Neutral Citation Number: [2019] EWCA Civ 1724

Case No: A2/2018/2520

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION
WHIPPLE J

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2019

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE COULSON

- -

Between:

ANDREA BROWN	**Appellant**
- and -	
(1) THE COMMISSIONER OF POLICE OF THE METROPOLIS **(2) THE CHIEF CONSTABLE OF GREATER MANCHESTER POLICE**	**Respondents**
-and-	
THE EQUALITY AND HUMAN RIGHTS COMMISSION	**Intervener**

- -

Claire Darwin & Emma Foubister (instructed by Hausfeld & Co. LLP)
for the **Appellant**
Lord Faulks QC & Adam Clemens (instructed by Weightmans LLP and Clyde & Co. LLP)
for the **Respondents**
Ben Jaffey QC & Raj Desai
(instructed by The Equality and Human Rights Commission) for the **Intervener**

Hearing date: 3rd October 2019

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Approved Judgment

Lord Justice Coulson :

1. The Issue

1. This appeal concerns the rules relating to Qualified One-Way Costs Shifting ("QOCS") at CPR 44.13 - 44.16. QOCS provides automatic costs protection to a claimant with a claim for damages for personal injury, so as to ensure that, win or lose, such a claimant does not emerge from the proceedings with an adverse cost liability. In the present case, the claimant (whom I shall call 'the appellant') made various claims arising out of the respondents' wrongful obtaining and use of private information about her. It was what is often referred to as a 'mixed claim'; that is to say, her claims included a claim for damages for personal injury, but also included claims for non-personal injury damages and other relief. Claims for general damages for misuse of the appellant's personal data were upheld by the trial judge, but he rejected her claim for damages for personal injury. In circumstances where the appellant failed to beat the respondents' Part 36 offer, resulting in adverse costs orders against her, the question is whether the appellant can automatically avoid the enforcement of those orders by relying on the QOCS regime, on the ground that one of her failed claims was a claim for damages for personal injury.

2. For the reasons set out below, I consider that an analysis of the relevant parts of the CPR, supported by the existing first instance authorities, produces a negative answer to that question. In setting out those reasons, and notwithstanding the very particular facts of this case, I have endeavoured to give some guidance as to the proper application of the QOCS regime to mixed claims.

2. The Background

3. The respondents unlawfully obtained and used private information about the appellant and her daughter. She brought claims for damages under the Data Protection Act 1998 ("DPA") and the Human Rights Act 1998 ("HRA"), and for breach of contract, misfeasance in public office, and the misuse of private information. The respondents admitted liability under the DPA and the HRA. The claim for damages for breach of contract was not pursued. The claims for damages for misfeasance and misuse of private information went to trial. The claimant lost on the former but won on the latter.

4. HHJ Luba QC presided over the trial on liability. His ex tempore judgment was given as long ago as 30 July 2016. He rejected the claimant's claim for damages for personal injury arising out of the respondents' conduct. Specifically, he found that the claimant had not shown that her depression had been caused or materially contributed to by the respondents' wrongful actions.

5. This finding was also reflected in Judge Luba's written 'Judgment on Remedy' dated 7 October 2016. The outcome of that judgment was that the claimant was awarded general damages under the DPA and HRA, and for the misuse of private information, in the sum of £9,000, apportioned on a two thirds/one third split between the first and the second respondents. He rejected her claims for aggravated damages and exemplary damages. He also rejected the appellant's claims for declarations and erasure/destruction of information.

6. There were then arguments about costs. The respondents had made Part 36 offers in the total amount of £18,000. The appellant had therefore comprehensively failed to beat those offers. In consequence, Judge Luba ordered the respondents to pay 70% of the appellant's costs up to the date of the offers but ordered the appellant to pay the respondents' costs thereafter.

7. However, the appellant argued that, because her claims had included a claim for damages for personal injury, she was protected by the QOCS regime against any adverse costs orders in an amount higher than the £9,000 she had recovered (i.e. that the overall result of the case should be cost neutral for the appellant). In a judgment given on 24 March 2017, Judge Luba agreed. He said:

> "18. As I have already indicated, pleadings against both Defendants incorporate four heads or causes of action. If any one of them does not include a claim for personal injury damages, then it might be arguable that the terms of 44.16 (2)b are met. It seems to me, however, that on a consideration of the pleaded case here, set out in the Statement of Case advanced by the claimant against each of the two defendants, what is alleged is that injury has followed as a consequence of each of the four matters that I have already recounted in this judgment …
>
> 19. It is not a case, for example, in which there has been included a separate claim for some other form of damage or loss arising in consequence of that claim alone. It seems to me in those circumstances, on the fact of these particular cases, that the exceptions in CPR 44.16 on which the defendants would seek to rely if matters came to that point, is not in fact available."

The respondents appealed Judge Luba's decision on the basis that he had wrongly granted the appellant the automatic protection of the QOCS regime in respect of claims which were not claims for damages for personal injury.

