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Two cases about QOCS where the claimant accepted a Part 36 offer late

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Two cases about QOCS where the claimant accepted a Part 36 offer late

Two recent decisions on the application of qualified one-way-costs-shifting ("QOCS"), of the High Court in *Chappell v Mrozek* [2022] EWHC 3147 (KB), and of the Court of Appeal in *Harrison v University Hospitals of Derby & Burton NHS Foundation Trust* [2022] EWCA Civ 1660, reinforce the difficulty that personal injury and clinical negligence defendants will face in obtaining enforceable costs orders other than where the claimant obtains an order for damages at trial[1]. Defendants will generally be unable to enforce costs orders where the claim is settled via Part 36, even if an order of the court is required to enforce the settlement, to permit the claimant to accept the offer, or to direct that the amount payable to the claimant is reduced by the amount of any deductible benefits.

Chappell v Mrozek

The facts [1, 5-8]

In *Chappell,* the claimant, alleged to have had a *"burgeoning career as a chef"*, was injured in a road traffic accident caused by the admitted negligence of the defendant. The defendant made a Part 36 offer of £250,000 which the claimant did not accept within the 21-day relevant period. Nearly 2 years later, after the claim had progressed significantly with directions for disclosure and forensic accountant analysis, the claimant accepted the offer out of time. The defendant did not pay the agreed sum and so the claimant applied pursuant to r36.14 to enforce the settlement. Meanwhile, the defendant applied to enforce the costs order which the claimant had agreed the defendant was entitled to (that the claimant pay the defendant's costs from expiry of the relevant period).

The issue [9-12]

The claimant argued that the wording of r44.14(1) was clear that a defendant could only enforce orders for costs up to the value of *"any orders for damages and interest made in favour of the claimant"* and that a judgment under r36.14(7) enforcing a Part 36 settlement was not an *"order for damages"*. The claimant argued that to decide otherwise would be a strain on the wording of r44.14(1) and that it would be wrong to financially reward a defendant for refusing to pay a Part 36 settlement sum (thereby necessitating an order of the court which would not otherwise have been required). Further, the claimant argued that the decisions of the Court of Appeal in *Cartwright v Venduct Engineering Limited* [2018] EWCA Civ 1654 and of the Supreme Court in *Ho v Adelekun* [2021] UKSC 43 provided binding authority that a defendant could not enforce an order for costs against a settlement sum, regardless of whether that settlement was via Part 36 or contained in a Tomlin order, as in *Cartwright*.

The defendant argued that the claimant was seeking to impermissibly expand the ratio in *Cartwright* and in *Ho*. In *Cartwright*, the Court was dealing with damages payable pursuant to the schedule to a Tomlin order and in *Ho*, the issue was whether the defendant could set off a costs entitlement against a costs liability, rather than against damages, however obtained. The defendant argued that a judgment pursuant to r36.14(7) was an "*order for damages"* within r44.14(1). Otherwise, a claimant could delay accepting a Part 36 offer and put the defendant to additional expense without any risk of adverse costs consequences.

The decision

Master Stevens held that regardless of whether she was bound by *Cartwright,* she agreed with the dicta in that case that acceptance of a Part 36 offer fell outside the wording of r44.14(1) [34-35]. The

[1] Or where one of the exceptions in r44.15 or r44.16 applies. Neither case concerned these so-called "conduct exceptions".

Master considered that Coulson LJ's reasoning in *Cartwright* did not permit any relevant distinction between Tomlin orders and Part 36 settlements [36]. As for *Ho*, whilst the Master acknowledged that there was no in-depth examination of *Cartwright* in that case, she considered that the Supreme Court would have overturned *Cartwright* had it considered that it was inconsistent with the language of Part 44 [41-42]. In conclusion, the Master noted that the QOCS provisions operated on a *"swings and roundabouts basis"* [49], that the defendant could have withdrawn the offer [50] and that it was "*unfortunate*" that the defendant had not paid the claimant the agreed damages [54]. The claimant was permitted to enforce the settlement and the defendant not permitted to enforce its costs entitlement.

