CASE LAW REVIEW 4

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R (on the application of Amaravathi Perinpanathan) v (1) City of Westminster Magistrates' Court (2) Commissioner of Police of the Metropolis [2010] EWCA Civ 40

FACTS:

The Applicant successfully defended civil proceedings brought against her in the Magistrates' Court under s.298, Proceeds of Crime Act 2002. The police had instituted forfeiture proceedings in respects of £150,000 cash seized by them at Heathrow Airport on the basis that they had reasonable grounds to suspect that the money was intended for transfer to and use by a terrorist organization. The magistrates found that that police had reasonable grounds to suspect the monies were to be used for unlawful conduct at the time of seizure. However, they did not grant the police application for forfeiture of those monies as they could not be satisfied that there actually was a link between the Applicant and a terrorist organization.

The Applicant wished the magistrates to exercise their powers under s.64 Magistrates Courts Act 1980 to make a costs order on the basis that she had successfully defended the application. The magistrates refused her such an order on the basis that it was reasonable for the police to have made the application in the first place.

The Applicant challenged the refusal of the magistrates to make a costs order by way of an application for judicial review. She was refused leave to apply for judicial review by the Divisional Court. She then appealed to the Court of Appeal.

ISSUES:

1. Should individuals be deprived of their costs upon successfully defending an application brought against them by a public body, even where they have done nothing wrong during the course of the proceedings?

HELD:

1. Principles outlined in **Bradford MDC v Booth** (2000) 164 JP 485 DC (Divisional Court) applied and **Baxendale-Walker v Law Society** (2007) EWCA Civ 233 (Court of Appeal) followed.

2. Section 64, Magistrates' Courts Act 1980 which gives the Magistrates' Court the "power in its discretion to make such order as to costs…as it thinks just and reasonable" relates to both the liability for costs and the quantum of those costs if awarded. The only statutory restriction is that they cannot make an order for costs against a successful party.

3. In proceedings to which the CPR does not apply (i.e. the present case) and an individual has successfully defended the application made by the public body the starting point should be that there is no order as to costs. The individual may nonetheless be awarded its costs if the conduct of the public body in bringing the proceedings is deemed unreasonable or considered to be open to criticism.

4. This does not affect the presumption that costs should follow the event in proceedings in the County Court and High Court which are governed by the CPR.

Morris and Sibthorpe v London Borough of Southwark

[2010] EWHC B1 (QB)

FACTS:

The Claimants were pursuing housing disrepair claims against the London Borough of Southwark and were being funded by way of separate but virtually identical CFAs. The CFAs, which provided for success fees of 10%, stated that the solicitors' costs would be limited to sums recovered on assessment and that the solicitors would indemnify the Claimants against any claims for costs made by the Defendant in the event the claims were unsuccessful. Both cases settled by way of Tomlin orders with Mr. Morris receiving £10,000 in damages and Mr. Sibthorpe receiving £1,300 in damages.

The matter proceeded to a Detailed Assessment before Deputy Costs Master Hoffman. Preliminary points were taken in respects of the validity of the CFA; firstly on the basis that it was tainted by champerty or maintenance and secondly on the basis that the indemnity provided by the solicitors amounted to insurance provided by way of a business within the Financial Services and Markets Act 2000 which rendered the CFA invalid. The Deputy Costs Master found the indemnity to be champertous and the CFA unenforceable thus rendering the previously negotiated costs order valueless. Had the CFA been enforceable on that point, he stated that he would not have found the indemnity to amount to the provision of insurance. The Claimant's appealed on the first point and the Defendant cross-appealed on the latter.

ISSUES:

1. Was the indemnity against liability to pay the opponent's costs tainted by champerty or maintenance and if so did the whole CFA become unenforceable?
2. Was the indemnity against liability to pay the opponent's costs insurance provided as an activity by way of a business within the Financial Services and Markets Act 2000?

HELD:

1.
    a. Such cases had to be decided on a case-by-case basis taking account of the nature of the case, the potential size of the indemnity, the nature of the indemnity, the circumstances of the indemnity and the purpose of the indemnity. This list of factors is not exhaustive.
    b. In this case, a separate ATE policy was virtually unavailable and definitely unavailable at a proportionate cost. The risk of the solicitors firm having to pay out on the indemnity was low and this was reflected in the modest success fee. The Defendant also benefited from the work being done on a CFA as they could pursue a claim for costs as opposed to a situation where the Defendants may have been on legal aid. The Defendant was also not at risk of having to pay an insurance premium upon it losing the case. In this case the obligation created by the indemnity clause did not place an unacceptable burden on the Claimant's solicitor which may have caused him to override the interests of the client and put forward somewhat different interests. The indemnity and thus the CFA were deemed valid.

