Welcome to this week’s edition of BC Disease News.

In the last week, it has been reported that the European commission is planning to relicense a controversial weed killer that the World Health Organisation (WHO) believes probably causes cancer in people. Elsewhere, we report on a ruling handed down by the High Court, Smith v Portswood House Ltd, whereby an employer has successfully defended a mesothelioma claim arising from exposure from cutting asbestos in a factory during the 1970s.

This week we present a feature in which we consider the further exceptions to QOCS, including when the claim is struck out pursuant to CPR r 44.15 and where a claimant fails to beat the defendant’s part 36 offer. We also consider the prospect of enforcing a costs order against a claimant in a multi-defendant claim where a co-defendant has settled out of court.

Any comments or feedback can be sent to Boris Cetnik or Charlotte Owen.

As always, warmest regards to all.

SUBJECTS

Carcinogenic Weedkiller to Be Relicensed by European Commission

It has been reported that the European commission is planning to relicense a controversial weed killer that the World Health Organisation (WHO) believes probably causes cancer in people, despite opposition from several countries and the European Parliament. ¹

Last year, the International Agency for Research on Cancer (IARC) said that glyphosate, the active ingredient in the herbicide made by agriculture company Monsanto and used widely with GM crops around the world, was classified as probably carcinogenic to humans along with a finding of ‘limited evidence’ for the conclusion that glyphosate was carcinogenic in humans for non-Hodgkin’s lymphoma.

Glyphosate is an ingredient in Monsanto’s bestselling Roundup brand as well as in herbicides manufactured by Syngenta and Dow. The chemical is typically mass-sprayed on crops that have been genetically engineered for immunity, and some farmers say it has triggered an explosion of resistant weeds in the US since its introduction in 1974.

Following this finding, Italy, France, Sweden and the Netherlands have opposed the relicensing of glyphosate in March and more than 1.4 million people have signed a petition calling for the chemical to be banned. However, the reported proposal from the European commission apparently has few substantive changes from the one that was blocked last month. It would cut the authorisation period for glyphosate from 15 to 10 years and mandate consideration of an immediate ban if a European Chemicals Agency (ECHA) study next year finds it hazardous.

There has been much disagreement from the Green Party and also European agricultural industry groups who say that they too are concerned that a precedent could be set by any decision to reduce the new approval period. Graeme Taylor of the European Crop Protection Agency told the Guardian: ’Clearly we are disappointed that political pressure has resulted in the scientific process for substance authorisation being undermined. If the substance is considered to have met all the criteria for re-approval then it should re-approved for a period of 15 years’.

The IARC has deemed it ‘probably carcinogenic to humans’, although the European Food Safety Authority disagrees. An opinion from the ECHA panel could resolve a dispute over lab methodologies and industry influence between the two scientific bodies. But the study will take 18 months and has not yet begun. An ECHA spokesman would only say that ‘currently, ECHA has no opinion on changing the classification of glyphosate’.

In edition 131 of BC Disease News we also reported on research published by the journal, Environmental Research by the National Institute for Occupational Safety and Health (NIOSH), which reported on deaths caused by prapquat and diquat, two of the more commonly used weed killers. This feature can be accessed here.

Costs and Disbursements Funder Enters Market with New £20m Facility

We are seeing an increasing number of private equity funders providing lending to the claimant personal injury market. These lenders help relieve cash flow problems, at least in the short term, but what are the additional costs of these schemes in the long term to firms that utilise them and will these add to future cash flow concerns?

The growth of such private equity investment undoubtedly helps prop up the disease market and assist claimant firms though cash flow problems, at least in the short term, but what are the additional costs of these schemes in the long term to firms that utilise them and will these add to future cash flow concerns?

Amending the Costs Budget – What Is A ‘Significant Development’?

In the recent case of Churchill v Boot, heard in the Queen’s Bench Division of the High Court, Justice Picken found that a master at first instance had been correct to refuse a party permission to amend its costs budget, as there had been no significant developments in the case within the meaning of CPR PD 3E para 7.6. This states that:

‘Each party shall revise its budget in respect of future costs upwards or downwards, if significant developments in the litigation warrant such revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of
agreement, the amended budgets shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party. The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed’.

