Case No: G00HF194

IN THE COUNTY COURT AT OXFORD

St Aldates
Oxford OX1 2TL

Date: 13 November 2020

B e f o r e:

HER HONOUR JUDGE MELISSA CLARKE

- - - - - - - - - - - - - - - - - - - -

B e t w e e n:

MR MATTHEW WATERFIELD and 25 others

Claimants

- and -

(1) DENTALITY LTD T/A DENTALITY @HODDESTON
(2) DR VISHAL SHAH
(3) MS E. PARIKH
(4) ISHDENT LTD

Defendants

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Mr William Poole (instructed by Cleversons) for the **Claimants**
Ms Nadia Whittaker (instructed by Medical Protection Society) for the **First** and **Second Defendants**
Ms Romilly Cummerson (instructed by Hempsons) for the **Third** and **Fourth Defendants**

Hearing date: 4 August 2020

- - - - - - - - - - - - - - - - - - - -

JUDGMENT (No.2) (QOCS)

Her Honour Judge Melissa Clarke:

Introduction

1. I have handed down judgment in this matter in which I have refused the Claimants' application for a group litigation order ("GLO") on the basis that it was inadequate and also premature. It now comes to me to determine costs.

2. The Defendants seek an order that the Claimants pay their costs pursuant to the general rule that the unsuccessful party pays the costs of the successful party, unless the Court makes a different order.

3. The Claimants do not dispute that the Defendants have been successful, and accept a costs order being made against them, but say that the application for a GLO has been made in proceedings to which the Qualified One Way Cost Shifting ("QOCS") rules apply, and so that order should be expressed by the court not to be enforced without permission of the court. The Defendants say that there are no proceedings afoot and so QOCS does not apply. It is common ground that none of the Claimants issued a claim form at the time the application for a GLO was made and nor had they done so by the time that application was heard and dismissed.

4. The question which arises, then is whether the QOCS rules apply to the costs of pre-action application for a GLO so as to limit the extent to which any order may be enforced against the Claimants. Counsel for the parties have searched, but there do not appear to be any authorities directly on the point.

The law

5. I will set out the statutory provisions and parts of the CPR that are relevant to the arguments before me.

6. Section 51(1) Senior Courts Act 1981 provides:

> "Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in… (c) the county court shall be in the discretion of the Court".

7. Section 51(3) of that Act provides that:

> "The Court shall have full power to determine by whom and to what extent the costs are to be paid".

8. CPR Part 44 provides general rules about costs. Part II of CPR Part 44 sets out the regime for QOCS introduced by the reforms of Jackson LJ.

9. Rule 44.13(1) provides that "*This Section* [i.e. Part II of CPR Part 44*] applies to proceedings which include a claim for damages - (a) for personal injuries;… 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"*. I will come back to those exceptions.

10. *"Claimant"* is defined in rule 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".*

11. Rule 44.14(1) provides: *"(1) Subject to rules 44.15 and 44.16, orders for costs made against the 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".*

12. It is common ground that the exceptions contained in rules 44.15 and 44.16 have no relevance to this case.

13. Rule 2.3(1) provides that *""Claim for personal injuries" means proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person's death, and "personal injuries"*

includes any disease and any impairment of a person's physical or mental condition".

14. Returning to the exceptions in rule 44.13, it is common ground that rule 44.17, which deals with transitional provisions where pre-commencement funding arrangements were in place, does not apply to this case. S. 33 of the Senior Courts Act and s. 52 of the County Courts Act are mirror provisions which provide for the High Court and county court to have certain powers to make an order for, inter alia, pre-action inspection (s. 33(1)/s. 52(1)) and pre-action disclosure (s. 33(2)/s. 52(2)). Ss. 33(2)/ 52(2) refer not to a claimant but to *"a person who appears to the [High Court/county court] to be likely to be a party to subsequent proceedings in that court…"*.