Harrison v University Hospitals of Derby & Burton NHS Foundation Trust

The facts [5-11]

In *Harrison,* the claimant brought a clinical negligence claim against the defendant following the perforation of her uterus and bowel during surgery. The defendant made a Part 36 offer of £421,362.88. The offer stipulated that it included any deductible benefits and so the claimant would require the court's permission pursuant to r36.11(3)(b) to accept the offer after expiry of the relevant period if further deductible benefits had been paid. Nearly two years later, the claimant indicated that she wished to accept the offer. The matter came before HHJ Sephton KC, who gave the claimant permission to accept the offer, directing pursuant to r36.22(9) that the net sum payable to the claimant after deduction of deductible benefits and interim payments was £298,156.16, and ordered the claimant to pay the defendant's costs after expiry of the relevant period. However, he ordered that the defendant could not enforce this costs entitlement pursuant to r44.14(1).

The issue [18-21]

The defendant argued on appeal that it should have been permitted to enforce its costs entitlement because the order made by the judge was an "*order for damages"* within r44.14(1). Not only had the judge given the claimant permission to accept the offer, but he had directed that the amount of the offer payable to the claimant be reduced by the deductible amounts. The claimant submitted that the judge's order simply gave the claimant permission to accept the offer such that the defendant's obligation to pay arose by virtue of Part 36 and not any order of the court. There was therefore no *"order for damages"* within the meaning of r44.14(1).

The decision

Coulson LJ gave a judgment with which Stuart-Smith LJ and Snowden LJ agreed. The Court held that an order under r36.22(9), permitting the Claimant to accept a Part 36 offer and directing that the amount of the offer payable to the claimant be reduced by deductible amounts, was not *"an order for damages"* within r44.14(1). The Court gave the following reasons.

Firstly, the exercise under r36.22(9) did not entail any evaluation or assessment of what was due or to be paid; the judge simply directed that one part of the offer would be payable to the claimant and the balance payable to the DWP [28-29]. If the defendant had failed to pay, then the claimant could not have independently enforced HHJ Sephton KC's order and would have had to apply for judgment pursuant to r36.14(7) [30].

Secondly, it could not make a difference to a claimant's QOCS protection that in some situations a claimant required permission to make a Part 36 offer or the offer included deductible amounts [32-38].

Thirdly and relatedly, there were a variety of situations in which Part 36 required the court to make some sort of order, for example offers to make periodical payments or to pay provisional damages

or cases where the claimant lacked capacity. There was no justification for those claimants to lose their QOCS protection whilst "ordinary" claimants kept it [39-44].

Fourthly, Coulson LJ considered that the Supreme Court in *Ho* had treated all settlements interchangeably and had held that where a case was settled by Part 36, there was no *"order for damages"* within r44.14(1) [46-47].

Fifthly, had the Civil Procedure Rules Committee ("CPRC") intended r44.14(1) to cover settlements, r44.14(1) would have said so. Coulson LJ noted that the CPRC had recently proposed an amendment to r44.14(1) to allow the defendant to enforce orders for costs up to the value of any *"orders for or agreements to pay damages, costs and interest"*. However he considered that this assisted the claimant rather than the defendant in *Harrison*, because it indicated that the committee felt that the present wording of r44.14(1) did not cover such agreements.

Conclusion

Personal injury defendants cannot generally enforce orders for costs where the claim settles via Part 36, even where an order of the court is required to enforce the settlement, permit the claimant to accept the offer, or direct that the amount of the offer payable to the claimant is to be reduced by the amount of deductible benefits. However, it now appears that the CPRC are seeking to amend the QOCS provisions to permit defendants to enforce their costs against a claimant's costs or damages, even if obtained pursuant to a settlement. This would reverse both *Ho* and *Cartwright* (and therefore *Chappell* and *Harrison* as well).

On the one hand, the Court of Appeal in *Harrison* plausibly suggested that it made no sense for different types of Part 36 settlement to afford differing degrees of QOCS protection. On the other hand, the suggestion that an order for provisional damages following acceptance of a Part 36 offer would not amount to *"an order for damages"* [42] might seem to run contrary to the express wording of r44.14(1). Such an interpretation of r44.14 was justified on policy grounds, notwithstanding the dicta of the Supreme Court in *Ho* that if the QOCS provisions had adverse policy consequences, then that was a matter for the CPRC to address (*Ho,* [31-32]).

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