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Case No: QB/2017/0101
QB/2017/0206

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2018

Before :

MRS JUSTICE WHIPPLE DBE

- -

Between :

THE COMMISSIONER OF POLICE OF THE METROPOLIS	**(First) Appellant and Defendant**
- and –	
ANDREA BROWN	**Respondent and Claimant**
AND	
THE CHIEF CONSTABLE OF GREATER MANCHESTER POLICE	**(Second) Appellant and Defendant**
-and-	
ANDREA BROWN	**Respondent and Claimant**
-and-	
THE EQUALITY AND HUMAN RIGHTS COMMISSION	**Intervener**

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Mr Adam Clemens (instructed by **Weightmans LLP**) for the **First Appellant and Defendant**
Ms Charlotte Ventham (instructed by **Clyde & Co LLP**) for the **Second Appellant and Defendant**
Ms Claire Darwin and Mr Paul Skinner (instructed by **Thomas Mansfield Solicitors Ltd**) for the **Respondent and Claimant**
Ms Nathalie Lieven QC and Mr Raj Desai (instructed by **The Equality and Human Rights Commission**) for the **Intervener**

Hearing dates: 4th July 2018

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Judgment Approved

Mrs Justice Whipple :

INTRODUCTION

1. This is an appeal against a judgment given by HHJ Luba QC on 24 March 2017 in relation to one aspect of the costs of an action brought by Ms Andrea Brown, the Claimant in the underlying action and the Respondent to the current appeal, against two Defendants, both of whom are now the Appellants: the Commissioner of Police of the Metropolis and the Chief Constable of Greater Manchester Police. It is easier if I simply refer to the parties as Ms Brown, the Met and the GMP, and the "Police" to describe the two Appellants together. The appeal concerns the operation of the qualified one-way costs shifting regime (known as "QOCS") contained in Section II of Part 44 of the Civil Procedure Rules ("CPR"). The Judge decided that QOCS applied, automatically, to protect Ms Brown against any adverse costs order which might be made against her in the Police's favour. The Judge's reason for doing so, in summary, was that her claim included a claim for damages for personal injury which related to all the various parts of her claim, so that he had no discretion to disapply QOCS protection.

2. The Police argue that the Judge erred in law in construing CPR Part 44 so as to confer "automatic" QOCS protection on Ms Brown. The Police argue that her claim was for much more beyond damages for personal injury and that the mixed nature of Ms Brown's claim meant that QOCS protection was not automatic, but was subject to the Judge's discretion.

3. Unsurprisingly, Ms Brown rejects the challenge and supports the Judge's conclusion, for the reasons he gave as well as for other reasons.

4. Ms Brown is supported by the Equality and Human Rights Commission which intervenes. It argues that QOCS should be broadly construed to promote access to justice and achieve the aims of the CPR and of the QOCS regime, specifically.

BACKGROUND FACTS

5. The background is set out in two judgments of HHJ Luba QC which are before me. (There was a third *ex tempore* judgment on liability which I have not been shown.) The "Judgment on Remedy" is dated 7 October 2016. It states that Ms Brown was a serving officer in the Met until November 2013. In December 2011, while employed but on sick leave, she had travelled to Barbados with her daughter without notifying her line manager of her whereabouts. This was a breach of police service procedures as to absence management. As part or preparatory work for possible later disciplinary proceedings against her, the Met submitted a request for information to the National Border Targeting Centre (NBTC) the police arm of which is managed by the GMP. The GMP responded by email giving the Met information about Ms Brown's trip to and from Barbados, attaching a copy of her passport and a print-out containing other information about her recent travel arrangements and passport details.

6. The Met then approached Virgin Atlantic, the relevant carrier. It asked for information using a "Personal Data Request Form". The airline responded by email

with details of the flight, passenger names (Ms Brown travelled with her daughter) and other details; a copy of the booking form was attached.

7. That information was used against Ms Brown in the disciplinary process which culminated in a finding that she had a case to answer but that a sufficient sanction would be "informal management action".

8. Ms Brown then sued the Police. She claimed that they had misused facilities at their disposal for gathering data and information, which facilities existed for the purpose of detecting and preventing crime, and did not permit the requests or disclosures in this case.

