



Neutral Citation Number: [2023] EWHC 2575 (KB)

Case No: KA-2023-000026

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE
COSTS JUDGE LEONARD

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2023

Before :

MR JUSTICE FREEDMAN

Between :

THE SCOUT ASSOCIATION

Appellant

- and -

BOLT BURDON KEMP

Respondent

Mr Jamie Carpenter KC (instructed by Clyde & Co) for the **Defendant/Appellant**
Mr Roger Mallalieu K.C. (instructed by Bolt Burdon Kemp LLP) for the **Respondent**

Hearing date: 12 June 2023

Draft judgment sent to the parties: 29 September 2023

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Approved Judgment

This judgment was handed down remotely at 12noon on 17 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FREEDMAN:

I Introduction

1. This is an appeal by the Scout Association (“the Appellant”) against an order of Costs Judge Leonard (“the Costs Judge”). The Costs Judge refused to make an order under section 51(3) of the Senior Courts Act 1981 against Bolt Burdon Kemp (“BBK”). The background was that there was an action by a person referred to as PME (“the Claimant”) against the Appellant in which the Claimant had the benefit of Qualified One-Way Costs Shifting (“QOCS”). The action was settled for an agreed sum of £29,500 plus costs. BBK refused to accept an offer of costs of £22,500. There followed various applications in which BBK, as it was entitled to do, used the name of the Claimant to seek to recover higher costs from the Appellant. The Appellant was unsuccessful on each application. No costs were payable by the Claimant due to the QOCS. The Appellant sought a non-party costs order against BBK, submitting that BBK was a real party or the real party in these applications, with the consequence that it ought to be responsible under section 51(3) of the Senior Courts Act 1981. The application was refused by the Costs Judge. I have heard this appeal with the assistance of Costs Judge Rowley.

II The facts

2. It is convenient to take the facts from the summary of the Costs Judge in his judgment. They are uncontroversial. In large part, they are set out also in the skeleton argument of the Appellant at paras. 55-71. The summary of the Costs Judge was as follows:

“8. The Claimant claimed against the Defendant damages for personal injury. On 22 August 2017, without proceedings being issued, the Claimant accepted the Defendant's Part 36 offer of £29,500.

9. The Claimant served a schedule of costs in August 2017. In September 2017 the Defendant, on the basis of that schedule, offered to settle the claim for costs at £22,500. That offer was rejected.

10. On 20 November 2017, on the Claimant's Part 8 application, the Senior Costs Judge made a "costs-only" order under CPR 47.14 providing, at paragraph 2:

"The Claimant's costs of the claim arising from the cause of action described in the claim form in respect of which terms of settlement have been agreed shall be paid by the Defendant and be the subject of a detailed assessment hearing in this Court."

11. The Claimant served a bill of costs on 23 November 2017. The bill came to £42,118.58. The Claimant's bill was provisionally assessed by Costs Officer Kenny at £22,868.

Excluding the time for drafting the bill, the figure was £21,357.80, less than the Defendant's September 2017 offer. The Claimant sought, under CPR 47.15 (7)-(9), an oral review on the issue of hourly rates and document time only.

12. At the oral review on 15 August 2018 before Costs Officer Kenny the Claimant conceded the document time point and only the hourly rates were reviewed. They were slightly increased, the bill being assessed at £23,626.28. Deducting again the costs of drafting the bill, the Claimant's costs were assessed at £22,096.28. This was still less than the Defendant's offer of September 2017.

13. As a result, the Claimant was ordered to pay the Defendant's costs of the Part 8 proceedings, the provisional assessment and the oral review, which were assessed at £3,290.11. Interest on the Claimant's assessed costs was disallowed.

14. That is the first costs order to which this application relates: the order made by Costs Officer Kenny on 15 August 2018.

15. The Claimant then filed an Appellant's notice under CPR 47.21 .

16. The Grounds of Appeal stated:

"... the Claimant seeks a de novo detailed assessment hearing so that all issues and costs not agreed are heard afresh and assessed in the usual manner. Therefore all decisions made by Costs Officer Kenny at the provisional assessment and subsequent oral hearing are appealed..."

17. The Grounds of Appeal went on to identify preliminary issues including the argument that the appeal hearing would, effectively, be a new detailed assessment on the standard basis and an argument (not subsequently pursued) to the effect that a costs officer does not have jurisdiction to summarily assess costs.

18. The appeal was listed before me on 14 February 2019. On the day, the Claimant raised a new argument to the effect that a costs officer did not have jurisdiction to conduct a provisional assessment at all. The hearing was adjourned, so that two issues could be argued before me: whether the appeal was limited to the issues actually considered by Ms Kenny on 15 August 2018, and whether Ms Kenny had had jurisdiction to undertake the provisional assessment.

19. I heard argument on those issues on 3 May 2019 and handed down judgment on 30 July 2019. I found that there was no viable argument to the effect that costs officers have no

jurisdiction to conduct provisional assessments; that there is no appeal from a provisional assessment, only from an oral hearing, if requested; and that any such appeal would be limited to decisions made at the oral hearing.

20. *I reserved to the detailed assessment hearing the costs of the issues addressed by my judgment. The Claimant sought (and I granted) permission to appeal only on the issue of whether, following an oral hearing under CPR 47.15 (7)-(9) , a party's rights of appeal extend not only to decisions made at the oral hearing but to decisions made on the provisional assessment that preceded it.*

21. *The Claimant's appeal from my judgment of 30 July 2019 was dismissed by Stewart J on 12 December 2019. The Claimant was ordered to pay the Defendant's costs of the appeal, summarily assessed at £8,091 net of VAT.*

22. *That is the second costs order to which this application relates.*

23. *On 16 January 2020 I heard and dismissed the substantive appeal from Costs Officer Kenny, ordering the Claimant to pay the Defendant's costs of the appeal. I gave directions for the determination of those costs in a hearing listed for 3 July 2020, which was adjourned by consent to await the judgment of the Supreme Court in *Ho v Adekun* [2021] UKSC 43 .*

24. *It is not, as I understand it, in dispute that because the Claimant has accepted a Part 36 offer from the Defendant, there is no order for damages in favour of the Claimant against which the Defendant could enforce an order for costs without the permission of the court (see *Cartwright v Venduct Engineering Limited* [2018] 1 WLR 6137, at paragraph 44). The effect of the decision in *Ho* (handed down on 6 October 2021) is that the Defendant is also unable to recover its costs by way of set-off against the damages or costs payable to the Claimant.*

25. *It follows that, without the permission of the court, the Defendant has no means of recovering from the Claimant the costs which the Claimant was ordered to pay by Costs Officer Kenny on 15 August 2018 (£3,290.11); by Stewart J on 12 December 2019 (£8,091 net of VAT, the recoverability of which is a bone of contention between the parties); and by me on 16 January 2020 (which have yet to be assessed but which I understand will be claimed in the sum of £28,499.07 inclusive of VAT).*

26. *The Defendant has stated in correspondence that it has no intention of attempting enforcement against the Claimant and instead seeks an order that BBK pay all of those costs."*

3. There is reference in this judgment to the terms “CFA lite” and “capped CFA”. As the Costs Judge explained at para. 31 and following, these terms can be understood as follows. The term “CFA lite” is commonly used to describe a Conditional Fee Agreement (“CFA”) under which a solicitor undertakes litigation on the basis that the client will be responsible for the solicitor’s fees and expenses only to the extent that they are recovered from the other party. Under such arrangements, win or lose, there are no circumstances in which the client will have to draw upon their own resources to meet those fees and expenses.
4. The CFA between the Claimant and BBK does not quite meet that description, but it comes close. It provides for the Claimant, in the event of success, to pay a success fee (irrecoverable from the Defendant) of 100% but it also provides for any shortfall between the sums payable by the Claimant to BBK under the CFA and the costs and disbursements recovered from the Defendant, to be capped at 15% of the damages received by the Claimant.
5. There is in any event a statutory limit on the success fee payable by the Claimant to BBK, but the arrangement offered by BBK, in imposing an overall limit on any costs shortfall, offers an additional benefit to the Claimant. This sort of arrangement shall be referred to as a “capped CFA”.
6. Since the capped CFA between the Claimant and BBK provides for a 100% success fee, following the recovery of £29,500 in damages the Claimant will have to account to BBK for no more and no less than 15% of those damages, whatever might be recovered from the Defendant by way of costs. In consequence, it is said that the only party with a tangible financial interest in the outcome of these detailed assessment proceedings has been BBK itself.
7. There was a question before the Costs Judge as to whether he would have a power to make a non-party costs order (“NPCO”) in respect of the costs not only at first instance, but also the costs of the application before Stewart J. He decided that the costs before Stewart J must be pursued before the appeal court. An application was issued on 29 March 2023, and an order was made by Mr Justice Bourne on 21 April 2023 for those costs to be dealt with at the same time as this order. It is envisaged that those costs would follow the event of the costs of the appeal. This is a matter to be considered further following receipt of the draft judgment, and the making of an order to reflect this judgment. The Court may then reflect this when finalising the judgment.

