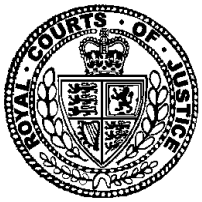

Neutral Citation Number: [2023] EWHC 158 (SCCO)
Case No: SC-2017-DAT-006054
CL1706106

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London WC2A 2LL

Date: 20/01/2023

Before :

COSTS JUDGE LEONARD

- -

Between :

PME	**Claimant**
- and -	
The Scout Association	**Defendant/ Applicant**
Bolt Burdon Kemp LLP	**Respondent**

- -
- -

Roger Mallalieu KC (instructed by **Bolt Burdon Kemp**) for the **Respondent**
Jamie Carpenter KC (instructed by **Clyde & Co**) for the **Defendant/Applicant**

Hearing date: 18 October 2022

- -

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.

.....

COSTS JUDGE LEONARD

Costs Judge Leonard:

1. This judgment addresses an application by the Defendant for an order to the effect that Bolt Burdon Kemp LLP ("BBK") pay costs which the Claimant has been ordered to pay to the Defendant. I must thank counsel for both parties for their cogent and detailed submissions, by which I have been greatly assisted.

Statutory Provisions and the Civil Procedure Rules ("CPR")

2. Section 51 of the Senior Courts Act 1981, at subsections (2) and (3) empowers this court to make costs orders against parties other than those who have brought or defended litigation:

> "(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in… the High Court… shall be in the discretion of the court.
>
> (2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings…
>
> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

3. Part II of CPR 44 sets out The Qualified One-Way Costs Shifting ("QOCS") provisions introduced in 2013 for personal injury cases. CPR 44.14 (1) provides:

> "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."

4. Under the heading "Exceptions to qualified one-way costs shifting where permission required", CPR 44.16(2)(a) and (3) provide:

> "(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…
>
> (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."

5. Practice Direction 44, at paragraphs 12.2 and 12.5 provides:

> 12.2

> Examples of claims made for the financial benefit of a person other than the claimant… within the meaning of rule 44.16(2) are subrogated claims and claims for credit hire.
>
> 12.5
>
> The court has power to make an order for costs against a person other than the claimant under section 51(3) of the Senior Courts Act 1981 and rule 46.2. In a case to which rule 44.16(2)(a) applies (claims for the benefit of others) –
>
> > (a) the court will usually order any person other than the claimant for whose financial benefit such a claim was made to pay all the costs of the proceedings or the costs attributable to the issues to which rule 44.16(2)(a) applies, or may exceptionally make such an order permitting the enforcement of such an order for costs against the claimant.
> >
> > (b) the court may, as it thinks fair and just, determine the costs attributable to claims for the financial benefit of persons other than the claimant."

6. I should refer also to the following definitions at CPR 2.3 and the Glossary referred to at CPR 2.2:

> (*CPR 2.3*) "'claimant' means a person who makes a claim;
>
> (*Glossary*) Counterclaim… A claim brought by a defendant in response to the claimant's claim, which is included in the same proceedings as the claimant's claim…"

7. For ease of reference, I shall adopt the terminology used by Mr Mallalieu for BBK, and refer to the order sought by the Defendant as a Non-Party Costs Order ("NPCO").

The Procedural History

8. The Claimant claimed against the Defendant damages for personal injury. On 22 August 2017, without proceedings being issued, the Claimant accepted the Defendant's Part 36 offer of £29,500.

9. The Claimant served a schedule of costs in August 2017. In September 2017 the Defendant, on the basis of that schedule, offered to settle the claim for costs at £22,500. That offer was rejected.

10. On 20 November 2017, on the Claimant's Part 8 application, the Senior Costs Judge made a "costs-only" order under CPR 47.14 providing, at paragraph 2:

> "The Claimant's costs of the claim arising from the cause of action described in the claim form in respect of which terms of settlement have been agreed shall be paid by the Defendant and be the subject of a detailed assessment hearing in this Court."

11. The Claimant served a bill of costs on 23 November 2017. The bill came to £42,118.58. The Claimant's bill was provisionally assessed by Costs Officer Kenny at £22,868. Excluding the time for drafting the bill, the figure was £21,357.80, less than the Defendant's September 2017 offer. The Claimant sought, under CPR 47.15 (7)-(9), an oral review on the issue of hourly rates and document time only.

12. At the oral review on 15 August 2018 before Costs Officer Kenny the Claimant conceded the document time point and only the hourly rates were reviewed. They were slightly increased, the bill being assessed at £23,626.28. Deducting again the costs of drafting the bill, the Claimant's costs were assessed at £22,096.28. This was still less than the Defendant's offer of September 2017.

13. As a result, the Claimant was ordered to pay the Defendant's costs of the Part 8 proceedings, the provisional assessment and the oral review, which were assessed at £3,290.11. Interest on the Claimant's assessed costs was disallowed.

14. That is the first costs order to which this application relates: the order made by Costs Officer Kenny on 15 August 2018.

15. The Claimant then filed an Appellant's notice under CPR 47.21.

16. The Grounds of Appeal stated:

> "… the Claimant seeks a de novo detailed assessment hearing so that all issues and costs not agreed are heard afresh and assessed in the usual manner. Therefore all decisions made by Costs Officer Kenny at the provisional assessment and subsequent oral hearing are appealed…"

17. The Grounds of Appeal went on to identify preliminary issues including the argument that the appeal hearing would, effectively, be a new detailed assessment on the standard basis and an argument (not subsequently pursued) to the effect that a costs officer does not have jurisdiction to summarily assess costs.

18. The appeal was listed before me on 14 February 2019. On the day, the Claimant raised a new argument to the effect that a costs officer did not have jurisdiction to conduct a provisional assessment at all. The hearing was adjourned, so that two issues could be argued before me: whether the appeal was limited to the issues actually considered by Ms Kenny on 15 August 2018, and whether Ms Kenny had had jurisdiction to undertake the provisional assessment.

19. I heard argument on those issues on 3 May 2019 and handed down judgment on 30 July 2019. I found that there was no viable argument to the effect that costs officers have no jurisdiction to conduct provisional assessments; that there is no appeal from a provisional assessment, only from an oral hearing, if requested; and that any such appeal would be limited to decisions made at the oral hearing.

20. I reserved to the detailed assessment hearing the costs of the issues addressed by my judgment. The Claimant sought (and I granted) permission to appeal only on the issue of whether, following an oral hearing under CPR 47.15 (7)-(9), a party's rights of appeal extend not only to decisions made at the oral hearing but to decisions made on the provisional assessment that preceded it.

