



# QOCS – Judicial inconsistency and recent decisions

---

14<sup>th</sup> May 2019  
Roger Mallalieu

# QOCS – what is it good for?

---

- CPR 44.13 to CPR 44.16 – the basic concept:
  - In return for not being able to recover additional liabilities, personal injury Claimants will be protected from the effect of adverse costs orders (CPR 44.13-44.14);
  - But damages are not ringfenced and interlocutory costs orders and successful D Part 36 offers can ‘bite’ (CPR 44.14);
  - The protection does not prevent the making of a costs order, but its enforcement, but costs judgments which are unsatisfied due to QOCS are not on the Court record as outstanding debts (CPR 44.14(3));

# The exceptions

---

- QOCS is automatically lost if the claim is struck out on the basis of no reasonable grounds or abusive or likely to obstruct just disposal (CPR 44.15);
- QOCS MAY be lost if:
  - The claim is fundamentally dishonest (CPR 44.16(1));
  - The claim includes a claim for someone else's benefit (with exceptions) (CPR 44.16(2));
  - The claim is a claim other than 'a claim to which this Section applies' (CPR 44.16(2)(b));
- Note – there is no 'football pools' provision re QOCS;



# Transitional provisions

---

- QOCS does not depend on when the claim was brought, but only on whether C has entered into a PCFA (CPR 44.17 / CPR 48.2);
- PCFA includes a CFA as well as ATE, so QOCS is NOT just a quid pro quo (QPQ?) for loss of recoverable ATE;
- A LASPO exempt funding arrangement (e.g. mesothelioma) is a PCFA and such cases do not therefore attract QOCS;
- Post 4/13 Clin neg ATE premiums are NOT PCFAs and so do not affect the recoverability of ATE (McMenemy v Peterborough).



# Transitional problems

---

- Sorry, I didn't meant it!
  - Price v Egbert Taylor & Co;
  - C did not have a PCFA, but mistakenly said he had;
  - C was estopped from denying the same and QOCS was lost;
  - A principle open to some argument.
- I did mean it, but I don't what it anymore!
  - Catalano (CA) – the disavowing of a CFA;
  - C had a PCFA (a CFA), but could not get ATE;
  - C 'abandoned' the CFA;
  - This was irrelevant – C had entered into a PCFA and QOCS was lost in respect of the proceedings;
  - Some unfortunate 'tail end' observations.



NEW SQUARE

# Set off

---

- QOCS expressly permits set off of adverse costs against damages and interest. Damages are not ‘ringfenced’.
- QOCS does not expressly allow a losing D to set off its costs against a successful C’s costs;
  - *Darini v Olsoy* (County Court) – set off not permitted;
  - *Howe v MIB* (no. 2) (CA) – yes it is; Attempts to revisit;
  - Note – set off is always at Court’s discretion (contrast 44.14).
- Can a successful D set off costs against damages awarded to C against an unsuccessful D?
  - *Cartwright v Venduct* – in principle, yes. But only where awarded in an order. A Tomlin order or Part 36 (?) doesn’t count [45]!
  - Note – Howe revisited (but only in respect of same Defendant)!

# Counterclaims

---

- Does ‘proceedings’ under CPR 44.13 include a counterclaim?
  - C & D involved in RTA. Each is injured. Each blames the other.
  - C is protected against adverse costs by QOCS. Is D?
  - If so, is D protected against adverse costs in the claim, or the counterclaim only? What about C defending the counterclaim?
- Ketchion v McEwan. C financial loss only. D personal injury;
  - D – QOCS protection because ‘proceedings’ included a claim for PI
- Waring v McDonnell;
  - Contrary view. The claim and counterclaim are different proceedings for QOCS purposes. In respect of the Counterclaim, D had QOCS. In respect of defending the claim, he did not.

# Exceptions ‘prove’ the rule?

---

- CPR 44.16 (2)(b) – claims for the benefit of C other than a claim to which this Section applies. ‘Mixed’ claims? What is a mixed claim?
- The section applies to ‘a claim which includes a claim for damages’ (CPR 44.13). Why, therefore is a ‘mixed claim’ not a ‘claim to which this Section applies’?
  - How is the Court to decide whether and to what extent to ‘disapply’ QOCS?
  - How is a Claimant to know to what extent QOCS might be disappplied and to what extent they need ATE cover?
  - Jeffreys, Siddiqui, Brown v Commissioner Metropolis. Watch this space?

# Who – or what – does QOCS protect?

---

- The ‘section’ applies to proceedings which include a claim for damages for personal injuries;
- However, it applies to prevent enforcement of orders for costs against ‘the Claimant’;
- It is disapplied where ‘the Claimant’ has entered into a PCFA;
- What, then, if ‘the Claimant’ changes – in particular, a claim for damages where C dies and ‘the proceedings’ are continued by the estate?;
- Difficult issues not anticipated.



# What about appeals?

- QOCS applies to appeals in personal injury claims – probably;
  - See Parker v Butler, Howe v MIV and Plevin;
  - The appeal proceedings are part of the same ‘personal injury proceedings’ covered by QOCS;
- As D discovered in Wagenaar v Weekend Travel, the timing of the proceedings is immaterial. Costs orders, whether made pre or post April 2013, in any kind of personal injury proceedings (including appeals) are covered by QOCS provided the requirements of CPR 44.13 are otherwise satisfied;
- Note, in many if not most personal injury cases the presence of a pre 4.13 PCFA will prevent the application of QOCS – but most such Claimants will have pre LASPO ATE;



# What can you do about all this?

---

- Know the existing limitations and caselaw. In particular;
  - Multi party cases;
    - QOCS protection in practice may be limited;
    - Form of settlement may be crucial;
  - The risk of set off – both costs and damages, when it is automatic, when it may be order and when it is lost;
  - The effect of your client's funding arrangements on QOCS and the limited scope (if any) for change;
- Pick your Defendants with care;
- Be very cautious with mixed claims;

# Thank You



NEW SQUARE

4 NEW SQUARE LINCOLN'S INN

LONDON WC2A 3RJ

[WWW.4NEWSQUARE.COM](http://WWW.4NEWSQUARE.COM)

T: +44 20 7822 2000

DX: LDE 1041

E: [CLERKS@4NEWSQUARE.COM](mailto:CLERKS@4NEWSQUARE.COM)