



Case No: HC 1999 No 01661

Neutral Citation No: [2002] EWHC 519 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th March 2002

Before :

THE HONOURABLE MR JUSTICE FERRIS

Between :

INLINE LOGISTICS LIMITED

Claimant

- and -

UCI LOGISTICS LIMITED

Defendant

Mr. Peter Kirby (instructed by **Berry & Berry**, 11 Church Road, Tunbridge Wells Kent
TN1 1JA) for the Appellant, Inline Logistics Limited
Mr. Paul Shenton (partner in **Eversheds**, Fitzalan House, Fitzalan Road, Cardiff **CF24**
0EE) for the Respondent, UCI Logistics Limited

Hearing dates : 14th March 2002

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

F. K. Ferris

.....
The Hon. Mr. Justice Ferris

Mr Justice Ferris:

1. This appeal from a decision of Costs Judge Campbell given on 21st September 2001 raises a question concerning the recoverability of a premium paid by a defendant for an insurance policy protecting it against its potential liability for costs in pending high court proceedings. The special feature of the case is that the premium in question was paid during what can now be seen to be a transitional period during the lifetime of the relevant statutory provisions and rules, namely the period between 1st April 2000 and 3rd July 2000.
2. The proceedings in question are an action, commenced in 1999, in which Inline Logistics Ltd (“Inline”) alleged that UCI Logistics Ltd (“UCI”) had acted in breach of a joint venture agreement or had misused Inline’s confidential information. The action was tried by me over five days in May 2000. I gave judgment in favour of UCI on 31st July 2000. As part of that judgment I ordered Inline to pay UCI’s costs of the action, to be ascertained by detailed assessment if not agreed.
3. On 5th May 2000, shortly before the trial began, UCI effected insurance against the risk of incurring a costs liability if its defence to the action failed. For this it paid a premium of £40,000 plus insurance tax of £2000. Having succeeded in the action and been awarded its costs, UCI sought to recover those sums as part of its costs. Costs Judge Campbell held that it was entitled to do so. This appeal is against that decision.
4. The appeal is brought only on the question whether, as a matter of law, Costs Judge Campbell was entitled to include the premium and the related tax in the costs recoverable by UCI. If he was, no question is raised as to the reasonableness of the amount of the premium or any exercise of discretion.
5. At the hearing I was assisted by assessors in the form of Costs Judge O’Hare and Mr. Tony Girling, a solicitor and former president of the Law Society. Having heard the arguments advanced on behalf of the parties and the advice of the assessors, for which I am much indebted, I announced at the end of the hearing that the appeal would be dismissed but that I would state my reasons in writing. I now state those reasons.
6. Although parties have always been free to effect insurance in respect of their liability for costs in legal proceedings, it could not have been suggested that, before 1st April 2000, the costs of effecting such insurance could have been recovered from another party to the litigation pursuant to an order for costs. After 31st March 2000, however, public funding ceased to be available for a wide range of civil claims. The withdrawal of public funding was accompanied by a range of measures designed to enable litigation to be funded by means of conditional fee agreements and appropriate insurance arrangements.

7. One of these measures was section 29 of the Access to Justice Act 1999, which came into force on 1st April 2000. It provides as follows:

“Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy.”
8. As at the 1st April there were no rules of court in existence to regulate the way in which section 29 was to be applied. This created a dilemma for litigants and their advisers. On the one hand legislation was in effect which, on its face, appeared to enable a litigant to protect himself against the costs risk by means of insurance and to seek to recover the cost of such protection from the opposite party if he obtained an award of costs. On the other hand it was clearly envisaged that rules of court were to be introduced to regulate the matter. A litigant would not wish to incur the cost of protection only to find that rules were introduced with retrospective effect which limited his ability to recover that cost. At the same time some litigants could not afford to wait to see what the rules might provide when they were made. Among them were prospective claimants whose cause of action was about to become time barred. They also included litigants in the position of UCI who were about to go to trial and might receive judgment before rules were in place. Some of these litigants, like UCI, will have resolved the dilemma by deciding to effect the insurance, trusting that when the rules were forthcoming they would contain nothing to take away the right which appeared to have been extended to them by section 29.
9. The rules were duly promulgated and came into effect on 3rd July 2000. So far as material they take three forms, namely (i) a new CPR 44.15; (ii) a new section, section 19, of the Costs Practice Direction which supplements CPRs 43 to 48; and (iii) transitional provisions contained in regulation 39 of the Civil Procedure (Amendment No.3) Rules 2000 (to which I shall refer simply as “regulation 39”). I will consider these in turn
10. CPR 44.15 provides, so far as material:

