

Case No: A2/2018/0185

Neutral Citation Number: [2018] EWCA Civ 1654  
**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM Leicester County Court**  
**Regional Costs Judge Hale**  
**B37YP015**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 17/07/2018

**Before :**

**LADY JUSTICE ARDEN**  
**LORD JUSTICE HENDERSON**  
and  
**LORD JUSTICE COULSON**

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**Between :**

|                                    |                           |
|------------------------------------|---------------------------|
| <b>Jeffrey Cartwright</b>          | <b><u>Claimant /</u></b>  |
|                                    | <b><u>Respondent</u></b>  |
| <b>- and -</b>                     |                           |
| <b>Venduct Engineering Limited</b> | <b><u>Defendant /</u></b> |
|                                    | <b><u>Appellant</u></b>   |

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**Mr Benjamin Williams QC** (instructed by **BC Legal**) for the **Defendant/Appellant**  
**Mr Andrew Hogan** (instructed by **MRH Solicitors**) for the **Claimant/Respondent**

Hearing date: Thursday 28th June 2018

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**Judgment**

## Lord Justice Coulson :

### *Introduction*

1. This ‘leap-frog’ appeal raises two issues arising out of the rules concerned with Qualified One Way Costs Shifting (“QOWCS”). They are:
  - i) Issue 1: Whether defendant B can enforce an order for costs out of sums payable to the claimant by way of damages and interest by defendant A;
  - ii) Issue 2: If the answer to Issue 1 is Yes, whether enforcement is possible if those sums are payable to the claimant by way of a Tomlin order, rather than a direct order of the court for damages and interest.
2. Although counsel identified a third issue, to the effect that, even if the answer to both Issues 1 and 2 is Yes, defendant B would not have been entitled to enforce the order against the claimant on the facts of this case (because the sum to be paid was a global figure for damages, interest and costs), I am firmly of the view that this is not a separate dispute, but arises as part of any consideration of Issue 2.
3. *The CPR and the Authorities*
4. The QOWCS regime is set out in four short rules (r.44.13 – r.44.16) in Section II of Part 44 of the CPR. Rule 44.13 makes plain that the regime applies to, amongst others, “proceedings which include a claim for damages for personal injuries”. It is common ground that it applied in this case.
5. Rules 44.14-44.15 provide as follows:

#### **“Effect of qualified one-way costs shifting**

##### **44.14**

(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.

#### **Exceptions to qualified one-way costs shifting where permission not required**

##### **44.15**

(1) Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that –

(a) the claimant has disclosed no reasonable grounds for bringing the proceedings;

(b) the proceedings are an abuse of the court’s process; or

(c) the conduct of –

(i) the claimant; or

(ii) a person acting on the claimant’s behalf and with the claimant’s knowledge of such conduct,

is likely to obstruct the just disposal of the proceedings.”

6. Rule 44.16 goes on to address other exceptions to QOWCS. It is common ground that these do not apply here. This case is solely concerned with the proper interpretation of r.44.14.

7. The significance of the QOWCS regime was addressed by this court in *Wagenaar v Weekend Travel Limited* [2014] EWCA Civ 1105; [2015] 1 WLR 1968, in which Vos LJ said:

“26. It is worth mentioning also that, as was pointed out in argument, the introduction of the QOCS regime is part of a wholesale reform of the funding of personal injury litigation. It is just one of a raft of interconnected changes. If QOCS were to be struck down, there would need to be a complete rethink of the entire Jackson reform programme as it affects personal injury litigation. It will be noted also that the changes in respect of the recoverability of success fees under conditional fee agreements and of ATE premiums were effected by primary legislation as they needed to be: see sections 44 and 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which amended the CLSA 1990.

...

