THE COURT ORDERED that no one shall publish or reveal the name or address of the Respondents who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Respondents or of any member of their families in connection with these proceedings.

Michaelmas Term
[2019] UKSC 48
On appeal from: [2018] EWCA Civ 1099

JUDGMENT

Travelers Insurance Company Ltd (Appellant) *v* XYZ (Respondents)

before

Lord Reed, Deputy President
Lady Black
Lord Briggs
Lord Kitchin
Lord Sumption

JUDGMENT GIVEN ON

30 October 2019

Heard on 11 June 2019

Appellant
Colin Edelman QC
Ben Lynch
(Instructed by DWF LLP
(London))

Respondents
Hugh Preston QC
Marcus Pilgerstorfer
(Instructed by Hugh James
(Cardiff))

LORD BRIGGS: (with whom Lady Black and Lord Kitchin agree)

1. This appeal challenges the making of a non-party costs order under section 51 of the Senior Courts Act 1981 against the product liability insurer of one of the defendants in litigation being managed under a Group Litigation Order ("GLO").

2. Although the particular circumstances which led to the making of the non-party costs order may fairly be described as unusual or even rare, they give rise to important questions about the principles upon which the exercise of the court's broad jurisdiction to make such orders should depend, where the non-party is a liability insurer, both funding and largely directing the conduct of its insured defendant's defence in the relevant litigation. The search for principle is particularly acute where, as here, some but not all the claims in the group litigation fall within the confines of the cover provided by the insurance.

3. In *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965, 975 Lord Goff of Chieveley said that it was for the rule-making authority making rules of court and for the appellate courts to establish principles upon which the broad discretionary power to make costs orders against non-parties should be exercised. As will appear, a series of authorities have sought to lay down some principles regulating the exercise of this discretion against non-party insurers. This appeal provides an opportunity to review that developing jurisprudence.

The Facts

4. The group litigation which has generated this appeal concerns the supply of defective silicone implants for use in breast surgery, manufactured by the French company Poly Implant Prothèse ("PIP"). One of the defendants, Transform Medical Group (CS) Ltd ("Transform") operated medical clinics which supplied and fitted implants manufactured by PIP to customers in England. The appellant Travelers Insurance Co Ltd ("Travelers") provided product liability insurance to Transform which covered liability for bodily injury (or property damage) occurring during the period of insurance, which ran from 31 March 2007 to 30 March 2011. Many of those implants ruptured, causing bodily injury (as defined), principally in the form of leakage of their contents. Of the 1,000 or so women claimants joining in the group litigation, some 623 of their claims were brought against Transform, which was one of a number of similar clinics joined as defendants in the litigation. Of the 623 claiming against Transform, some 197 were later identified as having suffered bodily injury from defective PIP implants during the period covered by Travelers' insurance. Of the 426 remaining claimants

against Transform, all of whose claims fell outside the cover provided by Travelers' insurance, some 194 (labelled in the proceedings the "worried well") had not yet suffered bodily injury from a rupture of their implants, but were exposed to a risk that they would do in the future. The remainder had suffered bodily injury from a rupture of their implants outside the period covered by Travelers' insurance. Collectively, the 426 claimants within those two classes have been labelled the "uninsured claimants". They are the respondents to this appeal.

5. Product liability cover was provided by Travelers to Transform under standard form policies which, broadly speaking, required Travelers to indemnify Transform in respect of the costs (and costs liability) incurred or arising in proceedings where the claims made fell within the cover provided and, in relation to such claims, conferred upon Travelers the right to control the conduct thereof on behalf of Transform. Further, Transform was prohibited from making admissions or offers to settle in relation to claims falling within the cover provided by the policies, without Travelers' consent. Transform was required to give Travelers all information and assistance which it might require in connection with any such claim.

6. The 1,000 claimants pursued their claims arising out of allegedly defective PIP implants pursuant to a GLO made on 17 April 2012 by Wyn Williams J. The litigation was case managed by Thirlwall J (later LJ) at all material times after October 2012. As is reflected in para 5 of the GLO, it was appreciated from the outset that the claims were likely to give rise to common or related issues of fact and law. Paragraph 12 of the GLO made provision for sharing of common costs (that is all costs other than those which are purely personal to each claimant), on the basis of dividing common costs by the number of claimants pursuing their claims, and for each party's liability for, and entitlement to recover, costs to be several and not joint.

7. By case management orders made in 2013 Thirlwall J identified two common issues for early determination and selected four test claims to be fast-tracked for the purposes of their early determination ahead of the remainder, which were all stayed. In order to preserve the anonymity of the claimants I shall refer to them as claims A to D. Transform was the defendant clinic in all four of them. Claims A and B were made by two of the 197 claimants against Transform whose claims fell within the cover provided by the Travelers' policies ("insured claimants"). Claims C and D were by uninsured claimants. Claim C asserted bodily injury falling outside the period of insurance. Claim D was by a worried well claimant.

8. The selection of the test cases was not made by reference to any understanding on the part of the court, or the claimants, about the extent and terms

of Transform's product liability insurance from Travelers. It was, therefore, mere happenstance that two of the test claims were insured, and two uninsured. Furthermore, the costs liability and entitlement arising from the litigation of the common issues in the four test claims was itself shared among all 1,000 claimants and, in particular, all 623 claimants against Transform, on a several-only basis pursuant to the GLO.

9. Transform had obtained the PIP breast implants supplied to its customers from a company called Cloverleaf Products Ltd ("Cloverleaf"), against which Transform made a Part 20 claim for an indemnity for any liability of its own to the claimants. Cloverleaf was itself insured by Amlin Corporate Solutions Ltd ("Amlin") which provided cover to Cloverleaf in respect of the period 2004 to 2007, for which Transform was itself uninsured.

10. The claimants' legal team had from an early stage in the litigation been understandably concerned to discover, if they could, the nature and extent of Transform's insurance cover, all the more so when in about mid-2013 they became aware that Transform might be in financial difficulties. Inconclusive discussions took place between the claimants' legal team, the solicitors jointly retained by Transform and Travelers to conduct Transform's defence, and between Transform, Travelers and those solicitors, about what if any disclosure might voluntarily be made. Eventually the claimants made an application against Transform for disclosure of information about its insurance position in July 2013, which was heard by Thirlwall J in late September and dismissed (subject to one exception) in her reserved judgment on 22 November 2013: [2013] EWHC 3643 (QB). The exception was that she directed Transform to inform her, confidentially, as to whether it had the resources to fund its own defence up until trial. In the event however, the relevant limitations upon Transform's cover from Travelers, namely the temporal limits and the exclusion of worried well claims, were voluntarily disclosed to the claimants by June 2014. It was by then apparent that, without insurance, Transform would be unlikely to have the resources to pay compensation or costs to successful uninsured claimants.

11. The judge was later to find that, had the claimants' solicitors known from the outset about those limits on Transform's insurance cover, the uninsured claimants would not have commenced or at least continued their claims as registered members of the claimants' group under the GLO. But by June 2014 they had on a several-only basis participated in the cost of the prosecution of the common issues in the four test cases, upon which considerable outlay had been expended, including on the obtaining of vital expert evidence probative of the deficiencies in the quality of the PIP implants. They had done so on the basis of no win no fee contingency fee agreements, backed by after the event ("ATE") insurance so that, although to that extent protected in their own pockets, the substantial recoveries (including success fees and ATE premium) which might be

expected to be made after a successful claim against an insured defendant were threatened with being frustrated if the uninsured claimants' only recourse lay against the financially distressed Transform (which, incidentally, went into insolvent administration a year later).

12. It might be asked therefore why, after the disclosure of the limitations on Transform's insurance cover was made in June 2014, the uninsured claimants against Transform continued as members of the GLO, or the group as a whole continued to pursue the uninsured test claims C and D. The answer, as was expressly confirmed by Mr Hugh Preston QC on behalf of the respondents in response to an inquiry from the court during the hearing of this appeal, was that an important (although not sole) reason why they did so was in the hope of obtaining a non-party costs order against Travelers in due course, if successful in their claims against Transform.

13. Travelers was in the meantime funding the whole of Transform's defence costs, consisting mainly of the costs of defending all four sample claims in relation to the common issues, notwithstanding that claims C and D were uninsured. This is because, in relation to issues common to insured and uninsured claims, it is settled law that insurers may not seek to apportion their contractual liability to pay defence costs: see *New Zealand Forest Products Ltd v New Zealand Insurance Co Ltd* [1997] 1 WLR 1237 (PC) approved by this court in *International Energy Group Ltd v Zurich Assurance plc UK Branch* [2016] AC 509, paras 36-38. That much is common ground.

14. In July 2014 Transform sought and obtained Travelers' consent to the making of a drop-hands offer to the worried well claimants. It does not appear that such an offer was made and, when Transform sought consent to do so again in January 2015, consent was not given. The judge also found (but it is not clear precisely when this occurred) that Transform sought consent from Travelers to make an admission of liability to the uninsured claimants, and that consent for this was not forthcoming either.

15. Meanwhile, an attempt to settle the litigation against Transform by mediation was attempted but without success in August 2014, mainly because Cloverleaf and Amlin declined to participate. In September 2014 the trial of the sample claims listed for October 2014 was adjourned, so as to enable a coverage dispute to be resolved between Transform and Travelers. That was settled in April 2015 and a settlement of all the insured claims against Transform resolved at a mediation in June 2015 in which Cloverleaf and Amlin did participate. Transform was by then in administration and, being fully insured in relation to those claims, the administrators took no active part in the mediation. Final agreement was reached in August 2015, including sample cases A and B, leaving only the

uninsured claims outstanding. At that point Travelers' obligation to fund defence costs ceased. The remaining uninsured sample claims C and D were eventually determined in May 2016, by an award of summary judgment. By then, all the other uninsured claimants against Transform had obtained default judgment, in March 2016.

