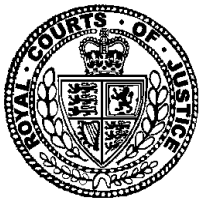

Neutral Citation Number: [2020] EWCA Civ 165

Case No: B3/2018/2189(C)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Lambert J
[2018] EWHC 2060 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2020

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE IRWIN
and
LADY JUSTICE NICOLA DAVIES DBE

- -

Between:

Charlotte SWIFT	**Appellant**
- and -	
Malcolm CARPENTER	**Respondent**
-and-	
THE PERSONAL INJURIES BAR ASSOCIATION	**Intervener**

IN THE MATTER OF AN APPLICATION FOR A PROTECTIVE COSTS ORDER

- -
- -

Derek Sweeting QC and **James Arney** (instructed by **Leigh Day & Co**) for the **Appellant**
William Audland QC and **Richard Viney** (instructed by **Weightmans LLP**) for the **Respondent**
Darryl Allen QC (instructed by **Simpson Millar LLP**) for the **Intervener**

Hearing date: 6 February 2020

- -

REASONS FOR RULING

Sir Terence Etherton MR, Lord Justice Irwin and Lady Justice Nicola Davies DBE:

Introduction

1. This judgment concerns an application by the appellant for a protective costs order ("PCO") in an appeal against part of the decision of Mrs Justice Lambert DBE of 2 August 2018 on the trial of a personal injury claim by the appellant against the respondent. The appeal turns on a narrow but difficult issue, namely the decision by the Judge to make no award in respect of the additional capital cost which she found to be required by the appellant so as to fund the special accommodation costs arising from her disability. The reason for that decision of the Judge was that she considered she was bound by the approach set down in *Roberts v Johnstone* [1989] QB 878. The underlying cause of that outcome was the then current negative discount rate. The appeal proceeds on this issue with the permission of the Judge herself.

2. On 31 October 2013 the appellant was a front seat passenger in a motor car driven by the respondent. She was badly injured in a collision for which the respondent was responsible. At the time of the accident the appellant and respondent were partners and they have since married and have a child.

3. The appellant sustained serious injuries in the collision. She had to undergo an amputation of her left lower leg and had significant disruption of the right foot. She was a very active and sports-oriented individual and has made sustained efforts at rehabilitation. She has had continuing difficulties which it is not necessary to set out in detail, but they include severe continuing "phantom pain" in the amputated foot and continuing complications from the disruption of the structure of the right foot.

4. The Judge made a lump sum order in the sum of £4,098,051. She found that the additional capital cost of the required special accommodation would be £900,000 more than the value of the appellant's existing home. She concluded, however, that she was bound by the approach approved in *Roberts v Johnstone* and so, by the application of that approach in light of the then negative discount rate of -0.75%, she felt compelled to decline to make any award in respect of the additional capital cost which she found would arise.

5. On 6 February 2020 we ruled against the application by the appellant for a PCO and said that we would give our reasons in a written judgment. This is that judgment. In order to provide the context for our reasons we first set out the procedural history to date.

Intervention by the Personal Injuries Bar Association ("the PIBA") in this appeal

6. On 9 May 2019 the PIBA applied to intervene in the appeal. Underhill LJ ordered that application to come before the full court. Written submissions from the PIBA on the appeal were filed and served on 4 July 2019, subject to the outcome of that application. At the opening of the hearing of the appeal on 23 July 2019 Underhill and Nicola Davies LJJ ruled that the PIBA should be permitted to intervene.

The appellant's applications to adjourn and to admit further evidence

7. At the hearing of the appeal on 23 July 2019 the appellant repeated the submission she made below that there is no requirement for expert evidence as to generic longer-term interest rates. She was "prepared to limit her claim to a figure which is lower than an unadjusted interest-rate-based lump sum award". The appellant did apply, however, to introduce evidence of a particular mortgage package backed by a periodical payment order ("PPO"), so as to assist consideration of that alternative submission. The evidence was said to be helpful since it might assist this court in considering whether a PPO-based award was appropriate as an alternative to the *Roberts v Johnstone* approach.

