IN THE COUNTY COURT AT BRIGHTON **CLAIM NO: D60YJ743**

Brighton County and Family Court
William Street
Brighton
BN2 0RF

BEFORE HER HONOUR JUDGE VENN

BETWEEN

MR ANDREW GRAEME WARING

Claimant

and

MR MARK MCDONNELL

Defendant

MR K LATHAM appeared on behalf of the Claimant

MR L ASHBY appeared on behalf of the Defendant

Judgment

Introduction

1. On 14 June 2016, the claimant and defendant were cycling in opposite directions on Lodge Lane, Keymer, West Sussex, when they collided head-on. Both sustained personal injury and both pursued claims for damages for personal injury. On 25 September 2018, I gave judgment for the claimant and dismissed the defendant's counterclaim.

2. The defendant asserted that he was protected by Qualified One-Way Costs Shifting ("QOCS") and any order for costs made against him could not be enforced by the claimant.

3. I adjourned the issue of costs to 11 October 2018 and ordered the parties to file skeleton arguments on the effect of the QOCS regime in this case.

The CPR

4. The relevant parts of the CPR are set out below.

CPR 20.2(2)

In these Rules –

(a) 'additional claim' means any claim other than the claim by the claimant against the defendant; and

(b) unless the context requires otherwise, references to a claimant or defendant include a party bringing or defending an additional claim.

CPR 20.3(1)

An additional claim shall be treated as if it were a claim for the purposes of these Rules, except as provided by this Part.

CPR 44.13

Rule 44.13 provides:

(1) This Section applies to proceedings which include a claim for damages -

(a) for personal injuries;

(b) under the Fatal Accidents Act 1976; or

(c) which arises out of death or personal injury and survive 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.

CPR 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 of money in 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.

The defendant's argument

5. Mr Ashby, counsel for the defendant, submitted that a wide meaning must be given to the word 'proceedings' in CPR 44.13; he said it includes a counterclaim for damages for personal injury brought by a defendant; and, the effect of this is that the defendant has the benefit of QOCS protection in respect of his unsuccessful counterclaim and his unsuccessful defence of the claimant's claim.

6. The defendant relies on the decision of HHJ Freedman in *Ketchion v McEwan*, claim number C87YJ176, 28 June 2018, and invites me to follow HHJ Freedman's approach. In that case, a defendant in a claim arising out of a road traffic collision was unsuccessful in their defence of the claim and unsuccessful in their counterclaim for damages for personal injury. Deputy District Judge Thorn refused the claimant permission to enforce an order for costs against the defendant on the basis that QOCS applied. HHJ Freedman refused permission to appeal that decision and said at paragraph 23 of his judgment:

In my judgment, therefore, the proper interpretation of CPR 44.13 is that the reference to proceedings is to both the claim and the counterclaim; and that since it is expressly stated that a Claimant includes a person who brings a counterclaim/additional claim, it follows that the Defendant/Part 20 Claimant has the protection of QOCS. For the reasons advanced by Mr Lyons, I reject the submission that to interpret the provisions in this way will encourage spurious or hopeless claims for damages for Personal Injuries.

7. Mr Ashby also relies on:
    a. *Wagenaar v Weekend Travel Ltd* [2014] EWCA Civ 1105.
    b. *Plevin v Paragon Personal Finance Ltd and another (No 2)* [2017] UKSC 23.
    c. *Howe v Motor Insurers' Bureau* [2017] EWCA Civ 2523.
    d. *Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654.

8. In *Wagenaar*, the defendant to a personal injury claim brought an additional claim for an indemnity or contribution against a third party. Both the claimant's claim and the defendant's additional claim were dismissed. The Court of Appeal found that the QOCS regime did not apply to the proceedings between the defendant and the third party. At paragraphs 38 and 39, Vos LJ said:

38 In my judgment, the proper meaning of the word "proceedings" in CPR Pt 44.13 has to be divined primarily from the rules on QOCS themselves. The whole thrust of CPR rr 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 r 20.2(2))…

39 It is true, however, that the word "proceedings" in CPR r 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 r 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.

