

Consultation on changes to the Qualified One-Way Costs Shifting (QOCS) regime in personal injury cases

Summary

1. In this consultation, the Government proposes specific rule changes to Qualified One-Way Costs Shifting (QOCS), a form of costs protection in personal injury (PI) cases which was introduced in 2013. The QOCS provisions are set out in the Civil Procedure Rules (CPR). In their judgment in *Ho v Adekun* [2021] UKSC 43,¹ the Supreme Court noted that the Civil Procedure Rule Committee (CPRC) might consider revisiting the rules, the Court of Appeal ([2020] EWCA Civ 517²) having previously said that the CPRC may wish to consider whether costs set-off should be possible in a QOCS case.
2. This work is now being taken forward by the CPRC costs sub-committee as part of the rule drafting work on extending fixed recoverable costs (FRC) in civil cases.³ This consultation (i) provides background on QOCS and costs protection in PI claims; (ii) summarises current issues with the QOCS regime; (iii) sets out the Government's proposed way forward and draft rule changes; and (iv) seeks views on the Government's approach.
3. The rule changes that the Government proposes should be made to the CPR on QOCS are in Annex A. We consider that these rule changes will ensure that the extension of FRC does not exacerbate existing issues with QOCS arising from the Supreme Court's judgment in *Ho* and the earlier Court of Appeal decision in *Cartwright v Venduct Engineering* [2018] EWCA Civ 1654.⁴ As outlined below in paragraphs 12-15, these issues concern (i) whether both damages and costs should form a fund for the defendant's costs where the claimant does not beat the defendant's offer at trial (in *Ho*), and (ii) the interplay of QOCS and Part 36 (in *Cartwright*).
4. The Government considers that the most effective way of addressing issues around QOCS is by amending Section II of Part 44 as follows:
 - Allow that a claimant's entitlement to costs is considered to be part of the overall fund against which set-off can be applied; and
 - Extend costs orders to deemed orders, so a defendant can enforce a deemed order for costs (especially following acceptance of a Part 36 offer) without the permission of the court.

¹ See paragraph 9, page 5 of the Supreme Court's 2021 judgment in *Ho*: <https://www.supremecourt.uk/cases/docs/uksc-2020-0102-judgment.pdf>.

² See paragraphs 33 and 49 of the Court of Appeal's 2020 judgment in *Ho*: <https://www.bailii.org/ew/cases/EWCA/Civ/2020/517.html>

³ The Government published its consultation response on extending FRC in civil cases on 6 September 2021: <https://consult.justice.gov.uk/digital-communications/extended-fixed-recoverable-costs-consultation/results/extended-fixed-recoverable-costs-civil-cases-government-response.pdf>. This followed a 2019 consultation on extending FRC: <https://consult.justice.gov.uk/digital-communications/extended-fixed-recoverable-costs-consultation/results/extended-fixed-recoverable-costs-civil-cases-government-response.pdf>; this consultation was based on Sir Rupert Jackson's 2017 report on FRC: <https://www.judiciary.uk/wp-content/uploads/2017/07/extended-fixed-recoverable-costs-supplemental-report-online-2-1.pdf>.

⁴ See the Court of Appeal's 2018 decision in *Cartwright*: <https://www.bailii.org/ew/cases/EWCA/Civ/2018/1654.html>.

In consulting, we invite views on these rule changes and responses to the questions at paragraph 18 below.

Background on QOCS and costs protection in PI claims

5. The Government regards QOCS as an integral part of costs protection in PI claims. It is right that claimants have sufficient protection, so they are not left in a worse position after the claim than before it. However, there must be balance. It is the Government's position that defendants must be able to make effective use of Part 36 and recover costs where appropriate and, if necessary, by set-off, so that there is effective control over the running of unmeritorious issues. This approach was permitted under the previous civil legal aid regime for PI, with suitable controls.
6. Most PI cases were previously funded under legal aid. They had costs protection under the legal aid 'shield'. Over the years, financial eligibility for civil legal aid was reduced. Under the Access to Justice Act 1999 (AJA), legal aid was removed from PI claims (except clinical negligence).⁵ Adverse costs in PI claims were then covered by 'after the event' (ATE) insurance, the premiums of which became recoverable.
7. QOCS was originally implemented to enable the end of recoverable ATE premiums. It was first proposed by Sir Rupert Jackson in his 2010 *Review of Civil Litigation Costs: Final Report*.⁶ In Chapter 19 of his *Final Report*, Sir Rupert proposed that a new costs protection regime be developed, for PI claims, based on the legal aid 'shield', then in s. 11(1) of the AJA, such that:

'Costs ordered against the claimant [in any PI claim] shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including – (a) the financial resources of all parties to the proceedings, and (b) their conduct in connection with the dispute...'⁷
8. The Government decided, with the agreement of all sides that, for practical reasons, means should not be an issue in respect of QOCS in PI claims. Conduct – e.g. in relation to fundamental dishonesty – was accounted for in the rules as drafted.
9. The original policy intention behind QOCS can be simply stated (in Sir Rupert's words):

'The proposed new rule has the effect of putting parties who are in an asymmetric relationship onto a more equal footing. It ensures that a party is not denied access to justice because of the prospect of incurring liability for adverse costs beyond its means.'⁸
10. In simple terms, then, the policy intention behind QOCS can be summarised that a claimant with no assets may have nothing to lose in facing an adverse costs order, but an otherwise poor claimant with a house should not face the prospect of losing their house for acting reasonably in bringing a PI claim that fails.

