

Qualified one-way costs shifting: qualified no more?

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In this article, Colin Campbell of Kain Knight examines the qualified one-way costs shifting (QOCS) regime and the recent rule change to CPR 44.14 (Effect of QOCS).

On 21 December 2009, Sir Rupert Jackson published his Review of Civil Litigation Costs: Final Report. Of many recommendations, key was his proposal that for personal injury claims, success fees and after-the-event (ATE) insurance premiums should cease to be recoverable as costs from losing defendants. In return, an honest claimant whose claim failed, would pay no costs to the winning defendant. Sir Rupert explained:

"If this recommendation is implemented, it will lead to significant costs savings, whilst still enabling those who need access to justice to obtain it." (Executive Summary Recommendation 2.2.)

(For more information about the final report, see [Practice note, Jackson LJ's Review of Civil Litigation Costs: Final Report.](#))

These recommendations were adopted, with the Civil Procedure Rules (CPR) being amended on 1 April 2013 via the implementation of Section II of CPR 44.13 to CPR 44.17 (qualified one-way costs shifting (QOCS)). In proceedings which included a claim for damages for (a) personal injuries or (b) under the Fatal Accidents Act 1976 or (c) arising out of death or personal injury which survived for the benefit of an estate by virtue of section 1(1) Law Reform (Miscellaneous Provisions) Act 1934, a losing claimant would have "QOCS protection", and pay no costs on a loss.

Straightforward enough, but that left some middle ground. What would happen if the claimant won, but on the way, was ordered to pay some costs, for example, the costs of amending a defence consequential to amendments to the particulars of claim?

[CPR 44.14](#) catered for that. Where there has been an *order* (emphasis added) for the payment of damages and interest, two-way costs shifting applies. The defendant can enforce the costs against the aggregate of those damages and interest, but there can be no recourse to the claimant for anything else unless the action has been struck out (CPR 44.15) or the court makes a finding of "fundamental dishonesty" against the claimant and

considers it just to disapply QOCS protection (CPR 44.16). By these means, adverse costs are capped at damages (and interest) and no honest claimants will ever have to put their hands in their pockets to pay them.

During the ten years (exactly) since the implementation of Section II of CPR 44, QOCS protection was bolstered by the following case law:

- **Tomlin orders.** Where the obligation to pay damages is set out in a confidential schedule to a consent order, there is no order for the payment of damages, merely a record of a settlement reached between the parties which is designed to have binding effect. Thus, adverse costs orders cannot be enforced against those damages, as would be the case if the agreement to pay was recorded in the body of the order. Thus, if the defendant has agreed by Tomlin order to pay the claimant £10,000 damages and £5,000 costs, but has adverse costs orders of £10,000, it must hand over £15,000, with no adjustment for their own costs (*Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654). (For more information about Tomlin orders, see [Practice note, Consent orders and judgments: Tomlin orders.](#))
- **Part 36 offers.** Acceptance, whether in time or late, does not require any order from the court, so a settlement under Part 36 is also outside the words of rule 44.14(1) (see *Cartwright* at paragraph 44). Thus, where the claimant, a protected party, had accepted an offer of £421,362.88 almost two years out of time, the defendant could not enforce the £115,000 it had incurred in costs in that period against the damages. That was so, even though the claimant needed an order of the court under CPR 36.11(3)(b) to accept the offer, as further deductible amounts had been paid since the date it had been made (see *Harrison v University Hospitals of Derby & Burton NHS Foundation Trust* [2022] EWCA Civ 1660).
- **Set-off of costs orders against costs orders.** Although it was originally permissible for adverse costs to be set off by defendants against costs awarded to successful claimants where the court gave permission and considered it just to do so (*Howe v Motor Insurers*

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Bureau [2017] EWCA Civ 932, on 6 October 2021, the UK Supreme Court in *Ho v Adekun [2021] UKSC 43* overruled that decision. Accordingly, in *Ho*, the defendant could not set-off any of the £48,600 adverse costs due to her against fixed costs of £16,700 which she owed to the claimant under CPR 45.

