Neutral Citation Number: [2022] EWCA Civ 1660

Case No: CA-2022-000564

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE KING'S BENCH DIVISION
HIS HONOUR JUDGE SEPHTON KC
(SITTING AS A HIGH COURT JUDGE)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 2022

Before:

LORD JUSTICE COULSON
LORD JUSTICE STUART-SMITH
and
LORD JUSTICE SNOWDEN

- -

Between:

University Hospitals of Derby & Burton NHS Foundation Trust	**Appellant**
- and -	
Rebecca Harrison	**Respondent**
-and-	
Association of Personal Injury Lawyers	**Intervener**

- -
- -

Alexander Hutton KC & Nicholas Pilsbury (instructed by **Browne Jacobson LLP**) for the **Appellant**
Andrew Hogan (instructed by **Potter Rees Dolan**) for the **Respondent**
Roger Mallalieu KC (instructed by the **Association of Personal Injury Lawyers**) for the **Intervener**

Hearing Date: 24 November

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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LORD JUSTICE COULSON:

Introduction

1. This is another appeal about the operation of Qualified One-Way Costs Shifting ("QOCS"). The issue is a simple one. Was the Order that the judge made following the respondent's late acceptance of the appellant's Part 36 offer "an order for damages and interest made in favour of the claimant", as defined in r.44.14(1)? If it was, the appellant could set off its own costs, incurred since the offer was made, against the (otherwise agreed) amount due to the claimant. If it was not an order for damages and interest made in favour of the claimant, then the appellant was not entitled to such a set off.

2. As Vos LJ (as he then was) noted in *Wagenaar v Weekend Travel Limited (Trading as Ski Weekend)* [2015] 1 WLR 1968, the QOCS regime was an important part of the wholesale reform of the funding of personal injury litigation which was part of the Jackson Reforms. The importance of QOCS, and its success since its introduction, was reiterated by the Supreme Court in *Adelekun v Ho*, cited below. It has allowed claimants who could not otherwise afford to bring personal injury claims to do so because, subject to limited 'conduct' exceptions, they know that, if they are unsuccessful, they will not be obliged to pay the defendant's costs.

3. The only general exception to that position is CPR 44.14(1) which – in its current form - provides that:

> "(1) Subject to rules 44.15 and 44.16 [the 'conduct exceptions'], orders for costs made against a claimant 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 made in favour of the claimant."

It is that rule that contains the expression "any orders for damages and interest made in favour of the claimant" which lies at the heart of this appeal.

4. It should be noted at the outset that this rule is the subject of a proposed amendment by the Civil Procedure Rules Committee ("CPRC"). If the amendment goes ahead in the form in which it is currently proposed, it may be that the whole basis on which the issue in this appeal rests – the distinction between orders of the court, on the one hand, and settlements between the parties, on the other – will cease to matter. I address the proposed amendment briefly in paragraphs 51 - 53 below.

The Factual Background

5. I shall refer to the respondent, Ms Harrison, as the claimant, because it makes more sense when referring to the CPR. I shall refer to the Hospital Trust as the appellant.

6. In February 2019, the claimant brought a clinical negligence claim against the appellant, following the perforation of her uterus and bowel during surgery in February 2016. On 6 December 2019 the appellant made a Part 36 offer in the sum of £421,362.88. As was permitted by r.36.22(3), the appellant chose to stipulate that the amount offered included any deductible amounts, that is to say benefits which might be

paid by the Department of Work and Pensions to the claimant between the date of the offer and the date of its acceptance. The offer stipulated that "if this offer is not accepted by 27 December 2019 [the date of the expiry of the relevant period for the purposes of r.36.3(g)] and further deductible benefits have been paid, the Claimant will require the Court's permission, pursuant to r.36.11(3)(b), to accept this offer."

7. The appellant admitted liability on 14 January 2020. At a CCMC on 27 January 2020, District Judge Hassall ordered that judgment be entered for the claimant with damages to be assessed and, amongst other things, required the appellant to make a payment on account of costs of £75,000. Experts' reports were prepared and an updated schedule of loss was provided, dated 8 October 2021, in which the claimant sought damages to a maximum amount of £5.7m.

