BTE ENQUIRIES NOT NECESSARY

Knightley (Winns ATE Cases) v Dailey

County Court (Middlesbrough)

11 October 2013

ATE STILL RECOVERABLE

Case Analysis

Where Reported

Unreported

Case Digest

Subject: Legal advice and funding **Other related subjects:** Civil procedure; Insurance; Personal injury

Keywords: Conditional fee agreements; Costs between the parties; Funding arrangements; Legal advice; Legal insurance; Low value personal injury claims; Reasonableness; Road traffic accidents

Summary: Premiums paid by the claimants in low value road traffic accident claims for after-the-event legal expenses insurance were reasonable costs reasonably incurred and therefore were recoverable from the defendants. Enquiries made by the claimants' solicitors as to whether the claimants had suitable before-the-event insurance policies had been inadequate, but those policies were potentially unsuitable and therefore the claimants had acted reasonably in opting, on advice, for conditional fee agreements and the after-the-event policies.

Abstract: The court was required to determine in 10 test cases whether the successful claimants' after-the-event (ATE) insurance premiums were reasonable costs reasonably incurred and therefore were payable by the defendants. The claimants had all made claims following road traffic accidents. They had all used a firm of solicitors (W), which acted for them under conditional fee agreements backed by ATE insurance. W arranged credit packages including car hire, car repair and medical assistance, all of which required that the claimant used W's legal services for the claim. When a claimant approached W the usual procedure in relation to legal insurance was as follows: it would write to the claimant's own motor insurer to enquire about before-the-event (BTE) insurance; it would send the claimant a BTE checklist, asking about the existence of insurance policies or union membership that might provide BTE insurance; it would advise the claimant that there were significant risks involved in using BTE insurance; and it would recommend that the claimant use W's no win no fee agreement backed by ATE insurance. Normally the checklist would not be fully completed by the claimant and normally the claimant's insurer would not respond to any enquiry. The defendants submitted that W's enquiries as to the existence and suitability of BTE insurance in each case were inadequate and designed to be off-putting, and therefore the claimants were unable to and did not make reasonable decisions when opting for ATE insurance; the ATE insurance

arranged by W was unsuitable.

Judgment for claimants. (1) All but two of the claimants in the test cases had BTE insurance (see paras 15-28 of judgment). (2) The checklist sent to claimants by W was an excellent document: if fully completed it would reveal all necessary details about any relevant insurance policies. However, it was used in a context of the client having been repeatedly told that there was a grave risk that BTE insurers would act against his interest or increase the premium and would not cooperate in confirming that none of those things would happen (para.55). Further, there was no follow-up if the client did not return the checklist or it was returned incomplete; that meant that W did not make even initial enquiries in all those cases where there might well have been household insurance with bundled BTE. W had failed to make reasonable enquiries of the claimants (paras 60, 68). W's enquiries made to its claimants' motor insurers were hostile and uncooperative, but adequate. The majority of motor insurers failed to respond; that was not reasonable or proportionate on their part (para.66). W failed to enquire of household insurers. Overall, W's enquiries were inadequate (para.70). The burden of paying for funding enquiries fell upon the claimant, *Motto v Trafigura Ltd [2011] EWCA Civ 1150, [2012] 1 W.L.R. 657* followed. That bore on how many enquiries had to be made and what would be proportionate. The decision in *Motto* did not really impact on the requirement of reasonableness in CPR Pt 44 or PD 11. The ATE premium was still a cost that had to be reasonably and proportionately incurred. A claimant would have to make some sort of assessment, and that would include reasonable and proportionate acquisition of an appropriate amount of information, even in low value road traffic accident cases, *Motto* considered (para.72). (3) If the BTE insurance available to a claimant was not suitable for his claim then it could not be reasonable to require him to use it. It would then be reasonable for him to look around and see what other forms of funding were available. An average claimant in a low value personal injury claim was certainly not required to use his own money, *Campbell v Mirror Group Newspapers Ltd (Costs) [2005] UKHL 61, [2005] 1 W.L.R. 3394* followed. Therefore the real choice was between BTE and ATE. A failure by a claimant or his representative to make sufficient enquiries would not make an otherwise reasonable claimant holding an unsuitable BTE policy into an unreasonable claimant such that any ATE taken out was not recoverable (paras 41,78). Despite some discrepancies in the wording of W's ATE policies regarding cancellation and exceptions, and the fact that once a client had taken a credit package he was bound to use W, overall, the ATE terms offered by W were attractive to customers and a reasonable customer might well find them so. A clear merit of W's system was that the claimants paid nothing and were not even technically liable for anything. Also, it was a one-stop-shop service. It was clearly suitable for those with low value road traffic accident claims (paras 81-88). Not all BTE was unsuitable, but there was significant potential for

unsuitability and consumer confusion, requiring considerable and potentially disproportionate explanation given that public understanding of BTE was poor. A client faced with a choice between BTE, explained to him as carrying risks and complexities, or no win no fee with an ATE policy, would be reasonable in choosing the latter (paras 123-124). Therefore, the ATE premiums were reasonable costs reasonably incurred and were recoverable from the defendants, *Sarwar v Alam (Costs)* considered (para.128).

Judge: District Judge Spencer

Counsel: For the claimants: N Bacon QC, B Williams. For the defendants: R Mallalieu.

Significant Cases Cited

Motto v Trafigura Ltd
[2011] EWCA Civ 1150; [2012] 1 W.L.R. 657; [2012] 2 All E.R. 181; [2011] 6 Costs L.R. 1028; Times, November 22, 2011; Official Transcript; CA (Civ Div); 2011-10-12

Campbell v Mirror Group Newspapers Ltd (Costs)
[2005] UKHL 61; [2005] 1 W.L.R. 3394; [2005] 4 All E.R. 793; [2006] 1 Costs L.R. 120; [2006] E.M.L.R. 1; [2006] H.R.L.R. 2; 21 B.H.R.C. 516; (2005) 102(42) L.S.G. 23; (2005) 155 N.L.J. 1633; Times, October 21, 2005; Official Transcript; HL; 2005-10-20

Sarwar v Alam (Costs)
Official Transcript; Sup Ct Costs Office; 2003-03-07

All Cases Cited

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Significant Legislation Cited

Civil Procedure Rules 1998 (SI 1998/3132) Pt 44

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