III The essence of the rival submissions

8. The essence of the application is that “*BBK was the only party with an interest in the outcome of the detailed assessment and, in particular, with [sic] recovering more by way of costs than the Defendant had previously offered*”: see Mr Edwards’ first statement para. 19. Underlying this, it was said that since the CFA contained a cap on any solicitor-client liability which limited the Claimant’s liability in that regard to 15% of damages recovered and that because that cap would have been ‘used up’ by the success fee under the CFA, ‘*the only party with*

an interest in [the recovery of base costs and disbursements] was BBK': see Mr Edwards' first statement at para. 21.

9. BBK's response in essence is that where a solicitor is acting under a lawful funding arrangement which caps the client's costs liability, and the solicitor, on success of the claim, is doing no more than seeking to recover the claimant's costs through the usual assessment process. The solicitor is in these circumstances simply acting in the ordinary course of being a solicitor and cannot properly be regarded as 'the real party' or 'a real party' for the purposes of s.51(3) Senior Courts Act 1981 and without more there is no basis for an NPCO. Further, the application is not based on BBK behaving unreasonably or improperly in the conduct of the proceedings or the appeal. The application was not made by reference to CPR 44.11 (misconduct) or the wasted costs jurisdiction: see the Judgment at paras. 129 and 137-138. The argument is that in these circumstances, the fact that the fruit of the recovered costs will flow in whole or in large part to the solicitors ought not to form the basis of an NPCO. Alternatively, it is submitted that in such circumstances it would not be just for the solicitor to be made subject of an NPCO under section 51(3).

IV QOCS

10. It is common ground that QOCS was introduced as part of the Jackson reforms as an adjunct to the abolition of recovery of ATE premiums from the paying party. The essence of QOCS is that claimants in personal injury claims will not generally be exposed to the risk of paying the defendants costs except insofar as they have received damages. The consequence is that they no longer require ATE insurance in respect of the risk of paying defendants' costs if they lose the claim.
11. This arose because there was a great cost to defendants in having to pay the costs of ATE insurance. There were disadvantages about not being able to obtain costs orders against claimants in many circumstances, but the trade-off of no payment of very large sums in respect of ATE insurance made this advantageous to all concerned.
12. The protection was targeted on those who needed it most. This was expressed in the final report of Sir Rupert Jackson at para. 5.2 in the following terms:

"...there is only one sensible way to give effect to that social policy, namely by introducing one way costs shifting. The advantage of this solution is that costs protection can be targeted upon those who need it, rather than offered as a gift to the world at large".
13. Whilst not all of the proposals of the Jackson reports were enacted, the Appellant drew attention to the principles behind Sir Rupert Jackson's recommendations including paragraph 4.5 of chapter 19 in the following terms:

“A one way costs shifting regime for personal injuries litigation (including clinical negligence) needs to have the following elements:

- (i) Deterrence against bringing frivolous claims or applications.*
- (ii) Incentives for claimants to accept reasonable offers”.*

14. The latter was provided for in the QOCS rules as enacted, by permitting enforcement of costs orders against the claimant up to the amount of damages plus interest.

15. Part II of CPR 44 sets out The Qualified One-Way Costs Shifting ("QOCS") provisions introduced in 2013 for personal injury cases. The operative rule is CPR 44.14(1) between 2013 and April 2023 provided that:

*“(1) Subject to rules 44.15 and 44.16 [which have no application in the instant case], 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 terms of such orders does not exceed the aggregate amount in money terms for damages and interest made in favour of the Claimant.”*

16. Under the heading "Exceptions to qualified one-way costs shifting where permission required", CPR 44.16(2)(a) and (3) provide:

"(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...

(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."

17. Practice Direction 44, at paragraphs 12.2 and 12.5 provides:

12.2

Examples of claims made for the financial benefit of a person other than the claimant... within the meaning of rule 44.16(2) are subrogated claims and claims for credit hire.

12.5

The court has power to make an order for costs against a person other than the claimant under section 51(3) of the Senior Courts Act 1981 and rule 46.2. In a case to which rule 44.16(2)(a) applies (claims for the benefit of others) –

(a) the court will usually order any person other than the claimant for whose financial benefit such a claim was made to pay all the costs of the proceedings or the costs attributable to the issues to which rule 44.16(2)(a) applies, or may exceptionally make such an order permitting the enforcement of such an order for costs against the claimant.

(b) the court may, as it thinks fair and just, determine the costs attributable to claims for the financial benefit of persons other than the claimant."

18. Three cases have restricted the ability of the Defendants to obtain payment of their costs under this rule, namely:
- (i) *Cartwright v Venduct Engineering Ltd* [2018] 1 WLR 6137 to the effect that compromises by way of damages (e.g. a Tomlin order or a settlement pursuant to a part 36 offer or a settlement without court order) are not an “order for damages” and so are not available to pay the Defendants’ costs. (That has application in the instant case, where the settlement of the damages was pursuant to a part 36 offer).
 - (ii) *Ho v Adekun* [2021] UKSC 43, the Supreme Court held that QOCS rules did not permit a set off of the defendant's costs against costs payable to the claimant. (This has application because the costs incurred by the Appellant in resisting the applications for costs in the unsuccessful attempts to obtain higher costs could not be set off against the costs in the action.)
 - (iii) In *University Hospitals of Derby and Burton NHS Foundation Trust v Harrison* [2022] Costs L.R. 1823, the Court of Appeal held that an order permitting and dealing with the consequences of late acceptance of a Part 36 offer is not an ‘order for damages’ and effectively that all damages payable under a settlement are protected from enforcement. Nothing short of a court order following a trial would suffice to enable the defendant to obtain payment of its costs.
19. CPR 44.14(1) has been changed so that it extends to agreements to pay or settle a claim for damages or costs with effect from 6 April 2023, but this has no retrospective effect, and only applies to claims issued after this date. The same applies in respect of a new CPR 44.14(2) which provides that “(2) For the purposes of this Section, orders for costs includes orders for costs deemed to have been made (either against the claimant or in favour of the claimant) as set out in rule 44.9.”
20. It is common ground that the new rules do not apply to claims issued before the change of the rules in April 2023 and therefore have no direct application to the facts of the instant case.

V Policy behind QOCS

21. The sole purpose of QOCS is to protect claimants from having to pay defendants' costs. Its purpose is not to prevent defendants from recovering their costs per se, albeit that that might be a common outcome of the regime. In *Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654, [2018] 1 WLR 6137, Coulson LJ said at para.9:

“It should be emphasised that one of the principal purposes of QOWCS [sic] is to provide some assistance to claimants with personal injury claims. It is not to penalise their prospective defendants. So I disagree with para 22 of Mr Hogan's skeleton argument, that a central feature of the regime is that defendants ‘would have to stand their own costs in unsuccessful claims’. That might be a common outcome of the QOWCS regime, but it is not its principal purpose or intent. If a defendant can bring itself within rule 44.14(1), then it can recover its costs.”

22. The Supreme Court explained in *Ho v Adekun* [2021] UKSC 43, [2021] 1 WLR 5132;

“The central rationale behind QOCS was that the burden falling on defendants and their insurers would be less if they were to forego costs recovery from claimants when the claim was dismissed than the burden they were forced to bear when they had to pay claimants not only their costs but also recoverable success fees and ATE premiums when the claimants were successful.” (para. 3)

23. Its purpose therefore was to address a systemic problem in the pre-April 2013 regime in relation to the effect of the recoverability of success fees and ATE premiums whilst at the same time maintaining access to justice for claimants (which would have been damaged had, for example, the recoverability of success fees and ATE premiums simply been removed without counterbalance).

24. As expressed in BBK's skeleton argument at para.26:

“The means by which this was to be achieved, however, was precisely by preventing defendants recovering costs from personal injury claimants in those circumstances so prescribed under the rules. There was a broad and imprecise financial equivalency intended – Defendants would be out of pocket due to costs non recovery in the circumstances specified under the rules, but at the same time they would be in pocket by virtue of not having to pay success fees and ATE premiums.”

25. QOCS does not apply to a third-party claim brought by a defendant to a personal injury claim: *Wagenaar v Weekend Travel Ltd* [2015] 1 WLR 1968. Per Vos LJ (as he then was) at para.36: “*There is nothing in the Jackson report that supports the idea that QOCS might apply to the costs of disputes between those liable to the injured parties as to how those personal injury damages should be funded amongst themselves.*”
26. In *Cartwright* (above), it was held that the QOCS rules permitted enforcement by one defendant to proceedings against damages payable by another defendant. Coulson LJ said at para. 24:

“Any other result would give a claimant carte blanche to commence proceedings against as many defendants as he or she likes, requiring those defendants to run up large bills by way of costs, whilst remaining safe in the knowledge that, if the claim fails against all but one defendant, he or she will incur no costs liability of any kind to the successful defendants, despite the recovery of sums by way of damages from the unsuccessful defendant. That seems to me to be wrong in principle, because it would encourage the bringing of hopeless claims.”