The section 51 Applications

16. Notice that a section 51 application would be made against Travelers was communicated to Travelers before the uninsured claimants obtained summary judgment against Transform, as described above. It was heard by Thirlwall LJ in October 2016 and determined in an admirably concise reserved judgment handed down on 24 February 2017: [2017] EWHC 287 (QB).

17. The judge reminded herself of the leading general authorities on non-party costs orders, to which reference will be made below. She referred only to one first-instance case about non-party cost orders against insurers, namely *Citibank NA v Excess Insurance Co Ltd* [1999] 1 Lloyd's Rep IR 122, although she noted that it had been followed in later cases. But she distinguished that line of authority on the basis that, uniquely in the case before her, the insurers had participated in the defence of wholly uninsured claims. She therefore directed herself by reference to the general principles relating to non-party costs orders namely: (1) whether the case was exceptional and (2) whether the making of an order would accord with fairness and justice.

18. Her decision to make a non-party costs order against Travelers was, in summary, motivated by the following analysis. First, she took the view that the uninsured claims were entirely separate and distinct from the insured claims, so that Travelers had no business involving itself in the uninsured claims at all, either directly or through jointly retained solicitors.

19. Secondly, she was powerfully influenced by her conclusion (which is not open to challenge in this court, having been affirmed by the Court of Appeal) that if early disclosure of the limitations on Travelers' insurance had been made, the uninsured claimants would not have pursued their claims, so that the costs which they then incurred on a several-only basis under the terms of the GLO for which they had no effective recourse, outside section 51, against anyone, would not have been incurred at all. She concluded that the decision not to make early disclosure had been, at least, influenced by a perception on the part of the jointly retained solicitors that non-disclosure would serve Travelers' rather than Transform's interests, and that the conflict in that regard had been overlooked.

20. Thirdly, the judge was clearly much affected by her perception that there was an asymmetry or lack of reciprocity in costs risk as between the uninsured claimants and Travelers. If the uninsured claims were successfully defended (at Travelers' expense) then Travelers would have a full costs recovery against, inter alia, the uninsured claimants for their several shares of that liability. By contrast, if the uninsured claimants were successful against Transform, they would have no recourse at all against Travelers for their costs and, because of Transform's financial plight, no effective recourse against Transform either. Looking at it from Travelers' perspective, the presence of the uninsured claimants within the GLO reduced their costs exposure of failure on the common issues by reference to the number of the uninsured claimants against Transform expressed as a fraction of all the claimants against Transform, whereas Travelers would suffer no corresponding reduction in their costs recovery if successful. By contrast, if only insured claimants had proceeded against Transform, Travelers' costs risk would have been for the whole of the common costs, and there would have been reciprocity.

21. Finally, the judge regarded Travelers' participation in questions about whether to make offers of settlement or admissions to the uninsured claimants as further factors strongly supportive of a conclusion that Travelers had participated in the uninsured claims to an extent sufficient to incur a non-party costs liability.

22. The Court of Appeal (Patten and Lewison LJJ) reached the same conclusion as the judge, but for slightly different reasons: [2018] EWCA Civ 1099. They thought that the judge went too far in her conclusion that the uninsured claims had nothing whatsoever to do with the insured claims, because the same common issues arose in both, and Travelers were obliged under the policies (and the general law) to fund the defence of Transform's position in relation to those common issues in all four test cases. They were, if anything, even more powerfully affected by the asymmetry or lack of reciprocity as between the uninsured claimants and Travelers in relation to costs risk. Having described that lack of reciprocity as leading to the fortuitous result that Travelers escaped liability for approximately 68% of the costs of the common issues Lewison LJ continued, at para 12:

> "My instinctive reaction is that this result accords neither with reason nor justice given the probably unique circumstances of this case."

He noted that the editors of *Colinvaux and Merkin on Insurance Contract Law* reached a similar conclusion, namely "that reciprocity was appropriate" (see para 17).

23. The Court of Appeal broadly upheld the judge's factual analysis of the circumstances in which disclosure of Transform's insurance cover was delayed, and its consequences, and (not without hesitation) her conclusion that Travelers should bear responsibility for what she had regarded as the flawed advice given by the jointly retained solicitors, mindless of the underlying conflict of interest between Travelers, which stood to gain from the addition of uninsured claimants, and Transform, which stood to lose from it. But it is clear that the Court of Appeal regarded the reciprocity point as decisive, both because it made the present case exceptional and because it pointed the way to a non-party costs order against Travelers as achieving a just result: see para 45, and its reference back to para 32.

24. In conclusion, after an analysis of the cases (referred to below) about non-party costs orders against insurers, the Court of Appeal concluded, at para 46, that the judge had been "entirely correct" to treat the question as depending upon the twin issues of exceptionality and justice, rather than upon any particular principles applicable to non-party costs orders against insurers.

The Law

25. Section 51 of the Senior Courts Act 1981 (previously known as the Supreme Court Act) provides as follows:

> "(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in -
>
> (a) the civil division of the Court of Appeal;
>
> (b) the High Court;
>
> (ba) the family court; and
>
> (c) the county court,
>
> shall be in the discretion of the court.
>
> (2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters

> relating to the costs of those proceedings including, in particular, prescribing scales of costs to be paid to legal or other representatives or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs.
>
> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid …"

This formulation amends the original language of section 51(1), which was as follows:

> "Subject to the provisions of this or any other Act and to rules of court, the costs of and incidental to all proceedings in the civil division of the Court of Appeal and in the High Court, including the administration of estates and trusts, shall be in the discretion of the court, and the court shall have full power to determine by whom and to what extent the costs are to be paid."

It is not suggested that the change of language affects the issues arising in this appeal in any way.

26. It was not initially appreciated that the jurisdiction to determine "by whom … costs are to be paid" (first conferred in those words by section 5 of the Supreme Court of Judicature Act 1890) enabled the court to make costs orders against non-parties at all. That was the issue decided in the affirmative by the *Aidan Shipping* case in 1986, reversing long-standing authority consisting of decisions of the Court of Appeal to the contrary in 1901 and 1958. Lord Goff's recognition in that case that it was for the Rules Committee to regulate the exercise of this broad jurisdiction if it thought fit has not been reflected in any rules or practice directions relevant to this appeal. Rather the task of formulating principles for the discretionary exercise of this jurisdiction has fallen to the courts.

27. It is evident (from p 981B in the *Aidan Shipping* case), and obviously right, that it is a pre-requisite for the making of a costs order against a non-party that the person sought to be made liable has some relevant connection with the proceedings in question. But the passage of time, and the endless development of novel ways of funding the ever-increasing cost of civil litigation, has shown that non-parties may become connected with proceedings in a wide variety of ways, usually providing

funding and/or exercising some degree of control or providing assistance. They range from the "pure" funder who contributes to a litigation fund out of sympathy or charity, with no financial or other interest in the outcome, through the company shareholder who funds the company's litigation to preserve the value of his shareholding, or the director who controls the conduct of the litigation pursuant to a fiduciary duty to the company, to the speculator who buys into a piece of litigation with a view to making a profit from a share in the damages recovered. Liability insurers occupy a particular, well-populated, space on that broad spectrum.

28. It is therefore not surprising that the appellate courts have struggled to identify principles applicable across the board to the exercise of the jurisdiction to make a costs order against a non-party, save at the very highest level of generality, although some attempt has been made, for example by Lord Brown of Eaton-under-Heywood giving the opinion of the Judicial Committee of the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807, paras 25-29, approved as an authoritative statement of English law by the Court of Appeal in *Deutsche Bank AG v Sebastian Holdings Inc* [2016] 4 WLR 17, para 62. But neither was a case about insurers, and the conduct of the non-party relied upon in the *Dymocks* case for the making against it of a costs order consisted in the main of self-interested funding rather than, as here, conduct of the relevant litigation.

29. An earlier attempt to lay down general principles had been made by the Court of Appeal in *Symphony Group Plc v Hodgson* [1994] QB 179, but that was not an insurance case either. The ratio of that case was that a section 51 non-party costs application should not be used as a substitute for the pursuit of a related cause of action against the non-party in ordinary proceedings. Beyond that, the particular statements of principle there enunciated have no relevance to this appeal.

30. It is not the purpose of this judgment comprehensively to reassess those generally applicable principles. It may be (and I am reluctantly prepared to assume but without deciding) that they really are limited, as the Court of Appeal thought in the present case, to the twin considerations of exceptionality and justice. The same general conclusion is to be found in the *Deutsche Bank* case. That said, I share all Lord Reed's concerns as to the lack of content, principle or precision in the concept of exceptionality as a useful test. Rather, this is an occasion to consider, in more granular detail, the principles which ought to apply to that distinct part of the broad spectrum of non-parties occupied by liability insurers. While doing so it will be appropriate to make some brief observations about the impact of those general principles in the liability insurance context, and in particular about the role played by the presence or absence of a causative link between the conduct of the non-party relied upon and the costs which the applicants incurred which they seek to recover against the non-party under section 51.

