

Arroyo v BP Exploration Co (Colombia) Ltd

Queen's Bench Division

06 May 2010

Case Analysis

Where Reported

Unreported

Case Digest

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

Keywords: Disclosure; Funding arrangements Group litigation; Jurisdiction; Legal costs insurance; Legal professional privilege; Prejudice

Summary: The court had no jurisdiction to order disclosure and inspection of the after the event insurance policy obtained by the claimants in group litigation. Furthermore, the insurance policy, the terms of which had been individually negotiated, was privileged.

Abstract: The applicant (B) applied for the respondents (C) to disclose the after the event (ATE) insurance policy they had obtained as claimants in group litigation. Most of C lived in rural Colombia and the majority of them were peasant farmers. It was clear from C's notices of funding that they had obtained an ATE insurance policy. The terms of the policy had been individually negotiated. In accordance with [CPR r.44.15](#), C had disclosed to B the information required by CPR PD 44 para.19.4, namely the name and address of the insurer, the policy number, the date of the policy, the claim to which it related, the level of cover provided by the insurance and the fact that the premium was not staged. B's application was brought under the court's general case management powers in [CPR r.3.1](#) and [CPR r.18.1](#) and/or the general case management powers in relation to group litigation in CPR PD 19B para.12. C submitted that there was no jurisdiction in the court to order the disclosure of the policy; the policy was not relevant for the purposes of disclosure; the policy was privileged; if disclosure was ordered it would cause irreparable prejudice to C.

Application refused. (1) The disclosure obligation in respect of insurance was not general: it applied only to parties who intended to seek payment of a success fee or an ATE premium as part of their costs. Hence the rules did not create any general right for parties to be informed of their opponents' insurance resources in order to gauge their ability to satisfy judgments or costs orders. A party funded by insurance which pre-existed the claim or a party which decided not to claim its ATE premium was not obliged to give its opponent any information about the policy or even to declare its existence. The only sanction for non-compliance with CPR r.44.15 was that the party in default would not, on assessment, recover its ATE premium without a special order of the court. That sanction showed that the rules were directed simply to ensuring that opposing parties knew, from the outset of a claim, if they were at risk of an augmented costs claim because a party had a conditional fee agreement or ATE insurance and would be seeking payment of an "additional liability" in the language of the rules. The obligation on a party to state the prescribed information under r.19.4 "unless the court otherwise orders" did not confer on the court a jurisdiction to require the disclosure of additional information. Rather it allowed the

court to relieve a party from stating some or all of the prescribed information. The practice direction expressly restricted the scope of disclosure, [King v Telegraph Group Ltd \[2004\] EWCA Civ 613, \[2005\] 1 W.L.R. 2282](#) considered. The rules and the practice direction were in no way drafted to authorise disclosure of the terms of an ATE insurance policy and, a fortiori, one in which, as in the instant case, the individual terms had been negotiated. B was not entitled to be in any better position than any other defendant facing an impecunious claimant merely because that claimant had the benefit of a conditional fee agreement and of ATE insurance. There was no more reason for C to give disclosure of the details of their insurance in an ATE case than there would be for them to give disclosure of their funds generally or the funds available from non-ATE insurance, [West London Pipeline & Storage Ltd v Total UK Ltd \[2008\] EWHC 1296 \(Comm\), \[2008\] C.P. Rep. 35](#) considered. There was no provision in the CPR for the disclosure which B sought. The provisions relied on by B did not confer jurisdiction on the court to order disclosure. An ATE policy would not fall within standard disclosure or "train of inquiry" disclosure and was not relevant to the substantive proceedings. (2) The policy was privileged. Its terms had been individually negotiated. It was produced for the purposes of litigation and its terms necessarily reflected the legal advice of C's solicitors and the views formed by the solicitors and insurers as to the risks of the litigation, [Winterthur Swiss Insurance Co v AG \(Manchester\) Ltd \(In Liquidation\) \[2006\] EWHC 839 \(Comm\)](#) considered. The court was not bound by authority to hold that such a policy was not privileged, [Henry v BBC \(Costs Capping\) \[2005\] EWHC 2503 \(QB\), \[2006\] 1 All E.R. 154, Hobson v Ashton Morton Slack Solicitors \[2006\] EWHC 1134 \(Admin\), \(2006\) 103\(24\) L.S.G. 30](#) and [Barr v Biffa Waste Services Ltd \[2009\] EWHC 1033 \(TCC\), \(2009\) 25 Const. L.J. 547](#) considered. (3) As a matter of discretion, disclosure would not be ordered because to do so could inflict a severe tactical blow on C and thereby prejudice them in the conduct of the litigation.