VI Non-party costs orders (“NPCO’s”)

27. Section 51 of the Senior Courts Act 1981, at subsections (1) and (3) empowers the Court to make costs orders against parties other than those who have brought or defended litigation:

“(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in... the High Court... shall be in the discretion of the court.

(2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings...

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.”

VII Grounds of appeal on behalf of the Appellant in outline

28. The arguments were fully set out in the Judgment. Much of the argument was rehearsed due to the extensive grounds of appeal, but the common thread of the various arguments on appeal was that the decision as a whole was arrived at due to a flawed exercise of discretion. In summary, the grounds of appeal, which will be set out more fully below, were as follows:

- (i) The Costs Judge wrongly failed to take into account that BBK was the real party in respect of the costs proceedings, which they funded and controlled and from which they stood to benefit, to the complete exclusion of their client.
- (ii) The Costs Judge erred in failing to consider and apply properly the case of *Myatt v National Coal Board (No 2)* [2007] 1 WLR 1559 which supported the making of an NPCO, and wrongly interpreted *Flatman v Germany* [2013] 1 WLR 2676 prohibiting the making of an NPCO.
- (iii) He failed to consider that the making of an NPCO would not have contravened the policy underpinning QOCS and indeed would have been supported by that policy.
- (iv) He should have considered that not making an NPCO would substantially reduce the incentives on solicitors in the position of BBK to accept reasonable offers in respect of costs and could encourage undesirable litigation behaviour.
- (v) In all the circumstances, the justice of the case was for the party who sought to gain out of the proceedings to be liable to pay the costs of the other successful party.

VIII The law relating to appeals challenging an exercise of discretion

29. It is to be noted that the appeal is based on a flawed exercise of discretion. It is clear from the summary of this that the Appellant has in mind the principles in respect of such appeals. It is said that the Costs Judge failed to consider and apply the proper legal test, and that he failed to consider properly or adequately policy considerations attaching to NPCOs and the overall justice of the case.
30. It is important to set out the relevant law in respect of an appeal against an exercise of discretion. The principles were usefully set out by Mr Justice Saini in an appeal against a decision in respect of section 33 of the Limitation Act 1980 in a clinical negligence claim, *Azan v University Hospital Birmingham NHS Foundation Trust* [2020] EWHC 3384 (QB) emphasising the limited circumstances in which the Court will entertain an appeal against an exercise of discretion. Saini J said the following:

“V. Appealing discretion

48. At this stage it is important to restate some basic principles concerning appellate challenges to the exercise of a discretion at first instance.

49. I base my summary on a number of well-known cases including G v G [1985] 1 WLR 647 (HL), Tanfern Ltd v Cameron-MacDonald [2000] 1 WLR 1311 (CA), Chief Constable of Greater Manchester Police v Carroll [2018] 4 WLR 32 (CA), and Kimathi & Ors v Foreign and Commonwealth Office [2018] EWCA Civ 2213 (the latter two

cases being concerned specifically with section 33 of the LA 1980).

50. An appellate court will only interfere with a discretionary evaluation where an appellant can identify one or more of the follows errors:

(i) a misdirection in law;

(ii) some procedural unfairness or irregularity;

(iii) that the Judge took into account irrelevant matters;

(iv) that the Judge failed to take account of relevant matters;
or

(v) that the Judge made a decision which was “plainly wrong”.

51. Error type (v) requires some elaboration. This means a decision which has exceeded the generous ambit within which reasonable disagreement is possible.

52. So, even if the appeal court would have preferred a different answer, unless the judge’s decision was plainly wrong, it will be left undisturbed. Using terms such as “perversity” or “irrationality” are merely likely to cause confusion. What is clear is that the hurdle for an appellant is a high one whenever a challenge is made to the outcome of a discretionary balancing exercise. The appellate court’s role is to police a very wide perimeter and it will be rare that a judge who has exercised a discretion having regard to relevant considerations will have come to a conclusion outside that perimeter. I would add that an appellate court is unlikely to be assisted in such challenges by a simple re-argument of the points made to the judge below. It needs to be underlined that an appellate court in an appeal such as the present is exercising a CPR 52.21(1) “review” power. It is also well-established that the weight to be given to specific factors is a matter for the trial judge and absent some wholly unjustifiable attribution of weight, an appellate court must defer to the trial judge.”

IX The jurisdiction to make an NPCO

31. The jurisdiction to make NPCOs arises as part of the Court’s general power to make costs orders under s. 51 Senior Courts Act 1981 (“SCA”) (see *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] 1 AC 965).

32. The modern statement of the approach generally to be taken to applications for NPCOs is to be found in para 25 of *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 (PC). At para 25(1) Lord Brown said:

“Although costs orders against non-parties are to be regarded as ‘exceptional’, exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such ‘exceptional’ case is whether in all the circumstances it is just to make the order. It must be recognised that this is to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against”.

33. Having first considered the position of a “pure funder” (i.e. somebody who funds litigation without seeking to gain financially from it), Lord Brown said at [25(3)]:

“Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice would ordinarily require that, if the proceedings fail, he will pay the successful party’s costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is ‘the real party’ to the litigation, a concept repeatedly invoked throughout the jurisprudence ... Nor indeed, is it necessary that the non-party be ‘the only real party’ to the litigation in the sense explained in the Knight case, provided that he is ‘a real party in ... very important and critical respects”.

34. The position of solicitors has been given special consideration in the case law, particularly if they act under a contingent retainer. There is a line of cases to the effect that solicitors are generally protected from NPCOs “so long as they act solely in their capacity as a party’s solicitor.”

35. In *Tolstoy-Miloslavsky v Aldington* [1996] 1 WLR 736, in which the solicitor respondents to an application for costs had acted for the claimant pro bono, Rose LJ held that a costs order could only be made against a solicitor (a) under the wasted costs provisions; (b) under the court’s inherent power to sanction breaches of duty to the court; and (c) “if he acts outside the role of solicitor, e.g., in a private capacity or as a true third party for someone else”. He went on, “There is, in my judgment, no jurisdiction to make an order for costs against a solicitor solely on the ground that he acted without fee” (at 745H-746B).

36. In the same case, Roch LJ said at 750D-F:

“A person who is not a party to proceedings can be ordered to pay costs in those proceedings if he has made himself a quasi-

party, for example, by being a party to separate proceedings which have been heard together with the proceedings in which the costs order is sought, or by funding the proceedings or by initiating them for some purpose of his own and it is reasonable and just to make the order. The legal representative who acts as a legal representative does not make himself a quasi-party and no jurisdiction to make an order for costs against him under section 51(1) and (3) arises. However, a legal representative who goes beyond conducting proceedings as a legal representative and behaves as a quasi-party will not be immune from a costs order under section 51(1) and (3) merely because he is a barrister or a solicitor". (emphasis added)

37. Subsequent cases have confirmed the application of this approach even where the solicitor is acting under a contingent retainer which gives them an express interest in the outcome of the litigation. Thus, in *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056, it was held per Lord Woolf MR:
- (i) (at 1065G) that acting under a lawful CFA did not render a solicitor any more exposed to an NPCO.
 - (ii) (at 1066H) "*This is a jurisdiction which cannot arise where a legal representative is acting only in that capacity in the context of legal proceedings*".
 - (iii) (at 1067H) "*What we intend to make clear is that lawyers acting under CFAs are at no more risk of paying costs personally than they would be if they were not so acting.*"

X The case of *Myatt v National Coal Board (No 2)* [2007] 1 WLR 1559 ("*Myatt*").

38. It is now necessary to consider the case of *Myatt* referred to in the grounds of appeal. At the heart of the appeal is the submission that in circumstances such as this case, where the solicitor was using the name of the client to obtain an improvement in the costs payable of which the solicitor would have the benefit, an NPCO may be made on the basis that the solicitor is seeking to recover the costs of its own funding. The Court will need to consider what is the ratio of *Myatt* bearing in mind different emphases in the judgments of Dyson LJ and Lloyd LJ. The Court will then need to consider the impact on the above question of later cases, and especially the case of *Flatman v Germany*.
39. The Appellant places emphasis on the Court of Appeal case of *Myatt*. In *Myatt*, four personal injury claimants had been represented by one firm, Ollerenshaws. On assessment, their CFAs had been found to be unenforceable. The claimants appealed, but the appeal was really driven by the solicitors, whose entire basket of (about 60) CFA cases was affected by the outcome. While the claimants themselves had a modest financial interest in the result of the appeal, the solicitors' financial

interest was far greater coming to a six-figure sum as opposed to the sums of £3,000-4,000 in the cases of the four claimants.

