6 October 2021

PRESS SUMMARY

Ho (Respondent) v Adelekun (Appellant)
[2021] UKSC 43
On appeal from [2020] EWCA Civ 517

JUSTICES: Lord Briggs, Lady Arden, Lord Kitchin, Lord Burrows, Lady Rose

BACKGROUND TO THE APPEAL

This appeal concerns the operation of a scheme known as Qualified One-way Costs Shifting ("QOCS"), located in Part 44 of the Civil Procedure Rules ("CPR"). QOCS applies to most personal injury claims and ordinarily has the effect of limiting the amount of legal costs payable by a claimant to a defendant where a claimant loses on part or all of their claim.

In some circumstances, QOCS does allow a defendant to recover legal costs, up to a certain limit. If a court orders a claimant to pay a defendant's legal costs, the defendant will normally only be able to enforce this up to the amount of any court orders for damages and interest that the defendant is ordered to pay to the claimant. For example, if a claimant is awarded £10,000 in damages but ordered to pay £15,000 of the defendant's costs, that defendant could only enforce that order up to £10,000 in costs against the claimant (cancelling out the damages award).

Ms Adelekun was injured following a road traffic accident with Ms Ho on 26 June 2012. Some years later, Ms Ho offered to pay Ms Adelekun £30,000 to settle her claim. Ms Ho also offered to pay Ms Adelekun's legal costs up to that point ("the pre-settlement costs"). Ms Adelekun accepted the offer and a settlement agreement was concluded.

There was, however, a dispute regarding the extent of the pre-settlement costs owed by Ms Ho. The Court of Appeal upheld Ms Ho's contention that she was only liable for £16,700 of the pre-settlement costs. Reflecting the fact that Ms Ho had succeeded on this point, the Court of Appeal made a costs order that Ms Adelekun should pay Ms Ho's legal costs of about £48,600 for the hearings dealing with that dispute ("the Court of Appeal costs order").

Ms Ho accepted that because she had agreed to pay Ms Adelekun the £30,000 by way of a settlement agreement rather than being ordered to pay that amount by a court, this meant that there were there were no orders for damages and interest for the purposes of CPR 44. There was nothing, therefore, against which Ms Ho could enforce the Court of Appeal costs order under the QOCS regime. That was the result of an earlier decision in *Cartwright v Venduct Engineering Ltd* [2018] 1 WLR 6137.

The issue was whether Ms Ho could nonetheless avoid paying the £16,700 that she owed Ms Adelekun for the pre-settlement costs, because it was cancelled out by the £48,600 that Ms Adelekun owed her under the Court of Appeal costs order. The Court of Appeal concluded that Ms Ho could, leading Ms Adelekun to appeal to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows the appeal. The judgment is given by Lord Briggs and Lady Rose, with whom Lady Arden, Lord Kitchin and Lord Burrows agree.

REASONS FOR THE JUDGMENT

It was agreed by both parties that the question was one of construction of the language of the QOCS provisions in CPR rule 44.14 **[32]**.

Lord Briggs' and Lady Rose's judgment explains that the effect of rule 44.14(1) is to create a monetary cap on the amount that a defendant can recover in costs from the claimant, set at the level of the aggregate amount in money terms of all court orders for damages and interest in a claimant's favour. The defendant must keep a running account of all costs recoveries which it makes against the claimant, and cease enforcement once that monetary cap is reached **[38]**.

Ms Ho nonetheless argued that she could set off the opposing costs orders against each other because the monetary cap created by rule 44.14(1) only applied to the net costs liability of a claimant after all opposing costs orders had been netted off **[36]**. Therefore, despite the aggregate amount of court orders for damages and interest in Ms Adelekun's favour being zero, Ms Ho argued that the £16,700 owed by her for the pre-settlement costs could still be netted off against £16,700 of the Court of Appeal costs order.

Lord Briggs and Lady Rose reject this argument. The setting off of costs against costs is a form of enforcement covered by the QOCS provisions just as the setting off of costs against damages is **[39-40]**. A calculation of a claimant's net costs liability was therefore an incorrect approach, as the bar to enforcement in the QOCS provisions applied to the gross amount of a defendant's costs orders against a claimant rather than the net amount **[41]**.

The effect of this is that Ms Ho must pay Ms Adelekun the full pre-settlement costs of £16,700 on top of the £30,000 agreed to in the settlement agreement, but cannot enforce the Court of Appeal costs order against Ms Adelekun at all.

Lord Briggs and Lady Rose recognise that this conclusion may lead to results which at first look counterintuitive and unfair. But the conclusion follows from the wording of the QOCS provisions in CPR Part 44, and any apparent unfairness in an individual case is part and parcel of the overall balance struck by the QOCS regime **[44]**.

References in square brackets are to paragraphs in the judgment.

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