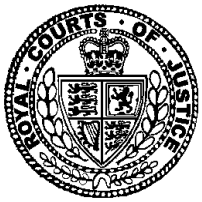

Neutral Citation Number: [2022] EWHC 3244 (KB)

Case No: QA-2021-000288

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2022

Before :

THE HON. MR JUSTICE BOURNE

- -

Between :

MUNIRA PATHAN	**Appellant**
- and -	
COMMISSIONER OF POLICE OF THE METROPOLIS	**Respondent**

- -

Alex Bennie (instructed by **Edwards Duthie Shamash**) for the **Appellant**
Robert Talalay (instructed by **Plexus Law**) for the **Respondent**

Hearing date: Thursday 24 November 2022

- -

Approved Judgment

This judgment was handed down remotely at 10am on 16 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Hon. Mr Justice Bourne:

Introduction

1. This appeal against an order made by HHJ Saunders on 2 December 2021 concerns "qualified one way costs shifting" ("QOCS") under CPR Part 44. The respondent also applies for permission to cross-appeal against another part of the judge's order relating to costs. By agreement between the parties, I am invited to decide that cross-appeal if I grant permission for it.

2. The appellant was the claimant below. On 13 December 2017 she was arrested by police officers and then detained at a police station for 12 hours. In due course she was released and the police took no further action against her. On 3 May 2019 she issued a claim form, drafted by her husband and signed by both of them, alleging that her arrest and detention were unlawful. The particulars of claim said that she suffered high blood pressure and felt faint while in detention and that she "has suffered loss and damage", but she did not indicate that she was making a claim for damages for personal injuries.

3. A defence was served on 18 June 2019, denying that the police had acted unlawfully. At paragraph 15 it stated: "In the event that the Claimant is seeking damages for personal injury, the Defendant will aver that any such claim ought to be struck out for non-compliance with the pre-action protocol, CPR 16.4 in Practice Direction 16. The claim form did not comply with the rules for personal injury claims, in particular because it did not give details of any injury or annexe a medical report.

4. At a CCMC on 18 August 2020, the court heard an application on behalf of the appellant, now with legal representation, for permission to amend her claim. The court considered draft amended particulars of claim containing a number of changes. One of these was a paragraph under particulars of loss and damage, claiming that she had suffered a psychiatric injury. That claim was supported by a report from a GP. At the hearing, the judge took the view that this was not sufficient and that a report by a psychiatrist would be needed. Some amendments were allowed, but the amendment to introduce the personal injury claim was not. However, the appellant was given permission to make a further application to allow the amendment introducing a personal injury claim if so advised.

5. On 26 November 2020 she made a further application, serving amended particulars of claim which again contended that her arrest and detention had precipitated "a depressive disorder associated with anxiety" and now attaching a report from a consultant psychiatrist. Her renewed application to amend was opposed by the respondent because the claim was listed for trial starting on 22 February 2021 and this date would be lost if the amendment was permitted.

6. At a further hearing on 22 January 2021, HH Judge Roberts granted permission for the amendment and vacated the trial date.

7. By an amended defence served on 11 February 2021, the respondent neither admitted nor denied the claim for personal injury but put the appellant to proof. In due course the respondent instructed a psychiatric expert. That expert confirmed that the

appellant had some psychiatric issues but there were some differences of opinion on diagnosis. Without overtly disputing causation, the respondent's expert appeared to express some scepticism about causation of the appellant's continuing illness.

8. The trial took place at Central London County Court between 30 November 2021 and 2 December 2021. Much of one day was occupied by the evidence of the expert psychiatrists. The defendant's two lay witnesses gave evidence on liability only. The claimant gave evidence on liability and quantum and submissions were made on liability and quantum.