36. I should start by referring briefly to the Jackson Report, pursuant to which QOCS was introduced. I shall not repeat here the careful discussion in Chapters 9 and 19 of the Jackson Report. Suffice it to say that the rationale for QOCS that Sir Rupert Jackson expressed in those sections came through loud and clear. It was that QOCS was a way of protecting those who had suffered injuries from the risk of facing adverse costs orders obtained by insured or self-insured parties or well-funded defendants. It was, Sir Rupert thought, far preferable to the previous regime of recoverable success fees under CFAs and recoverable ATE premiums. There is nothing in the Jackson Report that supports the idea that QOCS might apply to the costs of disputes

between those liable to the injured parties as to how those personal injury damages should be funded amongst themselves.”

8. Although in some ways the QOWCS regime reflects the pre-1999 Legal Aid scheme, it represents a major departure from the traditional principle that costs follow the event and that, save in unusual circumstances, the losing party pays the winning party’s costs. The QOWCS regime provides that, subject to limited exceptions, a claimant in a personal injury claim can commence proceedings knowing that, if he or she is unsuccessful, he or she will *not* be obliged to pay the successful defendant’s costs.
9. The only general exception to that is r.44.14(1), which permits a defendant with a costs order in its favour to recover the amount of that order, but only to the extent that the claimant will recover damages and interest for that amount or more. Thus, the amount that is payable to the claimant by way of damages and interest is a cap on the amount which a defendant can seek by way of enforcement of any costs order(s) in its favour. If the claimant is unsuccessful, then the defendant will recover nothing, despite those costs orders.
10. It should be emphasised that one of the principal purposes of QOWCS is to provide some assistance to claimants with personal injury claims. It is not to penalise their prospective defendants. So I disagree with paragraph 22 of Mr Hogan’s skeleton argument, that a central feature of the regime is that defendants “would have to stand their own costs in unsuccessful claims”. That might be a common outcome of the QOWCS regime, but it is not its principal purpose or intent. If a defendant can bring itself within r.44.14(1), then it can recover its costs.

### ***The Factual Background***

11. On 19 November 2015, the claimant issued proceedings against six named defendants for noise induced hearing loss (“NIHL”). The third defendant, Venduct Engineering Limited (“Venduct”) accepted that it was responsible for any liability that was established on the part of D1 and D2. The claims against those defendants were therefore discontinued by consent.
12. The claim was transferred to Leicester County Court. It was allocated to the fast track and directions were given for the early hearing of a trial of the limitation issue. That was fixed for 18 January 2017.
13. On 12 December 2016, the claimant compromised its claim against D4 – D6. That compromise was in the form of a Tomlin order. It ordered that all further proceedings in respect of the claims against D4- D6 were stayed, except for the purposes of carrying out the agreed terms of settlement, which were set out in a separate schedule. The schedule provided that:

“The claimant do accept the sum of £20,000 in full and final settlement of his cause of action against the fourth, fifth and sixth defendant, inclusive of general damages, special damages, costs of the action, interest, and CRU.”

14. At about the same time, on 7 December 2016, the claimant served a notice of discontinuance in respect of the claim against Venduct. CPR 38.6(1) provides that, unless the court orders otherwise, “a claimant who discontinues is liable for the costs which the defendants against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant”. Accordingly, Venduct’s solicitors asserted that they had the right to recover the costs (approximately £8,000) which they had incurred as a result of the claimant’s claim. They maintained that this could be paid out of the £20,000 paid by D4 - D6 pursuant to the terms of the Tomlin order.
15. In response, the claimant said that it had the protection of the QOWCS regime, such that one defendant could not take advantage of sums payable by another defendant to the claimant. In addition, the claimant alleged that, since the sums from D4 – D6 were paid by way of a Tomlin order, which reflected a contractual agreement between the parties, there had been no “order for damages and interest made in favour of the claimant”, so Venduct could not rely on r.44.14 in any event.

