Neutral Citation Number [2024] EWHC 1315 (SCCO)
Case No: B0YMY739

SCCO Reference: SC-2021-BTP-000973

IN THE SENIOR COURTS COSTS OFFICE
FROM THE COUNTY COURT AT BATH

Thomas More Building, Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/05/2024

Before:

COSTS JUDGE LEONARD

- -

Between:

Ms YVETTE THOMAS	**Claimant**
- and -	
SOUTHWICK CAR CENTRE LTD	**Defendant**

- -
- -

Jacqueline A. Perry KC (instructed by **Harding Mitchell Solicitors**) for the **Claimant**
Simon Teasdale (instructed by **DWF Law LLP**) for the **Defendant**

Hearing date: **21 February 2024**

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Approved Judgment

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

.....

COSTS JUDGE LEONARD

Costs Judge Leonard:

1. I am dealing with the assessment of costs payable by the Claimant to the Defendant under orders for costs made on 9 June 2017 and 8 January 2021.

2. The parties have agreed that I should determine, as a preliminary issue, the question of whether the Claimant has the protection of the Qualified One-Way Costs Shifting ("QOCS") regime introduced to the Civil Procedure Rules ("CPR") on 1 April 2013.

3. Strictly speaking, the application of QOCS is a matter for enforcement rather than assessment. Because however a finding in the Claimant's favour could render further detailed assessment proceedings pointless, the parties have agreed that it would be appropriate for me to determine the issue.

4. The QOCS regime was introduced on 1 April 2013, along with changes in the law which had the effect (with specified exceptions not relevant for present purposes) of excluding "additional liabilities" from the costs and expenses that can be awarded by a court.

5. Additional liabilities include a success fee under a Conditional Fee Agreement ("CFA") and the premium for an "After the Event" ("ATE") insurance policy taken out by a claimant to cover the financial consequences of an unsuccessful claim. Cover typically extends to irrecoverable expenses and liability for a defendant's costs.

6. Transitional provisions provide for the continued recovery of additional liabilities where a CFA was entered into or an ATE policy taken out by a claimant before 1 April 2013. Such arrangements are referred to in the CPR as "a pre-commencement funding arrangement". Claimants who have entered into a pre-commencement funding arrangement are still eligible to recover success fees and ATE premiums against an unsuccessful opponent under a court's order for costs.

7. Personal Injury claimants who have not entered into a pre-commencement funding arrangement, whilst unable to recover any additional liabilities, will instead enjoy a degree of protection from the enforcement of adverse costs orders under the QOCS regime. This protection extends retrospectively to costs incurred before 1 April 2013: *Wagenaar v Weekend Travel Ltd* [2015] 1 W.L.R. 1968.

Statutory Provisions

8. These are the relevant provisions for present purposes.

9. The rules governing the QOCS regime are at CPR 44.13 to CPR 44.17.

10. CPR 44.13, at (1) and (2), provides:

> "This Section applies to proceedings which include a claim for damages… for personal injuries… 'claimant' means a person bringing a claim to which this Section applies…"

11. CPR 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… costs and interest made in favour of the claimant."

12. CPR 44.15 and 44.16 provide for exceptions to the protection offered by QOCS. CPR 44.15 is not relevant in this case. CPR 44.16(1) provides:

> "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."

13. Under the heading "Transitional Provision", CPR 44.17 reads:

> "This Section does not apply to proceedings where the claimant has entered into a pre-commencement funding arrangement (as defined in rule 48.2)."

14. CPR 48 incorporates the transitional provisions which permit the continued recovery of additional liabilities under pre-commencement funding arrangements. CPR 48.1(1) reads:

> "The provisions of CPR Parts 43 to 48 relating to funding arrangements… will apply in relation to a pre-commencement funding arrangement as they were in force immediately before 1 April 2013, with such modifications (if any) as may be made by a practice direction on or after that date."

15. CPR 48.2:

> (1) A pre-commencement funding arrangement is—
>
> (a) in relation to proceedings…
>
> (i) a funding arrangement as defined by rule 43.2(1)(k)(i) where –
>
> (aa) the agreement was entered into before 1 April 2013 specifically for the purposes of the provision to the person by whom the success fee is payable of advocacy or litigation services in relation to the matter that is the subject of the proceedings in which the costs order is to be made; or
>
> (bb) the agreement was entered into before 1 April 2013 and advocacy or litigation services were provided to that person under the agreement in connection with that matter before 1 April 2013;
>
> (ii) a funding arrangement as defined by rule 43.2(1)(k)(ii) where the party seeking to recover the insurance premium took out the insurance policy in relation to the proceedings before 1 April 2013…"

16. The references, at CPR 48.2 to rule 43.2(1)(k) are to that rule as in force before April 2013. The relevant definitions are:

> "… "funding arrangement" means an arrangement where a person has—
>
> (i) entered into a conditional fee agreement or a collective conditional fee agreement which provides for a success fee within the meaning of section 58(2) of the Courts and Legal Services Act 1990;
>
> (ii) taken out an insurance policy to which section 29 of the Access to Justice Act 1999 (recovery of insurance premiums by way of costs) applies…"

17. Section 29 of the Access to Justice Act 1999, as in force before April 2013, reads:

> "Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy."