9. Judge Saunders ruled that the arrest and detention were lawful, and therefore the claim failed in its entirety. He therefore did not decide causation of loss or quantum. The judge then heard submissions on costs. He decided that these would follow the event, in other words the claimant would be ordered to pay the defendant's costs, subject to the effect of QOCS. As to that, the judge said:

> "86. QOCS would normally apply to a personal injury case and I am grateful to the parties for showing me the case of *Brown v Commissioner of the Police of the Metropolis* [2019] EWCA 1724, which is the leading authority on the question of disapplication of QOCS in certain circumstances.
>
> 87. My view is that up until the date when HHJ Richard Roberts made the order allowing the claimant to amend the particulars of claim in this action, the case was simply a loss of liberty case. It was not a personal injury case. On that date, it became in my view, a personal injury case or at least a substantially enlarged portion of the case became a personal injury case.
>
> 88. In my view, the correct application of the QOCS exceptions is for me to make an order that the QOCS protection only applies to the period as from 22 January 2021. Prior to that, the QOCS protection cannot apply because it is simply not during that period, a personal injury case. I do not agree with Mr Bennie's submission that this is a retrospective application.
>
> 89. In my view, the claimant should pay the defendant's costs of the action up until 22 January 2021 on the standard basis and for the whole of the action, but as from 22 January 2021, it should be applied as subject to QOCS. In order to explain why my decision is in relation to the post-22 January period is that this case was substantially, from that date, a personal injury action. Most of the evidence I have heard during the trial, in fact nearly all was relating to the PI aspect of the claim. it clearly formed the vast majority and I think it is very difficult to strip out which part relates to loss of liberty and which part relates to personal injury because it relates all back to the same incident, namely the arrest."

10. The relevant parts of the Judge's order provided:

> "3. The Defendant is permitted to enforce 100% of her costs … incurred up to 22 January 2021.
>
> 4. The Defendant may not enforce her costs … incurred subsequent to 22 January 2021 without further Order of the Court."

11. By the appeal, the appellant contends that the judge was wrong to decide that QOCS did not apply to costs incurred up to 21 January 2021. By the cross-appeal, the respondent contends that the judge erred by not permitting the enforcement of the order relating to costs incurred after that date.

The law

12. The relevant provisions of the CPR relating to QOCS are as follows:

> "**44.13**
>
> (1) This Section applies to proceedings which include a claim for damages –
>
> (a) for personal injuries;
> (b) under the Fatal Accidents Act 1976; or
> (c) which arises out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934,
>
> but does not apply to applications pursuant to section 33 of the Senior Courts Act 1981 or section 52 of the County Courts Act 1984 (applications for pre-action disclosure), or where rule 44.17 applies.
>
> (2) In this Section, 'claimant' means a person bringing a claim to which this Section applies or an estate on behalf of which such a claim is brought, and includes a person making a counterclaim or an additional claim.
>
> **44.14**
>
> (1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant.
>
> (2) Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.
>
> (3) An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.
>
> **44.15**
>
> Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that –

(a) the claimant has disclosed no reasonable grounds for bringing the proceedings;
(b) the proceedings are an abuse of the court's process; or
(c) the conduct of –
  (i) the claimant; or
  (ii) a person acting on the claimant's behalf and with the claimant's knowledge of such conduct,

is likely to obstruct the just disposal of the proceedings.

44.16

(1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.

(2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that is considers just, where –

(a) the proceedings include a claim where which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1979 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or
(b) a claim made for the benefit of the claimant other than a claim to which this Section applies.

(3) Where paragraph (2)(a) applies, the court may, subject to rule 46.2, make an order for costs against a person, other then the claimant, for whose financial benefit the whole or part of the claim was made."

13. The basic effect is that where proceedings "include" a claim for damages for personal injury, any costs order against the claimant cannot be enforced to the extent that its value exceeds any damages and costs awarded to the claimant. So claimants seeking damages for personal injury can proceed on a "cost-neutral" basis, knowing that they will not incur a net liability to the defendant.

14. That basic rule is subject to exceptions, several of which are not relevant to this case. But a relevant exception is found in rule 44.16(2)(b). Where the proceedings are of a "mixed" kind, meaning that they include both a personal injury claim and some other kind of claim, the Court may grant permission for a costs order to be enforced against the claimant up to its full extent and to the extent that the court considers just.

