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Case No: SC-2023-BTP-000086

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 13 May 2024

Before :

DEPUTY COSTS JUDGE ROY KC

- -

Between:

SHARON CHALLIS	**Claimant/ Receiving Party**
-and-	
HOWARD BRADPIECE	**Defendant/ Paying Party**

- -
- -

Thomas Mason (counsel instructed by **Penningtons Manches Cooper LLP**) for the **Claimant**
Edward O'Neill (costs advocate instructed by **Medical Protection**) for the **Defendant**

Hearing date: 25 May 2023 (followed by written submissions)

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JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment has been handed down remotely by circulation to the parties or their representatives by email and release to the National Archives.

Introduction

1. I am determining a difficult and (to the best of my knowledge) hitherto undecided point of law. The point is one of statutory construction. The provision in question is **CPR 44.13**.

2. The question can be stated simply: does the qualified one way costs shifting regime ("QOCS") apply to detailed assessment proceedings ("DAs")?

3. Identifying the correct answer is much more difficult.

Background

4. Nothing turns on the facts of the substantive claim itself.

5. In briefest summary, the claimant brought a claim for personal injury (PI) arising out of clinical negligence. This was compromised by the Defendant's acceptance of a ***Calderbank*** offer. The settlement was embodied in a Tomlin order.

6. There was therefore no order for damages in the claimant's favour, provision for the payment of damages being contained in the schedule to the Tomlin order.

7. The claimant was entitled to her costs. These could not be agreed. The matter thus came before me for a detailed assessment.

8. It was not possible to complete the assessment within the one day allocated. The parties agreed that I should determine the outstanding issues on paper.

9. After a long delay due to administrative errors (for which I repeat my previously expressed apologies) I did so. I then asked the parties either to (a) agree consequential matters; or (b) identify any disputed consequential matters and submit materials for me to determine them on papers.

10. The parties duly did so. The result was that the claimant failed to beat the defendant's Part 36 offer, thereby entitling the defendant to a costs order in his favour in respect of the costs of the DA. The only disputed issue is whether QOCS precludes enforcement of this order.

11. Given the difficulty and importance of this point I considered whether to order an oral hearing. However I decided not to given that: (a) neither party requested this, both being content for me to determine it on paper; (b any further delay would be highly undesirable; (c) there would be a risk of disproportionate costs; (d) the parties have filed comprehensive and extremely helpful written submissions; and (e) it is unlikely that mine will be the last word on this issue should the parties wish to continue to contest it.

QOCS

12. QOCS was introduced in 2013 as part of a raft of reforms originating in Jackson LJ's *Final Report*. Its basic purpose and operation were summarised by Males LJ as follows in ***Achille v Lawn Tennis Association Services Ltd*** [2022] EWCA Civ 1407; [2023] 1 WLR 1371 at [2]:

> [QOCS] *is intended to promote access to justice in personal injury cases. It deals with the problem that an individual who had suffered personal injury could be deterred from bringing proceedings by the prospect of liability to pay the defendant's costs in the event that his claim failed, a prospect which it is often difficult to rule out in view of the uncertainty inherent in litigation. The solution adopted in CPR 44.14 was to place a cap on the claimant's liability to pay the defendant's costs, so that any order for costs made against a claimant can only be enforced up to the amount of any damages and interest ordered in his favour. Thus an unsuccessful claimant would not have to pay any costs ordered in favour of the defendant, while even a successful claimant who obtained an order for damages would not have to pay any costs (for example of interlocutory hearings) ordered in favour of the defendant in the course of the proceedings to the extent that they exceeded the damages and interest payable by the defendant. The result was that a personal injury claimant would never be out of pocket as a result of bringing legal proceedings. Any damages recovered might be eaten up by liability to pay the defendant's costs, but the claimant would not be worse off financially as a result of bringing the claim (liability to pay his own costs being addressed in other ways).*

13. **CPR 44.13** is titled "*Qualified one-way costs shifting: scope and interpretation*". It provides:

> *(1) This Section applies to proceedings which include a claim for damages –*
>
> *(a) for personal injuries;*
> *(b) under the Fatal Accidents Act 1976[Z]; 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 1981 or section 52 of the County Courts Act 1984[10] (applications for pre-action disclosure), or where rule 44.17 applies.*
>
> *(2) In this Section, 'claimant' means a person bringing a claim to which this Section applies or an estate on behalf of which such a claim is brought, and includes a person making a counterclaim or an additional claim.*

14. Under the previous iteration of **CPR 44.14(1)**) in force at the time of this claim, leaving aside exceptions such as fundamental dishonesty, costs against a claimant can be enforced "*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*" (emphasis added).

15. The Court of Appeal held in ***Cartwright v Venduct Engineering Ltd*** [2018] EWCA Civ 1654; [2018] 1 WLR 6137 that an actual order for damages was required. A defendant could therefore not enforce costs where case settles for example by Tomlin order or acceptance of Part 36 offer. See further in this regard ***University Hospitals of Derby & Burton NHS Foundation Trust v Harrison*** [2022] EWCA Civ 1660; [2023] 4 WLR 8.

16. The Supreme Court held in ***Ho v Adelekun*** [2021] UKSC 43; [2021] WLR 5132 that setting off a defendant's against claimant's was a species of enforcement and therefore precluded where it exceeded the cap reflecting the sum of any orders for damages and interest made in favour of the claimant. Costs set off is therefore not available to the defendant under the old QOCS rules unless there is an order in the claimant's favour, and even if there is such an order set off is capped at the total of the amount of damages and interest ordered.

17. Given that the vast majority of personal injury claims settle, the practical consequences of ***Ho*** in combination with ***Cartwright*** are that, in the vast majority of case to which the previous QOCS regime applied a defendant has no means of recovering any costs order in

its favour. If QOCS extends to DAs, this also applies to costs orders made in DA, such as that made in the defendant's favour here.

18. Following ***Ho***, the view was taken that the QOCS rules as they had been interpreted titled the playing field too far in favour of claimants. This led to the following amendments to **CPR 44.14:**

> *(1) 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 or agreements to pay or settle a claim for, damages, costs and interest made in favour of the claimant.*
> *(2) For the purposes of this Section, orders for costs includes orders for costs deemed to have been made (either against the claimant or in favour of the claimant) as set out in rule 44.9.*
> *(2) (3) Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.*
> *(4) Where enforcement is permitted against any order for costs made in favour of the claimant, rule 44.12 applies.*
> *(3) (5) An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.*

19. These amendments reverse the effect of ***Cartwright*** and ***Ho.*** Indeed, the go further. They raise the general enforcement cap to give defendants an absolute right to enforce by any means up to the level of any damages, interest or costs recovered by claimant. Under the old rules the cap was limited to damages and interest. This means that under the new rules in the vast majority of cases QOCS will not pose an obstacle to a defendant seeking recover costs in DA proceedings.

20. However, there is a transitional provision that these amendments "*apply only to claims where proceedings are issued on or after 6th April 2023*". There will thus for many years be a long tail of cases to which the old regime will continue to apply. Moreover, even under the new regime there may be (rare) cases where a defendant's costs exceed the aggregate of a claimant's costs, interest and damages. The question before me therefore remains an important one.

Analysis

The issue

21. QOCS applies – and only applies - to "*proceedings which include a claim for damages … for personal injuries*" within **44.13(1)(a)**,

22. If DAs are not "*proceedings which include a claim for damages … for personal injuries*" then QOCS simply does not apply at all. If they are, it does.

23. The issues is therefore a binary one of whether or not DAs arising from PI claims fall within this definition.

Arguments for the defendant

24. There are strong arguments that DAs do not fall within this definition. They are as follows.

25. (1) A DA is a distinct proceeding. It has distinct jurisdictional basis; ***Bayliss v Powys*** [2021] EWHC (QB). Engagement of this jurisdiction requires a sperate originating process; **PD47 13.3**.

