Neutral Citation Number: [2023] EWCA Civ 744

Case No: CA-2022-002402

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
PETERBOROUGH DISTRICT REGISTRY
HER HONOUR JUDGE WALDEN-SMITH (sitting as a Judge of the High Court)
Ref: E85YM642

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/06/2023

Before :

LORD JUSTICE LEWISON
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

OWEN TABBITT	**Appellant**
- and -	
THOMAS CLARK	**Respondent**

- -
- -

Andrew Hogan (instructed by **Hunt and Coombs LLP**) for the **Appellant**
Robert Marven KC (instructed by **Keoghs LLP**) for the **Respondent**

Hearing date : 28/06/2023

- -

Approved Judgment

This judgment was handed down at 14.30 on 28/06/2023 in Court
and by release to the National Archives.

.....

Lord Justice Lewison:

1. On 12 January 2016 Mr Tabbitt was involved in a road traffic accident when a car driven by Mr Clark collided with a stationary trailer that Mr Tabbitt was towing. Mr Tabbitt sustained serious personal injury. On 18 December 2018 he issued a claim form seeking damages. On 20 January 2022 Mr Clark (or rather his insurers) made a Part 36 Offer but it was not accepted until 3 November 2022. In consequence, Mr Tabbitt was entitled to his costs up to and including 10 February 2022, and Mr Clark was entitled to his costs thereafter. It is common ground that the claim is one to which qualified one-way costs shifting ("QOCS") applies. QOCS is dealt with by CPR Part 44.13 to 44.16.

2. The quantum of the award had been agreed by the late acceptance of the Part 36 Offer. The incidence of costs had been agreed against the background of the costs provisions of Part 36.

3. But, in addition, Mr Tabbitt sought a declaration to be included in the order giving effect to the acceptance of the Part 36 Offer on the basis of the rules as they stood at the time. The form of declaration sought was:

> "Pursuant to rule 44.14 CPR the Defendant is not permitted to enforce (including by way of setoff) the costs Order in paragraph 3 of this Order in his favour against the Claimant."

4. On 1 December 2022 HHJ Waldon-Smith, sitting as a judge of the High Court, heard the application. Her role was limited to deciding whether to make that declaration.

5. CPR Part 44.14 (2) provides:

> "Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed."

6. It was common ground that as the rules stood at the date of the judge's judgment (a) acceptance of a Part 36 Offer did not result in an award of damages and (b) any costs order in favour of the defendant could not be enforced either against the amount of the Part 36 Offer or against the order for costs made in Mr Clark's favour.

7. Since the costs had not been assessed or agreed, there was at the date of the judge's judgment no immediate prospect of enforcement of any costs order against Mr Tabbitt.

8. But at the time of the judge's judgment changes to the QOCS rules were under active consideration by the Civil Procedure Rules Committee ("the CPRC"). On 7 October 2022 the CPRC approved an amendment to the rules which, as drafted, would permit enforcement by a defendant of a costs order against agreements to pay damages and other costs order. The text of the draft was quoted in *Harrison v University Hospitals of Derby & Burton NHS Foundation Trust* [2022] EWCA Civ 1660, [2023] 4 WLR 8 at [51].

9. Mr Tabbitt wished to guard against the possibility of a future rule change with potential retrospective effect. Mr Clark (or rather his insurers) were willing to take

their chances. Since the claim had been disposed of by agreement, it would have been open to the parties to have achieved Mr Tabbitt's objective by agreement, perhaps by Mr Tabbitt making it a condition of acceptance of the Part 36 offer that no costs order would be enforced against him; or by offering to accept a lower sum in exchange for that agreement. But that was not done.

10. In the *Harrison* case HHJ Sefton KC, sitting at first instance, made an order in the terms that Mr Tabbitt sought in this case. He made an order in that form because there was a dispute about what the QOCS rules actually meant. Thus what was argued on appeal was limited to the meaning of rule 44.14 as it then stood. The question whether the position under the current rules should be preserved even after any rule change does not appear to have been argued. Nor was it in any of the other cases that we were shown.

11. In *Adelekun v Ho* [2021] UKSC 43, [2021] 1 WLR 5132 the Supreme Court considered the operation of QOCS. The actual decision of the court was that where a defendant has a costs order in his favour, that costs order cannot be set off against a costs order in the claimant's favour in a case to which QOCS applies. But they also approved the earlier decision of this court in *Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654, [2018] 1 WLR 6137 holding that there is no set-off against a sum recovered under an agreed settlement. The court made it clear that their task was simply to interpret the rules as they stood. At [44] they recognised that their conclusion "may lead to results that at first blush look counterintuitive and unfair." They also recognised at [45] that their interpretation of the rules "may lead to results that appear anomalous." But earlier in their judgment they said at [9]:

> "We should say at the outset that we doubt the appropriateness of a procedural question of this kind being referred to this court for determination. The very fact that two eminently constituted Courts of Appeal have differed profoundly over the interpretation of a provision of the CPR suggests that there must be an ambiguity which practitioners need to have sorted out. The CPRC exists for the purpose of keeping the CPR under constant review. It is better constituted and equipped than is this court to put right such ambiguities, all the more so where, as here, the outcome is suggested by both parties and by the Association of Personal Injury Lawyers ("APIL"), intervening, to have potentially profound policy consequences for the maintenance of a reasonably fair and level playing field in PI litigation, something which this court is much less well equipped than is the CPRC to assess. Nonetheless, permission having been given, this court must decide the question of construction, leaving it to the CPRC to consider whether our interpretation best reflects the purposes of QOCS and the overriding objective, and to amend the relevant rule if, in their view, it does not."