8. In a detailed judgment dated 31 July 2018 ([2018] EWHC 2046 (Admin)) Whipple J allowed the respondents' appeal. She referred to a number of authorities, including the decision of Morris J in *Jeffreys v Commissioner of the Metropolis* [2017] EWHC 1505 (QB), [2018] 1WLR 3633, a case decided after Judge Luba's judgment of 24 March 2017 but on this very point. She concluded that, because this was a mixed claim, in that it included claims for damages for matters unconnected to personal injury, as well as a claim for personal injury damages, one of the express exceptions to the QOCS regime was triggered. Accordingly she held that the automatic costs protection arising from the QOCS regime fell away, although she emphasised at [50] and [51] that, even though that protection did not automatically apply, costs in a mixed claim remained a matter for the court to deal with in a fair and flexible fashion.

9. The appellant was granted permission to appeal to this court. In giving permission, Lewison LJ said, in relation to the underlying principle, that the application of the QOCS regime to mixed claims was one of considerable importance and that "clarity is essential". However, the financial consequences of this appeal are much less apparent. Ms Darwin, on behalf of the appellant, said in her opening remarks that the appellant faced a bill of £100,000 if she lost the appeal. This figure was not apparent from the papers and the court sought more information from the parties as to what was at stake. Lord Faulks QC produced a post-hearing note which showed that, on the respondents'

figures, the amount was much lower. The appellant's solicitors responded with not one but two further recasts of the figures, each different, which at least demonstrated that the £100,000 had been over-stated. It is surprising that the parties were not able to agree, even after the hearing, what the appeal was actually worth in monetary terms.

3. The QOCS Regime

10. The QOCS regime originated in the Jackson Review of Civil Litigation Costs, and Sir Rupert's observation in chapter 9 of his Final Report that "in personal injuries litigation it must be accepted that claimants require protection against adverse costs orders. Otherwise injured persons may be deterred from bringing claims for compensation" (paragraph 5.8). In chapter 19 (paragraph 1.1), Sir Rupert said that he was treating personal injuries litigation "as a broad concept, including claims where the claimant's injuries were caused by clinical negligence". There is no further explanation or exposition of what was intended to be covered by the expression 'personal injuries litigation'.

11. Further on in chapter 19, Sir Rupert noted that s.11(1) of the Access to Justice Act 1999 operated "as something very close to complete immunity from costs liability". He proposed a new rule "that all claimants in personal injury cases, whether or not legally aided, be given a broadly similar degree of protection against adverse costs". The wording of his proposed rule was, he said, designed to put parties "who are in an asymmetric relationship onto a more equal footing. It ensures that a party is not denied access to justice because of the prospect of incurring liability for adverse costs beyond its means" (paragraph 4.9). It is, however, to be noted that Sir Rupert's proposed wording was not adopted by the Civil Procedure Rules Committee and the relevant rules are in a different form.

12. The QOCS regime is set out at CPR 44.13 - 44.16. CPR 44.13 sets out those proceedings to which the QOCS regime applies:

> "(1) This Section applies to proceedings which include a claim for damages –
> (a) for personal injuries;
> (b) under the Fatal Accidents Act 1976; or
> (c) which arises out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934,
> but does not apply to applications pursuant to section 33 of the Senior Courts Act 1981or section 52 of the County Courts Act 1984 (applications for pre-action disclosure), or where rule 44.17 applies."

When, during the course of this judgment, I refer to 'a claim for damages for personal injury', that is intended as convenient shorthand to encompass the three types of claim detailed in r.44.13(1)(a)-(c).

13. A 'claim for personal injuries' (r.44.13(2)(b)) is defined at CPR 2.3 as follows:

> "'claim for personal injuries' means proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person's death, and 'personal injuries' includes any disease and any impairment of a person's physical or mental condition…"

This is the same definition as appears in the Limitation Act 1980 at section 38 (1). It is trite law that 'distress', 'upset', 'fear' and other similar human emotions do not constitute personal injury: see most recently Stewart J in *Kimathi v The Foreign and Commonwealth Office* [2018] EWHC 1305.

14. CPR 44.14(1) enshrines the core principle of the QOCS regime:

> "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."

Because orders for costs made against a claimant may be enforced without the permission of the Court *only to the extent* of any order for damages and interest made in favour of the claimant, a claimant is protected against any liability for the defendant's costs which is greater than the amount (if anything) that the claimant has himself or herself recovered. In that simple way, it is designed to make claims for damages for personal injury cost neutral.

15. The express exceptions to this wide-ranging principle are set out at CPR 44.15 and 44.16. Rule 44.15 concerns proceedings which are struck out for misconduct and does not arise in the present case. Rule 44.16, one part of which does arise here, provides as follows:

> "(1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.
>
> (2) **Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where –**
> (a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or
> **(b) a claim is made for the benefit of the claimant other than a claim to which this Section applies…"** (Emphasis supplied)

The highlighted exception to the QOCS regime at r.44.16(2)(b) was referred to by Whipple J as the 'mixed claim' exception. Its proper interpretation is at the heart of this appeal.

16. Section 2 of Practice Direction 44 sets out some limited guidance in relation to QOCS. In respect of r.44.16 as a whole, paragraph 12.6 of the PD provides as follows:

> "In proceedings to which rule 44.16 applies, the court will normally order the claimant or, as the case may be, the person for whose benefit a claim was made to pay costs notwithstanding that the aggregate amount in money terms of such orders exceeds the

> aggregate amount in money terms of any orders for damages, interest and costs made in favour of the claimant."

