Neutral Citation Number: [2020] EWCA Civ 517

Case No: A2/2018/2615

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
His Honour Judge Wulwik
Claim number: A06YQ205

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/04/2020

Before:

SIR GEOFFREY VOS, Chancellor of the High Court
LORD JUSTICE NEWEY
and
LORD JUSTICE MALES

- -

Between:

MRS SIU LAI HO	**Appellant (Defendant)**
- and -	
MISS SEYI ADELEKUN	**Respondent (Claimant)**

- -
- -

Mr Andrew Roy (instructed by **Taylor Rose TTKW**) for the **Appellant**
Mr Roger Mallalieu QC (instructed by **Bolt Burdon**) for the **Respondent**

Hearing date: 24 March 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 2pm on 09 April 2020.

Lord Justice Newey:

1. On 19 November of last year, we allowed an appeal by Mrs Siu Lai Ho against His Honour Judge Wulwik's reversal of a decision made by Deputy District Judge Harvey, sitting in the County Court at Central London, on 7 February 2018 (see [2019] EWCA Civ 1988, [2019] Costs LR 1963). It is common ground that, in consequence, it is appropriate for us to make a costs order in the appellant's favour. The parties differ, however, over whether the respondent, Miss Seyi Adelekun, should be ordered to pay the appellant's costs of the hearing before the Deputy District Judge and, more importantly, over whether the appellant should be able to set off the costs due to her under our order against her liability to the respondent for the costs of the claim generally.

2. As I mentioned in my previous judgment, the respondent notified the appellant's insurer of a claim arising from a road traffic accident in accordance with the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the RTA Protocol") on 15 January 2014. The appellant not having admitted liability, the claim left the RTA Protocol and the respondent issued proceedings on 7 January 2015. However, on 19 April 2017 the appellant's solicitors offered to pay the respondent £30,000 in settlement of her claim in what was described as a "Part 36 Offer Letter". On 21 April 2017, the respondent's solicitors emailed the appellant's solicitors to accept the offer and a "*Tomlin*" order was subsequently made by consent on 24 April.

3. The principal issue in the appeal to this Court was the extent of the appellant's liability for the respondent's costs of the claim. The appellant contended that the fixed costs regime for which Section IIIA of CPR Part 45 provides is applicable, but the respondent argued otherwise. We preferred the appellant's submissions, concluding that the letter of 19 April 2017, correctly construed, did not offer to pay conventional rather than fixed costs and, accordingly, that the parties had not contracted out of the fixed costs regime. Absent any application by the respondent pursuant to CPR 45.29J for a higher amount by reason of "exceptional circumstances", the respondent will thus be entitled to £16,705.15 in respect of her costs of the claim.

4. The main point that we now need to decide relates to the availability of set-off. The appellant asks us to direct that she may set off her entitlement to costs from the respondent against her liability for the respondent's costs of the claim. The respondent, on the other hand, contends that we have no jurisdiction to sanction such set-off and that, even were that wrong, it would not be appropriate to order set-off here.

5. A power to authorise costs liabilities to be set off is to be found in Section I of CPR Part 44, which has the heading "General" and comprises CPR 44.1 to 44.12. CPR 44.12 reads:

> "(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—
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> (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."

6. However, Mr Roger Mallalieu QC, who appeared for the respondent, argued that CPR 44.12 does not apply because (as the appellant accepts) the case falls within the scope of the "qualified one-way costs shifting" ("QOCS") regime for which Section II of CPR Part 44 provides. Section II consists of CPR 44.13 to 44.17. They are in these terms:

> "44.13. Qualified one-way costs shifting: scope and interpretation
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> (1) This Section applies to proceedings which include a claim for damages—
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> (a) for personal injuries;
>
> (b) under the Fatal Accidents Act 1976; or
>
> (c) which arises out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934,
>
> but does not apply to applications pursuant to section 33 of the Senior Courts Act 1981 or section 52 of the County Courts Act 1984 (applications for pre-action disclosure), or where rule 44.17 applies.
>
> (2) In this Section, *'claimant'* means a person bringing a claim to which this Section applies or an estate on behalf of which such a claim is brought, and includes a person making a counterclaim or an additional claim.
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> 44.14.— Effect of qualified one-way costs shifting
>
> (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.

44.15. Exceptions to qualified one-way costs shifting where permission not required

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.

