



Recovery of Loss Adjusters' Costs – Cause for Thought?

The recent decision in the case of *Cuthbert v Gair* (reported at (2008) 105(39) L.S.G. 22; (2008) 152(38) S.J.L.B. 29) raises some difficult issues concerning the recovery of costs in connection with the fees of loss adjusters instructed by insurers. It is, however, important to understand the context in which the court held that an insurer could not recover the loss adjusters' fees as part of the costs of any litigation relating to the claim.

Cuthbert had suffered personal injuries whilst attending an equestrian event and subsequently instigated a claim for damages against the equestrian centre ("Bowes Manor") at which the accident had occurred. Bowes Manor's insurers engaged a firm of loss adjusters to investigate the case at a stage before solicitors were formally instructed. Subsequently, insurers (on behalf of Bowes Manor) instructed solicitors to defend the action and the case was allocated to the fast track. Thereafter, Cuthbert discontinued her claim and Bowes Manor requested a detailed assessment of its costs. It sought to recover costs in relation to the work undertaken by the loss adjusters, comprising work done at a time before solicitors had been instructed and also work done by the loss adjusters after solicitors had been instructed. Bowes Manor argued that claimed that these costs were disbursements for the purposes of the detailed assessment. Cuthbert argued that the costs related to pre-litigation work undertaken by someone other than a legal representative and did not fall within the categories of costs recoverable on an inter parties basis.

On appeal, the court held that:

(1) A person who acted without a solicitor was not entitled to recover, as a disbursement, any fees and expenses paid to a third party for work of a kind which a solicitor could have done. In the instant case, the work that the loss adjuster had billed for prior to Manor Bowes instructing solicitors included corresponding with Cuthbert's solicitor, investigating the accident, obtaining witness statements and dealing with documentation. That work was work that would normally be carried out by a solicitor and R was not entitled to recover costs in respect of them.

(2) In respect of work done after Manor Bowes had instructed solicitors, it was necessary to assess the relationship between those solicitors and the loss adjusters. If the solicitors had sought the loss adjusters' assistance on an agency basis then they would have been entitled to recover the loss adjusters' costs not as a disbursement but as a profit cost (the work of the loss adjusters being performed on behalf of the solicitors). However, no true agency agreement existed; there was no letter of instruction and no terms of engagement. On that basis, it was not possible for Bowes Manor to recover the loss adjusters' fees post the instruction of a solicitor.

(3) Furthermore, the work undertaken by the loss adjuster did not fall within the category of "expert assistance" for the purposes of the litigation that otherwise might have rendered the costs



recoverable under the rule in Nossen's case. The present case was, when correctly analysed, a case of the insurer contracting out part of its normal claims adjustment process in order to investigate claims made against the insured. It was routine work which many insurers would have undertaken in-house. The mere fact that Bowes Manor's insurers chose to contract out that work to a loss adjuster did not render the costs recoverable.

It is clear that the court was concerned to ensure that the insurer (which was the party truly interested in recovering the costs from Cuthbert) did not recover costs that were in fact part of its ordinary business overheads, namely the costs of and incidental to the adjustment of claims. There may be good sound commercial reasons for insurers to use the services of loss adjusters rather than carry out that work in-house. Plainly loss adjusters bring considerable expertise to the process which insurers might find too expensive to maintain in-house. However, the costs of adjusting a claim are not costs that ordinarily would be recoverable by the insurer from the insured (absent some contractual agreement between the insured and the insurer).

The decision in *Cuthbert v Gair* can be seen as simply confirming that an insurer cannot recover costs that are part of its ordinary business overheads and the position should be no different where the claim is withdrawn or substantially reduced as a result of the loss adjusters' work adjusting the claim without any litigation being involved from the position where litigation is commenced and later withdrawn or successfully resisted by insurers. The principle is that only those loss adjusters' fees truly incurred in defending litigation brought against the insured by a third party should be recoverable in the event that the litigation fails or is withdrawn.

Cuthbert v Gair does not mean, however, that loss adjusters' fees incurred for the purpose of litigation are not recoverable. The recoverability of such fees will remain subject to the ordinary test – were the fees incurred in connection with the litigation and were they reasonable. Whether the fees meet this test will not be simply a question of whether or not solicitors have been instructed. It is the nature and purpose of the work undertaken by the loss adjusters that will be critical (although it is likely that the task of proving this will be easier if solicitors have been instructed).

It is important, however, to ensure that loss adjusters' fees for undertaking work that should, in principle, be recoverable by the insurer are not rendered irrecoverable simply because of the mechanism used to instruct them or the tasks they are asked to perform in not carefully considered. Plainly undertaking pre-action correspondence and attendance at meetings and reporting to insurers at a time when litigation is reasonably in prospect could, if the work is undertaken at the direction of the insurer without any solicitor involvement, mean that the loss adjusters' fees are irrecoverable. Once litigation is reasonably in prospect insurers would be prudent to involve a solicitor through whom the loss adjusters' future work can be managed. If the loss adjusters are to be involved in work that ordinarily the solicitor would undertake it is important



to ensure there is an agency relationship established between the loss adjusters and the solicitor and that the solicitor is responsible for payment of the loss adjusters (no doubt with a suitable arrangement for passing on that cost to the insurers).