QOCS CPR 44.16: claimant caught "bang to rights"

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CPR 44.15 and CPR 44.16; *Gosling v (1) Hailo (2) Screwfix Direct* (2014) CC (Cambridge) (Judge Moloney QC) 29/4/14.

Patrick West member of St John's Chambers' Personal Injury team reviews the latest case law under the QOCS provisions introduced post-Jackson.

Most of us are by now aware of the final piece of the Jackson jigsaw to fall into place.

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. 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.

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.

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" 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.

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. It has taken a while for the case report to become available but it is now out on Lawtel. 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.

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. So here we have the limits of "fundamental dishonesty" set out reasonably clearly (albeit not yet binding authority):

- 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.

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