18. Section 58 of the Courts and Legal Services Act 1990 reads:

> "(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but… any other conditional fee agreement shall be unenforceable.
>
> (2) For the purposes of this section…
>
> (a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances;
>
> (b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances…"

19. Section 119 of the 1990 Act provides definitions which include the following:

> "*"litigation services"* means any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right to conduct litigation in relation to any proceedings, or contemplated proceedings, to provide;

20. This definition is supplemented by section 58A(4) of the 1990 Act:

> "In section 58… (and in the definitions of "advocacy services" and "litigation services" as they apply for their purposes) "proceedings" includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated."

The History of the Claim

21. Each of the parties has provided witness evidence with regard to the QOCS issue. Much of the history of the Claimant's claim is set out in a witness statement of Mr Tim Marshall dated 27 September 2023, with supporting exhibits. Other details can be found in the narratives to bills of costs produced by the Defendant for the purposes of the assessment of the Defendant's costs, and in a chronology supplied by the Defendant. None of the procedural history appears to be in issue.

22. I do not have any witness evidence from the Claimant herself. A witness statement from Mr Kalilou Fadiga, her solicitor, does not take issue with Mr Marshall's account of events but rather with the conclusions Mr Marshall invites the Court to draw from them.

23. The witness evidence filed by both parties is incorporated in an agreed hearing bundle, produced in accordance with directions given on 30 October 2023, which provided for service at least 28 days before the hearing. Nonetheless, the day before the hearing, the Claimant produced a short supplemental bundle of documents. No objection was taken to my considering those documents, but Mr Teasdale for the Defendant has pointed out that they are not exhibited to any witness statement, nor do they offer a complete record of the events to which they relate.

24. In 2012, the Claimant instructed Wilkin Chapman LLP ("WCL") to pursue a claim for personal injury against the Defendant. The essence of the claim was that on 31 May 2012, the Claimant, whilst a lawful visitor to the Defendant's premises, was stepping over a hosepipe when an employee of the Defendant lifted it, causing her to trip, fall and sustain injuries.

25. It is not in issue that WCL acted for the Claimant on the understanding that they did so under the terms of a CFA (the actual status of that CFA is discussed below). A copy of the CFA in question ("the August 2012 CFA") is included in the supplemental bundle. It is dated 3 August 2012. The subject matter is an action for damages against the Defendant. The specified accident date is 31 May 2012.

26. The first page of the August 2012 CFA starts with the words:

> "Conditional Fee Agreement… This Agreement is a legally binding contract between you and your solicitor. The Conditions are part of the Agreement. Before you sign, please read everything carefully."

27. At the bottom of the first page of the CFA are signatures which appear to be those of a representative of WCL and of the Claimant. Just underneath that is a notice of the right to cancel in writing within 7 days. The remainder of the CFA appears to comprise three pages of terms and conditions incorporating a success fee of 100% and terminating in a detachable cancellation notice, which incorporates a warning that the notice does not extend to any contract of insurance that the Claimant may have taken out.

28. On 20 October 2012, WCL (then "Wilkin Chapman Grange") wrote a formal letter of claim to the Defendant. The letter, accompanied by an extra copy for use by the Defendant's insurers, set out the detail of the allegation that the Defendant, on 31 May 2012, caused the Claimant to sustain injury, along with details of the alleged injuries. It requested documentation such as accident book entries.

29. The letter incorporated the following information:

> "Please note that this claim is supported by a Conditional Fee Agreement which provides for a recoverable success fee within the meaning of section 58(2) of the Courts and Legal Services Act 1990.
>
> Furthermore the Claimant has taken out a legal expenses policy with a recoverable premium which has been provided by ARAG plc on behalf of Brit Insurance Ltd, 9 Whiteladies Road, Clifton, Bristol BS8 1NN.
>
> The policy number is 802410 and the policy is dated 10th October 2012. The policy premium is staged. This policy provides indemnity of £100,000."

30. The Claimant's claim was issued in the County Court on 28 May 2015, but not I understand served until 21 September 2015, along with a notice of funding in standard form N251, dated 12 June 2015.

31. The Notice of funding stated that the claim was being funded by a CFA dated 1 October 2012 which provided for a success fee, and by an ATE policy with Brit Syndicate at Lloyds, ARAG plc dated 10 October 2012, with £100,000 cover and a staged premium.

32. I would make some brief observations at this point. First, the stated date of the CFA in the Notice of Funding would appear to have been an error, given that the CFA was actually entered into in August 2012.

33. Second, the information incorporated in WCL's letter of 20 October 2012 and in the Notice of funding evidences compliance by the Claimant with requirements of the CPR (preserved by transitional provisions) to the effect that a defendant has to be given notice of recoverable additional liabilities as early as possible, and again on the service of proceedings.

34. The point of those provisions is to ensure that a defendant is on notice, from the earliest possible stage, of the fact that should the claim be successful, the defendant is likely to have to bear the burden of the additional liabilities. Failure to give due notice can result in the loss of the right to recover them, reflecting the fact that the defendant has not had the opportunity to factor those additional liabilities into the risks attendant upon defending the claim.

35. The Claimant terminated WCL's retainer on 21 December 2016. According to a narrative in a decision of the Financial Ombudsman Service ("FOS") which would appear to date from about April 2018 and to which I shall refer in more detail below, she subsequently instructed direct access counsel, Mr Wayne Lewis, who represented

her at trial. Although I have no details, it would appear that Mr Lewis acted under a CFA.

