Neutral Citation Number: [2025] EWCA Civ 44

Case No: CA-2023-001684

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NOTTINGHAM COUNTY COURT
HIS HONOUR JUDGE JONATHAN OWEN
Appeal No: NG23-023
Case No: H92YX456

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2025

Before :

THE LADY CHIEF JUSTICE
LORD JUSTICE BIRSS
and
LORD JUSTICE WARBY

- -

Between :

NATHANIEL BIRLEY and VIRGINER BELL (Personal Representatives of the Estate of Ms Rosa Taylor)	**Claimants/ Respondents**
- and -	
HERITAGE INDEPENDENT LIVING LTD	**Defendant/ Appellant**
and	
ANGEL RISK MANAGEMENT **AXA XL INSURANCE COMPANY UK LTD**	**Additional Parties**

- -
- -

Mr Kiril Waite (instructed by **Kennedys Law LLP**) for the **Appellant and the Additional Parties**
Mr James Wibberley (instructed by **Your Lawyers**) for the **Respondents**

Hearing date: 20 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 28/1/2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Birss:

1. This appeal is about costs. The main question is whether the cost provisions relating to certain media claims, which did at one time permit recovery of a success fee together with an after the event (ATE) insurance premium, could be applicable at the same time as qualified one-way costs shifting (QOCS) applicable to personal injury claims. The short answer to that question is yes. However there is some groundwork to cover and further explanation required, in order to deal with the point. The appeal also involves other related questions of civil procedure.

2. The appellant Heritage was a recruitment agency for care workers. Ms Rosa Taylor applied to be registered with Heritage. Heritage was aware that she had two previous convictions. It is alleged that in 2018 Heritage disclosed these previous convictions to a friend and colleague of Ms Taylor. This is alleged to have been a breach of the General Data Protection Regulations (GDPR) and the Data Protection Act 2018, a misuse of private information and a breach of confidence. Heritage's case is that the disclosure was inadvertent and with the honest albeit mistaken belief that Ms Taylor had consented to her friend being given this information. Heritage contends that when it was informed that there had not been consent, the Information Commissioner's Office (ICO) was immediately told, Heritage apologised to Ms Taylor, and later the ICO concluded that no offence or actionable infringement had occurred. This appeal is not concerned with the merits of the claim or the defence.

3. Starting in January 2019, Ms Taylor's solicitors wrote a number of letters to Heritage about the claim. The letters were all anonymised and quite unspecific. There was no response from Heritage. The solicitors also telephoned Heritage about the claim, to no avail. Heritage's director said later he thought these letters were a scam. Whether that is so or not does not now matter. Amongst the letters was a notification letter of 21 January 2019 and a letter of claim in October 2019. The correspondence included claims based on all the causes of action referred to in the previous paragraph above, and explained that the solicitors had entered into a Conditional Fee Agreement (CFA) which provides for a success fee. The letter of claim included a claim for personal injury on the basis that the disclosures had affected Ms Taylor's mental health, and also reserved the right to take out a policy of ATE insurance. That letter also asserted that, in the event the solicitors considered a personal injury claim was appropriate, then QOCS would apply to the claim.

4. On 3 August 2021 a claim form was issued. It refers to all the same causes of action as the letter of claim. It includes a claim for damages for personal injury. The total value of the claim is said to be up to £5,000, with a statement that the claimant expects to recover more than £1,000 for pain, suffering and loss of amenity.

5. The deadline for service of that claim form was therefore 3 December 2021.

6. On 27 September 2021 Ms Taylor died and on 18 November 2021 the solicitors for her executors applied for a stay of proceedings until 3 March 2022.

7. On 14 December 2021, after the deadline for service of the claim form had expired, DJ Ashby granted the stay which was sought, until 3 March 2022. The order directed the deceased's executors to file and serve an amended claim form and particulars of claim by 17 March 2022.

8. An amended claim form substituting the executors as claimants was filed at court around 29 December 2021. By 28 February 2022 a certificate of service had been filed at court confirming that the amended claim form, particulars of claim and other relevant documents including a psychiatric expert's report, had by then been served on Heritage.