17. For reasons which will become apparent below, I strongly doubt the utility or accuracy of that paragraph. It purports to treat all of the exceptions in r.44.16 in the same way and assumes that, if any of the exceptions are triggered, the result will, in a normal case, be adverse to the claimant. It seems to me that this fails to recognise that the exception at r.44.16(1) will be triggered in circumstances of fundamental dishonesty (when an adverse costs order which removes QOCS protection will normally be justified) whilst the exception at r.44.16(2)(b) – whatever its interpretation – is not intended to reflect adversely on the claimant and cannot, of itself, justify a similarly harsh approach.

4. The Relevant Authorities

18. QOCS has been considered in a small number of reported cases. I note below those which appear to be of some relevance to the issue before this court.

19. In *Wagenaar v Weekend Travel Limited and Another* [2014] EWCA Civ 1105, [2015] 1WLR 1968, the defendant in a personal injury claim brought third party proceedings against the ski instructor said to have been liable for the accident. Whilst the claimant was entitled to QOCS protection, the defendant sought to argue that it too was entitled to QOCS protection in respect of its third party claim. The argument was that QOCS applied to the proceedings as a whole (because of the words used in r.44.13(1)), which would therefore include the third party claim. That argument was rejected. Vos LJ said:

> "39 It is true, however, that the word "proceedings" in CPR Rule 44.13 is a wide word which could, in theory, include the entire umbrella of the litigation in which commercial parties dispute responsibility for the payment of personal injury damages. I do not think that would be an appropriate construction. Instead, I think the word "proceedings" in CPR Part 44.13 was used because the QOCS regime is intended to catch claims for damages for personal injuries, where other claims are made in addition by the same claimant. There may, for example, in the ordinary road traffic claim, be claims for damaged property in addition to the claim for personal injury damages, and the draftsman would plainly not have wished to allow such additional matters to take the claim outside the QOCS regime.
>
> 40 Thus, in my judgment, CPR Rule 44.13 is applying QOCS to a single claim against a defendant or defendants, which includes a claim for damages for personal injuries or the other claims specified in CPR Rule 44.13(1)(b) and (c), but may also have other claims brought by the same claimant within that single claim. Argument has not been addressed to the question of whether QOCS should apply to a subsidiary claim for damages not including damages for personal injuries made by such a claimant against another defendant in the same action as the personal injury claim. I would prefer to leave that question to a case in which it arises. CPR Rule 44.13 is not applying QOCS to the entire action in which any such claim for damages for

> personal injuries or the other claims specified in CPR Rule 44.13(1)(b) and (c) is made."

Although the first sentence of [40] might be said to offer some support to the appellant in the present case, I do not consider that, when taken together, these paragraphs express a concluded view on the application – or otherwise - of r.44.16(2)(b) to a mixed claim.

20. In *Howe v Motor Insurers' Bureau (No2)* [2017] EWCA Civ 932, [2018] 1WLR 923, Lewison LJ said that QOCS protection was "intended to overcome the deterrent effect on bringing claims for personal injury at the risk of paying a defendant's costs if the claim failed" [11]. He said that QOCS was therefore a domestic version of the European principle of effectiveness.

21. The actual dispute in *Howe* is only of tangential relevance to this appeal. Mr Howe was making a statutory claim under EU law arising out of a traffic accident abroad, and the defendants sought to argue that that was not a claim for "damages for personal injuries". The Court of Appeal had no difficulty in rejecting that submission. Lewison LJ found that the QOCS regime applied. There was no separate argument about the r.44.16(2)(b) exception because the judge at first instance had made it plain that, if QOCS applied, he would have exercised his discretion under the exception against the defendants in any event.

22. There is a trio of first instance cases which address the exception at r.44.16(2)(b). The first is *Jeffreys*, referred to above. In that case, the claimant sought to avoid the exception by contending that it only applied if the non-personal injury claims were divisible or separable from the personal injury claims and that, since the claims for personal injuries in that case were not divisible or separable, the exception did not apply. Morris J rejected that argument. In his view, the drafting of the rule gave rise to some difficulty (because of the reference to "proceedings" in r.44.13 and "claim" in r.44.16 (2) (b))[1] but at [37] he resolved that potential difficulty as follows:

> "In my judgment, in order to give meaning to the phrase 'a claim is made … other than a claim to which this Section applies' in r.44.16 (2) (b), it must be interpreted as referring to 'proceedings which include a claim other than a claim for damages for personal injury'.

He concluded at [39]:

> "Thus, as a matter of construction, I conclude that CPR r 44.16 (2) (b) applies in a case where, in proceedings the claimant has brought a claim for damages for personal injuries and has also brought a claim or claims other than a claim for damages for personal injuries."

23. On the facts of that case, Morris J found that the claimant's claims included damages for personal injury but also other claims for non-personal injury damages. He went on

[1] An argument I address in greater detail at paragraphs 34-42 below.

to reject the argument that the exception did not apply where the claim for personal injury damages was indivisible. He said at [44]:

> "As to the second question, the alleged requirement for divisibility, in my judgment, there is no authority for the proposition that in order for CPR 44.16(2)(b) to apply the personal injury claim and the non-personal injury claim must be "divisible". There is nothing in the wording of the CPR provision itself to support his. Further, there is no reason in principle why there should be such a requirement. If the two claims are "inextricably" linked or otherwise very closely related, then that relationship can be reflected in the exercise of discretion (in the claimant's favour) which arises once CPR 44.16(2)(b) applies."