26. (2) That a DA is not simply a continuation of the substantive PI proceedings is made clear by the fact that a detailed assessment can be commenced even if the substantive claim settles without proceedings have been issued; **CPR 46.14**. Such DA proceedings could not be a further phase in the substantive proceedings, given that none such exist. In such a case the commencement of DA proceedings under **CPR 47.6** will be the only originating process and the DA proceedings will be the only proceedings.

27. (3) This distinction can be seen in the QOCS rules themselves.

28. **CPR 44.14(3)** (as it now stands, previously **CPR 44.14(2)**) that (emphasis added):

> *Orders for costs made against a claimant may only be enforced after the proceedings have been concluded **and** the costs have been assessed or agreed.*

29. This arguably reflects that the determination of costs is a separate process to the substantive PI claim to which QOCS protection attaches.

30. (4) Authority arguably provides some support for this. Per Carr J in ***Parsa v DS Smith Plc*** [2019] Costs LR 331 at [35] in respect of an application in respect of fixed following late acceptance of a Part 36 offer:

> *The substantive litigation had ended; the claim had settled in relation to all bar costs and had been stayed by the automatic operation of **CPR 36.14** . It is clear from [**Sharp v Leeds City Council** [2017] EWCA Civ 33; [2017] 4 WLR 98] and, in particular, the statement by Briggs LJ at [35], that when one speaks of the settlement of the claim for present purposes, one speaks of settlement of the claim for damages for personal injury, not settlement of the costs claimed arising upon the claim.*

31. However, I note that ***Parsa*** was concerned with an entirely different question, namely whether a costs application following substantive settlement constituted an interim payment for the purposes of fixed costs. It does not say (even inferentially in my view) that such a costs application forms no part of the proceedings at all so as to fall outside QOCS.

32. (5) As a matter of ordinary language, a DA is not a claim for (or including) damages for PI.

33. Indeed it is not a claim for damages at all. It is a claim for (the assessment) of costs.

34. (6) That the claim for costs arises out of a claim for damages for PI would not normally convert a claim for costs into a PI claim.

35. A claim for damages for PI requires a claim to be compensated for physical/psychiatric injury itself.

36. It is for that reason that a professional negligence claim arising out of a PI claim does not qualify as a claim for personal injury for the purpose of QOCS, or indeed for any other purpose such as limitation; ***Jones v GR Smith & Co*** (8 February 1993, unreported, CA).

37. (7) By **CPR 44.13(1)(c)** QOCS does not apply to applications for pre-action disclosure.

38. This might be said to illustrate that:

    (a) QOCS only applies to the substantive PI proceedings, not to any ancillary proceedings.
    (b) PI claimants do not have absolute protection (leaving aside the enumerated exceptions at **CPR 44.15-16**) against a defendant's costs. A claimant could lose a pre-action disclosure., ultimately recover no damages or costs, and thus be left with an enforceable net liability for a defendant's costs.

39. (8) An interpretation that DAs were covered by QOCS is arguably inconsistent with the legislative intention.

40. Jackson LJ recommended that the beefed up Part 36 regime should apply to DAs, replacing the rule that the court should merely take offers into account. The purpose of this was incentivise early settlement of DAs; *Final Report* Chapter 4, 3.1 and 3.33, Chapter 45, 5.14-15.

41. This reflected a concern about *"large payments of costs, if paying parties regard it as prohibitively expensive to challenge bills of costs*" (Chapter 4, 3.33). It is clear from the report that effective defendant offers in DAs were considered a necessary corrective to this.

42. (9) For similar reasons, an interpretation which rendered defendant offers largely toothless in the vast majority of PI cases (effectively all those which settle) would not be consistent with the overriding objective. By **CPR 1.2** I am required to seek to give effect to the overriding objective when interpreting any rule.