9. On 10 March 2022 Heritage acknowledged service and shortly afterwards applied to set aside service and for the claim to be struck out "for late service pursuant to CPR r3.4".

10. The application came to be heard before District Judge Nicolle on 25 January 2023. The judge accepted Heritage's submission that the claimants had failed to apply in time for an extension of time to serve the claim form. She rejected the claimants' case that the application which had been made, for a stay, could be understood as or treated as including an application for an extension of that kind. District Judge Nicolle decided to set aside service of the claim form and declared that the court did not have jurisdiction to hear the claim on the ground of late service of the claim form. She also ordered the claim to be struck out.

11. When dealing with costs the judge held that continuing with the claim when the claim form had been served out of time amounted to an abuse of process and therefore the case fell within the exception to QOCS provided for in CPR r 44.15(b). The order directed that the claimants pay Heritage's costs of the application and the action, and disapplied QOCS.

12. The claimants appealed and permission was given on three grounds (numbered grounds 2, 3 and 4). Ground 2 was that once the claim form had not been served in time, there was nothing to strike out. Ground 3 was that the court having done what it did had no power to award costs of the action. Ground 4 was that the court had been wrong to find that r44.15 applied, essentially because there was no abuse of process. The significance of these grounds is their impact on costs.

13. HHJ Owen heard the appeal. He dismissed ground 2 on the basis that while it was not necessary to strike out a claim in these circumstances, if the conditions for making such an order were made out (CPR r3.4) then in principle there was no reason why such an order could not be made. HHJ Owen dismissed ground 3 on the basis that s51 of the Senior Courts Act 1981 and CPR r44.2 gives the court a wide power in relation to costs, which includes power to make an order about the costs of the action in a case like this one.

14. However the claimants' appeal on ground 4 succeeded. What would be required to justify a strike out in these circumstances was inordinate or inexcusable delay, or intentional or contumelious default, or wholesale disregard for the rules in failing to serve the claim form in time, whereas all that had been identified in this case was, at most, a failure to serve the claim form in time. There was no evidence it was deliberately or wilfully late (judgment [71]). That does not amount to an abuse of process, applying *Aktas v Adeptas* [2010] EWCA Civ 1170 (at [90]).

15. Heritage had filed a Respondent's Notice which, amongst other things, sought to support the District Judge's decision to strike out based on criticisms of the claimants' conduct as a whole. The major points relied on were the anonymised nature of the pre-action correspondence and a failure to notify Heritage before issue of the claim. The

judge addressed this from [73] onwards. The judge held that the claimants were not unfairly disadvantaged and decided overall that there had been no abuse of process and, even if there had been, no strike out was warranted.

16. The judgment addressed five major topics. First, the judge, at [82], agreed that the correspondence ought to have named Ms Taylor and did in one place give the wrong date for the breach, but while they were mistakes and errors of judgment ([83]), they did not amount or contribute to an abuse of process.

17. Second, at [84] and [85], the judge rejected the idea that there was an abuse arising from the way the claim had been characterised as a media and communications claim with an attempt to argue for recovery of a CFA success fee or ATE insurance premium. As part of this the judge referred to the pre-action correspondence as having used the Pre-action Protocol for Media and Communication Claims (the MAC Protocol). I will return to this aspect below.

18. Third, at [86], the judge rejected the submission that any abuse arose from the claimants' failure to notify Heritage that the claim had been issued or that the application for a stay had been made.

19. Fourth, at [88], the judge held that even if there was an abuse of process here, such as a wholesale failure to comply with the pre-action protocol, it was not the kind of case which would justify a strike out as a result. The proper response would only be an order such as an extension of time, a stay or costs.

20. Fifth, at [89], in any event irrespective of the errors and mistakes in the pre-action conduct, "there was no wholesale failure to comply with the pre-action protocol here".

21. Overall HHJ Owen concluded, at [90] – [91], that the order to strike out was wrong and that since there was no other basis to disapply QOCS, that aspect of the District Judge's order was wrong too. He held that the pleaded case clearly included a claim for personal injury and noted that Heritage had not invited the court to treat this as a mixed claim under CPR r44.16 so as to partially disapply QOCS. He concluded:

> "[91] … I am quite satisfied, looking at the statements of case, that no matter how this case may have been presented in the pre-action protocol letters, this is squarely a claim for personal injury where the main and substantial loss which is alleged psychiatric injury. Stepping back, one would characterise this matter both broadly and as a matter of detail as a claim for personal injury."

