

Case No: QB/2016/0261

Neutral Citation Number: [2017] EWHC 1505 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

The Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 4 May 2017

BEFORE:

MR JUSTICE MORRIS

BETWEEN:

ROBERT JAMES JEFFREYS

Claimant

- and -

THE COMMISSIONER OF POLICE FOR THE METROPOLIS

Defendant

SOPHIE KHAN (of Sophie Khan & Co) appeared on behalf of the Claimant

LISA DOBIE (instructed by Weightmans LLP) appeared on behalf of the Defendant

JUDGMENT
(As Approved)

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MR JUSTICE MORRIS:

Introduction

1. This is an appeal brought with permission by Robert James Jeffreys ("the Appellant") from the order of His Honour Judge Freeland QC sitting at the Central London County Court dated 17 November 2016 ("the order"). By the Order, the learned judge ordered that the Appellant pay the costs of the Commissioner of Police for the Metropolis ("the Respondent") relating to an action brought by the Appellant against the Respondent and further ordered that the Respondent be permitted, pursuant to CPR 44.16(2)(b) to enforce that order for costs to the extent of 70 per cent.
2. By this appeal, the Appellant seeks an order to set aside the order for enforcement of costs against him and further seeks an order that the Respondent pays the costs of the costs hearing before the learned judge on 17 November 2016.
3. The appeal raises a point on the construction of the provisions, relatively newly introduced, of the CPR dealing with Qualified One-Way Costs Shifting and raises points upon which there is to date no reported decision.

The Order

4. The Order was made at the end of civil proceedings brought by the Appellant as claimant against the Respondent as defendant for damages for wrongful arrest, false imprisonment, assault and battery, malicious prosecution and misfeasance in public office. After a jury trial, on 27 July 2016, the claims were dismissed by the learned judge. Following a hearing on 27 November 2016 on cost issues consequential upon that dismissal and after giving a fully reasoned judgment, the learned judge made the Order which provided, so far as relevant as follows:

"2. For the period 5 June 2014 to 27 July 2016, the Claimant do pay the Defendant's costs to be subject to detailed assessment on the standard basis in default of agreement.

3. The Claimant do pay 70% of the Defendant's costs of today, to be subject to detailed assessment on the standard basis in default of agreement.

4. As to enforcement of the costs under part 2 and 3 of this order, the Defendant be permitted under CPR 44.16(2)(b) to enforce the order for costs in its favour to the extent of only 70%."

Factual background

5. The factual background to the appeal is as follows. Following an incident on 29 September 2009 at his home, when he was arrested and then detained, the Appellant

was charged with an offence of harassment without violence contrary to section 2 of the Protection from Harassment Act 1997. On 15 July 2010, the Appellant was acquitted of that charge at Waltham Forest Magistrates Court.

6. On 8 October 2012 the Appellant brought a civil claim against the Respondent in Central London County Court. The brief details of claim endorsed on the claim form stated:

"The Claimant claims damages, including aggravated and exemplary damages for wrongful arrest, false imprisonment, assault and battery, malicious prosecution and misfeasance in public office arising out of the actions of the police officers acting in the purported performance of their police functions under the direction and control of the Defendant on 29 September 2009.

As a direct consequence of the actions of the police officers under the direction and control of the Defendant, the Claimant has suffered, pain suffering and loss of amenity.

Value

The value of the claim is in excess of £15,000 but not more than £50,000 to include a claim for pain suffering, and loss of amenity which exceeds £1,000..."

7. The Particulars of Claim served on 7 February 2013 expanded upon these brief details, repeating the causes of action of assault, false imprisonment, malicious prosecution and misfeasance in public office. The essence of the latter two causes of action was an allegation that police officers had provided information to the CPS which they had concocted and which they knew to be false. The claim for loss was pleaded in paragraph 13 which stated as follows:

"By reason of the matters set out above, the Claimant has suffered pain, distress, anxiety and inconvenience, injury to feelings and loss of liberty."

