Neutral Citation Number: [2022] EWHC 3147 (KB)

Case No: QB-2021-001731

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2022

Before :

MASTER STEVENS

- -

Between :

Mr Aidan Chappell	**Claimant**
- and -	
Mr Bartlomiej Mrozek	**Defendant**

- -
- -

Andrew Hogan (instructed by **Cycle Legal Solicitors**) for the **Claimant**
Nicholas Bacon KC (instructed by **DWF Law LLP**) for the **Defendant**

Hearing dates: 30th September 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER STEVENS

Master Stevens :

INTRODUCTION

1. This judgment arises from the hearing of two cross-applications to implement the terms of a settlement agreement between the parties in a personal injury claim. The first application was brought by the claimant, pursuant to CPR 36.14, to enforce the terms of a Part 36 compromise and to compel the defendant to pay the settlement sum accepted by the claimant on 16th February 2022, all of which remains wholly outstanding. The claimant had not accepted the defendant's settlement offer within the "relevant period" as defined in CPR 36.3, such that they were required to agree liabilities for costs with their opponent, or request that the court make a suitable order, after considering what would be just in all the circumstances of the case. They chose to agree the most usual order in such circumstances, as provided for in CPR 36.13 (5), allowing the defendant some costs, but the parties could not agree whether the Qualified One Way Costs Shifting (QOCS) provisions contained in CPR 44.14 prevented enforcement of any part of that costs liability by the defendant. The defendant's application was brought to try and enable it to enforce its agreed entitlement to costs by way of set-off against damages, such enforcement being wholly resisted.

2. It was common ground that parties involved in personal injury litigation after the introduction of the QOCS regime in April 2013 had, over time, reached a relatively settled approach towards the enforceability of relevant Part 36 costs orders, as described in the Court of Appeal decision in *Howe v Motor Insurers' Bureau* [2020]Costs LR 297. This allowed for a defendant's costs order to be set-off against an order for costs in the claimant's favour. However, in October 2021 the Supreme Court decision in *Adelekun v Ho (Association of Personal Injury lawyers intervening)* [2021] UKSC 43, removed the foundations for the earlier practice.

3. Both parties before me were represented by very experienced costs counsel who had each prepared submissions based on very differing constructions of the current civil procedure rules governing the situation, as well as opposing views on the binding nature, or otherwise, of recent court decisions. I was informed that the Ministry of Justice has also been consulting on changes to the QOCS rules to introduce possible amendments to the civil procedure rules dealing precisely with the issues raised in this claim. No rule changes have yet been finalised following that consultation. In any event I have to determine the issues based on the rules in force when the settlement was reached.

4. The hearing bundle ran to an unremarkable 202 pages but the authorities bundle comprised a further 612 pages.

FACTUAL BACKGROUND

5. The claimant suffered a serious road traffic accident on 16th December 2016 whilst riding his motorbike. The defendant driver attempted a right turn across his path and the parties were in collision. The claimant's injuries were said to be a closed fracture of his dominant right wrist requiring surgical reconstruction, exacerbation of a

previous shoulder injury, possible left hip injury, some soft tissue injuries and post-traumatic stress disorder with adjustment disorder. Liability was formally admitted some 6 months after receipt of the letter of claim. Proceedings were served nearly 3 years later, accompanied by a Schedule of Loss totalling £8,432,461.26, although there were many "TBC" costs identified in addition.

6. The major items of loss were past and future earnings. The claimant was just 24 years' old at the time of the accident and was pleaded to have had a "burgeoning career as a chef for which he was professionally trained". He was head chef and manager of a new branch of a small Lebanese/Palestinian restaurant chain in London, with his longstanding family friend and business partner. That branch had been in operation since October 2015 and the claimant was said to be "devoted" to it (paragraph 8 at page 3 of the Schedule). It was part of the claimant's case that there were plans to open further branches in due course, and that his earnings would significantly increase at ages 35 and 45. Following the accident, and after attempting to return to work for 6 months, it was pleaded that the injuries had a "catastrophic" effect on the claimant's career due to the disabling injury affecting his dominant right hand, and the associated pain levels. The claimant took a difficult decision to retrain from autumn 2017, by undertaking a 4 year degree course in psychology at the University of London, expressing a possible interest in working in the public sector with children suffering mental health issues thereafter. By the time of the settlement the claimant had completed his degree course, having secured first class honours in psychology with a specialism in neuroscience.

7. The defendant served a 12 page Counter-Schedule with their Defence on 19th May 2020, but pleading "NIL" or "TBC" against each head of loss. Paragraph 4 of the Counter-Schedule contained the following statement, "The Defendant is concerned that the Claimant has been less than frank in respect of his true past income and earning capacity. In that event, the Claimant is put on notice that the Defendant will seek a finding of fundamental dishonesty for the purposes of section 57 of the Criminal Justice and Courts Act 2015".At the same time they served a Part 36 offer to settle the claim for the sum of £250,000. That offer was not accepted in the usual 21 day period provided for under CPR Part 36, but neither was the offer withdrawn.

8. Thereafter the parties spent nearly 2 years progressing the claim through court directions for disclosure, Part 18 requests and exchange of witness statements, forensic accountant analysis, and were preparing to exchange experts' reports when the claimant accepted the Part 36 offer out of time. It was submitted for the defendant that shortly before their offer was accepted, i.e. by January 2022, they were exploring the possibility of formally amending the Defence to plead fundamental dishonesty. This had not been revealed to the claimant and was said to be based on investigations "of what the Defendant believes is the Claimant's partner's instagram account" which were said to reveal physical activities inconsistent with a suggestion that he could not continue in the restaurant trade. This information was not contained in the defendant's application notice, nor in any of the inter partes correspondence within my bundle, but was in counsel's skeleton argument.

