General liability newsletter

November 2018

Claimant's costs are subject to set-off against Defendant's costs under QOCS

RPC recently represented a Defendant in a successful application for enhanced costs recovery in a QOCS case. In a reserved judgment made on 27 September 2018 in *David Anthony Ellis v Mr Ian Hancock trading as Mullions Restaurant* (unreported) His Honour Judge Ralton sitting at the County Court at Bristol ordered that the Claimant's costs incurred before the expiry of a Part 36 offer which the Claimant failed to beat at trial were subject to set-off against the Defendant's costs incurred after the Part 36 offer had expired.

The Claimant was injured as a result of falling from a defective chair in the Defendant's restaurant. He claimed damages exceeding £500,000 as a result of chronic pain and an inability to work. Liability was admitted but the Claimant's alleged chronic pain syndrome was not. The Claimant had been paid interim payments totalling £30,092.69 (pursuant to Court order and contrary to Defence submissions) but was awarded only £11,813.63 at trial on 24 August 2018 which was less than a Part 36 offer which had expired on 15 August 2017.

The Claimant argued that under QOCS the Defendant was limited to recovering costs from the Claimant of no more than the £11,813.63 damages awarded to him at trial. The Claimant also alleged impecuniosity had forced him to go to live in Spain, beyond the likely reach of any enforcement action.

The Claimant denied that the Defendant was entitled to any set-off against the Claimant's costs on the basis that this was a type of enforcement of costs against the Claimant that was prohibited by CPR 44.14(1). The Defendant argued that such set-off is permitted by CPR 44.12 and further that it would be equitable in this case for any further sum payable by the Defendant after set-off against the Claimant's costs had taken place to be further offset against the sum the Claimant was required to repay to the Defendant because of the overpayment arising from the interim payments.

The judge decided that interim payments were not "damages" and that the excess interim payments made to the Claimant were money owed to the Defendant who was entitled to have his money back. Also, that although the set-off under CPR44.12 arose at assessment of costs (which he was not assessing when making the order) he was nevertheless entitled under the court's discretion to order equitable set-off, which he did. The judge also dismissed the Claimant's argument that such a set-off was "enforcement" caught by CPR 14.14 as the Court of Appeal in *Howe v Motor Insurers Bureau* (6 July 2017) had already decided that it was not. He also allowed the Defendant to further set-off any further costs payable to the Claimant against the money owed to the Defendant because of the interim payment overpayments.

Any comments or queries?

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This case shows that in addition to the sum awarded to the Claimant for damages, the Court is entitled to treat the sum awarded to the Claimant for costs as being available by way of set-off to pay any costs liability the Claimant has to the Defendant. The effect of this is that a Claimant's solicitors are also potentially financially vulnerable if a Claimant fails to beat a Part 36 offer.

There is no such thing as an interim costs budget

One might think that if it was not possible to reliably ascertain whether expert evidence might be needed at trial because this depended upon issues that could not be determined at the time a costs budget was prepared, that it would reasonable to leave the trial and trial preparation parts of the budget blank and ask the Court to consider these at a later costs and case management conference (CCMC).

The Claimant thought this in *Justyn James Page v RGC Restaurants Ltd*[1]. He filed an "interim costs budget" in which the "trial preparation" and "trial" sections had been left blank, and asked for a further CCMC in six months to consider these.

The remainder of the Claimant's budget up to and including the proposed second CCMC had been agreed by the Defendant which also agreed that directions should be given at a second CCMC.

At the (first) CCMC the judge held that the Claimant's costs budget failed to comply with Practice Direction 3E of the Civil Procedure Rules because the budget was incomplete, and made a budget order which allowed the Claimant to recover court fees only – the sanction in rule 3.14 of the Civil Procedure rules for not filing a costs budget. The judge also refused to order a second CCMC and objected to the perceived assumption that he was bound by the parties' agreement.

On Appeal to the High Court, the Claimant argued that the judge should have considered exercising the saving provision in rule 3.14, which says that the sanction applied "unless the court otherwise orders". Also, that the judge had ignored the agreement of the parties on certain costs phases.

The High Court decided that an "interim costs budget" suggested something that was not yet a budget and that the Court of Appeal in *Mitchell v News Group Newspapers Ltd*[2] had rejected the submission that rule 3.14 was directed to the situation where a party failed to file any budget at all. That approach was equally applicable to one concerning an incomplete budget. Also, the obligation under Practice Direction 3E was to file a budget "in the form of Precedent H", which included setting out the budgeted costs for trial preparation. That obligation could not be displaced by agreement between the parties.