Then, under the subheading "Particulars of Loss" within that paragraph, the Appellant identified four distinct elements of loss, namely: (a) loss of liberty; (b) soft tissue injuries and swelling to the hands; (c) exacerbation of existing medical condition; and (d) distress, humiliation, fear and upset.

The "existing medical condition" referred to in subparagraph (c) is a reference to the Appellant's pre-existing medical condition of paranoid schizophrenia.

8. Additionally, the Appellant sought in paragraph 14 of the Particulars of Claim, aggravated and exemplary damages.
9. Thus, from the Claim Form and the Particulars of Claim, it is clear that by this action the Appellant was seeking damages in respect of four distinct causes of action (assault,

false imprisonment, malicious prosecution and misfeasance in public office). It is further clear that the Appellant was seeking damages in respect of personal injuries to himself (both physical and psychological) and, importantly, that he was also seeking damages in respect of other loss (including loss of liberty and distress, humiliation, fear and upset, ie, subparagraphs (a) and (d) of the Particulars of Loss); and he was also seeking aggravated and exemplary damages.

10. A jury trial of this claim took place between 18 July and 27 July 2016. On the latter date, the jury returned the jury questionnaire and essentially found in favour of the Respondent in respect of the questions which had been put to it. As a result, the learned judge dismissed the claims in respect of each of the causes of action and then ordered a hearing on costs issues.

Relevant provisions

11. Before turning to the learned judge's judgment on the question of costs and the parties' arguments on this appeal, I set out the relevant provisions of the CPR which are material to the issues:

"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) under the Fatal Accidents Act 1976; or

(c) which arises out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934;

but does not apply to applications pursuant to section 33 of the Senior Courts Act 1981 or section 52 of the County Courts Act 1984 (applications for pre-action disclosure), or where rule 44.17 applies.

(2) In this Section, 'claimant' means a person bringing a claim to which this Section applies or an estate on behalf of which such a claim is brought, and includes a person making a counterclaim or an additional claim.

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 damages and interest made in favour of the claimant.

...

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 or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (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."

12. CPR 2.3, which deals with the interpretation of the CPR as a whole, provides certain definitions as follows:

"claim for personal injuries' means proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person's death, and

'personal injuries' includes any disease and any impairment of a person's physical or mental condition..."

The learned judge's judgment

13. In his judgment, the learned judge recorded that at the costs hearing it was accepted that this was a case where in principle Qualified One-Way Costs Shifting applied. The issue was whether or not an exception to that principle should apply. It was common ground that the claim in the proceedings included a claim for personal injuries. The learned judge considered that that had been rightly accepted because the Appellant claimed damages for an exacerbation of his pre-existing psychological condition and

also for his soft tissue injury as a result of the unlawful assault: see paragraph 4 of the judgment. Accordingly, he concluded that the provisions of CPR 44.13 applied.

14. At the hearing, the Respondent had put forward two distinct grounds as to why costs shifting should, exceptionally, not apply: fundamental dishonesty pursuant to CPR 44.16(1), and the existence of a claim other than a personal injury claim pursuant to CPR 44.16(2)(b). The learned judge rejected the first argument of the Respondent based on fundamental dishonesty, but accepted its second argument based on CPR 44.16(2)(b). He dealt with the second argument at paragraphs 19 to 31 of his judgment. In summary, after analysing the Claim Form and the Particulars of Claim, and taking account of the course of the factual issues, the learned judge concluded that the essence of the Appellant's claim against the Respondent were the allegations of serious malfeasance, that these allegations were distinct from the personal injury claims and that the latter constituted an ancillary element of the Appellant's claim.

15. His final conclusion at paragraph 31 was that the majority of the Appellant's claim "was malfeasance (the alleged false imprisonment and malicious prosecution and misfeasance in public office and the alleged assault)". He then continued:

"I am clear that only an ancillary part of the claim was the personal injury aspect of the claim and I remind myself that this was a claim where the claimant sought both exemplary and aggravated damages by virtue of the defendant's misconduct, none of which was ultimately proved."