36. The Claimant's personal injury claim was heard by District Judge Goddard on 16 and 17 May 2017. DJ Goddard gave a judgment dismissing the claim, which was circulated on 31 May 2017 but formally handed down on 9 June 2017.

37. Among DJ Goddard's findings were that the Claimant and her cousin, Ms Daley, had together "made up" (in other words, invented) a claim for over £11,000 for care and assistance (advanced at trial at a figure of just £873.10); that the Claimant and Ms Daley had both been untruthful about that claim; that Ms Fraya Jones, a very close friend of the Claimant's daughter and the only person who claimed to have witnessed the Claimant's fall on 31 May 2015, was not telling the truth and had not witnessed the fall; that this untruthful evidence could only have come about in consequence of the Claimant and Ms Jones "putting their heads together"; that the Claimant had exaggerated the extent of her injuries; and that the Claimant had been untruthful about a claim for loss of earnings which, at its highest, had been put at nearly £100,000.

38. As to the alleged accident, DJ Goddard said:

> "In my judgment the case that Mrs Thomas puts forward simply does not add up. I do not find her story in any way believable notwithstanding that she may well have by now convinced herself that what she said happened did happen. I am sure that something happened on the 31st May 2012 at the garage that subsequently caused Mrs Thomas to put forward a version of events and consequentially a claim but the evidence before the court does not support what she now alleges…
>
> The evidence of Mrs Thomas, her cousin, her son, her daughter and her daughter's best friend has in my judgment been tailored and shaped, not very cleverly, to fit the claim that Mrs Thomas now pursues. As I have said something happened on that day that caused Mrs Thomas to come up with a version of events that, on a hearing of the evidence, is quite implausible. It was not a pre thought out plan. The story put to the court germinated on that day and was elaborated upon over the months and years that followed…
>
> The consequence of my findings is that the claim must be dismissed in its entirety…
>
> I will ask the court office to send out this judgment by e-mail and in the post and for the purposes of any applications or time limits I shall formally hand the same down on Friday the 9th June at 12 noon. I would not expect any attendance on that date. I have avoided saying anything on the issue of costs. If either party were minded to make any application in respect of the same then such should be on notice."

39. On 9 June 2017 DJ Goddard, who had (as he had said in his judgment) not been expecting anyone to attend the handing-down, did hear from the parties: Mr Lewis for the Claimant and Mr Marshall for the Defendant.

40. A transcript of the proceedings records Mr Lewis' explanation to the effect that the primary purpose of his attending was to seek permission to appeal, with which application most of the hearing was taken up and which was refused. It also records that Mr Lewis had not come prepared to argue about the basis (standard or indemnity) upon which costs should be awarded, given that DJ Goddard had stated in his judgment that this should be the subject of an application on notice. The pertinent part of the transcript reads:

> "JUDGE GODDARD:… I purposely have not addressed costs because I wanted to see where you were on costs. I think I saw an email - 1 guess it was from your side, Mr. Marshall - saying it is not a QOCS case.
>
> MR. MARSHALL: That is correct, Sir, yes.
>
> JUDGE GODDARD: Is that right? It is not a QOCS case.
>
> MR. LEWIS: It is not a QOCS case but it is something that I understood from your order that it was to be on notice so I was not prepared for that today, the costs application and the costs arguments. So I—
>
> JUDGE GODDARD: Right. So shall we just deal with your application for permission to appeal?..."

41. DJ Goddard did, in fact, address the incidence of costs, which does not appear to have been in issue. His order of 9 June 2017 provided for the claim to be dismissed; for the Claimant to pay the Defendant's costs of the action, "the basis of the same, indemnity or standard to be dealt with as a preliminary issue at any detailed assessment if not agreed…"; for the Claimant to make a payment on account of £20,000; and for permission to appeal be refused.

42. The Defendant took enforcement proceedings and initiated the detailed assessment of the costs awarded the 9 June 2017. The Claimant made a series of unsuccessful applications and appeals. It is not necessary to recite the full sequence of events here, other than that permission to appeal against the judgment of DJ Goddard was refused, as was an application to transfer the appeal to another appeal centre; and that unsuccessful applications by the Claimant, including for judicial review and to the European Court of Human Rights delayed the assessment of the costs payable under the order of 9 June 2017 (which, in fairness, also appears to have been delayed, from 2021, by difficulties in getting the assessment process under way).

43. In any event, on 8 January 2021 HHJ Ralton dismissed as totally without merit an application by the Claimant to adduce fresh evidence and for permission to appeal against two orders made by District Judge Byass; considered, but declined to make, a Limited Civil Restraint Order against the Claimant; ordered that the Claimant pay the Defendant's costs of a detailed assessment hearing on 15 October 2019, adjourned pending the application for judicial review); and re-confirmed an order of the December 2019 for the transfer of the case to this court, the Senior Courts Costs Office ("SCCO"), which the Claimant had previously and unsuccessfully attempted to set aside.

WCL's Claim for Costs

44. On 26 April 2017, not long before the Claimant's claim came before DJ Goddard, WCL issued a claim in the County Court against the Claimant. The claim was for legal fees of £44,908.94, with interest. The Defendant signed a statement of truth to a defence dated 26 May 2017.

