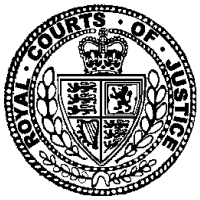

Neutral Citation Number: [2018] EWHC 536 (QB)

Case No: HX14X03469

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2018

Before:

MR JUSTICE FOSKETT

- -

Between:

FAIZ SIDDIQUI **Claimant**

- and –

THE CHANCELLOR, MASTERS AND SCHOLARS OF THE UNIVERSITY OF OXFORD **Defendant**

- -
- -

Roger Mallalieu (instructed by **Dale Langley Solicitors**) for the **Claimant**
Julian Milford (instructed by **Bevan Brittan LLP**) for the **Defendant**

- - - - - - - - - - - - - - - - - - -

RULING

MR JUSTICE FOSKETT:

Introduction

1. The substantive judgment in this case was handed down on 7 February 2018: see [2018] EWHC 184 (QB). There are two consequential issues arising from the judgment: first, the question of costs; second, the Claimant's application for permission to appeal.

2. I have, as requested at the time the judgment was handed down, received written submissions from both parties on these two issues. I will deal with each separately.

Costs

3. The Claimant failed in his claim. The parties are agreed that the Defendant is, in those circumstances, entitled to a costs order in its favour, save in relation to the costs of certain discrete issues where orders have already been made (including in relation to the Defendant's unsuccessful application to have the claim struck out). However, there is disagreement about the enforceability of the order for costs.

4. The disagreement arises in the context of the Qualified One Way Costs Shifting ('QOCS') rules that apply to personal injuries claims. It is agreed between the parties that the rules do apply to the present case, but the disagreement is as to whether an exception to the general rule (namely, that a claimant is protected from an adverse costs order in the event that his claim fails) applies in this case. The Claimant's position is that the costs order should not be enforceable because this is a personal injuries claim. The Defendant accepts that these proceedings fall within the QOCS provisions of CPR r.44, but it submits that the costs order should be enforceable pursuant to CPR r.44.16(2)(b), at least to a significant extent even if not to the whole amount of its costs, said to be approximately £300,000.

5. The background to the QOCS provisions was summarised by Lewison LJ in *Howe v Motor Insurers' Bureau (No 2)* [2018] 1 WLR 923 as follows at [11]:

> "… The origins of QOCS lie in Sir Rupert Jackson's Review of Civil Litigation Costs (2010). Chapter 19 of the report dealt with one-way costs shifting in the context of personal injuries litigation which, Sir Rupert said, he was treating as "a broad concept". Once after the event ("ATE") insurance premiums ceased to be recoverable it was necessary to protect claimants from the risk of adverse costs orders obtained by insured or self-insured parties with deep pockets. His proposal was that all claimants in personal injury cases be given a broadly similar degree of protection against adverse costs orders as that enjoyed by legally aided claimants. Plainly, this recommendation was designed to protect claimants who lost their cases, as successful claimants would not be liable to pay an unsuccessful defendant's costs. It was intended to overcome the deterrent effect on bringing claims for personal injury of the risk of paying a defendant's costs if the claim failed. Although the broad thrust of Sir Rupert's recommendation was accepted, the eventual scheme embodied in the Civil Procedure Rules did not follow the legal

aid model. … it is much more prescriptive than the broader more discretionary approach that Sir Rupert recommended."

6. The relevant rules are as follows:

"**44.13**

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

(a) for personal injuries;

…

(2) In this Section, 'claimant' means a person bringing a claim to which this Section applies …

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.

44.15 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.

> **44.16**
>
> (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) … or
>
> (b) a claim is made for the benefit of the claimant other than a claim to which this Section applies ….”

7. The drafting of these provisions has been the subject of adverse comment: see, e.g., *Jeffreys v The Commissioner of Police for the Metropolis* [2017] 4 Costs L.O. 409 at [35-36]. Nonetheless, those provisions were the subject of detailed scrutiny by Morris J in that case and given a purposive construction. Mr Mallalieu, on behalf of the Claimant, indicates that the analysis in *Jeffreys* is not accepted.

