QOCS--when does the unsuccessful party have to pay?

21/08/2015

Personal Injury analysis: When should an unsuccessful claimant pay a successful defendant's costs? Alex Bagnall, associate and costs advocate of Just Costs Solicitors in Manchester, examines the decision in Casseldine in which the costs judge had to decide whether qualified one way costs shifting (QOCS) applied.

Original news

Casseldine v The Diocese of Llandaff Board for Social Responsibility (claim no 3YU56348, 3 July 2015, unreported)

In March 2012 the claimant entered into a conditional fee agreement (CFA) with Thompsons. They were instructed to bring a claim against her employer for damages for personal injuries she claimed she sustained at work. On 30 January 2013 Thompsons terminated the retainer and its CFA came to an end. On 1 April 2013 the changes to the Civil Procedure Rules 1998, SI 1998/3132 (CPR) came into force to implement the changes recommended by Lord Justice Jackson. On 6 August 2013 the claimant entered into another CFA with a different firm of solicitors (SRB). As this was a post-April 2013 claim SRB could not claim additional liabilities by way of success fee or after the event (ATE) insurance if they were successful. The claim was issued in December 2013 and was dismissed at trial on 1 December 2014.

The issue of any costs liability was referred to a regional costs judge to determine. He had to decide whether the claimant should pay the defendant's costs because the Thompsons CFA predated the April 2013 changes; or whether QOCS should apply and the defendant should not recover its costs from the claimant. The costs judge said the existence of the Thompsons CFA was irrelevant as it had been terminated. The only CFA that was relevant was the SRB one. This CFA was taken out after the April 2013 changes--SRB could not recover success fees or ATE. The quid pro quo for the April 2013 changes was that QOCS would apply. The costs judge accordingly ruled, applying QOCS, that the successful defendant could not recover its costs from the unsuccessful claimant.

What is the background to QOCS protection?

The Jackson changes brought to an end the system brought in by the Access to Justice Act 1999 (AJA 1999). AJA 1999 abolished legal aid for the vast majority of civil claims and replaced it with a 'no-win, no fee' system. This meant that solicitors acting for unsuccessful claimants recovered no costs, but on cases they did win they could recover a success fee of up to 100% of their base costs. Claimant solicitors were often required to take out ATE insurance to pay a defendant's costs on claims that failed.

The 1999 system was discredited and criticised by some of the Supreme Court judges in *Coventry v Lawrence* [2014] UKSC 13, [2014] All ER (D) 245 (Feb). Prior to this, Lord Justice Jackson had recommended many changes to the way civil courts operated. These came into effect on 1 April 2013. In relation to costs, the Jackson changes meant that for post-April 2013 claims, claimant solicitors could no longer recover either a success fee or ATE premiums by way of additional liabilities from a defendant on cases they won.

As claimants could no longer recover ATE premiums if they were successful it was unlikely there would be any ATE insurance available to pay a defendant's costs on unsuccessful claims. Lord Justice Jackson recognised this and the compromise introduced in the CPR in April 2013 was QOCS. This meant that for post-April 2013 claims that failed, a defendant would not recover its costs. QOCS represented a radical departure from the usual rule that had existed in civil courts that a loser pays the winner's costs.

QOCS was also partly intended to stimulate defendants into settling or using alternative dispute resolution (ADR) more as defendants could no longer be supine on weak claims in the belief that the other side would have to pay costs if a claim was lost.

QOCS applies only in circumstances where the claimant has not entered into a 'pre-commencement funding arrangement'.

What is the significance of the decision in the Cardiff County Court?

This is a significant decision. While not binding, it carries some weight as it is a reserved judgment of an experienced regional costs judge. The reasoning of the regional costs judge in *Casseldine* reflects the intentions of Lord Justice Jackson when he recommended changing the CPR and introducing QOCS.

The costs judge was at pains in his judgment to explain why this case was different to the case of *Landau v The Big Bus Company and Zeital* (Case number: 1403806). This is an unreported decision of Master Haworth sitting in the Senior Courts Costs Office on 31 October 2014. Landau had a pre-April 2013 CFA and he brought a personal injury claim. That claim was unsuccessful and Landau appealed. Landau entered into a post-April 2013 CFA (without ATE) for an appeal. His appeal to the Court of Appeal was unsuccessful. The same firm of solicitors acted for Landau.

Master Haworth, in a decision that was not free from difficulties of interpretation, held that the appeal and the trial were all part and parcel of Landau's claim. Master Haworth therefore said even though Landau had a new post-April 2013 CFA for his appeal (and there were no attacks on its authenticity), that QOCS should not apply because this related to a claim brought under a pre-April 2013 CFA. Master Haworth reached his decision in applying the transitional provisions in CPR 44.

Casseldine was distinguished from *Landau* on the basis that the proceedings in *Landau* were commenced under the pre-commencement CFA, whereas in *Casseldine* the pre-commencement CFA had been terminated by Thompsons and proceedings were issued under the post-April 2013 CFA.

Could this decision affect other cases operating under CFAs?

For all those with active personal injury claims in the civil courts, it is worth while taking stock of this decision. The decision serves as a potent reminder to those advising defendants (in claims to which QOCS apply) that even though they may be successful they are unlikely to recover their costs from a claimant in the absence of any of the exceptions found at CPR 44.16.

For those acting for claimants the decision is useful as it shows that, properly applied, a claimant will not have to pay a defendant's costs if his claim fails. Where a claimant has changed representation and/or there has been a new CFA then the dates must be checked to see whether they are pre- or post-April 2013 ones in the event a claim is unsuccessful.

What are the exceptions where QOCS will not apply?

There are two groups of exceptions set out in CPR 44.15 and 44.16. The former group does not require permission of the court for them to apply and the latter does. The without permission exception applies to proceedings a claimant has brought which have been struck out because:

- the claimant has disclosed no reasonable grounds for bringing the proceedings
- the proceedings are an abuse of the court's process, or
- the conduct of either the claimant or someone acting on his behalf is likely to obstruct the just disposal of the proceedings

- The permission exception applies where:

- the claim is found on the balance of probabilities to be fundamentally dishonest, or
- the proceedings include a dependency claim (under the Fatal Accidents Act 1976) made for the financial benefit of a person other than the claimant

What has been the reaction to the QOCS regime? What is the overall impression of QOCS among practitioners?

The genesis of QOCS was in data which appeared to demonstrate that it was cheaper for defendants to bear their own costs, win or lose, than to pay the cost of ATE premiums where defendants lost.

Initially QOCS was met with some hostility, being referred to in terms as a 'fraudster's charter' in some quarters. However, anecdotally at least, courts do not seem particularly averse to removing QOCS protection in appropriate cases.

What's next for QOCS?

We are yet to see any binding authorities dealing with the application of QOCS. So far, issues such as 'fundamental dishonesty' have been the preserve of the County Court. It is likely to be only a matter of time before the Court of Appeal becomes seized of this particular issue and gives guidance on:

- what constitutes 'fundamental dishonesty'
- the appropriate standard of proof which is to be applied, and
- the evidence that is required in support of such an allegation

Interviewed by David Bowden.

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