PART 36 REGAINS ITS BITE AS SET-OFF RETURNS FOR DEFENDANTS UNDER QOCS

There has been a lot of noise regarding Qualified One-Way Costs Shifting (QOCS) lately, with claimant friendly decisions dominating the personal injury news. Our clients were rightly worried at the continued watering down of powers to manage claims through use of effective Part 36 offers; but they needn't worry any longer.

WHAT IS QOCS?

QOCS was introduced in April 2013, and essentially provides claimants with protection against liability to pay a defendant's legal costs if they are unsuccessful with their claim, save for in limited circumstances. A defendant will not recover their legal costs unless one of the following apply:

- The claim is struck out (under certain conditions);
- The claimant is found to be fundamentally dishonest;
- The claimant fails to beat the defendant's **Part 36 offer.**

WHAT IS A PART 36 OFFER?

At the risk of oversimplifying, from a defendant perspective, a Part 36 offer is a powerful tool to mitigate legal costs exposure. A well-placed offer can focus the minds of the parties towards settling a claim, without admission of liability.

More importantly, it gives defendants some costs protection under QOCS. When making a defendant Part 36 offer, a defendant agrees liability for the claimant's legal costs for 21 days. If that offer is accepted late, the defendant's liability for the claimant's costs is capped to the end of the 21 days. Further, *in theory,* the claimant becomes liable for the defendant's costs after the 21 days.

This can be particularly powerful, where for example a claimant takes their case to trial and does not better the defendant's Part 36 offer. The defendant can recover its costs from the end of the 21 days to Trial up to the level of damages and costs recovered by the claimant.

HOW HAD DEFENDANT'S POWERS LESSENED?

Whilst the Part 36 consequences existed in theory, the powers of defendants to enforce had been watered down by the courts. England and Wales have a common law legal system. This means the law develops as issues are tested in court, and judges make decisions in the higher courts, which become binding on cases with similar facts in lower courts. There are two key cases which impacted recoverability for defendants:

- *Cartwright v Venduct Engineering Ltd* – the Court of Appeal decision of *Cartwright* (2018), prevented a defendant from offsetting their costs against a claimant's damages where the matter had settled by any other means than a court awarding those damages. i.e., a defendant could not touch a claimant's damages for the offset of the legal costs it was entitled to as a result of late acceptance of its Part 36 offer.
- *Ho v Adelekun* – Despite being a modest claim, the case proceeded to the Supreme Court on the issue of enforcement of defendant costs against claimant costs. The outcome was that a defendant could only enforce its costs up to the level of costs **ordered** by a court. This removed the defendant's ability to offset its costs where settlement had been achieved by any other means outside of trial, including by way of Part 36.

The combination of the above cases has often left defendants with an entitlement to recover their costs under Part 36, without a means to enforce them.

WHAT HAS CHANGED?

Thursday 2 February 2023, saw the publishing of the amendments to the Civil Procedure Rules. Nestled in them, some welcome amendments for defendants to CPR 44.14 which governs the 'effect' of QOCS ahead of their inception for claims issued on or after 6 April 2023. I reproduce the accompanying explanatory note to the changes, which sets out the rule maker's intentions plainly:

"… *(i) to allow the court in cases falling within the scope of the qualified one-way costs regime to order that the parties' costs liabilities be set-off against each other, Ho v Adelekun [2021] UKSC 43 having previously found that this rule, properly construed, did not allow the court to do so; and*

(ii) to include within this rule, as well as deemed orders, agreements to pay damages or costs, so to allow the off-setting of costs orders made in favour of a defendant and ensure that offers made under Part 36, and, for example, settlements concluded by way of a Tomlin Order, come within the rule; …"

WHAT DOES THIS MEAN?

This is fantastic news for our clients. In short, it cancels out the decisions in *Cartwright* and *Ho*, meaning costs **and damages** awarded to a claimant are back up for grabs for the purpose of recovering/offsetting defence costs.

Further, defendant representatives needn't try and reinvent the wheel with some of the recent ingenious (and not so) attempts to circumvent the mechanism for offset. The new rules make it plain that, in addition to orders, 'deemed' orders, Tomlin Orders, and Part 36 offers are all now in play.

Where appropriate, a well-placed Part 36 offer has regained its bite, and is back on the table as a means for insurers to effectively risk manage claims, with the chance to recoup costs from claimants who push their claim too far.

I have no doubt we will hear more from QOCS in 2023; particularly with the implementation of the fixed costs regime looming in the latter half of this year, and for the claims issued prior to the 6 April 2023 date. But, for now, defendants can rejoice over the change of momentum, and it's back to the drawing board for claimant representatives.

WILL WE SEE A SPIKE IN LITIGATION?

This remains to be seen. Claimant representatives may seek to avoid these changes by issuing their client's claim in court before the changes come into force on 6 April 2023. Then again, claimant representatives will be mindful of the relevant Pre-action Protocols (PAP). Whilst technically the PAP is for claims allocated to the fast track, the general protocol for Personal Injury Claims states "… the "*cards on the table" approach advocated by this Protocol is equally appropriate to higher value claims. The spirit, if not the letter of the Protocol, should still be followed for claims which could potentially be allocated multi-track …"*.

The PAP allows the Defendant 3 months to investigate a claim. For many of our clients, this is extended to 6 months where the accident occurred outside England and Wales.

The overview of the PAP states: "*… Failure to comply with a Pre-action Protocol will be taken into account in any court proceedings which follow. The defaulting party may be ordered to pay additional costs resulting from his failure. If he is awarded costs by the court, the amount may be reduced on account of his failure. Other sanctions may be applied. …"*

So long as defendants are complying with their obligations under the relevant protocol, I find it difficult to see how a court would accept the looming QOCS change is a good reason to breach the PAP without penalty.

We will continue to work with our clients on appropriate strategies as the aftermath unfolds.

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Sources:

The Civil Procedure (Amendment) Rules 2023 - https://www.legislation.gov.uk/uksi/2023/105/made

Pre-action Protocols - https://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/general/pre-action-protocols