General liability newsletter

July 2018

Claimant's damages protected from successful co-Defendants' claim for costs – provided no order for damages has been made

Whilst there remains some uncertainty regarding the application of Qualified One Way Costs shifting where a claim is settled against one of two or more Defendants, the Court of Appeal has provided some clarification to the situation where the Claimant agrees settlement terms with one Defendant and then discontinues the claim against others.

The key provision is CPR 44.14(1) which states:

"Subject to rules 44.15 and 44.16, orders for costs made against a Claimant may be enforced without the permission of the Court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any **orders for damages and interest** made in favour of the Claimant".

In *Cartwright v Venduct Engineering Ltd* (17 July 2018) [2018] EWCA Civ 1654 the Court of Appeal upheld a first instance decision that although filing a Notice of Discontinuance automatically created liability for costs against the Claimant in favour of the successful Defendant, the effect of CPR 14.14(1) was that the order may be enforced against the Claimant only if the damages received had been made by a Court order in the Claimant's favour. The Court decided that the Tomlin order made in this case was not an order for damages in the Claimant's favour because the order merely recited the terms of settlement in the schedule to the order.

It follows that if a Claimant settles a claim against one or more Defendants through a Tomlin order or accepts a Part 36 offer made by one of two or more Defendants (neither of which create an order for damages in the Claimant's favour) then the remaining Defendants against whom the Claimant discontinues the claim will not be able to enforce their order for costs against the money the Claimant secures from the unsuccessful Defendant.

If further follows that a Claimant who settles a claim against one Defendant in a multi-party claim by using a conventional consent order which includes an order for damages in the Claimant's favour, and then discontinues claims against other Defendants will have lost the costs protection available through settlement using the Part 36 procedure or Tomlin order procedure.

Any comments or queries?

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Claimant's costs limited to fixed costs regardless of a Defendant's late Part 36 acceptance

On 23 July 2018 the Court of Appeal decided in *Hislop v (1) Perde (2) Kaur (3) Committee (for the time being) of Ramgarhia Board Leicester* [2018] EWCA Civ 1726 that where claims are commenced under the pre-action Protocol for low-value claims, then it should only be in exceptional circumstances that the parties are able to escape the Part 45 fixed costs provisions that apply. The effect of this is that in relation to offers made under Part 36, the only likely way out of the fixed costs regime is where the Claimant beats his Part 36 offer at trial (as was the case in *Broadhurst v Tan*). If a Defendant accepts a Part 36 offer before trial, even if the acceptance is very late the Claimant will be limited to recovery of the fixed costs provided by the rules unless there are exceptional circumstances. The Court did not define what would constitute an exceptional circumstance, but said that late acceptance of the offer alone was not enough. Clearly this will depend upon the individual circumstances of the case.

Fundamental dishonesty

On 24 May 2018 some guidance was provided by the High Court as to the distinction between dismissing a claim because the Claimant had failed to prove his case, and fundamental dishonesty.

In *Mirajuddon Molodi v Cambridge Vibration Maintenance Service and Aviva Insurance Limited* [2018] EWHC 1288 (QB) QBD the judge at first instance awarded the Claimant damages for a whiplash injury on the basis that the Claimant could have sustained his claimed injuries in the accident despite significant other problems with his claims for other losses.

On Appeal, the High Court decided that whilst Claimants will sometimes make errors and cannot be expected to be completely consistent, the trial judge had been too lenient and should have taken greater account of the fact that the Claimant had been proved under cross examination at trial be inconsistent and unreliable. On some points he had been simply been untruthful; he had lied to his medico-legal doctor about the number of previous accidents in which he had been involved. He had also claimed nearly £1,300 for damage to his car that had cost him about £400 to repair and gave inconsistent evidence about the length of time he was affected by his injuries and the effect of this upon his ability to work.

The Appeal judge decided that the Defendant had proved, on the balance of probabilities, that the Claimant had been fundamentally dishonest, and that where a Claimant's evidence cannot be accepted as reliable, the Court should be reluctant to accept the claim as genuine or, at least, deserving of an award of damages. The trial judge should not have accepted the Claimant's claimed injuries and should have dismissed the claim, either pursuant to s.57(2) of the Criminal Justice and Courts Act 2015, or because the Claimant had failed to prove his case.

This is a rare example of an appellate court overturning a first instance decision on the basis of the facts, and demonstrates that it is not necessary for a Defendant to plead fundamental dishonesty in the Defence, but that such a finding of fundamental dishonesty can be made if the Claimant is proved to be dishonest through evidence given at trial.

The big slip

The High Court has also clarified in *Santos-Albert v Ochi* [2018] EWHC 1277 (Ch) (23 May 2018) that corrections to orders made under the "slip rule" set out in CPR 40.12 are not confined to minor errors.

The Court said that the purpose of the rule was to ensure that the order made by the Court reflected the Court's intention, even though the error in the original order was substantial. Thus, an order to pay £1,000 which the Court had intended to be an order for £1,000,000 was something that could be corrected under the slip rule, despite the large difference in amount. The essential element is that the error was a genuine mistake and the Court said that the slip rule cannot be used to try to revisit issues that the Court had already decided, or add new elements to the existing order that had not been previously intended.

Automated and Electric Vehicles Act 2018

On 19 July 2018 the Automated and Electric Vehicles Act 2018 received Royal Assent. It is noteworthy that if your car causes an accident when driving itself, you cannot blame the car. If your car is insured then your Insurer is liable. If you have not insured your car, then you are liable. It appears the days of being able to blame your IT for your problems are numbered.

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