He therefore rejected the restriction urged on him by the claimant that, for the exception to apply, the personal injury claim and the non-personal injury claim had to arise out of distinct facts or distinct breaches of duty. He said at [55] that "what is ultimately important is whether they are claims for different types of loss".

24. In *Siddiqui v The Chancellor, Masters and Scholars of the University of Oxford* [2018] EWHC 536 (QB), [2018] 4WLR 62, the claimant made various claims against the University arising out of what he said were their breaches of duty regarding his undergraduate education. He claimed that those breaches led to his failure to gain entry to a leading US law school. There were a number of different claims, including a claim for damages for personal injury, based on the alleged exacerbation of his pre-existing psychiatric condition. All the claims failed. On costs, Foskett J concluded that the claim fell within the mixed claim exception to the QOCS regime at r.44.16(2)(b) and, as a result, ordered the claimant to pay 25% of the University's costs.

25. In his analysis of the exception at r.44.16(2)(b), Foskett J expressly endorsed the reasoning and result in *Jeffreys*. He said:

> "7. The drafting of these provisions has been the subject of adverse comment: see, e.g., *Jeffreys v The Commissioner of Police for the Metropolis* [2017] 4 Costs LO 409 at [35-36]. Nonetheless, those provisions were the subject of detailed scrutiny by Morris J in that case and given a purposive construction. Mr Mallalieu, on behalf of the Claimant, indicates that the analysis in *Jeffreys* is not accepted.
>
> 8. Whilst the analysis is not, strictly speaking, binding upon me, ordinarily I would need to be persuaded that it is obviously wrong before departing from it. I am alive to the objectives of the QOCS provisions (see paragraph 5 above) and the need to be cautious about disturbing those objectives too readily by looking for an exception where an exception was not intended. However, as a matter of construction of the rules, I respectfully think that the analysis in *Jeffreys* is correct and I propose to apply it to the extent that it is relevant in this case (see further at paragraphs 17-18 below). It is, I might add, also an important objective to ensure that the QOCS provisions are not abused by simply "dressing up" a non-personal injuries claim in the clothes of a personal injuries claim to avoid the normal consequences of failure in litigation….

> 17. I respectfully think that this analysis is correct, the essential question being whether the claims advanced are for different forms of loss, one attributable to personal injury and the other not.
>
> 18. That being so, I consider that the circumstances of the present case do fall within the exception provided by CPR 44.16(2)(b). The issue is, therefore, how the discretion afforded by that provision should be exercised."

26. The last of the trio is the decision of Whipple J in the present case. In her judgment, she specifically noted the terms in which permission to appeal had been granted by Warby J:

> "2. The standard claim for damages for breach of duty under the DPA, or for misuse of private information, seeks damages for emotional and intangible harm, in the form of distress and intrusion only. It would be unconventional at the least to describe such a claim as one for 'damages for personal injury', falling within CPR 44.13(1). It would not qualify as such for limitation purposes, for instance, in ordinary language, such claims would be aptly described as claims "other than a claim to which this Section applies".
>
> 3. If HH Luba QC is correct, however, a standard or ordinary DPA or misuse claim ceases to be one 'other than a claim to which this section applies' once it incorporates a head of damages in the form of compensation or for personal injury. So, if a claimant says that a DPA breach caused them to suffer depression (see paragraph 37 of the Particulars of Claim), all their claims will fall within the scope of CPR 44.13(1), and they will do so even if that head of claim fails, as it did here.
>
> 4 The effects of such an interpretation are quixotic, and it is at least arguable they were not intended by the rule-makers …"

27. Whipple J agreed with the analysis in *Jeffreys* and *Siddiqui* and adopted the same approach. In particular, she said:

> "48. Coming to CPR 44.16(2), the first issue is how to construe the words "a claim … other than a claim to which this Section applies". This wording is problematic, because "this Section applies", by operation of CPR 44.13(1), to "proceedings" not to "claims". But I agree with Morris J that the solution is obvious: CPR 44.16(2)(b) refers back to CPR 44.13(1), and thus to "proceedings which include a claim other than a claim for damages for personal injury.
>
> 49. Thus, CPR 44.16(2) applies in any proceedings where a claim has been made for damages for personal injuries *as well as* for something else (ie, as well as a claim other than a claim for damages for personal injury). This is a "mixed claim".

> 50. Once that point is resolved, the construction of CPR 44.16(2)(b) becomes clear. Mixed claims are within the scope of QOCS, by virtue of CPR 44.13(1). But CPR 44.16(2)(b) provides a mechanism to deal with mixed claims. The mechanism is quite simply to leave it to the Court at the end of the case to decide whether, and if so to what extent, it is just to permit enforcement of a defendant's costs order."