9. Mr Ashby said the facts of *Wagenaar* differ from the current case, but it is clear from the parts of the judgment of Vos LJ set out above, that where the defendant is nevertheless a claimant, he should be protected by the QOCS regime and only disputes between defendants and third parties are carved out. The emphasis, he said, is on protecting a claimant who brings a claim, including when they are a counterclaimant, because whilst they are a defendant to the claimant's claim, they are nevertheless also a claimant.

10. The judgment of Lord Sumption in *Plevin* (the lead judgment, which Baroness Hale, Lord Clarke and Lord Carnwath agreed with) was referred to because it considered the meaning of the word "proceedings" in section 44(6) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 at paragraphs 19 and 20:

19 However, "proceedings" is not a defined term in the legislation, nor is it a term of art under the general law. Its meaning must depend on its statutory context and on the underlying purpose of the provision in which it appears, so far as that can be discerned. The context in which the word appears in section 46(3) of LASPO is different and so, in my judgment, is the result.

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 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…

11. In *Howe* the Court of Appeal considered the meaning of "proceedings" in CPR 44.15(1). Lewison LJ said at paragraph 8:

    … In some contexts, the word "proceedings" can have a narrower meaning, but I do not consider that this is one of them…

12. In *Cartwright* the claimant issued proceedings against six named defendants for damages for noise induced hearing loss. The claims against two of the defendants were discontinued by consent and the claims against three of the defendants were compromised in the form of a Tomlin order; the schedule provided that the claimant would accept £20,000 in full and final settlement of his cause of action against the fourth, fifth and sixth defendants. The claim against the remaining defendant was discontinued by notice of discontinuance. The claimant argued that he had the protection of the QOCS regime and one defendant could not take advantage of sums payable by another defendant to him. The Court of Appeal found that the defendant who had been served with a notice of discontinuance could enforce his costs against a Judgment awarded against another defendant, but not against the Tomlin order.

13. Mr Ashby relied on paragraph 26 of Coulson LJ's judgment:

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 the defendant A.

14. Mr Ashby submitted that it would be artificial to characterise an order for costs against the defendant as an order against the defendant in his capacity as defendant. He said that the status of a litigant was only important sometimes; that, he said, was the clear effect of the authorities.

15. Mr Ashby contended that the word "proceedings" must not be artificially dissected; he said the position was simple; the defendant had brought a claim for personal injury in these proceedings and as an unsuccessful counterclaimant, he is also protected by the QOCS regime, which debars the claimant from enforcing orders for both his costs of his claim and his costs of defending the counterclaim.

The claimant's argument

16. The claimant says that he succeeded in his claim and he should be entitled to recover the costs of doing so; the defendant failed in pursuing his counterclaim and should enjoy QOCS protection against having to pay the claimant's costs of defending the counterclaim. Mr Latham, counsel for the claimant, submits that nothing in the rules affords the defendant the benefit of QOCS protection in his capacity as defendant to the claimant's claim.

17. Mr Latham also referred to the judgment of Lord Sumption in *Plevin* at paragraphs 19 and 20 and the judgment of Lewison LJ in *Howe* at paragraph 8 and invited me to conclude that the word "proceedings" can have different meanings and may be given a broad or narrow interpretation, depending upon the context in which the word is used and the purpose of the provision.

18. The claimant referred to Sir Rupert Jackson's Review of Civil Litigation Costs: Final Report (December 2009) ("the Jackson report") and submitted that the purpose of introducing QOCS was to reduce legal costs and compromised a straightforward *quid pro quo* for the abolition of recoverable ATE premiums.

19. Mr Latham also referred to paragraph 39 of *Wagenaar* (set out above) and paragraph 40, where Vos LJ said:

Thus, in my judgment, CPR r 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 r 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 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 r 44.13(1)(b) and (c) is made.

