The Bar Council

Bar Council response to the "Consultation on changes to the Qualified One-Way Costs Shifting (QOCS) regime in personal injury cases"

1. This is the response of the Bar Council of England and Wales to the Civil Procedure Rules Committee's Consultation on changes to the Qualified One-Way Costs Shifting (QOCS) regime in personal injury cases.[1]

2. The Bar Council represents over 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Response to this Consultation

4. The Bar Council limits its response to this consultation to answering question 1: "*Do you have views on the Government's position on set-off, as outlined above*?" The Bar Council opposes the proposed rule change. The Bar Council's view is that the current rule strikes an appropriate balance between providing appropriate costs protection for Claimants and potential unfairness to defendants. Our reasons are set out below.

[1] https://www.gov.uk/government/organisations/civil-procedure-rules-committee/about

Overview

5. QOCS is a valuable procedural device that ensures equality of arms between impecunious claimants in personal injury claims and well-resourced defendants. The Bar Council was a stakeholder in the consultations with Sir Rupert Jackson which informed his report into the costs of civil litigation and the reforms to the Civil Procedure Rules which followed.

6. One-way costs shifting was intended to avoid the need for ATE (After the Event) insurance. It was an innovation that was supported, and advocated for, by the representatives of the insurance industry. The representatives of Claimant groups and the Bar Council recognised the potential advantages of One-way costs shifting but were concerned that there would be a residual need for ATE insurance, the costs of which would now be irrecoverable *inter partes*. The transactional nature of the underlying policy considerations is significant: claimants gained the advantages of one-way costs shifting but lost the ability to recover ATE premiums.

7. The "qualified" aspect of one-way costs shifting was always intended to balance the need to provide costs protection to claimants in cases which failed, but at the same time ensure that in appropriate circumstances the defendants could recover costs. This 'balancing' exercise also reflected wider policy considerations: (i) that QOCS should not undermine the effectiveness of Part 36; (ii) that fraudulent claimants should not benefit from a costs shield; and (iii) and that unmeritorious and unarguable claims that were struck out would not have costs protection.

8. 'Qualified' one way cost shifting also reflects another key policy consideration which was that claimant's themselves would be accountable for the adverse effects of the conduct of litigation: they would have 'skin in the game'. The claimant's entitlement to damages would be reduced to reflect adverse costs orders during and the failure to 'beat' a Part 36 offer.

9. The Civil Procedure Rules introduced in 2013 were 'interlinked'. Sir Rupert Jackson had proposed a package of reforms. The introduction of QOCS and the non-recoverability of ATE premiums was introduced at the same time as the abolition of success fee recovery, the introduction of a 10% increase in general damages, and fixed recoverable costs for most personal injury fast track cases. These reforms had a 'swings and roundabout' effect while they may cause actual or perceived injustice in some cases, they would operate satisfactorily in the vast majority of cases.

Reasons

10. The Bar Council notes the observations of APIL as interveners in the Supreme Court in *Ho v Adelekun* [2021] UKSC 43. APIL's concerns summarised at § 30 of the

judgment are that the effect of a costs against costs set-off "*was to deprive the claimant's solicitor of the means of payment for work done on credit in parts of the case in which the client had been successful and recovered costs. This would, they said, undermine the whole economic basis upon which PI litigation under QOCS could be undertaken by solicitors for deserving clients of modest or non-existent means. This would strike at the heart of what QOCS was seeking to achieve*."

11. In advancing a case for reform the consultation document says:

> *"In giving the judgment of the Supreme Court, Lord Briggs felt bound by the drafting of the CPR to decide the case in this way, but noted that the decision appeared to be 'counterintuitive and unfair'."*

The Bar Council does not consider that this sentence is a proper reflection of the opinion expressed by the Supreme Court: in fact what Lord Briggs said at § 44 was: "*We recognise that this conclusion may lead to results that at first blush look counterintuitive and unfair*." What at 'first blush' may seem unfair had to be seen in a wider context as he continued:

> *"Any apparent unfairness in an individual case such as this dispute between Ms Ho and Ms Adelekun is part and parcel of the overall QOCS scheme devised to protect claimants against liability for costs and to lift from defendants' insurers the burden of paying success fees and ATE premiums in the many cases in which a claimant succeeds in her claim without incurring any cost liability towards the defendant."*

This point is significant as the Bar Council agrees with Lord Briggs' observations: unfairness in an individual case has to be seen in the context of the overall fairness of QOCs.

