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King's Bench Walk

Ho v Adelekun: Supreme Court hands down landmark QOCS ruling

The issue before the Supreme Court in ***Adelekun*** [2021] UKSC 43 was whether it is permissible in claims to which Qualified One Way Cost Shifting applies to order set off of a defendant's costs against a claimant's.

Andrew Roy, instructed by Matthew Hoe at Taylor Rose MW, appeared as junior counsel for the Defendant/Respondent.

The Court unanimously held that, as a matter of construction, set off in this context was a species of enforcement and therefore was precluded where it exceeded the total of any orders for damages and interest made in favour of the claimant. Therefore where there is no such order (e.g. because the claim concludes by settlement rather than by order, or is dismissed), a defendant cannot recover any of its costs absent some other exception (e.g. fundamental dishonesty) applying. Any costs orders in favour of a claimant are protected from set off, even where the balance of costs would be heavily in the defendant's favour. Likewise, where the claimant only recovers limited damages, a defendant who e.g. betters its Part 36 offer cannot recover any of its costs beyond that limit.

Given that the vast majority of personal injury cases settle, this decision has wide ranging and significant ramifications for claimants and defendants, and for their representatives.

The Court did however leave the door open for the Civil Procedure Rules Committee to revisit the issue.

It expressed at [9] "*doubt* [as to] *the appropriateness of a procedural question of this kind being referred to this court for determination. The very fact that two eminently constituted Courts of Appeal have differed profoundly over the interpretation of a provision of the CPR suggests that there must be an ambiguity which practitioners need to have sorted out. The CPRC exists for the purpose of keeping the CPR under constant review. It is better constituted and equipped than is this court to put right such ambiguities, all the more so where, as here, the outcome is suggested by both parties and by the Association of Personal Injury Lawyers ("APIL"), intervening, to have potentially profound policy consequences for the maintenance of a reasonably fair and level playing field in PI litigation, something which this court is much less well equipped than is the CPRC to assess.*"

The Court itself acknowledged at [44] that its construction "*may lead to results that at first blush look counterintuitive and unfair. Why should a defendant which has a substantial costs order in his favour have to pay out costs to a claimant under an order made against him when the two costs orders would net off against each other, leaving both sides to meet their own solicitor's costs themselves?*" It also recognised at [45] that "*this construction of rule 44.14 may lead to results that appear anomalous. We have already referred to the fact that a judge in making an order for costs may adjust the amount or percentage ordered to reflect the relative success of the parties though, as* [counsel for the claimant] *pointed out, a judge might also take into account when invited to do so, that this would be watering down the protection that would be afforded to the claimant if the judge made cross costs orders instead.*"

The full judgment can be found here: Ho (Respondent) v Adelekun (Appellant) – The Supreme Court