



LEGAL BRIEFING

Sousa v London Borough of Waltham Forest Council [2011] EWCA Civ 194

The Facts

Trees for which the London Borough of Waltham Forest Council (the "Council") was responsible, caused damage to Mr Sousa's property as a result of their roots encroaching from the pavement outside. Mr Sousa made a claim against his insurer for the cost of remedial works. The insurer sought to recover its loss from the Council through a subrogated claim.

Liability was not contested and before proceedings were issued the Council agreed to pay a sum in settlement of the claim plus reasonable costs. Determining the amount of costs to be paid was complicated by the fact that the insurer had entered into a Collective Conditional Fee Arrangement (a "CCFA") with its solicitors, providing for a success fee with a mark-up of 100% for this type of claim.

The parties invited the Court to decide whether any success fee was recoverable, and if so, what percentage uplift should be allowed. The District Judge at first instance refused to allow any success fee. That ruling was overturned on appeal, which resulted in the Council pursuing a second appeal to the Court of Appeal on this important and far-reaching matter of principle.

The Issue

Was Mr Sousa, in pursuing a subrogated claim, entitled to recover the success fee from the Council?

The point of principle raised in this appeal was: is it permissible for the Court to have regard to the fact that the claimant is insured (and has been fully indemnified) in considering the question whether it was reasonable for the claimant (and/or his insurer) to instruct solicitors on terms which included a success fee?

The Decision

The Court of Appeal bench was unanimous in deciding to allow Mr Sousa to recover the 100% success fee.

The Civil Procedure Rules 1998 regulate the making of costs orders and the assessment of such costs including success fees. To decide whether Mr Sousa was entitled to recover the success fee, with reference to CPR 44 and paragraph 11 of the Costs Practice Direction, the Court was required to have regard to all the circumstances and assess whether the costs were unreasonably incurred or were unreasonable and disproportionate in amount.

On the matter of principle referred to above, Lord Justice Moore-Bick, with whom Lord Justice Etherton agreed, held that as between Mr Sousa and the Council, the existence of the insurance policy under which he had already been indemnified against his loss was irrelevant. Lord Justice Moore-Bick held that if Mr Sousa had been uninsured, it would have been impossible to suggest that it was unreasonable for him to instruct solicitors on a conditional fee basis and the fact that he is insured makes no difference.

Lord Justice Ward preferred a different approach and decided that in making an assessment of whether the costs were reasonably incurred and were reasonable and proportionate, the Court should look at the reality of the situation and take account of the fact that the claimant is indemnified by the insurer in respect of the costs he may incur in bringing the

claim at the insurer's request. However, this would not, in the circumstances of this case, alter the result - after taking account of the existence of the insurance policy, Lord Justice Ward held that:

"whether one approaches the matter through an application of pure principles of subrogation or after an examination of the real facts, the appeal should fail".

Comment

Claims of this nature arise regularly in towns and cities throughout the United Kingdom. As outlined in Lord Justice Jackson's *Review of Civil Litigation Costs*, local authorities are concerned that *"the costs of these cases have risen greatly and are inflated by 100% success fees"*, which has *"a detrimental effect on public finances"*. Unfortunately for local authorities, a claimant's costs relating to such claims, even when they are settled before proceedings are issued, can often be greater than the cost of the remedial works themselves.

As referred to in this Judgment, the objective of CFAs was to provide a greater range of funding options to allow the widest possible range of people access to legal services. The argument now raised is that those who can afford to fund litigation such as the 'tree claims' themselves, i.e. insurance companies, should do so. However, even though the Court arrived at its decision for differing reasons, this Judgment confirms that local authorities will continue to incur liabilities for success fees of this nature, up to the 100% maximum uplift allowed under law, unless and until legislation is passed which alters the situation.

For local authorities the last sentence of Lord Justice Ward's decision is pertinent:

"Let Lord Justice Jackson's reforms be enacted sooner rather than later".

Andrew Hales
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