Stamping your mark—indemnity costs on discontinued claim (Rosenblatt v TAL)

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Dispute Resolution analysis: How will the court approach the entitlement to costs after the discontinuance of a claim where the claimant's pre-action conduct is called into question? David Bowden, freelance independent consultant, comments on the consequences of the reserved judgment of Master McCloud and considers what lessons can be learned from this case.

Practical implications

Rosenblatt (a firm) v TAL [2016] EWHC 242 (QB)Rosenblatt (a firm) v TAL [2016] EWHC 242 (QB)Three Rivers DC v Bank of England [2006] EWHC 816 (Comm), [2006] All ER (D) 175 (Apr)

The general rule is that costs on discontinuance will be determined on the standard basis (CPR 44.9(1)(c). However, CPR 38.6(1) gives the court power to order costs on the indemnity basis although such an order will not be made simply because the claimant brought a losing case. When considering whether the court will order indemnity costs in such circumstances consider the factors as set out in *Three Valleys* and whether they apply in the case you are dealing with.

What is background to this case?

The claimant (a solicitor's firm) and the first defendant entered into a retainer for the claimant to provide professional services in relation to acquiring what were termed 'senior life settlements' from a bank. The retainer provided that if the transaction did not proceed, there would be no fee payable to the claimant. A solicitor, the third defendant (Mr Frudd), initially dealt with this for the claimant. However, his employment with the claimant came to an end and he started to work for first defendant instead.

The claimant's view was that Mr Frudd had an undisclosed financial interest in the first defendant which put him in conflict with the claimant and caused him to act contrary to its financial interests. The claimant 'suspected that something untoward had happened' as after Mr Frudd's departure the fee income it expected did not materialise.

The claimant wrote letters before action to each defendant. These were in quite emphatic terms as to the wrongs alleged and were not expressed as suspicions upon which an explanation was requested. These letters claimed damages and were expressly stated to be a letter before action under the CPR mentioning the Practice Direction on Pre Action Conduct.

What was the issue before the Master?

The Master had to determine three issues:

- to use her discretion to award costs on the indemnity basis to a defendant following the service of a notice of discontinuance of a claim—the usual rule being that a defendant gets costs on the standard basis after discontinuance
- the conduct of the parties, especially the claimant, before and during proceedings followed the spirit and the letter of the Practice Direction on Pre-Action Conduct
- the conduct of the claimant took the case out of the norm

What does the CPR say about discontinuance and costs?

CPR 38.6 provides as follows:

> '(1) 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 on the defendant.'

It also goes on to remind of the provisions of CPR 44.9 which provides as follows:

> '(1) Subject to paragraph (2), where a right to costs arises under
>
> (c) rule 38.6 (defendant's right to costs where claimant discontinues), a costs order will be deemed to have been made on the standard basis.'

What does the Practice Direction on Pre-Action Conduct say?

The Practice Direction requires parties to conduct a stock take of their positions before proceedings are issued. It says:

> 'Stocktake and list of issues
>
> 12. Where a dispute has not been resolved after the parties have followed a pre-action protocol or this Practice Direction, they should review their respective positions. They should consider the papers and the evidence to see if proceedings can be avoided and at least seek to narrow the issues in dispute before the claimant issues proceedings.'

This is intended to have some teeth because the Practice Direction then goes on to provide what sanctions are available to the court.

Can a court depart from the CPR?

The introductory wording to CPR 38.6(1) says 'unless the court orders otherwise' and so gives the court a power to depart from the usual deemed basis under CPR 44.9(1)(c) that costs following discontinuance are assessed on the standard basis.
Three Rivers DC v Bank of England [2006] EWHC 816 (Comm), [2006] All ER (D) 175 (Apr)

In considering this, the Master said she derived support as to what she proposed to do from the decision in *Three Rivers* in which the costs of discontinuance were granted on the indemnity basis in a reserved judgment. Some of the factors relevant in that case to whether to grant indemnity costs were:

- the court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide
- the critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstance which takes the case out of the norm
- insofar as the conduct of the unsuccessful claimant is relied on, the test is not conduct attracting moral condemnation but rather unreasonableness
- the court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations
- where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails

Some of the factors that took a case out of the norm were:

- where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time
- where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end
- where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched, and
- where the claimant pursues a claim which is irreconcilable with the contemporaneous documents

What did the Master decide?

The Master decided that there had been a wholesale failure to make proper use of the pre-action process, in a claim where what was alleged was very serious, which in her judgment was:

> 'Unreasonable conduct which ultimately ensured that the weakness of the claim was appreciated only late in the day and not before issue. A serious set of allegations requires a substantial basis at the outset and realistically demands the fullest of engagement pre-action.'

The Master emphasised that one does not impose an indemnity costs order simply because a party brought a losing case. Here, however, this case was pleaded with very serious allegations against professionals, without proper pre-action process being followed by the claimant to explore issues and merits and take stock before the claim was issued. She said that:

> 'It cannot be emphasised too strongly that pre-action conduct is important in the protection of parties from excessive cost and in the preservation of limited court resources.'

The Master correspondingly ordered that the claimant must indemnify, by way of an order for assessment on the indemnity basis, both the second and third defendants for their costs from a date 28 days after their response to the pre-action letter. The Master ruled that this was the point the unreasonable failure to engage realistically arose. In the period before this, costs would be on the standard basis.

What should lawyers do next?

Mitchell v News Group Newspapers [2013] EWHC 2355 (QB)

Master McCloud is perhaps best known for giving the judgment in *Mitchell* in which she refused relief from sanctions to a litigant who submitted a costs budget late and which judgment was then upheld by the Court of Appeal. It is clear that she is a stickler for compliance with the CPR as is the want of many other Masters or other judges that deal regularly with procedural applications.

This was a case issued before the Jackson reforms to the CPR and so there was no costs budget. For claims to which the costs budgeting regime apply, there may not be such a great difference between costs on the standard and indemnity basis. Even where there is, a party will have a reasonably clear idea of the potential maximum costs liability.

Lawyers will do well to remember it is their clients who are in dispute. This case illustrates the importance of giving clear yet firm advice to clients about the Practice Direction on Pre-Action Conduct. While claimant clients may understandably want to get on with issuing a claim, it is important that lawyers explain that the rules have changed and set out the consequences of not taking stock.

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