15. Counsel for the Claimants relies on three authorities from which he submits that principles may be discerned which are applicable to this case. Those are the Court of Appeal decision of *Wagenaar v Weekend Travel Limited t/a Ski Weekend* [2014] EWCA Civ 1105; a decision of Edis J in *Parker v Butler* [2016] EWHC 1251 (QB), and a recent Court of Appeal decision *Wickes Building Supplies Limited v William Gerarde Blair (No 2) (Costs)* [2020] EWCA Civ 17 in which Baker LJ (with whom Hamblen LJ and Holroyde LJ agreed) approved the conclusion and reasoning of Edis J in *Parker v Butler*.

16. At para 18 of *Wickes*, Baker LJ considered the case of *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd and Another* [2012] EWCA Civ 987, in which the Court of Appeal was concerned with the construction of section 29 of the Access to Justice Act, and whether or not a trial and an appeal from a trial were the same proceedings for the purposes of recoverability of an ATE premium. Rix LJ at paras [42] and [58] acknowledged that they could be thought to be the same proceedings but had clearly been treated as different for the purposes of costs. Etherton LJ at [61]-[63] said:

> "[61] The word 'proceedings', in the context of court proceedings, is a word of uncertain meaning. It can sometimes mean part of court proceedings, such as being limited to proceedings at first instance or to appeal proceedings, or it can mean the entire course of proceedings from inception to final conclusion.

> …
> [63] …It is, therefore, perfectly possible to give the word 'proceedings' in section 29 a wide or a narrow meaning. The section would make sense and could work whether the appellants' interpretation or the respondent's interpretation were adopted. I agree with Rix LJ that, in those circumstances, section 29 must be interpreted in a way that will best reflect the legislative purpose."

17. Etherton LJ decided that the narrower construction best reflected the legislative purpose in that case.

18. At para 19 of *Wickes*, Baker LJ addressed *Wagenaar*, in which the Court of Appeal held that a part 20 claim brought by a defendant to a QOCS claim was not itself protected by QOCS, as follows:

> "In Wagenaar v Weekend Travel Ltd [2014] EWCA Civ 1105, this court held that a Part 20 claim brought by a defendant to a QOCS claim to shift or share the burden of any judgment in favour of the claimant is not a claim to which the QOCS regime applies. At paragraph 38 of his judgment, Vos LJ stated: "In my judgment, the proper meaning of the word "proceedings" in CPR Part 44.13 has to be divined primarily from the rules on QOCS themselves. ….""

19. I think it is instructive to set out Vos LJ's discussion at [37] to [39] of *Wagenaar* more fully:

> "[37] Against that background, the first and fundamental issue is as to the correct construction of CPR rules 44.13 to 44.17. It is here that, in my judgment, the judge fell into error. His starting point seems to have been a search for an applicable definition of the word "proceedings" in CPR rule 44.13, since that rule makes it clear that QOCS applies to "proceedings which include a claim for damages... for personal injuries". The judge then considered the definition of "claim for personal injuries" in CPR rule 2.3. Whilst that definition is no doubt instructive, it is not directly relevant, since the precise term "claim for personal injuries" is not used in CPR rules 44.13 to 44.17. Moreover the fact that the term is widely defined to mean "proceedings in which there is a claim for damages in respect of personal injuries..." does not much inform the proper meaning of the word "proceedings" in CPR rule 44.13.
>
> [38] In my judgment, the proper meaning of the word "proceedings" in CPR part 44.13 has to be divined primarily from the rules on QOCS themselves. The whole thrust of CPR rules 44.13 to 44.16 is that they concern claimants who are themselves making a claim for damages for

> personal injuries, whether in the claim itself or in a counterclaim or by an additional claim (as defined in CPR rule 20.2(2)) …
> [39] It is true, however, that the word "proceedings" in CPR rule 44.13 is a wide word which could, in theory, include the entire umbrella of the litigation in which commercial parties dispute responsibility for the payment of personal injury damages. I do not think it would be an appropriate construction. Instead I think the word "proceedings" in CPR part 44.13 was used because the QOCS regime is intended to catch claims for damages for personal injuries, where other claims are made in addition by the same claimant…"

