HENDERSON CHAMBERS

UPDATE

COURT OF APPEAL JUDGMENT IN TRAFIGURA

By Malcolm Sheehan

The Court of Appeal has handed down its widely anticipated judgment in Motto v Trafigura Limited. Permission was given for the costs appeals to leapfrog to the Court of Appeal and the judgment gives importance guidance on proportionality, necessity and the recoverability of funding costs.

SUMMARY

The Court of Appeal has decided multiple leapfrog costs appeals arising in the *Motto v Trafigura Limited* group litigation. The appeals arise from preliminary issues decided by Senior Costs Judge Hurst in the detailed assessment of the Claimants' £105 million bill of costs. The Claimants' costs claim is believed to the biggest in English legal history.

The judgment provides clarity on a number of important issues of costs law which are of general application, particularly in relation to proportionality, necessity and the recoverability of funding costs.

Charles Gibson QC and Malcolm Sheehan of Henderson Chambers along with Nicholas Bacon QC and Daniel Saoul appeared for the Defendants instructed by Macfarlanes.

THE CLAIMS

Nearly 30,000 Claimants sued the Defendants following the discharge of slops by a local contractor in and around Abidjan in the Côte d'Ivoire. The proceedings were settled before trial on the basis that, at worst, exposure to the slops could have caused a range of short-term flu-like symptoms and anxiety. The settlement provided that £30 million would be paid by the Defendants and that the Defendants would pay the Claimants' costs on the standard basis.

THE COSTS BILL

The Claimants presented a bill of costs consisting of 55,000 items and seeking just under £105 million including CFA (conditional fee agreement) success fees of 100% for solicitors and counsel and an ATE (after the event) insurance premium of over £9 million. The parties agreed that a number of preliminary issues should be determined before the full detailed assessment of the Claimants' costs. Both the Defendants and Claimants appealed various of the preliminary issue determinations and permission was given for the appeals to leapfrog to the Court of Appeal given the importance of the issues raised.

PROPORTIONALITY AND NECESSITY

The Claimants claimed base costs (excluding success fee and ATE premium) of approximately £49 million. The Senior Costs Judge found *"no hesitation in saying that the base costs, excluding additional liabilities, have the appearance of being disproportionate"*. The Court of Appeal held that it was *"unsurprising that there is no challenge"* by the Claimants to this finding even though the effect of other parts of the Senior Costs Judge's decision was that base costs were reduced to a maximum of approximately £40 million before commencement of the full detailed assessment.

Giving the only judgment the Master of the Rolls stated that when assessing proportionality the court should not ignore the amount actually received as it can provide *"some sort of a reality check"*. Although the question of proportionality should not be judged simply by reference to the sum actually recovered *"where the sum eventually awarded or agreed is substantially less than the amount claimed, that may (and I emphasise "may") call into question the notion that the claim was genuinely or reasonably thought to be worth what it was claimed to be worth when it was first raised and while it was being prosecuted"*

It has been widely accepted on the basis of *Lownds v The Home Office* [2002] EWCA Civ 365 that where an overall bill of costs is considered to be or have the appearance of being disproportionate the result is that the test of necessity is applied to the entire bill of costs and to all items in the bill. Sums would only be allowed where the court was satisfied that it was necessary to incur them conducting the litigation in a proportionate manner.

The Defendants were successful in their appeal against the Senior Cost Judge's decision that, despite his finding that the overall costs appeared to be disproportionate, he was not obliged to apply the necessity test to all parts of the bill of costs. The Senior Costs Judge held that if individual items or

groups of items in a bill of costs appeared to him to be proportionate then he need not apply the necessity test to those items.

The Court of Appeal accepted the Defendants' argument that once an overall appearance of disproportionality had been established the necessity test must be applied to all cost items in addition to the requirement that the sums be proportionately incurred and reasonable and proportionate in amount. This approach was *"a good way of maintaining a degree of discipline in the thinking and actions of lawyers when advising or acting for clients".*

The Master of the Rolls confirmed that "*hurdle is higher"* for receiving parties to establish that costs were necessarily incurred rather than merely reasonably incurred. The Senior Costs Judge was ordered to revisit his determination of the preliminary issues in light of the Court of Appeal's decision.

COST OF FUNDING & ATE COSTS

An issue which frequently arises in disputes about costs is whether the costs incurred by solicitors, counsel, costs draftsmen and insurers in establishing and setting up conditional fee agreements and/or ATE insurance policies are recoverable from the paying party. The Senior Costs Judge held that these costs were recoverable but, in a decision that will have a wide application, the Defendants successfully appealed.

The costs of arranging the funding of the action are not recoverable as they *"are ultimately attributable to the need of a litigant to fund the litigation as opposed to the actual funding of the litigation itself".* Until a CFA is signed *"the potential claimant is not merely not a claimant: he is not a client".* Accordingly all of the expenses of getting business, including negotiating with potential clients, should be treated as overheads or expenses and not as items directly recoverable from the paying party.

The Court of Appeal also held that the Claimants could not recover the costs of their solicitors liaising with the ATE insurers during the course of the litigation after the ATE policies had been entered into. The Master of the Rolls stated that while *"the precise dividing line between recoverability and irrecoverability is, perhaps inevitably, somewhat blurred and subjective"* discussions with and taking instructions from ATE insurers during litigation *"was not so much a cost of the litigation as a cost which was collateral to the litigation, being a cost incurred to ensure that the claimants were not at risk on costs".*

OTHER ISSUES

The Court of Appeal upheld the Senior Costs Judge's decision to reduce the success fee claimed from 100% to 58%. In considering the approach to be taken to the assessment of the prospects of a claim succeeding the court warned of the risk of an overly mathematical assessment. The Master of the Rolls noted that there is *"a risk of becoming beguiled by the apparent accuracy of an assessment which is expressed in figures and appears to be logically based. In the end, however, the determination is a matter of judgment"*

The Defendants contended that the Claimants had carried out unnecessary work and incurred inflated expenses. Although the Court of Appeal declined to address this at this stage of the proceedings the Master of the Rolls stated that *"I am left with the impression that there may well be something in that contention."* The judgment states that *"The issue of whether [the Claimants' representatives] ought to have adopted a different system of management remains open and must be determined by the tests of necessity, reasonableness and proportionality when the Judge resumes the costs assessment"*

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