



Neutral Citation Number: [2023] EWHC 1974 (KB)

Case No: QB-2020-004224

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2023

Before :

MRS JUSTICE HILL DBE

Between :

EDWIN AFRIYIE

Claimant

- and -

**THE COMMISSIONER OF POLICE
FOR THE CITY OF LONDON**

Defendant

Re: Costs

David Hughes (instructed by **Donoghue Solicitors**) for the **Claimant**
Mark Ley-Morgan (instructed by **Weightmans LLP**) for the **Defendant**

Written submissions: 30 June and 4 July 2023

Approved Judgment

This judgment was handed down remotely at 2:00 pm on 28/07/23 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

Mrs Justice Hill DBE:

1: Introduction

1. By a judgment handed down on 30 June 2023 at [2023] EWHC 1632 (KB) (“the liability judgment”) the Claimant’s claims for assault, battery and misfeasance in public office 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. It is now necessary to resolve the costs issues between the parties. These issues were addressed in helpful written submissions from both counsel.

2: The issues

2. While the Claimant initially suggested that the proper order was no order for costs, in submissions Mr Hughes accepted that as the Claimant was the unsuccessful party, the court was likely to order that he pay the Defendants’ costs. In my judgment, that is the correct starting point, given the general rule set out in CPR 44.2(2)(a) to the effect that the unsuccessful party will be ordered to pay the costs of the successful one.
3. However, the parties agreed that this is a “mixed claim” for the purposes of the Qualified One-Way Costs Shifting (“QOCS”) regime. The key issue between the parties therefore related to whether permission to enforce such a costs order against the Claimant should be granted. The Defendant did not seek such permission under the CPR r 44.16(1) on the basis that the Claimant had been fundamentally dishonest; but relied on the “mixed claim” provision for the grant of permission under CPR r 44.16(2)(b).
4. The Defendant sought permission to enforce the costs order against the Claimant to the level of 25% of her costs. She also sought an interim payment on account of costs under CPR r 44.2(8) of £10,000.

3: The nature of the Claimant’s claims

5. The Claimant brought claims of assault, battery and misfeasance in public office. All of his claims arose out of an incident on 7 April 2018 in which he had been “tasered” by one of the Defendant’s officers, falling to the ground and hitting his head, and handcuffed.

4: The legal framework

6. The relevant legal principles were recently set out in *ABC & Ors v Derbyshire County Council & Anor* [2023] EWHC 986 (KB) at [22]-[36], to which I refer.
7. The key principles for the purposes of this case are as follows.
8. CPR r 44.16(2)(b) makes provision for “mixed claims”, namely where “a claim is made for the benefit of the claimant other than a claim to which this Section applies.”
9. In *Brown v Commission of the Police of the Metropolis* [2019] EWCA Civ 1724; [2020] 1 WLR 1257 at [31], Coulson LJ (with whom David Richards LJ and McCombe LJ

agreed) held that “...if the proceedings also involve claims made by the claimant which are *not* claims for damages for personal injury...then the exception in r 44.16(2)(b) will apply”.

10. Under the CPR r 44.16(2) exception, “[o]rders 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”.
11. In *Brown*, Coulson LJ considered the meaning of claims in respect of personal injuries, as follows:

“54. The starting point is that QOCS protection only applies to claims 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...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...”.

12. At [56] he accepted that in personal injury proceedings, another common claim will often be for damage to property. He gave the example of road traffic accident litigation where 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. He noted that such claims are not consequential or dependent on the incurring of a physical injury. They are consequent upon damage to property, namely the vehicle that suffered the accident, and therefore they fall within the mixed claim exception in CPR r 44.16(2)(b).
13. However, at [57] he found that the fact that there is a claim for damages in respect of personal injury, and a claim, for example, for damage to property “does not mean that the QOCS regime suddenly becomes irrelevant”. He continued:

“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...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 the 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” [emphasis added].

14. At [58] he held as follows:

“It is however important that flexibility is preserved. It would be wrong in principle to conclude that all mixed claims require discretion to be exercised in favour of the claimant, because that would lead to abuse, and the regular “tacking on” of a claim for personal injury damages (regardless of the strength or weakness of the claim itself) in all sorts of other kinds of litigation, just to hide behind the QOCS protection...”

