

# QOCS: Where are we now? Where are we going?

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## What We'll Cover

- ▶ (1) QOCS: Summary of the Key Points
- ▶ (2) The Scope of QOCS
- ▶ (3) Enforcing Costs Against Damages
- ▶ (4) ***Ho v Adeleku***
  - ▶ (a) *Practice Points for Cs*
  - ▶ (b) *Practice Points for Ds*
- ▶ (5) QOCS – looking forward

Will not look go through all slides in detail – will focus on most important/difficult/controversial points

# (1) QOCS Rules – Summary of Key Points

- ▶ The rules are found at **CPR 44.13-44.17**.
- ▶ They are very short and self-contained. Look them up if in any doubt.
- ▶ They apply to proceedings which include a claim for personal injury or a fatal claim; **r44.13(1)** (NB not professional negligence claims arising out of PI).
- ▶ But they do not apply to applications for pre-action disclosure or where C has entered into an old style funding arrangement i.e. an old style CFA or ATE policy before 1 April 2013 (or afterwards in mesothelioma cases); **rr.44.13(1)** and **44.17**.
- ▶ A claimant includes someone bringing a counterclaim or an additional claim; **rr44.13(2)**.

## (1) QOCS Rules – Summary of Key Points

- ▶ The effect of QOCS is to bar enforcement **r44.14**. It generally effects costs orders in principle (e.g. whether C pays D's costs), although the court's can take it into account when exercising discretion (see further below).
- ▶ Subject to **rr44.15-16** D's costs can only be enforced against the total of damages and interest ordered in favour of C; **r.44.14(1)**.
- ▶ By **r44.14(2)** *"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."*
- ▶ So it is **not** possible for D to enforce any interim order. **But** Ds should always seek such orders if appropriate so as to facilitate recovery at the end of the case (either from damages or cost set-off; see later).

# (1) QOCS Rules – Summary of Key Points

- ▶ **Rule 44.15** provides that D can enforce costs in full without the court's permission when proceedings have been struck out on grounds that:

*“(a) the claimant has disclosed no reasonable grounds for bringing the proceedings;*

*(b) the proceedings are an abuse of the court's process; or*

*(c) the conduct of – (i) the claimant; or (ii) a person acting on the claimant's behalf and with the claimant's knowledge of such conduct, is likely to obstruct the just disposal of the proceedings”*

- ▶ NB: QOCS is not displaced when the claim is struck out on any other grounds e.g. breach of an unless order, service failure, etc.
- ▶ And also not displaced if D obtains summary judgment. Nor if C discontinues.

## (1) QOCS Rules – Summary of Key Points

▶ **Rule 44.16(1)** provides that D can enforce costs in full with the court's permission where the claim is found on the balance of probabilities to be fundamentally dishonest.

▶ By **r.44.16(2)** D can enforce costs up the extent the court considers it just where:

*“(a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses) [e.g. for a credit hire company]; or*

*(b) a claim is made for the benefit of the claimant other than a claim to which this Section applies [e.g. a mixed claim containing PI and no PI elements].*

▶ By **r.44.16(3)**, where **44.16(2)(a)** applies court can order costs against the person who stood to benefit from the claim e.g. the credit hire company.

## (2) The Scope of QOCS

- ▶ ***Brown Commissioner/Metropolitan Police*** [2019] EWCA Civ 1724; [2019] Costs LR 1633
- ▶ D obtained data about C (police officer) for disciplinary proceedings.
- ▶ C brought claims for (1) breach of DPA 1998; (2) breach of HRA 1998; (3) misfeasance in public office; (4) misuse of private information.
- ▶ C also claimed these had caused depression, but the judge found that there was no psychiatric injury, merely distress.
- ▶ Costs ordered against C. C argued that QOCS applied because she had a PI claim.