<u>The parties' submissions on the appeal</u>

15. The appellant's counsel Alex Bennie contends that the meaning of the judge's ruling is that, before 22 January 2021, the proceedings did not fall within CPR 44.13 because, at that time, they did not "include a claim for damages … for personal

injuries". He points to the words in paragraph 88 of the judgment: "Prior to that, the QOCS protection cannot apply because it is simply not during that period, a personal injury case. I do not agree with Mr Bennie's submission that this is a retrospective application." This, he says, was not an application of the discretion under rule 44.16(2)(b) to allow a costs order to be enforced, but a ruling that the protection against enforcement simply did not apply.

16. Mr Bennie's short point is that this ruling was wrong in law, because the wording of rules 44.13 and 44.14 makes clear that if there is a personal injury claim, then QOCS applies to the entire proceedings. Although rule 44.16(2)(b) creates a discretion to permit enforcement, that does not mean that QOCS protection cannot apply to costs incurred during a period before a personal injury claim is added by amendment.

17. Mr Bennie relied on *Brown v Commissioner of Police of the Metropolis* [2019] EWCA Civ 1724. *Brown* concerned the scope and effect of rule 44.16(2)(b). In this case the police had unlawfully obtained and used private information about the claimant and her daughter. She brought claims for damages under the Data Protection Act 1998, the Human Rights Act 1998 and for at common law for breach of contract, misfeasance in public office and misuse of private information, putting forward heads of loss including, but not limited to, personal injury. The judge found that personal injury was not caused by the defendant's wrongful acts. Some other heads of claim succeeded and others did not. The claimant was awarded damages of £9,000 for loss and damage other than personal injury. As this was below the amount of previous Part 36 offers, a costs order was made in favour of the defendant. The trial judge ruled that QOCS gave the claimant automatic protection against enforcement of the costs order to any extent exceeding the amount of her damages. That was because the claimant had sought damages for personal injury in respect of each of the causes of action on which she had relied. The judge considered that every "claim" had therefore been a personal injury claim, so that the discretionary exception to QOCS under rule 44.16(2)(b) did not apply. The defendant appealed to the High Court.

18. Whipple J allowed the appeal, and the Court of Appeal dismissed a further appeal by the claimant, ruling that the rule 44.16(2)(b) exception applies if the proceedings "also involve claims made by the claimant which are not claims for damages for personal injury" and that these would include "the data protection or police misconduct claims which were successful in the present case".

19. Mr Bennie referred me to paragraph 27 of *Brown*, where Coulson LJ quoted from the decision of Whipple J which the Court of Appeal was upholding:

> "49. Thus, CPR r 44.16(2) applies in any proceedings where a claim has been made for damages for personal injuries as well as for something else (i e, as well as a claim other than a claim for damages for personal injury). This is a 'mixed claim'.
>
> 50. Once that point is resolved, the construction of CPR r 44.16(2)(b) becomes clear. Mixed claims are within the scope of QOCS, by virtue of CPR r 44.13(1). But CPR r 44.16(2)(b) provides a mechanism to deal with mixed claims. The mechanism is quite simply to leave it to the court at the end of the case to decide

> whether, and if so to what extent, it is just to permit enforcement of a defendant's costs order."

20. Mr Bennie submits that the present situation was the same. Regardless of the fact that the personal injury claim was added by amendment, this was a mixed claim, to which rule 44.16(2)(b) applied. There was therefore a discretion to permit enforcement but the claim did not fall outside the QOCS regime.

21. The other authority relied on by Mr Bennie was *Achille v Lawn Tennis Association Services Ltd* [2022] EWCA Civ 1407. This involved another mixed claim which was based on several causes of action and which alleged personal injury and other heads of loss. The personal injury claim was struck out on the ground that it disclosed no reasonable grounds for bringing the claim, but another head of loss remained in issue. The county court made a costs order against the claimant in respect of the struck out part of the claim. It also held that that order could be enforced to its full extent, applying the exception to QOCS in CPR 44.15. The claimant appealed, arguing that QOCS applies to "proceedings" which include a personal injury claim, that the exception applies only where those "proceedings" (as opposed to just the personal injury element of those proceedings) are struck out, and that in his case the proceedings remained in being despite part of them being struck out. The Court of Appeal allowed the appeal, holding that "proceedings" has the same meaning in rules 44.13 and 44.15.