Picken J found that the parties could have envisaged the developments in the case at the time of the original budget. The claimant and defendant had been involved in a road traffic accident in 2009, in which the claimant allegedly sustained a brain injury. In 2014, a master approved a costs budget for the parties. That order also granted permission to the claimant to adduce evidence from experts in various disciplines. The claimant later had to provide further disclosure, including education and employment records, and the trial was delayed by six to nine months. A further order in 2015 provided for the exchange of updated expert reports. The claim had doubled in value since originally pleaded. The claimant applied to amend the costs budget under CPR PD 3E para.7.6. The master refused on the basis that there had been no significant development within the meaning of para.7.6, as the case had taken a predictable course following the original budget.

The claimant submitted that there had been significant developments since the 2014 order, namely the doubling of the amount claimed, the adjournment of the trial, and the further disclosure which had led to updated expert reports.

It was held that, doubling the amount of the claim did not necessarily justify an increase in costs. The so-called developments were capable of being envisaged at the time of the original costs budget. An adjournment could be a significant development, but in the instant case it had not been one of itself. It was also not tenable that the further disclosure was a significant development; the type of disclosure ordered, namely education and employment records, was standard for the instant type of claim. Disclosure and the service of expert evidence were not significant developments which had not been contemplated when the costs budget was set. The 2014 order had identified the expert disciplines from which reports could be adduced; it was clear that it had always been envisaged that the experts would review the types of documents sought through disclosure. The 2015 order referred to an exchange of updated reports. It was difficult to see how the subsequent reports were a significant development, in the sense of being significant and previously unexpected. There was no merit in the claimant’s ground of appeal; the master had exercised his discretion in a way not susceptible to challenge. Therefore the application by the claimant was refused.

Progress for New Bill of Costs?

In an attempt to restart momentum towards one of the unfinished elements of his reforms in the Jackson Report, LJ Jackson has recently advocated for the new format bill of costs, developed by the Hutton Committee, to be used from October 2017.2 However, he recommended that this should be decoupled from the J-Codes to make it more palatable to the profession.

In January of this year, the Civil Procedure Rule Committee had said it was ‘too soon’ to make the new bill compulsory. However, in his speech at the Law Society last week, LJ Jackson said that while the CPRC was ‘right to be cautious’, there was now a ‘state of deadlock’. He suggested that using the bill prepared by the Hutton committee, but without mandating use of the J-Codes, would allow ‘greater flexibility’.

He went on to say that although the J-Codes conferred ‘considerable advantages’ on users, it was never intended to make them mandatory for the new bill of costs.

As a reminder to readers, the new J-Codes, as summarised in the 2015 Harbour Lecture by LJ Jackson,4 will work as follows:

‘The J-Codes are designed to be compatible with commercial time recording software. Participating solicitors will adapt their time-recording systems by using the following codes. A number with J as prefix denotes a task (i.e. the subject matter of the work). A number with A as prefix denotes an activity, i.e. what you are doing within that subject matter. For example, if you wish to record your time drafting a witness statement as a result of an earlier meeting with the witness, you would select your Task Code as JG-10, defined as “Taking, preparing and finalising witness statement(s)” and then select your Activity Code as A103, namely “draft/revise”. There is therefore no need to select a Phase Code, only a Task Code and Activity Code as the Task Code always includes the Precedent H phase within it (in the above example, JG-10 relates only to Witness Statements). Thus all time-recorded work is assigned to the Precedent H phases. You can then additionally enter manually on the time recording system for that same entry as detailed a description as you wish of the particular work done, such as “drafting the Claimant’s witness statement, including…”.

In his recent speech to the Law Society, LJ Jackson said that, ’most – if not all – of the criticisms about the new format bill of costs are aimed at the J-Codes. There are strong views on both sides of the debate. As a result of the new format bill’s foundations being built on J-Codes, this has meant that the entire bill has been criticised rather than one discrete part of it’.

Instead, he said, the CPR should allow practitioners to prepare that bill in any manner of their choosing, whether with the assistance of J-Codes, automatically generated by an Excel spreadsheet or by hand.

‘A digital copy of the bill should be served on the court and the paying party along with an electronic spreadsheet, which clearly and accurately details the work done in the course of litigation, following the Precedent H stages. This should be in the same format of phase/task/activity and adopt the Precedent H guidance for what work falls in a given phase. Time entries can either be generated automatically by time-recording software or inputted manually by those who prefer to record their work done on paper. For those using J-Codes, the Hutton Committee spreadsheet provides an excellent tool for preparing the bill’.
One of the major objections to the Hutton committee’s work was the fear that retrospective application of the new format bill and of J-Codes would increase the cost of bill preparation dramatically.

