

12

King's Bench Walk

QOCS: Recent Battles and the Wars to Come

Andrew Roy

roy@12kbw.co.uk

Topics

1. The scope of QOCS
2. Enforcing costs against damages
3. Setting off D's costs against C's
4. Fundamental dishonesty

(I) The Scope of QOCS

- ▶ ***Brown v Commissioner/Metropolitan Police*** [2019] EWCA Civ 1724; [2020] 1 WLR 1257
- ▶ 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 she suffered no psychiatric injury, merely distress.
- ▶ C failed to beat D's Pt 36 offer. Costs ordered against her.
- ▶ C argued that QOCS applied because she had a PI claim.

(I) The Scope of QOCS

HELD:

- (1) QOCS only automatically applied to pure PI claims, as opposed to mixed claims.
- (2) A pure PI claim is one where all the losses claimed are consequential to or dependant upon the injury.
 - (1) Therefore a claim for e.g. loss of earnings would not render the claim a mixed one but a claim for e.g. vehicle damage would.
 - (2) When the claim as a whole can fairly be described as a PI one even it contained a small non-PI element, QOCS would normally be applied.
 - (3) This was a genuinely mixed claim. QOCS should be disapplied to the extent it was just to do so. This issue was remitted to the trial judge.

(I) The Scope of QOCS

- ▶ **Brown** provides *welcome* (if unsurprising) clarification (a) as to what qualifies as a mixed claim; and (b) that such claims do not benefit from QOCS protection simply by including a PI element (especially a spurious or minor one).
- ▶ Although it leaves considerable scope for argument in genuine mixed claims.
- ▶ Further welcome clarification was provided in **Wickes Building Supplies Ltd v Blair (No.2: Costs)** [2020] EWCA Civ 17; [2020] Costs LR 31 as to whether QOCS applies to appeals in PI cases.
- ▶ There had been several lower court decisions holding that it did. In **Wickes** the C/A affirmed these. QOCS applies to PI appeals as it does to litigation at first instance.

(2) Enforcing Costs against 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's damages recovered from Ds 4-6.

(2) Enforcing Costs against Damages

- ▶ **HELD** (Coulson LJ, Henderson and Arden LJJ agreeing):
 1. Costs can be enforced against any order for damages, not just against an order made in favour of the D seeking its costs. Therefore if C wins at trial against D1 but loses against D2, D2 can enforce costs against damages from D1.
 2. **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 settlement, including under Part 36. This is made explicit at [45-46].

(2) Enforcing Costs against Damages

- ▶ The rules committee considered reversing this but decided not to.
- ▶ Extremely important decision with very wide consequences.
- ▶ Needs to be kept in mind when making strategic/tactical decisions.
- ▶ Some unanswered questions:
 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. **Spire Healthcare Ltd v Brooke** [2016] EWHC 2828 (QB) at [60-61] 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) Setting off D's costs against C's

- ▶ **Ho v Adekun (No. 2)** 2020] EWCA Civ 517.
- ▶ Ex-Protocol claim settled for £30K.
- ▶ Argument as to whether C was restricted to fixed costs.
- ▶ DDJ held she was. CJ held she was not. C/A held she was.
- ▶ C therefore in principle liable for D's costs of the DDJ hearing and both appeals.
- ▶ But **Cartwright** (see above) precluded D enforcing costs against C's damages.

(3) Setting off D's costs against C's

- ▶ D therefore sought partial recovery by an order setting off her costs against C's costs of the substantive claim.

- ▶ C argued that (1) QOCS precluded set off; and (2) even if it did not set off should not be ordered as matter of discretion.

- ▶ **HELD:**
 1. *Howe v Motor Insurer's Bureau (No. 2)* (6 July 2017) was binding that QOCS did not preclude set off.

 2. That being so, set off should be ordered. There was nothing in the particular circumstances of the case rendering it unjust to do so.

(3) Setting off D's costs against C's

- ▶ **BUT**, the Court was of the view that there powerful arguments that OQCS should preclude set off.

- ▶ They made clear that they would have so held but they not been bound by **Howe**.

- ▶ They therefore:
 1. Urged the Rules Committee to reconsider the matter; **and**

 2. Gave C permission to appeal to the Supreme Court.

- ▶ The ultimate resolution of this issue is therefore awaited.

(3) Setting off D's costs against C's

- ▶ The issue is one with important practical ramifications for both Cs and Ds.
- ▶ The vast majority of personal injury cases settle.
- ▶ As confirmed in ***Cartwright***, supra, Ds cannot enforce costs against damages obtained via settlement.
- ▶ It follows that in the vast majority of cases (subject to exceptions such as FD) Ds cannot enforce costs unless C recovers damages at trial.
- ▶ Given that going to trial and losing is normally the last outcome Ds wish to seek, for practical purposes set off against costs will be the only worthwhile vehicle for recovery.

(3) Setting off D's costs against C's

- ▶ The availability of costs set off can avail D in a number of circumstances e.g.:
 1. Where D makes an effective Part 36 offer:
 - (a) Which C fails to beat at trial. Whilst D could enforce costs against damages, there could easily be a shortfall.
 - (b) Which C accepts late. Whilst D would normally be entitled to a costs order in his favour, **Cartwright** precludes enforcement of such costs against damages.
 2. Where C loses the claim but wins an interim hearing (including any appeal) along the way. C costs of that hearing would be extinguished by D's costs of the action.
 3. Where C 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**.

(3) Setting off D's costs against C's

- ▶ The availability of costs set off thus gives D's Part 36 offers sharper teeth (both in substantive proceeding and – particularly - costs assessments).
- ▶ It likewise puts Cs at a costs risk if they advance unmeritorious points.
- ▶ This generates considerable costs/settlement pressure on Cs/their advisers. Any costs shortfall will have been borne by one or both.
- ▶ Conversely, if costs set off is precluded (a) D's Part 36 offers will be significantly defanged; (b) Cs will be at no risk of adverse costs when they lose points.
- ▶ So watch this space.

(4) Fundamental Dishonesty

- ▶ QOCS will be displaced by a finding of FD at trial.
- ▶ Recent authority confirms that any significant dishonesty will be sufficient; **Haider v DSM Demolition Ltd** [2019] EWHC 2712 (QB) [2019] Costs LR 1659.
- ▶ This will be so even if C does not persist with the dishonesty to the trial itself; **Roberts v Kesson** [2020] EWHC 521 (QB).
- ▶ If case concludes before trial court has a discretion as to whether or not to order a determination of FD for the purposes of displacing QOCS.
- ▶ Exceptional circumstances needed for such determination if a case settles (NB: Ds beware leaving offers on the table).

(4) Fundamental Dishonesty

- ▶ However, no such requirement if C discontinues; ***Alpha Insurance A/S v Roche*** [2018] EWHC 1342 (QB); [2018] 4 WLR 92 (phantom passenger claim).
- ▶ In ***Roche Yip J*** held that it was appropriate to order a FD determination. Although that would entail costs and court time, there was a public interest in deterring fraud.
- ▶ The main factors in ***Roche*** were that C discontinued (a) the day before trial; and (b) without explanation.
- ▶ c.f. ***Zurich Insurance Plc v Romaine*** [2019] EWCA Civ 851 per Haddon-Cave LJ: at [60] “*the message needs to go out to those who might be tempted to bring - or lend their names to - fraudulent claims: that dishonest claimants cannot avoid being liable to committal proceedings merely by discontinuing their original fraudulent claim*”.

Thank you