20. At para 22 of *Wickes*, Baker LJ set out salient parts of the judgment of Edis J in *Parker v Butler*, saying:

> "[22] Edis J set out the principles behind the QOCS regime in paragraphs 3 and 4:
>
> > "3. If (as is likely to be the case here) the claimant's access to justice is dependent on the benefit of QOCS, that access will be significantly reduced if he is exposed to a risk as to the costs of any unsuccessful appeal which he may bring or any successful appeal a defendant may bring against him. The effect of QOCS is that his liability to meet any adverse order for costs is limited to the value of sums recovered in the proceedings by way of damages except in certain circumstances. In other words, except in those circumstances, he cannot be worse off as a result of bringing his claim. If he has the benefit of a Conditional Fee Agreement he will not be liable for his own costs and QOCS restricts his liability to the sums recovered in the proceedings. The risk that a failure in litigation may result in the loss of existing assets is a substantial inhibition on access to justice and that is an important part of the reason why QOCS was established.
> >
> > 4. The power to make enforceable orders for costs is designed to compensate successful parties for their expense in bringing or resisting claims, but it also has an effect of deterring people from bringing or resisting claims unsuccessfully. It is an incentive to resolve disputes and serves a public as well as a private interest. That consideration is in tension with access to justice. In appellate civil proceedings in QOCS cases permission to appeal is always required. That filter affords some protection for the civil justice system and the other parties against unmeritorious appeals. The costs disincentive is not rendered irrelevant by this fact, but in resolving the tension between access to justice and other considerations it is reasonable to start from the proposition that the issue only concerns the claimant's ability to bring an appeal which a judge has held to have a realistic prospect of success or that there is some other compelling reason for it, or to resist an appeal where a judge has made the order which is challenged. Therefore, in either

> case the stance of the claimant has a measure of judicial approval at a very early stage in any appeal proceedings. In these circumstances a claimant's right to access to justice deserves particular weight."

[22]. Having considered the decisions in *Hawksford* and *Wagenaar*, Edis J reached this conclusion:

> "17. An appeal by a claimant against the dismissal of his claim for personal injuries is a means of pursuing that claim against the defendant or defendants who succeeded in defeating that claim at trial. There is no difference between the parties or the relief sought as there is between the original claim and the Part 20 claim. Most importantly, to my mind there is no difference between the nature of the claimant at trial and the appellant on appeal. He is the same person, and the QOCS regime exists 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 you were to succeed in establishing the claim which had earlier attracted QOCS protection would do nothing to serve the purpose of the QOCS regime. The other construction, which holds that for the purpose of CPR Part 44.13 an appeal between the claimant and the defendant in a personal injury claim is part of the proceedings which include a claim for personal injuries is open to me, following Hawksford v Trustees Jersey Ltd, and should be preferred because it more justly achieves what is plainly the purpose of the regime as divined from the Rules.
>
> 18. … In my judgment for the purposes of the QOCS regime any appeal which concerns the outcome of the claim for damages for personal injuries or the procedure by which it is to be determined is part of the proceedings as defined in CPR 44.13. Therefore an order for costs against the claimant in favour of a defendant will only be enforceable to the extent permitted by the QOCS regime.
>
> 19. I do not accept that this construction is affected by CPR 52.9A [now CPR 52.19]. This allows the court to make an order (generally at a very early stage of the appeal proceedings) to alter the consequences of the general scheme for costs in civil appeals in cases where other rules applied to the proceedings which resulted in the decision against which the appeal is brought. This covers cases where there are no special rules governing the costs in the appeal court, but there are in the proceedings below. This does not apply to cases where, on a proper construction of the rules, the same regime applies to the proceedings at first instance and on appeal. The fact that the court has a discretion to limit the costs orders which may be made protectively in a variety of situations is simply irrelevant to the present issue.
>
> 20. For these reasons the costs order which I have made will not be enforceable."