40. The fact that the clients did have a modest financial interest in the outcome did not prevent an order from being made against the solicitors. They were ordered to pay 50% of the defendant's costs of the appeal, bearing in mind that their clients did have a real interest in the outcome (their disbursements represented approximately one third of the total costs) and that the solicitors had not been warned, before the appeals were dismissed, that a costs order might be sought against them.
41. The Appellant referred to the judgment of Dyson LJ who said that a solicitor can be a real party or the real party (and therefore not immune from an NPCO) even where they are ostensibly acting for a client in litigation. At [8-9], he said the following:

"8. In my judgment, the third category described by Rose LJ in the Tolstoy-Miloslavsky case should be understood as including a solicitor who, to use the words of Lord Brown in Dymocks Franchise Systems (NSW) Pty Ltd v Todd is 'a real party ... in very important and critical respects' and who 'not merely funds the proceedings but substantially also controls or at any rate is to benefit from them'. I do not accept that the mere fact that a solicitor is on the record prosecuting proceedings for his or her client is fatal to an application by the successful opposing party under section 51(1) and (3) of the Supreme Court Act 1981, that the solicitor should pay some or all of the costs.

9. Suppose that the claimants had no financial interest in the outcome of the appeal at all because the solicitors had assumed liability for all the disbursements with no right of recourse against the clients. In that event, the only party with an interest in the appeal would be the solicitors. In my judgment, they would undoubtedly be acting outside the role of solicitor, to use the language of Rose LJ."

42. In the same case, Lloyd LJ also referred to the observations of Rose LJ in *Tolstoy-Miloslavsky* and said that:

"19. Those observations do not, and did not purport to, set out in definitive terms exactly what is the borderline between the case where a solicitor acts purely as such in the ordinary way on behalf of a client and is therefore immune from the jurisdiction of the court under sections 51(1) and (3), and on the other hand a case where the solicitor's acts are such that he is within the scope of that jurisdiction. Although the court in Count Tolstoy noted the enactment of the conditional fee provisions of the Courts and Legal Services Act 1990, it did not have occasion to consider the implications of those provisions in detail."

43. Lloyd LJ emphasised the importance of having a clear understanding of and having regard to the economic realities of the case:

"24. At any given stage in the course of the appeal, if one had asked in what role the solicitors were acting, even looking beyond their necessary role of conducting the litigation, [counsel for the solicitors] said the answer would have to be that they were representing the claimants and their interests, even if they were also furthering their own interests. Like my Lord, I do not consider that this is a sufficient answer to the arguments of Mr Morgan for the respondents. In the very different context of CFA funded litigation, which was not at issue in Tolstoy, it seems to me that the criteria indicated in that case must be considered and applied with as clear an understanding as the court can have of the reality of the issues at stake in the litigation and their economic context and also, of course, with the benefit of later developments in the law as regards the circumstances in which it is possible, and if so proper, to make an order under subsections (1) or (3) of section 51."

44. He did however suggest that the relevance of this appeal to other cases was likely to be limited:

"23. Accordingly, although I would accept that a decision in favour of the respondents and against the solicitors in the present case is of wider relevance, it seems to me that its relevance is limited to cases where the litigation is funded by a CFA and where the issue is as to the enforceability of the CFA."

...

26. "...it is correct to regard Ollerenshaw in the present case in relation to the conduct of the appeal as having acted in part for the sake of their own benefit in a respect which was of no interest or concern to their clients, and as having acted as a matter of business to seek to establish their right to be paid, not by their own clients in practice, the profit costs on these four cases and all the others of which these were representative.

27 In those circumstances, which could be common in relation to cases where the enforceability of a CFA is at stake but would be most unusual in any other situation, it seems to me proper to regard the solicitors as having acted in respect of the appeal in a dual capacity; acting for their clients, certainly, and with a real interest of those clients to protect, but primarily acting for their own sake" (emphasis added). In terms of what Lord Brown said later in paragraph 25 in Dymocks, I agree

with my Lord in saying that Ollerenshaws were a real party to the litigation at the stage of the appeal, albeit that the claimants were also. On that basis it seems to me that the case is materially different from the Count Tolstoy case and the court has jurisdiction to make an order under subsection (1) and (3) of section 51 against the solicitors.”

XI The case of *Flatman v Germany* [2013] 1 WLR 2676 (“*Flatman*”)

45. In *Flatman*, the Court of Appeal addressed the question of whether a High Court judge had been right to order a Claimant to disclose how proceedings had been funded for the purposes of a potential application by defendants for an NPCO. It was said that the unsuccessful claimants were impecunious. Their claims had been funded by CFAs. No ATE had been taken out. The solicitors had apparently funded disbursements and stood to claim substantial fees if the claim had been successful.

46. The appeals were dismissed, but only because information had, since the hearing below, emerged regarding the solicitors’ conduct in one of the cases which suggested that they had pressed on with litigation without insurance, contrary to instructions, in circumstances where they might have recovered substantial costs.

47. The Court of Appeal referred to the above paragraphs 8 and 9 in *Myatt* without criticism. At the outset, Leveson LJ who gave the leading judgment sounded a note of caution that arguments in relation to a liability of solicitors on a one-way cost shifting case were likely to persist post the Legal Aid Sentencing and Punishment of Offenders Act 2012 (“LASPO”) and in particular noted at para. 2 that:

“...they may become more acute if defendant’s insurers can undermine the principle of one-way costs shifting...by pursuing solicitors acting for the claimant who fails”.

48. A relevant consideration to deciding whether the solicitor was ‘acting outside the role of a solicitor’ was whether they were ‘...doing no more than the legislation which set up CFAs rendered lawful’ at paras. 27, 37 and 50.

49. Leveson LJ noted the submission made on behalf of the Law Society in that case in the following terms at para.31:

“Putting the issue on a wider canvas, the Law Society, on the other hand, submits that a solicitor who funds disbursements on behalf of a client on the basis that the costs will be recovered from the other side in the event of success but will not be recovered from the client if the claim fails (at least in cases, such as these, of moderate complexity in which the disbursements are modest) is not acting in circumstances which are outside the ordinary run of cases. Neither can it be said, it is submitted, that the solicitor is either ‘the real party’ to the litigation, the person ‘with the principal interest’ in its

outcome, or is acting 'primarily for his own sake'. Thus, without more, the solicitor should not be made liable to a third party costs order."

50. Leveson LJ broadly accepted the submission of the Law Society. He found that the statutory conditional fee regime permitted a solicitor to agree with a client that the solicitor would fund disbursements on behalf of the client on the basis that (a) the costs of the disbursements would be recovered from the other side if the claim succeeded, but (b) they would not be recovered from the client if the claim failed. A solicitor who funded a client's disbursements in that way was not acting in circumstances which were outside the ordinary run of cases and would not, without more, be the real party to the litigation.
51. In his judgment at paras. 45-47, Leveson LJ said the following:

"45. In my judgment, therefore, the legislation does visualise the possibility that a solicitor might fund disbursements and, in that event, it would not be right to conclude that such a solicitor was 'the real party' or even 'a real party' to the litigation. As for the policy imperative argued by Mr Brown, after the event insurance is not a pre-requisite of bringing a claim on a CFA (see King v Telegraph Group [2005] 1 WLR 2282 at paragraph 100 and Floods of Queensferry Ltd v Shand Construction Ltd (supra) at paragraph 37). The fact that a litigant can (or cannot) afford an expert report or the court fee says nothing about his or her ability to fund the costs incurred by opponents in an unsuccessful claim and, indeed, Eady J (at paragraph 25 of his judgment) recognised that the solicitor could advance disbursements with a technical (albeit improbable) obligation for repayment.

That much is also clear from the fact that solicitors are entitled to act on a normal fee or conditional fee for an impecunious client whom they know or suspect will not be able to pay own (or other side's costs) if unsuccessful (see Sibthorpe v Southwark BL [2011] 1 WLR 2111 at paragraph 50; Awwad v Geraghty [2001] QB 570 at 588; Dophin Quays Developments Ltd v Mills [2008] 1 WLR 1829 at paragraph 75.

In those circumstances, contrary to the submissions of Mr Brown, I agree with the issue of principle advanced by the Law Society (and Mr Carpenter) that payment of disbursements, without more, does not incur any potential liability to an adverse costs order..."

52. In *Tinseltime Limited v Roberts* [2012] EWHC 2628 (TCC) HHJ Stephen Davies, sitting as a judge of the High Court, considered whether or not a solicitor who takes on a case for an impecunious claimant under a CFA, with no ATE in place, and who agrees to fund the disbursements necessary to enable the case to proceed, thereby constitutes himself a non-party funder and renders himself liable to an NPCO. HH Judge Davies reached a view doubting the view of Eady J in *Flatman* at first instance. The decision of Eady J was subsequently reversed in the Court of Appeal (consistently with that found by HH Judge Davies in *Tinseltime* which decision was before the Court of Appeal in *Flatman*). It is therefore useful to quote from HH Judge Davies who said the following at paragraphs 56 and 57 of his judgment:

"(1) The starting point in any case must be the first principle stated by Lord Brown in Dymocks, namely that the ultimate question is whether in all the circumstances it is just to make a non-party costs order, that this is a fact-specific enquiry, and that it must be recognised that in a particular case the court may have to balance a number of different considerations, some of them conflicting.

(2) The starting point when considering the position of a solicitor is that it must be shown that he has in some way acted beyond or outside his role as a solicitor conducting litigation for his client to make him liable for a non-party costs order.