Jackson LJ’s “complete solution” to this was for the CPRC to choose a future date for the implementation of the new bill, and only work done after this date would have to be done in the new format bill.

The judge also mooted fixing or capping the recoverable costs of preparing the bill, stating, ‘the receiving party should only expect to recover up to a certain amount for the preparation of the bill – possibly expressed as a percentage figure of the total value of the assessed bill’.

He also argued that the new format bill was required even if fixed costs were introduced for the multi-track. Jackson LJ published a ‘possible preliminary draft of the new bill’, adding: ‘Regardless of whether this particular proposal is accepted or not, one thing does need to be kept in mind: the status quo is of no benefit to anyone’.

**Should Litigators Take Technical Points As To Service?**

This is one of the most difficult decisions that litigators face, particularly in relation to service of the claim form and it has been addressed in the recently reported decision of De Souza v Perry. The facts of this case were that the claimant brought a claim for damages following his suffering significant injuries in a road traffic accident. Liability was admitted but the defendant alleged he had been served on 6th July 2015, she had in fact received an original sealed claim form (in compliance with the rules) and that the only defect within the documents received [...] had been the erroneous placement of an original bar coded sticker by the court staff on the first page of the response pack rather than on the claim form itself.

She went on to find that:

‘I am bound to express some dismay that this application was pursued and a ruling sought in circumstances where, at the outset of the hearing on 23rd October 2015, both counsel recognised that contrary to arguments which had been raised in Ms Harris’ statement concerning the invalidity or otherwise of copy documents with which she had allegedly been served on 6th July 2015, she had in fact received an original sealed claim form (in compliance with the rules) and that the only defect within the documents received […] had been the erroneous placement of an original bar coded sticker by the court staff on the first page of the response pack rather than on the claim form itself’.

In my judgment, Miss Harris sought to capitalise on a relatively minor procedural defect - the lack of a bar code on the face of the sealed claim form – and, in the erroneous belief that she had received a sealed copy of the claim form, then engaged in tactical manoeuvring in order to resist service of a substantial claim within the relevant limitation period’.

In addition to these comments, HHJ Straite also made reference to the decision of Denton v White (& Others), in particular she drew attention to paras 41 and 42 of the judgment which references the parties working together to ensure that, in all but the most serious case, satellite litigation should be avoided and the observation made at para 43 that the court will be more ready in the future to penalise opportunism if applications to the court are made when they could have been averted in the spirit of cooperation between the legal representatives.

In doing so, it was concluded that on the facts of this case, the claimant did effect service of the proceedings before 9th July 2015 and that service was not compromised by any subsequent communications between the solicitors. To the extent that there was any defect or flaw on the face of the claim form, this did not justify an application for relief from sanctions and could previously have been remedied by the application of CPR r 3.10, which, it was considered, can now be applied to remedy any outstanding errors of procedure including remedying the time for service of the filing of the certificate of service by the claimant’s solicitor.

In edition 23 of BC Disease News we considered the rules on service of the claim form, defective service and the consequences of defective service. This feature can be accessed here.

**Low Exposure Mesothelioma Judgment: Case Comment on Smith v Portswood House Ltd**

In a ruling handed down by the High Court, Smith v Portswood House Ltd [2016] EWHC 939 (QB), an employer has successfully defended a fatal mesothelioma claim arising from factory exposure during the 1970s.

The deceased was a wood working machinist, employed in the defendant’s joinery shop from 1973 to 1977. It was alleged he was exposed to asbestos dust from the manufacture of fire doors containing asbestos cement sheets which he would cut to size using an electric saw.
connected to a dust extraction system. As a result of this he developed mesothelioma in 2013 and sadly died in 2015.

The defendant’s witnesses (including the joinery shop manager) could not recall asbestos being used in the manufacture of any item in the joinery shop. At the relevant time two types of fire door were produced, half hour fire doors containing no asbestos and one hour fire doors containing an asbestos sheet underneath the plywood facing. The defendant’s witnesses could not exclude the possibility that one hour fire doors were made occasionally within the joinery shop.

It was alleged that the exposure was negligent and in breach of the Asbestos Regulations 1969 and section 63 of the Factories Act 1961 in terms of inadequate control of dust given off by the processes involved.

