

QOCS: Pitfalls and Opportunities

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Introduction

- QOCS is a crucial part of PI litigation.
- It is self-evidently crucial in respect of costs, which are important in themselves.
- Its effects moreover feed into (or should feed into) to settlement dynamics, and thus into both strategy and tactics.
- However, the effects QOCS are not as clear or well understood as they should be.
- The QOCS rules themselves are extremely short. Whilst brevity is generally desirable, these rules are so brief as to beg as many questions as they answer.
- QOCS therefore creates pitfalls for unwary litigators and corresponding opportunities for canny litigators.

Topics

1. The QOCS rules – summary of key points (AR)
2. The scope of QOCS (CT)
3. Enforcing D's costs against C's damages (AR)
4. Setting off D's costs against C's costs (AR)
5. Displacing QOCS (CT)

**PLEASE MESSAGE ANY POINTS/QUESTIONS DURING THE TALK – WE
WILL ADDRESS THEM AT THE END TIME PERMITTING**

(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; **rr44.13(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. took 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 **only** effect of QOCS is to bar enforcement **r44.14**. It has **no** effect on costs orders in principle (e.g. whether C pays D's costs).
- ▶ 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 seeks 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 a 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 balance of probabilities to be fundamentally dishonest.

- ▶ By **r.44.16(2)** D can enforce costs up to 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.
- ▶ **HELD:**
 - (1) 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.
 - (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. **PD 44 12.6** was wrong to suggest otherwise (this is being amended in next update to the CPR this spring).
 - (3) 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
 - ▶ R sustained injuries in an accident at work whilst employed by A. R submitted a claim under the Protocol. A admitted liability. R successfully appealed a decision to allow the claim to continue under the Protocol after R served additional evidence. A successfully appealed to the Court of Appeal. The parties agreed that R should pay costs.
 - ▶ 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.
 - ▶ Even where: (a) second appeal; (b) appeal brought by the defendant to the original claim; and (c) the court had declined to exercise its discretionary powers to limit recoverable costs under r.52.19.

(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 had failed. “Proceedings” was synonymous with “a claim”.
- ▶ *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.

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

- ▶ The leading case is *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.

- ▶ **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.
 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 out of court settlement, including under Part 36, as is made explicit at [45-46]. Although C's should be careful how to draft non-Pt 36 consent orders (i.e. insist on a Tomlin order).

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

- ▶ The rules committee considered reversing this but decided not to.
- ▶ 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.
- ▶ 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, again, consent orders should be carefully worded to be safe.

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

- ▶ Given the effect of ***Cartwright***, the potential availability for Ds to set their costs off against C's is crucial. It will be the only means of D recovering any costs in the vast majority of cases.
- ▶ It the only way in which D can e.g. recover his costs of successfully contesting a detailed assessment following settlement of a substantive claim.
- ▶ The law as it currently stands is that the court (1) can order set-off when it is just to do so; and (2) will generally do so on the basis that costs should follow the event.
- ▶ This was recently confirmed in ***Ho v Adelekun (No. 2)*** [2020] EWCA Civ 517; [2020] Costs LR 317 (AR for D).

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

- ▶ **Ho** was a PI claim which settled for £30,000. There was then a dispute about whether fixed costs applied.
- ▶ D won on this point at first instance. She lost on first appeal. She won in the Court of Appeal ([2019] EWCA Civ 1988; [2020] RTR 6; [2019] Costs LR 1963).
- ▶ D was therefore entitled to her costs of these hearings, totalling c£48,000.
- ▶ **Cartwright** precluded enforcement of these against C's damages. (NB these would have been insufficient in any event. Set-off thus can be valuable to Ds even when C has an order for damages.)
- ▶ D therefore sought partial recovery by setting off against C's fixed costs of c£17,000.

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

▶ C argued that:

- (1) Set-off was a species of enforcement, and therefore precluded by QOCS; and
- (2) Even if the court had jurisdiction to order set-off, it should not exercise its discretion to do so as such an order would be inconsistent with the underlying principles of QOCS.

▶ Both these arguments were rejected. The court held that:

- (1) ***Howe v MIB*** [2017] 7 WLUK 84 (No. 3) was binding that set-off was permissible.
- (2) On that premise there was no principled reason not to order it. D had incurred substantial costs vindicating her rights and even with set-off would be left with a large shortfall.

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

- ▶ **However**, the Court of Appeal recommended that rules committee revisit the issue and gave permission to appeal to the Supreme Court.
- ▶ C has lodged an appeal to the Supreme Court. (The rules committee have deferred consideration of the issued pending this appeal.)
- ▶ So watch this space.
- ▶ But at the moment **Howe** remains good law and Ds should be astute to seek set-off.
- ▶ Although as the hearing date in **Adelekun** approaches (provisionally listed on 29-30 June 2021) it may be possible for Cs to ask for an application for set-off to be adjourned.
- ▶ In appropriate cases D could circumvent these problems by seeking that the notional set-off be reflected in % reduction to C's costs as opposed to cross-orders for costs.

(5) Displacing QOCS: Strike out

44.15

Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that –

- (a) the claimant has disclosed **no reasonable grounds** for bringing the proceedings; or
- (b) the proceedings are **an abuse of the court's process**; or
- (c) the conduct of –
 - (i) the claimant; or
 - (ii) the 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.

