**In the County Court at Leicester B37YP015**

**Before Regional Costs Judge S. Hale**

**Sitting at Nottingham**

**Jeffery Cartwright**

**v**

**Venduct Engineering Ltd**

**Reserved Judgment**

1. In this application the Defendant seeks a declaratory ruling from me as to the scope and applicability of Civil Procedure Rule 44.14(1), which purports to set out the effect of qualified one-way costs shifting.
2. In order to understand the issues that I have to resolve it is necessary to consider them in the context of the facts of the case and in the light of the background to the Rule under consideration.

**Qualified One Way Costs Shifting**

1. Qualified One Way Costs Shifting (QOCS) was introduced by the Civil Pocedure (Amendment) Rules 2013 following Lord Justice Jackson’s wide ranging review of Civil Costs. One of Jackson LJ’s concerns was the very significant financial burden shouldered by the insurers of unsuccessful defendants who were required to pay the significant costs of After the Event Insurance Policies taken out by Claimants. The rationale behind the QOCS scheme, which is set out in Civil Procedure Rules 44.13 to 44.17 is that if a Claimant’s potential liability to pay the Defendant’s costs of an action were removed the Claimant would not require ATE insurance and the expense of the premium would be saved by the Claimant and ultimately in most cases the Defendant. In essence the recommendation involved a compromise arrangement whereby the recoverability of ATE premiums was abolished and in return the Claimant’s liability to pay the defendant’s costs was in general terms at least, removed. The underlying premise for this new arrangement was that although Defendants would be denied the opportunity to recover their costs of claims defended successfully, their losses would be more than compensated by their not having to pay substantial ATE premiums in cases where the defence had failed.
2. The applicability of the scheme is defined by CPR 44.13(1) which provides that:
3. This section applies to proceedings which include a claim for damages
4. for personal injuries.
5. The QOCS scheme does not change the basic law that entitles the court to make a costs order in favour of a successful litigant. The QOCS scheme simply provides that a losing Claimant is immune from the enforcement of any costs order made in favour of a successful Defendant, except in certain limited circumstances. One such exception with which this application is concerned is that embodied in Civil Procedure Rule 44.14. The rule states as follows:
6. 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.
7. 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.
8. 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.