21. The Claimant's appeal from my judgment of 30 July 2019 was dismissed by Stewart J on 12 December 2019. The Claimant was ordered to pay the Defendant's costs of the appeal, summarily assessed at £8,091 net of VAT.

22. That is the second costs order to which this application relates.

23. On 16 January 2020 I heard and dismissed the substantive appeal from Costs Officer Kenny, ordering the Claimant to pay the Defendant's costs of the appeal. I gave directions for the determination of those costs in a hearing listed for 3 July 2020, which was adjourned by consent to await the judgment of the Supreme Court in *Ho v Adelekun* [2021] UKSC 43.

24. It is not, as I understand it, in dispute that because the Claimant has accepted a Part 36 offer from the Defendant, there is no order for damages in favour of the Claimant against which the Defendant could enforce an order for costs without the permission of the court (see *Cartwright v Venduct Engineering Limited* [2018] 1 WLR 6137, at paragraph 44). The effect of the decision in *Ho* (handed down on 6 October 2021) is that the Defendant is also unable to recover its costs by way of set-off against the damages or costs payable to the Claimant.

25. It follows that, without the permission of the court, the Defendant has no means of recovering from the Claimant the costs which the Claimant was ordered to pay by Costs Officer Kenny on 15 August 2018 (£3,290.11); by Stewart J on 12 December 2019 (£8,091 net of VAT, the recoverability of which is a bone of contention between the parties); and by me on 16 January 2020 (which have yet to be assessed but which I understand will be claimed in the sum of £28,499.07 inclusive of VAT).

26. The Defendant has stated in correspondence that it has no intention of attempting enforcement against the Claimant and instead seeks an order that BBK pay all of those costs.

27. On 14 April 2022 the court made an order in agreed terms for BBK to be added as a party to the proceedings for the purposes of costs only, and giving directions for the hearing of the application.

28. The Defendant says that following the rejection of the Defendant's September 2017 offer (which if accepted would have resulted in a better outcome for the Claimant) the Defendant has been forced to incur costs which it puts at over £40,000, a figure which substantially exceeds both the damages payable to the Claimant and the Claimant's recoverable costs of the claim itself.

29. BBK, says the Defendant, was the only party with an interest in the outcome of the detailed assessment and in particular in recovering more by way of costs than the Defendant had offered in September 2017. That offer was nominally rejected by the Claimant but in reality, says the Defendant, by BBK.

The Significance of the Claimant's Retainer Agreement with BBK

30. The Defendant's assertion that only BBK, and not the Claimant, has had any financial interest in the outcome of the proceedings before me and Stewart J, is based upon the terms of the retainer agreement between the Claimant and BBK.

31. The term "CFA lite" is commonly used to describe a Conditional Fee Agreement ("CFA") under which a solicitor undertakes litigation on the basis that the client will be responsible for the solicitor's fees and expenses only to the extent that they are recovered from the other party. Under such arrangements, win or lose, there are no circumstances in which the client will have to draw upon their own resources to meet those fees and expenses.

32. The CFA between the Claimant and BBK does not quite meet that description, but it comes close. It provides for the Claimant, in the event of success, to pay a success fee (irrecoverable from the Defendant) of 100% but it also provides for any shortfall between the sums payable by the Claimant to BBK under the CFA and the costs and disbursements recovered from the Defendant, to be capped at 15% of the damages received by the Claimant.

33. There is in any event a statutory limit on the success fee payable by the Claimant to BBK but the arrangement offered by BBK, in imposing an overall limit on any costs shortfall, offers an additional benefit to the Claimant. For ease of reference I will again adopt Mr Mallalieu's phrase and refer to this sort of arrangement as a "capped CFA".

34. Because the capped CFA between the Claimant and BBK provides for a 100% success fee, following the recovery of £29,500 in damages the Claimant will have to account to BBK for no more and no less than 15% of those damages, whatever might be recovered from the Defendant by way of costs.

35. In consequence, the only party with a tangible financial interest in the outcome of these detailed assessment proceedings has been BBK itself.

The Scope of my Jurisdiction

36. Before turning to the principles underlying this application, I must address a question of jurisdiction. The Defendant contends that it is open to me to make an NPCO in relation to the appeal proceedings before Stewart J. BBK disagrees. The parties have agreed to await the outcome of this application before any further application is made in respect of those proceedings.

37. Under section 51 of the 1981 Act, separate orders would need to be made by this court in respect of the proceedings in the SCCO and by a High Court Judge in respect of the High Court appeal. That is because the making of a non-party costs order is an aspect of the process of dealing with the costs of the proceedings before the court and so should be dealt with by the same judge who dealt with the substantive proceedings (*Symphony Group plc v Hodgson* [1994] QB 179 at 193D).

38. The Defendant's application is however made under both section 51 and CPR 44.16. Mr Carpenter for the Defendant argues that section 51 is expressly subject to the provisions of any rules of court, and that there is nothing in CPR 44.16 to impose any such restriction.

39. Mr Carpenter accepts that, as Turner J held at paragraph 29 of his judgment in *Mee v Jones* [2017] 1 WLR 4426, the breadth of the power created by CPR 44.16 is the same as that which otherwise exists under section 51 of the 1981 Act.

40. He submits, however, that CPR 44.16 serves to emphasise that QOCS is only concerned with protection of a claimant from costs orders, not third parties who stand to benefit from the claim. Paragraph 12.5(a) of Practice Direction 44 offers a strong indication that the power should be used against third parties in appropriate cases.

41. Consistently with the purpose of CPR 44.16, he argues, "a claim which is made for the financial benefit of a person other than the claimant" should be given a broad interpretation and can include a claim for the costs of the proceedings, so that BBK fall within CPR 44.16.

42. To that end, the rule permits any court to make an order in respect of costs incurred at any stage of the proceedings.

43. Mr Mallalieu, for BBK, argues that CPR 44.16(2)(a) does not create any new discretion to award costs. It is merely reflective of the jurisdiction created by section 51 of the 1981 Act. Hence, for example, the reference at paragraph 12.5 of CPR 44 to the power to make such orders being conferred by section 51(3) of the 1981 Act.