16. As regards the course of his reasoning, at paragraphs 21 to 23, the learned judge recited in some detail the causes of action and particulars of loss and damage claimed in the Particulars of Claim, as I have also set out above, recording his view that "The gravamen of the case ... was one of very serious malfeasance" and that the "main complaint ... was that he was gratuitously and arbitrarily arrested for no good or justifiable reason."

17. At paragraph 24 the judge recorded Miss Khan's central submission in the following terms:

"It is artificial if not irrational to divide up the personal injury claim from the false imprisonment, malicious prosecution and assault claim. It is all wrapped up together. It is indivisible, inseparable and the exacerbation of the paranoid schizophrenia was in effect as a result of all these matters. Thus, Miss Khan submits that the personal injury element is not a separate element of the claim, and I should reach the conclusion that 44.16(2)(b) does not apply because the claim is not made for the benefit of the claimant other than a claim to which this section applies."

18. The learned judge rejected that argument in the following terms, at paragraphs 25 and 26:

"I am clear that in this case, this was a claim for serious wrongdoing, including a claim for aggravated and exemplary damages alleging

against the defendant false imprisonment, malicious prosecution and assault and also a personal injury claim, but I have no doubt that this was a claim made for the benefit of the claimant other than a claim to which the section applies, in other words personal injury. It would be, in my judgment, quite impossible, looking at the claim form and the pleadings, the causes of action relied upon, the way the case was opened and importantly the disputed issues of fact which emerged after five days of evidence and which were eventually encapsulated in the questionnaire (which I formulated and left to the jury) for me to reach any other conclusion. It would be, in my judgment, quite wrong for this to be characterised as a personal injury claim alone. It plainly was not.

I reach the clear conclusion, therefore, that this was a claim made for the benefit of the claimant other than a claim to which this section applies and, for the avoidance of doubt, those claims or causes of action in this case, other than personal injuries were, in my judgment, assault, false imprisonment, malicious prosecution and misfeasance in public office. As to misfeasance in public office, it is clear to me that that stood or fell with the malicious prosecution."

19. Having decided that the case fell within the terms of CPR 44.16(2)(b), the learned judge then went on to consider the exercise of his discretion as regards the extent to which the costs order made in favour of the Respondent should be enforced. His conclusion (to allow enforcement as to 70%) was based on his assessment that the claim was fundamentally based upon the allegation of misfeasance on the part of the Respondent and that the personal injury element was "an ancillary part of the claim" (see paragraph 29).

The appeal

20. The Appellant filed an Appellant's notice on 9 December with attached grounds of appeal. The essence of those grounds is that the learned judge was wrong to treat the exacerbation of the Appellant's psychiatric illness as an ancillary claim as it was caused by the "index event". Referring to the claims for false imprisonment, malicious prosecution and misfeasance in public office compendiously as the "malfeasance claims", it is contended that "there was no divisibility or severability from the malfeasance claims as it was the malfeasance claims that caused the claimant's exacerbation".
21. The grounds continue that the learned judge was wrong to find that the malfeasance claims were brought for the "benefit of the claimant, other than a claim to which this Section applies", because those claims were integral to the personal injury claim.

Permission to appeal

22. On 3 March 2017, Langstaff J granted permission to appeal setting out at some length his observations. First, he commented as to the difficulties in the wording of CPR 44.16(2)(b) when set in the context of the wording of CPR 44.13(1). He indicated his provisional view that the threshold question under CPR 44.16(2)(b) is whether the

proceedings include a claim which is not one for damages for personal injury and, if they do, the power to make an exception order arises. Secondly, he considered that, subject to the issue of construction of the rule, no question arose as to whether or not the learned judge exercised his discretion under that rule appropriately.

23. Langstaff J concluded, however, as follows:

"Because there is no reported case which deals with the central question directly, and it is a matter of some potential importance, I have not refused permission as I might otherwise have been inclined to do, but have set out my tentative thoughts in case they may assist the parties and the court hearing the appeal, for which I grant permission. My observations are not to be treated as binding in any way."