21. At para 29 of *Wickes*, Baker LJ stated:

> "The purpose of the QOCS regime is to facilitate access to justice for those of limited means. As Edis J observed at paragraph 3 of his judgment in *Parker v Butler*, if a claimant's access to justice is dependent on the availability of the QOCS regime, that access will be significantly reduced if he is exposed to a risk as to the costs of any unsuccessful appeal which he may bring or any successful appeal a defendant may bring against him. It follows that, as Edis J noted at paragraph 17 of his judgment, to construe the word "proceedings" as excluding an appeal would do nothing to serve the purpose of the QOCS regime. I therefore conclude that any appeal which concerns the outcome of the claim for damages for personal injuries, or the procedure by which such a claim is to be determined is part of the "proceedings" under CPR rule 44.13. This interpretation applies even where, as here, (a) the court is dealing with a second appeal, (b) the appeal is brought by the defendant to the original claim, and (c) the court has declined to exercise its discretionary powers to limit recoverable costs under CPR 52.19".

The parties' submissions

Claimant

22. The Claimants submit that they are protected by QOCS as:

22.1. the application has been made in the course of the Claimants pursuing their "claims for personal injury";

22.2. an application for a GLO is permitted in accordance with the Rules prior to the issuing of a claim form, and that application is part of the proceedings within the Claimants' claims;

22.3. the intention of the GLO application was to seek binding orders in relation to all of the issues set out in the proposed GLO Order, and had it been successful, they would have progressed to issue their individual claims. As such, the application for a GLO was an intrinsic part of the Claimants' claims and falls squarely into the definition of "proceedings";

22.4. if the GLO application had been issued post-issue of the Claim Forms or any of them there is no doubt that QOCS would apply;

22.5. the Defendants' solicitors through the witness statement of Mr Joseph McCaughley acknowledge that QOCS applies to GLO proceedings. Of course this cannot affect the legal issue I have to determine and so I will not consider it further;

22.6. the very narrow definition for which the Defendants contend, namely that "proceedings" means post-issue, flies in the face of the overriding objective and undermines the purpose of the QOCS regime, namely to ensure access to

justice to claimants after the abolition of recoverable success fees and ATE insurance premia protecting against adverse costs orders. Such ATE policies would have covered the Claimants in this matter, and they were generally taken out at the first instigation of claims, mainly prior to issue of even a letter of claim;

22.7. *Wagenaar* provides (i) that QOCS is retrospective in effect; (ii) that "proceedings" is widely defined and must be given a purposive construction in light of the QOCS rules as a whole.

Defendants

23. The Defendants submit that QOCS do not apply to any costs order that may be made by the Court on the GLO application issued pre-action *inter alia* for the following reasons:

23.1. CPR rule 44.13 only applies to proceedings which include a 'claim for damages for personal injury';

23.2. CPR rule 2.3(1) defines 'claim for personal injuries' as proceedings in which there is a claim for damages in respect of personal injuries; and

23.3. CPR rule 7.2(1) provides that proceedings are started 'when the court issues a claim form at the request of the claimant';

23.4. no proceedings for damages in respect personal injuries have been issued by any of the listed Claimants and so QOCS does not apply;

23.5. CPR 44.13 specifically provides that QOCS does not apply to applications for pre-action disclosure. Although it does not expressly cover a pre-action GLO application, it would be strange if this was intentional, i.e. that legislators had decided that common pre-action disclosure applications should not be covered by QOCS but were content that rarer pre-action GLO applications should be;

23.6. *Wickes* and *Parker v Butler* relate to different situations where the Court was concerned with whether QOCS covered both the first instance proceedings and the appeal arising from them. There was no doubt that there were proceedings in those cases, unlike this one where no claim forms have been issued;

23.7. *Wagenaar* was also concerned with proceedings that were afoot and cannot be compared with this situation, which appears to be novel before the court.