9. Ms Brown pursued four causes of action: (1) breaches of the Data Protection Act 1998 (DPA), (2) breaches of the Human Rights Act 1998 (HRA), (3) misfeasance in public office and (4) the tort of misuse of private information. The Police conceded (1) and (2). Ms Brown lost on (3). Ms Brown won on (4).

10. As part of her case on (1), (2), (3) and (4), Ms Brown advanced a claim that she had sustained personal injury, in the form of depression. But the Judge rejected that claim. He held that she had not suffered personal injury in the form of any recognised psychiatric injury, and that in any event the breaches of the DPA did not cause or materially contribute to any such injury as she might have been able to establish. The Judge did accept that she had suffered distress, sufficient to warrant an award of damages under s 13(2) DPA.

11. In the Judgment on Remedies, the Judge rejected her claim for aggravated and exemplary damages and made a single global award of general (compensatory) damages to reflect the three causes of action on which she had succeeded. He awarded her £9,000. He apportioned the aggregate amount of the orders for damages and interest made in the Respondent's favour two-thirds / one-third between the Met and GMP respectively.

12. The award was less than Part 36 Offer made by the Met on 26 February 2016, and equalled the Part 36 offer made by the GMP on 2 May 2016.

13. It was against this background that the issue of costs came before the Judge. He held that Ms Brown was entitled to QOCS protection.

14. The Judge was subsequently invited to rule on costs, on the assumption that he was wrong about QOCS protection and that the exception did apply (it appears that this followed the order of Warby J dated 15 November 2017 granting permission, but staying the appeal until after the determination of whether there should be a Defendant's costs order, which he considered necessary in advance of the appeal to ensure the appeal was not academic). By order dated 22 January 2018, the Judge ordered the Met and the GMP to pay 70% of Ms Brown's costs up to the date of their respective Part 36 offers; thereafter, he ordered Ms Brown to pay the costs of each of the Met and the GMP.

15. As matters stand, the Police will be able to enforce the costs orders in their favour only to the extent of the award. The Police will not be able to set off the costs owed *by* Ms Brown to them against costs owed by them *to* Ms Brown; the costs owed by

them *to* Ms Brown will still have to be paid. The Police will not be able to pursue Ms Brown personally for any costs due to them. The Police will be substantially out of pocket.

16. On the other hand, if this appeal is allowed, then, subject to the Judge's further decision about whether to exercise his discretion or not, the Police will not only be able to enforce against the award, but they will also be able to set off the cross costs orders against each other, and they will be able to sue Ms Brown personally for any outstanding balance due to them.

QOCS

17. The QOCS regime is contained in the CPR, which is subordinate legislation enacted pursuant to the Civil Procedure Act 1997. They are at CPR 44.13-44.17.

18. CPR 44.13 provides, so far as relevant:

> (1) This Section applies to proceedings which include a claim for damages –
>
> (a) for personal injuries;
>
> (b) under the Fatal Accidents Act 1976; or
>
> (c) which arises out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934,
>
> ...

19. The term "claim for personal injuries" is defined at CPR 2.3 as follows:

> " 'claim for personal injuries' means proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person's death and 'personal injuries' includes any disease and any impairment of a person's physical or mental condition".

20. CPR 44.15 sets out the effect of QOCS, which is that orders for costs made against a claimant may be enforced without permission of the Court only to the extent of any orders for damages and interest made in favour of the claimant. A claimant is protected against any greater liability for the defendant's costs (this is "QOCS protection").

21. There are exceptions to the general rule set out in CPR 44.13(1). Some of them are set out at CPR 44.15, which provides an exception for proceedings which are struck out for misconduct. If that exception applies, any defendant's costs order is enforceable to the full extent without the Court's permission.

22. CPR 44.16 provides further exceptions, which permit a defendant to enforce a costs order with the permission of the Court. The first of those relates to dishonesty (CPR

44.16(1)). The second relates to proceedings which are made for the financial benefit of a third person (CPR 44.16(2)(a)). The third is relevant in this case:

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

23. The Practice Direction to Part 44 states as follows at paragraph 12.6:

> "In proceedings to which rule 44.16 applies, the court will normally order the claimant or, as the case may be, the person for whose benefit a claim was made to pay costs notwithstanding that the aggregate amount in money terms of such orders exceeds the aggregate amount in money terms of any orders for damages, interest and costs made in favour of the claimant."

