

# PART 38

## DISCONTINUANCE

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### SCOPE OF THIS PART

- 38.1 | (1) The rules in this Part set out the procedure by which a claimant may discontinue all or part of a claim.
- (2) A claimant who –
- (a) claims more than one remedy; and
  - (b) subsequently abandons his claim to one or more of the remedies but continues with his claim for the other remedies,
- is not treated as discontinuing all or part of a claim for the purposes of this Part.

(The procedure for amending a statement of case, set out in Part 17, applies where a claimant abandons a claim for a particular remedy but wishes to continue with his claim for other remedies)

### RIGHT TO DISCONTINUE CLAIM

- 38.2 | (1) A claimant may discontinue all or part of a claim at any time.
- (2) However –
- (a) a claimant must obtain the permission of the court if he wishes to discontinue all or part of a claim in relation to which –
    - (i) the court has granted an interim injunction<sup>(GL)</sup>; or
    - (ii) any party has given an undertaking to the court;

- (b) where the claimant has received an interim payment in relation to a claim (whether voluntarily or pursuant to an order under Part 25), he may discontinue that claim only if –
    - (i) the defendant who made the interim payment consents in writing; or
    - (ii) the court gives permission;
  - (c) where there is more than one claimant, a claimant may not discontinue unless –
    - (i) every other claimant consents in writing; or
    - (ii) the court gives permission.
- (3) Where there is more than one defendant, the claimant may discontinue all or part of a claim against all or any of the defendants.

## PROCEDURE FOR DISCONTINUING

- 38.3 | (1) To discontinue a claim or part of a claim, a claimant must –
- (a) file a notice of discontinuance; and
  - (b) serve a copy of it on every other party to the proceedings.
- (2) The claimant must state in the notice of discontinuance which he files that he has served notice of discontinuance on every other party to the proceedings.
- (3) Where the claimant needs the consent of some other party, a copy of the necessary consent must be attached to the notice of discontinuance.
- (4) Where there is more than one defendant, the notice of discontinuance must specify against which defendants the claim is discontinued.

## RIGHT TO APPLY TO HAVE NOTICE OF DISCONTINUANCE SET ASIDE

- 38.4 | (1) Where the claimant discontinues under rule 38.2(1) the defendant may apply to have the notice of discontinuance set aside<sup>(GL)</sup>.
- (2) The defendant may not make an application under this rule more than 28 days after the date when the notice of discontinuance was served on him.

## WHEN DISCONTINUANCE TAKES EFFECT WHERE PERMISSION OF THE COURT IS NOT NEEDED

- 38.5 | (1) Discontinuance against any defendant takes effect on the date when notice of discontinuance is served on him under rule 38.3(1).
- (2) Subject to rule 38.4, the proceedings are brought to an end as against him on that date.

- (3) However, this does not affect proceedings to deal with any question of costs.

## LIABILITY FOR COSTS

- 38.6 | (1) Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom he discontinues incurred on or before the date on which notice of discontinuance was served on him.
- (2) If proceedings are only partly discontinued –
- (a) the claimant is liable under paragraph (1) for costs relating only to the part of the proceedings which he is discontinuing; and
- (b) unless the court orders otherwise, the costs which the claimant is liable to pay must not be assessed until the conclusion of the rest of the proceedings.
- (3) This rule does not apply to claims allocated to the small claims track.
- (Rule 44.12 provides for the basis of assessment where right to costs arises on discontinuance)

## DISCONTINUANCE AND SUBSEQUENT PROCEEDINGS

- 38.7 | A claimant who discontinues a claim needs the permission of the court to make another claim against the same defendant if –
- (a) he discontinued the claim after the defendant filed a defence; and
- (b) the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim.

## STAY OF REMAINDER OF PARTLY DISCONTINUED PROCEEDINGS WHERE COSTS NOT PAID

- 38.8 | (1) This rule applies where –
- (a) proceedings are partly discontinued;
- (b) a claimant is liable to pay costs under rule 38.6; and
- (c) the claimant fails to pay those costs within 14 days of –
- (i) the date on which the parties agreed the sum payable by the claimant; or
- (ii) the date on which the court ordered the costs to be paid.
- (2) Where this rule applies, the court may stay<sup>(GL)</sup> the remainder of the proceedings until the claimant pays the whole of the costs which he is liable to pay under rule 38.6.