(3) The starting point when considering the position of a solicitor acting under a CFA is that the fact that he stands to benefit financially from the success of the litigation, in that otherwise he will not be able to recover his profit costs or his success fee, does not of itself mean that he has acted in some way beyond or outside his role as a solicitor conducting litigation for his client.

(4) The starting point when considering the position of a solicitor acting under a CFA who has agreed to fund disbursements under the CFA should be no different from the case of a solicitor who has not, since both arrangements are permitted and are regarded as meeting a recognised legitimate public policy aim. The position is no different where the solicitor knows that the client is impecunious and that there is no ATE policy in place; that is because acting for clients who are impecunious does not take the solicitor outside his role as such and, indeed, it is consistent with the recognised public policy aim of promoting access to justice, and because there is no obligation on a solicitor acting under a CFA to ensure that ATE insurance cover is in place when his client is impecunious.

... It follows, in my judgment, that there must be something beyond this combination of factors by themselves which would render it just to make a non-party costs order in such circumstances. Whilst it is unrealistic to seek to identify what will or will not be sufficient in any individual case, I do consider that in the majority of cases there will be present

either some financial benefit to the solicitor over and above the benefit which he can expect to receive from the CFA, or some exercise of control of the litigation over and above that which would be expected from a solicitor acting on behalf of a client, or some combination of both."

53. In the consideration of cases, consideration should also be given to a later decision of the Court of Appeal in which the leading judgment was given again by Leveson LJ. In *Heron v TNT (UK) Ltd* [2013] EWCA Civ 469, it was suggested, amongst other submissions, that the failure of the paying party's solicitors to seek after the event insurance demonstrated that the firm had become a party to the action and, as such, a non-party costs order under s. 51 of the Senior Courts Act 1981 and CPR 46.2 should be made. The Court held that failure to obtain after the event insurance did not render the solicitors a "real party" to the claim, just as the funding of disbursements did not have that result in *Flatman*.

XII Submissions of the Appellant

54. There were 10 Grounds of Appeal as to why the dismissal for an NPCO was a flawed exercise of discretion. The first three grounds can be grouped compendiously. The legal framework has been set out above.

(a) Grounds 1 – 3 – the Legal Framework and the Real Party

"1. He wrongly considered that the line of authorities including Flatman v Germany [2013] 1 WLR 2676 prohibited the making of an NPCO when those cases were concerned only with the situation where a defendant sought its costs of a failed substantive claim, in which the claimant had an interest. In the situation where BBK had the sole interest in the costs proceedings, the governing authority was Myatt v National Coal Board (No 2) [2007] 1 WLR 1559, which permitted and indeed strongly supported the making of an NPCO.

2. He wrongly considered that it was a relevant factor that BBK were acting under a lawful CFA and doing no more than any solicitor might do to recover costs under such a retainer.

3. He failed to consider that BBK were the real party in respect of the costs proceedings, which they funded and controlled and from which they stood to benefit, to the complete exclusion of their client."

55. The Appellant submits that the Costs Judge was wrong to conclude from *Flatman* at para. 133 of the Judgment in this case that "a solicitor cannot be said to be acting outside the role of a solicitor if the solicitor is doing no more than the legislation pertaining to CFAs renders lawful" and that in those circumstances the solicitor could

not be ‘the real party’ or ‘a real party’. It was submitted that this conclusion involved a fundamental error as to the principles to be derived from the authorities which vitiates the exercise of the Costs Judge’s discretion.

56. The Appellant submits that although the Costs Judge at para. 130 referred to *Myatt*, he failed to give it adequate consideration and to identify it as the governing authority. In the submission of the Appellant, the principle is to be derived from para.9 of the judgement of Dyson LJ. The reason why the solicitors in *Myatt* were exposed to an NPCO was not because their CFA had been held to be unenforceable but because in the appeal, they were the party with the principal interest in its outcome.
57. The Appellant submits that the test stated and applied by Dyson LJ in *Myatt* in the light of *Dymocks* was the or a ‘real party’ test. It was not a test as to whether the solicitor acted ‘*beyond or outside his role as a solicitor*’. The Appellant notes that Lloyd LJ agreed with the wide way in which the test had been encapsulated in paras. 8 and 9 of the judgment of Dyson LJ. There was no qualification in his agreement, for example by saying that he would express the test differently. Further, in subsequent cases, and especially *Flatman* and *Tinseltime*, there was no criticism of the test of Dyson LJ in the oft cited paras. 8 and 9 of his judgment. Further, it was submitted that the *locus classicus* has become *Dymocks*, and the words of Dyson LJ are consistent with *Dymocks*. The words of Lloyd LJ are, it is said, apposite to the particular case, but they are not restricting of the judgment of Dyson LJ.
58. The Appellant submits that there is nothing in *Flatman* and subsequent cases to the effect that paras.8-9 of the judgment of Dyson LJ have been overruled or are inapplicable. The decisive question was not whether BBK was acting under a lawful retainer, and doing no more than a solicitor would do in order to recover the costs which they believed was due to them. The solicitors were the real party in the costs assessment because they funded the assessment proceedings, giving up fee earners' time and paying disbursements including Counsel’s fees: they controlled the proceedings to the complete exclusion of their client, and they alone stood to benefit from them. The Costs Judge should have treated this aspect as decisive in favour of an NPCO or in providing a basis for the exercise of a discretion to make such an order. This by itself or together with the observations in other grounds provided a basis for the Costs Judge to make an NPCO and made it plainly wrong for the Costs Judge not to make such an order.
59. The Costs Judge accurately set out submissions made before him and renewed on appeal in the following terms at para. 76-78 of the Judgment, namely

“76. *None of these policy objectives, says Mr Carpenter, are imperilled in any way by an order that BBK pay the Defendant’s costs of the assessment process. The Claimant remains fully protected. It is no part of the policy behind QOCS that claimants’ solicitors should be allowed a “one-way bet” when it comes to assessment of their costs, so that challenges and appeals can be pursued which, if successful, would result in an increase in the recoverable costs and payment of their costs by the Defendant, but in the event of failure cost them nothing except their own outlay.*

77. *Claimants’ solicitors should be encouraged to accept reasonable offers on costs just as their clients are encouraged*

to accept reasonable offers on damages. To free BBK from the risk of an adverse costs order would put them in a better position than their own client. Had the Claimant rejected the Defendant's Part 36 offer on damages and received less at trial, under the QOCS rules the Defendant would have been entitled to set off any costs awarded to it against the damages awarded at trial. BBK claim the right to reject the Defendant's offer on costs free of any penalty whatsoever.

78. *BBK do not require special protection. They are not in an asymmetric relationship with the Defendant and its solicitors. They are perfectly capable of judging for themselves what is a reasonable level of costs recovery and weighing up the risks and benefits of rejecting an offer or challenging the result on detailed assessment."*

(b) Ground 4 – the Relevance of the pre-QOCS position

"4. He wrongly failed to consider that the fact that, in the absence of qualified one way costs shifting ("QOCS"), BBK would have borne a de facto liability for the Appellant's costs, demonstrated the justice of making an NPCO against BBK when that would not have contravened the policy underpinning QOCS and indeed would have been supported by that policy."

60. Before the Costs Judge, the Appellant had submitted that the operation of the QOCS rules conferred an indirect benefit upon solicitors acting under a CFA Lite or a capped CFA arrangement in that they could pursue the costs of the claim at less financial risk than before QOCS was introduced. Before the introduction of QOCS, it was submitted that it was highly unlikely that solicitors would have visited an adverse costs order in the detailed assessment on their own client: see the Judgment at [81]. The Appellant submits that it was wrong for the Costs Judge to treat this as *"just a consequence of the way the QOCS regime works"* [140].
61. The Appellant submits that the Costs Judge should have considered whether that was a just outcome. Unless it was caused by unintended consequences of the QOCS regime, and there was no evidence that it was, then the charge should have considered that the justice in circumstances such as this case was that the solicitors should have been liable to pay costs pursuant to NPCO.
62. When the application was before the Costs Judge, the amendments to CPR 44.14 had not been published. They made no difference. If they had been published, the Appellant would have submitted that the impending restoration of the pre-QOCS position reinforced the justice of solicitors in the position of BBK in paying adverse costs.

(c) Ground 5 – the relevance of public funding

“5. He wrongly considered that the position of a solicitor acting with public funding (which is subject to a specific and distinct statutory regime) was relevant to disposal of the application. Insofar as it was relevant, it in any event supported the application, since, in the absence of QOCS, a solicitor under a public funding certificate would have a de facto liability for any adverse costs of detailed assessment by operation of set off.”

63. This was an additional factor which did not go to the crux of the application. At paras.141-142, the Costs Judge considered the possibility that the argument of the Appellant could be applied to the case of a solicitor for a legally aided party, and that this would not be consistent with the authorities. The Appellant submitted that legal aid was not in point because it was a form of statutory CFA with different principles including the possibility of recovery against a client, recovering costs against a solicitor by way of set off and the risk of paying adverse costs of detailed assessment. In short, it was submitted that the Costs Judge took into account a matter irrelevant to the exercise of his discretion.