LEGAL ISSUES

9. As set out in my introduction, the difficulty which both parties have been grappling with stems from the wording of Government policy reforms introduced into the civil

procedure rules in 2013 concerning costs recoverability under QOCS and the subsequent case law which has developed to assist with its interpretation. In a nutshell, the claimant's arguments were:

Case law precedent

i) The recent Court of Appeal decision in *Cartwright* and Supreme Court decision in *Adelekun* are both binding upon this court and I must therefore resist any temptation to draft an order permitting the defendant to enforce the claimant's agreed adverse costs liability against his settlement sum.

Correct interpretation of CPR Parts 36 and 44

ii) If I do not consider myself bound by case law, that I should not strain the clear wording of CPR 44.14 which only provides for enforcement of costs orders against claimants by way of set-off against "*any orders for damages and interest made in favour of the claimant*" to construe that such a set-off can apply equally against a "*sum of money*" tendered in a settlement offer under the CPR Part 36 regime. Such a "sum", it was submitted, reflects the commercial value a party has placed on resolving a dispute which is markedly different to a judicially determined award of damages supplemented by a judicial calculation of interest.

iii) I was taken to the rules whereby a written notice of acceptance under CPR Part 36.11, results in a stay of proceedings and automatic obligations on the offeror to pay the settlement sum in a specified timeframe. If there is a breach of those obligations, the claimant contended that whilst the offeree can apply to enter judgment for the unpaid sum under CPR 36.14 (7), the resultant court order is not an "*order for damages and interest*" for the reasons set out in the paragraph above, but is a completely different species of order, with a DNA more analagous to that of a Tomlin order.

Application of the overriding objective and Human Rights Act considerations

iv) As a matter of common sense and basic justice, the claimant submitted, it cannot be fair or right that a paying party is financially rewarded (by securing an order for damages and interest) against which it can enforce costs orders, only through the deliberate breach of an obligation imposed by the CPR to pay an agreed sum.

v) Furthermore, it was suggested that another case authority relied upon by the defendant, *MRA v The Education Fellowship Limited (aka Rushden Academy)* [2022] EWHC 1069 (QB), involved discriminatory treatment of protected parties, and should therefore not be followed (i.e. by suggesting that cases requiring court approval of a settlement due to the vulnerability of a party should not involve the elevation of the resulting court order into one for damages and interest such that enforcement of adverse liabilities could apply through the set-off mechanism).

10. The defendant's arguments in a nutshell were:

No binding case authority

i) It was submitted that the ratio decidendi relied upon by the claimant in the leading cases of *Cartwright* and *Adelekun* does not assist him in avoiding an enforceable set-off of adverse costs against his damages.

Appropriate purposive construction of the CPR in the light of stated Government policy intentions

ii) The defendant was also at pains to contend that the correct interpretation of CPR 44.14 requires not simply reading the words, " .. an order for damages" without applying any purposive construction to those words, which takes account of both the statutory purpose of the relevant civil procedure rules and the context within which those few words are situated. Part 36 acceptances are, it was submitted, quite naturally orders for damages, as are judgments for the unpaid sum under CPR 36.14 (7), such that costs orders in the defendant's favour can be offset against damages under QOCS rules.

iii) The defendant also reminded me that the procedural reforms introduced in 2013 were designed to incentivise settlement in personal injury cases, such incentivisation being lost, it was submitted, if on the claimant's interpretation of the rules, they can delay accepting reasonable settlement offers without adverse consequences; such behaviour, it was argued, puts defendants to the expense of further case preparation without any redress and is a waste of court resource which cannot be the intention or purpose of either Part 36 or Part 44.14. The defendant also asserted such an interpretation renders the making of offers futile unless claims go all the way to trial, which is rare in injury litigation.

Making orders which are just in the light of the overriding objective

iv) The position the defendant finds itself in, on the facts of this case it was further submitted, if the court accepts the claimant's interpretation of the CPR, is one that " any even-handed bystander would consider ..most unjust and unfair". That situation was described as one whereby they are required to hand over £250,000 damages without any set-off for the further 20 months' work incurred by them in defending the claim after their offer was made, such costs being in the region of £152,000 to the date of acceptance, and continuing to accrue to the time of the hearing.

v) I was encouraged to find a way through the current impasse, by being reminded that the court can make an order for damages now under CPR 36.14 (7), or indeed under the court's inherent jurisdiction and/or case management powers pursuant to CPR 3.1 (2)(m) which states that the court may:

" take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case".

11. Both parties asked me to imply markedly different meanings to words in the civil procedure rules in order to arrive at the respective interpretations which they say

reflect the original policy intentions. The battleground in this case, has a focus on the words "*settlement sum*" or "*damages and interest*" as the target funding pot for the defendant's additional costs outlay, beyond the relevant 21 day period for acceptance of their offer. There is a separate issue about which statements in the various judgments to which I was referred establish precedent or are otherwise binding upon me.

12. The structure of the parties submissions followed rather different routes. I will adopt a chronological approach, charting the history of QOCS both from the initial policy perspective, through to the language of the rules as laid before Parliament, and then the evolving judicial interpretation. I will summarise the weight given to each aspect by the parties in their reasoning before me, and making my own findings as I conclude each topic.

THE POLICY-MAKING BACKGROUND BEHIND QOCS

13. Policy considerations behind the introduction of QOCS were the starting point for the defendant's proposition that their construction of the meaning of CPR 44.14(1) was the correct one for me to approve. That rule states:

"*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.*"

As Coulson LJ observed in *Cartwright v Venduct Engineering Limited* [2018] EWCA Civ 1654 ("Cartwright") at [30], it "seems to have become an almost compulsory detour in disputes about the costs sections of the CPR,…(to go) to various elements of the preparatory materials leading up to CPR rr 44.13-44.17 coming into force", before a conclusion can be reached on the correct interpretation.

