POLICING THE APPLICATION OF QOCS TO MIXED CLAIMS – A NOW SETTLED VIEW WITH A GUIDANCE OVERLAY

In ***Brown v (1) The Commissioner of Police of the Metropolis (2) The Chief Constable of Greater Manchester Police with the Equality and Human Rights Commission intervening*** [2019] EWCA Civ 1724 the Court of Appeal (lead judgment Coulson LJ) has resolved any uncertainty there might have been on the proper construction of the QOCS provisions and the availability of the exception under rule 44.16(2)(b) where a claim is made for the benefit of the claimant "**other than a claim to which this Section applies**." The Court refused permission to Ms Brown to appeal to the Supreme Court.

Executive summary

The decision is important for three principal reasons:

- It clarifies the proper construction of CPR 44.13 and, in particular, the exception in rule **44.16(2)(b)**. In doing so, it offers a consistent approach with three High Court Judges: Morris J in *Jeffreys*, Foskett in *Siddiqui* and Whipple J in this case at the first appeal.

- It offers some – albeit limited – guidance on how the exception might operate in practice in so-called 'mixed claims'. On a first reading, the guidance might be read to mean that, even in mixed police claims where the discretion is triggered and exercised, the outcome should be "cost neutral". Not so. The exception has real teeth.

- It makes clear that **44PD.12.6** is plain wrong and that it should be amended as soon as possible. It suggests, when applying the QOCS provisions, that the outcome should normally be *adverse* to the claimant. In light of the suggested guidance, that cannot hold good.

Overview and the possibility of further appeal

The appellant Ms Brown, previously a Met' officer, sued the Commissioner and the Chief Constable of Greater Manchester Police ("GMP") for the unlawful obtaining of information about her travel movements abroad (in the context of possible disciplinary proceedings). GMP ran the Joint Border Operations Centre and provided the information requested by her employer. Both police forces conceded a breach of the Data Protection Act 1998 ("DPA") and the Human Rights Act 1998 ("HRA"), but fought the allegations of misfeasance (pursued by the claimant on the basis that there had been a vendetta against her), misuse of private information, and breach of contract. It was pleaded, in global terms, that the causes of action all caused, or exacerbated (it was never clear) the claimant's depression. The appellant abandoned breach of contract, won on misuse of private information, but lost on misfeasance (which took up the vast majority of the trial). **Critically, the personal injuries component failed.** She won £9,000 in damages, which failed to beat the Part 36 offer(s) totalling £18,000. The damages, which did not depend on personal injury being established, were awarded under the DPA, the HRA and the tort of misuse of private information. Aggravated and exemplary damages, and requests for erasure/destruction of information, were rejected.

The costs orders made – to which there was no challenge by the appellant throughout the whole appeal process – was that the police should pay 70% of the appellant's costs up to the

Part 36 offer(s) and that she should pay the police costs from then. The issue was one of *enforcement* and the QOCS exception.

In light of the High Court's and Court of Appeal's judgments, the trial Judge got the law on QOCS wrong. That was the view taken by the respondents at the time, and that there was no alternative but to appeal. In fact, this was an ideal case to take on appeal because the appellant's personal injury claim failed, but she succeeded on the DPA, HRA and misuse of information claims which, on any view, were <u>not</u> claims for personal injury. The appellant never seemed properly to grasp the significance of that, and it was a matter of some surprise to the respondents when Lewison LJ gave permission to the appellant to appeal to the Court of Appeal.

What now – will the Supreme Court entertain an appeal? Highly unlikely, not least because the Court of Appeal, clearly alive to that possibility (i) addressed arguments *beyond* those essential to the disposal of the appeal [60] – [70] including access to justice, certainty and deterrent effect, and (ii) it is hard to see, when the exercise of the discretion will be case/fact specific, how the guidance suggested by the Court of Appeal could be refined or improved upon in any meaningful way.

<u>Analysis – construction</u>

The appellant and the intervener were wedded to, and forced to argue, that "claim" in part 44 could be equated with a cause of action. The intervener went further and argued that a claim for loss of earnings caused by a workplace injury or road traffic argument was not a claim for damages for personal injury. That is demonstrably flawed [40], [45-7] and would have meant, irrespective of the underlying causes of action, that if personal injury damages were claimed as a result of each pleaded cause of action, the exception would be redundant and automatic QOCS protection would apply. The headline Court of Appeal points are:

- "This Section" in "other than a claim to which this Section applies" is the Section of the CPR dealing with the QOCS regime which comprises three types of claim [31].