### ***The Judgment***

16. These were therefore the two issues that came before Regional Costs Judge Hale in the Nottingham County Court. In an impressive reserved judgment dated 6 December 2017, the Costs Judge dealt with the Tomlin order issue first. He decided that issue against Venduct, concluding that the claimant’s entitlement to damages arose, not by reason of an order of the court for damages, but by reason of an agreement with D4 – D6. This analysis was based on the decisions of Ramsey J in *Community Care North East v Durham County Council* [2012] 1 WLR 338 and the Court of Appeal in *Watson v Sadiq* [2013] EWCA Civ 822. As the Costs Judge noted, those cases were authority for the general proposition that, whilst the Tomlin order itself is enforceable, the schedule is not an order of the court at all.
17. Although this conclusion rendered it academic, the Costs Judge then moved on to deal with the argument concerning enforcement of costs orders in multi-defendant cases. He decided that issue in favour of Venduct, saying that “the ordinary and literal meaning of the words used in CPR 44.14 leads to the conclusion that the rule intends to permit enforcement by whatever means may be available under the CPR generally, but subject to a monetary limit measured by reference to the amount of damages and interest received by reason of a court order made within the proceedings”. Accepting the submissions of Mr Williams QC, he concluded:

“Had the claimant been entitled to damages from either D3 or any of the other defendants by way of a court order then he [D3] would have been entitled to enforce his costs order in accordance with CPR 44.14(1) and would have been entitled to a declaratory remedy accordingly. However in view of my conclusion on the Tomlin Order issue D3 cannot enforce his deemed costs order in this case.”
18. Before this court, Venduct are the appellants, seeking to argue that the Costs Judge was wrong to say that they could not recover the costs on discontinuance, merely because the £20,000 was payable pursuant to a Tomlin order rather than an ordinary order of the court. However, the claimant not only seeks to uphold the judge’s conclusion on that issue, but also (by way of his respondent’s notice) asks this court to

say that the Costs Judge was wrong to find that one defendant could recover costs from sums payable by way of damages and interest to the claimant by another defendant. Accordingly, both the original issues remain in play. Moreover, with respect to the Costs Judge, I consider that, logically, the issue as to whether r.44.14 applies to multi-defendant proceedings is one of general application, and therefore falls to be decided first.

***Issue 1: Can One Defendant Take Advantage of Sums Paid to the Claimant by Another Defendant?***

*(a) Claimant's Submissions*

19. On behalf of the claimant, Mr Hogan argued that, in a multi-defendant case, the expression “the proceedings” in r.44.13 should be taken to refer to separate proceedings against each individual defendant. Thus, in this case, he argued that there were six separate sets of proceedings and a defendant in one set could not seek to enforce a costs order out of sums paid by another defendant in what, on his submission, was a separate set of proceedings. He relied on the absence of any references in CPR 44.13-44.17 to multi-defendant proceedings in support of a general submission that r.44.14 was based on single-defendant proceedings only. In addition, he said that there were various parts of the preparatory materials relating to CPR 44.13 – 44.17 which confirmed that interpretation.

*(b) Venduct's Submissions*

20. On behalf of Venduct, Mr Williams QC said that the plain words of r.44.14(1) permitted a successful defendant to enforce a costs order against a claimant, provided the claimant was entitled to an order for damages and interest, regardless of the source of the sums payable to the claimant. He said that *Wagenaar* was authority for the proposition that the term “proceedings” should be given the widest possible interpretation, and that the unusual and complex division of the case, as envisaged by Mr Hogan, into six separate sets of proceedings, would be contrary to the CPR, as well as to common sense.

*(c) Analysis*

21. It is helpful to start any analysis of these arguments by taking a simple example and seeing whether, as a matter of principle, there should be a prohibition on a successful defendant seeking to enforce a costs order out of sums payable to the claimant by an unsuccessful defendant. Then it is necessary to test this against both the words of the rule and the decisions in *Wagenaar* and *Plevin v Paragon Personal Finance Ltd and Another (No 2)* [2017] UKSC 23; [2017] 1 WLR 1249. Finally, I consider the preparatory materials.
22. For the reasons explained below, I consider that each of these ways of testing the underlying dispute between the parties about multi-defendant cases leads to the conclusion that the Costs Judge was correct when he concluded that Venduct were, in principle, entitled to enforce its costs order against the claimant, even though the source of the claimant's funds was another defendant.

