Case No: SC-2021-APP-001284

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
London, WC2A 2LL

Date: 25/05/2022

Before :

SENIOR COSTS JUDGE GORDON-SAKER

- -

Between :

IBIYINKA MACAULAY	**Claimant**
- and -	
(1) DR ABDUL KARIM	**Defendants**
(2) CROYDON HEALTH SERVICES NHS TRUST	

- -
- -

Mr Shaman Kapoor (instructed by **Russell Cooke**) for the **Claimant**
Mr Murray Heining (instructed by **Gordons Partnership LLP**) for the **First Defendant**

Hearing date: 21st April 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SENIOR COSTS JUDGE GORDON-SAKER

Senior Costs Judge Gordon-Saker :

1. In 2015 the Claimant commenced proceedings in the Queen's Bench Division against both defendants for damages for clinical negligence. Following a split trial on liability in May 2017, the claim against the First Defendant was dismissed. As against the Second Defendant, the Claimant obtained judgment for damages to be assessed. The Claimant had the benefit of legal aid throughout the proceedings.

2. In his ruling on consequential matters, dated 4th August 2017, Foskett J. explained that the causation issues raised by the First Defendant had "dominated much of the trial, but … did not ultimately prevail". However, there was no alternative other than to order the Claimant to pay the First Defendant's costs limited to the issue of breach of duty "to be paid on the usual basis associated with a legally aided claimant".

3. The order dated 10th October 2017 provided, at paragraph 3:

> The Claimant do pay the First Defendant's costs in respect of breach of duty, such costs to be subject to a detailed assessment if not agreed. These costs are to be payable from any damages awarded to the Claimant at the conclusion of his action against the Second Defendant but are not to be enforced without permission of the Court. The First Defendant is not entitled to his costs arising out of the causation argument.

4. Paragraphs 4 and 5 of the order provided that the Second Defendant should pay the Claimant's costs of the issue of liability against the Second Defendant and of responding to the First Defendant's case on causation. Paragraph 6 provided that the Second Defendant should "make an interim payment on account of costs in the sum of £450,000" and paragraph 8 provided that the Second Defendant should pay the Claimant "£250,000 by way of interim damages". The order provided also for a legal aid assessment of the Claimant's own costs.

5. The claim against the Second Defendant was concluded by a consent order in Tomlin form dated 8th January 2021. The order provided that the proceedings should be stayed, save for enforcement of the agreed terms, that the Defendant (presumably the Second Defendant) would pay the Claimant's costs and that there should be a legal aid assessment of the Claimant's costs. The schedule provided that the Claimant would accept a sum "in full and final settlement of his claim", that the Defendant would pay the balance and that "upon payment of the Claimant's damages and costs referred to above, the Defendant would be discharged from any further liability".

6. By an application dated 12th October 2021 the First Defendant sought an order:

> That the Court shall determine the periods, if any, for which the Claimant has statutory costs protection; the Court shall determine the full costs of the First Defendant and assess the amount of those costs; and the amount of costs which it is reasonable for the Claimant to pay to the First Defendant.

7. On 3rd December 2021 the parties agreed directions:

> This matter shall be listed for a preliminary hearing to determine the following issues:
>
> i) To what extent, if any, does the Tomlin Order dated 8 January 2021 amount to "damages awarded to the Claimant at the conclusion of his action" in the sense of paragraph 3 of the Order of Foskett J. sealed on 10 October 2017?
>
> ii) Whether the order for payment of interim damages of £250,000 contained in paragraph 8 of the Order of Foskett J. sealed on 10 October 2017 be included as part of the aggregate amount in money terms of any orders for damages and interest made in favour of the Claimant for the purposes of CPR 44.14.
>
> iii) To what extent, if any, does QOCS[1] apply to the substantive case, given that the Claimant had the benefit of legal aid?
>
> iv) Given the foregoing determinations, whether the Claimant's solicitors are permitted to release any monies they hold on account, to the Claimant.
>
> v) Such further directions as may be necessary.

8. This judgment sets out my decisions on the first three of those issues. It would seem sensible to take the third issue first. However, I should first say something about the Claimant's legal aid status and why this court is being asked to consider qualified one-way costs shifting ("QOCS").

The Claimant's legal aid status

9. It is not in issue that the Claimant had the benefit of legal aid throughout under a certificate dated 25th January 2013 and so is entitled to costs protection under section 11(1) of the Access to Justice Act 1999[2], which provided:

> Except in prescribed circumstances, costs ordered against an individual in relation to any proceedings or part of proceedings funded for him shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including—
>
> (a) the financial resources of all the parties to the proceedings, and
>
> (b) their conduct in connection with the dispute to which the proceedings relate;

[1] Qualified One-Way Costs Shifting

[2] This would be a "pre-commencement case" to which the Legal Aid, Sentencing and Punishment of Offenders Act 2012 would not apply: reg.6 The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Consequential, Transitional and Saving Provisions) Regulations 2013 SI 2013/534.