31. Liability insurance serves an obvious public interest. It protects those incurring liability from financial ruin. More importantly, it serves to minimise the risk that persons injured by the insured will go uncompensated as a result of the insured's lack of means. Unlike ATE insurance it is not primarily aimed at making a profit by assisting in the funding of litigation but, where liability becomes the subject of litigation, the insurance typically contains provision under which the insurer is obliged to fund the insured's defence and, as an inevitable concomitant, entitled to exercise substantial (although not always complete) control over the conduct of its insured's defence. The liability insurer is therefore typically an involuntary rather than voluntary funder of litigation, and the control which the insurer habitually exercises over the conduct of its insured's defence arises from a pre-existing contractual entitlement, rather than from a freely made decision to intermeddle.

32. Where a liability for which the insurance policy provides cover becomes the subject of litigation, there are long-settled principles of insurance law which, in addition to the contractual terms of the policy itself, serve to regulate the proper participation of the insurer in the funding and, in particular, conduct and control of the insured's case. They long pre-date the recognition of the non-party costs jurisdiction. They were summarised by Sir Wilfred Greene MR in *Groom v Crocker* [1939] 1 KB 194, 203, as follows:

> "The right given to the insurers is to have control of proceedings in which they and the assured have a common interest - the assured because he is the defendant and the insurers because they are contractually bound to indemnify him. Each is interested in seeing that any judgment to be recovered against the assured shall be for as small a sum as possible. It is the assured upon whom the burden of the judgment will fall if the insurers are insolvent. The effect of the provisions in question is, I think, to give to the insurers the right to decide upon the proper tactics to pursue in the conduct of the action, provided that they do so in what they bona fide consider to be the common interest of themselves and their assured. But the insurers are in my opinion clearly not entitled to allow their judgment as to the best tactics to pursue to be influenced by the desire to obtain for themselves some advantage altogether outside the litigation in question with which the assured has no concern."

33. The combination of the clear public interest in the provision of liability insurance and the fact that, within the above confines of contractual propriety, an insurer commits itself to the funding and control of its insured's litigation long before the dispute in question is even known about, provides a firm basis for

concluding that (in the absence of engagement by the Rules Committee) the appellate courts ought to be as clear and detailed as they properly can in setting out the principles applicable to the incurring of non-party costs liability by insurers. It would be unsatisfactory if the insurer's exposure to that liability, *ex hypothesi* lying outside the confines of the policy, were to depend purely upon the uncontrolled perception of a particular judge about the general justice of the matter, controlled only by a requirement to show exceptionality, in the general sense that the case in which the question has arisen is unusual, measured against the general run of civil litigation.

34. Cases in which any question of the non-party liability of the liability insurer under section 51 arises may be said, almost by definition, to be unusual. This is because, in the vanilla case of a single claim within the scope of the cover provided by the policy, the insurer will be contractually liable to the insured to indemnify it in respect of its costs liability to the successful claimant, who will make a full costs recovery by that indirect route, if necessary (where the insured is insolvent) with the assistance provided by the Third Parties (Rights against Insurers) Act 2010, replacing the earlier Act of the same name in 1930 ("the 1930 Act"). To treat every case as exceptional where, for any reason, the claimant lacks that indirect means of costs recovery exposes the liability insurer to the unpredictable outcome of the judge's perception of justice in every case where a section 51 application is likely to need to be made. The court should therefore be disposed to identify within the requirement for exceptionality something much more focussed than that the facts of the particular case are unusual.

35. Prior to the present case, the reported decisions about non-party costs applications against liability insurers do disclose a sustained attempt to provide some measure of guiding principle for the exercise of this wide jurisdiction. In *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12 the section 51 application was made because the cover was limited under the defendant's liability policy and insufficient to pay all the damages, let alone any part of the costs, and the defendant was not worth powder and shot. Nonetheless the claim fell squarely within the cover provided by the policy. It was, in the argot of the present case, an insured claim, and could have been pursued (subject to the limit of cover) directly against the insurer under the 1930 Act if the insurer had not put the defendant in funds (up to the policy limit) with which to settle it.

36. Drawing upon general principles about the section 51 jurisdiction Phillips LJ identified two separate bases upon which a liability insurer might become exposed to non-party costs liability. The first basis (by no means limited to insurers) may be labelled intermeddling. Repeating dicta of his own in *Murphy v Young & Co's Brewery Plc* [1997] 1 WLR 1591, 1601, he said at p 16:

> "In *Giles v Thompson* [1994] 1 AC 142, 164 Lord Mustill suggested that the current test of maintenance should ask the question whether: 'there is wanton and officious intermeddling with the disputes of others in which the meddler has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse.' Where such a test is satisfied, I would expect the court to be receptive to an application under section 51 that the meddler pay any costs attributable to his intermeddling."

37. The second, which may be labelled the real defendant test, arose from the combination of the insurer's interest in the outcome of the proceedings, its contractual obligation to indemnify the defendant for its costs liability and its exercise of control over the conduct of the defence. In a case where there was no limit of cover which excluded such a contractual obligation in relation to costs he regarded a section 51 order as a convenient time and cost-saving short-cut to recovery against the insurer of an insolvent defendant under the 1930 Act. He regarded a case where a limit of cover excluded the insurer's contractual liability for costs, as it did in that case, as a "more complex" example of the second type, calling for a more nuanced approach.

38. The claimant company relied upon five features of the case which justified a section 51 order, namely that:

> "(1) the insurers determined that the claim would be fought; (2) the insurers funded the defence of the claim; (3) the insurers had the conduct of the litigation; (4) the insurers fought the claim exclusively to defend their own interests; (5) the defence failed in its entirety."

The Court of Appeal agreed. Much the most important consideration, for both purposes, was that the claim had been funded and defended by the insurers purely in their own interests, regardless of the interests of the assured defendant, who had been entirely without means from start to finish, and who would have been content to settle the case at the outset rather than contest it. The insurers were regarded as the real defendants in all but name. In passing Phillips LJ rejected the submission that exceptionality was to be measured by comparison with other insurance cases rather than the generality of cases, and the argument that an insurer who stayed within the bounds of his rights and obligations under the policy should never be exposed to liability beyond the limit of cover by means of a section 51 application.

39. In *Citibank NA v Excess Insurance Co Ltd* [1999] Lloyd's Rep IR 122, the section 51 application was prompted by the reporting of the *Chapman* case, and decided by Thomas J (as he then was) specifically upon the basis that the continued defence of the quantum of the claim after judgment on liability had been conducted by the insurers solely in their own interests, after the insured's interest in protecting its reputation had been terminated by the adverse judgment on liability. It was another case in which the claim fell within the cover, but the policy limit left the insured's costs liability uninsured.

40. Thomas J said, at p 131:

> "The decision in *Chapman* has laid down clear principles that a court can apply. If the circumstances are such that the application for a costs order falls within those principles, then it should follow that there should be a costs order under section 51; if they do not, they should not. To my mind, the principles have been formulated in such a way that the cases that fall within them will be exceptional across the spectrum of litigation and thus the primary approach of the court should be to consider whether the principles set out have been satisfied."

The principles to which Thomas J was particularly referring are those features of the *Chapman* case numbered (1), (3) and (4) in the above summary: namely that the insurers decided that the claim should be fought, conducted the defence, and did so motivated entirely by their own interests. They have since come to be known (and were referred to in submissions during this appeal) as the *Chapman* principles.

41. *Cormack v Excess Insurance Co Ltd* [2002] Lloyd's Rep IR 398 was another case in which a limit of cover triggered the section 51 application. It turned on the proper application of the fourth *Chapman* principle. The insurers had conducted the litigation for the defendant under a professional indemnity policy, without objection from the defendant, and the outcome was an award of damages and costs which left part of the costs outside the limit of cover. The judge decided that the insurers had not conducted the litigation solely in their own interests, and that the defendant had, throughout, an interest in defending its reputation. Further the insurers' conduct of the case had not been the cause of the claimant incurring costs in excess of the limit of cover. He therefore refused the application, for both those reasons.

42. Dismissing the appeal, the Court of Appeal endorsed the judge's analysis that the question whether a limit of cover case of this type was exceptional for the purposes of section 51 was likely to depend critically upon the extent of the insurer's self-motivation in its conduct of the defence, although this was not to be regarded as an invariable rule. Giving the leading judgment, Auld LJ treated the passage in *Groom v Crocker* (cited above) as setting the bench-mark. Insurers who strayed beyond an appropriate balance, as identified by *Groom v Crocker*, in allowing their interests to predominate over those of the insured might be found to have acted exceptionally, so as to attract the section 51 jurisdiction to make a non-party costs order against them. He said that it followed from the *Chapman* case that this is what could turn an insurer for all practical purposes into the real defendant.

43. In passing the Court of Appeal warned against treating non-disclosure of cover as exceptional, because there was no duty to do so, and disclosure might damage the insurer's legitimate interests. Finally the Court of Appeal firmly endorsed the need for the applicant to demonstrate that the relevant conduct of the insurer (or some part of it) caused the claimant to incur the costs sought to be recovered from the insurer under section 51. Auld LJ said that the causation question went to the satisfaction (or otherwise) of the exceptionality requirement.

44. *Palmer v Palmer* [2008] Lloyd's Rep IR 535 was essentially an application of the fourth *Chapman* principle, as interpreted in the *Cormack* case. The judge had concluded that the insurers' conduct of an unsuccessful defence was sufficiently self-motivated to make it the real defendant in all but name, and the Court of Appeal dismissed the appeal. It adds nothing beyond repetition to the development of the relevant principles.

