

QOCS APPLIES TO APPEAL PROCEEDINGS

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# England and Wales High Court (Queen's Bench Division) Decisions

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Case No: A54YM068

IN THE HIGH COURT OF JUSTICE  
 QUEENS BENCH DIVISION  
 ON APPEAL FROM THE KINGSTON-UPON-HULL COUNTY COURT  
 Her Honour Judge Pemberton  
 A547M068

Leeds Combined Court Centre  
 The Courthouse  
 1 Oxford Row  
 Leeds LS1 3BG  
 26/05/2016

Before:

MR JUSTICE EDIS

Between:

PAUL JOHN PARKER

Appellant

- and -

STEPHEN BUTLER

Respondent

Mr. Craig Fisher (instructed by 2020 Legal Limited) for the Claimant/Appellant  
 Mr. James Benson (instructed by DWF) for the Defendant/Respondent

Hearing dates : 23rd May 2016

HTML VERSION OF JUDGMENT

**Mr. Justice Edis :**

## 1. The issue for resolution in this judgment is this:-

In a case where a claimant has the benefit of Qualified One Way Costs Shifting (QOCS) at trial, is he subject to the ordinary rules as to costs on a first appeal to an appeal court at least where no other order is made under CPR 52.9A?

2. This is a small case in value terms, but the issue may apply equally to very substantial claims and appears to be undecided. There are some decisions of the Court of Appeal Civil Division which may provide assistance by analogy, but I have not been referred to any case directly on the point.
3. If (as is likely to be the case here) the claimant's access to justice is dependent on the benefit of QOCS, that access will be significantly reduced if he is exposed to a risk as to the costs of any unsuccessful appeal which he may bring or any successful appeal a defendant may bring against him. The effect of QOCS is that his liability to meet any adverse order for costs is limited to the value of sums recovered in the proceedings by way of damages except in certain circumstances. In other words, except in those circumstances, he cannot be worse off as a result of bringing his claim. If he has the benefit of a Conditional Fee Agreement he will not be liable for his own costs and QOCS restricts his liability to the sums recovered in the proceedings. The risk that a failure in litigation may result in the loss of existing assets is a substantial inhibition on access to justice and that is an important part of the reason why QOCS was established.
4. The power to make enforceable orders for costs is designed to compensate successful parties for their expense in bringing or resisting claims, but it also has an effect of deterring people from bringing or resisting claims unsuccessfully. It is an incentive to resolve disputes and serves a public as well as a private interest. That consideration is in tension with access to justice. In appellate civil proceedings in QOCS cases permission to appeal is always required. That filter affords some protection for the civil justice system and the other parties against unmeritorious appeals. The costs disincentive is not rendered irrelevant by this fact, but in resolving the tension between access to justice and other considerations it is reasonable to start from the proposition that the issue only concerns the claimant's ability to bring an appeal which a judge has held to have a realistic prospect of success or that there is some other compelling reason for it, or to resist an appeal where a judge has made the order which is challenged. Therefore, in either case the stance of the claimant has a measure of judicial approval at a very early stage in any appeal proceedings. In these circumstances a claimant's right to access to justice deserves particular weight.

**The way in which the issue arises**

5. On the 23<sup>rd</sup> May 2016 I dismissed the claimant's appeal against the dismissal of his claim for personal injuries by Her Honour Judge Pemberton on 3<sup>rd</sup> March 2015. That was a claim which had been allocated to the fast track. The claim arose out of a road traffic accident which occurred on 10<sup>th</sup> April 2013. The appeal was brought with leave of the High Court Judge. In my judgment leave was properly granted applying the test to which I have just referred. I decided that the reasoning of the judge could not be sustained, but that I could and should decide the liability issue on the material before me. I found that the claim was properly dismissed but for different reasons from those given by the judge. The reasons were given orally in an *ex tempore* judgment at the conclusion of the hearing.
6. The defendant/respondent, having successfully resisted the appeal, sought an order for his costs.

