IN THE COURT OF APPEAL (CIVIL DIVISION) No. A2/2016/1904

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

(Stewart J) HQ14P05029

Royal Courts of Justice

Thursday, 6th July 2017

Before:

THE PRESIDENT
LORD JUSTICE MCFARLANE
LORD JUSTICE LEWISON

B E T W E E N :

MICHAEL HOWE — Appellant

- and -

MOTOR INSURERS' BUREAU — Respondent

MR B. WILLIAMS QC (instructed by Fieldfisher LLP) appeared on behalf of the Appellant.

MR H. PALMER QC (instructed by Weightmans LLP) appeared on behalf of the Respondent.

J U D G M E N T

(Transcript prepared without the aid of documentation)

LORD JUSTICE LEWISON:

1 Mr Howe, having won his appeal on the question of QOCS, ought to be entitled to his costs of the appeal. He ought, also, to be entitled to his costs of the proceedings before Stewart J, which led to the judge's second judgment and order under appeal. The main questions this morning are what to do about the costs of the trial on substantive liability and the unsuccessful appeal against the judge's first judgment, which was struck out by this court following the decision of the Supreme Court in *Moreno v The Motor Insurers' Bureau* [2016] UKSC 52.

2 The court's power to award costs arises under s.51 of the Senior Courts Act. Subject to rules of court the court has a wide discretion. The power to allow one set of costs to be set off against another is a discretionary power recognised by CPR Part 44, r.12. The circumstances in which set-off of costs may be ordered owes nothing to the detailed rules about legal or equitable set-off as substantive defences, although those rules may give some guidance about how the discretion should be exercised. That is *Burkett, R (on the application of) v London Borough of Hammersmith & Fulham* [2004] EWCA Civ 1342, [2005] 1 CLR 184. *Burkett* also decides that there is no objection to ordering costs awarded to a non-legally aided party from being set off against costs awarded to a legally aided party and emphasises that a set-off does not require the person against whom the set-off is ordered to pay anything. CPR 44.14(1) provides:

> "Subject to rules 44.15 and 44.16 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."

3 Mr Williams QC argues that this rule precludes set-off of costs. He submits that a set-off is enforcement and that set-off is only permitted against orders for damages and costs. I do not agree. First, under the general law, set-off is not a species of enforcement and I do not consider that the decision of Andrew Smith J in *Vava & Ors v Anglo American South Africa Ltd.* [2013] EWHC 2326 QB compels a conclusion to the contrary. The judge in that case was construing a contract rather than a rule and the reference in 44.14 is enforcing against the defendant and specifically limits that by reference to damages and interest. "Enforcement" there means enforcement in accordance with all the rules of the court, which would include the various powers that the court had as to compel compliance with its orders. Secondly, Part 44.14 enables enforcement without the permission of the court, whereas 44.12 requires the permission of the court or at least a court order in order for one set of costs to be set off against another.

4 I consider, therefore, that the court does have jurisdiction under CPR Part 44.12 to order a set-off of costs.

5 Mr Williams also submits that as a matter of discretion the court should not permit set-off. In the old days of Legal Aid, the claimant would not have had any liability to pay his lawyers. The Legal Aid fund would have borne the costs. If, therefore, a set-off of costs had been ordered against a legally aided claimant he would not have been out of pocket at all because he would not have been liable to pay his lawyers. That may well be true as a matter of reality, although one must not forget that under s.11 of the Access to Justice Act

1999 costs could be awarded against a legally aided litigant, so long as they did not exceed what it was reasonable for him to pay. As pointed out in the substantive judgment, Sir Rupert Jackson envisaged that costs protection similar to Legal Aid's cost protection should be given to claimants with QOCS. The law in force at the time permitted set-off of costs against legally aided litigants and Sir Rupert made no recommendation to change that. Moreover, Sir Rupert also envisaged that claimants would pay their own disbursements, so that, at least to some extent, unsuccessful claimants might end up out of pocket. To allow set-off of costs would not, in my judgment, go against the thrust of his recommendations, and I do not consider that there is anything in the detailed rules setting up the QOCS regime which disapplies the court's power to order set-off.

6 In my judgment, it would be just for the costs awarded to Mr Howe to be set-off against costs orders in favour of MIB.

7 MIB, however, goes further, and seeks to enforce the costs orders of the ground that Mr Howe's appeal was struck out. CPR Part 44.15(1) provides:

> "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."

In my judgment, the appeal on liability was part of the same proceedings as the original claim tried by Mr Justice Stewart.

8 The conclusion is supported by the decision of the Supreme Court in *Plevin v Paragon Personal Finance Ltd. No.2* [2017] UKSC 23, [2017] 1 WLR 1249, in which Lord Sumption said, at para.20:

> "The starting point is that as a matter of ordinary language one would say that the proceedings were brought in support of the claim and were not over until the court had disposed of that claim one way or the other at whatever level of the judicial hierarchy. The word is synonymous with action."

In some contexts, the word "proceedings" can have a narrower meaning, but I do not consider that this is one of them. Moreover, even if one were to chop up the various stages in the overall action Mr Howe had reasonable grounds for bringing, and I stress the word "bringing" his appeal, because it was not until after the appeal was brought that the law changed. I consider, therefore, that the MIB are not entitled to rely on CPR Part 44.15(1).

9 I conclude, therefore, that Mr Howe should have his costs of the costs issue, both here and below, but that the order in his favour should be set off against costs orders existing in favour of the MIB.

LORD JUSTICE MCFARLANE:

10 I agree.

THE PRESIDENT:

11 I also agree.

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This transcript has been approved by the Judge