No QOCS shield for claimant's in pre-issue applications: definition of "proceedings" for CPR r.44.13

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Patrick West looks at the latest case arising from the failure of the Rules Committee to provide a conclusive definition of the word "proceedings" in QOCS cases and a decision which may expose personal injury claimants to costs orders in pre-action applications.

MATTHEW WATERFIELD & 25 ORS v (1) DENTALITY LTD (T/A DENTALITY @HODDESTON) (2) VISHAL SHAH (3) E PARIKH (4) ISHDENT LTD (2020) CC (Oxford) (Judge Melissa Clarke) 13/11/2020

In this latest skirmish over the definition of the word "proceedings" for the purposes of CPR r.44.13 a circuit judge has sided with a defendant's argument that there is no QOCS shield for claimants making pre-action applications.

The decision revolved around the ongoing dispute about how to define the term sparked by the case of *Wagenaar v Weekend Travel Ltd (t/a Ski Weekend)* [2014] EWCA Civ 1105.

In *Wagenaar*, following the dismissal of a claim by the claimant (C) for damages for personal injury, the defendant (D) and the third party (TP) each appealed against costs orders made by the judge.

The claimant in that case had been injured while skiing on a winter sports package holiday arranged by the defendant. The holiday operator joined the ski instructor as a third party. The judge dismissed the claimant's claim against D, and the defendant's claim against the additional party instructor. He ordered that the claimant should pay the defendant's costs, and that the defendant should pay the third party's costs. He applied the rules on qualified one-way costs shifting (QOCS)

introduced by the Jackson reforms, directing that, pursuant to CPR r.44.13 and CPR r.44.14, neither costs order was to be enforced.

In doing so the judge held that although the costs had been incurred before the QOCS rules came into force, the rules had retrospective effect. He also held that they applied to CPR Pt 20 claims in the same way as they applied to primary claims between claimant and defendant.

The Defendant in *Wagenaar* submitted that the judge had erred in applying the QOCS rules to the case.

On appeal, Vos LJ held that the QOCS rules were not, as the defendant argued, *ultra vires* s.51(3) of the 1981 Act. The basic rule was that costs were in the discretion of the court, subject to rules of court. Vos LJ further held that the defendant's argument that the QOCS rules should not have been applied retrospectively was unsound.

In relation to the definition of "proceedings" he held that the judge had erred in holding that the QOCS rules applied to the Pt 20 claim against the third party. The proper meaning of the word "proceedings" in r.44.13 had to be divined primarily from the QOCS rules. Rules 44.13 to r.44.16 concerned claimants who were making a claim for damages for personal injury, whether in the claim, in a counterclaim, or by an additional claim.

In the context of the QOCS regime, the word "proceedings" in r.44.13 did not mean the entire umbrella of litigation in which commercial parties disputed responsibility for the payment of personal injury damages. Rather, it was used because the QOCS rules were intended to catch claims for damages for personal injuries where other claims were also made by the same claimant.

Rule 44.13 applied QOCS to a single claim against a defendant in which the claimant sought damages for personal injury but might also be making claims for damaged property and the like. It did not apply QOCS to the entire action in which a claim for damages for personal injury was made (paras 34-46).

He dismissed the defendant's appeal but allowed that of the third party and the defendant was ordered to pay the third party's costs on the standard basis if not agreed.

In a blow to claimants the Court of Appeal held in *Jeffrey Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654 held that under the qualified one-way costs shifting regime in CPR r.44.14(1) a defendant could enforce an order for costs out of damages payable to the claimant by another defendant. The claimant had issued proceedings against six defendants for noise-induced hearing loss but discontinued against two of them.

The Court of Appeal held that the costs judge had been correct to conclude that the first to third defendants were, in principle, entitled to enforce their costs order against the claimant, even though the source of the claimant's funds was another defendant.

The qualified one-way costs shifting regime was designed to ensure that a claimant did not incur a net liability as a result of their personal injury claim; at worst they would break even at the end of the action.

Any other result would give claimants carte blanche to commence proceedings against as many defendants as they liked, requiring them to run up costs, while remaining safe in the knowledge that if the claim failed against all but one defendant, the claimant would incur no costs liability of any kind. That would be wrong in principle, because it would encourage the bringing of hopeless claims.

In *James Ketchion v James McEwan* [2018] CC (Newcastle) (Judge Freedman) 28/06/2018, the Court held that the reference to "proceedings" in CPR r.44.13 included a claim and a counterclaim, and a defendant to a road traffic accident claim who had made a Part 20 counterclaim was therefore entitled to the protection of qualified one-way costs shifting in relation to the costs of the main action.