8. Whilst the analysis is not, strictly speaking, binding upon me, ordinarily I would need to be persuaded that it is obviously wrong before departing from it. I am alive to the objectives of the QOCS provisions (see paragraph 5 above) and the need to be cautious about disturbing those objectives too readily by looking for an exception where an exception was not intended. However, as a matter of construction of the rules, I respectfully think that the analysis in *Jeffreys* is correct and I propose to apply it to the extent that it is relevant in this case (see further at paragraphs 17-18 below). It is, I might add, also an important objective to ensure that the QOCS provisions are not abused by simply “dressing up” a non-personal injuries claim in the clothes of a personal injuries claim to avoid the normal consequences of failure in litigation.

9. Mr Mallalieu says that the Claimant’s position on this issue is simple: the claim is a personal injuries claim, having been expressly pleaded as such from the outset. It was further expressly stated to be so in the Reply to the Defendant’s Defence and the nature of this case “was placed firmly at the core of his Preliminary Schedule of Loss”. The fact that it was a personal injuries claim is, he contends, clear from the fact that, when addressing the limitation issues in the case (as they applied to the whole claim), the parties treated the applicable provisions as being sections 11, 14 and 33 of the Limitation Act 1980 which only apply to claims where the damages consist of or include damages in respect of personal injuries (section 11) or actions in respect of personal injuries (section 33).

10. Mr Milford accepts that the claim <u>includes</u> “a claim for damages for personal injuries”, but says that it includes also claims in contract and tort for “straight financial loss as a result of alleged negligence” which therefore qualify as claims “made for the benefit of the claimant other than a claim to which this Section applies” within r.44.16(2)(b). He draws attention to the pleaded claim for pure financial loss in paragraphs 47-49 of the Particulars of Claim which were pleaded as follows:

> "47. The Claimant's chosen career path was to pursue postgraduate qualification through an Ivy League University with a view thereafter to a career at the Commercial Bar. Whilst a (low) Upper Second degree from the University of Oxford remains a qualification of some substance, the difference between that degree and the First or high Upper Second he would or should have been awarded made and continues to make a very material, substantial and continuing difference to his ability to obtain admission to the prestigious post graduate courses he had chosen and, in turn, to his ability to pursue his career at the desired level.
>
> 48. The Claimant applied for positions at leading US law schools in 2000, 2001, 2003 and 2006. On each occasion, he was rejected. When the Claimant made enquiries as to why this was the case, he was consistently informed that his undergraduate grades and resultant class rank were not high enough to justify admission.
>
> 49. Further or alternatively, the Claimant has lost the chance of obtaining the higher degree referred to above and of the consequent substantially enhanced career path."

11. This pleading does demonstrate that the case (or at least one important aspect of the case) the Claimant was proposing to advance at trial was that the low level of his degree (which was substantially caused by the poor result in the gobbets paper) caused his failure to secure a place at one of the major US Law Schools which itself led to the lost opportunity to pursue a "substantially enhanced career path". That part of his case did not depend upon establishing some psychiatric injury following the obtaining of his lower than anticipated degree level.

12. That case was indeed substantially advanced at the trial. Since the trial did not address the issue of financial loss, the precise nature of any remedy, had this case succeeded on the merits, did not fall to be examined. However, I consider that Mr Milford is correct to characterise it as a "pure financial loss" claim based upon breach of contract and/or negligence (in the form of alleged inadequate teaching such as to constitute, in effect, professional negligence). It is correct to say that substantially the same evidential platform was put forward in support of the case that the Claimant sustained a psychiatric injury as a result of his poor result (see [121] of the substantive judgment), but that does not detract from the proposition that a free-standing claim for economic loss unrelated to psychiatric injury was also made.