44.16.— Exceptions to qualified one-way costs shifting where permission required

(1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.

(2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where—

(a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or

(b) a claim is made for the benefit of the claimant other than a claim to which this Section applies.

(3) Where paragraph (2)(a) applies, the court may, subject to rule 46.2, make an order for costs against a person, other than the claimant, for whose financial benefit the whole or part of the claim was made.

44.17. Transitional provision

> This Section does not apply to proceedings where the claimant has entered into a pre-commencement funding arrangement (as defined in rule 48.2)."

7. QOCS was introduced following the publication of Jackson LJ's *Review of Civil Litigation Costs: Final Report* (December 2009). In that report, Jackson LJ recommended that after-the-event insurance premiums and conditional fee agreement success fees should no longer be recoverable from an opposing party under a costs order but that "[t]hose categories of litigants who merit protection against adverse costs liability on policy grounds should be given the benefit of qualified one way costs shifting" (paragraph 7.1(ii) of chapter 9 of the *Final Report*). More specifically, Jackson LJ proposed that a regime of QOCS should apply in personal injury litigation (chapter 19). By that, he meant that the claimant in such a case should "not be required to pay the defendant's costs if the claim is unsuccessful, but the defendant will be required to pay the claimant's costs if it is successful" (paragraph 2.6 of the executive summary). He noted, however, that a claimant "must be at risk of some adverse costs, in order to deter (a) frivolous claims and (b) frivolous applications in the course of otherwise reasonable litigation" (paragraph 4.6 of chapter 19).

8. The rules in respect of QOCS were included in the Civil Procedure (Amendment) Rules 2013. The explanatory memorandum to that instrument observed that "A number of provisions are introduced and existing provisions strengthened to bring the expenses of costs management to a proportionate level and bring down the total costs of litigation", including "rules for a new system of qualified one way costs shifting (QOCS) in personal injury cases, devised as an alternative to after the event (ATE) insurance". The memorandum went on to say this:

> "The effect of QOCS is that a losing claimant will not pay any costs to the defendant, and a successful claimant against whom a costs order has been made (for example, where the claimant does not accept and then fails to beat the defendant's 'part 36 offer' to settle) will not have to pay those costs except to the extent that they can be set off against any damages received. QOCS protection will however be lost altogether if the claim is struck out or is found to be fundamentally dishonest."

9. The regime for which the new Section II of CPR Part 44 provided did not in all respects reflect Jackson LJ's recommendations. Jackson LJ had proposed that a provision along the following lines should be added to the CPR (*Final Report*, chapter 19, paragraph 4.7):

> "Costs ordered against the claimant in any claim for personal injuries or clinical negligence shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:
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> (a) the financial resources of all the parties to the proceedings, and
>
> (b) their conduct in connection with the dispute to which the proceedings relate."

As Longmore LJ noted in *Catalano v Espley-Tyas Development Group Ltd* [2017] EWCA Civ 1132, under Section II of CPR Part 44 "claimants are, contrary of Jackson LJ's original proposal, given costs protection regardless of their resources" (paragraph 6). Longmore LJ nonetheless commented in paragraph 7:

> "Overall the 2013 reforms are … favourable to defendants and their insurers, since the cost of defending unsuccessful claims should be significantly less than the amount of ATE insurance premiums and success fees formerly recovered by successful claimants."

10. The thrust of Mr Mallalieu's submissions on jurisdiction was to the effect that Section II of CPR Part 44 represents a self-contained code providing a claimant with protection from having to bear a defendant's costs other than in the particular circumstances specified in Section II. A defendant may recover costs from the claimant where the proceedings have been struck out on the grounds set out in CPR 44.15 or, with the permission of the Court, where the claim is found to be fundamentally dishonest or CPR 44.16(2) applies. Those exceptions apart, a defendant can enforce a costs order, whether by set-off or otherwise, only up to "the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant" in accordance with CPR 44.14. CPR 44.14, which McCombe LJ described as "enshrin[ing] the core principle of the QOCS regime" in *Brown v Commissioner of Police of the Metropolis* [2019] EWCA Civ 1724, [2019] Costs LR 1633 (at paragraph 14), means that orders for costs against a claimant can be the subject of set-off or other enforcement "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" unless CPR 44.15 or CPR 44.16 is applicable. Costs liabilities cannot be set off against each other, Mr Mallalieu argued.

