Case No: HQ14CO3775

Neutral Citation Number: [2017] EWHC 1993 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2017

Before :

MR JUSTICE NICOL

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Between :

Pa Abubacarr Jabang	**Claimant**
- and -	
(2) Dr Simon Wadman	**Defendants**
(3) Dr Andrew Pool	
(4) East Sussex NHS Trust	
(5) Dr Yvonne Underhill	

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Mr D. Westcott QC and Mr R. Cartwright (instructed by **Irwin Mitchell**) for the **Claimant**
Mr S. Readhead QC and Joshua Munro (instructed by **Brachers**) for the **2nd and 5th Defendants**

Hearing date: 24th July 2017

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Judgment

Decision on Costs

Mr Justice Nicol :

1. I handed down judgment in this matter on 24th July 2017 – [2017] EWHC 1894 (QB) – 'the substantive judgment'. The background to the case is set out in the substantive judgment and is not repeated here. The Claimant succeeded in his claim against the 2nd Defendant and, as against him, there will need to be an assessment of damages. The claims against the 3rd, 4th, and 5th Defendants were unsuccessful. Shortly before trial the Claimant had discontinued his claim against the 1st Defendant and, accordingly, my substantive judgment did not concern it.

2. The Claimant accepted that he should be ordered to pay the costs of the 3rd and 4th Defendants (although, as will be seen, he sought an indemnity for that liability from 2nd Defendant). The 2nd Defendant accepted that he would have to pay at least most of the Claimant's costs of his claim against the 2nd Defendant. However, there was disagreement as between the Claimant on the one hand and the 2nd and 5th Defendants on the other as to the following issues:

    i) Whether the 2nd Defendant should have to pay all of the Claimant's costs of his claim against him or whether there should be a reduction to reflect the fact that, while I found that the 2nd Defendant had been negligent on 5th October 2011, I rejected the claim that the 2nd Defendant had also been negligent on 28th October 2011.

    ii) Whether the 2nd Defendant should have to indemnify the Claimant for his liability to pay the costs of the 3rd and 4th Defendant -whether a *Bullock* order should be made in the Claimant's favour - see *Bullock v The London General Omnibus Company* [1907] 1 KB 264.

    iii) Whether the Claimant should be able to recover from the 2nd Defendant his own costs incurred in making his unsuccessful claims against the 3rd and 4th Defendants.

    iv) What orders in principle should be made regarding the 5th Defendant's costs and the Claimant's costs of pursuing his unsuccessful claim against the 5th Defendant. The complication here is that the 2nd and 5th Defendants were partners in the same General Practice, the Heathfield Practice. They were represented at trial by the same solicitors and counsel. So far as these matters were concerned I was asked to give a decision in principle, allowing Mr Readhead QC and Mr Munro (as well as Mr Westcott QC) the opportunity to consider how such a decision could be practically and expressed in a court order.

Whether the 2nd Defendant should have to pay only a proportion of the Claimant's costs of pursuing the claim against him?

3. The Court, of course has a discretion as whether costs are payable by one party to another and the amount of any such costs – see CPR r.44.2.

4. The starting point is the general rule that the unsuccessful party will be ordered to pay the costs of the successful party – CPR r.44.2(2)(a). There is no dispute that, as between the Claimant and the 2nd Defendant, the Claimant was the successful party.

5. I recognise, as well that the rules expressly allow the Court to make some other order – r.44.2(2)(b). One of the matters which the Court must take into account is whether a party has succeeded on part of its case, even if that party has not been wholly successful – r.44.2(4)(b). In this case, Mr Readhead is right to say that the Claimant was not successful in his allegation that the 2nd Defendant had been negligent on 28th October 2011 as well as on 5th October 2011 – see substantive judgment [140].

6. Although it is possible to make a costs order by reference to the costs incurred on particular issues – see r.44.2(6)(f), the Court is encouraged to consider instead ordering a party to pay a particular part of the successful party's costs - see r.44.2(6)(a) and r.44.2(7). Mr Readhead argues that, of the time taken up with the claim against the 2nd Defendant, about one third was concerned with the allegation of his negligence on 28th October 2011. Accordingly, he argues, the 2nd Defendant should be ordered to pay only 70% of the Claimant's costs of pursuing his claim against the 2nd Defendant. He refers me to the discussion at paragraph 44.2.7 in the 2017 edition of the White Book.