45. The defence stated, inter alia, that at all material times, "the Claimant's arrangement" was subject to the August 2012 CFA; that the Claimant (having been approached in Trowbridge town centre by an agent of WCL) signed a one-page CFA, not incorporating any terms and conditions, which accordingly did not form part of the agreement; that the Claimant relied upon provisions of the August 2012 CFA to the effect that if a claim was successful, WCL expected to recover all of their fees from the Defendant, and would not charge the Claimant for items not recoverable from the Defendant; that the August 2012 CFA was subject to the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008 (as amended by provisions which do not appear to have been in effect in 2012); that the Claimant had not been given a copy of the August 2012 CFA when she signed it, and so had not been given written notice of her right to cancel, as required by the 2008 Regulations; that the August 2012 CFA, in consequence, was unenforceable; that WCL had failed to comply with the requirements of the Supply of Goods and Services Act 1982, in particular in carrying out work with reasonable care and skill within a reasonable time; and that WCL was responsible for the criticisms levelled at the Claimant by DJ Goddard. In the alternative, the Claimant relied upon the conditional element of the August 2012 CFA in support of the proposition that any right to payment that WCL might have was subject to the outcome of the trial of her personal injury claim, in respect of which at the time judgment was still awaited. The defence also intimated that professional negligence proceedings would be taken against WCL.

46. According to the Claimant's supplemental bundle, WCL responded by letter dated 3 August 2017 saying that the Claimant had changed her version of events from an initial denial that she had signed the August 2012 CFA at all, to a denial that she had received a copy; referring Mr Lewis to the reference, on the first page of the August 2012 CFA, to the fact that the accompanying terms and conditions were part of the agreement; and intimating that they would be obtaining witness evidence from the agent who had arranged for the Claimant to sign the August 2012 CFA.

47. The letter concluded with a reference to a second letter sent under separate cover "in an effort to resolve this matter". I have not seen a copy of that letter, but I am aware that WCL served a Notice of Discontinuance on 3 November 2017.

The Claimant's Complaint to the Financial Ombudsman Service ("FOS")

48. The Claimant's supplemental bundle contains a set of ARAG plc ATE insurance "Recourse" policy conditions (without a policy schedule) which I understand to represent the terms of the ATE policy taken out by the Claimant in October 2012 to cover the litigation risks of her claim against the Defendant. I shall refer to it as "the October 2012 ATE policy" (a submission by Ms Perry to the effect that it was not "signed off" until May 2015 has been withdrawn as erroneous). The policy document confirms that ARAG is an agent for a Lloyd's syndicate. In the usual way, the policy covers any order made for the Claimant to pay the Defendant's costs, and expenses other than barristers' fees.

49. The policy terms include, under the heading "your policy cover":

> Your policy only covers you during the period of insurance and provided that… you have entered into a conditional fee agreement with your solicitor or your solicitor has entered into a collective conditional fee agreement with us…"

50. Under "Significant Exclusions or Limitations" the policy terms state:

> "Your solicitor must be acting under a conditional fee agreement or a collective conditional fee agreement…"

51. In early 2018 (or possibly 2017: the chronology is not entirely clear) the Claimant complained to the FOS about the insurer's termination of cover under the October 2012 ATE policy (for the purposes of the complaint the insurer was the Society of Lloyd's). Termination appears to have been based primarily upon a purported refusal by the Claimant to accept a reasonable offer of settlement from the Defendant.

52. According to the Ombudsman's decision, the Claimant provided the FOS with a signed CFA between the Claimant and WCL: there appears to have been no suggestion in the course of the Claimant's dealings with Lloyd's and the FOS, that the CFA was in any way invalid or unenforceable.

53. The Ombudsman found that Lloyd's did not notify the Claimant in good time either of the withdrawal of cover or the reason for it, and did not give the Claimant an adequate chance to furnish them with a barrister's opinion upon the offer. Her conclusion was that Lloyd's should reinstate the policy and pay the claim, subject to the policy terms, along with the sum of £100 for distress and inconvenience.

54. My understanding is that under section 228 of the Financial Services and Markets Act 2000, acceptance by the Claimant of the Ombudsman's decision would have been binding upon both the Claimant and Lloyd's. The Ombudsman asked the Claimant to confirm acceptance or rejection of her decision by 8 May 2018.

55. As I have mentioned, I have no witness evidence from the Claimant, and there is nothing in either bundle concerning acceptance of the Ombudsman's decision by the Claimant. I was however advised on the hearing of this issue that the Claimant did accept the decision, and it would be surprising if she did not, given that it represented a complete vindication of her complaint and provided her with an indemnity against her costs liabilities to the Defendant.

The Detailed Assessment Proceedings

56. With regard to the order of 9 June 2017, the Claimant served a bill of costs and Notice of Commencement of detailed assessment proceedings on 5 December 2018. The claimed costs come to £72,098.04. The Defendant (following the issue and setting aside of a Default Cost Certificate) served Points of Dispute on 17 January 2019, to which the Defendant served Replies on 12 July 2019.

57. With regard to the order of 8 January 2021, the Defendant served its Notice of Commencement and bill of costs on 18 February 2021. The amount claimed came to

£10,649.67. The Claimant served Points of Dispute on 9 February 2021, and the Defendant served replies on 18 February 2021.

58. On 19 March 2021, the Claimant served supplemental points of dispute in relation to the Defendant's bill of costs under the order of 9 June 2017. The supplemental points of dispute raised the QOCS issue for the first time.