11. As, however, Mr Mallalieu recognised, this Court took a contrary view in *Howe v Motor Insurers' Bureau* (6 July 2017, unreported in this respect). In that case, the Court considered that it could and should provide for costs awarded to the claimant to be set off against costs orders in favour of the defendant. In an unreserved judgment, Lewison LJ, with whom Sir James Munby P and McFarlane LJ agreed, said this:

> "2. The court's power to award costs arises under s.51 of the Senior Courts Act. Subject to rules of court the court has a wide discretion. The power to allow one set of costs to be set off against another is a discretionary power recognised by CPR Part 44, r.12. The circumstances in which set-off of costs may be ordered owes nothing to the detailed rules about legal or equitable set-off as substantive defences, although those rules may give some guidance about how the discretion should be exercised. That is *Burkett, R (on the application of) v London Borough of Hammersmith & Fulham* [2004] EWCA Civ 1342, [2005] 1 CLR 184. *Burkett* also decides that there is no objection to ordering costs awarded to a non-legally aided party from being set off against costs awarded to a legally aided party and emphasises that a set-off does not require the person

against whom the set-off is ordered to pay anything. CPR 44.14(1) provides:

> '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.'

3. [Counsel for the claimant] argues that this rule precludes set-off of costs. He submits that a set-off is enforcement and that set-off is only permitted against orders for damages and costs. I do not agree. First, under the general law, set-off is not a species of enforcement and I do not consider that the decision of Andrew Smith J in *Vava & Ors v Anglo American South Africa Ltd.* [2013] EWHC 2326 QB compels a conclusion to the contrary. The judge in that case was construing a contract rather than a rule and the reference in 44.14 is enforcing against the defendant and specifically limits that by reference to damages and interest. 'Enforcement' there means enforcement in accordance with all the rules of the court, which would include the various powers that the court had as to compel compliance with its orders. Secondly, Part 44.14 enables enforcement without the permission of the court, whereas 44.12 requires the permission of the court or at least a court order in order for one set of costs to be set off against another.

4. I consider, therefore, that the court does have jurisdiction under CPR Part 44.12 to order a set-off of costs.

5. [Counsel for the claimant] also submits that as a matter of discretion the court should not permit set-off. In the old days of Legal Aid, the claimant would not have had any liability to pay his lawyers. The Legal Aid fund would have borne the costs. If, therefore, a set-off of costs had been ordered against a legally aided claimant he would not have been out of pocket at all because he would not have been liable to pay his lawyers. That may well be true as a matter of reality, although one must not forget that under s.11 of the Access to Justice Act 1999 costs could be awarded against a legally aided litigant, so long as they did not exceed what it was reasonable for him to pay. As pointed out in the substantive judgment, Sir Rupert Jackson envisaged that costs protection similar to Legal Aid's cost protection should be given to claimants with QOCS. The law in force at the time permitted set-off of costs against legally aided litigants and Sir Rupert made no recommendation to change that. Moreover, Sir Rupert also envisaged that claimants would pay their own disbursements, so that, at least to some extent, unsuccessful claimants might end up out of pocket. To allow set-off of costs would not, in my judgment, go against the

> thrust of his recommendations, and I do not consider that there is anything in the detailed rules setting up the QOCS regime which disapplies the court's power to order set-off.
>
> 6. In my judgment, it would be just for the costs awarded to [the claimant] to be set-off against costs orders in favour of [the defendant]."

12. As I understand it, therefore, Lewison LJ rejected the submission that CPR 44.14 precludes set-off of costs on the basis that, first, set-off is not a species of enforcement and, secondly, CPR 44.14 enables enforcement without the permission of the Court whereas CPR 44.12 requires such permission.

13. Mr Mallalieu disputed both limbs. He further submitted that set-off of costs would undermine the QOCS regime and so impair access to justice. In that connection, he submitted that QOCS was intended to protect claimants bringing personal injury claims in good faith from facing personal liabilities as a result of costs orders in favour of defendants. Such a claimant will typically have entered into a conditional fee agreement ("CFA") with his solicitor and so will owe the solicitor nothing if the proceedings fail. Where, on the other hand, the defendant is ordered or agrees to pay damages, a claimant with a standard CFA is likely to be personally liable for his solicitor's fees irrespective of the extent of the recoveries from the defendant. Allowing the defendant to set off his costs liability against costs due to him from the claimant would, Mr Mallalieu said, leave the claimant with personal liability to his solicitor while depriving him of the fund from which payment is invariably made in personal injury cases.