CASE LAW

24. The background to the QOCS regime was summarised by Lewison LJ in *Howe v Motor Insurers' Bureau (No 2)* [2017] EWCA Civ 032, [2018] 1 WLR 923 at [11] and [36]. It is not necessary to set those passages out; *Howe* was referred to in *Siddiqui*, a case to which I shall shortly come.

25. Three cases were cited to me, as having direct relevance to this case. The first was *Wagenaar v Weekend Travel Ltd* [2015] 1 WLR 1968 where Vos LJ recorded the background to the provisions:

> 36 I should start by referring briefly to the Jackson report, pursuant to which QOCS was introduced. I shall not repeat here the careful discussion in Chapters 9 and 19 of the Jackson report. Suffice it to say that the rationale for QOCS that Jackson LJ expressed in those sections 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.

26. In that case, a claimant had brought a claim seeking damages for personal injury against the defendant, who joined the third party claiming an indemnity or

contribution. The claim was dismissed as was the third party claim. The Court held that the claimant did benefit from QOCS protection:

> 38 … The whole thrust of CPR rr 44.13 to 44.16 is that they concern claimants who are themselves making a claim for damages for personal injuries, whether in the claim itself or in the counterclaim or by an additional claim …

27. The Court held that the defendant did not benefit from QOCS protection in relation to the third party claim, and was liable for the third party's costs:

> 39 It is true, however, that the word "proceedings" in CPR r 44.13 is a wide word which could, in theory, include the entire umbrella of the litigation in which commercial parties dispute responsibility for the payment of personal injury damages. I do not think that would be an appropriate construction. Instead, I think the word "proceedings" in CPR r 44.13 was used because the QOCS regime is intended to catch claims for damages for personal injuries, where other claims are made in addition by the same claimant. There may, for example, in the ordinary road traffic claim, be claims for damaged property in addition to the claim for personal injury damages, and the draftsman would plainly not have wished to allow such additional matters to take the claim outside the QOCS regime.
>
> 40 Thus, in my judgment, CPR r 44.13 is applying QOCS to a single claim against a defendant or defendants, which includes a claim for damages for personal injuries or the other claims specified in CPR r 44.13(1)(b) and (c) , but may also have other claims brought by the same claimant within that single claim. Argument has not been addressed to the question of whether QOCS should apply to a subsidiary claim for damages not including damages for personal injuries made by such a claimant against another defendant in the same action as the personal injury claim. I would prefer to leave that question to a case in which it arises. CPR r 44.13 is not applying QOCS to the entire action in which any such claim for damages for personal injuries or the other claims specified in CPR r 44.13(1)(b) and (c) is made.

28. The second case is *Jeffreys v Commissioner of the Metropolis* [2017] EWHC 1505 (QB), [2008] 1 WLR 3633. In that case, the claimant sued the Met for wrongful arrest, false imprisonment, assault and battery, malicious prosecution and misfeasance in public office arising out of the actions of the Met in arresting and detaining him for an offence of harassment. Morris J summarised the claim as follows:

> 9 Thus, from the claim form and the particulars of claim, it is clear that by this action the claimant was seeking damages in respect of four distinct causes of action (assault, false imprisonment, malicious prosecution and misfeasance in public office). It is further clear that the claimant was seeking damages in respect of personal injuries to himself (both physical and psychological) and, importantly, that he was also seeking damages in respect of other loss (including loss of liberty and distress, humiliation, fear and upset, i e, sub-paragraphs (a) and (d) of

> the particulars of loss); and he was also seeking aggravated and exemplary damages.

