SUPREME COURT PROVIDES WELCOME CLARITY ON WHEN NON-PARTY COSTS ORDERS SHOULD BE MADE AGAINST INSURERS BUT DOES NOT TAKE THE OPPORTUNITY TO CONSIDER WIDER ISSUES, SAYS HERBERT SMITH FREEHILLS PARTNER PAUL LEWIS

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News

The Supreme Court has overturned the Court of Appeal's decision in Travelers Insurance Company Ltd v XYZ [2019] UKSC 48 in a landmark decision on the question of insurers' liability for costs under section 51 of the Senior Courts Act 1981.

Responding to a Supreme Court decision, which brings some much-needed clarity to the question of when an unsuccessful party's insurer can be held liable for another party's costs in litigation, Paul Lewis, Global Head of the Insurance Disputes Practice said: "*This decision should bring some welcome clarity to this area of law, especially with the heavy criticism of the 'exceptionality' test which, it may be thought, never sat well in the context of liability insurers and was at best opaque in any event.*"

He went on to say, "*This has signaled that a divergent approach is to be adopted between cases which involve insured claims (but where costs exceed the limits of cover) and those which concern some uncovered claims. In particular, the return to prominence of the 'intermeddling' test for the latter type of situation should be welcomed because the test has a long history of case law behind it drawn from the historical aversion to champerty and maintenance. As Lord Sumption noted (concurring separately), cases in which a costs order may be made against a liability insurer on this basis are* 'likely to be rare'."

Finally Paul commented that: "*The court emphasised that the purpose of its judgment was not to reassess the generally applicable principles relating to non-party costs orders outside the insurance context. Lord Briggs, who gave the main judgment, commented that he was "reluctantly prepared to assume but without deciding" that those generally applicable principles are limited to: (i) whether the case is exceptional; and (ii) whether the making of an order accords with fairness and justice. However, both he and Lord Reed, who gave a concurring judgment, expressed concern as to the lack of content, principle or precision in the concept of exceptionality as a useful test. It may be, therefore, that those principles are ripe for review in an appropriate case and quite possibly in the context of the burgeoning litigation funding market*."

For a full analysis of this decision by Partner David Reston and Associate Hamish Hunter, please visit out blog page.

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