14. As, however, was pointed out by Mr Andrew Roy, who appeared for the appellant, a claimant could potentially find himself owing more to his solicitor than he had recovered from the defendant regardless of whether set-off of costs is permissible. Suppose, for example, that a defendant to a personal injury claim makes a very early Part 36 offer of £50,000 and that the claimant having none the less proceeded to trial is awarded only £40,000. Were the defendant's post-offer costs to be in excess of £40,000 and the claimant's own costs similar, there would be no question of the claimant being able to meet his liability to his solicitor from recoveries from the defendant irrespective of any order for costs set-off. While, therefore, QOCS is plainly intended to prevent a claimant from having to make a net payment to the defendant where CPR 44.15 and 44.16 do not apply, it can never have been expected to remove any risk of a claimant owing more to his solicitor than he had received from the defendant.

15. However, there seems to me to be more force in other arguments advanced by Mr Mallalieu. In the first place, I find it hard to see how costs set-off can be justified on the basis that CPR 44.14 deals with set-off without the permission of the Court while CPR 44.12 authorises set-off with such permission. As I see it, CPR 44.14 is designed to bar *any* enforcement of costs orders against claimants in excess of damages and interest unless CPR 44.15 or CPR 44.16 applies, not merely to bar enforcement without the permission of the Court. Were the position otherwise, the protection afforded to claimants by QOCS would be severely curtailed. There would be no evident restriction on the circumstances in which costs orders against claimants could be enforced against them with the Court's permission.

16. Secondly, there are, as it seems to me, compelling reasons for interpreting "enforced" as extending to set-off in the context of CPR 44.14. Mr Mallalieu acknowledged that set-off is not as a general rule regarded as a species of "enforcement". It is plain, moreover, that CPR 44.14 encompasses conventional methods of enforcement such as are described in Practice Direction 70 - Enforcement of Judgments and Orders. Supposing, therefore, that a defendant wished to recover costs from a claimant who had already received sums he had been awarded by way of damages and interest, CPR 44.14 would allow him to use the ordinary mechanisms of enforcement to the extent of the award. On the other hand, those responsible for the QOCS regime will surely also have intended it to be possible for a claimant's costs liability to a defendant to be set against the defendant's liability for damages and interest so that the claimant simply receives a net sum. In fact, it would appear far preferable to adopt such an approach where possible. Yet it is hard to see where authorisation for such a course is to be found unless it is in CPR 44.14. CPR 44.12 could not be in point as it is concerned with the setting-off of mutual costs obligations, not with setting off a costs entitlement against a liability for damages and interest.

17. Some further support for the respondent's case is to be found in the following:

    i) The QOCS rules in Section II of CPR 44 do not cross-refer to CPR 44.12. CPR 44.14(1) is expressly stated to be subject to CPR 44.14 and 44.16. Nothing is said about CPR 44.12;

    ii) The explanatory note to the Civil Procedure (Amendment) Rules 2013 said that "a successful claimant against who a costs order has been made … will not have to pay those costs except to the extent that they can be set off *against any damages received*" (emphasis added). It was not suggested that costs set-off would be possible; and

    iii) While set-off of costs may have been common in legally-aided cases (see *Lockley v National Blood Transfusion Service* [1992] 1 WLR 492 and *R (Burkett) v London Borough of Hammersmith and Fulham* [2004] EWCA Civ 1342, [2005] 1 Costs LR 104), the QOCS regime does not mirror that relating to legal aid. Jackson LJ proposed the adoption of the formula contained in section 11(1) of the Access to Justice Act 1999 (*Final Report*, paragraph 4.6), but that recommendation was not implemented. As Vos LJ observed in *Wagenaar v Weekend Travel Ltd* [2014] EWCA Civ 1105, [2015] 1 WLR 1968 at paragraph 44, legal aid had "a quite different statutory regime".

