Civil Procedure Rule Committee

Consultation on proposed amendments to Part 44 II CPR on Qualified One Way Costs Shifting

A response by the Association of Personal Injury Lawyers

June 2022

Introduction

APIL welcomes the opportunity to respond to the Civil Procedure Rule Committee, in conjunction with the Ministry of Justice, on its proposals to amend Part 44 CPR as a result of the cases of *Ho v Adelekun*[1] and *Cartwright v Venduct Engineering Limited*[2].

We are disappointed by the substance of the proposed changes, given that we consider that they fail to reflect the key purpose of Qualified One-way Costs Shifting (QOCS) and the policy reasons for its introduction. The decisions in *Ho* and *Cartwright* bring significant certainty to how QOCS operates. Such certainty is welcome to practitioners and the judiciary in reducing unnecessary ancillary litigation. We believe that the proposed changes would lead to unfairness for claimants and ongoing uncertainty, just as stability has been achieved by appellate clarification of the rules, and would lead to other unintended and undesirable consequences.

Preliminaries

APIL considers that the proposals involve two quite distinct issues, which need to be considered in turn.

First, there is the question, explored in *Ho,* about whether the "fund" available for any defendant costs should include costs payable to the claimant, in addition to damages.

Secondly, and quite separate to that first point, and arising out of the decision in *Cartwright*, is the question of the precise circumstances in which a claim may be resolved and therefore the circumstances in which the key exception to QOCS applies, whereby defendants' costs may be enforced up to the level of damages awarded. This is a broader point which raises questions about the parity of approach, under Part 36, between late-accepting claimants and late-accepting defendants.

Both these issues need to be seen in the context in which QOCS was introduced. For the reasons which follow, APIL considers that context did not anticipate loss of QOCS protection on the basis of "unmeritorious points" i.e. points which have been pursued but which have simply been unsuccessful. We also do not believe that the scheme, as clarified by the courts in a series of decisions over the last nine years, has produced a system which generates any kind of "windfall" for claimants. On the contrary the caselaw has carefully interpreted the

[1] [2021] UKSC 43
[2] [2018] EWCA Civ 1654

rules, in a way that reflects the carefully calibrated system introduced by the Government based on the recommendations of Sir Rupert Jackson.

QOCS – background

Section 2 of Part 44 CPR, which provides for QOCS, was intended as a very specific carve out for strong policy reasons. Sir Rupert Jackson, in his preliminary report noted that, prior to the enactment of the Access to Justice Act 1999 on 1 April 2000, almost all proceedings were within the scope of legal aid[3]. Many personal injury claims were pursued with the support of legal aid, though the impact of means and costs / benefit testing over time reduced the number of those who, in practice, could benefit from the same.

The 1999 Act contained a list of exclusions that placed a large number of types of case generally outside the scope of legal aid. This included personal injury (other than clinical negligence – which claims have since been largely removed from scope). Personal injury cases were excluded specifically because of the availability of other funding mechanisms, in particular CFAs, supported by After the Event insurance.

Hand in hand with this was the provision in the same Act for the recovery of success fees and ATE premiums from unsuccessful opponents[4]. Access to Justice was no longer to be achieved by the provision of legal aid – providing for funding of the claimant's case whilst at the same time providing protection for the claimant against adverse costs (save where the claimant essentially behaved improperly). Instead, the funding burden was placed on solicitors, who would provide access to justice by not charging for unsuccessful cases, but being able to charge (and recover from the opponent) a 'reward' – the success fee – in successful cases. Adverse costs protection was no longer provided by legal aid, but instead by ATE and to prevent the cost of the same being a bar to access to justice, the reasonable cost of such policy was to be recoverable from the claimant in successful cases (and, in practice, to be met by the insurer in unsuccessful ones).

As set out in Sir Rupert Jackson's final report in 2009, there were policy reasons for introducing recoverability of success fees and ATE premiums: *"The Government had recognised that the civil law tended to be accessible only to those who could afford to pay the high and unpredictable costs of litigation or to those who were so poor that they qualified financially for legal aid. The so-called MINELAs, sometimes described as middle England, were people who had means above the legal aid threshold but who could not afford to litigate without putting their homes and their assets at risk. Introducing recoverability would provide support not only for those who would previously have qualified for legal aid, but also for the MINELAs."*[5] Therefore the substantial retraction of legal aid and the introduction of the recoverability of success fee and ATE premiums, complimented each other.

