Neutral Citation Number: [2020] EWHC 296 (QB)

Case No: E53YM613

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Manchester Civil Justice Centre
1 Bridge Street West, Manchester, M60 9DJ

Date: 18/02/2020

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

Mr Michael Faulkner	**Claimant**
- and -	
Secretary of State for Business, Energy and Industrial Strategy	**Defendant**

- -
- -

Gordon Exall (instructed by **Atherton Godfrey LLP**) for the **Claimant**
James Williams (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendant**

Hearing date: 5 February 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

INTRODUCTION

1. The issues which fall to be determined between the parties in this case are:

   (i) whether or not a defendant in proceedings to which the QOCS regime applies may, nevertheless, seek to set off against a costs order made in favour of the claimant a costs order which had previously been made in favour of the defendant; and

   (ii) if so, whether the court can or should exercise its discretion in favour of such a claimant against allowing such a set off.

THE BACKGROUND

2. The background is uncomplicated. The claimant brought a claim against the defendant alleging that he had sustained injury to his lungs as a result of tortious exposure to harmful dust during the course of his employment. The claim was defended.

3. At a CMC on 14 November 2019, I ordered that a preliminary issue should be heard to resolve disputes between the parties relating to diagnosis and causation. I awarded the defendant its costs of that hearing in the case. Such costs have been presented to me in the sum of £3,650 which I reduce by way of summary assessment to £3,500.

4. As it happens, the preliminary hearing never took place because the claimant served pre-emptive notice of the discontinuance of his claim. The defendant, however, applied, in response, to set aside the notice of discontinuance in the hope that, following the exhumation of the claimant's claim, it could forthwith apply to extinguish it once more by striking it out. On the face of it, this might appear to amount to no more than an arbitrary procedural act of wanton posthumous desecration followed by a prompt and unceremonious reinterment. However, there was method in the madness of this procedural manoeuvre.

5. In short, the claimant enjoyed the protection afforded by the QOCS regime against the enforcement by the defendant of any costs orders against him. The service of a notice of discontinuance does not, of itself, remove such protection. Under CPR 44.15, however, the protection of the QOCS regime is stripped away where proceedings have been struck out on one or more of the grounds therein identified. Accordingly, the defendant hoped to reanimate the claim solely for the purpose of striking it out in such a way that it could proceed thereafter to enforce an order for costs against the claimant.

THE ISSUES

6. On 6 February 2010, the matter came before me and I refused the defendant's application to set aside the notice of discontinuance. I went on to award the claimant his costs of resisting the application which I summarily assessed in the sum of £7,000. The defendant, however, determined not to leave the field of combat without at least securing a modest consolation prize, argued that I should set off the value of its favourable costs order awarded at the conclusion of the November hearing against this sum. This argument, if successful, would result in a diminished award in favour of the claimant in the sum of £3,500.

7. Having reserved judgment, however, I considered the matter further and raised the issue by email to the parties as to whether it would be theoretically open to the defendant, although this had not been an argument raised before me at the hearing, to claim to set off not just the sum of £3,500 but the whole of the costs which it had incurred in the action for which the claimant would be deemed to be liable by the operation of CPR 38.6. Faced with this doubtless unwelcome judicial initiative, Mr Exall on behalf of the claimant, with characteristic realism, conceded that this set off could be extended to cover the defendant's entire costs of the action and that, if it were, then the claimant's costs order of £7,000 would be extinguished. He nevertheless continued to urge me to hold that, in any event, no set off in either sum should be ordered.

8. Turning to the procedural framework, CPR 44.14(1) provides:

> "(1) Subject to rules 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."

9. Put shortly, the claimant contends that, on a straightforward reading of this paragraph, any costs order in his favour was not an order for either damages or interest and so remained within the scope of the protection afforded to him by the QOCS regime.

10. The defendant responds that the reduction of the claimant's entitlement to costs would operate as a set off and not by way of enforcement. In this regard, CPR 44.12 provides:

> "44.12(1) Where a party entitled to costs is also liable to pay costs, the court may assess the costs which that party is liable to pay and …

> (a) set off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance…"

11. However, in the alternative, the claimant argues that, even if, contrary to his primary case, the court has power to order a set off against costs thereby circumventing the operation of the QOCS regime, it still retains a residual discretion not to exercise such a power and that such a discretion should be exercised in the claimant's favour on the facts of this case.

12. I will deal with each issue in turn.

SET OFF v ENFORCEMENT

13. Support for the claimant's position is to be found in the decision of HHJ Dight in ***Darini v Markerstudy Group*** 24 April 2017 (Unreported). The factual background in that case was very similar to that in the instant case. Having failed in a bid to set aside notice of discontinuance, the defendant faced a claim to pay the claimant's costs in respect of that application. However, it contended that it could set off against any such costs order the costs which to which they had become entitled by virtue of the operation of CPR 38.6.

14. The defendant's set off argument was successful before the District Judge but came to grief on appeal to the Circuit Judge.

15. HHJ Dight found that section 2 of CPR 44 (comprising Rules 13 to 16 inclusive) was to be treated as providing for a separate code which created a "different procedural environment" for the costs of personal injury claims. Rule 14 had been drafted so as to exclude reference to a set off against costs.

16. The matter, however, does not end there. In ***Howe v Motor Insurers' Bureau*** (2017) WL 05659795 Lewison LJ reached the contrary conclusion. He held that set off was not a form of enforcement and pointed out that Part 44.14 enables enforcement without the permission of the court whereas Part 44.12 requires a court order before one set of costs can be set off against another.