> and for this purpose proceedings, or a part of proceedings, are funded for an individual if services relating to the proceedings or part are funded for him by the Commission as part of the Community Legal Service.

10. In the ordinary way, where a legally aided party is ordered to pay costs and the other party wishes to recover them, a request is made to a court for a hearing to determine the costs payable.[3] In relation to proceedings in the High Court, other than in a District Registry, such requests are made in the Senior Courts Costs Office. The regulations refer to "requests" rather than "applications", although in my experience most requests are made by application notice in form N244.

11. That is what happened in this case. But for the agreed directions, directions would have been given for the determination of the reasonable amount for the Claimant to pay.

12. Whether or not QOCS applies is generally a matter for the court which is dealing with the substantive proceedings or for the court dealing with enforcement. With limited exceptions, the SCCO does not deal with enforcement. However, the SCCO is the correct forum for the determination under s.11. The question of whether or not QOCS applies will be relevant to the outcome of that determination and so it is proper that I should deal with it, as the parties have agreed.

Does QOCS apply?

13. The First Defendant's argument is that QOCS does not apply to a claimant who is legally aided. Mr Heining submitted that it seems improbable that it was intended that claimants should have both the protection under s.11 of the 1999 Act (or s.26 of the 2012 Act) and QOCS. He suggested that nowhere in the reports of Sir Rupert Jackson[4] was it suggested that QOCS should be substituted for legal aid costs protection. Rather, QOCS was designed to provide protection for claimants following the reforms which removed the recoverability of after the event insurance premiums. As Lord Briggs said in *Ho v Adelekun* [2021] UKSC 43:

> QOCS may be described as the third generation of ameliorating procedural schemes. The first was Legal Aid, under which state funding of meritorious claims was (partly to protect the public purse) accompanied by a virtual prohibition on the recovery of costs by defendants against legally-aided claimants. The second was a combination of Conditional Fee Agreements … and the use of After the Event ("ATE") insurance which would cover the unsuccessful claimant's liability to pay the defendant's costs and so insulate claimants from costs risk, with both success fees under the CFAs and ATE premiums recoverable in a successful case from defendants as part of the claimant's costs. Legal Aid had largely been withdrawn by the end of the 20th century, and the burden on defendants of having to pay the claimants' solicitors success fees and the claimants' ATE premiums was

[3] Under the 1999 Act, the procedure is prescribed by the Community Legal Service (Costs) Regulations 2000. See the Guidance Notes on the application of s.11 Access to Justice Act 1999 issued by the Senior Costs Judge: White Book 2013 volume 1 para 48.14.9.

[4] Review of Civil Litigation Costs: Preliminary Report (May 2009) Final Report (December 2009)

> found to have tilted the playing field too far in favour of claimants, with a politically unacceptable knock-on effect on motor and other insurance premiums.

14. While that is a clear explanation of why QOCS was introduced, the difficulty with the First Defendant's argument is that there is nothing in the rules by which QOCS was introduced to indicate that it does not apply to claimants who are legally aided. That may be by design or by accident, but there is nothing to suggest that it was intended not to apply.

15. There is a specific exception in rule 44.17 of the Civil Procedure Rules 1998. QOCS does not apply to proceedings where the claimant has entered into a pre-commencement funding arrangement (broadly a conditional fee agreement or after the event insurance policy entered into before 1st April 2013). Had it been intended also to exclude legally aided claimants, that would have been the obvious place to put it.

16. QOCS applies to proceedings which include a claim for damages for personal injuries (CPR 44.13(1)), the Claimant falls within the definition of those to whom QOCS applies (CPR 44.13(2)) and there is nothing in the rules to exclude him because he was legally aided.

17. Accordingly, in my judgment, CPR 44.14 applies to the Claimant in this case. That rule provides:

> (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.

18. It seems to me that there is no difficulty in the approach to be taken in the case of a legally aided party who is also entitled to QOCS, because legal aid costs protection relates to the amount to be paid and QOCS relates to enforcement. The applicability of QOCS is not a bar to a determination under s.11 of the 1999 Act (or s.26 of the 2012 Act), although, in practice, if QOCS does apply, there may be little reason for the receiving party to make a request for a determination.

Were the damages paid to the Claimant pursuant to the Tomlin order "damages awarded to the Claimant at the conclusion of his action" within the meaning of paragraph 3 of the order dated 10th October 2017?

19. In his skeleton argument, Mr Heining submitted that this issue was of limited relevance and conceded "that the court is generally required to exclude from the QOCS regime sums payable pursuant to a Tomlin order". However, in his oral submissions, he appeared to row back from that concession and sought to distinguish the decision of the Court of Appeal in *Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654. That may be the sensible place to start.

