

**Bitten by the costs: third party costs orders**  
**Antony Smith and Nick Gillies, May 2007**

A reminder of the court's power to make costs orders against third parties comes from *Plymouth & South West Co-Operative Society Ltd v Architecture, Structure & Management Ltd* [2006] EWCH 3252 (TCC) (19 December 2006). Those involved in litigation 'behind the scenes' should take note.

Section 51(1) of the Supreme Court Act 1981 provides that "*the costs of and incidental to all proceedings in ... the High Court ... shall be in the discretion of the court*". Further, s51(3) makes plain that the court "*shall have full power to determine by whom and to what extent the costs are to be paid*". In *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965 the House of Lords confirmed that s51 permits a court to award costs against a person who was not a party to the proceedings. Nevertheless, such orders are only made in exceptional circumstances.

The *Plymouth* case concerned negligent advice by a firm of architects (the defendant). The defendant had a standard professional indemnity policy with a limit of £2m.

The claimant was awarded just over £2m in damages plus costs, which were estimated at approximately £1m. The defendant's insurers paid £2m toward the damages, but refused to pay any more or meet the claimant's costs as the limit of indemnity had been met. The defendant itself ceased trading at about the time the claim was brought and had virtually no assets from which to meet the shortfall. In these circumstances, the claimant sought to recover its costs from the defendant's insurers directly.

The Judge found that the circumstances were exceptional and therefore warranted a third-party order against the insurers because:

- they alone determined that the claim would be fought;
- they funded the entirety of the defence;
- they had full conduct of the claim;
- they fought the claim exclusively to defend their own interests and, in doing so, caused additional costs for the claimant; and
- the defence failed entirely.

The defendant was little more than a shell, with no reputation or trading concerns and whose involvement in the litigation was limited to providing information and assistance. This meant the claim was being defended by the defendant's insurers solely for their own ends. (It was open to them, for example, to settle the claim at the outset or admit liability and dispute only the quantum – both of which would have substantially reduced the claimant's costs.)

The case will naturally be of interest to insurers and their lawyers given who the order was made against and the fact that the defendant's limit of indemnity was exceeded. This is the second such decision in the past 10 years. The first was *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12 (CA).

However, the case also has a wider commercial relevance. The same principles may apply to other persons who stand behind a party to proceedings – be it claimant or defendant. If that person is funding the claim/defence and 'calling all the shots' and the party itself is impecunious and/or has no commercial interest in the outcome of the litigation, then there would seem to be a real risk of a Section 51 order should that party lose. The risk would increase if the claim/defence had little prospect of success and/or was being run for some other ulterior purpose.

Such a situation might arise if, for example, an action was brought by or against a non-trading shell company and the action/defence was being run and funded by one of its parents.

In these circumstances, unless there are good reasons for fighting 'tooth and nail', serious thought should be given - as early as possible - to other options for resolving claims expeditiously.

Having some involvement or interest in a proceeding will not, of itself, result in a s51 order. Nor should funding a party. (See *Jackson & Ors v Thakrar & Ors* [2007] EWHC 626 (TCC) (22 March 2007) for some recent comments about funding.) More is required. In *Plymouth* the insurers had nothing to lose by running a full defence given the defendant's non-trading status. This, coupled with the failure of the defence in its entirety, were the main reasons for the outcome.

*Plymouth* was a first instance decision and no appeal has been lodged by the insurers. It remains to be seen whether it will be applied or drawn back and limited to its facts. While third-party costs orders are not common, the case does show that the court is willing to make them where appropriate.

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