IN THE COUNTY COURT AT NEWCASTLE UPON TYNE

Case No: B54YJ494

Hearing date: 11th August 2017

Before:
HIS HONOUR JUDGE FREEDMAN

B E T W E E N:

DEBORAH BOWMAN — Claimant

and

NORFRAN ALUMINIUM LIMITED (1)
R M EASEDALE AND CO LIMITED (2)
NORFRAN LIMITED (3) — Defendants

MR S BROWNE QC appeared on behalf of the Claimant
MR K NAZIR appeared on behalf of the Second Defendant

JUDGMENT

HHJ FREEDMAN:

Introduction.

1. The court is asked to determine two applications, which are inextricably linked:

(1) The Application of the second defendant that paragraph 3 of the Order dated 28 June 2017 (there be no order as to costs between the claimant and the second defendant) be set aside and the claimant pays the costs of the second defendant pursuant to CPR 38.6, the claimant having discontinued her action against the second defendant.

(2) The Application of the claimant that if such an Order is made under (1), the order may not be enforced due to the operation of Rule 44 CPR Part II, and in particular Rules 44.13 and

44.14, as a result of the operation of Qualified One-Way Costs Shifting ("QOCS").

2. The first and third defendants are not concerned with these applications and, accordingly, they did not attend the hearing. The claimant's claim against the first and third defendant was compromised on the day of trial, on 28 June 2017 when they jointly agreed to pay the claimant damages in the sum of £20,000 in respect of her injuries.

Background.

3. The claimant bought a claim for damages for hand/arm vibration syndrome and carpal tunnel syndrome in both wrists, arising out of her employment as a trim shop operative. Liability and causation were in issue but, as indicated above, on the day of trial the claimant's claim was compromised by the first and third defendants.

4. As against the second defendant, the claimant discontinued her claim by Notice dated 22 November 2016. The claim was discontinued when it became clear that the claimant was never in fact employed by the second defendant. The claim, however, was brought originally against all three defendants because according to the HMRC schedule, the claimant had been employed by the first, second and third defendants from 2003 onwards. The information available to the claimant's solicitors at the time of service of the proceedings (5 October 2015) was to the effect that in June 2009, the second defendant had purchased the assets of the first defendant, but approximately one month later, the third defendant was created as a separate company. Notwithstanding the incorporation of the third defendant, it appeared to be the case that the payroll of this company continued to be undertaken by the second defendant until April 2010.

5. Given the uncertainty about the involvement of the second defendant, very sensibly, at the time of serving the Particulars of Claim, the claimant's solicitors sought confirmation that the second defendant had, by virtue of TUPE, been transferred to the third defendant. The response of the second defendant, by a letter dated 14 December 2015, was to the effect that the second defendant was only involved for one month and the payroll was done for administrative reasons only. DAC Beachcroft invited the claimant to discontinue against the second defendant. On 23 December 2015, a defence was filed on the second defendant in which it was asserted:

'd. At no point did the claimant work for the second defendant. She was employed by the first defendant and subsequently the third defendant.

e. In the circumstances, the second defendant's involvement, if any at all, (which is denied) is for the one month between when the assets were purchased from the administrator on 24 June 2009 to when the third defendant started trading on 27 July 2009'.

6. On 3 June 2016, the second defendant through its then solicitors, Horwich Farrelly, offered to bear its own costs if the claimant discontinued by 10 June 2016. On 7 June, and again on 9 June 2016, the claimant asked for evidence that the second defendant did not employ her. On 14 October 2016, the defendant served a witness statement from Graeme Watt as to the corporate history. One month later, both the first and third defendants confirmed that they did not assert that the claimant was employed by the second defendant. This prompted discontinuance of the claim against the second defendant, six days later.

Costs of discontinuance.

7. CPR 38.6 provides:

'(1) Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant'.

8. The notes to the *White Book 2017 (p.1195)* summarises the principles upon which the court should base its decision if it is to "order otherwise" under Rule 38.6 (1). The claimant must show:

(1) A change in circumstance; and

(2) Some form of unreasonable conduct on the part of the defendant.

It follows that in the absence of a change in circumstance and some form of unreasonable conduct, there will be no good reason to depart from the usual rule that a claimant who discontinues must pay the costs of the party in respect of whom the action has been discontinued.