8. In oral submissions on the opening of the appeal on 23 July 2019 Mr Derek Sweeting QC, for the appellant, emphasised that there was a difficult problem for this appellant (and others in a similar position) in seeking permission to call extensive expert and other factual evidence at trial. The likely response of a trial judge was to decline to admit such evidence, because the court below was bound to follow *Roberts v Johnstone*, and the evidence was unnecessary for that purpose. For this reason, he said, it was highly problematic to introduce below the proper evidential platform, so that other approaches to the problem could be considered on appeal.

9. On that basis, following some discussion before the court, the appellant sought an adjournment of the appeal.

10. The respondent opposed the admission of further evidence. The preamble to the respondent's opposition included the following factual points. The appellant had confirmed by way of communications between the parties that the first attempt to obtain any such evidence began only after the trial in the court below in August 2018, although the relevant attendance note disclosed indicates that earlier attempts had been made to obtain such evidence from a different financial institution. The respondent further noted that the only step taken by the appellant prior to trial in this regard was to obtain evidence as to mortgage products and rates by means of a basic internet search, the results of which were not disclosed or sought to be introduced at trial. The appellant therefore took no steps to obtain evidence as to the availability of a PPO-mortgage-backed product prior to trial.

11. The respondent noted the principles laid down in the well-known case of *Ladd v Marshall* [1954] 1 WLR 1489 and the provisions of the Civil Procedure Rules ("CPR") 52.21(2)(b). The respondent also relied on the observation of Mummery LJ in *Transview Properties Ltd v City Site Properties Ltd* [2009] EWCA Civ 1255 at paragraph 23, that, if the reception of fresh evidence by the Court of Appeal would lead to a retrial, then its admission should only be allowed "if imperative in the interests of justice".

12. The respondent, therefore, opposed an adjournment on the ground that the relevant evidence could have been obtained before trial.

13. The court (Underhill, Irwin and Nicola Davies LJJ) considered these arguments on the first day on which this appeal was originally listed. The court concluded that it was a proper course in this case, in the interests of the parties, and in the wider public interest, to adjourn the case, and to exercise the court's powers under CPR 52.21(2) to

admit evidence which was not before the lower court, including oral evidence. It was made plain to the parties that, whilst of course it was for them to decide what evidence should be adduced, the court desired to reach a properly informed conclusion as to the underlying problem and the solution, in the contemporary conditions. On that basis, the appeal was adjourned to be re-listed.

14. Case management directions were given (by Irwin LJ) on 24 July 2019, the second day of the original appeal listing.

Subsequent Procedural Developments

15. Expert evidence was exchanged between the parties in late 2019. The Intervener reviewed the evidence and concluded that they should seek to serve evidence from one further expert, Mr Watson, whom the Intervener had already approached. The Intervener had indicated in July 2019 that they reserved their position as to making such an application. Mr Watson is an actuary who conducts a business in auctioning and valuing reversionary interests. Following consideration of this application the court (Irwin and Nicola Davies LJJ) ruled in favour of admission of the evidence, as part of extensive directions given following the decision on the PCO application in respect of which these reasons are given. It is not necessary to repeat the directions given or the reasons expressed orally on 6 February 2020.

The application for a PCO

16. On 26 November 2019 the appellant issued an application for a PCO in the form of an order that, if the appellant is unsuccessful in her appeal, she shall not be responsible for the respondent's costs incurred on or after 24 July 2019. The application was supported by a witness statement from the appellant's solicitor Grant Incles.

17. The application has throughout been opposed by the respondent. The respondent's solicitor David Cottam made a witness statement, and the respondent filed a skeleton argument at the same time. Both parties filed and served further skeleton arguments, and both parties made oral submissions to us on 6 February 2020.

Discussion

18. The general purpose of a PCO is to allow a claimant of limited means access to the court in order to advance their case without the fear of an order for substantial costs being made against them, a fear which would inhibit them from continuing with the case: *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600, at [6]. A PCO can take a number of different forms, including that sought by the appellant in the present case: *Corner House* at [75].