43. I finally note that the defendant's point that the claimant in this case happens to have insurance against adverse costs is in my view neither here nor there. It can have no bearing on the question of construction. There can only be one correct interpretation, and it must apply irrespective of whether or not a claimant has insurance or other means to pay the defendant's costs. The possibility that QOCS protection should be means tested was mooted but ultimately rejected. This leaves no scope to introduce any form of means testing save by further legislative intervention.

Arguments for the claimant

44. There are, however, strong arguments to the contrary. These are as follows.

45. (1) The term *"proceedings"* in **44.13(1)(a)** has generally been interpreted broadly and purposively.

46. In ***Parker v Butler*** [2016] EWHC 1251 (QB); [2016] 3 Costs L.R. 435 at [3-4, 17-20] Edis J held that QOCS extended to appeals. His reasoning was that:

    (a) An appeal between in a personal injury claim is part of the proceedings which include a claim for personal injuries.
    (b) To construe the word "*proceedings*" as excluding an appeal which was necessary if claimant were to succeed in establishing the claim which had earlier attracted costs protection would do nothing to serve the purpose of QOCS.

47. This was endorsed by the Court of Appeal in ***Wickes Building Supplies Ltd v Blair (No.2: Costs)*** [2020] EWCA Civ 17; [2020] 1 WLR 1246 at [21, 28-29].

48. In ***Howe v Motor Insurers' Bureau (No. 2)*** ([2017] EWCA Civ 932; [2018] 1 W.L.R. 923 the claim was against the MIB under **regulation 13** of the **Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003**. It was held thar QOCS applied. However: (a) the claim in ***Howe*** could more naturally be described as claim for damages for PI than could a claim for costs by way of DA; (b) the

ratio in ***Howe*** was that EU principles of equivalence and effectiveness compelled this result. Those principles have no application here.

49. In ***Achille v Lawn Tennis Association*** supra Males LJ at [22] emphasised the need for a purposive approach:

> *Case law has established that the term "proceedings" as used in the QOCS rules does not bear this natural meaning in its full sense. It requires some qualification in this context in order to give effect to the purpose of the QOCS regime. Thus it does not apply to a claim made by a defendant to a personal injury claim against a third party or against another defendant for contribution (**Wagenaar v Weekend Travel Ltd** [2014] EWCA Civ 1105; [2015] 1 WLR 1968) or to a counterclaim against a personal injury claimant (**Day v Bryant** [2018] EWHC 158 (QB)). These qualifications are appropriate because such claims or counterclaims have nothing to do with the purposes of the QOCS regime, which are, first, to promote access to justice in personal injury cases by removing the deterrent of potential liability for a defendant's costs and, second, to deter frivolous personal injury claims.*

50. This led the Court in ***Achille*** adopt a wide definition. Males LJ held at [26] that:

> *... the term "proceedings" in **CPR 44.13** refers to all of the claims made by a claimant against a single defendant, when one such claim is a claim for personal injury. Thus, in a mixed claim case, QOCS applies pursuant to the basic rule in **CPR 44.14**, unless one of the exceptions in **CPR 44.15** or **CPR 44.16** applies.*

51. I do however note that in the cases cited by Males LJ – ***Wagenaar*** *and* ***Day*** – purposive contextual considerations in fact told in favour of more restrictive interpretation of "*proceedings*". It therefore cannot be said that authority is all one way in favour of a wide interpretation.

52. (2) If QOCS did not apply to DA proceedings a claimant could be left with a net liability for the defendant's costs. That would be completely contrary to the purpose of QOCS.

53. (3) Such an interpretation would go wholly against the grain of the Supreme Court decision in ***Ho v Adelekun*** supra at [37-41]. In ***Ho***:

(a) The claimant was entitled to costs of £16,700.

(b) The defendant's costs amounted to £48,600.

(c) The substantive claimant settled under a Tomlin Order and therefore the defendant would have nothing to enforce her costs against.

(d) The claimant argued she was QOCS protected.

(e) The defendant argued that it was possible to set off the two costs orders against each other.