7. In my judgment, Mr Westcott was right to say that the proportion of time on the allegation relating to 28th October was far less than 1/3rd of the time spent on the Claimant's case against the 2nd Defendant as a whole. Although not negligible, it occupied a minimal proportion of the time spent on the Claimant's claim against the 2nd Defendant. It is right that answers provided by the physiotherapist in May 2016 showed that Dr Wadman had not misunderstood her telephone message as to her request for the Claimant to be further x-rayed (see [138] of the substantive judgment), but a second part of the allegation of negligence on 28th October 2011 was difficult to separate out from the allegation relating to 5th October (see substantive judgment [139]). Ms Thompson provided two witness statements and gave oral evidence, but both her statements and her testimony covered much wider ground than her telephone call on 28th October 2011.

8. As the notes in the White Book make clear, an issue based order is not mandatory and, in my view, the costs exclusively referable to the issue on which the Claimant failed as against the 2nd Defendant were too small a proportion of the total costs of the claim against the 2nd Defendant to warrant such a division in this case.

9. Accordingly, I conclude that the 2nd Defendant must pay all of the Claimant's costs of his claim against the 2nd Defendant.

Whether there should be a *Bullock* order in favour of the Claimant to indemnify him for the costs of the 3rd and 4th Defendants?

10. The general rule in r.44.2(2)(a) means that the 2nd Defendant has to pay the Claimant's costs (of the case against him), not that he should also have to bear the costs of the other defendants against whom the Claimant did not succeed. The genesis of *Bullock* orders long pre-dated the Civil Procedure Rules but it is clear and Mr Munro (who argued this aspect on behalf of the 2nd Defendant) did not dispute that the Court's discretion under the CPR is wide enough to allow such orders still to be made.

11. As Keene LJ said in *King v Zurich Insurance Company* [2002] EWCA Civ 598 at [33],

> 'The judge had to deal with a not uncommon situation where a claimant was unsure which of the defendants would be liable for his injury and where – in the event - he succeeded against one but failed against the other. In the days before the Civil Procedure Rules came into effect this situation would often be met by a *Bullock* order … ordering the plaintiff to pay the successful defendant's costs but ordering the unsuccessful defendant to pay those costs over to the plaintiff. In cases where the plaintiff was legally aided the order would often court be a *Sanderson* order…. whereby the unsuccessful defendant was ordered to pay the costs of the successful defendant directly. These decisions reflected the approach of the courts, namely that where a plaintiff had behaved reasonably in suing both defendants he should not normally end up paying costs to either party even though he succeeded only against one of the defendants.'

12. While Mr Munro accepted that *Bullock* orders could still be made, he submitted that it would not be fair to the 2nd Defendant to make one in this case. This was not, he submitted, a case where the Claimant had to sue more than one defendant because he was unsure which of them had caused his loss. This was not a situation where the claims were genuinely in the alternative. He relied on what Griffiths Williams J. said in *Whitehead, David McLeish v Barrie Searle, Hibbert Downall and Newton (a firm)* [2007] EWHC 2046 (QB) at [24],

> 'In my judgment they [*Bullock* and *Sanderson* orders] are appropriate nowadays only in those cases where the claimant does not know which party is at fault.'

13. There are, though, a number of difficulties with that submission:

    i) The underlying judgment in *Whitehead*, whereby the Claimant in part at least succeeded against one defendant, was reversed by the Court of Appeal- see [2008] EWCA Civ 285. I accept that this did not directly affect the judgment on costs on which Mr Munro relied, but it did mean that there would have been no cause for the Court of Appeal to review Griffiths Williams J's statement of principle (and it is, of course, the statement of principle on which Mr Munro relied).

    ii) The statement of principle enunciated by Griffiths Williams J., with respect, sits uncomfortably with what Waller LJ said in *Moon v Garrett* [2006] EWCA Civ 1121 at [38] and [39],

> '[38] It seems to me that the above citation [viz from *Irvine v Commissioner of the Police for the Metropolis* [2005] EWCA Civ 129] demonstrates that there are no hard and fast rules as to when it is appropriate to make a *Bullock* or *Sanderson* order. The court takes into account the fact that, if a claimant has behaved reasonably in suing two defendants, it will be harsh if he ends up paying the costs of the defendant against whom he has not succeeded. Equally, if it was not reasonable to join one defendant because the cause of action was practically unsustainable, it would be unjust to make a co-defendant pay those defendant's costs. Those costs should be

paid by a claimant. It will always be a factor whether one defendant has sought to blame another.

