

# How do you mitigate the tricky situation brought about by QOCS following the cases of Cartwright and Ho?

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# A reminder of the current regime (cases issued before 6 April 2023)

- At present a court **order** for damages and interest in C's favour is required for D to enforce costs orders up to aggregate amount due to C: see CPR 44.14(1)
- No set-off of costs against costs under CPR r. 44.12

# A reminder of the current regime (until 6 April 2023)

- Combined effect of:
- *Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654 - agreement to pay in Tomlin order and acceptance of an offer under Part 36 (*obiter*) do not come within CPR r. 44.14(1)
- *Ho v Adelekun* [2021] UKSC 43 (overruling the CoA).

## And the difficulties: Unfairness for protected party who accepts P36 offer late

- MRA v The Education Fellowship Board [2022] EWHC 1069 (Master McCloud, 22 April 2022)
  - Historic sexual abuse claim, C accepts P36 out of time and approval is needed, Ps can't agree liability for costs, C argues unjust to have to pay D's costs under CPR 36.13(5) +(6) + (7)
  - Not unjust. Not like *SG v Hewitt* where no prognosis was possible at all until child was 18. Fact C lacked capacity is not a basis to depart from the usual rule.
  - Court parks the question of difference in treatment btw protected parties and non-protected parties due to need for court order approving settlement, and whether possible or proper to explore means of approving order drafted to avoid alleged difference

# Late acceptance and failure by D to pay in accordance with r. 36.14

- *Chappell v Mrozek* [2022] EWHC 2147 (KB) (Master Stevens, 14 Dec 2022)
  - C accepts P36 out of time and liability for costs is agreed so D has some costs, but can't agree re set-off
  - Court considers *Cartwright, Ho, MRA v The Education Fellowship*
  - Rejects D's argument *Cartwright* wrong (not a P36 case) and not binding
  - No order for damages and so costs can't be set off against C's damages
  - Rejected D's alternative argument – an order to compel payment of the sum was an order for damages – r. 44.14
  - Made order in C's favour for payment of "settlement sum"

# And some further consideration of the reach of *Cartwright*

- *University Hospitals of Derby & Burton NHSFT v Rebecca Harrison* (APIIL intervening) [2022] EWCA Civ 1660 (16 December 2022)
  - D makes P36 inc deductible benefits; by time C accepts the benefits had increased so court's permission required to accept offer (CPR r. 36.11(3)(b); Ps can't agree liability for costs
  - CoA considers *Ho* and *Cartwright*
  - *D* argues that because order identified amount to be deducted it was an order awarding damages – r. 44.14(1) applied

# Harrison (2)

- Coulson LJ: Not an order for damages and interest – no evaluation or assessment of what was due; Judge just directs one part of sum to C and another to CRU (adjustment to settlement between the parties)
- D elevating form over substance
- Policy considerations: CoA questions analysis whereby a more vulnerable C may lose QOCS protection e.g. because approval is needed, provisional damages claimed, order for PPs
- SC in *Ho* did not distinguish between different types of settlement. Hence, where damages are subject of agreement – outside CPR r. 44.14(1).

# Late discontinuance did not disapply QOCS

- *Excalibur & Keswick Groundworks Ltd v McDonald* [2023] EWCA Civ 18 (17 Jan 2023)
  - Judgment of Nicola Davies LJ, agreed by Peter Jackson LJ and Davis LJ
  - Ds had said from the outset your case is riddled with inconsistencies (GP records say trip on pavement or fell from scaffolding cf PoC fell from ladder)
  - DJ says really? At start of remote trial and C files NoD; Ds apply to set aside NoD and to strike out on grounds obstructs just disposal of proceedings : CPR 44.15(c) (obvs Ds would not recover costs if won at trial anyway...)
  - QOCS is ‘broad-based and mechanical’ scheme
  - Not appropriate to remove QOCS protection from a C who had discontinued at the last minute in the light of inconsistencies in his case or to set aside his NoD where there was no evidence of abuse of process, dishonesty or egregious conduct. Don’t approach NoD differently in a QOCS case; need powerful reasons to remove substantive right to QOCS protection

