

## **Whose insurance is it anyway?**

It is often the case that a party involved in a construction dispute has the benefit of insurance covering him against an award of damages and legal costs.

It is also a fact that the existence of such insurance is a matter between the party and his insurers, and, save in exceptional circumstances, no concern of any other party to the dispute. This has several consequences for the parties. For Claimants, one of the risks they have to take into account before commencing a claim is whether they are likely to recover any money at the end of the dispute. It is pointless obtaining a judgment against a party who cannot satisfy that judgment. For the Defendant, the fact that they have insurance cover for both their legal costs and an award of damages can be reassuring, but can also be a cause of concern if the limit of indemnity provided by the insurance is not sufficient to cover the potential award against them.

Very rarely will a Claimant be entitled to have sight of the actual insurance cover prior to commencing proceedings or during the course of such proceedings. However, a recent case has identified circumstances in which the Court will depart from this rule. The case, Harcourt –v- FEF Griffin (representatives of Pegasus Gymnastic Club) and others is a personal injury claim, but is of relevance to all involved in the construction industry. The facts of the case are that the Claimant, who was then aged 16, suffered severe spinal injuries in a gymnastic accident in a gymnasium run by the Defendant. The Defendant was an unincorporated association whose individual members were not wealthy.

The Defendant admitted liability and judgment was given against them for damages to be assessed plus costs. The Claimant argued that because of the extent of the injuries the claim was likely to be worth between £6 and £7½ million, plus costs estimated to be in the region of £1 million.

The Claimant was concerned that the Defendant may not have sufficient insurance cover for such amounts. Consequently, he applied to the Court under Part 18 of the Civil Procedure Rules (“CPR”) to establish the extent of the insurance cover. CPR Rule 18 provides that the Court may order a party to either (a) clarify any matter which is in dispute in the proceedings or (b) give additional information in relation to any such matter.

The court accepted that the extent of the Defendant’s insurance cover was not in itself a “matter in dispute in the proceedings” but went on to hold that CPR Rule 18 needs to be interpreted reasonably liberally. In the view of the Court, CPR 18 “must be taken to ensure that the parties have all the information they need to deal efficiently and justly with the matters which are in dispute between them” Consequently, the Court ordered the Defendant to disclose details of their insurance cover.

The Defendant made the point that if the Claimant’s request was granted then it could hand him an unfair advantage in the litigation and that it would rapidly become standard practice in every case for Claimants to request such information from Defendants. This would result in satellite litigation between the parties about whether the insurance cover should be disclosed.

The Court recognised the force in these arguments and noted that there would have to be very good reasons before a Court would order disclosure of the terms of a contract of insurance to a third party. The Judge thought that a Claimant would have to demonstrate that there was some real basis for concern that a realistic award in the particular case would not be satisfied.

The implications for those involved in construction disputes are significant. In many cases, claims are made for sums in excess of a party’s insurance cover. Will Claimants in such cases be

tempted to make applications to the Court for disclosure of the Defendant's cover? In all probability they will, and in the next few years we will see a raft of such applications as anticipated in the Judgment. At a time when the self insured excess under such policies can be quite substantial, disclosure of the terms of the insurance cover will place Defendants at an unfair disadvantage. If a Claimant knows that a Defendant runs a significant personal risk either because of the size of their excess or because they have limited cover, then this is a fact which they can use in the litigation to their advantage.

**Mark Jones**

Associate

Construction & Engineering Team

T: +44 (0)116 257 6133

E: [mark.jones@harveyingram.com](mailto:mark.jones@harveyingram.com)