Sir Rupert Jackson's Review of Civil Litigation Costs 2009 ("the Review")

14. The defendant took me to paragraph 2.3 of Chapter 19 of the Review where the general insurance community consensus in favour of adopting QOCS was articulated, whilst noting that such a regime would carry "a costs penalty for failing to beat a defendant's Part 36 offer or other unreasonable conduct". Then I was taken to paragraph 5.3, where Sir Rupert set out how the QOCS formula should be structured along the lines of legal aid regulations, such that if a party failed to beat a Part 36 offer, adverse costs could be enforced against them. Chapter 41 of the Review set out how a claimant failing to accept an adequate offer under Part 36 would forfeit, or substantially forfeit, the benefits of QOCS.

The Government's Response to the Review presented to Parliament in March 2011 ("the Response")

15. I was taken by the defendant to paragraphs 11 and 12 of the Response where the Government broadly accepted Sir Rupert's recommendations to introduce QOCS "so a reasonable claimant will not be at risk of paying the other side's costs on behaviour grounds" and Part 36 rules would be amended to equalise the incentives between claimants and defendants to make and accept reasonable offers. The White Paper

continued, "The Government will continue to discuss with stakeholders how the rules should be drafted, including whether any minimum payment to a successful defendant's costs should be payable by the losing claimant in order to prevent speculative claims". It is clear that the policy guidance was still somewhat fluid at this point in time.

16. The claimant's response to the relevance of these submissions on the policy background was twofold. First, that there can be many reasons why a claimant may accept an offer outside the 21 day relevant period under Part 36. For example, an expert witness may change their mind or the claimant may suffer litigation fatigue i.e. it cannot be fairly assumed that a late acceptance is *unreasonable* in the absence of a specific finding. Under QOCS there are only a small number of exceptions where a defendant can enforce a costs order against a claimant, and none of those apply in this case. Such cases where no permission of the court is required to enforce are listed at CPR 44.15(1) as ones where there are no reasonable grounds to have brought the claim, or there has been abuse of process or where the claimant's conduct is likely to obstruct the just disposal of proceedings. Separately at CPR 44.16(1) costs can be enforced, with the permission of the court, where there has been a judicial finding on the balance of probabilities that the claim is fundamentally dishonest.

17. Furthermore, submitted the claimant, the rules resulting from the policy review were designed to be simple and mechanistic and the costs protection afforded by QOCS to claimants was a "quid pro quo" for insurers no longer having to pay out extremely large sums for recoverable success fees and After the Event ("ATE") insurance premiums, thus netting them an overall costs saving on the pre-QOCS situation. It was argued that if, in isolated cases, the defendant ended up in a worse costs situation under the new rules, that was not automatically unfair such that it required a remedy, as it was part of the overall system design which globally across the whole basket of cases increased costs savings for defendant insurers.

Government consultation on changes to QOCS May 2022

18. The defendant also took me to the document containing this consultation which has recently closed. It raises the possibility of future amendments to the civil procedure rules in relation to the interaction between Parts 36 and 44 and the creation of newly enforceable costs set-off orders where there has been a Part 36 acceptance by a claimant. Whilst the Government reports some current perceived risks of unfairness to defendants which could disincentivise the making of Part 36 offers, as case law has recently evolved, (which I will review in paragraph 25 and onwards), I need to decide what is fair and just, in accordance with the rules and correct legal interpretation of them, at the time material decisions were taken by the parties in this case, in order to fairly reflect the intended outcome of their settlement agreement.

My conclusions on the policy background

19. I have studied the source documents to which I was referred and note that whilst Sir Rupert proposed an interlocking set of reforms, the vast majority of which were implemented by Government, there was not 100% adoption. Clearly the type of control over parties running unmeritorious issues provided for under the previous legal aid regime, which he had advocated, such as taking account of financial means, was not replicated, but redress for poor conduct such as in relation to fundamental

dishonesty, was to be managed by specific provisions built into CPR 44.16 referred to above. Although the defendant has submitted that they were considering raising fundamental dishonesty in this case, at around the time of acceptance of their offer, (see paragraph 7 above), that gets them nowhere near satisfying the provisions in CPR 44.16(1), and quite rightly they did not seek to persuade me otherwise. Their mention of their suspicions was by way of informed background to the sense of unfairness which they articulate over the settlement outcome, where set-off, of what they consider to be wasted costs incurred through late acceptance of their Part 36 offer, is far less straightforward, if permissible at all under my judgment, due to changes in case law after their offer was made.

20. The language of Chapter 41 of Sir Rupert's report is framed in terms of redress for defendants where claimants failed to beat Part 36 offers, but there is no specific reference to late acceptance of an offer. The chapter starts by reflecting on the pre-Part 36 arrangements for payments into court and sanctions for claimants who failed to do better than an offer at trial. The examples provided in the chapter also tend to reflect on outcomes at trial where judgments have been obtained. This may be an important distinction, although not expressly referred to in submissions, because a "failure to beat" situation arising at trial, is one when there has been a judicial determination of the merits and /or quantum of the claim.

21. Sir Rupert expressly stated in respect of QOCS in Chapter 19 of the Review, that he was proposing deterrence of "frivolous" claims (at paragraph 4.6) which is not the situation in this claim and the rule he proposed at paragraph 4.7 in this regard was not adopted. At paragraph 4.3 of chapter 41 he proposed no amendments to CPR Part 36 as a result of QOCS. I conclude that the Review does not provide positive affirmation of the defendant's assertions in this case, as to how I should interpret the rules which followed thereafter.

22. The Government Response to Sir Rupert's report equally offers me no encouragement to accept the defendant's submissions. The recommendations are extremely brief, no doubt because it was plain that both statutory and rule changes would be required before implementation and detailed attention to drafting would be undertaken during those processes. The approval of the introduction of QOCS, as set out at paragraph 15, merely recites that the only exception to a claimant being shielded from paying any defendant costs, where he was overall successful in receiving personal injury compensation, would be "on behaviour grounds-where the claimant has acted fraudulently, frivolously or unreasonably in pursuing proceedings". Those policy objectives have clearly reached fruition in the subsequent drafting of CPR 44.15 and 44.16. There was no reference in either the Response or the subsequent rule changes to late acceptance of Part 36 offers being deemed unreasonable conduct. Paragraph 12 of the Response dealing with changes to Part 36 surrounding incentives to make and accept reasonable offers expressly refers to situations arising where there has been a trial, which does not match the current situation at all.