- If the proceedings also involve claims by the claimant which are not claims for damages for personal injury then the exception will apply [31].

- There is no justification for allowing claims which are not claims for personal injury – such as, for example, data protection or misconduct claims – to attract automatic QOCS protection. It would be equally wrong to allow claimants with a mixed claim to use the fact that their claim includes a claim for damages for personal injury to gain automatic costs protection in respect of their claims for non-personal injury damages [32].

- "Claim" cannot be equated with cause of action [34.] Any previous tension between "proceedings" and "claim" falls away.

- The narrower words of the exception demonstrate that what the CPR intended was to exempt from the QOCS regime, within the widest possible umbrella of the proceedings as a whole, claims which were *not* claims for damages for personal injury [36].

Guidance – the operation of the 44.16(2)(b) exception

The high points of the Court of Appeal guidance at [53] – [58] are:

- Where in a personal injuries claim there is a claim not dependent on or consequential to personal injury so as to trigger the exception – where in an RTA there is damage to a car – the idea of QOCS protection should not suddenly go out of the window.

- In such cases, the starting – and possibly the finishing – point will be that QOCS protection *would* have been available so as to avoid a claimant having to pay any costs above the award of damages and interest.

- If **unlike the appellant's case**, the proceedings can properly be described in the round as a personal injury case, unless there are exceptional features of the non-personal injury claim such as gross exaggeration of a car hire claim or similar, the expectation is that the outcome will be "cost neutral."

- That said, flexibility has to be preserved. It would be wrong to assume, in mixed cases, that the discretion will normally be exercised in the claimant's favour because that would lead to abuse and the "dressing up" of claims by tacking on a nominal claim for personal injuries.

44PD.12.6 IS WRONG

It provides: "*In proceedings to which rule 44.16 applies, the court will normally order the claimant or, as the case may be, the person for whose benefit a claim was made to pay costs notwithstanding that the aggregate amount in money terms of such orders exceeds the aggregate amount in money terms of any orders for damages, interest and costs made in favour of the claimant.*" The origin of the provision is obscure, but Coulson LJ – a member of the Civil Procedure Rule Committee and the Deputy Head of Civil Justice – expressed the view [17] and [57] that it cannot stand because it appears to suggest a normally adverse costs consequence to a claimant more akin to the harsh approach on fundamental dishonesty, and because it would fetter the exercise of the discretion.

COMMENT

- A mixed claim, within the Part 44 QOCS regime if it contains a claim for personal injury, will not have automatic QOCS protection. The rule **44.16(2)(b)** discretion is triggered and available to the trial Judge.

- The rule **44.16(2)(b)** exception has real teeth, but must be applied in a fair and flexible fashion. The initial analysis has to be to ask whether the case, at its core, is a personal injury claim. The Court of Appeal summarily assessed the respondents' costs of the appeal and gave permission to enforce them.

- This is an important decision that will be of interest to police lawyers nationally. There are currently no plans for the Ministry of Justice to extend the QOCS regime to actions against the police. See paragraphs 102 and 160 of the Post-Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, February

2019. Rule **44.16(2)(b)** will be of pertinence whenever an additional cause of action is advanced with a personal injury component. For example, a claim for assault that is advanced with an additional cause of action such as false imprisonment, misfeasance in public office, malicious prosecution or a claim for aggravated and exemplary damages.

- It should become routine to put claimant solicitors on notice/warning of the possibility of the rule **44.16(2)(b)** exception biting and thereby laying the ground for a possible claim in negligence by the claimant against their solicitor if it is applied, but not discussed. Equally, the application of the exception to QOCS should now be pleaded in Defences and Counter-Schedules as a warning shot.

- Note though, that pursuant to **CPR 44.14(2)**, enforcement can only happen *after* the proceedings have been concluded and the costs have been assessed or agreed. An interim costs order will not have the same leverage.

- Treat **44PD.12.6** as having no effect and that it will disappear.

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Adam Clemens of 7 Bedford Row acted for the Respondents with Lord Edward Faulks QC of 1 Chancery Lane. Instructed by Daniel Rutherford of Weightmans LLP and Lucy Gallagher of Clyde and Co LLP.

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