

Once bitten, twice shy
By Nick Gillies

Litigants in costs disputes can now force defendants to disclose further details about third-party funding, says Nick Gillies

Three years ago the defendant's insurers in *Plymouth & South West Co-Operative Society Ltd v Architecture, Structure & Management Ltd* [2006] EWCH 3252 (TCC) were ordered to pay the claimant's costs in circumstances where the defendant's limit of indemnity had already been met (see 'Bitten by the costs', *Solicitors Journal* 151/18, 11 May 2007). The decision sounded a warning to third parties who are calling the shots in litigation.

In the latest development on this issue (*Thomson v Berkhamsted Collegiate School* [2009] EWHC 2374 (QB)) parties may now be forced to disclose documents evidencing a third party's involvement in the proceedings.

In *Thomson* the claimant sought damages from his former school for bullying. During the trial he discontinued the action and was subsequently ordered to pay the school's costs. However, as there was no prospect of him meeting these, the school applied for an order against his parents, who had funded the claim. To support its application, the school sought disclosure of correspondence between Mr Thomson's parents and his solicitors, experts and counsel, as evidence that they were a driving force behind the litigation.

New territory

This was a decision on ancillary relief (i.e. disclosure) so we are yet to see whether the court will make an order against Mr Thomson's parents. There are good reasons to believe it will. If an order is made then, as Blake J noted, it will "traverse new territory" in that it is "not a case of a commercial funder or a private or corporate entity that may be regarded as the alter ego of the litigant which was ordered to pay costs".

More immediately, Thomson paves the way for other litigants to seek similar disclosure. In past cases, sufficient evidence of a third party's involvement was already available or emerged incidentally in subsequent procedural steps. When deciding this issue, the court will ask whether disclosure is necessary for the fair determination of the application. The following considerations are relevant:

- (a) Strength of the application without the disclosure.
- (b) Potential value of the disclosure.
- (c) Likelihood that the documents will be privileged.
- (d) Proportionality and justice.

Before filing his claim, Mr Thomson instructed new solicitors, who were more careful to refer to him as their client alone. This meant the school had little actual evidence of his parents' involvement in the period following their instruction. Blake J believed the application would turn upon the extent to which the school could point to such evidence – i.e. the application had much better prospects with the disclosure. He also accepted that disclosure was likely to be relevant and may be highly probative in demonstrating control, interference and an assumption of responsibility.

As for privilege, Blake J resolved this by reasoning that legal advice or litigation privilege would not normally arise in communications between a solicitor and a third party which were not connected with the obtaining of a witness statement or the giving of legal advice. Similarly, communications between a third party and experts will not normally attract litigation privilege. The position may differ if a third party was acting as agent for the litigant, but this could only be established from the documents in any event. Instructions or input from the third party on their own account should not attract privilege and would be highly probative.

Blake J therefore ordered the disclosure, and requested that privileged documents be listed individually with some explanation as to the claim to privilege. If any disputes arose, he would inspect the documents and decide whether they were privileged, with the artificial consequence of then disregarding them if they were. This may cause some practitioners discomfort, but it is probably the only sensible method in most cases.

Change of tack

The facts in *Thomson* are unusual, but it is not difficult to imagine similar scenarios in a commercial context where, for example, a parent company, insurer, director or other person is controlling the proceedings or stands to benefit from the outcome. Understandably, the prospect of disclosing correspondence with that third party will not sit comfortably with many as it may reveal tactics, commercial information or other sensitive details. However, it must be right that a party can be required to disclose evidence relevant to an application for an order where the application has merit and the disclosure is likely to be fruitful. Surprisingly, no privacy issues were raised in *Thomson*, but the courts are accommodating of such concerns and measures can be put in place to address them.

If a third party is involved in a client's claim or defence, solicitors should be mindful of the costs risk and take steps to manage this; for example, by:

- (a) ensuring correspondence is addressed to the client alone;
- (b) avoiding correspondence with the third party, or at least carefully considering the contents and whether it will be privileged;
- (c) warning the client of the risk of an order so there are no surprises; and
- (d) revisiting tactics; for example, is settlement more imperative?

Two days after *Thomson*, the High Court made another order – this time against shareholders of a defendant's holding company (*Hitachi Capital (UK) Plc v V-12 Finance Ltd* [2009] EWHC 2432 (Comm)). Disclosure was unnecessary in that case, but it is a further timely reminder of the court's willingness to oblige third parties for costs in appropriate cases.

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