22. The order for the claimants to pay Heritage the costs of the action and of the application was varied to reflect QOCS, adding a provision that its terms were not to be enforced without permission, with a declaration that QOCS applied.

23. On the costs of the appeal, the judge decided to award them all to the claimants, even though the appeal had failed on the first two grounds. The main battleground was the abuse issue and whether QOCS applied. The claimants were the overall winners.

Appeal to the Court of Appeal

24. Heritage sought and obtained permission to appeal to this court on the basis that the matter raises an important point of principle: whether the claimants' solicitors 'cherry-picked' their way through pre-action protocols in order to avail themselves of the most favourable position upon the recovery of success fees and protection on the issues of costs and, if they did, whether such conduct, coupled with a failure to comply with the requirements of the MAC Protocol represents an abuse of the process of the court.

25. The first three grounds of appeal are directed at challenging HHJ Owen's conclusion that there was no abuse of process and his refusal to strike out on that basis. They can be taken together. Addressing them also involves considering the "cherry picking" argument about the relation between the media claims and QOCS. The fourth ground of appeal relates to the costs of the appeal below.

26. The claimants filed a Respondent's Notice raising five grounds (RN grounds 1 to 5). RN grounds 1, 2, and 3 relate to the abuse of process/strike out issue and can be taken together with the first three grounds of appeal. Essentially RN grounds 1 and 3 contend that Heritage did not apply for or ask the District Judge to make an order striking out the proceedings on the basis of abuse of process, rather the application was based on the failure to serve in time. This is in part a challenge to HHJ Owen's decision to consider the abuse of process question on the wider basis, as he did. RN ground 2 contends that, since a failure to serve was the basis on which the District Judge struck out the proceedings, the judge had no power to strike them out a second time. In effect this is a challenge to HHJ Owen's dismissal of ground 2 of the appeal before him. RN ground 4 contends that the claimants did not seek to use the MAC Protocol and in any case did make clear that the claims included damages for personal injury. Finally RN ground 5 makes the same point as found by HHJ Owen at [89] (see above) i.e. that even if there was any abuse, which is denied, it was not sufficient to justify striking out.

27. With all this in mind, this appeal involves essentially two topics. The first is the question of abuse of process and striking out, which deals with the first three grounds of appeal and all five grounds of the Respondent's Notice. The second topic is the separate costs question under ground 4 of the appeal.

The dissolution of the appellant

28. Before turning to the two main issues, a further point emerged a few days before the hearing of the appeal. The appellant company Heritage Independent Living Ltd had been dissolved on 19 October 2024. On the face of it one might think that the appeal could not succeed in these circumstances since there was no appellant, unless the company was restored to the register. The matter was discussed with counsel at the outset of the hearing. Since this appeal has only ever been about costs, the appellant's insurers explained, via counsel and solicitors for the appellant, that they wished to pursue the appeal in their own interest and did not see a purpose in restoring the appellant company to the register. They submitted that s1, 2 and 6A of the Third Parties (Rights against Insurers) Act 2010 (the 2010 Act) came into play, automatically transferring and vesting the claimants with the rights which Heritage had under the insurance contract between Heritage and its insurers.

29. Briefly, by s1(2), if an insured person incurs a liability against which that person is insured and that person becomes a "relevant person", then their rights under the contract of insurance automatically transfer to and vest in the third party to whom the liability

is or was incurred. One way in which a liability can be incurred is by a judgment (s1(4)(b)). By s6A, a company is a relevant person if it has been dissolved. By s2(3) the insurer may rely on any defence the relevant person could rely. The effect of these provisions is summarised in a passage in Halsbury's Laws Vol 13 at [90] as follows:

> "Under the Third Parties (Rights Against Insurers) Act 2010, where under any contract of insurance a person is insured against liabilities to third parties which he may incur, then, in the event of the insured becoming bankrupt or insolvent, or being a company, in the event of its winding-up, administration or dissolution, if any such liability is incurred by the insured, his rights against the insurer under the contract in respect of the liability are transferred to and vest in the third party to whom the liability was so incurred."