**The Claimant’s action against Venduct Engineering Ltd and others**

1. The Claimant brought an action for damages against a number of Defendants in which he alleged that he had suffered noise induced hearing loss (NIHL) in the course of his employment with the respective defendants. It is frequently the case that Claimants have been employed by several different entities in the course of their working lives and have been exposed to noise to a greater or lesser extent with each employer for differing amounts of time. NIHL is recognised to be a divisible condition that is to say each day’s negligent exposure to excessive noise constitutes a fresh tort and as a consequence each defendant may be held individually liable for their portion or contribution to the Claimant’s injury and his consequential losses. Defendants are therefore severally liable in respect of their having caused a defined percentage of the Claimant’s hearing loss and not jointly responsible for the entirety of the loss. It is therefore very often the case that a Claimant will sue several different defendants.
2. On the 9th February 2016, the Claimants claims against the 1st and 2nd Defendants were discontinued. On 7th December 2017 the Claimant reached a settlement with the fourth, fifth and sixth defendants. The terms of the settlement were embodied in a schedule reciting that the Claimant was to accept a lump sum payment of £20,000 in full and final settlement of his cause of action against the 4th 5th and 6th Defendant’s inclusive of general damages, special damages, costs of the action interest and CRU. The lump sum was not defined by reference to its component parts. The schedule was annexed to a consent order which provided that the proceedings in respect of the claim against 4th 5th and 6th Defendants be stayed except for the purposes of carrying into effect the terms of the settlement. This order is commonly referred to as a Tomlin Order. It was formally approved by Deputy District Judge Josephs on 12th December 2016 and drawn up in the office at the County Court in Leicester on 20th December 2016.
3. In the light of the compromise of the claims against defendants 4, 5 and 6 and the discontinuance of the claims against Defendants 1 and 2, the only extant claim was against the 3rd Defendant Venduct Ltd (D3), but that claim also came to a conclusion on 7th December when the Claimant served a notice of discontinuance. Plainly, the Claimant was not due to receive any payment of damages from D3 nor was he the recipient of any order for costs against D3. A notice of discontinuance gives rise to a deemed order that the Claimant must pay the costs of the Defendant against whom the claim has been discontinued, unless the parties agree or the court otherwise orders. CPR 38.6(1) is the relevant rule.
4. Because the claim against D3 was made in proceedings which included a claim for personal injuries, D3 wishing to recover its costs of the discontinued proceedings, faces the obstacle of the QOCS regime insofar as it applies to the facts of the case. However, D3 asserts that Civil Procedure Rule 44.14 allows it to enforce its deemed costs order against the Claimant albeit only to the extent of the damages and interest received from Defendants 4, 5 and 6. He asserts that it does not matter that the damages that the Claimant has received comes from it and not from D3.
5. In its simplest terms the issue can be said to be: Can a defendant recover his costs against a Claimant when the Claimant is to receive damages payable by a different defendant in the same action? D3 submits that it can and that nothing in Civil Procedure Rule 44.14 prevents this. The Claimant on the other hand says that the proper interpretation of CPR 44.14 prevents the Defendant from enforcing its order against the Claimant save by way of setting off his entitlement to costs against any order for him to pay damages to the Claimant. The Claimant also argues that even if the Rule can be construed as the Defendant contends, enforcement will still not be possible on the particular facts of this case because on the facts of this case there is no order for damages to which Rule 44. 14 can attach and D3’s application should be dismissed for that simple reason. The basis of this argument is founded on the nature of a Tomlin Order.
6. It will be immediately apparent that my ruling on what I will call “the Tomlin Order issue” is potentially determinative and conclusive on the question of whether the Defendant is able to enforce its deemed costs order and would obviate the need to rule on the more substantial matter involving the matters of enforcement and set off, However the importance of this case lies not so much in the Defendant’s recovery of a relatively modest sum of costs from the Claimant (estimated to be of the order of £8,000 before assessment) but in securing a decision on what I understand to be a highly contentious issue of general importance to insurers in personal injury claims where there are several defendants. At the time of writing this judgment there is no binding authority on the main issue that I have to deal with and it is proper that I try to do justice to Counsel’s arguments even if my decision is to be considered higher up the judicial ladder in due course and regardless of my decision on the Tomlin Order issue.
7. The importance of the issues to the parties is reflected in the fact that each side has expended significant outlay to retain experienced and able Counsel well versed in Costs Law; Mr Ben Williams Q.C. represents the Defendant and Mr Andrew Hogan represents the Claimant. I am grateful to them both (and to Mr Williams predecessor Ms Mc Donald, whose skeleton he adopted for their respective skeleton arguments and the oral submissions they developed before me. I mean no disrespect to them by attempting to summarise their respective arguments and refraining from a wholesale repetition of the written skeletons.

**The Tomlin Order issue**

1. The Claimant argues that his entitlement to damages arises not by reason of an order for damages ( the wording in CPR 14.14 (1) ) but by reason of an enforceable agreement with D4, D5 and D6, which is set out in the schedule to a Tomlin order. The nature of a Tomlin order has been analysed by Ramsey J in Community Care North East v Durham County Council [2012] 1 W.L.R. 338. At paragraph 28 of his judgment he said:

*In relation to the terms of the agreement incorporated in the schedule to the Tomlin Order, other considerations apply. The terms of the schedule are not an order made by the court. The court obviously has the ability to interpret that agreement on well known principles of interpretation as set out in the Sirius case [2004] 1 W.L.R. 3251 and would have to do so when it was asked to take any enforcement action under the standard liberty to apply for that purpose in the Tomlin order. Likewise the court has the ability to deal with the terms of that agreement in the same way as any other contract….to what extent though would the court otherwise vary the terms of the agreement incorporated as the schedule to the Tomlin order ?*

1. The Court of Appeal has endorsed Ramsey J’s analysis in Watson v Sadiq and Sadiq [2013] EWCA Civ 822. At paragraph 50 McCombe L.J. says this:

*For my part, I agree with the analysis of Ramsey J in Community Care North East v Durham CC that the Civil Procedure Rules have no application to the schedule to a Tomlin Order, which indeed is not an order of the court at all. A different principle applies to the curial part of the order. The curial part of a Tomlin order is a consent order. In Weston v Dayman, Arden LJ with whom Brooke and Wall LJJ agreed, proceded on the basis that, whether the source of the jurisdiction for varying or revoking a consent order was in CPR 3.1(7) or the liberty to apply contained in the order, there is jurisdiction to vary or revoke the order where it was just to do so but that the court has to be very careful in exercising its discretion where the consent order represented a contract between the parties (paragraph 24). “One of the aspects of justice is that a bargain freely made should be upheld.” In cases where the variation is contrary to the agreement that the parties have made, and leaving aside the possible effect of a violation of Article 6 in the proceedings in which the Tomlin order was made, I agree with Ramsey J that a major and often determinative factor in the exercise of the discretion will be the fact of that agreement. In the present case, Mr Watson seeks to set aside the whole of the Recorder’s order but it follows that from this discussion of the authorities that putting on one side violation of Article 6, before the curial part of the order can be set aside, he must establish in the usual way that he is entitled to have the contract in the schedule to the order set aside.*

1. Mr Hogan for the Claimant, relies on the two authorities and submits that they are fatal to the Defendant’s claim to be entitled to enforce its costs order. In the Defendant’s first skeleton argument Ms McDonald sought to rely on a comment by Smith LJ at paragraph 7 of her judgment in **Zurich Insurance v Hayward [2011] EWCA Civ 641** as authority for the proposition that if the schedule is provided to the judge it becomes part of the order. Furthermore, Ms McDonald asserts that it would be wrong to allow the Claimant to “hide behind a Tomlin Order to circumvent the QOCS rules and avoid the enforcement of costs by a successful Defendant. Mr Williams argued before me that a purposive construction is called for in deciding whether the Claimant should be regarded as having become entitled to his damages by reason of an order. He said that it would be wrong to give a literal and narrow meaning to the rule and that there is no policy reason why the court should prefer the interpretation contended for by Mr Hogan.
2. I do not find the case of Zurich v Hayward of any assistance on the issue in hand and I prefer the analysis of Ramsey J and McCombe LJ as making clear what has always been regarded as the status of agreements referred to in Tomlin orders. A Tomlin Order can quite properly be regarded as comprising two parts; the curial part and the agreement part. In many cases the agreement achieves a solution mutually acceptable to the parties but which the court would have no power to order. Sometimes the terms of the agreement are to remain confidential and are therefore never disclosed to the judge making the order. It is firmly established that except in very limited circumstances the court has no power to interfere with a compromise agreement freely entered into by the parties. It seems to be to be entirely artificial to regard the benefit received by the Claimant whether monetary or otherwise as being ordered by the court. An agreement settling litigation is a contract like any other and can be enforced by an action for specific performance or damages. Its enforceability in principle has nothing to do with the curial part of the Tomlin Order. The benefit of the Tomlin Order to the parties is that it creates an expedient summary mechanism for a party to enforce compliance with the terms of the settlement without the need to commence fresh proceedings.
3. In this case the only order made by the court was that staying the proceedings. I prefer the Claimant’s argument to that of the Defendant and I conclude that the Claimant has received a lump sum payment by reason of a pragmatic agreement with D4, D5 and D6 not by reason of a court order and that it was not the intended purpose of CPR 14.14 that it should apply to such a scenario.