The claimant in a road traffic accident claim sought permission to appeal against a district judge's refusal of permission to enforce an order for costs against the defendant. The claimant had brought proceedings against the defendant for financial losses arising from the accident. He made no claim for personal injuries. The defendant denied liability and brought a Part 20 claim for damages for personal injuries. The claimant was successful on his claim; the defendant's Part 20 claim was dismissed. The defendant was ordered to pay the claimant damages. However, the district judge concluded that the claimant was entitled only to fixed costs, which

could not be enforced without the permission of the court because the defendant was entitled to the protection of qualified one-way costs shifting (QOCS). He stated that the reference to "proceedings" in CPR r.44.13 had to be taken to refer to the whole of the proceedings, including the claim and the Part 20 claim. Following the hearing of the instant application, the Court of Appeal handed down its decision in *Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654, which was directly relevant to the instant case.

The claimant argued, referring to *Wagenaar* v Weekend Travel Ltd (t/a Ski Weekend) [2014] EWCA Civ 1105 and notwithstanding the decision in *Cartwright*, that "proceedings" in r.44.13 had to be given a narrow interpretation and the defendant's Part 20 claim should be construed as separate proceedings. The claimant further argued that a wide interpretation would encourage defendants to bring personal injury claims relating to road traffic accidents as, even if unsuccessful, they would avoid having to pay costs.

The Court held that post-*Cartwright*, "proceedings" had to be given a wide definition. It would therefore be absurd and illogical if "proceedings" was deemed to cover all the claims brought against six separate defendants, but not a claim and Part 20 claim which arose from the same accident and were joined in one action.

Although it might seem unjust that the defendant could avoid payment of costs in the main action purely as a result of bringing Part 20 proceedings for damages for personal injuries that was an inevitable result of the wording of r.44.13 and r.44.14, *Cartwright* followed.

If the intention was to limit a Part 20 claimant's protection in costs, it would have been set out in the rules.

The proper interpretation of r.44.13 was, therefore, that the reference to "proceedings" was to both the claim and the counterclaim, and that as it was expressly stated that a claimant included a person who brought a counterclaim/additional claim, it followed that the defendant/Part 20 claimant had the protection of QOCS. The argument that to interpret the provisions in such a way would encourage spurious or hopeless claims for damages for personal injuries was rejected (paras 21-25).

In a judgment which for non-lawyers probably appears close to counting the number of angels dancing on pins, the Court in *Andrew Graeme Waring v Mark McDonnell* [2018] CC (Brighton) (Judge Venn) 06/11/2018 took the opposite view.

The claimant and defendant had been cycling in opposite directions when they collided head-on. Both sustained personal injury and pursued claims for damages. The court gave judgment for the claimant and dismissed the defendant's counterclaim.

Judge Venn held that the defendant who had made an unsuccessful counterclaim was not entitled to the protection of qualified one-way costs shifting in relation to the costs of the claimant's successful claim. He was not an unsuccessful claimant in the claimant's claim; he was an unsuccessful defendant, and nothing in the CPR afforded him the benefit of QOCS protection in that capacity. Doubting *Ketchion* in relation to the reference to "proceedings" in r.44.13 including a claim and a counterclaim.

The Judge held that the underlying purpose of the QOCS regime was to protect those who suffered injuries from the risk of adverse costs orders obtained by insured, self-insured or well-funded defendants. The purpose was not to protect those who were liable to pay damages to an injured party from the risk of adverse costs orders made against them in their capacity as defendant or paying party (see para.31 of judgment).

In a persuasively well-considered judgment, the Judge took the view that several unjust consequences would arise from such an approach, including:

(a) insurers of defendants to claims for personal injury arising out of road traffic collisions would be incentivised to encourage counterclaims for damages for personal injury; even if the counterclaim was unsuccessful, there would be no liability for costs;

(b) claimants making claims for damages for personal injury arising out of road traffic collisions (where a counterclaim was most likely to be made) would be significantly worse off than any other claimant making a claim for damages for personal injury as it was difficult to think of counterclaims for damages following accidents at work, clinical negligence or public liability claims;

(c) access to justice would be reduced as it would be surprising if any solicitor continued to act once a counterclaim was intimated as they would be unlikely to recover any costs;

(d) the Part 36 regime would have no teeth as costs recovery would be limited to the amount of damages recovered in the counterclaim (if any);

(e) liability insurers would not only avoid having to pay ATE premiums and success fees under CFAs, they would, in many cases, avoid having to pay any costs to a successful claimant at all. If such radical changes had been intended, they would have been spelt out (paras 42-43). Instead, the word "proceedings" in r.44.13 meant the claim or the counterclaim; it did not mean the entire action, including the claim, the counterclaim and all the parties.