⁵ The Access to Justice Act 1999: <<https://www.legislation.gov.uk/ukpga/1999/22/contents>>.

⁶ Sir Rupert's 2010 *Final Report* on civil litigation costs: <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>>.

⁷ *Ibid.*, p. 190.

⁸ *Ibid.*

11. But that is the intended limit of the protection: that the claimant should be able to bring a claim, not that they should incur what is an unintended windfall to allow unmeritorious points to be taken because of a technical distinction between costs and damages.

Current issues with the QOCS regime

12. *Ho* concerns the question of whether QOCS constrains in any way the defendant's liberty to seek, or the court's discretionary power to permit, a 'set-off' between opposing costs orders, that is orders in favour of the claimant and the defendant respectively.⁹ In their judgment, the Supreme Court found that the defendant's ability to offset costs awarded to the defendant against both damages and costs awarded to the claimant is *not* available, and that the offset is limited to damages awarded.
13. In giving the judgment of the Supreme Court, Lord Briggs felt bound by the drafting of the CPR to decide the case in this way, but noted that the decision appeared to be 'counterintuitive and unfair'.¹⁰
14. It is not just the decision in *Ho* that creates problems with the meaning of the QOCS regime. The earlier Court of Appeal decision in *Cartwright* (as cited by the Supreme Court in *Ho*) caused difficulties in that it stated that the acceptance of a Part 36 offer does not create an enforceable order for the purposes of QOCS.¹¹ That decision was manageable in practice because parties could then agree an offset against costs.
15. The *Ho* decision now makes it clear that any offset must be limited to damages only and *not* costs, so the decision in *Cartwright* cannot now be managed between the parties in the same way. Thus, the combined outcome of both of these cases is to undermine the effectiveness of QOCS and Part 36 in resolving disputes.

Proposed way forward

16. *Ho* was an FRC case where the claimant was arguing unmeritorious points as to the application of fixed costs in the claim. Despite the lack of merit in the underlying argument, the claimant was able to do so at no risk to themselves and at significant cost to the defendant.
17. The Government believes that (i) changes should be made to the application of QOCS to restore the fairness of the regime and that (ii) the changes should be made before (or at the same time as) the wider extension of FRC in civil cases, to ensure that defendants are not similarly disadvantaged in an increasing amount of cases. Problems around the effectiveness of QOCS and Part 36 in resolving disputes arising from *Ho* and *Cartwright* must be addressed, to ensure that adverse behaviours in litigation are discouraged and the claimant bears adequate financial risk. The Government does not wish to create an environment in which there is an increase in applications without merit and more satellite litigation on costs issues.

Questions for respondents: please give reasons for your response

18. We invite views generally on the rule changes at Annex A, including the questions below:

⁹ See the judgment in *Ho*: <<https://www.supremecourt.uk/cases/docs/uksc-2020-0102-judgment.pdf>>.

¹⁰ *Ibid.*, p. 15 (at paragraph 44).

¹¹ See the judgment in *Cartwright*: <<https://www.bailii.org/ew/cases/EWCA/Civ/2018/1654.html>>.

- i. Do you have views on the Government's position on set-off, as outlined above?
- ii. Do you have views on the Government's position on extending costs orders to deemed orders, as outlined above?
- iii. Do you have any comments on the draft revisions to Section II of Part 44 that are proposed at Annex A?
- iv. Do you have views on other ways in which QOCS might be reformed, to ensure that there is an appropriate balance between the interests of claimants and defendants in PI cases?

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ANNEX A: PART 44 QOCS AMENDMENTS

Cases where costs orders deemed to have been made

44.9

- (1) Subject to paragraph (2), where a right to costs arises under –
- (a) rule 3.7 or 3.7A1 (defendant's right to costs where claim is struck out for non-payment of fees);
 - (a1) rule 3.7B (sanctions for dishonouring cheque);
 - (b) rule 36.13(1) or (2) (claimant's entitlement to costs where a Part 36 offer is accepted); or
 - (c) rule 38.6 (defendant's right to costs where claimant discontinues), a costs order will be deemed to have been made on the standard basis.
- (2) Paragraph 1(b) does not apply where a Part 36 offer is accepted before the commencement of proceedings.
- (3) Where such an order is deemed to be made in favour of a party with pro bono representation, that party may apply for an order under section 194(3) of the 2007 Act.
- (4) Interest payable under section 17 of the Judgments Act 1838 or section 74 of the County Courts Act 1984 on the costs deemed to have been ordered under paragraph (1) will begin to run from the date on which the event which gave rise to the entitlement to costs occurred.