30. Therefore, the insurers submitted, Heritage, having been dissolved, is now a relevant person and the costs orders against Heritage, including those made below, are directly enforceable by the claimants against the insurers. Moreover by s2 of the 2010 Act the insurers contended any defence open to Heritage was something the insurer could rely on in its own interest. The appeal relates to a costs order made in Heritage's favour, which depending on the outcome of the appeal, could be material to the insurer's liability to satisfy the existing costs orders made against Heritage below.

31. In effect, the insurers were seeking to maintain this appeal in their own interests. We decided that the appropriate way forward in these circumstances was for the insurers (Angel Risk Management and AXA XL Insurance Company UK Ltd) to be joined as parties to these proceedings and directed that an application notice seeking an order that they be joined under CPR r19.2(2)(b) be issued and served. We would decide the application in this judgment. In accordance with the court's direction that was done on 21 November 2024.

The application of 21 November 2024

32. Under CPR r19.2(2)(b) the court has power to order a person to be joined as a new party when there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue. The power can be exercised at any stage. The rule does not require the court to decide the issue one way or another at the stage at which the party is joined. No doubt in most cases the power will be exercised before trial but if appropriate, as here, it can be exercised on appeal.

33. In this case there is an issue between the insurers and the claimants, i.e. the question of costs. It is clearly desirable to add the insurers as additional parties so that the court can resolve the issue in a manner binding on all relevant parties and so the order will be made as part of the final order disposing of this appeal. For the remainder of this judgment, I will refer to the appellant as Heritage without getting into the distinction between that dissolved company and the insurers. The heading of this judgment has been amended accordingly.

First topic - abuse of process and striking out

34. The context for this topic is the QOCS scheme. That scheme was introduced when the recovery of CFA success fees and ATE insurance premiums was prohibited in personal injury claims (this is addressed in more detail below). The point of QOCS was to promote access to justice by mitigating the claimants' litigation cost risk in those cases. The scheme is in section II of CPR Part 44, rules 44.13 to 44.17.

35. By r44.13 the scheme applies to proceedings which include a claim for damages for personal injuries. It also applies to claims for damages under the Fatal Accidents Act 1976 and to claims for damages which arise out of death or personal injury and survive for the benefit of the estate under s1(1) of the Law Reform (Miscellaneous Provisions) Act 1934.

36. By r44.14, subject to certain exceptions, a limit is placed on the ability to enforce a costs order against a claimant without the permission of the court. The limit, for cases like this one issued prior to April 2023, would be the total of any damages and interest obtained whether by order or settlement, in the proceedings. So for example, if that claimant lost the claim entirely, received nothing from the defendant, and the court made the usual order requiring the claimant to pay the defendant's costs of those failed proceedings, then the effect of QOCS would be that the costs order could not be enforced without permission at all because the total damages and interest recovered was nil. This shows how QOCS protects a claimant from a costs risk, provided the claimant avoids the exceptions.

37. One of the exceptions is in CPR r44.15, which provides as follows:

> 44.15 Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that –
>
> (a) the claimant has disclosed no reasonable grounds for bringing the proceedings;
>
> (b) the proceedings are an abuse of the court's process; or
>
> (c) the conduct of – (i) the claimant; or (ii) a person acting on the claimant's behalf and with the claimant's knowledge of such conduct, is likely to obstruct the just disposal of the proceedings.

38. This exception has two elements. The proceedings must have been struck out, and the reason for the strike out must be one of the reasons in (a) to (c). The relevant limb in this case is sub-paragraph (b) – abuse of process.

39. Finally, it is worth mentioning the exception for so called mixed claims provided for in r44.16(2)(b). Essentially if, in addition to the claim to which QOCS applies by r44.13, the claimant also brings another claim which is not one to which QOCS applies, then the court has a discretion as to the extent to which a costs order may be enforced with permission (see *Brown v Commissioner of Police of the Metropolis* [2019] EWCA Civ 1724). As mentioned above already, HHJ Owen treated this action as a claim for personal injury and not a mixed claim, so that r44.16(2)(b) did not apply. There is no appeal from that decision.

