Neutral Citation Number: [2023] EWHC 2832 (KB)

APPEAL REF: M22Q647

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Date: 10th November 2023

Before :

MR JUSTICE RITCHIE

- -

BETWEEN

MR MUHAMMAD TANVEER AMJAD

Appellant/Claimant

- and -

UK INSURANCE LIMITED

Respondent/Defendant

Paul F McGrath of counsel (instructed by **Messrs Kaizen Law)** for the **Appellant/Claimant**
William Poole of counsel (instructed by **Keoghs)** for the **Respondent/Defendant**

Hearing date: 19th October 2023

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APPROVED JUDGMENT

Mr Justice Ritchie:

The appeal

1. This is an appeal from the costs decision of HHJ Pearce (the Judge) made at Manchester County Court on 27.7.2022 (sealed on 16th September 2022). It concerns the exceptions to QOCS protection from adverse costs orders for claimants in personal injury claims mixed with non personal injury claims.

The claim

2. The Claimant was a taxi driver who was driving a Mercedes Vito when, on 4.7.2019, he suffered a road traffic accident (RTA). The other driver, Mr Smith, in a Nissan, hit his passenger side rear wing and door. The Claimant sued for damages for personal injuries, recovery and storage charges and for the cost of hiring a replacement vehicle from a credit hire company (CHC) for the 3-4 months it took the Defendant (Mr. Smith's insurer) to pay an interim payment for the crash repairs. He did not do the repairs himself because (on his case) he did not have £6,000. His disclosed accounts and tax returns for the two years 2018-2020 showed he earned £12,000 gpa after expenses. He was on working tax credit. He had a wife who did not work because she cared for their 3 children. He did not rent the cheapest car to replace his Mercedes taxi, he chose to use a CHC called "Bespoke" who charged a much higher rate than the basic hire rate (BHR). The advantage of credit hire for him was that he did not have to pay the hire charge week by week or in advance and he could continue earning so he suffered no loss of profit. The eventual bill from the CHC totalled approximately £51,600. The repairs cost £5,231. The recovery costs and storage costs were £3,249. In the end the trial judge assessed the total value of the claims at around £10,000. The CHC charges were not awarded because the Claimant was found to have breached an unless order for disclosure of income documents.

3. The claim was issued in late 2020. The Claimant asserted impecuniosity so as to justify the CHC charges. The Defendant admitted negligent driving by Mr Smith but put the Claimant to proof: that he was in the car, of all of his injuries and losses, asserted that the Claimant had failed to mitigate his expenses and asserted his loss of profit was recoverable not the high CHC charges. The Defendant required the Claimant to prove impecuniosity and asked for various documents relating to income and savings.

The strike out

4. A directions order was made on 20.10.2021 requiring the Claimant to disclose by 29th December 2021, inter alia, proof of income for the 3 months before the RTA and from the RTA to February 2020. This was an unless order. In my judgment attaching an unless order despite the Claimant never having breached any earlier direction may be seen as contrary to the general principle that unless orders are only attached after default in compliance. The words of the directions are relevant:

> "2(c) If it is the Claimant's intention to rely on impecuniosity then the Claimant is to provide full financial disclosure, regardless of the

> country in which the financial accounts are held, in support of the same; should the Claimant fail to do so then they shall be debarred from relying upon impecuniosity at all. Such disclosure to include:-
> i) Wage slips (or other proof of earnings if self-employed) for the period 3 months pre-accident, covering the period of hire and 3 months after hire ended.
> ii) Bank/building society statements for any accounts held, either in sole or joint names for the period commencing 3 months pre-accident and continuing until the date 3 month after cessation of hire.
> iii) Copies of savings accounts statements for any accounts held, either in sole or joint name for the period commencing 3 month s pre-accident and continuing until the date 3 months after cessation of hire.
> iv) Copies of credit and/or charge card statements for any such cards held, either in sole or joint names for the period commencing 3 months pre-accident and continuing until the date 3 months after cessation of hire.
> v) Details of any loans and/or overdraft facilities held. With regards to overdraft facilities the Claimant is to provide details as to the limit and terms of any such overdraft.
> 3. Requests for copies/inspection are to be made by 4pm on 12th January 2022 and to be complied with within 14 days of receipt."

5. The Claimant disclosed his filed accounts, tax returns and bank statements for the relevant periods and, in addition, longer periods: 4/2018-4/2020. Each year he was earning around £12,000 gpa before tax but after expenses. He had little or no money in his bank account. He was married with 3 children. His wife did not work (as he asserted in his served witness statement). He was on working tax credit. The Defendant raised no criticism of that disclosure after 29.12.2021 or in January or February or at any time before the skeleton arguments for the trial in July 2022 and did not apply for specific disclosure or assert that what had been provided was inadequate or that the CHC claim was therefore struck out for breach of the unless order. This is an important omission to which I shall return below. So, the Claimant pursued the claims to trial. He rejected three part 36 offers. The first was made in 2020 by the Defendant insurer, before defence lawyers were instructed, it was for £15,700.

6. The trial took place over two days (it was listed for one) starting on 14.7.2022 and ending on 27.7.2022.

7. On day one the Defendant raised a procedural point. It asserted that the Claimant had failed to plead impecuniosity properly and breached the disclosure unless order. The Judge agreed that the unless order had been breached and debarred the Claimant from asserting impecuniosity.

8. As to the pleadings, the Particulars of Claim (POC) stated:

> "12. Pursuant to PD 16 paragraph 8.2(8) it is the Claimant's case that at the time of the accident and throughout the period of hire he was impecunious, in that he did not have the financial means to repair or replace his vehicle or to hire a replacement vehicle from the basic hire market without exposing himself and his family to unreasonable sacrifice pursuant to *Langden-v-O'Connor* [2003] UKHL 64.
> 13. The Claimant's financial position was such that his only reasonable means of replacing his vehicle whilst it was un-roadworthy was to hire a replacement vehicle on a credit hire basis. The Claimant will disclose evidence in support of his contention that he was impecunious in the normal course of directions relating to disclosure and exchange of witness statements."

In the schedule the Claimant pleaded:

> "Pursuant to PD 16 paragraph 8.2(8) it is averred that the Claimant has mitigated the claim for vehicle damage and car hire charges in that at the time of the accident and throughout the duration of hire the Claimant will say that he had insufficient funds to repair or replace his vehicle and had no alternative but to hire a replacement vehicle on a credit hire basis. The Claimant's disclosure will show that at the time of the accident he only had limited funds available to him. The Claimant hired a vehicle from Bespoke Credit Hire Ltd ."

9. The judge ruled on the pleadings as follows:

> "4. My attention was drawn, first of all, by Mr Poole to the terms of the Practice Direction to Part 16 of the Civil Procedure Rules. In its amended format, paragraphs 6.3 and 6.4 applied to this claim:
>
> > "6.3. Where the claim includes the cost of hire of a replacement motor vehicle following a road traffic accident, the claimant must state in the particulars of claim: ... (5) Impecuniosity (if the claim relates to credit hire)".
>
> And by paragraph 6.4(2):
>
> > "The obligation to state matters there set out [that is to say in the previous paragraph that I have just quoted] includes an obligation to state relevant facts".
>
> 5. Mr Poole contends that the claimant did not comply with that obligation within the particulars of claim, or the schedule of special damages annexed to the particulars of claim. Indeed, it seems to me that he is right about that and that that in and of itself might in the appropriate case lead to an argument that due to a failure to comply with

> the Practice Direction, the claimant ought not to be allowed to pursue the claim for damages on that credit hire basis."

10. In full PD 16 states this about credit hire claims:

> "Hire of replacement motor vehicle following a road traffic accident
> 6.3 Where the claim includes the cost of hire of a replacement motor vehicle following a road traffic accident, the claimant must state in the particulars of claim—
> (1) the need for the replacement vehicle at the relevant time;
> (2) the period of hire claimed (providing the start and end of the period);
> (3) the rate of hire claimed;
> (4) the reasonableness of the period and rate of hire; and
> (5) if the claim relates to credit hire, whether the claimant could afford to pay in advance to hire a replacement car, and, if not, why not ("impecuniosity").
>
> 6.4 In paragraph 6.3—
> (1) "relevant time" means at the start of the hire and throughout the period of hire;
> (2) the obligation to state the matters in paragraph (3) includes an obligation to state relevant facts."

11. It is plain that PD 16 para 6.4(2) relates to 6.3(3) because it says it does. The Judge in his judgment appears to have thought it related to all of para. 6.3. In any event the Particulars of Claim and schedule did set out the pleading of impecuniosity as did the Schedule. It did not set out his annual income but did say he could not afford to pay the hire charges. However, the Judge did not strike out on the basis of the pleadings. He did so because he found the Claimant had not complied with the unless order for disclosure set out above. The Judge ruled as follows:

> "13. On the facts of this case, by way of example, Mr Poole has drawn attention to the fact that the day books have not been provided. The day books are not referred to within (i) to (v) of (c). They are a route by which the claimant might have proved his earnings, but if he proves his earnings through another route of disclosure, it would not be right to say that he is in breach of the unless order and, therefore, is debarred from relying on impecuniosity. But Mr Poole makes another point, which is this: that the earnings information that is provided is by way of income and expenditure accounts that cover annual periods.
> 14. **In this case, by way of example and clearly most relevantly, 6 April 2019 to 5 April 2020. Those accounts start two days after the period covered by 2(c) in the directions order and finish very approximately a month and a half after the end of the period**

> **provided for by 2(c).** What Mr Poole says is that that income and expenditure is not the disclosure of proof of earnings for the relevant period. It simply does not cover the same period as that being referred to in paragraph 2(c) and, in that case, it cannot be said that there is compliance with the unless order.
> 15. It might be thought at first blush that that is a somewhat pedantic line to take since it might be said that the greater or longer period covered by the documents disclosed includes the lesser three months either side of the hi.re period. But Mr Poole makes what seems to me to be the very good point that meaningful cross-examination, and indeed meaningful preparation of the case from his side, calls for proper particularisation of the case and proper compliance with the detail of the order.
> …
> 18. In my judgment, it cannot be said that the claimant has complied with paragraph 2(c) here. **The failure to provide more precise proof of earnings for the period referred to seems to me to be non-compliance with the obligation.** That is not simply pedantry, as I have said already. It is important to a defendant faced with what is, after all, a large claim for credit hire which, on the face of it, appears disproportionate either to the cost of repairing the vehicle or to other means of hiring the vehicle. It is not, it seems to me, simply requiring compliance for the sake of compliance to say that the claimant in this case needed to give the proper particularisation for that period." (My emboldening).

12. This finding is rather detached from reality and I do not consider that it was right factually. The two years of annual accounts covered the relevant period and more. They started in April 2018 and went to April 2020. There was no 2 day gap. This taxi driver did not have accounts which precisely matched the period starting 3 months before the RTA to 3 months after the hire ended. No taxi driver would. Having ruled that the directions order did not require disclosure of the taxi driver's day books, with which I agree, the Judge found that disclosure of the accounts and tax returns submitted to the Inland Revenue, which on any view were the best evidence of his income, were insufficient. As I shall set out below, I do not consider that decision to have been fair to the Claimant who clearly disclosed the best evidence which he had of his income covering the relevant period. As for the "pedantic" two-day point made by the Defendant, I do not consider that there is any substance in it. The Claimant could not afford a £6,000 repair bill on an annual income of £12,000 but, for the reasons set out below, the issue is not before me on this appeal because both on paper and at the renewal hearing permission to appeal this finding was refused. However, I mention here that I would not want this part of the decision to be used in other cases as a precedent for rejecting filed annual accounts, tax returns and bank statements as good evidence of income and expenditure or for suggesting that disclosure of these is in breach of

standard directions. Nor do I think that it was right, in pursuance of the overriding objective and the cards on the table approach to litigation, for the Defendant to have failed to raise the point that they considered that the unless order had been breached much earlier, for instance straight after disclosure and in any event well before trial.

The causation and quantum trial

13. Having knocked out the impecuniosity issue the Defendant had no liability for the CHC charges.

14. In his substantive judgment the Judge awarded the following heads of loss:

    (1) Pain, suffering and loss of amenity: £2,500.
    (2) Car repairs: £5,231.
    (3) Car hire charges: £1,549 (£994 of hire; £554 of collision damage waiver).
    (4) Loss of profit as a taxi driver (3 weeks): £750.

15. The Judge ordered that judgment would be entered for the Claimant for £10,029.64. On costs the Defendant raised the Part 36 offer for £15,700 which expired on 14.5.2020. The Claimant had failed to beat it. As a result the Judge ordered the Defendant to pay the Claimant's costs to 13.5.2020 and also ordered the Claimant to pay the Defendant's costs from 14.5.2020 on the standard basis. The key part of the order was that pursuant to CPR r.44.16(2) the Judge granted permission to the Defendant to enforce the costs against the Claimant up to a maximum of £15,000, so around £5,000 more than the damages and interest awarded and so above the QOCS cap. This is the sum in dispute in this appeal.

Bundles and evidence

16. For the appeal this Court was provided with an appeal bundle, a Respondent's appeal bundle, two authorities bundles and skeleton arguments.