Claimant's submissions.

9. Mr Browne QC seeks to persuade me that a change of circumstances occurred when the statement of Graeme Watt was served in October 2016, which served to explain the inaccuracy of the HMRC schedule and the wage slip records; and when the first and third

defendants confirmed that the claimant was not employed by the second defendant.

10. As to unreasonable conduct, Mr Browne points to the fact that the second defendant failed to comply with the two requests made in June 2016 for evidence to demonstrate the claimant was not in fact employed by the second defendant. He also relies upon the fact that at no stage did the second defendant seek to strike out the claimant's claim but, rather, allowed it to proceed for over a year until service of witness statements.

My ruling.

11. Despite Mr Browne's bold submissions, in reality, I do not think it can be said that there was a change of circumstances merely because a witness statement was produced verifying that which was pleaded in the defence and which had been asserted in a letter from DAC Beachcroft. It seems to me that once the defence had been served along with a statement of truth, the claimant knew or ought to have known that the claim could not properly be pursued against the second defendant. Furthermore, it is of note that neither the first nor the third defendant sought to suggest in their respective defences that the claimant was employed by the second defendant. If the claimant required further confirmation that they would not be alleging employment of the claimant on the part of the second defendant, this could have been achieved by merely asking the question. The claimant did not need to wait until November 2016 before obtaining confirmation from the first and third defendants.

12. It follows that I am unpersuaded that there was any or any material change of circumstance between December 2015 and November 2016.

13. Although, perhaps, academic in the light of my finding as to an absence of change of circumstances, I am equally unpersuaded that there was unreasonable conduct on the part of the second defendant. The second defendant was not obliged to serve a witness statement until such time as the court made an order for the provision of witness statements. It seems to me that the second defendant acted reasonably in making its position abundantly clear in its defence and in correspondence. Furthermore, far from acting unreasonably, it made a very reasonable offer to bear its own costs if the claimant discontinued by 10 June 2016. In my judgement, the prudent course for the claimant would have been to have accepted that

offer.

14. I therefore see no basis for departing from the usual rule that the claimant should pay the costs of the second defendant upon service of the notice of discontinuance.

Claimant's application.

15. Having found that the claimant is liable to pay the second defendant's costs, the question which then arises is whether the claimant is entitled to the protection of QOCS. The second defendant agrees that the claimant's claim, being a claim for damages for personal injuries, is subject to QOCS. However, it is argued on behalf of the second defendant that it is entitled to set off its costs against the damages, namely the sum of £20,000 to be paid by the first and third defendants to the claimant.

16. As against the above, it is argued on behalf of the claimant that the underlying premise of the QOCS scheme is that where a claimant is ordered to pay the costs of a defendant, the claimant never actually pays those costs but instead, sets them off against the damages payable by that defendant. Accordingly, it is submitted that the "set off" can only be in relation to the proceedings against the second defendant and since there is to be no payment of damages by the second defendant, there is nothing to set off. What is said is that if damages paid by the other defendants is taken in to account, there is in fact no set off but rather a payment, which is not permitted under the QOCS regime.

The background to QOCS.

17. The QOCS regime came in to effect on 1 April 2013 following what are loosely referred to as the Jackson reforms. I have helpfully been referred to chapters 9 and 19 of the **Review of Civil Litigation Costs: Final Report** drafted by Jackson LJ in December 2009. In essence, in the context of personal injury claims, Jackson LJ concluded that the protection afforded to legal aid claimants in relation to the recovery of costs should apply generally, in return for After the Event (ATE) premiums no longer being recoverable from insurers. The evidence collated by the Jackson committee served to show that the non-recovery of costs by a winning defendant was well off set by the savings consequent upon a claimant no longer being able to claim ATE premiums as recoverable costs from a defendant.

18. The general thrust of the Jackson reforms were approved by the Civil Procedure Rules Committee save that the test of *reasonableness* in the context of what costs should be paid by a losing claimant was not adopted and does not feature in the rules as drafted. The Civil Procedure Rules Committee also considered other aspects of personal injury litigation where QOCS might or might not apply. Specifically, of relevance to this case, consideration was given as to what the position should be in the event of a claim being discontinued. In its response to the Ministry of Justice's Commission note entitled **Implementation of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012: Civil Litigation Funding and Costs – issues for further consideration by the Civil Justice Council,** the committee expressed this view about discontinuance and QOCS:

'90. Again, we start with the position as stated in the MoJ's Commissioning Note, which is that QOCS protection will be allowed in claims that are discontinued during proceedings and for appeal proceedings. This is straightforward and was generally agreed by the group when it first considered the points'.

