
FOCIS
The Forum of Complex Injury Solicitors

Response to the Government Consultation on changes to the Qualified One Way Costs Shifting (QOCS) Regime in Personal Injury Cases

June 2022

About Us

FOCIS members act for seriously injured Claimants with complex personal injury and clinical negligence claims, including group actions. The objectives of FOCIS are to:-

1. Promote high standards of representation of Claimant personal injury and medical negligence clients;

2. Share knowledge and information among members of the Forum;

3. Further better understanding in the wider community of issues which arise for those who suffer serious injury;

4. Use members' expertise to promote improvements to the legal process and to inform debate;

5. Develop fellowship among members.

See further www.focis.org.uk

Membership of FOCIS is intended to be at the most senior level of the profession, currently standing at 25 members. The only formal requirement for membership of FOCIS is that members should have achieved a pre-eminence in their personal injury field. Eight of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members currently include:

Anthony Gold
Atherton Godfrey
Ashtons Legal
Balfour + Manson
Bolt Burdon Kemp
CFG Law
Dean Wilson
Digby Brown
Fieldfisher
Fletchers
Freeths
Hodge Jones & Allen
Hugh James
JMW
Irwin Mitchell
Leigh Day
Moore Barlow
Osbornes Law
Potter Rees Dolan
Serious Law
Slater and Gordon
Stewarts
Thompsons NI

FOCIS members act for seriously injured Claimants with complex personal injuries and clinical negligence claims. In line with the remit of our organisation we restrict our responses relating to our members experiences, and to practices and procedures relating to complex injuries claims only. We leave it to others to respond to the impact relating to other classes of case.

Introduction

We welcome the opportunity to respond to this consultation on the proposals to amend Part 44 CPR following the cases of *Ho v Adelekun*[1] and *Cartwright v Venduct Engineering Limited*[2]. FOCIS response is made with reference to the core principles underlying the implementation of QOCS. The reasons behind the introduction of those changes to the injury costs regime, by Lord Justice Jackson, must not be forgotten in relation to any proposal to revise it.

The rationale behind the QOCS reforms was that defendants, often liability insurers and regular governmental/institutional organisations, would make major savings of the ATE insurance premiums they had been paying in the majority of cases in which they were liable for the claimant's damages, but with the trade-off being that they would no longer recover their costs in the minority of cases in which they successfully defended. It should also be acknowledged that a successful defence, does not mean a claimant's case was unmeritorious or 'frivolous'.

Lord Justice Jackson said in his report[3]

> *"It seems to me that a person who has a meritorious claim for damages for personal injuries should be able to bring that claim, without being deterred by the risk of adverse costs"*

and

> *"Access to justice entails that those with meritorious claims (whether or not ultimately successful) are able to bring those claims before the courts for judicial resolution or post-issue settlement, as the case may be. It also entails that those with meritorious defences (whether or not ultimately successful) are able to put those defences before the courts for judicial resolution or, alternatively, settlement based upon the merits of the case"[4].*

However, the proposals on set off and deemed costs orders, will serve to place additional burden and risk upon claimants in relation to costs, which will increase the need (and cost) of ATE insurance. This is in conflict with the principal aim of QOCS, which was intended to obviate the need for claimants to take out ATE insurance.

We respond to the elements of consultation question 18 as follows:

i. Do you have views on the Government's position on set-off, as outlined above?

We do not agree that the proposed changes on set off are necessary.

The introduction of QOCS was to level up the position following the removal of recoverability of ATE premiums and success fees. We agree with APIL, that the proposals must be

[1] [2021] UKSC 43

[2] [2018] EWCA Civ 1654;

[3] Introduction, Para 2.7 (page xvii) of Review of Civil Litigation Costs: Final Report December 2009

[4] Chapter 4, Para 2.3 (page 41) of the Report

reviewed within the context in which QOCS was introduced by Lord Justice Jackson[5]. His recommendations confirmed that 'the fact that a solicitor is on a CFA already, discourages a) frivolous claims and b) the rejection of reasonable offers[6]. The proposals made by the government in this consultation fail to recognise that the claimant's claim is nearly always run under a CFA pursuant to which the claimant will have been liable to pay their own costs (solicitors, counsel, disbursements and VAT) when they obtained an interlocutory court order in their favour and so will no longer have the funds from which a set off could be met. It is unlikely that the success fee regime (capped at 25% of general damages and past loss) would allow solicitors to bear the risk of set off of costs orders which may lead to those solicitors being unable or unable to take cases on, hindering the claimant's access to justice in seeking to bring a reasonable claim[7].

The QOCS rules already go far enough in affording defendants sufficient protection against frivolous or unmeritorious claims, given the circumstances in which the QOCS rules may be disapplied within CPR 44.15, and/or where fundamental dishonesty is made out. We consider that the QOCS regime is such that the parties already have clarity on when these exceptions to the rules apply.

As Vos LJ confirmed in *Wagenaar v Weekend Travel Limited*[8]:

> *"Suffice it to say that the rationale for QOCS that Sir Rupert Jackson expressed in those sections came through loud and clear. It was that QOCS was a way of protecting those who had suffered injuries from the risk of facing adverse costs orders obtained by insured or self-insured parties or well-funded defendants. It was, Sir Rupert thought, far preferable to the previous regime of recoverable success fees under CFAs and recoverable ATE premiums…"*

The proposed changes would seriously weaken the protection for claimants that was intended by the QOCS regime; exposing claimants to further risk of adverse costs and thus impede access to justice.