At the material time the Asbestos Regulations 1969 were accompanied by the Factories Inspectorate Technical Data Note (TDN13), which set limits for ‘safe’ asbestos dust concentrations of 2 fibres/ml for a four hour time weighted average (TWA) concentration and 12 fibres/ml for a 10 minute TWA.

Section 63 of the Factories Act required employers to remove dust or fumes by all practicable measures where the same was ‘likely to be injurious’ or of a ‘substantial quantity’.

‘In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulation in any workroom, and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust or fume or other impurity, so as to prevent it entering the air of any workroom’.

The court found that the deceased making a fire door containing asbestos was an exceptional occurrence and, when he used the saw, the extraction system collected the dust, keeping the dust levels below the concentrations specified in the Factories Inspectorate TDN13. As such there was no breach of the Asbestos Regulations 1969.

Further on the issue of s. 63 of the Factories Act, it was held that: ‘Any woodworking machine with reasonable exhaust properties would discharge some dust as the irreducible residue implicit in the data set out in TDN42. No doubt such residual dust could “fly up in the air” and (if so) it might well be difficult for the operator to avoid inhaling some of it. Mr. Upton said that the extraction was very efficient so that there was little in the way of dust in the air in the shop. He was not directly challenged on that statement. In the circumstances, the evidence does not support a finding that there was a “substantial quantity of dust” given off, and thus there is no basis for a finding of breach of section 63’.

The rationale of this decision focused very much on whether residual dust is the test of significance. On the facts of this case there was evidence of extraction with little dust in the air and this seems to be the reason that there was no ‘substantial quantity of dust’ found. It is unclear, if that were not the case, whether the outcome would have been the same. Due to the lack of guidance in McDonald around this issue more clarity around the statutory interpretation of s.63 would be useful and it is yet to be reported if this decision will be appealed.

We have previously discussed the topic of low exposure mesothelioma in editions 89 (here) and 91 (here) of BC Disease News, these will be followed shortly by an updated feature on low exposure. In addition, there will be a future feature in BC Disease News discussing the statutory interpretation of s.63 of the Factories Act 1961.

Feature

The Exceptions to QOCS

Introduction

In last week’s feature we focused on QOCS and fundamental dishonesty. We discussed the separate regimes available under which practitioners may make an application for a finding of fundamental dishonesty under CPR r 44.16 and s.57 of the CJCA 2015, with a comparison of their different consequences. This week we consider the further exceptions to QOCS, including when the claim is struck out pursuant to CPR r 44.15, where a claimant fails to beat the defendant’s part 36 offer and we will also address the prospect of enforcing costs orders against a claimant in a multi-defendant claim where a co-defendant has settled out of court.

CPR r 44.15

This is sometimes referred to as the cousin provision of CPR r 44.16, which sets aside QOCS protection on grounds of fundamental dishonesty. However, unlike r 44.16, r 44.15 does not require permission of the court in order to enforce an order for costs against the claimant. The rule states:

‘Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that:

a) The claimant has disclosed no reasonable grounds for bringing the proceedings;

b) The proceedings are an abuse of the court’s process; or

c) The conduct of –

i. The claimant; or

ii. A person acting on the claimant’s behalf and with the claimant’s knowledge of such conduct.

Is likely to obstruct the just disposal of the proceedings.’
The reader will note that the terms used in r 44.15 are the same as the terms used in r 3.4(2)(a) and (b) and it is only if the claim is struck out under r 3.4 that QOCS protection is lost under r 44.15. As mentioned above, once a claim is struck out, permission from the court is not required to enforce a costs order.

However, the problem with r 44.15 is that it only applies if the claim has actually been struck out. Many fraudulent claims will not come within this rule because it is extremely difficult to strike out a claim on the basis it is fraudulent. The nature of such an allegation means it is rarely going to be a suitable issue to decide on an interim application and so it will usually be left to be determined at trial. Although, in certain cases, it may be possible to apply to have the claim struck out after a full trial as was ascertained in the case of, Summers v Fairclough Homes. In this decision the Supreme Court held that, the court had power under the CPR and under its inherent jurisdiction to strike out a statement of case at any stage of the proceedings, even when it had already been determined that the claimant was, in principle, entitled to damages in an ascertained sum. However, that power was to be exercised only where it was ‘just and proportionate’ to do so, and that was likely to be only in ‘very exceptional circumstances’.