19. It is common ground that the appellant has the benefit on her appeal, as she had at first instance, of qualified one-way costs shifting ("QOCS") under section II of CPR Part 44. The effect of QOCS is that no order for costs made against the appellant may be enforced, without the permission of the court, to the extent that the costs payable under such an order exceed the amount of damages and interest awarded in her favour. The appellant does not consider that limitation on the recoverability of the respondent's costs gives her fair and adequate protection in all the circumstances

because, she says, without a PCO an adverse order for costs on the appeal would exceed the additional amount of £900,000 which she requires for a suitably adapted house to meet her needs as a result of the accident caused by the respondent's negligence. It would also diminish her damages award to a significant extent and will, she says, leave some of her needs unmet.

The appellant's argument

20. Mr James Arney, junior counsel for the appellant, addressed us on the application for the PCO. He began his submissions by emphasising the breadth of the court's discretion in relation to costs under section 51 of the Senior Courts Act 1981 and Part 44 of the CPR. Section 51(1) provides that the costs of and incidental to all proceedings in the civil division of the Court of Appeal are in the discretion of the court. Section 51(3) provides that the court shall have full power to determine by whom and to what extent the costs are to be paid. CPR r.44.2(1) provides that the court has a discretion as to (a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid. CPR 44.2(4) provides that, in deciding what order (if any) to make about costs, the court will have regard to all the circumstances.

21. Mr Arney submitted that, in the present case, the court's discretion should be exercised so as to comply with the "overriding objective" specified in CPR 1.1(1), that is to say the overriding objective of enabling the court to deal with cases justly and at proportionate cost. CPR 1.1(2)(a) provides that this includes, so far as practicable, ensuring that the parties are on an equal footing.

22. Mr Arney contrasted, in this regard, the limited resources of the appellant, which would be consumed by an adverse order for costs, and the financial strength of the respondent, which he characterised as a multi-billion euro organisation with a deep pocket.

23. Mr Arney described the appellant as a person with modest means, whose assets are essentially confined to her damages award in the present case and the equity in her home. He pointed out that, had the appeal proceeded on 23 July 2019, the appellant's risk exposure would have been in the region of £209,000 in respect of the respondent's costs together with her own minimal disbursements. If a PCO is granted retrospective to 24 July 2019, as the appellant seeks in her application, her risk exposure would be £345,000, being the aggregate of the respondent's estimated costs until 23 July 2019 and the appellant's own disbursements. Mr Arney said that even that amount would exceed the totality of the appellant's life savings but she is prepared to accept that risk. On the basis of the available evidence, Mr Arney said that, if the PCO was to run from 26 November 2019, the date of the application notice, the appellant's costs exposure would be £580,000; and if the PCO were to run only from the date of the hearing of the application, 6 February 2020, her costs exposure would be £710,000. He said that, if the application was refused, the appellant's costs exposure would be £944,000. Mr Arney emphasised the appellant's horror at the size of those figures. That is a reaction with which we have considerable sympathy.

24. The appellant's case is that the ambit of the appeal changed completely when the hearing of the appeal was adjourned in July 2019 to enable a range of expert evidence,

both written and oral, to be presented by both sides, with a substantial consequential increase in the costs, including costs arising from a further eight months of litigation and a longer appeal hearing time estimate. Such evidence was thought necessary for a proper resolution of the central issue on the appeal, that is whether *Roberts v Johnstone* bound the trial judge to calculate the award in favour of the appellant in respect of the additional costs of purchasing special accommodation by reference to the discount rate. Mr Arney described the situation as one which has been reached "with the guiding hand of the court". The appellant's case is that this issue is of particular and enduring financial importance to the respondent's insurers in respect of its continuing business and, indeed, to the legal profession and insurers generally who deal with cases of seriously injured litigants. Mr Arney described it as the issue of the generation.

