QOCS conundrums

Andrew Hogan assesses the issues posed by qualified one-way costs shifting

A central part of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 reforms was the introduction of qualified one-way costs shifting (QOCS) in personal injury and clinical negligence cases, as part of the Faustian bargain struck between the government and the insurance industry - in return for the abolition of recoverable additional liabilities, including success fees and after-the-event insurance premiums.

Conceptually similar to the scheme of qualified one-way costs shifting that applies under the Access to Justice Act 1999 and the former Legal Aid Acts, QOCS prohibits the enforcement of a costs order made in favour of a defendant in a personal injury claim, save in certain defined circumstances.

It means that in the vast majority of unsuccessful personal injury claims, the winning defendant will be left to stand their own costs, and yet the insurance industry taken as a whole will still save substantial sums of money, as this is a lesser price to pay than the former costs of success fees and ATE premiums. The instances where a costs order may be enforced include where fundamental dishonesty is found at trial, the case is an abuse of process, or there is no reasonable claim at law or its prosecution obstructs the just disposal of the case.

POINTS OF NOTE

At the current time, I would identify three aspects of QOCS as being of particular interest.

These include first, the curious fact that, although the rules are approaching their fifth anniversary, they are still notoriously 'rough around the edges' with many unanswered questions as to how they are meant to work in practice.

Second, that despite their systemic victory embodied in the post 1 April 2013 settlement, defendants are still pushing to minimise the application and effect of QOCS.

Third, the interesting question as to whether the current template of QOCS should be extended to cover other types of claim, including actions against the police or actions for professional negligence in the conduct of personal injury claims, or unrelated areas altogether such as defamation and media claims.

QOCS CASELAW

In relation to the first aspect, the caselaw is now starting to build some momentum, with four significant decisions in recent years. These include the widely reported decision in *Wagenaar v Weekend Travel* [2014] EWCA Civ 1105, *Catalano v Espley-Tyas Development Group* [2017] EWCA Civ 1132, *Budana v The Leeds Teaching Hospitals NHS Trust* [2017] EWCA Civ 1980 and the recent decision in *Corstorphine v Liverpool City* [2018] EWCA Civ 270.

Of these cases, *Wagenaar* is significant in that it provides the fullest explanation of the purpose behind QOCS, and so is an essential exposition when considering a purposive construction to the rules. *Catalano* provides an explanation of the transitional provisions, and an interesting analysis in paragraphs 27 to 29 which probably amounts to a misunderstanding of how they differ in effect between individual and collective CFAs.

Budana was a case which hinged on the transitional provisions to preserve assigned CFAs from otherwise inevitable findings of unenforceability, while *Corstorphine* provided that when making substantive costs orders, the courts should include the purposes behind the QOCS regime as a material consideration.

At the current time, a hot topic is the question of where there are a number of defendants to an action, and damages are recovered against some defendants but not against others who successfully defend themselves and get a costs order in their favour, can they proceed to enforce the order against the claimant to the extent of the damages the claimant might otherwise pocket?

In the case of *Bowman v Norfran Aluminium* (County Court at Newcastle 11 August 2017), HHJ Freedman decided they could not, adopting arguments similar to some I posited on my blog last year (www.costsbarrister.co.uk/uncategorized/QUOCS-and-Niall-claims). In the case of *Cartwright v Venduct Engineering Ltd* (County Court at Nottingham 6 December 2017), Regional Costs Judge Hale decided they could in principle, but not in the instant case, because although the claimant had recovered monies, he had not done so by reason of an order of the court, but by way of a contractual settlement embodied in the schedule to a Tomlin Order.

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This latter decision has now been appealed to the Court of Appeal, and Lewison LJ has directed that it be dealt with by way of expedition, with a hearing due by 2 January 2019. The case will re-examine the distinction of *Bowman* and raises a point of policy: many categories of personal injury or clinical negligence involve multiple defendants: road traffic claims, clinical negligence claims against an NHS trust and a GP, as well as industrial disease claims.

One wonders whether there is a further point here, that liability insurers for some reason are not taking. QOCS serves to protect a claimant from the effects of enforcement of a costs order: it does not serve to hold harmless the provider of any before-the-event or ATE insurance that the claimant might otherwise have. Both of these types of insurance commonly provide an indemnity for adverse costs, and there is a long line of authority supporting the making of non-party costs orders against legal expenses insurers.

This is particularly surprising when one considers that insurers have been active in pursing non-party costs applications against credit hire companies to circumvent the QOCS restrictions which might otherwise apply, as cases such as *Select Car Rentals v Esure* [2017] EWHC 1434 (QB) illustrate.

QOCS EXPANSION

The third aspect is perhaps the most interesting. Whither QOCS? In 2016 a Working Group of the Civil Justice Council put forward a discussion document on the extension of QOCS for actions against the

No move from the government to extend QOCS to actions against the police

police, and actions against solicitors who are alleged to have been negligent in the conduct of a personal injury claim. There is no indication that the government will take these reforms forward.

Yet in principle, the case for extension of QOCS to deal with all types of asymmetric litigation is compelling: claims under the Equality Act 2010, claims for environmental damage and judicial review claims, all of which would be obvious candidates for legal aid, would go some way to squaring the circle created by the decline of legal aid, the grant of which, it should be noted, would carry its own statutory form of qualified one-way costs shifting. In a very real sense, QOCS can be seen as a 'privatised' version of former state provision in costs protection, with all the flaws that one would expect in a partial and privatised provision.

The absence of enthusiasm for the expansion of QOCS into other asymmetric litigation morphs into a positive aversion when one considers the position in relation to claims for defamation and privacy, which currently enjoy an exemption from the provisions of LASPO 2012 under the Conditional Fee Agreements Order 2013.

With the shelving of Leveson II and the proposal for a press regulator and swinging costs penalties, this government plainly has no appetite to upset the status quo in cases involving the press and media. Interestingly, the scheme of QOCS contemplated for defamation and privacy claims was very different from that which applies to personal injury claims, which in itself was different from the original proposals of the Final Report by Lord Justice Jackson.

Given the precarious standing of a minority government tackling Brexit, the lack of desire to grapple with the media or to stir the various interests up is readily explicable, but devoid of principle – as recent years have seen the abolition of recoverable liabilities in insolvency litigation (probably to the government's net cost), and the parlous state of mesothelioma claims, where revocation of the exemption from the rigours of the LASPO 2012 funding regime is probably only a matter of time.

Andrew Hogan is a barrister at Ropewalk Chambers in Nottingham specialising in costs and funding; blog: www.costsbarrister.co.uk