

## **Fixed Recoverable Costs (FRC): MoJ consultation on QOCS (May 2022) – the way forward (February 2023)**

### **Overview**

This is the Ministry of Justice (MoJ) response paper to the May 2022 consultation on changes to the Qualified One-way Costs Shifting (QOCS) regime in personal injury cases, which was held as part of the process of finalising the new Civil Procedure Rules (CPR). This paper (i) outlines the number of responses received to the consultation; (ii) summarises the responses; and (iii) sets out the way forward and the agreed drafting in light of the consultation. The consultation lasted from 9 May 2022 to 20 June 2022. The Court of Appeal judgment in *University Hospitals of Derby & Burton NHS Foundation Trust v Harrison and another* [2022] EWCA Civ 1660 became available before the new rules were agreed.

### **(i) Number of respondents**

We received 33 responses to the consultation.

Of these respondents, 20 respondents were broadly supportive of the Government's suggested changes to the QOCS regime (60.6%), subject to a further amendment to rule 44.14(1).

By contrast, 13 respondents were broadly unsupportive of the Government's suggested changes (39.4%). Of these 13 respondents, 11 engaged constructively with the proposals, to say how they could be improved.

### **(ii) Summary of responses**

In responding to the Government's proposed changes to the QOCS regime in Part 44 of the Civil Procedure Rules (CPR), respondents made the following points:

- Defendant respondents strongly agreed that the 'adverse consequences' of the decisions in both *Ho* and *Cartwright* should be reversed (and that the balance had shifted significantly in the claimant's favour).
- However, it was generally noted by defendant respondents that the rule changes proposed in the consultation do not adequately deal with the point in *Cartwright* concerning set-off and Part 36 offers. These respondents proposed a further amendment to the rules to address this point, generally involving wording re 'agreements to pay'. In particular, it was stressed:
  - To achieve the Government's aims, it is necessary to extend the rule change to not only cover deemed orders but to also cover 'agreements to pay' damages and/or costs. This will enable defendants to off-set any costs order that has been made in their favour, and ensure that offers made under Part 36, settlements concluded by way of Tomlin Order, and any other type of offer/acceptance are captured.
- Most defendant respondents agreed and supported the Government's proposal to extend costs orders to deemed orders, but thought that this should go further (see point above).

- By contrast, those opposed to the proposed rule changes argued that *Ho* and *Cartwright* have provided certainty to how QOCS operates, and that the rule changes would have adverse impacts. In particular, it was argued:
  - i. Defendants are already afforded protection against genuinely unmeritorious claims (see CPR 44.15 and CPR 44.16).
  - ii. The proposed changes to QOCS do not appropriately ensure that the claimant, as opposed to their solicitor, bears a financial risk to achieve the intended outcome of discouraging adverse behaviours in litigation. It was argued that, if solicitors bear increased financial risk, there could be an adverse impact on access to justice (if solicitors refuse to take on cases).
  - iii. Having the claimant's damages as 'the only fund' against which defendants might recover costs was the 'original function' of QOCS, and any amendments to the CPR should give effect to this original intention.
  - iv. There could be adverse impacts on the After-the-Event (ATE) insurance market. One respondent argued that the rule changes would increase financial jeopardy for claimants and, therefore, the value proposition of ATE insurance policies. It was argued this would lead to the under-settlement of personal injury (PI) claims, and adverse impacts on the poor and vulnerable.
  - v. If set-off against costs is opened up, the proposals will leave claimants unable to insure against adverse costs, but potentially liable for more in costs than they have recovered from the proceedings (i.e., they will end up paying the defendant's costs, and will then have a shortfall of costs which they will be liable to their own solicitor for).
  - vi. There is no evidence that this is a problem that needs addressing.
- Some claimant respondents said that it might be reasonable to allow set-off against costs in exceptional circumstances, or at the court's discretion (e.g., as at CPR 44.16 or CPR 44.12, involving the discretionary jurisdiction of the court or a threshold test).
- Most claimant respondents argued that it was unnecessary to make any further CPR amendments re deemed orders.
- Other issues raised included: (i) further extension of the QOCS regime beyond PI; (ii) removing detailed assessment from CPR 44.13(4); (iii) making further amendments at CPR 36.14(7) to deal with the payment of damages once a Part 36 offer has been accepted; (iv) whether to apply the proposed rule changes retrospectively; (v) further financial penalties to claimants if they do not beat a Part 36 offer.

### **(iii) The way forward**

Having carefully considered the points raised by respondents, the Government intends to implement the rule changes on QOCS as set out in the consultation document with some further amendments. Noting the objections raised by some respondents, the Government's view is that the existing QOCS rules in Part 44 do not operate in a manner consistent with the original policy intention (see paragraphs 9 to 11 of the consultation document), nor fairly, resulting in an imbalance between claimants and defendants. The current problems around QOCS and Part 36 in resolving disputes (identified at paragraphs 12 to 15 of the consultation document) can now only be addressed through changes to the CPR, which need to be taken 'to ensure that adverse behaviours in litigation are discouraged and the

claimant bears adequate financial risk' (see paragraph 17 of the consultation). As such, it is right to take these changes forward now.

Following consideration of the amendment proposed by defendant respondents, it became apparent that some further refinement was required and so, at CPR Part 44.14(1), after the words 'agreements to pay' the phrase 'or settle a claim for' has been included. The Government considers that this will help to achieve the objectives set out in the consultation paper and ensure that the scope of set-off is appropriately addressed.

Ministry of Justice

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