The costs judgment

17. I have summarised above that in the substantive judgment the Judge found in the Claimant's favour on the injuries suffered (save for one injury asserted to the lower back), the car repair charges, some hire charges and some loss of profit. In addition, the Judge rejected the Defendant's assertion of fundamental dishonesty so the Claimant won on that issue as well. However, the Claimant lost on the CHC charges which were the largest part of the claim and on storage charges and recovery charges.

18. In paras. 20-30 the Judge dealt with the requests by the Defendant for: (1) indemnity costs and (2) to lift the QOCS cap (I shall explain that in more detail below). The Defendant lost the request for an indemnity costs order. Thus, I can work on the basis that the Judge did not consider that the Claimant had conducted the litigation either with dishonesty or in a way which was "outside the normally expected" conduct, or hurly burly of claims and denials in civil litigation.

19. As for lifting the QOCS cap, the Judge ruled as follows:

> "25. By the far the largest part of this claim was a credit hire claim. It was not a claim which I have found to be grossly exaggerated in the manner that was found to be the case in *Brown v Commissioner of Police of the Metropolis* [2019] EWCA Civ. 1724, but it was a claim that has failed for reasons that I gave on a preliminary ruling at the trial. **It seems to me that this is patently a case in which the claim is made in respect of a claim other than one to which this section applies because it is a claim for credit hire** and, equally, **it is very likely a claim made for the financial benefit of a person other than the claimant**, namely the credit hire company. **Therefore, CPR 44.16(2)(a) is in play.**
> 26. The consequences of the credit hire claim to this case have been considerable. They are no doubt what drove the case to go to trial and no doubt also played a significant part in this being a case heard on the multi-track with costs budgeting and by the standards of litigation of this kind relatively generous budgets. In those circumstances the court should seriously consider making an order under CPR 44.16(2).
> 27**. In reality, this was a case that in large part was about the credit hire and, in those circumstances, I do not consider it unjust to make an order under 44.16(2). Rather, justice to the defendant calls for an order to be made**. There ought, however, to be a limit on that because, to defend this claim, the defendant would have had to incur costs in any event even if the credit hire claim had not been made.
> 28. It is not simply a case of deducting costs that would have been incurred to defend the claim because, as Mr Poole points out, the very fact of a Part 36 offer being made and being beaten itself so complicates the issue that one cannot simply say there is one set of circumstances in which a certain amount of costs would have been incurred and another set where a different set of costs would be incurred and it is the extra costs that might be laid at the door of the claimant.
> 29. Nevertheless, if the defendant is able to persuade a costs judge to depart from the costs budget and order a higher costs amount, there would be potentially an injustice if the defendant were able to enforce the costs to the full extent of the £21,464 set out in its current costs statement since it seems to me to allow that would potentially be to drive a coach and horses through the larger scheme of qualified one-way costs shifting.
> 30. Doing the best I can - and this is a very rough and ready approach seeking to do justice between the parties - I make an order under 44.16(2) but limit the amount against which the order for costs may be

> enforced to the sum of £15,000. May I make it absolutely clear that that is not a back of the fag packet summary assessment of costs in this case. That is simply to say that if the costs judge is persuaded to go beyond the budgeted costs, then as to enforcement that cannot go beyond the figure of £15,000."

The ground of appeal

20. By a notice of appeal dated 4.8.2022 the Appellant raised 9 grounds. Permission to appeal on grounds 1-9 was refused on paper by Heather Williams J on 11.11.2022 but on renewing the application the Claimant was granted permission on ground 9 by Collins-Rice J on 6.3.2023. Ground 9 was as follows:

> "9. The Judge failed to take into account, or give appropriate weight, to relevant factors: the Claimant was a person of modest means (the Judge accepting for other purposes that he earned c. £250 per week), the Judge accepted the claim was made for the financial benefit of another but only gave an order against the Claimant, the Claimant remained liable to the hire company for the entire amount, the Claimant had not been found guilty of any 'gross exaggeration' as might justify such an order. Accordingly, the Judge failed to take into account, or give appropriate weight, to material facts and failed to follow the suggested approach set out in paragraphs 56-59 *Brown v The Commissioner of Police of the Metropolis* [2019] EWCA Civ. 1724; [2020] 1 WLR 1257."

21. In the skeleton and in submissions that ground was expanded and explained. It was submitted by the Appellant that r.44.16(2) (a) and (b) are mutually exclusive and cannot both be found to have been proven, so the Judge was wrong to do so. In submissions the Appellant altered that position and submitted that both (a) and (b) might, in other cases, be found both to have been proven but not in this case. It was submitted that (b) was not made out and that in any event the Defendant's submissions to the trial Judge were to the effect that (a) applied, not (b). In the Respondent's skeleton it was submitted that (a) applied and "*arguably (b) as well".* Whilst never abandoning that position the appeal proceeded on the basis that this was really a case about (a) not (b). However, because (b) was arguably found to apply by the Judge and the Respondent never abandoned it I shall deal with it below.

22. In the Appellant's skeleton and submissions Mr McGrath, with admirable clarity, made the following main points:
    a. The Claimant was covered by the QOCS cap for his proceedings.
    b. None of the automatic qualifications to the QOCS cap applied to him.

c. The Judge was wrong to rule that the discretionary qualification in r.44.16(2)(b) applied to the proceedings.
d. In relation to the discretionary qualification in r.44.16(2)(a), which did apply, the Judge exercised the discretion wrongly in law by: raising the cap protecting the Claimant and in relation to what was "just", by failing to take into account the guidance of Coulson LJ in *Brown*; failing to take the QOCS cap as the costs neutral starting point in relation to the Claimant; failing to consider a non-party costs order (NPCO) against the CHC as the first in line (relying on *Mee)*; failing to assess and consider the Claimant's financial impecuniosity; failing to consider all the circumstances of the case; by impliedly ruling that the Claimant's rejection of the part 36 offers was "exceptional" behaviour, when it was not, it was just the normal behaviour in litigation; and the Judge's reasoning shows he overlooked these relevant matters.

23. The Respondent cross appealed on two points. The Respondent's skeleton, fleshed out by Mr Poole in his elegant submissions, may be summarised in relation to the key points as follows. Where a smallish PI claim is run alongside a large CHC claim and the CHC goes "wrong" the costs issue involves a two-stage process. At stage one, provided the court considers that claim is a mixed claim and cannot fairly be described in the round as a personal injury claim, an "enforcement order" should be made against the Claimant to the extent that the court considers it just to do so. The CHC will not usually be a party. This costs order should strip out the costs of the defence of the PI claim without the CHC, thus retaining the QOCS protection for the PI claim but lifting the cap from the CHC claim. At stage two, if the Claimant does not pay the costs order, the court should make a NPCO against the CHC whether or not the claim could fairly be described "in the round" as a PI claim. This can only be done after joining the CHC and giving it the opportunity to defend itself against the NPCO. In addition, *the Claimant* could apply for the NPCO to be made against the CHC if he cannot pay or wishes to do so. The Defendant does not have possession of the documents or facts to determine whether a NPCO should be made, only the Claimant and the CHC have that information. The proceedings on costs are "summary" and should not be long, drawn out or expensive. In any event, it is the Claimant's duty to put evidence before the court about who "benefits" from the CHC charges claim and who refused the Defendant's Part 36 offers and whether he/she is really going to have to pay the CHC the outstanding charges. The Respondent complained of the Appellant expanding his grounds in his skeleton (see para. 42 of the skeleton). The Respondent relied on para. 5 of the judgment of Lord Briggs in *Adelekun v Ho (Association of Personal Injury Lawyers*

intervening) [2021] UKSC 43, to asserts that the Supreme Court considered that claims for CHC charges are within (b) not (a). It was submitted that the Judge rightly characterised the claim as not a personal injury claim "in the round". The Respondent also asserted that the Appellant raised new grounds not argued at first instance.

New Grounds

24. The approach on appeal with new grounds, not argued below, was considered by the Court of Appeal in *Singh v Dass* [2019] EWCA Civ. 360 In which Haddon-Cave LJ gave this guidance:

> "The legal principles
> 15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.
> 16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
> 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ. 2 at [30] and [49]).
> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ. 24; [2017] R.T.R. 22 at [29])."

25. The new grounds were really an expanded explanation of the asserted mutually exclusive nature of (a) and (b). I treat the new grounds put forwards by the Appellant with caution. I consider that none of them would have necessitated new evidence being called during the substantive part of the trial, only during the summary procedure for the determination of costs and even then only by information being provided to the court by the Claimant's solicitors in a witness statement. The rest of the points made are points of law and the Respondent has had adequate time to deal with them; has not acted to it's detriment in reliance on the earlier omission and can be protected on costs, so I permit the "new grounds", which area really expanded submissions, which the Appellant has put forwards in his skeleton.

The issues

26. The issues in the appeal were as follows:
    (1) Was the Judge wrong to rule that CPR r.44.16(2)(a) applied?
    (2) Was the Judge wrong to rule that CPR r.44.16(2)(b) also applied?
    (3) Was the Judge wrong to rule that the claim was not a PI claim in the round?
    (4) Did the Judge mis-apply the law or make an error of law (by omitting to consider relevant factors) when approaching the justice of lifting the Qualified One-way Costs Shifting (QOCS) cap protecting the Claimant to around £5,000 above the damages and interest award?
    (5) Should the appeal be re-opened on the refused grounds?

Appeals - CPR 52

27. I take into account that under CPR rule 52.21 every appeal is a review of the decision of the lower court. The appeal court will allow the appeal if the decision was wrong or unjust due to procedural or other irregularity.

28. Under CPR rule 52.20 this court has the power to affirm, set aside or vary the order; refer the claim or an issue for determination by the lower court; order a new trial or hearing etc.

Findings of fact appeals

29. I take into account the decisions in *Henderson v Foxworth* [2014] UKSC 41, per lord Reed at [67]; *Grizzly Business v Stena Drilling* [2017] EWCA Civ. 94, per Longmore LJ at [39-40] and *Deutsche Bank AG v Sebastian Holdings* [2023] EWCA Civ. 191, per Males LJ at [48-55], that any challenges to findings of fact in the court below have to pass a high threshold test. The trial Judge has the benefit of hearing and seeing the witnesses which the appellate Court does not. The Appellant needs to show the Judge was plainly wrong in the sense that there was no sufficient evidence upon which the decision could have been reached or that no reasonable Judge could have reached that decision.

30. The threshold was summarised in *Deutsche Bank AG v Sebastian Holdings* [2023] EWCA Civ 191, per Lord Justice Males at [48] - [55]:

> "48. The appeal here is against the Judge's findings of fact. Many cases of the highest authority have emphasised the limited circumstances in which such an appeal can succeed. It is enough to refer to only a few of them.
> 49. For example, in Henderson v Foxworth Investments Ltd [2014] UKSC 41, [2014] 1 WLR 2600 Lord Reed said that:
> "67. ... in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of

relevant evidence, an appellate court will interfere with the findings of fact made by a trial Judge only if it is satisfied that his decision cannot reasonably be explained or justified."

50. We were also referred to two more recent summaries in this court explaining the hurdles faced by an appellant seeking to challenge a Judge's findings of fact. Thus in *Walter Lily & Co Ltd v Clin* [2021] EWCA Civ. 136, [2021] 1 WLR 2753 Lady Justice Carr said (citations omitted):

"83. Appellate courts have been warned repeatedly, including by recent statements at the highest level, not to interfere with findings of fact by trial Judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The reasons for this approach are many. They include:

(i) The expertise of a trial Judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed;

(ii) The trial is not a dress rehearsal. It is the first and last night of the show;

(iii) Duplication of the trial Judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case;

(iv) In making his decisions the trial Judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping;

(v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence);

(vi) Thus, even if it were possible to duplicate the role of the trial Judge, it cannot in practice be done...

85. In essence the finding of fact must be plainly wrong if it is to be overturned. A simple distillation of the circumstances in which appellate interference may be justified, so far as material for present purposes, can be set out uncontroversially as follows:

(i) Where the trial Judge fundamentally misunderstood the issue or the evidence, plainly failed to take evidence in account, or arrived at a conclusion which the evidence could not on any view support;

(ii) Where the finding is infected by some identifiable error, such as a material error of law;

86. Where the finding lies outside the bounds within which reasonable disagreement is possible. An evaluation of the facts

> is often a matter of degree upon which different Judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and appellate courts should approach them in a similar way. The appeal court does not carry out a balancing task afresh but must ask whether the decision of the Judge was wrong by reason of some identifiable flaw in the trial Judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion.
>
> 87. The degree to which appellate restraint should be exercised in an individual case may be influenced by the nature of the conclusion and the extent to which it depended upon an advantage possessed by the trial Judge, whether from a thorough immersion in all angles of the case, or from first-hand experience of the testing of the evidence, or because of particular relevant specialist expertise."

