Recent QOCS Success

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In two recent cases, James Marwick of our Personal Injury team has successfully obtained enforceable costs orders for a Defendant local authority in personal injury claims subject to qualified one way costs shifting.

The cases are interesting because in neither case was fundamental dishonesty alleged.

Fundamental dishonesty is widely regarded as the central gateway under which a Defendant might seek to escape the strictures of QOCS.

However, there is an increasing focus on the other procedural tools available to a Defendant to recover costs.

In the first case, a late notice of discontinuance was set aside and the claim struck out on the basis that it disclosed no grounds for bringing the claim. An enforceable costs order under CPR 44.15(a) was duly made.

In the second case, a wasted costs order was obtained against the Claimant's solicitors pursuant to CPR 46.8 upon the claim being discontinued at trial upon rejection of a late application to amend a defective statement of case.

Edwards v Bristol City Council (2017), the Claimant pursued a claim for damages for personal injuries arising out of an accident on the highway where she alleged she had tripped over protruding cables from street works. Liability was denied on the basis that the Defendant was not responsible for the street works in question and owed no duty otherwise in respect of transient hazards on the highway. The claimant chose to issue proceedings against the Defendant before establishing the position with the utilities company who had likely been carrying out the works in question.

The Defendant had invited the claimant to discontinue failing an application to strike out the claim would be made under CPR 3.4(2) on the basis there were no grounds for bringing the claim.
The familiar strike out gateway is of course relevant to QOCS as it is one of the prescribed gateways under CPR 44.15(a) by which an enforceable costs order can be made. The rationale behind the rule is obvious. Defendants ought as a matter of policy to be able to recover their costs if they have to defend claims without merit which should never have been brought. This is a clear exception to the normal operation of QOCS.

The claim was not discontinued and the strike out application was made. An application by the Claimant to stay proceedings to make further investigations was subsequently rejected and the hearing of the strike out application was subsequently listed several months after it was made.

A few days prior to the listed hearing, the Claimant discontinued. Discontinuance prima facie gave costs protection under QOCS. The Defendant applied to set aside the notice of discontinuance under CPR 38.4 on the basis that it was a tactical ploy to avoid the inevitable striking out of the claim with an enforceable costs order.

The Claimant resisted the order on the basis that the notice could only be set aside in exceptional circumstances where there was an abuse of process. It maintained that the evidential position had changed such that the Claimant had reconsidered her position and elected to discontinue as she was entitled to do.

It was accepted at the hearing by the District Judge that:-

(i) The application to set aside the notice of discontinuance and the application to strike out were inextricably linked.
(ii) The claim disclosed no grounds for bringing the claim as there was no evidence to suggest that the Defendant was responsible for the street works in questions and the claim would inevitably have been struck out.
(iii) The Court's discretion under CPR 38.4 was not a prescribed power and was not restricted to cases of abuse of process: per *Sheltam Rail Co (Pty) Ltd v Mirambo Holdings Ltd and another* [2008] EWHC 829 (Comm).
(iv) The case was on all fours with the unreported decision of *Kite v Phoenix Pub Group* (2016) which was cited in *Costs & Funding* as an authority for the proposition that late discontinuance in the face of a meritorious strike out application in a QOCS matter could entitle the Court to set aside a notice of discontinuance.
(v) The late timing of the notice of discontinuance in circumstances where the evidential position was unchanged since the pre-action correspondence and where the claimant

had ignored the earlier invitation to discontinue, was plainly an attempt to avoid an enforceable costs order.

(vi) In those circumstances, it was appropriate for the notice of discontinuance to be set aside.

(vii) Notice having been set aside, the claim was duly to be struck out in accordance with the Defendant's strike out application and an enforceable costs order was made under CPR 44.15.

The decision is consistent with the commentary in *Costs & Funding* albeit it is clear that each case will turn on its facts. The further case of *Magon v RSA* is cited in the commentary. In that case, the Claimant discontinued at the invitation of the Defendant (the underlying claim was a sound one, the wrong insurer entity had been issued against) and the Defendant's attempt to set aside the notice of discontinuance was overturned on appeal. No doubt this was because the Claimant discontinued at an early stage and not in the face of an application to strike out.

The central feature of the reported cases where notice has been set aside is where there was an extant strike out application. The authorities do not provide a mandate to Defendants to recover costs in any hopeless claim which is discontinued, particularly if the Claimant has not been afforded a chance to consider its position.

In *Issa v Bristol City Council* (2017), the Claimant pursued a claim for personal injuries arising out of an alleged defect in the rear yard of her local authority maintained property. The claim was pleaded under the Occupiers' Liability Act 1957 notwithstanding that a landlord owes no such duty. This was raised in the defence by the Defendant in clear terms and the claimant was invited to reconsider her cause of action.

No application to amend (in particular to plead the correct cause of action under the Defective Premises Act 1972) was forthcoming and the matter proceeded towards trial. A matter of days before trial, the Claimant applied to amend the particulars of claim to plead the correct cause of action.

The application to amend was heard at the outset of the trial and refused by the District Judge who accepted that the application was too late without good reason in circumstances where the prejudice to the Claimant was a factor to which significant weight could not attached (per the leading authority on late amendments: *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Limited & Ors* [2015] EWHC 1345).

The Claimant immediately discontinued her claim following dismissal of the application to amend. The Defendant made alternative submissions to set aside the notice of

discontinuance and strike out the claim or to make a wasted costs order against the Claimant's solicitors under CPR 46.8.

The Judge held as follows:-

(i) It would not be appropriate to set aside the notice of discontinuance with regard to CPR 38.4.

(ii) However, the failure to take steps sooner to correct the pleadings lay with the Claimant's solicitors and it was appropriate for a notice to show cause to be issued against them as to why they should not pay the Defendant's costs of defending defective proceedings which were ultimately struck out at trial.

(iii) The Defendant's costs were assessed in the region of £6,000.

Subsequently, an agreement was reached for payment of those costs without a contested hearing by the Claimant's solicitors.

The decision is consistent with other reported authorities where it is only because of a failure by the Claimant's solicitors to conduct or consider matters properly which has led to a matter proceeding as it has and the incurring of unnecessary costs by a Defendant.

James was retained as Counsel for the Defendant in both cases. He was instructed by Maxine Hobbs of Wansbroughs Solicitors.

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