18. In all the circumstances, were there no authority on the issue, I would be inclined to accept Mr Mallalieu's submission that, where QOCS applies, the Court has no jurisdiction to order costs liabilities to be set off against each other. I would find convincing Mr Mallalieu's contention that Section II of CPR Part 44 represents a self-contained code and that, accordingly, a defendant can recover costs he has been awarded only by set-off against damages and interest under CPR 44.14 or, where appropriate, by invoking CPR 44.15 or CPR 44.16. That conclusion would accord with that of His Honour Judge Dight in *Darini v Markerstudy Group* (County Court at Central London, 24 April 2017). In paragraphs 23 and 24 of his judgment, Judge Dight expressed the view that "where a costs order is made against the claimant, it can be set off against damages and interest only", a set-off of costs against costs being "a

means of giving effect to an order in favour of the defendant and therefore … enforcement within the meaning of [Section II of CPR Part 44]".

19. However, this Court decided otherwise in *Howe v Motor Insurers' Bureau*. The judgments in that case were unreserved. Further, it seems unlikely that the Court had the benefit of anything like as much argument as we did and, unsurprisingly, it would not appear to have known of the judgment which Judge Dight had given less than three months earlier in *Darini v Markerstudy Group*. Even so, as Mr Mallalieu accepted, we are bound by the decision in *Howe* unless it was given per incuriam.

20. In that connection, we were taken to the decision of the Court of Appeal in *Young v Bristol Aeroplane Co Ltd* [1944] 1 KB 718. In that case, Lord Greene MR, giving the judgment of the Court, concluded at 729-730 that the Court was bound to follow previous decisions of its own subject only to these exceptions:

> "(1.) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2.) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3.) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam."

21. Earlier in his judgment, Lord Greene had referred to a case in which the Court of Appeal had declined to follow a previous decision which had been made in ignorance of a provision in the Rules of the Supreme Court, which, as Lord Greene noted at 729, had "statutory force". Lord Greene continued at 729:

> "Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam. We do not think that it would be right to say that there may not be other cases of decisions given per incuriam in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts. Two classes of decisions per incuriam fall outside the scope of our inquiry, namely, those where the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covers the case before it - in such a case a subsequent court must decide which of the two decisions it ought to follow; and those where it has acted in ignorance of a decision of the House of Lords which covers the

> point - in such a case a subsequent court is bound by the decision of the House of Lords."

22. In *Morelle Ltd v Wakeling* [1955] 2 QB 379, the Court of Appeal returned to the question of when it was free to depart from a previous decision of the Court. Evershed MR, giving the judgment of the Court, said at 406:

> "As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene M.R., of the rarest occurrence. In the present case it is not shown that any statutory provision or binding authority was overlooked, and while not excluding the possibility that in rare and exceptional cases a decision may properly be held to have been per incuriam on other grounds, we cannot regard this as such a case. As we have already said, it is, in our judgment, impossible to fasten upon any part of the decision under consideration or upon any step in the reasoning upon which the judgments were based and to say of it: 'Here was a manifest slip or error.' In our judgment, acceptance of the Attorney-General's argument would necessarily involve the proposition that it is open to this court to disregard an earlier decision of its own or of a court of co-ordinate jurisdiction (at least in any case of significance or complexity) whenever it is made to appear that the court had not upon the earlier occasion had the benefit of the best argument that the researches and industry of counsel could provide. Such a proposition would, as it seems to us, open the way to numerous and costly attempts to re-open questions now held to be authoritatively decided."

23. In the present case, Mr Mallalieu sought to persuade us that *Howe v Motor Insurers' Bureau* was decided per incuriam because the Court had overlooked an applicable principle. More specifically, he argued that the Court had failed to recognise that the QOCS rules amount to a self-contained code which should be construed according to its purpose. In contrast, Mr Roy contended that *Howe* is binding on us.

24. In my view, Mr Roy is right. There is no reason to suppose that the Court decided *Howe* in ignorance of any relevant statute, CPR provision or previous decision of its own, of a Court of co-ordinate jurisdiction, or of the House of Lords or Supreme Court. The Court did not apparently know of *Darini v Markerstudy Group*, but that of course was not a decision of the Court of Appeal, a Court of co-ordinate jurisdiction, the House of Lords or Supreme Court. In *Morelle Ltd v Wakeling*, Evershed MR recognised the possibility of a case being considered to have been decided per

incuriam even though it had not been made "in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned". Echoing Lord Greene MR in *Young v Bristol Aeroplane Co Ltd*, however, Evershed MR also observed that such cases must be "of the rarest occurrence" and "rare and exceptional". I do not think *Howe* is of that kind. Mr Mallalieu has persuaded me that, with the benefit of fuller argument perhaps, the Court might have arrived at a different conclusion in *Howe*, but I can see nothing in the circumstances that could justify us in regarding the case as "rare and exceptional". The doctrine of precedent, as applied to previous decisions of this Court, would have little substance if we were entitled to treat *Howe* as having been decided per incuriam when Mr Mallalieu could not point to any provision or binding authority that was overlooked but, in essence, merely argued that the case would have been better decided differently. *Howe* cannot even be said to have involved a manifest slip or error.