17. It does not appear that ***Darini*** was brought to the attention of the Court of Appeal in ***Howe***. Nevertheless, I can find no basis upon which to distinguish the two cases on the issue of set off and enforcement. Therefore, the decision of the Court of Appeal in ***Howe*** is binding on me and it would be an act of hubris on my part to embark on any discussion concerning which of the two irreconcilable decisions is academically the more compelling. Accordingly, ***Darini*** must be treated as being no longer good law on this point.

18. It must follow that the defendant succeeds on this issue.

DISCRETION

19. In ***Howe***, the Court of Appeal refused to exercise its discretion to decline to permit the set off of costs against costs. However, it would appear from the judgment of Lewison LJ that the issue of discretion had been argued not on the particular facts of that case but in support of the unsuccessful proposition that there should be a general rule that the court would be expected to refuse to allow a set off against costs as being incompatible with the broader aims of the QOCS regime. There was thus no individual feature of that case which counsel had sought to deploy in favour of the exercise of the court's discretion.

20. In contrast, in ***Darini*** the court heard full argument on the issues relevant to the exercise of the discretion on the particular facts of that case. I find nothing in the decision of ***Howe*** which could be taken to cast any doubt about the soundness of the approach taken by HHJ Dight in this regard.

21. In ***Darini*** the claimant advanced the following argument on the issue of discretion:

> "But for the defendant's application, the position would have been simple. The claim had been discontinued, the defendant's ability to enforce the deemed costs order in its favour by virtue of CPR 38.6 would have been effectively nil.
>
> There were no damages, none of the exceptions in CPR 44.15 or 44.16 applied, and therefore 44.14(1) applied. From the claimants' perspective, they would have incurred such costs as they incurred in bringing their claim unsuccessfully but would have no further liability. The QOCS regime would have operated as intended.
>
> It cannot be correct that a defendant is able thereafter to bring an unsuccessful application which is dismissed with costs but, as a result, places the claimants in a worse position than they would have been but for that application. But for the application, the position would have been as set out above. The application has been brought and has caused the claimants to incur additional costs. The court has held that the claimants should be entitled to those costs in principle, thereby placing the claimants back in the position they would have been but for the application. However, the effect of the set-off is then to prevent the claimants from being placed back in that same position, but rather to leave them effectively paying their own costs for the defendant's failed application."

22. HHJ Dight found this argument to be persuasive and held, with reference to the decision of the District Judge:

> "Even if she had a general jurisdiction under CPR 44.12, and bearing in mind that an appellate court can only overturn an exercise of discretion of a lower court where the lower court has acted in a way which no judge properly directing himself on the law could have exercised such discretion, I would nevertheless have overturned her decision for the reasons given by the claimant in Mr Mallalieu's skeleton in the sections that I cited above."

23. There is an obvious danger in attempting to lay down general rules concerning the exercise of a pure discretion. The whole purpose of affording the court a procedural discretion is to provide for the flexibility necessary to achieve the overriding objective in circumstances of infinite potential permutation. I would not, therefore, conclude that the discretion to set off costs against costs is to be exercised against the defendant in every case in which it unsuccessfully applies to set aside notice of discontinuance of a claim falling within the QOCS regime - as the logic of Mr Mallalieu's argument might otherwise appear to mandate. Each case must be decided on its own facts.

24. In this case, however, it became readily apparent that the application to set aside the notice of discontinuance was very weak. Indeed, the bid to strike out the resurrected claim under CPR 44.15 was doomed to failure. If the defendant had ever considered that such a strike out application had realistic prospects of success then it could and should have made it whilst the claim was still proceeding and weeks before the notice of discontinuance had been served. It was entirely inconsistent for the defendant to proceed towards the hearing of a preliminary issue in a case in which, as they were later to argue, the claimant's case was so weak that it could have been struck out without the need for any such issue to be heard. One can understand the tactical reasons behind the defendant's application but it was deeply flawed. There were, indeed, grounds upon which the claimant's evidence was vulnerable. Doubtless, the defendant was fairly confident that the preliminary issue would be determined in its favour. Nevertheless, the strength of its case was never such as to justify a strike out application falling within one of the narrowly defined circumstances set out in CPR 44.15 and that is why one was never made until after the claim had already been discontinued.

25. Furthermore, if the claimant had not served notice to discontinue, the hearing of the preliminary issue would have gone ahead. The defendant would have incurred yet more costs. The claimant, however, even had it lost the issue, would still have enjoyed the full protection of the QOCS regime. It is not without irony that the defendant sought to set aside a notice of discontinuance which, albeit served late in the day, had had the

effect of saving it money. I can well understand the defendant's frustration that the notice was not served earlier but the resilience of the QOCS regime is such as to limit very strictly the inroads which can be made into the scope of its application.

26. I was told that the defendant would, in the event of success on the preliminary issue, have wanted to deploy the decision against claimants in later similar cases. But this was not a "lead case" in a GLO in which there was any court imposed restriction on settlement or discontinuance. I have suggested that, if the defendant remains eager to pursue such a procedural path in future, then suitable lead cases must be selected for that purpose.

CONCLUSION

27. It follows that, in the circumstances of this case, I exercise my discretion against allowing the defendant to set off any sum against the claimant's costs of successfully resisting the application to set aside the notice to discontinue. The claimant is, therefore, entitled to a costs order in his favour in the sum of £7,000.