## (2) The Scope of QOCS

### ▶ HELD:

- ▶ QOCS only automatically applied to pure PI claim e.g. where all the losses claimed are consequential to or dependant upon the injury. A claim for e.g. LoE would not render the claim a mixed one but a claim for e.g. vehicle damage would.
- ▶ When the claim as a whole can fairly be described as a PI claim, even if it contained a small non-PI element, QOCS would normally apply. **PD 44 12.6** was wrong to suggest otherwise.
- ▶ This was a genuinely mixed claim. QOCS should be disapplied to the extent it was just to do so.



## (2) The Scope of QOCS

- ▶ ***Wickes Building Supplies Ltd v Blair (No.2 : Costs)*** [2020] EWCA Civ 17; [2020] 1 WLR 1246
- ▶ C sustained injuries in an accident at work whilst employed by D.
- ▶ C submitted a claim under the Protocol.
- ▶ D admitted liability.
- ▶ C successfully appealed a decision to allow the claim to continue under the Protocol after D served additional evidence.

## (2) The Scope of QOCS

- ▶ C successfully appealed to the Court of Appeal.
- ▶ Agreed that in principle D should pay costs.
- ▶ D argued QOCS did not apply
- ▶ HELD: Any appeal which concerned the outcome of a claim for damages for personal injuries, or the procedure by which such a claim was to be determined, was part of the "proceedings" under r.44.13.

## (2) The Scope of QOCS

- ▶ Does the fact that D has a PI claim take a case outside QOCS?
- ▶ Conflicting CJ decisions:
  - ▶ **“YES”** → *Ketchion v McEwan* [2018] 6 WLUK 625 (HHJ Freedman)
    - ▶ C brought a claim for financial losses; no PI. D counterclaimed including a claim for PI. C succeeded. **HELD:** D entitled to QOCS protection on the basis that the matters were all part of the same “proceedings” and those proceedings included a claim for damages for personal injuries — even though that claim had been brought by D, not C.
  - ▶ **“NO”** → *Waring v McDonnell* [2018] 11 WLUK 203 (HHJ Venn)
    - ▶ Both parties suffered PI. C succeeded and D failed. D relied on *Ketchion* to claim QOCS protection in relation to C’s claim for costs. **HELD:** in relation to C’s claim D was not an unsuccessful “claimant” but instead a losing defendant. He was a claimant in respect of his counterclaim, which failed. “Proceedings” synonymous with “a claim”.

## (2) The Scope of QOCS

- ▶ **Waring** clearly correct for any number of reasons.
- ▶ Not least that **Ketchion** would generate bonkers consequences.
- ▶ e.g. RTA. C suffers catastrophic injuries. D suffers mild whiplash. D has a weak but arguable case that C is partially to blame. According to **Ketchion**, C cannot recover any costs.
- ▶ As we say, bonkers.
- ▶ Unsurprisingly, appears never to have been followed.

### (3) Enforcing D's costs against C's damages

- ▶ ***Cartwright v Venduct Engineering Ltd*** [2018] EWCA Civ 1654; [2018] 1 WLR 6137
- ▶ NIHL case. C sued 6 Ds.
- ▶ Claims against Ds 4-6 compromised by way of Tomlin order.
- ▶ Claims against other Ds discontinued.
- ▶ D3 sought to enforce costs against C by reference to damages recovered against Ds 4-6.

### (3) Enforcing D's costs against C's damages

- ▶ HELD (Coulson LJ, Henderson and Arden LJ agreeing):
- ▶ Costs can be enforced against *any* order for damages, not just against an order made in favour of the D seeking its costs.
- ▶ **BUT**, costs can only be enforced against an "**order** for damages" (CPR 44.14(1)), not against a settlement.
- ▶ Preclusion is not limited to Tomlin orders. Reasoning applies to any out of court settlement not in form of court order for damages in C's favour, including settlement under Part 36, as is made explicit at [45-46].

