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When Part 36 and QOCS clash

In *Chappell v Mrozek (2022) EWHC 3147 (KB)* the claimant had accepted the defendant's Part 36 offer 20-months outside of the "relevant period" as defined in CPR 36.3, such that they were required to agree liabilities for costs with the defendant. Agreement was reached on the basis of the usual order under CPR 36.13 (5), allowing the defendant the costs after the relevant period had expired, but the parties could not agree whether the Qualified One-Way Costs Shifting (QOCS) provisions contained in CPR 44.14 prevented enforcement of any part of that costs liability by the defendant. The defendant's application was brought to try and enable it to enforce its agreed entitlement to costs by way of set-off against damages, such enforcement being wholly resisted.

IN BRIEF

Two recent cases (one at first instance and the other from the Court of Appeal) confirm that, as currently drafted, the rules provide full QOCS protection to claimants accepting Part 36 offers out of time

After considering the numerous authorities cited, a Master held that the government policy statements about the introduction of QOCS provided no hint that Part 36 offers accepted out of time should be subject to enforceable adverse costs set-offs. She also rejected suggestions that the decision in *Cartwright* was both wrong, and not binding upon her; or that the Supreme Court's decision in *Adelekun* did not touch on matters relevant to her construction of the QOCS regime. The Master observed that when the QOCS rules were introduced, they reflected a global policy intention which would reduce adverse costs paid by defendants in injury litigation overall on a swings and roundabouts basis; they marked a radical departure from the previous position on costs recovery. The language

in both CPR Part 36 and Part 44 clearly demarcated between the position where the court's permission was required for a particular type of costs order to be made following judicial scrutiny, and those where it was not. This was consistent with the overriding objective to allow matters to be resolved expeditiously, save expense and manage court resource effectively, so that parties were not forced through time-consuming and expensive court processes unless absolutely necessary.

It was understood that the defendant's early offer was made with a view to saving their overall costs outlay, should it have been accepted at that very early stage in proceedings. As soon as the Supreme Court decision in *Adelekun* was handed down in October 2021 the defendant could have decided to withdraw the offer. The offer however was not totally worthless in terms of both costs' protection and an incentive to the claimant to settle. It stopped recovery by the claimant of their costs from expiry of the relevant period 21 days after the offer had been made. Acceptance of the offer also saved the defendant from paying the significant costs of completing expert evidence, trial preparation and trial.

The Master held that it was important to recognise the unfairness to the claimant, and those trying to advise him as well, if the finding was against him. At the time his acceptance of the Part 36 offer was served there had been a recent, clear Supreme Court authority as to the enforceability of adverse costs orders in QOCS cases. The claimant's letter of acceptance made it plain that his legal team was fully conversant with the *Adelekun* decision and that they recognised an agreement on costs liability was required as the acceptance was out of time. On the latter point the defendant confirmed that they accepted the claimant's suggested costs liability so the only issue was the QOCS set-off. The defendant's decision to challenge the position judicially had resulted in the claimant being denied any payment of his agreed damages to date.

Any hopes on the part of defendants that this case may have been wrongly decided were dashed two days later by the Court of Appeal judgment in *University Hospitals of Derby & Burton NHS Foundation Trust v Rebecca Harrison and another (2022) EWCA Civ 1660.*

This was another appeal about the operation of Qualified One-Way Costs Shifting. The issue the appellate court identified was a simple one. Was the order that the judge made following the claimant/respondent's late acceptance of the defendant/appellant's Part 36 offer "an order for damages and interest made in favour of the claimant", as defined in CPR 44.14(1)? If it was, the defendant could set off its own costs, incurred since the offer was made, against the (otherwise agreed) amount due to the claimant. If it was not an order for damages and interest made in favour of the claimant, then the appellant was not entitled to such a set off.

The Court of Appeal held that a court making an order under CPR 36.22(9) was not making an order for damages and interest in favour of the claimant. Thus, the order did not mean that the claimant lost her QOCS protection, and the judge was right to reach the conclusion that he did.

The remainder of the judgment was designed to show that, however the underlying issue on this appeal was approached, on the current wording of CPR 44.14(1), the claimant had the better of the arguments.

The court noted that as a result of the decision in *Adelekun*, the Ministry of Justice consulted on proposed amendments which would allow set-off in respect of costs orders. It appeared 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 had 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. (The court's emphasis)."*

The court observed that 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 did not expressly address Part 36. Secondly, it provided a final indication of why this court considered that the defendant's interpretation was incorrect. Not only did 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 was an "agreement to pay") that a party in the claimant's position would lose her QOCS protection in the future. If the CPRC were changing the rule so as to cover "agreements to pay", then it was not unreasonable to conclude that they thought that the present rule did not cover "agreements to pay".

Rhys Sanchez partner at **DWF** who had conduct of the Chappell case for the defendant says:

"The decisions in Chappell and subsequently Harrison are disappointing and demonstrate why rule changes to CPR 44.14 are so desperately needed. In Chappell, the defendant made a reasonable offer of £250,000 against a claim pleaded in excess of £8m. The claimant did not accept that offer until nearly two years later, forcing the defendant to litigate the case at great expense. In such circumstances, it is unjust for the defendant not to be able to enforce its post-Part 36 costs against the claimant's damages, disincentivising the use of Part 36. We welcome the proposed CPRC changes which will allow enforcement of defendant costs against both damages and claimant costs".

Nicola Critchley President of FOIL and member of the costs SFT says:

"It is the government's position that defendants must be able to make effective use of Part 36 and recover costs where appropriate and, if necessary, by set-off, so that there is effective control over the running of unmeritorious issues. In light of the comments of LJ Coulson in Harrison it is hoped that the MOJ and CPRC will review the draft amendments and specifically reference that "agreements to pay damages" includes a Part 36 settlement or any other agreement to pay a lump sum and/or periodical payment in settlement of a claimant's claim to clarify the issues to prevent further potential for dispute."