5: Submissions and analysis

15. As noted at [3] above the parties agreed that this was a “mixed claim” within CPR r 44.16(2)(b). On that basis the central issue is whether it is “just” in the exercise of the Court’s discretion to grant permission under CPR r 44.16(2) for the Defendant to enforce the costs order against the Claimant, and if so, to what extent.
16. Although Mr Ley-Morgan relied on the general costs discretion under CPR r 44.2, the manner in which the specific discretion under CPR r 44.16(2) should be exercised was described by Coulson LJ in *Brown* at [57]-[58], as recently confirmed in *Achille v Lawn Tennis Association Services Limited* [2023] 1 WLR 1371 at [37].

5.1: Can this fairly be described “in the round” as a personal injury case?

17. Following *Brown* at [52], it is necessary for me to determine, first, whether in Coulson LJ’s words, these proceedings “can fairly be described in the round as a personal injury case”.
18. Mr Ley-Morgan argued that the Claimant had brought a claim for misfeasance in public office, which was something other than a claim for personal injuries. However, in *Brown* at [43]-[51], Coulson LJ rejected the argument that “claim” for the purposes of CPR r.44.16(2)(b) should be interpreted as referring to a cause of action, observing at [46] that:

“... a claim for damages for personal injury is not a cause of action at all. A cause of action is, for example, a breach of duty or a claim under a statute. A claim for damages in respect of personal injury is a claim for a particular head of loss arising out of the breach or misconduct of the defendant. The two are not the same at all.”
19. I consider that the same approach should be taken when considering whether a claim is, in the round, one for personal injuries. On that basis, the fact that one of the Claimant’s causes of action was a claim for misfeasance is of limited assistance in determining whether his claim was, in the round, a personal injury claim. In any event, on the facts of this particular case, the acts of misfeasance alleged were the acts of threatening and causing the Claimant personal injuries, without lawful justification: see [114] of the liability judgment.
20. Rather than focussing on the Claimant’s causes of action, it is more helpful to consider the types of damages he sought. These were addressed at section 6 of the liability judgment, in five categories: (i) basic damages for assault and battery; (ii) general damages for personal injuries; (iii) special damages; (iv) aggravated damages; and (v) exemplary damages.

21. Under category (ii), the Claimant sought damages for pain, suffering and loss of amenity in respect of (a) head injuries; (b) further physical injuries (namely puncture wounds to his posterior chest wall and injuries to his back and knee); and (c) psychiatric injuries. These claims plainly fell within Coulson LJ's definition of "claims in respect of personal injuries" set out in *Brown* at [54]: see [11] above.
22. So too does category (iii) insofar as the special damages claimed related to the costs of medical appointments and treatment. The modest further special damages claims relating to the Claimant's clothing were "consequent upon damage to property" and thus not claims in respect of personal injuries, per Coulson LJ in *Brown* at [56] (see [12] above).
23. The claims for basic damages for assault and battery under (i) above were not claims in respect of personal injuries. However, they reflected a modest part of the Claimant's claim. They would have merited a total award of £1,500 had the claims succeeded: see [118]-[119] of the liability judgment. I accept Mr Hughes' submission that it is unlikely that the case would have been litigated if this was the extent of the Claimant's claim. Mr Ley-Morgan placed no reliance on this factor in his submissions.
24. Similarly, the claims for aggravated and exemplary damages under (iv) and (v) above did not "relate to, nor require proof of, any personal injury"; rather they are "further heads of claim of punitive and compensatory damages respectively": *Jeffreys v Commissioner of the Metropolis* [2017] EWHC 1505 (QB), [2018] 1WLR 3633 at [42], per Morris J.
25. These claims were a substantial part of the claim in terms of its overall value. In his opening submissions, Mr Hughes contended that no less than £10,000 would be appropriate in aggravated damages and no less than £50,000 in exemplary damages; whereas he sought awards of £7,000 for the Claimant's head injuries; £5,000 and £6,000 for his back and knee injuries respectively; and somewhere towards the lower end of the £23,150 to £59,860 range for his psychiatric injuries.
26. However, the grounds on which both aggravated and exemplary damages were sought, as set out at [149]-[154] and [158] of the liability judgment, all flowed from the actions of the Defendant's officers in tasing and handcuffing the Claimant, thereby causing him personal injuries, and then, on his case, lying about it, and unfairly cross-examining him about his belief that the officers' actions had been motivated by his race.
27. Further, as Mr Hughes highlighted, the issues underpinning the claims for aggravated and exemplary damages were matters that the court would have had to consider in any event, as they were relevant to the primary issues of liability for assault, battery and misfeasance: for example, whether the officers had fabricated their accounts was relevant to whether their stated beliefs in the need to use force were honest, and reasonable, and were thus relevant to liability.
28. As noted at [53] of the liability judgment, the assault claim based on the act of tasing the Claimant was the most serious of his assault claims. In my judgment it was that act which was at the heart of the case, and the claims for aggravated and exemplary damages related largely to matters which made the Claimant's experience of being tasered worse and/or the actions of both parties in seeking to explain the tasing after the event. The act of tasing the Claimant was one that did cause him personal injuries