13. Does the fact that this free-standing claim has some common evidential basis with the claim for damages for personal injury mean that it must be treated as part of the personal injury claim and thus be covered by the QOCS provisions? Mr Mallalieu contends that the purpose of CPR 44.16(2)(b) is to allow the Court, in appropriate cases, to disapply the QOCS provisions in whole or part where the claimant has sought to bring a discrete claim which <u>does not</u> include a claim for damages for personal injuries within the protection of those provisions by bringing it within the same proceedings as a claim which <u>does</u> include a claim for damages for personal injuries. However, he submits that where there is a single claim within a single set of proceedings and where that claim

includes a claim for damages for personal injuries, then it is not open to the Court to seek to divide up that single claim into constituent parts for the purpose of the QOCS provisions. To do so would, he says, be contrary to the legislative intention underpinning those provisions and would inhibit access to justice for claimants bringing claims including damages for personal injuries. He submits that it would be unjust for the Claimant in this case now to be subject to a QOCS exception given, as he says, (i) that the case advanced by him "has always been treated as a personal injury case" and (ii) it would have been "impossible for him to attempt in advance to try and sever out any discrete part as being a non QOCS element and impossible for him to seek discrete after the event insurance cover for that part." I am bound to say that that latter proposition is merely assertion and there is no evidence to back up the alleged difficulty, but if there was such a difficulty, it may simply have been a reason for not pursuing the non-personal injury element of the case.

14. Leaving aside these submissions, Mr Mallalieu also submits that the inclusion of the loss of chance claim added nothing in terms of time, cost, complexity or court time to the "core claim which was undoubtedly a personal injury claim". That, as it seems to me, is something that would go to the quantum of any award of costs if I was persuaded that an exception to the QOCS provisions should be permitted in this case.

15. On the issue of whether an overlap between the evidential basis for a personal injury claim and a non-personal injury claim precludes the operation of CPR 44.16 (2)(b), Morris J said this in *Jeffreys*:

> "As to … the alleged requirement for divisibility, in my judgment, there is no authority for the proposition that in order for CPR 44.16(2)(b) to apply the personal injury claim and the non-personal injury claim must be "divisible". There is nothing in the wording of the CPR provision itself to support this. Further, there is no reason in principle why there should be such a requirement. If the two claims are "inextricably" linked or otherwise very closely related, then that relationship can be reflected in the exercise of discretion (in the claimant's favour) which arises once CPR 44.16(2)(b) applies."

16. In applying that approach to the circumstances of that case, he said this after referring to two examples in [52] of his judgment:

> "53. In my judgment, in each of these examples, proceedings in which claims were brought for those two different types of loss, namely the damage to property and the personal injury, would fall within CPR 44.16(2)(b), even though they arose out of essentially the same facts and out of one and the same breach of duty. Each claim would be for different types of loss (personal injury and non-personal injury) and in claims where damage is an essential element of the cause of action, would in fact arise from different causes of action. There is no basis for requiring the personal injury claim and the non-personal claim to arise out of either distinct facts or distinct breaches of duty. Indeed, it is inherently likely that they will arise out of the same set of facts.

> What is important ultimately is whether they are claims for different types of loss.
>
> 54. In the present case, and even assuming that the malfeasance breaches of duty, indistinctly, caused the psychological injury, there remains the very substantial claims for damages for something other than damages for personal injury. Even though those claims were caused by the same breaches of duty, in my judgment, there were claims "other than a claim for damages for personal injury". CPR 44.16(2)(b) therefore applies."

17. I respectfully think that this analysis is correct, the essential question being whether the claims advanced are for different forms of loss, one attributable to personal injury and the other not.

18. That being so, I consider that the circumstances of the present case do fall within the exception provided by CPR 44.16(2)(b). The issue is, therefore, how the discretion afforded by that provision should be exercised.

19. As with so many matters concerning costs, a broad brush has to be applied. In my view, the issue of the alleged effect of the "poor degree" on the Claimant's ability to obtain a place at a US Law School did occupy a not insignificant amount of time at the trial (and indeed in the preparations for trial). Obviously, part of that aspect of the overall case involved consideration of whether the Defendant had been in breach of duty, an issue that had to be addressed in relation to the personal injury element of the claim too. I cannot see any reason in principle why I should not reflect some part of that time in the order made pursuant to the exception to the QOCS provisions, though plainly I must be careful not to make an order that unfairly deprives him of the legitimate QOCS protection to which, by virtue of the acknowledged personal injury element of the claim, he is entitled.