8. Shortly thereafter, the appellant applied to adduce at trial evidence collected in various ways which, so it was said, was inconsistent with the claimant's account of the effect of the negligence upon her health and way of life. Permission to adduce this evidence was granted on 22 October 2021. There was an unsuccessful mediation on 3 November 2021. On 8 November 2021, the claimant indicated that she wished to accept the appellant's Part 36 offer made in December 2019.

9. The parties were unable to agree liability for costs and that issue came before HHJ Sephton KC ("the judge") on 7 March 2022. Having heard argument, he gave the claimant permission to accept the appellant's Part 36 offer. He directed that the deductible benefits (i.e. the benefits paid by the DWP to the claimant by way of disability allowance and the like since the date of the negligence) were £48,206.17. That meant that, following the additional deduction of the interim payment of £75,000, the net sum due to the claimant was £298,156.16. As to costs, the judge ordered that the appellant was to pay the claimant's reasonable costs until 27 December 2019. He ordered that the claimant should pay the appellant's reasonable costs from 28 December 2019 but, crucially, he went on to say that "the [appellant] may not set-off or enforce this costs order against the [claimant] pursuant to rule 44.14". In this way, the judge preserved the claimant's QOCS protection.

10. The judge's order ("the Order") was made under r.36.22(9), which provides that, where deductible benefits have accrued after the making of the Part 36 offer, and the court gives the claimant permission to accept the offer, the court "may direct that the amount of the offer payable to the offeree shall be reduced by a sum equivalent to the deductible benefits paid to the claimant since the date of the offer". The Order itself was in these terms:

> "UPON hearing Counsel for the Claimant and Counsel for the Defendant
>
> AND UPON the Claimant indicating her wish to accept the Defendant's Part 36 Offer dated 6 December 2019 in the gross sum of £421,362.88 after the expiry of the Relevant Period
>
> AND UPON the Court being required to determine the liability for costs unless the parties can agree, pursuant to CPR 36.13(4)
>
> AND UPON additional deductible amounts having accrued since the date the Part 36 Offer was made, such that

(a) CPR 36.1l(3)(b) is engaged and the Claimant needs permission to accept the Part 36 Offer; and
(b) CPR 36.22(9) is engaged such that the Court needs to determine whether the amount of the offer should be reduced for additional deductible benefits paid to the Claimant since the date of the offer

AND UPON it being recorded that under the CRU Certificate dated 7 January 2022 and valid until 28 April 2022, the deductible benefits pursuant to the Social Security (Recovery of Benefits) Act 1997 paid to the Claimant are £48,206.17

AND UPON the Defendant having made interim payments on account of costs to the Claimant in the sum of £100,000 (£75,000 paid on 23 January 2020 and £25,000 paid on 16 March 2020)

AND UPON the Court noting that an Order has already been made by District Judge Hassall determining liability costs on 27th January 2020

IT IS ORDERED THAT

1. The Claimant shall have permission to accept the Defendant's Part 36 Offer dated 6 December 2019.

2. The court directs that the net sum payable to the Claimant by the Defendant after deduction of deductible benefits (£48,206.17) and interim payments (£75,000) is £298,156.16.

3. In the event that the Claimant's CRU Certificate is appealed or reviewed or for any other reason there is a refund of recoverable benefits, the refund will be payable to the Defendant and not to the Claimant.

4. The Defendant shall pay the Claimant's reasonable costs to be assessed on the standard basis if not agreed until 27 December 2019 in addition to those liability costs already ordered by the Court.

5. The Claimant shall pay the Defendant's reasonable costs to be assessed on the standard basis if not agreed from 28 December 2019 but the Defendant may not set off or enforce this costs Order against the Claimant pursuant to rule 44.14 CPR.

6. There be no Order for the costs of and occasioned by the Claimant's application dated 17th November 2021.

7. The Defendant's application for permission to appeal is refused."

11. In his *ex tempore* judgment, the judge referred to the judgment of this court in *Cartwright v Venduct Engineering limited* [2018] EWCA Civ 1654; [2018] 1WLR 6137 ("*Cartwright*"), and the Supreme Court decision in *Adelekun v Ho* [2021] UKSC 43. The core of his explanation for not permitting the appellant to set off or enforce its costs order against the claimant was at paragraphs 11, 13 and 14 as follows:

> "11. In my judgment, the issue turns on the legal nature of the acceptance of a Part 36 offer, in particular whether it amounts to "an order for damages and interest made in favour of the