23. Let us assume that the claimant issued proceedings against two defendants, A and B, which went all the way to trial. The claimant recovered £100,000 against defendant A, but the claim against defendant B failed, leading B to incur £40,000 by way of costs. In circumstances where the claimant had freely sued B (so that a *Bullock* or *Sanderson* order was inappropriate), I can see no reason in principle why B should not recover the £40,000 from the £100,000 payable by A to the claimant.
24. The QOWCS regime is designed to ensure that a claimant does not incur a net liability as a result of his or her personal injury claim: that, at worst, he or she has broken even at the end of the action. In the example I have given, the QOWCS regime will have facilitated his recovery of £100,000 against A. But there is no reason why that regime should prevent B from recovering its costs out of the damages payable by A.
25. Any other result would give a claimant *carte blanche* to commence proceedings against as many defendants as he or she likes, requiring those defendants to run up large bills by way of costs, whilst remaining safe in the knowledge that, if the claim fails against all but one defendant, he or she will incur no costs liability of any kind to the successful defendants, despite the recovery of sums by way of damages from the unsuccessful defendant. That seems to me to be wrong in principle, because it would encourage the bringing of hopeless claims.
26. The wording of the rule is consistent with that approach. There is nothing in r.44.14(1) which suggests that the claimant's fund (out of which the costs order will be met) is specific to the damages and interest payable by the defendant seeking to enforce the costs order, as opposed to the damages and interest payable by any other defendant. No such limitation can be discerned, and on the contrary, r.44.14(1) deals simply with orders for costs made against a claimant on the one hand, and orders for damages and interest made in favour of the claimant, on the other. The language is wide. It is clearly capable of embracing the situation in which defendant B has a claim for costs against the claimant which does not exceed the amount of the order for damages and interest made in favour of the claimant and payable by defendant A.
27. As I have said, Mr Hogan's principal argument did not arise out of r.44.14(1) at all. Instead, he maintained that these proceedings should not be treated as a single set of proceedings, but instead as six separate sets of proceedings, one against each defendant. He said that this was because the claims against each of the six defendants would ultimately be concluded with a separate costs order. On this basis, he said that defendant B could not enforce a costs order in the separate proceedings against defendant A.
28. In support of his submission, Mr Hogan relied on the decision of the Supreme Court in *Plevin v Paragon Finance*. That was a case concerned with different provisions of the CPR. Lord Sumption made plain at paragraphs 18 – 20 of his judgment that, for some purposes, "the trial and successive appeals do constitute distinct proceedings." He went on to say:
  - “20. The starting point is that as a matter of ordinary language one would say that the proceedings were brought in support of a claim, and were not over until the courts had disposed of that claim one way or the other at whatever level of the judicial hierarchy. The word is

synonymous with an action. In the cases cited above, relating to the awarding or assessment of costs, the ordinary meaning is displaced because a distinct order for costs must be made in respect of the trial and each subsequent appeal, and a separate assessment made of the costs specifically relating to each stage. They therefore fall to be treated for those purposes as separate proceedings. The present issue, however, turns on a different point. The question posed by section 46(3) of LASPO is whether the fact of having had an ATE policy relating to the trial before the commencement date is enough to entitle the insured to continue to use the 1999 costs regime for subsequent stages of the proceedings under top-up amendments made after that date. The fact that costs are separately awarded and assessed in relation to each stage does not assist in answering that question.”