31. The threshold was also more recently considered by Lord Justice Lewison in *Volpi v Volpi* [2022] EWCA Civ. 464, [2022] 4 WLR 48, at paras. 2-4 and 52:

> "2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:
>
> (i) An appeal court should not interfere with the trial Judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> (ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial Judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable Judge could have reached.
>
> (iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial Judge has taken the whole of the evidence into his consideration. The mere fact that a Judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> (iv) The validity of the findings of fact made by a trial Judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial Judge must of course consider all the material evidence (although it need not all be

discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

(v) An appeal court can therefore set aside a judgment on the basis that the Judge failed to give the evidence a balanced consideration only if the Judge's conclusion was rationally insupportable.

(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

3. If authority for all these propositions is needed, it may be found in *Piglowska v Piglowski* [1999] 1 WLR 1360; *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477; *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29; *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600; *Elliston v Glencore Services* (UK) Ltd [2016] EWCA Civ 407; *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176, [2019] BCC 96; *Staechelin v ACLBDD Holdings Ltd* [2019] EWCA Civ 817, [2019] 3 All ER 429 and *Perry v Raleys Solicitors* [2019] UKSC 5, [2020] AC 352 .

4. Similar caution applies to appeals against a trial Judge's evaluation of expert evidence: *Byers v Saudi National Bank* [2022] EWCA Civ. 43, [2022] 4 WLR 22. It is also pertinent to recall that where facts are disputed it is for the Judge, not the expert, to decide those facts. Even where expert evidence is uncontroverted, a trial Judge is not bound to accept it: see, most recently, *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ. 1442, [2022] 1 WLR 973 (although the court was divided over whether it was necessary to cross-examine an expert before challenging their evidence). In a handwriting case, for example, where the issue is whether a party signed a document a Judge may prefer the evidence of a witness to the opinion of a handwriting expert based on stylistic comparisons: *Kingley Developments Ltd v Brudenell* [2016] EWCA Civ. 980."

[…]

"52 … It need hardly be emphasised that "plainly wrong", "a decision ... that no reasonable Judge could have reached" and "rationally insupportable", different ways of expressing the same idea, set a very high hurdle for an appellant.

[...]

54. These considerations apply with particular force when an appeal involves a challenge to the Judge's assessment of the credibility of a witness. Assessment of credibility is quintessentially a matter for the trial Judge, with whose assessment this court will not interfere unless it is clear that something has gone very seriously wrong. It is not for this court to attempt to assess the credibility of a witness, even if that

> were possible, but only to decide, applying the stringent tests to which I have referred, whether the Judge has made so serious an error that her assessment must be set aside."

Costs appeals

32. As for appeals on costs orders, a similarly high threshold applies where the judge below was exercising a discretion as to the costs award, but if a mistake of law has been made or the judge has omitted to take into account matters which should have been taken into account or taken into account irrelevant matters then the decision can be set aside as wrong in law.

Case management orders appeals

33. Appeals from case management decisions have a high threshold test, see *Royal & Sun v T & N* [2002] EWCA Civ. 1964, Chadwick LJ ruled as follows:

> "37. … these are appeals from case management decisions made in the exercise of his discretion by a judge who, because of his involvement in the case over time, had an accumulated knowledge of the background and the issues which this Court would be unable to match. The judge was in the best position to reach conclusions as to the future course of the proceedings. An appellate court should respect the judge's decisions. It should not yield to the temptation to "second guess" the judge in a matter peculiarly within his province.
> 38. I accept, without reservation, that this Court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

34. In *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ. 1537, at [52] the Master of the Rolls said:

> "We start by reiterating a point that has been made before, namely that this court will not lightly interfere with a case management decision. In *Mannion v Ginty* [2012] EWCA Civ. 1667 at [18] Lewison LJ said: "it has been said more than once in this court, it is vital for the Court of Appeal to uphold robust fair case management decisions made by first instance judges."
> In *Chartwell Estate Agents Ltd v Fergies Properties SA [2014] EWCA Civ. 506,* [2014] 3 Costs LR 588, Davis LJ said at [63]:
> "… the enjoinder that the Court of Appeal will not lightly interfere with a case management decision and will support robust and fair case management decisions should not be taken as applying, when CPR 3.9

> is in point, only to decisions where relief from sanction has been refused. It does not. It likewise applies to robust and fair case management decisions where relief from sanction has been granted."
>
> In *Clearway Drainage Systems Ltd v Miles Smith Ltd* [2016] EWCA Civ. 1258, the test in considering an appeal against a decision of this nature was neatly encapsulated by Sir Terence Etherton MR at paragraph 68:
>
> > " … The fact that different judges might have given different weight to the various factors does not make the decision one which can be overturned. There must be something in the nature of an error of principle or something wholly omitted or wrongly taken into account or a balancing of factors which is obviously untenable."

Short history of funding for personal injury claims

35. To understand what these QOCS issues really mean, a short history of how personal injury claims were and now are funded is needed. Before the year 2000 Legal Aid was available to claimants for personal injury (PI) claims. This funded the claimants' lawyers' costs (at a reduced rate if they lost) and protected claimants from adverse costs orders (costs awarded to the defendants). So, claimants could start personal injury claims safe in the knowledge that their money and property (home) was generally safe from any defendants' costs orders. Furthermore, defendants generally could not recover their costs against the Legal Aid Fund, so one-way costs shifting (OCS) was in place. This meant that claimants could recover their costs against the defendants in personal injury claims but that defendants could not generally recover their costs against claimants in legally aided claims. Different factors applied in Union funded or before the event insurance (BTE) funded claims. There was a qualification in Legal Aid claims: if the claimants won and obtained some damages but the defendants obtained costs orders, those could be enforced against the claimants' damages if certain factors were found to exist.

36. After the year 1999 Legal Aid was withdrawn for personal injury claims and conditional fee agreements were made legal. Under these, claimants' lawyers' costs were not recoverable from the claimant (no win no fee) on losing, and adverse costs orders (in favour of the defendants) were covered by after the event or before the event insurance (ATE or BTE). The claimants' lawyers' success fees and ATE premiums were paid by the defendants if the claimants won. After the December 2009 *Jackson* report the funding rules were altered again. Claimants were required to pay the success fees to their lawyers for the risk of taking the cases on. In exchange for relieving defendants of these liabilities, one-way costs shifting (OCS) was re-introduced. ATE premiums became irrelevant or less relevant because of OCS. If the claimants lost, the defendants were granted the normal costs orders but they were made unenforceable. There were qualifications (Qs) to OCS, hence: QOCS. If the claimants won damages then any defendants' costs order could be enforced against the damages and interest. Damages

are only awarded if the claimants "win" their claims, and usually the defendants only obtain a costs award, having lost the claims, if they have made an effective Part 36 offer which the claimants have not beaten at trial. So, under the current qualified one-way costs shifting (QOCS) the defendants cannot enforce or recover their costs at all from Claimants if they completely defeat the claims but can recover their costs out of damages if they lose the claims but make effective part 36 offers. The amount of the recovery of defendants' costs is capped at the total of the damages and interest awarded to the claimants. Following an amendment to the CPR the cap includes costs awarded to the claimants. This is the QOCS cap.

37. There is a second qualification to the QOCS cap on enforcement, which is at the heart of this appeal. Under CPR r.44 the QOCS cap on recovery of the defendants' costs from claimants can be lifted so that claimants must pay out of their own money in certain defined circumstances. Those circumstances usually involve frivolous or obviously bad claims or dishonesty by the claimants. However, they also involve mixed claims, a term which I shall return to below.

The law relating to QOCS

38. In his December 2009 report Sir Rupert Jackson wrote about QOCS thus at chapter 19:

> "1.1 Scope of this chapter. In this chapter I discuss the possible adoption of one way costs shifting in personal injuries litigation in the event that after-the-event ("ATE") insurance premiums cease to be recoverable. This option was identified in chapter 25 of the Preliminary Report as one possible way forward. For the purpose of this chapter, I am treating personal injuries litigation as a broad concept, including claims where the claimant's injuries were caused by clinical negligence.
> 1.2 Important features of personal injuries litigation. There are two important features of personal injuries litigation. First and self-evidently, the claimant is an individual. For the vast majority of individuals it would be prohibitively expensive to meet an adverse costs order in fully-contested litigation. The most recent Social Trends report shows that 73% of all households have savings (made up of securities, shares, currency and deposits) of less than £10,000. Defence costs can easily be many times higher than £10,000 in fully-contested litigation. This would mean that for three quarters of households their other financial assets (their own home in most cases) would be at risk from an adverse costs order. Secondly, the defendant is almost invariably either insured or self insured. By "self insured", I mean that the defendant is a large organisation which has adopted the policy of paying out on personal injury claims as and when they arise, rather than paying substantial liability insurance premiums every year." …
> "2.11 Conclusion. On the basis of the material provided during the Costs Review, it seems to me inevitable that, provided the costs rules

> are drafted so as (a) to deter frivolous or fraudulent claims and (b) to encourage acceptance of reasonable offers, the introduction of one way costs shifting will materially reduce the costs of personal injuries litigation. One layer of activity, namely ATE insurance against adverse costs liability, will have been removed from the personal injuries process."

In relation to the qualifications to full OCS shielding for claimants Sir Rupert provided his view by analogy with legal aid costs shielding as follows:

> "4.1 In my view, the regime of recoverable ATE insurance premiums is indefensible for the reasons set out in chapters 9 and 10 above. On the other hand, most claimants in personal injury cases have for many years enjoyed qualified protection against liability for adverse costs and there are sound policy reasons to continue such protection. The only practicable way that I can see to achieve this result is by qualified one way costs shifting.
> 4.2 Despite the arguments of the MDU, the ABI and others, I do not regard it as practicable to introduce one way costs shifting for limited categories of personal injury cases, such as low value cases or CFA cases. Either one way costs shifting is introduced across the board for personal injury cases or, alternatively, two way costs shifting remains the rule, except for those protected by the legal aid "cap". Given that stark choice, I favour introducing qualified one way costs shifting for all personal injury cases.
> 4.3 <u>The legal aid cap.</u> Section 11(1) of the Access to Justice Act 1999 (the "1999 Act") provides:
>
> > "Except in prescribed circumstances, costs ordered against an individual in relation to any proceedings or part of proceedings funded for him shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:
> > (a) the financial resources of all the parties to the proceedings, and
> > (b) their conduct in connection with the dispute to which the proceedings relate…"
>
> It can be seen that this protection against costs liability is qualified protection, rather than total protection.
> 4.4 How the legal aid cap works in practice. Section 11 of the 1999 Act is supplemented by the Costs Regulations, the Cost Protection Regulations and sections 21 to 23 of the Costs Practice Direction. The effect of these provisions is that the judge making a costs order against a legally aided party may specify the amount to be paid or may direct that the amount be determined at a separate assessment. Before that

separate assessment, the legally aided party files and serves a statement of resources. Whilst on its face section 11 of the 1999 Act appears to give the court a wide discretion to order costs to be paid, in practice the section operates as something very close to complete immunity from costs liability. It is not hard to see why this is the case. Pursuing an order will involve the receiving party in significant costs and the prospects of making any significant recovery, when the paying party is by definition of very limited means, are low. Although no official figures exist my understanding, confirmed by discussion with my assessors, is that it is rare indeed for a successful opponent even to attempt recovery against a legally aided party.

4.5 The necessary elements of a one way costs shifting regime. A one way costs shifting regime for personal injuries litigation (including clinical negligence) needs to have the following elements:

(i) Deterrence against bringing frivolous claims or applications.

(ii) Incentives for claimants to accept reasonable offers.

4.6 Deterrence against frivolous claims or applications. The claimant must be at risk of some adverse costs, in order to deter (a) frivolous claims and (b) frivolous applications in the course of otherwise reasonable litigation. In my view, the best formula is that contained in section 11(1) of the 1999 Act. This provides a proper degree of protection against adverse costs without eliminating all personal risk. It is a formula which is tried and tested, having been included in all legal aid legislation since the original Legal Aid and Advice Act 1949.

4.7 Proposed rule. I therefore propose that all claimants in personal injury cases, whether or not legally aided, be given a broadly similar degree of protection against adverse costs. In order to achieve this result I propose that a provision along the following lines be added to the CPR:

> "Costs ordered against the claimant in any claim for personal injuries or clinical negligence shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:
>
> (a) the financial resources of all the parties to the proceedings, and
>
> (b) their conduct in connection with the dispute to which the proceedings relate."

If this proposal is adopted, there will have to be consequential provisions of the kind that currently exist to enable section 11(1) of the 1999 Act to be operated. The details of these consequential provisions will be a matter for the Civil Procedure Rule Committee.

4.8 I do not think it should be necessary in most cases to require a detailed enforcement procedure to determine liability under this provision. In the great majority of cases it should be determined at the

> conclusion of the case whether an order should be made and, if so, the amount should be determined summarily. Furthermore the making of a costs order will be the exception, rather than the rule. Nevertheless, the formula suggested above will enable the court to make a costs order in three specific situations where such an order would be appropriate:
> (a) where the claimant has behaved unreasonably (e.g. bringing a frivolous or fraudulent claim);
> (b) where the defendant is neither insured nor a large organisation which is self insured; or
> (c) where the claimant is conspicuously wealthy."