> claimant". In the case of a Part 36 offer accepted within the relevant period it is quite clear, in my view, that that is not an order for damages of interest made in favour of the claimant. I respectfully agree with what Coulson LJ said at paragraph [44] in *Cartwright*: when a Part 36 offer is accepted the court makes no order whatsoever…
>
> 13. Does it make any difference that the court is required to give permission, pursuant to CPR 36.11(3)(b)? In my judgment it does not. My powers are limited to (a) giving or refusing permission to accept a Part 36 offer, and (b) if I give permission to direct that the sum payable can be reduced by a sum equivalent to the additional benefits that have accrued since the Part 36 offer ought to have been accepted. I do not have the power to order the defendant to pay the claimant anything. Once I give permission the action is stayed and is not technically concluded. I am not making an order for damages and interest in the claimant's favour. Accordingly, it seems to me that I am constrained by authority to direct that the order for costs made against the claimant should not be enforceable without the permission of the court.
>
> 14. …I regard that outcome as extremely regrettable. However, in my view, it is the inevitable consequence of the authorities that bind me. I remind myself of what Coulson LJ said and of the words of Lord Briggs in the case of *Ho*, where he said: "If the true construction of the QOCS scheme set out in Section II of CPR Part 44 has adverse policy consequences, that is a matter for the Civil Procedure Rules Committee to determine". Accordingly, I find in the claimant's favour."

The Authorities

12. As the judge had done, the parties to the appeal identified the two principal authorities as *Cartwright* and *Adelekun v Ho*. *Cartwright* was a case which raised, as a second issue, the question of whether sums due by way of a Tomlin Order were an "order for damages and interest made in favour of the claimant". This court concluded that the schedule to a Tomlin Order was not caught by the words in r.44.14(1).

13. Counsel for the appellant in *Cartwright* accepted that a Tomlin Order was not properly described as "as an order of the court for damages and interest" and so was, on a strict interpretation, outside the words of r.44.14(1) (see [38] of *Cartwright*). This was partly because there was a body of authority, including the decision of this court in *Watson v Sadiq* [2013] EWCA Civ 822, to the effect that the schedule to a Tomlin Order – the part that contains the obligation for X to pay Y - was not a part of the order of the court. Having set out those authorities in my judgment in *Cartwright*, I said this:

> "44 These authorities make it clear that a Tomlin order cannot be described as "an order for damages and interest made in favour of the claimant". It is no such thing. It is a record of a settlement reached between the parties which is designed to have binding effect. In that sense, as the parties agreed in the

> present case, it is no different to the settlement that arises when there is an acceptance of a Part 36 offer. Such acceptance does not require any order from the court, so a settlement in consequence of an acceptance of a Part 36 offer would also be outside the words of rule 44.14(1)."

14. That part of [44] dealing with Part 36 was, strictly speaking, *obiter dicta* because *Cartwright* was about a Tomlin Order; it was not about Part 36. But I was using the Part 36 situation by way of analogy, to explain one reason why I thought that the Tomlin Order was not caught by r.44.14(1). Moreover, Counsel for the appellant in *Cartwright* also accepted – quite correctly, in my view - "that a settlement resulting from a claimant's acceptance of a defendant's Part 36 offer did not result in an order for damages and interest and so was, on a literal interpretation, also outside rule 44.14(1)": see [39]. His unsuccessful argument was that this could not have been the *intention* of CPR: he had no difficulty in accepting that, on their face, that was what the words *meant*.

15. In *Adelekun v Ho,* the claimant accepted the defendant's Part 36 offer in the normal way, although the settlement was subsequently reflected in a Tomlin Order. The Supreme Court overruled the decision of this court in *Howe v Motor Insurer's Bureau* [2020] Costs LR 297 and decided that, in a case that had been settled (so that there was no "order for damages and interest in the claimant's favour" as per r.44.14(1)) the defendant was not entitled to a direction under r.44.12(1) that she could set-off her liability to pay the claimant's cost of the claim against the costs that she was entitled to be paid in respect of the assessment dispute (on which she had been successful).

16. Although *Adelekun v Ho* was therefore primarily concerned with the operation of r.44.12(1) in a QOCS case, for the purposes of this appeal, the decision is important because it approved *Cartwright* and applied it to a case where a Part 36 offer had been accepted. At [7], Lord Briggs and Lady Rose JJSC considered the situation "where the claimant succeeds, but by way of settlement rather than at trial" and said that, in such a case, "there is no court order for damages or interest." There, in the clearest of terms, was the distinction made between orders of the court, on the one hand, and settlements, on the other.