# And so how do you mitigate this?

- The effect of the decisions in *Cartwright* and *Ho* is that D's ability to give practical effect to a costs order in a QOCS case is very limited (absent strike out, fundamental dishonesty or another exception)
- But remember successful defendant can enforce costs order out of damages and interest paid by unsuccessful defendant to C (see *Cartwright* Issue 1 at [32], *necessary element of one-way costs shifting regime* – discourage Cs from bringing weak claims)
- Practical tip: Belt and braces – in proceedings settled by agreed order, include reference to D1's right to set-off against damages and interest paid by D2 to Claimant (in body of order)

# And so how do you mitigate this? (2)

- Use 44.2 offer to provide for set-off (costs of interlocutory hearing) and use consent order with sums in the body of the order (avoid Tomlin) – sum for damages and interest need to be identified separately? Consent order is curial part of order. Court orders and approves consent order – see Ramsey J in *Community Care North East v Durham CC* [2010] EWHC 959 (QB) [25], *Watson v Sadiq, Sadiq* [2013] EWCA Civ 822 [50].
- But claimants won't agree!
- Would court enforce – abuse of process argument?

# Changes afoot

- The CPR are going to change
- See Coulson LJ in Harrison:
  - MoJ consulted on set-off in respect of costs orders (the *Ho v Adelekun* point)
  - CPRC 7 Oct 2022 amendment agreed was: (1) subject to rules 44.15 and 44.16 order for costs made against a C may be enforced w/o 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 C'
  - As Coulson LJ pointed out, it did not expressly address P36. Bolsters decision in Harrison: if amend rules to say agreement, was not covered!
  - Would it cover accepted P36 offers and was that an agreement to pay damages as opposed to an agreement to pay a settlement sum?

# But the amendments to the rule go further!

- The Civil Procedure (Amendment) Rules 2023 set out that the new rule 44.14 that apply to claims issued on or after 6 April 2023 is:

*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, or agreements to pay or settle a claim for, damages, costs and interest made in favour of the claimant.*

*(2) For the purposes of this Section, orders for costs include orders for costs deemed to have been made (either against the claimant or in favour of the claimant) as set out in rule 44.9.*

*(3) Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.*

*(4) Where enforcement is permitted against any order for costs made in favour of the claimant, rule 44.12 applies.*

- *Note: transitional provision which will benefit claimants: this amendment only applies to claims where proceedings are issued on or after 6 April 2023 (r.1(3))*

# What is the effect of the new rule?

- Reversal of *Cartwright* and *Ho*
- Plainly covers P36 (costs pursuant to deemed order 36.13(1), (2)). But would be covered by “agreement” to pay or settle (r. 44.14(1)) anyway – of relevance if P36 accepted before commencement – not a deemed order (r. 44.9(2))
- Goes further than reversal of *Ho* in that D has a right to enforce up to the cap of damages, costs and interest.

# What is the effect of the new rule (2)?

- Has this gone too far? 44.14(4) provides that r. 44.12 (set-off) applies only if order for costs in C's favour – so no application of r. 44.12 if agreement to pay C's costs (language of r. 44.12 is entitled to costs/liable to pay). Usual discretion of court re set-off costs against costs does not apply.
- But will this make a substantial difference? Set-off opposing costs orders in same action not set-off to which equitable rules of mutuality apply but exercise of discretion to strike fair balance - *R (Burkett) v London Borough of Hammersmith & Fulham* [2004] EWCA Civ 1342.
- Court has discretion under r. 44.16 (FD) – enforcement to full extent of orders for costs made against C.

# Practical implications (1)

- Cs should issue before 6 April 2023 if they can
- Cs beware of D's P36 offers. Late acceptance of a well pitched P36 offer spells bad news for C. Ds likely to make early offers to put pressure on Cs.
- Careful thought given to benefits/risks of bringing and defending interim applications
- Cs to consider need/adequacy for ATE to insure own fees.
- Two sets of QOCS rules in force!

# Practical implications (2)

- Post-settlement costs disputes including detailed assessment. In a settled PI case, if D has costs orders in its favour from DA, these can now be enforced against a claimant up to limit of cap of damages, costs and interest. Note application of r. 44.12 if enforcement against costs order in C's favour.
- What about Coulson LJ's concerns in *Cartwright* about the need for fuller guidance about Tomlin orders – circs in which confidentiality removed (para. 47)? If Ds have several rather than joint liability (divisible injury), what is entitlement of successful D (with costs order against C) to see Tomlin order agreed with another D? Apply to court for inspection?

# Questions?

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