45. Nor does *Legg v Sterte Garage Ltd* [2016] Lloyd's Rep IR 390. It was not a limit of cover case, because the policy required the insurers to indemnify the insured defendant's costs liability without monetary limit. Further the claimants were entitled to pursue their costs claim in full against the insurers under the 1930 Act. The section 51 issues arose from the fact that the claimants put their nuisance and *Rylands v Fletcher* pollution claim on two alternative grounds, single escape of fuel and (by a later amendment) long-term leakage, when the relevant policy only provided cover against the former. The insurers abandoned the defence when they (mistakenly) thought that the covered basis of claim had been abandoned, but the claimants then secured default judgment on the basis of both. The judge held, and the Court of Appeal agreed, that the insurers had defended the claims solely or predominantly in their own interests, because they were concerned not to defend the insured from all liability, but only from liability for the head of claim covered by the policy, and the insured had no commercial or reputational reason to defend the claim. The *Legg* case was therefore a conventional application of the fourth *Chapman* principle, as interpreted in the *Cormack* case.

46. In the present case the judge appears to have been persuaded that the *Chapman* principles, which she identified by reference to the *Citibank* case, were of limited assistance, because the problem facing her was conceptually different from a limit of cover case about an otherwise insured claim. Her approach was rather to examine whether Travelers became involved in the litigation of the uninsured claims which, in her view, had nothing to do with the insured claims or, therefore, with Travelers, who therefore had no business to become involved in them at all. Although she did not say so in terms, she clearly regarded the question whether Travelers should be liable for the uninsured claimants' costs as turning upon whether Travelers intermeddled in those claims. She therefore concentrated her analysis of what she called the exceptionality question upon the conduct of the insurers. She was properly alert to the question of causation, and therefore took the trouble to examine whether the non-disclosure of the relevant limits of the cover was a cause of the incurring of costs by the uninsured claimants, concluding that it was.

47. For its part the Court of Appeal conducted a review of the *Chapman* line of cases, concluding that they did not seek to lay down rigid rules, before concluding that exceptionality was established by the unusual nature of the circumstances, in particular the asymmetry or lack of reciprocity between Travelers and the uninsured claimants, rather than by any departure on the part of the insurers from the normal boundaries of conduct summarised in *Groom v Crocker,* and treated as a useful bench-mark in the *Cormack* case.

Analysis

The Chapman principles

48. The main thrust of Travelers' case is that the decisions of the courts below, for different reasons, wrongly departed from the *Chapman* principles, thereby exposing insurers to unexpected and unforeseeable liability for costs as a non-party in excess of their obligations under the relevant policies, where their own conduct did not depart from the acceptable norm in a way that could properly be described as exceptional, and that the supposed asymmetry or lack of reciprocity as to costs risk between them and the uninsured claimants was neither exceptional in the relevant sense, nor a good reason why an order under section 51 was a just solution. More specifically they say that the reliance of the courts below upon the non-disclosure of the policy cover was contrary to principle, and that the other respects in which the judge found that Travelers had overstepped the proper boundaries had no causative consequences in either causing or increasing the uninsured claimants' expenditure of costs.

49. Travelers also sought to mount a detailed attack on the judge's findings of fact, although they were confirmed by the Court of Appeal. This court would not have considered it appropriate to entertain this part of the appeal (although it was not actively pursued in oral submissions) but, for reasons which will appear, it has been unnecessary to do so in any event.

50. For their part the uninsured claimants say that the judge was right to treat the insured and uninsured claims as completely separate, that the judge was therefore correct to regard any significant involvement by Travelers in the conduct of the defence of the uninsured claims as conduct stepping across the boundary into the exceptional, and that the lack of reciprocity was, on its own, sufficient to justify an order under section 51.

51. In my view the courts in the *Chapman* line of cases were right to seek to identify clear and reasonably detailed principles, by way of guidelines rather than rigid rules, sufficient to enable liability insurers to know in advance what kind of conduct would, and what would not, be likely to attract non-party liability for the costs of successful claimants against their insured defendants, in excess of any relevant policy limits. It may be that Thomas J went a little too far towards elevating the *Chapman* principles into rigid conditions rather than guidelines, turning what was designed to be a good servant into a poor master. But the underlying perception that a loose requirement for exceptionality was an insufficient protection from exposure to a particular judge's after the event perception of the just result was correct, essentially for the public policy reasons identified in para 32 above.

52. I also consider that the two bases under which an insurer might become liable to a non-party costs order identified in the *Chapman* case, namely by intermeddling or becoming the real defendant, do represent a principled approach to the engagement of this jurisdiction against liability insurers, which is much preferable to the quest for factors which may satisfy an elusive concept of exceptionality. Where the claim itself falls within the scope of the insurance, whether or not subject to limits of cover, the real defendant test will usually be the appropriate one to apply.

53. Furthermore the underlying purpose of the *Chapman* principles, namely to identify in a limit of cover situation the cases where an insurer has become the real defendant in all but name is also correct. As Lord Reed demonstrates, this has been the animating principle behind the jurisdiction of the Scottish courts to make costs orders against non-parties for far longer than the parallel jurisdiction has been recognised in England and Wales, at least following the Judicature Acts. The *Chapman* line of cases make it clear that this is what the principles which they enunciate are designed to reveal.

54. But I am not satisfied that the *Chapman* principles really assist in relation to a case, such as the present, where the costs sought to be recovered against the insurer arise in the successful conduct against the insured defendant of a claim which lies outside the scope of the cover provided by the insurer: ie an uninsured claim. In such a case it is the intermeddling principle which falls to be applied. This is a principle derived from the English law about maintenance and champerty, as Phillips LJ acknowledged in the *Chapman* case, and which has no equivalent in Scotland, as Lord Reed explains. Its starting assumption is that non-parties usually, although not invariably, have no legitimate interest in becoming involved in the litigation of others. It does not render involvement of any kind objectionable, but only involvement which is (in old-fashioned language) wanton and officious, for which the non-party cannot demonstrate some justification or excuse.

55. This basis for the costs liability of the non-party does not necessarily depend upon showing that it has taken control of the litigation, or done anything approaching becoming the real defendant in it. Nor is there any fixed benchmark which will establish whether involvement has become a form of intermeddling. In every case the nature and extent of the non-party's involvement will have to be measured against the alleged justification or excuse for it. In sharp contrast with the real defendant test, the question whether the non-party has become involved under a framework of contractual obligation is likely to be of primary relevance. It may even be decisive against liability, especially where the relevant contract is of a type which is recognised and supported by public policy, such as liability insurance. If the non-party has not gone beyond the confines of those contractual obligations and attendant rights in framing its involvement, as explained in *Groom v Crocker*, liability as an intermeddler may be very hard to establish.

56. The key feature of the present case is that every one of the successful claims for which the claimants seek a non-party costs order is wholly uninsured. The uninsured claimants can have had no real expectation, if successful, of being paid their costs by the insurers, unless those costs were incurred as a result of some unjustified intervention in their claims by the insurers. This is sufficient on its own to take them out of the proper ambit of the *Chapman* principles, and to make it necessary to ask whether Travelers' involvement in the defence of the uninsured claims amounted to intermeddling. The question is not whether Travelers became the real defendant in each of them, but whether its level of involvement in them was justified and, even if not, whether it caused the incurring by the claimants of the relevant costs.

57. The present case is of course further complicated by the facts that the uninsured claims against Transform were brought in a group action alongside a smaller number of insured claims by different claimants against Transform, together with further claims (whether insured or uninsured) by yet further claimants against other defendants, all raising similar issues to be tried by

reference to test cases, with the claimants contributing to, and liable for, costs on a several-only basis. It is out of these additional facts (coupled with Transform's insolvency) that the asymmetry or lack of reciprocity in costs risk arose.

Asymmetry - Lack of Reciprocity

58. This factor, which so deeply affected the courts below, may be summarised by saying that it describes a situation where one side faces having to pay the other side's costs if it loses, but the other side faces no such risk if it loses. Put the other way round, one side gets its costs if it wins, but not the other side if it wins. While it may be said that there is usually symmetry or reciprocity as to costs risk in ordinary civil litigation between solvent opponents, there are numerous situations where this is not so. The opponent may be legally aided. The claimant may have the benefit of Qualified One-way Costs Shifting ("QOCS"). Sometimes the court makes special orders limiting the costs exposure of one side only, for example under the Aarhus Convention. As in the present case, one side may be uninsured and be or become insolvent. In the latter situation there is theoretical reciprocal liability between the parties, but asymmetry in practicable recovery, and therefore risk.

59. The risk of asymmetry when claiming against a defendant of unknown means is aggravated by any uncertainty whether the defendant is adequately insured, and the law does not generally, and did not in this case, enable the claimants against Transform to obtain disclosure of the terms of its insurance cover. Whether that should be the law is not the subject of this appeal.

60. In the present case every one of the claimants against Transform began their claims without knowing whether they were covered by insurance, and continued them in face of increasingly depressing evidence about Transform's impending insolvency. They all took the risk of asymmetric costs exposure and, for a majority of them, namely the respondents, that risk came to pass, as was revealed when Transform voluntarily disclosed the limits of its insurance cover in June 2014, followed by Transform going into insolvent administration in 2015. By contrast the lucky minority made a satisfactory costs recovery, funded by Travelers, when their cases were settled after mediation in August 2015.