44. As for *Mee v Jones*, Turner J found (at paragraph 11 onwards) that section 51 of the 1981 act is the statutory basis for the making of an NPCO, with CPR 46 merely identifying the procedure. He agreed (paragraphs 30-31) with the analysis of the authors of *Cook on Costs* that

> " the express references to CPR 46.2 in CPR 44.16(3) itself and to s 51(3) and CPR 46.2 in the PD, the overarching statutory jurisdiction in respect of costs in s 51(3) and the absence of any other defined criteria by which the court may determine applications under CPR 44.16(3), resulted in the conclusion that the rule was superfluous, other than a) by way of identifying specific categories of non-party in the firing line and b) as a reminder to parties and the court of the availability of a non-party costs order."

45. Mr Mallalieu points to the court's binding conclusion in *Mee v Jones* (at paragraph 32) that

> "…the new rules and Practice Direction produce no broader or different discretion than that which has developed under the common law..."

46. He also argues that CPR 44.16(2) (and by extension the provisions of Practice Direction 44 paragraph 12.2 and 12.5) are directed at "mixed claims", as defined by the Court of Appeal in *Brown v Commissioner of Police of the Metropolis* [2019] EWCA Civ 1724 as claims that include a claim for damages for personal injury, but also for non-personal injury damages and other relief.

47. CPR 44.16(2) was he says, never directed towards questions of the basis on which a claim was funded or whether the ultimate beneficiary of between the parties costs recovery was the solicitor or the client. It is directed to issues concerning the substantive claim and for whose financial benefit the substantive claim was being pursued (in whole or part).

48. I agree with Mr Mallalieu. Whilst the term "claim" is not defined in the CPR, it seems to me fairly clear that the term, where it appears in the CPR, must refer to a substantive

claim, rather than the recovery of costs attendant on the substantive claim (a distinction clearly made, in this case, in the Senior Cost Judge's costs-only order of 20 November 2017).

49. Otherwise, for example, where a claim is successfully defended and the defendant awarded costs, for the purposes of the assessment or enforcement of those costs the defendant would, by reference to the definition at CPR 2.3, become the claimant.

50. Bearing that in mind, along with the findings of Turner J in *Mee v Jones*, my conclusion is (a) that CPR 44.16, as *Cook on Costs* puts it, identifies, in the context of the QOCS regime, "specific categories of non-party in the firing line" and (b) that those categories are confined to persons other than the claimant for whose benefit the substantive claim was made, obvious examples (as offered at paragraph 12.2 of Practice Direction 44) being subrogated claims and claims for credit hire.

51. In my view CPR 44.16 is not intended to, nor does it, refer to third parties who might have an interest in the recovery of a claimant's costs. Nor does it add anything to the provisions of section 51 of the 1981 Act, so as to make it appropriate for me to entertain an application for an NPCO in relation to the appeal proceedings before Stewart J. Any such application must be pursued in the appeal court.

Whether to make an NPCO: the Defendant's Submissions

52. Mr Carpenter refers me to paragraph 25 of the judgment of Lord Brown in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 (PC):

> "(1) Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.
>
> (2) Generally speaking the discretion will not be exercised against "pure funders", described in paragraph 40 of *Hamilton v Al Fayed (No 2)* QB 1175, 1194 as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.
>
> (3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence…"

53. This focus on who is "the real party" has recently been emphasised in the context of applications against company directors or shareholders in *Goknur Gida Maddeleri Enerji Imalet Ithalat Ihracat Tiracet v Sanayi AS v Aytacli* [2021] 4 WLR 101 (paragraph 40: notably at paragraph 27 the Court of Appeal reiterated the *Dymocks* criteria). Factors such as control, funding and benefit can be indicia of who is "the real party".

54. It has been said that a non-party costs order cannot be made against a solicitor who is acting in that capacity (*Tolstoy-Miloslavsky v Aldington* [1996] 1 WLR 736 at 745-746 and *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056 at 1066H).

55. However, as the Court of Appeal held in *Myatt v National Coal Board (No 2)* [2007] 1 WLR 1559 (paragraph 8), such dicta now have to be read in the light of *Dymocks*, so that a costs order can be made against a solicitor who is "the real party" or "a real party", even if they are on the record in proceedings for their client.

56. In *Myatt*, the Court of Appeal dealt with costs after dismissing the appeals of four claimants whose CFAs had been held to be unenforceable. Because the issue affected the solicitors' entire book of cases, they had a far larger interest (to the value of about £200,000) in the outcome of the appeal than any of the individual clients, who each had a relatively minor financial interest which would probably not have justified an appeal at all (Dyson LJ at paragraph 13).

57. Dyson LJ (at paragraph 9) observed:

> "Suppose that the claimants had no financial interest in the outcome of the appeal at all because the solicitors had assumed liability for all the disbursements with no right of recourse against the clients. In that event, the only party with an interest in the appeal would be the solicitors. In my judgment, they would undoubtedly be acting outside the role of solicitor…"

58. The fact that the clients did have a modest financial interest in the outcome did not prevent an order from being made against the solicitors. They were ordered to pay 50% of the defendant's costs of the appeal, bearing in mind that their clients did have a real interest in the outcome (their disbursements represented approximately one third of the total costs) and that the solicitors had not been warned, before the appeals were dismissed, that a costs order might be sought against them.

59. No such warning has been given in this case: the possibility of a costs order against BBK was not raised until January 2020, after the appeal to Stewart J was dismissed. Mr Carpenter submits however that it is important not to overstate the significance of a warning, still less elevate it to a pre-condition for an order or a full order. In *Dymocks* at paragraph 31, Lord Brown said that a warning

> "…is not more than a material consideration in the case … and their Lordships are unable to see how an earlier warning could have made any difference to the course of the proceedings here".

60. In *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 23, [2016] 4 WLR 17, dismissing an appeal against a costs order under section 51 of the 1981 Act, the court considered (at paragraphs 30-39) the weight to be attached to the fact that the respondent to the section 51 application had not been given a warning, and observed (at paragraph 32) that

> "The importance of a warning will vary from case to case and may depend on the extent to which it would have affected the course of the proceedings… if the third party against whom an order for costs is sought is the real party to the litigation, the absence of a warning may be of little consequence…"

61. At paragraph 62 the court emphasised that

> "… the absence of a warning is simply one factor which the court will take into account in an appropriate case when deciding whether, viewed overall, it would be unjust to exercise the discretion in favour of making an order for costs against the third party. We think it important to emphasise that the only immutable principle is that the discretion must be exercised justly."

