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QOCS on manoeuvres

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Introduction

As most personal injury practitioners will now be aware, significant changes are being made to the qualified one-way costs shifting (QOCS) regime from 6th April 2023.

It is important to note that the changes will only apply to claims issued after 6th April 2023. Therefore, for the next few years, there will the 2 QOCS regimes running in tandem, with the applicability being determined by the date of issue. It is expected that Claimants will, if possible, issue before the changes take effect, in order to take advantage of the existing regime, which as shall be demonstrated, is far more favourable to Claimants.

Before considering the changes, it is helpful to consider what the previous regime was.

QOCS was first introduced to provide protection to Claimants in personal injury claims from having to pay adverse costs orders, in circumstances where they were unable to recover, on an *inter partes* basis, the costs of an insurance product to protect them from such a risk.

CPR 44.14 sets out the effect of the QOCS regime. It currently reads as follows:

1. 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.
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.
3. An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.

Over the years, QOCS has become a key battleground in personal injury litigation. The changes from April will overturn to 2 relatively recent cases. In summary, the cases being overturned are:

- *Cartwright v Venduct Engineering* – the Court of Appeal held that CPR 44.14 was not engaged where there had been a settlement by way of a Tomlin Order. This was because the Court Order provided for a stay, with the terms of the settlement being recorded in the accompanying confidential schedule. Given the order was only for a stay, it could not be said there was an order for damages or interest in favour of the Claimant. Accordingly, there was nothing in the 'pot' for the Defendant to enforce its costs order against. The Court of Appeal held, strictly *obiter dictum* but subsequently followed as binding precedent, settlement via a Tomlin Order was '*no different to the settlement that arises when there is an acceptance of a Part 36 offer*'.
- *Ho v Adelekun* – the Supreme Court held that whilst set off pursuant to 44.12 was permitted in a QOCS case, set off against costs was a species of enforcement. Accordingly, set off against costs could only be ordered up to the limit provided by 44.14 (the aggregate amount in money terms of any orders for damages and interest). Accordingly, if there was no order for damages or interest, there could be no set off.

Changes

The new QOCS regime will provide as follows (the changes are shown in red):

1. 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 **or agreements to pay or settle a claim for, damages, costs and interest** made in favour of the claimant.

2. **For the purposes of this Section, orders for costs includes orders for costs deemed to have been made (either against the claimant or in favour of the claimant) as set out in rule 44.9.**
3. 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.
4. **Where enforcement is permitted against any order for costs made in favour of the claimant, rule 44.12 applies.**
5. An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.

These changes increase significantly the 'pot' that Defendants can enforce any costs orders in their favour against. Not only can they enforce against orders for damages, but agreements to pay damages or costs. In addition, costs orders, whether made by the Court or deemed to have been made (for example upon acceptance of a Part 36 offer), can be enforced against.

The rules do not provide any guidance on what will constitutes an 'agreement to pay'. In my view, a Calderbank offer for damages would certainly be caught by the definition. A Part 36 offer probably would also, although I expect it will be argued that Part 36 is a self-contained code. The schedule of a Tomlin order would, I consider, in most cases constitute an agreement to pay damages and/or costs. However, given the schedule is confidential, in practice it will be difficult to effect enforcement. It will be interesting to see how Defendants approach enforcement whilst blinded by confidentiality.

Set off against costs

Given the changes, there is now a significant risk for Claimant lawyers of their fees, even those incurred prior to any offer having been made, being extinguished entirely.

Whilst this has caused much comment, it is important to consider and appreciate the exact wording of the amendment. In this regard, 44.14 (4) is of extreme importance.

This provides that set off pursuant to the new CPR 44.14 is subject to 44.12. CPR 44.12 allows the Court to order a set off at its discretion. In exercising its discretion, the Court will apply the *Lockley* principles. In most post-April 2023 personal injury cases, I would envisage the Court being persuaded to make an order for set off, but an order for a set off is required in the absence of agreement.

This raises the prospect of there being many cases in which, pursuant to CPR 44.14, the Defendant is entitled to enforce a costs order against a Claimant, but it not having an order allowing it to set off. To take an example, let us imagine the Claimant recovers damages after trial of £30,000. The Defendant had made a Part 36 offer of £50,000 9 months earlier. The Claimant's pre-offer costs are £45,000. The Defendant's post-offer costs are £110,000. Under the new regime the enforcement 'pot' would total £75,000 (rather than £30,000 under the current regime). However, without an order for set off, the Claimant's solicitor could, in theory, insist that the Defendant pays it its £45,000 costs order. The Defendant would then be left with a £45,000 deficit which it is entitled to enforce against the Claimant personally. But if the Claimant is without assets, that does not help the Defendant. And if the Claimant does have assets, such as a house, but no liquid assets, it leaves them in a very vulnerable position indeed. It is for this reason, that I would encourage practitioners, but Defendants in particular, not to overlook the set off provision and, in any case in which it is needed, seek an order for set off from the Court in the absence of agreement from the Claimant.

Fundamental dishonesty

Many cases in which I am instructed in for insurers involve express or implicit allegations that the Claimant has been fundamentally dishonest in the presentation of or prosecution of their claim. It is important to remember that if fundamental dishonesty is established, that provides an exception to the QOCS regime. This means that enforcement of cost orders is not limited to the 'pot' provided by 44.14, but is unlimited, with the Claimant being responsible for the full extent of any order made.

CPR 44.16 (1) currently provides:

> Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.

The changes to the QOCS regime from April 2023 will not affect 44.16. It is important to remember that even with a more generous 'pot', if a case is dismissed without any interlocutory costs order being made in the Claimant's favour, the Defendant will be left unable to enforce the resulting costs order in its favour without an exception to QOCS being established.

For this reason, it is my view that the raising of issues of fundamental dishonesty are unlikely to be impacted by the changes to the QOCS regime. I would advise insurers to continue to take points in relation to a Claimant's credibility where there are reasonable grounds to suggest they have told lies or deliberately exaggerated.

Interim applications

The most significant change in respect of litigation approach or tactics is likely to be the view taken on interim applications. There will, in my view, be a far greater incentive for Defendants to defend and contest interim matters. If the Defendant is successful in obtaining a costs order against a Claimant, this will have far greater potency given the more generous 'pot' against which enforcement can be made. Equally, if a Claimant is successful on an interim application, and obtains a costs order in its favour but then goes on to lose at trial, the Defendant would be permitted, under the new regime, to enforce the costs order in its favour up to the value of the earlier order for costs in the Claimant's favour.

It seems likely, given the changes, that Defendants would be well advised to take a robust view on interim applications (where appropriate), even where the value of the claim is limited.

Summary

The changes will make the enforcement of costs orders by Defendants in QOCS cases far easier, as there will be a larger 'pot' to enforce against. Enforcement will no longer be constrained to cases where there are orders for damages or interest, but where there has been any agreement to pay damages and interest. Costs orders, and deemed costs orders, will also form part of the enforcement 'pot'.

The changes represent a significant manoeuvre in the favour of Defendants. The QOCS shield is now full of holes. There will now be a significant risk for Claimants, and their lawyers, of litigation proving fruitless.

However, whilst the fortunes of Defendants have improved in this latest battle, there is likely to be continued fighting over the QOCS regime, what it means, and how it should be fairly applied.

Jamie Hill
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