23. The extensive hearing bundle did not include the Government's Explanatory Memorandum ("the Memorandum") setting out the policy rationale for laying the QOCS proposition before Parliament in the new Civil Procedure Amendment Rules 2013 No. 262 (L.1). I have drawn on that reference material myself and noted at paragraph 7.1.a) sub-paragraph 4, it was stated that "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 fails to beat the defendant's "part 36 offer" to settle) will not have to pay those costs except to the extent that they can be set off against any damages received." Once again therefore the policy was silent, intentionally or otherwise, as to what should happen under QOCS in a situation where the claimant was successful in recovering damages and has not failed to accept, but accepted late. The brief wording quoted above speaks of a claimant who "does not accept", but does not add words "in the relevant period". The sense I take from the wording, is that it is designed to encompass the claimant who never accepts the offer but there is not a lot for me to go on, as there is just one illustration, and the claimant's submissions did not take me this way. Finally, all the changes to Part 36 outlined in the subsequent paragraph of the Memorandum also deal only with situations at trial.

24. I have also been able to obtain copies of the relevant CPRC minutes relating to the drafting of QOCS, which the parties had been unable to source. Those minutes for the November 2012 meeting are the most pertinent and make it plain that Ministry of Justice policy was deliberate in not adopting all of Sir Rupert's recommendations in respect of QOCS and in not requiring the rules to include reference to a costs set off against any relevant costs orders, as opposed to damages and interest. Once again the language used does not reference or allude to a situation where there has been late acceptance of a Part 36 offer, such that the QOCS shield should be broken. Of more significance, to my mind, is the fact that it is plain from the minutes that there had been circulation of previous draft QOCS rules to interested parties who had engaged extensively with the Ministry of Justice during a relatively lengthy and fluid consultation process. This involved significant rule redrafting effort, prior to the final draft rules being laid before Parliament. It is important, I feel, not to under-estimate with the benefit of hindsight, the seismic changes introduced by QOCS and the sense that all involved were "feeling their way" into a new era. The minutes imply that there was a scaling-back during the drafting process[1], which would have been understandable given the various concerns expressed by practitioners at the time about the viability of the market-place following these and other interlocking reforms.

THE RELEVANT CASE LAW

[1] CPRC Minutes 2.11.12 at paragraph 6, "The Chair reported that whilst discussions were continuing a letter had been received from APIL pointing out that the drafts had departed from the Written Ministerial Statement (WMS), and asking what instructions the Committee had received from the MoJ. A response had been sent indicating that the drafts were a work in progress to be finalised. A similar point had been made in a letter from the President of the Law Society which noted that the draft rules had departed from the WMS in two respects. The President did not have the current draft but raised two points based on a previous draft:
(1) "the current drafting of the rule does not introduce one way costs shifting as envisaged by Lord Justice Jackson, or indeed the Government statement. The draft now appears to maintain the two way costs shifting rule for unsuccessful claimants but with a provision that the costs can only be enforced with the leave of the court…" and
(2) "the stated government policy was that any set off of costs (for example because of a claimant failing to beat a Part 36 offer) would be limited to the amount of damages only. We understand that the draft rule provides that all costs orders during the case (e.g. interlocutory hearings) will be set off against each other and against any final costs orders at the end of the case."
The Chair posited that at the time of writing both points were relevant, particularly as the WMS not fully expressed the Part 36 set off position, but that the policy had since been resolved and the issues dealt with in subsequent drafts. William Featherby confirmed that the WMS had not addressed all aspects of the Part 36 set off position particularly the whether it was set-offable and that the second point was a matter of government policy."

25. The parties hold diametrically opposed positions as to any precedent set by the two most important cases pertaining to the issues which this case raises, those cases being the ones which the Government has cited in paragraphs 12-15 of its recent consultation document proposing changes to QOCS.

Cartwright v Venduct Engineering Limited **[2018] EWCA Civ 1654 ("Cartwright")**

26. This case concerned a claim for damages for noise induced hearing loss brought by an individual against six defendants. Having discontinued against some parties, the claimant compromised his claim against defendants four to six by way of Tomlin order and thereafter discontinued his claim against the last remaining defendant, Venduct. Venduct sought its costs of the claim, arguing that they could be paid out of the damages secured by the claimant under the Tomlin order. The two issues in the appeal, as identified by Coulson LJ, were:

i) Whether the third defendant could enforce its costs order from sums payable to the claimant as damages and interest from another defendant

ii) If the answer to issue i) above is "yes" whether enforcement was still possible under the QOCS provisions where sums due to the claimant were payable by way of Tomlin order rather than a direct order of the court for damages.

27. The court held that:

i) Nothing in CPR r 44.14 (1) prevented Venduct from enforcing its costs order out of the damages and interest payable to the claimant from other defendants to the claim (this finding is included for contextual completeness but is not strictly relevant to the issues before me).

ii) A Tomlin order was a record of settlement and not an "order for damages and interest made in favour of the claimant" within the meaning of CPR r 44.14 (1) such that Venduct's order for costs could not be satisfied from the sums paid by others pursuant to the Tomlin order.

The claimant's submissions

28. The claimant submitted that as the argument before the Court of Appeal regarding the status of a Tomlin order under QOCS provisions had included consideration of the application of CPR 44.14 to settlements "of whatever kind (including settlements by way of part 36)", the decision reached was binding upon me as to the true construction of "an order for damages and interest". The inevitable outcome of accepting that the reasoning of Coulson LJ on this point was part of the ratio decidendi of the case, and not obiter dictum, would be that the claimant in the instant case could not be forced to allow the defendant to set off costs against his Part 36 settlement sum; this is because he does not have an order for damages and interest within the meaning of the QOCS rules.