The defendant was not, in the claim in which he was the defendant, protected by the QOCS scheme; in his capacity as defendant he was not making a claim for damages for personal injury. In the context of r.44.13 and its application to the instant case, the word "proceedings" was synonymous with "a claim", *Howe v Motor Insurers' Bureau (Costs)* [2017] 7 WLUK 84 and *Plevin v Paragon Personal Finance Ltd* [2017] UKSC 23 applied (paras 28-29).

Accordingly, the defendant was not an unsuccessful claimant in the claimant's claim for damages for personal injury (he was not a claimant at all in the claimant's claim); he was an unsuccessful defendant (and an unsuccessful claimant in his counterclaim for damages for personal injury). He only had the protection of the QOCS regime in respect of his claim for damages for personal injury and did not benefit from it in relation to the claimant's claim for damages for personal injury (para.46).

Another dispute over the meaning of proceedings in CPR 44.13 arose in *Paul John Parker v Stephen Butler* [2016] EWHC 1251 (QB) QBD (Edis J) 26/05/2016 in which the Court held that for the purposes of QOCS any appeal which concerned the outcome of a claim for damages for personal injuries or the procedure by which it was to be determined was part of the "proceedings" as defined in CPR r.44.13. Cost orders made in connection with such appeals were therefore subject to r.44.14.

The claimant had brought a personal injury claim against the defendant following a road traffic accident. The claim was dismissed and the claimant's appeal was unsuccessful. The defendant was awarded costs. The claimant had the benefit of

qualified one-way costs shifting (QOCS) at trial, so that the costs order against him was not enforceable without permission by virtue of r.44.14 because no sum in damages or interest had been recovered in the proceedings. The issue for the court was whether the costs order made in connection with the appeal was subject to the same rule.

Following *Wagenaar*, the court accepted that not every step in proceedings (broadly defined) which began with a claim for personal injuries was included in the definition of the word "proceedings" as used in CPR r.44.13. The word had a narrower construction. Rule 44.13 was all about a claim made by a claimant against one or more defendants which included a claim for damages for personal injuries. For that reason, a claim by a defendant against a third party for a contribution to or indemnity against such a claim was included in the proceedings as broadly defined, but not as narrowly defined for the purposes of r.44.13. An appeal by a claimant against the dismissal of his claim for personal injuries was a means of pursuing that claim against the defendant or defendants who succeeded in defeating that claim at trial. There was no difference between the parties or the relief sought as there was between the original claim and the Pt 20 claim. Most importantly, there was no difference between the nature of the claimant at trial and the appellant on appeal. He was the same person, and the QOCS regime existed for his benefit as the best way to protect his access to justice to pursue a personal injury claim. To construe the word "proceedings" as excluding an appeal which was necessary if he were to succeed in establishing the claim which had earlier attracted costs protection would do nothing to serve the purpose of the QOCS regime.

The other construction, which held that for the purposes of r.44.13 an appeal between the claimant and the defendant in a personal injury claim was part of the proceedings which included a claim for personal injuries, was open to the court and should be preferred because it more justly achieved what was plainly the purpose of the regime, *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2012] EWCA Civ 987 applied.

It would be very difficult to describe a hearing at which the claim was determined as not part of the proceedings which included that claim. Accordingly, for the purposes of the QOCS regime any appeal which concerned the outcome of the claim for damages for personal injuries or the procedure by which it was to be determined

was part of the proceedings as defined in r.44.13. Therefore, an order for costs against the claimant in favour of a defendant would only be enforceable to the extent permitted by the QOCS regime. That construction was not affected by CPR r.52.9A (see paras 16-19 of judgment).

In the employers' liability case of *Wickes Building Supplies Ltd v William Gerarde Blair (No 2) (costs)* [2020] EWCA Civ 17 CA (Civ Div) (Hamblen LJ, Holroyde LJ, Baker LJ) 21/01/2020 the Court of Appeal held that enforcement of the costs order in an appeal was subject to the qualified one-way costs shifting regime in Pt 44: "proceedings" in r.44.13 included both first instance proceedings and any subsequent appeal. Accordingly, a costs order would be made against a party which had brought a claim under the Protocol and been unsuccessful on appeal, but the costs order would not be enforced against them as it was subject to the qualified one-way costs shifting (QOCS) regime.

The Court approved *Parker* and held that "Proceedings" in r.44.13 included both first instance proceedings and any subsequent appeal. If a claimant's access to justice depended on the availability of the QOCS regime, that access would be significantly reduced if they were exposed to a risk as to the costs of an appeal. That interpretation applied even where (a) the court was dealing with a second appeal; (b) the appeal was brought by the defendant to the original claim; and (c) the court had declined to exercise its discretionary powers to limit recoverable costs under r.52.19. Accordingly, the costs order would not be enforceable against the respondent (paras 28-30).

