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Qualified One Way Costs Shifting: Problems solved and problems yet to come

By Andrew Hogan
Kings Chambers
Manchester, Leeds and Birmingham
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The story so far

One of the key planks of the Jackson Reforms implemented on 1st April 2013, was the introduction to England and Wales of Qualified One-Way Costs Shifting (QOCS) in personal injury claims. This was the price that compensating parties paid for the abolition (for the most part) of recoverable success fees and ATE insurance premiums in personal injury claims.

In October 2021, the Supreme Court in **Adelekun v Ho [2021] UKSC 43** clarified the law on QOCS, revealing that this protection was more extensive than previously held by the Court of Appeal in **Howe v Motor Insurers Bureau [2020] Costs LR 297**, which was overruled. Whereas hitherto in a case where a defendant's part 36 offer was accepted out of time, an order for set off of a claimant's costs against a defendant's costs would have been made under rule 44.12 CPR, the Supreme Court ruled this was impermissible unless an "order for damages and interest" for the purposes of rule 44.14 CPR had been made in favour of the claimant.

In the earlier case of **Cartwright v Venduct Engineering Limited [2018] EWCA Civ 1654** the Court of Appeal construed rule 44.14 CPR as being inapplicable to cases that concluded by way of settlement. The settlement in that case was concluded by way of Tomlin Order. The aggregate effect of **Cartwright** and **Adelekun** is that only in a small number of cases will a defendant be able to enforce a costs Order in its favour, as there is no corresponding order for "damages and interest" as most cases settle without trial.

In May 2022, the government published a consultation document entitled **Consultation on changes to the Qualified One-Way Costs Shifting (QOCS):** this document proposed amendments to part 44 CPR which would reverse **Adelekun** and restore the position to that pertaining in **Howe** to enable a defendant to set off a costs order in its favour against its own liability to pay costs. Further discussion led to proposals in October 2022, to also reverse **Cartwright** as part of the package of amendments.

But rather than wait for the amendments, in the last year a number of cases have been fought by compensating parties in the Court of Appeal and the High Court, seeking to gain leverage under the existing rules, and expand the bases upon which QOCS can be disapplied.

Chappell v Mrozek [2022] EWHC 3147 (KB)

The first of the cases to proceed to a hearing was that of **Chappell v Mrozek** in the High Court of Justice before Master Stevens. The facts of the case were simple. A young man suffered a road traffic accident in December 2016 and sustained serious injuries. His claim was valued in his schedule of loss at in excess of £8 million when it was issued. But when serving a counter schedule in May 2020, the defendant made a part 36 offer of £250,000. In February 2022, the claimant accepted that offer, many months out of time. The costs order was accepted by both parties to be the usual one: giving the claimant the costs of the action to 21 days after the offer was made, and the defendant the costs thereafter.

But the defendant would not accept that the costs order in his favour could not be enforced, due to **Adelekun**. So, the defendant refused to pay the settlement, effectively forcing the claimant to apply to court for an order for payment under CPR 36.14(7). This the defendant contended, would be an "order for damages and interest" within the meaning of CPR 44.14 which would permit enforcement up to the limit of the settlement sum. Master Stevens rejected this argument. She found that she was bound by **Cartwright** and **Adelekun**, that consequently where the case had settled without a trial there was no "order for damages and interest" and rejected the defendant's argument, that CPR 36.14(7) provided an escape route.

University Hospitals of Derby and Burton NHS Foundation Trust v Harrison [2022] EWCA Civ 1660

A matter of days later, the Court of Appeal handed down judgment in the case of **University Hospitals of Derby and Burton NHS Foundation Trust v Harrison**, whereby the Court of Appeal had to consider again whether an order following the late acceptance of a defendant's part 36 offer was an "order for damages and interest" made in favour of the claimant, entitling the defendant to enforce a costs order made in its favour.