The scheme of CFAs and ATE with recoverable additional liabilities was ultimately deemed to be unsatisfactory. Sir Rupert's final report detailed the four perceived flaws with the recoverability of success fees and ATE premiums from unsuccessful opponents. The third flaw was said to be the excessive *"costs burden"* it placed upon unsuccessful opponents which sometimes amounted to a denial of justice. As a result of such flaws, Sir Rupert recommended the abolition of recoverability of success fees and ATE premiums from unsuccessful opponents, and proposed instead that successful claimants would have to pay success fees (capped at 25 per cent of general damages and past losses) and ATE

[3] P144 of Sir Rupert Jackson's preliminary report dated May 2009
[4] P167 of Sir Rupert Jackson's preliminary report dated May 2009
[5] P108 of Sir Rupert Jackson's final report dated December 2009

premiums out of recovered damages (subject to a partial exception for ATE premiums in clinical negligence cases).

Sir Rupert recognised the need for a one-way-costs shifting rule as an integral part of these proposed changes[6]:

> *"1.2 Claimants often take out ATE insurance in order to cover (a) liability for the other side's costs and (b) own disbursements in the event that the claim fails. Defendants are liable to pay such insurance premiums in all the cases which they lose (i.e. the vast majority of claims which are seriously pursued). Therefore defendants pay a high price for the luxury of costs recovery in those few cases which they win. On looking at the data which has come in during phase 1 of the Costs Review, it seems to me that a one-way costs shifting rule would (a) be cheaper for defendants than the present two-way rule and (b) reduce the burden on claimants. It is therefore necessary to look at this proposal and its implications in further detail."*

Sir Rupert went onto consider one-way costs shifting from 3 different perspectives:

> *"3.1 This question needs to be looked at from three perspectives, namely that of the claimant, that of the defendant and that of the public interest.*
>
> *3.2 Claimant perspective. Under a one way costs shifting regime, the claimant would no longer be at risk of having to pay the defendant's costs. The claimant would no longer need to insure against that risk. These features may be thought advantageous. On the other hand, some incentive may need to be introduced into the rules (a) to discourage frivolous claims and (b) to encourage acceptance reasonable offers. If such an incentive is introduced, this may affect the merits of one way cost shifting from the claimant's perspective.*
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> *3.3 Defendant perspective. On the material which I have so far seen, the two way cost shifting rule appears to bring little benefit to defendants. On the other hand, it may be said that without such a rule (a) more frivolous actions would be started and (b) claimants would be less likely to accept reasonable offers. The incentives which the Forum of Insurance Lawyers ("FOIL") suggest would be necessary to prevent such conduct are set out in chapter 10 above. An alternative suggestion which has been made is that even under a one way costs shifting regime there should be a power to award costs against the claimant in exceptional circumstances.*
>
> *3.4 My own tentative view is that penalties of the kind suggested by FOIL may not be necessary. The fact that the solicitor is on a CFA already discourages (a) frivolous claims and (b) the rejection of reasonable offers. Furthermore the claimant must still incur (or insure against) court fees and expert fees, which he will not recover if the action fails. In most personal injury claims ATE insurance is issued under delegated authority. I would question whether the risk of liability for adverse costs operates as a brake upon claimant conduct.*
>
> *3.5 The public interest perspective. The personal injury litigation industry is populated by numerous interest groups and middlemen, all of whom have to meet their overheads and make a profit on top. If any layer of activity can be removed from the process (and insurance against adverse costs liability is one layer of activity), it may be thought that this will serve the public interest."*

[6] P224 of Sir Rupert Jackson's preliminary report dated May 2009

Sir Rupert's initial proposal[7] was for a very simple scheme whereby where a claimant lost a personal injury case, no order for costs was made and it was only claimants who would recover costs in successful cases. However, during the consultation there was a perceived need, as noted above, to discourage frivolous claims and encourage claimants to accept reasonable offers[8]. Sir Rupert, in the final report at p184, identified why a one-way costs shifting regime was suited to personal injury litigation, leading to a recommendation (at p188 to 193) to introduce qualified one way costs shifting, with deterrence against bringing frivolous claims or applications and incentives for claimants to accept reasonable offers.

> "*…5.8 In personal injuries litigation it must be accepted that claimants require protection against adverse costs orders. Otherwise injured persons may be deterred from bringing claims for compensation. I recommend a form of qualified one way costs shifting in personal injury cases, as set out in chapter 19 below*
>
> *…*
>
> *4.7 I therefore propose that all claimants in personal injury cases, whether or not legally aided, be given a broadly similar degree of protection against adverse costs…"*

The introduction of QOCS was therefore an integral and necessary part of the removal of recoverable success fees and ATE premiums. Whilst the precise model differed from that proposed by Sir Rupert, the policy aim remained to place PI claimants in a similar position to the position that they would have been, at least so far as adverse costs orders were concerned, with legal aid. Claimants were to have the ability, regardless of their means, to pursue claims against well-resourced defendants.