### (3) Enforcing D's costs against C's damages

- ▶ The RC considered reversing this but decided not to. (Query; might they revisit this when reviewing QOCS following **Ho**; see below)
- ▶ Extremely important decision with wide consequences.
- ▶ Only a small minority of PI claims go to trial. So it is not possible to enforce against C's damages in the vast majority of cases.
- ▶ Precludes D enforcing costs not only in the type of scenario in **Cartwright** itself but also:
  - (1) Where C accepts D's Pt 36 offer late.
  - (2) In respect of costs proceedings e.g. when D makes an effective Pt 36 offer in a DA or wins a costs argument (see e.g. **Adelekun**, discussed below).

### (3) Enforcing D's costs against C's damages

- ▶ Needs to be kept in mind when making strategic/tactical decisions.
- ▶ Cs need to think very carefully about taking matters to trial.
- ▶ Ds need to think carefully about whether any given strategy or step will end up costing more in irrecoverable costs, especially in multi-party cases.
- ▶ Also gives incentives for Ds to make contribution claims and/or actively contend at trial that another D is liable (although this carries its own risks – see below).



## (4) *Ho v Adelekun*

- ***Ho v Adelekun*** [2021] UKSC 43; [2021] 1 WLR 5132 has compounded the effect of ***Cartwright***.
- Previously Ds could recover at least some of their costs by way of set off against C's costs, even if QOCS precluded direct recovery because there was no order for damages in C's favour.
- But SC held in ***Ho*** that setting off D's costs against C's was a species of enforcement and therefore precluded where it exceeded the cap reflecting the sum of any orders for damages and interest made in favour of C.
- So no costs set off unless there is an order in C's favour, and even if there is such an order set off is capped at the total of C's damages and interest.

## (4) Consequences of *Ho v Adelekun*

- Given that the vast majority of personal injury claims settle, the consequences of ***Ho*** in combination with ***Cartwright*** are numerous and significant.
- (1) Ds will normally only be able to recover its costs if an order for damages is made in the claimant's favour (i.e. at trial unless a non-Tomlin consent order).
- (2) No adverse costs penalty to C who accepts D's Pt 36 offer out of time.
- (3) Where D makes a Pt 36 offer which C fails to beat at trial, D will only be able to recover costs up the extent of the level of damages i.e. D may be left with a large shortfall.

## (4) Consequences of *Ho v Adelekun*

- (4) C will not normally have to pay the adverse costs of an unsuccessful interim hearing.
- (5) Where C loses the claim but wins at an interim hearing along the way, C will recover the costs of that interim hearing notwithstanding the order in D's favour for the costs of the action.
- (6) Where there is no order for damages C will not have to pay any adverse costs in any consequential costs proceedings (DAs, etc) e.g. if D makes an effective Pt 36.
- (7) ATE premiums should go down. Insofar as they do not, open to challenge on solicitor/client assessment

## (4)(a) Practice Points for Cs

- (1) Never (unless unavoidable) agree or allow for a settlement to be embodied in a court order that D pays C damages.
- (2) If you have to embody the settlement in formal order (e.g. because the court needs to approve it, to provide for provisional damages or periodical payments) use a Tomlin Order.
- NB: an order for damages in favour of one D can be enforced against by another D; ***Cartwright***.
- (3) Factor QOCS considerations into any decision, as to (i) what offers to make, accept or reject; (ii) when to make, accept or reject an offer; (iii) the form of any offer; (iv) if and when to withdraw or revise an offer. Ensure that D does likewise.

## (4)(a) Practice Points for Cs

- (4) **Ho** also affects the cost/risk/benefit analysis of making or resisting interim applications. C will be at minimal risk of having to meet the D's costs even if they lose.
- (5) Therefore deploy **Ho** and **Cartwright** to exert settlement pressure.
- (6) Cs who are subject to, or at risk of, adverse costs if they win (e.g. in multi-D cases or where there is Pt 36 risk) need to think very carefully before going to trial. Doing so will expose C to adverse costs against which they will normally otherwise be protected. Particular consideration should be given to this where damages are low and costs are high.
- (7) Resist proportional orders (D pays x% of C's costs) in lieu of cross-orders (D pays C's costs of [X], C pays D's costs of [Y]).
- (8) Make sure ATE premiums reflected C's limited costs risk.