25. In short, I consider that we are bound by *Howe* and must, accordingly, proceed on the basis that there is jurisdiction to order the set-off of the parties' respective costs entitlements. Should we, then, so order?

26. Mr Mallalieu submitted that no such order ought to be made. To direct a set-off would, he said, be inconsistent with the principles underlying QOCS. Having conducted the litigation reasonably, the respondent should be allowed to receive the costs due to her. In contrast, Mr Roy argued there is no principled reason not to direct set-off and that, on the contrary, the just course is to do so. It would, he said, be wrong to allow the respondent to recover all of her costs and the appellant to recover none of hers. Even with the benefit of set-off, he pointed out, the appellant would suffer a significant costs shortfall.

27. To my mind, it is appropriate for us to direct set-off. At this stage of the argument, the premise has to be that costs set-off is compatible with QOCS. Submissions to the effect that such set-off is inconsistent with the principles underlying QOCS cannot therefore avail Mr Mallalieu, as it seems to me. To the extent that such contentions have force, they tend to suggest that set-off should not be possible at all, not that the Court should decline to exercise its discretion to direct set-off in this particular case. Once it has been determined that set-off can be ordered in principle, the arguments lose their potency. Since (a) it is to be assumed that those responsible for the QOCS regime intended the Court to be able to order costs set-off regardless of whether the claim was unfounded or the claimant has misconducted himself in some way, (b) there is no evidence of anything specific to the respondent's circumstances which could render costs set-off unjust and (c) the appellant has herself incurred substantial costs in vindicating her rights and will be left with a large shortfall even with the benefit of costs set-off, we should, I think, exercise our discretion to order set-off.

28. There remains to be considered the question whether the respondent should be ordered to pay the appellant's costs of the hearing before Deputy District Judge Harvey on 7 February 2018. While agreeing with the appellant that the fixed costs regime applied, the Deputy District Judge decided to make no order as to costs. He thought it right to depart from the general rule that the unsuccessful party will be ordered to pay the costs of the successful party on the footing that the appellant had been the author of her own misfortune. The application had arisen, he said, because of the "ambiguity or irregularity in the wording of a consent order which was signed by the [appellant] [viz. the *Tomlin* order of 24 April 2017]". He took the view that the

appellant "ought not to have agreed" to the paragraph in that order providing for her to pay "the reasonable costs of the [respondent] on the standard basis to be the subject of detailed assessment if not agreed".

29. Mr Roy submitted that the appellant's supposed fault in signing the *Tomlin* order did not provide a proper basis for depriving her of her costs. If, he argued, there was an error in the order, it was a bilateral one and in fact one for which the respondent bore primary responsibility as it was she who drafted the order. In any case, the terms of the order were irrelevant. The parties, he pointed out, have always agreed that the claim concluded when the respondent accepted the offer contained in the appellant's solicitors' letter of 19 April 2017. Mr Roy further referred us to *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790, [2011] 6 Costs LR 961, where Jackson LJ noted in paragraph 62 "a growing and unwelcome tendency … to depart from the starting point set out in rule 44.3(2)(a) too far and too often".

30. For his part, Mr Mallalieu contended that the Deputy District Judge was entitled to decide as he did. In that connection, it is to be remembered that this Court is relatively slow to interfere with costs orders. Sir Murray Stuart-Smith said this about costs appeals in *Adamson v Halifax plc* [2002] EWCA Civ 1134, [2003] 1 WLR 60 (at paragraph 16):

> "Costs are in the discretion of the trial judge and this court will only interfere with the exercise of that discretion on well-defined principles. As I said in *Roache v News Group Newspapers Ltd* [1998] EMLR, 161, 172:
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> > 'Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale.'
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> That statement was approved in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507, 1523, per Lord Woolf MR. Although that decision was before the CPR came into force, it is clear that the court applied the same principle in relation to interfering with the trial judge's discretion."