The High Court judge considered that the Court had a wider discretion to grant relief when considering whether to disapply rule 3.14 than where relief from sanction was being sought under rule 3.9. He thought that the Claimant's breach was of only moderate seriousness and significance. He took into account that the Claimant's advisers had genuinely thought that a second CCMC was needed and mistakenly thought that it appropriate to file a budget which left the trial phase for later consideration. Also, the Defendant had also been content to adopt that approach.

1. (2018) EWHC 2688.
2. [2013] EWCA Civ 1537.

In the circumstances the Appellate judge considered it was appropriate to disapply the sanction to those parts of the budget that had been agreed between the parties. However, that still left the Claimant unable to claim for the future costs of the trial preparation and trial.

Now that this point has been decided, the courts might not be so forgiving in future. Parties who only partially complete a costs budget are at risk of having their claim for costs restricted to court fees.

Pleadings are not evidence

In *Kimathi and others v Foreign and Commonwealth Office*[3] (2 August 2018, Stewart J) the High Court dismissed the Claimant's application to Court to exercise its discretion under Section 33 of the Limitation Act 1980 to allow his claim (a test case in a group action) brought out of time to proceed.

The defeating factor was the Claimant's failure to expressly refer to the reason for his delay in his written and oral evidence supporting the application. Although the Claimant had referred in his pleadings to factors that arguably explained the reason for delay, the judge held that as a matter of principle, and pursuant to rule 32.3 of the Civil Procedure Rules and rule 32(6), the contents of a statement of case were not evidence, even if they were verified by a statement of truth.

On 11 October 2018 the Court of Appeal refused permission to Appeal against this decision.

This case is a reminder that the facts pleaded in a Particulars of Claim or Defence must be supported by witness evidence even where the pleading is signed personally by the litigant. A sure way to avoid such a pitfall is for the pleadings to be prepared from the witness evidence. It follows that facts alleged in a schedule of loss also need to be supported by evidence.

Issue-based costs orders and how to get them

In a clinical negligence claim the High Court made an issue-based costs order after the Claimant, whose claim was otherwise successful, abandoned her arguments over consent and pre-operative issues which had taken up two days of trial time. In *Amanda Jayne Welsh v Walsall Healthcare NHS Trust*[4] (High Court 28/09/2018) the Claimant was awarded 85% of her costs on the basis that it had not been reasonable for her to pursue the arguments she had abandoned.

Although Courts are reluctant to make issue-based costs orders, in this case there was a discrete point that was readily identifiable as having taken up a significant part of the trial and which the Claimant abandoned.

The Court also took into account its decision that the Claimant's abandoned points were not properly arguable and that it had not been reasonable for her to maintain them through to trial, thus entitling the Court to depart from the usual rule of ordering the Defendant to pay all her costs.

A Court might also be persuaded to make an issue-based order where a party establishes facts at trial which were contained in a Notice to Admit facts, served in the course of the proceedings under rule 32.18 of the Civil Procedure Rules. Although this approach is unsuitable for contentious facts, in appropriate cases it will help the Court to agree to make an issue-based

3. [2018] EWHC 2066 (QB).
4. Click here

costs order under rule 44.2 of the Civil Procedure Rules (the Court's discretion as to costs) and in particular rule 44.2(5)(b) which deals with whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue.

Notices to admit facts are a generally under-used tool which can save time both at the pre-trial and trial stages of a claim, and have the additional potential economic advantage of reducing liability for costs even if an opponent establishes liability.

A stay of proceedings stays all aspects of the claim

On 16 October 2018 the Court of Appeal clarified whether a stay of proceedings applied to the time allowed for service of the Claim Form.

In *David Grant v Dawns Meats (UK)*[5] the Claimant had brought a claim against his employer under the pre-action Protocol for low value personal injury claims for injuries he sustained at work on 30 September 2013. Liability was admitted but the parties were unable to agree quantum. On 24 June 2016 the Claimant issued a Claim Form under Part 8 of the Civil Procedure Rules which also requested a stay of proceedings to allow time for medical evidence to be obtained. The stay was granted on 7 July 2016 until 7 October 2016 and was extended until 30 November 2016. The Claimant's solicitors then served the Claim Form on the Defendant on 6 March 2017.

The Defendant argued that the stay of proceedings applied to the procedural aspects of the claim only and that the Claim Form had been served outside the four months allowed after the date of issue of proceedings. The Claimant argued that the stay also applied to the requirement to serve the Claim Form, and that when the periods of stay were taken into account the Claim Form had been served within the four months allowed.