28. Reference was made during argument to the 5th Edition of *Costs and Funding following the Civil Justice Reforms: Questions and Answers*, published as part of the White Book Service and written by three well-known lawyers, including former Senior Costs Judge Hurst. At paragraph 6-15 the learned authors state that the r.44.16(2)(b) exception applies where the claimant's claim "is only partially a personal injury claim" and goes on to note that "the mere fact that procedurally the claim as a whole is deemed a personal injury claim, because it includes a claim for damages for personal injury, does not appear to prevent the court disapplying QOCS to the extent just". This interpretation is therefore broadly consistent with the approach adopted by Morris, Foskett and Whipple JJ, noted above.

29. For completeness, and because Lord Faulks relied upon it, I should note the Explanatory Memorandum which was issued with those amendments to the CPR which introduced the QOCS regime in 2013. Paragraph 7(a) of the Memorandum, at bullet point 4, said in terms that QOCS protection will be lost in part, and subject to the court's permission "if an otherwise successful claim includes an unsuccessful non-personal injury element... and there is an order for costs against the claimant in that unsuccessful element, the claimant is liable for all the defendant's costs of that unsuccessful element to the extent that it is just and fair."

30. The Memorandum therefore identifies the mischief at which these rules are aimed. I do not, however, place any further reliance upon it. The Explanatory Memorandum is not a form of document which is seen (let alone approved) by the Civil Procedure Rules Committee. It has no status as an aid to the proper interpretation of the CPR.

5. The Exception at CPR 44.16(2)(b)

5.1 The Proper Interpretation

31. What is the proper interpretation of the words "other than a claim to which this Section applies"? It seems to me quite clear. "This Section" is the Section of the CPR setting out the QOCS regime. Rule 44.13(1) identifies the three types of claim which are covered by that regime: they are claims for damages for personal injury. Thus, if the proceedings also involve claims made by the claimant which are *not* claims for damages for personal injury (that is to say, claims "other than a claim to which this Section applies"), then the exception at r.44.16(2)(b) will apply.

32. I consider that this is the sensible and straightforward interpretation of the rule. It also produces a logical and fair outcome. The QOCS regime only applies to claims for

damages for personal injury. It does not apply to other types of claim.[2] There is therefore no justification for allowing claims which are not claims for damages for personal injury (such as, for example, the data protection or police misconduct claims which were successful in the present case) to attract automatic QOCS protection. It would be equally wrong to allow claimants with a mixed claim to use the fact that their claims includes a claim for damages for personal injury to gain automatic costs protection in respect of their claims for non-personal injury damages.

33. In my view, the exception at r.44.16(2)(b) was designed to deal with the situation where a claim for damages for personal injury was only one of the claims being made in the proceedings. In those circumstances, the *automatic* nature of the QOCS protection falls away. But of course, that is not the end of the matter: it then becomes a question of the judge's discretion. I refer to that issue again in Section 5.4 below.

5.2 The 'Literal' Interpretation

34. On behalf of the appellant, Ms Darwin's skeleton argument complained that the approach of Morris, Foskett and Whipple JJ, in the cases noted above, was flawed because it equated "proceedings" in r.44.13(1) with "a claim" at r.44.16(2)(b). But her skeleton offered no plausible alternative interpretation of the exception in consequence of that submission. If "a claim other than a claim to which this Section applies" does not mean a claim other than a claim for damages for personal injury, because of some alleged contradiction with r.44.13, then what does it mean? How is the exception intended to operate?

35. On behalf of the intervener, Mr Jaffey QC made the same criticism and his skeleton argument did endeavour to answer these questions. But what was offered was a version of the argument rejected in *Jeffreys*, to the effect that if one of the claims made in the proceedings was a claim for damages for personal injury then, because that was protected by r.44.13, none of the claims in the proceedings could be excepted by r.44.16. It was said this was "a literal reading" of the exception, with the implicit concession that the result might, at the very least, be regarded as unrealistic. In my view, this was not a literal interpretation. Furthermore, if it were right, it would deprive the exception of any utility.

36. First, I consider that this interpretation does not naturally arise out of the words used. It appears that this was the reason why, when he refused permission to appeal in *Siddiqui*, Foskett J said that the alternative interpretation was not arguable. It is clear that r.44.13 was widely drawn so as to refer to all proceedings in which there might be a claim for damages for personal injury. Ms Darwin correctly called that "a broad gateway". But the exception at r.44.16(2)(b) is more specific. It does not refer to proceedings. It simply refers to 'a claim…other than a claim to which this Section applies'. The narrower words of the exception demonstrate that what the CPR intended was to exempt from the QOCS regime, within the widest possible umbrella

[2] The Ministry of Justice has expressly said that, although the QOCS regime might be extended to other types of claim in the future, they remain to be convinced of the necessity of taking that step at present: see paragraphs 102 and 160 of the Post-Implementation Review of LASPO, February 2019, published by the Ministry of Justice.

of the proceedings as a whole, claims which were *not* claims for damages for personal injury.

37. The second reason why the alternative interpretation must be wrong is because it would make the exception redundant. If, as Mr Jaffey argued, claims which include a claim for damages for personal injury, but which also include 'other' claims, did not fall within the r.44.16(2)(b) exception, then it is impossible to see how the exception could ever work, or what its purpose or rationale would be. That was one of the points made by Morris J in *Jeffreys*.