29. Counsel for the claimant maintained that this point of construction went "to the heart of the decision and must be construed as ratio". He drew my attention to paragraphs 44-46 of Coulson LJ's judgment in particular:

44. These authorities make it clear that a Tomlin order cannot be described as "an order for damages and interest made in favour of the claimant". It is no such thing. It is a record of a settlement reached between the parties which is designed to have binding effect. In that sense, as the parties agreed in the present case, it is no different to the settlement that arises when there is an acceptance of a part 36 offer. Such acceptance does not require any order from the court, so a settlement in consequence of an acceptance of a Part 36 offer would also be outside the words of rule 44.14(1).

45.Mr Williams pointed out that, although the schedule to a Tomlin order is not part of the original order, if one or other party does not comply with the terms in the schedule, the court can eventually enforce those terms pursuant to the words of the Tomlin order itself. Thus, he said, even if not at the outset, the schedule to a Tomlin order may eventually be enforced by order of the court.

46.That is right as far as it goes, but it does not get around the fact that this is not what rule 44.14(1) is referring to. In order to allow for this, Mr Williams had to rewrite the rule to refer to "a sum payable by way of damages which is compellable by court order". That is not what the rule says. Indeed, no matter how he put his case, Mr Williams needed to add further words to rule 44.14(10. At the very least, on his case, the rule would have to refer, not only to an order, but to an agreed settlement. In my view, the absence of the necessary words is fatal to his case on interpretation.

The defendant's submissions

30. The defendant maintained that as the *Cartwright* case was not a Part 36 case at all, any observations on that rule were strictly obiter. They took me to the Editors of *Halsburys Laws of England* where it was recorded:

"Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand are generally termed "dicta"; they have no binding authority on another court, but they may have some persuasive efficacy".

31. The defendant acknowledged that a settlement under a Tomlin order reflected an agreement reached between parties but stated that Part 36 settlements were different because damages were "agreed and identified" in such cases. In Tomlin orders they submitted "damages are unknown and kept confidential" such that there was a "world of difference" to a Part 36 settlement. In addition Tomlin orders may encompass non-monetary compensation which cannot be categorised as "damages". However, *Cartwright* was a damages case so I do not consider that assists with my deliberations.

32. Furthermore the defendant drew my attention to the fact that the parties had agreed in *Cartwright* that a Part 36 settlement was no different to a Tomlin order, therefore the court did not need to consider the point under Part 36, emphasising that observations made on the Part 36 point were truly obiter.

33. Finally, the defendant relied upon the structural difference of a Tomlin order where settlement terms are contained in a schedule which is not part of the order, as discussed at paragraph 41 of the judgment.

My conclusions on the correct interpretation of Cartwright

34. It is clear from the foregoing that *Cartwright* is only a hindrance to me, rather than of assistance, if I consider the points argued before me from that case are not only binding, but are also ones with which I disagree. I do not want to detain myself with a detailed examination of the principles of ratio decidendi and obiter dictum, the learned articles on which took up many pages of the hearing bundle, when I am in agreement with the observations of Coulson LJ, and from a unanimous Court of Appeal. It is more important that I explain why the observations are helpful to me in dealing with the current issue between the parties.

35. The "heart of the decision" in *Cartwright*, is to my mind, comprised of several observations and findings in order to reach the overall conclusion as follows:

i) The fundamental principles underlying QOCS

Whilst Coulson LJ considered this point in relation to issue one before the court (see paragraph 26 i) above), it is relevant to his findings on issue two and to this case. At paragraph 23 he said, " The QWOCS regime is designed to ensure that a claimant does not incur a net liability as a result of his or her personal injury claim; that, at worst, he or she has broken even at the end of the action….But there is no reason why that regime should prevent B from its costs out of the damages payable by A". After considering Sir Rupert Jackson's recommendations contained in the Review at paragraph 31 and the need to provide incentives for claimants to accept reasonable offers, at paragraph 32 he noted that one-way cost shifting "requires a claimant, in the appropriate case, to pay to a successful defendant the amount of a costs order made in favour of that defendant, out of the sums payable by way of damages and interest to the claimant..". He further noted at paragraph 30 that the final QWOCS rules were substantially different to those proposed by Sir Rupert and that the Explanatory Memorandum "was technically incorrect when it talked about set off, an error now corrected by the Court of Appeal in *Howe v Motor Insurers' Bureau* (No 2)".

ii) The appropriate technical construction of the CPR wording "any orders for damages and interest made in favour of a claimant" and its implication for forms of order not containing those words

Having set out why it is good and well-established policy that defendants should be able to set off costs orders, the court turned to consider types of order which might fall outside the rules. The tenor of the judgment is one where it is seen as regrettable, against the policy background, if claimants are able to carve out exceptions to the rules to avoid liabilities. The defendant in *Cartwright* had submitted " it would be absurd if a claimant was liable to meet a defendant's costs order if the damages and interest were the subject of a simple court order, but not so liable if they were the subject of a Tomlin order. He said that would elevate form over function and could not be what the rules intended". The court noted that an essential component of a Tomlin order is the schedule which is not a court order, but an agreement of the parties (at paragraph 41).