The model that was introduced did not seek to pursue a different principle or policy objective, but instead sought a different means of achieving those objectives.

The 'blanket' protection for the claimant was provided by CPR 44.14(1) generally prohibiting enforcement of costs orders against claimants.

The need to encourage claimants to accept reasonable offers was provided for also within CPR 44.14(1) by providing that if the claimant went to trial and failed to beat such a reasonable offer the damages awarded at trial (and interest) would be subject to being reduced by costs orders made in the defendant's favour (usually being the costs incurred for the period after expiry of the defendant's relevant offer).

The need to discourage frivolous claims (whilst not discouraging claims generally) was achieved by the specific provisions in CPR 44.15. The 'frivolity' bar was set reasonably high – for the exception to apply, the claim had to have been struck out for one of the reasons given. 'Mere' failure of the claim was not enough. In addition, the Government made provisions to address dishonest claims and claims where the claim was a mixed claim or was in whole or part for the benefit of a third party (CPR 44.16).

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[7] Preliminary Report page 224, paragraph 1.3

[8] Final Report, page 187, paragraph 2.11

The model chosen was therefore consistent with the general recommendations and intentions of Sir Rupert, if not the precise form he proposed.

The policy aims of QOCS have been expressly recognised by the Courts. In *Catalano v Espley-Tyas Development Group Limited*[9] Longmore LJ stated:

"In Jackson LJ's 2009 Review of Civil Litigation Costs, he recommended that success fees under conditional fee arrangements and ATE premiums should no longer be recoverable as costs from the defendant but he recognised that some form of costs protection would be required in personal injury cases. His intention was that claimants should have protection similar to that enjoyed under the pre-2000 legal aid provisions: -"

Vos LJ also set out the policy justification for QOCS in *Wagenaar v Weekend Travel Limited*[10]:

> *"Suffice it to say that the rationale for QOCS that Sir Rupert Jackson expressed in those sections came through loud and clear. It was that QOCS was a way of protecting those who had suffered injuries from the risk of facing adverse costs orders obtained by insured or self-insured parties or well-funded defendants. It was, Sir Rupert thought, far preferable to the previous regime of recoverable success fees under CFAs and recoverable ATE premiums…"*

These important policy reasons for the introduction of QOCS still stand. It is important in understanding them to fully appreciate the delicate balance struck. Whether a legal aid model or the model finally chosen was to be used, the core policy objective was to ensure access to justice but at the same time remove the burden of additional liabilities. This could only be done by removing the need for claimants to insure, so far as possible, against the risk of adverse costs. The mechanism to achieve that was one of blanket costs protection subject only to limited and narrow exceptions.

Those exceptions were deliberately aimed at and were intended to be confined to;

(i) Putting claimants at risk of a loss of damages if they proceeded to trial having failed to accept reasonable offers;
(ii) Putting claimants at risk of adverse costs orders where their claims were so flawed that they were struck out on the limited basis identified;
(iii) Putting claimants at risk of adverse costs orders if they behaved in a fundamentally dishonest fashion;
(iv) Ensuring QOCS was limited to personal injury claims;
(v) Putting third parties at risk of costs if the claimant's claim was, in truth, being brought for their benefit (in whole or part).

It is important to note that in considering first a model of complete adverse costs protection (no adverse costs orders), then a legal aid type model and then the final proposed model identified above, of starting with a blanket ban on enforcement subject to specifically identified exceptions, all three models;

(i) Seek to ensure access to justice and to strike the careful balance of not seeking to inhibit claimants pursuing claims whilst at the same time providing safeguards against specific and narrowly identified risks;

[9] [2017] EWCA Civ 1132, paragraph 4
[10] [2014] EWCA Civ 1105; paragraph 36

(ii) Do not seek to provide defendants with a general right to recover costs, subject only to certain restrictions. Quite the opposite – the approach is of costs shifting only one way, subject only to very limited and express qualifications to that principle (as the acronym states);

(iii) Do not provide for any kind of set off of any type of defendant costs generally against claimant costs, whether discretionary or otherwise. Not only would such a concept be wholly inconsistent with the whole idea of one way costs shifting, it would introduce a fundamental departure from the legal aid principle which was relied on so heavily.

In particular, on the last point, whilst set off (of defendant costs against claimant costs) could occur in the legal aid model, it would not usually expose a claimant to being personally out of pocket. This was because any such set off would reduce the between the parties' costs payable to the claimant solicitor (who may therefore only be compensated for some of their work at legal aid rates). The solicitor, however, could not charge the claimant for this work (the legal aid regime prohibited such a charge). Accordingly, a claimant was not discouraged from pursuing a claim by the risk of any such set off.