29. It was upon that straightforward division between different temporal stages of the same proceedings that Mr Hogan sought to rely in support of his vertical division of this case into six separate sets of proceedings. I can find nothing in the judgment of Lord Sumption which hints at such a cumbersome result. In any event, I consider that Mr Hogan’s submission is contradicted by the judgment of Vos LJ in *Wagenaar*, which also dealt with the meaning of the word “proceedings”, but this time in relation to the relevant rule, namely r.44.13. He said:

“38. In my judgment, the proper meaning of the word "proceedings" in CPR Part 44.13 has to be divined primarily from the rules on QOCS themselves. The whole thrust of CPR Rules 44.13 to 44.16 is that they concern claimants who are themselves making a claim for damages for personal injuries, whether in the claim itself or in a counterclaim or by an additional claim (as defined in CPR Rule 20.2(2)). This can be seen from a number of the provisions including the following:-

i) CPR Rule 44.13 refers to an estate on behalf of which such a claim is brought. This is obviously intended to include estates bringing claims under the Fatal Accident Act 1976.

ii) CPR Rule 44.14(1) allows costs orders to be enforced to the extent that damages and interest have been awarded to the claimant. The implication is that QOCS is about claimants who may have obtained an award of personal injury damages.

iii) CPR Rule 44.14(3) provides that a partially enforced award of costs shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record. This provision seems to be aimed at relieving individuals from the adverse economic consequences of having an unsatisfied costs judgment recorded against them.

iv) CPR Rules 44.15 and 44.16 allows costs to be enforced when a claim is struck out as an abuse or for obstructive conduct, or when a claim is fundamentally dishonest or brought for the benefit of a third party. The implication is that the provision is intended to deter the bringing of false or fraudulent personal injury claims. These provisions do not seem particularly directed at disputes between commercial

parties or insured parties as to the ultimate responsibility for funding personal injury damages.

39. It is true, however, that the word "proceedings" in CPR Rule 44.13 is a wide word which could, in theory, include the entire umbrella of the litigation in which commercial parties dispute responsibility for the payment of personal injury damages. I do not think that would be an appropriate construction. Instead, I think the word "proceedings" in CPR Part 44.13 was used because the QOCS regime is intended to catch claims for damages for personal injuries, where other claims are made in addition by the same claimant. There may, for example, in the ordinary road traffic claim, be claims for damaged property in addition to the claim for personal injury damages, and the draftsman would plainly not have wished to allow such additional matters to take the claim outside the QOCS regime.

40. Thus, in my judgment, CPR Rule 44.13 is applying QOCS to a single claim against a defendant or defendants, which includes a claim for damages for personal injuries or the other claims specified in CPR Rule 44.13(1)(b) and (c), but may also have other claims brought by the same claimant within that single claim. Argument has not been addressed to the question of whether QOCS should apply to a subsidiary claim for damages not including damages for personal injuries made by such a claimant against another defendant in the same action as the personal injury claim. I would prefer to leave that question to a case in which it arises. CPR Rule 44.13 is not applying QOCS to the entire action in which any such claim for damages for personal injuries or the other claims specified in CPR Rule 44.13(1)(b) and (c) is made.”

30. Not only does Vos LJ’s analysis not support Mr Hogan’s stance, but in my view, it is contrary to it, in particular because of his clear reference to the application of QOWCS “to a single claim against a defendant or defendants”. Vos LJ thus envisaged that there may be one set of proceedings with multiple defendants. For completeness, I should add that in *Howe v Motor Insurers’ Bureau (No 2)* [2017] EWCA Civ 2523, this court again adopted a wide meaning of the word ‘proceedings’, this time in relation to r.44.15(1).
31. In what seems to have become an almost compulsory detour in disputes about the costs sections of the CPR, we were taken to various elements of the preparatory materials leading up to CPR 44.13–44.17 coming into force, including the Jackson Final Report of December 2009; the Civil Justice Council’s Note of June 2012; and the Explanatory Memorandum to the Rules which introduced QOWCS. In my view (with the exception of the point noted in paragraphs 30 and 31 below), none of these references made any difference to the analysis which I have already set out. Sir Rupert Jackson’s report proposed dealing with the funding for a claimant in a personal injury case in a way that was quite different to the QOWCS rules that were subsequently introduced; the CJC Note did not deal with this issue at all (although it envisaged multi-defendant cases); and the Explanatory Memorandum (which did not refer to multi-defendant cases) was technically incorrect when it talked about set off, an error now corrected by the Court of Appeal in *Howe v Motor Insurers’ Bureau*.