20. Doing the best I can to reflect these various factors, in my judgment, the Claimant should be ordered to pay the Defendant 25% of its costs to be subject to a detailed assessment on the standard basis if not agreed. Whether that amounts to £75,000 will depend on that assessment. My initial view was that an order for one-third of the costs would be appropriate, but to ensure that the legitimate QOCS protection is not lost I have reduced that proportion to 25%.

21. Mr Mallalieu has suggested that the practical effect of any costs order against the Claimant would be to make the Claimant bankrupt. That proposition is doubtless advanced on the Claimant's express instructions. I regret to say that, as with many assertions that the Claimant makes, I must take that one with a very large pinch of salt. Mr Milford is entitled to respond by saying, as he does, that any claim of impecuniosity has to be seen in the context of the fact that the Claimant has secured the necessary funding to litigate the claim that has been advanced thus far with, for the most part, the assistance of a solicitor and senior Junior Counsel. Leading Counsel was partly responsible for drafting the Particulars of Claim and, I apprehend, would have given advice at some stage. The Claimant is now contemplating an appeal that will have to be funded.

22. At all events, I have to make such order as I consider just having regard to the rules that I must apply, irrespective of the personal consequences to the Claimant.

Permission to appeal

23. Mr Mallalieu submits courteously that I was wrong in my conclusions on limitation, breach of duty and causation. He submits that the judgment contains a number of (unspecified) factual errors. He also contends that, irrespective of those matters, there is a "compelling reason" to grant permission to appeal. The basis for that last submission is that this has been a "widely publicised case [which] undoubtedly raises unique, novel and compelling issues of law which [I] must have regard to in assessing whether to grant permission to appeal." He submits that it "is appropriate that the clearest and most authoritative guidance possible as to the correct approach" to these issues is given at an appellate level. The issues that make it such a case are said to be as follows:

> "… the question of the extent to which the quality of education provided can and should be the subject of scrutiny is an issue of very considerable, and growing, public interest. Whether litigation is, or is not, the best forum is a policy decision. What is important is that where there is a high profile case such as the instant, which unquestionably raises interesting and difficult issues in relation to such a case and, in particular, issues as to the precise nature and extent of duties owed by Universities to their students, the extent of liability of Universities towards their students for their negligent acts or omissions, the vicarious liability of tutors, the nature and extent of the evidence required to establish both breach of duty and causation and issues in relation to the nature and extent of a University's duty to bring such acknowledged deficiencies to the attention of students."

24. Given the vigour with which the Claimant has pursued this case and given the decision he has made to pursue an appeal if granted permission to do so, I rather doubt whether my decision on the question of permission to appeal will be the last word on the issue unless I grant permission to appeal. Because I do not consider that grounds for appeal exist, I propose, therefore, to keep my observations relatively short. Essentially, I am entirely happy to leave the substantive judgment to speak for itself.

Limitation

25. I do not consider that any of the points raised by Mr Mallalieu in relation to the limitation issue have any substance: on the basis of the approach of the authorities referred to in the judgment and, most particularly, to the factors referred to in [228] (a paragraph not directly criticised on behalf of the Claimant), I consider it clear that the Claimant had the necessary "knowledge" for the purposes of the Limitation Act and I do not consider the converse to be reasonably arguable.

26. The point raised concerning "fraudulent concealment" is completely devoid of merit: if the decision not to refer to other authorities within the University the complaints made by SB was "obviously unreasonable", it might have afforded grounds for concluding that there was "fraudulent concealment" of material issues in the eyes of the law. Since

I have concluded that the decision was "reasonable and tenable", a conclusion entirely justified by the evidence, I can see no mileage in the argument advanced in Mr Mallalieu's submissions. I have not introduced some novel test: I have merely reflected on the reasonableness of the decision that the complaints of SB were not of a nature that required onward transmission to the University authorities.

27. In any event, in relation to the whole limitation issue, I considered the Claimant's case on its merits and rejected it. Accordingly, the question of whether I was right on the limitation issue is academic.