He is funded by his insurer. I assessed the costs summarily in the sum of £2,795.21 including VAT. The Claims Notification Form was dated 12<sup>th</sup> July 2013 and the fixed costs regime only applies to cases where it was dated after 31<sup>st</sup> July 2013. The assessment was therefore not governed by that regime.

7. It was common ground that QOCS applies to this case because there was no funding arrangement in place before 1<sup>st</sup> April 2013 (the accident occurred 10 days after that date). The costs order against the claimant after the trial was therefore not enforceable without permission by virtue of CPR 44.14 because no sum in damages or interest had been recovered in the proceedings. The issue for me is whether the costs order which I have made on appeal is subject to the same rule.
8. I am grateful to both counsel who argued this point with restraint and enthusiasm. I was told that they had been unable to find any authoritative decision on the point and that they had looked. For this reason I decided to reserve judgment and to send it out in writing.

### **The Rules and the closest decision to the present**

9. CPR 44.13 provides

"(1) This Section applies to proceedings which include a claim for damages –

(a) for personal injuries"

10. The issue is, therefore, whether the appeal is part of the proceedings which include a claim for damages for personal injuries or whether it is separate from them and thus not subject to the regime. If it is separate from the proceedings which culminated in the trial, is it nonetheless a set of proceedings which includes a claim for damages?

11. Mr. Benson, on behalf of the defendant/respondent, relied on CPR 52.9A

"52.9A—Orders to limit the recoverable costs of an appeal

52.9A (1) In any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.

(2) In making such an order the court will have regard to—

- (a) the means of both parties;
- (b) all the circumstances of the case; and
- (c) the need to facilitate access to justice.

(3) If the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order under paragraph (1).

(4) An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise."

12. He submits that this provision would not be necessary if all appellate proceedings covered by CPR Part 52 were subject to the same costs regime as the proceedings at first instance.

13. Mr. Fisher drew my attention to a decision of Master Haworth in the Senior Court Costs Office

31<sup>st</sup> October 2014 (unreported but available on Westlaw). This held that the QOCS regime did not apply to an appeal because a funding arrangement had been entered into before its commencement date and the regime was therefore excluded by the transitional provisions. The funding arrangement did not extend to the appeal which the claimant brought, but it did arise out of "the matter" which was the subject of the trial and of the appeal. Therefore whether or not the trial and the appeal were the same proceedings the QOCS regime did not apply. This aspect of the decision turned on the construction of the transitional provision which does not apply to the present case because there was no funding arrangement in place prior to 1<sup>st</sup> April 2013. Alternatively, Master Haworth decided that for the purposes of the QOCS provisions, the appeal was part of the same proceedings as the trial and therefore QOCS did not apply to the appeal for this reason also. If that decision is right, then QOCS, which applied to the trial in this case, would also apply to give the claimant costs protection on the appeal. I gratefully adopt Master Haworth's setting of the legal context of the decision which he took, and will not repeat it. His decision on the issue before was obiter and is persuasive only in any event.

### Analogous decision which have been cited

14. The researches of counsel have only produced one decision which was not cited and examined by Master Haworth. That was *Akhtar v. Boland* [2014] EWCA Civ 943 which was discovered by Mr. Fisher after the hearing, and I am grateful to him for his work. That case concerned an appeal against a refusal to allocate a small claim to the fast track. The small claims track "no costs rule" applies to any appeal by the clear words of the CPR 27.14(2) and the court held that it could not therefore make a costs order, having dismissed the appeal. The court said that, if it could make such an order, it would have done. That observation was made in the context of credit hire litigation where the parties were proxies for commercial organisations seeking to use the costs regime to their best advantage in what Aikens LJ memorably called "the saecular war" [1] between the credit hire industry and the motor insurance industry. QOCS was not designed to have any relevance to parties of this type and the entirely understandable preference expressed *obiter* by the court as to the order which would have followed if possible is not of assistance in the present situation.
15. The two cases which were examined by Master Haworth were *Hawksford Trustees Jersey Limited v. Stella Global UK Limited and another (No 2)* [2012] EWCA Civ 987; [2012] 1 WLR 3581 and *Wagenaar v. Weekend Travel Limited* [2014] EWCA Civ 1105; [2015] 1 WLR 1968. Only the second of these concerned QOCS. The first decided that whether an appeal is part of the same proceedings as the trial will depend upon the context in which the question arises and the purpose of any provisions which have to be construed in order to answer it. The second, so far as relevant, decided that a Part 20 claim brought by a defendant to a QOCS claim to shift or share the burden of any judgment in favour of the claimant is not a claim to which the QOCS provisions apply. Neither of these decisions resolves the present issue, although the second of them establishes that the word "proceedings" in CPR 44.13 is to be construed with reference to the purpose of the Jackson Reforms from which it arises, but principally by reference to the terms of the QOCS rules themselves: see [38]-[40] per Vos LJ.