39. The QOCS system which was actually introduced was similar to, but did not precisely match, Sir Rupert's recommendations. The precise Legal Aid exceptions for exercising the discretion to lift the OCS cap were not set out. CPR Part 44 Section II contains the current QOCS provisions:

> "**Qualified one-way costs shifting: scope and interpretation**
> 44.13
> (1) This Section applies to proceedings which include a claim for damages –
> (a) for personal injuries;
> (b)…"

40. Thus, the costs cap of QOCS set out in Part 44 Section II applies to proceedings which include a claim for damages for personal injuries. The natural meaning of these words is that the whole of the costs relating to all of the claims in the proceedings brought by the claimant are covered by CPR Part 44 Section II. In *Brown v Comm. of Police for the Metropolis* [2019] EWCA Civ. 1724, Coulson LJ made clear that this at the least covers all the heads of loss arising from the personal injuries thus at para. 54:

> "54 The starting point is that QOCS protection only applies to claims for damages in respect of personal injuries. What is encompassed by such claims? It seems to me that such claims will include, not only the damages due as a result of pain and suffering, but also things like the cost of medical treatment and, in a more serious case, the costs of adapting accommodation and everything that goes with long term medical care. In addition, contrary to the submissions advanced by Ms Darwin and Mr Jaffey, I consider that a claim for damages for personal injury will also encompass all other claims consequential upon that personal injury. They will include, for example, a claim for lost earnings as a result of the injury and the consequential time off work.
> 55 In other words, a claim for damages in respect of personal injury is not limited to damages for pain and suffering. For these reasons, as Whipple J noted at para 60 of her judgment, claimants in a large swathe

> of "ordinary" personal injury claims will have the protection and certainty of QOCS."
>
> 56 I acknowledge that, in personal injury proceedings, another common claim will be for damage to property. For example, in road traffic accident litigation, there will usually be a claim for the cost of repairs to the original vehicle, and the cost of alternative vehicle hire until those repairs are effected. Such claims are not consequential or dependent upon the incurring of a physical injury: they are equally available to a claimant who survived the accident without a scratch as they are to a claimant who broke both legs in the accident. They are claims consequent upon damage to property, namely the vehicle that suffered the accident, and therefore fall within the mixed claim exception at rule 44.16(2)(b)."

41. So, what is the effect of Part 44 Section II? The main QOCS cap is set out in r.44.14 as follows:

> **Effect of qualified one-way costs shifting**
>
> 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, or agreements to pay or settle a claim for, damages, costs and interest made in favour of the claimant.
>
> (2) For the purposes of this Section, orders for costs includes orders for costs deemed to have been made (either against the claimant or in favour of the claimant) as set out in rule 44.9.
>
> (3) Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.
>
> (4) Where enforcement is permitted against any order for costs made in favour of the claimant, rule 44.12 applies.
>
> (5) An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.

42. The QOCS costs cap is constructed to protect the claimant's money and property outside the claim. Any damages recovered are not protected by the cap.

Automatic or semi-automatic qualifications

43. The cap is qualified by the "Qs". The qualifications are set out in the subsequent rules in Section II. Some are automatic or semi-automatic, others

are discretionary for the Judge. The automatic or semi-automatic qualifications are as follows:

> **"Exceptions to qualified one-way costs shifting where permission not required**
> 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."

Frivolous or abusive claims

44. Thus, automatic cap withdrawal occurs when a claimant brings a claim:
    a. but had no reasonable grounds for bringing the claim; or
    b. which was an abuse of the court process; or
    c. where the claimant's conduct, or his lawyers' conduct, is found to have been likely to obstruct the just disposal of the claim.

Dishonest claims

45. In addition, QOCS cap withdrawal usually occurs where the court finds that the Claimant has been fundamentally dishonest.

The discretionary qualifications are as follows:

46.

> **"Exceptions to qualified one-way costs shifting where permission required**
> 44.16
> (1) 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.
> (2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where –
> (a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant … (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or

> (b) a claim is made for the benefit of the claimant other than a claim to which this Section applies.
>
> (3) Where paragraph (2)(a) applies, the court may, subject to rule 46.2, make an order for costs against a person, other than the claimant, for whose financial benefit the whole or part of the claim was made."

47. So, the QOCS cap for claimants in personal injury claims is absolute in all cases where the qualifications are not present. Claimants do not pay defence costs out of their own money, only damages, interest and, more recently, costs. If a claimant loses she/he pays none of the Defendant's costs out of her own money (only damages) unless a qualification applies. However, where the qualifications are proven, then the claimant loses all or part of the QOCS cap and is liable for the Defendants' costs either automatically (including semi-automatically) or under a discretionary power.

Mixed claims

48. Discretionary, partial or total QOCS cap lifting may only occur when gateways (a) or (b) in CPR r.44.16(2) are found as proven on the balance of probabilities. They have been called "signposts" but in my judgment are better considered as "gateways". The two are best considered in reverse order. Each gateway is opened by consideration of who benefits from the relevant head of claim.

Claims for the claimant's benefit

The scope of r.44.16(2)(b)

49. The gateway in subparagraph (b) is opened when "*a claim is made* ***for the benefit of the claimant other than a claim to which this Section applies****."* The interpretation of these words has caused confusion. The words require us to consider the scope of the claims to which CPR Part 44 Section II does apply to be able to identify the claims to which Section II does not apply. The scope is defined by Part 44 Section II, r.44.13 (set in full out above), the key words of which are as follows:

> "This Section applies to proceedings which **include** a claim for damages …
>
> (a) for personal injuries; …" (my emboldening).

50. So the "proceedings" are covered by the QOCS provisions in Part 44 Section II if the proceedings "include" a claim for personal injuries. The scope is not restricted just to the claims for damages for personal injuries. The natural interpretation of those words is that the whole proceedings, the whole action is covered by Section II. This means that Section II covers all the heads of loss claimed within the proceedings. What does (b) mean by the use of the words: "*other than a claim to which this Section applies"*? There appeared to be two potential ways of interpreting this subsection. The one which has *not* been applied by the courts to date is that all heads of claim in the proceedings, which are made alongside a claim for damages for personal injuries, are covered by Part

44 Section II. In which case (b) does not apply to any of them because none of them is outside Section II. In which case (b) has no use or effect whatsoever.

The case law on interpretation

51. The wording issue was addressed by Morris J in *Jeffries v Comm. of Police for the Metropolis* [2018] 1 WLR 3633. The claimant sought to avoid the cap lift permitted by (b) by contending that the subsection only applied if the non-personal injury claims were divisible or separable from the personal injury claims. Morris J rejected that argument. In his view, the drafting of the rule gave rise to some difficulty as set out above but at para. 37 he resolved that potential difficulty as follows:

> "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 rule 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."

And at para. 39 he ruled that:

> "… 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."

52. Foskett J considered r. 44.16(2)(b) in *Siddiqui v University of Oxford* [2018] EWHC 536. The claimant brought a personal injury claim against the defendant for psychiatric injuries due to alleged bad teaching and failure to deal with his depression appropriately and also a contract claim for loss of career prospects due to his law degree results. The claim was dismissed. The University sought to lift the QOCS cap by using CPR r. 44.16(2)(b). Both claims were for the claimant's benefit and arose from the same facts. It was submitted by the claimant that the claim for damages for personal injury and the claim for damages not arising from personal injury had to be in some way "divisible", or arising from different facts, for (b) to be triggered. Foskett J did not agree and ruled as follows:

> "15 On the issue of whether an overlap between the evidential basis for a personal injury claim and a non-personal injury claim precludes the operation of CPR r 44.16 (2)(b), Morris J said this in *Jeffreys*, at para 44:
>
> > "As to … 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."
>
> 16 In applying that approach to the circumstances of that case, he said this after referring to two examples in para 52 of his judgment, at paras 53–54:
>
> "53. In my judgment, in each of these examples, proceedings in which claims were brought for those two different types of loss, namely the damage to property and the personal injury, would fall within CPR r 44.16(2)(b), even though they arose out of essentially the same facts and out of one and the same breach of duty. Each claim would be for different types of loss (personal injury and non-personal injury) and in claims where damage is an essential element of the cause of action, would in fact arise from different causes of action. There is no basis for requiring the personal injury claim and the non-personal claim to arise out of either distinct facts or distinct breaches of duty. Indeed, it is inherently likely that they will arise out of the same set of facts. What is important ultimately is whether they are claims for different types of loss.
>
> "54. In the present case, and even assuming that the malfeasance breaches of duty, indistinctly, caused the psychological injury, there remains the very substantial claims for damages for something other than damages for personal injury. Even though those claims were caused by the same breaches of duty, in my judgment, there were claims 'other than a claim for damages for personal injury'. CPR r 44.16(2)(b) therefore applies."
>
> 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."

53. At para.18 Foskett J held the mixed claims fell within (b) and, following Morris J, the words *"other than one to which this Section applies*" in (b) were substituted by the words *'other than a claim for damages for personal injury'.* In the event Foskett J considered the justice of raising the cap on QOCS and finding it just to do so raised the cap to cover 25% of the defendant's costs to reflect the claim for damages not related to personal injury failing and the time it took at trial.

54. This interpretation issue was firmly resolved in *Brown v Comm. of Police of the Metropolis* [2020] EWCA Civ. 1724; [2020] 1 WLR, by the Court of Appeal. The claimant made a mixed claim consisting of a claim for damages for personal injuries and a claim for damages unrelated to personal injuries. The PI claim was dismissed, the

non PI claim succeeded but the claimant failed to beat a Part 36 offer. The defendant sought to enforce costs against the claimant and to raise the QOCS cap for the non PI claim using CPR r. 44.16(2)(b). The judge ruled that QOCS prevented such an order because the non PI claim was not divisible or separate from the PI claim. Whipple J overturned that ruling. The Court of Appeal upheld Whipple J. Coulson LJ ruled as follows:

> "The exception at CPR r 44.16(2)(b)
> 5.1 The proper interpretation
> 31. What is the proper interpretation of the words "other than a claim to which this Section applies"? It seems to me quite clear. "This Section" is the Section of the CPR setting out the QOCS regime. Rule 44.13(1) identifies the three types of claim which are covered by that regime: they are claims for damages for personal injury. Thus, if the proceedings also involve claims made by the claimant which are not claims for damages for personal injury (that is to say, claims "other than a claim to which this Section applies"), then the exception at rule 44.16(2)(b) will apply.
> 32. I consider that this is the sensible and straightforward interpretation of the rule. It also produces a logical and fair outcome. The QOCS regime only applies to claims for damages for personal injury. It does not apply to other types of claim. There is therefore no justification for allowing claims which are not claims for damages for personal injury (such as, for example, the data protection or police misconduct claims which were successful in the present case) to attract automatic QOCS protection. It would be equally wrong to allow claimants with a mixed claim to use the fact that their claims includes a claim for damages for personal injury to gain automatic costs protection in respect of their claims for non-personal injury damages.
> 33. In my view, the exception at rule 44.16(2)(b) was designed to deal with the situation where a claim for damages for personal injury was only one of the claims being made in the proceedings. In those circumstances, the automatic nature of the QOCS protection falls away. But of course, that is not the end of the matter: it then becomes a question of the judge's discretion."

Conclusion on the interpretation of r.44.16(2)(b) – mixed claims

55. Following the decision in *Brown*, the proper interpretation of the gateway qualification in CPR Part 44 Section II r.44.16(2)(b), which bites on claims *"other than a claim to which this Section applies*" is to be read down so as to delete those words and replace them with the words *"which is not a claim for damages for personal injury."* So, a "mixed claim" is one in which the claimant seeks damages for personal injury (the PI claim) and damages for another type of claim, for instance in contract, or for damage to property (a car or a house) or for breach of Data Protection Act rights (the non PI claim).

For the benefit of the claimant

56. Once it is established that the relevant claim is a mixed claim and so is potentially in (b), how then does the court decide if the non PI part of the claim is for the claimant's benefit or not? No guidance is provided in the CPR on what "for the benefit of the claimant" means.

57. Can any assistance be gained from looking at claims for damages for personal injuries? In personal injury litigation the heads of claims for loss and expense arising from the personal injuries include:

    a. General Damages: for pain, suffering and loss of amenity;
    b. Special Damages: for past and future: loss of income; medical expenses; care costs; necessary equipment costs; pension loss; deputy's costs; extra expense for holidays/DIY/Gardening/household services; accommodation alterations or purchases and other heads.

    Damages awards made to the claimant for heads of claim for his past *losses* may be for his benefit or they may not. Awards to the claimant for past *expenses* the claimant has paid out may likewise be for "his benefit" or they may not. So, if the claimant himself paid the past expense or suffered the loss the award benefits him by compensating him. For future likely expenses and losses the same will apply. The claimant will benefit from the ability to pay the expense or will be recompensed for the likely future loss, for instance of earnings. But, where the claimant's own insurer (say medical expenses insurer, or RTA insurer, or household insurer) has covered the expense (or will do so in future), the claimant's claim will be subrogated and then the issue arises: whether the claimant's head of loss in the PI claim is "*for his benefit*" or the benefit of the insurer. Where a charity has covered the loss the same issue arises. Where a relative has covered the loss the same issue arises. Where an employer has provided sick pay (recoverable under the employment contract on the claim succeeding) the same issue arises. The same may be said to apply to the recovery of benefits paid to the claimant by the DWP out of damages. I consider that the factual matrix of what does not and what does benefit the claimant is of assistance when looking at CHC charges claims. In particular I note that under gateway (a) subrogated claims for medical expenses and gratuitous care and employers sick pay are expressly excluded. This can only be on the basis that the rules were drafted on the understanding that the benefit would be going to the third party provider not the claimant (that is why gateway (a) would otherwise bite on them).

