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Ho v Adelekun: set-off is the same as enforcement under QOCS

Ho v Adelekun (2021) UKSC 45

This appeal concerned the operation of Qualified One-Way Cost Shifting ("QOCS") under the CPR and what effect it has on the separate power to set off a defendant's costs against a claimant's costs. QOCS applies to most personal injury claims and ordinarily has the effect of limiting the amount of legal costs payable by a claimant to a defendant where a claimant loses on part or all of their claim.

In some circumstances, QOCS does allow a defendant to recover legal costs, up to a certain limit. If a court orders a claimant to pay a defendant's legal costs, the defendant will normally only be able to enforce this up to the amount of any court orders for damages and interest that the defendant is ordered to pay to the claimant. The court gave the example of where a claimant was awarded £10,000 in damages but ordered to pay £15,000 of the defendant's costs, that defendant could only enforce that order up to £10,000 in costs against the claimant (cancelling out the damages award).

The claimant/appellant (Ms Adelekun) was injured following a road traffic accident with the defendant/respondent. The defendant offered to pay the claimant £30,000 to settle her claim and also her pre-settlement legal costs. The claimant accepted the offer and a settlement agreement was concluded.

IN BRIEF

The UKSC allowed the claimant's appeal finding that the defendant could not set off her costs of the appeal in the Court of Appeal against the pre-settlement costs otherwise due to the claimant.

There was, however, a dispute regarding the extent of the pre-settlement costs owed by the defendant. The Court of Appeal upheld the defendant's contention that she was only liable for £16,700 of the pre-settlement costs. Reflecting the fact that the defendant had succeeded on this point, the Court of Appeal made a costs order that the claimant should pay the defendant's legal costs of about £48,600 for the hearings dealing with that dispute ("the Court of Appeal costs order").

The defendant accepted that because she had agreed to pay the claimant the £30,000 by way of a settlement agreement rather than being ordered to pay that amount by a court, following the Court of Appeal decision in *Cartwright v Venduct Engineering* this meant that there were there were no orders for damages and interest for the purposes of CPR 44. There was nothing, therefore, against which the defendant could enforce the Court of Appeal costs order under the QOCS regime.

The issue was in this appeal was whether the defendant could nonetheless recoup the £16,700 that she had paid to the claimant for the pre-settlement costs, because it was cancelled out by the £48,600 that the claimant owed her under the Court of Appeal costs order. The Court of Appeal concluded that the defendant could do so.

The Supreme Court unanimously allowed the appeal.

It was agreed by both parties that the question was one of construction of the language of the QOCS provisions in CPR 44.14. The court found that the effect of CPR 44.14(1) was to create a monetary cap on the amount that a defendant could recover in costs from the claimant, set at the level of the aggregate amount in money terms of all court orders for damages and interest in a claimant's favour. The defendant must keep a running account of all costs recoveries which it made against the claimant, and cease enforcement once that monetary cap was reached.

The defendant nonetheless argued that she could set off the opposing costs orders against each other because the monetary cap created by rule 44.14(1) only applied to the net costs liability of a claimant after all opposing costs orders had been netted off. Therefore, despite the aggregate amount of court orders for damages and interest in the claimant's favour being zero, the defendant argued that the £16,700 owed by her for the pre-settlement costs could still be netted off against £16,700 of the Court of Appeal costs order.

The UKSC rejected this argument. The setting off of costs against costs was a form of enforcement covered by the QOCS provisions just as the setting off of costs against damages was. A calculation of a claimant's net costs liability was therefore an incorrect approach, as the bar to enforcement in the QOCS provisions applied to the gross amount of a defendant's costs orders against a claimant rather than the net amount.

The effect of this was that the defendant must pay the claimant the full pre-settlement costs of £16,700 on top of the £30,000 agreed to in the settlement agreement, but could not enforce the Court of Appeal costs order against the claimant at all.

The court recognised that this conclusion might lead to results which at first looked counterintuitive and unfair. But the conclusion followed from the wording of the QOCS provisions in CPR 44, and any apparent unfairness in an individual case was part and parcel of the overall balance struck by the QOCS regime.

The full judgment may be found at: Ho (Respondent) v Adelekun (Appellant) (supremecourt.uk)

Matthew Hoe of **Taylor Rose MW** and member of FOIL's Costs Sector Focus Team acted for the defendant. Matthew comments: *'The judgment is tremendously disappointing and compounds the inequity of the QOCS regime already arising from the Cartwright v Venduct decision. Claimants can now pursue bad points with virtually no risk of paying the defendant's costs. The Supreme Court's approach to construction of the CPR is a confusing departure, in taking the QOCS rules in isolation, and construing 'enforce' to have a meaning not expressly defined and differing from Part 70 and other usages in the CPR so as to include set off. Unpredictability for future CPR construction cases may follow. The court's conclusion that set off is enforcement in the QOCS context, even where by consent, is surprising; generally, a set off might be thought of as saving the need for enforcement, like other means of simply paying the defendant's costs. It is clear from his Final Report that this is not the QOCS regime Lord Justice Jackson envisaged, and while his vision was modified, there must be doubt as to whether the fund subject to QOCS was intentionally altered also. There is a pressing case now for the CPRC to review the QOCS rules and I hope the FOIL community lends its weight in support of that.'*

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