IN THE COUNTY COURT AT CENTRAL LONDON

Case No: B53Y J995

Court No. 60

Thomas More Building
Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 26th February 2016

Before:
MR RECORDER BERKLEY

B E T W E E N:

MISS EASHA MAGON

and

ROYAL & SUN ALLIANCE INSURANCE PLC

Transcript from a recording by Ubiqus
61 Southwark Street, London SE1 0HL
Tel: 020 7269 0370

MR BENTLEY appeared on behalf of the Appellant
MR BANKS appeared on behalf of the Respondent

JUDGMENT
(Approved)

MR RECORDER BERKLEY:

1. This is an appeal of the order of Deputy District Judge Colquhoun, which is at page 21 of the appeal bundle. It is dated 5 October 2015.

2. The history of the matter is that there was a road traffic accident on 29 April 2014, in which the claimant was hit by a Polish-registered vehicle. The identity of the insurer was not this defendant, which is the Royal & Sun Alliance Insurance plc, but a Polish insurer. The defendant in this case was the claims handler for that insurance company. Through some errors on the part of the claimant's solicitors, the defendant was named as defendant in these proceedings. I do not need to go into the reasons behind that except to say that it was clearly an error and it was not done for malicious purposes.

3. The claim form was issued on 12 March 2015. The defence was served on 26 March 2015. On 5 May 2015, directions questionnaires were filed. On 15 July 2015, the claimant offered to correct the name of the defendant, their solicitors having realised that there had been an error. It had been pointed out in a letter of 14 April 2015 that it was not possible to substitute the correct defendant for the current defendant because of the regulatory nature of the claim. Accordingly, it was suggested that the proper defendant – that is to say the principal driver – was added and then the case discontinued against the then current defendant. On 5 June 2015, the claimant served a notice of discontinuance. The claim was subsequently settled with the principal driver separately from these proceedings.

4. On 16 July 2015, the defendant made an application to disapply the QOCS regime and that was heard on 5 October 2015. The application to disapply the QOCS regime was in the form of permission to enforce the order for costs that followed upon the discontinuance, rather than anything else. However, at that hearing, counsel for the defendant applied to amend the application to be one whereby the notice of discontinuance was set aside

pursuant to CPR 38.4.

> '(1) Where the claimant discontinues under rule 38.2(1) the defendant may apply to have the notice of discontinuance set aside. (2) The defendant may not make an application under this rule more than 28 days after the date when the notice of discontinuance was served on him'.

5. It is common ground that the application was served more than 28 days after the notice of discontinuance was served. I will just read briefly the notes to *The White Book* at 38.4.1: 'The rule provides a procedure and time limit for a defendant to apply to have a notice of discontinuance set aside. The court may set aside a notice of discontinuance as an abuse of the process of the court'. *Ernst and Young v Butte Mining plc* [1996] 1 WLR 1605 is cited. The notes go on: 'A defendant who would have opposed an application for permission must invoke Rule 38.4 and apply to have the notice of discontinuance set aside within 28 days of service of the notice upon them'.

6. The reason that the application was made was because of the QOCS regime, and that is a well-known regime to those who practice in that field, and is covered by 44.14, 44.15 and 44.16. Those provide for the protection of the claimant in certain circumstances, and that protection has limited exceptions to it, which are set out in 44.15 and 44.16. 44.15 is where the claim has been struck out because either:

> '(a) the claimant has disclosed no reasonable grounds for bringing the proceedings;
>
> (b) the proceedings are an abuse of the court's process; or
>
> (c) the conduct of –
>
> (i) the claimant; or
> (ii) a person acting on the claimant's behalf and with the claimant's knowledge of such conduct,
>
> …is likely to obstruct the just disposal of the proceedings'.

The other exception is at 44.16, which is related solely to where it is found that the claimant has brought the claim and has been found to be fundamentally dishonest in doing so. When

the claim was discontinued, the normal costs order was made, but the claimant was protected by the QOCS regime unless either the defendant was able to get permission to enforce the order or, alternatively, to set aside, under 38.4, the notice of discontinuance, which would thereby restore the case so that the defendant could make an application to strike out the claim for disclosing no reasonable cause of action, thereby invoking the exception at 44.15(a).

7. It is common ground at least, it does not go as far as a full concession, but it is realistically accepted by Mr Bentley for the claimant that the claim was susceptible to being struck out. Indeed, if an application had been made to strike out the claim, and then the notice of discontinuance had been served, this appeal would have had no prospect or very little prospect of success, it was said.