“(1) A party who seeks to recover an additional liability must provide information about the funding arrangement to the court and to all other parties as required by a rule, practice direction or court order.”
11. The references to ‘additional liability’ and ‘funding arrangement’ take one back to definitions contained in CPR 43.2. It is not necessary to examine these in the present case because it is accepted that the insurance policy effected by UCI is a funding arrangement and that the premium and tax paid in respect of it is an additional liability
12. Section 19 of the Costs Practice Direction sets out the requirements as to providing information about funding arrangements. It is not necessary to examine it in detail. It

requires a party who wishes to claim an additional liability in respect of a funding arrangement to give the other party information about the claim as a condition precedent to the ability to recover. Section 19.2 prescribes the method of and time for giving information. Speaking generally a claimant who has a funding arrangement in place when the proceedings are in place must file and serve the requisite notice when he issues his claim form. A defendant who has such an arrangement in place when he acknowledges service, serves a defence or makes an application to set aside a default judgment must file and serve the requisite notice at that time. Section 19.2(4) provides

“In all other circumstances the notice must be filed and served within 7 days of entering into the funding arrangement concerned”.

13. It will be apparent that if CPR 44.15 and section 19 of the Costs Practice Direction apply to funding arrangements entered into before 3rd July 2000 in respect of proceedings which were commenced before that date, it will be impossible for either the claimant or the defendant to satisfy the requirements as to filing and serving notice, except possibly in the case of arrangements entered into six days or less before 3rd July of which the requisite notice is filed and served on 3rd July. This is because the “in all other circumstances” provision will apply and the seven day period will have passed before the relevant requirements came into effect and in many cases before the intention to impose them was made public. (I was told that a draft of the relevant provisions was in circulation from about mid-June 2000).
14. The position is further complicated by section 57 of the Costs Practice Direction, which provides certain transitional arrangements. For the most part these arrangements relate to the assessment after 26th April 1999 (when the CPRs came into effect) of the costs of work done before that date. But section 57.2(2) introduces certain additional transitional arrangements including, by virtue of sub-paragraph (e), arrangements “to deal with funding arrangements made before 3 July 2000”
15. Those arrangements are detailed in section 57.9, which refers to regulation 39, which I will come to in a moment, and draws attention to the need to act promptly.
16. One might expect from this introduction that regulation 39 would apply to all types of funding arrangement entered into in the period between 1st April and 3rd July 2000. When one examines its terms, however, it is apparent that this is not the case. It provides as follows:

“39. Transitional provisions

- (1) This rule applies where a person has
 - (a) entered into a funding arrangement, and
 - (b) started proceedings in respect of a claimthe subject of that funding arrangement

before the date on which these rules come into force

- (2) Any requirement imposed –
 - (a) by any provision of the Civil Procedure Rules 1998 amended by these Rules, or
 - (b) by a practice direction

in respect of that funding arrangement may be complied with within 28 days of the coming into force of these Rules, and that compliance shall be treated as compliance with the relevant rule or practice direction”

(Note: The version of regulation 39 printed on page 915 of the White Book (Autumn 2001) and in previous editions of that work erroneously omits the words ‘shall be treated as compliance’ in the last line of regulation 39(2).)

17. The Rules referred to, namely those contained in the Civil Procedure (Amendment No.3) Rules 2000, came into force on 3rd July 2000, as I have already mentioned. By virtue of regulation 39(3)(b) an insurance policy to which section 29 of the Administration of Justice Act 1999 applies is a ‘funding arrangement’ for the purposes of regulation 39.
18. However, regulation 39 applies only to funding arrangements entered into by claimants, for only claimants will have ‘started proceedings’. It does not apply to a funding arrangement entered into by a defendant, such as UCI, who merely defends. (I leave aside any argument as to whether a counterclaiming defendant also ‘starts proceedings’).
19. It might be thought to follow from these provisions that the implied assumption is that all parties, whether claimants or defendants, who have entered into funding arrangements between 1st April and 2nd July 2000 are required to comply with CPR 44.15, although only claimants who come within regulation 39(1) are given an extension of time for compliance without which compliance would be impossible. If this were right UCI would not be able to recover the premium paid by it because, while it gave notice of the kind required by CPR 44.15 soon after 3rd July, it did not do so within 7 days of entering into the relevant funding arrangement.
20. This argument was canvassed briefly at the hearing at the instance of the court and I have thought it right to mention it in this judgment, but it was not adopted by Mr. Kirby on behalf of Inline. I think he was right to eschew it. If it was correct it would require CPR 44.15 to be regarded as retrospective and to have the effect of requiring a defendant to do something which it would almost certainly be impossible for him to do in time. In the absence of regulation 39 it could not, I think, be maintained that CPR 44.15 was retrospective. It seems to me most unlikely that regulation 39 was intended to make it retrospective in respect of both claimants and defendants. In my

judgment it does not do so even in respect of claimants. What it does, in my view, is to impose, as from 3rd July but not retrospectively, a new obligation on claimants who had in place on that date a funding arrangement, namely an obligation to comply with CPR 44.15 within 28 days of 3rd July. I do not consider that this tells one anything about the position of defendants.