To permit a set off in the QOCS context would place the claimant at the risk of being out of pocket. In a successful case they will be liable to their solicitor under a CFA, but the defendant will reduce the recovered costs by virtue of a set off, leaving the claimant potentially liable to pay the balance. This risk would go far beyond the risk claimants were exposed to under the legal aid scheme and far beyond the risks it was decided, by virtue of the Jackson report and the consultations, that claimants should be exposed to which were then expressly identified in the rules.

It would materially remove the protection provided to claimants and would fundamentally alter the careful balance of risk. If claimants bear that risk, they will be discouraged from pursuing reasonable claims by virtue of the risk of adverse costs orders. If the claimant solicitors are told that they should bear that risk instead, it will be a risk the CFA success fee scheme (already capped) does not cater or compensate for and will risk solicitors being unable or unwilling to take cases on, with a similar deleterious effect on access to justice.

The unfairness created by allowing set-off is illustrated in the case of *Howe (No 2) v Motor Insurers Bureau*[11]. Mr Howe was a lorry driver, left paraplegic after an accident in France caused by an unidentified vehicle shedding a wheel. His claim against the MIB failed on limitation grounds. The MIB then asserted that Mr Howe's claim was outside QOCS, as the claim against MIB did not lie in negligence. Mr Howe and his lawyers were then required to argue this point in the Court of Appeal. Mr Howe won and the MIB's costs orders against him in the damages claim were declared unenforceable. However, the Court of Appeal then set the costs off against the costs orders in Mr Howe's favour on the QOCS issue. The result was that Mr Howe recovered no funds by which to pay his solicitors for the work they had done on the QOCS issue. Mr Howe had no choice but to incur these liabilities to his lawyers, given the MIB's erroneous assertion that he was not entitled to QOCS. Mr Howe's solicitors were left unpaid for the work they did, as Mr Howe could not afford to pay them. Neither of these things can possibly have been contemplated by the drafters of the QOCS regime.

It is important to note too, that there is no ATE insurance product of which we are aware, which enables a claimant to insure a failure to recover costs resulting from a set-off. While it is still possible to obtain ATE insurance to cover a claimant's liability for adverse costs, e.g. because of a failure to better a Part 36 offer or a loss on an interlocutory dispute, insurance

[11] [2017] EWCA Civ 932

is not available to cover a claimant's liability to their own lawyers which results from funds which would otherwise have been recovered under an inter partes costs order being cancelled out by a set off.

To permit set off of this kind in principle would fundamentally alter the balance of QOCS protection and materially risk access to justice

We consider that there is no justification for removing or reducing the level of protection provided. We do not agree that amendments are required "to ensure that adverse behaviours in litigation are discouraged and the claimant bears adequate financial risk". The amendments proposed would not "ensure that the claimant bears adequate financial risk", but would rather result in an unlevel playing field, with claimants being left at risk of adverse costs orders leading them to potentially be no longer able to pursue a claim. At the same time, well-resourced defendants reap a double benefit of no longer having to pay the claimant's ATE premiums and success fees, and also being able to offset any costs they are required to pay against the claimant's costs.

In relation to discouraging "adverse behaviours in litigation", the QOCS provisions already have mechanisms built in to tackle exploitation of the system or bad behaviour. There are very clear, limited, exceptions as to when QOCS protection is lost, as set out in CPR 44(15).

Judicial interpretation of the QOCS regime

In *Faulkner v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 296 QB*,* Mr Justice Turner commented that "*the resilience of the QOCS regime is such as to limit very strictly the inroads which can be made into the scope of its application*".

Whilst it has been necessary, over the last 9 years, for there to be a number of cases clarifying the precise operation of the regime, that process is now largely completed. The key issues have been clarified and the regime is now capable of being interpreted and applied in a consistent and predictable fashion.

The courts have embraced, and supported, the policy considerations which led to the recommendations made by Sir Rupert Jackson and which the 2013 revisions to the CPR were intended to implement. There have been a range of decisions dealing with different aspects of QOCS in which this has been made clear.

In *Wagenaar* the Court of Appeal held that when a defendant commenced a Part 20 claim against a third party, the claimant had the benefit of QOCS (including the costs of a defendant in pursuing a Part 20 claim) but that did not prevent the third party, if successful, from obtaining a costs order against the defendant.