(f) It was held that the costs orders made in the claimant's favour should not be taken into account when determining the limit up to which the defendant may enforce an order for costs in its favour. The claimant's costs did not form part of the "pot" of money against which the defendant may enforce its costs.

54. (4) The Defendant's points re policy, legislative intention and unfairness are in effect the same as those rejected in ***Cartwright*** and ***Ho***.

55. (5) There is prima facie binding authority confirming that DAs are not standalone proceedings. See ***Serbian Orthodox Church - Serbian Patriarchy v Kesar & Co*** [2021] EWHC 1205 (QB) at per Foxon J at [56]:

> *There was a dispute between Mr Latham and Mr Hogan as to whether the service of notice of commencement of costs assessment proceedings was to be equated with service of originating process for the purposes of CPR 6.15. Mr Hogan pointed to the fact that CPR 47.6 refers to "commencement of detailed assessment proceedings" and sets out how the "detailed assessment proceedings are commenced". I accept that the detailed assessment of costs is a distinct phase of the proceedings, with a distinct process for commencement. However, I do not accept that this is equivalent to the commencement of originating process. By the time costs are assessed, in personam jurisdiction over the defendant has long been established, and the defendant has been fully engaged in the proceedings. The commencement of "detailed assessment proceedings" is the next step in the proceedings, which a defendant against whom an adverse costs order has been made should be expecting. I accept that the service of notice of commencement bears some resemblance to the commencement of a claim, in that a failure to respond in time can generate a default liability, but that is also true of a failure to serve a defence in response to particulars of claim. For these reasons, I have approached the Appellant's application under CPR 6.15 on the basis that the particular considerations engaged by applications relating to the service of originating process do not apply.*

56. However, it seems to me that this is per incuriam. The court's attention was not drawn to the rules that:

(a) DA proceedings have their own strict jurisdictional gateway, namely a costs order or proof of a deemed costs order; **PD47 13.3**, ***Bayliss v Powys*** [2021] EWHC (QB). The fact that the court has jurisdiction over a party for the purposes of substantive proceedings does not by itself provide any jurisdiction in respect of DA proceedings.

(b) By **CPR 46.14** there can be jurisdiction for the purposes of DA proceedings even in the absence of any substantive proceedings.

57. (6) The specific and explicit exception for pre-action disclosure juxtaposed with the lack of any such exception for DAs support this. If the intention had been to exclude DAs as well as PAD applications, the rules would and could have said so.

58. (7) **CPR 47.20(7)** provides that: **"***For the purposes of* ***r36.17*** *(costs consequences of failing to beat a part 36 offer following judgment), detailed assessment proceedings are to be regarded as an independent claim.*" This suggests that DA proceedings should not be regarded as a separate claim for other purposes.

59. See per Costs Judge Leonard in ***Best v Luton & Dunstable Hospital NHS Foundation Trust*** [2021] EWHC B2 (Costs):

> *26. There can be no detailed assessment proceedings without an authority for assessment. As between parties, that will be either an order for the payment of costs by the paying party to the receiving party or a deemed order to that effect. One example of a deemed order is* ***CPR 44.9(1)(b)****, which creates a deemed order for costs in favour of a claimant up to the point of acceptance of a Part 36 offer.*
>
> *27. The court's jurisdiction to undertake a detailed assessment of costs rests upon that underlying authority.* ***CPR 47.20****further empowers the assessing court to make an order as to the costs of the detailed assessment proceedings themselves. Those costs are normally summarily assessed at the conclusion of the detailed assessment proceedings (****CPR 47.20****).*
>
> *28. Where, as here, the authority for assessment is an order made in an underlying claim (in this case, as in* ***Bourne****, for damages for negligence), the detailed assessment proceedings remain part of that action. The receiving party's claim for costs is not an independent claim: it is made under the order for costs made on the conclusion of the underlying claim.*

60. I note however that **CPR 36.4** makes similar provision in respect of appeals notwithstanding that, as per ***Parker*** supra, an appeal is not regarded as a separate claim for QOCS purposes. It therefore seems to me that **CPR 47.20(7)** is simply defining the operation of Part 36 within DAs.