59. The Claimant's case on QOCS was put in this way:

> "The Claimant was led to believe she had entered into a CFA with her then Solicitors Wilkin Chapman around 31.07.12/03.08.12. However, on termination of that retainer and proceedings brought by Wilkin Chapman for recovery of fees from the Claimant, they apparently accepted there was no valid CFA at all - the CFA upon which they had sought to rely was unenforceable, therefore, null and void, ie did not exist… Accordingly, the Claimant did not enter into a pre 1 April 2013 CFA. As such the Claimant automatically has QOCS unless the provisions of CPR 44.16(1) apply, namely that the Court has made a determination that, on the balance of probabilities, the claim was fundamentally dishonest. The Court made no such determination. The Court did not accept the witness evidence so dismissed the claim, but did not find it to be "fundamentally dishonest".

60. There is no mention, in the Claimant's supplemental Points of Dispute, of the October 2012 ATE policy. The only representation I have seen on behalf of the Claimant regarding the status of that policy is an assertion made by email on 17 May 2021 by a costs lawyer who appears to have advised the Claimant before her current solicitors were instructed, to the effect that the August 2012 CFA was unenforceable and that "As such it is deemed not to exist. As a consequence of it not existing the ATE insurance that would have provided Ms Thomas with some protection fell away, too."

61. Nor was the Claimant's case in relation to either the August 2012 CFA or the October 2012 ATE policy, as put to me by Ms Perry KC for the Claimant, consistent with the Claimant's supplemental Points of Dispute. Ms Perry advised me that she was not advancing the argument that unenforceability rendered the August 2012 CFA non-existent. She advanced instead a primary case to the effect that the August 2012 CFA was never a real agreement: it was rather an "empty" or "shell" agreement under which no work was done until 2015 and which was superseded by the subsequent CFA with Mr Lewis. As the October 2012 ATE policy required that the Claimant enter into a CFA with her solicitors, and there was no valid CFA, there was no cover under the policy.

62. There is a procedural point to be made here. CPR 47 and the accompanying practice direction contain provisions which are intended to ensure that the receiving party is not unfairly "ambushed" by new points in a detailed assessment hearing. Those provisions have not been complied with by the Claimant.

63. CPR 47.14(6) provides that in a detailed assessment hearing, only items specified in Points of Dispute may be raised, unless the court gives permission. Permission to raise new points has neither been asked nor given.

64. Practice Direction 47, paragraph 13.10 provides that if a party wishes to vary Points of Dispute, an amended or supplementary document must be filed with the court and copies of it must be served on all other relevant parties. That has not been done either.

65. The Defendant does, however, appear able and ready to meet all the Claimant's arguments, and has not raised any procedural objection to my hearing them.

66. I should also mention that whilst it is not necessary here to recite in any detail the Defendant's Replies, unlike the Claimant's Points of Dispute they do refer to the October 2012 ATE policy. The Defendant says that the Defendant's solicitors were contacted by ARAG in December 2018 with an indication that "assuming all was well", ARAG "would look to settle costs" and that in August 2018, ARAG notified the Defendant's solicitors that cover had been withdrawn for breach of the policy terms. The Replies also refer to the Claimant's successful complaint to the FOS, and state that the Claimant subsequently took enforcement proceedings against ARAG plc to enforce the Ombudsman's decision, which proceedings were settled on an unknown basis.

67. I do not know the source of the information offered by the Defendant on the enforcement and settlement of the Ombudsman's decision, and I have seen no evidence to substantiate it, but it is clear from the evidence to which I have already referred that the Claimant did secure an indemnity from her ATE insurer against the Defendant's costs.

68. The Defendant also argues that the Claimant, having represented from the outset that she had the benefit of a CFA and ATE insurance policy, and in particular having informed the Defendant and the court, on 9 June 2017, that this is not a QOCS case, is estopped from now claiming the benefit of QOCS protection.

69. Given the shifting nature of the Claimant's case it seems to me that I must address every issue that may arise out of the Points of Dispute, the evidence I have seen and the submissions I have heard. The questions I have to address in this judgment are, accordingly, as follows.

    (a) Does either the August 2012 CFA or the October 2012 ATE policy, putting to one side the challenges raised by the Claimant to their enforceability or validity, appear to meet the statutory definition of a pre-commencement funding arrangement?

    (b) If so, is there any ground for concluding that either the August 2012 CFA or the October 2012 ATE policy were void or non-existent, so that it cannot be said that the Claimant entered into a pre-commencement funding arrangement?

    (c) Could any effective challenge to the enforceability (as opposed to the existence) of the August 2012 CFA or the October 2012 ATE policy mean that either or both do not meet the definition of a pre-commencement funding arrangement?

    (d) Is there such an effective challenge, either to the August 2012 CFA or the October 2012 ATE policy?

(e) If it follows from my conclusions on any of the above questions that the Claimant has QOCS protection, is the Claimant nonetheless estopped from claiming that protection?

Does the August 2012 CFA Appear to Meet the Statutory Definition of a Pre-Commencement Funding Arrangement?

70. The August 2012 CFA, on its face, meets the definition of a pre-commencement funding arrangement under sub-paragraph (aa) to CPR 48.2(1)(a)(i). It was entered into before 1 April 2013, specifically for the purposes of the provision to the Claimant of litigation services in relation to the Claimant's personal injury claim against the Defendant. It also appears to meet the definition at sub-paragraph (bb), because, as the letter of claim dated 20 October 2012 demonstrates, litigation services (falling within the broad statutory definitions I have reproduced above) were in fact provided to the Claimant under the August 2012 CFA before 1 April 2013.