29. Following a jury trial in the County Court, the claim was dismissed. On costs, the trial judge decided that the case fell within the exception at CPR 44.16(2)(b). The claimant appealed. The claimant (who was by then the appellant) argued that the exception in CPR 44.16(2)(b) only applied if the non-personal injury claims are divisible or separable from the personal injury claims, but that the claims for personal injuries in that case (both for physical injury and exacerbation of psychiatric condition) were not divisible or separable (see [24]). Morris J identified the effect of CPR 44.13 as being to bring a wide range of proceedings within the scope of QOCS, including cases where a claim for damages for personal injury played a very minor and subsidiary part of the claims advanced (see [34]). He noted that the drafting of CPR 44.16(2)(b) gave rise to some difficulties [36] and concluded that he could resolve those difficulties in this way at [37]:

> In my judgment, in order to give meaning to the phrase "a claim is made … other than a claim to which this Section applies" in CPR r 44.16(2)(b) , it must be interpreted as referring to "proceedings which include a claim other than a claim for damages for personal injury".

30. On this point, he concluded:

> 39 Thus, as a matter of construction, I conclude that CPR r 44.16(2)(b) applies in a case where, in proceedings the claimant has brought a claim for damages for personal injuries and has also brought a claim or claims other than a claim for damages for personal injuries.

31. Turning back to the appeal, he decided that the proceedings clearly did include claims other than claims for personal injury:

> 43 In my judgment, and in agreement with the judge, it is clear that, even leaving out of account the claims in respect of the soft tissue damage and the exacerbation of the psychological condition, the claimant was advancing distinct claims for damages relating to other matters. In other words, claims other than claims for damages for personal injury. Accordingly, subject to the divisibility argument, there is no doubt that in this case CPR r 44.16(2)(b) applied.

32. He rejected the argument that the exception did not apply where the claim for personal injury damages was indivisible:

> 44 As to the second question, the alleged requirement for divisibility, in my judgment, there is no authority for the proposition that in order for CPR r 44.16(2)(b) to apply the personal injury claim and the non-personal injury claim must be "divisible". There is nothing in the wording of the CPR provision itself to support this. Further, there is no reason in principle why there should be such a requirement. If the two claims are "inextricably" linked or otherwise very closely related, then

> that relationship can be reflected in the exercise of discretion (in the claimant's favour) which arises once CPR r 44.16(2)(b) applies.

33. He concluded that there was simply no basis for requiring the personal injury claim and the non-personal injury claim to arise out of either distinct facts or distinct breaches of duty. "What is ultimately important is whether they are claims for different types of loss" (see [55]). He dismissed the claimant's appeal.

34. The third case is *Siddiqui v Chancellor, Masters and Scholars of the University of Oxford* [2018] EWHC 536 (QB), [2018] 4 WLR 62, where a claimant brought an action against the university alleging that he had received a lower degree classification than he should have done as a result of inadequate teaching and a failure by his personal tutor to convey information regarding his depression and anxiety to the relevant authorities, with the result that he had suffered personal injury (an exacerbation of his pre-existing psychiatric condition) and had failed to gain entry to a leading US law school which caused damage to his career prospects. The claim was dismissed. On costs, Foskett J concluded that the claim fell within the exception at CPR 44.16(2)(b) and ordered the claimant to pay 25% of the university's costs. He followed *Jeffreys* saying at [8]:

> However, as a matter of construction of the rules, I respectfully think that the analysis in *Jeffreys* is correct and I propose to apply it to the extent that it is relevant in this case (see further at paragraphs 17-18 below). It is, I might add, also an important objective to ensure that the QOCS provisions are not abused by simply "dressing up" a non-personal injuries claim in the clothes of a personal injuries claim to avoid the normal consequences of failure in litigation.

35. He added at [17]:

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

36. He refused the application for permission to appeal to the Court of Appeal at [34], saying:

> In my view, the interpretation of this provision, as decided in *Jeffrey*, is clear and the converse is not reasonably arguable.

37. (After I had circulated this judgment in draft to the parties, Ms Brown's solicitors sent me a copy of the transcript in *Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654, handed down on 17 July 2018. I am grateful for sight of that judgment which concerns the operation of CPR 44.14. I agree that it does not bear on the outcome of this appeal and I mention it only for the sake of completeness.)

MS BROWN'S PLEADED CASE

38. In Amended Particulars of Claim against the Met, Ms Brown set out her various causes of action and sought the remedy of "general and/or aggravated and/or exemplary damages, including compensation for distress" setting out a list of factors relied on in that claim. It was then asserted that "By reason of the matters aforesaid, the Claimant has suffered personal injury, loss and damage", particulars of which were said to be that she had "developed depression" and further evidence would be disclosed in due course. In the next paragraph, she asserted particulars of losses including "great distress, stress and anxiety". In the final prayer, she sought various declarations, an order for the erasure of certain information held by the Met, compensation under the DPA and the HRA, "damages (including tortious, aggravated and exemplary damages) for misuse of private information; misfeasance in public office, breach of contract and personal injury". She sought costs and interests and any other relief the Court considered appropriate.