40. I turn to address briefly various subsidiary procedural points taken by both sides. First, HHJ Owen was right in my judgment that the District Judge was entitled to consider the question whether the criteria for striking out for an abuse of process were met, even though she had also decided to set aside service. The reason is because of the significance attached to striking out for abuse of process in the context of QOCS.

41. Nevertheless while Heritage's position on QOCS in the circumstances was understandable, in future when a defendant makes an application which might lead to a disapplication of QOCS, the defendant ought to give clear notice to that effect. Given that the original application did seek a strike out and referred expressly to CPR r3.4, HHJ Owen construed it as including an application to strike out for abuse of process. Therefore if that had succeeded it was likely to lead to a debate about QOCS, but that was never spelled out. If it had been, matters would have gone much more smoothly. In general applicants for orders with that potential should identify that aspect expressly if that is what they plan to contend for.

42. Second, while HHJ Owen was not bound to consider the claimants' conduct in general as a separate basis for abuse of process, it was within his discretion to do so and he gave cogent reasons for it. The judge noted, at [78], that the appellants before him (i.e. the claimants) knew that there was criticism of the pre-action conduct and that both parties had led evidence on the topic. He did not believe further new evidence would be needed to address the points being raised and found that the claimants would not be put to an unfair disadvantage.

43. The third procedural point is this. On appeal to this court Heritage's oral submissions included further points which were described as more examples of "flouting" the pre-action protocol by the claimants. I am not satisfied it would be right to entertain the submissions on this, a second appeal. The caution identified in *Singh v Dass* [2019] EWCA Civ 360 concerning the raising of a new point on appeal applies even more so on a second appeal. Adherence to pre-action protocols is of real importance but these points were not explored in the proceedings below, were not developed in the evidence. Nor were they dealt with by HHJ Owen in his judgment. The conduct issues addressed by HHJ Owen are the ones on which this appeal will be decided and I turn to address those.

44. The principles relevant to abuse of process and strike out are not in dispute. While the decision to strike out is a matter for the court's discretion, whether something is an abuse of process is different, in that, although it involves an evaluation of a large number of factors, it is a judgment which is either right or wrong, (*Aldi Stores v WSP Group* [2008] 1 WLR 748 followed by Rix LJ in *Adeptas* at [53]). The principles to be applied in deciding whether something is an abuse of process were summarised in *Cable v Liverpool Victoria* [2020] EWCA Civ 1015. The whole passage from [42] to [48] is relevant, starting at [42] with the well-known statement by Lord Diplock in *Hunter v Chief Constable of West Midlands Police* [1982] AC 529. There is nothing to be gained from attempting to restate those principles. The two aspects I would highlight are these. The first is the court's real reluctance to strike out a claim save as a last resort (see [45] and [47]). The second is that abuse of process can apply to pre-action conduct (at [55] to [58]). The issue in *Cable* being compliance with the "RTA Protocol" (the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents).

45. Adherence to pre-action protocols, even the most general protocol, is of real importance in civil justice. However in this case there has been an unproductive debate about which pre-action protocol was applicable and therefore which one had not been complied with. It is unproductive, because if the pre-action conduct criticised in this case did amount to an abuse of process, then that would be true whichever pre-action protocol one had in mind. Conversely, if it was not abusive, measuring what happened against one of the other protocols does not make it abuse.

46. The three candidates are the MAC Protocol, the PI Protocol (the Pre-Action Protocol for Personal Injury Claims) and the general Pre-Action Protocol.

47. HHJ Owen was referred to the MAC Protocol, and that is reflected in the judgment at [84] and [85]. However, it has been pointed out that this pre-action protocol only came into effect on 1 October 2019, after the correspondence started. That is true but it does not help. It does not mean that no pre-action protocol at all applied and certainly does not mean that the pre-action correspondence would somehow be immune from criticism. Apart from anything else, once the MAC Protocol came into force on 1 October 2019, then an obvious thing for sensible litigators to do when bringing claims such as the ones in this case, which manifestly fell within its ambit, would be to follow it from then on with suitable adaptations.