25. Mr Arney described the appellant as an unwilling participant in the litigation as she was compelled to bring the proceedings and fight them to trial in order to recover from the respondent the amount that she was eventually awarded as compensation for the serious injuries she suffered as a result of a traffic accident for which the defendant was entirely responsible; and she is now compelled to bring the appeal in order to recover damages for the cost of suitably adapted accommodation, a long established head of recoverable loss.

26. The appellant does not say that she will discontinue her appeal if her application for a PCO is refused. Her concern is that the financial imbalance between the parties, and the implications of an adverse order for costs against her, will force her to compromise her claim at a level at which she would not otherwise compromise it, particularly in the light of the continuing application of CPR Part 36 and the possibility of Part 36 offers by the respondent. This would lead to the important issue of principle at the heart of this appeal not being determined.

27. In the skeleton argument on the appellant's behalf dated 3 February 2020 it is also pointed out that, in so far as the respondent may have made earlier offers which the appellant has not accepted, the consequence to the appellant of late acceptance (in the absence of further offers) would be to incur a cost penalty for late acceptance.

28. For all those reasons, Mr Arney submitted that the court has a wide discretion as to costs, which includes the power to make a PCO, and that this is an exceptional case where, in order to satisfy the overriding objective under the CPR, such an order should be made in favour of the appellant on and from 24 July 2019.

The respondent's argument

29. The essence of the respondent's argument, orally presented by Mr Audland, may be summarised as being that there is no jurisdiction to make a PCO in the present case and, even if there is jurisdiction, it should not be exercised in all the circumstances. It is not necessary for us to set out in more detail Mr Audland's submissions as many of them are incorporated in our analysis below.

Analysis

30. We do not agree with Mr Audland that the court does not have jurisdiction to make a PCO in the present case. The wide power conferred on the court under section 51 of

the Senior Courts Act and CPR Part 44 confers jurisdiction. We do, however, consider that the case law establishes that, as a matter of judicial policy and practice, we should not do so in the present case. Even if the policy did not compel that result, we would have refused to make a PCO in the exercise of our discretion on the particular facts.

31. Turning to the legal principles, the starting point is *Corner House*. That case concerned an application for judicial review. After an extensive discussion of relevant cases in private law litigation and public law litigation, the Court of Appeal stated the governing principles for PCOs as follows:

> "(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
>
> (2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.
>
> (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."

32. The Court of Appeal in *Corner House* (at [6] and [72]) approved, and intended to incorporate in those guidelines, Dyson J's description of public interest challenges in *R v Lord Chancellor ex p. CPAG* [1999] 1 WLR 347, which was the leading authority on PCOs prior to *Corner House*: *Corner House.* Dyson J's description in *CPAG* (at p.353) was as follows:

> "The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own."

33. The restriction of PCOs to such cases is intimately connected to the essential purpose of a PCO, which is, as stated in *Corner House* at [76(xii)], to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of

general public importance at all, where the court considers that it is in the public interest that an order should be made.

34. The *Corner House* conditions have been considered in several subsequent cases, in which there has been a divergence of view about the strictness with which they should be applied, particularly the third (no private interest) condition. It was applied strictly in *Goodson v HM Coroner for Bedfordshire and Luton* [2005] EWCA 1172. In that case the applicant was seeking judicial review of the coroner's decision not to conduct a full enquiry into the circumstances of her father's death in hospital. It was held that her personal interest, albeit not a financial one, was sufficient to rule out a PCO. It had been argued that it should be sufficient if the "public interest in having the case decided transcends … or wholly outweighs the interest of the particular litigant." The court disagreed, noting that such alternative formulations had been considered in *Corner House* itself, but nonetheless the guideline had been expressed "in unqualified terms".

35. A more flexible approach to the *Corner House* conditions was advocated in several other cases, notably *Wilkinson v Kitzinger* [2006] EWHC 835 (Fam), *R (Bullmore) v West Hertfordshire NHS Trust* [2007] EWHC 1350 (Admin), *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749, *R (Buglife) v Thurrock Gateway Development Corp* [2008] EWCA Civ 1209, and *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107. None of those cases is binding authority on the point because the strictness of the *Corner House* conditions was not an essential part of the reasoning for the decision and several of them were first instance decisions.

