Travelers Insurance Company Ltd (Appellant) v XYZ (Respondents) [2019] UKSC 48

Background to the case

An action was brought by 623 claimants against Transform Medical Group (CS) Ltd ('Transform) for the supply of defective silicone breast implants, which had been manufactured by a French company, Poly Implant Protèse. The claims ultimately succeeded. Unfortunately, Transform had gone into administration half-way though the litigation.

Transform were insured by the Appellant, 'Travelers'; though it transpired that this insurance only covered claims brought by the 197 claimants whose implants had ruptured between 31 March 2007 and 30 March 2011. It did not cover the other 426 claims, which included claimants who were concerned about unruptured implants, and claimants whose implants had ruptured outside the insured period. Nonetheless, Travelers funded Transform's defence of all the claims brought against it. It was not disclosed until a relatively late stage in the litigation that a large number of claims were uninsured. This decision was taken on the basis of legal advice given jointly to Travelers and Transform.

The insured claims concluded by way of a settlement agreed in August 2015, in which Travelers paid a proportion of the damages and costs. The uninsured claimants succeeded in obtaining judgment, but were unable to recover any damages or costs due to Transform's insolvency.

Therefore, the uninsured claimants sought a non-party costs order against Travelers under section 51 of the Senior Courts Act 1981.

The decisions below

In the High Court, Thirlwall J (as she then was) granted the non-party order against Travelers on the basis that:

(1) The uninsured claims were nothing to do with the insurer. In order to obtain a non-party costs order, the applicants did not need to establish that the non-party had controlled the litigation of the claims. However, the involvement of the insurer in the defence of the claims and the approach taken were relevant considerations. Here, it was clear that Travelers had been in the driving seat of the litigation. The fact that Travelers had insured the other claims did not entitle it to influence the non-insured claims.

(2) Furthermore, if the lack of insurance had been disclosed, costs would not have been incurred in relation to the uninsured claims. But for Travelers interest, Transform would have disclosed the lack of insurance to the claimants at an earlier stage, and the applicants would not have incurred the costs of pursuing those claims.

(3) There was an asymmetry in costs risk between the uninsured claimants and Travelers. If Travelers were successful in defending the uninsured claims, they would have a full costs recovery against those claimants. Conversely, on Travelers' analysis, if the uninsured claimants were successful against Transform, they would have no recourse against Travelers.

The Court of Appeal took a broader-brush approach. It held that, in applications for non-party costs orders, the court was not concerned with legal rights and obligations 'but with a broad discretion which it will seek to exercise in a manner that will do justice' and that 'the only immutable principle is that the discretion must be exercised justly' [6]. Therefore, previous cases did not authoritatively set out a series of conditions which must be satisfied before the discretion could be exercised. Interestingly, however, the Court of Appeal disagreed that Travelers had nothing to do with the uninsured claims; both raised common issues and, due to the policy wording, Travelers were obliged to fund Transform's defence of those common issues. However, Thirlwall J had been entitled to conclude that this was an exceptional case which justified a non-party costs order, largely due to the asymmetry in costs risk which, on the Court of Appeal's analysis, was decisive.

The Supreme Court decision

The majority judgment was given by Lord Briggs, with whom Lady Black and Lord Kitchin agreed. The court overturned the decisions of the lower courts, and allowed Travelers' appeal

Firstly, after reviewing the previous authorities, the court stated that this judgment was not the place to comprehensively re-assess the principles generally applicable to non-party costs orders. Rather, this was an opportunity to refine the principles which apply where the non-party is a liability insurer [30]. Given that there is a clear public interest in the provision of liability insurance, and that there are settled principles of law which govern the obligations and rights of insurers to fund, conduct and control litigation on behalf of the insured, the appellate courts should set out clear principles determining if and when insurers will be exposed to non-party costs liability [33].

<u>Applicable principles</u>

On the basis of previous authority, there were 2 separate bases on which a liability insurer may be at risk of a non-party costs order:

(1) Where the insurer had 'intermeddled' in a dispute in which it had no interest; and

(2) Where the insurer could be considered the 'real defendant', due to a combination of its interest in the outcome of proceedings, obligation to satisfy any judgment, and exercise of control over the conduct of the litigation [35]-[37].

Previous authorities had been correct to attempt to lay down guidelines as to when a non-party costs orders may be granted, and the two bases which had been identified did represent

a principled approach to when the jurisdiction would be engaged. These were preferable to an elusive concept of 'exceptionality' [51]-[52].