In *Mabb v English*[12], May J held that there was no inherent unfairness in a claimant filing a notice of discontinuance to avoid the risk of strike out, reiterating the purpose of QOCS:

> "*In essence, QOCS was introduced to cover the abolition of recoverable success fees and ATE premiums in personal injury litigation, previously a burden to defendants obliged to pay costs…whilst I can see that the effect of r.38 and 44.15 taken together can give rise to a situation in which a defendant, as here, loses the opportunity to obtain the benefit of the exception, I cannot conclude that there is any*

[12] [2017] EWHC 3616 (QB)

inherent unfairness in a claimant taking advantage of the result that the rules together permit…"

It has also been held that if the claimant has the benefit of QOCS in the original claim the claimant will retain that protection in the event of an appeal. That approach to QOCS in appeals taken in *Parker v Butler*[13] and was endorsed and adopted by the Court of Appeal in *Wicks Building Supplies Ltd v Blair (No, 2) (Costs)*[14]. Baker LJ held that:

"*29. … The purpose of the QOCS regime is to facilitate access to justice for those of limited means. As Edis J observed at paragraph 3 of his judgment in Parker v Butler, if a claimant's access to justice is dependent on the availability of the QOCS regime, that access will be significantly reduced if he is exposed to a risk as to the costs of any unsuccessful appeal which he may bring or any successful appeal a defendant may bring against him. It follows that, as Edis J noted at paragraph 17 of his judgment, to construe the word "proceedings" as excluding an appeal would do nothing to serve the purpose of the QOCS regime. I therefore conclude that any appeal which concerns the outcome of the claim for damages for personal injuries, or the procedure by which such a claim is to be determined, is part of the "proceedings" under CPR r.44.13."*

It is clear, therefore, that the judiciary are supportive of the role that QOCS plays in helping to ensure a level playing field between claimants and defendants and have been able to identify where the balance was intended to lie and to construe the rule accordingly.

Aside from strong policy reasons for maintaining the rule as it stands, we would also urge caution in relation to making amendments to the rules relating to QOCS, as doing so is likely to lead to unintended consequences. As was stated by Vos LJ in *Wagenaar*:

"It is worth mentioning…the introduction of the QOCS regime is part of a wholesale reform of the funding of personal injury litigation. It is just one of a raft of interconnected changes. If QOCS were to be struck down, there would need to be a complete rethink of the entire Jackson reform programme as it affects personal injury litigation…"

For the reasons already identified above, we are seriously concerned that the proposed changes here risk this very problem. They proposed a 'rebalancing' of the scheme, but in a way which goes beyond anything considered or contemplated in the process leading to its introduction. A careful balance was struck. Tweaking one part of that scheme alone risks upsetting that careful balance.

Seen in this context the ruling in *Ho* is not an outlier. Rather the outlier was the earlier Court of Appeal ruling in *Howe (No 2) v Motor Insurers' Bureau [2017] EWCA Civ 932* that allowed a set off against costs (a point effectively recognised by the Court of Appeal in *Ho* when granting permission to appeal).

The cases referred to illustrate both the determination of defendants to undermine, at every opportunity, the application of QOCS matched by the robust approach of the courts, reflecting the compromises which underpinned the 2013 reforms to the CPR, to ensure the system works fairly. The sound approach of the common law, to the Civil Procedure Rules and the policy underpinning those rules, should not be overturned by piece-meal changes.

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[13] [2016] EWHC 1251 (QB)
[14] [2016] EWHC 1251 (QB)

The Proposals - 'Unmeritorious points'

Paragraph 11 of the consultation seems to suggest that there should be a further exception to QOCS protection where a claimant raises "unmeritorious" points. "Unmeritorious" is not defined and would likely have dangerous consequences and lead to satellite litigation – it is likely that whenever a point in a case is lost, it would be argued that it was unmeritorious and should not have been brought in the first place.

If 'unmeritorious' is to be read to mean no more than 'unsuccessful', the idea that claimant should be exposed to adverse costs orders for pursuing unsuccessful points in cases is, of course, contrary to the whole concept of One Way Costs Shifting. The whole point of such a regime is that, bar conduct of the type expressly provided for in CPR 44.14 and 44.15, claimant are able to pursue points with a risk of losing without facing adverse costs consequences. A one way costs shifting regime that only protects claimants when they are successful on all points is no protection at all.

The example given in the consultation paper is a prime example. The 'unmeritorious' point appears to refer to the point which was subject of the first decision by the Court of Appeal in *Ho*[15] - as opposed to the QOCS point which went to the Court of Appeal.

In relation to that point – the claimant was unsuccessful at first instance. She not only obtained permission to appeal but was successful on a first appeal. She was unsuccessful in the Court of Appeal, but there is absolutely no indication that the Court of Appeal viewed the claimant's case in that Court as 'without merit'. Quite the opposite, whilst unsuccessful, the Court referred to the claimant having advanced a *"powerful argument"* on an issue that was seen as being of sufficient importance to warrant surmounting the second appeal test.

The point taken – ultimately unsuccessfully – was only 'unmeritorious' in the sense of ultimately being unsuccessful after prolonged legal argument, respectfully treated by the Court of Appeal, and two appeals.