Although it should be noted that the power was not exercisable in the instant case, the principle has been applied in subsequent decisions, for example, Plana v First Capital East. In this case, there was surveillance evidence which revealed a lack of any apparent impairment in the claimant’s abilities to go about his normal working life. Despite, the disclosure of such evidence, the claim proceeded to trial, notably without the claimant having taken any steps to have the medical experts address the surveillance evidence. Indeed, the judge held at para 20 that:

‘[...] whatever the circumstances of [the claim’s] inception, at some stage, [it] has been brought not based on true facts but upon a clear intention to deceive’.

Accordingly, HHJ Collender QC, concluded that the case should be struck out pursuant to the court’s powers under CPR r 3.4(2)(b) as being both an abuse of the court’s process and likely to obstruct the just disposal of the proceedings.

This is useful for those cases in which the court may be unwilling to strike out a claim following a ‘standard’ strike out application but where the evidence at trial reveals grounds for a strike out, but what happens where there are allegations of fraud in a discontinued claims?

Where a personal injuries claim has been discontinued, the effect of CPR r 44.14(1) is that generally the claimant has costs protection under QOCS which overrides the usual costs position in discontinued claims as set out in r 38.6.

Anecdotally, there has been an increasing trend of weak claims being brought, with proceedings being issued and being run to their limit in the hope that the defendant ‘blinks’ and makes an offer on the basis that it will have to pay its own costs even if it wins.

A recent example of this was seen in the case of KB (an infant) v Go North East Ltd, in which the defendant’s bus was proceeding along a narrow road outside a school with lots of parked cars present. A car driven by KB’s great Grandfather, was coming the other way. KB was 5, and a rear seat passenger. There was insufficient room for both vehicles, so they both stopped. The bus driver (wrongly) assessed that he could squeeze through, slowly.

The bus scraped the side of the car whilst travelling very slowly at about 5 mph. The drivers swapped details, no complaint was made of injury, and the damage to the car was paid for promptly by Go North East. About 18 months later, a claim for injuries was made against Go North East by both the Grandfather and KB.

It was then discovered that the Grandfather had told his insurers 7 days after the accident that no one was injured and he had signed a statement of truth to that effect. This was subsequently pointed out to his solicitors who also acted for KB but they continued nonetheless and medical reports were produced. The medical reports alleged a whiplash injury causing ongoing pain that might be permanent and need physiotherapy for the Grandfather and a whiplash injury lasting 4 months, and bed wetting that started 2 days post-accident and persisted for 7 months on behalf of the child, KB.

Proceedings were issued on behalf of the Grandfather. At trial in April 2015, the Judge found that he had not proven any injury was caused by this accident, and that whilst he was not fraudulent, if he had a neck pain, it was unrelated to the accident. In coming to this conclusion the judge noted that there were two different versions of the claimant’s statement, the second of which elaborated considerably on the effects of the collision and which the claimant said he had not seen. It was determined that the solicitor’s had improved the statement and taken the signature page from the original statement and stapled it to the improved version. In addition, the claim for physiotherapy was withdrawn and in cross examination the claimant admitted he had never had physiotherapy but was told to claim for it ‘just in case’ he decided to have some. It was determined that the disclosed invoice for the physiotherapy was from a company with connections with the solicitors. Finally, when asked why it had taken him so long to notify his insurance company of the claim, the claimant said that he had been called by the solicitor that acted for him.

Despite this, the claimant solicitors still went on to issue proceedings on behalf of KB. On obtaining the child’s medical records, it was discovered that there was not only no record of any neck injury to KB but that he had in fact suffered from bed wetting for a long time prior to the accident. The claimant solicitors were then invited to discontinue the claim but they never responded.

An application was then made to strike out the claim which was due to be heard at the start of the trial. In the meantime, KB’s solicitors proceeded as if they would pursue the claim at trial, but the day before the trial, formally discontinued the claim. The consequence was that there was now no claim for the defendant to strike out and they could not seek a costs order against KB.

In this instance the defendant made an application to reinstate the case, then strike
out the case on the grounds that there were no reasonable grounds for bringing the case, that it was an abuse of court process or the claimant’s conduct obstructed the just disposal of proceedings. The court set aside the discontinuance and then made a costs order in favour of the defendant. The claim was then struck out and a finding was made of fundamental dishonesty on the part of KB’s mother for telling the medical expert that KB had suffered serious bed wetting due to the accident. It was determined that she had misled the medical expert for financial gain. Additionally, the court found serious misconduct by the claimant’s solicitors. As a result, the defendant received their costs.