At paragraph 44 it was clearly set out that a record of settlement reached between parties and intended to be of binding effect is not an order for damages and interest. Furthermore, "Such acceptance does not require any order from the court". The practical difficulties of a court trying to identify sums agreed by way of damages and interest, "(which may not be expressly identified in the schedule…..may explain why settlements are not part of the QOWCS rules" was also mentioned at paragraph 40. It is noteworthy that the latter point impliedly accepts that, on occasion, a schedule may dissect damages from interest, but would not necessarily do so. I mention this because counsel for the defendant spent some time taking me to clauses in CPR 36 concerning provisional damages where acceptance of a Part 36 offer requires damages to be specified as well as interest, such that some of the issues in this case over the definition in CPR 44.14 fall away. However, this is not a provisional damages case, so just as Coulson LJ had to ignore the fact that some schedules to Tomlin orders may specify damages, rather than a globalised settlement sum, to focus on the specifics of the case before the Court of Appeal, so do I in reaching my determination. All of the points noted in the judgment on the issue of orders which reflect a settlement, rather than a matter on which a court has tried the issues, whether expressly by analogy to Part 36 settlements or not, would apply to the Part 36 settlement before me, by their very reasoning. The fact that Part 36 is referenced at paragraph 44 is illustrative of the nub of the problem, when considering the difficulty for the court in permitting enforcement of terms under Part 44.14, where those terms have been negotiated by the parties directly, and do not contain the precision of a judgment which identifies specific heads of damage.

iii) How the words, "any orders for damages and interest made" could be construed to include Tomlin orders or settlement agreements.

The court rejected submissions that the addition of wording, (whether implied or express) in CPR 44.14(1)to include, "a sum payable by way of damages which is compellable by court order", would fulfil the original purpose of the rule and indeed encompass Tomlin orders as well. A conclusion was reached at paragraph 46 "At the very least,…the rule would have to refer, not only to an order, but to an agreed settlement". Once again, the line of reasoning, even though it did not reference Part 36, would naturally encompass it.

iv) Whether the choice of wording in the QOCS rules was an oversight by the CPRC when drafting policy intentions, such that an improved purposive construction can now be adopted.

Coulson LJ was particularly concerned about the practical implications of allowing an expanded construction of the rule, as sought, which would cover "Tomlin orders, or out-of-court settlements" at paragraph 47. He referred to the fact that a judge does not expressly approve the terms of such an order and discussed at paragraph 48 that in some settlements the component parts are never articulated, such that the court could not identify the relevant figures for damages and interest. The practical difficulties of interpreting the rule more widely to incorporate settlements were stated at paragraph 50 to be far too numerous, absent more detailed guidance, for the courts to apply it. I consider it helpful to set out that concluding paragraph in full, with my own emphasis

> highlighted in bold; " It is these practical difficulties which have confirmed my view that Mr William's liberal interpretation of rule 44.14 (1) is wrong. Essentially, he **has to argue that the CPRC intended** that the rule should **cover any circumstances in which a claimant recovers something,** by whatever means, from a defendant. But not only does **the rule not say that**, but if that is what was intended, **the rule would have needed to contain much fuller guidance as to** what should happen **to settlements** and Tomlin orders: whether they were to remain confidential; the circumstances in which confidentiality would be removed; **the way in which any global sum was to be apportioned**, and so forth. In the absence of that sort of guidance, it cannot be said that this is a situation which the rules were intended to cover. So, it does not seem to me to have been an oversight or a lacuna in the CPR; **if it had been the intention for rule 44.14 (1)to cover settlements of whatever kind, different words and greater guidance would have been required**".

36. My overall conclusion is that the line of reasoning adopted by Coulson LJ in reaching a determination on the position of Tomlin orders under CPR 44.14, is so interwoven with reasoning touching upon other types settlement where the court has not conducted a judicial inquiry into the appropriate damages and interest components of the final court order, that his comments on Part 36 settlements do form part of the overall ratio of his judgment. Even if I was wrong on that, his findings would be highly persuasive, not only because they emanate from a more senior court, but also because they are reflected in the later Supreme Court decision to which I will now turn..

Adelekun v Ho (Association of Personal Injury Lawyers intervening) [2021] UKSC 43

In the Court of Appeal

37. This case concerned a relatively low value road traffic accident damages claim where the defendant's Part 36 offer to settle for £30,000 was accepted but the parties fell out over costs liabilities and enforcement terms. The first issue was whether fixed costs or standard costs applied, the claim having commenced in the portal for low value claims. The defendant was successful in the Court of Appeal in only being ordered to pay the claimant's fixed costs amounting to £16,700 but the defendant had an appeal costs order in the sum of £48,600. The Court of Appeal refused to allow enforcement of the adverse costs liability against the claimant's damages as they said, following *Cartwright*, that the settlement order drawn up following the Part 36 acceptance was not an order for damages and interest within the meaning of QOCS. The Court of Appeal however considered itself bound (it seems with some reluctance) by its earlier decision in *Howe* and therefore allowed set off, of the defendant's appeal costs against the claimant's costs of the main action. The net result was that the claimant retained her damages but recovered no costs, and the defendant received no appeal costs but avoided paying costs in the main action.

In the Supreme Court

38. The claimant successfully appealed the set off in the Supreme Court. The Supreme Court held that QOCS was intended to be a complete code about the use which defendants could make of costs orders made against claimants. Further that the

jurisdiction to set off one costs order against another was only permissible under rule 44.12 (1) if it did not exceed the aggregate amount in money terms for any orders for damages and interest. The net outcome of the decision was that the claimant kept both her damages and costs, whilst the defendant did not recover its costs. The apparent unfairness of this particular result was acknowledged in the judgment, but seen as part and parcel of the overall "swings and roundabouts" of the QOCS regime which was said to work well overall, but does lead to surprising results in some individual cases. I will set out a more detailed analysis below after summarising the parties submissions.

The defendant's submissions

39. The defendant maintained that this decision was irrelevant to my determination, as it centres on the possibility of setting off costs orders against each other, which is not the issue in this case. Furthermore, it was submitted, the Supreme Court was not invited to interrogate the correctness of the decision in *Cartwright* in the way I was now being asked to. As such, it was said that I could distinguish my decision on a reasoned basis, in order to find that costs orders could be set off against sums due in consequence of acceptance of a Part 36 offer. The defendant relied upon paragraph 14 of the judgment in this regard, where the parties agreement is recorded, that acceptance of a Part 36 offer does not result in an order for damages within the meaning of the QOCS regime.