61. In my view the reliance placed by the courts below on asymmetry or lack of reciprocity as a factor tending to justify a section 51 order against Travelers was misplaced. My reasons follow. First, leaving aside the incurring of costs by the uninsured claimants, the asymmetry in risk was not itself in any sense the result of any aspect of the intervention in, or conduct of, the defence of the uninsured claims by Travelers. It arose from the combination of the facts that Transform was

insolvent, had insurance for only some of the claims, excluding those of the respondents, and that the claimants' liability for and therefore entitlement to costs was several-only, and extended to the prosecution of the common issues in the test cases. They chose, no doubt for good reason, to undertake that several-only costs burden regardless whether their claims were insured, taking the risk that they would not recover their outlay if they were not, even if successful.

62. One consequence of the several-only costs liability of each of the claimants is that the costs position of each of the claimants needs to be looked at separately. This is so notwithstanding the fact that, behind the scenes, the claimants may have used common solicitors, CFAs and ATE insurance in a way which greatly modified both their personal costs exposure, and the entitlement of the common solicitors to make a satisfactory costs recovery. Looked at separately, each claimant had either an insured or an uninsured claim against a common insolvent defendant, with all the consequences in terms of reciprocity which that entailed.

Non-disclosure of Cover

63. The only sense in which anything done or not done by Travelers may be said to have contributed to that asymmetric outcome for the uninsured claimants was that the solicitors jointly instructed by Travelers and Transform played an advisory role in Transform's decision not to disclose the limits of its insurance cover earlier, when the uninsured claimants might have abandoned their claims, and successfully to resist an order for disclosure in 2013. That advice was given in good faith without a perception by the solicitors that there might be (as the judge held that there was in fact) a conflict between the interests of Transform and Travelers in whether to make that disclosure. Still less was the advice motivated in fact by a desire to dilute Travelers' costs risk in the defence of the common issues. It was not in any recognisable sense an inappropriate intervention by Travelers in the defence of the uninsured claims, as distinct from the insured claims. The advice was given in relation to the claims against Transform as a whole and was plainly part of the conduct of the defence to the insured claims which Travelers was entitled to control (in the *Groom v Crocker* sense) just as much as it was part of the conduct of the defence of the uninsured claims. Of course Transform, Travelers and their jointly instructed solicitors knew that the Worried Well claimants' claims were not insured, nor were claimants' claims falling outside the insurance policy periods, but disclosure could not practicably have been made to the uninsured claimants alone, since all the claimants were represented by common solicitors.

64. Both the judge and (but with less assurance) the Court of Appeal regarded it as right for Travelers to have to take responsibility for that advice. Whether or not that is so, it was advice which fairly reflected Travelers' rights as insurer, as was in

due course confirmed by the judge, and noted as something not properly contributory to the making of a section 51 order in the *Cormack* case. It was not conduct which amounted to unjustified intermeddling in the uninsured claims for the purposes of section 51.

Causation

65. I have noted above how firmly the Court of Appeal in the *Cormack* case endorsed the requirement for an applicant under section 51 to demonstrate a causative link between the incurring of the costs sought to be recovered from the non-party and some part of the conduct of the non-party alleged to attract the section 51 jurisdiction. That requirement is in my view rightly imposed. Auld LJ regarded it as part of the exceptionality requirement. It could equally be seen as going to the justice, or otherwise, of making the order. If the costs would still have been incurred if the non-party had not conducted itself in the relevant manner, why should it be just to visit the non-party with liability for them?

66. The causation requirement was not the subject of challenge on this appeal. It does not appear to have featured in the other *Chapman* cases, but their facts suggest that the relevant costs ordered to be paid would not have been incurred, but for the exceptional conduct relied upon. In cases such as the present, where it is the intermeddling test rather than the real defendant test which falls to be applied, the formulation of that test by Phillips LJ in the passage in the *Chapman* case quoted above clearly incorporates a need to demonstrate causation, since it is the costs attributable to the intermeddling that the meddler is ordered to pay.

67. The judge found that there was a causative link between the non-disclosure of the limits of the cover and the incurring of costs by the uninsured claimants. But for the reasons already given the non-disclosure was not itself conduct by Travelers in relation to the uninsured claims which falls within the necessary requirement for unjustified intermeddling. It remains to consider whether the other aspects of Travelers' conduct in relation to the uninsured claims amounted to unjustified intermeddling and, if so, whether it had any causative consequence in relation to the incurring of costs by the uninsured claimants.

The relationship between the insured and uninsured claims

68. The starting point is that the Court of Appeal was right to depart from the judge's view that the uninsured claims were totally separate from the insured claims, so that they were no business of Travelers at all. On the contrary, all the claims, insured and uninsured, were being pursued together within a single group

action, by common solicitors. All the claims raised common issues which were ordered to be tried together by way of sample test claims. Although there were several defendant clinics, all the test cases were against Transform and, as already noted, it was mere happenstance that two of them (A and B) were insured and two (C and D) uninsured. At the time of the selection of the test claims, the limits of Travelers' cover had not been disclosed.

69. Transform were contractually entitled as against Travelers to have the defence of the common issues funded, regardless whether they arose in insured or uninsured claims. Thus Travelers' participation in the litigation of the common issues in claims C and D was not unjustified intermeddling in litigation in which Travelers had no legitimate business, but the involuntary engagement which arose from their status as insurers under the policies. Mr Hugh Preston QC for the respondents acknowledged this, up to a point, but submitted that this legitimate role of Travelers in the uninsured claims did not extend to funding the whole of their defence (a point not relied on by the judge) still less to decision-making about admissions or offers of settlement (two matters upon which she did rely). While those distinctions may be discernable conceptually, I consider that they are likely to break down in the real world of hostile group litigation, all the more so when, as here, the main issues in the litigation are common to the insured and uninsured claims alike. For example the offer of a drop hands settlement to uninsured claimants might well be taken as a sign of weakness in relation to the merits of the common issues, and therefore a sign of weakness in relation also to the insured claims.

Settlement and Admissions

70. Leaving aside non-disclosure of the limits of cover, the two aspects of participation by Travelers in the uninsured claims which the judge regarded as crossing the line were involvement in decision-making about whether Transform should make a drop hands offer to all the uninsured claimants, or make certain admissions in relation to their claims, in a context where Transform believed, rightly or wrongly, that Travelers' consent was required for both, pursuant to the terms of the policies.

71. As noted above, Travelers consented to the making of a drop hands offer to the uninsured claimants in July 2014, but the offer was not then made. Travelers withheld consent in early 2015, and its participation in the decision whether an admission of liability should be made to the uninsured claimants appears also to have occurred some time in 2015, but before the final settlement by agreement of the insured claims, ie at a time when the common liability issues were still live. By 2015 the uninsured claimants knew who they were and had resolved to continue with their claims, notwithstanding the impending insolvency of Transform, in part

for the specific purpose of recovering costs already incurred by means of a section 51 application against Travelers.

72. Against that background it is striking that there is no analysis by the judge of the question whether Travelers' conduct in relation to settlement or admissions in relation to the uninsured claims had any causative consequence in terms of the expenditure of costs sought to be recovered under section 51. This is in sharp contrast with her careful analysis of causation in relation to the non-disclosure of the limits of cover. It cannot be said that (as perhaps in some of the *Chapman* line of cases), causation was too obvious to need to be mentioned. The Court of Appeal did not appear to place reliance upon this aspect of Travelers' conduct, and conducted no causation analysis of its own. It therefore falls to this court to do so, if satisfied that the relevant conduct in relation to the uninsured claims amounts to unjustified intermeddling. That question also needs to be addressed afresh, because of the judge's erroneous view that the uninsured claims were entirely separate from the insured claims, such that Travelers had no business being involved in them at all.

73. Had it been necessary to do so I would have concluded that the judge was wrong to regard Travelers' involvement in settlement and admissions in relation to the uninsured claims (while the closely related insured claims were still live) as a sufficient crossing of the line to attract a section 51 order, either alone or in combination with any other matters. Contrary to the judge's view there were no other relevant matters, because she was (for reasons already given) wrong about non-disclosure of the limits of cover. The court should be slow to second guess jointly instructed solicitors where they allow the insurer a role in decision-making about claims raising common issues, notwithstanding that some of them, even as here a majority, are uninsured. Although the judge was far better placed as the manager of this litigation than this court to identify the relevant boundaries, her analysis was undermined by her over-rigid separation of the insured and uninsured claims into separate camps.

74. I am however content to rest my decision on the absence of any relevant causative link. By 2015 the uninsured claimants were pursuing their claims to a judgment with costs, in part so that they could seek to recover substantial expenditure already incurred by mid-2014 (while ignorant that they were uninsured) by means of a costs order against Travelers under section 51, as Mr Preston acknowledged during the hearing of this appeal. I cannot see how the offer of an admission of liability, still less a drop-hands offer (ie with each side paying their own costs) would have dissuaded the uninsured claimants from continuing to incur the cost of obtaining (in the event) default judgment, and summary judgment in relation to test claims C and D, once the insured claims had been settled and Travelers had withdrawn further funding.

75. I would add that there is to my mind at least some element of disingenuity in the respondents stoutly maintaining that, at the relevant time, the uninsured claims had nothing to do with Travelers when they were by then being pursued by the uninsured claimants for the purpose of obtaining a costs order against Travelers in due course. But that reflection was not advanced in the submissions of the appellant, and my decision is in no sense based upon it.

Conclusions

76. It may be convenient to draw together the threads of this rather long analysis into some concluding propositions. First, the underlying question, whether the non-party has either become the real defendant in relation to an insured claim, or intermeddled in an uninsured claim, is fundamental to the exercise of the section 51 jurisdiction, in insurance cases. It is the conduct of the non-party which matters, rather than the mere rarity of the case.