After noting that insurers considered that it was unfair if QOCS protection were to be allowed as a matter of course when proceedings were discontinued, the committee said this:

'94. First, that allowing QOCS protection in claims which are discontinued after proceedings would disadvantage defendants since they would have been put to irrecoverable cost as a result of the now-discontinued claim. That is indeed the case, but the outcome is consistent with the general policy aim of QOCS protecting claimants who are not, in broad terms, successful'.

Thus, the thinking (as reflected in the Rules) was that there should be no different approach, in principle, in relation to costs, where proceedings have been discontinued as opposed to a situation where a claimant has been unsuccessful at trial.

The rules.

19. Before citing the rules themselves, it is perhaps convenient to make reference to the explanatory memorandum to the Civil Procedure (Amendment) Rules 2013, which says as follows:

'Introducing rules for a new system of qualified one-way costs shifting (QOCS) in personal injury cases, devises an alternative to after the event (ATE) insurance. The effect of QOCS

is that a losing claimant will not pay any costs to the defendant, and a successful claimant against who a costs order has been made (for example, where the claimant does not accept and then failed to beat the defendant's "Part 36" to settle) will not have to pay those costs except to the extent they can be set off against any damages received. QOCS protection will however be lost all together if the claim is struck out or is found to be fundamentally dishonest…'.

20. The starting point in the rules is CPR 44.13 and, insofar as material, reads as follows:

'(1) This section applies to proceedings which include a claim for damages –
(a) for personal injuries'.

44.14 (1) reads as follows:

> 'Subject to Rule 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant.
>
> (2) Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.
>
> (3) An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record'.

21. CPR 44.15 contains the exceptions to QOCS where the permission of the court is not required to enforce orders for and, importantly, it provides that orders for costs *may be enforced to the full extent of such* orders. Permission is not required where *the claimant has disclosed no reasonable grounds for bringing the proceedings; the proceedings are an abuse of the court's process;* or *the conduct of the claimant…is likely to obstruct the just disposal of the proceedings.*

22. CPR 44.16 is concerned with the situation where *the claim is found on the balance of probabilities to be fundamentally dishonest*. In that event, the court can give permission to make an order for costs against the claimant, and the order for costs (as with CPR 44.15) *may be enforced to the full extent of the orders for costs*.

23. There is, therefore, a fundamental difference between CPR 44.14 and 44.15/44.16. Whereas CPR 44.14 permits enforcement of costs against only orders for damages and

interest made in favour of a claimant, 44.15/16 allows recovery of costs *in toto.* The difference between the rules was subject to a careful analysis by HHJ Dight in *Darini and another v The Markerstudy* (24/4/2017) at paragraphs 13-24.

Interpretation of the rules.

24. It should be noted at the outset that it is clear that the QOCS provisions are a self-contained regime. Such is plain from the observations of Vos LJ in *Wagenaar v Weekend Travel Limited* [2015] 1 WLR 1977. In the result, there is no discretion for a court to make any order different from that which flows from QOCS.

25. Further, it is clear that what is envisaged pursuant to the provisions of CPR 44.14 is a set-off. It seems to me that the way in which CPR 44.14 has been drafted is such that it is not susceptible to any other construction. Indeed, I do not understand Mr Nazir, on behalf of the second defendant to be arguing the contrary.

26. However, because at the heart of this dispute is the issue as to whether costs can be set off against damages awarded to a claimant by another defendant, it is perhaps helpful to see what has been said about a set-off in other cases. In particular, the position was discussed in *Lockley v National Blood Transfusion Service* [1992] 1 WLR 492 where the claimant had the benefit of a Legal Aid certificate, and the defendant was looking to set off its costs against the claimant's damages. In the lead judgment of Scott LJ, at p.495f-g:

> 'The operation of a set-off does not place the person whose chose in action is thereby reduced or extinguished under any obligation to pay. It simply reduces or extinguishes the amount the other party has to pay. The operation of a set-off, in respect of the liability of a legally assisted person under an order for costs does not require the legally aided person to pay anything. It does not lead to costs being recoverable against the legally aided person'.