20. I was also asked to consider the judgment of Edis J in *Parker v Butler* [2016] EWHC 1251 QB at paragraph 16:

Following the approach in Wagenaar I accept that not every step in proceedings (broadly defined) which began with a claim for personal injuries is included in the definition of the word "proceedings" as used in CPR 44.13. That word as there used has a narrower construction than that. That rule is all about a claim made by a claimant against one or more defendants which includes a claim for

damages for personal injuries. For this reason a claim by a defendant against a third party for a contribution to or indemnity against such a claim is included in the proceedings as broadly defined, but not as narrowly defined for the purposes of CPR 44.13.

21. Mr Latham submitted that the proper interpretation to be given to the word "proceedings" within the context and purpose of CPR 44.13 is that it encompasses the claimant's claim against the defendant, but not the defendant's defence of the claimant's claim. This, he said, was consistent with *Medway Oil and Storage Company Limited v Continental Contractors Limited & Ors* [1929] AC 88, which holds that the costs of a claim are to be assessed as if the claim stood by itself and the costs of the counterclaim will compromise only those costs attributable to the increase in costs that the counterclaim has caused.

22. The case of *Cartwright* was distinguished from the index claim because a claimant can choose how many defendants he pursues, but he has no control over whether a counterclaim is brought against him.

23. Mr Latham says that *Ketchion* is not binding on me and was wrongly decided.

Analysis

24. The fundamental issue in *Wagenaar* was the correct construction of CPR 44.13 to 44.17. Vos LJ considered the Jackson report and thought it helpful to set out the rationale for QOCS, saying, at paragraph 36:

… 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, Jackson LJ thought, far preferable to the previous regime of recoverable success fees under CFAs and recoverable ATE premiums…

25. In *Cartwright* Coulson LJ might have expressed concern about over-reliance on the Jackson report, but he also found it instructive to examine the Jackson report when interpreting the word "proceedings" in CPR 44.13.

26. In *Wagenaar* Vos LJ said at 38 - 40:

> *38 In my judgment, the proper meaning of the word "proceedings" in CPR Pt 44.13 has to be divined primarily from the rules on QOCS themselves. The whole thrust of CPR rr 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 r20.2(2))….*
>
> *39 It is true, however, that the word "proceedings" in CPR r 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 r 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…*
>
> *40 Thus, in my judgment, CPR r 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 r 44.13(1)(b) and (c), but may also have other claims brought by the same claimant within that single claim… CPR r 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 r 44.13(1)(b) and (c) is made.*
>
> [Emphasis supplied]

27. Vos LJ held that the word "proceedings" was used in CPR 44.13 to ensure that hybrid claims (where the claim for damages is not solely in respect of personal injury) came within the QOCS regime, but emphasised that CPR 44.13 is applying QOCS to a single claim

against a defendant or defendants and CPR rr 44.13 – 44.16 concern claimants who are themselves making a claim for damages for personal injuries.

28. CPR 20.2(2) states that an additional claim is "*any claim other than the claim by the claimant against the defendant*"; the counterclaim is therefore an additional claim. CPR 20.3(1) states that an additional claim (in this case, the counterclaim) shall be treated as if it were a claim for the purposes of the CPR. Thus, in this case there were two claims; the first claim was the claim brought by the claimant against the defendant; the second claim was the additional claim brought by the defendant against the claimant, where the defendant was Part 20 claimant and the claimant was Part 20 defendant. Applying *Wagenaar*, the QOCS regime protects each of the claimants in the two claims in this case as follows:

    a. the claimant, in the claim in which he claims damages for personal injury against the defendant;
    b. the defendant, in the additional claim, in which he counterclaims damages for personal injury against the claimant.

29. The defendant is not, in the claim in which he is the defendant, protected by the QOCS regime; in his capacity as defendant, he is not making a claim for damages for personal injury. In the context of CPR 44.13 and its application to this claim, the word "proceedings" is synonymous with "a claim".