39. Ms Brown's Particulars of Claim against the GMP were in similar form. Under Particulars of Injuries in support of her claim for personal injury, loss and damage she asserted that she "suffers from depression, stress and anxiety. The Claimant's depression, stress and anxiety have been exacerbated and/or caused by the Defendant's actions as set out above and below". The final prayer was in similar form.

THE COSTS JUDGMENT

40. The Judge set out the rival arguments and set out the relevant parts of the CPR. At [18] he noted that the structure of CPR 44.16 is that it is subject to a "preliminary pre-condition, namely that one of the two sub-paragraphs (a) or (b) must be fulfilled". He analysed the pleadings and concluded that Ms Brown's claim was that the "injury has followed as a consequence of each of the four matters" (ie the four causes of action which were advanced at trial, which were a little narrower than as pleaded – but nothing turns on this). At [19] he said that "It is not a case, for example, in which there has been included a separate claim for some other form of damage or loss arising in consequence of that claim alone" and so, on the facts of this case, he concluded that the exception in CPR 44.16 was not available. Ms Brown had the benefit of QOCS protection. It is important to note that his judgment preceded the judgment of the High Court in either *Jeffreys* or *Siddiqui*.

GROUNDS OF APPEAL

41. The Met advanced four overlapping grounds of appeal against the costs judgment (Warby J granted permission for all grounds of appeal):

    i. Mischaracterisation of the claims under the DPA, the HRA and the tort claim for misuse of private information as personal injury claims, simply because they were pleaded as such; on a proper characterisation, they were not personal injury claims at all;

    ii. Conflation producing a result likely to be contrary to the intention of the rules, by permitting a person who brings a mixed claim with personal injury and non-personal injury elements automatically to enjoy QOCS protection in relation to all aspects of the claim;

iii. Discretion rendered otiose, because if the Judge was right, there was no reason to have the discretion at CPR 44.16(2) (b) at all;

iv. Proper construction, because properly construed, CPR 44.16(2)(b) confers a discretion on the Court to permit enforcement in relation to costs of other aspects of the claim – relating to the DPA, the HRA, the claim for misfeasance and the alleged tort of misuse of private information – which are claims "other than a claim to which this Section applies".

42. The GMP advanced a single ground of appeal, namely that the Judge was wrong in law to hold that, because Ms Brown had brought a claim for personal injury damages under each of the four pleaded causes of action, the exception in CPR 44.16(2)(b) was not available in the event of an adverse costs order being made against her.

RESPONSE TO GROUNDS OF APPEAL

43. Ms Brown submitted a Respondent's Notice. She seeks to uphold the Judge for the reasons he gave. But she also seeks to uphold him on two additional grounds:

i. Properly construed, Section II of Part 44 applies not just to a claim for personal injuries as the Judge held, but to any proceedings in which there is a claim for damages for personal injuries; thus, Section II would extend to a case where a separate claim for damages for personal injury was made within the same proceedings.

ii. Further, CPR 44.16(2)(b) only applies to claims made for the benefit of the Claimant which are outside the scope of Section II of CPR 44.

INTERVENTION

44. By order dated 22 December 2017, Warby J gave the EHRC permission to intervene (and by order dated 24 May 2018, permission to file evidence and make oral submissions).

45. The EHRC's position is that QOCS should be construed so as to provide certainty for claimants making personal injury claims that they will not be subject to adverse costs orders, even if ultimately unsuccessful, subject only to narrow exceptions The effect of *Jeffreys* has been to introduce uncertainty, which was having a chilling effect across a broad swathe of personal injury claims, which was inimical to the interests of justice and to the aim of promoting access to justice. *Jeffreys* was wrongly decided. The accompanying witness statement of Clare Collier dated 12 June 2018 set out the Commission's concerns about access to justice if *Jeffreys* was upheld; she reported on data provided by the Police Action Lawyers Group which suggested that a high proportion of cases handled by lawyers within that group involved claims for personal injuries alongside other claims; she also recounted evidence to show, including examples of cases in human rights and other areas of law, where the claimant had been deterred because of the unsatisfactory costs position following *Jeffreys*. This, she said, evidenced the "chilling effect".

