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A regular solicitor update on legal expenses insurance from Temple Legal Protection

temple legal protection

Recoverable ATE insurance premiums and CFA success fees do not breach Article 10 rights

In a landmark ruling the Supreme Court rejected three appeals brought by leading newspaper publishers, who had tried to assert that payment of CFA success fees and ATE insurance premiums in defamation and privacy proceedings breached their freedom of expression rights under Article 10 of the European Court of Human Rights.

The court heard appeals from the defendants in Flood v Times Newspapers Ltd, Miller v Associated Newspapers Ltd and Frost and Others v MGN Limited. Temple insured Miller and eighteen of the claimants in Frost and Others. Each appellant pleaded that the Supreme Court should follow the ECtHR ruling of MGN v UK, which declared recoverability of additional liabilities in the United Kingdom to be in breach of Article 10.

This would have meant that the claimants, having brought their claims on a 'no win, no fee' basis over a number of years, would not recover the CFA success fee or ATE insurance premium from the newspaper publishers, and would potentially have had to meet this liability themselves.

Lord Neuberger stated that one of the main questions before the court was whether, as put forward by the defendants, domestic law should reflect MGN v UK as a general rule.

This rule would state: 'where a claim involves restricting the defendant's freedom of expression, then at least where the defendant is a newspaper or broadcaster, it would, as a matter of domestic law, normally infringe the defendant's Article 10 rights to require it to reimburse the success fee and ATE premium'.

But by ruling that the ruling in MGN v UK was binding, Lord Neuberger stated that the Supreme Court would create various complications for the government. He went on to say that 'even if the answer… is that the rule applies… the orders for costs made in the three cases should not be varied'. The decisions on each appeal thereon were reached on the presumption that MGN v UK should be followed, but strictly on the basis that the Court was not holding it to be binding.

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Whilst acting on this presumption and in concluding its application to the Miller and Flood defamation cases, it was held that the Court would be 'wreaking a plain injustice' by taking away rights conveyed to the claimants which enabled them to pursue their successful claims.

Depriving the claimants of the ability to recover these costs would also breach Protocol 1 Article 1 of the European Convention of Human Rights – the claimants had incurred financial obligations in reliance on a legal act (signing up to CFAs and insurance policies) and they therefore had a legitimate expectation that their legal action would not be retrospectively invalidated to their detriment.

This position was elaborated on by Lord Neuberger in his further comments that amendments to the costs orders would undermine the rule of law; citizens act on the presumption that the law is as set out in legislation, and that the law cannot undo retrospectively the law upon which they once committed themselves to act.

It was argued by the respondents that in practical terms, neither the lawyers nor the insurers of the claimants would seek payment in the event that the additional liabilities were removed from the orders for costs; the Court noted that, in such a situation, the lawyers would then lose their Protocol 1 Article 1 rights.

The ATE premiums and CFA success fees in these cases were therefore to be left within the orders for costs as the claimants should not be deprived of their legitimate expectations. Either the claimants or the newspapers were due to suffer an injustice, and it was noted that the injustice would be far more substantial for the former.

In determining whether MGN v UK applied to Frost and Others, Lord Neuberger stated that it would need to be determined whether such a principle would apply where the defendant had obtained information illegally by phone hacking, and where the information illegally obtained had not been in the public interest.

It was held that where a newspaper publisher had been successfully sued for phone hacking, it would not breach the publisher's human rights to freedom of expression or undermine the importance of public debate that newspapers play in a democracy, if they were obliged to pay additional liabilities.

IN OUR VIEW

This Judgment upholds parliament's intent; MGN v UK ruled these additional liabilities would breach human rights, but parliament has since protected their recoverability in certain areas of litigation in law under LASPO.

Temple has a long-term commitment to and experience in supporting defamation and privacy proceedings, and continues to be the lead ATE insurer for this area of work. We provide ATE insurance and disbursement funding for these types of claims, many of which have resulted in landmark judgments and have shaped the development of this high profile area of law.

To find out about ATE insurance for Defamation and Media Litigation for your firm and clients please call our commercial team on 01483 577877 or send an email to david.chase@temple-legal.co.uk

Jack Monroe sues Katie Hopkins for libel with Temple ATE Insurance

Writer and blogger Jack Monroe successfully sued Katie Hopkins for £24,000 damages plus costs last month, for defamatory remarks made on the social media platform Twitter.

The respondent published two posts averring Ms Monroe was involved with an anti-austerity demonstration that took place shortly after the 2015 general election, which specifically involved vandalism of war memorials in Whitehall.

