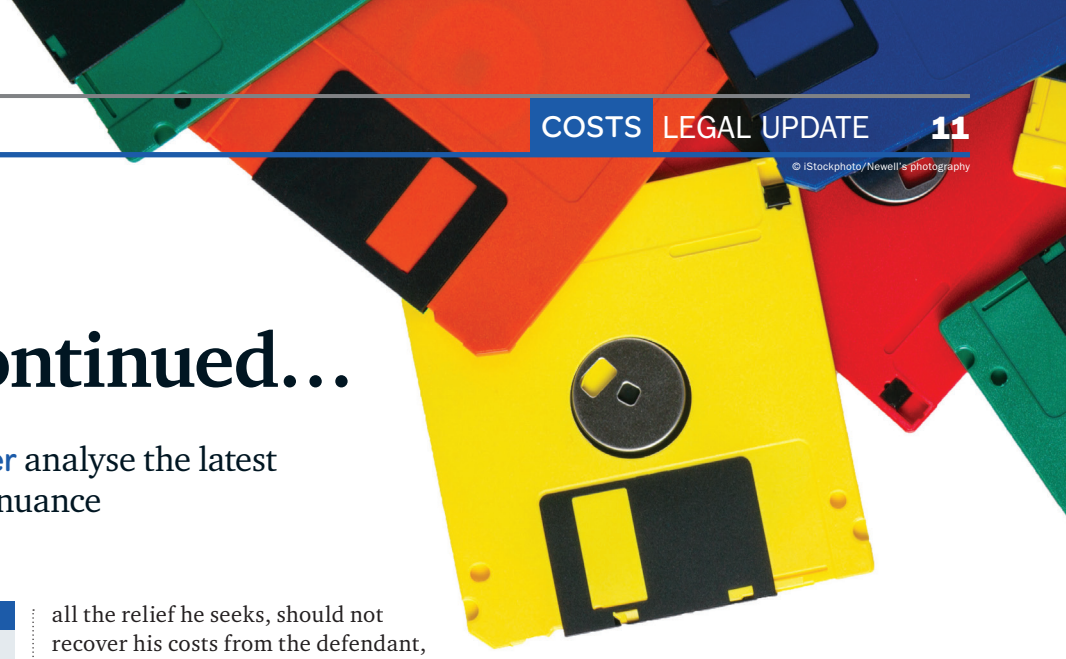

To be (dis)continued…

Winston Jacob & Toby Walker analyse the latest approach to costs on discontinuance

IN BRIEF

▶ What happens if a defendant to a claim gives the claimant the relief it seeks post-issue but without an admission of liability and the claimant therefore discontinues the claim?

CPR 38.6(1) sets out the general principle to be applied on discontinuance of a claim: '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 notice of discontinuance was served on the defendant.'

In *Nelson's Yard Management Co v Eziefula* [2013] EWCA Civ 235, [2013] CP Rep 29, [2013] All ER (D) 216 (Mar) Lord Justice Beatson stated, at [32]-[33], that: '… the mere fact that a claimant has got all or almost all he could reasonably hope to achieve from the proceedings has been said not to justify a claimant from relying on the avoidance of a trial which would be solely about liability to recover costs as justifying a departure from the default rule: see Lord Justice Patten in *Messih v McMillan Williams* [2010] EWCA Civ 844 at [28], [30] and [31]. …

'Does the fact that a defendant disputes the conduct on which a claimant relies preclude the court proceeding? Is the claimant obliged, absent an agreement as to costs, to proceed to a trial which in reality would be solely about liability to recover costs? Where the defendant's position is one deserving argument at trial, the general answer must be "yes".'

However, if the defendant agrees to give the claimant the relief it seeks in a consent order (again without admission of liability) but without agreement as to costs, the general rule is that the claimant will recover its costs from the defendant. In *M v Croydon London Borough Council* [2012] EWCA Civ 595; [2012] 3 All ER 1237, Lord Neuberger MR, at [49], stated: 'Given the normal principles applicable to costs when litigation goes to a trial, it is hard to see why a claimant, who, after complying with any relevant protocol and issuing proceedings, is accorded by consent all the relief he seeks, should not recover his costs from the defendant, at least in the absence of some good reason to the contrary. In particular, it seems to me that there is no ground for refusing the claimant his costs simply on the ground that he was accorded such relief by the defendants conceding it in a consent order, rather than by the court ordering it after a contested hearing. In the words of r 44.3(2), the claimant in such a case is every bit as much the successful party as he would have been if he had won after a trial.'

Tension

There is perhaps a tension between the two approaches to costs adopted by the Court of Appeal. If a defendant gives the claimant the relief sought via a consent order without any agreement as to costs, the general rule is that the claimant need not pursue any issues to trial and can safely assume that the court will order the defendant to pay its costs. However, if the defendant gives the claimant the relief sought but refuses to sign a consent order, *Nelson's Yard* suggests that the claimant must either pursue the matter to trial solely to be able to claim costs, or else discontinue and pay the defendant's costs.