2. Insurance is defined as "*the purchase of an indemnity against the risk of loss caused by a fortuity*" in **Callery v Gray** [2001] EWCA Civ. Accordingly the court decided that the indemnity was not a contract of insurance. The court also had reference to McGillivray on Insurance Law which states that "*where a contract…for services contains elements of insurance it will be regarded as a contract of insurance only if, taking the contract as a whole it can be said to have as its principal object the provision of insurance*". The indemnity was a subsidiary clause and the CFA was quite clearly a contract for the provision of legal services. Thus the CFA was again enforceable.

Owens v Noble

[2010] EWCA Civ 284

FACTS:

The Respondent (N) pursued the Appellant (O) for damages for personal injury. Liability was admitted and damages were eventually assessed in the High Court in excess of £3.3 million. The Appellant subsequently came into possession of a film of the claimant walking about without the aid of crutches or a stick and appealed the damages award and sought a retrial. The Court of Appeal agreed that the matter had to be referred back to the trial judge but rather than ordering a retrial, ordered that the trial judge determine the issue of whether a fraud had been perpetrated by N. In respects of the costs of the appeal, the Court of Appeal ordered that there be no order as to costs.

ISSUES:

Was the Appellant entitled to recover the costs of the appeal given that the matter had been remitted back to the trial judge?

HELD:

O had appealed on the basis that the evidence of fraud was such that the Court of Appeal should set-aside the judgment and order a re-trial. The Court of Appeal stated it would only make such an order where the fraud was either admitted or the evidence adduced amounted to incontrovertible evidence of fraud. The allegation of fraud in this case was hotly contested and thus needed to be adjudicated upon before the previous order could be set-aside. O had effectively been unsuccessful in his appeal as the court had not ordered a re-trial as requested and thus there would be no order as to the costs of the appeal even if N were found to have committed a fraud.

Silvera v (1) Bray Walker Solicitors (2) Bevans Bray Walker Limited (t/a Bevans)

[2010] EWCA Civ 332

FACTS:

Mr Silvera was the Defendant to a claim brought by the 1st and 2nd Respondents for outstanding professional fees. Mr Justice Blake in the High Court gave judgment for the Respondents in the sum of £351,000 plus interest and costs. Mr Silvera appealed on the basis that the Conditional Fee Agreements (4 in total and all entered into before November 2005) were all unenforceable on the basis that they had failed to comply with Regulation 3 of the Conditional Fee Agreements Regulations 2000. He claimed that every CFA failed to "*briefly specify the reasons for setting the percentage increase at the level stated in the agreement*". Each CFA was based upon the Law Society's model form and employed the standard terms for explaining the percentage increase, referring to "the fact that if you lose, we will not earn anything" and "our assessment of the risks of your case".

ISSUES:

Had the CFA's sufficiently explained the basis for the percentage increase and if not were the CFA's then unenforceable?

HELD:

Wilson LK held that the requirement of Regulation 3 to "briefly specify" reasons was just that and no more. He noted that the agreements had been explained to Mr Silvera in some considerable detail before he signed them. This, combined with the contents of the CFA's meant that the reasons provided, albeit extremely brief, were sufficient. Thus there was no breach of Regulation 3. Even if there was found to be a breach of the Regulations, the judge felt it did not amount to a material breach "*in the sense of having a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice*". Wilson LJ applied the test from *Hollins v Russell (2003) EWCA Civ 718* as to the enforceability of a CFA upon there being a breach of the Regulations.

Connaughton v Imperial College Healthcare NHS Trust

[2010] EWHC 90173 (Costs) – Judgment by Master Howarth

FACTS:

The Claimant was walking through a hospital when she slipped, fell and fractured her ankle whilst crossing a wet patch of floor which had just been mopped. The matter proceeded by way of a standard Law Society model CFA which had been modified (a CFA-lite) and provided that the Claimant's liability for costs was limited to sums recovered by way of costs from the opponent. It further described the claim as "your claim against your opponent for damages for personal injury suffered on 2nd September 2008". The CFA did not further define "opponent".

A pre-action disclosure application was made against the NHS Trust who eventually complied with the request for certain information. A consent order was filed however the issue of the costs of the application was still in dispute. The Defendant raised issues as to the interpretation of the CFA, whether the costs of the PAD could come within the scope of the CFA and thus whether the Claimant had any liability as to costs. The District Judge awarded the Claimant its costs and summarily assessed them however this was subject to the issues in dispute being determined by the SCCO. The matter was duly transferred to the SCCO for determination. Prior to the hearing in the SCCO the Claimant confirmed that it was no longer pursuing the NHS Trust but instead pursuing the cleaning contractors.