Judge: Senior Master

Counsel: For the claimants: Alexander Layton QC, Benjamin Williams. For the defendant: Charles Gibson QC, Nicholas Bacon QC.

Solicitor: For the claimants: Leigh Day & Co. For the defendant: Freshfields Bruckhaus Deringer LLP.

Significant Cases Cited

Barr v Biffa Waste Services Ltd

[\[2009\] EWHC 1033 \(TCC\); \(2009\) 25 Const. L.J. 547; Official Transcript; QBD \(TCC\)](#)

West London Pipeline & Storage Ltd v Total UK Ltd

[\[2008\] EWHC 1296 \(Comm\); \[2008\] C.P. Rep. 35; \[2008\] 1 C.L.C. 935; \[2008\] Lloyd's Rep. I.R. 688; Official Transcript; QBD \(Comm\)](#)

Hobson v Ashton Morton Slack Solicitors

[\[2006\] EWHC 1134 \(Admin\); \(2006\) 103\(24\) L.S.G. 30; Official Transcript; QBD \(Admin\)](#)

Winterthur Swiss Insurance Co v AG (Manchester) Ltd (In Liquidation)

[\[2006\] EWHC 839 \(Comm\); Official Transcript; QBD \(Comm\)](#)

Henry v BBC (Costs Capping)

[\[2005\] EWHC 2503 \(QB\); \[2006\] 1 All E.R. 154; \[2006\] 3 Costs L.R. 412; \(2006\) 103\(1\) L.S.G. 16; \(2005\) 155 N.L.J. 1780; Official](#)

[Transcript](#); QBD

King v Telegraph Group Ltd

[\[2004\] EWCA Civ 613](#); [\[2005\] 1 W.L.R. 2282](#); [\[2004\] C.P. Rep. 35](#); [\[2004\] 3 Costs L.R. 449](#); [\[2004\] E.M.L.R. 23](#); [\(2004\) 101\(25\) L.S.G. 27](#); [\(2004\) 154 N.L.J. 823](#); [\(2004\) 148 S.J.L.B. 664](#); Times, May 21, 2004; Official Transcript; CA (Civ Div)

All Cases Cited

Barr v Biffa Waste Services Ltd

[\[2009\] EWHC 1033 \(TCC\)](#); [\(2009\) 25 Const. L.J. 547](#); Official Transcript; QBD (TCC)

West London Pipeline & Storage Ltd v Total UK Ltd

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Hobson v Ashton Morton Slack Solicitors

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[\[2006\] EWHC 839 \(Comm\)](#); Official Transcript; QBD (Comm)

Henry v BBC (Costs Capping)

[\[2005\] EWHC 2503 \(QB\)](#); [\[2006\] 1 All E.R. 154](#); [\[2006\] 3 Costs L.R. 412](#); [\(2006\) 103\(1\) L.S.G. 16](#); [\(2005\) 155 N.L.J. 1780](#); Official Transcript; QBD

King v Telegraph Group Ltd

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Legislation Cited

CPR PD 19B para.12

CPR PD 44 para.19.4

[Civil Procedure Rules 1998 \(SI 1998 3132\) r.3.1](#)

[Civil Procedure Rules 1998 \(SI 1998 3132\) r.18.1](#)

[Civil Procedure Rules 1998 \(SI 1998 3132\) r.44.15](#)