ANALYSIS

46. CPR 44.13 extends to any proceedings which "include" a claim for damages for personal injuries. I would see this as a broad gateway, through which any proceedings which include a claim for damages for PI will pass. There are limits, as Vos LJ identified in *Wagenaar*. In that case, a third party claim for indemnity or contribution was held to be outside the scope of CPR 44.13 (and therefore outside QOCS completely). But that case also confirmed that an ordinary case, where a claimant seeks damages consequent on a road traffic accident ("RTA"), would be within scope, even if those proceedings included a claim for compensation for damage to the car as well as damages for personal injuries.

47. *Wagenaar* is a case about CPR 44.13 and not CPR 44.16, which is in point here. It is therefore of limited assistance in resolving this case.

48. Coming to CPR 44.16(2), the first issue is how to construe the words "a claim … other than a claim to which this Section applies". This wording is problematic, because "this Section applies", by operation of CPR 44.13(1), to "proceedings" not to "claims". But I agree with Morris J that the solution is obvious: CPR 44.16(2)(b) refers back to CPR 44.13(1), and thus to "proceedings which include a claim other than a claim for damages for personal injury".

49. Thus, CPR 44.16(2) applies in any proceedings where a claim has been made for damages for personal injuries *as well as* for something else (ie, as well as a claim other than a claim for damages for personal injury). This is a "mixed claim".

50. Once that point is resolved, the construction of CPR 44.16(2)(b) becomes clear. Mixed claims are within the scope of QOCS, by virtue of CPR 44.13(1). But CPR 44.16(2)(b) provides a mechanism to deal with mixed claims. The mechanism is quite simply to leave it to the Court at the end of the case to decide whether, and if so to what extent, it is just to permit enforcement of a defendant's costs order.

51. In this way, the infinite variety of mixed claims can be dealt with fairly and flexibly, according to the justice of the case. Read in this way, the provision is entirely consistent with the overriding objective.

52. The key is in the definition of a "personal injury" claim, because it is only a personal injury claim which carries automatic entitlement to QOCS protection. Personal injury claims are claims for damages in respect of personal injuries (see the definition at CPR 2.3). The question to be asked in any given case seems to me to be this: in the proceedings, is the claimant claiming anything *other than* damages for personal injuries?

    i. If the answer is no, then QOCS protection applies automatically (subject of course to one of the other exceptions applying, where the case is struck out or dishonesty is found).

    ii. If the answer is yes, then the case is subject to the court's discretion under CPR 44.16(2)(b).

53. This is a simple question to which, in most cases, I believe that there should be a simple answer. There may of course be cases where the position is more complex; but this is not such a case. In answering that central question, I am not persuaded that

it is necessary to delve into whether there are separate causes of action or remedies claimed (in this case, the answer, if the question was put that way, would be that there were both other causes of action and other remedies being claimed). But mixed cases such as this one often present various inter-connected causes of action and claims for remedies. It is in my judgment unnecessary to try to dissect them out into distinct causes of action, each with different component parts (which may or may not include personal injury) and remedies. That is not what is required by CPR 44.16(2)(b).

54. On my proposed approach, the example given by Vos LJ in *Wagenaar* can be resolved. A standard PI claim for damages for personal injury and damage to property *is* subject, at least in theory, to the discretion in CPR 44.16(2)(b) because the claimant is claiming for something beyond damages for personal injuries. In an ordinary claim arising out of an RTA, it might be thought unlikely that a Court would consider it just to remove QOCS protection, simply because the injured claimant also sought compensation for damage to their car. But the discretion is there, and in an unusual RTA, for example where the personal injury claim is modest but the main issue in the case relates to damage to the car, the Court might consider it just to remove QOCS protection.

55. In summary, I agree with the approach taken by Morris J and Foskett J, and with the reasons they each give for reaching their conclusions.

