

NO ADVERSE COSTS IF CFA POST-DATES
1.3.13 (EVEN IF THERE WAS ONE (HOW))

Casseldine v Diocese of Llandaff Board for Social Responsibility (A Charity)

County Court (Cardiff)

03 July 2015

The defendant charity sought determination of whether the claimant employee should pay its costs in her personal injury claim, or whether she was protected by qualified one-way costs shifting (QOCS) under CPR r.44.17. The claim had been dismissed and the judge ordered that the issue of the defendant's costs, if not agreed, should be subject to a detailed assessment and should be referred to the regional costs judge to determine the preliminary issue on QOCS. QOCS provided, with some exceptions, that in the event of a claimant losing his case at trial, he would not be ordered to pay the defendant's costs. The claimant had instructed solicitors to act for her and had entered into a conditional fee agreement with them as well as obtaining an after-the-event (ATE) insurance policy. They terminated that CFA without issuing proceedings and the claimant then entered into a second CFA with her current solicitors. The instant proceedings were subject to the second CFA. The defendant submitted that as the claimant had entered into a CFA with the first solicitors at a date prior to the introduction of the QOCS, rules on 1 April 2013, she could not rely on QOCS protection. The claimant contended that the court had to take into account the background to the changes, which dealt with the abolition of the recoverability of additional liabilities from defendants and the introduction of the QOCS, and that the changes had to be taken together to effect a quid pro quo. She further argued that the definition of pre-commencement funding arrangements in CPR r.48.2 was directed squarely at the issue of whether additional liabilities could be recovered and that in the instant case the proceedings were subject to the second CFA so that if she won at trial the defendant would not have had any liability to pay any additional liabilities; and that in those circumstances she was entitled to rely on the protection afforded by the QOCS. She also argued that the decision in *Landau v Big Bus Co Ltd* was distinguishable.

Costs determined. There was no binding authority on the instant issue. The case of *Landau* was distinguishable because in that case two sets of proceedings had been taken, whereas in the instant case proceedings were never commenced in relation to the first CFA but only to the second. So far as the first CFA was concerned, it was the solicitors who terminated it and therefore they were not entitled to payment of any success fee or costs. The meaning of the word "proceedings" had to be decided in the context in which it appeared. CPR Pt 48 dealt, amongst other things, with the recoverability of additional liabilities and CPR r.44.13 to CPR r.44.17 dealt with QOCS. Both changes to the rules were brought in at the same time and there was good reason for that. In respect of funding arrangements entered into on or after 1 April 2013, a claimant would no longer need to take out ATE insurance to cover the defendant's costs because even if he lost at trial, he would no longer be required to pay the defendant's costs subject to the exceptions set out at CPR r.44.15 and CPR r.44.16. At the same time, in relation to such funding arrangements, defendants would no longer be liable to pay any additional liabilities to the claimant in the event of the claimant winning. In the instant case the claimant had issued proceedings pursuant to the CFA entered into with her current solicitors. That CFA had been entered into after 1 April 2013 and therefore the court was never in the position to order the defendant to pay the claimant's additional liabilities. That was an important consideration when determining the meaning of CPR 44.17 and CPR 48.2, which itself referred to the person by whom the success fee was payable. The reference later in the rule to the matter that was

the subject of the proceedings did not entitle the court to order the claimant to pay the defendant's costs having regard to the circumstances of the instant case, and the fact that no proceedings were ever issued in relation to the first CFA. In those circumstances it could not be right that the claimant should not be able to rely on the protection afforded by QOCS. The claimant should not be responsible for payment of the defendant's costs and could rely on the protection afforded to her by CPR 44.17. She had not entered into a pre-commencement funding arrangement as defined by CPR 48.2.