

Qualified One Way Costs Shifting

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1. A central part of the LASPO 2012 reforms, was the introduction of Qualified One Way Costs Shifting (QOCS) as part of the Faustian bargain struck between the government and the insurance industry, in return for the abolition of recoverable additional liabilities including success fees and ATE premiums in personal injury and clinical negligence cases.
2. Conceptually similar to the scheme of qualified one way costs shifting that applies under the Access to Justice Act 1999 and the former Legal Aid Acts, QOCS prohibits the enforcement of a costs Order made in favour of a defendant in a personal injury claim, save in certain defined circumstances.
3. It means that in the vast majority of unsuccessful personal injury claims, the winning defendant will be left to stand its own costs, and yet the insurance industry taken as a whole will still save substantial sums of money, as this is a lesser price to pay than the former sum of recoverable success fees and ATE premiums across personal injury claims as a whole.
4. The instances where a costs order may be enforced include where fundamental dishonesty is found at trial, as case is an abuse of process, or there is no reasonable claim at law or its prosecution obstructs the just disposal of the case.
5. At the current time, I would identify three aspects of QOCS as being of particular interest. These include first, the curious fact that notwithstanding that the rules are approaching their fifth anniversary, they are still notoriously “rough around the edges” with many unanswered questions as to how they are meant to work in practice.
6. Secondly, that notwithstanding their systemic victory embodied in the post 1st April 2013 settlement defendants are still pushing to minimize the application and effect of QOCS.

¹ The author’s blog on costs and litigation funding can be found at www.costsbarrister.co.uk

7. Thirdly, the interesting question as to whether the current scheme of QOCS should be extended to cover other types of claim, including actions against the police or actions for professional negligence in the conduct of personal injury claims, or unrelated areas altogether such as defamation and media claims.

8. In relation to the first aspect, the caselaw is now starting to build in volume, with four significant decisions in recent years. These include the widely reported decision in **Wagenaar v Weekend Travel [2014] EWCA Civ 1105**, **Catalano v Espley-Tyas Development Group [2017] EWCA Civ 1132**, **Budana v The Leeds Teaching Hospitals NHS Trust [2017] EWCA Civ 1980** and the recent decision in **Corstorphine (An Infant) v Liverpool City Corstorphine [2018] EWCA Civ 270**.

9. Of these cases **Wagenaar** is significant in that it provides the fullest explanation of the purpose behind QOCS and so is an essential exposition when considering a purposive construction to the rules. **Catalano** provides an explanation of the transitional provisions, and an interesting analysis in paragraphs 27 to 29 which probably amounts to a misunderstanding of how they differ in effect between individual and collective CFAs. **Budana** was a case which hinged upon the transitional provisions to preserve assigned CFAs from otherwise inevitable findings of unenforceability and **Corstorphine** provided that the court when making a substantive costs Order, should include as a material consideration the purposes behind the QOCS regime.

10. I should say something more about **Corstorphine (An Infant) v Liverpool City Council [2018] EWCA Civ 270** having argued it in the Court of Appeal. It has provided some illumination on two aspects of the QOCS provisions which were hitherto obscure. **Corstorphine** is a sad case. The infant claimant suffered brain damage whilst utilising a tyre swing at a playground under the control of the Liverpool City Council. The claimant sued the council as occupier, and then subsequently after they had been brought in by the council as part 20 defendants, also as second and third defendants the installers of the swing and it's manufacturer.

11. After a 5 day trial on liability before Mr Recorder Edge in the County Court at Liverpool, the claimant lost against all defendants. In between the action being started against the council, and the joinder of the second and

third defendants, the Jackson reforms had taken effect with the implementation of LASPO 2012 on 1st April 2013.

12. The Learned Recorder directed that the Part 20 claim be dismissed, and the council should pay the part 20 defendants costs of the Part 20 claim, but in the usual way directed that those costs could be added to the bill the council would present to the claimant. But it was contended before the Recorder that he would be wrong to do so: because although the claimant had made a CFA and incepted an ATE insurance policy before 1st April 2013, those funding arrangements only pertained to a claim against the council.