62. Mr Carpenter submits that this is a case par excellence for the making of a costs order against BBK. BBK funded the assessment proceedings, paying disbursements as well as deploying the value of their fee earners' time. They controlled them and stood to benefit from them. They were in every respect "the real party", to the complete exclusion of the Claimant.

63. BBK has not complained about the absence of a warning that the Defendant would seek costs against them, nor offered any evidence to the effect that they would have acted differently if they had been warned. In any event, BBK were "the real party". As solicitors, they can be taken to be aware of this jurisdiction.

64. It would, says Mr Carpenter, be consistent with the policy underpinning QOCS to make the order sought by the Defendant. QOCS was introduced in 2013 as part of the "Jackson reforms" under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") in order to remove the need for claimants in personal injury claims to take out ATE insurance, mitigating the effect of the cessation of ATE premiums being recoverable as costs.

65. In paragraph 5.1 of chapter 9 of his Final Report, Sir Rupert Jackson identified the question, if recoverable ATE premiums were abolished, as

> *"…how the law should protect those claimants who, as a matter of social policy should be protected against the risk of adverse costs"*.

66. In paragraph 5.2, he wrote:

> *"…there is only one sensible way to give effect to that social policy, namely by introducing one way costs shifting. The advantage of this solution is that costs protection can be targeted upon those who need it, rather than offered as a gift to the world at large"*.

67. In paragraph 5.10, when considering in what fields other than personal injury to enact QOCS, Sir Rupert wrote

> *"The essential thrust of the present chapter is that recoverability of ATE insurance premiums should be abolished and that this should be replaced by qualified one way costs shifting, targeted upon those who merit such protection on grounds of public policy"*.

68. In paragraph 5.11, he noted that a key feature of claims in which QOCS might be appropriate were ones where the parties were in an *"asymmetric relationship".*

69. Sir Rupert Jackson's proposals for QOCS were developed in more detail in chapter 19 of his Final Report. His approach (which was not in fact enacted) was that QOCS would operate in the same way as costs orders against publicly funded parties, so that costs orders could be enforced against those who could afford it, but not otherwise.

70. The principles behind Sir Rupert's recommendations are, nonetheless, just as relevant to QOCS as in fact enacted. For example, in paragraph 4.5 of chapter 19, Sir Rupert wrote:

> "A one way costs shifting regime for personal injuries litigation (including clinical negligence) needs to have the following elements:
>
> (i) Deterrence against bringing frivolous claims or applications.
>
> (ii) Incentives for claimants to accept reasonable offers".

71. The latter was provided for in the QOCS rules as enacted, by permitting enforcement of costs orders against the claimant up to the amount of damages plus interest.

72. The courts have had regard to the Jackson Report when construing the provisions relating to QOCS to ensure that they operate consistently with their purpose. In *Wagenaar v Weekend Travel Ltd* [2015] 1 WLR 1968, it was held that QOCS does not apply to a third party claim by a defendant to a personal injury claim. Vos LJ said at paragraph 36:

> "Suffice it to say that the rationale for QOCS that Jackson LJ expressed in…" (*chapters 9 and 19 of his report*) "… came through loud and clear. It was that QOCS was a way of protecting those who had suffered injuries from the risk of facing adverse costs orders obtained by insured or self-insured parties or well-funded defendants. It was, Jackson LJ thought, far preferable to the previous regime of recoverable success fees under CFAs and recoverable ATE premiums. There is nothing in the Jackson report that supports the idea that QOCS might 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."

73. Similarly, Hamblen LJ in *Corstorphine v Liverpool City Council* [2018] 1 WLR 2421 observed at paragraph 30 that

> "… the purpose of the QOCS regime is to protect personal injury claimants from adverse costs orders. Originally that protection was provided by legal aid. Later

> it was provided by the complicated regime of CFAs and ATE policies. Now it is provided by the QOCS regime."

74. In *Cartwright v Venduct Engineering Ltd* it was held to be consistent with the policy behind QOCS that costs orders can be enforced by one defendant by reference to damages paid by another defendant. Coulson LJ observed at paragraph 24:

> "Any other result would give a claimant carte blanche to commence proceedings against as many defendants as he or she likes, requiring those defendants to run up large bills by way of costs, whilst remaining safe in the knowledge that, if the claim fails against all but one defendant, he or she will incur no costs liability of any kind to the successful defendants, despite the recovery of sums by way of damages from the unsuccessful defendant. That seems to me to be wrong in principle, because it would encourage the bringing of hopeless claims."

75. Coulson LJ also said, at paragraph 9:

> "It should be emphasised that one of the principal purposes of QOWCS is to provide some assistance to claimants with personal injury claims. It is not to penalise their prospective defendants. So I disagree with para 22 of Mr Hogan's skeleton argument, that a central feature of the regime is that defendants 'would have to stand their own costs in unsuccessful claims'. That might be a common outcome of the QOWCS regime, but it is not its principal purpose or intent. If a defendant can bring itself within rule 44.14(1) , then it can recover its costs."

76. None of these policy objectives, says Mr Carpenter, are imperilled in any way by an order that BBK pay the Defendant's costs of the assessment process. The Claimant remains fully protected. It is no part of the policy behind QOCS that claimants' solicitors should be allowed a "one-way bet" when it comes to assessment of their costs, so that challenges and appeals can be pursued which, if successful, would result in an increase in the recoverable costs and payment of their costs by the Defendant, but in the event of failure cost them nothing except their own outlay.

77. Claimants' solicitors should be encouraged to accept reasonable offers on costs just as their clients are encouraged to accept reasonable offers on damages. To free BBK from the risk of an adverse costs order would put them in a better position than their own client. Had the Claimant rejected the Defendant's Part 36 offer on damages and received less at trial, under the QOCS rules the Defendant would have been entitled to set off any costs awarded to it against the damages awarded at trial. BBK claim the right to reject the Defendant's offer on costs free of any penalty whatsoever.

78. BBK do not require special protection. They are not in an asymmetric relationship with the Defendant and its solicitors. They are perfectly capable of judging for themselves what is a reasonable level of costs recovery and weighing up the risks and benefits of rejecting an offer or challenging the result on detailed assessment.

79. Granting this application will not make it more likely that solicitors will be exposed to adverse costs orders where the underlying claim fails. In that scenario, absent something unusual, the claimant will be the real party.

80. Nor will granting the application imperil access to justice. This is a baseless assertion. BBK operate in a competitive market. They did not have to offer an arrangement which gave the Claimant no interest in the costs assessment. They did so presumably in order to attract business. The purpose of QOCS is not to protect claimants' solicitors' commercial interests. There is no evidence from which the Court could conclude that ordering solicitors to pay costs in these circumstances will cause them to cease offering their services to claimants.

