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DISCONTINUANCE AND DIS-APPLYING THE USUAL RULE

In a recent action at the county court at Manchester issued against four defendants, (but not served against third and fourth defendants) settlement was eventually reached between the claimant (C) and the first defendant (D1.) Part of the agreement was a condition that C would not seek their costs of pursuing D2 against D1 in the event of discontinuance against D2. D1 had blamed D2 from the outset. C discontinued and eventually made an application to the court to dis-apply the usual rule that D2 would recover costs against C and instead applied for their costs of the action against D2. C wanted to be in a position to recover costs of the action as a consequence of issues related to the conduct of D2. Those issues were mainly in respect of alleged late disclosure of documents which might have been disclosed at a much earlier stage and which effectively dissolved any prospect of success which C might have had against D2. The situation arose partly because D2, unwisely as it turned out, handled matters themselves without the benefit of legal assistance for a period of time both pre and post-issue.

By way of background, the claimant pursued the action against D1, her employer, on the basis of a 'workplace accident' and yet under the terms of the Occupier's Liability Act 1957 and in negligence. The claim was pleaded against D2 purely in negligence on the basis that a leak was somehow causative of the accident and injury complained of. It was against that backdrop, that the proceedings were issued by C just four days before the expiry of limitation.

The index application made reference only to CPR 44.2 and placed no reliance upon the exception to the provisions of CPR 38.6. It was argued with force that the discontinuance by C against D2 and the costs consequences which flow are 'part and parcel of litigation' and that the position adopted by C was wholly misconceived.

The claim against D2 was without merit and on any view it was disproportionate to issue proceedings against four defendants in a claim with a value of £1400.00. At no stage did D2 either precipitate the issue or generate the continuance of proceedings against them. C appeared to accept that they were fully aware that it was D1's position to blame D2. C was under no obligation whatsoever to issue proceedings against D2. If C was satisfied, as they undoubtedly were, that any liability could be established against D1, C had no need to pursue D2 at all.

The entering of judgment in default offered a windfall to the C in what was otherwise a claim wholly without merit. Judgment in default was set aside on the basis that D2 had a reasonable prospect of success. No appeal was made by C in respect of that order.

CPR 38.6(1) provides as follows:

"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 the notice of discontinuance was served on the Defendant."

A summary of the relevant principles governing the award of costs following discontinuance that were given by HHJ Waksman QC in *Teasdale v HSBC Bank plc*.

[2010] EWHC 612 (QB), [2010] 4 All ER 630, [2010] NLJR 878, attached. Para 7 of his judgment was to the following effect:

i) Costs are matter for the exercise of the court's discretion under CPR Pt 44.3;

***i**i) When a party discontinues, there is a presumption by reason of CPR 38.6 that the Defendant will get his costs. The burden is on the Claimant to show that there is good reason to dis-apply it;*

iii) The fact that the Claimant would have, or might well have succeeded at trial is not itself a good reason;

iv) If it is plain that claim would have failed at trial that is a relevant factor against dis-applying the presumption;

v) The fact that the Claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence on the merits of the case will not displace the presumption. A simple re-evaluation of the commercial point in proceedings, as with a re-evaluation of the merits, is not enough.

vi) In most cases, in order to show good reason, the Claimant will need to show a change of circumstances since the claim was made. This will demonstrate at least that there is something more than a simple re-evaluation. But even if circumstances have changed since the commencement of the claim, if they result from the very fact of the claim, for example the Defendant has run out of money because he has spent it all on defending it, the Claimant cannot invoke that. If the chances of success had reduced in the Claimant's eyes because of what the Defendant produces on disclosure or because of some argument raised in the Defence it would be very unlikely that this would assist the Claimant on costs if he then discontinues. That is because such changing "circumstances" are a part and parcel of litigation;

vii) A change in circumstance can be a good reason if it is connected with some misconduct on the part of the Defendant which deserves to sound in costs are against him (see Maini v Maini [2009] EWHC 3036 (Ch), 11; RTZ Pension Property Trust v ARC Property Developments [1999] 1 All ER 532, at 541, [1999] BLR 23.)

viii) Even if there has been some conduct by a Defendant which has caused a change of circumstances this should not have an adverse impact against him if, having regard to all the circumstances, it does not amount to a good reason to dis-applying the presumption.

ix) Thus the context for the court's mandatory consideration of all the circumstances under CPR 44.3 is the determination of whether there is a good reason to depart from the presumption imposed by CPR 38.6.