77. Secondly, the *Chapman* principles are useful guidelines for establishing whether the liability insurer has become the real defendant in all but name, in a case where some part of the claim (including the claim for costs) is or may lie outside the limits of cover, so that the insured has at least a prima facie joint interest with the insurer in the outcome of the litigation.

78. Thirdly , the *Chapman* principles are not likely to be of assistance where the question is (as here) whether the liability insurers crossed the line in becoming involved in the funding and conduct of the defence of wholly uninsured claims, as opposed to claims where there is limited cover. In such cases the insurer may cross the line by conduct falling well short of total control, and without becoming the real defendant, if the insurer intermeddles in the uninsured claim in a manner which it cannot justify.

79. But, fourthly, where there is a connection between uninsured claims and claims for which the insurer has provided cover, it may well be that the legitimate interests of the insurer will justify some involvement by the insurer in decision-making and even funding of the defence of the uninsured claims without exposing the insurer to liability to pay the successful claimant's costs. This is just such a case because of the very close connection between insured and uninsured claims, raising common issues to be tried together in test cases in group litigation, and the limited nature of Travelers' involvement in the uninsured claims.

80. Fifthly, causation remains an important element in what an applicant under section 51 has to prove, namely a causative link between the particular conduct of

the non-party relied upon and the incurring by the claimant of the costs sought to be recovered under section 51. If all those costs would have been incurred in any event, it is unlikely that a section 51 order ought to be made.

81. Sixthly, the non-disclosure of limits of cover by the defendant at the request of the insurer is unlikely to amount to relevant conduct, for as long as the law continues to make that non-disclosure legitimate.

82. Seventhly, asymmetry or lack of reciprocity in costs risk, as between the uninsured claimant and the defendant's insurer, is unlikely on its own to be a reason for the making of a non-party costs order against the insurer where, as here, the asymmetry arises because a claimant sues an uninsured and insolvent defendant and incurs several-only costs liability in group litigation.

83. Applied to this case, those conclusions mean that this appeal should be allowed. This is because, of the three elements of the conduct of Travelers which the judge regarded as crossing the line, the first (non-disclosure) was not unjustified intermeddling, although it did cause those costs to be incurred, while the second and third (decision-making about offers and admissions), even if amounting to unjustified intermeddling, which I doubt, plainly had no relevant causative consequences. The Court of Appeal's alternative route to the judge's conclusion, based essentially upon the asymmetry point, was in my view wrong for the reasons already given.

LORD REED:

84. I am respectfully in general agreement with the judgment of Lord Briggs, and wish only to make some additional observations directed towards three points. The first is that Lord Briggs's conclusion that an award of costs against a non-party may be justified where that person is a meddler in the proceedings, or is in substance a party to those proceedings, has historical antecedents in the practice of the English courts. The second is that the "real party" approach has also been adopted in other comparable jurisdictions. The third is that "exceptionality" is not in my opinion a necessary pre-condition of an award of costs against a non-party.

Historical antecedents

85. It may be worth explaining at the outset the historical background to the decision of the House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965, where the scope of the discretion conferred by section 51 of the Senior Courts Act 1981, as it is now known, was held to be sufficiently wide to allow

costs to be awarded against persons who were not party to the proceedings before the court.

86. Traditionally, costs were dealt with differently at common law and in equity, although it was possible in both types of proceedings for an award to be made against a person who was not a party to the proceedings, as I shall explain. With the fusion of the administration of law and equity under the Judicature Acts, section 16 of the Supreme Court of Judicature Act 1875 provided for rules of court, contained in the First Schedule to that Act, to regulate proceedings in the High Court and the Court of Appeal. Those rules of court contained, in Order LV, a single general provision regulating the award of costs. The rules scheduled to the 1875 Act were repealed by the Statute Law Revision Act 1883, and new rules, referred to as the Rules of the Supreme Court 1883, were made pursuant to section 19 of the Supreme Court of Judicature Act 1881. Order 65, rule 1 of those rules provided that, subject to the provisions of, among other things, the Judicature Acts and the rules of court, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, were within the discretion of the court or judge. In *In re Mills' Estate; Ex p Comrs of Works and Public Buildings* (1886) 34 Ch D 24 it was held by the Court of Appeal that the effect of the Judicature Acts and of Order 65 was not such as to confer any new jurisdiction to award costs, but was merely to regulate the mode in which costs were to be dealt with in cases where the court already had such jurisdiction. Parliament sought to overcome this restrictive interpretation by enacting section 5 of the Supreme Court of Judicature Act 1890, which was the statutory predecessor of section 51(1) of the Senior Courts Act 1981. The language of section 5 of the 1890 Act was, however, itself restrictively interpreted by the Court of Appeal, notably in *Forbes-Smith v Forbes-Smith* (1901) P 258 and *John Fairfax & Sons Pty Ltd v E C de Witt & Co (Australia) Pty Ltd* [1958] 1 QB 323, until the ground-breaking decision in *Aiden Shipping*.

87. Prior to the Judicature Acts, as I have mentioned, costs were dealt with differently at common law and in equity. The general position in common law proceedings was summarised by Blackburn J in *Mobbs v Vandenbrande* (1864) 33 LJ QB 177,180:

> "In ordinary cases, *where there has been no abuse of its process*, the court has no jurisdiction to order a person not a party on the record to pay costs." (Emphasis added)

In this context, it appears that the concept of an abuse of process was not narrowly confined. That can be seen, for example, in the judgment of Lord Abinger CB in *Hayward v Giffard* (1838) 4 M and W 194. In that case, the Court of Exchequer

refused to make an order for costs against a non-party to the action although he was interested in the outcome of the suit. His Lordship said at p 196:

> "If we were at liberty to consult equity and justice, we should probably make this rule absolute. But the authority of the courts at Westminster is derived from the Queen's writ, directing them to take cognisance of the suits mentioned in the writs respectively, and thus bringing the parties before them. This being so, they have no power to order any particular individual to come before them at their pleasure. In the present case, *if it could have been shewn that Spencer had committed any contempt of Court, or been guilty, in respect of this suit, of anything in the nature of barratry or maintenance, it would have been another matter*; but we cannot make any order against an individual who is not party to any suit before us, nor has been guilty of any contempt, but merely because he has an interest in the event of the suit." (Emphasis added)

It appears from Lord Abinger's reference to "anything in the nature of barratry and maintenance" that the court could have made an award of costs against a non-party who instigated the prosecution of groundless litigation or who intermeddled in proceedings contrary to the laws of maintenance and champerty.

88. There are also a number of examples of awards of costs against non-parties which were based on the conclusion that the non-party was the real plaintiff or defendant. For example, in *Doe dem Masters v Gray* (1830) 10 B and C 615, an order for costs was made in an action of ejectment against a parish council which had put a pauper into possession of the premises in question. Lord Tenterden CJ said at p 616:

> "In ejectment we can make the real party to the suit pay the costs."

Actions of ejectment could be regarded at that time as being in a special position by reason of the fictitious form of the proceedings, as Lord Abinger explained in *Hayward v Giffard* at p 197. However, the "real party" approach continued to be adopted in relation to actions of ejectment even after the fictitious form of action had been abolished by the Common Law Procedure Act 1852. For example, in *Hutchinson v Greenwood* (1854) 4 El and Bl 324 Lord Campbell CJ stated at p 326 that the court had jurisdiction "to order the persons, who really conducted the defence in an action of ejectment, to pay the costs, though they were not parties on

the record". Lord Campbell explained this on the basis that the real party had engaged in an abuse of process, stating (ibid):

> "The principle is that the individuals who order an appearance to be entered in ejectment, in the names of those not really defending the suit, abuse our process, and that, as they substantially are the suitors, we have jurisdiction to make them pay the costs."

89. The "real party" approach was not confined to actions of ejectment. For example, in *Hearsey v Pechell* (1839) 5 Bing (NC) 466, an action of trespass, the question arose whether the action should be stayed until a non-party provided security for costs. Tindal CJ said at pp 468-469:

> "The real question is, whether this is the action of the plaintiff, or substantially the action of Mr Wood [the non-party]. If it were an action which the plaintiff would not have brought but for the instigation and countenance of Wood, the case would fall within the principle of *Tenant v Brown* (1826) 5 B and C 208, and another case in the Court of King's Bench, where a master was compelled to pay costs for his servant, whom he had put forward as a defendant instead of himself."

90. An example of an award of costs against the "real party", in a different type of case from ejectment, is *In re Jones* (1870) LR 6 Ch 497, which decided, in the words of the headnote, that "where a solicitor engages to indemnify the plaintiff in a suit against the costs of the suit, and has the control of the suit, he will be ordered to pay to the defendants their costs of the suit when dismissed". Lord Hatherley LC stated at p 499 that the general principles of the court were perfectly well established upon the point:

> "The view of the court is, that when a solicitor takes upon himself the conduct of a suit by saying that he will indemnify his client against all costs - where the plaintiff is a mere puppet, and the real party suing is the solicitor - the court will hold the solicitor liable for all the expenses to which he has put the other parties by his conduct."

It was said by Sir Montague Smith in the Indian case of *Coondoo v Mookerjee* (1876) App Cas 186, 212 that the award of costs in *In re Jones* was based on the

court's disciplinary jurisdiction over solicitors, but the next case to be cited suggests that that may be too narrow a view. It is in any event noteworthy that the Lord Chancellor's dictum expressly mentions the need for a causal connection between the conduct of the non-party and the incurring of the costs for which he was held liable.