13. As there was no “pre-commencement funding arrangement” against the second and third defendants, the rules on QOCS applied to the claims against those defendants. And accordingly, the court should not make an order, which effectively circumvented the QOCS protection that the claimant would otherwise enjoy, by requiring the claimant to pay those parties costs through a procedural anomaly. The Learned Recorder disagreed with this analysis and hence an appeal had to be made to the Court of Appeal.

14. In the Court of Appeal a rather different approach was taken to costs to that which had been applied at first instance. Hamblen LJ who gave the sole substantive judgment of the Court of Appeal explained:

31. In the present case, we are concerned with proceedings involving additional parties which were commenced after the QOCS regime came into effect. There is no CFA or ATE policy which applies to the claims against those parties. Unless the QOCS regime applies, the Appellant will have no protection against adverse costs orders in respect of such claims. Although it is suggested that a further or amended CFA and ATE policy could have been entered into, that assumes that it would have been lawful so to do after 1 April 2013. Even if it was, the Appellant might legitimately have taken the view that there was no need to do so once the QOCS regime applied.

32. Lord Sumption explains that the purpose of the transitional provisions was to preserve vested rights and expectations. At the time of the inception of QOCS the Appellant had no vested rights or expectations in respect of claims against the Second or Third Defendants. Its sole rights and expectations concerned the claim against the Respondent, which alone was the subject

matter of the PCFAs. At the time of the PCFAs the “underlying dispute” was the claim against the Respondent, which was the only existing claim at that time. Similarly, it alone was the subject of the retainer.

33. *In the above circumstances, in my judgment the correct construction of CPR 48.2 is that the relevant “matter” in the present case was the claim for damages for personal injury against the Respondent. In terms of CPR 48.2(1)(a)(i), that was the “matter” which was the “subject of the proceedings” and in relation to which “advocacy or litigation services were to be provided”. It was “specifically” for the “purposes of the provision” of such services that the PCFA was entered into. In terms of CPR 48.2(2)(a)(ii) it was “proceedings” in relation to that claim that the ATE policy was taken out and which are the sole subject-matter of that policy.*

34. *It follows that in my judgment the judge should have concluded that the QOCS regime applied to the claims made against the Second and Third Defendants. If so, that would have been a highly material factor to be taken into account in determining whether the Appellant should be liable to pay to the Respondent the costs it had to pay the Second and Third Defendants.*

15. He then went on to set aside the costs order made at first instance:

35. *In an ordinary case of an additional claim which was closely interconnected with a primary claim, where both claims failed, the order made by the judge would be unexceptional – see, for example, Johnson v Ribbins [1977] 1 WLR 1458 at 1464 (Goff LJ); Arkin v Borchard Lines Ltd [2005] EWCA Civ 655; [2005] 1 WLR. 3055 at [72]-[77] (Lord Phillips MR). This is not, however, an ordinary case.*

36. *The consequence of concluding that the QOCS regime applies to the claims against the Second and Third Defendants is that the Appellant is entitled to QOCS protection in respect of adverse costs orders in respect of those claims. The effect of the judge’s order is effectively to deprive them of that protection. By ordering the Appellant to pay to the Respondent the costs of the Second and Third Defendants for which it is liable, the Appellant is made liable for virtually all those costs. In essence, it makes the Appellant indirectly liable for costs which could not be enforced against him directly.*

37. Further, there is Court of Appeal authority that draws a clear distinction with regard to the QOCS regime between costs relating to the claimant's claim and those relating to third party proceedings. In *Wagenaar v Weekend Travel Ltd* [2015] 1 WLR 1968 it was held that the QOCS regime does not apply to third party proceedings in relation to a claim for damages for personal injury and that the normal costs rules apply. As Vos LJ observed at [36], there is no good reason to suppose that the QOCS regime was meant to apply "to the costs of disputes between those liable to the injured parties as to how those personal injury damages should be funded amongst themselves".