17. They went on in their judgment to elaborate on that distinction:

> "14. Because Ms Adelekun's claim included a claim for damages for personal injury it was accepted by the parties that the QOCS scheme applies. It is further agreed that since Ms Adelekun's personal injury claim concluded by way of an acceptance of a CPR Pt 36 offer, there was no "order for damages" made here within the meaning of the QOCS regime. This, as we have said, follows from the decision in *Cartwright*. Ms Adelekun contends that she is entitled to be paid the damages and interest pursuant to the settlement plus her fixed recoverable costs of the claim and that although she has been ordered to pay Ms Ho's costs of the assessment dispute, that order cannot be enforced against her, not even by treating the £16,700 fixed costs she is owed as being absorbed by the £48,600 costs she owes to Ms Ho…
>
> 31. It is not necessary or appropriate to describe or examine those policy considerations in any detail. First, as already emphasised, this court is not well placed to assess them reliably. If the true construction of the QOCS scheme set

> out in Section II of CPR Pt 44 has adverse policy consequences, that is a matter for the CPRC to put right. The purpose of QOCS is tolerably clear, to seek to rebalance an inherently tilted playing field. The question underlying this appeal is how far that levelling process was intended to go. The answer to that question will not affect that levelling process to any great degree. It is common ground that there can be no costs recovery at all against claimants who simply lose, and obtain no damages or costs order in their favour. A much larger effect on the levelling process was arrived at by the decision in *Cartwright* [2018] 1 WLR 6137 that damages and interest payable under a settlement did not count for the purposes of rule 44.14(1), since far more cases settle than go to trial. Where a claim does conclude with a court order, in many cases, the defendants' "costs orders will be less than the claimants" damages and interest, and the defendant will undoubtedly be able to deduct the costs it is owed from the damages and interest it must otherwise pay over to the claimant."

The Submissions

18. On behalf of the appellant, Mr Hutton KC and Mr Pilsbury argued that the Order made by Judge Sephton was an Order awarding damages and therefore caught by r.44.14(1). They accepted that, if the judge had simply given permission to the claimant to accept the Part 36 offer out of time, it would not have been such an order. However, they argued that, because the judge had also identified the amount to be deducted to reflect the deductible benefits paid since the offer, it was such an order. They distinguished *Cartwright* on the basis that that was concerned with a Tomlin Order (which did not arise here) and that *Adelekun v Ho* was also a Tomlin Order case and was, in any event, not a case requiring the deduction exercise which the judge had to do here. In essence, they argued that this was a court order awarding a sum of money and was therefore within r.44.14(1).

19. On behalf of the respondent, Mr Hogan submitted that the judge was right for the reasons that he gave. He went on to say that the Order was simply giving the claimant permission to accept the Part 36 offer out of time. The direction in respect of the deductible amounts, by reference to the CRU certificate and the parties' agreement, did not change the nature of the Order. He submitted that the appellant's obligation to pay arose out of the operation of Part 36 and could be enforced as such, whilst paragraph 2 of the Order (declaring the net sum payable by the appellant to the claimant after deduction of benefits) could not be enforced.

20. On behalf of the intervener, Mr Mallalieu KC also submitted that the judge was correct. In common with Mr Hogan, he submitted that, if all that mattered for the purposes of r.44.14(1) was the making of a court order (regardless of the fact that the parties had settled by agreement) then there would be a raft of absurd and unintended results relating, amongst other things, to infant settlements, periodical payments, and provisional damages. He argued that such an interpretation was contrary to the CPR, because it would have the effect of penalising those most in need of QOCS protection.

21. Having considered those submissions, I have concluded that the judge was right to reach the decision that he did. Although I have reached that conclusion for five separate reasons, by far the most important is the first: that, on my analysis, an order under r.36.22(9) is not "an order for damages and interest made in favour of the claimant" (as per r.44.14(1)). The other reasons are that, if the appellant was right, it would elevate

form over substance; that there are policy considerations which also militate against the appellant's construction of the rule as it stands; that to the extent that they are relevant, the authorities support the claimant's position, not that of the appellant; and finally because what the appellant says that r.44.14(1) means in its present form is not what the rule provides, and that problem may explain why there is a proposal to amend the words of the rule.