**The enforcement and set-off issues**

**The Defendant’s arguments**

1. When construing legislation the court should be guided by one or more of the fundamental canons of construction. The first, sometimes called the mischief rule requires a judge to interpret the legislation in the context of the purpose underlying the legislation. The second is to give effect to the ordinary and natural meaning of the words actually used insofar as they are consistent with the legislative purpose and the third is to interpret the legislation so as to avoid an absurd outcome, which legislators can be readily presumed not to have intended.
2. The starting point of the Defendant’s argument must of course be the wording of CPR 14.14. The Defendant submits that CPR 44.14 is concerned with enforcement and not set off. The Rule read in conjunction with CPR 44.13, it is argued, limits the extent of **enforcement** by reference to the aggregate amount of any orders for damages. There is no mention of the phrase “set-off” and the word chosen by the Rules Committee is **“enforce”.** Furthermore the Defendant argues that what it is intending to do and what the Rule allows it to do is to enforce its costs entitlement up to a monetary limit of the sum recovered as damages and interest. It is not seeking to attach a particular fund. The Defendant also points out that the plain and ordinary meaning of the words “any orders for damages and interest” could properly include orders made against other co-defendants in the same proceedings and had the Committee intended to limit the Defendant’s right to enforce by reference to an order for damages against that particular Defendant alone it could have easily so provided.
3. The Defendant submits that the interpretation contended for is consistent with the underlying purpose of the legislation. Mr Williams submitted that an underlying principle of QOCS is that an unsuccessful or only partly successful Claimant will enjoy protection under the scheme so that he or she is never worse off at the conclusion of litigation than at the start. It foIlows therefore that the Claimant should be liable to pay another Defendant’s costs if the Claimant has access to a fund of damages and interest as a result of a successful claim against any Defendant in the proceedings because he or she will usually be no worse off at the end of the litigation so long as he /she must account to a successful Defendant for costs up to the value of the damages and interest received from an unsuccessful defendant. The worst that can happen to a Claimant is that he/she can lose his/her damages (and pay his/her own disbursements unless insured under an ATE agreement) but will not be penalised in costs beyond that. That submission is attractive because it is in accordance with the general principle of fairness and it is consistent with the observation of Jackson LJ in his Final Report at Chapter 19 paragraph 4.6 where he states:

*The claimant must be at some risk of some adverse costs, in order to deter (a) frivolous claims and (b) frivolous applications in the course of otherwise reasonable litigation.*

1. Mr Williams in his supplemental skeleton argument reinforces his argument that CPR 44.14(1) is not concerned with set-off but enforcement by referring to the case of **Michael Howe v Motor Insurers Bureau** or more specifically to the judgment of Lewison L.J. on the issue of costs, which arose at the conclusion of the proceedings. Mr Howe was the unfortunate victim of a road traffic accident while driving in France. He sustained life-changing injuries when he was struck by a wheel, which had come off an unidentified lorry. The driver of the lorry being untraceable, Mr Howe brought a claim against the M.I.B. The claim against the MIB failed leaving Mr. Howe liable to pay the MIBs costs unless he could claim the protection of QOCS. Stewart J decided he did not have QOCS protection and Mr Howe appealed on both the substantive issue and the QOCS issue. By the time the appeal was listed the decision of the Supreme Court in Moreno v M.I.B put paid to the Claimant’s argument on the substantive issue and his appeal against that judgment was struck out with costs. Mr Howe was successful in his appeal on the question of whether QOCS applied. The outcome was that the Claimant was liable to be paid his costs of that part of the proceedings before Stewart J on the QOCS issue and the costs of his successful appeal on the QOCS issue. However the Defendant had orders in its favour for the Claimant to pay it its costs of the trial on the substantive issue and on the appeal that had been struck out.
2. Mr Williams QC, who on this occasion was appearing for the Claimant and who was instructed to advance an argument contrary to that which he advances before me, sought to persuade the Court of Appeal that notwithstanding the existence of CPR 44.12, Rule 44.14(1) nevertheless precludes set off of costs. He submitted that a set-off is a form of enforcement and that set-off was only permitted against orders for damages and costs as provided for in CPR 44.14. Lewison L.J. disagreed and held “that under the general law, set-off is not a species of enforcement…” He further held that the process of enforcement contemplated in CPR 44.14 means enforcement in accordance with all the rules of the court. He observed that CPR 44.14 enables enforcement without the permission of the court, whereas CPR 44.12 requires the permission of the court or at least a court order in order for one set of costs to be set off against another and he concluded that the court had jurisdiction under CPR 44.12 to order a set-off of costs. The court ultimately ordered that Mr Howe should have his costs of the costs issue in the Court of Appeal and below, but that the order in his favour should be set off against the costs orders in favour of the MIB.