Breach of duty

28. It is suggested that I was wrong to reject "the unequivocal contemporaneous evidence contained in the 'Washbrook letter' and his subsequent report (January 2002) as merely 'sounding off'." I considered Professor Washbrook's comments made at the time in the light of the oral evidence he gave and in the context of all the other evidence in the case, including how all the students in the year (including the Claimant and how he performed in Collections) fared in the gobbets paper, and concluded that there was nothing that supported the conclusion that the teaching fell below acceptable standards. It was a finding of fact entirely justified by the evidence.

Causation

29. The suggestion is that I "erred in law in rejecting the common ground in opinion of the expert psychiatrists instructed in the case". This suggested ground of appeal is hopeless. No judge is "bound" by an agreed view of expert witnesses if, on examination of the evidence, the experts had been acting on an erroneous factual basis: [143] of the judgment gives the reason for the conclusion I reached which, to my mind, is unassailable.

Factual errors

30. As I have indicated (paragraph 23 above), the alleged "factual errors" are unspecified. That is not an appropriate way of inviting a judge to consider granting permission to appeal. However, the reality, I suspect, is that anything that does not fit with the Claimant's own perception of a "fact" will be seen as an error. Nonetheless, it is said specifically that I focused only on the gobbets paper as being the source of Defendant's negligence and that the Claimant's case "is and was that the cumulative effect of the negligence was of wider effect and the same was not properly addressed in the judgment."

31. I do not agree that that is a fair description of the judgment. The gobbets paper was not the sole focus of the judgment. However, the principal platform of the Claimant's case, once he became aware of the complaint made by SB, was the proposition that the teaching of gobbets paper was negligently inadequate. A great deal of the time at the trial was devoted to this issue – all the Claimant's witnesses were called on that issue, for example. Inevitably, a great deal of the judgment was devoted to the principal issue raised by the Claimant. Had the issue not been dealt with in the detail it was, that would doubtless have been the subject of criticism by the Claimant. In my view, the criticism made is groundless.

Other compelling reason

32. I accept that this case has been widely publicised. That does not mean it raises issues of public importance. There may be a case where some of the wider issues referred to by Mr Mallalieu would be worthy of the attention of a higher court, but a case where there is more intrinsic merit would, in my view, be such a case. There is no real issue about the legal principles involved. The Claimant failed on virtually every issue of contested fact and the chain of causation upon which he relied was tenuous in the extreme. If the Claimant pursues his application for permission to appeal, it would be for a higher court to decide whether this case is one for its attention, but, for my part, I would regard the prospects of a successful appeal on the merits of this case to be nil.

Conclusion

33. An order for costs giving effect to the decision set out in paragraph 20 above will be made.

34. Since seeing this Ruling in draft form, Mr Mallalieu has invited me to give the Claimant permission to appeal on the decision as to costs on the basis that the correct construction of CPR 44.16(2)(b) is an important point of principle and practice which would benefit from authoritative guidance by the Court of Appeal. In my view, the interpretation of this provision, as decided in *Jeffrey*, is clear and the converse is not reasonably arguable. For that reason, I am not prepared to grant permission to appeal. If the Court of Appeal feels that there is arguable merit in a different interpretation, it will doubtless say so on any renewed application for permission to appeal.

35. Permission to appeal will, therefore, be refused in relation to both to the substantive judgment and in relation to the issue of costs on the basis that there is no realistic prospect of success and there is no other compelling reason to give permission to appeal.

36. If the Claimant wishes to take matters further, he will need to lodge an Appellant's Notice within 21 days of the hand down of this decision.

37. The Claimant seeks a stay of the enforcement of any order for costs pending the determination of the application for permission to appeal and any appeal, "otherwise the effect of such a costs order would be to stifle any appeal and prohibit his access to justice". I have not received any representations from the Defendant on that issue, but observations on the Claimant's alleged impecuniosity have been made (see paragraph 21 above). Unless there is agreement on the imposition of a stay, I will simply order a stay until the Appellant's Notice is lodged. Whether the stay continues thereafter will be a matter for further application in default of agreement.