Reason 1: What The Court Does Under r.36.22(9)

22. In order to address this, it is necessary to set out the relevant parts of CPR Part 36. Rule 36.11 deals with the acceptance of a Part 36 offer. It provides:

> "**36.11**
> (1) A Part 36 offer is accepted by serving written notice of acceptance on the offeror.
> (2) Subject to paragraphs (3) and (4) and to rule 36.12, a Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer), unless it has already been withdrawn…
> (3) The court's permission is required to accept a Part 36 offer where—
> (a) rule 36.15(4) applies;
> (b) rule 36.22(3)(b) applies, the relevant period has expired and further deductible amounts have been paid to the claimant since the date of the offer;
> (c) an apportionment is required under rule 41.3A; or
> (d) a trial is in progress…
> (4) Where the court gives permission under paragraph (3), unless all the parties have agreed costs, the court must make an order dealing with costs, and may order that the costs consequences set out in rule 36.13 apply."

23. Rule 36.13 deals with the cost consequences of acceptance of a Part 36 offer. Rule 36.13(1) addresses acceptance within the relevant period. Where, as here, a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period, r.36.13(4) provides that "the liability for costs must be determined by the court unless the parties have agreed the costs." In those circumstances, r.36.13(5) provides:

> "(5) Where paragraph (4)(b) applies but the parties cannot agree the liability for costs, the court must, unless it considers it unjust to do so, order that—
> (a) the claimant be awarded costs up to the date on which the relevant period expired; and
> (b) the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance."

24. Enforcement is dealt with at rule 36.14:

> "**36.14**
> (1) If a Part 36 offer is accepted, the claim will be stayed.
> (2) In the case of acceptance of a Part 36 offer which relates to the whole claim, the stay will be upon the terms of the offer.
> (3) If a Part 36 offer which relates to part only of the claim is accepted, the claim will be stayed as to that part upon the terms of the offer.

> (4) If the approval of the court is required before a settlement can be binding, any stay which would otherwise arise on the acceptance of a Part 36 offer will take effect only when that approval has been given…
> (6) Unless the parties agree otherwise in writing, where a Part 36 offer that is or includes an offer to pay or accept a single sum of money is accepted, that sum must be paid to the claimant within 14 days of the date of—
> (a) acceptance; or
> (b) the order when the court makes an order under rule 41.2 (order for an award of provisional damages) or rule 41.8 (order for an award of periodical payments), unless the court orders otherwise.
> (7) If such sum is not paid within 14 days of acceptance of the offer, or such other period as has been agreed, the claimant may enter judgment for the unpaid sum…"

25. Rule 36.22 provides for the deduction of benefits and lump sum payments. Rule 36.22(9) provides:

> "(9) Where—
> (a) further deductible amounts have accrued since the Part 36 offer was made; and
> (b) the court gives permission to accept the Part 36 offer,
> the court may direct that the amount of the offer payable to the offeree shall be reduced by a sum equivalent to the deductible amounts paid to the claimant since the date of the offer."

26. As noted in paragraph 10 above, the judge gave effect to these provisions by giving the claimant permission to accept the appellant's Part 36 offer and directing the amount of the deduction. He went on to do the resulting maths, to the effect that the net sum payable, after the deduction of deductible benefits and the interim payment, was £298,156.16. The critical question then becomes whether, in undertaking this exercise, the court was making an order for damages and interest in favour of the claimant pursuant to r.44.14(1).

27. As a preliminary point, there was some debate during the hearing of the appeal as to whether the Part 36 procedure was in any way contractual. The authorities, such as *Flynn v Scougall* [2004] EWCA Civ 873; [2004] 1 WLR 3069 and *Gibbon v Manchester City Council* [2010] EWCA Civ 726; [2010] 1 WLR 2081, make it plain that Part 36 is a self-contained procedural code, a statement now enshrined in r.36.1(1). But contractual principles remain relevant when construing the terms of an offer (see *Adelekun v Ho* in the Court of Appeal at [2019] EWCA Civ 1988) or trying to establish the terms of settlement (*Rosario v Nadell Patisserie Ltd* [2010] EWHC Civ 1886 at [34]). An order under r.36.22(9) is a good example of a procedural adjustment required by Part 36 to the basic settlement evidenced by the offer and the acceptance.

