Another non-party costs order made against a liability insurer: *Various Claimants v Giambrone & Law (a firm) and others* [2019] EWHC 34 (QB)

This case again highlights the perils facing insurers of claims in which the insured's liability may exceed the limit of indemnity under the policy, after Foskett J granted an application for a non-party costs order in a case where insurers were obliged, after reaching an agreement with their insured in relation to aggregation, to continue to fund defence costs in group litigation. The decision follows the decision in *Travelers Insurance Company v XYZ* [2018] EWCA Civ 1099 (***For an analysis of that decision, see Hailsham Chambers' briefing note – click here.)***

Non-party costs orders and insurers

Section 51 of the Senior Courts Act 2018 confers upon the court a very broad discretion to order by whom costs are to be paid, and empowers it to order costs to be paid by a non-party to proceedings. Until May 2018, it was generally thought that a liability insurer would be unlikely to face such an order unless it had taken over control of the litigation for its own purposes and without due regard to the interests of its insured.

However, the Court of Appeal in *Travelers* held that the very fact that a defence is being funded by insurance may be sufficiently "exceptional" to bring it within the ambit of s.51. Though the facts of the case were unusual, it plainly opened up the possibility that a non-party costs order might potentially be available against an insurer in any case in which the insured's liability for damages and costs exceeds the limit of the policy and the insured cannot pay.

Giambrone

It is perhaps unsurprising, then, that an application for such an order was made in *Various Claimants v Giambrone & Law (a firm) and others* [2019] EWHC 34 (QB). The underlying claim was, as in the *Travelers* case, quasi-group litigation. A large number of claimants who had lost money in a fraudulent property investment scheme sought damages from Giambrone, a law firm which had the benefit of professional indemnity insurance. Early on in the dispute, the insurer asserted that the claims aggregated, with the result that cover for the claimants' damages and costs would be limited to £3m. The aggregation dispute had been compromised on terms that limited the insurer's liability to indemnify Giambrone, but provided that it was still obliged to advance defence costs, subject to a right to bring its defence of the proceedings to an end if it reasonably concluded that there was no realistic prospect of defending a claim.

The claimants ultimately succeeded at trial on all points. Giambrone's appeal to the Court of Appeal was unsuccessful and its application for permission to appeal to the Supreme Court refused. Substantial costs orders were made against the firm, which it failed to satisfy, and the claimants made an application for a non-party costs order against the insurers.

In his judgment on the application, Foskett J, who had heard the underlying professional negligence trial, commented that Giambrone had conducted its defence unreasonably, with every conceivable

point being pursued, and concessions being made only when the previous position had become untenable.

The judge considered that by the terms upon which it had settled the aggregation dispute, the insurer had arguably tied its own hands in relation to its ability to control the future conduct of the defence. Given what it knew of its insured, it was highly likely that this would result in the defence being conducted in an unreasonable manner. To the extent, therefore, that the insurer sought to argue that it had not been in a position to prevent the claimants from incurring costs as a result of Giambrone's conduct of the defence, that argument did not assist. He held (at paragraph 78 of the judgment) that "where an indemnity insurer substantially relinquishes control of the conduct of the litigation to the insured (or fails to take steps to control it when there are grounds for intervening), and does so in the expectation that it will be immune from a costs liability towards the opposing party if the opposing party is successful, that expectation is open to be falsified by the court in a section 51 application, particularly if the prospects of success for the insured are assessed as poor."

The judge considered that the decision in *Travelers* established a principle of "reciprocity" whereby any party who stood to benefit from the outcome of the litigation could, in principle, be made to bear the burden of costs. The insurers argued that there should be a distinction between the position of litigation funders and 'after-the-event' insurers, who provide funding for litigation with a view to profiting from that litigation by sharing in its proceeds in the event of success, and liability insurers, who provide cover for the risk that their insured may in the future be faced by a claim and cannot profit from the litigation per se. It might also be thought to be relevant that the funder or ATE insurer of a claimant is on the side of the party whose decision it is to bring the litigation and who is in, at least, the strongest position to end it: a defendant, by contrast, has no choice at the outset as to whether to become a party to litigation at all.

The judge did not explicitly reject that submission, though plainly he was not persuaded that it mattered in the present case, partly because he accepted (at paragraph 80) that the insurer derived an additional benefit from the fact that, when it settled the aggregation dispute, the position on aggregation was not clear and therefore the "consequence of a successful defence would have been that [the insurer's] alleged right to aggregate would not need to be tested." With respect to the judge, it is difficult to see how this meant that the insurer derived a benefit from the continued defence of the claims after that dispute had been settled, because the settlement agreement itself meant that its rights in respect of aggregation had been agreed. It was therefore in no better or worse a position than any liability insurer hoping that its liability will be limited because its insured's defence succeeds in whole or in part. It may be that the question would have arisen had the claimants sought to argue that the settlement agreement between Giambrone and its insurers did not bind them, but that does not appear to have been the basis for the judge's conclusion on this point.

It appears in any event to have been accepted by the Court of Appeal in *Travelers* that the possibility of successfully defending, or partly defending, a claim, and thus limiting the insured's exposure to costs and damages, could constitute a sufficient benefit to insurers to give rise to a potential liability under s.51.

The judge also accepted that the claimants needed to demonstrate that the insurer's funding of the defence had caused them to incur additional costs. In contrast to the position in *Travelers*, where a decision had been made not to tell the claimants that many of their claims were uninsured, the claimants in the present case had been well aware of the insurer's stance in relation to aggregation. Nonetheless the judge held that on the facts, by providing Giambrone with the funds to do so, the insurers had enabled Giambrone to conduct the defence in an unreasonable manner and had thereby increased the claimant's costs, concluding on a broad-brush basis that the claimants had spent approximately twice as much as they would have done had the defence not been funded. Accordingly, he ordered the insurers to pay 50% of the claimants' costs.

Points to note

Although the case represents an extension to *Travelers* (in that it did not matter that the claimants had been in a position to choose not to risk expending costs they might not recover), and is likely to be troubling to insurers, the facts were still striking.

Of particular significance was the fact that the insurer's approach, on the judge's findings, made it almost inevitable that the litigation would be conducted unreasonably and extravagantly by its insured; presumably, similar considerations would apply if, rather than ceding control of the claim to an unreasonable insured, insurers themselves conducted the defence unreasonably.

Secondly, the judge was clearly influenced by his view that the defence had at all material times been very weak. The message for liability insurers faced with a claim which may, under the policy, be partly uninsured must be that they should consider the merits of any defence carefully, because unless they can extricate themselves from the litigation altogether, they risk liability for claimants' costs which exceeds their contractual limits of liability to their insured. This is a problem that is particularly likely to arise where there are multiple claims and aggregation issues, but in principle there seems no reason why the argument should not apply in any case where there is an insurance shortfall.

However, particularly given that many professional liability insurers are obliged to offer certain minimum terms, and to treat their insureds fairly, the continued funding of an ultimately unsuccessful defence by insurers who contend that they are liable for only some of the costs may not, without more, be sufficient grounds for a non-party costs order. The extent to which insurers could reasonably have considered that the claim was defensible is likely to be highly relevant. In that regard, a full assessment may require disclosure of privileged material. This may put insurers in difficulties if the insured will not waive privilege, and it is suggested that courts should not be too ready to conclude that insurers should have pulled the plug.

Finally, practitioners should be aware that Travelers' appeal to the Supreme Court is pending. The argument that the circumstances in which insurers can be ordered to pay costs on a non-party basis should be subject to strict limitations may yet prevail.

Alice Nash, Hailsham Chambers

18 January 2019