12. In broad terms the amendments to the Civil Procedure Rules introduced in 2013 are designed to achieve the general policy objective of reducing the costs of claims. This can create unfairness in individual cases but the 'swings and roundabouts' approach has been applied consistently by the court and is well-established, particularly in dealing with cases involving fixed recoverable costs. In *Nizami v Butt* [2006] 1 WLR 3307: Simon J (as he then was) described the intention of fixed recoverable costs: "*was to provide an agreed scheme of recovery which was certain and easily calculated. This was done by providing fixed levels of remuneration which might over-reward in some cases and under-reward in others, but which were regarded as fair when taken as a whole."* In *Sharpe v Leeds City Council* [2017] EWCA Civ 33 the Court found that the fixed costs regime applied to application for Pre-action disclosure, Briggs LJ (as he then was) said:

> "*The starting point is that the plain object and intent of the fixed costs regime in relation to claims of this kind is that, from the moment of entry into the Portal pursuant to the EL/PL Protocol (and, for that matter, the RTA Protocol as well) recovery of the costs of pursuing or*

defending that claim at all subsequent stages is intended to be limited to the fixed rates of recoverable costs, subject only to a very small category of clearly stated exceptions. To recognise implied exceptions in relation to such claim-related activity and expenditure would be destructive of the clear purpose of the fixed costs regime, which is to pursue the elusive objective of proportionality in the conduct of the small or relatively modest types of claim to which that regime currently applies." [**31**]

At § 44 in *Ho v Adelekun* Lord Briggs appears to acknowledge that this 'swings and roundabouts' approach applies equally to policy considerations in relation to QOCS.

13. Taking these factors into account the Bar Council's view is that the current rules achieve their intended aim in the vast majority of cases and there is no justification for a change in the rules. The Bar Council shares the concerns expressed by APIL (Association of Personal Injury Lawyers) about the adverse effect such a rule change may have on the conduct of litigation.

14. The Bar Council considers that the current rule which allows set off against damages achieves the essential aim of the proposed reforms: there is no need for ATE and Claimants have 'skin in the game' as they face the consequences of their damages being significantly reduced. A set off against costs is not relevant to the policy objective of avoiding the need for ATE; on the contrary it adds a further layer of complexity which will encourage claimants and their advisers to seek alternative forms of insurance protection.

15. Litigation is not conducted with the benefit of hindsight. Claimant's representatives have to advise their clients on the basis of the evidence currently available. If they consider they have good prospects of making a successful application or successfully resisting an application made by the defendant, it is reasonable for them to do so and for a costs order to made in favour of the client if successful. Litigation is always unpredictable, and it is right that lawyers advising clients on such procedural matters have reasonable certainty that the costs awarded them will be recovered irrespective of the final outcome of the case.

16. While noting the particular comments made by APIL in the Supreme Court, the Bar Council also considers that the experience of our own members is relevant and illustrates the potential problems that may arise as a result of this rule change. In particular the Bar Council is concerned that the effect of such a change will have a chilling effect on barristers considering interlocutory applications in personal injury cases.

17. Most personal injury cases legal representatives act under Conditional Fee Agreements (CFAs) and most barristers enter into solicitor-counsel agreements, commonly the industry wide APIL-PIBA (Personal Injury Bar Association) agreement. Various terms of that agreement are concerned with interlocutory matters and the

obligations of Counsel to represent the Claimant or ensure that appropriate representation is available. Such work is ordinarily undertaken either on the basis that an interlocutory costs order will be made in the claimant's favour during the course of the claim or Counsel will be entitled to his fees at the end of the case when the claim succeeds. Either way Counsel has a reasonable expectation of being paid for work done. Essentially, this expectation falls apart is there is the potential for costs set-off. In this situation Counsel's position is exceptionally vulnerable as barristers are sole practitioners, they have a limited capacity to undertake work and so to offset 'wins' against 'losses'. They do not have the resources of even a small solicitors' firm. They always bear the risk of receiving no payment if the case ends in failure, a set off against costs would also mean that they bear the risks of losing their entitlement to fees in cases which they 'won' and were successfully represented their clients at interlocutory stages of the case.

18. The inevitable effect of this rule change is that counsel will be unwilling to take on interlocutory matters during the conduct of litigation on a CFA basis when there are such potential threats to costs recovery. It may well be that counsel will only offer to do such work on a private basis: this is inimical to the best interests of clients and leads to a significant issue about access to justice. Interlocutory applications can also be of huge importance and substantive: strike-out, summary judgment, limitation, and other preliminary issues. Given that complex and contentious interlocutory applications are likely to be conducted by counsel. This rule change is likely to have a detrimental effect on lay clients and access to justice if counsel is unwilling to act on anything other than a private basis because their entitlement to costs is at some future risk.

19. The current system that allows for set off against damages strikes the right balance. It allows legal representatives, including counsel, to advise clients about the conduct of litigation with a reasonable expectation that they will be paid for the work they do under a CFA. Set-off against damages meets the essential requirement of the CPR reforms that clients have a significant interest in the outcome of the claim: they will understand that the amount of damages they receive will be reduced if they fail to beat a Part 36 offer or face other adverse costs orders. For these reasons the Bar Council considers that the current rules should stay as they are.

Bar Council
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