91. Another illustration is *R v Greene* (1843) 4 QB 646, which concerned relator proceedings brought by an indigent plaintiff who had been procured to bring them by an attorney. The reasoning does not however appear to turn upon the fact that the case concerned an attorney. Lord Denman CJ stated at pp 649-650:

> "Nothing, however, is more certain than that this court has in several instances granted costs against persons who have made affidavits without being strictly parties, especially against attorneys, who are considered as being before the court, and, as its officers, bring cases to its notice … We take the true rule to be that the court may adjudge from all circumstances who is the party, and give costs against any party, or against an attorney, if the affidavit of the person sought to be charged, or any affidavit produced by an attorney, shews good ground for imposing them upon them respectively."

A similar approach can also be seen in cases concerning next friends, such as *Palmer v Walesby* (1868) LR 3 Ch App 732.

92. In proceedings in equity, the award of costs was discretionary, and was said to be based on conscience and arbitrium boni viri: *Andrews v Barnes* (1888) 39 Ch D 133, 138. There are numerous cases concerned with the enforcement of awards made against non-parties, such as *Attorney General v Skinners' Co, Ex p Watkins* (1837) Coop Pr Cas 1 and *Sangar v Gardiner* (1838) Coop Pr Cas 262.

93. It is unnecessary for present purposes to reach any definite conclusions as to the circumstances in which, prior to the Judicature Acts, the courts might have made an order for costs against a non-party. It can however be seen from the examples cited that such awards were by no means unknown, even if the circumstances in which they were made were special in one respect or another. The position was in my respectful opinion aptly summarised by Mason CJ and Deane J, giving the majority judgment of the High Court of Australia in *Knight v FP Special Assets Ltd* [1992] HCA 28; (1992) 174 CLR 178, 190:

> "Having regard to the variety and the nature of the circumstances in which an order for costs was made against a person who was not a party according to the record, we cannot accept that there was before the Judicature Acts a general rule that there was no jurisdiction to order costs against a non-party in the strict sense. It is plain enough that the courts from time to time awarded costs against a person who, not being a party on the record, was considered to be the 'real party'. It may be that these cases are capable of being explained on various grounds, including the ground that the non-party ordered to pay costs was guilty of abuse of process, taking a very broad view of what constitutes an abuse of process, but to say that does not deny that there was jurisdiction to make an order for costs against a non-party even if the jurisdiction was exercised in limited circumstances only."

Other jurisdictions

(1) Scotland

94. By 1986, when *Aiden Shipping* was decided and the earlier decisions of the Court of Appeal were overruled, the general understanding that costs could not be awarded against non-parties was long established in England and Wales. In Scotland, on the other hand, where the courts have always possessed an inherent jurisdiction to award expenses (in English terminology, costs), the power to make awards against non-parties, without the necessity of establishing conduct which would merit condemnation as an abuse of process, has been recognised and exercised continuously since at least the 18th century (see, for example, *Leigh v Rose* (1792) Mor 4645), and the principles governing its proper exercise have been considered in a substantial number of cases of different kinds.

95. The power to award expenses can be exercised under Scots law against a person who, although not a party to an action, has the true interest in its subject-matter and the control and direction of the case. Such a person is known in civilian terminology as the verus dominus litis (the real master of the litigation), or more briefly as the dominus litis. Put briefly and in broad terms, the court is prepared to look beyond the person who is formally a party to the action, and to exercise its power to award expenses on the basis that another person is the real party in all but form: the person, that is to say, who is in reality conducting the suit and interested in its outcome.

96. In more precise language, the classic description of a dominus litis was given by Lord Rutherford in *Mathieson v Thomson* (1853) 16 D 19, 23:

> "There may be some difficulty in defining exactly what is a *dominus litis*; but I confess that I very much agree with what has been laid down by your Lordship [Lord President McNeill, later Lord Colonsay], and with the definition quoted from the civil law by Lord Ivory, that he is a party who has an interest in the subject-matter of the suit, and, through that interest, a proper control over the proceedings in the action. Now it will not make a person liable in the expenses of an action that he instigated the suit, or told a man that he had a good cause of action, and that he would be a fool if he did not prosecute it, or though he promoted it by more substantial assistance. It will not make him liable in the expenses of the suit that, while he does both of these things, he shall have some ultimate consequent benefit in the issue of that suit. But when you go a step further, and find a party with a direct interest in the subject-matter of the litigation, and, through that interest, master of the litigation itself, having the control and direction of the suit, with power to retard it, or push it on, or put an end to it altogether, then you have a proper character of *dominus litis*; and, though another name may be substituted, the party behind is answerable for the expenses."

97. As appears from that passage, the alleged dominus litis must, in the first place, have "the control and direction of the suit, with power to retard it, or push it on, or put an end to it altogether". Lord President Dunedin observed in *McCuaig v McCuaig* 1909 SC 355, 357 that

> "The true test of whether a party is or is not dominus litis is probably whether he has or has not the power to compromise the action."

98. Control and direction of the proceedings are not in themselves sufficient. The alleged dominus litis must also have an interest in the subject-matter of the action. As Lord Rutherford explained in the passage cited from his opinion in *Mathieson*, it is not sufficient that the non-party have "some ultimate consequent benefit"; rather, he must have a "direct interest in the subject matter of the litigation". The interest must, as Lord President Dunedin stated in *McCuaig v McCuaig* at p 357, be:

> "… the true interest in the cause, and by true interest I mean the entire interest, using that term not in the absolute sense, but as denoting the whole interest for all practical purposes."

99. The alleged dominus litis must also, of course, have caused the expense for which he is sought to be made liable. As Lord President Robertson stated in *Kerr v Employers' Liability Assurance Co Ltd* (1902) 2 F 17, 22:

> "The next point is this, what is the ground upon which a *dominus litis* is made liable in expenses? As I take it, it is simply the ground upon which everybody is made liable in expenses, and it is stated thus by Lord Jeffrey in *Irvine v Kilpatrick* (1847) 10 D 367 - 'If any party is put to expense in vindicating his rights he is entitled to recover it from the person by whom it was created,' - that is to say, by whom the expense was created."

To the same effect is the opinion of Lord Hunter in *Main v Rankin & Sons* 1929 SC 40, 43:

> "The principle upon which liability attaches to a dominus litis is the simple one that he is responsible for the expenses which have been caused to the other party in the litigation."

100. It was established long ago that the requirements of a dominus litis might be satisfied by a liability insurer conducting the defence of proceedings in accordance with a policy of insurance. The leading authority on the point is *Kerr v Employers' Liability Assurance Co Ltd*, in which an injured workman who had obtained an award of damages and expenses against his employer sought, after the employer became insolvent, to obtain an award of expenses against the insurer. It was accepted that, under the policy, the insurers had complete control of the conduct of the defence, that they had exercised such control, and that they also had the entire interest in the subject-matter of the action. The court found the insurer liable for the expenses of the action on the basis that it was the dominus litis.

101. Lord President Robertson stated at pp 21-22:

> "Now, if anybody other than the person whose name is printed as party in the record can be the *dominus litis*, I think this assurance company was. To begin with, to the person whose name was used it was immaterial whether the result of

> the action was success or failure; he was completely covered by his policy of assurance, and accordingly the assurance company very naturally stipulated in their contract that they, and not he, should have the control of the action, and should, of course, incur all liabilities resulting from that position. There are valuable illustrations, in the cases, of the relations which might constitute a man a *dominus litis*, but I do not cite any of them, for this reason, that I think that not one of them is clearer than, or, indeed, so clear as, the present case, of an assurance company who begin by stipulating that the insured shall give his name to them in order that they may conduct the action, and where, from that point onwards, he has nothing whatever to do with the conduct of the case. Therefore, that the assurance company was the *dominus litis* in this matter seems to me to be beyond all doubt."

Lord Adam reached the same conclusion at p 22 by reference to the opinion of Lord Rutherfurd in *Mathieson v Thomson:*

> "That the assurance company had an interest in the subject-matter of this suit is beyond doubt. They were ultimately liable to the employers for the damages, and a greater interest in this suit they could not have. And, having that direct interest in the suit, they had entire control of it. It is not disputed that the defenders claimed and obtained, as the insuring company, the absolute conduct and control of the suit. Therefore it appears to me that if ever there was a case where a party fell within the definition of Lord Rutherfurd it is this assurance company."

Several other cases of a similar kind can be found in the law reports. Claims of that nature have however seldom, if ever, been necessary since the enactment of the Third Parties (Rights against Insurers) Act 1930, now replaced by the Third Parties (Rights against Insurers) Act 2010.

102. I have not found in the reports any example of a Scottish case where the insurer was sought to be made liable beyond its contractual limit of cover or, as in the present case, was sought to be made liable for the expenses of an uninsured claim. In such a case, it would remain necessary to establish that the insurer had control of the conduct of the defence and had the real interest in its success or failure: requirements which might not readily be satisfied.

103. Finally, in relation to Scotland, it is relevant to note that there is no equivalent of the English law of maintenance and champerty. The discussion of "intermeddling" in the English cases, as the basis of an award of costs, has no equivalent in the Scottish case law.

(2) Other common law jurisdictions

104. It is also relevant to note the approach adopted in some other common law jurisdictions in the aftermath of the decision in *Aiden Shipping*. The position in Australia, in relation to jurisdictions conferring a discretionary power to award costs, analogous to that existing in England and Wales, was considered by the High Court of Australia in *Knight v FP Special Assets Ltd*. The court held that costs should be awarded against a non-party in a general category of case described by Mason CJ and Deane J at pp 192-193:

> "That category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made."