The parties' submissions

(1) The Appellant's submissions

24. The Appellant contends as follows. First, and essentially, the exception to Qualified One-Way Costs Shifting in CPR 44.16(2)(b) can only apply if, in any case, the non-personal injury claims are "divisible" or "severable" from the personal injury claims. In the present case, the claims for personal injuries here (both for physical injury and in particular the exacerbation of the psychological condition) were caused by all of the relevant actions of the police officers which founded all of the causes of action, including those for malfeasance and are therefore not divisible or severable from the other parts of the claims arising from those actions.

25. In oral argument, Ms Khan expanded the argument as follows:

- (1) The claim for the exacerbation injury was caused by the misfeasance claims.
- (2) There were also non-personal injury monetary claims based on the malfeasance claims.
- (3) However, the case does not fall within CPR 44.16(2)(b) because the non-personal injury claims and the personal injury claims cannot be divided. Rather they are intrinsically linked because they are based on the same cause of action. The allegation was that the whole incident caused the personal injuries and it is not possible to separate out the particular cause of action which caused the personal injury. This is to be contrasted with a case where the false imprisonment and malicious prosecution allegations caused no personal injury but where there is a separate assault which separately caused personal injury.

26. In support of these contentions, the Appellant referred to various materials, including guidance to the applicability of the rule found in "The White Book Service 2017,

Practical Law, Costs Funding following the Civil Justice Reforms: Questions and Answers, 3rd Edition”; “the White Book Q&A”); and two documents published *before* the enactment of the CPR rules on Qualified One-Way Cost Shifting, namely the Ministry of Justice's Commissioning Note to the Civil Justice Council in relation to Qualified One-Way Cost Shifting dated May 2012 ("the Commissioning Note") and the Civil Justice Council's Response to Ministry of Justice Commissioning Note dated June 2012 ("the CJC Response"). Particular reference was made to paragraph 46 of the CJC Response.

27. In this connection, Ms Khan contended that the present case fell into neither Type 1 nor Type 2 of the "mixed claims" which the CJC had identified, but she contended formed a different type of mixed claim, to which she gave the label "Type 3". The Appellant also relied upon two decisions of this court relating to CPR 44.16(2)(b), the unreported ruling on costs of Foskett J in the case of **LL v The Lord Chancellor** (unreported) (9 December 2015) and the case of **Howe v Motor Insurers Bureau** [2016] EWHC 884 (QB).
28. Secondly and distinctly, the Appellant also submitted that the provisions relating to Qualified One-Way Cost Shifting in their entirety apply only in a case where there has been a positive order for damages and interest made in favour of the claimant. This, it is submitted, is clear from the standard rule in CPR 44.14, namely that a costs order can only be enforced against a claimant to the extent that the amount of that order does not exceed the amount of any award in the claimant's favour. It therefore assumes a positive award in the claimant's favour. It follows that if the standard rule can only apply in those circumstances, then any exceptions to that standard rule equally can only apply in such circumstances.

The Respondent's submissions

29. The Respondent submits as follows. First, as a matter of construction, CPR 44.16(2)(b) applies where proceedings include a claim, for the benefit of the claimant, which is a claim for something other than a claim for damages for personal injury. Thus, where there is a "mixed claim" (ie, a claim which includes a claim for damages for personal injury and a claim for something else) CPR 44.16(2)(b) applies.
30. Secondly, for CPR 44.16(2)(b) to apply, there is no requirement for the personal injury claim and the non-personal injury claim to be divisible as contended for by the Appellant. The claims for malfeasance were actionable without damage and could be pursued absent any evidence of personal injury. The same facts may form the basis of the claims for personal injury and non-personal injury, but the claims are different. Indeed, in any case where two claims are included in the same proceedings, then by their very nature, the claims will or are likely to arise from the same facts. The case turns on the wording of the CPR provisions and neither the Commissioning Note or the CJC Response nor the two case authorities assist in this case.
31. In summary, the proceedings included significant malfeasance claims which were claims for the benefit of the claimant, other than claims for damages for personal

injury. Finally, it is clear from the wording of CPR 44.14 and 44.16 that the Appellant's second main submission cannot be correct.