and involved the use of potentially lethal force on him: see [70] of the liability judgment.

29. For these reasons I consider that the claim was, in the round, one for personal injuries.

5.2: Are there any “exceptional features” of the non-personal injury claims?

30. On that basis, applying *Brown* at [57], the “starting point” for the exercise of the discretion is that QOCS protection would have been available for the personal injury claim, and it is expected that a ‘cost neutral’ result would be achieved through the exercise of the discretion unless there are “exceptional features of the non-personal injury claims”.

31. I remind myself that in *Brown* at [57] Coulson LJ gave as an example of the sort of matter that might constitute an exceptional feature of a non-personal injury claim “gross exaggeration of the alternative car hire claim”.

32. As noted at [22]-[24] above, the only “non-personal injury” claims pursued by the Claimant in this case related to (i) basic damages for assault and battery; (ii) special damages for his clothing; and (iii) aggravated and exemplary damages.

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;
- (v) The finding that the Claimant’s conduct caused or at least contributed to the incident (see [155] of the liability judgment);
- (vi) 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.
36. Further, matter (iv) must be seen in the context of the Defendant failing on a key element of her defence, namely that relating to fundamental dishonesty (see section 7 of the liability judgment): she was not, therefore, successful on “all” the issues as Mr Ley-Morgan contended. The fundamental dishonesty issue itself added to the time and costs of the second trial.
37. Matter (v) was relevant to the quantum of damages the Claimant would have recovered had his claim succeeded, but does not mean he was so wrong to litigate the claim that it is an “exceptional” feature of the litigation.
38. Matter (vi) has to be seen in the context of the fact that precisely the same finding was made against the Defendant’s own officers: see [85] of the liability judgment, where it was found that the totality of the officers’ evidence created “a justified concern...that the officers had colluded together to deliberately exaggerate the Claimant’s conduct to make him appear more aggressive than he had in fact been”; and where it was noted that the Defendant had chosen not to call any of these officers as witnesses at trial.
39. Matter (vii) was explored fully in the context of the Claimant’s exemplary damages claim: see [150]-[152] of the liability judgment. By giving an interview that was inconsistent with his pleaded case the Claimant exposed himself to a risk of cross-examination, but I am not willing to make the finding sought by the Defendant as to his motives for doing so, or to conclude that this conduct was “exceptional” for these purposes.
40. Even if any of these matters could properly be said to be exceptional, they do not relate exclusively to the non-personal injury claims, but were applicable to the personal injury claims too.
41. I do not therefore consider that there are any exceptional features of the non-personal injury claims, such that a ‘cost neutral’ result through the exercise of the discretion is appropriate, applying Coulson LJ’s guidance in *Brown* at [57].

6: Conclusion

42. For the reasons set out herein I order that the Claimant shall pay the Defendant’s costs, to be assessed if not agreed, but permission to enforce those costs under CPR r 44.16(2)(b) is refused. It follows that the Defendant’s application for a payment on account of costs is also dismissed.