If that is an example of the sort of case where a claimant is to be now exposed to an additional exception to QOCS on the basis of having pursued an 'unmeritorious' point, then one way costs shifting would have minimal residual value.

The Proposals – Set-off & CPR 44.14

(a) generally

Amending section II of Part 44 to allow that a claimant's entitlement to costs is considered to be part of the overall fund against which set off can be applied will defeat the policy objectives of QOCS. A set off prejudices the protection intended to be provided for injured people under the QOCS regime and, contrary to the overriding objective, encourages satellite litigation, potentially of an unmeritorious nature, with the defendant seeking to set aside notice of discontinuance in order to make allegations of fundamental dishonesty, which then do not succeed, or simply seek to restore the claim so that the application might be made for strike out.

[15] [2019] EWCA Civ 1988; paragraph 43

The reference in paragraph 13 of the proposals suggesting that Lord Briggs in *Ho* considered that the decision appeared to be 'counter intuitive and unfair' is, with respect, inaccurate. Lord Briggs in fact stated that;

> *"We recognise that this conclusion may lead to results that at first blush look counterintuitive and unfair…Any apparent unfairness in an individual case such as this dispute between Ms Ho and Ms Adelekun is part and parcel of the overall QOCS scheme devised to protect claimants against liability for costs and to lift from defendants' insurers the burden of paying success fees and ATE premiums in the many cases in which a claimant succeeds in her claim without incurring any cost liability towards the defendant."*

The 'apparent unfairness' he was referring to was, therefore no more than the sort of unfairness complained of by the defendant in *Wagenaar*. Of course, in an individual case a defendant may perceive unfairness in being unable to recover its costs. That is inherent in a system of one-way costs shifting. However, any apparent unfairness in the individual case is balanced by the wider policy objectives identified by Lord Briggs. That balance must not be lost. It also cannot be said that the Supreme Court in *Ho* purely considered the wording of the QOCS regime and ignored the policy reasons behind QOCS. Although the Supreme Court was largely concerned with the language of the QOCS regime in its CPR context, the policy reasons behind QOCS were given due regard.

There appears to be a perception that the decision in Cartwright has 'short changed' defendants, because they have been 'denied' the ability to set off defendant's costs against claimant's damages in most settled cases because of the lack of a curial order for damages. For reasons considered below, this perception is inaccurate – CPR 44.14 operates as intended by a limited removal of protection from a claimant who rejects an offer, proceeds to trial and fails to better it. Nothing further was intended and therefore nothing has been denied to defendants. However, even if that were incorrect, 'correcting' Cartwright would then correct that perceived imbalance. To then permit set off in addition would represent a huge shift in balance in favour of defendants and the combination of the two would have the potential to greatly inhibit justice for claimants.

In *Cartwright*, Coulson LJ recited the aforementioned words of Vos LJ in *Wagenaar* regarding the policy reasons behind QOCS. The Court decided that Tomlin orders and part 36 offers and acceptances do not constitute as "an order for damages" in the context of CPR 44.14(1), and therefore costs orders in a defendant's favour are unenforceable where a claim has settled by Tomlin order or part 36 offer and acceptance. Coulson LJ went on to say that encompassing damages by way of Tomlin order and part 36 offer and acceptance into the QOCS regime cannot be done simply[16]; and his lordship further stated that his decision goes beyond just the straightforward construction of the rule and gives some examples as to the issue of bringing 'out of court settlements' into the QOCS regime[17].

Coulson LJ stated unequivocally that the wording of CPR 44.14(1) would need wholesale reform if 'out of court settlements' were to be included. The suggested wording of the Government seemingly does not attempt to do this, and merely seeks to add the orders for costs in the claimant's favour into the fund against which the defendant can enforce its costs orders.

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[16] Paragraph 41

[17] Paragraphs 48 to 51

This appears to be illogical. As noted, one of the key reasons for an inroad into otherwise blanket costs protection (in whatever form) was perceived to be the need to encourage claimants to accept reasonable offers. If, as these proposals seem to accept (by not incorporating Part 36 and other settlements into 'orders' for damages), that policy objective was achieved by putting at risk claimants' damages but only where they reject an offer, go to trial and fail to better that offer, then the same is acknowledging both that that balance and policy objective has been achieved and that the claimant's damages should not be otherwise at risk.

The remaining policy objectives (discouraging frivolous claims) are already expressly addressed by CPR 44.15 and 44.16. There was never any identified policy objective which required the potential for a set off of costs against costs (save in the sort of case already covered by CPR 44.15 and CPR 44.16 and which is therefore already achieved), much less one which warrants including not merely costs orders, but 'deemed' costs orders in CPR 44.14 when deemed orders for damages (for good reason) are not.