The effect of these decisions, at least in the eyes of the UK government and defendant insurers, was that the costs pendulum had swung too much in favour of claimants. After all, where was the justice in preserving QOCS protection for a claimant who had accepted a Part 36 offer long out of time, if there was to be no route by which the defendant could be compensated for its post-offer costs, either by recourse to the damages or by set-off against the pre-Part 36 offer costs? Likewise, what of the position of the third defendant in *Cartwright* against whom the claimant had discontinued his claim with costs, having recovered £20,000 against other defendants under a Tomlin order, thereby taking the settlement outside the words of CPR 44.14(1), so there were no damages against which the third defendant could enforce its costs?

The answer was a Ministry of Justice consultation undertaken from May 2022, resulting in a rule change to CPR 44.14 in respect of claims *issued* (emphasis added) on or after 6 April 2023 to which section II applies. Claims issued before that date continue under the old CPR 44.14.

Under the rule change, defendants in QOCS claims are permitted to set-off costs orders in their favour not only against actual orders for damages made by the court, but also against deemed costs orders (for example, on acceptance of a Part 36 offer), and also agreements to pay damages. Put differently, the decisions in *Ho* and *Cartwright* have been overruled, and defendants can now set-off costs orders made in their favour against claimants' costs, as well as against damages and interest awarded, whether under court orders or settlements.

Does this mean that QOCS protection in cases that fall under the new regime is no longer qualified because:

- Tomlin orders now fall within the CPR 44.14 net and damages are no longer ring-fenced?
- Part 36 acceptances, whether in or out of time, mean that adverse costs are recoverable out of damages?
- CPR 44.12 (the setting-off of costs against costs) applies against any order for costs made in favour of the claimant?

No, it does not. Although much has been written that the amended rule will drive a coach and horses through QOCS protection, the reality may well be different.

First, pre-6 April 2023, defendants could not be compelled to settle cases using Tomlin orders. If the obligation to pay damages was evidenced in the body of the court order rather than in the schedule, CPR 44.14 was available, and the best advice to a defendant with an adverse costs order would have been "do not to use a Tomlin order to settle the case". Now, the only difference for QOCS purposes is that it does not matter where the obligation to pay costs appears in the document.

Second, if a claimant accepts a Part 36 offer late because the claim turns out not to be as valuable as originally advanced, either by greed or exaggeration, the justice of the situation will be met if, and only if, the claimant pays the adverse costs. However, it is not automatic that the defendant has post-offer costs on a late acceptance. If the parties cannot agree the liability for costs, the court will decide under CPR 36.13(5). If the reason is that the claimant did not exaggerate, but on the contrary, happily recovered better than expected, that may be a good reason not to give the defendant the post-offer costs.

Third, the rule change returns set-off to the pre-*Ho* position which applied until 6 October 2021, with the refinement that the court's permission is not now required: set-off appears to be automatic rather than at the discretion of the court only where it is just.

That all said, the real difference between the pre- and post- 6 April 2023 period may be regarding ATE insurance. Sir Rupert said:

"Litigation costs can be reduced by taking away the need for ATE insurance in the first place. This can occur if [QOCS] is introduced." (Executive Summary Recommendations 2.6 and 2.7.)

However, it would appear that there will now be a real requirement for ATE insurance, since it is possible that the combination of enforcement and set-off will leave a successful claimant with nothing, save for a bill from their own solicitors, unless insurance is taken out against the risk of having adverse costs deducted from damages.

Better off, in that case, to have litigated and lost, or to have discontinued under CPR 38 so as to benefit from QOCS protection? Possibly! Previously, where insurance was taken out, cover only up to the level of damages recovered was needed rather than up to the adverse costs at large, and with the risk carried by the insurance providers being lower, premiums were not high. Now, the position will be different. ATE insurance may be required in every case, the complete opposite of what Sir Rupert intended!

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