8. It is accepted by the claimant that, when the district judge came to make his decision, based on the amended application, it was procedurally feasible what he did, and it was also an exercise of his case management discretion. Therefore, this matter has to be dealt with in an appropriate Wednesbury appellate type way. In other words, the district judge had a very wide discretion which he was able to exercise, provided he did so judicially and in a way that took into account relevant factors, and did not take into account irrelevant factors, and an appellate court is very slow to interfere with the exercise of such discretion. The judgment of Deputy District Judge Colquhoun is short:

> '1. I have before me an application dated 16 July 2015 in which the defendant underwriters ask that the defendant be granted permission to enforce the costs order made in its favour, as the claimant's claim was an abuse of process, due to the claimant disclosing no reasonable grounds for bringing it. However, this is caught by qualified one way costs shifting and the relevant rules are 44.16(1) which says, "Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest".
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> 2. The facts in this case are that the claimant elected to discontinue the claim by serving a notice of discontinuance by a letter dated 5 June 2015, received

into court on 9 June 2015. The defendants raise an issue about how far the court can deem the claimant's conduct to be either fundamentally dishonest, or in some other way which would entitle the defendants to recover their costs and expenses of defending the claim, but for the QOCS provisions. As such, I take the view that the defendants should not be shut out of their opportunity to recover their costs in some circumstances. I referred to Part 38 discontinuance under Part 38.6, liability for costs, subsection one: "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".

3. In the note in the Civil Court Practice 2014 Volume 1, page 968, there is an editorial note saying:

> "On an application by the discontinuing claimant, the court can order that there should be no order to pay the defendant's costs. The court may take account of the claimant's delay in making the application, not the fact that the defendant had not applied to set the notice of discontinuance aside, *Hoist UK Ltd v Reid Lifting Ltd* [2010] EWHC 1922 (Ch)".

I do not have a copy of that authority before me. However, it seems to me just that this issue should be determined to prevent valuable court resources being taken up in claims which, on a view of the conducting party, are doomed to fail and in this regard, I exercise my discretion to extend time for the claimant to set aside the notice of discontinuance and will treat that as an application which succeeds this day.

4. As to the other matters mentioned in the application, because of the nature of the Regulations themselves, there has to be a further hearing, and I will give directions as to evidence in respect of that further hearing today'.

9. The grounds of appeal are at page 40 and 41 of the appeal bundle. Essentially, the claimant says that:

> 'In exercising his discretion the learned district judge failed to take into account:
>
> (1) the purpose of qualified one-way costs shifting.
>
> (2) that there was no abuse of process in serving the notice of discontinuance.
>
> (3) the prejudice suffered by the claimant in setting aside the notice of discontinuance.
>
> (4) that the defendant's principal had already settled the claim.
>
> (5) that the defendant presented no evidence of actual costs incurred as a result of the claimant's representatives' conduct.

(6) that the defendant, in fact, failed to apply to strike out the claim despite having had almost three months to do so'.

The claimant also claims, as part two of the grounds of appeal, that:

> 'By looking at his judgment, it appears that the district judge took two factors into account which he should not have done. That is to say fundamental dishonesty. (2) the decision in *Hoist UK Ltd v Reid Lifting Ltd* [2010] EWHC 1922 (Ch) which reads that qualified one-way costs shifting deprives defendants of an enforceable costs order'.

10. The claimant says that the purpose of QOCS is important. It is to provide protection to a claimant in a claim that is brought honestly and has not been struck out. It is urged upon me that the QOCS regime has two, and only two, exceptions to it. They are set out, as I have already referred to, at CPR 44. What is said, in essence, is that a district judge, when faced with an application of this nature, should take into account those matters raised, because really it should only be in exceptional circumstances where a claimant who has validly served a notice of discontinuance prior to a defendant having applied to strike them out should be deprived of their QOCS protection. In support of that is cited the authors of *Costs & Funding following the Civil Justice Reforms: Questions & Answers*, a well-known addendum to *The White Book*, where it is said that:

> 'Interesting issues arise when a claim is one which was arguably abusive or in relation to which there are no reasonable grounds for bringing the claim, but the claimant has beaten the defendant to the point by discontinuing the claim before an application could be heard to have the proceedings struck out.
>
> Under CPR 38.4 it will be possible to apply to have a notice of discontinuance set aside in order for the court to hear an application for strike-out which, if successful, would allow for a full enforcement of the costs order without permission. It is likely that the court will then permit this in exceptional circumstances, perhaps where a claimant has been repeatedly warned as to the abusive nature of the claim but has persisted but then responds to a formal application to strike out by discontinuing. However, it remains to be seen in practice how the court approaches such issues'.