Discussion and analysis

32. The issue on this appeal is whether the learned judge was correct in concluding that he had the power to give permission for enforcement under CPR 44.16(2)(b). If he was correct, then it is not disputed that his exercise of discretion under that power (at paragraphs 27 to 31 in this judgment) was in error.
33. As to whether he had power, I address the issue under three heads: (1) the construction of CPR 44.16(2)(b); (2) Did the claims in the present case fall within CPR 44.16(2)(b)?; and (3) Can an order be made under CPR 44.16(2)(b) where the claimant's claim has been dismissed in its entirety?

(1) The true construction of CPR 44.16(2)(b)

34. By way of preliminary, it is to be observed that CPR 44.13 has the effect of bringing within the scope of Qualified One-Way Cost Shifting, a wide range of proceedings, including proceedings where a claim for damages for personal injury plays a very minor and subsidiary part of the claims advanced. This is clear from the words "proceedings which include..." in CPR 44.13(1). By so doing, this gives rise to the need for the exceptions, and in particular the exception in CPR 44.16(2)(b) which itself then gives the court a broad discretion to reach a just result as to the appropriate extent of enforcement.
35. The drafting of CPR 44.16(2)(b) itself is not clearly expressed and, on a literal reading, gives rise to some difficulty. As regards the words in CPR 44.16(2)(b), "a claim to which this Section applies", reference back to CPR 44.13(1) indicates that in fact the "Section" applies to "proceedings" and not to "claims". Secondly, even if "proceedings" in 44.13(1) were to be read as a reference to "claims", or "a claim" in CPR 44.16(2)(b) were to be read as "proceedings", then since CPR 44.13(1) addresses claims which "include" (for example) personal injury claims, read literally, a claim or proceedings which included not just personal injury claims, but also non-personal injury claims, would still be a claim or proceedings to which the "Section" applied; and on that basis it is hard to see what sort of claim or proceedings would be one which was "other than a claim to which this Section applies", so as to trigger the application of the exception in 44.16(2)(b).
36. These infelicities of drafting are noted in footnote 25 to paragraph 6-12 of the White Book Q&A, where the authors work on the assumption that the provision is intended to be read as meaning "where the proceedings include a claim other than a personal injury claim". Similarly, Langstaff J on granting permission commented that CPR 44.16(2)(b) is badly drafted, observing that the phrase "claim is made for the benefit of the claimant other than a claim to which this Section applies" lacks meaning because the section does not apply to "claims" but to "proceedings". He went on to express the view that:

"In order to give it meaning, I suspect a court should hold that it is intended to cover a situation in which a claim is made which, if it stood in proceedings on its own, would not attract Qualified One-Way Costs Shifting. If so, then in any proceedings which include both a claim and a separate claim for personal injuries, it is open to the court to permit an exception to Qualified One-Way Costs Shifting to the extent it thinks just."

37. I agree with those observations. In my judgment, in order to give meaning to the phrase "a claim is made ... other than a claim to which this Section applies" in CPR 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."
 38. In this connection, whilst the learned judge did not expressly address this issue in his judgment, such a conclusion is implicit in his statement at paragraph 25: "I have no doubt that this was a claim made for the benefit to the claimant, other than the claim to which this section applied, in other words personal injury". Further, the Appellant has not disputed or contested that this is the true construction of the words in CPR 44.16(2)(b).
 39. Thus, as a matter of construction, I conclude that CPR 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 bought a claim or claims other than a claim for damages for personal injuries.
- (2) **Did the claims in the present case fall within CPR 44.16(2)(b)**
40. Two questions arise here. First, were there claims other than claims for damages for personal injury? Secondly, even if there were, does CPR 44.16(2)(b) nevertheless not apply because the non-personal injury claims and the personal injury claims were "indivisible"?
 41. As to the first question, damages other than damages in respect of loss arising from personal injury were clearly claimed in the action by the Appellant. First, the claim is for false imprisonment for malicious prosecution and misfeasance in public office are all actionable *per se* (ie, without proof of damage) and if the facts had been established, the Appellant would have been entitled to damages on that basis.
 42. Secondly, the pleaded particulars of loss included claims for losses other than personal injury, namely loss of liberty and distress, humiliation, fear and upset. Thirdly, the Appellant also expressly claimed both exemplary and aggravated damages. Neither of these claims relate to, nor require proof of, any personal injury. These are further heads of claim of punitive and compensatory damages respectively. In this regard, I was referred to the standard guidance for quantum of basic damages, aggravated damages and punitive damages in cases of wrongful arrest, false imprisonment and malicious prosecution in **Thompson v Commissioner of Police for the Metropolis** [1998] QB 498 at 514 - 517 and was also give updated figures to take account of changes in value of money over time. This shows that substantial sums will be