Where the court makes no order for costs

44.10

- (1) Where the court makes an order which does not mention costs –
- (a) subject to paragraphs (2) and (3), the general rule is that no party is entitled –
 - (i) to costs; or
 - (ii) to seek an order under section 194(3) of the 2007 Act, in relation to that order; but
 - (b) this does not affect any entitlement of a party to recover costs out of a fund held by that party as trustee or personal representative, or under any lease, mortgage or other security.
- (2) Where the court makes –
- (a) an order granting permission to appeal;
 - (b) an order granting permission to apply for judicial review; or
 - (c) any other order or direction sought by a party on an application without notice, and its order does not mention costs, it will be deemed to include an order for applicant's costs in the case.
- (3) Any party affected by a deemed order for costs under paragraph (2) may apply at any time to vary the order.
- (4) The court hearing an appeal may, unless it dismisses the appeal, make orders about the costs of the proceedings giving rise to the appeal as well as the costs of the appeal.
- (5) Subject to any order made by the transferring court, where proceedings are transferred from one court to another, the court to which they are transferred may deal with all the costs, including the costs before the transfer.

Court's powers in relation to misconduct

44.11

(1) The court may make an order under this rule where –

(a) a party or that party's legal representative, in connection with a summary or detailed assessment, fails to comply with a rule, practice direction or court order; or

(b) it appears to the court that the conduct of a party or that party's legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper.

(2) Where paragraph (1) applies, the court may –

(a) disallow all or part of the costs which are being assessed; or

(b) order the party at fault or that party's legal representative to pay costs which that party or legal representative has caused any other party to incur.

(3) Where –

(a) the court makes an order under paragraph (2) against a legally represented party; and

(b) the party is not present when the order is made, the party's legal representative must notify that party in writing of the order no later than 7 days after the legal representative receives notice of the order.

Set Off

44.12

(1) Where a party entitled to costs is also liable to pay costs, the court may assess the costs which that party is liable to pay and either –

(a) set off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance; or

(b) delay the issue of a certificate for the costs to which the party is entitled until the party has paid the amount which that party is liable to pay.

II QUALIFIED ONE-WAY COSTS SHIFTING

Qualified one-way costs shifting: scope and interpretation

44.13

(1) This Section applies to proceedings which include a claim for damages –

(a) for personal injuries;

(b) under the Fatal Accidents Act 1976; or

(c) which arises out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934, but does not apply to applications pursuant to section 33 of the Senior Courts Act 1981 or section 52 of the County Courts Act 1984 (applications for pre-action disclosure), or where rule 44.17 applies.

(2) In this Section, 'claimant' means a person bringing a claim to which this Section applies or an estate on behalf of which such a claim is brought, and includes a person making a counterclaim or an additional claim.

Effect of qualified one-way costs shifting

44.14

(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, costs and interest made in favour of the claimant.

(2) For the purposes of this Section, orders for costs include 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.

(~~2~~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.

(~~3~~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.

Drafting Note 1: *The amendment to include enforcement against an order for costs in favour of the claimant and the entitlement to set off under 44.12 flowing from that will mean that such enforcement does not require permission of the court. That is thought to be appropriate: neither 44.12 nor 44.14 require court permission where there is an available fund from the claimant's entitlement to costs.*

If it was thought that a more cautious approach should be adopted, provision could be made in a new 44.14A for enforcement against an order for costs to require permission, although the consequences of this in practice will need to be considered.

Drafting Note 2: *Although the proposed amendments extend to cover orders deemed to be made under Part 36, it is considered that no changes should be made to Part 36 itself. There are currently no references to QOCS in Part 36, even in the provisions at rule 36.20 and rule 36.29 where the types of case covered by the rule are limited to personal injury and orders for costs expressly contemplated against the claimant. There are also no references in these provisions to the application of set off under rule 44.12.*

It is considered preferable to keep the QOCS and set off provisions in Part 44 alone. If any reference within Part 36 is considered appropriate, it could be limited to a suitable signpost e.g. after rule 36.20 and rule 36.29.

Exceptions to qualified one-way costs shifting where permission not required

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;
- (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.

Exceptions to qualified one-way costs shifting where permission required

44.16

(1) 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.

(2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers 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); or

(b) a claim is made for the benefit of the claimant other than a claim to which this Section applies.

(3) Where paragraph (2)(a) applies, the court may, subject to rule 46.2, make an order for costs against a person, other than the claimant, for whose financial benefit the whole or part of the claim was made.

Transitional provision

44.17 This Section does not apply to proceedings where the claimant has entered into a pre-commencement funding arrangement (as defined in rule 48.2).