38. In a case in which the QOCS regime applied to the main claim but not to the third party proceedings, a successful defendant would not be able to enforce its costs order against the claimant and so the costs of the third party proceedings would lie where they fell. It would be surprising if a different result was to follow in a case such as the present where, although the QOCS regime does not apply to the claim against the defendant, it does apply to the claim against the additional parties.

39. In these circumstances, I consider that the judge has exercised his discretion on an erroneous basis in that he has failed to take into account a highly material factor, namely the applicability of the QOCS regime to the claims against the Second and Third Defendants. His decision should accordingly be set aside and this Court may itself exercise that discretion. In my judgment, for the reasons outlined above, the fair, just and proportionate order to make in the circumstances of the present case is to vary the costs order made in favour of the Respondent so as to exclude any costs of the Second and Third Defendants parties which the Respondent had been ordered to pay.

16. The case establishes clearly that the scope and application of the QOCS rules in any individual piece of litigation, is set not by the subject matter of the claim in broad terms or by reference to the fact of the accident, but rather is to be determined by scrutinising the terms of the claimant's funding arrangements, in particular to look at the scope of any pre-commencement CFA and ATE insurance policy. Where these have been limited in their application to a claim against a named defendant, later additions of parties

post the implementation date are likely to lead to the application of QOCS to the claims against those parties.

17. That in turn means that it will be necessary to carefully consider to what extent such defendants may be liable-or not liable-to pay any success fees or ATE insurance premiums at the end of the case. Fresh contracts of retainer or ATE insurance in respect of additional parties may well push such sums into the realm of irrecoverability: variation and amendment of existing contracts may well have a greater scope to enable such sums to be recoverable on any assessment of costs.

18. In relation to the second aspect at the current time, the hottest topic is whether, where in a case there are a number of defendants to an action, and damages are recovered against some defendants but not against others who successfully defend themselves, those successful defendants can proceed to enforce their costs orders against the claimant to the extent of the damages the claimant might otherwise pocket.

19. In the case of **Bowman v Norfran Aluminium** (County Court at Newcastle 11th August 2017) , HHJ Freedman decided they could not, adopting arguments similar to some I posited on my blog last year www.costsbarrister.co.uk/uncategorized/QUOCS-and-Nihl-claims/.

20. I argued another case last year on the point. In the case of **Cartwright v Venduct Engineering Ltd** (County Court at Nottingham 6th December 2017), Regional Costs Judge Hale, decided they could in principle, but not in the instant case, because although the claimant had recovered monies, he had not done so by reason of an order of the court, but by way of a contractual settlement embodied in the schedule to a Tomlin Order.

21. This latter decision has now been appeared to the Court of Appeal and Lewison LJ has directed that it be dealt with by way of expedition, with a hearing floating in the last week of June 2018. The case will re-examine the distinction of **Bowman** and raises a point of policy: many categories of personal injury or clinical negligence involve multiple defendants: road traffic claims, clinical negligence claims against an NHS trust and a GP, as well as industrial disease claims.

22. I shall say something more about the arguments on the appeal as they are of interest, and also illustrate the application of the rules more generally. There are two points of construction on this appeal concerning rules 44.13 and 44.14 CPR as to the scope of permitted enforcement:

(1) Whether a Tomlin Order is an Order for damages and interest within the meaning of rule 44.14(1) CPR permitting enforcement of a costs Order to the extent of the damages and interest specified in the Order.

(2) Whether any such Order for damages and interest must be made in favour of a Claimant against the same Defendant who has the benefit of the costs Order, in the proceedings within the meaning of rule 44.13 CPR.

Consideration of both points of construction, requires consideration of the statutory purpose discernible in the rules.