awarded for such claims, regardless of any element of personal injury. Applied to the present case, this guidance establishes beyond doubt that these proceedings included substantial claims for damages which had nothing to do with any personal injury.

43. In my judgment, and in agreement with the learned judge, it is clear that, even leaving out of account the claims in respect of the soft tissue damage and the exacerbation of the psychological condition, the Appellant was advancing distinct claims for damages relating to other matters. In other words, claims other than claims for damages for personal injury. Accordingly, subject to the divisibility argument, there is no doubt that in this case CPR 44.16(2)(b) applied.
44. As to the second question, the alleged requirement for divisibility, in my judgment, there is no authority for the proposition that in order for CPR 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 44.16(2)(b) applies.
45. Neither the Commissioning Note nor the CJC Response assist. First, these documents evidence a debate as to the approach to mixed claims that took place in advance of the enactment of CPR 44.16(2)(b). They do not amount to a commentary on the provisions enacted, nor do they appear to address the particular wording of the provision as enacted. Further, the relevant parts of the CJC Response are addressed principally to particular issues of mixed claims arising in the context of road traffic accidents and encompass discussion of third party issues, which issues were subsequently addressed distinctly in CPR 44.16(2)(a).
46. Secondly, the Type 1 one and Type 2 claims there discussed do not find expression in CPR 44.16 as enacted. Analysis of these types or of a so-called Type 3, into which the present case is said to fall, does not assist in the construction of the enacted provision.
47. Thirdly, even if the approach to mixed claims suggested in the Commissioning Note were to be applied, ie, allowing the standard rule in CPR 44.14 to apply where the “non-personal injury element of the claim is integral or directly consequential to the personal injury claim”, that would not apply to the present case, where the non-personal injury claims were not either “integral or consequential” to the personal injury claim. Further, in my judgment, there is nothing in the commentary in the White Book Q&A which supports the concept of divisibility.
48. As to the two cited cases, they do not assist. In **Howe** it was held, obiter, that, if the damages claim there had been a claim for personal injury, then the additional relief claim for a declaration of liability to compensate did not bring the case within CPR 44.16(2)(b) because the latter was “inextricably linked with the claim for damages for personal injuries”: see paragraphs 27(i) and (ii) and also paragraphs 6(ii), (vii) and 25 and 26. (Whilst it appears that the judgment is currently subject to appeal, it is not clear whether the appeal covers this issue). In that case first, there was no other claim

for damages, and the claim for a declaration added nothing at all to the claim for damages; rather it was effectively part and parcel of the claim for compensation for personal injury. Even if **Howe** could be read as authority for the proposition that where claims are "inextricably linked" CPR 44.16(2)(b) does not apply, in the present case, the different claims are not inextricably linked in the way that they were in **Howe**.