28. The two questions that the judge had to decide under this procedural code were each binary. One was whether or not he should grant permission to accept the offer out of time. The other was whether or not the deductions, in the amount set out in the CRU certificate and agreed between the parties, should be deducted from the amount of the offer. They were questions to which the answer was either Yes or No. The judge was not carrying out any evaluation or assessment of what was due or to be paid. He was not, therefore, making an order for damages in favour of the claimant.

29. So what was the judge doing? In my view, he was simply directing that one part of the offer, when accepted pursuant to his permission, would be paid to the claimant, but that the balance (namely the deductible benefits) would be paid to the DWP. That was an adjustment to the settlement between the parties provided by the detailed procedure set out in Part 36.

30. That the judge was directing the amount of a deduction, rather than making an order in accordance with the r.44.14(1), can also be demonstrated by reference to the question of enforcement. If the appellant had not paid the claimant the sum due, how would the claimant have enforced it? The answer is that she would have enforced it pursuant to the procedure set out at r.36.14(7) (paragraph 24 above). That reflects the fact that the appellant's obligation to pay the amount accepted by the claimant arose from the CPR. It did not arise from the Order. In particular, paragraph 2 of the Order, which Mr Hutton argued was the critical element that brought it within r.44.14(1), could not have been independently enforced at all.

31. A more general consideration of Part 36 leads to the same conclusion. In most Part 36 cases, a claimant does not require the court's permission when deciding to accept the Part 36 offer, whether within the relevant period or thereafter. It is a settlement between the parties, based on an offer and an acceptance, which does not generally involve the court at all. Such a settlement would not ordinarily give rise to an order by the court for damages and interest made in favour of the claimant.

32. Does it make a difference that, in some situations under Part 36, a claimant requires the court's permission to accept the offer? The answer to that must be No: in those circumstances, the granting of permission by the court is simply a formal endorsement of the settlement between the parties. Mr Hutton fairly accepted that when he conceded that the court's grant of permission did not by itself lead to an order under r.44.14(1). As he put it, "the court has to go further than that" for it to become an order which might permit set-off.

33. His argument was that, in the present case, the court did go further, because it identified the amount of deductible benefits. But as I have explained, the court's direction as to the deductible amount, which had the effect of identifying that part of the offer to be paid to the DWP rather than the claimant, did not somehow transform what the court was doing, in the words of r.44.14(1), into "an order for damages and interest made in favour of the claimant". It was simply a redirection of part of the offer to the DWP, as required by the procedural code. As so many of the court orders required by Part 36 are, it was merely ancillary to the settlement which the parties had reached.

34. Because Mr Hutton's argument was based foursquare on the proposition that the deductible benefits were the "trigger" that removed the QOCS protection, he was asked what the rationale of such a reading might be. He fairly accepted that there was no link between an order which included the direction in respect of deductible benefits, and the QOCS regime, and he was unable to argue that, if his interpretation was correct, it would in some way link back to the underlying purpose of QOCS. Of course, in the absence of any such link, it became a question of happenstance that, simply because r.36.22(9) was in play, there was a potential route round the claimant's QOCS protection that would not have existed if, for example, the Part 36 offer had not included the deductible benefits so that there was no deduction to be calculated. In my view, that would be an entirely random result.

35. For these reasons, therefore, I conclude that a court making an order under r.36.22(9) is not making an order for damages and interest in favour of the claimant. Thus the Order did not mean that the claimant lost her QOCS protection, and the judge was right to reach the conclusion that he did. The remainder of my analysis is designed to show that, however the underlying issue on this appeal is approached, on the current wording of r.44.14(1), the claimant has the better of the arguments.

Reason 2: The Elevation Of Form Over Substance

36. Picking up from the point made in paragraph 33 above, it seems to me that the entire basis of Mr Hutton's argument ran the risk of elevating form over substance. Parties can settle their disputes in a myriad ways. On Mr Hutton's case, a claimant who put the entirety of his or her agreement into a schedule to a Tomlin Order would not lose their QOCS protection (see *Cartwright*). A claimant who required a simple granting of permission by the court to accept a Part 36 offer would, likewise, not lose that protection. But if, for reasons wholly unconnected with the QOCS regime, a particular form of order was required in accordance with the CPR, notwithstanding the settlement reached between the parties, the QOCS protection might be lost.