In that case, the claimant had required the permission of the court to accept the part 36 offer, because of the continuing accrual of social security benefits paid to her, affecting the net amount of the part 36 offer, payable after those had been taken into account. Coulson LJ, giving the substantive judgment of the Court of Appeal held that the order was not an "order for damages and interest" for 5 reasons.

First the mere granting of permission under CPR 36.22(9) did not create an order for "damages and interest" even though the amount of compensation the claimant would receive was on the face of the order. Secondly, that the defendant's argument risked elevating form over substance. Thirdly, that the policy considerations favoured the claimant's arguments. Fourthly that both **Cartwright** and **Adelekun** indicated that a settlement achieved by an offer and an acceptance under the part 36 regime was not an "order for damages and interest". Finally, what the present rule did not say: that it was only until recently the CPRC had intended that CPR 44.14 should cover all the ways in which a claimant could recover something, they would have said so.

Excalibur and Keswick Groundworks v McDonald [2023] EWCA Civ 18

The latest judgment in the Court of Appeal, handed down on 17th January 2023 was the decision of the Court of Appeal in **Excalibur and Keswick Groundworks Ltd v McDonald**. Over the years there have been any number of decisions at first instance, where judges have struck out personal injury claims under CPR 3.4(2)(b) on the basis of the Delphic phrase that the claimant's conduct has been such as to "obstruct the just disposal of the proceedings".

There has been no clear definition of what form such conduct must take and compensating parties have pushed the edge of the envelope of the rule, in order to gain a disapplication of QOCS. I suspect that practice will now cease, as in this case, the Court of Appeal laid down a clear test, of the high hurdle that a defendant must surmount to achieve a strike out.

On the facts of the case, the claimant gave a different account in his witness statement, to that contained in the statement of case, as to how his accident came about. In pre-trial discussions this was pointed out, and the claimant elected to serve notices of discontinuance, on the morning of the trial. The district judge at first instance, set aside those notices and struck out the proceedings. On appeal this decision was reversed. On further appeal to the Court of Appeal, the defendant lost again. Lady Justice Nicola Davies giving the judgment of the Court of Appeal stated at paragraph 49:
I would formulate the question thus: is the litigant's conduct of such a nature and degree as to corrupt the trial process so as to put the fairness of the trial in jeopardy? In my judgment, the claimant's conduct did not begin to meet the degree of seriousness which is envisaged in this formulation.

All these cases involved compensating parties attempting to expand the circumstances in which a claimant's QOCS protection could be disallowed. In the cases of **Chappell** and **University Hospitals of Derby and Burton NHS Foundation Trust**, to overcome the hurdle presented by **Cartwright** and **Adelekun**. In the case of **McDonald**, to expand a point of procedural default, into something analogous to an abuse of process.
Success for the defendant in any of these cases would have created a series of anomalies in the application of the QOCS provisions adversely affecting claimants who found defendants did not pay their settlements, or disabled claimants, claimants who lack capacity and children who settle their cases by way of part 36 settlement or claimants whose cases were struck out for procedural default.

The backdrop to all these cases is the reforms introduced by LASPO 2012 on the 1st April 2013: in each case, the defendant thought the result was unfair and pursued its arguments to court, where the bigger picture had to be considered by the judges, who found against them, notwithstanding that the result in any individual case might be "counterintuitive and unfair" per **Adelekun** at paragraph 44. This is often the consequence of "bright line" rules.

But any apparent "unfairness" is part of the overall QOCS scheme which seeks to rebalance a field inherently tilted against claimants in their favour. Moreover, it is also right to note that by reason of the QOCS provisions, defendants do not now have to pay success fees on those elements of the Claimant's costs which are recoverable, and pay a greatly reduced ATE insurance premium, than would have been the case before 1st April 2013 when the recovery of ATE insurance premiums was largely abolished.