Discussion and Determination

24. The issue in this case is whether the use of the word "proceedings" in rule 44.13 encompasses claims which have not yet been issued.

25. Although *Wagenaar* was concerned with proceedings which were afoot, some of the guidance that it gives in relation to the proper construction of CPR 44.13 is of more general application, and is binding authority.

26. The Claimants' submission that *Wagenaar* provides that "proceedings" is widely defined does not, with respect, do justice to what Vos LJ actually said. He acknowledged that it is *"a wide word which could, in theory, include the entire umbrella of litigation…"* but held that would not be an appropriate construction in construing the meaning of the word "proceedings" in rule 44.13. He gave it a narrower meaning.

27. In [37] and [38] of *Wagenaar* Vos LJ provides guidance about where and where not to start in construing that rule. Contrary to the Defendants' submission, that guidance is **not** to start at rule 2.3, which he describes as neither relevant nor informative to this endeavour because the definition in rule 2.3 is not used in rule 44.13, and because it is, effectively circular back to the word "proceedings". That, he says, is where the judge at first instance fell into error: the correct starting place is within the QOCS rules themselves, and I should seek to give rule 44.13 a purposive construction in the context of the QOCS regime as a whole.

28. Of course, Vos LJ did not address the question of whether "proceedings" encompasses pre-action claims, as that was not a feature of the facts in *Wagenaar*. So when he considered where the first instance judge should have started in construing the meaning of "proceedings", and decided that should have been within the QOCS rules themselves, he did not direct himself to rule 7.2, which provides that proceedings are started *"when the court issues a claim form at the request of the claimant"*. It seems to me that he did not do so because this was not a feature of the dispute before him. The issue before him was whether "proceedings" in rule 44.13 encompasses appeals, which are not started by a claim form but by an appeal notice. The issue before me is whether "proceedings" in rule 44.13 encompasses pre-action claims, and in those circumstances, it seems to me that rule 7.2 is not only relevant but directly on point. It is not a full answer, because it is trite law that the general provisions of the Civil Procedure Rules yield to specific provisions, see, for example, Moore-Bick LJ's explanation at

paragraph 21 of *Solomon v. Cromwell Group PLC* [2012] 1 W.L.R. 1048, and in this case I have no trouble in characterising rule 7.2 as a general provision and Part II of CPR Part 44, including rule 44.13, as specific provisions. However, if the specific provisions do not conflict with the general, then the general apply.

29. One might ask the question why, if it was intended that "proceedings" in rule 44.13 should have a different, specific meaning to that contained in rule 7.2, was that meaning not made explicit within the rule or elsewhere in Part II of CPR Part 44? The Claimants do not address this issue, and I do not see an answer for it. The corollary to that is that one might ask (although the Claimants have not) why, if "proceedings" is to be construed as having the rule 7.2 definition excluding pre-issue claims, the exclusions for, inter alia, pre-issue applications for disclosure and inspection are necessary at all, or alternatively are not more widely drawn to exclude all pre-issue applications? The Defendants' answer to the former is that such applications are very common, and the exclusions provide clarity. Their answer to the latter is that rule 7.2 does, by its definition of "proceedings", exclude all pre-issue applications.

30. What is undoubtedly the case from the authorities is that I must give "proceedings" a purposive construction within the context of the QOCS provisions as a whole. As Vos LJ states, the thrust of the rules 44.13 to 44.16 is that they concern claimants who are themselves making a claim for damages for personal injuries, whether in the claim itself or in a counterclaim or by an additional claim. The references to counterclaims and additional claims come from, inter alia, the definition of "claimant" in rule 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 provides weight, in my judgment, to the Defendants' argument that what are being referred to are issued claims. They are certainly not incompatible with that argument.