38. Mr Jaffey worked hard in his skeleton argument to try and identify ways in which, on this assumption, the exception would not be redundant. He identified two types of claim to which the exception might refer: i) applications for pre-action disclosure or for a pre-commencement funding arrangement; and ii) claims for non-personal injury damages in one set of proceedings, which have become consolidated with proceedings that do benefit from QOCS protection. In this context, particular reference was made to the possibility of two separate sets of proceedings in respect of housing disrepair, one being in respect of personal injury, and the other being for the costs of repair or property damage, which proceedings might subsequently be consolidated. I consider that here are two complete answers to those arguments.

39. The first is that, in my view, it is artificial to conclude that, in providing the general words of the exception at r.44.16(2)(b) ("a claim other than…"), what the CPRC actually had in mind were such relatively uncommon types of applications such as pre-action disclosure, or the rather arcane formalities of consolidated sets of proceedings. There is no basis for saying that the rules were designed to refer only to such limited situations, rather than the ordinary run of civil litigation. If they were designed to be so limited, the rules would have said so.

40. Secondly, as Lord Faulks QC pointed out for the respondents, the detail of these submissions was also wrong. An application for pre-action disclosure is outside the scope of QOCS in any event, as a result of the express words at r.44.13(1)[3]. In relation to the example of consolidated proceedings, the whole purpose of consolidation is that the two original sets of proceedings become one. Thus, on the interpretation contended for by the appellant and intervener, in the single set of proceedings following consolidation, the r.44.16(2)(b) exception would not apply in any event.

41. At root, the appellant's case on the so-called 'literal interpretation', as expanded by the intervener, had to be that the r.44.16(2)(b) exception could not arise in any proceedings to which QOCS applied. In that way it would no longer be an exception to the QOCS regime at all. That result would obviously be contrary to the scheme set out at r.44.14 and r.44.16.

42. For all those reasons, therefore, I do not consider that the so-called 'literal' interpretation is any such thing. It would make r.44.16(2)(b) redundant. I therefore reject it.

5.3 'Claim' to be read as 'Cause of Action'

[3] Mr Jaffey conceded this at the hearing, in answer to a direct question from the court.

43. Perhaps conscious of the difficulties with the so-called literal interpretation, at the hearing of the appeal Ms Darwin suggested that it was instead appropriate to interpret 'claim' in r.44.16(2)(b) as meaning a cause of action. She said that Judge Luba had been right to adopt this approach (paragraph 7 above) "because each of the four heads or causes of action alleged that personal injury had followed as a consequence". Mr Jaffey also sought to advance this alternative argument. He put it slightly differently, suggesting that the reference at r.44.16(1) to "claim" must be to "cause of action", and so the same should apply to r.44.16(2)(b).

44. The effect of these submissions would be that, regardless of the nature, scope and extent of the underlying cause or causes of action, if damages for personal injury were claimed as a consequence of each pleaded cause of action, the exception would not apply and automatic QOCS protection would remain. However, I consider that there are a number of fundamental difficulties with this interpretation.

45. First, addressing Mr Jaffey's particular submission, I do not accept that the reference to "claim" in r.44.16(1) is necessarily intended to encompass a cause of action. On the contrary, an aspect of the claim may be found to be fundamentally dishonest, with the consequence that the claim fell outside the QOCS regime, but it would not necessarily require an element of the underlying cause of action itself to be fundamentally dishonest before that result eventuated. Take for example a case where there is a valid claim in negligence for damages for personal injury, but where the extent of a very minor injury had been grossly exaggerated by the claimant into a claim for six months incapacity and loss of earnings. Video footage revealed the extent of the deception. In such a case, the necessary ingredients of the claimant's underlying cause of action may all be in place (the existence of the duty, the breach of that duty, the causation of a very minor injury), but the dishonesty in respect of the level of damages claimed may be regarded by the court as so fundamental that the QOCS protection was lost.

46. Secondly, a claim for damages for personal injury is not a cause of action at all. A cause of action is, for example, a breach of duty or a claim under a statute. A claim for damages in respect of personal injury is a claim for a particular head of loss arising out of the breach or misconduct of the defendant. The two are not the same at all.

47. Thirdly, I consider that it is wrong to construe these rules by reference to a cause of action, in circumstances where the rules themselves make no such reference. The words used in the relevant rules are "proceedings" and "claim", and I have set out the proper interpretation of those words above. There is no reference to "causes of action" in these rules, so to import such a concept, when the rule-makers have not done so, is not a proper method of interpretation.

48. Fourthly, I note that in the present case at [53], Whipple J was not persuaded that it was necessary to delve into whether or not there were separate causes of action. Similarly, as we have seen, Morris J took the view that it was an unwelcome complication to interpret the rules by reference to whether the claims could be said to be "divisible" or "inextricably linked". I note paragraphs 53 and 54 of his judgment in *Jeffreys* where he said:

> "53. In my judgment, in each of these examples, proceedings in which claims were brought for those two different types of loss, namely the

> damage to property and the personal injury, would fall within CPR 44.16(2)(b), even though they arose out of essentially the same facts and out of one and the same breach of duty. Each claim would be for different types of loss (personal injury and non-personal injury) and in claims where damage is an essential element of the cause of action, would in fact arise from different causes of action. There is no basis for requiring the personal injury claim and the non- personal claim to arise out of either distinct facts or distinct breaches of duty. Indeed, it is inherently likely that they will arise out of the same set of facts. What is important ultimately is whether they are claims for different types of loss.
>
> 54. In the present case, and even assuming that the malfeasance breaches of duty, indistinctly, caused the psychological injury, there remains the very substantial claims for damages for something other than damages for personal injury. Even though those claims were caused by the same breaches of duty, in my judgment, there were claims "other than a claim for damages for personal injury". CPR 44.16(2)(b) therefore applies."