If that is right, a defendant who decides post-issue to give the claimant the relief sought has little incentive to agree a consent order. Instead, the defendant could simply give the relief sought and rely on the likelihood of the claimant discontinuing rather than face the time and inconvenience of pursuing a trial of the underlying merits just to seek to obtain a costs order. In many cases, such a course of action is likely to be highly unattractive to a claimant and fraught with risk. The claimant will need to incur further costs to seek to recover the costs already incurred, knowing that even if successful its costs may be assessed down.

Nelson's Yard was decided before the changes brought about by the Jackson reforms. The overriding objective of the Civil Procedure Rules now requires the court to deal with cases justly *and at proportionate cost*. It might be said that this new approach requires a new approach to the court's analysis in *Nelson's Yard*. Although different people will express different views on what is 'proportionate', there is a strong argument for saying that, where the defendant has given the claimant all the relief it seeks, it would often incur disproportionate cost to have a full trial on the merits solely to enable the claimant to recover its costs of the claim from the defendant.

Hope

In *Oakcircle v Levinson* [2019] Lexis Citation 64, Insolvency and Companies Court Judge Mullen offered some hope to claimants faced with the dilemma of what to do when they have obtained substantially what they sought from a defendant but without any admission of liability and without any agreement to sign a consent order.

The claimants, a management company for a property known as Caudwell's Castle in Oxford and a shareholder (and former registered director) of the company, issued a Pt 8 claim seeking rectification of the companies register pursuant to s 1096 of the Companies Act 2006. The first defendant was a director of the first claimant. He had purported to pass resolutions removing other directors from office and had filed notices of termination at Companies House, with the result that the register had been altered. An attempt at administrative rectification of the register had failed due to an objection raised by the first defendant. The Registrar of Companies was added as a second defendant but took no active part in proceedings.

The claimants also sought injunctions restraining the first defendant from unlawfully interfering in the proper administration of the first claimant and requiring him to deliver up company records.

Rectification

During the proceedings, the claimants

were able to obtain administrative rectification of the register on a second attempt. The first defendant handed over company records and began to attend board meetings with the directors in relation to whom he had filed the notices of termination. In the circumstances, the claimants decided not to pursue the proceedings and filed and served a notice of discontinuance. They applied for an order under CPR 38.6(1) that the first defendant pay their costs of proceedings on the indemnity basis.

The claimants contended that they had obtained post-issue substantially what they had claimed and that the first defendant's conduct of the litigation was unreasonable. As to the latter point, they argued that he had raised irrelevant issues which had served to increase costs, and he had unreasonably attempted to damage the professional standing of a director who had made a witness statement in support of the claimants.

The first defendant argued, among other matters, that the merits had not been determined and that, relying on *Nelson's Yard*, the fact that the claimants may have recovered substantially all of what they had sought could not, in itself, justify departing from the default rule in CPR 38.6(1) that the claimants should pay the defendant's costs.

The court concluded that the first defendant should pay the claimants' costs of the rectification claim. In doing so, it found that the proceedings had been discontinued due to a material change in circumstances, in that the first defendant no longer maintained his objection to administrative rectification and the register had been restored to its previous position. The court also ordered the first defendant to pay the claimants' costs of the claim for delivery up of company documents, as they had achieved what they sought.

Departing from the general rule

In regard to both the claim for rectification and the claim for delivery up, the court considered the situation as in substance akin to a claim that had been settled on terms which had given the claimants what they sought and the parties had referred the question of costs to the court. As such, the court was satisfied there was good reason to depart from the general rule.

The court considered that the first defendant had also acted unreasonably in the litigation by raising numerous irrelevant and unnecessary issues which had detracted attention from the essential issues in the claim. Furthermore, a threat made in correspondence to involve a director's workplace in the dispute in an aggressive attempt to pressurise her into changing her evidence was an example of the first defendant's uncompromising and hostile attitude. His conduct was outside the ordinary and reasonable conduct of proceedings and warranted an indemnity costs order.

Comment

The court's approach in treating the circumstances as akin to a case of settlement as in *M v Croydon LBC*, should be welcome to claimants faced with defendants who are prepared to give the relief sought but who are not prepared to enter into a consent order or to formally admit the claim. It will often appear disproportionate to the claimants, in terms of time and resources, to pursue a claim solely about costs. And considering the greater emphasis on proportionate costs brought about by the Jackson reforms, one can legitimately expect the approach to costs on discontinuance as set out in *Nelson's Yard* to be tempered somewhat moving forward. **NLJ**

Winston Jacob, barrister, Lamb Chambers (*www.lambchambers.co.uk*). **Toby Walker**, solicitor, Allan Janes Solicitors (*www.allanjanes.com*).