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King's Bench Walk

Court of Appeal success for Andrew Roy in important QOCS case (permission to appeal to the Supreme Court granted)

In ***Ho v Adelekun (No. 2)*** 2020] EWCA Civ 517 the Court of Appeal confirmed that the QOCS regime did not preclude a defendant from setting off his or her costs against a claimant's costs. This was irrespective of whether or to what extent the defendant was precluded from enforcing costs against the claimant's damages. Recognising that this was a point of law of general public importance, permission has been given to appeal to the Supreme Court.

Andrew Roy, instructed by Matthew Hoe at Taylor Rose, appeared for the defendant. The full judgment can be found here.

Background

In ***Ho v Adelekun (No.1)*** [2019] EWCA Civ 1988; [2020] RTR 6; [2019] Costs LR 1963 Andrew Roy successfully appeared for the defendant in an appeal concerning the application of the fixed costs regime, for ex-Protocol cases at **Section IIIA** of **CPR Part 45**. A summary and discussion of that decision can be found here.

As a result, the defendant was entitled to its costs of the appeals in both the County Court and the Court of Appeal. However, following the decision in ***Cartwright v Venduct Engineering Ltd*** [2018] EWCA Civ 1654; [2018] 1 W.L.R. 6137 that QOCS only permitted enforcement against damages ordered by the court as opposed to damages resulting from settlement, the defendant could not recover her costs from the claimant's damages. Nor as a result of the general operation of QOCS could she otherwise recover them from the claimant directly.

The defendant, therefore, sought to set-off her costs against the costs to which the claimant was entitled as part of the settlement of her substantive claim. The claimant argued that (1) there was no jurisdiction to order set-off; and (2) if there were the jurisdiction to do so, the discretion should not be exercised in the defendant's favour.

There was also a dispute as to whether the decision at first instance that there be no order to costs should be upheld. The claimant contended that it should. The defendant argued that it should be overturned and replaced by an order for costs in her favour.

The Court of Appeal's Decision

Jurisdiction

Newey LJ gave the lead judgment with which both Males LJ and Sir Geoffrey Vos C agreed. He construed **CPR 44.14** as automatically barring enforcement of costs orders against claimants in excess of damages and interest (subject to **CPR 44.15** and **CPR 44.16**) as opposed merely to barring enforcement without the Court's permission. Were this not the case, in his view, a claimant's QOCS protection would be curtailed, and there would be no restriction on the circumstances whereby claimants could have costs orders enforced against them with the Court's permission.

Newey LJ considered that there were compelling reasons for constructing "enforced" to include set-off (including costs set off) for the purposes of **CPR 44.14**. This was because **CPR 44.14** encompasses conventional methods of enforcement, as contained in **Practice Direction 70 – Enforcement of Judgments and Orders**. These methods of enforcement would allow a defendant to seek recovery of costs from a claimant who has already received damages and interest. He also highlighted how the QOCS regime would have been intended for it to be possible to set a claimant's costs liability to a defendant against the defendant's liability for damages and interest, so the

claimant receives a net sum. He found it hard to see where jurisdiction for such an order was to be found other than **CPR 44.14.**

Newey LJ also acknowledged the force of the claimant's arguments that (1) The QOCS rules do not cross-refer to **CPR 44.12** (the general rule permitting set off of costs against costs); (2) the explanatory note to the **Civil Procedure (Amendment) Rules 2013** suggested that set-off was only possible against damages; and (3) the QOCS regime does not mirror the position in legally-aided cases where costs set-off is common.

He, therefore, held that were there no authority on the issue, he would have been inclined to accept the claimant's argument that where QOCS applied the Court has no jurisdiction to order costs liabilities to be set off against each other.

However, there was authority on the point. In ***Howe v Motor Insurer's Bureau (No. 2)*** (6 July 2017, the Court of Appeal had held precisely to the contrary. This decision was binding unless, as the claimant contended it was made per incuriam.

The Court accepted the defendant's argument that the test for per incuriam was not satisfied. Per Newey LJ at [24]:

> *In my view, Mr Roy is right. There is no reason to suppose that the Court decided **Howe** in ignorance of any relevant statute, CPR provision or previous decision of its own, of a Court of co-ordinate jurisdiction, or of the House of Lords or Supreme Court.*

The Court therefore accepted that ***Howe (No. 2)*** compelled it to hold that there was jurisdiction to order set off.

Nevertheless, both Newey LJ and Males LJ in his short concurring judgment expressed the view that this was a point which might merit reconsideration by the Rules Committee. In the same vein, the Court granted permission to appeal to the Supreme Court on this point.

Discretion

The Court accepted the defendant's contention that set off was appropriate. It held that claimant's argument that so ordering would be contrary to the principles of QOCS lost its potency following the finding on jurisdiction. In light of ***Howe (No. 2)*** it had to be assumed that the QOCS regime intended the Court to be able to order costs set-off regardless. There was no evidence of anything specific to the claimant's circumstances which could render costs set-off unjust. The defendant had incurred substantial costs in vindicating her rights and would be left with a large shortfall even with the benefit of costs set-off.

Costs at first instance

The judge at had based his decision to make no order as to costs on the defendant signing a *Tomlin* order which was capable of being interpreted as providing for something other than fixed costs. The Court accepted the defendant's arguments that this was a red herring. The parties had agreed that the relevant agreement was complete when the claimant emailed the defendant to accept the latter's Part 36 offer. The wording of the subsequent *Tomlin* order was neither here nor there. It did not provide a reason to depart from the normal order that costs should follow the event. The defendant was therefore entitled to her costs of the costs hearing at first instance.

Comment

Given that the point is now going to the Supreme Court, ***Howe (No. 2)*** attracted little attention when it was

delivered in 2017, or indeed since. However, the power to set off a defendant's costs against a claimant's in QOCS claims is an important one.

The vast majority of personal injury cases settle. As confirmed in ***Cartwright,*** supra, a defendant cannot enforce his costs against damages obtained via settlement. It follows that in the vast majority of cases, subject to exceptions such as fundamental dishonesty, set-off against costs is the only way a defendant can recover any of his costs unless the claimant recovers damages at trial. Given that going to trial and losing is usually the last outcome a defendant would wish to seek, for practical purposes set off against costs will be the only worthwhile vehicle for recovery.

The availability of costs set off can avail a defendant in a number of circumstances. For example:

- Where a defendant makes an effective Part 36 offer, as in one that the claimant either fails to beat at trial or accepts late. Whilst in the former scenario, the defendant, could enforce costs against damages recovered, there could easily be a shortfall, e.g. if the claimant's quantum case collapses entirely. In the latter scenario, whilst the defendant would normally be entitled to a costs order in his favour, ***Cartwright*** precludes enforcement of such costs against damages.
- Where the claimant loses but wins an interim hearing along the way. The claimant's costs of that interim hearing (including any subsequent appeal) would be almost certainly be extinguished by the defendant's costs of the action.
- Where the claimant wins but is subject to an adverse costs order in any consequential costs proceedings (again including a subsequent appeal). This was the case in ***Adelekun***

This in turn gives defendants' Part 36 offers sharper teeth (both in substantive proceeding and costs assessments). It likewise puts claimants at a costs risk if they advance unmeritorious points.

It obviously remains to be seen whether the Supreme Court reverses this decision. However, as the law currently stands set-off can (and, it appears, normally will) be ordered against a claimant's costs. As described above, this has important practical ramifications of which all personal injury litigators should be aware.