As mentioned by APIL in their response, 'set off' was considered in the case of *Howe (no 2) v Motor Insurers Bureau*[9] where the claimant was successful on appeal, but the Court of Appeal then set the costs of the original action off against the costs orders in Mr Howe's favour on the QOCS issue. Consequently Mr Howe recovered no funds by which to pay his solicitors and counsel for the work they had done on the QOCS issue. In light of the MIB's erroneous assertion that he was not entitled to QOCS Mr Howe had no choice but to incur these costs, which he could not pay. This outcome was surely not intended by Lord Justice Jackson nor the drafters of the QOCS regime. If the proposed rule change is made, it is unlikely that a claimant facing an analogous appeal to Mr Howe would be able to secure representation, as even if they had strong grounds, the set off risk would be significant to any legal team, who face not being paid even if they were successful in the appeal. This position is supported by the Court of Appeal and Supreme Court justices in *Ho* where it was acknowledged that the decision in *Howe* may have been incorrect[10].

Where a claimant has the benefit of QOCS in the original claim the claimant should retain that protection in the event of an appeal. Lord Justice Jackson also reported that '*any*

[5] Sir Rupert Jackson at the time of the Report

[6] Para 3.4 of the 2010 Report

[7] As mentioned by APIL in their response

[8] [2014] EWCA Civ 1105; paragraph 36

[9] 2017 EWCA Civ 932

[10] Paras 8 and 47 of *Ho v Adelekun UKSC decision*

litigation which is subject to one way costs shifting at first instance, should also be subject to one way costs shifting on appeal'.[11] The Court of Appeal[12] in considering appeals/QOCS stated that 'any appeal which concerns the outcome of the claim for damages for personal injuries, or the procedure by which such a claim is to be determined, is part of the 'proceedings' under CPR 44.13'[13]. We submit that this reflects the overarching principle that QOCS should provide comprehensive protection to claimants pursuing appeals, which should not be hindered by potential costs set off risk[14]. Whilst the justices in *Ho* mentioned that its decision may seem 'counterintuitive and unfair', FOCIS do not agree. Rather, in our view any perceived unfairness, would simply be an intended side effect of the initial policy aim of QOCS (as noted above).

An intention of Lord Justice Jackson was also that the QOCS regime should obviate the need for ATE for injury claims. ATE is still required for adverse costs risk but there is not cover for a claimant facing liability to their own lawyers, particularly where a previous recovery of costs interpartes is cancelled out by a set off later in proceedings.

It is FOCIS' view that both the decisions of *Ho* and *Cartwright* offered sufficient certainty as to the implications of QOCS and if the claimant is to continue to be afforded the protection QOCS intended, there is no need to change rule 44, as proposed, save for a point we make below in relation to cases involving multiple defendants. We do not agree that there is an increased risk of claimants running 'unmeritorious' points, as suggested in the paper, and see no basis for this assertion made nor is any evidence presented in relation to this. Claimants should not be deterred from bringing genuine injury claims, as was the intention of the QOCS reforms when they were proposed by Lord Justice Jackson. It should also be acknowledged that the number of personal injury claims is falling.

We contend that it was unintentional in the drafting of the original QOCS rules that they have enabled a successful defendant to pursue enforcement of costs following trial against damages awarded against another defendant. That was inconsistent with the primary aims of QOCS as described above.

Consequently CPR 44.14(1) ought to be amended, using similar wording to CPR 44.12, to limit the right of a defendant to enforce without court permission to the damages paid by the same defendant (not another defendant). We support Stewarts' proposed wording for a new 44.14(1) as follows:-

"Subject to rules 44.15 and 44.16, where a party is entitled to orders for costs made against a claimant they 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 that party is liable to pay to the claimant".

ii. Do you have views on the Government's position on extending costs orders to deemed orders, as outlined above?

FOCIS do not agree that there is a need to extend costs orders to deemed orders, as proposed.

[11] Chapter 34 Para 3.10 (page 341)

[12] In Wicks Building Supplies Ltd v Blare (no 2) (Costs)2016 EWHC 1251 QB

[13] Baker LJ para 29

[14] Jackson also noted in his report at chapter 34 para 3.10 (iii)' if a party not at risk of adverse costs is successful below, it is harsh to expose that party to risk of adverse costs on an appeal brought by his opponent'

If the CPRC do consider this to be an issue with QOCS, effectively 'dampening' the effect of Part 36 generally, then we propose that this issue should be considered in relation to a separate comprehensive review of CPR 36 in its own right, rather than limited to its knock on effect on the QOCS regime. In that review, we would propose that the impact on claimants who accept offers outside the relevant period is not reviewed in isolation, but alongside a review of the impact upon claimants where defendants accept offers late. We agree with APIL that CPR 36 already allows the defendant recourse in costs under CPR 36.13(4), subject to court discretion, in any event.

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?

In summary, FOCIS do not support the proposed revisions in relation to set off and deemed costs orders.

Judges already have the "tools" to do justice between the parties in relation to interlocutory costs orders, when interpreting Calderbank offers under Part 44 and Part 36 offers accepted late by Claimants.

Despite clear case law and certainty on QOCS, we note and endorse the proposal of APIL that if changes are to be made then there should be consideration of adoption of the Scottish QOCS model, rather than removing the court's discretion to allow set off. The Scottish model required judges to consider whether to make a costs order against the claimant at all where QOCS applies, rather than making an order which would be unenforceable by a defendant (as in England & Wales) unless permission is granted. The Scottish method is more aligned to the original Jackson proposals and would be better understood by members of the public. It is also notable that Scotland do not allow set off, but an ability to seek costs orders that are out of the norm, as a result of the claimants conduct or the claim not being wholly injury[15].

In any case, if set off of costs against costs is to be permitted, FOCIS wholly support the assertion that this should only be possible with permission of the court.

[15] See APIL response for Scottish wording and comments