It is accepted that no authority is cited for that and, indeed, there is no authority to cover this position, at least not of an authoritative nature. The seniority and position of the editors,

including the fact that Simon Middleton is the editor of *Cook on Costs* and Peter Hurst was a senior costs judge and senior editor of *The White Book* for many years, that that should give it some weight. It is indeed accepted by Mr Banks, on behalf of the defendant, that those are authoritative authors, but it is urged upon me that, of course, no authority has yet been decided on that and no real justification for the assertion that was made in that passage.

11. The claimant also says that there was no abuse of process and that that is a relevant consideration because, whilst there does not need to be an abuse of process in order to set aside a notice of discontinuance, it is one, and probably the main, reason for setting a notice of discontinuance aside. The Claimant says that there really has to be some other reason which relates to the conduct of the person having served the notice of discontinuance, which is completely absent from this situation. Therefore, it is said, it was wrong for the district judge not to have considered that aspect.

12. The claimant also says that the prejudice suffered by the claimant by the removal of the QOCS was not considered by the district judge, and he really should have taken that into account. It is also relevant that this was not a frivolous claim. The claimant says that the main, substantive, claim which was eventually started against the correct defendant was settled, and it was not, therefore, a frivolous claim in the nature of an unwarranted claim for damages for any other reason. It was also said on behalf of the claimant that no evidence was presented of the actual costs incurred and, therefore, the district judge could not exercise his discretion properly when he did not know whether, in fact, any loss had been incurred. Finally, on this, it is said on behalf of the claimant, the appellant, that the district judge failed to take into account the fact that the claim had not in fact been struck out. This goes hand in hand really with the question of the judge failing to consider the purpose of QOCS, and the effect of his order would be to remove that protection, given the weakness of any resistance to an application to strike the claim out.

13. In relation to irrelevant factors that the judge was said to have taken into account, the claimant said the district judge, in reciting, as he did, at paragraph one of his judgment, and indeed in paragraph two, the reference to fundamental dishonesty, meant that the district judge had in his mind a factor that neither party here suggested was relevant; that is to say the dishonesty or the honesty of the claimant, which has never been brought into question. It is also said on behalf of the appellant that the district judge took into account the fact that the QOCS deprived defendants generally of their costs and that it was not fair. Therefore, that was an irrelevant consideration because it is a statutory or quasi-statutory arrangement that has been decided upon following careful consideration, not only by Jackson LJ in his report, and also the Rules Committee of the CPR. Therefore, it was wrong of the district judge to have referred to the fairness or otherwise of the QOCS regime. The district judge also referred to the decision in *Hoist v Reid,* which both parties accept was an irrelevance as far as his reasoning should have been concerned, and the appellant prays that in aid.

14. On the defendant's/respondent's part, in essence, and in the round, what the defendant says is the district judge did absolutely as he should have done. He had available to him a discretion which he had to exercise. He took the view, if you look at his judgment in the round, that this was a case which is part of a group of cases which fall outside the QOCS protection because it had no basis in law. It was vulnerable to being struck out and, therefore, it was one of those cases where QOCS protection should not apply as a matter of justice and, therefore, there was no reason why he should not have exercised his discretion in the way he did, and this court should not interfere with it given the wide discretion particularly that he has.

15. In relation to the purpose of QOCS, first of all the defendant says actually QOCS is a commercial situation. The reason for having QOCS was that it was to save the insurers paying ATE, and QOCS just happens to be a consequence of it. It is not genuinely and

primarily a scheme intended to protect claimants. It is simply exists as a consequence of having the ATE removed from insurers' balance sheets, so to speak.

16. What the defendant says is that the combination of CPR 44 and 38 is that there is a balancing exercise to take into account. The claim was of a genuine nature; it was not abusive, it was not frivolous as such, but it was a hopeless case and, therefore, was one of those that the district judge was able to, as a balancing exercise, effectively remove the claimant's protection.

17. The claimant had argued that there was a floodgates argument potentially here, that this would prevent or encourage claimants to run unmeritorious cases for fear of having their notice of discontinuance set aside. The defendant's answer to that is that this is an unusual circumstance and that what we have here is an unmeritorious claim, a completely unmeritorious claim. Therefore, there will not be many circumstances where the case has not been struck out where the claimant is likely to be so put off from serving his or her notice of discontinuance.

18. The defendant goes on to say that you do not need anything akin to an abuse of process in order to set aside a notice of discontinuance under 38.4 and, therefore, the failure of the district judge to make reference to it is neither here nor there. The defendant says the prejudice to the claimant is an irrelevance. This was simply a decision the district judge had to make. The impecuniosity or otherwise of the claimant is neither here nor there. The defendant also says that the claimant can have recourse to her legal advisers and, therefore, the impecuniosity of the claimant, even if it were relevant, should not have been a factor that weighed in the district judge's mind.