37. That would elevate the form of the order over the substance. On that basis, it would not matter what the settlement was: all that might matter is the form of court order in which that settlement was addressed. I simply cannot accept that that is a sensible or appropriate approach to the CPR.

38. Mr Mallalieu demonstrated that this was not a hypothetical concern. In *MRA v The Education Fellowship Ltd* [2022] EWHC 1069 (QB) Master McCloud noted that there was an issue as to the form of order in cases concerned with protected parties, as opposed to non-protected parties, which rendered them potentially more exposed to a QOCS deduction. There was a related argument as to whether the court should explore a means of approving an order so as to avoid that alleged difference in treatment. The defendant opposed that suggestion as a device to avoid QOCS. *MRA* demonstrates that the risk in QOCS cases of the elevation of form over substance is, sadly, all too real.

Reason 3: Policy Considerations

39. I agree, with respect, with the remarks of Lord Briggs and Lady Rose in *Adelekun v Ho* to the effect that, in this sort of dispute, policy considerations, and the adverse policy consequences of the opposing arguments on the question before the court, are not particularly helpful. That said, there is at least one clear policy point which arises out of this appeal and which seems to me to point away from the appellant's interpretation of r.44.14(1) and towards the correctness of the judge's conclusion.

40. Usefully gathered together at paragraph 103 of Mr Hogan's skeleton argument was a list of situations where Part 36 requires the court to make an order of some kind to reflect the settlement reached between the parties. Those include not only this sort of case (where a claimant is disabled, so qualifies for the ongoing receipt of disability benefits) but cases where a claimant is disabled and lacks mental capacity, so that any settlement that is reached requires the approval of the court; where the claimant is a child and lacks legal capacity; where a claimant is severely disabled and qualifies for an award of provisional damages (often high value claims); where a claimant is severely disabled and qualifies for an award of periodic payments (again these are often high

value claims); or where a claimant has qualifying family status to be a dependent of a deceased and is entitled to an apportionment of an award of dependency damages.

41. Those are all cases in which it might be said that a claimant has a particular need of the protection of QOCS but where, on the appellant's case, because an order must be made by the court, such protection would or might be lost. On this analysis, an 'ordinary' claimant would be able to keep their QOCS protection, whilst a more vulnerable claimant would lose it. That would not be rational or proportionate, and no explanation or justification to the contrary has been provided. I do not need to go as far as Mr Hogan and say that such an outcome would be "absurd"; I can confine myself to saying that, in my view, such an outcome is not what the CPR means or intended.

42. Moreover, the appellant's interpretation could have a substantive, let alone a procedural, consequence. For example, a claimant has a choice as to whether or not to claim provisional damages. It might affect the substance of his or her claim if the claimant realised that, if they claimed provisional damages, which would ultimately result in a court order regardless of any settlement, they might be at risk of losing their QOCS protection. That would be a particular concern, because such a claim would be predicated on the happening of a future event which could not itself be predicted. The same would be true of a claim for periodical payments: a claimant may be put off making such a claim at all if he or she thought they would lose their QOCS protection on settlement, whilst they would not lose that protection if they framed their claim in a different way. Again, that would not in my view be in accordance with the CPR.

43. On that basis, I agree with Mr Hogan and Mr Mallalieu that those wider policy considerations support the judge's conclusion as to the operation of r.44.14(1).

44. Of course, many of my observations under both Reasons 2 and 3 stem, in one way or another, from the distinction (drawn by the Supreme Court in *Adelekun v Ho*) between orders of the court, on the one hand, and settlements between the parties, on the other. I recognise that r.44.14(1) may soon be amended in an effort to do away with that distinction, and I also recognise that Mr Hutton might be right when he submitted that such a distinction was incapable of justification purely on policy grounds. But for the purposes of this appeal, the distinction, which is firmly grounded in the clear words of the current r.44.14(1), remains of critical importance.

Reason 4: The Authorities of *Cartwright* and *Adelekun v Ho*

45. It seems to me that the judge was right to say that the authorities supported the claimant's position. As to *Cartwright*, although I have already said that my analogy with Part 36 was *obiter*, there is undoubtedly a close similarity between a settlement under Part 36 and a Tomlin Order. As with a Tomlin Order, when a Part 36 offer is accepted, there is a settlement which is nothing to do with the court. Moreover, for the reasons that I have already given, I cannot see that that analysis is affected by the fact that, in a case like this, the court has to give a direction as to the amount of any deductible benefits.