48. The second candidate pre-action protocol is the PI Protocol. That has been in force in one form or another since 1999. It was suggested that this might not apply here given the media-based causes of action and the fact that that protocol is aimed at claims likely to be allocated to the Fast Track. Neither of these is a good point either. Taking the second point first, the PI Protocol expressly notes at paragraph 1.1.2 that the spirit, if not the letter, of the protocol should still be followed for claims which could potentially be allocated to the multi-track (or since 2023 the intermediate track). The fact that most claims handled under the PI Protocol are brought in negligence does not prevent sensible litigators from following it, again with suitable adaptations if necessary.

49. Finally and in any event, the general Pre-Action Protocol would always be relevant if no other pre-action protocol was thought to be suitable. It sets out a general procedure to take place pre-action which involves (at [6(a)]) the claimants providing concise details of the claim to the defendant before issue.

50. Turning to the alleged abuses, on the main conduct arguments as they were before HHJ Owen, such as the anonymisation of the pre-action letters, I cannot fault his decision. The letters certainly should have identified the claimant and they were unreasonable in not doing so, but I agree with the judge that this error does not amount to an abuse of process. Nor, even if it did, would this justify striking out the proceedings. Neither, again as the judge recognised, would the failure to serve the claim form on time. *Aktas v Adeptas* (at [90]) shows that a negligent failure of that kind is not, without more, an abuse of process. The same is true considering these two failures in combination, coupled with the other errors (a mistake on dates and failures to notify the other party of steps being taken). The claimants' solicitors' conduct was lax but did not step over into an abuse of the process, let alone as conduct justifying the remedy of striking out.

51. That leaves the matter of cherry picking between the recovery of success fees and QOCS. The QOCS scheme has been described already but it is now necessary to

address what is and is not recoverable in costs in the context of privacy and other media claims.

52. In 1990 s58 of the Courts and Legal Services Act 1990 (CLSA) introduced the idea of enforceable CFAs. However, in 2012 following recommendations in the Jackson Report, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) at s44 made amendments to the CLSA which, broadly, prevented the recovery of success fees payable under a CFA or recovery of ATE insurance premiums. The operative parts of the CLSA as amended were s58A(6) on success fees and s58C(1) on ATE insurance premiums. These changes applied to most types of civil claims, including claims for personal injury, and it was at this time that the QOCS system was introduced.

53. The terms of these sections are as follows:

> S58A(6) A costs order made in proceedings may not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement.
>
> S58C (1) A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2)

54. When these bans came into force "publication and privacy proceedings" were excluded. The term "publication and privacy proceedings" was defined in article 1 of the 2013 LASPO Commencement Order No 5 (SI/2013/77) to include proceedings for breach of confidence involving publication to the general public, and misuse of private information. The operative part of the statutory instrument provides that the provision in it which brings s44 of LASPO into effect, which in turn amends s58 of the CLSA, does not apply to those kinds of proceedings.

55. However, by a later statutory instrument, the 2018 LASPO Commencement No. 13 (SI 2018/1287), the exception for success fees in publication and privacy proceedings was abolished, as from 6 April 2019. From that time on, the ban on recovering success fees applied to these claims. However there remains no ban on the recovery of ATE premiums in publication and privacy proceedings.

56. Thus, when the correspondence started in January 2019, both a CFA success fee and ATE premium were potentially recoverable in costs in publication and privacy proceedings, although by April 2019 that position had changed as far as success fees were concerned. Given that the correspondence included a claim for misuse of private information, it is manifest that the court proceedings contemplated by the correspondence from the outset were, or at least included, publication and privacy proceedings.

57. Turning to Heritage's submission on "cherry picking", the argument is that the purpose for which QOCS was introduced was as an alternative to the recovery of success fees and ATE premiums and therefore it cannot have been intended that both could apply in the same action. One way of putting it is to say that personal injury cases are not

publication and privacy proceedings. I agree with Heritage's premise in general terms, but the conclusion does not follow from it. The answer depends on the precise manner in which QOCS was introduced and in which recovery of success fees etc. was maintained. The way the legislator chose to implement the ban on the recovery of success fees was by prohibiting the relevant sort of costs order in certain kinds of proceedings. No such prohibition applied, prior to April 2019, in publication and privacy proceedings. However the rules bringing in the QOCS scheme provided that it applies to claims for damages for personal injury. Although most claims for these damages are made based on a cause of action in negligence, the rules do not approach the matter in that way.

