

# Out of Order! QOCS, Part 36 and Setting-Off Costs on Late Acceptance

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Two important recent cases have grappled with the issue of how qualified one-way costs shifting ("QOCS") affects the situation where a defendant's offer is belatedly accepted. Can the defendant enforce a costs order against the settlement sum?

The issue arises because the core QOCS provision, CPR 44.14, as it presently stands is worded 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 damages and interest made in favour of the claimant [emphasis added].*

*University Hospitals of Derby & Burton NHS Foundation Trust v Harrison (Association of Personal Injury Lawyers intervening)* [2022] EWCA Civ 1660 is a decision of Coulson, Stuart-Smith and Snowden LJ. The full judgment may be found [here](#). It was a clinical negligence claim where the claimant sought damages of nearly £6 million but belatedly accepted a Part 36 offer of just over £420,000. The late acceptance led to the court having to make an order under CPR 36.22(9) dealing with costs and recoverable benefits. Was that order an 'order for damages' within the meaning of CPR 44.14?

Decided a few weeks before *Harrison*, *Chappell v Mrozek* [2022] EWHC 3147 (KB) (for the judgment see [here](#)) is a decision of Master Stevens in a road accident case where an offer for £250,000 was accepted nearly two years after it was made, in the face of accusations of dishonesty. The parties agreed the costs position, including a costs order against the claimant in respect of the post-expiry costs, but the defendant did not pay the settlement money. The claimant sought an order that it do so. Again the question arose of whether this situation gave rise to an 'order for damages' within the meaning of the rule.

In *Chappell*, Master Stevens noted that case law was still evolving in this area. However the clear message Master Stevens took from the Supreme Court in *Ho v Adekun* [2021] UKSC 43 was that the Court was not prepared to imply or infer words into CPR Part 44 to expand the scope for enforcement, even where the Supreme Court recognised that their conclusion might "lead to results that at first blush look counterintuitive and unfair".

In *Harrison*, the Court of Appeal demonstrated that it was not impressed with an outcome which put "form over substance" in the interpretation and application of CPR Part 44. Coulson LJ drove in five wrought-iron nails of reasoning, determining that an order dealing with ancillary matters relating to a Part 36 acceptance was not "an order for damages and interest made in favour of the Claimant" and therefore the Defendant was not able to set-off the costs order in its

favour against the settlement money.

This must surely now bring finality to the issue of the status of a matter settled by way of Part 36.

It must be noted that, following the suggestion by the Supreme Court in *Ho* that the Civil Procedure Rules Committee was better placed to remedy any ambiguities in the rules, the Ministry of Justice did indeed consult on proposed amendments which might allow set-off in respect of costs orders in settlement situations. The latest published amendment agreed in principle by the CPRC provides for the insertion of the following into CPR 44.14:

*"... 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"* [emphasis added].

Although Coulson LJ in *Harrison* at [52] appears to query whether a Part 36 acceptance would constitute an "*agreement to pay*", it is clear that the intended amendment could result in a claimant losing their QOCS protection in the future to the same extent under a settlement as they currently do when they secure an award by way of a court order.

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