**The Claimant’s argument**

1. On behalf of the Claimant Mr Hogan says his case is simple. At the heart of Mr Hogan’s argument on behalf of the Claimant is the proposition that for the purposes of costs, the claims against each Defendant are separate proceedings and (subject to me concluding that CPR 44.14 is concerned with limiting the right to set-off as opposed to enforcement) D3’s application must fail because in the proceedings between it and the Claimant the court made no order for damages and interest against which D3’s costs entitlement can be set off. Mr Hogan submits that the term “proceedings” has an elasticity of meaning, it is not specifically defined in the Civil Procedure Rules and its meaning must depend on its statutory context and the underlying purpose of the provision in which it appears, so far as that can be discerned. He drew my attention to the case of **Plevin v Paragon Personal Finance Limited [2017] UKSC 23** in which Lord Sumption observed that in certain contexts and for some purposes there can be vertical separation of parts of the proceedings as a whole. It is plain from the judgment that Lord Sumption was speaking specifically about the distinction between the trial and subsequent appeals and the fact that such parts of the litigation are treated as separate proceedings for the purposes of awarding and assessing costs. However, Mr Hogan says that there is no logical reason why there cannot be horizontal separation of the claims brought against each of several defendants not least because each attracts its own costs order and moreover if there was a dispute as to the costs it would require separate and distinct assessment proceedings in respect of each Defendant’s bill. He also argues that the Claimant could have issued separate claims against each of the other Defendants and had he done so and secured an order for damages there would have been no possibility of D3 claiming its costs from the Claimant out of those damages.
2. Mr Hogan says that for the purposes of costs the making of a costs order divides the stages of a piece of litigation into separate proceedings and the Claim against D3 is a separate and distinct set of proceedings. He argues that the sequential structure of Section Two of CPR 44 is consistent with and supportive of this argument. He also submits that the approach he contends for would avoid what he refers to as the “absurd and inconsistent results” which would arise if a Claimant reached a settlement with some Defendants without issuing proceedings. Why (he asks rhetorically) should such a hypothetical Claimant be better off than the actual Claimant in the situation I am concerned with ?
3. Insofar as he can, Mr Hogan draws support for his argument from the first instance decision of HHJ Freedman in the case of **Bowman v Norfran Aluminium Ltd and others** a case in which the issues were identical to those I am considering and where the Claimant’s legal team adopted and deployed successfully Mr Hogan’s analysis. Judge Freedman was persuaded that :
4. The QOCS provisions are a self-contained regime leaving no scope for the court to exercise any discretion to bring about an outcome different to that which flows from the QOCS provisions.
5. What was envisaged pursuant to the provisions of CPR 44.14 was a set-off of costs against damages.
6. The concept of set-off imports a mutuality of liabilities whereby there are cross claims between a paying party and a receiving party.
7. In reliance on what was said by Lord Sumption in Plevin the word proceedings in the context of QOCS refers to individual claims and not the entirety of the action.
8. If it were the intention of the Rules Committee that one defendant could recover costs from a claimant out of damages paid by another Defendant it is likely that this would have been spelt out in the Rules.

This decision is not binding on me but in accordance with common custom it may be persuasive. With respect to Judge Freedman there is no detailed analysis of why “the only proper interpretation of CPR 44.14(1) is that it is intended that there should be a set-off of costs against damages” (paragraph 35 of the judgment). That is not intended as a criticism and in any event he himself states at paragraph 25 that Counsel for the Defendant did not contend for any other construction. However, I note that at paragraph 19 Judge Freedman refers to the Explanatory Memorandum to the Civil Procedure ( Amendment) Rules 2013 which provides, inter alia:

*The effect of QOCS is that a losing claimant will not pay any costs to the Defendant, and a successful claimant against who a costs order has been made (for example, where the claimant does not accept and then failed to beat the Defendant’s “Part 36”offer to settle) will not have to pay those costs* ***except to the extent they can be set off against any damages received.”*** [my emphasis]