36. In *Morgan*, in which the earlier cases were reviewed, Carnwath LJ, giving the judgment of the court, said (at [39]):

> "39. On a strict view, it could be said, *Goodson* remains binding authority in this court as to the application of the private interest requirement. It has not been expressly overruled in this court. However, it is impossible in our view to ignore the criticisms of this narrow approach referred to above, and their implicit endorsement by this court in the last two cases [*Compton* and *Buglife*]. Although they were directly concerned with other aspects of the *Corner House* guidelines, the "flexible" approach which they approved seems to us intended to be of general application. Their specific adoption of Lloyd Jones J's [in *Bullmore*] treatment of the private interest element makes it impossible in our view to regard that element of the guidelines as an exception to their general approach."

37. All those cases were reviewed by the Court of Appeal in *Eweida v British Airways plc* [2009] EWCA Civ 1025. In that case the claimant, who worked for British Airways ("BA") on its check-in desks, wished to wear a cross, denoting her Christian faith. She was told that, because of BA's then uniform policy, she must not wear such a cross in a manner which was visible. She refused to conceal the cross and went home. BA subsequently changed its policy and the claimant was allowed to wear a cross in a visible manner. She had by then already issued her claim in the Employment Tribunal ("the ET"). During the period of her absence from work she was not paid by BA. She claimed, among other things, discrimination on the ground

of religion. Her claim raised important issues, including on the scope of indirect discrimination. Her claim was dismissed by the ET, and the appeal from that decision was dismissed by the Employment Appeal Tribunal ("the EAT"). She appealed to the Court of Appeal.

38. In the ET and in the EAT (with their "no costs" regime) the claimant was not, in practice, at risk of having to pay BA's costs. In the Court of Appeal she did face a real risk of liability to BA for costs if her appeal was not successful. Her assets were enough to disentitle her from public funding but not adequate to cover BA's costs if she was not successful on the appeal. She applied for a PCO that BA be not permitted to recover its costs of the appeal from her. Sedley LJ dismissed that application on the papers but, upon a revised application, made a second order that the amount for which the claimant should be at risk in respect of BA's costs be limited to £20,000. BA challenged that order before the full court (Maurice Kay, Lloyd and Moses LJJ). The court held that it could not make a PCO. It held that Sedley LJ's second order be discharged and no order ought to be made in its place limiting the claimant's contingent liability for BA's costs, if the claimant failed in her appeal.

39. Lloyd LJ gave the lead, and only reasoned, judgment, with which the other two members of the court agreed. He observed (at [16]) that the third of the five *Corner House* conditions had been the subject of discussion in several cases since then, and counsel for the claimant submitted that it should be applied flexibly. He referred to all the cases mentioned above and proceeded to analyse them, concluding (in [20]):

> "Thus, in the only case in this court since *Corner House* in which the point has been critical, the private interest requirement, as stated in *Corner House*, has been applied strictly, but in several other cases since then, in none of which has the point arisen for decision, the court has shown a distaste for that strict approach."

40. Lloyd LJ then said that: "[t]he other aspect of *Corner House* that requires attention is that it is confined to public law litigation". He said that arose from the Court of Appeal's review of the cases, and in particular from the case of *McDonald v Horn* [1995] ICR 685. He then quoted from the judgment of Hoffman LJ in that case, and from *Corner House* itself and reviewed the decision in *Wilkinson*.

41. Lloyd LJ concluded (at [38]

> "[T]he court cannot make a PCO in this case. This is not public law litigation, but a private claim by a single employee against her employer. A PCO cannot be made in private litigation. I do not regard *Wilkinson v Kitzinger* is a true exception to this principle, even though the President considered the Corner House conditions. It was close to public law litigation, and could have been brought by way of judicial review but for a particular statutory provision. Moreover, the President's order was not made as a PCO, but as a CCO [costs capping order]. … The particular issue in the present case may not be usual, but the nature of the claim is commonplace. The issue may be of

> general importance, but the claim is a private claim, for the benefit of the employee."