81. Furthermore, it is unlikely that a costs order in this case would give rise to any different outcome from what would have happened before QOCS in a case where solicitors acted under a CFA lite. In circumstances where only the solicitors had an interest in the outcome of the assessment, it is highly unlikely that they would have visited an adverse costs order in the detailed assessment on their own client.

82. In any event, BBK's exposure to a costs order derives only from the fact that they had unrealistic expectations about their own costs recovery. All a decision in the Defendant's favour will do is deter solicitors from pursuing excessive claims for costs. If solicitors are encouraged to bring greater scrutiny to their own costs claims, that can only be a good thing.

83. Mr Carpenter submits that is a parallel to be drawn with the special pleading of litigation funders in *Excalibur Ventures LLC v Texas Keystone Inc* [2017] 1 WLR 2221. In that case, it was held that commercial funders of litigation should pay costs on the indemnity basis if the funded party was ordered to do so. At paragraph 27 Tomlinson LJ endorsed this paragraph from the judgment below:

> "I entertain some doubt that my decision will send an unacceptable chill through the litigation funding industry, whose aim is not to finance hopeless cases but those with strong merits. If it serves to cause funders and their advisors to take rigorous steps short of champerty, ie behaviour likely to interfere with the due administration of justice – particularly in the form of rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals – to reduce the occurrence of the sort of circumstances that caused me to order indemnity costs in this case, that is an advantage and in the public interest."

84. Quite apart from the financial effect on the Defendant, BBK's rejection of the Defendant's early offer on costs in this case has caused the court to devote disproportionate scarce resources to this case: a provisional assessment on 23 May 2018; around half a day for an oral rehearing of the provisional assessment before Costs Officer Kenny on 15 August 2018; an abortive appeal hearing before a Costs Judge on 14 February 2019; a further hearing before the Costs Judge on 3 May 2019 to determine issues of principle relating to the appeal which required a 14 page reserved judgment; a hearing before Stewart J on 3 December 2019 which again required a reserved judgment; and a further hearing of the substantive appeal before the Cost Judge on 16 January 2020.

85. The costs order sought by the Defendant is not intended to be punitive: it is the ordinary consequence which every litigant faces of losing litigation which was fought for their benefit. In concluding that it is just to make the order sought by the Defendant, the Court is perfectly entitled to take into account its wish to discourage what has happened

in this case and that not making such an order may only encourage similar conduct in other cases.

Whether to make an NPCO: BBK's Submissions

86. Mr Mallalieu argues that it was no part of (and was never suggested in) the Jackson reforms or the policy behind the introduction of QOCS that one of the effects of QOCS should be to shift, in whole or part, the liability for costs of any part of personal injury proceedings from Claimants to their solicitors. Rather, the intention was to remove that liability (in most circumstances) in return for defendants being relieved of the obligation to pay ATE premiums and to enhance access to justice.

87. The Defendant's application is, he says, a transparent attempt to circumvent what it perceives to be the unsatisfactory operation of the QOCS rules as drafted; hence the attempt to reinterpret CPR 44.16 as changing the basis upon which an NPCO can be made.

88. In *Flatman v Germany* [2013] EWCA Civ 278, [2013] 1 WLR 2676 the Court of Appeal addressed the question of whether a High Court judge had been right to order a Claimant to disclose how proceedings had been funded for the purposes of a potential application by defendants for an NPCO. It was said that the unsuccessful claimants were impecunious; their claims had been funded by CFAs; no ATE had been taken out; and the solicitors had apparently funded disbursements and stood to claim substantial fees if the claim had been successful.

89. The appeals were dismissed, but only because information had, since the hearing below, emerged regarding the solicitors' conduct in one of the cases which suggested that they had pressed on with litigation without insurance, contrary to instructions, in circumstances where they might have recovered substantial costs.

90. Leveson LJ, giving the leading judgment, considered and put into context the dicta of Dyson LJ in *Myatt v National Coal Board* referred to above, observing (at paragraph 32) that the case required consideration of what, in the context of a CFA, the normal role of a solicitor is or should be.

91. He found that the statutory conditional fee regime permitted a solicitor to agree with a client that the solicitor would fund disbursements on behalf of the client on the basis that the costs of the disbursements would be recovered from the other side if the claim succeeded, but would not be recovered from the client if the claim failed. A solicitor who funded a client's disbursements in that way was not acting in circumstances which were outside the ordinary run of cases and would not, without more, be the real party to the litigation. At paragraph 45 of his judgment he concluded:

> "…the legislation does visualise the possibility that a solicitor might fund disbursements and, in that event, it would not be right to conclude that such a solicitor was 'the real party' or even 'a real party' to the litigation."

92. Leveson LJ noted that arguments in relation to such matters were likely to persist after the introduction of the changes to the costs regime introduced by LASPO and in particular (at paragraph 2 of his judgment) that:

> "…they may become more acute if defendant's insurers can undermine the principle of one-way costs shifting…by pursuing solicitors acting for the claimant who fails"

93. He also observed at paragraph 46 that solicitors are entitled to act on a normal fee or conditional fee for an impecunious client whom they know or suspect will not be able to pay their own or their opponent's costs, without the risk of being exposed to an NPCO, a principle restated at paragraph 37 of his judgment in *Heron v TNT (UK) Ltd* [2013] EWCA Civ 469, [2014] 1 WLR 1277.

94. The same, crucial, principle was, says Mr Mallalieu, referred to in *Hodgson v Imperial Tobacco* [1998] 1 WLR 1056 at 1067;

> "… Just as in the *Tolstoy-Miloslavsky* case it was made clear that it is in the public interest and perfectly proper for counsel and solicitors to act without fee, so it must now be taken to be in the public interest, and should be recognised as such, for counsel and solicitors to act under a C.F.A. There are no grounds for treating the party who is or has been represented under a C.F.A. differently from any other party. The same is true of their lawyers. We can conceive of situations where the means of a party can be relevant. But absent an application, properly founded and raised, putting in issue the validity or the contents of the CFA, we cannot see that its terms are of any relevance…
>
> What we intend to make clear is that lawyers acting under CFAs are at no more risk of paying costs personally than they would be if they were not so acting."