## (4)(b) Practice Points for Ds

- So very good news for C's (or, perhaps more accurately, their lawyers) and very bad news for Ds.
- Are there any solutions for Ds?
- There are several possible ones, but all to varying degrees have their limitations and weaknesses.
- One overarching downside is that they all carry a large risk of satellite litigation and thus more potentially irrecoverable costs.

## (4)(b) Practice Points for Ds

**(i) Proportional orders in lieu of cross-orders.** If e.g. D wins on a discrete issue D should seek a % reduction of the claimant's costs as opposed to a cross order.

However:

(i) there is a large and controversial question as to whether and to what extent such orders should be refused as being inconsistent with QOCS protection; SC in **Ho** suggested that this could be relevant to exercise of discretion i.e. court can take QOCS into account what costs should be made rather than QOCS just biting on enforcement.

(ii) little or no scope for a proportional order when there is a clear temporal dividing line for costs (e.g. in light of a Pt 36 offer).

## (4)(b) Practice Points for Ds

- ▶ **(ii) Displacement or circumvention of QOCS.** Ds can displace QOCS protection by reference to one of the exceptions therein (e.g. FD, strike out on certain bases) or circumvent it by seeking wasted or non-party costs orders.
- ▶ However (i) the fact that such orders are more desirable for Ds does not lower the threshold for obtaining them; (ii) orders against an unsuccessful C are only worthwhile if they are good for the money, which will not often be the case.
- ▶ It will be apparent by reference to (ii) that the provisions at **CPR 46.16(2)(a)** permitting recovering against e.g. credit hire companies will be particularly valuable when they apply.



## (4)(b) Practice Points for Ds

- ▶ Another way to circumvent QOCS in a multi-D case is to seek costs against a co-D (i.e. a **Sanderson** order).
- ▶ Again, however, the fact that there is a greater incentive to obtain these does not lower the bar for doing so.
- ▶ That QOCS will inflict hardship on D1 would probably not strengthen the case for **Sanderson** order against D2. **Irvine v Commissioner of Police for the Metropolis** [2005] EWCA Civ 129; [2005] 3 Costs LR 380 at [15] “... the question of liability for costs should be considered as a matter of principle and as to whether or not there is any practical consequence of making one order or another...”
- ▶ That said, actively blaming co-D will increase the risk of a **Sanderson** order. Take this into consideration when deciding whether or not to do so.

## (4)(b) Practice Points for Ds

- ▶ **(iii) Reliance on CPR 36.13(4).** When a Pt 36 offer is accepted out of time the court has discretion as to costs. This can be invoked if C accepts late.
- ▶ D could also tactically accept C's offer 1 day late (see *Pallett v MGN Ltd* [2021] EWHC 76 (Ch); [2021] Costs LR 69, discussed below). D could then argue for e.g. a proportional order.
- ▶ However, the arguments against a proportional order would apply with even greater force given the strong presumption per **CPR 36.13(5)** that D pays C's costs up to expiry of the relevant period.

## (4)(b) Practice Points for Ds

- ▶ **(iv) Settling under a non-Tomlin order.** This should work but would be very difficult to achieve unless C drops the ball. Not doable under Pt 36; ***Jolly v Harsco Infrastructure Services Ltd*** [2012] EWHC 3086 (QB); [2013] 1 Costs L.R. 115.
  
- ▶ Also, some practical disadvantages:
  1. If D's costs exceed the damages under the consent order, D will still be left with a shortfall.
  2. D might be reliant on court's discretion to order set off. Might be met with an argument that this should not be exercised to enable D to circumvent ***Cartwright/Ho***.

## (4)(b) Practice Points for Ds

► **(v) More nuanced settlement offers.** D, rather than making a normal part 36 offer, could make an offer along one of the following lines.

(A) A **Calderbank** offer which mirrors a Pt 36 offer save that late acceptance is conditional upon the settlement being embodied in a formal (non-**Tomlin**) consent order. In other words, solution **(iv)** above. Not ideal even on its own terms for the reasons set out immediately above. Options (B) or (C) seem clearly preferable.