Does the October 2012 ATE Policy Appear to meet the Statutory Definition of a Pre-Commencement Funding Arrangement?

71. Self-evidently, by reference to the statutory provisions I have reproduced above, it does. The policy was taken out before 1 April 2013, and if the Claimant had been successful in her claim and obtained an order for her costs against the Defendant, she would have been entitled to recover the policy premium as part of her costs.

Is There any Ground for Concluding that the October 2012 ATE policy was void or Non-Existent?

72. There is none. The October 2012 ATE policy was a contract between the Claimant and her insurer. It stood entirely independently of any arrangement between the Claimant and her solicitors. It was a condition of the October 2012 ATE policy that the Claimant enter into a CFA with her solicitors, but the effect of the Claimant not doing so would have been that the policy would not provide cover. It would not, and could not, mean that the October 2012 policy ceased to exist.

Is there any Ground for Concluding that the August 2012 CFA was Void or Non-Existent?

73. I can find none. The Claimant's Points of Dispute confuse the enforceability of a CFA with the existence of a CFA. There are a number of authorities, including *Radford v Frade & Others* [2018] 1 Costs LR 59, that illustrate the difference. For example, the existence of an unenforceable CFA prevents a solicitor from claiming payment on the basis of some alternative form of implied retainer or on a quantum merit basis. If, by virtue of being unenforceable, a CFA were simply to cease to exist, there would be no such barrier.

74. Ms Perry's submission that the August 2012 CFA was not a real agreement rested upon the proposition that WCL did nothing under the agreement until 2015, and that the August 2012 CFA was effectively superseded by the Claimant's post-April 2013 CFA with Mr Lewis. Her argument was that this case fits the circumstances described by the Court of Appeal at paragraphs 28 and 29 of its judgment in *Catalano v Espley-Tyas Development Group Ltd* [2017] 4 Costs LR 769 (which rejected a claimant's

claim to QOCS protection based on the termination of a pre-April 2013 CFA and its replacement by a post-April 2013 CFA):

> "What then of the case where a CFA is made before 1 April 2013 but, before any work is done, a second CFA is made after 1 April 2013, or the case where work is done but the retainer is terminated (whether by the solicitors or the client) before 1 April 2013 and a second CFA is made by new solicitors after 1 April 2013?... We would prefer to express no concluded view.... But we think the first case will be comparatively rare since almost inevitably some chargeable work will be done at about the time the first CFA is made."

75. The primary difficulty with Ms Perry's argument is that work was undertaken by WCL no later than October 2012, and the Claimant did not terminate the CFA until long after 1 April 2013 (on the evidence, in late 2016). This case, in consequence, does not match either of the sets of circumstances contemplated by the Court of Appeal in the passages I have quoted above. There is no basis in fact or law for describing the August 2012 agreement as some sort of "empty" or "shell" agreement. It was, as the Claimant herself said in her defence to WCL's claim for fees, a contract for services.

Could an Effective Challenge to the Enforceability of the August 2012 CFA or the October 2012 ATE Policy Mean That Either Does not Meet the Definition of a Pre-Commencement Funding Arrangement?

76. In my view, it could not. The definitions of a pre-commencement funding arrangement to which I have referred do not require that the agreement be enforceable. In *Catalano* the Court of Appeal rejected the appellant's attempt to add "un-terminated" to the definition of a pre-commencement funding arrangement. Here, the Claimant is attempting to add the word "enforceable". There is no basis for that.

Is there an Effective Challenge to the Enforceability of the October 2012 ATE policy?

77. For the reasons I have already given, there is none. It is a remarkable feature of this case that the Claimant herself, through the FOS, appears to have held her ATE insurer under a pre-commencement funding arrangement to its obligation to indemnify her against the Defendant's costs, but now resists payment of those costs on the basis that no such arrangement existed, or that it was somehow invalid.

Is There an Effective Challenge to the Enforceability of the August 2012 CFA?

78. If there is, the Claimant's Points of Dispute do not identify it. They rely rather on speculation to the effect that WCL accepted that it was unenforceable.

79. With regard to the enforceability of the August 2012 CFA, I cannot make a finding based upon speculation. If I could, I would probably start with the fact that the terms of the August 2012 CFA do not seem to me to preserve any right on the part of WCL to claim its base costs from the Claimant, win or lose, should she withdraw her

instructions (in contrast, for example, to the agreement being terminated by WCL in certain circumstances).

80. If that is right, then under the terms of the August 2012 CFA, WCL had no right to payment unless the Claimant won her case against the Defendant. When she did not win, as would have become clear by the end of May 2017, any potential right to payment would have been extinguished. It may be that WCL took that view, but as I have said I cannot base any conclusions upon speculation.

81. I have taken note of three other issues not raised in the Points of Dispute. First, Mr Fadiga says in his witness statement that the Claimant did not sign the August 2012 CFA. In contrast, the Claimant's defence to WCL's claim for fees says that she did sign it, but did not see more than the first page and did not receive a copy, so creating a breach of the 2008 Regulations and rendering the August 2012 CFA unenforceable. There is also some heavily redacted correspondence on the supplemental bundle indicating that in 2020, the Claimant consulted another firm of solicitors, who advised that the August 2012 CFA was unenforceable.

82. None of this, even if it were raised in the Claimant's Points of Dispute, would be sufficient to establish that the August 2012 CFA was unenforceable.

