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## IT'S ALL GUNG-HO FROM HERE: QOCS IN LIGHT OF *HO V ADELEKUN* [2021] UKSC 43

There is little doubt that if you are a personal injury practitioner then you will have heard of the ground-breaking decision of *Ho v Adelekun* [2021] UKSC 43. This decision will have ramifications across the personal injury landscape. The Supreme Court held that the Court has no discretion to order costs set-off in qualified one-way costs shifting ("QOCS") cases.

This article goes back to the basics to address four key questions:

1. What is QOCS?
2. What is set-off?
3. What is this case about? and
4. What are the implications of this decision?

### WHAT IS QOCS?

Since April 2013, QOCS was introduced in Civil Procedure Rules (CPR) 44.13 to 44.17. Its implementation was to provide claimants with protection from defendants' costs in personal injury claims, claims under the Fatal Accidents Act 1976 and claims under s1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 (Civil Procedure Rule 44.13).

QOCS ensures that any costs order made against a claimant is enforceable only up to the amount of any damages and interest recovered by the claimant. Therefore, an order for costs, such as an interim application or the failure to beat a Part 36 offer made by the defendant, can only be enforced up to the level of damages and interest awarded to the claimant. If the claimant is unsuccessful, then the defendant cannot enforce payment for their costs without permission from the court (CPR 44.14(1)).

There are a number of exceptions to the general rule:

1. The claimant discloses no reasonable grounds for bringing a claim (CPR 44.15(a));
2. The proceedings are an abuse of process (CPR 44.15(b));

3. The conduct of the claimant or someone acting on the claimant's behalf with the claimant's knowledge of such conduct is likely to obstruct the just disposal of proceedings (CPR 44.15(c)); and
4. A claim is found to be fundamentally dishonest (CPR 44.15(d)).

### WHAT IS SET-OFF?

QOCS is distinct from set-off. CPR 44.12 provides that the Court may "set off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance" where a party entitled to costs is also liable to pay costs. If a claimant owes the defendant £50,000 and the defendant owes the claimant £100,000, then the defendant can set-off the £50,000 against £100,000. This would result in the defendant paying £50,000 to the claimant.

Set-off and QOCS are important issues, particularly to defendants. If set-off is allowed, then defendants are able to enforce its costs order against the claimant's costs. Consider an example where QOCS is in operation; the defendant's costs order is £3,000 and a claimant's costs order is £6,000. The judgment sum is £2,000. Defendants can enforce the costs order in its favour against the claimant's damages and interest, without the need for permission. The defendant would be able to enforce £2,000 of its costs order against the claimant's damages. If set-off against the claimant's costs was allowed, then the defendant would only have to pay the claimant costs of £5,000. If set-off was not allowed, then the defendant would have to pay £6,000 to the claimant. Therefore, the defendant is better off in the sum of £1,000 if the court allowed set-off against the claimant's costs.

Can set-off be used in QOCS cases? The Court of Appeal in *Howe v Motor Insurance Bureau (No 2)* [2017] EWCA Civ 2523 (*Howe*) considered this question. It was necessary to interpret CPR 44.14(1), which states that:

"Subject to rules 44.15 and 44.16 orders for costs made against a

claimant may be enforced without the permission of the court, but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant".

The Claimant contended that this rule precludes set-off of costs. However, the court disagreed. The Court decided it had jurisdiction in QOCS cases to order the set-off of the parties' respective costs entitlement. In this case, the Court exercised its discretion in favour of the Defendant by setting off the costs order in favour of the Defendant against the Claimant's costs order.

## THE FACTS OF HO V ADELEKUN [2021] UKSC 43

The Claimant, Ms Adelekun, issued proceedings relating to the injuries she sustained in a road traffic accident (RTA). The claim left the RTA Protocol as liability was not admitted. Ordinarily, fixed costs would apply to claims that leave the RTA Protocol. The Claimant accepted a Part 36 offer, and the terms of settlement were set out in a Consent Order. One of the terms of the offer stated "costs to be subject to detailed assessment if not agreed". According to the Defendant, Ms Ho, the Claimant was entitled to no more than fixed costs which were estimated at about £14,500 to £16,000. The Claimant, in contrast, argued that she was not limited to fixed costs and claimed some £42,000 in costs. The Court of Appeal held that the Claimant was only entitled to fixed costs.

The case subsequently returned to the Court of Appeal to deal with the issue of QOCS. The Claimant contended that despite being ordered to pay the Defendant's costs, the order could not be enforced against her. As such, the Claimant submitted that the Defendant must pay her fixed costs of £16,700 and this should not be absorbed by the costs order of £48,600 she owes the Defendant. The Defendant contended that she should not pay the fixed recoverable costs of £16,700 to the Claimant as they should be set-off against the £48,600 costs that the Claimant owes her.

The Claimant sought to argue that the Court did not have the jurisdiction to award the set-off as QOCS is a self-contained provision. QOCS gives claimants protection from having to bear the defendant's costs, except in particular circumstances as under CPR 44.14. Whilst this submission was contrary to the Court of Appeal's decision in *Howe*, the Claimant contended that the decision was *per incuriam* as the Court had overlooked an applicable principle. The Court of Appeal disagreed with the Claimant stating that "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". On this basis, the Court of Appeal felt bound to follow *Howe*, which ultimately meant that the Court had the jurisdiction to direct costs set-off.

Permission to appeal was granted. On 6 October 2021, the Supreme Court handed down its unanimous decision which found in favour of the Claimant. The Supreme Court held that CPR 44.14 was ambiguous. However, the Supreme Court held that there was no jurisdiction to order set-off against costs. In reaching their decision, the Supreme Court considered the fact that:

1. Set-off of costs against damages required less assistance from the court than set-off against costs. The latter requires the court's discretion under CPR 44.12.
2. Cost orders are not mentioned at all in CPR 44.14.

Consequently, the Defendant must pay the Claimant's full pre-settlement costs of £16,700 and cannot enforce the Court of Appeal costs order against the Claimant.

## IMPLICATIONS OF THE DECISION

The decision in *Ho* has caused a stir amongst practitioners. For claimant firms, this is no doubt a welcomed decision. It provides reassurance for claimant firms as claimant costs are now protected from any costs order in favour of the defendant. In particular, this clarification is helpful to claimant practitioners when considering whether to accept a defendant's Part 36 offer or not. In the words of Bolt Burdon Kemp, Adelekun's representatives, the decision protects claimant firms in the same position from "potential financial ruin".

Defendant firms are now in a more precarious position. Critics of the decision have suggested that claimant firms have been given the green light to make inflated costs claims, safe in the knowledge that even if defendant firm successfully resist them, then victory will be won at too great a cost to have been commercially successful. However, it is important to remember that this is a case where there was no court determination that the original claim was anything but honest. There will be instances where claimants seeking to inflate costs claims will not be protected as there are still safeguards, such as where the claimant's conduct obstructs the just disposal of proceedings and/or where the claim is an abuse of process.

For now, this decision sets a clear precedent for future cases. In this sense, it brings certainty to a previously murky area. However, this is not the end for QOCS and set-off. The Supreme Court made it clear that there is an ambiguity within

the CPR and the judiciary are not in the best position to decide questions of construction. The Supreme Court highlighted that the Civil Procedure Rule Committee (CPRC) are better equipped to put right any ambiguities in the CPR. Therefore, the CPRC should amend the relevant rule if, in their view, the purpose of QOCS and the overriding objective is not upheld by the Supreme Court's decision.

If you would like to discuss any matters raised in this article, please contact me on [shoshana.mitchell@normantonchambers.com](mailto:shoshana.mitchell@normantonchambers.com).

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