95. In *Tinseltime Limited v Roberts* [2012] EWHC 2628 (TCC) HHJ Stephen Davies, sitting as a judge of the High Court, considered whether or not a solicitor who takes on a case for an impecunious claimant under a CFA, with no ATE in place, and who agrees to fund the disbursements necessary to enable the case to proceed, thereby constitutes himself a non-party funder and renders himself liable to an NPCO. Refusing to make such an order, he observed, at paragraphs 56 and 57 of his judgment:

> "(1) The starting point in any case must be the first principle stated by Lord Brown in *Dymocks*, namely that the ultimate question is whether in all the circumstances it is just to make a non-party costs order, that this is a fact-specific enquiry, and that it must be recognised that in a particular case the court may have to balance a number of different considerations, some of them conflicting.
>
> (2) The starting point when considering the position of a solicitor is that it must be shown that he has in some way acted beyond or outside his role as a solicitor conducting litigation for his client to make him liable for a non-party costs order.

> (3) The starting point when considering the position of a solicitor acting under a CFA is that the fact that he stands to benefit financially from the success of the litigation, in that otherwise he will not be able to recover his profit costs or his success fee, does not of itself mean that he has acted in some way beyond or outside his role as a solicitor conducting litigation for his client.
>
> (4) The starting point when considering the position of a solicitor acting under a CFA who has agreed to fund disbursements under the CFA should be no different from the case of a solicitor who has not, since both arrangements are permitted and are regarded as meeting a recognised legitimate public policy aim. The position is no different where the solicitor knows that the client is impecunious and that there is no ATE policy in place; that is because acting for clients who are impecunious does not take the solicitor outside his role as such and, indeed, it is consistent with the recognised public policy aim of promoting access to justice, and because there is no obligation on a solicitor acting under a CFA to ensure that ATE insurance cover is in place when his client is impecunious.
>
> … It follows, in my judgment, that there must be something beyond this combination of factors by themselves which would render it just to make a non-party costs order in such circumstances. Whilst it is unrealistic to seek to identify what will or will not be sufficient in any individual case, I do consider that in the majority of cases there will be present either some financial benefit to the solicitor over and above the benefit which he can expect to receive from the CFA, or some exercise of control of the litigation over and above that which would be expected from a solicitor acting on behalf of a client, or some combination of both."

96. Mr Mallalieu submits that the authorities referred to above establish that whilst the key "gateway" issue remains whether the solicitor can be described as the (or perhaps "a") real party to the litigation, in the context of an NPCO application (as opposed to say a wasted costs application) the key issue will be whether the solicitor was "acting outside the role of a solicitor", and a solicitor doing no more than the relevant funding legislation permits will not usually be so acting.

97. "CFA lite" arrangements are a well-established and permissible form of funding and a permissible inroad into the indemnity principle. So too are CFAs, like that between the Claimant and BBK, where the client has a residual liability, but such liability is capped.

98. In order for such a permissible funding regime to work, it is fundamental that in successful claims the between the parties costs may be recovered from the opponent. If they cannot be, the very essence of the "no win-no fee" funding regime, incorporating the expectation that in the event of success the majority of the fee for winning will be paid by the opponent, would be disrupted. "CFA lites" would simply be unworkable.

99. Similarly, capped CFAs would cease to function effectively since the only reason such caps can be offered is in the expectation that all or the majority of the costs in a successful case will be recovered between the parties.

100. Given the nature of CFA lites and capped CFAs it can properly be said that claimants with the benefit of such arrangements may have no, or only a limited interest in the resolution of costs or the detailed assessment process, but it is inherent that the between the parties costs awarded to the Claimant will be recovered in their name.

101. In seeking to recover those between the parties costs from a defendant in a claimant's name, a claimant's solicitors are doing no more than is both permitted by and is inherent in the core functioning of the relevant legislation. That is what BBK have been doing, and they cannot therefore be said to be "acting outside the role of a solicitor" for the purposes of an NPCO.

102. It is well known that arrangements such as CFA lites represent a form of legal fiction, permitted and widely used in order to enhance access to justice. It is a (and probably the) core part of that legal fiction that the costs are recovered in the client's name in permissible circumvention of the indemnity principle despite the client's lack of a conventional liability for such costs.

103. On a detailed assessment between the parties in such a case, the outcome cannot be of any benefit to the Claimant at all, in a narrow sense. Despite that, there is no recorded case (as far as the Respondent is aware) where a solicitor has been held liable for an NPCO, whether in a successful or unsuccessful case and whether in relation to the substantive proceedings or otherwise, simply by virtue of acting on a CFA lite.

104. With capped CFAs, the fiction is similar but less stark. The client does have a liability over and above the recovered between the parties costs, but that liability is limited and depending on the facts the relevant cap may be reached, as it has here, so that greater or lesser recovery of base costs between the parties will again make no immediate difference to the Claimant's liability.

105. There is no greater warrant in such a case for treating the solicitor as the "real party" than in a CFA lite case. In both cases, the solicitor is not acting outside the role of the solicitor. The solicitor is rather doing that which is at the very heart of such funding arrangements if they are to work at all, which is seeking to recover the between the parties costs.

106. If the premise of the instant application is correct, it would apply to every case where a solicitor was acting on a CFA lite, or a capped CFA, and even every case where the claimant was publicly funded, given that solicitors acting in public refunded cases depend heavily for their remuneration upon recovery from the opponent. In all such cases the success of any between the parties assessment will ultimately benefit the solicitor, not the client.

107. The Court of Appeal has repeatedly held that lawyers acting under CFAs are at no more risk of paying costs personally than they would be if they were not so acting. It is inherent in some of the most common CFAs that when the time comes for recovering the costs of so acting the client may have no direct interest in the question of how much is recovered. The principle repeatedly emphasised by the Court of Appeal will not be preserved if, in each such case, the solicitors are personally at risk of an adverse costs order.

108. As to causation, Mr Mallalieu submits that the requirement for a causal link between the factor identified as being said to support the making of an NPCO and the costs claimed is identified in many cases, perhaps most particularly *XYZ v Travelers Insurance Co Ltd* [2019] UKSC 48, [2019] 1 WLR 6075 and *Goknur* (at paragraphs 40(g) and 64).

109. The factor said by the Defendant to support the making of an NPCO against BBK is that the Claimant had no continuing interest in the benefit of higher costs recovery because his costs liability to BBK was capped. It is the capping of the costs liability, and therefore the financial interest in the assessment and appeals being said to be entirely BBK's, that is said to be key. Absent the effective limiting or capping of a client's liability by CFA lite or, as here, by a cap by reference to a percentage of damages, the client would have a direct financial interest.