ISSUES:

1. Did the terms of the CFA cover an application for pre-action disclosure?
2. Did the absence of a "win" mean there was no liability for costs?
3. As there was no claim against the Trust did this mean that the PAD costs did not come within the meaning of "claim" in the CFA?

HELD:

1. Following the guidance provided by Lord Hoffman in *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896 as to the interpretation of contractual documents, it was appropriate to take a broad interpretation of the scope of the CFA. Although the CFA did not specifically refer to PAD applications it did not specifically exclude them. With reference to the Law Society standard definitions which define a claim as "a demand for damages for personal injury whether or not court proceedings are issued", The application was "part and parcel" of the claim for damages arising out of the accident which occurred on 2nd September 2008. Furthermore, PAD applications are applications for an interim remedy within CPR 25 and the CFA covers appeals from interim orders, thus the application for the interim order must also be covered.
2. The CFA provided that "if on the way to winning or losing you are awarded any costs by agreement or Court order, then we are entitled to payment of those costs together with a success fee on those charges if you win overall". On this basis there was no requirement for a "win" for the costs liability to be triggered.

3. The suggestion that the PAD application did not fall within the CFA on the basis that the NHS Trust was not the "opponent" was misconceived. The Claimant was originally pursuing the NHS Trust according to the original Letter of Claim. Master Howarth states that "the fact that proceedings have not been issued against the Defendant does not mean that the Claimant was not claiming against the Defendant in accordance with the definition of "claim" within the CFA.

4. Each party referred to contrasting decisions of District Judges. The Claimant relied upon District Judge Culletton's decision in Liverpool County Court in *Billy Mae Smith v MacDonalds* (1st October 2009) which considered that a similarly worded CFA covered such work as it was undertaken in "*preparation for and in contemplation or in anticipation of proceedings*". The Defendant relied upon Deputy District Judge Smith's decision in Manchester County Court in *Roche v Newbury Homes Limited* (10th February 2009) which concluded that the PAD application could not relate to the action as it pre-dated the substantive claim. Needless to say Master Howarth preferred the approach taken by District Judge Culleton and "respectfully" disagreed with Deputy District Judge Smith's interpretation.

Adris & Ors v Royal Bank of Scotland [2010] EWHC 941 (QB)

Facts:

The Claimant's brought consumer credit claim proceedings against the Defendant. They brought their claims through the claims management company Client Cartel Review Ltd (CCR) and were represented in the litigation by Richard Burley trading as Consumer Credit Litigation Solicitors (CCLS).

Claims were undertaken by CCR and CCLS on the basis that if a client did not win he would not have to pay anything. This meant that when CCLS took over a file from CCR it required funding for its administrative costs and disbursements (i.e. court and counsel's fees). It also meant that ATE insurance would be required.

Funding was provided to CCLS in the form of loans from CCR. However, ATE insurance was never obtained. This was not discussed with Mr Wright or the Claimant's.

When the claims proved unsuccessful, the Defendant applied for CCR, CCLS and Carl Wright (the sole shareholder and managing director of CCR) to be added as interested parties for the purpose of an non-party costs order (NPCO) to be made against them.

Law

The power to make an NPCO is contained in s. 51(3) Supreme Court Act 1981.

The leading case is ***Dymocks Franchise Systems v Todd*** [2004] 1 WLR 2807. Lord Brown said: "Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order". The discretion will not be exercised against pure funders but where the funder controls or is to benefit from the proceedings justice will ordinarily require that if the proceedings fail he will pay the successful parties costs

Issue:

Should an NPCO be made against Mr Burley, CCR and/or Carl Wright?

Held:

1. As against Mr Burley and CCLS, the Judge held that the failure to tell the clients they had no ATE insurance was a "gross breach of duty" which meant that "when cases were taken forward by CCLS on behalf of those clients, Mr Burley was effectively acting without instructions since the clients were prevented from giving instructions on anything like an informed view". This justified the making of an NPCO against Mr Burley because if the client's had been informed there was no ATE insurance "they are likely to have instructed CCLS not to have progressed the claims" and therefore have avoided the costs incurred by the Defendants. The Judge found that "Mr Burley through CCLS was in a very real sense controlling the litigation since decisions were being taken without proper instructions from the clients and I do not accept that anyone else was controlling it.

2. As against Mr Wright, although CCR funded the litigation, without which the claims could not have continued, and would benefit in the event of success, the "real parties" were the Claimants themselves. Mr Wright did not control the litigation, the cases were progressed by solicitors and Counsel and the Claimants in this case were "genuine claimants". Mr Wright was neither "the" real party nor even "a" real party and it would not be appropriate to make a NPCO against him.