Defendant's submissions.

27. Notwithstanding what a set-off imports, namely that a claimant should not be required to pay any money to another party, nevertheless Mr Nazir submits that on a plain reading of CPR 44.14 a defendant is entitled to recover its costs from the claimant out of damages paid to the claimant by another defendant. He starts from the proposition that CPR 44.13 refers to *proceedings* which he takes to mean the entirety of the claim, in this instance against all

three defendants. It is, he says, one indivisible claim albeit that there are three defendants and that is what is intended by the use of the word *proceedings.* He then turns to the words of CPR 44.14 and submits that the proper interpretation of "any orders for damages" must cover orders for damages made against other parties to the proceedings. Accordingly, it is his contention that because the second defendant's claim for costs arises from the same proceedings for personal injury as the claim against the first and third defendants, the second defendant should be entitled to recover its costs from the damages paid out to the claimant by the other two defendants.

28. Further, Mr Nazir argues that if a purposeful approach to interpretation of the rules is adopted, the conclusion is the same. He emphasises that underlying the Jackson reforms was a concern that litigants should not be exposed to the risk of financial loss and possibly ruin in having to pay the defendant's costs. Accordingly, he submits that in permitting a defendant to recover its costs from damages paid by another defendant the court would be acting in accordance with the spirit of the Jackson reforms because the claimant is not in fact suffering any financial loss. In other words, he is still protected to the extent that he is no worse off financially than if he had not pursued his claim for damages. He also points out that the Civil Justice Council considered that the objective of QOCS was to protect *claimants who are not, in broad terms, successful.* The claimant, here, he says has been successful.

29. Mr Nazir's final point is that if it had been the intention of the Rules Committee to restrict recoverability of costs so that a defendant could only recover its costs against damages paid by that particular defendant, the rules would have so provided. As it is, he says that CPR 44.14 does not in any way limit the enforcement of a costs order against damages payable by a co-defendant.

Claimant's submissions.

30. Understandably, Mr Browne focuses heavily on the concept of set off. As Scott LJ observed (SUPRA) an order for set off does not give rise to any obligation to pay over money, but rather it reduces or extinguishes the amount the other party has to pay. Accordingly, Mr Browne submits that if the claimant here has to pay costs out of damages

paid to her by the co-defendants, such runs contrary to the whole notion of a set-off. He puts it this way: 'The essence of a set-off is that there are cross claims between a claimant and the same defendant, which predicate a setting off of liability'. In short, Mr Browne submits that a set-off is based on a mutuality of liabilities between the paying and the receiving party.

31. Nor does Mr Browne accept the defendant's interpretation of the word *proceedings* as used in CPR 44.13 (1). The term proceedings is not defined within the CPR, but Mr Browne places some reliance upon what Lord Sumption said in the case of *Plevin v Paragon Personal Finance* [2017] UKSC 23. Paragraph 20:

> 'The starting point is that as a matter of ordinary language one would say that the proceedings were brought in support of a claim, and were not over until the courts had disposed of that claim one way or the other at whatever level of the judicial hierarchy. The word is synonymous with an action. In the cases cited above, relating to the awarding or assessment of costs, the ordinary meaning is displaced because a distinct order for costs must be made in respect of the trial and each subsequent appeal, and a separate assessment made of the costs specifically relating to each stage. They therefore fall to be treated for those purposes as separate proceedings'.

32. Mr Browne, of course, accepts that there the Supreme Court was concerned with costs at different stages in the proceedings but, by analogy, he says that it must follow that if separate costs orders are to be made against each individual defendant, then they are separate sets of proceedings.

33. In adopting this interpretation of the word *proceedings*, Mr Browne submits that such is supported by a sequential approach to rule 44. He argues that the starting point is to determine what are the proceedings to which CPR 44.13 applies. In reliance on *Plevin*, he says that at the time when the costs order at discontinuance was made in favour of the defendant, the relevant proceedings were the proceedings against the second defendant. Logically, CPR 44.14 then follows on so that the scope of the enforcement permitted by the rule is limited to an order for damages or interest made in the same proceedings within which the costs order is made. The sub-sections follow on, one after the other: CPR 44.13 setting out where QOCS apply, CPR 44.14 setting out the effect of QOCS, CPR 44.15 and 44.16 providing the exception to QOCS.