(d) Ground 6 – exceptionality

“6. He was wrong to consider that granting the application would contravene the requirement that NPCOs be “exceptional”, since they would “become routine” in similar situations. The concept of exceptionality in this context is not concerned with a head count or a proportion of cases. A case such as this is exceptional because BBK were ostensibly acting on behalf of their client, but in fact acting entirely in their own interests in proceedings which they funded and controlled and from which they stood to benefit.”

64. The Appellant submits that the Costs Judge misapplied the concept of exceptionality in *Dymocks*. It was simply exceptional compared to the general run of cases where the real parties are the named claimant and defendant: per Lord Reed in *XYZ v Travelers Insurance Co Ltd* [2019] UKSC 48, [2019] 1 WLR 6075 at [65]. “So understood, “exceptionality” is in reality of little if any significance, since no judge would contemplate making a non-party costs order in “the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense” at [112]. In the same case, Lord Briggs at [30] said: “I share all Lord Reed’s concerns as to the lack of content, principle or precision in the concept of exceptionality as a useful test. There are many commercial funder cases, and they are liable in principle to be treated as liable to pay the other party’s costs if unsuccessful: see *Arkin v Borchard Lines* [2005] 1 WLR 3055.
65. In any event, the Appellant submits that the case was exceptional because it was not a case where the Respondent was acting for its own benefit or at its own expense, but a case where the real party was BBK.

(e) Ground 7 – Causation

“7. He approached the issue of causation in the wrong way. The question was not whether the Appellant would have incurred the same costs even if BBK’s client had had an interest in the costs proceedings. Causation was established simply by virtue of BBK pursuing the costs proceedings – and thereby causing the Appellant to incur costs – when it was the real party to those proceedings.”

66. The parties are agreed that it is necessary to show that the party against whom the NPCO has caused the costs to be incurred. The requirement for such a causative link was emphasised by the Supreme Court in *XYZ v Travelers Insurance Co Ltd* [2019] UKSC 48, [2019] 1 WLR 6075 at [65].
67. The Appellant submits that BBK has caused the costs to be incurred because if the offers had been accepted, the costs would not have been incurred. It was BBK who refused to accept the offers and who therefore caused the costs to be incurred.
68. The Costs Judge answered this by saying that in the context of the instant case, the costs which BBK sought to recover are no different from the costs that would be likely to have been incurred if the client had been represented by solicitors acting on a more traditional basis of retainer. This went also to the point that, through whichever prism these matters are looked at, there was nothing exceptional here. BBK was not acting outside their role as solicitor, they were doing nothing over and above that which would be expected from a solicitor acting for their client and they did not therefore cause – in the sense meant by the authorities in this context - the costs of which the Appellant complains.
69. The Appellant submits that this is not an answer because the costs were incurred because the solicitor alone took the decision not to accept the offer made by the Appellant. It was therefore BBK’s unilateral decision which caused the costs to be incurred.

(f) Ground 8 – Access to justice

“8. He was wrong to conclude that granting the application would discourage firms such as BBK from offering their services to clients under similar retainer terms. There was no evidence to that effect and it was inherently unlikely given that such retainers exposed solicitors who used them to liability for adverse costs of detailed assessment prior to the introduction of QOCS.”

70. The Appellant criticises the Costs Judge for finding that if it became common for NPCO's to be made against a solicitor acting in a CFA lite or a capped CFA who is simply seeking to recover costs in the name of the client, then solicitors in the position of BBK may be discouraged from offering services to claimants on QOCS cases. It was said that there was no evidence to support this belief, and that the Costs Judge erred in taking this point into consideration. It is said that the purpose of QOCS was not to protect the commercial interests of claimants' solicitors.

(g) Ground 9 – Incentivising desirable litigation behaviour

“9. He should have considered that not making an NPCO would substantially reduce the incentives on solicitors in the position of BBK to accept reasonable offers in respect of costs and could encourage undesirable litigation behaviour.”

71. The Appellant submits that not making a costs order against BBK in these circumstances would reduce the incentives on solicitors in similar circumstances to accept reasonable offers to the detriment of defendants and the court. Solicitors ought to be encouraged to have greater scrutiny to their own costs claims, which would occur in the event of adverse costs orders against the solicitor. As noted above, in his report, Sir Rupert Jackson had regarded the need to enforce litigation discipline and to encourage the acceptance of reasonable offers was an important aspect of any QOCS regime. In this case, all the applications in the face of the offer have had a very serious impact on the Appellant and on the court time taken by all the applications. There is a useful summary of the applications which was made at para. 84 of the Judgment.

(h) Ground 10 Justice

“10. He should have concluded that it was not just for BBK to be able to pursue a claim for costs in excess of the amount offered by the Appellant and to fail in that endeavour and thereby cause the Appellant to incur significant costs, when that endeavour was for BBK's sole benefit, without being liable for the Appellant's costs thereby occasioned. The learned Costs Judge should have considered that, in that situation, justice demanded that BBK pay those costs.”

72. This ground is to the effect that that the only just outcome is for BBK to be ordered to pay the costs which they caused to be incurred. This is a sweep up of all the above factors which indicate that since the applications were for the sole benefit of BBK, and for costs far in excess of the amount offered, the overall justice of the case was to make the order.

(i) Other points

73. The Costs Judge was not impressed by a point of BBK on delay. There was some delay in bringing the application, but it caused no prejudice. The Costs Judge said that if he had been minded to make an NPCO, the delay would not have affected the result. There is no Respondent's Notice in this regard.
74. There was another point about the absence of a warning which has featured in the Appellant's skeleton argument. It was that there was no warning in circumstances in which it would be incumbent on a defendant to notify a party of an intention to seek an NPCO and that failure could be significant. The Costs Judge found that he had seen no evidence to suggest that a warning would have made a difference in the instant case. As with delay, this point does not arise, because there is no Respondent's Notice to this effect. In any event, on the premise that the submissions of the Appellant are correct that it can be rejected as a point, the conclusions in this case are unaffected by the absence of a warning.

XIII Discussion

(a) Grounds 1 – 3

75. Applying the above law, the question arises as to whether in the circumstances of this case, the solicitor who has taken the different steps to recover fees, costs and disbursements over and above that offered by the paying party, and who has failed on each occasion, should be liable to pay the costs of the successful party. The question which then arises is what is the appropriate test: is the question whether the solicitor is to be treated as "*the real party*" or "*a real party*" in the litigation because the benefit of success in the application would have gone to them in the receipt of the greater costs than those offered? Or is it necessary for the solicitor to have been acting "*beyond or outside his role as a solicitor*"? Do they mean different things? Whichever test is applied, if the test is satisfied, is there then an exercise of discretion before making an order, and how should that discretion be exercised in the case of a solicitor acting on a CFA or a CFA lite without more?
76. It follows from the passages set out above in the cases subsequent to *Myatt* that where a solicitor is seeking to recover costs or disbursements or a success fee, and no more, they are not acting beyond or outside their role as a solicitor. It is a consequence of the CFA itself. Access to justice is promoted by the CFA or the CFA lite. That involves the solicitor taking the risk that the proceedings will fail and there will be no entitlement to these costs, disbursements and fees. If the proceedings succeed, it is consistent with the recognised public policy aim of promoting access to justice for the claimant that the solicitor is able to take steps to recover the costs. The route for them to do so is not in their name but in the name of the client. Without this ability, the solicitor would not be able to recover his disbursements or in a different case their profits costs or a success fee.
77. The effect of the above decisions is that for a solicitor to be acting "*beyond or outside his role as a solicitor*", there must be some financial benefit to the solicitor over and above the benefit which they can expect to receive from the CFA or some exercise of control of the litigation over and above that which would be expected from a solicitor acting on behalf of a client. This might occur in "*cases where the enforceability of a CFA is at stake*" but would not usually occur without this: per Lloyd LJ in *Myatt*.