### Discussion and decision

16. Following the approach in *Wagenaar* I accept that not every step in proceedings (broadly defined) which began with a claim for personal injuries is included in the definition of the word "proceedings" as used in CPR 44.13. That word as there used has a narrower construction than that. That rule is all about a claim made by a claimant against one or more defendants which includes a claim for damages for personal injuries. For this reason a claim by a defendant against a third party for a contribution to or indemnity against such a claim is included in the proceedings as broadly defined, but not as narrowly defined for the purposes of CPR 44.13.

17. An appeal by a claimant against the dismissal of his claim for personal injuries is a means of pursuing that claim against the defendant or defendants who succeeded in defeating that claim at trial. There is no difference between the parties or the relief sought as there is between the original claim and the Part 20 claim. Most importantly, to my mind there is no difference between the nature of the claimant at trial and the appellant on appeal. He is the same person, and the QOCS regime exists for his benefit as the best way to protect his access to justice to pursue a personal injury claim. To construe the word "proceedings" as excluding an appeal which was necessary if he were to succeed in establishing the claim which had earlier attracted costs protection would do nothing to serve the purpose of the QOCS regime. The other construction, which holds that for the purposes of CPR Part 44.13 an appeal between the claimant and the defendant in a personal injury claim is part of the proceedings which include a claim for personal injuries is open to me, following *Hawksford Trustees Jersey Limited*, and should be preferred because it more justly achieves what is plainly the purpose of the regime as divined from the Rules.
18. That construction derives particular force from the facts of this case. The appeal concerned the way in which the judge had determined the claim for personal injuries. It was inextricably linked with that claim. Having found that her approach was flawed, I went on and determined the claim myself (following *Cooper v. Floor Cleaning Machines Limited* [2003] EWCA Civ 1649). It would be very difficult to describe a hearing at which the claim was determined as not part of the proceedings which include that claim. This reasoning will not apply so closely to other types of appeal, but it illustrates the point. In my judgment for the purposes of the QOCS regime any appeal which concerns the outcome of the claim for damages for personal injuries or the procedure by which it is to be determined is part of the proceedings as defined in CPR 44.13. Therefore an order for costs against the claimant in favour of a defendant will only be enforceable to the extent permitted by the QOCS regime.
19. I do not accept that this construction is affected by CPR 52.9A. This allows the court to make an order (generally at a very early stage of the appeal proceedings) to alter the consequences of the general scheme for costs in civil appeals in cases where other rules applied to the proceedings which resulted in the decision against which the appeal is brought. This covers cases where there are no special rules governing the costs in the appeal court, but there are in the proceedings below. This does not apply to cases where, on a proper construction of the rules, the same regime applies to the proceedings at first instance and on appeal. The fact that the court has a discretion to limit the costs orders which may be made protectively in a variety of situations is simply irrelevant to the present issue.

### Outcome

20. For these reasons the costs order which I have made will not be enforceable. I was told that some courts include this provision in the order and others do not, since it is a consequence of the rules and not of any judicial decision. In this case the result will appear in the order, for the avoidance of doubt.

Note 1 [\[2011\]EWCA Civ 1384 \[1\]](#). [\[Back\]](#)