19. Likewise, the fact the substantive claim settled is irrelevant, says the defendant. It is a completely different claim. This was a hopeless claim which has got nothing to do with whether the claimant did suffer an accident at the hands of the driver of the other vehicle.

20. Again, the defendant says in relation to the question of no costs being incurred, or no costs having been proved to have been incurred, it says it is irrelevant. The costs order is the costs order to be assessed if not agreed. If there were not any costs incurred, then that would follow on in the assessment.

21. In relation to the failure to have applied to strike the claim out, the defendant says, well, this is a situation where we were entering into negotiations. Bearing proportionality etc. and the costs of making an application in mind, together with the overriding objective, the defendant did the correct thing by discussing the matter with the claimant, inviting a modest payment of costs, and then it was shut out of the ability to negotiate by the notice of discontinuance. That, it is said, would punish a defendant who is trying to be reasonable. Instead, it encourages him to make a striking-out application straightaway.

22. In relation to the irrelevant factors, the defendant says, well, yes, the district judge did mention fundamental dishonesty, but certainly there was no finding as to fundamental dishonesty, and it does not form any part of his albeit short reasoning in his judgment. It was just background to the application.

23. In relation to the district judge's observations as to the fairness of the QOCS regime, the defendant really says, well, yes, that is part of the exercise of his discretion, and he, therefore, must take that into account. Not only was he able to do so, he should have done so, and the conclusion he came to was right in all the circumstances. Again, in relation to the *Hoist v Reid* case, as I have said, both parties agree that it is irrelevant. The defendant says again it did not actually affect the judgment of the district judge because the authority is so off point.

24. I cannot pretend this has not been a difficult case for me to decide. This is an *ex tempore* judgment given at the end of nearly two hours of submissions, very helpful skeleton arguments, and an interesting point it is. It is not helped by the fact that there is no

appellate authority on the point. The best that we have to go on is the passage in the supplement to *The White Book*, as I have set out above.

25. I have considered 38.4 and what is to be considered when 38.4 is brought into play when a claimant has discontinued a claim and then the other side wants to set it aside. The one authority of any relevance that is cited is the *Ernst and Young* authority which I have already referred to. I will read just the passage at 1610G:

> 'A plaintiff's apparently unfettered right to discontinue before or within 14 days after defence is, however, subject to the overriding rule that discontinuance will not be permitted if it is an abuse of process. That was established by the House of Lords in *Castanho v Brown & Root (UK) Ltd*. [1981] AC 557. Although the House of Lords affirmed the decision of the Court of Appeal, they preferred the first instance judgment of Parker J and the dissenting judgment of Master of the Rolls, Lord Denning.
>
> Lord Scarman in the House of Lords referred to the view of Shaw LJ that it was "an inversion of logic to speak of an act which purports to terminate a process as being an abuse of that process". Lord Scarman continued: "I am not sensitive to the logical difficulty. Even if it be illogical (and I do not think it is) to treat the termination of legal process as an act which can be an abuse of that process, principle requires that the illogicality be overridden, if justice requires. The court has inherent power to prevent a party from obtaining by the use of its process a collateral advantage which it would be unjust for him to retain: and termination of process can, like any other step in the process, be so used. I agree, therefore, with Parker J and Lord Denning MR that service of a notice of discontinuance without leave, though it complies with the rules, can be an abuse of the process of the court"'.

It seems to me, therefore, that the history of the ability to set aside the notice of discontinuance is based historically on where is an abuse of the process. It is conceded by the claimant that there is nothing specific which sets out that an abuse of process or something akin to it is referred to in the rules, but when one takes that with the QOCS regime and the specific exemptions, in order for 38.4 to be used to circumvent the QOCS regime suggests that something akin to an abuse of process should be there. That is based upon two principles. One is the history as I have just referred to. Two, the fact that there are two specific exceptions to the QOCS regime and they both are of the nature of either an

abuse or a hopeless case that has been struck out.