Finally, in *Waterfield & ORS*, the defendants sought an order that the claimants pay their costs in relation to a failed application for a group litigation order (GLO). The defendants were a dental practice and its owner. The claimants were all patients at the practice. They had indicated their intention to bring damages claims against the defendants after being exposed to a risk of contracting blood borne viruses following failings by a dental hygienist. Before issuing any claims, the claimants applied for a GLO. Their application was refused on the basis that it was inadequate and premature. The claimants accepted a costs order being made against them but an issue arose as to whether they were protected by the qualified one-way costs shifting regime (QOCS) given that their application for a GLO had been issued pre-action. The claimants submitted that the application for the GLO had been made in

"proceedings" to which the QOCS rules applied. The defendants submitted that there were no proceedings afoot and so QOCS did not apply.

Applying *Wagenaar* the Court held that "proceedings" only started when the court issued a claim form on the request of a claimant, the qualified one-way costs shifting rules did not apply to pre-issue applications, including a pre-issue group litigation order application.

It was held that it was undoubtedly the case from the authorities that the court must give "proceedings" a purposive construction within the context of the QOCS provisions as a whole.

The thrust of r.44.13 to r.44.16 was that they concerned claimants who were themselves making a claim for damages for personal injuries, whether in the claim itself or in a counterclaim or by an additional claim. The references to counterclaims and additional claims came from, inter alia, the definition of "claimant" in r.44.13 (2) as meaning "a person bringing a claim to which this Section applies... and includes a person making a counterclaim or an additional claim". Their inclusion provided weight to the defendants' argument that what were being referred to were issued claims.

The general rule in r.7.2 which stated that proceedings were started "when the court issues a claim form at the request of the claimant", was not only relevant but directly on point. There was no specific rule within CPR which conflicted with the general rule in r.7.2.

Construing the definition of "proceedings" in r.44.13 to give it the meaning in the general rule in r.7.2 did not conflict with the aim and purpose of the QOCS regime, and so was compatible with a purposive construction.

Accordingly, "proceedings" for the purposes of r.44.13 started when the court issued a claim form on the request of a claimant, and so the QOCS rules did not apply to pre-issue applications, including the pre-issue GLO application in the instant case (paras 28, 35).

Furthermore, excluding the claimants from QOCS protection in relation to the pre-action GLO application did not undermine the purpose of the QOCS regime of ensuring access to justice; the option remained to make a post-action GLO application which did benefit from cost protection.

The Court distinguished the instant case from *Wickes* and *Parker* where the access to justice facilitated by the QOCS protection that the claimants enjoyed at first instance would be undermined if that protection was not maintained at appeal. The Court accepted the Defendant's submissions that those cases dealt with the meaning of "proceedings" in the context of a different question which was whether a claimant who had the benefit of QOCS protection in bringing a claim for damages for personal injury retained QOCS protection for an appeal from the determination of that claim.

So what can we draw from all this? In general terms, the question of whether the word "proceedings" should be defined narrowly or widely remains a moveable feast with the following result:

1) *Wagenaar*: narrow.
2) *Cartwright*: wide.
3) *Ketchion*: wide.
4) *Waring*: narrow.
5) *Parker*: wide.
6) *Wickes*: wide.
7) *Waterfield*: narrow.

Given the importance of the term under CPR 44.13 in such a huge volume of personal injury cases, it is to be hoped that clarification might be offered by way of guidance from a conclusive and wide-ranging decision of the superior courts or from the Rules Committee itself. Presently, taking a novel question to the Courts on the issue is akin to engaging in a game of Russian roulette often with contradictory outcomes.

Law/Procedure:

CPR 44.13; *Arabella Wagenaar (Claimant) v Weekend Travel Ltd(T/A Ski Weekend) (Defendant) & Nawelle Serradj (Third Party)* [2014] EWCA Civ 1105; *Jeffrey Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654; *James Ketchion v James McEwan* [2018] CC (Newcastle) (Judge Freedman) 28/06/2018; *Andrew Graeme Waring v Mark McDonnell* [2018] CC (Brighton)

(Judge Venn) 06/11/2018; *Paul John Parker v Stephen Butler* [2016] EWHC 1251 (QB) QBD (Edis J) 26/05/2016; *Wickes Building Supplies Ltd v William Gerarde Blair (No 2) (costs)* [2020] EWCA Civ 17 CA (Civ Div) (Hamblen LJ, Holroyde LJ, Baker LJ) 21/01/2020; *Matthew Waterfield & 25 Ors v (1) Dentality Ltd (t/a Dentality @ Hoddeston) (2) Vishal Shah (3) E Parikh (4) Ishdent Ltd* (2020) CC (Oxford) (Judge Melissa Clarke) 13/11/2020.