RESPONSE TO MS BROWN AND EHRC

56. I have considered the grounds advanced by Ms Darwin on behalf of Ms Brown. I am unable to reconcile them with the words, scheme or purpose of the QOCS regime. For reasons set out above, I reject Ms Darwin's submissions that the Judge was right for the reasons he gave. His reasons were, in essence, that Ms Brown's PI claim was not severable from the other claims she was advancing. But, like Morris J, I do not consider severability to be an issue; an inseverable claim for damages for personal injury is a mixed claim of the sort caught by CPR 44.16(2)(b).

57. The consequence of Ms Darwin's two wider arguments is that QOCS would have automatic application to any *proceedings* which include a personal injury claim, or even, on her second alternative, to any proceedings related to proceedings in which a personal injury claim is advanced. This applies QOCS protection very widely. It would mean, at its most basic, that mixed claims would have automatic protection. That would render CPR 44.16(2) entirely redundant, and so it cannot be right. Further, such an outcome would not be just (and would not conform with the overriding objective), because it would permit claims to be dressed up as PI claims (precisely in the manner identified by Foskett J) in order to obtain the benefit of QOCS protection. The answer to this latter point cannot be to invite defendants to apply to strike out obviously abusive claims – which would lead to more cost of litigation and greater use of court time. The answer must be that the provisions are simply not intended to be open to abuse in so obvious a manner; they are intended to confer automatic QOCS protection only on claims for damages for personal injury (the goal at which the Jackson report was aiming in making the recommendation for QOCS to be implemented), leaving mixed claims at the discretion of the Court.

58. I have also considered the points made by the EHRC. I accept that the purpose of the QOCS regime is to secure access to those who are bringing claims for damages for

personal injury. But I reject Ms Lieven's proposition that a claim for personal injury means any proceedings which include a claim for personal injury: that is not what CPR 44.13 read with CPR 2.3 says. The examples of cases where access to justice is said to have been inhibited, set out in Ms Collier's witness statement, are all good examples of mixed cases. I make two points.

59. First, I accept that since the availability of public funding for personal injury and other cases has been reduced, many claimants find it harder to access justice. That will be for a number of reasons. One such is the deterrent of being potentially liable for an adverse costs order (noting that claimants with public funding are effectively protected from enforcement of a defendant's costs order). But the QOCS regime was not intended to address wider issues of access to justice. It was intended to address a specific issue which arose in relation to claims for damages for personal injury, where claimants were forced to take out ATE insurance to protect themselves against adverse costs orders, and where the premiums for that insurance served to increase the costs of personal injury litigation. I do not believe the QOCS regime can or should be construed in the way suggested by EHRC to promote access to justice. That would be to go far beyond its intended purpose.

60. Secondly, I also accept that for claimants involved in the sort of mixed claims described by Ms Collier (and of which this case is an exemplar), the position is imperfect because those claimants do not have certainty of QOCS protection at the outset; they are subject to the Court's discretion on costs at the end of the day. But there are many, many personal injury claims which are not mixed claims and where no such unwelcome uncertainty arises. Many clinical negligence cases, claims arising out of accidents at work, RTAs, slips and trips and such like, will be claims for damages for personal injury only. In some of those cases, the claim will in fact arise under the Fatal Accidents Act 1976 or the Law Reform (Miscellaneous Provisions) Act 1934, both of which are expressly included in the scope of CPR 44.13(1) and neither of which, on my analysis, comes within the exception at CPR 44.16(2). These are ordinary PI cases. It is in this area that the problem addressed by Jackson LJ arose most acutely and where the pressing need for QOCS protection was identified. It is no surprise that mixed cases, which are inherently more complex, are not automatically subject to QOCS protection.

CONCLUSION

61. This appeal is allowed.

62. In summary, because Ms Brown advanced claims within the proceedings other than a claim for damages for personal injury, her case does come within the exception at CPR 44.16(2)(b). In consequence, the Judge does have a discretion to permit enforcement of the defendant's costs order, to the extent he considers it just. I understand that a hearing is fixed before the Judge in September 2018 at which the Judge will consider whether it is appropriate, in light of this Judgment, to exercise his discretion under CPR 44.16(2)(b).

63. I am grateful to all counsel for their helpful submissions, both written and oral.