32. That said, it is instructive to note that, in paragraph 4.5 of his final report, Sir Rupert Jackson noted that the necessary elements of a QOWCS regime were:

- a) Deterrence against bringing frivolous claims or applications;
- b) Incentives for claimants to accept reasonable offers.

The following paragraphs of his report then go on to discuss those two elements in greater detail. The proposed deterrence against frivolous claims or applications was identified as the need to put the claimant at risk of adverse costs orders. The incentive for a claimant to accept a reasonable offer was again identified as the possible payment by the claimant of some of the defendant's costs. Sir Rupert said:

“...the costs in respect of in the pre-offer period plus the damages recovered by the claimant provide sufficient funds out of which the claimant can reasonably be expected to pay at least some costs.”

33. In my view, a result which requires a claimant, in the appropriate case, to pay to a successful defendant the amount of a costs order made in favour of that defendant, out of sums payable by way of damages and interest to the claimant by an unsuccessful defendant, is precisely in accordance with what Sir Rupert calls “the necessary elements of a one-way costs shifting regime”. It is important that claimants are discouraged from bringing proceedings which are unlikely to succeed. Claimants with QOWCS protection should not think that this general principle does not apply to them, or that they can issue proceedings against any number of defendants with impunity.

34. I understand of course that in NIHL claims, it is often necessary for a claimant to consider carefully which of his or her former employers may be liable and why. I understand too that, because it is a divisible injury, there may be times when a claimant may have to issue proceedings against a number of such employers, even if it is known that the claim against employer A is likely to be stronger than the claim against employer B. But none of that can override the need to ensure that defendants such as Venduct are not faced with a hopeless claim, in respect of which they have to incur costs, only for that claim to be discontinued shortly before trial.

35. On a related topic (covered in the short post-hearing written submissions), I do not accept Mr Hogan's argument that, if a claimant can be found liable to pay one defendant's costs out of sums paid by another defendant, the claimant will be encouraged to bring one action against one defendant and then, subsequently a second action against another, and so on. Such a strategy would immediately run into limitation difficulties, and may also founder on the principles derived from *Henderson v Henderson*. So in a NIHL case, it is a much better course for a claimant to consider the position carefully at the outset, and issue one set of proceedings against those former employers against whom he or she is advised that they have an arguable claim. In addition, the claimant should also make appropriate Part 36 offers to all of the defendants as soon as reasonably practicable.

36. Accordingly, for all these reasons, I consider that the Costs Judge was right to conclude that a claimant who has an order for damages and interest payable by defendant A is liable to pay out of that amount any adverse costs orders in favour of

defendant B, but only up to the limit of the order for damages and interest payable by defendant A.

***Issue 2: Does It Make A Difference If Sums Are Due By Way Of A Tomlin Order?***

*(a) The Claimant's Submissions*

37. Mr Hogan's basic case was straightforward. He said that the words in r.44.14(1) ("any orders for damages and interest made in favour of the claimant") were simply not apt to describe an agreement embodied in a Tomlin order. He relied on well-known authority to the effect that, whilst a Tomlin order itself is curial, the schedule to the order is not a court order and cannot be treated as one.
38. In addition, Mr Hogan pointed to the numerous practical problems that would arise if a Tomlin order was deemed to be included in the words of r.44.14(1). He illustrated those difficulties by reference to a case like this, where the sum to be paid to the claimant was expressed to be in full and final settlement of damages, interest, costs and other potential liabilities. How would it be possible, he asked, for the court then to embark on an exercise which sought to identify some parts of the lump sum as being referable to damages and interest, and some parts being referable to costs and other irrelevant matters? He said that there was simply no mechanism in the rules by which the court could undertake such an exercise, which he said confirmed his basic submission that the rule did not envisage that the claimant would be liable to pay out to another defendant from sums payable by way of a Tomlin order.