Those principles were applied by the Court of Appeal in *Nelson's Yard Management Co v Eziefula [2013] EWCA Civ 235,* attached. Paras. 14 and 15 are set out as follows:

14. There were appeals from two of the Teasdale decisions to this court. In the judgment given by Moore-Bick LJ (with whom Ward and Arden LJJ agreed) sub nom Brookes v HSBC Bank [2011] EWCA Civ 354 at [6] – [8] HHJ Waksman's statement of the principles was approved and his formulation was stated to be a fair summary of the effect of the authorities. Moore-Bick LJ, (at [6]), however, stated that that the eight principles formulated by the Deputy Judge could be reduced to the following six principles:

"(1) When a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position;

(2) The fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so;

(3) However, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption;

(4) The mere fact that the claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;

(5) If the claimant is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he has not himself contributed;

(6) However, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule." The debate before us primarily concerned the sixth principle. There is further guidance from this Court as to the approach to dis-applying CPR Part 38.6(1) in Messih v MacMillan Williams [2010] EWCA Civ 844. I refer to this at [31]. But it is common ground between the parties that the principles set out in the Teasdale cases and in Brooks v HSBC constitute the correct approach for the court to adopt when dealing with the issue of costs on discontinuance.

15. It is also necessary to refer to CPR Part 44.3 which sets out the circumstances the court is to consider when making an order about costs, and the relationship between it and CPR 38.6. Moore-Bick LJ's summary of the principles does not expressly refer to

CPR Part 44.3 but his approval of HHJ Waksman's formulation must have encompassed the Deputy Judge's eighth principle. That is, that "the context for the Court's mandatory consideration of all the circumstances under CPR 44.3 is the determination of whether there is a good reason to depart from the presumption imposed by CPR 38.6."

The case of *Nelson's Yard* it was argued could be distinguished from the index case. In that case there was a single defendant against whom liability would either succeed or fail. In the index case C issued against four defendants. It was alleged that the single defendant had failed to respond to any pre-action correspondence, without good reason. In the index case D2 did acknowledge pre-action correspondence and was at that stage a litigant in person. In respect of correspondence unanswered, D2 offered an explanation. Judgment in default was set aside. In Nelson, C had little choice but to issue court proceedings. In so far as D2 was concerned at the very least, that was not the position within the index case. In any event and in reference to the principles which applied, D2 submitted that C could not discharge the burden placed upon her to show a good reason from departing from the general rule; C could not have succeeded at trial against D2; the claim would have failed in any event; C's decision to discontinue may well have been motivated by a number of reasons none of which were sufficient to displace the presumption; C could not show a change in circumstances to which he has not himself contributed. Any change in circumstances as the C may have been able to prove was unlikely to suffice unless it had been brought about by some form of unreasonable conduct on the part of D2 which in all the circumstances provided a good reason for departing from the general rule. All the circumstances mitigated in favour of D2.

CPR 38.6 does not create a general discretion as to costs and it was argued that there was no reason to depart from the usual rule and D2 sought an order for the C to pay D2's costs of the action to be assessed on the standard basis if not agreed. The alternative position adopted by D2 was in the event that the court was not sufficiently persuaded to make such an order, D2 sought an order that C pay D2's costs from the date of disclosure and was the very latest date upon which C had knowledge that the claim was wholly without merit.

The District Judge disagreed and found that D2 had acted unreasonably in failing to respond to an order for pre-action disclosure and could and should have disclosed material at an earlier stage than standard disclosure - particularly when such disclosure was found to be the catalyst or turning point, so that C might have had the clarification they were seeking and were made fully aware of the position in respect of D2. She found there was sufficient reason to dis-apply the usual rule and ordered that C should have their costs until the date of disclosure, with no order for costs between the date of disclosure and the date of discontinuance. C also recovered their costs of the application. The decision reminds parties of the need for early disclosure of material documents likely to extinguish a claim and co-operation between the parties at every stage.

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