[39] The fact that cases are in the alternative so far as they are made against two defendants will be material, but the fact that claims are not truly alternative does not mean that the court does not have the power to order one defendant to pay the costs of another. The question of who should pay whose costs is peculiarly one for the discretion of the trial judge.'

Although *Moon* was cited to Griffiths Williams J. he does not explain how his statement that a *Bullock* order should be made '*only* in those cases where the claimant does not know which party is at fault' is consistent with Waller LJ's observation that there are 'no hard and fast rules' as to when it is appropriate to make such an order.

iii) In any case Griffiths Williams J. was, as he said, dealing with a situation 'when both defendants succeeded in defending a large part of the claim' – see *Whitehead* at [24]. That is not the case here. As I have already indicated, the 2nd Defendant's success was in relation to a minimal part of the claim against him.

14. In my judgment a *Bullock* order is appropriate here for the following reasons,

i) Mr Munro did not argue that the claims against the 3rd or 4th Defendant were unreasonable. He was right not to do so. They were ultimately unsuccessful, but, as will be apparent from the substantive judgment, I reached those conclusions only after a careful consideration of all the evidence. The claims against the 3rd and 4th Defendants, although unsuccessful, were reasonably brought by the Claimant.

ii) I accept that these were not alternative claims as was *Besterman v British Motor Cab Company* [1914] 3 KB 181 where the plaintiff was injured in a collision between a taxi and a bus and did not know which was at fault. In *Irvine* this was given as a 'classic example of where it is appropriate to make the order' – see [30], but interestingly the Court extrapolated from this the wider proposition that

'An important consideration which the court should have in mind when exercising the discretion whether to make a *Bullock* or *Sanderson* order is the reasonableness of the claimant's conduct in joining and pursuing a claim against whom the claimant did not succeed.' – see *Irvine ibid*.

In *Dixon v Blindley Heath Investments Ltd* [2016] EWCA Civ 548 at [75] the Court of Appeal described the *Besterman* type situation as 'a paradigm situation: but it is not a necessary condition.'

iii) Mr Westcott submitted that, if the 2nd Defendant had accepted his responsibility at the outset there would have been no claim brought against the other defendants. I accept that proposition. It is of some relevance that the negligent act of the 2nd Defendant was earlier than the alleged negligence of the other defendants. The Claimant's case on causation was always going to be

strongest against the 2nd Defendant; he did not need to insure his position on causation by including the claims against the other defendants.

iv) Dr Wadman himself accepted that, if he had identified the Claimant as having thoracic pain radiating around his chest, he would have referred him for investigation of the spine - see substantive judgment [127], [130] and [131]. However, as I said in the substantive judgment, that is what Dr Wadman did identify, as his physiotherapy referral form showed. I accept Mr Westcott's argument that the action would have been unnecessary if Dr Wadman had faced up to his responsibility. Mr Westcott stressed that he did not attribute any malign intention to Dr Wadman, but Mr Westcott was entitled to say that the costs of the whole action (including those of the reasonable, though ultimately unsuccessful, claims against the other defendants) would have been avoided if Dr Wadman had earlier accepted his liability.

v) Mr Westcott accepted that this was not a case where one defendant was blaming another. While that is a relevant consideration, as the Court of Appeal also said in *Dixon* it is not determinative.

vi) Weighing all the factors, it seems to me to be fair, right and consistent with the overriding objective that the 2nd Defendant should ultimately bear the costs of the 3rd and 4th Defendants.

Whether the Claimant should be able to recover from the 2nd Defendant his own costs incurred in making his unsuccessful claims against the 3rd and 4th Defendants?