58. In CHC charges claims the claimant can only recover damages if he has a lawful and sufficiently drafted contract so that he has a contractual debt to the CHC which is recoverable from the defendant in the proceedings, albeit deferred. Therefore, by definition the claimant has some interest in succeeding to alleviate that potential debt. However, the CHC has a far stronger interest in the success of the CHC charges claim because all the money awarded will end up with the CHC. The whole of the financial benefit in money terms goes to the CHC. All the claimant will achieve, should the head of claim be awarded, is to be relieved of any residual liability to the CHC. I bear in

mind that the claimant's liability is partly illusory, because in most or many of such arrangements there is a tacit agreement that the CHC will not enforce against the (generally impecunious) claimant if the legal claim is lost. Often CHCs insure against losing the subrogated claims so suffer no loss themselves and do not charge the claimant.

59. In my judgment the words *"for the benefit of the claimant"* are to be construed in accordance with their normal and usual meaning in the context of the rule in which they were used and the funding background. The rules are designed to give access to justice to claimants by QOCS protection, due to the absence of Legal Aid and the qualified OCS protection that provided. The QOCS protection is qualified by a cap upon enforcement which protects the claimant's money and property and permits enforcement only against damages and interest awarded in the PI claim (and in later cases costs as well). The lifting of the cap in r.44.16(2) is constrained by the "who benefits?" test in relation to the claims. Sub-paragraph (a) relates to all heads of claim and sub-paragraph (b) only relates to non PI heads of claim. The "who benefits" test is used to trigger gateway (a) "or" (b). The rule does not say (a) "and/or" (b). The test of "who gains the benefit?" is common to both options: (a) and (b). These sub-sections open gateways to determine against whom the Courts are permitted to enforce costs. If a non party is gaining the benefit then gateway (a) is open against the non party. If the claimant is benefitting then gateway (b) is open and the claimant is the target of the above cap enforcement, but only in relation to the costs of the non PI heads of claim.

60. A parallel can be gained from damages for personal injuries. So, if the Claimant is to gain little or no benefit from recovering damages for a relevant head of PI loss, because all the money will go to a third party, the third party benefits. Claimants seek damages for the benefit of others where, due to their own thrift, they have pre-accident insurance or where post-accident they have received a gift satisfying their need for assistance or to cover their losses. The "thrift or gift" approach of the law ensures that the defendant is still liable for the loss even though the claimant has not paid the expense himself. In "thrift" claims (subrogation claims), the benefit will be received by the insurer of the policy which the claimant, through his thrift, took out. In "gift" claims, the charity or the relative will receive the benefit. In employment contract claims, the employer will gain the benefit of the sick pay if there is a recoverability clause. Where the Government pays the clamant benefits due to the injuries the DWP recoups the benefit. As I have explained above. Some of these claims have been expressly excluded from (a) on the assumption that the insurer/employer benefits from the award.

61. These parallels are of some assistance in looking at the interpretation of "who benefits". So, retuning to CHC charges, at one end of the scale is the claimant who has paid the CHC charges (unlikely though that may be), then the whole benefit of the award for CHC charges is going to the claimant and (b) applies. At the other end is the claimant who has not paid the CHC charges and although stated as liable under the CHC contract that liability is or may be illusory or technical, because the reason for choosing a CHC

vehicle was the claimant could not afford to hire one at the BHR. In my judgment the correct interpretation of who benefits at this end of the scale is that this is an (a) case not a (b) case. The award will go to the CHC. If the claimant has paid nothing to the CHC and, despite the passage of years since the vehicle was returned, the CHC has not enforced the charges, or if the CHC has tacitly agreed not to enforce the charges unless and until the claimant wins damages, then there is no real benefit to the claimant in the claim for CHC charges.

62. I take into account the case law below on when a Court may make a NPCO. To do so the Court must consider who is the real party and who controls the case and for whose benefit that control is being exerted. If a third party is the "real party" and controlling the non PI head of claim, it is difficult to see how both the Claimant and the third party could be held liable in relation to lifting the QOCS cap. Of course, the Claimant is primarily liable for any costs order made against him but that is just the basic factual background.

63. In my judgment, because the two gateways in r.44.16(2) are aimed at different people or entities, the choice of gateway is determined by the issue of to whom the benefit goes. The "who benefits" test is generally binary and so the court is assessing to whom all or most of the benefit is going. I do not go so far as to say that in all cases it is binary, however in this type of case I do consider that the choice is mutually exclusive. In other cases, in other circumstances, there may be scope for both (a) and (b) to apply.

"Just" to do so against the claimant under (b)

64. Once the court has decided who benefits, and so which gateway is open, the next question is whether it is just to lift the enforcement cap. The discretion to lift the QOCS cap above the level of the damages awarded for the claimant's benefit is to be exercised by the Court: "to the extent that it considers just" to do so. No guidance is given in the CPR on the relevant factors to consider when the gateway is opened under CPR r.44.16(2)(b).

65. Taking into account the history of the funding of personal injury litigation and the recommendations of Sir Rupert Jackson for QOCS, the objective is to achieve access to justice for members of the public who are not so well off by abolishing or moderating the adverse costs risks which would prevent claimants making a clam. The costs neutral approach is therefore fundamental to achieving that aim. So, if we exclude the automatic qualifications, the question becomes:

> "is it just to lift the cap on enforcement against this claimant who:
>
> a. has brought a mixed claim for damages for personal injury and non PI;
> b. which was not frivolous or an abuse of process; and
> c. which has not been conducted in an abusive way; and
> d. which was not fundamentally dishonest; and
> e. has won some damages for personal injuries; and

f. has failed to beat a Part 36 offer resulting in a costs liability?"

In these circumstances the factors which a court should take into account when considering whether it is just to order a claimant personally to pay costs of the non PI claim, out of his own money (because his damages will be all used up) include all of the circumstances of the case, but in particular the following:

a. the conduct of the parties and whether the claimant's conduct is exceptional in some way;
b. the amount of the damages and interest already lost by the failure to beat the Part 36 offer;
c. the relative value of the claim for damages for personal injury (the PI claim) compared with the non PI claim (for damage to property) or arising from damage to property (e.g. the CHC charges);
d. the relative amount of costs, time and effort during the claim and the trial allocated to the non PI claim as compared to the PI heads of claim;
e. the size of the defendant's costs award relative to the size of the damages award;
f. the financial situation of the claimant;
g. the size of and actual liabilities (rather than the perceived liabilities) of the claimant in relation to: (1) the defendant's costs, (2) the ATE premiums, (3) the success fees and (4) the solicitor-own party costs; arising from the case.

Case law on CHC charges

66. In reaching the rulings above I have taken into account the following case law.

67. In *Giles v Thompson* [1994] 1 AC 142, Lord Mustill gave the lead judgment in the House of Lords. The case concerned CHC charges. The growth of the CHC industry was described thus (page 154G):

> "There remains the claim for loss of use of the car. In principle, if such a claim is made it will often be quantified by reference to the cost of hiring a substitute vehicle, and will be recoverable upon proof that the motorist needed a replacement car whilst his own was off the road. I say "if such a claim is made" for two reasons. First, because the loss of use is not recoverable under a comprehensive policy, so that there are no subrogated insurers to stand behind the claim, and in situations where there is no personal injury claim and where the damage to the motorist's vehicle is dealt with as between insurers there are few motorists who will have the time, energy and resources to go to law solely to recover the cost of a substitute vehicle. Secondly, because there are many motorists who lack the inclination or the ready cash to hire a substitute on the chance of recovering reimbursement from the defendant's insurers. Thus, there exists in practical terms a gap in the remedies available to the motorist, from which the errant driver, and hence his insurers, frequently profit. In recent years a number of

> commercial concerns (hereafter "the companies") have identified this gap and have sought to fill it in a manner advantageous alike to motorists and to themselves, by offering to motorists with apparently solid claims against the other parties to collisions the opportunity to make use of the company's cars whilst their own are off the road. The terms on which this opportunity is given are said to be, in broad outline, as follows. (1) The company makes a car available to the motorist whilst the damaged car is under repair. (2) **The company pursues a claim against the defendant, at its own expense and employing solicitors of its choice, in the name of the motorist for loss of use of the motorist's car**. (3) The company makes a charge for the loan of the replacement car, which is reimbursed from that part of the damages recovered by the motorist from the defendant or his insurers which reflects the loss of use of the motorist's car. **(4) Until this happens the motorist is under no obligation to pay for the use of the replacement car.** (5) These arrangements are conditional on the co-operation of the motorist in pursuing the claim and any resulting legal proceedings. (6) The companies aim to confine the scheme to cases where the motorist is very likely to succeed in establishing the defendant's liability, without any contributory negligence on the part of the motorist." (my emboldening).

68. Such CHC agreements were held not to be champertous and were enforceable. I have highlighted some of the contractual terms because these will become relevant later on. In particular the House carefully considered the claimants liabilities to the CHC. For instance (at page 160E):

> "The next question is whether the motorist incurs a personal liability to the company for the hiring charges. The defendant contends for a negative answer, maintaining that what is dressed up as a hiring on credit is not a hiring at all, but is a free loan of the substitute car, for the cost of which the company looks to recovery solely against the fruits of the action. I can see that this might be the position under some forms of contract; and indeed this is how the scheme appears to be described in the company's brochure. But we must look to the terms of the contract alone. Although these are defective, they are sufficient to answer the question. The motorist does retain a "residual liability" (as it was called in argument) for the hire charges, and this will become enforceable, not only in the special circumstances contemplated by condition 6, but also under condition 5(i) when "a claim for damages has been concluded" (emphasis added)."

69. In relation to costs Lord Mustill said this (at page 163C):

> "the unlawfulness of the arrangement as a whole. There remains one further aspect of the relationship, namely the responsibility for the cost of the litigation. Again the agreement is silent. In the simplest case, where only the hiring charge is the subject of claim, there is no problem. Since the action is brought at the company's request there is clearly an implied obligation not only to finance it, but also to cover the motorist's liability to the defendant in the event of failure. The position will be, at least in theory, less straightforward where there is a mixed claim, for personal injury as well as hiring charges, and where the action wholly or partially fails. It may be that in practice the company will bear all the costs involved, but the agreement does not say so, and in the event of dispute some difficult questions may arise. These may perhaps be solved by recourse to the analogy with subrogation, and if so the authorities collected in *Clarke, The Law of Insurance Contracts* (1989), p. 643, para. 31-6B3 may be germane. The point was not, however, explored in argument, and I do not think it profitable to do more than suggest that under this particular form of contract the motorist cannot be confident of a complete cover in respect of costs."

70. In *Dimond v Lovell* [2002] 1 AC 384, the claimant sought £384 in hire charges for 8 days of car hire whilst her car was being repaired after an RTA. The defendant's insurer refused to pay the car hire. The relevant defence was that the charges were too high. Spot hire rates were lower. Lord Hoffman described the background thus (at para. 3) :

> "**The company pursues the hirer's claim at its own expense and satisfies its claim for hire out of the damages recovered on the hirer's behalf**. Thus the hirer is spared the need to lay out the cost of the hire in advance of recovery from the defendant or his insurers, the trouble and anxiety of pursuing a claim and the risk that the claim may fail. The services thus offered by an accident hire company, in providing the car on credit and assuming the burden and risk of pursuing the claim, have filled a gap in the market. Many comprehensive motor insurance policies cover damage to the vehicle but not the cost of hiring a replacement. The owner of a damaged car can arrange for his car to be repaired in the knowledge that the bill will be sent to the insurance company. Whether his company meets the cost itself or recovers it from the other driver's insurer is (apart from the question of a no-claim bonus) not a matter which need concern him. If, however, he wants to hire a replacement vehicle, he will have to make the arrangements at his own expense and claim the cost from the other driver himself. Faced with such a prospect, many drivers will make do without a car while their vehicle is off the road. Accident hire companies enable them to have a replacement car without cost, trouble or risk. The accident hire business has increased the cost of third party

> claims against motor insurance companies such as C.I.S. **Motorists not only hire replacement cars when they would not previously have done so but also, since they are not themselves paying, do not necessarily exercise the closest scrutiny over the rate that is being charged**. Partly for this reason and partly because the companies have to be compensated for the credit and additional services that they provide, claims by accident hire companies are generally at rates substantially above the market or "spot" rates that an ordinary hire company would have been willing to offer for ready money. Motor insurance companies have therefore tried to resist such claims." (My emboldening).