(5) Displacing QOCS: Strike out

- ▶ ***Shaw v Medtronic Corevalve LLC*** [2017] EWHC 1397 (QB); [2017] 3 Costs L.R. 491.
 - ▶ Identified a lacuna in the rules.
 - ▶ Having set aside permission for the claimant to serve proceedings on D1 and D3, thereby bringing the claims to an end in circumstances where but for such setting aside the Court would have struck them out, the QOCS rules did not allow for those Ds' costs to be enforced against C.
- ▶ ***Mabb v English*** [2017] EWHC 3616 (QB); [2018] 1 Costs L.R. 1.
 - ▶ In deciding applications to set aside notice of discontinuance under r.38.4(1) the court has a discretion which it should exercise to give effect to the overriding objective
 - ▶ Abuse of process is a powerful factor in favour, but not a necessary or exclusive criterion. There's nothing inherently abusive in C taking steps to avoid a costs liability.
 - ▶ The rules do not put the onus on C to give a reason for discontinuing.
 - ▶ Parts 38 and 44 together gave rise to a situation where D might lose the opportunity to displace QOCS but there is no inherent unfairness in C taking advantage of that.

(5) Displacing QOCS: Strike out

- ▶ Possible to circumvent this by presenting summary judgment application as a strike out.
- ▶ See **Higgins v Swanlea Ltd** [2016] EWHC 1147 (Ch) per John Baldwin QC: “*the court may use rule 3.4 to strike out a claim which has no prospect of success on the facts.*”
- ▶ Successfully deployed to displace QOCS in **XY v Ingenious Media** [2018] EWHC 350 (QB), where the claim was struck out on merits rather than because C’s pleading per se disclosed no arguable claim (AR for D).
- ▶ Conduct likely to obstruct the just disposal of proceedings includes C, facing fraud allegations, not attending trial; **Brahilika v Allianz Insurance Plc** [2015] 7 WLUK 956.
- ▶ Might also arguably encompass serial or other egregious non-compliance with rules and orders or the like.

(5) Displacing QOCS: Fundamental dishonesty (44.16)

- ▶ Test for FD familiar from strike-out applications under **s57 CJCA 2015**
- ▶ Test is an objective one. See HHJ Simpkins in ***Garraway v Holland & Barrett Ltd*** [2020] 3 WLUK 582 at [76] “[C] *may not have recognised that she was being dishonest because she has become obsessed with this case, and with attributing her current medical condition to the accident. There is a considerable psychiatric element to this. Nevertheless, what she has done was objectively dishonest and in doing so, she has misled the experts. Nothing could be more fundamental in a personal injury claim of this nature than to give the experts a false impression of her condition*”.
- ▶ Examples:
 - ▶ Clear lies (e.g. ***Razumas v MOJ*** [2018] EWHC 215 (QB))
 - ▶ False documents (e.g. ***LOCOG v Sinfield*** [2018] EWHC 51(QB))
 - ▶ Important omissions (e.g. ***Molodi v Cambridge*** [2018] EWHC 1288 (QB))
 - ▶ Evidence which is “*hopelessly inconsistent*” or contradictory (e.g. ***Richards v Morris*** [2018] EWHC 1289 (QB))
 - ▶ Witness box “*performances*” (e.g. ***Pinkus Pinkus v Direct Line*** [2018] EWHC 1671 (QB))

Some recent FD cases

Fundamentally dishonest	NOT fundamentally dishonest
Pegg v Webb [2020] EWHC 2095 (QB)	Crosby v Wakefield MDC [2020] 1 WLUK 573
Roberts v Kesson [2020] EWHC 521 (QB)	Smith v Ashwell Maintenance [2019] 1 WLUK 541
Haider v DSM Demolition Ltd [2019] EWHC 2712 (QB)	Wright v Satellite Information Services [2018] EWHC 812 (QB)
Patel v Arriva Midlands Ltd & Zurich Insurance Plc [2019] EWHC 1216	Miley v Friends Life Ltd [2017] EWHC 2415 (QB)

(5) Displacing QOCS: Fundamental dishonesty

- ▶ QOCS will be displaced by a finding of FD at trial. In a particularly strong case the court can strike out for FD before trial; ***Patel v Arriva Midlands Ltd*** [2019] EWHC 1216 (QB); [2019] 3 All ER 702.
- ▶ If case concludes before trial (or a ***Patel*** type strike out) the court has a discretion as to whether or not to order a determination of FD.
- ▶ Exceptional circumstances needed for such determination if case settles, but 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 where 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”.

(5) Displacing QOCS: Fundamental dishonesty

- ▶ The court can find FD even if not pleaded by D; ***Howlett v Davies*** [2017] EWCA Civ 1696; [2018] 1 W.L.R. 948.
- ▶ It is not open to a judge who which dismisses a claim on the basis of fraud not to apply not to apply substantive conclusions when deciding costs; ***Zurich Insurance Plc v Bain***, HHJ Freedman Newcastle upon Tyne County Court, 04 June 2015, ***Menary v Darnton*** Portsmouth CC, 13 December 2016, HHJ Iain Hughes QC.
- ▶ The position is obviously different if C merely fails to prove his case and there is no positive finding of dishonesty; ***Nesham v Sunrich Clothing Ltd*** HHJ Freedman Newcastle upon Tyne County Court, 22 April 2016

THANKS FOR LISTENING

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