30. This analysis is consistent with the judgment of Lewison LJ in *Howe*, who said that in some contexts "*the word "proceedings" can have a narrower meaning*" and the judgment of Lord Sumption in *Plevin*, who stated:

19 However, "proceedings" is not a defined term in the legislation, nor is it a term of art under the general law. Its meaning must depend on its statutory context and on the underlying purpose of

the provision in which it appears, so far as that can be discerned. The context in which the word appears in section 46(3) of LASPO is different and so, in my judgment, is the result.

20 The starting point is that as a matter of ordinary language one wold 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.

[Emphasis supplied]

31. The underlying purpose of the QOCS regime is, as set out above, to protect those who suffer injuries from the risk of adverse costs orders obtained by insured, self-insured or well-funded defendants. The purpose is not to protect those who are 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.

32. As Mr Latham noted, the word "proceedings" is often used interchangeably with the word "claim" in the CPR. For example, CPR 36.14 states:

(1) If a Part 36 offer is accepted, the claim will be stayed.

…

(3) If a Part 36 offer which relates to part only of the claim is accepted, the claim will be stayed as to that part upon the terms of the offer.

…

[Emphasis supplied]

33. CPR 36.16 goes on to state:

(3) Paragraph (2) does not apply –

…

(b) where the proceedings have been stayed under rule 36.14 following acceptance of a Part 36 offer;

…

[Emphasis supplied]

34. As appears, CPR 36.14 states that a claim will be stayed if a Part 36 offer is accepted, but CPR 36.16 refers to proceedings having been stayed under CPR 36.14 following acceptance of a Part 36 offer. The word "proceedings" can have different meanings in different contexts.

35. Edis J adopted Vos LJ's reasoning in *Wagenaar* in his judgment in *Parker* at paragraph 16:

Following the approach in Wagenaar I accept that not every step in proceedings (broadly defined) which began with a claim for personal injuries is included in the definition of the word "proceedings" as used in CPR 44.13. That word as there used has a narrower construction than that. That rule is all about a claim made by a claimant against one or more defendants which includes a claim for damages for personal injuries. For this reason a claim by a defendant against a third party for a contribution to or indemnity against such a claim is included in the proceedings as broadly defined, but not as narrowly defined for the purposes of CPR 44.13.

[Emphasis supplied]

36. I do not accept the submission made by Mr Ashby that the effect of *Cartwright* is that the word "proceedings" in CPR 44.13 must be construed more widely, so as to give the defendant QOCS protection in the claim he is defendant in. In *Cartwright*, the claimant brought a claim against a number of defendants and the QOCS rules were applied to that claim, the single claim against the six defendants; the context material to the QOCS regime

was that there was a single claim for damages arising out of a single injury, not six sets of proceedings.

37. The decision of HHJ Freedman in *Ketchion* is not binding on me and I respectfully disagree with HHJ Freedman's conclusions. It should be noted that HHJ Freedman did not appear to have the benefit of the full argument I heard.

38. HHJ Freedman distilled the following principles from *Cartwright* (at paragraph 16 of his judgment):

(i) a wide meaning is to be given to the word proceedings (see paragraphs 26 and 30);

(ii) Wagenaar does not permit a claim brought against six defendants to be interpreted as six separate sets of proceedings as opposed to a single set of proceedings;

(iii) only very limited attention should be paid to the preparatory materials leading up to CPR 44.13-44.17 coming into force, including the Final Report of December 2009.

39. I do not agree that *Cartwright* holds that a wide meaning is to be given to the word "proceedings" in CPR 44.13:

    a. In paragraph 26 of his judgment, Coulson LJ is discussing CPR 44.14(1) and it is CPR 44.14(1) that he is referring to when he says, "*The language is wide*".

    b. In paragraph 30 of his judgment, Coulson LJ says: "*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)*". Again, it can be seen how "proceedings" in CPR 44.13 is synonymous with "a claim" – a claim with multiple defendants. *Howe* concerned a different rule.

Cartwright shows that regard must be had to the context and underlying purpose of the provision being considered (an approach consistent with *Plevin, Howe* and *Parker*).