Where a court sought to apply the 'real defendant' test, the factors first set out in *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12 ('The Chapman factors') were likely to be useful [51] and [78]. Specifically:

(1) The insurers had determined that the claim should be fought;

(2) The insurers had had conduct of the litigation; and

(3) The insurers had fought the claim exclusively to defend their own interests.

The 'real defendant' test was useful for identifying whether an insurer should be liable to pay costs in claims within the scope of cover, including where there was a limit on cover. However, this test did not assist in cases such as the present, which involved claims that were completely uninsured.

It was clear that Thirlwall J had found the Chapman factors to be of limited assistance and, though not stated explicitly in the judgment, it was clear that the decision had turned upon the judge's impression that Travelers had intermeddled in the proceedings in relation to the uninsured claims [46].

In such 'uninsured' cases, it was the 'intermeddling' test which fell to be applied [53]-[54]. To obtain a non-party costs order in such a case, it was not necessary to demonstrate that the insurer had taken control of the litigation or had done anything which approached becoming the real Defendant. Nor was there any fixed benchmark as to what *level* of involvement constituted unjustified intermeddling. Rather, in each case, the nature and extent of the non-party's involvement was to be measured against the justification or excuse for it.

In other words, the primary question would be whether or not the intermeddling was justified. In contradistinction to the 'real defendant' test, the question of whether or not the involvement took place within a framework of contractual obligation was likely to be of primary relevance. If the non-party had not gone any further than its contractual obligations, the unjustified intermeddling test will most probably not have been met [55].

<u>Costs asymmetry</u>

Unlike the courts below, the Supreme Court did not consider the asymmetry in costs risk to be decisive. As was observed, there will often be such asymmetry; for instance, if a party is legally aided, or if Qualified One-way Costs Shifting applies. Therefore, the courts below had placed undue reliance on this fact. This was especially so given that the asymmetry in costs risk had not arisen due to any action taken by Travelers [58]-[61].

Causation

It is necessary to demonstrate a causative link between the conduct of the non-party and the incurring of the costs which the applicant seeks to recover [67].

As to the non-disclosure of cover, which Thirlwall J had found had had a causative impact on the costs incurred, the decision not to make this disclosure was within Travelers' rights as an insurer. Consequently, it did not amount to unjustified intermeddling [63]-[64].

Relationship between the insured and uninsured claims

The Court of Appeal had been right to depart from Thirlwall J's finding that Travelers had nothing to do with the uninsured claims. All the claims were part of the same group action and raised common issues, which had been ordered to be tried together in sample test claims. Furthermore, under the terms of its policy, Transform were entitled to have the defence of the common issues funded by Travelers, irrespective of whether they arose from insured or uninsured claims. As such, Travelers' involvement in the litigation of the uninsured claims did not amount to unjustified intermeddling [68]-[69].

Offers and admissions

Finally, the Supreme Court considered the relevance of the fact that Travelers had participated in the uninsured claims by becoming involved in the decision to make a drop-hands offer in relation to the uninsured claims, and of whether to make certain admissions in relation to those claims. Lord Briggs stated that, were it necessary to do so, he would have found that this did not amount to unjustified intermeddling. In any event, no causative link had been established between this conduct and the costs which were sought [70]-[74].

Comment

The decision of the Supreme Court provides a more principled approach to the question of when a non-party costs order is likely to be granted against a liability insurer. It has clarified that there are two separate bases upon which an insurer may be liable in different kinds of case, that is, where it is the 'real defendant' and where the insurer has unjustifiably 'intermeddled'. Furthermore, the Supreme Court explains that the first test is likely to be appropriate where the claim is within the scope of cover and so insured (even if there is a limit on cover) whereas the second test is appropriate where the claim is not within the scope of cover at all. In the first situation the Supreme Court also confirms that when applying the 'real defendant' test, the Chapman principles are likely to be decisive.

However, there is still uncertainty as to what the precise criterion for 'unjustified intermeddling' is in a case where the claim is not insured at all. Though the judgment stresses that a liability insurer's involvement in litigation pursuant to contractual obligations will most likely *not* amount to unjustified intermeddling, the question remains as to what other justifications (if any) will permit an insurer's involvement in litigation where in the claims in

question it is not carrying the insurance risk. Subsequent cases will have to draw the boundaries in such a respects. For the moment, a liability insurer which becomes involved in defending claims which are not within the scope of cover, such as where there is a common interest with parallel claims which are so covered, would be wise to check carefully that its involvement is in accordance with its rights and duties under the policy. To step outside that contractual framework could expose the insurer to the peril of a non-party costs order.

Tom Stafford, 31 October 2019