34. As to a purposive approach, Mr Browne submits that underpinning QOCS, are two fundamental propositions, namely;

(1) In the absence of defined exceptions, a winning defendant will have to bear its own costs; and
(2) A losing claimant will not have to meet any costs orders obtained by a winning defendant.

My decision.

35. As I observed in Paragraph 25 above, I agree with Mr Browne that the only proper interpretation of CPR 44.14 (1) is that it is intended there should be a set-off of costs against damages. I also agree that the concept of a set-off imports a mutuality of liabilities whereby there are cross claims between a paying party and a receiving party. Scott LJ's observations in *Lockley* (supra) are apposite: the whole idea of a set-off, in the context of liability for costs, is that a claimant should not be required to pay anything but rather the defendant pays less or nothing at all. That being the position, it is difficult to see how such would be consistent with the claimant in the instant case handing over all of her damages to the second defendant to meet any order for costs. In short, it would not be a set-off but rather the claimant would be paying money to the second defendant.

36. In my judgment, that analysis is largely determinative of the issue which I have to decide. However, it is necessary to consider what is meant by the word *proceedings* in the context of the QOCS rules because if it refers to the whole action, then, there is at least an argument that CPR 44.14 (1) could cover awards of damages made by other defendants. But, and in reliance on what was said by Lord Sumption in *Plevin,* I think that the word *proceedings,* in the context of QOCS must refer to individual claims and not the entirety of the action. That seems to me to be appropriate construction given that there will, at least in many instances, be separate orders for costs between a claimant and each individual defendant. In such circumstances, it is difficult to see how all the claims brought by the claimant against multiple defendants can be lumped together.

37. Nor am I troubled by the use of the phrase "any orders for damages". It does not seem to me that this is referring to damages paid by any defendant but rather the type of order for

damages which may be made. I agree with Mr Browne that what is here being referred to is different types of damages such as periodical payment orders, lump sum damages and interim payment of damages.

38. Moreover, if it were the intention of the Rules Committee that one defendant could recover costs from a claimant out of damages paid by another defendant, I think it very likely, if not inevitable, that such would have been spelt out. In effect, this would be providing a qualification to what would be generally understood as being a set-off and therefore it would need to be clearly stated in the Rules.

39. I also consider that there are very real difficulties in the approach urged upon me on the part of the second defendant. If the claimant had opted to issue three separate claim forms against each of the defendants, there would be no question of one defendant being able to recover its costs from damages paid by another defendant. Equally, if a claimant brings a claim against only one defendant and loses, then subject to the exceptions, the defendant must bear its own costs. It seems to me, therefore, that if a defendant is entitled to recover its costs from the damages paid by another defendant, this can be seen only as a windfall and not consistent with the whole ethos of QOCS. There also needs to be a degree of consistency and certainty to the extent that, subject to the exceptions to QOCS, the sole means of recovery of costs will be by way of a set-off.

40. Additionally, I am attracted by Mr Browne's submissions in relation to there being a sequential approach to Rule 44. I agree with him that such an approach does support the conclusion that the enforcement of costs permitted by 44.14 (1) is of necessity limited to an order for damages or interest made in the claim brought against the individual defendant, that is the same proceedings.

41. Looking at the matter in the round, the claimant was successful against the first and third defendant but unsuccessful against the second defendant. It seems to me that the whole purpose of QOCS is to protect the claimant from financial disadvantage in proceedings which did not result in an order for damages. Such was the position as regards to the claim against the second defendant.

42. In these circumstances, and despite the robust submissions of Mr Nazir, I have come to the clear conclusion that, on a proper construction of the QOCS rules, a claimant cannot be required to pay the costs of one defendant from damages paid to her by another defendant. To make such an order, to my mind, makes a mockery of the whole notion of a set-off.

Conclusion.

43. In my judgment, therefore, the claimant is entitled to QOCS protection and the second defendant will have to bear its own costs.

Transcript from a recording by Ubiqus
61 Southwark Street, London SE1 0HL
Tel: 020 7269 0370
legal@ubiqus.com