58. The claim identified in the pre-action correspondence and in the claim form was one for damages for personal injury (psychiatric damage) caused by the wrongful disclosure of private/confidential information. There is nothing inherently wrong with that. Claims of that kind are rare but not unknown (Warby LJ kindly referred me to paragraph 11.222 of *The Law of Privacy and The Media*, 4th ed, which contemplates just such claims).

59. It has never been alleged that the claim as framed in this case was fictitious or otherwise bogus. After all it was supported by an expert's report. The pre-action correspondence did not conceal the basic nature of the claim, which was firmly within the ambit of CPR 53.1 concerning proceedings in the Media and Communications List. Therefore, once it was in force, the MAC Protocol was apt. Given that the causes of action included a claim for misuse of private information, prior to April 2019, a CFA success fee was recoverable; and at the same time the QOCS scheme applied, because personal injury damages were claimed. Whether and how the provision on mixed claims might or might not have effect if this case had gone to trial is not in issue.

60. Therefore I would dismiss the appeal on this first topic.

61. Before leaving the first topic it is worth noting that on this appeal it was not necessary to grapple with the recent ECHR judgment in *Associated Newspapers v the United Kingdom* (No. 37398/21), 24 November 2024 on the success fee regime in media cases. When I describe a success fee as recoverable prior to April 2019, I simply mean recoverable within the terms of the CLSA itself without reference to that judgment.

The second topic – costs of the appeal before the circuit judge

62. HHJ Owen awarded 100% of the costs of the appeal before him to the claimants, the appellants at that stage. Heritage recognises the court's very wide discretion on costs but contends that nevertheless this order was plainly wrong and falls outside the scope of a reasonable difference of opinion. Heritage makes two submissions:

    i) It is not correct to say that the principal argument in the appeal centred on QOCS. In fact the claimants spent as much time trying to persuade HHJ Owen that the court had no power or jurisdiction to make a costs order in the first place.

    ii) The judge did not consider or attach sufficient weight to the fact that the claimants did not argue the abuse of process point at all before the District Judge. Instead, the focus of their argument was on jurisdiction and so they brought the

appeal on their own heads. The only reason there is an appeal at all was because the claimants' solicitors failed to serve in time in the first place.

63. Standing back, the claimants were plainly the overall winners, and a costs order of some kind in their favour is unremarkable. It is true that the claimants did fail on points which took up a more than a trivial amount of time and effort, and so a percentage costs order which awarded less than 100% of the costs might well have been the result. The question on appeal is only whether something less than 100% was open to the judge, so that he erred in awarding all the costs in the claimants' favour.

64. HHJ Owen's reasons for his costs order were set out at [93] to [104]. He started with the CPR and the general rule that costs are awarded to the successful party but the court may make a different order ([93]). He held at [94] that the claimants were the winners of the appeal. He analysed the grounds at [95] to [99], recognising the importance of the unsuccessful grounds 2 and 3. Nevertheless concluded that abuse of process/QOCS was the "main battleground". The judge, who was clearly aware of how much time and effort had gone into those unsuccessful points, was entitled to come to that conclusion.

65. HHJ Owen also had well in mind the second point taken by Heritage, which he addressed at [103] recognising that there had been, as he put it "a degree of '*moving of the goalposts*'". In this part of his decision the judge was standing back and reflecting on the overall fairness of the situation. He did not accept that either side was open to criticism for what had happened before the District Judge, again a conclusion which he was entitled to reach.

66. I am not inclined to intervene in this aspect of the appeal. HHJ Owen gave full reasons for coming to the conclusion he reached. I believe the result was open to him on the facts.

Conclusion

67. I would dismiss the appeal.

68. Returning to the dissolution of Heritage, in the circumstances that the appeal is dismissed, it is not clear whether there will be any outstanding dispute between the claimants and the insurers about the effect of the 2010 Act. I suspect there is not. However if there is then the parties will need to notify the court and directions may have to be given.

Lord Justice Warby:

69. I agree.

Lady Chief Justice:

70. I also agree.