The claimant's submissions

40. Whilst the claimant accepted the main focus of the Supreme Court had been on rules allowing costs set offs against each other, they maintained that the court had accepted the correctness of the decision in *Cartwright*. Furthermore, the claimant maintained that the relevant passages were not obiter but part of "the necessary building block to the decision in *Adelekun*". In the alternative, it was submitted that even if the passages were technically obiter dicta, they are strong obiter dicta and should be given considerable weight in my ruling.

My conclusions on the correct interpretation of *Adelekun*

41. It is apparent from preceding paragraphs that I have no difficulty with the construction of rule 44.14(1) reached by Coulson LJ in *Cartwright* and its applicability to Part 36 settlements. For completeness I have undertaken a review of the findings in *Adelekun* as well.

i) The fundamental principles underlying QOCS

The judgment commences with a review of the "inherent inequality of arms between claimants and defendants in personal injury claims and the evolution of procedural schemes to try and ameliorate the situation. At paragraph 4 the Supreme Court made plain that a court is in no way restrained from making any type of costs order it considers appropriate by the advent of QOCS, but enforcement of such orders is constrained by the rules. The judgment is permeated by references to the strict wording of the QOCS rules as being determinative of the approach towards enforcement of costs orders rather than any other source, even where this may produce unpalatable results. So at

paragraph 37 it was held, " ..we would accept that QOCS is intended to be a complete code about what a defendant in a PI case can do with costs orders obtained against the claimant". And at paragraph 45, " No one has claimed that the QOCS regime is perfect. It is, however, the best solution so far that the opposing sides in the ongoing debate between claimant solicitors and defendant insurers have been able to devise. It works to achieve the aims for which it was introduced in the great majority of straightforward cases in which one side or the other is entirely successful".

ii) The interaction between CPR 36 and CPR 44

On the specific point about the interaction between Part 36 and QOCS, and whether QOCS constrains a set off, the court expressly recognised at paragraph 7 that there "are at least three types of case where it may be critical. They went on to describe one of these types of case as "where the claimant succeeds, but by way of settlement rather than at trial. In such a case there is no court order for damages or interest, even if the settlement agreement is annexed to a Tomlin order, and therefore no headroom below the cap available under QOCS for the defendant's costs enforcement" and went on to cite *Cartwright*. Having recognised the issue, the court proceeded to determine it, having regard at paragraph 31 to "the decision in *Cartwright*…that damages and interest payable under a settlement did not count for the purposes of rule 44.14 (1)". There was no discussion or finding that *Cartwright* had been decided wrongly, or was confined to a Tomlin order only case, even though the opportunity was there and the situation in that case was one of importance in setting the foundation for the ruling in *Adelekun*. In this, my interpretation accords with that of the claimant in this case.

iii) Policy intention and the overriding objective

At paragraph 9 the court had acknowledged "this court must decide the question of construction, leaving it to the CPRC to consider whether our interpretation best reflects the purposes of QOCS and the overriding objective, and to amend the relevant rule if, in their view, it does not." Further, at paragraph 31 within its analysis, the court dealt with the respondent's submissions as summarised at paragraph 30, that in a case where there has been no court order for damages, by following a purist interpretation of CPR 44.14 the court "would be giving a green light to the pursuit by claimants of weak interim applications and unmeritorious points. It would also remove any real incentive to settle before trial, if the adverse costs consequences of losing at trial (or failing to beat a part 36 offer) led to a purely unenforceable costs sanction." At paragraph 31 the court held " it is not necessary or appropriate to describe or examine those policy considerations in detail. First, as already emphasised, this court is not well placed to assess them reliably. If the true construction of the QOCs scheme … has adverse policy consequences, that is a matter for the CPRC to put right."

42. The clear message that I take from *Adelekun* is that the court was not prepared to imply or infer words into Part 44 to expand the scope for enforcement, where the brief wording of the rule might otherwise seem to produce an unfair result on occasion. It is correct that there was no in depth examination of *Cartwright*, but it seems that was

because the Court of Appeal had chosen to follow the plain language of the rule without adornment, which was consistent with the construction adopted by the Supreme Court. The Supreme Court was however not slow to overturn the Court of Appeal in *Howe* on a purposive construction basis. I take the view that if the Supreme Court had considered the language of Part 44 was inconsistent with *Cartwright*, despite the parties not contesting it, they would have overturned that decision too as the decision was referenced when determining the correct construction of the rule overall, but this is not critical to my overall determination. The most important point, to my mind, is that the Supreme Court did not consider it appropriate to add words to the QOCS scheme which is currently set out "with commendable brevity" (as noted at paragraph 19), to expand its scope, preferring that words should be given their straightforward meaning and any amplification or further finesses should only be introduced by the CPRC.

MRA v The Education Fellowship Board [2022] EWHC 1069 "MRA"

43. The defendant also sought to rely upon the recent MRA decision where late acceptance of a Part 36 offer by a protected party resulted in a costs order against the claimant, which was ordered to be set-off against damages. Having studied the case which runs to 82 paragraphs, I am struck by the following:

- The headnote clearly states that "the parties had not agreed who should pay costs after its expiry, the court had to decide whether it would be unjust to order the Claimant to pay costs after expiry". CPR Part 36.13 (5) contains clear provisions about how the parties should approach the court to determine a costs order if they cannot reach agreement themselves. That is not the situation in the case before me.

- At paragraph 40 there was a brief reference to argument between the parties that had the claimant not been a minor or lacking in capacity, the court would not need to have approved damages and would not necessarily have been exposed to the QOCS risk of set-off of any costs order against such damages. Whilst counsel for the claimant suggested a form of wording that might avoid a QOCS set-off arising "It was generally agreed between counsel that perhaps this aspect of argument was not one which needed at this stage to be considered further".

- At paragraph 65 under the heading "Decision", the Master clearly stated, " I am not here going to decide the effectively "parked" argument……to the effect that there were differences in treatment of protected parties versus non-protected parties which rendered them more exposed to the situation here under QOCS. This was not fully argued before me…".

- As a matter of pure precedent I am not bound by the decision in any event.