83. I appreciate that the Claimant does not accept the judgment of DJ Goddard, but she has not succeeded in her attempts at overturning it, and it does leave her with some credibility problems. Nor can I accept the Claimant's attempt to blame DJ Goddard's findings upon WCL: his findings concerning the Claimant and her witnesses go well beyond any error for which WCL could have been responsible.

84. In any event, her case in relation to the validity of the August 2012 CFA is not consistent.

85. I start with the question of signature of the CFA. In 2012, signature by a client was not a requirement for a valid CFA, so the only significance of the signature issue, for present purposes, is that the Claimant says one thing and her solicitor says another.

86. The Claimant's assertion, in the proceedings brought by WCL, that she only saw the first page of the August 2012 CFA and had never been provided with a copy of it, was supported by a statement of truth. It was however no more than an assertion, contested by WCL and never put to the test.

87. The proposition that the Claimant signed a one-page agreement in August 2012 is inconsistent with the form and content of the August 2012 CFA. It is evident that WCL prepared a standard form of CFA with the right to cancel and the application of its full terms clearly flagged on the signature page and complete with a detachable notice of cancellation, in accordance with the 2008 Regulations.

88. The further proposition that WCL, having taken such care to comply with the 2008 Regulations, did not complete the process of compliance by supplying the Claimant with a copy of the agreement she had just signed seems an unlikely one.

89. I would need clear and persuasive evidence to accept either contention, and I do not have it.

90. As for the correspondence in 2020, I have no idea what the Claimant said to persuade a firm of solicitors to reach the conclusion that the August 2012 CFA was unenforceable.

91. If the Claimant had filed some evidence to assist me in making this decision, I might take a different view, but as it is I have no sufficient basis for concluding that the August 2012 CFA was unenforceable.

Is the Claimant Estopped from Claiming QOCS protection?

92. The conclusions that I have already reached lead inevitably to the conclusion that the Claimant does not have the benefit of QOCS protection in this case. Strictly speaking, it is not necessary to consider the estoppel point, but for the sake of completeness I shall do so.

Case Law

93. The Defendant refers to the judgments of Lord Burrows JSC in *Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39, and of His Honour Judge Lopez in *Price – v- Egbert H Taylor & Co Ltd* (unreported, the County Court at Birmingham, 16 June 2016).

94. The Defendant relies upon estoppel by convention, which may (according to *Tinkler* and the other authorities to which it refers) arise in the following circumstances.

95. First, there has been a common assumption of fact or law by the party raising the estoppel ("C") and the party against whom the estoppel was raised ("D") and it was made clear, by words or conduct that could be said to have "crossed the line" between them, that they shared that common assumption. Second, D had conveyed to C that D expected C to rely on the sharing of the common assumption, so that D might be said to have assumed some element of responsibility for C's reliance on the common assumption. Third, C had in fact relied on that common assumption rather than merely upon its own independent view of the matter. Fourth, reliance had occurred in connection with some subsequent mutual dealing between C and D. Fifth, C had thereby suffered some detriment, or D received some benefit, in such a way as to make it unconscionable for D to assert the true legal or factual position.

96. Lord Burrows, at paragraph 78 of his judgment, confirmed that these five principles comprise a correct statement of the law on estoppel by convention for contractual, as well as non-contractual, dealings.

97. At paragraph 75 of his judgment Lord Burrows confirmed that, whilst for example promissory estoppel cannot create a cause of action, proprietary estoppel can.

98. In *Price*, a personal injury claim was struck out before service. The claimant attempted to rely on the protection of QOCS. However, a letter before action written on 30 October 2012 had stated (according to Mr Price, erroneously) that the claim was being funded by a conditional fee agreement which provided for a success fee. HHJ Lopez found that Mr Price was estopped from asserting that QOCS applied. His order incorporated the following paragraph:

> "It is declared that the Claimant having represented that there was a pre-commencement funding agreement in place and the Defendant having relied upon that representation, the Claimant is now estopped from asserting that no such agreement was in place and/or that qualified one-way costs shifting applies."

Submissions on Estoppel

99. The Defendant relies upon the assertion by WCL, in both their October 2012 letter of claim and their September 2015 notice of funding, that the Claimant had entered into two pre-commencement funding arrangements and upon Mr Lewis's clear statement, on 9 June 2017, that this was a case in which QOCS did not apply.

100. It is, the Defendant argues, inherent in the nature of the Letter of Claim and Notice of Funding, as formal documents, that the Claimant (through her representatives) was assuming responsibility for those assertions, in the expectation that the Defendant would rely on them. The same is true of Mr Lewis's statement of 9 June 2017, when, following trial and with costs to be addressed, it was for the Claimant's representatives to convey what was in issue and what was not.

101. The Defendant did rely on those expressions in the proceedings, to their detriment. That is confirmed in the witness evidence of Mr Marshall, who confirms that had the Claimant ever claimed the protection of QOCS (as opposed to notifying the Defendant that she had entered into pre-commencement funding arrangements and advising the court through Mr Lewis, on 9 June 2017, that this was "not a QOCS case") the Defendant would certainly have applied to DJ Goddard for a finding of fundamental dishonesty and the disapplication of QOCS under CPR 44.16. Further, says Mr Marshall, the Defendant would not have incurred the costs of these detailed assessment proceedings if the Claimant's representatives had not confirmed that the Claimant did not have the protection of QOCS.