26. It seems to me undeniable that the deputy district judge did not take full account of the purpose and effect of QOCS when one looks at his judgment. He looked at the QOCS regime. He referred to its purpose as providing a way whereby the defendant was deprived of their costs rather than whether the claimant was protected. He did not refer to the specific exceptions except insofar as by way of introduction when he introduced the matter when he made reference to the dishonesty, the fundamental dishonesty point, and the other specific exemption for QOCS. He did not refer to the fact that there were only two specifically provided for, and that this would be a third way around QOCS which is not dealt with in 44 as being a specific exception. He did not refer to the history and nature of the jurisdiction to set aside a notice of discontinuance. It seems to me that the history and purpose of the setting aside of a notice of discontinuance is relevant. I find support for that in the passage that I have read out from the supplement to *The White Book*, that something out of the ordinary needs to be in the nature of the case when a judge is considering whether to set aside a notice of discontinuance, particularly when it removes what is a specifically established protection for claimants with a specifically established couple of exceptions, one of which involves dishonesty. The other involves a striking-out application having been made and having been successful.

27. The defendant is correct to say that the claimant's behaviour in issuing proceedings was not of an abusive nature or anything of that sort. It was just a mistake. It was capable of being struck out, perhaps, but the plain fact is, and the bare reality is, that it was not struck out. Therefore, it simply cannot fall into the Part 44 regime excluding QOCS from applying.

28. Looking at the deputy district judge's judgment, it seems to me that the only matter that he considered was the question of whether this was a case which wasted court resources and whether this was the type of case which a defendant might or should be entitled to recover

their costs from a claimant by virtue of removing the QOCS protection. It is my judgment that the deputy district judge should have taken into account the origin and purpose of the QOCS regime which he did not. He should also have taken into account the fact that there were these exceptions and they are specifically referred to. It would have been easy for the Rules Committee to have disapplied QOCS where a claim was struck out or vulnerable to being struck out or something of that nature. They could merely have provided that the exception applied where a case disclosed no reasonable grounds for bringing the proceedings *simpliciter*, without reference to a requirement of being struck out. The fact that the matter had not been struck out is something that the district judge should have taken into account as well, and he did not make any reference to it at all. He did not take into account, as I have said, and the history of 38.4(2) and the fact that when you take the combination of 38.4 and 44.15 and 16, this was a big step to remove the QOCS protection for the claimant. In this case, the costs were described as nugatory by counsel for the defendant but that would not necessarily be the case in every scenario. In my judgment, when a district judge is considering whether to grant permission to set aside a notice of discontinuance, they should take into account the fact that there are exceptions specifically provided for in the CPR, together with the history of why there is jurisdiction to set aside notices of discontinuance as well as the effect that such a setting aside would have on the carefully considered and applied QOCS protection found elsewhere in the CPR.

29. When exercising his discretion, the district judge should also have taken into account prejudice suffered by the claimant as well as that by the defendant. He took into account the effect on the defendant but not the effect on the claimant, and he failed, therefore, to put that into the balance. When he considered the effect on the defendant, that was the only apparent consideration that he had. He did not give sufficient weight to any of the other factors which the claimant has pointed out in the notice of appeal subject to the matters I

will now make reference to.

30. The fact that the claim did settle: I accept the defendant's argument that it was a separate claim. It is, however, of peripheral consideration that this was not a fundamentally flawed claim or a dishonest claimant trying to bring a dishonest claim. This was a genuine claim where a mistake had been made.

31. I do not accept the claimant's submissions in relation to the fact that no evidence was entered of actual costs incurred for the reasons given by the defendant.

32. I do consider it relevant that the claim had not been struck out. The learned district judge did not take any account of the fact that there was an opportunity for the claimant to have obtained its costs by a different route, and it had three months in which to do so. In fact, it was very late in making the application which was amended at the very last minute to include this application. Those are matters which the district judge should have taken into account when considering whether he should exercise his discretion.

33. In relation to ground two of the grounds of appeal, fundamental dishonesty is raised as one. Looking carefully at paragraphs one and two of the order, I do not actually think that the district judge did have in the forefront of his mind or make a finding that the claimant was fundamentally dishonest. I think when he refers to that at 44.16 when he refers to fundamentally dishonest, he was setting out the background, really: setting out why the defendant was in the position it was, that the case was caught by qualified one-way costs shifting and that is why they needed to make the application that they did make. Furthermore, he did not actually make reference to the fact that the application had been amended. I therefore think that he was, at that stage, referring to the original application. I therefore do not consider that he took that irrelevant factor into account.

34. As I have said, in relation to the fact that the QOCS deprive defendants of their costs, I do not agree that that was an irrelevant factor, but I do, however, agree that it was the only

factor that the district judge appeared to have taken into account. As such, it rendered his decision vulnerable to appeal. I agree with the defendant in relation to the question of the authority. I cannot deduce from what the district judge has said for what purpose he relied on that authority, but I do not think it affected his judgment.

35. As will have been clear from my judgment thus far, I do consider that the district judge erred in principle by failing to take into account relevant factors when coming to his decision and am therefore indeed to allow the appeal.