1. In response to Mr Williams’s submissions, Mr Hogan submits that the decision of Lewison LJ in Howe v MIB is of no application to the issues with which I am dealing for a number of reasons. He sets them out at paragraphs 8 to 16 of his skeleton. I can deal very shortly with the first of Mr Hogan’s points. The subject matter of the substantive case having no connection with the issues in this application is with respect to Mr Hogan a bad point. Mr Williams seeks to rely on Lewison LJ’s ruling on the separate argument about costs at the conclusion of the appeal and for which a further short hearing was listed. The ruling is relevant to the issues I have to deal with. As to the remaining points which to a lesser or greater extent may have some merit, he says the costs argument was directed at the issue of whether CPR 44.12 had any applicability in the light of the QOCS regime ( involving a re-run of the argument that succeeded in Darini v Markerstudy ) and Lewison LJ decided that CPR 44.12 was applicable and was not overridden by CPR 44.14. He observes that Lewison L.J. did not carry out any deep analysis of Rule 44.14 and its origins and he invites me to conclude that his observations are at best obiter dicta. He suggests that the proper conclusion to reach even in the light of the costs ruling in Howe is that CPR 44.12 preserves the court’s *discretion* to allow a set off of costs against costs and that CPR 44.14 gives a Defendant a *right* to set off costs against damages, if the criteria of the rule are fulfilled.

**Decision**

1. On the whole and after careful consideration I prefer Mr William’s submissions to those of Mr Hogan on the construction of CPR 44.14. They stand up to scrutiny whichever of the canons of construction is applied and they are supported by binding authority. In my judgment the ruling of Lewison LJ in Howe v MIB disposes of Mr Hogan’s argument that CPR 44.14 is concerned with set-off and I reject Mr Hogan’s submission that the decision is obiter. Lewison LJ’s finding on the scope of CPR 44.14 was central to his ultimate conclusion that it did not override CPR 44.12. It seems to me that the ordinary and literal meaning of the words used in CPR 44.14 leads to the conclusion that the rule intends to permit enforcement by whatever means may be available under the Civil Procedure Rules generally but subject to a monetary limit measured by reference to the amount of damages and interest received by reason of a court order made within the proceedings. For my own part I would interpret setting off in this context as being an accounting process and not as a means of enforcement. Set off is applied to the situation where there is a claim and cross claim and it is fair and convenient to reduce or extinguish a party’s liability to another party to the extent of his own liability to that other party. Only if there is a residual debt owing after setting off is enforcement necessary at all. I am satisfied that had it been the intention of the Rules Committee to create a limited statutory right to set-off then it could have used the term set-off specifically as it did in Rule 44 .12 or it could have made explicitly clear that the right to enforce was only available to a Defendant against whom the Claimant had obtained an order for damages.
2. Adopting the ordinary and literal meaning of the words does not in my judgment undermine the underlying purpose of QOCS because the claimant will at worst lose some or all of his damages and will be no worse off than he would have been had he lost or discontinued the claims against all the defendants. As Mr Williams observed it is always possible to construct an argument around extreme examples of what the outcome of a particular construction might be but Mr Hogan has not persuaded me that my interpretation results in any potentially absurd outcomes that would be outwith the intentions of the rule makers.
3. In the final analysis the outcome of this case has turned on whether I could be persuaded that Rule 44.14 addresses enforcement generally or set off specifically. I can see the logic in Mr Hogan’s argument that if it were correct in the context of costs issues to treat the claims against each defendant as constituting separate proceedings it would be difficult to avoid the conclusion that set off against a cross claim for damages would be the only means by which the Defendant could notionally recover its costs. However, save in the special context of detailed assessment proceedings it seems entirely artificial to see this type of case not as a single set of proceedings but as a series of parallel proceedings against different defendants under the same single Claim Number. With all due deference to the Supreme Court Justices and to Lord Sumption in particular I do not agree that the judgment at paragraph 20 supports Mr Hogan’s analysis. Lord Sumption states

*“that as a matter of ordinary language one would say that the proceedings were brought in support of a claim”.*

