BEAT THE QOCS: costs in personal injury claims following Jackson

Patrick West, St John's Chambers

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Patrick West looks at the growing impact of one of the most important costs consequences of the Jackson reforms and what it means for Claimants and Defendants seeking to recover their costs

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Qualified One Way Costs Shifting

Cases subject to the new Qualified One Way Costs Shifting, or QOCS, regime introduced on 1 April 2013 are now starting to reach trial in numbers.

CPR 44.15 and 44.16 are among the provisions introduced by QOCS to counterbalance the attack on ATE insurance. CPR 44.13-14 are drafted somewhat clumsily. CPR 44.14 states:

"Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced with 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."

In effect, CPR 44.14 means that a claimant does not face having to pay the defendant's costs if he/she loses, thereby removing the need for a claimant to take out ATE insurance and theoretically reducing costs to defendants.

Who is covered?

It applies only to the following claimants (although the suggestion is that QOCS will be extended to other areas of practice too):

a) A personal injury claimant;

b) A claimant under the FAA 1976;

c) A claim by representatives of the estate of an accident victim under the Law Reform (Miscellaneous Provisions) Act 1934;

d) A counterclaimant.

QOCS applies unless you are a claimant who has entered a pre-commencement funding arrangement.

A successful claimant still recovers his/her costs from the defendant.

There remain costs risks. These arise due to CPR 44.15 and 44.16 and Pt 36 which still applies and is not overridden by QOCS.

QOCS and Pt 36

This last point is important as a Pt 36 Offer, if effective, will wipe out a Claimant's damages by permitting enforcement of a costs order in favour of the defendant capped by the total damages/interest figure awarded to the Claimant. It also makes it likely that ATE insurance will continue to exist (perhaps in more modest forms) at least to cover the costs risk of not beating a defendant's Pt 36 Offer.

Piercing the QOCS shield

CPR 44.15 states that:

"(1) Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that—

(a) the claimant has disclosed no reasonable grounds for bringing the proceedings;

(b) the proceedings are an abuse of the court's process; or

(c) the conduct of—

(i) the claimant; or

(ii) a person acting on the claimant's behalf and with the claimant's knowledge of such conduct,

is likely to obstruct the just disposal of the proceedings. "

CPR 44.16 states that:

"(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.

(3) Where paragraph (2)(a) applies, the court may, subject to CPR 46.2, make an order for costs against a person, other than the claimant, for whose financial benefit the whole or part of the claim was made. "

CPR 44.15 echoes principles which are well established and can be found set out in detail in CPR 3.4.

Fundamental dishonesty

"Fundamental dishonesty" is however not such a familiar legal term. It plainly is intended to catch fraudulent claims but it is qualified by the term "fundamental". Until now it has been unclear how to interpret that beyond the ordinary English meaning and all the hazard that carries with it.

Note that these provisions allow costs enforceable to "the full extent" so getting around the cap in CPR 44.14.

Case law

Fundamental dishonesty

The case of *Gosling v (1) Hailo (2) Screwfix Direct* (2014) CC (Cambridge) (Judge Moloney QC) 29/04/14 deals with this point in detail. G injured himself in an accident involving a ladder. He discontinued his claim. The Defendant had obtained surveillance video evidence. The Second Defendant then applied for an order for costs under CPR 44.16.

Judge Moloney QC held that "fundamental dishonesty" had to be interpreted "purposively and contextually in the light of the context" [44], i.e. whether the Claimant deserves to benefit from the QOCS shield or not.

He distinguished fundamental dishonesty from the corollary terms "incidental" and "collateral" and stated:

"Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self-contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty." [45]

The claimant in *Gosling* was unmasked by a surveillance video which showed that far from being in constant pain and reliant on crutches such that his wife did his shopping for him, he was in fact able to shop without a crutch.

His claim was put at £80,000, half of which was general damages and half specials comprising *inter alia* £17,000 for future care due to his alleged knee pain. The allegation of permanent loss of function was found to have represented about half his claim for PSLA.

What is "fundamental" dishonesty?

The Court held that dishonesty in relation to such a substantial part of the Claim (in this instance about half of the total quantum) was in fact "fundamental".

This was such a glaring case of dishonesty it seems that Judge Moloney held it was not necessary to have the Claimant cross-examined. In *Gosling* it was held the conduct was only explicable as intended to deceive given that statements were

demonstrably false combined and the medical experts found the video was inconsistent with G's complaints. The evidence therefore passed the threshold and the order for costs was enforceable to its full extent, notwithstanding QOCS [51-52]. G had been caught "bang to rights".