Whilst the defendant’s in these cases achieved the desired outcome, in that they were granted their costs, it is not absolutely necessary for the defendant to have applied for the discontinuance to have been set aside and then the judge to have awarded costs and subsequently struck the claim out. This is because Practice Direction 44 at para 12.4(C) provides that:

‘where the claimant has served a notice of discontinuance, the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined notwithstanding that the notice has not been set aside pursuant to rule 38.4’.

As such, the claimant could have simply made an allegation of fundamental dishonesty and the judge would have been able to make this finding without having to go through the ritual of hearing the application, granting the application, making the costs order for the defendant and then striking out the claim. Had the judge taken the approach in PD 44 a finding of fundamental dishonesty could have been made under CPR r 44.16 and as was outlined last week, this would still have meant the defendant was granted their costs in full.

This issue arose again this week, in the decision of Rouse v Aviva,1 whereby HHJ Gosnell confirmed that the new regime of QOCS had not changed a much older rule that the service of a notice of discontinuance ‘is not the end of the matter for a claimant’. He went on to state that:

“If a defendant thinks they can satisfy a court on balance of probability the claim is fundamentally dishonest, they can ask the court to direct that an issue arising out of that allegation be determined’.12

Interestingly, the judge added that: ‘I think it must be right that where the claimant does not give evidence or does not proffer any reason for the decision to discontinue, then the defendant can invite the court to draw an adverse inference’.

However, it was deemed necessary that the allegation be considered at a full hearing and not just on the papers as was initially suggested by District Judge Edwards at first instance.

**Part 36 Trumps QOCS**

The wording of CPR r 44.14(1) means the defendant can enforce a split costs order made under r 36.17(3) where the defendant has made a Part 36 offer, and the claimant has failed to achieve a judgment more advantageous than that offer. Assuming the claimant with the benefit of QOCS has succeeded on liability and obtained a money award, r 36.17(3) says that unless the court considers it unjust to do so, it will award costs to the claimant up to the end of the relevant period, and the defendant its costs thereafter.

These two costs orders can be set off against each other under r 44.12 which states that:

‘(1) Where a party entitled to costs is also liable to pay costs, the court may assess the costs which that party is liable to pay and either—

(a) set off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance; or

(b) delay the issue of a certificate for the costs to which the party is entitled until the party has paid the amount which that party is liable to pay.

The effect, especially if the Part 36 offer was made in the early stages of the claim, is that there is often a net costs liability due from the claimant to the defendant under the usual r 36.17(3) order.

So, by virtue of r 44.14(1) that net costs liability can be enforced against the claimant without permission against the awards for damages and the award for costs, up to the extent of reducing those figures to zero.13

**QOCS and Multi-Defendant Claims**

Finally we look at the scenario whereby a claim is brought against two or more defendants and the claimant has succeeded against one defendant but failed against the other(s). In this circumstance, the successful defendants may obtain a costs order in their favour as the claimant has obtained damages against which such costs order can be enforced. It would not appear relevant that the defendants who are recovering their costs have not made any damages payments themselves.14

However, where there is a settlement the approach is not so straightforward. This is because r 44.14(1) states that:

‘...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’. (Emphasis added).

It is possible then that where settlement is reached, there may be no ‘order’ for damages in favour of the claimant and so the defendant may not be able to recover their costs against the settlement amount. However, there is currently no case law on this topic.

**Conclusion**

It can be seen that, as well as the provisions relating to fundamental dishonesty, there are other scenarios in which QOCS will no longer apply. Once a particular exception has been identified the rules for each of these provisions should be considered carefully.

However, there remain some questions regarding QOCS and their exceptions and test litigation is encouraged in these cases. We will keep a keen eye on any developments in this area and continue to report on emerging case law.
References


5 (Chelmsford County Court, 6 November 2015)

6 [2014] EWCA Civ 906.

7 [2012] UKSC 26


10 (Gateshead County Court, 22 December 2015)

11 (Claim no A28YP882, Bradford County Court)


13 Ibid Sime

Disclaimer

This newsletter does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to provide an update on issues that may be of interest to those handling occupational disease claims. Specialist legal advice should always be sought in any particular case.

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