In the context of Mr Cartwright’s case it can be said that he commenced one set of proceedings in support of claims for damages for personal injury against six different defendants. In my view that would be the plain and obvious interpretation of the position, and as Lord Sumption observes, the word *proceedings* is synonymous with *an action.* He notes that for some purposes the trial and successive appeals do constitute distinct proceedings, in particular they are distinct proceedings for the purpose of awarding and assessing costs. Nonetheless Lord Sumption goes on to say that the question that the Supreme Court had to decide was whether Section 46(3) of LASPO allowed a party with an ATE policy in force before the act came into force to entitled the insured to continue to use the 1999 costs regime for subsequent stages of the proceedings under top up amendments made after the commencement date and on that matter the fact that costs are separately awarded and assessed is of no assistance in answering the question. To that extent I would conclude that the observations that Mr Hogan seeks to rely on are obiter dicta. In any event what Lord Sumption is saying is that appeals are treated as separate proceedings for the purposes of awarding and assessing costs. He is not saying that appeals (or indeed any other distinct parts of the proceedings proper) are separate proceedings because they are delineated as such by the making of separate costs orders. If that were the case every contested interlocutory application would be liable to be regarded as separate proceedings if one party were ordered to pay the costs of another. That could lead to the absurd situation where a Claimant could argue that a defendant who succeeded in a series of interlocutory applications could not recover his costs because the orders were not made in proceedings that included a claim for personal injuries.

1. If Lord Sumption’s remarks are authoritative at all in the context of this application, it seems to me that the most important point to emerge for the purposes of my analysis is that the meaning of proceedings depends on its statutory context and on the underlying purpose of the provision in which it appears. With that in mind I am bound to say that I have found nothing in Mr Hogan’s submissions to lead me to conclude that the use of the word *proceedings* in the context of CPR 44.13(1) or the underlying purpose of the Rules requires me to attribute to the word the rather strained meaning he contends for.
2. Because I have concluded that CPR 44.14 governs enforcement and not set-off it is not necessary for me to dwell in detail on arguments about distinctions between equitable set off and statutory set off and the need for mutuality of claims between Claimant and Defendants. I shall therefore decline the invitation to analyse the judgments in the cases of **Lockley v National Blood Transfusion Service 1992 WLR 492 and R (Burkett) v London Borough of Hammersmith and Fulham [2004] EWCA Civ 1342**. However in deference to the efforts of both Counsel I shall simply observe that I do agree with Mr Hogan’s submission that it is of the essence of any species of set off that there is a claim and cross claim between two parties and the particular equitable rule of mutuality of obligations is merely concerned with the situation where set off is capable of being recognised as a defence to impeach the Claimants claim as opposed to it giving rise to an accounting and re-balancing of liabilities.
3. I agree with Mr Williams that the decision in Howe disposes of the reasoning of HHJ Freedman in Bowman v Norfran Aluminium Ltd. I should add that when giving his judgment Judge Freedman would not have had the transcript of Lewison LJ’s judgment on the costs issue in Howe and it does not appear to be the case that he was made aware of the decision. I would also observe that Judge Freedman might have been influenced by the content of the Memorandum to the Rules. Mr Hogan did not suggest that the Memorandum was of any particular persuasive value in the context of my analysis. In as far as the Memorandum appears to contemplate a situation where the court is dealing with a case where a claimant and a defendant have orders in their favour against each other then set off is clearly relevant and applicable. However the Memorandum is silent as to the situation involving multiple defendants and I do not find that it helps me in this case.

**Conclusion**

1. On the substantive issue of the scope of CPR 44.14 I prefer Mr Williams’s argument to that of Mr Hogan. Had the Claimant been entitled to damages from either D3 or any of the other defendants by way of a court order then he would have been entitled to enforce his costs order in accordance with CPR 44.14(1) and would have been entitled to a declaratory remedy accordingly. However in view of my conclusion on the Tomlin Order issue D3 cannot enforce his deemed costs order in this case. I shall circulate this judgment to the parties in advance of the date for its formal handing down. Until that date I impose the usual embargo on its publication. I shall receive submissions as to the form of order, the costs of the application and any applications for permission to appeal. I am sorry to say that yet again the lower courts are having to deal with expensive satellite litigation over the interpretation of the post April 2013 costs rules, where the same could be avoided if the rules had been more clearly or specifically worded. I can readily see that more clarity is required in this particular area and what is required is either a change in the wording of the rules or an authoritative decision from an appellate court as to their interpretation.
2. It only remains for me to thank the party’s and Counsel for their assistance and their patience in awaiting this reserved judgment, which has been delayed by reason of pressure of workload in court, the absence of judgment writing time and a two week holiday shortly after the hearing.

**District Judge Hale**

**6th December 2017.**