Brown-Quinn v Equity Syndicate Management Ltd [2012] EWCA Civ 1633

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This decision is important to every BTE insurer (and, indeed, all legal expenses insurers). It is important, too, to their policyholders, and to lawyers who may be instructed to act for such policyholders.

"To make matters yet worse", wrote the Court of Appeal of insurers' behaviour. What had startled the Court was that, both in writing their policy terms and in their initial arguments to the first instance Judge, the insurers "exhibit[ed] an insouciance to their obligations under the Directive and the Regulations which leaves one quite breathless."

Woe, then, betide BTE insurers who do not get themselves up to speed with Articles 198-205 of Directive 2009/1008/EC and with the Insurance Companies (Legal Expenses Insurance) Regulations 1990 (S.I. 1990 No. 1159). The core point is that the insured ***must*** be free to choose his or her own lawyer. ***All*** legal expenses insurers should review their policy terms and see that they are compliant with the law. (NB particularly regulation 6(3) which requires express recognition in the policy of certain rights.)

The outcome for the insurers in the case was not all woe. Yes, they were told that two of their General Conditions were in breach of the Regulations and must be either deleted or comprehensively re-drafted. No doubt, had they not sensibly volunteered, when asking to withdraw a concession they had made to the Judge at first instance, to pay the respondents' costs regardless of the outcome of the appeal, they would in any event have been ordered to pay those costs as a mark of the Court of Appeal's disapproval of their conduct. But they persuaded the Court of Appeal to allow them to withdraw that concession, and they won on the point they had previously conceded.

The various questions all concerned one practical subject: to what extent can BTE insurers force policyholders to use the services of lawyers who will offer the BTE insurers cut-price rates for work referred to them? This required consideration of the policy and the Regulations.

It is not necessary for the purposes of this note to refer to the particular policy terms: the essence of the case is to understand the interaction between any policy and the Regulations.

The insurers had "panel" solicitors. They also had standard terms on which they were prepared to deal with "non-panel" solicitors. The policyholders wished to use "non-panel" solicitors who were not prepared to work for the rates and on the terms on which the insurers insisted that "non-panel" solicitors should work. In some cases these were the policyholders' wishes from the moment of their need for lawyers; in others, individual lawyers had moved from "panel" to "non-panel" law practices while cases were in progress, and the policyholders wished their work to move with the individual lawyer.

It was generally accepted that there was an effective policy limit on the maximum total

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money amount that the insurers would have to pay. The dispute was as to what should happen if the insureds pressed on and used their chosen lawyers despite the insurers' opposition: what (if anything) would the insurers have to pay? And if insurers had to pay something, how was the something to be calculated?

The possibilities canvassed at various times in the case were that if the insurer did not agree to the insured's choice of lawyer:

A. the insurer did not have to pay anything to, or for the cost of the services of, the non-panel lawyer;

B. the insurer had to meet the reasonable charges of the non-panel lawyer, subject only to the limit of indemnity;

C. the insurer had to pay for the non-panel lawyer's services at the insurers' standard non-panel rates, leaving the insured to pay the balance;

D. the insurer had to pay at rates which the Court would assess, either 4a) taking the panel rate as the starting point or 4b) not taking it as the starting point but taking it into consideration.

The Court of Appeal concluded as follows:

A. As a matter of law, insurers cannot, by contract, restrict a policyholder's choice of lawyer.

B. It is open to insurers to specify in the policy the maximum rates of remuneration recoverable under the policy, but

C. Those rates must not be so low as to render the insured's apparent freedom of choice of lawyer meaningless (in which event the policy restriction as to recoverable rates would be "struck down"; in practice this seems to mean that the policyholder would recover a reasonable sum in respect of the expenses actually incurred).

D. It is for a policyholder who claims that the rates are so low as to make the freedom of choice of lawyer meaningless to prove his case.

E. If the policyholder wishes to show that the policy payment terms operate as an illegitimate restriction of freedom of choice of lawyer, it is not sufficient to refer to the standard costs rates published periodically by HM Courts and Tribunals Service (to be found, e.g., in the Guideline Rates for Summary Assessment, which usually appear in Appendix 2 to CPR Part 48, reproduced in the *White Book*).

As the policyholders had not made out their case on the rates (they had relied on the Guideline Rates, with no other evidence), the conclusion was that at 3 above: the insurer had to pay for the non-panel lawyer's services at the insurers' standard non-panel rates, leaving the insured to pay the balance.

Three observations:

Firstly, as has been noted, ***all*** BTE and other legal expenses insurers should review their policy terms and see that they are compliant with the law, above all, the 1990 Regulations.

Secondly, this should be the end of insureds being told "If you can't get your preferred lawyer to agree to our terms you can't have your lawyer and our money".

Thirdly - and this is purely a commercial matter - should insurers reflect on the product they are offering? Some years ago the writer acted for lawyers who were in dispute with the legal aid authorities. The *maximum* hourly rate which legal aid allowed to be paid to the lawyers for the type of work they were doing was about £60 - which was about half the hourly rate normally allowed for routine litigation in the solicitors' local county Court. To defend themselves against the claim, the legal aid authorities did not confine themselves to solicitors who would accept £60 per hour. Naturally, defending public funds, they used well-regarded central London solicitors experienced in the class of work. Their rate was £295 per hour. Just about 5 times the rate they reckoned sufficient to pay for services for the benefit of their legally aided clients.

What hourly rate were the insurers paying their leading and junior counsel and solicitors to conduct the *Brown-Quinn* case in the Court of Appeal? If, as seems likely, they were paying a good deal more than the rates under the cover they provided to their insureds, would it be a good idea to tailor the cover, and premium, to a level which covers the insured against the risk of needing to pay market rates for legal services? For those unfortunate enough to have to go to law, cheapness and cheerfulness will always be welcome, but it is also welcome to have the confidence that one has equality of arms (an objective of human rights law and of the CPR). The trouble with cut-price rates is that they incentivise cut-cost service (though it is far from the case that such service will always be the result). Insurers may have very strong reason to do that when their role is that of liability insurer. When they are insuring the client against the risk of needing to pay for services, the considerations are different and difficult.