Overall conclusions

44. At the start of my conclusions I have to recognise that each party was seeking what it considered a principled outcome to the position they found themselves in. It is unfortunate that due to timetabling and availability constraints it has taken some little while for their dispute to reach this court for resolution.

45. Turning to the substance of the dispute, I have concluded that the Government policy statements about the introduction of QOCS provided no hint that Part 36 offers accepted out of time should be subject to enforceable adverse costs set-offs. This is despite the intense involvement of interested parties when the rules were being drafted. I am therefore reliant on evolving case law to assist in the correct approach to the issue before me, as well as my obligation to reach a decision in accordance with the overriding objective.

46. Although the defendant has tried hard to persuade me that the decision in *Cartwright* is both wrong, and not binding upon me, as such observations made which could be material to the case were expressed obiter, I am unable to accept those submissions. I have set out my reasons at paragraph 35.

47. Similarly, I am unable to accept that the Supreme Court's decision in *Adelekun* did not touch on matters relevant to my construction of the QOCS rules as I have explained at paragraph 41.

48. Having reached my conclusions on the two leading cases on the subject from the Court of Appeal and the Supreme Court there is no need for me to consider any other decision of the lower courts, to which I was taken but which I have not considered necessary to summarise in this judgment, where a judge has felt uncomfortably constrained by those authorities .

49. Even if I did not consider myself bound by *Cartwright* and *Adelekun*, I do not consider the application of those decisions to be unfair and totally arbitrary in the particular way characterised by the defendant. It was well understood when QOCS rules were introduced, that they reflected a global policy intention which would reduce adverse costs paid by defendants in injury litigation overall on a swings and roundabouts basis; they marked a radical departure from the previous position on costs recovery. The language in both CPR Part 36 and Part 44 clearly demarcates between the position where the court's permission is required for a particular type of costs order to be made following judicial scrutiny, and those where it is not. This is consistent with the overriding objective to allow matters to be resolved expeditiously, save expense and manage court resource effectively, so that parties are not forced through time-consuming and expensive court processes unless absolutely necessary.

50. It is understood that the defendant's early offer was made with a view to saving their overall costs outlay, should it have been accepted at that very early stage in proceedings. At the time the offer was made, adverse costs orders by way of set-off were being enforced by the courts, following the decision in *Howe v MIB*. The defendant's offer can only have been made on a commercial basis to try and dispose of the claim as neither party had had the opportunity to fully evaluate losses. The offer could have been withdrawn at any time,(and there was a 4 month gap between handing down of the *Adelekun* decision and the claimant's late acceptance) but the necessary corollary to that under the rules, was that costs protection would be lost. Therefore as soon as the Supreme Court decision in *Adelekun* was handed down in October 2021 the defendant could have decided to withdraw the offer. The offer however was not totally worthless in terms of both costs protection and an incentive to the claimant to settle. It stopped recovery by the claimant of their costs from expiry of the relevant period 21 days after the offer had been made. Acceptance of the offer

also saved the defendant from paying the significant costs of completing expert evidence, trial preparation and trial.

51. Although I was encouraged to think that the claimant might have dishonestly inflated his claim, the suspicions of the defendant which I set out at paragraph 8 are nowhere near meeting the threshold required by the court at CPR 44.16 (1) to implement costs sanctions against him, and quite correctly counsel did not seek to suggest otherwise; he simply contended for me to find a way to ordering a more equitable outcome for the defendant than the resulting judgments in *Cartwright and Adelekun* might otherwise encourage me to adopt.

52. If the parties had not agreed costs liabilities between themselves, the provisions of CPR 36.13(5) as applied in the *MHA* case, would have required them to ask me to make such order as I considered just, having reviewed the underlying damages claim and settlement offer in some detail. The defendant did not choose this route. I cannot say whether it would have made a difference to the overall outcome, but it is simply another factor weighing against the overall sense of injustice which has been portrayed to me.

53. In alternative submissions, as I set out at paragraph 10 v), the defendant encouraged me to consider two pragmatic enforcement orders which could be made in his favour, if I did not accept that Part 36 acceptances are to be interpreted as falling within "an order for damages" within the meaning of CPR 44.14. One such alternative was to make an express "order for damages" pursuant to CPR 36.14(7) rather than simply adopting the wording of the rule that there be "judgment for the unpaid sum". The other option was to use my inherent case management powers pursuant to CPR 3.1(2)(m) being, it was submitted, a "step" taken by the court to further the overriding objective. I consider that both of these options would be inappropriate given the clear statements from the Court of Appeal and the Supreme Court in *Cartwright* and *Adelekun* that any construction of the QOCS rules as currently drafted which may have given rise to unintended consequences is a matter for rule changes by the CPRC, not judicial intervention.

54. Finally, I consider it important to recognise the unfairness to the claimant, and those trying to advise him as well, if my finding was against him. At the time his acceptance of the Part 36 offer was served there had been a recent, clear Supreme Court authority as to the enforceability of adverse costs orders in QOCS cases. The claimant's letter of acceptance made it plain that his legal team was fully conversant with the *Adelekun* decision and that they recognised an agreement on costs liability was required as the acceptance was out of time. On the latter point the defendant confirmed that they accepted the claimant's suggested costs liability so the only issue was the QOCS set-off. The defendant's decision to challenge the position judicially has resulted in the claimant being denied any payment of his agreed damages to date. That is unfortunate and the notes in the White Book to CPR 36.14 contain case authority for the proposition that the claimant is entitled to receive the offered sum without awaiting set-off of an unquantified costs liability and that the court has no jurisdiction to extend the 14 day period for such payment which is set by the rules.

Terms of my Order

55. Accordingly, I will adopt the drafting of the order attached to the claimant's application notice, which is clear that monies to be paid to the claimant are the "settlement sum" agreed by the parties and that the costs order against the claimant made in respect of late acceptance is not to be set-off against any part of the ordered sums in the claimant's favour. The defendant's application is dismissed.