31. In the present case, the Deputy District Judge stated in terms that "the starting point" was "the general rule … that costs follow the event". I do not think, therefore, that he can be said to have erred in principle in his approach. On the other hand, it seems to me that the Deputy District Judge was mistaken in attaching the significance he did to the appellant's signing of the *Tomlin* order. I noted in paragraph 23 of my previous judgment in this case that both parties had focused their submissions on the offer made in the letter of 19 April 2017, that neither had sought to argue that the respondent's solicitors' response to the letter represented a counter-offer or that the *Tomlin* order was important and that "Each side essentially approached the case on the footing that the respondent had accepted the 19 April offer and, hence, that that

was key." In the circumstances, I agree with Mr Roy that the appellant's signing of the *Tomlin* order did not provide a proper basis for departing from the general rule. The Deputy District Judge should have made a costs order in favour of the appellant.

32. The upshot is that in my view:

    i) This Court is bound by *Howe v Motor Insurers' Bureau* and so must proceed on the basis that it has jurisdiction to direct costs set-off;

    ii) Approaching matters on that footing, it is appropriate to allow the appellant to set off the costs due to her under our order against her liability to the respondent for the costs of the claim generally;

    iii) Our order should include provision for the respondent to pay the appellant's costs of the application before Deputy District Judge Harvey.

33. I would add finally that the Civil Procedure Rules Committee may wish to consider whether costs set-off should be possible in a QOCS case.

Lord Justice Males:

34. I agree with the judgment of Newey LJ. I add some observations, mainly on the issue of principle whether there is jurisdiction in a QOCS case to allow costs ordered in favour of a defendant to be set off against costs ordered in favour of a successful claimant, as this appears to be a point of some general importance.

35. In my judgment we are bound by the decision of this court in *Howe v Motor Insurers Bureau (No. 2)* to hold that there is such jurisdiction under CPR 44.12. In that case Lewison LJ gave two reasons for holding that such a set-off was not precluded by CPR 44.14.

36. The first reason was that "enforced" in CPR 44.14(1) refers to the court's various powers to compel compliance with its orders but does not include set-off. His second reason was that CPR 44.14 enables enforcement without the permission of the court, whereas CPR 44.12 requires permission, or at least a court order, for one set of costs to be set off against another.

37. Whether or not that decision was correct, I see no basis on which it can be described as *per incuriam* in accordance with the principles established in *Young v Bristol Aeroplane Co Ltd* [1944] 1 KB 719 and *Morelle Ltd v Wakeling* [1955] 2 QB 379. Examples given in the former case of decisions given *per incuriam* were decisions made in ignorance of the terms of a statute or a rule having the force of the statute or of an earlier binding decision. Although these were examples and not an exhaustive list, the court indicated that other instances of decisions given *per incuriam* "would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts".

38. Mr Roger Mallalieu QC for the claimant submitted that the decision in *Howe v Motor Insurers Bureau (No. 2)* was *per incuriam* because the court failed to identify the statutory purpose of the QOCS rules set out in the Explanatory Memorandum to SI 2013 No. 262. This was laid before Parliament by the Ministry of Justice as part of the negative resolution procedure in implementing the Statutory Instrument which

brought into force amendments to the CPR including the QOCS rules. Even if the court did act in ignorance of the Explanatory Memorandum, however, which is not apparent as we do not know what was cited, that would in my judgment be an unjustified extension of the concept of *per incuriam*.

39. That said, I see considerable force in Mr Mallalieu's submission that, in the specific context of CPR 44.14, the term "enforced" should be understood as extending to the exercise of a right of set-off, with the consequence that set-off of costs orders against each other is precluded. The rule deals with the situation where a claimant has succeeded in her claim and has obtained, by judgment or agreement, an order for damages (and perhaps also interest), but the defendant has also obtained an order for costs in its favour during the course of the proceedings. In that situation what will typically happen is that the defendant will deduct from the damages payable the amount of costs awarded to it and will pay the net balance to the claimant. That in my view is what the rule contemplates and is likely to be what the rule-maker had in mind as constituting enforcement of the order for costs in the defendant's favour. The alternative situation where the defendant pays the damages in full and then seeks to enforce an order for costs in its favour is likely to be an exceptional case and is unlikely to be what the rule-maker contemplated.