71. In *Dimond* the CHC agreement was found to be unenforceable due to breaching consumer legislation. Obiter, the House considered the quantum of the CHC charges and ruled that the additional benefits in the CHC rates had to be stripped out of the award. Per Lord Hoffman at page 10 of the transcript:

> "How does one estimate the value of these additional benefits that Mrs. Dimond obtains? It seems to me that prima facie their value is represented by the difference between what she was willing to pay 1st Automotive and what she would have been willing to **pay an ordinary car hire company for the use of a car.** As the judge said, 1st Automotive charged more because they offered more. The difference represents the value of the additional services which they provided. I quite accept that a determination of the value of the benefits which must be brought into account will depend upon the facts of each case. But the principle to be applied is that in the *British Westinghouse case* [1912] A.C. 673 and this seems to me to lead to the conclusion that in the case of a hiring from an accident hire company, the equivalent spot rate will ordinarily be the net loss after allowance has been made for the additional benefits which the accident hire company has provided."

72. The impecuniosity of the claimant was considered in *Lagden v O'Connor* [2003] UKHL 64; [2004] 1 AC 1067. The claimant was impecunious and, after an RTA, chose a CHC car which cost £659. It was more expensive than the spot hire rate and included in the rate insurance for the chance of not recovering the hire charges from the defendant. The judge awarded the sum claimed and the Court of Appeal and the House of Lords upheld the award due to the claimant's impecuniosity. Lord Nichols at para. 6 ruled thus:

> "My Lords the law would be seriously defective if in this type of case the innocent motorist were, in practice, unable to obtain the use of a replacement car. The law does not assess damages payable to an

> innocent plaintiff on the basis that he is expected to perform the impossible."

73. At para. 9 Lord Nicholls recognised that impecuniosity was a matter of priorities.

74. In *Farrell v Birmingham* [2011] RTR 14, a non-party costs order (NPCO) was sought against a CHC when the Claimant's RTA non PI claim for car damage and hire charges was discontinued and he was ordered to pay back the sum of £9,300 due to fraud. The judge ordered the CHC to pay 80% of the defendant's costs of defending the claim. Sir Andrew Morritt gave the lead judgment. The Court of Appeal upheld the award, considering that the CHC had control of the litigation and funded the disbursements.

75. In *Pattni v First Leicester Buses* & *Darren Bent v Highways* [2011] EWCA Civ. 1384, the Court of Appeal considered claims by well off victims of RTAs who had used CHC cars. Mr Bent, a Premiership footballer, hired a Mercedes AMG to replace his crash damaged Aston Martin. Mr Pattni hired an Audi R8 to replace his Porsche 911. The law was summarised by LJ Aikens as follows:

> "30 For present purposes I think that the relevant principles established by these decisions are as follows:
> (1) the loss of use of a car as a result of the car being damaged by the negligence of another driver is a loss for which, in appropriate circumstances, the innocent claimant can recover damages, even where the car is "non-profit earning". It is the duty of the innocent claimant to mitigate his loss. If the loss of use of a car can be mitigated or avoided by the hire of a replacement car, the cost of that replacement car will be the measure of damages recoverable for the loss of use of the car.
> (2) A claimant who hires a car on credit terms as a replacement vehicle suffers a loss which is recoverable as damages, even though, by the terms of the credit hire agreement, the hirer is not liable to pay the hire until there has been a judgment in the hirer's favour against the negligent driver. In that circumstance there is, generally, a "real liability, the incurring of which constitutes a real loss to the motorist. Whatever the publicity material may have conveyed, the provision of the substitute car was not free". If a claimant has had the use of a replacement car and he has had to pay for it, then the claim may more aptly be characterised as one for special damages; however, if he does not have to pay for it Longmore LJ has stated that: "..it may be difficult to say that he can recover special damages at all. It may be that he can only recover general damages".
> (3) The injured party cannot claim reimbursement for expenditure that is unreasonable. If the defendant can show that the cost that was incurred was more than was reasonable, either by proving that the claimant had no use for a replacement car in part or at all, or because

the car hired was bigger or better than was reasonable in the circumstances, the amount expended on the hire must be reduced to the amount that would have been needed to hire the equivalent to the damaged car. As Lord Mustill put it in *Giles v Thompson* , "…The need for a replacement car is not self-proving".

(4) Even if it was reasonable for the innocent claimant to hire a replacement car on credit hire terms, the measure of damages recoverable will not necessarily be the amount of the credit hire that the claimant agrees to pay the credit hire company. It will depend on the financial circumstances of the claimant. If the claimant could afford to hire a replacement car in the normal way, ie. without credit terms and by paying in advance, then the damages recoverable for loss of use of the damaged car will be that sum which is attributable to the basic hire rate of the replacement car. This basic hire rate has often been referred to as the "spot rate", but that is, with respect, a misnomer. The term "spot rate" is more appropriately applied to rates of freight or charter hire, or the price of a commodity in open, often international markets, where the service or commodity is bought for delivery today, as opposed to some time in the future. I think it would be better if, in the context of credit hire cases, the term "spot rate" were not used in future and the term "basic hire rate" or "BHR" were used instead. That term more accurately describes what is the basic measure of damages recoverable in cases where the claimant could afford to have hired a car by paying in advance, ie. not hiring the car on credit.

(5) The difference between the BHR and the credit hire rate (assuming there is one) takes account of the additional services that a credit hire company provides to the hirer, viz. credit, handling the claim and effecting the recovery from the negligent driver, taking the risk of not recovering from the latter and an element of profit. Those elements are not part of the recoverable loss of a claimant who has hired a replacement car on credit hire terms but who could have afforded to do so by paying in advance. However, it is for a defendant to demonstrate, by evidence, that there is a difference between the credit hire charge agreed between the claimant and the credit hire company and the BHR.

(6) If it was reasonable for the claimant to hire a replacement car but he could not afford to hire a replacement car by paying in advance, (in the word used in the cases, that he is "impecunious") then, prima facie, he is entitled to recover the whole of the credit hire rate he has paid, provided that it was otherwise a reasonable rate to pay in the circumstances. If the claimant is "impecunious" then, on the assumption it is reasonable for him to hire a replacement car and it was a reasonable type of car that he hired, he is said to have had "no choice" but to hire on credit terms. In *Lagden v O'Connor* Lord Hope of Craighead suggested that a rule of thumb test on whether a claimant hirer is

> "impecunious" might be whether he has the use of a recognised credit or debit card. In practice whether someone is "impecunious" will depend on the facts of a particular case and Lord Hope's rule of thumb test is not necessarily determinative of the issue of whether a claimant can afford to pay hire charges day by day, which is the key question.
> (7) If the credit hire agreement provides that the hire will not be due and payable until judgment has been obtained against the negligent driver and there are no express terms in the hire agreement about the payment of interest on the hire charges then interest should not be awarded, at least under the terms of section 35A of the Senior Courts Act 1981 or section 69 of the County Courts Act 1984 . This is because, in such circumstances the hirer has not been "kept out of his money"; he was not contractually obliged to pay the hire charges to the credit hire company whilst the claim against the negligent driver was being assessed and (if necessary) litigated. No hire charges were then owed to the credit hire company.
> (8) In the judgment of the Court of Appeal in *Burdis v Livsey*, the court considered the method by which judges could calculate the BHR and so the measure of damages for loss of use in circumstances where the claimant was not "impecunious". The court canvassed three possible methods. The first was to break down the charge made by credit hire companies so as to enable the additional elements (for credit, claim handling etc) to be stripped out. That method was rejected because it was said it would entail detailed disclosure and analysis which would be cumbersome in small cases and the costs would be disproportionate to the sums claimed in most of this type of case. I agree that may well be so in most cases. But I do not understand this court to be saying, at [137] of *Burdis v Livsey*, that it is wrong as a matter of law to consider direct evidence on this issue from the actual credit hire company that hired the replacement car to the claimant, eg. in the form of the company's published credit hire rates and BHRs. If there is such direct evidence it might be the best evidence of any difference between the credit hire rate charged and the BHR for that type of car in that area at the time the replacement car was hired. But if there is not such direct evidence, then it is unlikely that indirect evidence from the car hire company (such as its assertion of what its BHR would have been had they had one) will be useful. It would also probably entail disproportionately costly disclosure."

76. In *Mee v Jones* [2017] EWHC 1434, Turner J was considering an appeal relating to a NPCO against a CHC. The issue was whether the provisions of CPR rs.44.16(2)(a) and (3) created a different NPCO jurisdiction to the usual one under section 51(3) of *the Senior Courts Act 1981* and CPR r.46.2. The ratio of the decision was that they did not. The usual threshold criteria applied to all NPCOs. The facts are instructive. Three

claimants asserted they suffered injuries in a rear end shunt RTA. After a three day trial the recorder dismissed the claims and found the claimants had not proven that they were involved in the RTA. He did not state they had been fraudulent but that the claims were "suspicious". The first claimant's car had a value of £1,700 odd and the credit hire charges claim was for over £23,000. It appears to have been accepted that the claimants were protected by the QOCS cap. There being no damages awards the defendant's costs order was not to be enforced against them. Stopping there, the defendant clearly did not seek to argue, as it did in the case before me, that (b) applied and so the cap should have been lifted exposing the claimants to costs orders. No question about this was raised on appeal. Instead, the defendant obtained a cap lift order against the CHC from the recorder under r.44.16(2)(a) and (3) for 60% of its costs. On appeal Turner J upheld the order and referred to the case law relating to the NPCO jurisdiction (including *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965; *Symphony Group plc v Hodgson* [1994] QB179 and *Deutsche Bank AG v Sebastian Holdings Inc* [2016] WLR 17). He extracted the following factors to consider: the exceptional nature of NPCOs; the need for the non-party to be given the opportunity to be heard at the summary procedure to determine costs; the need for a close connection between the non-party and the claim; the behaviour of the claimant and the non-party; the level of control of the non-party of the CHC claim and all of the circumstances of the case.

77. Turner J summarised the factors which the recorder had taken into account when making the NPCO against the CHC (which was called "Select") thus:

> "They included the following:
> (i) Select had actually retained solicitors, Samuels Law, to act on its behalf in the claim. It was no coincidence that these solicitors were also instructed by the claimants. Select's retainer eventually was terminated by letter dated 9 July 2015, nearly two years after the accident.
> (ii) Select was in direct e-mail contact with Esure concerning the progress of the claim, saying that Samuels Law was acting on its behalf and expressly inviting Esure to comment to it on the issue of liability.
> (iii) There was a close association between Select and a company by the name of Roy Lloyd Ltd. They shared a common director, Mr Justin Lloyd, who was the author of the witness statement relied upon by Select in resisting Esure's claim for costs. In a written agreement between Miss Mee and Roy Lloyd Ltd in respect of credit storage, recovery and repair Miss Mee was contractually obliged to co-operate in the appointment of a solicitor nominated by the company in pressing a claim for damages. In the event that Miss Mee were to choose another solicitor her credit would automatically be terminated.
> (iv) Under her rental agreement with Select, Miss Mee gave Select the power to deduct directly from any moneys she may recover in respect of her personal injury claim to pay for any shortfall in damages relating to Select's own claims against her.

> (v) Miss Mee gave an irrevocable authority to her solicitors to provide any engineering report in respect of her vehicle and further updates relating to that vehicle to Select.
> (vi) Miss Mee further granted Select the right to pursue an action in her name.
> (vii) Select was not merely providing Miss Mee with a hire car on credit, it was operating as de facto claims manager as is evidenced by its pro forma letter heading which states: "Revolutionising the way your claims are managed."
> 25. Having concluded that Miss Mee and Select were "absolutely locked together", the recorder went on to consider whether it would be just to make an order for costs against Select. In finding that it was, he noted that the preponderance of the claim was for the benefit of Select being in the sum of £23,456.85 in the context of a total claim worth less than £30,000."

78. In relation to the r.44.16(2)(a) discretion Turner J ruled that:

> "29 … even claimants otherwise protected under QOCS are not entirely immune from the enforcement of an order against them under CPR r. 44.16 even though it will usually be the case that it is **the relevant non-party who has sought a financial benefit who will be first in line**."
> …
> "32 … The financial benefit is made out because, however good or bad the original deal, it is to the financial benefit of the credit hire organisation to recover the moneys due under the hire agreement through the process of the claimant's litigation. Some money is better than no money." (My emboldening).

79. Thus, Turner J considered that the CHC was clearly obtaining the benefit from the proceedings which included a claim for damages arising from personal injury as well as a claim to recover the CHC's charges.

80. In *Brown v Comm. of Police of the Metropolis* [2020] 1WLR, Coulson LJ gave guidance on the approach to the justice issue in gateway (b) cases, where the defendant seeks to lift the QOCS cap against a claimant who has brought a mixed PI and non PI claim. He ruled as follows:

> "57. But in such proceedings, the fact that there is a claim for damages in respect of personal injury, and a claim for damage to property, does not mean that the QOCS regime suddenly becomes irrelevant. On the contrary, I consider that, when dealing with costs at the conclusion of such a case, the fact that QOCS protection would have been available for the personal injury claim will be the starting point, and possibly the

> finishing point too, of any exercise of the judge's discretion on costs. **If (unlike the present case) the proceedings can fairly be described in the round as a personal injury case then,** unless there are exceptional features of the non-personal injury claims (such as gross exaggeration of the alternative car hire claim, or something similar), I would expect the judge deciding costs to endeavour to achieve a "cost neutral" result through the exercise of discretion. In this way, whilst it will obviously be a matter for the judge on the facts of the individual case, I consider it likely that, in most mixed claims of the type that I have described, QOCS protection will "in one way or another" continue to apply. It therefore follows that, as already advertised at paras 16 and 17 above, to the extent that paragraph 12.6 of Practice Direction 44 suggests a different approach, I consider it to be wrong. It needs to be amended as soon as possible."