40. HHJ Freedman thought it "*patently absurd and illogical*" if the word "proceedings" is "*deemed to cover all of the claims brought against six separate defendants, but not a claim and Part 20 claim, both of which arise out of the same accident and are joined in one action*". HHJ Freedman appeared to view the claim against six defendants in *Cartwright* as six separate claims and concluded that if they were one set of proceedings, two separate claims (a claim and a counterclaim) must also be one set of proceedings for the purposes of CPR 44.13. However, the claim brought by *Cartwright* against six separate defendants was not six separate claims for the purposes of the QOCS regime; it was a single claim against a number of defendants (as envisaged by Vos LJ in *Wagenaar*).

41. HHJ Freedman went on to hold that the "*proper interpretation of CPR 44.13 is that the reference to proceedings is to both the claim and the counterclaim; and that since it is expressly stated that a Claimant includes a person who brings a counterclaim/additional claim, it follows that the Defendant/Part 20 Claimant has the protection of QOCS*". I do not agree with that conclusion. The word "proceedings" in CPR 44.13 means the claim *or* the counterclaim; it does not mean the entire action, including the claim, the counterclaim and all the parties. HHJ Freedman's analysis is not consistent with the decision in *Wagenaar.*

42. If the analysis of the defendant (applying *Ketchion*) is correct, the consequences are unjust and inconsistent with the stated aims of the QOCS regime:

    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. In *Ketchion*, the defendant argued that counterclaims totally devoid of merit or being used as a vehicle to secure QOCS protection would be struck out as an abuse of process or disclosing no reasonable grounds; this was not realistic. In claims arising out of road traffic collisions, the claims rest on the evidence of the parties, tested under cross-examination; the prospect of a counterclaim being dismissed as fanciful without conducting a mini-trial (which is not appropriate in an application for summary judgment) are slim at best. Even in the most straightforward of road traffic collisions, the 'rear-end shunt', liability might be disputed if it is alleged that the driver in front wrongfully slammed on their brakes.

b. Claimants making claims for damages for personal injury arising out of road traffic collisions (where a counterclaim is most likely to be made) would be significantly worse off than any other claimant making a claim for damages for personal injury. It is difficult to think of examples of counterclaims for damages for personal injury being brought to claims arising out of an accident at work, in the context of clinical negligence, or a public liability claim. It was not the stated purpose of the QOCS regime to significantly disadvantage claimants injured in road traffic collisions.
c. Access to justice would be reduced; it would be surprising if any solicitor continued to act once a counterclaim was intimated as they would be unlikely to ever recover any costs (unless the client was privately paying, in which case they may derive little benefit from the litigation). This would be stark in catastrophic injury claims, where disbursements for medico-legal reports alone are likely to be significant.
d. The Part 36 regime would have no teeth; 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.

43. If such radical changes were intended, one would expect them to have been spelt out.

44. I was also referred to the decision of Whipple J in *Commissioner of Police of the Metropolis v Brown; Chief Constable of Greater Manchester Police v Brown (Equality and Human Rights Commission intervening)* [2018] EWHC 2471 QB. At paragraph 52, Whipple J said: "*The key is in the definition of a "personal injury" claim, because it is only a personal injury claim which carries automatic entitlement to QOCS protection. Personal injury claims are claims for damages in respect of personal injuries (see the definition at CPR 2.3)…*". It is obvious that the defence of a personal injury claim is not itself a personal injury claim; my analysis is consistent with the judgment of Whipple J.

45. The fact that there are two different claims is obvious from the order it was agreed I should make at the end of the trial, entering judgment for the claimant for the agreed damages and dismissing the counterclaim.

Conclusion

46. The defendant in this case 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 for damages for personal injury); he was an unsuccessful defendant (and an unsuccessful claimant in his counterclaim for damages for personal injury). He only has the protection of the QOCS regime in respect of his claim for damages for personal injury and does not benefit from it in the claimant's claim for damages for personal injury.

END OF JUDGMENT