110. There is nothing in this case to suggest that the advice to the client would have been any different in those circumstances or that the same processes – with the same costs – would not have been followed. "But for" what is said to be the key factor (the limit on the client's liability) the same costs would have been incurred.

111. Neither the costs of the assessment and appeals in this case nor those in similar cases would have been avoided. No causative basis for making an NPCO can therefore be made out.

112. The effect of applications of this type by defendants being successful will, says Mr Mallalieu, either be to inhibit solicitors from using CFA lites or capped CFAs in the future (and thereby inhibiting access to justice) or to drive such solicitors to ensure that Claimants at all times retain a liability for costs (even if there is in due course some form of waiver). It will not prevent the costs of between the parties costs recovery being incurred. It will simply be to make the client's position in relation to costs recovery less clear cut and well protected.

113. BBK were unsuccessful in recovering costs in greater sums than the Defendant had offered, but absent a wasted costs application and the necessary attendant allegation that BBK were acting unreasonably, improperly or negligently (which has never been alleged), there is no basis for imposing an NPCO simply by virtue of the fact that points were robustly, but unsuccessfully pursued.

114. Mr Mallalieu points out that the appeal to Stewart J was brought on a point of principle with the permission of this court and by definition cannot be said to have been brought without merit or unreasonably. In fact the appeal might be thought to have provided some helpful guidance in the relevant area.

115. The appeal from the assessment by Costs Officer Kenny to this Court primarily related to the same issue. Insofar as it related to the substance of the provisional assessment and hourly rates, there is no basis for any suggestion that the bringing of the appeal could justify a CPR 44.11 order.

116. Nor, at any point of the proceedings in respect of which the Defendants seek an NPCO against BBK, has there been any application for, or even any suggestion of an application for, either indemnity basis costs or an order under the misconduct provisions of CPR 44.11. BBK simply advanced reasonably pursued, but ultimately unsuccessful,

arguments in the course of a between the parties assessment seeking to maximise the Claimant's recoverable costs under terms of settlement between the parties.

117. Even if, on a simple factual analysis, BBK was said to have a financial interest in the outcome of the detailed assessment proceedings and therefore, on a narrow basis, a party or the real party, it would not be just in all the circumstances to make such an order since to do so would be contrary to the public interest in promoting access to justice by allowing the proper functioning of funding arrangements such as capped CFAs and CFA lites.

118. As for the lack of any warning to BBK, In *Myatt v National Coal Board*, even though the Court concluded (at paragraph 13) that it was unlikely that a warning would have made any difference, the Court nevertheless took into account the fact that a failure to warn the solicitors at an early stage had denied them a reasonably opportunity to at least consider the position and the solicitors were only ordered to pay 50% of the relevant costs.

119. Here, not only was there no such warning, but BBK was doing no more than seeking to maximise between the parties costs whilst acting on a capped CFA, like thousands of solicitors before them. Absent a specific warning BBK had no prior opportunity to consider that they might be subjected to such an unusual application.

120. Nor, unlike the solicitors in *Myatt v National Coal Board*, were they in a position where a substantial part of their income in other cases depended on the outcome. With proper warning, the points upon which they were unsuccessful might not have been pursued at all. To the extent that potentially interesting points of principle arose, a decision might have been made to pursue them on other cases or not at all.

121. Mr Mallalieu also raises the issue of delay. The *Ho* judgment was 6 October 2021 and the effect of the judgment was communicated by BBK to the Defendant on 8 October 2021 (although, given its significance, one might have expected them already to be aware of it). The application was filed over five months later, on the 15th March 2022.

122. The Defendant's explanation is that time was required to take advice from counsel. All that *Ho* established was that the Defendants were not going to be able to able to settle their costs off against the Claimant's. *Ho* had no bearing on the principles of NPCOs. Its only apparent bearing was on whether the Defendant was going to seek an NPCO, not on the merits of any such application.

123. The Defendant could and should therefore have been in a position to move promptly after the *Ho* judgment. Even if it could justify waiting to seek counsel's advice until that judgment was handed down, that cannot reasonably explain the period of delay. The Defendant must have known that delay was a material factor in relation to an application of this type, and should therefore have provided instructions promptly and, as far as necessary, pressed counsel for a response.

124. BBK asked the Defendant on 8 October 2021 whether they intended to apply for an NPCO. The Defendant did not notify BBK of the intended application until 7 January 2022; BBK made it clear, on 20 January 2022, that it would not agree to pay the costs awarded to the Defendant against the Claimant; and the application was not filed for nearly another two months.

125. Should the court find that the 'real party' test is made out, Mr Mallalieu submits that it would be unjust to make an NPCO against BBK. No such order should be made, or if made should be very limited in scope. The lack of advance warning and the subsequent delay are highly material factors which should either strongly weigh against the making of any order that might otherwise have been made, or at least severely mitigate the scope of any such order.

126. In summary, Mr Mallalieu says that this application is an attempt to go behind the robust protection from NPCOs that the higher courts have repeatedly indicated should be provided to solicitors properly acting on legitimate funding arrangements such as CFAs.

127. It fails to even attempt properly to tackle the key question of whether BBK can be said to have been acting outside the normal role of a solicitor. They plainly have not (or if they have, so too have many other firms of solicitors for many years).

128. It is transparently clear that this application is no more than an attempt to go behind the protection of QOCS in precisely the way that Leveson LJ was concerned might happen when giving judgment in *Flatman*. If, contrary to his primary submissions, the Court where to conclude that the threshold and causation hurdles had been satisfied then, for the reasons given, applying the overall test of justice either no order or only a very limited order should be made.

Whether to make an NPCO: Conclusions

129. I believe that it is important (as Mr Mallalieu, in oral submissions, emphasised) not to lose sight of the distinction between a claim for damages and the costs attendant on making that claim. This is not a stand-alone claim for costs. Notwithstanding some unusual aspects, I have been dealing, in the usual way, with nothing more than the assessment of the Claimant's costs, as recoverable under a court order following settlement of the Claimant's claim for damages for personal injury. One has to judge the NPCO application in that context.

130. In his judgment in *Myatt v National Coal Board*, Lloyd LJ observed (at paragraph 23) that the relevance of the court's decision in that case to make a NPCO against a firm of solicitors was limited to cases where the issue is as to the enforceability of a CFA. He further observed (at paragraph 27) that the circumstances that had persuaded the court to make such an order could be

> "common in relation to cases where the enforceability of a CFA is at stake but would be most unusual in any other situation."