31. I accept the Defendants' submission that *Wickes* and *Parker v Butler* construed the meaning of "proceedings" in the context of an entirely different question – that of 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. This is the question which Baker LJ determines at para 29 of *Wickes*. That is not to say that the general discussions about the purposes of the QOCS regime in, for example, the first three sentences of para 4 of *Parker v Butler* and the first sentence of para 29 of *Wickes* are not instructive. In my judgment, they are.

32. The Claimants sought to argue that Baker LJ's wording in para 29 of *Wickes* that (my emphasis) *"…any appeal which concerns the outcome of the claim for damages for personal injuries,* ***or the procedure by which such a claim is to be determined****, is part of the "proceedings" under CPR rule 44.13."* means that any procedure by which a claim is to be determined is part of "proceedings" for the purposes of rule 44.13, and this would include an application for a GLO as that is a procedure for establishing the procedure by which a claim is to be determined. I am not with the Claimants. The subject of that sentence is an appeal: Baker LJ is referring only to *"an appeal which concerns… the procedure by which such a claim is to be determined",* and in my judgment he does so to clarify that both appeals from final determination of claims and also from interim case management decisions affecting such claims fall within the definition of "proceedings" and have the benefit of QOCS protection. As stated, the question he is determining is limited to whether appeals from decisions in claims with QOCS protection also have QOCS protection, and it would be wrong, in my judgment, to pick those words out of that sentence and give them wider application in the manner which the Claimants seek.

33. I consider that the question for determination in *Wickes* and *Parker v Butler* can be distinguished from the question before the Court in this case in a fundamental way. In *Wickes* and *Parker v Butler*, the claimant had undoubtedly issued a claim and at first instance there were proceedings afoot to which QOCS protection applied. In this case there are a number of potential claimants none of whom have issued a claim. It is instructive to analyse this difference in terms of the tension that Edis J identified at paragraph 3 of *Parker v Butler* between QOCS protection facilitating access to justice for those of limited means on one hand, and the power to make enforceable orders for costs deterring people from bringing or resisting claims unsuccessfully and providing an incentive to resolve disputes on the other.

34. In *Wickes* and *Parker v Butler* the claimants had already accessed the protections of the QOCS regime in bringing their claims, which had been determined at first instance. To exclude claimants from the QOCS regime at the appeal stage would expose them to a risk of costs of any unsuccessful appeal they may bring (or any successful appeal brought against them), and this would undermine the QOCS regime as a whole (or, as Edis J put it in para 4 of *Wickes*, *"would do nothing to serve the purpose of the QOCS regime"*). However in this case, the Claimants have two options. They may make an application for a GLO pre-issue of a claim form, as they are entitled to do, or they may issue a claim form first, and make the same GLO application afterwards, when I believe it is common ground that they would have the benefit of QOCS protection. The Claimants argue that to exclude them from QOCS protection in the former case would undermine the purpose of the QOCS regime of ensuring access to justice, but I am not convinced of this. They would have to think very carefully about making a pre-issue GLO application and bear in mind the risk of a costs order if the GLO application was unsuccessful, however in my judgment the fact that a pre-issue GLO application does not afford costs protection does not limit access to justice because the option remains to make a post-issue GLO application which does benefit from cost protection. It is not the same case at all, in my judgment, as in *Wickes* and *Parker v Butler*, 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.

35. I can see no specific rule within Part II of CPR Part 44 which conflicts with the general rule in rule 7.2. In my judgment, construing the definition of "proceedings" in rule 44.13 to give it the meaning in the general rule 7.2 does not conflict with the aim and purpose of the QOCS regime, for the reasons I have given, and so is compatible with a purposive construction. Accordingly, for those reasons, I find that "proceedings" for the purposes of CPR 44.13 start when the court issues a claim form on the request of a claimant, and so the QOCS rules do not apply to pre-issue applications, including the pre-issue GLO application in this case.