22. Mr Bennie therefore contends that QOCS applies to mixed proceedings even where, as in the present case, there is a period when those proceedings include a personal injury and another period when they do not. The Court in such a case can achieve a just outcome by applying the discretion under rule 44.16(2)(b).

23. Robert Talalay, counsel for the respondent, first submits that the judge did not in fact disapply QOCS but instead applied the discretion under rule 44.16(2)(b), and so did not commit the error of law alleged by the appeal. Paragraph 3 of the judge's order reads as a grant of permission to enforce the order for costs incurred in the period before the amendment, whereas no such grant would be needed if QOCS did not apply to those costs. He also points to the words "application of the QOCS exceptions" at the beginning of paragraph 88 of the judgment in support of this.

24. More generally, Mr Talalay founds his case on the proposition that it would plainly be unjust not to permit the respondent to enforce the order for the costs incurred in the period before the claim was amended. The just outcome, he submits, could be achieved either by a ruling that QOCS did not apply to that period or by an application of rule 44.16(2)(b).

25. Mr Talalay accepted that *Achille* makes it more difficult to argue that the first of those routes is legally correct. Nevertheless, he submits that when a personal injury element is added to a claim by amendment, interpreting QOCS as applying to the entire lifetime of the proceedings offends against the legal principles of certainty and non-retrospectivity. He draws an analogy with the approach of courts to limitation issues which arise when a new claim is added to existing proceedings outside a limitation period. Rather than applying a rigid rule of "relation back", whereby an amendment takes effect from the date of the original pleading, courts strive to achieve a just result

on the facts of each case: see *Ward v Hutt* [2018] 1 WLR 1789 at [46] per Judge Paul Matthews. [2017] FSR 31. Sometimes the court may grant permission to amend on terms as to the date from which the new claim takes effect, and this may be relevant when deciding issues of interest or costs: see *FA Premier League v O'Donovan* [2017] FSR 31 per Chief Master Marsh at [34(iii)].

26. Here, Mr Talalay submits, relation back would be inappropriate and contrary to the overriding objective of deciding cases justly, because the appellant failed to bring the whole of her claim at the outset and/or did not comply with the rules for personal injury claims, and because relation back would undermine any previous negotiations between the parties, creating a perverse incentive for a party to amend its case. Before an amendment adding a PI claim, he points out, a defendant may have taken strategic decisions about the litigation and about settlement which did not take QOCS into account, which could be unfairly upset by a later retrospective introduction of QOCS.

Discussion

27. In my judgment, the learned Judge did rule that the QOCS regime was inapplicable to the period before the amendment. Although paragraph 88 of the judgment is ambiguous, the words "QOCS protection cannot apply" are more consistent with that meaning, and the Judge's rejection of the "submission that this is a retrospective application" can only mean that, in the view of the Judge, the amendment did not have the effect of applying QOCS to the whole of the claim. Moreover, the reason given in paragraph 88 for the judge's order is that the claim at the relevant time "was not a personal injury case". The judge did not say that the case fell within rule 44.16(2)(b) because it was a mixed claim and that he therefore had a discretion to permit enforcement, or give any reason for his exercise of the discretion other than the lack of a personal injury claim at the relevant time.

28. Although Mr Talalay is right to observe that, on this interpretation, there was no need for the permission to enforce which paragraph 3 of the order appears to grant, that paragraph can be read as merely declaring the position as the judge saw it, i.e. that enforcement was permissible because QOCS did not apply, rather than as a grant of permission.

29. I also agree with the appellant that this was an error of law.

30. The case of *Achille* is consistent with that conclusion. QOCS applied to all of the proceedings in that case, even after the personal injury claim had been struck out. It would therefore be logical for QOCS to apply to all of the proceedings in the present case, even before the addition of the personal injury claim.

