

A Real Shift - Substantial Changes to CPR 44.14

By [Henrietta Hughes](#)

3PB

Background

1. The wording of CPR 44.14, Effect of Qualified One-way Costs Shifting ('QOCS'), at present is 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.*
- (2) *Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.*
- (3) *An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.*

2. Currently set off of a defendant's costs against a claimant's costs is precluded where it exceeds the monetary cap reflecting the total of any orders for damages and interest made in a claimant's favour (*Ho v Adekun* [2021] UKSC 43). Moreover, a defendant can only enforce their costs against damages and interest ordered in a claimant's favour, i.e. not against a settlement made in the claimant's favour (*Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654).

Changes

3. Now where personal injury proceedings are issued on or after 6th April 2023 (**so not retrospective**) the amended CPR 44.14 below will be applicable:

- (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 or settle a claim for, damages, costs and interest made in favour of the claimant.

(2) For the purposes of this Section, orders for costs includes orders for costs deemed to have been made (either against the claimant or in favour of the claimant) as set out in rule 44.9.

(3) Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.

(4) Where enforcement is permitted against any order for costs made in favour of the claimant, rule 44.12¹ applies.

(5) An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.

4. Consequently, both *Ho* and *Cartwright* have been reversed. The Civil Procedure (Amendment) Rules 2023 explanatory notes helpfully summarise the position:

(g) amending rule 44.14 (effect of qualified one-way costs shifting) -

- i. to allow the court in cases falling within the scope of the qualified one-way costs regime to order that the **parties' costs liabilities be set-off against each other**, *Ho v Adekun* [2021] UKSC 43 having previously found that this rule, properly construed, did not allow the court to do so; and*
- ii. to include within this rule, as well as deemed orders, agreements to pay damages or costs, so to allow the **off-setting of costs orders made in favour of a defendant and ensure that offers made under Part 36, and, for example, settlements concluded by way of a Tomlin Order, come within the rule***

¹ CPR 44.12(1) Where a party entitled to costs is also liable to pay costs, the court may assess the costs which that party is liable to pay and either -

- (a) set off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance; or*
- (b) delay the issue of a certificate for the costs to which the party is entitled until the party has paid the amount which that party is liable to pay.*

Impact

5. Defendant Pt 36 offers are going to have far more teeth.
6. There is likely to be a number of cases issued before the fast approaching 6th April. However, if claims are issued prematurely (so as to obtain the benefit of the current rules and at a time when it is not appropriate e.g. expiry of the limitation period is not close, the relevant pre-action protocol has not been followed) then issuing before this date may be met with criticism, at the very least. It is also important to note 7APD.6 with regards issue date:

*6.1 Proceedings are started when the court issues a claim form at the request of the claimant (see rule 7.2) but where the claim form as issued was received in the court office on a date earlier than the date on which it was issued by the court, **the claim is “brought” for the purposes of the Limitation Act 1980 and any other relevant statute on that earlier date.***
7. It will be interesting to see the number of ATE insurance products taken out in due course and whether the number of contested interim applications decrease. It may also lead to further satellite litigation during the period where both sets of rules are in force side by side. The impact of these QOCS reforms are undoubtedly far reaching.

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Henrietta Hughes

Barrister
3PB

020 7583 8055

henrietta.hughes@3pb.co.uk

3pb.co.uk