The turning to the facts of the case Coulson LJ upheld the lifting of the cap at to 60% of the defendant's costs thus:

> "70 Finally, in connection with the deterrent argument, Ms Darwin made much of the need to ensure access to justice for victims of personal injury. Of course: that is what the QOCS regime is all about. But in the present case the appellant was not the victim of personal injury: her claim for personal injury damages was rejected and there was no appeal. The appellant did have a valid (non-personal injury) claim under the DPA and HRA and in tort on which she was successful. Her difficulty was that she had refused the offers of a total of £18,000 and at the end of the trial recovered just £9,000. In other words, the proceedings following the appellant's rejection of the offer, were a waste of time and money for all parties, having been necessitated only by the appellant's refusal to accept much more than she eventually recovered. Should the appellant be able to avoid the usual cost consequences of her conduct, merely because she had a claim for damages for personal injury which the judge rejected? For all the reasons I have given, the answer must be No, and no wider considerations of access to justice, properly analysed, can make any difference to that conclusion."

81. In *Adelekun v Ho (Association of Personal Injury Lawyers intervening)* [2021] UKSC 43, the Supreme Court ruled that the defendant's costs order on a costs appeal could not be enforced against the claimant's costs order in the main action. In the case before me the Defendant placed reliance on paras. 4 and 5 of the judgment of Lord Brigges and Lady Rose in which they summarised matters thus:

> "4. Contrary to Sir Rupert's proposals, nothing in the QOCS scheme affects in any way (directly at least) the orders which a court may make in favour of defendants in PI cases, applying the general rules in CPR Pt 44, either at trial, at pre-trial interim hearings, at the conclusion of contested costs assessment proceedings post-trial or later still on appeal. The scheme focuses entirely upon what a defendant can do by way of enforcement of a costs order in its favour once obtained. The qualifications to the ban on enforcement inherent in the phrase "one-way" are of two types, one general and the other specific.
> 5 Generally, defendants' costs may be enforced up to an amount equivalent to the aggregate of court orders for damages and interest in favour of the claimant. This is, as we shall later explain, a form of monetary cap on the amount of the costs orders made in the defendant's favour which the defendant may enforce. The specific type of qualification consists of defined circumstances where there is no limit on enforcement, namely where the claimant's claim has been struck out as disclosing no cause of action, as an abuse of process or on account of obstructive conduct of the claim, where it has been found to have been fundamentally dishonest, or where it has been pursued for the benefit of a third party. Costs incurred in the same proceedings in the pursuit of claims other than for personal injuries (such as replacement car hire) may also be enforced without limit."

82. I do not find any assistance on the issues before me in that paragraph. It merely summarises the background.

83. In *Gass v On Hire* [2021] 21st June transcript, HHJ Roberts heard an appeal from a mixed claim with a large CHC charges element. The RTA claim, in which liability was admitted, was struck out because the claimant ceased giving instructions, his solicitors came off record and the claimant failed to comply with directions. The defendant's costs were awarded as to 60% against the CHC under r.44.16(2)(a) by the District Judge. The CHC contract contained terms allowing the CHC to choose solicitors, which they did (Winns); determine settlement of the CHC charges and to demand immediate payment from the claimant if he breached various terms of the CHC agreement including assisting in running the claim. The appeal centred on whether it was just to award a NPCO against the CHC. HHJ Roberts reviewed the law on NPCOs covering the "real party" test, the intermeddling test, exceptionality and causation of the CHC claim costs as opposed to the PI claim costs. He noted that the costs determination was a summary procedure. He ruled as follows:

> "65. In my judgment, the District Judge was correct to find that the claim for hire charges was brought for the financial benefit of a person other than the Claimant, namely the Appellant. The fact that a credit hire claim can only succeed if there is a valid and enforceable contract

> entered into between the Claimant and the credit hire does not obviate the fact that a hire claim may be for the ultimate financial benefit of a person other than the Claimant, namely the hire company."

84. HHJ Roberts also upheld the finding that the CHC had control over the CHC charges claim and was the real party. On causation he upheld the district judge's reasoning that the case would have settled if it were only for the PI claim absent the CHC charges.

85. In contrast to *Gass*, HHJ Freedman in *On Hire v Smithson* [2022] 20th May, transcript, overturned a NPCO. He ruled that the CHC was not the real party and that causation of the increased costs by the CHC charges claim was not proven. After an RTA the claimant hired a car from a CHC and later made a claim using the CHC's panel solicitors (Winns). Importantly, both liability and quantum were in dispute. The CHC charges and repair charges came to over £28,000, 88% of the damages claimed. The claim was allocated to the fast track and the claimant discontinued after fundamental dishonesty was alleged against him (he had an extensive history of RTA claims). The defendant joined the CHC and obtained the NPCO for 50% of the costs. HHJ Freedman found the District Judge had erred in conflating the real party test with the need for proof of causation of increased costs. In relation to the decision that the CHC was not the real party HHJ Freedman, relying on the guidance given by the Supreme Court in *Travelers Insurance Company Ltd v XYZ* [2019] 1 WLR 6075, summarised the law on the real party and causation tests as follows:

> "30. In summary, the position is that more than a shared commercial interest in the outcome of litigation is required for a non-party to be categorised as the 'real party' to the litigation for the purposes of costs. The non-party must control and direct the litigation and its participation in the litigation will only render it liable to costs if, when running the litigation it is not furthering the interests of the named party. The way in which Mr Williams QC puts it is that the conduct of the non-party:
> "...must render the named party a 'nominal party' in both senses of that term.""…
> "CAUSATION
> 31 It is sufficient to refer to the dicta of Lord Briggs in *Travelers* at [65]:
>
> > "I have noted ... how firmly the Court of Appeal ... endorsed the requirement ... to demonstrate a causative link between the incurring of the costs sought to be recovered from the non-party and some part of the conduct of the non-party alleged to attract the ... jurisdiction. That requirement is in my view rightly imposed... If the costs would still have been incurred if the non-party had not conducted itself in the relevant manner, why should it be just to visit the non-party with liability for them?"
>
> 32 At [80], Lord Briggs repeated the same point:

> "...causation remains an important element in what an applicant ... has to prove, namely a causative link between the particular conduct of the non-party relied upon and the incurring by the claimant of the costs sought to be recovered... If all those costs would have been incurred in any event, it is unlikely that a[n] ... order ought to be made."
>
> 33 Lord Reed expressed himself in a similar fashion. He put it in this way:
>
> "...[the non-party] must, of course, have caused the expense for which he is sought to be made liable."

86. The same CHC agreement terms which were in evidence in *Online* were put before HHJ Roberts in *Gass*. However, in the *Online* case witness evidence was put in before the District Judge and this showed that the CHC had played no role in the litigation and had not been aware of the claimant's dishonesty until late in the day. In addition, on causation, the significant costs were expended on proving the claimant's dishonesty. HHJ Freedman extracted the following relevant evidence when ruling that the CHC was not the real party and did not play a substantial controlling role and was not running the litigation in it's own interests:

> "61. …In particular:
> (i) The claimant chose to contract with the appellant because he required a replacement vehicle;
> (ii) The claimant had the option to pay up front for the cost of hire or to enter into a credit hire agreement;
> (iii) The claim brought by the claimant was his claim in the sense that he was seeking to recover his personal losses which included, of course, the appellant's hire charges but also, in particular, his claim for General Damages for personal injuries;
> (iv) The appellant neither controlled nor interfered with the conduct of the litigation. The appellant made no decisions whatsoever in relation to the conduct of the litigation;
> (v) The appellant was not provided with witness statements or with disclosure documents;
> (vi) The appellant had no dealings with the claimant other than to supply him with a replacement vehicle;
> (vii) The entirety of the litigation was conducted by Winns solicitors, an entity separate and distinct from the appellant; and
> (viii) In so far as the appellant had a contractual liability to indemnify the claimant against its costs, it discharged its obligation by arranging for the claimant to be insured against any adverse costs liability."

87. It can therefore be seen that it may not be enough for a successful defendant, who has beaten it's own Part 36 offer, simply to point at the "high" CHC charges claim and the

CHC agreement to obtain a NPCO under r.44.16(2)(a). In *Achille v Lawn Tennis Association Services Ltd* [2022] EWCA Civ. 1407, the District Judge struck out a personal injury claim because there were no reasonable grounds for it and awarded the defendant it's costs. It had been issued alongside a non PI claim which was not struck out. In addition, the District Judge lifted the QOCS cap because he found that CPR r.44.15(1)(a) applied. It will be recalled that there is no "justice" filter in this exception to QOCS. Despite being upheld by HHJ Kelly on appeal, on further appeal the costs enforcement order was set aside because it could only be considered at the end of the claim and because it was a mixed claim, CPR r.44.16(2)(b) applied and the Court of Appeal ruled that the appropriate gateway for lifting the cap was not 44.15(1)(a). Achille had a long-running dispute arising out of events in 2013 and 2014 which led to his expulsion from Moseley Tennis Club in Birmingham. He brought numerous claims against a variety of defendants, none of which had succeeded. This resulted in an extended civil restraint order being made against him. The present appeal was not affected by that order. This claim was brought against the Lawn Tennis Association in its capacity as the national governing body for tennis. Achille alleged negligence, racial victimisation (Equality Act) and breach of the Protection from Harassment Act 1997. He claimed damages for psychiatric injury (PI claim) and damages for injury to his feelings (non PI claim). Males LJ provided this reasoning for the decision:

> "34 It is true that in such a case the permission of the court must be obtained before enforcement under CPR r 44.16 can take place, and that permission will only be given to the extent that the court considers it just to do so. Accordingly, it follows that a defendant in a mixed claim case where the personal injury claim is struck out is not in quite as good a position as a defendant where a personal injury claim is struck out and there is no "other" claim. However, as the court has power in the mixed claim case to make whatever order it considers will meet the justice of the situation, it is impossible to say that the claimant's interpretation results in injustice or defeats the purpose of the QOCS rules."

88. In *ABC v Derbyshire* [2023] EWHC 1337, CPR r.44.16(2)(b) was again under the spotlight. Hill J was dealing with mixed claims for psychiatric injury and breaches of the Human Rights Act. Having dismissed all the claims at trial, the defendant sought to enforce against the claimants and lift the QOCS cap under r.44.16(2)(b). Hill J considered the approach and guidance given by Coulson LJ in *Brown*. She ruled that the proceedings were a PI claim "in the round" for the reasons set out at paras. 40-50. She took into account how some of the non PI claims had been abandoned by the time of the trial, leaving the PI claims and others which were mainly to produce PI damages; secondly the parties understood the claim to be mainly a PI claim and their counsel described it that way; thirdly all the expert evidence was necessary for the PI claim; fourthly the personal injuries were real not "tacked on" and the non PI claim was a modest part of the damages claimed. Hill J then applied Coulson LJ's "exceptional features" test to determine whether the neutral costs result expected in PI claims would

be displaced. She found no gross exaggeration by the claimants, and then ruled as follows:

> "65. Doing the best I can, in the exercise of my discretion under CPR 44.16(2)(b), I consider an appropriate level of enforcement to be 5%. In my judgment that figure properly respects the spirit of the QOCS regime and the starting point of the need for a costs neutral result in relation to the personal injury claims, but makes an appropriate allowance for the exceptional nature of the Mr Barratt issues insofar as they impacted on the non-personal injury claims."

89. Hill J determined a similar issue in *Afriyie v The Comm. of Police for the City of London* [2023] Costs LR 1125. The claimant's claims for assault and battery (PI claims) and misfeasance in public office (non PI claims) were dismissed after a trial. The defendant's argument that: had the claims succeeded they should have been dismissed in any event under the Criminal Justice and Courts Act 2015, s 57 due to the claimant's fundamental dishonesty was rejected. The defendant sought to enforce the costs under CPR r.44.16(2)(b). It was agreed that "in the round" the claims were to be characterised as PI claims. Hill J ruled that the defendant need to prove exceptional features to justify lifting the cap on the justice test. These are considered as follows:

> "33. Mr Ley-Morgan's submissions were not directed to the question of whether there were any exceptional features of these claims. Instead he submitted that the following matters should be taken into account in the exercise of the general costs discretion under CPR r 44.2:
>
> (i) The claimant's rejection of three (non-Part 36) offers by the defendant to settle the claim on a "drop hands" basis, leading to the wasted costs of the trials;
>
> (ii) The fact that the claimant did not limit his assault claim to the argument that the use of the taser was not objectively reasonable but instead made extremely serious allegations of bad faith and corruption on the part of the police officers;
>
> (iii) The claimant's pursuit of a misfeasance claim which added nothing to the other claims (see [116] of the liability judgment) and which should therefore have been withdrawn;
>
> (iv) The defendant's success on all the issues;
>
> (iv) The finding that the claimant's conduct caused or at least contributed to the incident (see [155] of the liability judgment);

(v) The "significant similarities" in the statements of the claimant, Mr Cole and Mr Grant (see [153] of the liability judgment);

(vii) The finding that the claimant had been dishonest on the issue of whether he had cooperated with the breath test procedure (see [171] of the liability judgment); and

(viii) The interview the claimant gave to The Guardian before the first trial (see [150] of the liability judgment), which was an unacceptable attempt to pressure the defendant to settle the claim, and his pursuit of an exemplary damages claim on the basis that it was grossly offensive for him to be cross examined about it.