The march turned violent, and it was noted as fact that the plaintiff was not present in the demonstration or privy to the vandalism.

A columnist at a left wing publication wrote an article condoning the march; Hopkins then took to Twitter thus: "@MsJackMonroe scrawled on any memorials recently? Vandalised the memory of those who fought for your freedom".

The respondent had misdirected the message, but a further comment followed: "Can someone explain to me - in 10 words or less - the difference between irritant @PennyRed and social anthrax @Jack Monroe".

Having sent the initial post by accident to the plaintiff, no apology was forthcoming when it was realised the post had been misdirected and instead Hopkins restated the defamatory remarks.

With no offer of apology or settlement offer forthcoming, proceedings were issued. Before going to trial, the pleadings stated the respondent had caused serious harm to the plaintiff as the allegations were inherently serious and the defendant had a large online following on social media.

Warby J held that both posts carried the meaning that the plaintiff approved or condoned vandalism of war memorials, which was defamatory. The defamatory posts in turn caused distress and damage to the plaintiff's reputation.

The claimant solicitor's view

Jack Monroe's solicitor Mark Lewis said: "Temple has been the key to unlocking justice. Without ATE protection Jack would simply not have been able to fight such an important case and clear her name from such dreadful allegations.

Bluntly, without Temple's help Jack would have had no choice but to have accepted Hopkins lies about her".

To find out about ATE insurance for Defamation and Media Litigation for your firm and clients please call our commercial team on 01483 577877 or send an email to david.chase@temple-legal.co.uk or jacob.white@temple-legal.co.uk

Plevin v Paragon Personal Finance Ltd [2017] UKSC 23 sees recoverability of additional liabilities preserved for certain cases

Additional liabilities recoverable from losing parties under the Access to Justice Act 1999 remain recoverable where they have been amended to cover appeals in the post-LASPO era.

Having heard from the appellant that variations to a pre-LASPO CFA and ATE policy constituted new agreements that were not 'in relation to proceedings' within the wording of ss.44(6)-46(3) LASPO and therefore not recoverable, the Supreme Court held that such amendments did not create new agreements and any increase in insurance cover or extension of retainer was for the purpose of the original underlying dispute which did not constitute distinct proceedings.

Whilst "proceedings" is not defined within the statute, its meaning would derive value from its context; the purpose of the remaining exemptions enabling certain types of additional liabilities to remain recoverable was to preserve specific rights available under the previous law.

This purpose would be defeated if the courts applied a rigid interpretation of different stages within the same litigation.

On the facts, the CFA had been amended to include an appeal following the underlying case, and was still in action within its original terms.

The ATE policy had been topped-up to cover the risk of losing what the respondent had already been awarded, by virtue of having the policy in place.

To find out more about how our ATE insurance and funding can work for your firm and your clients please call our commercial team on 01483 577877 or send an email to david.chase@temple-legal.co.uk or jacob.white@temple-legal.co.uk

Damages Based Agreements

As litigation costs increase and debates over access to justice ensue, solicitors are under renewed pressure to provide clients with a range of options to fund their case and transfer risk, which includes advising on utilising all options available.

Whilst traditional retainers have remained the instinctive choice for practitioners, a recent costs Judgment has demonstrated how law firms are beginning to change course and adopt new options.

The claimants in Harlequin Property (SVG) Ltd and 2) Harlequin Hotels and Resorts Ltd v Wilkins Kennedy instructed their solicitor on a Damages Based Agreement (DBA); this provided that no fee would be paid to the solicitor until the conclusion of the case and any fee would be a percentage of any damages recovery obtained against the defendant. If the claim were unsuccessful, the solicitor would gain nothing.

The claim itself was an action brought against an accountancy firm for failing to advise that the claimants, a holiday resort developer, should enter into a formal contract with a building contractor.

The contractor was paid substantial sums without any detailed agreement about the scope or valuation of the works; weekly payments were made regardless of what work was carried out and the agreement was entered into by the claimants on the advice of the defendant, who also provided business and accountancy advice to the contractor.

The contractor began work in 2008 and the agreement was terminated in 2010 due to allegations that the works were delayed or not carried out at all. Damages were sought from the defendant.

In the Rolls Building Coulson J held that the defendant was in breach of contract and was negligent in failing to provide adequate advice. It was noted that the claimants would not have sought a formal contract if they were so advised, but had they received proper advice about the need for a contractually binding valuation process, any agreement would have incorporated this process and limited the third party's costs to a reasonable amount. The claim failed on various other points but the successful claim was substantial in terms of quantum.