(B) A **Calderbank** offer which mirrors a Pt 36 offer save that late acceptance is conditional upon D being at liberty to enforce its costs following acceptance up to the total of C's damages, interest and costs [*NB – unrestricted enforcement that could result in C having a net liability for D's costs after damages are exhausted would be truly incompatible with QOCS and would probably denude the offer of costs protection at trial*], including by way of set off against costs and/or damages (i.e. C agrees to waive **Cartwright/Ho** protection in respect of those costs.)

## (4)(b) Practice Points for Ds

- ▶ (C) A slight twist on the above to bring the offer a little more under the Pt 36 umbrella:
  - D offers to pay C [X] damages pursuant to normal Pt 36 terms.
  - BUT if it is not accepted within 21 days it is automatically withdrawn.
  - AND is then immediately replaced by a non-Part 36 **Calderbank** offer for the same [X] damages.
  - The terms of acceptance of that **Calderbank** offer are that (a) D pay's C's costs up to expiry of the relevant 21 day period; (b) C pay's D's costs thereafter (c) D is at liberty to enforce those costs, including by way of set off, up to the total of C's damages, interest and costs

## (4)(b) Practice Points for Ds

- ▶ NB make any such offers fully mirror Pt 36 re CRU/interest etc.
- ▶ None of (A), (B) or (C) meet the problem of C losing a case but winning the application. Nor would they assist in situations such as **Adeleku** itself where the dispute is all or nothing.
- ▶ Perhaps more significantly, they would not prove the secure protection of a straight Pt 36 offer. (The rationale for C is to try and mitigate this a bit, although against it might be said that simpler is better) .
- ▶ There are arguments for and against the effectiveness of such offers should C not beat them at trial. There is will almost certainly be a fair bit of satellite litigation before we have an authoritative ruling.
- ▶ Query: advise Ds to consider immediately replacing outstanding Pt 36 offers with **Calderbank** ones?

## (5) QOCS – Looking forward

- ▶ It is difficult to predict how all this will pan out.
- ▶ Certainly fertile ground for future argument.
- ▶ There are also some further unanswered questions (really part of the enduring **Cartwright** hangover, exacerbated by **Ho**).

## (5) QOCS – Looking forward

1. Can D enforce against an IP order in respect of claim which ultimately settles? (Probably not by reference to **CPR 25(1)(k)** and **44.14(2)**, c.f. but arguable.)
2. Can D enforce against an order for damages made following approval of settlement? (Almost certainly not, but consent orders should be carefully worded to be safe.)
3. What about settlements for PDs or PPs where a court order in C's favour is almost certainly required?



## (7) QOCS – Looking forward

4. Perhaps most importantly does QOCS protection apply to detailed assessments?
  - ▶ e.g. Claim settles. Costs go to assessment. D makes a good early costs Pt 36. C in principle liable for costs of assessment
  - ▶ Can D enforce these? Are DA proceedings following a PI claim "*proceedings which include a claim for damages ... for personal injuries*" within **44.13(1)(a)**? Or does D just have to swallow the costs?
  - ▶ Credible arguments either way. Will need to be tested sooner rather than later.

## (5) QOCS – looking forward

- ▶ However, these points could all fall away
- ▶ The SC has left the door open for Rules Committee to revisit the issue.
- ▶ It acknowledged at [44-45] that its construction:

*... may lead to results that at first blush look counterintuitive and unfair ... [and] that appear anomalous.*

## (5) QOCS – looking forward

- ▶ RC have rolled up the consideration of this point into their consideration of the rules to implement the new extended fixed costs regime.
- ▶ A crucial element of that regime is costs penalties for unreasonable behaviour.
- ▶ This would be difficult to reconcile with the impunity granted to Cs by **Ho** and **Cartwright**.
- ▶ Although whether and how the RC will deal with this is difficult to predict.
- ▶ So watch this space.

# Thank you for listening

