



# QOCS & Adelekun

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17<sup>th</sup> March 2022  
Roger Mallalieu QC



# An outline

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How will market practice change over QOCS, following the Supreme Court's decision in *Ho v Adelekan*?

Is there any more wriggle room?

- What was decided in *Ho*?
- What does it mean in practice?
- What changes have been seen?
- What might the future hold?

# What was decided

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## Background

- Ms. Adelekun injured in RTA (June 2012);
- RTA Protocol claim – fell out;
- Settled by D Part 36 offer April 2017 £30,000 plus costs ‘in accordance with CPR 36.13, to be subject to DA’;
- No adverse costs orders during substantive claim;
- First issue – standard basis or FRC;
- Answer – First instance FRC;  
First Appeal – standard basis;  
Court of Appeal – FRC.

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- Net outcome at CA;
    - C entitled to £30,000 damages – by settlement (Pt. 36);
    - D awarded £48,600 in costs (by court order).

- But – QOCS;

*“CPR 44.14*

*(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 damages and interest made in favour of the claimant.”*



# Problem No. 1

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*Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654

*“...a Tomlin order cannot be described as “an order for damages and interest made in favour of the claimant”. It is no such thing... In that sense, as the parties agreed in the present case, it is no different to the settlement that arises when there is an acceptance of a Part 36 offer. Such acceptance does not require any order from the court, so a settlement in consequence of an acceptance of a Part 36 offer would also be outside the words of r.44.14(1).” [45]*

No order for damages per CPR 44.14 so no set off of D’s costs against C’s damages.

# The obvious (?) answer

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- Set off D's costs against C's costs.
- C's costs were FRC, so it would not 'recover' all of D's costs, but it would at least mitigate D's loss;
- It would also prevent D having to pay C's costs whilst not recovering any of its own costs.
- But – is such a set off permitted under QOCS?
- *Howe v Motor Insurers' Bureau* [2020] Costs LR 297;
  - Court of Appeal – yes it is;
  - Set off of costs against costs is not enforcement;
  - Therefore CPR 44.14 does not prevent it.

# Howe re-argued?

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- Court of Appeal in Ho;
- Rejected argument that Howe was decided per incuriam. CA therefore bound by Howe;
- But;

*“As I see it, CPR 44.14 is designed to bar any enforcement of costs orders against claimants in excess of damages and interest unless CPR 44.15 or CPR 44.16 applies” (Newey LJ [15]);*

*“...there are, as it seems to me, compelling reasons for interpreting “enforced” as extending to set-off in the context of CPR 44.14.” (Newey LJ [18])*

There was a *“...powerful case...”* for calling into question the decision in Howe (Males LJ [51])



# On it goes

- The Supreme Court – reluctantly – resolved the conflict;
- The focus was on construction, not policy [31-32];

*“QOCS is intended to be a complete code about what a Defendant in a PI case can do with costs orders obtained against the Claimant” [37]*

*“rule 44.14 does not in terms operate as a total ban of set-off of opposing costs orders. It just imposes a monetary cap. It does so by requiring the monetary value of any set-off by the defendant to be brought into account against the monetary amount of the claimant’s orders for damages and interest. That will amount to a ban only if there are no orders for damages or interest (as in the present case) or if the aggregate amount of damages and interest has already been used up by other means of enforcement.” [34]*

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*“The defendant can recover the costs ordered, by any means available, including set-off against an opposing costs order, but only up to the monetary amount of the claimant’s orders for damages and interest.” [37]*

*“may lead to results that at first blush look counterintuitive and unfair”; but*

*“no one has claimed the QOCS scheme is perfect. It is, however, the best solution so far that the opposing sides in the ongoing debate between claimant solicitors and defendant insurers have been able to devise...”*

# What does that mean?

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- The amount of damages and interest awarded is the maximum value – not the fund – against which a Defendant can enforce a costs order;
- That is the maximum amount the Defendant can seek by way of enforcement – by set off or any other way;
- That enforcement can be against any asset the Claimant has – damages, interest, costs or cash in the bank;
- But only up to the value of the damages and interest awarded; and
- **Crucially** – per Cartwright – only if those damages and interest are part of the judgment order, not a Part 36 or Tomlin or other settlement.