23. Section II of part 44 CPR applies the scheme of QOCS.

Rule 44.13

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

(a) for personal injuries;

(b) under the Fatal Accidents Act 1976; or

(c) which arises out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934,

but does not apply to applications pursuant to section 33 of the Senior Courts Act 1981 or section 52 of the County Courts Act 1984 (applications for pre-action disclosure), or where rule 44.17 applies.

(2) In this Section, 'claimant' means a person bringing a claim to which this Section applies or an estate on behalf of which such a claim is brought, and includes a person making a counterclaim or an additional claim.

24. QOCS applies to the “proceedings”. The issue between the parties for the purposes of the appeal, is whether the “proceedings” are the action generally, or the claim against the particular defendant.

25. Rule 44.14 CPR provides as follows:

44.14

(1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the 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.

(2) Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.

(3) An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.

26. The effect of this rule is to permit a defendant to enforce a costs Order (once the costs have been agreed or assessed) made in its favour as against any order for damages and interest made in favour of the claimant. See rule 44.12 CPR for a like provision which permits set off in respect of costs.

27. Rule 44.15 provides:

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.

28. Rule 44.16 provides:

(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 rule 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.

29. Of all the canons of construction, the most important is that the courts should give effect to the purpose behind the legislation. Legislation is thus to be given a purposive construction which considers that the statute as a whole and read in the context of the situation which led to its enactment.

30. Purposive interpretation as a phrase must be considered in context: it certainly does not mean that the court is free to consider in a vacuum what Parliament intended, or to carry out a far ranging review to hypothesise what Parliament meant and give effect to it's own view.

31. Instead, a purposive construction is one either following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose or applying a strained meaning where the literal meaning is not in accordance with the legislative purpose.

32. Purposive construction is therefore not a principle which conflicts with the literal wording of a statute, rather the courts take the view that the literal meaning must be taken to reflect the purpose that Parliament intended a set of provisions to have. Parliament uses the literal meaning to explain its purpose.

33. Although not directly on point, the statutory purpose behind QUOCS was considered by the Court of Appeal in the case of **Wagenaar v Weekend Travel Ltd (t/a Ski Weekend) [2015] 1 W.L.R. 1968**: see in particular paragraphs 36 to 42. The purpose is to protect individual unsuccessful Claimants to personal injury actions from being visited with the costs of successful Defendants.

34. The starting point is that the purpose of the QOCS scheme is to hold a losing claimant “harmless” from the enforcement of a costs Order made in a winning defendant’s favour, save for certain limited exceptions, of which the only material one in this case is that of enforcement against a claimant’s damages.

35. The scheme has its conception in the former Legal Aid Acts and the Access to Justice Act 1999. A detailed exposition of its origins lies in the **Review of Civil Litigation Costs: Final Report (December 2009)**: see chapters 9 and 19.

36. In the pre-LASPO 2012 regime, where multiple defendants were sued and a claimant won against one defendant and lost against other defendants, a claimant was able to incept ATE insurance to insure his potential costs liabilities and thus avoid any inroad into his damages. He could further recover the cost of the ATE premium from the losing defendant.

37. As noted by the Regional Costs Judge in his judgment, the scheme of LASPO 2012 largely abolished recoverable ATE premiums and as a quid pro quo, introduced the QOCS scheme. Defendants would have to stand their own costs in unsuccessful claims, but overall the insurance industry would benefit from a costs saving. It follows that in all cases where there is a single defendant sued, a defendant will almost invariably have to stand its own costs.

38. The question that then arises is whether claimants in multi-party actions were intended by Parliament to be treated differently to claimants in single party actions in that their damages won from one defendant can form a source of costs, for compensating defendants they have lost against, if further and

fortuitously, an Order for damages and interest was made in issued proceedings.

39. It is submitted that is not the Parliamentary intention. Rather than provide that a claimant's damages and interest should provide a general fund for insurance companies to call upon, the intention of the Parliament was to ensure that where a claimant recovered damages interest and costs against a defendant, he had to give credit against these sums for credit for costs he owed that defendant.