34. In fairness to the defendant, I have considered whether any of these matters can properly be considered "exceptional". I have concluded that they cannot.

35. In my judgment, matters (i)–(iv) above reflect nothing more than the usual incidences of litigation, where one party chooses to litigate a claim in a certain way but is unsuccessful. These matters have contributed to the usual order for costs, namely that the claimant should pay the defendant's costs, but they are not exceptional for the purposes of the CPR r 44.16(2)(b) discretion."

90. The final recent case put before me by the parties was *Sharzad v RSA* [2023] transcript 6th April. HHJ Gosnell was hearing an appeal from a District Judge about CHC charges. The Claimant had an RTA. He claimed damages for: pain, suffering and loss of amenity; physiotherapy of £790; the pre-accident value of his vehicle of £4,130; credit hire charges of £27,780 and storage and recovery charges of £9,200. The Defendant alleged it was a staged accident and the claim was fundamentally dishonest. The District Judge dismissed the claim and found fundamentally dishonesty. QOCS was removed under the provisions in CPR r.44 and the cap was lifted for the full extent of the defendant's costs and a NPCO was made against the CHC. HHJ Gosnall overturned the NPCO because the District Judge had found the CHC did not control the litigation and ruled as follows at para. 64:

> "My analysis of the previous authorities on this issue makes clear that it is only by exercising control over the litigation that a non-party can be treated as the "real party" in the litigation."

Analysis and rulings

91. The Judge in this appeal found that the CHC would have gained the benefit of the CHC charges claim. This was not appealed. Thus, the gateway in CPR r.44.16(2)(a) applied. In my judgment on a plain reading of the words in CPR r.44.16(2) and in particular the use of the word "or" between (a) and (b) and taking into account that both sub-sections

require the Court to determine who gains the "benefit" of an award for CHC charges: either the Claimant or a third party, the sub-sections are generally mutually exclusive. The real test for the Court to determine is who gains all or most of the benefit of the award. I refer back to paras. 57-63 in this judgment for my reasoning. The CHC clearly would have gained the whole of the benefit of any award under the terms of the CHC agreement. The only benefit which the Claimant would have gained would have been the eradication of his residual liability under the CHC agreement. Thus, in my judgment, the Judge erred in making his tentative additional finding that (b) also applied.

92. Once the gateway in (a) was open, the Court was empowered to look at making a NPCO against the CHC and would have been required to consider the case law setting out the tests and the provisions of the *Senior Courts Act 1981* S.51 and CPR r.46.2 and *Mee v Jones* [2017] EWHC 1434; *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965; *Symphony Group plc v Hodgson* [1994] QB179 and *Deutsche Bank AG v Sebastian Holdings Inc* [2016] WLR 17. However, the Judge was not asked to do so by the Defendant and so did not. In my judgment the Judge was wrong then to lift the QOCS cap protecting the Claimant using sub-paragraph (a), the Court was not empowered to do so. I do not accept the Respondent's submission here that the Claimant should apply for a NPCO at this stage.

93. As for gateway (b), in my judgment it was not open and the Judge erred in finding that (b) applied as well as (a) because he had decided that the CHC benefitted from the CHC charges claim not the Claimant. That determines this appeal.

Just to do so under (b)

94. However, if I am wrong and the Court could, in law, find that both the Claimant and a CHC "benefitted" from the CHC charges claim in this case, so that sub-paragraph (b) applied, then the Judge's rulings in paras. 25-30 of the judgment need consideration.

95. The Judge did not make use the words "in the round" to characterise the nature of the proceedings but it is clearly stated that he considered the CHC charges were the majority of the sums claimed and the reason why the claim went to trial. He expressly considered the decision in *Brown*. He correctly considered the CHC charges claim were a non PI claim. However, (presumably under sub-paragraph (b)) he appears to have ruled that the proceedings were characterised as "non PI". I consider that decision to have been plainly wrong for the following reasons. Had the Defendant raised the assertion that the Claimant had failed to comply with his disclosure obligation under the unless order a few weeks after disclosure was given in late December 2021, when, in my judgment it should have, the issue would have been resolved before trial and the trial would have proceeded on a different basis: namely that the Claimant was debarred from claiming CHC charges because he could not assert impecuniosity. After the preliminary issue had been decided by an interlocutory Judge and the CHC charges claim had been struck out, the trial would have been about the injuries; BHR charges

for a short period before the repairs were done, funded by the Claimant; fundamental dishonesty and other matters. The comparative values of the PI claims and non PI claims in dispute would have been completely different. The proper characterisation of the proceedings for trial would probably have been as a "PI claim". The neutral costs position under QOCS would have been the starting point and most probably the ending point because the Defendant would have had to show exceptionality. The Part 36 offers would have been approached differently by the Claimant and the CHC before trial, knowing that the CHC charges had been struck out (if that is what would have been decided on the Defendant's interlocutory application).

96. Once the character of the proceedings had been decided (presumably under sub-paragraph (b)) the Judge should have moved on to consider whether it was just to make a cap lifting order against the Claimant. I set out the relevant factors at para. 66 above. The Judge should have asked himself:

"is it just to lift the cap on enforcement against this claimant who:

(1) has brought a claim for damages for personal injury and non PI;
(2) which was not frivolous or an abuse of process; and
(3) which has not been conducted in an abusive way; and
(4) which was not fundamentally dishonest; and
(5) has won some damages for personal injuries; and
(6) has failed to beat a Part 36 offer resulting in a costs liability?"

In these circumstances the factors which the Judge should have taken into account when considering whether it was just to order the Claimant personally to pay the costs, out of his own money (because his damages would be all used up) included all of the circumstances of the case, but in particular the following:

(1) *The conduct of the parties*: The Defendant had failed to prove fundamental dishonesty and had failed to take a "cards on the table" approach to the unless order. The Claimant had failed to beat 3 part 36 offers. None of this conduct by the Claimant would usually qualify as "exceptional" such that QOCS would be lifted, see the decision of Hill J in *Afriyie.* Did the breach of the unless order about disclosure qualify as "exceptional?" In my judgment it could not, in relation to lifting QOCS cover on costs, when the unless order issue should have been raised long before trial by the Defendant to save the very trial costs arising from the CHC charges claim affected by that issue.
(2) *The amount of the damages and interest already lost by the failure to beat the Part 36 offer*: the Claimant had lost all of the £10,000 odd damages awarded for his PI claims and the non PI claims.
(3) *The relative value of the claim for damages for personal injury (the PI claim) compared with the claim for damage for non PI (to property: the vehicle repairs and BHR charges)):* if the unless order point had been taken when it should have been taken, before trial, the relative values would have weighed in favour of QOCS remaining in place.

(4) *The relative amount of costs, time and effort during the claim and the trial allocated to the non PI claim as compared to the PI heads of claim*: The costs of the trial preparation, absent the impecuniosity issue, would have been pretty much as they were in any event because the Defendant was asserting dishonesty and putting the Claimant to proof of all his PI claims. The BHR still had to be determined. The costs of the BHR charges would have been a smaller proportion. The Impecuniosity issue was a procedural argument for which no evidence was served.

(5) *The size of the defendant's costs award relative to the size of the damages award:* The Defendant's costs were already eradicating all of the Claimant's damages and interest.

(6) *The financial situation of the claimant:* the Judge had clear evidence that the Claimant was a low earner and had a wife and 3 children to support and was on working tax credit. The Judge found he earned £250 pw. This was not mentioned in the reasoning on costs. The fact that impecuniosity was debarred for the CHC charges claim did not apply to this stage of the case.

(7) *The size of and actual liabilities (rather than the perceived liabilities) of the claimant in relation to: (1) the Defendant's costs, (2) the ATE premiums, (3) the success fees and (4) the solicitor-own party costs; arising from the case:* None of these matters were considered in the reasons given by the Judge.

97. In my judgment the Judge erred by failing to consider these relevant matters in relation to: (1) the characterisation of the claim and (2) whether it was just to lift the cap on the Claimant's liability for adverse costs. In relation to causation, £5,000 was nearly half of the Claimant's annual income. The Judge took into account that the CHC charges claim put the case onto the multi-track; that the non PI claims were much larger than the PI claims and that the Claimant rejected valid Part 36 offers, but nothing more. He lifted the cap so that the Claimant had to pay £15,000 of the Defendant's budgeted costs which totalled £17,009 (footnote 6 of the Respondent's final skeleton). £15,000 was 88% of the budgeted costs. Whereas, on a proper analysis of the costs caused by the BHR charges and recovery and storage claims, which should have been the non PI claims which were in dispute, the percentage would have been far less on the basis that the CHC claim should have been recognised as struck out much earlier had the Defendant raised the assertion after disclosure. The repair costs were never in issue. A figure of 25% would have been in the right area which would have led to no lifting of the cap because the damages covered more than 25% of the Defendant's costs.

Grounds

98. Ground 9: I consider that this ground is made out as expanded in submissions. The Judge erred in law on the following matters:

a. The finding that both of the CPR r.44.16(2) gateways: (a) and (b) applied. On the correct analysis only gateway (a) applied because the benefit of the CHC charges claim would have gone to the CHC.

b. In my judgment, as a matter of law, when considering to whom the benefit of a head of claim goes, gateways (a) and (b) are generally alternatives and the issue for the Court is to decide to whom the majority of the benefit goes.
c. Under gateway (a) the Judge was not asked to consider an NPCO and so did not do so. That did not permit or facilitate the Court to apply gateway (b) instead.
d. If I am wrong and gateway (b) did apply then the Judge failed to consider the relevant factors for the correct characterisation of the proceedings as a whole when he found this was a non PI claim. Property categorised the disputed claims at trial should have been, in the round, a PI claim. The exceptionality test should then have been applied.
e. If I am further in error, and the proceedings were properly characterised as "not a PI claim", then in my judgment the Judge failed to consider the relevant factors, an in particular causation, to fulfil the justice filter set out at paras. 96-97 above when determining whether it was just to lift the enforcement cap so that the Claimant himself had to pay an additional £5,000 out of his own funds.
f. For these reasons, in my judgment, the QOCS cap should not have been lifted against this Claimant.

Re-opening permission to appeal on some of the other grounds

99. As trailed above, I am concerned about certain other aspects of the judgment. I do not consider that it was right on the facts to find that the Claimant had breached the unless order relating to disclosure on impecuniosity. However, permission for appeal on that decision has been refused and a broad allowance in relation to findings of fact is afforded to first instance tribunals, which appellate courts rarely interfere with.

100. Furthermore, I do not understand how an award of loss of profits of £750 (£250 pw for 3 weeks) could have been made when there was no such claim in the schedule of loss and when the Claimant did not lose any profits because he hired another taxi and kept on working. The Judge awarded BHR charges of around £1,300 so the loss of profit does not apply to the presumed hire charges for a presumed pecunious claimant. The rationale appears to be that this is what the Claimant would have lost had he paid to repair the car himself, that task taking 3 weeks to complete. So, he would have claimed loss of "profit" if he had paid for the repairs. But that is not the correct measure of the loss. The starting point would have been his lost gross profit, taking away only the running expenses, not the standing charges. None of that process was referred to. In any event if he was paying BHR charges for another taxi he would have suffered no loss of income.

101. I am grateful to both counsel for considering my concerns at the hearing and making submissions on CPR Part 52 r.52.30. The factors permitting re-opening after permission has been refused at a renewed hearing are very narrow. The case must be exceptional and re-opening must be needed to avoid a real injustice.

102. I have taken into account that had impecuniosity not been struck out the Defendant might have succeeded in reducing or defeating the claim for CHC charges on the basis of the Claimant's comprehensive insurance; the offers made by the Defendant insurer straight after the RTA to provide a hire taxi to the Claimant; or on the basis that the court might have decided that the Claimant was not impecunious in any event even if the "impecunious" assertion had not been struck out. In addition, the loss of profit award has been made where, in my judgment, there was insufficient legal or factual basis for it. Therefore, I have come to the conclusion that sufficient grounds for re-opening are not made out.

Conclusions

103. For the reasons set out above I allow the appeal and set aside paragraph 5 of the order of HHJ Pearce dated 16.9.2022. Enforcement of the Defendant's costs shall be capped in accordance with CPR r.44.14(1).

END