42. Lloyd LJ then said (at [39]) that, even if the court could make a PCO in that case, notwithstanding that it was not public law litigation, it should not do so. He said that, even if the private interest condition could be applied with some flexibility, the claimant's private interest was too significant to make it appropriate to treat the case as within the *Corner House* principles.

43. In a subsequent case, *Maugham v Uber London Limited* [2019] EWHC 39 (Ch) Mr William Trower QC (subsequently Trower J), sitting as a Deputy Judge of the High Court, concluded (at [38]) that it was an essential part of the Court of Appeal's reasoning in *Eweida* that, notwithstanding the general importance of the issue, the fact that the claim was a private claim brought in private litigation was fatal to the application. *Maugham* concerned a claim for a declaration that Uber was required to provide the claimant with a VAT invoice in relation to the supply of transport services in the form of a private hire vehicle. The deputy judge held that he should exercise his discretion under section 51 of the Senior Courts Act in accordance with the conclusion reached in *Eweida* to the effect that a PCO cannot be made in private litigation.

44. We agree with the view of the Deputy Judge in *Maugham* that, in terms of precedent, *Eweida* is binding authority that the policy and practice of the courts is that a PCO should not be made in private litigation. On that footing, the application for a PCO in the present case must be dismissed. The present proceedings are standard private litigation for damages for personal injury caused by the defendant's negligence. Inevitably, in the context of such litigation, and contrary to the second *Corner House* condition, the appellant has an overwhelming private interest in the outcome of the appeal, notwithstanding that the outcome may be of wider interest to future litigants in a similar position, insurers and the legal profession. Such wider interest is true of many, if not most, of the appeals in the Court of Appeal in private litigation.

45. Mr Arney placed reliance on observations made in *Unison v Glen Kelly* [2012] EWCA Civ 1148. That was an application by the respondents to the appeal for an order under the then CPR 52.9(1)(c) (now CPR 52.18) that the appellant should only be allowed to continue the appeal, which they had already been granted permission to pursue, on the basis that they would not seek any of their costs against the respondents if that appeal was successful. It was not, therefore, an application for a PCO. Some observations were made, nevertheless, by the two members of the court (Richards and Elias LJJ) about *Eweida* and the granting of a PCO as counsel for the appellant contended that, in essence, the application was for a PCO and the court had no jurisdiction to make a PCO because it was private litigation. Elias LJ said (at [13]) that:

> "… it would be stating the principal too high to say that a PCO cannot be awarded in circumstances where private interests are engaged; the jurisdiction is a flexible one and there is no absolute bar but it is right to say that where private interests are engaged that is a significant factor which will bear on the question whether a PCO should be granted or not."

46. Richards LJ said (at 21]):

> "But for the decision in *Eweida* that a PCO cannot be made in private litigation, I would have been minded to make a PCO in this case. It may be that notwithstanding *Eweida* the wide discretion of the court in matters relating to costs would admit of the possibility of a freestanding order analogous to a PCO, even in private litigation. But it is not necessary for us to go that far. In this case it is open to us to vary the grant of permission to appeal … so as to impose a condition that the appellant, if successful, will not seek costs against the respondents."

47. Those observations cannot undermine the binding nature of *Eweida* insofar as it sets out the policy and practice of the courts. Indeed, Richards LJ recognised that it was not open to the court in *Unison* to make a PCO. In any event, as we have said, the application in that case was not for a PCO.

48. Even if we had taken the view that, contrary to *Eweida,* a more flexible approach can be taken to the *Corner House* conditions, we would not have granted the present application for two principal reasons. Firstly, contrary to the impression in some of the observations made in the skeleton arguments on behalf of the appellant that the court was instrumental in bringing about the adjournment in 2019, the adjournment was made on the application of the appellant as a result of the appellant's own conclusion that she did not have sufficient and appropriate expert evidence for her appeal. As Nicola Davies LJ observed during the hearing, the trial judge had herself made an observation about the lack of such evidence. The resulting costs of the adjournment, and of the delay in the hearing of the appeal, obtaining further evidence and the extended time estimate for the hearing of the appeal were all consequences of that tactical decision by the appellant herself, from which she now seeks to protect herself by the present application.