However, the Judge was keen to emphasise that in cases falling short of very clear evidence the court would have to consider whether in all the circumstances it was just and proportionate to pursue enquiry by calling oral evidence from a claimant.

Subject to any further rulings from the superior courts we now have a reasonable guide as to the limits of "fundamental dishonesty":

- It is more than a simple definition of fraud (the "fundamental" test).
- It requires a fabrication or misrepresentation which goes to the root of a claim.
- The dishonesty must be substantial and important.
- A dishonesty in relation to a minor or collateral part of the claim is unlikely to be caught by the rule.
- Unless the evidence is "very clear" further evidence/cross-examination may be sought by the Court.
- This further enquiry may be pursued if a judge considers it just and proportionate in terms of costs.

Additional claims and QOCS

In *Arabella Wagenaar (Claimant) v Weekend Travel Ltd(T/A Ski Weekend) (Defendant) & Nawelle Serradj (Third Party)* [2014] EWCA Civ 1105 the Court of Appeal made it clear that QOCS, although it may apply between a Claimant and Defendant, does not apply to an additional claim under CPR Pt 20.

In *Wagenaar*, C was injured on a skiing trip arranged by D who denied negligence and joined the ski instructor as a Third Party. C's claim against D was dismissed as was the additional claim by D against the Third Party. The judge at first instance held that QOCS applied equally to the original PI claim and to the additional claim. D and TP both appealed. The Court of Appeal held that the word "proceedings" in r.44.13 did not mean the entire umbrella of litigation in which commercial parties disputed

responsibility for the payment of personal injury damages. Rather, it was used because the QOCS rules were intended to catch claims for damages for personal injuries where other claims were also made by the same claimant. Rule 44.13 applied QOCS to a single claim against a defendant in which the claimant sought damages for personal injury but might also be making claims for damaged property and the like. It did not apply QOCS to the entire action in which a claim for damages for personal injury was made (paras.34-46). Therefore if as a defendant you seek to join a Pt 20 Defendant be alive to the costs risks which remain as before and not subject to QOCS.

Appeals funded by post-1/1/13 CFAs

In *Michael Landau v (1) Big Bus Co Ltd (2) Zeital* [2014] EWCA Civ 1102, C was a scooter rider involved in a road traffic collision with the driver of D1's bus and a motorist D2. His claim, funded by a pre-commencement CFA, failed. He brought an appeal funded by a post-commencement CFA. The Court having determined the appeal of liability matters the issue of whether C had costs protection pursuant to QOCS due to his appeal proceedings being funded by a post-1/1/13 CFA was dealt with by the Costs Judge Master Howarth. He held that C did not have QOCS protection for the Appeal. It was a common sense judgment. CPR 44.17 specifically disapplied Section 2 of CPR 44 where a claimant had entered into a pre-commencement funding arrangement. The Judge held that CPR 48.2(1)(i)(aa) was clear in referring to the "matter that is the subject" of proceedings and not "proceedings" in which the costs order is made:

"To my mind there was only ever one "matter", namely a personal injury claim arising from the accident which took place on 3 May 2009. There was only ever one claim for damages arising out of that accident to be determined either at first instance or appeal." [17]

The Master also considered *Wagenaar* and *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd and Another* [2012] EWCA Civ 987. The latter, determined before the Jackson reforms were implemented, suggested trial and appeal could be considered as separate "proceedings". Master Howarth however followed Wagenaar and the divined the meaning of proceedings in relation to QOCS with reference to the QOCS rules themselves. He found the word proceedings in CPR 44.17 must have the same

meaning as in CPR 44.13(1) and was plainly intended to apply to appeals which were within the definition of "proceedings" in CPR 44.13(1).

Law/Procedure:

CPR 44.15 and CPR 44.16; *Gosling v (1) Hailo (2) Screwfix Direct* (2014) CC (Cambridge) (Judge Moloney QC) 29/4/14; *Arabella Wagenaar (Claimant) v Weekend Travel Ltd(T/A Ski Weekend) (Defendant) & Nawelle Serradj (Third Party)* [2014] EWCA Civ 1105; *Michael Landau v (1) Big Bus Co Ltd (2) Zeital* [2014] EWCA Civ 1102; *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd and Another* [2012] EWCA Civ 987.

Patrick West
St John's Chambers

patrick.west@stjohnschambers.co.uk
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