(b) Without permission

The proposed rule change to CPR 44.14(1) (the insertion of the word 'costs') in fact goes substantially beyond seeking to reverse Ho (which, for the reasons given above, is unnecessary and undesirable).

By inserting the word 'costs', a defendant would be entitled to set costs off against costs without having to seek permission of the court. This would therefore no longer be a discretionary set off of costs against costs – as provided for otherwise in CPR 44.12[18] or as might have occurred (at no risk to the claimant) under the legal aid regime. There would be no discretionary supervision by the court of this set off at all under this amendment.

Moreover, by virtue of the proposed new rule CPR 44.14(2), this would extend not merely to actual orders of the court, but to deemed orders.

For the reasons already given, introduction of even a discretionary and judicially supervised set off of costs against costs in a QOCS case would risk upsetting a delicate balance. To permit set off in all cases, without any judicial supervision or discretion and absent any threshold requirement for the claimant to have behaved improperly or dishonestly is a major, unwarranted and dangerous shift.

Even prior to *Ho*, in those cases where the court considered (in light of *Howe* or otherwise) that a discretion to set off did exist, the courts have been wary of its exercise. In *Faulkner,* the judge declined to order a set off and observed:

> *"23. There is an obvious danger in attempting to lay down general rules concerning the exercise of a pure discretion. The whole purpose of affording the court a procedural discretion is to provide for the flexibility necessary to achieve the overriding objective in circumstances of infinite potential permutation. I would not, therefore, conclude that the discretion to set off costs against costs is to be exercised against the defendant in every case in which it unsuccessfully applies to set aside notice of discontinuance of a claim falling within the QOCS regime - as the logic of Mr*

[18] For the avoidance of doubt, the suggestion in drafting note 1 that CPR 44.12 does not involve any exercise of judicial discretion is considered to be wrong. Not only is CPR 44.12 expressed entirely in terms of a discretionary power, but such has been the basis of its exercise. In this context – and in a specific QOCS example (pre *Ho*) see the decision of Turner J in *Faulkner*.

Mallalieu's argument might otherwise appear to mandate. Each case must be decided on its own facts."

In *Faulkner,* it *"became readily apparent that the application to set aside the notice of discontinuance was very weak".*

Without the discretion in place, defendants would exploit the ability to set off their costs against those of the claimant, leading to great unfairness for the claimant. More importantly, the uncontrolled potential for such set offs and their potential impact on claimants would have to be explained to every claimant at the outset of their case and would serve as a manifest disincentive to reasonable claimants seeking to pursue reasonable claims, but acknowledging the risk that they might not win every point. This is the very sort of inhibition of access to justice that was to be avoided.

Given the risk of game playing by the well-resourced defendant, and the potential that set off has to undermine the protection provided by QOCS, it is vital that the need for a court order expressly providing for set off of costs against costs, remains.

If, contrary to our primary submissions, any consideration is to be given to allowing a set off of costs against costs in a QOCS case, at the very least it should be a CPR 44.16 / CPR 44.12 type exercise, involving the supervisory and discretionary jurisdiction of the court and should ideally involve some threshold test requiring the case to be in some way out of the norm.

The proposals - "Orders for Costs against the Claimant" – CPR 44.14, deemed costs orders and Part 36

The reasons why both set off of costs against costs and in particular set off of deemed costs orders are unnecessary and undesirable are identified above.

Dealing specifically here only with the interaction with Part 36 if such proposals were to be adopted, it is important to note that the deemed costs order referred to in the consultation will only apply, pursuant to Part 36.13 (1) where an offer to settle the whole of the claim is accepted within the relevant period. In such circumstances, it seems entirely appropriate for the claimant to recover costs, indeed such provision is part of the certainty afforded by using the mechanism found in Part 36. To undermine the effectiveness of the deemed order, by leaving issues of costs open, would, potentially, discourage use of Part 36 and, in any event, be likely to generate satellite litigation about costs - precisely a result which the government expressly states, in the consultation, should be avoided.

Indeed, the need to amend Part 44.14 (1), to deal with deemed costs orders would seem unnecessary given that, away from acceptance of an offer to settle the whole claim within the relevant period, Part 36.13 (4) provides that the liability for costs must be determined by the court (unless the parties have reached agreement). Such an order might be regarded as falling within the scope of the term "orders for costs" within Part 44.14 (1), indeed in *Harford v Music Store Professional UK/DV246 Ltd*[19] such an order was regarded as a "judgment" for the purposes of Part 45.24 (and here, as in many contexts, the terms "order" and "judgment" might be regarded as synonymous, see for example *Vanden Recycling Ltd v Tumulty*[20].

