambrone*** were made after the conclusion of the HOTS and, therefore, their defence took place pursuant to its terms.

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Giambrone

Conduct

When it came to conduct, the Judge said that

- The conduct of the defence had been unbalanced and “at first blush, unfair”;
- Almost every issue raised by the Claimants was "hotly contested".
- A few matters were conceded during the trial but only when they became untenable, but all major issues were fiercely fought by the Defendants.
- "without prejudice" material indicated that the Defendants had little confidence in success on many of the major issues.
- It was a “war of attrition”.

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Giambrone

- His non-party costs order was made essentially, for two (cumulative or alternative) reasons.
- The HOTS was an agreement from which AIG had derived a commercial benefit: agreement of a basis of aggregation.
- In return, AIG agreed to fund defence costs outside and beyond the terms of the policy *and* relinquished control over how that defence was conducted.
- The additional/alternative basis was that AIG had been entitled to withdraw defence funding, but had decided not to do so.
- This was especially significant because AIG argued that it did no more than it was contractually obliged to do.

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Travelers & Giambrone

- ***Giambrone*** therefore followed ***Travelers*** in treating the previous "insurer" cases merely as examples of the exercise of the non-party costs jurisdiction, rather than as authority that different considerations applied in such cases.

- In so doing, both ***Travelers*** and ***Giambrone*** applied the criterion of "exceptionality" which is the touchstone of the general non-party costs jurisprudence.

- It is fair to say that this caused some consternation in the insurance market because of a feeling that there was now an unacceptable degree of uncertainty about when a liability insurer might be liable.

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Key principles emerging from *Travelers* – insurers generally protected – bases of liability intermeddling/real party

- The core of the Supreme Court decision is at §76-83 of Lord Briggs' judgment.

- Exceptionality of the case or a broad appeal to justice are not (*per* Lord Reed in ***Travelers*** at [106-109] - or seem unlikely to be (*per* Lord Briggs (with whom Lady Black, and Lord Kitchin agreed) at [30] and [52] - a useful test; they lack content, principle or precision.

- Rather, the focus is on whether the insurer (non-party) has (i) become the real defendant in relation to an insured claim, or (ii) intermeddled in an uninsured claim. It is the insurer's conduct that matters [76].

- An insurer will be seen as "the real defendant" where it has been influenced to obtain for itself some advantage altogether outside the litigation. (***Groom v Crocker*** [1939] 1 KB 194, CA, at 203, ***TGA Chapman Ltd v Christopher*** [1998] 1 WLR 12, at 20, and Lord Briggs in ***Travelers*** at [77]. *But what does this mean? A potential grey area.*

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Key principles emerging from *Travelers* (cont)

- Dealing with an uninsured claim may expose the insurer to a charge of intermeddling, but a close connection with an insured claim

> "may well [mean] that the legitimate interests of the insurer will justify some involvement by the insurer in decision-making and even funding of the defence of the uninsured claims without exposing the insurer to liability to pay the successful claimant's costs." *Per* Lord Briggs at 79.

- The insurer should be allowed a "large margin of judgment" and if he acts in good faith in the interests of the assured, he should not incur liability; *per* Lord Sumption at 116.

- Causation has to be proved in demonstrating the link between the insurer's conduct and incurring costs by the claimant. *Per* Lord Briggs at [80].

- Non-disclosure of limits of cover is unlikely to trigger liability. *Per* Lord Briggs at 80.

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Grey areas

(i) Are categories closed? Does *Travelers* suggest that outside "real party" liability or unjustified intermeddling, it will never be possible to obtain costs against an insurer under s51?

- Nothing definitive said on this point, but there was not much encouragement for some other category of case. What is clear is that mere exceptionality will not suffice.

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Grey areas (cont)

(ii) What is the relevance of benefit to an insurer?

- It will not often be the case that an insurer will want to spend money unnecessarily defending a claim for which it is not liable under a policy. Many cynical people would say that it is much more likely that an insurer would try to avoid covering a claim for which there is liability!

- It is not, however, difficult to conceive of circumstances where an insurer may have a commercial eye on an extraneous advantage.

- Suppose that an insurer, anxious to get a favourable decision on a really important legal principle, identifies a claimant's case as a really weak one, and ripe for running as a test case, yet where for some reason the insurer has a cast iron point in his favour as to why he is not liable under the policy; for example, properly construed it does not cover the liability in issue. Would this desire to run a test case be sufficient motive to expose the insurer to s51 liability?

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Grey areas (cont)

(iii) Suppose an insurer does a deal to close a coverage dispute?

- This was actually a key point in the *Giambrone* case. That case settled before it reached the Court of Appeal, so at appellate level it was never the subject of a decision. In that case, the commitment to conduct uninsured cases was actually formalised.

- But the critical question is whether there was a close connection, and an advantage genuinely perceived by the insurer in terms of the conduct of the insured cases, about which it is to be allowed a wide margin. The courts are likely to be very slow to impugn an insurer's decision where a colourable explanation of perceived benefit to an insured case might be made out.

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Grey areas (cont)

(iv) Lord Sumption's margin of judgment - how badly does the insurer have to get it wrong?

- Probably pretty badly.
- And remember the insurer can always make the common sense point that it is in business to make money not to fund cases out of the generosity of its heart.
- It probably funds an uninsured dispute only because it sees a real relevance to a connected insured dispute where it may have a liability.
- As Adam Smith put it in *The Wealth of Nations* in 1776, and it was not a new point then, "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest".

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Postscript
– the future of non-party costs generally

- It was unusual for the Supreme Court to hear an appeal on a point of procedure and the fact that it did so is an indication of the importance of the issue in ***Travelers***.
- At §30, Lord Briggs said this (in passing) about the non-insurer jurisprudence:
    - "It is not the purpose of this judgment comprehensively to reassess those generally applicable principles. It may be (and I am reluctantly prepared to assume but without deciding) that they really are limited, as the Court of Appeal thought in the present case, to the twin considerations of exceptionality and justice. The same general conclusion is to be found in the *Deutsche Bank* case. That said, I share all Lord Reed DPSC's concerns as to the lack of content, principle or precision in the concept of exceptionality as a useful test."
- A non-insurer non-party costs case is unlikely to be heard by the Supreme Court any time soon, but the *obiter* views of Lords Briggs and Reed in *Travelers* distinctly suggest that clearer "guidance" is required. Something for the Rules Committee?

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