15. I have identified this as a separate issue for decision, but in truth no separate argument was addressed to me about it, that is not separate from the arguments as to whether I should make a *Bullock* order. That I can understand. As between the Claimant and the 2nd Defendant, the Claimant was the successful party and, as such, the general rule is that the 2nd Defendant should pay his costs. It might be argued that on the issues as to whether the claims against the other Defendants were made out, the Claimant has failed and that should be reflected by not requiring the 2nd Defendant to pay those costs. On the other hand, I have decided that a *Bullock* order is appropriate and the 2nd Defendant should ultimately bear the costs of the 3rd and 4th Defendant. In those circumstances, I see the logic in saying that the Claimant's costs of those unsuccessful claims should also be paid by the 2nd Defendant. Part of the purpose of a *Bullock* order is that the Court accepts that, in the particular circumstances, the Claimant's victory ought not to be eroded, but there would be such an erosion by the Claimant having to meet his own costs of the unsuccessful claims.

16. No authority has been cited to me where a Court has made a *Bullock* order but nonetheless not required the unsuccessful defendant to pay the Claimant's costs of the claims against the successful defendants. Of course, my discretion is wide and not limited to models which have been adopted in the past, but the absence of any such authority, together with the approach of Mr Munro fortify my own conclusion that, having decided to make a *Bullock* order, I should also draw no distinction between the costs of the Claimant in pursuing his claim against the 2nd Defendant as opposed to his costs of bringing his claim against the other defendants. The 2nd Defendant must pay all of the Claimant's costs (as assessed or agreed).

The costs of the 5th Defendant

17. Mr Westcott argued that there should be no order as the costs of the 5th Defendant. In the original action she had not been separately sued. The Claimant did allege that she had been negligent, but he submitted that the 2nd Defendant was also vicariously responsible for her defaults since the two of them were partners. It was the 2nd Defendant who had wished her to be joined as an additional defendant. The Claimant did not object to an order to that effect which was made on 16th March 2016, but that did not change the fact that her joinder was only at the instigation of the 2nd Defendant.

18. I do not find this a convincing argument. Once she was joined, the Claimant did bring a separate cause of action against the 5th Defendant. That was unsuccessful. *If* the 5th Defendant had been negligent, the 2nd Defendant would have been vicariously responsible as her partner, but she was not and there was not therefore this additional reason why the 2nd Defendant was liable to compensate the Claimant.

19. In principle, therefore, the Claimant should have to pay the 5th Defendant's costs.

20. However, the claim against the 5th Defendant was also a reasonable one for the Claimant to bring. The same features apply in relation to this claim as they do to the claims which the Claimant brought unsuccessfully against the 3rd and 4th Defendants and which lead me to make a *Bullock* order in relation to their costs.

21. One of the other factors which I must take into account is any admissible offer to settle which is not a Part 36 offer – see r.44.2(4)(c). Mr Munro drew to my attention an email which the 5th Defendant's solicitors sent on 30th May 2017 at 09.25 to the Claimant's solicitors and which offered a 'drop hands' settlement (i.e. no order as to costs) if the Claimant discontinued his claim against the 5th Defendant. The offer remained open until 4.00pm on Wednesday 31st May 2017.

22. The time limit on this offer meant that it was only open for less than 31 hours. I consider that to be too short a time for the offer to carry any significant weight in my decision as to whether a *Bullock* order in principle should also extend to the 5th Defendant's costs. To be fair to Mr Munro, this offer did not feature at all in his skeleton argument of 21st July 2017 and not prominently in his oral submissions.

23. Mr Westcott argued that it was also material that the 2nd and 5th Defendants were represented by the same solicitors and counsel. I disagree. I see that as an entirely neutral factor in my decision as to what orders in principle should be made (the pragmatic working out of the orders may be a different matter).

24. Consequently, in principle, I conclude the Claimant should bear the 5th Defendant's costs, but the 2nd Defendant must indemnify him for these as well.

Conclusions

25.

i) The 2nd Defendant must pay all of the Claimant's costs as assessed or agreed.

ii) The Claimant must pay the costs of the 3rd, 4th and 5th Defendants.

iii) But the 2nd Defendant must indemnify the Claimant for his liability under (ii).

iv) The parties will have a brief opportunity to consider whether, for practical reasons, the representatives of the 2nd and 5th Defendants would wish to have these decisions in principle reflected differently in the formal order of the court.