46. As to *Adelekun v Ho*, the issue of whether set-off of opposing costs orders under r.44.12(1) was permitted under the QOCS regime only arose at all because the parties agreed - and the Supreme Court held - that the settlement meant that there was no order for damages and interest made in favour of the claimant under r.44.14(1), so that

another way had to be found for the set-off to arise. The suggested alternative was r.44.12. In other words, the specific issue that the Supreme Court decided only arose in the first place because they had held that the settlement under Part 36 was not caught by r.44.14(1).

47. The Supreme Court did not differentiate between different kinds of settlement. Although, on the facts of *Adelekun v Ho*, the acceptance of the Part 36 offer led to a Tomlin Order by consent, and so was similar to *Cartwright*, that difference of form did not matter to the Supreme Court. They appeared to treat all types of settlement interchangeably, whether that was an offer and acceptance by way of Part 36, or by way of a Tomlin Order. They did not suggest that there was any meaningful difference between the two: they worked on the basis that, if there was a settlement of any kind, r.44.14(1) did not apply.

48. Accordingly, it seems to me that the authorities – and in particular *Adelekun v Ho* – lead to the conclusion that a settlement achieved by an offer and acceptance under the Part 36 regime, whether it is recorded in a Tomlin Order or howsoever, is not "an order for damages and interest in favour of the claimant" within the meaning of r.44.14(1). That is therefore a fourth reason why I conclude that the present appeal should be dismissed.

Reason 5: What The Present Rule Does *Not* Say

49. In its essence, Mr Hutton's submission amounted to this: if there is a court order of any kind (beyond simply giving permission to accept an offer), which records a settlement between the parties howsoever reached, that is an order caught by r.44.14(1). But that is not what the rule presently says. At paragraph 50 of my judgment in *Cartwright*, I said this:

> "50. It is these practical difficulties which have confirmed my view that Mr Williams QC's liberal interpretation of r.44.14(1) is wrong. Essentially, he has to argue that the CPRC intended that the rule should cover any circumstances in which a claimant recovers something, by whatever means, from a defendant. But not only does the rule not say that, but if that is what was intended, the rule would have needed to contain much fuller guidance as to what should happen to settlements and Tomlin orders: whether they were to remain confidential; the circumstances in which the confidentiality would be removed; the way in which any global sum was to be apportioned, and so forth. In the absence of that sort of guidance, it cannot be said that this is a situation which the rules were intended to cover. So, it does not seem to me to have been an oversight or a lacuna in the CPR: if it had been the intention for r.44.14(1) to cover settlements of whatever kind, different words and greater guidance would have been required."

50. The same observations apply to Mr Hutton's submissions here. If the CPRC had intended that r.44.14(1) should cover all the ways in which a claimant may recover something after issuing proceedings, including settlements, they would have said so. Until very recently, they did not.

51. As a result of the decision in *Adelekun v Ho*, the Ministry of Justice consulted on proposed amendments which would allow set-off in respect of costs orders. It appears

that, originally, the proposed amendments were directed solely at that point. However, at the meeting of the CPRC on 7 October 2022, a fuller amendment was agreed in principle, although it has yet to be formally ratified. That read as follows:

> "(1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant 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 **or agreements to pay** damages, **costs** and interest made in favour of the claimant. (My emphasis)."

52. It would not be appropriate to say anything more about this proposed change for the purposes of this appeal, save to note two things. First, it does not expressly address Part 36. Secondly, it provides a final indication of why I consider that the appellant's interpretation is incorrect. Not only does rule 44.14(1) not presently say what it would need to say for the appellant to be right, but it would appear that the rule may be changed so as to make it at least arguable (if a settlement under Part 36 is an "agreement to pay") that a party in the claimant's position would lose her QOCS protection in the future. If the CPRC are changing the rule so as to cover "agreements to pay", then it is not unreasonable to conclude that they think that the present rule does not cover "agreements to pay".

53. For all those reasons, I would dismiss this appeal.

LORD JUSTICE STUART-SMITH

54. I agree.

LORD JUSTICE SNOWDEN

55. I also agree.