CAN A DEFENDANT'S COSTS BE SET OFF AGAINST A CLAIMANT'S IF QUALIFIED ONE-WAY COSTS SHIFTING APPLIES?

The case of Mrs Siu Lai Ho v Miss Sayi Adelekun is already well known following the Court of Appeal's ruling in 2019 that in an RTA case, a Part 36 offer making reference to "detailed assessment" does not escape the fixed costs regime. The same case now raises to question of how Qualified One-Way Costs Shifting (QOCS) should be applied and whilst the Court of Appeal decided begrudgingly in Mrs Siu Lai Ho (Appellant/Defendant) v Miss Seyi Adelekun (Respondent/Claimant) [2020] EWCA Civ 517 in favour of allowing a costs set-off, permission to appeal to the Supreme Court has been granted.

By way of background, this RTA claim fell out of the portal and settled on the basis of a Part 36 offer for £30,000.00 (with standard wording referencing standard basis costs and a Tomlin Order being signed to that effect.) The Defendant later issued a successful application for fixed costs to apply. The Claimant appealed the ruling and DDJ Harvey ruled that by virtue of the parties agreeing to reallocate the matter to the Multi Track, paying standard basis costs would have been the norm and the parties had therefore opted out of the fixed costs regime. A further appeal was made to the Court of Appeal and HHJ Wulwik determined that given there had been no application for a higher amount due to "exceptional circumstances", the fixed costs sum would stand.

Following the above judgment the question of who should pay the costs of the appeals needed to be decided. The 2 main issues being:

1. Should the Respondent pay the Appellant's costs of the hearing before the DDJ?
2. Should the Appellant be able to offset the costs due against her liability to the Respondent for costs of the claim generally?

The Respondent argued that there was no jurisdiction to sanction a set off of costs where QOCS applied but if it was found there *was* jurisdiction, it was inappropriate in this case.

CPR 44.12 allows a set off where costs are concerned however, the Respondent argued that CPR 44.12 did not apply, which the Appellant accepted, as the case fell within the scope of QOCS as set out in CPR 44.13 to 44.17.

With regard to jurisdictional issues, the Respondent argued that Section II CPR 44 represented a self-contained code providing a Claimant with protection from having to bear a Defendant's costs other than in the particular circumstances specified i.e. where the proceedings have been struck out due to misconduct, where there has been dishonesty or where CPR 44.16 (2) applies. Notwithstanding those exceptions, a Defendant can enforce a costs order, whether set off or otherwise, only up to the aggregate amount in money terms of such orders does not exceed the aggregate amount of money terms of any orders for damages and interest made in favour of the Claimant as per CPR 44.14.

However, the Respondent recognized that the Court of Appeal took a contrary view in Howe v MIB (July 2017, unreported) when it was decided that it could and should provide for costs awarded to the Claimant to be set off against orders in favour of the Defendant.

The Respondent argued that set off costs would undermine the QOCS regime and in doing so, impair justice given that it would leave the Claimant with a personal liability to his solicitor whilst depriving him of the fund from which payment is made. The Appellant rebutted that argument and suggested that that could be the case regardless of whether set off is permissible.

In the Court of Appeal's judgment, LJ Newey stated that had there been no previous authority on the issue, he would have been inclined to agree with the Respondent i.e. that where QOCS applies, the Court has no jurisdiction to order costs liabilities be set off. However, referring to *Howe v MIB*, he declared himself bound by that decision unless the comments within that case were made without due regard to the law (per incuriam).

The Respondent argued that that decision was made on that basis because the Court had overlooked an applicable principle and had failed to recognise that QOCS rules amounted to a self-contained code. LJ Newey determined that the decision in *Howe* was not determined per incuriam and proceeded on the basis that there *was* jurisdiction to order a set off of costs and followed on to consider whether he should so order. The Respondent argued no such order should be made however, the Court found in favour of the Appellant and ordered a set off.

Finally, it was ordered that provision should be made for the Respondent to pay the Appellant's costs of the application before DDJ Harvey on the basis that the Appellant's signing of the Tomlin Order, despite being mistaken in doing so, did not provide a proper basis for departing from the general rule that costs follow the event. Significance was placed upon an email sent which accepted the Part 36 offer; the wording of the order which followed was considered irrelevant i.e. fixed costs should have always been payable in any event.

LJ Newey and LJ Males have recommended that the CPR Committee give consideration as to whether costs set off should be possible in a QOCS case. LJ Males further suggested that arguments raised by both parties throughout the appeal give rise for the decision in *Howe v MIB* to be called into question.

The case is now headed for the Supreme Court for further determination. Currently, set off can be ordered against a Claimant's costs however, it is questioned whether further protection is required for Defendants who currently cannot enforce costs against damages obtained by way of settlement, only against Court ordered damages.

This briefing was prepared by Malcom Goodwin and Laura Dear. It is not intended to be an exhaustive statement of the law and should not be relied on as legal advice.

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