40. There is no difficulty in reading CPR 44.14(1) as authorising the set-off of costs payable to the defendant against damages payable to the claimant but, if that is so, it can only be because such a set-off is included within the concept of enforcement within the meaning of the rule. Conversely, if the rule does not authorise such a set-off, it is relevant to ask pursuant to what provision the set-off of costs against damages which typically occurs is permitted. The answer cannot be CPR 44.12, as that applies only where a party entitled to costs is also liable to pay costs to the other party. It would therefore be necessary to invoke principles of legal or equitable set-off under the general law. But that seems most unlikely to be what the rule-maker intended, not least as the QOCS rules are intended to form a self-contained code within the sphere of their application.

41. The view that "enforced" in CPR 44.14(1) includes the exercise of a right of set-off receives some support from the terms of the Explanatory Memorandum, as Newey LJ has explained. In my judgment it is legitimate to take this into account in interpreting the QOCS rules. I note that in *Brown v Commissioner of the Metropolitan Police* [2019] EWCA Civ 1724, [2019] Costs LR 1633, Coulson LJ at [30] expressed a contrary view, because the Explanatory Memorandum was not a document seen or approved by the Civil Procedure Rules Committee. However, I find persuasive the submission of Mr Mallalieu that, in the case of a Statutory Instrument, the Explanatory Memorandum is the document by which the proposer of the legislation explains to Parliament the purpose and effect of the proposed amendments, on which Parliament can be taken to have placed weight in deciding to approve (or not to reject) them. The fact that the amendments were first drafted by the Rules Committee does not diminish the fact that in order to become law they had to become part of a Statutory Instrument, proposed by the Ministry of Justice, whose purpose and effect would be explained to Parliament by the Explanatory Memorandum.

42. Finally on this issue, it should be noted that in the situation dealt with by CPR 44.14(1), the claimant will typically have obtained, in addition to damages, an order for costs in her favour, whether fixed costs (as in this case) or "conventional" costs.

The fact that the rule expressly permits enforcement of a costs order in the defendant's favour against damages awarded to the claimant, but says nothing about setting off the costs orders against each other, is therefore striking. Equally striking is the fact that CPR 44.14(1) is expressly made subject to CPR 44.15 and CPR 44.16, but not to CPR 44.12 which deals with set-off of costs.

43. All this adds up to a powerful case, in my judgment, for calling into question the decision in *Howe v Motor Insurers Bureau (No. 2*), albeit that it is binding upon this court.

44. On the basis that *Howe v Motor Insurers Bureau (No. 2*) was correctly decided, the question then arises whether an order for set-off should be made as a matter of discretion. I agree with the reasons given by Newey LJ for saying that, on this basis, such an order should be made.

45. I add one further point, which is that the QOCS rules are not intended to affect the liability of a claimant to pay her own solicitors. In *Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654, [2018] 1 WLR 6137 Coulson LJ described the purpose and effect of the QOCS regime in these terms:

> "7. 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.
>
> 8. 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.
>
> 9. 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."

46. He added at [23]:

> "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."

47. The "net liability" which the regime seeks to avoid (in cases where CPR 44.15 and CPR 44.16 do not apply) is a net liability to the defendant. The regime says nothing about the liability of the claimant to her own solicitor, which will typically be governed by the terms of a CFA.

48. In the present case there is no question of the claimant being required to make a payment to the defendant. If an order for set-off is made, the consequence will be that the costs awarded to the claimant will be substantially reduced and perhaps even extinguished by the costs payable to the defendant as a result of the claimant's unsuccessful challenge to the applicability of the fixed costs regime. That will leave the claimant with a potential liability in costs to her own solicitors, which (bearing in mind that the challenge to the fixed costs regime was in large part for their benefit rather than the claimant's) the solicitors may or may not choose (or be entitled) to enforce. But the claimant will in no circumstances have any net liability to the defendant and, in that respect, the order made will not be contrary to the QOCS regime. Moreover, as Newey LJ has explained at [14] above, it is perfectly possible under the QOCS regime for a successful claimant to be left with a liability to her solicitors.

49. I agree that the question whether costs set-off should be possible in a QOCS case could usefully be considered by the Rules Committee. Regardless of whether *Howe v Motor Insurers Bureau (No. 2*) was correctly decided, there are powerful arguments on each side of the issue as to what the law should be.

50. On the issue of liability for the costs at first instance I have nothing to add.

Sir Geoffrey Vos C:

51. I agree with both judgments.