78. The Appellant's submission is to the effect that the Court should look at the particular application and ask itself for whose benefit is the application. If it is about the recovery of costs (whether profit costs or disbursements or a success fee) in circumstances where the application will not affect the amount of damages received by the client (e.g. because of a cap on the amounts payable out of damages as in the instant case), then the Appellant says that the application is for the benefit solely (or primarily) of the solicitors. They therefore say that the real party (or at least a real party) in the application is the solicitors.
79. In my judgment, that is to look at the particular application other than in its proper context. The CFA or the CFA lite arrangement is to be seen as a whole. A solicitor who funds disbursements on the basis that they will be recovered only from the other side in the event of the success of the claim is thereby facilitating access to justice for a client. The action as a whole is to be seen as for the benefit of the client, albeit one in which the solicitors are rewarded in a way that is not beyond or outside their role as solicitors. It is very common that the only way in which the solicitors recover disbursements in the event of success is from the other party to the litigation. The way in which this is done is in the name of the client.
80. As was accepted in *Flatman*, the solicitor does not then become the real party because the case has succeeded, and the disbursements are to be recovered. It is simply an incident of the CFA or the CFA lite. The arrangement involves personal risk to the solicitors in the event of losing or not being able to recover costs or disbursements from the unsuccessful party. It is all one arrangement such that when the recovery is sought by the solicitor in the name of the client, this is all part of an arrangement against the other side. The solicitors do not therefore go beyond or outside the role as a solicitor when they make an application for the recovery of the disbursements. Without this ability, there would often be no ability of the solicitors to make the recovery, and neither the CFA nor the CFA lite arrangement would work in practice. The client would not get the benefit of the opportunity to obtain damages with limited personal exposure, and the solicitor would not get the opportunity to recover costs save to the extent provided by way of deduction from the damages as between solicitor and client.
81. The judgment of Dyson LJ in *Myatt* at paras.8 - 9 is to be seen in the above context. They do not have as their effect that every time the solicitors seek their costs and disbursements that the solicitor is on the line for costs in the event that the claim is successful, provided that the application is not "*beyond or outside his role as a solicitor*". It is too narrow to consider the application other than in context. The application is an incident of the CFA or the CFA lite arrangement and should therefore not be seen as being done for the benefit of the solicitor. Contrast this with *Myatt* where there was an issue as to the enforceability of a CFA. In those circumstances, the solicitors might be acting for their own benefit and be considered a party to the litigation. This was because if the CFA is not properly described as such, it might be beyond or outside the role of a solicitor to act other than pursuant to a compliant CFA.
82. The words of Dyson LJ at paras. 8 - 9 are properly to be seen as follows:
- (i) They were in the context of the facts of the case involving issues as to whether the CFAs in the instant 4 cases, and in a whole slew of other cases were compliant CFAs.

- (ii) The context is to be observed from the language of Lloyd LJ at paras. 19, 23, 26 and 27 above.
 - (iii) It is also to be seen in the light of the successful intervention of the Law Society in *Flatman* and the judgment of Leveson LJ in that case, especially at paras. 31 and 45 - 47, explaining or clarifying the position for the run of more general cases than *Myatt*.
 - (iv) If in fact, the words of Dyson LJ are to be conferring a more general power, as a matter of discretion the discretion ought to be exercised having regard to the matters set out above. If they were exercised in a manner such that each application was considered non-contextually, then the danger would be that the solicitors' role in providing or assisting with access to justice could become eroded or damaged because of the level of risk on the solicitor.
83. A point of emphasis in the instant case has been that there has been a whole series of applications to appeal or review the amount of costs payable. In each of them, the result of the application was irrelevant to the client, whose liability for the costs was unaffected. The solicitors were able to make the applications without reference to the client. It was submitted for the Appellants that the solicitors were taking each initiative for themselves alone, and on each occasion the paying party was vindicated in that there was an inability to beat the offer made.
84. In my judgment, this does not change the overall position for these reasons. It matters not whether there is one application or many applications provided that the solicitor is acting other than "*beyond or outside his role as a solicitor*". The key issue remains whether the solicitor can be described as 'the real party' (or 'a real party') to the litigation, but in the context of an NPCO application, that will usually be determined by reference to whether the solicitor was acting "*beyond or outside the role of a solicitor.*" As the Costs Judge put it at [133] "*I do not think that the two questions can so easily be separated. It is in my view clear from Flatman v Germany first that a solicitor cannot be said to be acting outside the role of a solicitor if the solicitor is doing no more than the legislation pertaining to CFAs renders lawful, and second that in such circumstances it would not be right to conclude that the solicitor is "the real party" or even "a real party" to the litigation.*"
85. A solicitor doing no more than the relevant funding legislation permits will not usually be so acting. It is said that it is important in these circumstances that there should be consequences for the solicitors, and that this is not achieved without a costs order against the solicitor in the event that the applications are not met with a costs order against the solicitor. This analysis fails to attach any or any adequate significance to the following matters, namely:
- (i) The scheme works on the basis that solicitors are not exposed to personal risk by, without more, acting for a client on a CFA or CFA lite basis. It is all one arrangement where at the front end, the solicitor provides access to justice by offering legal services and paying disbursements and other charges, and at a later stage, recovering the same through orders for costs in the name of the client. Their ability to make the application is an incident of the arrangement with the client which in turn assists with access to justice;

- (ii) The solicitor is not like a personal funder who would start on the usual premise of exposure to costs. The starting point in respect of a solicitor is not to be penalised in costs, that would be to create a burden on the solicitor which might affect a solicitor's willingness to take on such cases;
- (iii) In an appropriate case, where the conduct of the solicitor may be criticised, an application can be made on the basis of improper or unreasonable conduct under CPR 44.11.

86. It therefore follows that the applications which were met in the context of the CFA were ones which the solicitors were entitled to bring acting as such and within their role as solicitors. In these circumstances, there is no reason to treat this case as one outside the normal where the Courts should make orders against the solicitors personally. The fact that the solicitors stand to benefit financially from the success of the litigation does not mean that the solicitors have acted in some way beyond or outside their role as a solicitor. In line with the above case law, it cannot be said that the solicitor is "*either 'the real party' to the litigation, the person 'with the principal interest' in its outcome, or is acting 'primarily for his own sake'.*" Thus, without more, *the solicitor should not be made liable to a third party costs order.*" These words are those contained in the submission of the Law Society in *Flatman* that a third-party costs order should not be made at para. 31, which the Court of Appeal accepted at paras. 45 - 47, quoted at paras 49 and 51 of this above in this Judgment.

87. It follows in my judgment that:

- (i) The Appellant's submission does not read *Myatt* in its true context. It relies on the broad words of Dyson LJ instead of reading that judgment together with that of Lloyd LJ who described as "most unusual" an NPCO in cases other than where "the enforceability of a CFA is at stake". On that basis, it would not suffice without more that the solicitor had funded a case or was acting for an impecunious client and their only chance of being reimbursed was in the name of the client.
- (ii) In any event, the matter has been decided by subsequent cases and especially *Flatman* and the decision to follow the position submitted by the Law Society as intervener. The problem recognised in *Flatman* case was identified by the Law Society, and the problem was resolved in the manner set out at [45-47] in that case, namely that payment of disbursements without more does not give rise to a liability to an adverse costs order. The same logic ought to apply to the provision of professional services by a lawyer for an impecunious client under a CFA or a CFA lite;
- (iii) Whatever the true test, in the circumstances of this case, BBK did not act outside or beyond the role of a solicitor. The fact that there were a number of applications, and all driven by BBK (and initiated without consultation with the client) is an incident of the CFA or the CFA lite arrangement, and not that the solicitor was acting outside the role of a solicitor.
- (iv) There is no suggestion that any of the applications which were made were improper or unreasonable: if such were the case, then the applications could

be met with a costs application under CPR 44.11. The fact that this has not been done strongly suggests that there has been no misconduct of this kind.

88. It follows from the above that the solicitors were the beneficiaries of the scheme, as it then stood, up to cases commenced before April 2023. As the cases noted above, it is possible that the scheme, in protecting the client, had unintended consequences, which were capable of correction. If and to the extent that it provided protection to solicitors which was considered excessive, it does not mean that this should be achieved by treating solicitors like funders without a change in the rules. Further, the fact that the rules were changed does not mean that the regime up to the time of the change should be treated as different in order to meet the mischief through the broad wording of s.51(3). In my judgment, that would be contrary to established authority at Court of Appeal level. It would also be to render solicitors liable to third party costs in circumstances where their entry into the model would have been predicated in the light of the rules and authority on the basis where they would not be so liable provided that they were not acting outside or beyond the role of solicitor.

(b) Ground 4: the relevance of pre-QOCS position

89. The Costs Judge was correct that the pre-QOCS position was not relevant. Under QOCS, there would be no liability for costs of a claimant to a defendant, save in certain situations. The regime of QOCS involved the solicitor stepping into the shoes of the client for the purpose of seeking, obtaining and enforcing orders as to costs. The consequence was that in the event of an application for the benefit of a solicitor failing, there would be no liability as to costs without a third-party costs order.
90. At that point, it was necessary to consider the case law in respect of what would occur. This was the issue of principle as to which the Law Society intervened in *Flatman*, and it was decided that the payment of disbursements by a solicitor without more on the basis that the costs will be recovered from the other side in the event of success but not in the event of failure does not render a solicitor without more liable to an NPCO. In those circumstances, the solicitor is acting outside the ordinary run of cases or that the solicitor is “the real party” to the litigation, or the person with “the principal interest in its outcome” or the solicitor is acting “primarily for his own sake.” That applies also in respect of the provision of services and the time costs of a solicitor. The solicitor then is entitled under the QOCS regime to seek to recover the out-of-pocket costs or the time costs without the risk of an NPCO.
91. There is nothing in the instant case to indicate that there were circumstances which took it outside the *Flatman* type case. It is not an answer to say that there were a number of applications which were unsuccessful or that the amount of costs of these applications greatly exceeded the amount of costs which had been offered. If the conduct of the solicitor was unreasonable or improper, then an application could have been brought under the wasted costs jurisdiction (CPR 44.11), but this was not invoked in this case, indicating that it was not believed that BBK was guilty of any such misconduct.