Later Australian decisions have identified a number of other situations in which an award of costs against a non-party may be appropriate, as for example in *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5.

105. The position in New Zealand was considered by the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Associated Industrial Finance Pty Ltd, Third Party)* [2004] UKPC 39; [2004] 1 WLR 2807, and was held to be similar to that in England and Australia.

Exceptionality

106. In *Symphony Group Plc v Hodgson* [1994] QB 179, the Court of Appeal sought to respond to Lord Goff's observation in *Aiden Shipping*, at p 975, that section 51 of the 1981 Act left it to the appellate courts to establish principles upon which the discretionary power conferred by that provision might be exercised. Balcombe LJ, with whom Staughton and Waite LJJ agreed, listed at pp 192-193 a

number of considerations to be taken into account. The first, and the only one which need be considered for present purposes, was the following:

> "An order for the payment of costs by a non-party will always be exceptional: see per Lord Goff in *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965, 980F."

107. This dictum has been treated in some later cases as imposing a requirement of exceptionality before an award of costs can be made against a non-party. Such a requirement or pre-condition would not, however, reflect the true import of the dictum on which Balcombe LJ's observation was based. What Lord Goff said was this:

> "In the vast majority of cases, it would no doubt be unjust to make an award of costs against a person who is not a party to the relevant proceedings. But, as the facts of the present case show, that is not always so."

Lord Goff was not suggesting that exceptionality was a pre-condition. He was merely observing that cases in which it is just to make a non-party costs order form only a small proportion of the total.

108. It is obvious that, as a general rule, orders for costs are made only against a party to the proceedings. That is because, in general, persons who are not parties do not have a sufficient connection with the proceedings to provide a proper basis for them to be held liable for the costs of the litigation. There are, however, circumstances in which considerations of justice may, in accordance with general principles, justify such an award against a non-party. Such cases might be described as exceptional in the sense that their outcome involves a departure from the general rule that orders for costs are made against a party to the proceedings, but not in the sense that their determination depends on the identification of some unique or extraordinary feature.

109. Indeed, exceptionality can scarcely be in itself an intelligible criterion for the making of a non-party costs order. A case may be exceptional in respects which have no bearing on the appropriateness of a non-party costs order. The case of *Donoghue v Stevenson* [1932] AC 562, for example, was exceptional in that it concerned a snail. It was also exceptional in that it raised a point of law of the greatest importance. Neither of those factors would have rendered it a suitable case for an award of costs against a non-party, if such a question had arisen. In order for such an award to be appropriate, there would have to be some factor present which

justified the making of the award. What is necessary, therefore, is to identify the relevant factor or factors.

110. In *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12, Phillips LJ, in a judgment with which Waller and Mummery LJJ agreed, sought to reformulate the relevant principles, refining his earlier analysis in *Murphy v Young & Co's Brewery* [1997] 1 WLR 1591. As Lord Briggs has explained, he identified two separate bases on which a non-party costs order might be made against a liability insurer: first, that he had intermeddled in the proceedings, or secondly, that he had the control and direction of the proceedings, and the true interest in them, so as to render him the real defendant. He listed at p 20 five factors which were held to make an award of costs against the liability insurer appropriate:

> "(1) the insurers determined that the claim would be fought; (2) the insurers funded the defence of the claim; (3) the insurers had the conduct of the litigation; (4) the insurers fought the claim exclusively to defend their own interests; (5) the defence failed in its entirety."

Those factors, which were also present in the Scottish case of *Kerr* discussed at paras 100-101 above, established control of the proceedings, the real interest in the subject-matter of the proceedings, and causation of the plaintiffs' costs. Phillips LJ's observation at p 21 that "in reality, it is the insurers rather than Mr Christopher who are the defendants" also expresses in English the idea conveyed in Latin by the expression "verus dominus litis". Phillips LJ also clarified the issue of "exceptionality". Having listed the features of the case which made it appropriate to make a non-party costs order, he added at p 20:

> "In the context of the insurance industry, the features to which I have just referred may not be extraordinary. But that is not the test. The test is whether they are extraordinary in the context of the entire range of litigation that comes to the courts."

111. The later English decisions concerned with liability insurers are mostly consistent with the approach adopted in *Chapman*, as Lord Briggs has explained. In addition to the cases cited by Lord Briggs, I would mention in addition the case of *Globe Equities Ltd v Globe Legal Services Ltd* [1999] BLR 232, where Morritt LJ, in a judgment with which Butler-Sloss and Sedley LJJ agreed, observed that the supposed requirement of exceptionality was based on what had been said by Lord Goff in *Aiden Shipping*, and should not be elevated into a precondition to the exercise of the power conferred by section 51. Echoing Phillips LJ in *Chapman*, he

commented, at para 21, that "the exceptional case is one to be recognised by comparison with the ordinary run of cases" where "the party is pursuing or defending the claim for his own benefit through solicitors acting as such".

112. That was also the approach of Lord Brown of Eaton-under-Heywood, giving the advice of the Judicial Committee of the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Associated Industrial Finance Pty Ltd, Third Party)*. In a dictum subsequently repeated by the Court of Appeal in *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 23; [2016] 4 WLR 17, para 62, he stated at para 25:

> "Although costs orders against non-parties are to be regarded as 'exceptional', exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense."

So understood, "exceptionality" is in reality of little if any significance, since no judge would contemplate making a non-party costs order in "the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense".

LORD SUMPTION:

113. The common law has an instinctive reluctance to make orders in private law litigation which affect non-parties, but also a long-standing aversion to the unjustified interference by non-parties in other people's litigation. The first of these instincts is founded on elementary principles of justice. Non-parties may well have a more or less direct commercial interest in the outcome but do not thereby assume the risks associated with contested litigation. Nor are they bound by rules of practice in the way that parties are. At the same time, there are cases where a person who is not on the record may nevertheless be the real party. He may, for example, be an equitable assignee or, arguably, a subrogated insurer, or have some other interest entitling him to litigate in the name of another. The second instinct depends for its practical application on what constitutes interference and what is unjustified, large questions which vary with changing attitudes to litigation. Historically, it arose from the concern of the law with the implications of contested litigation for public order, but is now founded mainly on a purely procedural concern for the fair and efficient conduct of court proceedings. In the context of costs orders against non-parties, the first instinct is reflected in Lords Briggs's "real defendant" test, and the second in what he has called the "intermeddling" test. I agree with this taxonomy, and more broadly with Lord Briggs's analysis of the principles and their application to this case.

114. We are concerned on this appeal with the position of a liability insurer exercising a contractual right to direct the conduct of the defence on behalf of his assured. The relationship between a liability insurer and his assured has a number of specific features which are not necessarily common to other cases in which costs orders are sought against non-parties. In the first place, although the insurer is potentially liable to meet a third party's claim against his assured, that liability is owed only to his insured and not directly to the third party, subject to special statutory regimes such as that applicable to insolvent assureds under the Third Parties (Rights against Insurers) Act 2010. In this respect English law differs from many civil law systems which allow direct actions against insurers as a matter of course. Secondly, the insurer is not even liable to his assured during the litigation, since his liability arises only once the assured's liability has been ascertained by judgment, award, admission or agreement. Thirdly, the insurer's contractual right to direct the conduct of the litigation, which is an almost invariable incident of liability policies, is a form of compulsory agency. It is a right to direct it in his assured's interest, and not his own, even though their interests will usually coincide. The solicitor whom he appoints is the assured's solicitor, who owes all the usual professional duties to the assured and is entitled to look to the assured for his fees, notwithstanding that his instructions come from the insurer.

115. These features, and particularly the last, mean that the insurer cannot be regarded as the real defendant. He is simply in a position where (i) by virtue of his contractual obligations to the assured, he is liable to suffer a detriment if the assured loses; and (ii) by virtue of his contractual right against his assured, he is entitled to direct the conduct of litigation in his assured's interest. Both are common to other relationships which non-parties may have with a defendant without necessarily being at risk in costs, for example his solicitor or other litigation agent in case (i), or a liquidator bringing a claim in the company's name in case (ii). Neither factor is any concern of the claimant, whose concern is only with the defendant. The claimant may hope or even expect the defendant to be insured. But he has no legally recognised right to proceed on that basis and must accept the risk, commonplace in litigation, that he is not.

116. That leaves unjustifiable intermeddling as the only basis on which a liability insurer might be at risk of having a costs order made against him. Cases in which a costs order may be made against a liability insurer on this basis are likely to be rare. What may make a non-party's involvement in litigation an "unjustified intermeddling" is the absence of any interest in the litigation recognised by the law. That need not necessarily be a legal interest. But a liability insurer has an obvious legal interest in the performance of his contractual duties under the policy and the exercise of his contractual rights. Of course, that interest is limited to the defence of insured claims and different considerations may arise if he steps outside that role. But, as the present case illustrates, where insured and uninsured claims are at issue in the same litigation, the proper defence of insured claims may

involve steps which directly or indirectly affect uninsured claims. This is an area in which a person conducting or directing the conduct of litigation is entitled to a large margin of judgment and hindsight is not usually an adequate tool for assessing how he exercises it. If he acts in good faith in the interest of the assured qua the defendant to insured claims, he should not incur liability in costs. As at present advised, I would expect this to be equally true of the case where the potential liability of the assured is subject to a limit of cover which is exceeded, but that is not an issue which needs to be examined on this appeal because it does not arise on the facts.

117. I too would allow this appeal.