31. Whether or not *Achille* compels that conclusion, I consider that the meaning of rule 44.13(1) is clear. The QOCS regime, which includes certain layers of judicial discretion, applies if proceedings include a personal injury claim and does not apply if proceedings do not include a personal injury claim. That question, to be asked and answered when the judge considers what if any order to make relating to the enforcement of a costs order, is a binary question, in other words there are only two possible answers, which are "yes" and "no". In the present case the proceedings

included a personal injury claim and so the answer was yes. Moreover, that was indisputably so on the date when the judge made his order, making the position in this case clearer than it was in *Achille*. The QOCS regime therefore applied to the proceedings. With all due respect to the judge, who gave a careful and detailed judgment on the claim, he fell into error by ruling that QOCS was to be applied only to the proceedings occurring after the amendment.

32. I am not persuaded that the doctrine of "relation back" is relevant. This is not a case of an amendment having retrospective effect. Instead, a choice has been made by the drafters of the CPR about when the enforcement position is automatic and when it is discretionary.

33. Mr Talalay argues that the above interpretation would encourage claimants to bolster weak claims by adding spurious personal injury claims to them at a late stage in the hope of obtaining costs protection.

34. That argument has been advanced and considered in other cases about the scope and effect of QOCS. In *Siddiqui v University of Oxford* [2018] 4 WLR 62, Foskett J found that the proceedings were a mixed claim falling within rule 44.16(2)(b). He said at [8]:

> "It is … an important objective to ensure that the QOCS provisions are not abused by simply 'dressing up' a non-personal injuries claim in the clothes of a personal injuries claim to avoid the normal consequences of a failure in litigation."

35. That passage was referred to in *Brown*, where Coulson LJ set out his conclusion on how mixed claims are dealt with, emphasizing the need for flexibility in the application of the discretion under rule 44.16(2)(b):

> "57. But in such proceedings, the fact that there is a claim for damages in respect of personal injury, and a claim for damage to property, does not mean that the QOCS regime suddenly becomes irrelevant. On the contrary, I consider that, when dealing with costs at the conclusion of such a case, the fact that QOCS protection would have been available for the personal injury claim will be the starting point, and possibly the finishing point too, of any exercise of the judge's discretion on costs. If (unlike the present case) the proceedings can fairly be described in the round as a personal injury case then, unless there are exceptional features of the non-personal injury claims (such as gross exaggeration of the alternative car hire claim, or something similar), I would expect the judge deciding costs to endeavour to achieve a cost neutral result through the exercise of discretion. In this way, whilst it will obviously be a matter for the judge on the facts of the individual case, I consider it likely that, in most mixed claims of the type that I have described, QOCS protection will in one way or another continue to apply ...
>
> 58. It is however important that flexibility is preserved. It would be wrong in principle to conclude that all mixed claims require discretion to be exercised in favour of the claimant, because that would lead to abuse, and the regular tacking on of a claim for personal injury damages (regardless of the strength or weakness

> of the claim itself) in all sorts of other kinds of litigation, just to hide behind the QOCS protection (as Foskett J warned in *Siddiqui* [2018] 4 WLR 62)."

36. So, whilst the danger of encouraging spurious personal injury claims is recognised in the authorities, the solution is identified as the exercise by judges of the discretion conferred by rule 44.16(2)(b) in mixed claims. The solution is not a reading of rules 44.13 and 44.14 which excludes a period of time before a personal injury claim was added by amendment.

37. Finally, in respect of the appeal, Mr Talalay submits that this Court nevertheless should not interfere with the judge's order. Even if QOCS applied to the pre-amendment segment of the costs, the absence of any personal injury element at that time (to which the judge referred) meant that the only just course was to disapply QOCS under rule 44.16(2)(b). Therefore, he submits, the judge made the right order even if for the wrong reason.