The imminent reforms to QOCS in April 2023, will almost certainly remove the settlement exemption from the scheme, but may throw up some new challenges. As noted in the case of **University Hospitals of Derby and Burton NHS Foundation Trust** at paragraph 51:

51. *As a result of the decision in Adelekun v Ho, the Ministry of Justice consulted on proposed amendments which would allow set-off in respect of costs orders. It appears that, originally, the proposed amendments were directed solely at that point. However, at the meeting of the CPRC on 7 October 2022, a fuller amendment was agreed in principle, although it has yet to be formally ratified. That read as follows:*

"(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 or agreements to pay damages, costs and interest made in favour of the claimant. (My emphasis)."

52. It would not be appropriate to say anything more about this proposed change for the purposes of this appeal, save to note two things. First, it does not expressly address Part 36. Secondly, it provides a final indication of why I consider that the appellant's interpretation is incorrect. Not only does rule 44.14(1) not presently say what it would need to say

for the appellant to be right, but it would appear that the rule may be changed so as to make it at least arguable (if a settlement under Part 36 is an "agreement to pay") that a party in the claimant's position would lose her QOCS protection in the future. If the CPRC are changing the rule so as to cover "agreements to pay", then it is not unreasonable to conclude that they think that the present rule does not cover "agreements to pay".

PME v The Scout Association and Bolt Burdon Kemp LLP [2023] EWHC 158 (SCCO)

A further interesting case is that of **PME**. This case is yet another attempt to circumvent the absolute bar posed by the cases of **Cartwright** and **Adelekun**, upon a defendant seeking to enforce a claim to costs, but this time through the route of a non-party costs Order against the claimant's solicitors. I would not say that such an order is impossible to obtain, but cases such as **Myatt v The National Coalboard (No 2)** illustrate how difficult such an order is to obtain. There must be something more, than a solicitor simply acting as a solicitor within the permitted scheme of the Courts and Legal Services Act 1990, to recover her client's costs, even if they are to be used to pay her fees and expenses.

Perhaps the real lesson in all of this, is that it illustrates, again, that test cases tend not to work for defendants at least in the field of costs. Far better to lobby the rule makers and obtain statutory intervention to change the rules and principles upon which cases are decided, as demonstrated time and again, in the years since 2013.

The QOCS reforms from 6th April 2023

On 2nd February 2023 **The Civil Procedure Amendment Rules 2023** were laid before Parliament with the stated intention that they should come into force on 6th April 2023, amending the Civil Procedure Rules 1998 from that date. There appears to be a drafting error in rule 1, as the first two provisions are identical:

1.—(1) These Rules may be cited as the Civil Procedure (Amendment) Rules 2023 and comeinto force on 6th April 2023, except as provided by paragraphs (2) and (3).
(2) These Rules may be cited as the Civil Procedure (Amendment) Rules 2023 and come into force on 6th April 2023, except as provided by paragraphs (2) and (3).
(3) The amendments made by rule 24 of these Rules apply only to claims where proceedings are issued on or after 6th April 2023.

Nonetheless, the effect of rule 1(3) is tolerably clear. The amendments proposed by rule 24, are subject to transitional provisions, which mean that they only apply to claims where proceedings are issued on or after the 6th April 2023. As the amendments contained in rule 24, constitute a wholesale rewriting of the Qualified One Way Costs Shifting (QOCS) rules, which lie at the heart of personal injury litigation in this country, and reverse one Supreme Court decision and a number of Court of Appeal decision, this is very important.

Rule 24 provides:

24.In rule 44.14—
(a) in paragraph (1), for "damages" substitute ", or agreements to pay or settle a claim for,damages, costs";
(b) after paragraph (1), insert—
"(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.";
(c) renumber what was paragraph (2) as paragraph (3);
(d) after what will now be paragraph (3), insert—
"(4) Where enforcement is permitted against any order for costs made in favour of the claimant, rule 44.12 applies."; and
(e) renumber what was paragraph (3) as paragraph (5).