40. Thus where a claimant incurred costs liabilities to the defendant along the way to winning, that defendant would (1) be able to deduct from its liability to the claimant any costs it was owed from the claimant's costs under rule 44.12 CPR and (2) any costs it was owed from the claimant's damages and interest under rule 44.14 CPR.

41. Such a construction would also avoid a number of absurd and inconsistent results, where for example a claimant reaches a settlement with some defendants pre the issue of proceedings, but then issues proceedings which ultimately fail against other defendants so no Order for damages or interest is ever made in the subsequent failed proceedings. Those defendants have to stand their own costs.

42. This can be described as a set off, in the sense that most claims will involve a single defendant: a point of some significance when the **Explanatory Memorandum** accompanying the QOCS rules is considered below in the section on construction. It will be noted that the essence of a set off, is that that there are cross claims between the claimant and the same defendant, which predicate a "netting off" of liability.

43. Moreover it should be noted that rule 44.14 CPR is concerned only with damages and interest: there is no reference in the rule at all to other circumstances in which claimants may become entitled to monies such as compromises under part 36 offers or contractual settlements, a particularly significant omission as most personal injury cases will be resolved by settlements.

44. The simpler issue raised in this case is whether a Tomlin order, and in particular its schedule is an "Order" of the court. A schedule to a Tomlin Order is not an Order of the court. If the schedule is not an Order, then the appeal

must be dismissed for the simplest of reasons namely, that there is no Order for damages upon which rule 44.14 CPR can attach.

45. The nature of a schedule to a Tomlin Order was analysed by Ramsey J in **Community Care North East v Durham CC [2012] 1 W.L.R. 338** who concluded that it is not an Order of the court, where he stated this:

28 In relation to the terms of the agreement incorporated in the schedule to the Tomlin order, other considerations apply. The terms of the schedule are not an order made by the court. The court obviously has the ability to interpret that agreement on well known principles of interpretation, as set out in the Sirius case [2004] 1 WLR 3251 and would have to do so when it was asked to take any enforcement action under the standard liberty to apply for that purpose in the Tomlin order. Likewise the court has the ability to deal with the terms of that agreement in the same way as any other contract. That would include, for instance, a claim for rectification or a claim that the agreement was unenforceable for some reason. If the court decided that the agreement should be rectified or that it was unenforceable then the court may well take the view that they would vary or revoke the terms of the order part of the Tomlin order, to take account of that determination. To what extent, though, would the court otherwise vary the terms of the agreement incorporated as the schedule to the Tomlin order?

46. Perhaps more significantly, the Court of Appeal has endorsed the analysis of Ramsey J in the case of **Watson.v Sadiq and Sadiq [2013] EWCA Civ 822** at paragraph 50 where McCombe LJ stated:

50. For my part, I agree with the analysis of Ramsey J in Community Care North East v Durham CC [2010] EWHC 959 (QB) that the CPR have no application to the schedule to a Tomlin order, which indeed is not an order of the Court at all. A different principle applies to the curial part of the order. The curial part of a Tomlin order is a consent order. In Weston v Dayman, Arden LJ, with whom Brooke and Wall LJ agreed, proceeded on the basis that, whether the source of the jurisdiction for varying or revoking a consent order was in CPR3.1(7) or the liberty to apply contained in the order, there is jurisdiction to vary or revoke the order where it was just to do so but that the court has to be very careful in exercising its discretion where the consent order represented a contract between the parties (paragraph 24). "One of the aspects of justice is that a bargain freely made should be upheld." (paragraph 24).

In cases where the variation is contrary to the agreement that the parties have made, and leaving aside the possible effect of a violation of article 6 in the proceedings in which the Tomlin order was made, I agree with Ramsey J that a major and often determinative factor in the exercise of the discretion will be the fact of that agreement. In the present case, Mr Watson seeks to set aside the whole of the Recorder's order but it follows from this discussion of the authorities that, putting on one side any violation of article 6, before the curial part of the order can be set aside, he must establish in the usual way that he is entitled to have the contract in the schedule to the order set aside.