61. Also, whilst I respectfully agree with Costs Judge Leonard's essential analysis of the point before him, namely whether the costs of a DA could themselves form the part of the costs forming the subject matter of DA for the purposes of a Part 36 offer within a DA; (a) this analysis was made in a very different context; (b) the observation that a "*receiving party's claim for costs is not an independent claim*" (as well as being in my view strictly obiter) does not necessarily mean that DA proceedings are not independent proceedings for the purpose of QOCS.

62. I finally note that in ***PME v The Scout Association*** [2023] EWHC158 (SCCO) the parties agreed that QOCS applied to DAs. However, as the points was never argued in my view this takes the matter no further.

Conclusion

63. In my view these competing arguments are very finely balanced. I confess that my mind has wavered several times before coming to my conclusion.

64. After anxious consideration, I have decided that the claimant's construction to be preferred.

65. Of all the competing arguments, in my judgement the most compelling are that the defendant's interpretation would (i) go wholly against the grain of the Supreme Court's analysis in ***Ho***; and (ii) potentially leave the claimant with a net costs liability for the defendant's costs.

66. This in my view would be contrary to the legislative intention. See, in addition to ***Achille,*** supra, Coulson LJ in ***Cartwright v Venduct Engineering Ltd*** [2018] EWCA Civ 1654; [2018] 1 W.L.R. 6137 (emphasis added):

> *8. Although in some ways the QOWCS regime reflects the pre-1999 Legal Aid scheme, it represents a major departure from the traditional principle that costs follow the event and that, save in unusual circumstances, the losing party pays the winning party's costs. The QOWCS regime provides that, subject to limited exceptions, a claimant in a personal injury claim can commence proceedings knowing that, if he or she is unsuccessful, he or she will not be obliged to pay the successful defendant's costs …*
>
> *23.* ***The QOWCS regime is designed to ensure that a claimant does not incur a net liability as a result of his or her personal injury claim: that, at worst, he or she has broken even at the end of the action.***

67. Coulson LJ made the same point in ***Brown v Commissioner of the Metropolitan Police*** [2019] EWCA Civ 1724; [2020] WLR 1257 at [14] (emphasis added):

> *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.*

68. Although, as per above, there are other discernible elements of the legislative intention that the claimant's interpretation is not consistent with, this in essence simply reflects the effects of ***Cartwright*** and ***Ho***. Given that those consideration did not lead to a different result in those cases, I do not see how they can lead to a different result here.

69. I acknowledge that, leaving such matters aside, the defendant's interpretation accords better with a purely grammatical construction of the rules.

70. However, it would not be appropriate to leave these matters aside. Per Lord Burrows in ***Hassam & Anor v Rabot & Anor*** [2024] UKSC 11; [2024] 2 WLR 949 at [11] "*the modern approach to statutory interpretation requires the courts to ascertain the meaning of the words used in the light of their context and the purpose of the provisions*".

71. It follows that, as per *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edition, s.11.1) legislation is to be given a purposive construction:

> *(1) In construing an enactment the court should aim to give effect to the legislative purpose.*
> *(2) A purposive construction of an enactment is a construction that interprets the enactment's language, so far as possible, in a way which best gives effect to the enactment's purpose.*
> *(3) A purposive construction may accord with a grammatical construction, or may require a strained construction*

72. The claimant's construction, whilst somewhat strained, is not overly so. I draw support for this from Costs Judge Leonard's analysis in ***Best***, supra. My ultimate conclusion is that it is not so strained a construction that I am compelled to reject it notwithstanding that it gives much better effect than the defendant's to the legislative purpose as I discern it to be.

73. I therefore find that QOCS precludes the defendant enforcing his costs of the DA.

74. For reasons which will be apparent from my analysis above, this is a point where the test for permission to appeal is very clearly met. I therefore grant the defendant permission should he wish to pursue the point further.

Deputy Costs Judge Andrew Roy KC

13 May 2024