20. In *Cartwright* one of the issues was whether, in a QOCS case, enforcement was possible if the sums were payable to a claimant by way of a Tomlin order, rather than a direct

order of the court for damages and interest. The Court of Appeal concluded that an agreement to pay a sum under the terms of a schedule to a Tomlin order is not an order for damages and interest. In addition to the straightforward construction of the rule, at paragraphs 48 and 49 Coulson LJ pointed to the practical difficulties. First, the schedules to Tomlin orders are often confidential. Secondly, the sum payable under the schedule to the order is often a global figure, including costs and interest.

21. In the present case, the Claimant agreed to accept a sum in settlement of his claim. It is not entirely clear whether that sum included costs. While paragraph 3 of the schedule mentioned the "damages and costs referred to above", which may be taken to mean the sum mentioned in paragraph 1 of the schedule, there was a separate provision in the order for the defendant (presumably the Second Defendant) to pay the Claimant's costs to be assessed if not agreed.

22. However, whether in this case the sum payable was in respect of damages and costs, or just damages, the decision in *Cartwright* is clear. An agreement to pay a sum under a schedule to a Tomlin order is not an order for damages and interest.

23. Accordingly, insofar as it is necessary for me to decide the point in these determination proceedings under s.11, the sum paid by the Second Defendant under the agreement contained in the schedule to the Tomlin order will not enable the First Defendant to enforce his costs order.

24. It seems to me that the First Defendant is not assisted by the unusual wording of paragraph 3 of that order:

> These costs are to be payable from any damages awarded to the Claimant at the conclusion of his action against the Second Defendant but are not to be enforced without permission of the Court.

25. It is clear from the words "not to be enforced without permission of the court" that the court had in mind the costs protection afforded to the Claimant under s.11 and that the purpose of the sentence was to indicate that the appropriate time for the determination of the Claimant's liability under that section was when damages were awarded in the claim against the Second Defendant.

26. It was not intended that the payment of costs out of the damages awarded should be automatic and the court could not have intended the paragraph to deprive the Claimant of the benefit of QOCS, which it would have no power to do.

27. The order anticipated an award of damages: "… damages awarded … against the Second Defendant …" can mean only damages awarded by the court. It cannot mean damages which the Second Defendant has agreed to pay.

28. In my judgment the sum paid to the Claimant pursuant to the agreement contained in the schedule to the Tomlin order was not damages awarded to the Claimant at the conclusion of the action within the meaning of paragraph 3 of the order.

Whether the order for payment of interim damages of £250,000 contained in paragraph 8 of the Order of Foskett J. sealed on 10 October 2017 be included as part of the aggregate

amount in money terms of any orders for damages and interest made in favour of the Claimant for the purposes of CPR 44.14.

29. Paragraph 8 provided:

> The Second Defendant to pay the Claimant £250,000 by way of interim damages, such payment to be made to the Claimant's Solicitors. This provision is stayed pending the determination or withdrawal of any appeal. The said sum is to be paid within 28 days thereafter.

30. This paragraph was explained in Foskett J.'s ruling on consequential matters[5], following the trial of liability, at paragraph 13:

> I understand that, subject to any appeal, an interim payment on account of damages of £250,000 has been agreed. That should be incorporated into the order.

31. The jurisdiction to order interim payments is contained in CPR 25.6 to 25.9, made pursuant to s.32 of the Senior Courts Act 1981. The definition of an interim payment is contained in s.32(5):

> … in relation to a party to any proceedings … a payment on account of any damages … which that party may be held liable to pay to or for the benefit of another party to the proceedings if a final judgment or order of the court in the proceedings is given or made in favour of that other party.

32. Is an order for a payment on account of damages an order for damages for the purposes of CPR 44.14?

33. The obvious purpose of CPR 44.14 is to enable a defendant to recover costs ordered in its favour from damages and interest awarded to the claimant in the same proceedings. Claimants cannot be liable for more than they have been awarded in the proceedings, so they cannot be net losers as a result of bringing the claim.

34. If a defendant is found liable to pay less in damages than the interim payment, the overpayment is repayable by the claimant and there is power to award the defendant interest on the overpayment.[6] In such circumstances it cannot have been intended that a defendant could enforce an order for costs against the full amount of the interim payment, including the overpayment. Yet that would be a consequence of the wide definition that the First Defendant seeks to place on "orders for damages".

35. However, it is not necessary to look for practical difficulties in that interpretation. The plain words used, "orders for damages and interest", would not include an order for a payment of a sum *on account of* damages.

36. On behalf of the Claimant, Mr Kapoor submitted that the court had not in fact made the order set out at paragraph 8. Rather it was agreed between the parties. It makes no

[5] 4th August 2017
[6] CPR 25.8(5)

difference to the result, but, in my judgment, an order for damages would include a consent order (although not an order in Tomlin form).

37. Accordingly the interim payment provided for in paragraph 8 of the order dated 10th October 2017 was not an order for damages for the purposes of CPR 44.14.

Consequences

38. It follows that, for the purposes of these s.11 proceedings, the court will proceed on the basis that the Claimant is entitled to QOCS and that no order for damages or interest has been made against which the First Defendant can enforce its costs order.

39. The parties should make submissions in writing as to the way forward.