

It may pay to delay

Sometimes insurers should wait until proceedings have begun before incurring substantial pre-action costs.

Should insurers who fund the pre-action defence of unfounded claims be able to recover wasted costs from the claimant? The answer to this question should be “yes” but the recent decision in *McGlinn v Waltham Contractors* (2005) suggests otherwise.

Pre-action protocol costs

The significance of pre-action protocols for parties and their Insurers is the potential resolution of disputes without the need for litigation, and the impact of such protocols on the recovery of costs at the end of an action.

Parties to a claim have to follow pre-action protocols. Sanctions imposed for failing to do so include adverse costs awards. A further incentive is that successful parties have, in the past, been able to recover their reasonably incurred protocol costs.

As a result, defendants and their Insurers have been prepared to fund the pre-action investigation and the defence of all claims brought by a claimant, however spurious.

The decision in *McGlinn v Waltham Contractors* may, however, result in a change of attitude and a limitation on costs incurred in the pre-action process. This is because *McGlinn* says that, where a claimant abandons a pre-action issue before proceedings are actually started, the costs of defending that issue will not be recoverable unless there are exceptional factors.

The facts

Mr *McGlinn* retained a building contractor, architect and engineer in respect of building works carried out on his property in Jersey. He subsequently claimed that there were such serious defects in the works that the property had to be demolished and he sued all three professionals for approximately £4.5m.

In following the pre-action protocol, Mr *McGlinn* claimed for sums allegedly wrongly certified by the architect and paid to the contractor. This claim was denied by the architect and, ultimately, the allegation was not pursued in the subsequent litigation.

Not surprisingly, the architect sought to recover the costs incurred in defending the allegation. However, the application was denied.

Irrecoverable pre-action costs

The court's power to award costs is set out in section 51 of the Supreme Court Act 1981. This allows the court to order a party to pay costs 'of and incidental to' the court proceedings.

In considering the meaning and effect of section 51, the judge in *McGlinn* relied on the decision of *In re Gibson's Settlement Trusts* (1981). The *Gibson* case - which was decided 4 5 before the introduction of pre-action protocols - dealt with the recoverability of pre-action costs. The

judge in that case ruled that, where court proceedings were framed narrowly, previous disputes with no real relation to the subject matter of the proceedings could not be regarded as costs of the proceedings.

In *McGlinn*, the judge applied this principle and refused the architect's application for costs, saying that:

- the costs of complying with a protocol would normally be 'incidental to' subsequent proceedings and therefore recoverable under section 51;
- however, in this case Mr *McGlinn* had narrowed the proceedings sufficiently so that the claims relating to certification (which had previously been made against the architect but later abandoned) bore no relation to the subject matter of the proceedings;
- it would be contrary to the purpose of the preaction protocol to penalise claimants in costs if they decided not to pursue claims originally included in their protocol letter of claim.

The effect of *McGlinn*

The decision in *McGlinn* effectively gives claimants the opportunity to set out their claims in minute detail, whatever the merits, and to decide later which of the claims (if any) they want to pursue in litigation. And all this without any risk on costs should they subsequently choose not to pursue any particular allegation.

For defendants and their insurers, the position is far less helpful. Under the protocol process, a defendant has to provide a substantive response to pre-action issues raised by the claimant. In order to meet this obligation, a defendant and its insurers will probably carry out a full investigation and possibly obtain expert evidence, thereby incurring substantial costs. Under *McGlinn*, some of these costs may not be recoverable. While the judge in that case did say that costs could be awarded if there are 'exceptional factors', it is not clear what these might be.

Conclusion

The effect of *McGlinn* is to penalise defendants and their insurers for embracing the spirit and letter of pre-action protocols. In doing so, the decision threatens to undermine the primary aim of the pre-action regime - the resolution of claims without the need for litigation. In future, where significant sums are likely to be spent on issues such as experts' fees and the litigation risk is considered worth taking, there may be a significant cost advantage in waiting until proceedings have been started before incurring costs.

Sushma MacGeoch *London* s.macgeoch@kennedys-law.com