47. The argument below was side tracked by a decision of the Court of Appeal on the issue of set off/enforcement in a costs argument decided last year that of **Howe v Motor Insurers Bureau (Court of Appeal 6th July 2017)**. The actual issue in the instant case is not about "set off". It is about the scope of "the proceedings".

48. I return to the third aspect of my original three points. Whither QOCS?

49. Stepping back and looking at what QOCS cases might come forward in the future, one wonders whether there is a further point here, that liability insurers for some reason are not taking.

50. QOCS serves to protect a claimant from the effects of enforcement a costs Order: it does not serve, or arguably might not serve to hold harmless the provider of any BTE or ATE insurance that the claimant might otherwise have; both of these types of insurance commonly provide an indemnity for adverse costs and there is a long line of authority supporting the making of non-party costs orders against legal expense insurers.

51. This is particularly surprising when one considers that insurers have been active in pursuing non party costs applications to circumvent the QOCS restrictions which might otherwise apply, against credit hire companies as cases such as **Select Car Rentals v Esure [2017] EWHC 1434 (QB)** illustrate.

52. One of the other areas of work that keeps me busy, is credit hire. The gift that never stops giving, as I have been arguing those claims both for and against insurance companies for 20 years. I have another webpage I devote to all matters to do with credit hire here: <http://www.credithirebarrister.com>.

53. The significance of the **Select Car** case, is that it confirms that despite an unfortunately worded Practice Direction, the scope of the court's discretion to make a non party costs order, is no wider than it would be in any other type of case, where a non party costs application might be considered.

54. Mr Justice Turner within his judgment, also cites **Cook on Costs** with approval, a further example of that text's revived authority with the higher judiciary, under the careful stewardship of its current authors.

55. Systemic concerns also feature in my third aspect. In 2016 a Working Group of the Civil Justice Council put forward a discussion document on the extension of QOCS for actions against the police, and actions against solicitors who are alleged to have been negligent in the conduct of a personal injury claim. There is no indication that the government will take these reforms forward.

56. Yet, in principle the case for extension of QOCS to deal with all types of asymmetric litigation is compelling: claims under the Equality Act 2010, claims for environmental damage and judicial review claims, all of which would be obvious candidates for Legal Aid, would go some way to squaring the circle created by the decline of Legal Aid, the grant of which, it should be noted, would carry its own statutory form of qualified one way costs shifting.

57. In a very real sense, QOCS can be seen as a "privatised" version of former state provision, in costs protection, with all the flaws that one would expect in the partial and privatised provision of formerly universal provision.

58. The absence of enthusiasm for the expansion of QOCS into other varieties of asymmetric litigation, morphs into a positive aversion when one considers the position in relation to claims for defamation, and privacy, which currently enjoy an exemption from the provisions of LASPO 2012 under the Conditional Fee Agreements Order 2013.

59. With the shelving of Leveson II and the proposal for a press regulator and swinging costs penalties, this government plainly has no appetite to upset the status quo, in cases involving the press and media. Interestingly the scheme of QOCS contemplated for defamation and privacy claims, was very different from that which applies to personal injury claims, which in itself was different from the original proposals of the Final Report by Jackson LJ.

60. Given the precarious standing of a minority government grappling with Brexit, the lack of desire to grapple with the media or to stir the various interests up, the failure to deal with difficult questions is readily explicable but devoid of principle, as recent years have seen that in areas of lesser political cost, the government is prepared to act: eg the abolition of recoverable liabilities in insolvency litigation (probably and oddly, to the government's net cost) and the parlous state of mesothelioma claims, where revocation of the exemption of those desperately sad cases from the rigours of the LASPO 2012 funding regime, is probably only a matter of time.

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