*(b) Venduct's Submissions*

39. Mr Williams QC fairly accepted that a Tomlin order was not properly described 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). However, he said that it would be absurd if a claimant was liable to meet a defendant's costs order if the damages and interest were the subject of a simple court order, but not so liable if they were the subject of a Tomlin order. He said that that would elevate form over function and could not be what the rules intended.
40. He additionally submitted 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 r.44.14(1). Again, he said that this cannot have been the intention of the CPR. He went on to give examples of the practical difficulties that would be encountered if this court did not override the Costs Judge on this issue.

*(c) Analysis*

41. I have not found Issue 2 entirely easy to decide. I am acutely aware that any decision which upholds the Costs Judge on Issue 2 may encourage a claimant (who would otherwise be liable to meet a successful defendant's costs order) to try to avoid that result by the use of the Tomlin order mechanism. However, I have concluded that, in respect of the rule in its current form, the Costs Judge was right. The wording of the rule cannot, on even the most liberal interpretation, be construed in the wide way urged by Mr Williams QC. What is more, for the reasons explained below, I do not

consider that this is merely a technical point, which could be cured by adding a few words to r.44.14(1). It would in truth require a wholesale recasting of the rule because, amongst other things, it would require a mechanism to allow the court to consider the terms of a confidential schedule in order to try and identify the sum payable to the claimant by way of damages and interest (which may not be expressly identified in the schedule). As Mr Hogan submitted, these complexities may explain why settlements were not a part of the simple QOWCS rules.

42. The starting point is this: a Tomlin order is not an “order for damages and interest made in favour of the claimant”. The order itself is curial; but the schedule is not a part of the order of the court. Instead it reflects the agreement reached between the parties.

43. In *Community Care North-East v Durham CC*, Ramsey J said:

“28. In relation to the terms of the agreement incorporated in the schedule to the Tomlin Order, other considerations apply. The terms of the schedule are not an order made by the court. The court obviously has the ability to interpret that agreement on well known principles of interpretation, as set out in *Sirius* and would have to do so when it was asked to take any enforcement action under the standard liberty to apply for that purpose in the Tomlin Order. Likewise the court has the ability to deal with the terms of that agreement in the same way as any other contract. That would include, for instance, a claim for rectification or a claim that the agreement was unenforceable for some reason. If the court decided that the agreement should be rectified or that it was unenforceable then the court may well take the view that they would vary or revoke the terms of the order part of the Tomlin Order, to take account of that determination. To what extent, though, would the court otherwise vary the terms of the agreement incorporated as the schedule to the Tomlin Order?”

44. This approach was approved by McCombe LJ in *Watson v Sadiq & Sadiq* at paragraph 50, where he said:

“For my part, I agree with the analysis of Ramsey J in *Community Care North East v Durham CC* [2010] EWHC 959 (QB) that the CPR have no application to the schedule to a *Tomlin* order, which indeed is not an order of the Court at all. A different principle applies to the curial part of the order. The curial part of a *Tomlin* order is a consent order. In *Weston v Dayman*, Arden LJ, with whom Brooke and Wall LJ agreed, proceeded on the basis that, whether the source of the jurisdiction for varying or revoking a consent order was in CPR3.1(7) or the liberty to apply contained in the order, there is jurisdiction to vary or revoke the order where it was just to do so but that the court has to be very careful in exercising its discretion where the consent order represented a contract between the parties (paragraph 24). “One of the aspects of justice is that a bargain freely made should be upheld.” (paragraph 24). In cases where the variation is contrary to the agreement that the parties have made, and leaving aside the possible effect of a violation of article 6 in the proceedings in which the *Tomlin*

order was made, I agree with Ramsey J that a major and often determinative factor in the exercise of the discretion will be the fact of that agreement. In the present case, Mr Watson seeks to set aside the whole of the Recorder's order but it follows from this discussion of the authorities that, putting on one side any violation of article 6, before the curial part of the order can be set aside, he must establish in the usual way that he is entitled to have the contract in the schedule to the order set aside.”