49. Secondly, there was a significant delay in the application for the PCO. The possibility of such an application for a PCO was mentioned on 24 July 2019, at the directions hearing following the decision on the previous day to adjourn the hearing of the appeal, but the application for a PCO was not in fact made until late November 2019. During that time the respondent incurred very substantial costs, from which the appellant now seeks to protect herself. If a party wishes to have the protection of a PCO, the application must be made as soon as possible as its existence will be highly likely to have a material effect on decisions by the other party as to the incurring of costs and the making of offers of settlement. Mr Arney sought to explain and excuse the delay in the present case on the ground that the appellant failed to appreciate the likely size of the additional costs consequential on the adjournment and the obtaining of expert evidence. We cannot accept that as a justifiable reason for the delay, not least because the appellant has had the benefit of solicitors who are highly experienced in this area of litigation. Even if the very large sums now said to have been incurred were not predicted, considerable cost would have been anticipated.

50. The binding nature of *Corner House* and *Eweida* as precedents must be qualified to the following extent. As we have emphasised, those decisions are about how the wide discretion of the court as to costs should be exercised. They are not decision on law

but on policy and practice. Like any other policy or practice, they may be subject to adjustment in the light of circumstances that did not exist or were not anticipated at the time they were set. In the present case, Mr Arney was not able to draw our attention to any features of the present proceedings and the present application for a PCO that might distinguish them from the situations under consideration by the Court of Appeal in *Eweida*. He sought to distinguish those cases by emphasising that there has never been a decision on an application for a PCO in which the court has held that, but for the strict application of the *Corner House* conditions, it would have granted a PCO. That, however, is not a reason for departing from the policy and practice clearly set down in *Eweida*. In reality, the substance of the appellant's argument is that the Court of Appeal was simply wrong in *Eweida* to hold that the court should not make a PCO in private litigation, or, to the same effect, in litigation in which the applicant for the PCO has a material private interest. That is not a legitimate argument for a PCO in the present case.

51. One material change of circumstance that has occurred since *Eweida* is the introduction of what is now CPR 52.19 (previously CPR 52.9A). That provides as follows:

> "(1) Subject to rule 52.19A [Aarhus Convention claims], in any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.
>
> (2) In making such an order the court will have regard to—
>
> (a) the means of both parties;
>
> (b) all the circumstances of the case; and
>
> (c) the need to facilitate access to justice.
>
> (3) If the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order under paragraph (1).
>
> (4) An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise."

52. The appellant does not rely on that provision. It was apparently intended to address the type of situation in *Eweida* where a person appeals from a "no costs" jurisdiction, so as to preserve, in an appropriate case, the same costs policy on appeal. To that extent, therefore, the Civil Procedure Rule Committee, no doubt prompted by encouragement in some of the cases to review the inflexibility of the *Corner House* conditions, has reversed the effect of *Corner House* and *Eweida*. The Civil Procedure Rule Committee has not, however, decided to go further and remove entirely the condition that a PCO is not available in private litigation or where the applicant has a material private interest in the outcome of the litigation. As we have said, it is accepted by the respondent, correctly in our view, that the QOCS regime which applied at first instance in the present case continues to apply on appeal. It is also to be noted that it has been held that "the recoverable costs of an appeal" in CPR 52.19 means the costs recoverable by the winning party on the appeal, whoever the winner may turn out to be; the rule does not contemplate an order in favour of just one party, win or lose: *JE (Jamaica) v Secretary of State for the Home Department* [2014]

EWCA Civ 192, [2014] C.P. Rep. 24. That is not the order sought by the appellant in the present case.

Conclusion

53. For all those reasons we dismiss the application.