(c) Ground 5 – the relevance of public funding

92. Despite the many differences between a legal aid and a QOCS case, the Costs Judge was entitled to make a limited point that on the argument of the Appellant, the solicitor could in many legal aid cases (e.g. where the client had no resources and there was no possibility of a set off) be characterised as “the real party” or “a real party” and therefore subject to the possibility of an adverse costs order. The Costs Judge was entitled to conclude that this was contrary to the policy embedded in the authorities. The Court ought to consider a solicitor pursuing a detailed assessment in the client’s name as not acting outside the ordinary role of a solicitor and therefore not liable to in the ordinary course to a liability for costs simply because the application was unsuccessful.

(d) Ground 6 – exceptionality

93. It is apparent from the case law referred to above that exceptionality is not a particularly helpful concept in this jurisdiction for the reasons there identified. The reference of the Costs Judge to exceptionality at para. 144 of the Judgment was more nuanced. He was signalling a concern to the effect that such an incident of acting on a CFA, which is intended to promote access to justice, may discourage firms if the norm becomes that they will be liable for non-party costs whenever a costs order is made against the client of a solicitor pursuing a costs under a CFA lite or capped CFA. The concern was that acting in these circumstances would itself become a regular incident of such cases (and not exceptional) and therefore discourage firms such as BBK from taking on such cases. This was not the case of a solicitor acting outside the ordinary role of a solicitor.
94. The Costs Judge said at paras. 143-144 of his Judgment that the idea of such orders being standard against solicitors acting on arrangements believed to be in widespread use and to be beneficial to clients and promote access to justice reinforced his conclusion that such an order is not justified. It was very different from a third-party funder because it was a case of a solicitor acting in an ordinary role as solicitor. It was routine for a solicitor so to act and therefore it cannot be right to make an NPCO a matter of routine in such cases.
95. These were considerations which the Costs Judge was entitled to have in mind. They were consistent with those which arose in *Flatman*. The Costs Judge was entitled to conclude in line with authority that the norm should not become that a solicitor in the position of BBK should render itself exposed without more to adverse costs orders.

(e) Ground 7 – Causation

96. BBK submits that in the event that whether or not BBK were acting on a capped CFA, and therefore whether or not the client had a direct interest in the assessment, there is no basis for concluding that the course of proceedings or the costs involved would have been any different.
97. In the judgment of Lord Briggs in *XYZ v Travelers Insurance Co Ltd*, he said as follows:

“65. I have noted above how firmly the Court of Appeal in the Cormack case endorsed the requirement for an applicant under section 51 to demonstrate a causative link between the incurring of the costs sought to be recovered from the non-party and some part of the conduct of the non-party alleged to attract the section 51 jurisdiction. That requirement is in my view rightly imposed. Auld LJ regarded it as part of the exceptionality requirement. It could equally be seen as going to the justice, or otherwise, of making the order. If the costs would still have been incurred if the non-party had not conducted itself in the relevant manner, why should it be just to visit the non-party with liability for them?”

....

81. Fifthly, causation remains an important element in what an applicant under section 51 has to prove, namely a causative link between the particular conduct of the non-party relied upon and the incurring by the claimant of the costs sought to be recovered under section 51. If all those costs would have been incurred in any event, it is unlikely that a section 51 order ought to be made.”

98. Put this way, causation might be seen as part and parcel of the overall justice of whether or not to make the order. For the reasons which appear in this Judgment, the overall justice in this case is not without more to make an NPCO against a solicitor acting not beyond or outside their role as a solicitor on a CFA or under a CFA lite who is seeking to recover the time costs or disbursements. This being the case, it is not necessary to consider the issue of causation further. In another case where it is otherwise appropriate to make an NPCO, it might be an answer that the costs would have been incurred in any event.
99. It is in these circumstances that the Costs Judge found that in the event that the arrangement had been a more conventional arrangement that the solicitor would have obtained instructions from the client and would have been instructed in any event to make the application. The Appellant submits that this is not an answer because as a matter of fact the applications occurred because BBK decided to reject the offer and that caused the costs to be incurred. In the event, it is not necessary to rule on this aspect because it does not arise since the overriding consideration is that a solicitor in the position of BBK is not liable to an NPCO. If in fact, causation is made out, it would not affect the result in the sense that causation is only one aspect of the issues to consider. The Costs Judge did not rest his judgment on this point but ultimately on the finding that BBK was not acting beyond or outside his role as a solicitor and was not the real party or a real party to the applications.

(f) Ground 8 – Access to justice

100. BBK submitted that the highly experienced Costs Judge was entitled to bring his experience to bear and to believe that there was a concern that a routine exposure of

solicitors to NPCOs might have an impact on the availability of such arrangements. This protection had been going on for almost a decade since the QOCS regime started, and therefore it was legitimate to consider the position at the time of the hearing rather than to consider the very different regime which existed before the QOCS regime.

101. The position was very different at that time with very large success fees relative to what can be charged now. Of course, the fact that the QOCS rules have recently changed might indicate that the concerns are not as great as feared, but it remains to be seen what the impact of the recent changes will be. For the moment, considering an appeal from a specialist judge, I should be very slow to disregard his concerns about the market as a whole and the impact of having regular applications for NPCOs against solicitors. In my judgment, the Costs Judge was entitled to take into account these considerations and bring them to bear in his overall decision.
102. The point about access to justice also dovetails with the analysis in the crucial grounds 1-3 considered in detail above. It does not raise a new point. On the basis that grounds 1-3 are answered on the basis of the reasons set out above, this point does not add something new and/or is only a makeweight. It does not affect or make any difference to the overall exercise of discretion of the Costs Judge.

(g) Ground 9 – Incentivising desirable litigation behaviour

103. These points do not go anywhere. Whatever the objects of the QOCS regime, they brought about a series of rules which were to protect claimants, and which indirectly helped solicitors representing them. This has led to rule changes, and there might be others, but it would be inconsistent with authority to react to this by making NPCOs a new norm in respect of cases commenced before the rule changes. In any event, in the instant case, there are no findings which ought to lead to BBK's behaviour warranting an NPCO. There has been no application for a wasted costs order. There is nothing to show that their conduct in any way improper or unreasonable. It does not follow from the failure of the applications that there was any misconduct in making the applications.
104. If it is said that NPCOs will control behaviour and make such applications less frequent, there is no warrant for this to be taken into account. It is not consistent with the principle that solicitors or lawyers should not have costs orders made against them generally so long as they are not acting outside their ordinary role, and that in acting without more in such role, they should not be considered as the real party or a party in these applications.

(h) Ground 10 – Justice

105. This ground is to the effect that that the only just outcome is for BBK to be ordered to pay the costs which they caused to be incurred. This is not a free-standing ground. On the premise that BBK was acting not beyond or outside their role as solicitors and was not to be considered as the real party or a party, there is no reason to make such an order in this case. Once that had been found, it was necessary to find that there was something more to trigger a liability for an NPCO. It was submitted on behalf of the Appellant that the cap to the amount of costs payable by BBK of 15% of his

damages was the something more, such as had the effect that the costs offer in this case was irrelevant to the client in that (a) the client stood to recover nothing from the applications, and (b) the client was not exposed to an order of costs because of the QOCS regime. The Costs Judge was right to find that there was nothing more in this case. The cap does not affect the analysis as set out in detail above, especially in the discussion about Grounds 1-3 above. The solicitor in the position of BBK is allowed to make the application to recover its disbursements and costs, even although there is nothing in this for the client and the client is protected from exposure to costs under the QOCS regime. As BBK succinctly put it, if the core of the appeal fails, then the Costs Judge was right to conclude that it would not be just to make the order.

XIV Appeal against exercise of discretion

106. There is nothing to indicate that any of the above grounds for interfering with an exercise of discretion exist. There has been no misdirection in law. There has not been any procedural unfairness or irregularity. In respect of the other criticisms, the Costs Judge took into account all relevant matters and did not consider irrelevant matters.
107. Further, I consider that the decision was not plainly wrong. In this regard, I echo the words of Saini J in *Azam* that the hurdle is a high one to challenge a discretionary balancing exercise, and how rare it would be for a judge who has exercised a discretion having regard to relevant considerations will have come to a conclusion outside the broad ambit of their discretion.
108. If, contrary to the conclusion which I have reached, there was some error on the part of the Costs Judge such that the Court ought to exercise its discretion afresh on the appeal, I should then have concluded bearing in mind all the reasons which are set out in this Judgment and especially in the Discussion section above, that it was not appropriate to make an NPCO against BBK. In other words, the conclusion would have been the same as that of the Costs Judge. In the event, this is unnecessary because the decision of the Costs Judge was correct, and there was no error of the Costs Judge requiring the Court to exercise its discretion afresh.

XV Conclusion

109. For all these reasons, each of the grounds of appeal must fail and the appeal is dismissed. Both parties had representation of the highest order, and the Court is grateful to Counsel for their respective expertise and experience and for the quality of their written and oral submissions.
110. The parties are asked to draw up orders to reflect the above including the matters referred to in paragraph 7 above.