It follows from what I have already said that I agree with that analysis.

49. Finally, on the facts of this particular case, I consider that this interpretation works against the appellant in any event. Here, the appellant had complete - and ultimately successful - causes of action against the respondent under the DPA and HRA and for breach of duty in respect of the misuse of private information. Those claims stood alone: they did not require any claim for personal injury or proof of personal injury damages in order to be successful.

50. So when, at paragraph 38 of her skeleton argument, Ms Darwin said that, for the exception to apply, “there must be a claim which could stand in proceedings on its own, which does not include a claim for personal injury damages”, the simple answer is that there were such claims in these proceedings; which did stand alone; which included claims for personal injury damages but which did not depend on such claims; and which non-personal injury claims were successful. Thus, on the appellant’s own case, the exception at r.44.16(2)(b) must apply.

51. This perhaps highlights the difficulties involved in any more convoluted construction of the rule beyond the straightforward interpretation set out in Section 5.1 above.

5.4 The Effect On Ordinary Claims For Personal Injuries

52. During the course of the appeal, much was made by both Mr Jaffey and Ms Darwin about the effect of Whipple J’s analysis on what might be called ‘ordinary’ claims for personal injuries. The court was given examples of plumbers with claims for loss of earnings or businessmen with damaged vehicles, with the suggestion that, as a result of *Jeffreys, Siddiqui* and the judgment below, QOCS protection would not be available to these (and numerous other) hypothetical claimants. In an undoubtedly memorable submission, Ms Darwin went so far as to suggest that, if the appeal was not allowed, it would mean that, by reference to the well-worn facts of *Donoghue v Stevenson*, Ms Donoghue would have lost her QOCS protection if she had been claiming for the cost of another bottle of ginger beer, as well as for damages for gastro-enteritis.

53. Whilst this court should be wary about endeavouring to give comprehensive guidance in circumstances where the appeal arises out of a very different type of litigation, it does seem to me that there are some straightforward points that can be made which answer the submissions made, and which may be of assistance to those grappling with the outer limits of the QOCS regime.

54. The starting point is that QOCS protection only applies to claims for damages in respect of personal injuries. What is encompassed by such claims? It seems to me that such claims will include, not only the damages due as a result of pain and suffering, but also things like the cost of medical treatment and, in a more serious case, the costs of adapting accommodation and everything that goes with long term medical care. In addition, contrary to the submissions advanced by Ms Darwin and Mr Jaffey, I consider that a claim for damages for personal injury will also encompass all other claims consequential upon that personal injury. They will include, for example, a claim for lost earnings as a result of the injury and the consequential time off work.

55. In other words, a claim for damages in respect of personal injury is not limited to damages for pain and suffering. For these reasons, as Whipple J noted at [60] of her judgment, claimants in a large swathe of 'ordinary' personal injury claims will have the protection and certainty of QOCS.

56. I acknowledge that, in personal injury proceedings, another common claim will be for damage to property. For example, in RTA litigation, there will usually be a claim for the cost of repairs to the original vehicle, and the cost of alternative vehicle hire until those repairs are effected. Such claims are not consequential or dependent upon the incurring of a physical injury: they are equally available to a claimant who survived the accident without a scratch as they are to a claimant who broke both legs in the accident. They are claims consequent upon damage to property, namely the vehicle that suffered the accident, and therefore fall within the mixed claim exception at r.44.16(2)(b).

57. But in such proceedings, the fact that there is a claim for damages in respect of personal injury, and a claim for damage to property, does not mean that the QOCS regime suddenly becomes irrelevant. On the contrary, I consider that, when dealing with costs at the conclusion of such a case, the fact that QOCS protection would have been available for the personal injury claim will be the starting point, and possibly the finishing point too, of any exercise of the judge's discretion on costs. If (unlike the present case) the proceedings can fairly be described in the round as a personal injury case then, unless there are exceptional features of the non-personal injury claims (such as gross exaggeration of the alternative car hire claim, or something similar), I would expect the judge deciding costs to endeavour to achieve a 'cost neutral' result through the exercise of discretion. In this way, whilst it will obviously be a matter for the judge on the facts of the individual case, I consider it likely that, in most mixed claims of the type that I have described, QOCS protection will – in one way or another – continue to apply[4]. It therefore follows that, as already advertised at paragraphs 16 and 17 above, to the extent that paragraph 12.6 of Practice Direction 44

[4] I take some comfort from the fact that this is also the view expressed by the learned authors of the *Costs & Funding* book in the passage identified at paragraph 28 above.

suggests a different approach, I consider it to be wrong. It needs to be amended as soon as possible.