102. The Claimant's argument in response, as I understand it, rests on three propositions. The first is that estoppel is a "shield, not a sword", upon which the Defendant cannot found a claim for payment of its costs.

103. The second is that for me to find that the Defendant is estopped from relying upon QOCS would be to validate an unenforceable or otherwise invalid CFA. The decision of HHJ Lopez in *Price* (which is not binding on me) is described by Ms Perry as the application of estoppel to confirm a non-existent agreement and, as such (with great respect) "nonsensical".

104. The third is that estoppel cannot circumvent the statutory protection created by the QOCS regime.

Conclusions on Estoppel

105. Had I not already found that the Claimant does not have the protection of QOCS then I would have found that she is estopped from claiming it, for these reasons.

106. It seems to me that this case does meet the criteria for estoppel by convention, as identified in *Tinkler*. In October 2012, the Claimant notified the Defendant that she

had entered into two pre-commencement funding arrangements. In consequence, the Defendant was on notice that it faced claim for additional liabilities, in the event that the claim were to succeed; and, following the introduction of the QOCS regime in 2013, would have understood, on the basis of the information already supplied by the Claimant, that QOCS protection did not apply.

107. Further, Mr Lewis, counsel for the Claimant, on 9 June 2017, informed the court and the Defendant that the Claimant did not have the protection of QOCS. Whether (as Mr Fadiga says in his witness statement) Mr Lewis did not have the Claimant's consent to say that is not to the point. He was the Claimant's authorised representative and it was his duty to address the issue. The Claimant has to accept responsibility for representations made on her behalf by her authorised representatives.

108. I accept Mr Marshall's evidence to the effect that, if it were not for this confirmation and Claimant's previous confirmation that she had entered into pre-commencement funding arrangements, he would have applied to DJ Goddard for a finding of fundamental dishonesty.

109. I am unable to accept Ms Perry's submission, by reference to *Howlett v Davies* [2017] EWCA Civ 1696, that this is not a case in which a finding of fundamental dishonesty could have been appropriate. In my view, *London Organising Committee of the Olympic and Paralympic Games (In Liquidation) v Sinfield* [2018] EWHC 51 (QB) is more to the point. The test is whether a claimant's dishonesty had substantially affected the presentation of his or her case, in respect of either liability or quantum, in a way which potentially adversely affected the defendant in a significant way. Nor (see *Howlett*) was it necessary for fraud to have been pleaded. DJ Goddard's findings were entirely consistent with a finding of fundamental dishonesty, and there is every prospect that he would have made such a finding, had he been asked to do so.

110. I also accept that if it had not been for the representations made on behalf of the Claimant to the effect that this was not a QOCS case, the Defendant would not have incurred expenditure on these detailed assessment proceedings.

111. The Claimant's argument that estoppel cannot found a claim by the Defendant for its costs runs contrary to the clear guidance of Lord Burrows JSC in *Tinkler* to the effect that proprietary estoppel can found a cause of action.

112. Nor does the Defendant's reliance on estoppel in any way represent an attempt, through estoppel, to defeat the statutory QOCS provisions. The protection of QOCS is not absolute. Its withdrawal in cases of fundamental dishonesty is one of its most important features.

113. It is entirely consistent with the application of the QOCS provisions and the policy underlying them to find that the Claimant, by her clear representations to the effect that this was not a QOCS case, denied the Defendant the opportunity to make a successful application for the withdrawal of QOCS protection on the grounds of fundamental dishonesty; caused the Defendant to run up costs in these detailed assessment proceedings; and is in consequence estopped from claiming QOCS protection now.

114. As for Ms Perry's submission that a finding to the effect that the Defendant is estopped from relying upon QOCS protection would somehow validate an unenforceable or invalid CFA (the October 2012 ATE policy is not mentioned in this context), it seems to me that it is this argument, and not the judgment of HHJ Lopez in *Price*, that must (with equal respect) be described as nonsensical. A finding that a party is estopped from arguing that an agreement is non-existent or unenforceable is not a finding that the agreement exists or that it is enforceable. Although I am not bound by the judgment of HHJ Lopez, I respectfully agree with it.

Summary of Conclusions

115. The Claimant, in August and October 2012, entered into two pre-commencement funding arrangements, as defined by statute. The first was the August 2012 CFA. The second was the October 2012 ATE policy.

116. There is no basis for the conclusion that either the August 2012 CFA or the October 2012 ATE policy were in some way void or non-existent.

117. A pre-commencement funding arrangement does not have to be an enforceable agreement. The word "enforceable" does not appear in the statutory definition of a pre-commencement funding arrangement, and it is not open to the Claimant to add it.

118. There is in any event no adequate basis for concluding that either the August 2012 CFA or the October 2012 ATE policy were unenforceable. In fact, the Claimant appears, through the offices of the FOS, to have secured an indemnity, under the October 2012 ATE policy, for the Defendant's costs.

119. For all those reasons, my conclusion is that the Claimant does not have the protection of QOCS.

120. Had I not reached that conclusion, I would have found that the Claimant, in representing to the Defendant that this was not a QOCS case, (a) denied the Defendant the opportunity to apply for a finding of fundamental dishonesty, which application would have had every prospect of success, and (b) caused the Defendant to incur expenditure in these detailed assessment proceedings which would otherwise have been avoided. In consequence, I would have found that the Claimant was estopped from claiming the protection of QOCS.