HO v ADELEKUN: Supreme Court ruling to cause counterintuitive and unfair results for proceedings involving Qualified One-way Costs Shifting

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In a startling decision that will provide 'counterintuitive and unfair results', the Supreme Court has significantly shifted the practical application of 'Qualified One-Way Costs Shifting' (QOCs) in favour of claimants. It has been determined that the level of a claimant's ordered damages acts as a maximum cap against which a defendant can enforce any costs order in its favour. This decision will impact partially successful defendants of personal injury claims with costs orders where there is no order for damages or where the damages ordered do not cover the level of the defendant's costs. It is likely that the Civil Procedure Rules Committee ('CPRC') will now be called upon to review the purpose of the QOCs regime and if appropriate effect the required changes to the CPR.

The *Ho v Adelekun* saga

We reported on the costs saga that *Ho v Adelekun* became in our earlier article here. The background to the issue recently determined by the Supreme Court can be summarised as follows:

- The introduction of Qualified One-way Costs Shifting was the antidote to the problem with how to assess After the Event insurance premiums in personal injury cases (for ATE policies taken out by claimants against the risk of an adverse costs order). As a trade-off for prohibiting the recovery of an ATE premium from losing defendants, fully successful defendants cannot enforce payment of a costs order unless the claimant behaved unreasonably and has been stripped of QOCs protection.
- If the claimant was partially successful, obtaining some damages and some costs, a partially successful defendant is entitled to enforce payment of costs up to the level of damages ordered.
- There must be an order for 'damages and interest' to trigger the right to enforce under the QOCs regime. Part 36 offers accepted in time without any order for damages being made (and even Tomlin orders where the damages provision is not in the enforceable part of the order) do not constitute an order for damages to enforce against, as determined by the Court of Appeal in *Cartwright* v *Venduct Engineering* [2018] EWCA Civ 1654.
- If there is no order for damages, successful defendants could previously get something back for their successful endeavours through the 'off-set' principle, by off-setting costs against costs.
- Another scenario is to 'top-up' a shortfall. For example, in a case with damages of £3,000 but the defendant's costs are £5,000, the £2,000 shortfall once the damages amount is enforced against is off-set against the claimant's costs.

Off-set is enforcement

By determining that off-setting costs is to be treated as enforcement for the purposes of the QOCS provisions set-out at Section II CPR Part 44, the Supreme Court's judgment precludes the setting-off of any costs liability beyond the level of any ordered damages. It is not relevant that set-off is not mentioned in the provisions that list the court's enforcement powers in Part 70. This means it is not possible to off-set costs against costs beyond the level of damages ordered. Even where there is an order for damages and interest, there is no provision for any shortfall 'top-up'.

The outcome in this case

There were two key features to bear in mind;

1. The underlying damages claim had been compromised by acceptance of a Part 36 offer and therefore there was no order for damages to off-set any costs order in the defendant's favour against, see the point about *Cartwright*
2. The principle dispute centred on the claimant's attempt to escape fixed costs of £16,700 and instead claim £42,000. Eventually, after going to the Court of Appeal to determine that issue, the defendant won and reduced its costs liability by £25,300.

By successfully defeating the claimant's attempt to avoid fixed costs, the defendant has incurred costs of around £48,600. Accepting that it was not possible to off-set any of those costs against the damages due to *Cartwright*, it was submitted that at the very least the £48,600 fixed costs should be off-set against the £16,700 fixed costs. This would still leave the defendant out of pocket by some £31,900.

The combined outcome of *Cartwright* and *Ho* to the facts of this case is that the winning defendant with £48,600 costs has to pay the claimant a total sum of £46,700 (£30,000 damages and £16,700 costs) and stand the £48,600 costs of its successful

appeal relating to the costs dispute. The effect of the Supreme Court's judgment is that it will give rise to some circumstances in which the claimant can litigate without risk.

What this means for you

There are a number of concerns with the potential consequences of this judgment including the following:

- The judgment is a further erosion of access to justice for defendants. The decision undermines the fairness of the QOCs regime and will produce results which are both counterintuitive and unfair.
- This is a further erosion of the effectiveness of Part 36 for defendants and renders it even less effective than it is now.
- As highlighted on the facts of the case itself, once the underlying damages claim is settled, where there is no damages order or a very low value one is made, there is no or little risk for claimants to raise spurious arguments to avoid fixed costs or claim excessive amounts.

By removing the ability to off-set costs against costs in cases where settlement was agreed without an order for damages or where low damages were ordered means that other similar inherently unfair outcomes will not now be avoided.

Next steps and unintended consequences

It remains to be seen what pressure this judgment will bring on the CPRC to review the QOCs provisions and redress the imbalance. It was widely anticipated that a review would take place following *Cartwright* and it seems likely that one will now take place, as the effect of the judgment will have adverse policy consequences. One of the unintended consequences might be a growth in the pursuit of non-party costs orders or wasted costs against solicitors for pursuing cases purely for their own benefit rather than the benefit of their client.

For more information or advice, please contact one of our experts in our costs team.

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