In dealing with costs and the DBA, Coulson J noted r.44.18 which confirms such agreements do not affect the making of any costs orders. It was clear the holiday resort developers were successful regardless of their failure on two out of the three issues pleaded, and they sought their costs.

Counsel for the defendant argued that the draft bill relied upon by the claimants, having been based on the DBA, did not provide the figures incurred but indicative figures; the Judge agreed however with Mr Davidson QC who averred the claimants solicitor recorded costs on the standard basis and that the bill did not therefore contain an unreliable estimate of fees.

Taking into account that the claimants had been unsuccessful on several counts, the total bill was reduced by 40% to £3 million. Two thirds of the claimant's bill was awarded as an interim payment on account of costs with the Judge 'confident that not less than that will be recovered on final assessment'.

Whilst DBAs are yet to be used regularly, this case highlights how new retainers can be beneficial for clients who lack funds to pay lawyers throughout the life of a case and yet still be commercially viable for law firms.

Whilst this method of funding involves firms taking some risk, for the right case, the right opponent and the right client, it is likely that such retainers will gain popularity in the near future for commercial disputes.

To find out more about how Damages Based Agreements can work for your firm and your clients please call our commercial team on 01483 577877 or send an email to commercial@temple-legal.co.uk

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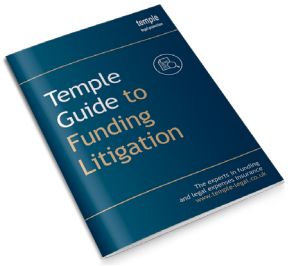
The Temple Guide to Litigation Funding



The third party funding market is rapidly developing and now an established option for clients, but is not the only option for clients without funds. With that in mind, as one of the leading underwriters of legal expenses insurance and acknowledged experts in funding litigation, we're sharing our knowledge and expertise with you.

The Temple Guide to Funding Litigation is required reading for solicitors, barristers, costs draughtspersons and in-house legal counsel and gets to the heart of what you need to know. In the Guide you'll find:

- Key considerations when identifying appropriate funding options
- Retainer alternatives – advantages and disadvantages
- A solicitor's duty to advise on different methods of funding
- What's best for your firm v what's best for your client
- Terminology explained – DBA? CFA or DCFA? ATE or BTE?
- Third Party Funding - what to consider and what you should avoid
- ATE for Commercial litigation & Clinical negligence/Catastrophic injury

To download your copy of the Temple Guide to Funding Litigation please click here. The guide is provided as a downloadable PDF.

The Professional Choice for Professional Negligence Lawyers

2017 sees Temple continue their long and successful association as the chosen provider of ATE insurance cover to the PNLA. At their most recent seminar in March we met many PNLA members who benefit from this and felt a reminder about this partnership would be of interest to you.

- The PNLA is at the forefront of promoting the education of lawyers specialising in this field and lobbies on behalf of claimants pursuing actions for professional negligence as well as being committed to improving dispute resolution in this area of law.
- PNLA networking activities take place in a convivial atmosphere, with Temple providing speakers and representatives for training conferences taking place throughout the year.
- Temple offers PNLA members ATE insurance cover from a delegated Scheme, where they have a number of cases to insure in any one year, or for individual cover through a simplified proposal form.

Temple would be delighted to discuss individual cases with you and give you details of our PNLA delegated ATE insurance scheme. Please call 01483 577877 to arrange for Temple to visit your litigation team or send an email to david.chase@temple-legal.co.uk or jacob.white@temple-legal.co.uk

Team News and Contacts

Jacob moves up to Underwriter

Jacob White, well-known to many law firms, clients and intermediaries since he joined Temple in 2014 has recently been promoted to Underwriter in the Commercial Team.

Working closely with Senior Underwriter David Chase he reviews and provides costs solutions for all types of commercial and business litigation.

He also assists with the development of Temple's ATE commercial business and supports the team with audits. Jacob is also currently studying the GDL part-time at the University of Law.

Jacob can be contacted on 01483 514411 or by email to jacob.white@temple-legal.co.uk

Alternatively please contact Senior Underwriter David Chase on 01483 514424 or by email to david.chase@temple-legal.co.uk

David has extensive and varied experience in risk analysis and, case management. He can consider all types of commercial litigation, professional negligence and insolvency matters.