At first instance the judge agreed with the Claimant and allowed the claim to proceed. On Appeal, the High Court decided that the stay did not apply to the time allowed to serve the Claim Form, largely on interpretation of paragraph 16.3 of Practice Direction 8B which requires the Claimant to send a copy of the Claim Form to the Defendant with a copy of the order imposing the stay.

The Court of Appeal considered the relevant parts of the Civil Procedure Rules and in particular noted that the wording of paragraph 16.3 of Practice Direction 8B required the Claimant to send a copy of the Claim Form to the Defendant (which the Claimant had done) rather than to serve the Claim Form. The Court found nothing in the rules to justify distinguishing between service of the Claim Form and any other procedural step.

The Court of Appeal also referred to paragraph 3.1.8 of the 2018 White Book which states: "The making of a stay imposes a halt, not only upon proceedings, but also upon the expiration of any time limit in those proceedings which have not expired when the stay was imposed."

5. 2018 EWCA Civ 2212.

A Company's vicarious liability of its Managing Director can extend to social events

The "close connection" test to determine whether an employer was liable for its employee's wrongdoing which took place outside the normal course of business has received further scrutiny by the Court of Appeal in *Clive Bellman (a protected party by his litigation friend Susan Thomas) v Northampton Recruitment Limited*[6].

The Claimant was employed as a sales manager in the Defendant Business. After the defendant Company's Christmas party had ended, its Managing Director and some of its employees and their partners went to a nearby hotel where arrangements had been made for most of them to stay at the Company's expense. There followed a drinking session that continued well into the night and early morning. Conversation covered many topics and eventually turned to work and the way the business was run. The Claimant questioned the Managing Director's decision to have another employee based in Northampton rather than at Nuneaton. This incensed the Managing Director who regarded this as a challenge his authority. He punched the Claimant who fell and sustained a significant brain injury.

At first instance the claim against the Company was dismissed. Among other things the trial judge decided that the drinks party was an impromptu event and not an extension of the Christmas party; and that the time and place of the discussion about work took it outside the limit of what could be considered as having a close enough connection with Company business to make the business liable for its Managing Director's actions.

The Court of Appeal disagreed. The Court decided that the first question was to examine what function or field of activities were entrusted to the Managing Director by the Company. In this case his field of activities were extensive. He regarded the Company as his business. He was the directing mind and will of a relatively small Company, and saw the maintenance of his managerial authority as a central part of his role. Although he might not have been attending the drinking session in his role as Managing Director all the time, the events leading up to the assault, and the assault itself formed part of the Managing Director's intention to assert his authority as Managing Director on those present, and thus arose out of a misuse of the position entrusted to him as Managing Director. The Court of Appeal accordingly decided that the defendant Company was liable for its Managing Director's assault, but only on the facts of this particular case.

Lord Justice Irwin emphasised that this case is not authority for the proposition that employers in effect become insurers for violent or other tortious acts by their employees, and that liability would not arise merely because of an argument about work matters between colleagues where one was more senior than the other. However, the case demonstrates that there is no need for the tortious act to take place at or close to the place of business or for there to be any temporal proximity between business hours and the tortious act. The tortfeasor needs only to be acting within the general field of activity of his work to make his employer liable for his wrongful act.

The extent to which someone is deemed to be an employee rather than an independent contractor now appears to be fairly settled by the tests to be applied as described by the Supreme Court in *Cox v Ministry of Justice*[7]. However, that did not stop Mr Kafagi from arguing in the Court of Appeal in *Nassir Kafagi v JBW Group Ltd*[8] (2018) that a bailiff engaged

6. [2018] EWCA Civ 2214.
7. [2016] UKSC 10.
8. [2018] EWCA Civ 1157.

by JBW Group Limited was engaged in something "akin to employment" so as to make the Defendant liable for the bailiff's alleged torts against the Claimant. The Claimant's claim failed at first instance, upon Appeal and then upon further Appeal to the Court of Appeal – by which time he had no legal representation and presented his case himself. Bearing in mind that the court had found that the bailiff was allowed to carry out his work without any control at all by the Defendant business, had paid for his own indemnity insurance, had provided a personal bond to the Court as required by Regulations, and worked for other clients, it is perhaps surprising that the case got as far as the Court of Appeal.

Civil Liability Bill moves on

On 23 October 2018 the third reading of the Civil Liability Bill was approved by the House of Commons. The Bill provides for fixed awards of damages for relatively minor whiplash injuries; for the small claims limit to be increased to £5,000; and for the way the discount rate for calculation of future losses is calculated. The Bill will now proceed for Royal Assent.

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