3. CCR accepted its liability to an NPCO.

Teasdale & Ors v HSBC Bank & Ors [2010] EWHC 612 (QB)

FACTS:

There were seven Claimants all of whom brought claims against the Defendant Banks alleging they had breached the Consumer Credit Act 1974. Following the decision in ***Carey v HSBC Bank Plc*** (2009) EWHC 3417 (QB), the Claimants sought to discontinue their claims but sought payment of their costs.

ISSUE:

Were the Claimant's entitled to their costs of the action notwithstanding they had discontinued their claims?

LAW:

CPR 38.6(1) provides that "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 the notice of discontinuance was served on the Defendant. In ***Re: Walker Wingsail Systems PLC*** Chadwick LJ commented as follows:

> "the rule makes it clear that a court may order otherwise; but the burden is on the party who seeks to persuade the court that some other consequence should follow; and the task of the court is to consider whether there is some good reason to depart from the normal order …"

HELD:

1. When a party discontinues, there is a presumption that the Defendant will get his costs. The burden is firmly upon the Claimant to show there is a good reason to disapply it. The fact that the Claimant would have, or might well have succeeded at trial is not of itself a good reason because by discontinuing the Claimant has chosen not to have a trial by which the claim could be determined. If it is plain to the court that the claim would have failed at trial that must be a relevant factor against disapplying the presumption because it suggests that all that the discontinuance has done is bring forward the day of defeat. Moreover, the fact that the Claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not, without more, assist. In order to show, "good reason", the Claimant will need first to show a change of circumstances since the claim was made

although it must be borne in mind that changing circumstances are "part and parcel of litigation". It is difficult to see how any change of circumstance could amount to good reason unless it is connected with some conduct on the part of the Defendant which deserves to sound in costs against him.

2. In the instant case, the fact that the Claimant's claims would not have succeeded because of the decision in ***Carey***, which was not decided until after the claims were brought, did not assist any of the Claimants: "as with any Claimant, they take the risk that the legal issues might be determined against them and if so, that is no reason why the other party should pay their costs. The principle applies irrespective of whether the discontinuance occurred before or after those decisions".

Eversheds LLP v Cuddy **[2009] EWHC 90154 (Costs)**

Facts:

The Defendants instructed the Claimants to act on their behalf. A detailed assessment took place under section 70 of the Solicitor's Act 1974 when four bills were challenged. During the course of the detailed assessment several issues arose which required further evidence. The bills were assessed subject to consideration of those further issues which were considered by Master Campbell on 4 and 18 November 2009. Judgment was reserved and handed down on 17 December 2009.

Issue:

1. Did Eversheds give Mr Cuddy an oral estimate that the costs they would incur would be "in the region of £150,000.00"?;

2. If yes, are their costs limited by the estimate uplifted by £50,000.00 for additional work falling outside he estimate?;

3. If no, should there be a reduction to this level or to a figure above this amount which, in all the circumstances the Court considers it reasonable for Mr Cuddy to pay?

Held:

1. On the evidence before him, Master Campbell held, as a matter of fact, that the figure of £150,000.00 came up in conversation. However, he found that these "mere words" could not "be elevated to the status of an estimate" because "no confirmation of the figure in question was requested or given and it is common ground that no individual document actually mentions the sum of £150,000.00" and the words used by Mr Richards for Eversheds that "the costs were £150,000.00" were open to more than one interpretation: "namely that it was £150,000.00 to date or alternatively that it was going to be £150,000.00 all-in";

2. There was a conversation between the parties during which Mr Richards said "it could be £200,000.00". The dispute was whether this was an additional £200,000.00 or £50,000.00 on top of the £150,000.00 previously advised. As this was a Solicitors Act assessment to which CPR 48.8(2) applied the Judge was obliged to give the benefit of the doubt to the receiving party;

3. The only costs information Mr Cuddy received from the date of the client care letter (May 2007) to the termination of the retainer (2 August 2007) were the invoices he received in the second week of July. In order to discharge its obligations about providing costs information under the terms of the retainer and paragraph 6 of the Solicitors' Code of Conduct, in the absence of an estimate, Eversheds ought regularly to have told Mr Cuddy about the level of costs he was incurring. The Judge held, applying CPR 44.4(1), that if

costs are incurred in breach of the Code they “are vulnerable to reduction” and decided that a reasonable amount for Mr Cuddy to pay would be in the region of £25,000.00 instead of the £91,754.86 charged.