58. It is however important that flexibility is preserved. It would be wrong in principle to conclude that all mixed claims require discretion to be exercised in favour of the claimant, because that would lead to abuse, and the regular 'tacking on' of a claim for personal injury damages (regardless of the strength or weakness of the claim itself) in all sorts of other kinds of litigation, just to hide behind the QOCS protection (as Foskett J warned in *Siddiqui*).

59. Accordingly, I reject the suggestion that, if QOCS protection is not extended to cover every kind of mixed claim, then it will have a potentially adverse effect on personal injuries litigation generally. On the contrary, the absence of any cases hitherto in which this point has arisen in an ordinary personal injury claim only confirms my belief that costs in such cases have generally been properly addressed.

60. The analysis set out above is sufficient to dispose of this appeal. However, the court heard a number of wider submissions about access to justice. Since a number of those submissions were based on what I consider to be false premises, it is appropriate to say something about that aspect of this appeal.

6. Access To Justice

6.1 The Effect of the Exception

61. Both the appellant and the intervener submitted that, if the appeal were dismissed, then not only the appellant but thousands of other claimants with mixed claims would be deprived of the protection of QOCS. For the reasons already set out in Section 5.4 above, I do not agree with the premise of that submission.

62. Ms Darwin suggested at paragraph 64 of her skeleton that any conclusion which exposed a claimant to the "unconstrained exercise of judicial discretion at the conclusion of the case", was an outcome to be avoided at all costs. With respect, such a suggestion is misguided: costs disputes are routinely decided through the exercise of the judge's discretion. What this argument highlighted was that what the appellant – and more particularly, the intervener - really wanted to achieve is the *certainty* of knowing that, regardless of the result, and regardless of how insignificant the claim for personal injury damages might be to the proceedings as a whole, a claimant with a mixed claim had automatic and inviolable QOCS protection.

6.2 Certainty

63. Certainty about the result on costs before the proceedings themselves have even started, let alone finished, is unusual. In some specialist areas, and for small claims in the county court, there is certainty, but in the usual run of civil litigation, there is not. That would be contrary to the common law principle, enshrined in r.44.2(2)(a), that costs follow the event. If the event has not yet happened, the outcome on costs cannot be certain, unless there is specific and express provision to that effect in the CPR.

64. If there is a claim for damages in respect of personal injury, then the QOCS regime, set out above, provides the required certainty. Any claimant can make such a claim

knowing that he or she will not be the subject of any adverse costs order in an amount higher than the sum (if any) which they recover in the proceedings.

65. If, on the other hand, the claimant is making claims for damages or other relief which are unrelated to personal injury, then that certainty is not generally achieved. There is no existing statutory provision, no part of the Jackson review, and certainly no part of the CPR, which indicates that the certainty of automatic costs protection, in respect of claims for non-personal injury damages, was intended or required.

66. On a related point, there was an underlying theme to the submissions of both the appellant and the intervener, to the effect that claims of the kind brought by the appellant (misuse of personal information and breaches of the DPA) should be the subject of QOCS in any event. There may be force in that – QOCS is generally regarded as a successful invention – but it can only be extended to other areas of civil litigation by amendments to the CPR, not by judicial intervention.

67. If the claim is a mixed claim, then the position on costs is a blend of the two approaches, as explained in paragraphs 52-59 above. Contrary to the suggestions of Ms Darwin and Mr Jaffey, I consider that to be an accessible, fair and efficient costs regime, in accordance with the obligations on the CPRC pursuant to section 1(3) of the Civil Procedure Act 1997, and in accordance the over-riding objective at CPR 1.1.

6.3 Deterrent Effect

68. Finally, much was made about the deterrent effect that the judgments in *Jeffreys*, *Siddiqui* and the present case may or will have upon claimants who are considering bringing proceedings. Again, that wide-ranging submission needs to be carefully analysed.

69. I accept that a claimant is more likely to bring a claim if he or she knows that there will be no adverse cost consequences of so doing. That is self-evident, so it is therefore unsurprising that the anecdotal evidence gathered together by the intervener is to the same effect. But it cannot sensibly be described as a deterrent to advise a claimant pursuing a claim for non-personal injury damages that the question of costs will be a matter for the judge's discretion at the end of the case.

70. Finally, in connection with the deterrent argument, Ms Darwin made much of the need to ensure access to justice for victims of personal injury. Of course: that is what the QOCS regime is all about. But in the present case, the appellant was *not* the victim of personal injury: her claim for personal injury damages was rejected and there was no appeal. The appellant did have a valid (non-personal injury) claim under the DPA and HRA and in tort on which she was successful. Her difficulty was that she had refused the offers of a total of £18,000 and at the end of the trial recovered just £9,000. In other words, the proceedings following the appellant's rejection of the offer, were a waste of time and money for all parties, having been necessitated only by the appellant's refusal to accept much more than she eventually recovered. Should the appellant be able to avoid the usual cost consequences of her conduct, merely because she had a claim for damages for personal injury which the judge rejected? For all the reasons I have given, the answer must be No, and no wider considerations of access to justice, properly analysed, can make any difference to that conclusion.

71. Accordingly, if my lords agree, I would dismiss this appeal.

Lord Justice David Richards:

72. I agree.

Lord Justice McCombe:

73. I also agree.