JAMES BENTLEY CONSIDERS QOCS AND DISCONTINUANCE - AUGUST 2016

As it stands, there is no authority on how QOCS fits with discontinuance. However, there have been multiple county court decisions on the issue. *Magon v Royal Sun Alliance (Unreported, 26th February 2016, Central London County Court)* is the latest of those cases and makes interesting reading for those worried about the effect of discontinuance and QOCS in claims where fundamental dishonesty is *not* alleged.

The Facts

The facts of the case were fairly straightforward. The Claimant was in a road traffic accident and pursued a claim for personal injuries. However, when it came to issuing the claim she issued not on the insurer of the Defendant driver (as would have been her right to) but on the claims handler instead. In light of the error, the Defendant claims handler invited the Claimant to discontinue and to pay their costs.

At around the same time, the Defendant also entered into settlement negotiations with the Claimant on behalf of their principal, leading the matter to be settled for a relatively modest sum. After the matter had settled the Claimant subsequently discontinued against the claims handler and accepted that although they were entitled to an order for costs, the order would not be enforceable since the Claimant was protected by QOCS.

The Defendant made an application to enforce their costs. The application was made not on the basis that the claim *had* been struck out, but on the basis that it *would* have been struck out.

At the hearing the Defendant made an application in the face of the court not to enforce the costs order (accepting that they could not do so) but instead to set aside the notice of discontinuance pursuant to CPR 38.4 (which in turn would allow them to proceed with the strike out application).

First Instance

Although the application had been made after the 28 day deadline set out in CPR 38.4 (2), the judge granted the application. He did so on the grounds that a) the defendant should not be shut out of their opportunity to recover their costs, and b) that the matter should be determined in order to prevent court resources being taken up with claims which are doomed to fail.

The Appeal

The Claimant appealed on the grounds that there were a number of relevant factors that the judge failed to take into account, as well as some irrelevant factors that *were* taken into account. Mr. Recorder Berkley allowed the appeal and set aside the order made by the first instance judge.

It was held that the judge had failed to take into account the fact that one of the main purposes of QOCS was to protect Claimants from adverse costs orders. He also failed to consider the fact that the specific exceptions to QOCS were already clearly laid out within the rules.

Historically speaking, setting aside the notice of discontinuance meant that there had to be some sort of abuse of process. There therefore clearly needed to be something 'out of the ordinary' when considering whether to set aside the notice *purely* to deprive the Claimant of the protection she would otherwise have been entitled to.

Although the claim was *capable* of being struck out, it was not. It would have been simple for the rules committee to add a further exception to cover this particular type of situation, but there was no such exception. The fact that such an exception was absent was again something that needed to be when setting aside the notice of discontinuance.

Finally, the judge also should have taken into account the prejudice that would be suffered by the Claimant and the fact that the (substantive) claim did in fact settle. Whilst that was not this claim specifically, the fact that the Defendant settled the matter on behalf of their principle demonstrated that the Claimant was not trying to bring a dishonest claim (which would be caught by CPR 44.16). It was a genuine claim where a mistake had been made.

For those reasons, the appeal was allowed.

Comment

This case sits in concert with a collection of other county court cases concerning QOCS and discontinuance, the most prominent of which is perhaps *Kite v Phoenix Pub Group*.

In that instance the Claimant had fallen in the car park of a public house and pursued the Defendant for damages. The Defendant maintained that although the pub had been previously been owned and operated by them, by the time of the accident it was owned and operated by a different company. An application was therefore made to strike out the claim. The application was supported by the relevant Companies House records.

After the application had been made, and two days before the matter was heard, the Claimant discontinued proceedings. In hearing the Defendant's application to set aside the notice of discontinuance it was held that the conduct of the Claimant had been 'unfair', and therefore the notice of discontinuance was set aside, leaving the matter to subsequently be struck out.

The two cases are not *necessarily* in conflict with one another, although in both the claim seemed doomed to fail. It will be noted that in *Kite* the application was made *before* the notice of discontinuance was served, whereas in *Magon* it was vice versa. Indeed, in *Magon* the Defendant had specifically invited the Claimant to discontinue.

Using the Recorder's reasoning from *Magon* and applying it to the facts in *Kite* it could be argued that discontinuing two days before a strike out application (which was also bound to succeed) was an abuse of process in that it frustrated *the course* of a legitimate application that had been made.

On *that* basis, Claimant fee earners running cases on which they know they are bound to fail should therefore serve a notice of discontinuance once it is clear that that is the case. In contrast, where a Defendant is confident that the claim can be struck out, the application should be made as promptly as they can. Whether that is a legitimate distinction remains to be seen. Indeed, until the law around QOCS and discontinuance is clarified by the appellate courts, or by the rules committee, it is likely that these types of cases will continue to create a degree of uncertainty.

To read the full judgment please click here

August 2016