The rule change will sweep away the current orthodoxy grounded in **Cartwright, Adelekun**, **Chappell** and **Harrison** that where a personal injury case concludes by way of settlement, rather than at trial, there is nothing that a defendant can practically do to enforce a claim for costs in her favour. Whether the costs orders are made on an interlocutory basis, or at the conclusion of a case, by for example, a claimant accepting a part 36 offer out of time, there was nothing the defendant could practically do. Now a defendant will be able to go after any entitlement that a claimant has to damages and costs, to enforce and set off their own entitlements to costs accordingly, capped only at the total of damages and costs notionally due to the claimant.

But I predict that the pendulum has likely swung too far again, and there are going to be a number of unwanted, if readily foreseeable consequences, which flow from this rebalancing of the rules.

The first and most obvious one, is that by permitting enforcement against costs as well as damages, until the claimants entitlements are exhausted, it is inevitable, that a claimant will end up in debt to his own lawyers. Thus it is quite conceivable that by bringing a personal injury claim, a claimant may well end up losing his house, in order to pay his own lawyers.

The rationale behind QOCS, was that a reasonable claimant who simply got the merits of his case wrong, would not have to lose his house to pay for the costs of the failed litigation. There will be scenarios, where a claimant's solicitor, reasonably advises his client to reject a low offer. A long way down the line, an expert will change his opinion, and that offer will have to be accepted out of time, and a claimant will then face not only the loss of his own damages and costs, but have to pay his own lawyers from his own resources.

Secondly, and parasitic upon the first issue noted above, a wise claimant faced with a marginal chance of success, will be positively incentivised to press on to trial, either to vindicate his own case, or for the ancillary purpose of avoiding paying his own lawyers, by losing the case. This is "bonkers", but there will be cases, where the merits are not clear cut, and a claimants lawyers will find themselves locked into trial, or bailing out and facing a solicitor-own client costs dispute.

Thirdly, these rule changes will give a second wind to the ATE insurance industry. For the last decade an optional extra, or reinsurance for a firm's disbursement carry, ATE immediately steps back up to the line as an essential element of any case, in order to defray a defendant's costs entitlements, or to look at it another way, to reinsure the claimant's lawyers own fees, to ensure that these are not depleted by setoff. But the pricing for these policies, as they are likely to be called on more often, may change markedly, and the increased premiums will have to be borne from the claimant's damages.

Fourthly, and immediately, all claimants in all personal injury cases, where proceedings might need to be issued, but have not yet been, need to be advised about the imminent rule change, and given advice that it is greatly in their interest to issue proceedings now, in order to retain the benefit of the enhanced QOCS protection that will inure to claimants who issue before 6th April 2023. This in turn will lead to any number of interesting premature issue arguments, in the next two years, where the essential argument will be that it was reasonable to take advantage of the transitional provisions.

Fifthly, and in consequence, the courts could be overwhelmed in March, by the number of cases issued, in order to take advantage of the transitional provisions. What will happen to all those cases? And what effect will it have on the existing backlog? And have any extra resources been made available by MOJ/HMCTS to deal with it?

And finally, the transitional provisions put an end to an apocryphal belief among defendants that the QOCS amendments, would in some form, be retrospective, permitting them to enforce against settlements made in the last 6 years. Leaving aside the problems with categorising QOCS rules as wholly procedural in nature or the clear conflict such a belief had with the principle of finality, that spectre at least has been laid to rest and claimants lawyers who have settled cases, without due regard to the imminent changes in the QOCS rules, can probably breathe a sigh of relief.

A further issue, which will probably have to await a change in government, is the expansion of the QOCS scheme into other areas of law. Obvious categories of case which would benefit from QOCS include actions against the police and claims for discrimination under the Equality Act 2010. However, given that central and local government and other arms of the state such as the police, may in turn face greater accountability for civil wrongs that they commit by reason of any expansion, this project may yet get placed in the circular filing cabinet.

Andrew Hogan practises from Kings Chambers in Manchester. His blog can be found at www.costsbarrister.co.uk. He appeared for the claimants in the cases of Cartwright, Chappell, University Hospitals of Derby and Burton NHS Foundation Trust and Excalibur and Keswick Groundworks Limited noted above.

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