49. As regards **LL v The Lord Chancellor**, the background facts, the nature of the pleaded claim or claims and the extent of the arguments are not clear from the terms of the ruling. The case appears to concern a claim for wrongful incarceration. There was a claim for a declaration of breach of Article 5 ECHR and also a claim for damages for injuries caused by the wrongful incarceration. The defendant argued that the primary claim was the claim for a declaration and thus CPR 44.16(2)(b) applied. Foskett J held that the claimant was "also seeking substantive compensatory relief for the alleged consequences of his incarceration". He then simply concluded at paragraph 9 that, "The QOCS provisions do apply and that enforcement will be as provided for in CPR 44.14(1)."
50. It is not clear whether this decision was based on a finding that CPR 44.16(2)(b) did not apply at all, or rather that it did apply, but that the judge decided on the facts to apply the normal rule as a matter of discretion (see the commentary at paragraph 6-15 second paragraph of the White Book Q&A, where the latter possibility is contemplated). Even if, as seems more likely, the former was the basis of the decision, in that case as in **Howe**, there is no suggestion that there was any other claim for damages for non-personal injury loss and it can equally be said that the declaration there added nothing of substance to the claim for damages.
51. In any event, insofar as it might be suggested that **LL** is authority for the proposition that CPR 44.16(2)(b) cannot apply where there are non-personal injury claims and personal injury claims which are inextricably linked, I do not accept that proposition. Further, and in any event, for the reasons already given, the different claims in the present case are not inextricably linked in the same way as they were in the **LL** case.
52. Indeed, it is not easy to define precisely what the Appellant is saying by reference to the submission on divisibility. To take a couple of examples. First a claim by a property owner for breach of covenant or negligence relating, say, to damp ingress which gives rise to damage to property and at the same time exacerbates a pre-existing medical condition of the property owner. Secondly, negligence on the part of an electrician working at domestic premises which causes a fire or explosion at the home causing damage to the house and some physical injury to the owner.
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 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 44.16(2)(b) therefore applies.

(3) Can an order be made under CPR 44.16(2)(b) where the claimant's claim has been dismissed in its entirety?

55. Finally, as to the Appellant's contention that neither the standard cost shifting rule in CPR 44.14(1) nor the exception to that rule can apply at all where, as in the present case, the claimant's claim has been dismissed in its entirety, this is unfounded. First, the scope and interpretation of Qualified One-Way Cost Shifting is defined in CPR 44.13. There is no reference there at all to the principle, or the section as a whole, applying only where the claimant has made *some* recovery in the relevant proceedings (rather than no recovery). Rather the section as a whole applies to certain types of claim, without any further definitional limit. Then, CPR 44.14 sets out the effect, in the normal course, where the Section applies. That effect is that any order or orders for costs which have been made against a claimant can only be enforced up to the amount of any recovery of damages and interest made by the claimant. Thus, in the case where this general rule applies, if the claimant's claim has been dismissed in its entirety (and thus the amount of damages and interest is zero) then an order for costs in any amount against the claimant cannot be enforced at all without permission.
56. The general position in CPR 44.14, however, is expressly stated in its own terms to be subject to the exceptions, which include the exceptions set out in CPR 44.16. In other words, the limitation upon enforcement in CPR 44.14 does not apply where one or more of the conditions of CPR 44.16 are satisfied, and, where they are satisfied, orders for costs made against the claimant may be enforced to, or up to, their full extent, ie, beyond the ceiling of the claimant's recovery.
57. In my judgment, there is no warrant for interpreting that ceiling as excluding the case where the claimant has in fact recovered nothing. Rather CPR 44.16 takes the matter of enforcement completely outside the limitation in CPR 44.14. That this is the correct interpretation, is supported by the commentary in paragraph 6-15, first subparagraph of the White Book Q&A and paragraph 12.6 of the Practice Direction 44: see the White Book Service 2017, volume 1, page 1375.

Conclusion

58. For these reasons, I conclude that in the present case the learned judge was correct to decide that he had the power to order enforcement of the costs order against the Appellant under CPR 44.16(2)(b). No further question arises as to the manner in which the learned judge then exercised his discretion arising under the power in relation to

whether he should order enforcement and the extent to which such enforcement should be ordered.

59. Accordingly, I reject the Appellant's grounds for challenging the learned judge's order and this appeal is dismissed.