45. 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 r.44.14(1).
46. Mr Williams QC pointed out that, although the schedule to a Tomlin order is not part of the original order, if one or other party does not comply with the terms in the schedule, the court can eventually enforce those terms pursuant to the words of the Tomlin order itself. Thus, he said, even if not at the outset, the schedule to a Tomlin order may eventually be enforced by order of the court.
47. That is right as far as it goes, but it does not get around the fact that this is not what r.44.14(1) is referring to. In order to allow for this, Mr Williams QC had to rewrite the rule to refer to “a sum payable by way of damages which is compellable by court order”. That is not what the rule says. Indeed, no matter how he put his case, Mr Williams QC needed to add further words to r.44.14(1). At the very least, on his case, the rule would have to refer, not only to an order, but to an agreed settlement. In my view, the absence of the necessary words is fatal to his case on interpretation.
48. But there is more to it than the straightforward construction of the rule. It seems to me that there are insurmountable practical difficulties which also militate against a conclusion that r.44.14(1) was designed to cover Tomlin orders, or out-of-court settlements, or that the absence of the necessary words was a simple oversight or omission. Take just two practical difficulties by way of example. First, a Tomlin order is often confidential. The normal practice is that a judge does not see or approve the terms of a confidential schedule before making the order. Although in certain cases, courts have ordered the disclosure to defendant B of a Tomlin order agreed between the claimant and defendant A, this has been in particular circumstances where justice has required it. So, for example, in *L’Oreal SA & Others v eBay International AG & Others* [2008] EWHC B13 (Ch), Master Bragge ordered the disclosure of a Tomlin order, because there was a possibility that the terms of the order released other defendants from liability altogether. But in a case like this, where each defendant’s liability is several, not joint, it may well be that a successful defendant with a costs order in its favour is not entitled even to see the Tomlin order. If the QOWCS rules had intended the contrary, they would have said so.
49. Secondly, there is the issue of global settlements. Sometimes, the figure for damages in a lump sum settlement figure can be easy to determine. But on other occasions it may never have been articulated by anyone during the settlement process, because it

was the overall lump sum for everything (including costs) which was commercially attractive to the claimant. How in those circumstances could the court embark on the task of identifying the relevant figure?

50. Indeed, that point can be taken even further. It can sometimes happen that a claim will be settled by a process which does not identify any lump sum at all, such as where the defendant offers the claimant some form of benefit in kind (continued employment in a different location, for example). It would be quite impossible for that sort of benefit to be given a liquidated financial value, so impossible for r.44.14(1) to operate.
51. 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.
52. It goes without saying that whether or not the CPR should be amended so as to make changes of this kind is a matter for the Ministry of Justice and the CPRC. It is not a matter for this Court.
53. Mr Williams QC's most powerful submissions arose out of his demonstration of the potentially odd and counter-intuitive results which might follow from a conclusion that r.44.14(1) covered court orders in the claimant's favour but not settlements or Tomlin orders. I understand those points and the obvious risks when very different consequences flow from what may appear to be only marginally different types of court order. But it is not enough to show that there would be unfortunate consequences in some cases if the rules mean what they say, particularly in circumstances where, even on Venduct's case, they provide none of the express guidance that would have been required if they related to all types of court orders and settlement agreements.
54. For all these reasons, therefore, I consider that the Costs Judge was right to exclude from the QOWCS regime sums payable pursuant to a Tomlin order.

### ***Conclusions***

55. For the reasons set out above, I would uphold the Cost Judge's decision on the applicability of the QOWCS regime to multi-defendant cases, and his decision that sums payable under the Tomlin order were not covered by r.44.14(1). On that basis, if my Lady and my Lord agree, both Venduct's appeal and the principal argument in the respondent's notice will be dismissed.

**Lord Justice Henderson :**

56. I agree.

**Lady Justice Arden :**

57. I also agree.