12. Judge Walden-Smith accepted that she had power to make an order in the form of the declaration sought by Mr Tabbitt, but in the exercise of her discretion declined to do so. As the judge put it at [22]:

> "The rule is what it is and will be applied in the wording of that rule at the relevant time."

13. She added at [25]:

> "It is not for the court to cast the rules as they are currently worded into stone so that if there were to be a rule change that had retrospective effect, that rule change could not take effect in the way that was intended."

14. She herself gave permission to appeal.

15. If, by the time that the question of enforcement were to arise, the rules had changed so as to entitle Mr Clark to enforce his costs order against Mr Tabbitt, that would have been because the CPRC (backed by Parliamentary approval of amending rules under the negative resolution procedure) had decided that the interpretation of the rules in the case law did not properly reflect the objectives of QOCS. If the CPRC were to have come to the conclusion that the rules as drafted were defective, and that the defect should be retrospectively cured, why should Mr Tabbitt be entitled to take advantage of that defect?

16. It is well-settled that there is no presumption against retrospective changes to procedure. But if the CPRC were to have taken the view that it would be unfair for any changed rules to apply to a person in Mr Tabbitt's position, then it may provide for transitional cases.

17. Mr Hogan argued that the extent of the court's powers under section 51 of the Senior Court Act 1981, which include power to determine the extent to which costs are to be paid, means that the court can decide the question of the enforceability of any costs order at the date when it makes the order. As a general rule, however, the enforcement of costs orders is a downstream activity from the making of a costs order in principle. Subsequent events might intervene, such as the bankruptcy of a party; or the acquisition of property against which a charging order could be made. It is not the practice in, say, an action for damages for breach of contract for a judgment awarding damages to address the question of enforcement, except perhaps to the extent of granting a stay of execution.

18. Mr Hogan had two answers to this point. The first was that the QOCS rules were so tightly drawn that they compelled a judge to judge to exercise any discretion to deal with the question of enforceability in favour of doing so; and to do so on the basis of the rules as they stood at the date of the decision. I do not agree. The QOCS rules themselves deal with the question of enforceability, and I do not consider that a judge is bound to replicate the effect of the rules by means of a declaratory judgment, at least where there is no dispute about what they mean. Although Mr Hogan submitted that the rules are given effect by orders, I consider that in fact in general the converse is true. Orders are given effect by the rules. The rules apply whether or not they are recorded on the face of an order. Mr Hogan also submitted that it would be unsatisfactory if, in order to understand the effect of a court order, it were necessary to consult the CPR. An order should be clear on its face. But the CPR (including the QOCS rules) are the general legal background against which orders are made; and the legal effect of an order is at least partly informed by those rules.

19. Mr Hogan's second main answer relied on the principle of finality. The order that the judge made was a final order because it disposed of the claim for damages. The principle of finality is an important principle, which also applies generally to litigation. Despite what Mr Hogan called the Balkanisation of personal injury litigation, I do not consider that the principle of finality applies with any greater force to such cases. As I have said, in the normal course of events the question of the enforcement of orders is an activity downstream of the substantive judgment. Moreover, I consider that Mr Hogan's submission mixes up finality with comprehensiveness. The finality principle is about changing or challenging orders that have been made. It is not about leaving some matters over for further decision.

20. The effect of Mr Hogan's argument is that the judge was required to make an order preserving the existing rules in aspic, regardless of what the CPRC might do. That is contrary to the approach in *Adelekun* which placed the responsibility for changes firmly on the shoulders of the CPRC. As the American jurist Lon L Fuller said in *The Morality of Law* (quoted with approval by Lord Reed in *Axa General Insurance Ltd v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868 at [120]):

> "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of law would be ossified forever."

21. In my judgment, the judge was entitled, in the exercise of her wide discretion, to decline to make the order sought and to leave the matter to the CPRC.

22. In fact the CPRC have now amended the rules. The amendments are contained in The Civil Procedure (Amendment) Rules 2023. Rule 24 of those Rules amends CPR Part 44.14 so as to permit a defendant to enforce an order for costs in their favour (including orders for costs deemed to have been made) against orders for damages, or agreements to pay or settle a claim for damages, as well as against costs orders. The effect of the change is to reverse *Adelekun* and some earlier decisions of this court. But rule 1 (3) of the 2023 Rules provides that the amendments made by rule 24 apply only to claims where proceedings are issued on or after 6 April 2023. The 2023 Rules did, therefore, provide for transitional cases. It follows that Mr Tabbitt's claim is unaffected by the change in the rules. Mr Marven KC accepted that this was so; and that even if Mr Clark is successful on this appeal, a costs order will not be enforceable.

23. Thus, the unfortunate reality of this appeal is that what seems to be in issue is the position as between Mr Tabbitt and his own lawyers. It is very regrettable that so much money has been spent on pursuing both the original application and this appeal, which now far exceeds the amount of costs initially in issue.

24. In my judgment, on the rules as they stood at the date of the judge's decision, she was fully entitled to decline to make the order that she was asked to make.

Result

25. I would dismiss the appeal.

Lord Justice Peter Jackson

26. I agree.

Lady Justice Nicola Davies

27. I also agree.