38. In my judgment, it is impossible to conclude that an order permitting enforcement of the pre-amendment costs was necessarily the just outcome. It was for the judge to consider what order was just, having regard to the application of QOCS and therefore to the fact that non-enforcement was the starting point, and I have held that he did not do so. The judge would then have had to consider the nature of this mixed claim, bearing in mind the observations of Coulson LJ in *Brown* which are quoted above. He would have had to consider what was known, and what could reasonably be inferred, about the reason why the proceedings did not initially include a personal injury claim. At one end of the spectrum is the case where a spurious personal injury claim is "tacked on", but (given the facts as summarised above) I see no basis for concluding that this was such a case. At the other end might be a case where all claims, personal injury and otherwise, arose from the same incident (as in this case) and where a personal injury claim initially was not advanced because of a lack of professional advice (which may or may not have been the case here). Even if the judge was minded to permit some enforcement, he would have had to consider what order would be just for the period between 13 August 2020 (when permission to add a personal injury claim was first sought, albeit without evidence from a psychiatrist) and 22 January 2021 when permission was granted. The judge might also have been able to have regard to the strength or weakness of the appellant's case as to the causation and quantum of loss and damage, subject to liability.

39. That exercise has not been performed, and I am not in as good a position as the judge to perform it.

40. The appeal must therefore be allowed and the issue remitted to the County Court.

The cross-appeal

41. On his application for permission to cross-appeal, Mr Talalay submits that the judge was wrong to decide that the order for the post-amendment costs should not be enforced, and that the judge should have exercised his discretion under rule 44.16(2)(b) in the respondent's favour.

42. Following *Brown*, Mr Talalay submits that the judge should have asked himself (1) whether this was a mixed claim (which it clearly was), (2) whether the claim, though mixed, could in the round be considered to be a personal injury claim, in which case the result would usually be cost-neutral for the claimant and (3) if it was not so considered, what percentage of the costs should be permitted to be recovered.

43. He contends that the judge erred in dealing with the second of those questions, and that in paragraph 89 of the judgment (quoted above), the judge was wrong in law to say that claims for personal injury and loss of liberty could not be stripped out from each other because they arose from the same facts, and wrong in fact to say that nearly all of the evidence related to the personal injury aspect of the claim.

44. Mr Talalay refers me to the discussion in *Brown* about when rule 44.16(2)(b) applies, i.e. what is meant by "a claim … for the benefit of the claimant other than a claim to which this Section applies". The Court of Appeal held that the rule applies when there is a claim or claims for different types of loss, personal injury and non-personal injury, and that there is no requirement for these to arise out of distinct facts or distinct breaches of duty. He submits that the judge committed the error of imposing such a requirement, and that the judge should have been persuaded to make a different order by the fact that the original claim based on loss of liberty was legally distinct from the personal injury claim and was substantial in its own right.

45. In response, Mr Bennie reminds me that the proposed cross-appeal is directed against an exercise of the judge's discretion. This Court should therefore interfere only where the decision has "exceeded the generous ambit within which reasonable disagreement is possible": see *Tanfern v Cameron-MacDonald* [2000] 1 WLR 1311 at [32]. Mr Bennie submits in essence that the judge reasonably could and did view this case as, in the round, a personal injury claim. Therefore his order followed the guidance in *Brown* and was wholly reasonable.

46. I agree with Mr Bennie that it was plainly open to the judge to take the view that, after the amendment, the claim could be viewed in the round as a personal injury claim. The fact that all heads of loss arose from the same incident was relevant to that question. This had nothing to do with the error identified in *Brown*, of insisting that a mixed claim needed to consist of different causes of action giving rise to different heads of loss.

47. Since the claim was permissibly viewed in that way, the policy underpinning QOCS meant that a claimant should be able to advance such a claim on a cost-neutral basis.

48. In fairness to Mr Talalay, the explanation at paragraph 89 of the judgment was expressed slightly oddly because, on the face of it, much of the evidence concerned liability for the police's actions and had nothing to do with the causation or the extent of any personal injury. Nevertheless, if the appellant had sought damages only for the personal injury element of her loss, then it would be right to say that all of the evidence heard at this trial would still have needed to be heard.

49. Be that as it may, in my judgment it cannot be said that the judge's order in this regard was outside the boundaries of reasonable disagreement. The cross-appeal could not succeed and therefore I refuse permission for it.