If, however, orders under Part 36.13 (4) are so regarded, so far as the defendant is concerned, then the same must apply, to the benefit of the claimant, in the event of late

[19] [2021] EWHC B17 (Costs)
[20] [2015] EWHC 3616 (QB)

acceptance of a Part 36 offer by the defendant and subsequent ruling on costs by the court, entitling the claimant to benefits under Part 36.17 (4).

Accordingly, even if (contrary to the points identified above) there is any reasonable and warranted need to introduce the word 'costs' into CPR 44.14, the proposed CPR 44.12 is entirely unnecessary and is only likely to generate unnecessary satellite litigation as to its implications.

Suggested amendments

As detailed above, at every step, consideration has been given to the interests of claimants and defendants, starting with the recommendation from Sir Rupert to implement QOCS and then the judiciary's interpretation of the QOCS regime at Court of Appeal and Supreme Court level. The decisions in *Cartwright* and *Ho* bring significant certainty to how QOCS operates and will reduce satellite litigation. There is no unfairness in the current QOCS regime and therefore the status quo must be considered as an option. Furthermore, the decision in *Ho* was handed down on 6 October 2021, a mere 8 months ago at the time of writing. It is therefore premature to state with certainty that the decision is causing unmeritorious issues to be run by claimants. Sir Rupert was acutely aware of how a QOCS regime could be abused by claimants taking unmeritorious points, and so the regime was drafted in such a way to deter claimants taking unmeritorious points, not to mention the natural deterrence in a claimant wasting its own resources on unmeritorious issues.

If the CPRC is not minded to accept that the case law is now sufficiently established to ensure that QOCS works well, we suggest that the way to resolve the issues is to adopt the Scottish model of QOCS, rather than a removal of the court's discretion to permit set-off.

In Scotland, the rules dictate that judges must be convinced to make a costs order in cases where QOCS applies, rather than a costs order being made and the defendant not being able to enforce it if QOCS is in play. That costs orders are made and then there is discretion as to whether a set off can be applied, creates spurious arguments and takes up court time. If costs orders are not granted in cases where QOCS applies, there will be no issues around enforcement of those orders.

For reference, the Scottish wording is as follows[21]:

> ***"8 Restriction on pursuer's liability for expenses[22] in personal injury claims***
>
> *(1)This section applies in civil proceedings where—*
>
> *(a) the person bringing the proceedings makes a claim for damages for—*
>
> *(i) personal injuries, or*
>
> *(ii) the death of a person from personal injuries, and*
>
> *(b) the person conducts the proceedings in an appropriate manner.*
>
> *(2)The court must not make an award of expenses against the person in respect of any expenses which relate to—*
>
> *(a) the claim, or*

[21] https://www.legislation.gov.uk/asp/2018/10/section/8
Section 8 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018

[22] For 'expenses' in the Scottish legislation read 'costs' in this jurisdiction.

(b) any appeal in respect of the claim.

(3) Subsection (2) does not prevent the court from making an award in respect of expenses which relate to any other type of claim in the proceedings.

(4) For the purposes of subsection (1)(b), a person conducts civil proceedings in an appropriate manner unless the person or the person's legal representative—

(a) makes a fraudulent representation or otherwise acts fraudulently in connection with the claim or proceedings,

(b) behaves in a manner which is manifestly unreasonable in connection with the claim or proceedings, or

(c) otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process.

(5) For the purpose of subsection (4)(a), the standard of proof is the balance of probabilities.

(6) Subsection (2) is subject to any exceptions that may be specified in an act of sederunt under section 103(1) or 104(1) of the Courts Reform (Scotland) Act 2014.

(7) In subsection (1)(a), "personal injuries" include any disease and any impairment of a person's physical or mental condition."

It is noted that this provision is much more akin to Sir Rupert's original proposal (that no costs orders be made), but with the added protection of a discretion to do so in the sort of circumstances which the legislative there (and Sir Rupert) identified in order to ensure an adequate balance.

In that regard, it is also noted that the Scottish regime does not contain any kind of general ability to seek orders for set off of defendant's costs against claimant's costs. Defendants can only seek costs orders (and therefore only obtain set off, whether against costs or damages – or otherwise enforce those orders) in those cases which are out of the norm as a result of either the claimant's conduct being improper or the claim not wholly being a personal injury claim.

Plainly, in Scotland, there is no perceived need of the type now said to be required for there to be any more general and non-discretionary set off made available in order for the right balance to be struck or 'unmeritorious' points somehow to be dissuaded. We respectfully suggest that there is no such need here, that none has been properly identified in the very short period post the Supreme Court judgment in Ho and that there is no proper evidence base for the changes proposed, let alone for changes so fundamental in terms of altering the balance of protection to be afforded to reasonable litigants and the consequent peril to access to justice.

Any queries about this response should be addressed, in the first instance, to:

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