21. This means that there are no rules of court or practice directions which apply to defendants who entered into a funding arrangement between 1st April and 2nd July 2000. This premise was the starting point of the argument of both parties before me on this appeal and before Costs Judge Campbell.
22. On behalf of Inline, Mr. Kirby based himself on the words 'subject in the case of court proceedings to rules of court' in section 29. His contention was that, in the absence of rules of court which cover the case of a defendant who has taken out an insurance policy, there is no right for such a defendant to seek to recover, pursuant to an order for costs in his favour, anything in respect of the premium which he has paid. This right only became available to a defendant who complied with CPR 44.15 after it was brought into effect. In practical terms this meant only a defendant who entered into the funding arrangement on or after 3rd July 2000. In contrast it was available to a claimant who entered into a funding arrangement between 1st April and 2nd July 2000 so long as the requisite notice was given within 28 days of 3rd July 2000..
23. On behalf of UCI Mr. Shenton argued that this required the words 'subject in the case of court proceedings to rules of court' to have an effect beyond their true meaning. Section 29 came into effect on 1st April and was not to be regarded as being left in suspense pending the making of rules of court. The words relied upon by Mr. Kirby meant only that, when relevant rules of court were made to regulate the application of section 29, the section would fall to be applied in accordance with those rules. Until then the position of a party was governed by the terms of the section standing alone. The effect of regulation 39 was to subject claimants to a special rule, but this was no reason to treat section 29 as having no effect at all in respect of defendants until CPR 44.15 had taken effect and been complied with in accordance with its own timetable.
24. The argument advanced by Mr. Shenton prevailed before Costs Judge Campbell and, in my judgment, it is correct. There can be no doubt that section 29 was in effect from 1st April 2000. Not only was that the effect of the ordinary commencement provisions applicable to that Act, but regulation 39, whose silence in respect of defendants is relied upon by Inline, recognised that it was already in force as at 3rd July 2000, because regulation 39(3)(b) refers to a claimant having taken out, of necessity before 3rd July, 'a policy to which section 29 ... applies'. If section 29 applies to a policy taken out by a claimant before 3rd July it must also apply to a policy taken out by a defendant before that date, there being nothing in the wording of section 29 itself to distinguish between them. The only impact of regulation 39 was to impose a requirement on a claimant which was not imposed on a defendant.
25. It may seem strange that the rule makers should have prescribed transitional provisions in respect of funding arrangements entered into before 3rd July by claimants but not in respect of similar arrangements entered into by defendants. A

possible explanation was that, at a time of considerable change, the predicament of claimants faced with the need to commence proceedings in order to avoid limitation problems was much in the minds of practitioners while the position of defendants was regarded as being of less concern. Whether this be so or not, the fact that special provision was made in respect of claimants by regulation 39 does not, in my judgment, justify treating the words 'subject in the case of court proceedings to rules of court' as leaving it to the rule makers to decide whether and when section 29 was to have any effect at all. Regulation 39 does not proceed on this basis even in respect of claimants. It treats section 29 as being in effect and assumes that some claimants will have made funding arrangements before 3rd July in the expectation that, if they succeed and have an order for costs made in their favour, the cost of those funding arrangements will be recoverable. All it does is to provide that for that expectation to be translated into reality certain procedural requirements must be satisfied.

26. This way of looking at the matter is, I think, reinforced by an additional consideration. The reference to 'any proceedings' in the opening words of section 29 must be to a wider range of proceedings than the 'court proceedings' mentioned in the words relied upon on behalf of Inline. Accordingly section 29 applied to proceedings other than court proceedings (e.g. arbitrations and probably also tribunal proceedings, at any rate where the tribunal has power to award costs) as from 1st April 2000, without the need for any rules to be made to bring it into effect. In my view it would have required much clearer words than those which are relied upon in order to produce a different commencement in respect of court proceedings.
27. At the end of the appeal I dealt with the costs of the appeal. Any question of permission to appeal from my order is a matter for the Court of Appeal, since an appeal from me would be a second appeal. In case it is desired to pursue that course, however, I directed pursuant to CPR 52.4(2)(a) that the appellant's notice is to be filed within 14 days after these reasons are received by the parties.