

Qualified one-way costs shifting and “The Troubles”

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In this article, Colin Campbell of Kain Knight discusses the High Court’s decision in *Clark and others v Adams and another* [2024] EWHC 62 (KB), where Soole J confirmed that qualified one-way costs shifting (QOCS) protection applied in a personal injury claim seeking £1 damages “for vindicatory purposes”.

What could qualified one-way costs shifting (QOCS) and “The Troubles” possibly have in common? That was one of the questions which Mr Justice Soole was required to address in *Clark and others v Gerry Adams and the Provisional Irish Republican Army (PIRA)* [2024] EWHC 62 (KB). For more information on the facts of the case, see [Legal update, QOCS applies to personal injury claim seeking £1 damages for vindicatory purposes \(High Court\)](#).

It will be remembered that (1) “the Troubles” are referred to as the period of disturbance and violence in Northern Ireland in the 1970s, ‘80s and ‘90s, which were largely resolved following the signing of the Good Friday Agreement on 22 May 1998 and (2) QOCS is “the regime under which the defendant pays the claimant’s costs if the claim is successful, but the claimant does not pay the defendant’s costs if the claim is unsuccessful”, as per Sir Rupert Jackson’s [Civil Litigation Costs Review: Final Report December 2009](#). The regime came into force in April 2013 under Part 44 of Section II of the Civil Procedure Rules (CPR) and applies to claims for damages for personal injuries and under the Fatal Accidents Act (see CPR 44.13(1)).

The interest in *Adams* for members of the legal profession who practise in the law of costs, lies in whether QOCS will apply should Mr Adams’s defence be successful, because the claimants’ claim is limited to just £1 for “vindicatory purposes” if the action succeeds. If “QOCS protection”, as it is known, is disappplied, Mr Adams will be permitted to enforce any costs orders made in his favour against the claimants without financial limit.

The three claimants who have brought the claim were injured in bombing incidents attributed to the PIRA at the Old Bailey in March 1973, London Docklands in February 1996 and at the Arndale Centre Manchester in June 1996. So far as Mr Adams has been concerned, as originally formulated, the claim alleged that he was a

leading member of the PIRA including membership of the Army Council (roles which he has denied), with the claim form seeking damages for “... pain, suffering and loss of amenity ... the Claimants between them claim £1.00 for vindicatory damages”.

On 19 January 2024, Soole J, when deciding preliminary issues, struck out the action against the PIRA on the grounds that an unincorporated association cannot be sued in its own name, and also against Mr Adams in so far as it had been made in a representative capacity. That left the claim against him in his personal capacity. Was Mr Adams correct in his submission to the court that the claimants did not benefit from “QOCS protection” because their claims did not include “... a claim for damages ... for personal injuries” within the meaning of CPR 44.13(1)(a)?

Before Soole J, counsel for Mr Adams referred to the Jackson Report and contended that the purpose of the QOCS regime was to address the typical inequality of arms between claimants and defendants after success fees and after-the-event insurance premiums ceased to be recoverable in personal injury claims under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. A claim for £1 vindicatory damages by claimants supported by crowdfunding against an uninsured individual defendant such as Mr Adams, was far removed from the considerations which had led to the implementation of the QOCS regime.

Counsel had continued that it was not Mr Adams’s case that the claim was an abuse of process which would permit the court to strike it out. Rather, the action was not a claim for damages for personal injury (see CPR 44.15) and there was a distinction to be drawn between a claim for substantial damages and for nominal damages. This was reinforced by the glossary to the CPR which treated damages as compensatory. The glossary’s “guide to the meaning of certain legal expressions

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used in these Rules” described “Damages” as “A sum of money awarded by the court as compensation to the claimant”. A nominal sum of £1, claimed for vindictory purposes and founded on torts which were actionable *per se*, did not constitute compensation. It followed that the claimants did not have QOCS protection and the court should give a declaration to that effect.

These arguments did not find favour with Soole J. The claimants had alleged that they had suffered assault/battery and injury as a result of a bombing incident, and in the pleadings, they had set out the necessary ingredients of a claim for damages for personal injury within the meaning of the rule. Limiting that claim to a nominal £1 did not diminish its status as a claim for damages for personal injury, and the necessary broad construction of the rule did not impose any limitation on the nature of the damages to be awarded if they were sought in respect of personal injury.

The point could be tested another way. A claimant might properly decide to limit the amount of damages claimed for personal injury to a sum which did not reflect the full compensation which the law would otherwise provide. This might be for a number of reasons, including:

- Limiting the fee payable for issuing the claim.
- Having regard to circumstances where the particular defendant was of limited means.
- Where the principal wish was to establish liability and thereby vindicate rights.

It followed that there was no basis for the court to impose any qualification by reference to the amount of damages claimed, or to require a claimant to pursue substantial damages in order to obtain QOCS protection.

This outcome is not one with which Mr Adams will be happy. Although the judgment does not say so, it is to be assumed that both he and the PIRA will have been awarded the costs of the issues upon which they were successful, namely the striking out of the claim, save for the case against Mr Adams in his personal capacity. However, that does not mean that Mr Adams will be able to recover those costs.

Where an action has been struck out as disclosing no reasonable grounds for bringing the claim, costs orders

made in favour of defendants can be enforced without the permission of the court (see CPR 44.15(a)). It follows that the PIRA will be able to recover its costs from the claimants. However, the same cannot be said so far as Mr Adams is concerned. It is not simply that he lost the QOCS protection issue. The point goes further than that.

In the first place, only one limb of the claim against Mr Adams, that in his representative capacity, has been struck out. The personal claim can proceed. It follows that CPR 44.15(a) will not have been engaged, as it would have been the case had the entire action gone.

Secondly, the claimants began their action in 2022 when section II of CPR 44 was in its original form. On 6 April 2023, CPR 44.14 was amended, permitting any costs orders made in favour of defendants against claimants in personal injury claims to be enforced after the proceedings have been concluded and the costs assessed, if not already agreed. However, the amended rule affects only claims issued on or after that date.

That will have two consequences for Mr Adams. First, if the claimants win, he will be unable to enforce any costs order awarded in his favour for the striking out of the representative claim against the costs of the action. This is because costs cannot be set off against costs: they can only be enforced against the aggregate of damages and interest (see CPR 44.14 in force until 5 April 2023). Since that sum will be the £1 vindictory damages, Mr Adams will be left significantly out of pocket because he will still have to pay the successful claimants’ costs of the action. Second, if the claimants lose, any costs orders made in Mr Adams favour will be unenforceable except against the vindictory damages, due to QOCS protection and to Soole J’s decision that it will apply in this case.

It was in order to address the potential unfairness of such a situation that CPR 44.14 was amended on 6 April 2023. While that might be of no help to Mr Adams, he will take comfort from the fact that there will be no more similar civil claims involving the Troubles. On 17 May 2022, the Northern Ireland Troubles (Legacy and Reconciliation) Act came into force: it ended the ability of a party to bring a personal injury claim where such a civil action would be “Troubles-related” under the Act.

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