


Article written by Mark Cannon QC and Clare Dixon on 1st March 2018.

Nesbit Law Group LLP v Acasta European Insurance Company Limited [2018] EWCA Civ 268

In *Nesbit Law Group LLP* the Court of Appeal had to determine the proper construction of an exclusion clause in a series of Fidelity Guarantee Indemnity policies and whether the insurer should be permitted to amend its defence (the application having been made weeks before the hearing of the appeal) to allege various breaches of a loan agreement by insured which breaches were necessary for the insured to be caught by the exclusion clause.

The Court of Appeal's decision is considered by **Mark Cannon QC** and **Clare Dixon**.

THE FACTS

In about 2007 Clydesdale Financial Services Limited ("**Clydesdale**") and Acasta European Insurance Company Limited ("**Acasta**") set up a funding scheme for personal injury solicitors. One of the solicitors which participated in the scheme was Nesbit Law Group LLP ("**Nesbit**").

Part of Acasta's role was to provide legal expenses insurance ("**LEI**") to litigants who had entered into CFAs with Nesbit. However, for the purposes of this litigation it was the legal relationships between Clydesdale and Nesbit and between Acasta and Nesbit which are of central importance.

Clydesdale and Nesbit entered into a framework agreement ("**the Umbrella Agreement**") pursuant to which Clydesdale agreed to provide loans to Nesbit to fund their recoverable and irrecoverable costs of the litigation. Thereafter, for each case, Nesbit took out a loan – known as an Irrecoverable Costs Loan Agreement ("**ICLA**"). It was a condition precedent to the provision of loan funding by Clydesdale that Nesbit would take out a Fidelity Guarantee Indemnity ("**FGI**") policy underwritten by Acasta.

Of significance in this action was an exclusion clause within the FGI policy which provided that Irrecoverable Costs would not be covered "*where the terms and conditions of the Loan have not been strictly adhered to, including but not limited to any agreement entered into by [Nesbit] and [Clydesdale] to repay a Loan*".

"Irrecoverable Costs" were defined as "*in relation to the Proceedings the capital costs incurred by [Nesbit] (and not the Client) which are funded by way of a Loan provided to [Nesbit] by [Clydesdale] under the Litigation Funding Scheme…*".

The average amount borrowed under an individual ICLA was about £1,000. The number of clients referred to Nesbit, as a result of the scheme, is indicated by the fact that the loan funding reached a peak of £6million. Nesbit became overstretched and Clydesdale terminated the Umbrella Agreement. The amount owing by Nesbit to the Clydesdale about was then subject to a refinancing agreement pursuant to which Nesbit agreed to pay the sum due in monthly instalments ("**the Refinancing Agreement**").

<u>THE LITIGATION AND FIRST INSTANCE DECISION</u>

Clydesdale issued proceedings against Nesbit for the sums due and owing under the Refinancing Agreement. Nesbit, in turn, made a claim against Acasta under the FGI and LEI policies for reimbursement of irrecoverable costs in claims which it had given prior notice were unsuccessful.

Clydesdale settled its claim against Nesbit. The Court stayed the claim on the LEI policies.

Acasta's primary submission before the Judge was that Nesbit's claim was not covered by the FGI because its claim was not for irrecoverable costs but for its liability pursuant to the Refinancing Agreement which was an agreement made after the termination of the Umbrella Agreement. This was rejected by the Judge as being contrary to business common sense when the litigation funding scheme as a whole was considered. Significantly (we consider) there was no appeal from that point.

Consequently, the issues before the Court of Appeal were:

- Acasta's secondary submission which was that, properly construed, the claim was excluded because the Refinancing Agreement fell within the ambit of the exclusion clause, being an *"agreement entered into by [Nesbit] and [Clydesdale] to repay a Loan"*; and
- Acasta's application to amend (the application having been made four weeks prior to the appeal) to allege that Nesbit were in breach of the Refinancing Agreement and consequently caught by the exclusion in the FGI.