# A practical example

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- In Ho – it would not have mattered if the damages had been paid and Ms. Adelekun had spent them;
- If the damages and interest (£30,000) **had been awarded by judgment order**, Ms Ho could have enforced her costs (including by set off) against;
  - Any unspent damages and interest;
  - Any costs due to Ms. Adelekun;
  - Ms. Adelekun's other assets;

But only up to the value of the £30,000 awarded;

- Because there was no judgment order – Cartwright – the monetary amount D could enforce was nil.



# Net outcome

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- D had to pay (and already had paid) C her damages and interest;
- D had to pay C's FRC of her claim;
- D could not recover any of the £48,600 it had been awarded in establishing that C was only entitled to FRC;
- C was entitled to her costs of the CA and Supreme Court arguments on QOCS – and D could not set its costs off against those, either.

# Key points following Ho

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- For QOCS purposes, set off is a type of enforcement and CPR 44.12 cannot help Ds;
- CPR 44.14 sets a maximum amount against which enforcement can take place – it does not limit enforcement to being only against the actual damages awarded;
- In practice, this will make little difference, since in most cases the damages will be the only liquid asset;
- Absent an exception to QOCS applying, Ds cannot expect to recover interlocutory or Part 36 costs awards;
  - Unless the damages are awarded by judgment order; and
  - Even then, in any sum greater than the damages and interest.

# Key points

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- Given that most cases settle, interlocutory costs awards to Ds / costs entitlements due to late Part 36 acceptances by Cs etc will rarely result in any benefit to Ds;
- Ds will still have to pay Cs their ‘full’ costs in this situation;
- Successful Ds at quantum trials (post Part 36) will not be able to ‘top up’ their costs by setting off against C’s pre Part 36 costs in addition to ‘wiping out’ damages;
- Where C loses overall – but has won an interim hearing – D will be unable to recover costs, but may still be liable for C’s costs of the interim hearing;



# Key points

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- The real force in Ho lies not just in Ho itself, but the combination of Ho and Cartwright;
- It is Cartwright that means that in settlements the limit against which D can enforce is set at nil;
- It is Cartwright in practice that means that a D with an interlocutory award will have nothing against which it can set those costs off – and has to pay C in full.



# What changes have we seen so far

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- Early days, but anecdotally;
  - An increased wariness on Ds' part to contest interlocutory issues and to contest technical costs issues post judgments;
  - A call for the CPRC to consider the position – both by the SC and others – but note;
    - In February 2020, the CPRC decided whether to consider rule changes in light of Cartwright, but decided not to;
    - The CPRC had decided not to intervene re CPR 44.14 but to await the SC decision in Ho;
    - Intervention is possible, but the outcome unpredictable.

# What changes have we seen so far

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- Attempts by Ds to circumvent Ho by asking a judge at trial to make a percentage costs order (to effectively set off D's costs against C's at that stage) may increase, but;
  - The SC noted that there may be a counter argument that to do so would be to undermine the principle of QOCS;
  - Opportunities for such arguments are likely to be limited and the legal merits are open to argument.

- An increased appetite for non party costs order / wasted costs order applications against Cs' solicitors;
- Caution needs to be exercised here;

*"As to the suggestion [the solicitors] stood to gain a substantial financial benefit from the case (both in terms of profit costs and a success fee), this is undoubtedly true in the sense that any solicitor engaged on a CFA has an interest in the outcome of the case. If the submission [is] that this of itself will render a solicitor liable to a [wasted costs order] or [non party costs order], it is simply contrary to the public policy that parties, and in particular, impecunious parties, should have access to justice when they do not have the means to fund litigation themselves. There must be additional factors before an order can be appropriate."*

*Heron v TNT (UK) Limited and Mackrell Turner Garrett (a firm) [2013] EWCA Civ 469*



# What might the future hold

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- A mass of wasted costs / non party costs applications – some good, some bad and some indifferent;
- Possible CPRC reconsideration of the situation – but if this is to happen;
  - A sound evidence base would be useful – what impact have Ho and Cartwright in fact had?
  - A holistic consideration of the operation of QOCS as a whole, not simply Ho in isolation would be sensible;
- Hopefully an acute awareness on the part of Claimants and Defendants of the terms of any settlement.

# Thank You



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