131. Mr Carpenter rightly says that Lloyd LJ did not exclude the possibility of such an order being made where the enforceability of the CFA is not an issue, only that it would be "most unusual". He also points out that it is not a precondition to an NPCO that a case in itself be exceptional. The point is rather (as I understand it) that an NPCO is itself exceptional, in that the occasion for making such an order will only arise outside the ordinary run of cases.

132. The Defendant's case is based upon the premise that the key question, in that context, is not whether a solicitor has been acting outside the role of a solicitor but rather whether the solicitor is the (or a) "real party".

133. I do not think that the two questions can so easily be separated. It is in my view clear from *Flatman v Germany* first that a solicitor cannot be said to be acting outside the role of a solicitor if the solicitor is doing no more than the legislation pertaining to CFAs renders lawful, and second that in such circumstances it would not be right to conclude that the solicitor is "the real party" or even "a real party" to the litigation. It seems to me that those principles, in particular, preclude the making of an NPCO in this case.

134. It is not suggested that the capped CFA entered into between the Claimant and BBK in any way fails to comply with legislative requirements. Any solicitor for a successful personal injury client will have to address the recovery of costs. If acting under a CFA lite or a capped CFA that solicitor may well be pursuing the costs of the claim largely, if not exclusively, for the solicitor's own benefit.

135. It may also be the case that because of QOCS, any adverse costs orders made as a result of that solicitor's efforts to maximise costs recovery will not be enforceable against the solicitor's client. That is a consequence of the QOCS regime. It does not follow that the solicitor should pay instead.

136. I think that Mr Mallalieu must be right in saying that if BBK is properly open to an NPCO because of the way in which it has managed these assessment proceedings, then so would be any solicitor who acts under a CFA lite (and many solicitors acting under a capped CFA) where costs orders are made against their clients in the course of the assessment of their clients' costs. That, on the Defendant's case as I understand it, would be so whether QOCS applies or not, and it would be contrary to the principles emphasised in *Flatman v Germany*, *Tinseltime Limited v Roberts* and *Hodgson v Imperial Tobacco Ltd*.

137. Another point made by Mr Mallalieu is that there is no good reason to suppose that BBK has acted any differently in the conduct of the detailed assessment proceedings in the SCCO, and on the appeal before Stewart J, than it would have done had the Claimant had a direct financial interest in the outcome of either the detailed assessment of the appeal.

138. Some of the points taken by BBK in the course of the detailed assessment proceedings surprised me, but I have no reason that to suppose they would not have been taken in any event. As Mr Mallalieu says it has never been suggested that anything BBK has done would merit a wasted costs order, an order under CPR 44.11 or even an order for indemnity costs.

139. That to my mind supports Mr Mallalieu's causation argument. It also justifies the conclusion that BBK has, in attempting unsuccessfully to maximise the Claimant's cost recovery and to beat the Defendant's offer, been doing no more than any solicitor might do who is acting under any CFA lite or capped CFA.

140. It may well be, as Mr Carpenter says, that the operation of the QOCS rules as clarified by *Cartwright v Venduct Engineering Ltd* and *Ho v Adelekun* confers an indirect benefit upon BBK, or any other solicitor acting under a "CFA lite" or capped CFA

arrangement, in that they can pursue the costs of the claim at less financial risk than before QOCS was introduced. That would be because before QOCS they would, in the course of the detailed assessment proceedings have borne the cost of any adverse costs orders themselves rather than passing them on to their client. Now, absent an NPCO, they may risk only their own costs and expenses. That, again, is however just a consequence of the way the QOCS regime works.

141. It also seems to me that Mr Mallalieu is right in saying that that the reasoning behind the Defendant's application would if accepted also justify an application against solicitors acting for a party supported by legal aid. Mr Carpenter argues that the position as regards a legally aided party is different, because a defendant will, in accordance with *Lockley v National Blood Transfusion Service* [1992] 1 WLR 492, be able to set off against any damages or costs due to a legally aided claimant, the amount of any costs awarded to the defendant.

142. That does not seem to me to be quite to the point. I appreciate that the Defendant's inability (thanks to QOCS) to set off its own costs against the costs and damages recoverable by the Claimant has prompted this application. Regardless of that, however, a solicitor for a legally aided claimant seeking to recover costs could on the Defendant's case properly be characterised as "the real party". An application for an NPCO against such a solicitor might be less likely, but it would be perfectly possible, and again I do not think that that could be consistent with the policy embodied in the authorities to which I have referred.

143. I also accept that BBK has a point with regard to access to justice. Mr Carpenter points out that I have been offered no evidence to support the proposition that CFA lites and capped CFAs are in common use, but I do not think that I need such evidence. My experience as a Costs Judge informs me that they are in widespread use, in particular in cases to which the QOCS regime applies.

144. That to my mind is significant. That is not just because to make the order sought by the Defendant would discourage firms such as BBK from offering arrangements to clients which are beneficial to the clients themselves; which do promote access to justice; and which (bearing in mind the observations of Sir Geoffrey Vos MR in *Belsner v CAM Legal Services Ltd* [2022] EWCA Civ 1387) will in many cases clearly be preferable to an uncapped arrangement.

145. It is also because if an NPCO could be justified whenever a costs order is made against the client of a solicitor pursuing costs under a CFA lite or capped CFA, merely because the client has no significant stake in the recovery of costs, then NPCOs would not be exceptional. They would become routine.

146. Although not strictly necessary, I will briefly address the questions of warning and delay raised by Mr Mallalieu. As Mr Carpenter says, I have seen no evidence to support the proposition that, if warned in good time about the possibility of an NPCO being made, BBK would not have pursued their unsuccessful attempt to improve upon the Defendant's costs offer of September 2017 . It does seem to me however that in circumstances where a solicitor acting under a CFA lite or a capped CFA is doing no more than, in the usual way, attempting to maximise cost recovery it would be incumbent upon a defendant to notify them of any intention to seek an NPCO, and that failure to do so could be significant.

147. As for delay, again it seems to me that this application should have been pursued more promptly, although in the absence of any real prejudice to BBK I would probably not have attached a great deal of weight to that.

148. In any event, for the reasons I have given, I am not satisfied that in the circumstances of this case it would be just or consistent with established authority to make an NPCO against BBK. The application will be dismissed.