<u>ISSUE 1</u>

By way of reminder, the exclusion clause provided that cover would not be afforded under the FGI where the terms and conditions of "the Loan" have not been strictly adhered to. The exclusion also applied where Nesbit had not complied with the terms and conditions of "any agreement … to repay a Loan".

Loan was defined in the FGI policies as "*funds advanced to [Nesbit] by [Clydesdale] to finance the [capital costs incurred by [Nesbit] in relation to the Proceedings, which are funded by way of a Loan … under the Litigation Funding Scheme]"*.

Acasta's position was that the Refinancing Agreement was an agreement which could fall within the meaning of "a Loan" and that Nesbit's defaults amounted to a failure to adhere to the terms of a Loan so that the claim was excluded. Sir Geoffrey Vos, Chancellor, (with whom Sharp and Hamblen LJJ agreed) described this as a "*beguilingly attractive argument*" but nonetheless rejected it.

The Court of Appeal found that the Refinancing Agreement had not been in the parties' contemplation when the FGIs were entered into. The exclusion clause was looking at loan arrangements which were in place whilst the litigation funding scheme was extant. The words "*any agreement … to repay a Loan*" referred only to *"any replacement agreement entered into as part of the same litigation funding scheme to repay the individual loan under the ICLA"*. As a result, they did not cover the Refinance Agreement which had been entered into after the termination of the Umbrella Agreement and in response to Nesbit having overreached itself.

Consequently the exclusion clause did not cover breaches of the Refinance Agreement.

ISSUE 2

As a result of the Court of Appeal's finding on Issue 1, the determination of Issue 2 was otiose. Nevertheless, the Court having heard full argument went on to determine the application. Having considered the relevant principles as summarised by Carr J in *Quah Su-Ling v. Goldman Sachs International* [2015] EWHC 759 they determined that the application had been made too late – no justification was or could be given for the lateness of the application and, if permitted, it would put the litigation back almost to square one.

COMMENTARY

For Acasta to succeed in this action, it needed to win on both issues. Therefore, even if the Court of Appeal had accepted its submissions on Issue 1, the finding on Issue 2 would have made that victory a pyrrhic one.

Nevertheless, the decision on Issue 1 does (to the writers at least) appear to be a surprising one, at least at first sight.

Understanding the decision of the Court of Appeal is made more difficult because the terms of the insuring clause are not set out in the judgment. It appears from paragraph 7 of the Chancellor's judgment that what was being insured was *"irrecoverable costs such as referral fees incurred in respect of unsuccessful claims"*. What is not clear is whether what was insured was: (a) the amount of those costs if a claim were unsuccessful or (b) the liability to Clydesdale under a particular ICLA if the claim were unsuccessful.

If it were (a), then the decision at first instance that Nesbit's right to claim under the ICLA's had not been extinguished by the Refinancing Agreement (which was not appealed) makes sense. Individual claims could still be unsuccessful, triggering the right to claim the amount of irrecoverable costs under each FGI.

And, if it were (a), then the decision of the Court of Appeal could be justified. *"Loan"* was defined in the FGI policies as "*funds advanced to [Nesbit] by [Clydesdale] to finance the [capital costs incurred by [Nesbit] in relation to the Proceedings, which are funded by way of a Loan … under the Litigation Funding Scheme*". The Refinancing Loan was not made under the Litigation Funding Scheme and so was not a *"Loan"* for the purposes of the exclusion clause.

But, if that <u>was</u> the Chancellor's reasoning, then it was, with respect, somewhat opaque.

If, however, what was insured was outstanding liability under an ICLA when a claim was unsuccessful, then that liability had been extinguished by the Refinancing Agreement, contrary to the unappealed finding at first instance. But that liability would have survived in the Refinancing Agreement and it is hard to see how, on that basis, the Refinancing Agreement falls outside the scope of the second limb of the exclusion as *"an agreement … to repay a Loan"*.

Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.