Proceedings to obtain an order for costs where damages are no longer at large (Ayton v RSM Bentley Bennison)

05/11/2018

Dispute Resolution analysis: To an extent, the procedural hiatus in the law that made it possible for a defendant who had agreed to pay damages prior to issue to resist paying costs has been plugged. This is because May J has explained that it would not be an abuse of process to issue proceedings for the sole or main objective of pursuing an order for costs. Written by Dr Mark Friston, barrister, Hailsham Chambers.

Ayton v RSM Bentley Bennison and others [2018] EWHC 2851 (QB)

What are the practical implications of this case?

Where a defendant declines to pay costs of a claim that has, in some way, concluded without proceedings being issued, then if costs are sought, the claimant must issue proceedings. If there is accord as to the incidence of costs but not the amount, then costs-only proceedings should be issued. But what of the situation where the defendant refuses to pay costs outright?

Practice Direction 47, para 9.12 makes it clear that the existence of costs-only proceedings does not detract from the availability of other means of bringing the matter before the court (such as where there is a putative agreement to pay costs in a stated amount) but there is a hiatus in that it does not address the situation where damages have been agreed or conceded yet the issue of the incidence of costs remains at large.

To an extent, May J's judgment in *Ayton* has plugged that gap—it will be highly relevant in the (increasingly common) instances where defendants agree to pay damages prior to issue but refuse to pay costs. May J has found that it would not be an abuse of process to issue proceeding for the primary purpose of obtaining an order for costs (albeit in circumstances where the underlying claim had not been totally extinguished).

May J's analysis raises two interesting questions, however. The first is whether it would be an abuse of process to issue such proceedings where the underlying claim had been totally extinguished, and the second is whether a defendant is able to issue proceedings for costs in the event of a claim having been abandoned pre-issue.

What was the background?

The claimant advanced a substantial sum (£150,000) for a Russian oil investment, this being on the advice of the defendant, a firm of accountants. That advice was negligent, and as a result the claimant suffered substantial losses (of £100,000). A letter of claim was sent. The defendant responded by sending the claimant a cheque for the amount claimed, plus interest at 1%. The defendant refused to pay costs, however. It asserted that because proceedings had not been issued, there was no mechanism by which the claimant could obtain an order for his costs. The claimant did not cash the cheque.

Proceedings were issued. In addition to the claim for the aforesaid losses, there was a claim relating to certain alleged losses concerning a car (the car claim). Stripped on inconsequential detail, the proceedings then took the following course. The defendant paid £103,577 in to court and pleaded tender before action. It resisted the car claim as being hopeless and applied to strike out the claim. The claimant then made two Part 36 offers (firstly to accept £105,000 and then to accept £105,500). The application to strike out was dismissed, following which the claimant made a third Part 36 offer (to accept £110,000). The defendant appealed the decision not to strike out the claim—it made a number of offers, none of which included costs to be assessed. That appeal was dismissed. There was then a further appeal (on the issue of whether there had been defence of tender), but that too was dismissed.

Following a case management conference, the defendant amended its defence so to admit the claim for damages (other than the car claim) but to plead that it ought not to be liable for the claimant's costs. The matter proceeded to trial, where the court decided two relatively minor issues (namely, the car claim and the rate of interest payable). The claimant was awarded £119,578, so he had 'beaten' all three of his Part 36 offers. Notwithstanding this, the Master ordered the claimant to pay 80% of the defendant's costs from the date of the case management conference. In this regard the Master criticised the claimant for having engaged in tactical litigation solely about costs—she had this to say on that point: '[T]he claimant chose to issue proceedings in order entirely so that he might assert he had a proper basis to recover costs. It would have been futile to bring a claim simply for costs. Accordingly, this was an entirely unnecessary piece of litigation if it was intended only to recover the claimant's legitimate claims.' The Master found that it would

be unjust to allow the claimant the benefit of the Part 36 offers—in this regard, she had the following to say: 'The Part 36 offers should not…be viewed in isolation from the controversial and primary relief being pursued, namely that of a costs order.'

What did the court decide?

The claimant appealed, essentially on the basis that the judge's decision had been permeated by her acceptance of the defendant's contention that the claimant was not entitled to bring proceedings so as to recover pre-action costs. May J allowed the appeal. She referred to *Birmingham City Council v Lee* [2008] EWCA Civ 891 (a case in which the Court of Appeal had confirmed that pre-action costs incurred in compliance with a pre-action protocol were recoverable) and to *In re Gibson's Settlement Trusts* [1981] Ch 179 (a case which determined that the court is able to allow pre-action costs reasonably incurred in general, subject to certain constraints). May J found that the fact that a party is unable to obtain an order for costs without issuing proceedings does not mean that if damages are no longer at large, a party is not entitled to issue proceedings for the purposes of obtaining an order for costs.

May J went on to find that the Master had been wrong to find that it would be unjust to allow the claimant to benefit of having made and 'beaten' his Part 36 offers. In particular, she found that the defendant had not cleared the hurdle of showing injustice merely be reason of the fact that the claimant had issued proceedings primarily or solely for the purposes of obtaining an order for costs.

While May J's judgment is authority for the proposition that it would not necessarily be abusive to issue proceedings primarily or solely for the purposes of obtaining an order for costs, this was in the context of the defendant's defence of tender before action having failed. Put otherwise, it was in the context of the original claim for damages still being extant (albeit in circumstances in which the sums claimed were not in dispute). It is moot point whether a claim for an order for costs could be brought where the underlying claim had been entirely extinguished by, for example, a binding compromise or a tender before action of a liquidated sum. There are passages in May J's judgment that suggest that the court would, in an appropriate case, allow such a claim, but they are obiter. This being so, claimants who seek their costs would do well to ensure that they do not allow their underling claims for damages to be wholly extinguished before issuing proceedings.

May J's judgment leaves open the question of whether a defendant who had successfully persuaded a claimant to abandon his or her claim prior to issue is able to issue proceedings for an order for the costs thrown away. While no more than the writer's view, it is not likely that the court would entertain such a claim. This is because the defendant's costs would not be 'of and incidental to proceedings' that were before the court (a requirement of section 51 of the Senior Courts Act 1981), they would relate to a claim that was never brought. No doubt some future case will determine that issue, however.

Case details:

- Court: High Court, Queen's Bench Division
- Judge: Mrs Justice May
- Date of judgment: 27 July 2018

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