Neutral Citation Number: [2022] EWCA Civ 1407

Case No: CA-2021-003229

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BIRMINGHAM COUNTY COURT
Her Honour Judge Emma Kelly

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/2022

Before:

LORD JUSTICE BAKER
LORD JUSTICE MALES
and
LORD JUSTICE EDIS

- -

Between:

RICHARD ACHILLE	**Claimant/ Appellant**
- and -	
LAWN TENNIS ASSOCIATION SERVICES LIMITED	**Defendant/ Respondent**

- -
- -

Frederick Lyon & Ryan Ross (instructed via **Advocate**) for the **Appellant**
Helen Bell (instructed by **Browne Jacobson LLP**) for the **Respondent**

Hearing date: 13 October 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 27th October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Males:

1. This appeal is about the meaning of the word "proceedings" in CPR 44.15.

2. CPR 44.15 is part of the QOCS regime in Section II of CPR 44. "QOCS" stands for Qualified One-Way Costs Shifting, a term which cannot be described as self-explanatory, but which is intended to promote access to justice in personal injury cases. It deals with the problem that an individual who had suffered personal injury could be deterred from bringing proceedings by the prospect of liability to pay the defendant's costs in the event that his claim failed, a prospect which it is often difficult to rule out in view of the uncertainty inherent in litigation. The solution adopted in CPR 44.14 was to place a cap on the claimant's liability to pay the defendant's costs, so that any order for costs made against a claimant can only be enforced up to the amount of any damages and interest ordered in his favour. Thus an unsuccessful claimant would not have to pay any costs ordered in favour of the defendant, while even a successful claimant who obtained an order for damages would not have to pay any costs (for example of interlocutory hearings) ordered in favour of the defendant in the course of the proceedings to the extent that they exceeded the damages and interest payable by the defendant. The result was that a personal injury claimant would never be out of pocket as a result of bringing legal proceedings. Any damages recovered might be eaten up by liability to pay the defendant's costs, but the claimant would not be worse off financially as a result of bringing the claim (liability to pay his own costs being addressed in other ways).

3. However, a disadvantage of this scheme, if unqualified, is that it promotes access to the courts not only for meritorious claims (by which I mean claims which it was reasonable to bring, whether or not they ultimately succeed) but also for claims which are frivolous and should never have been brought in the first place. Accordingly the basic rule just described was qualified so that, in such cases, an order for costs in favour of the defendant can be enforced to its full extent, sometimes without needing the permission of the court and sometimes only with such permission. The provisions which strike this balance are CPR 44.15 and CPR 44.16.

4. CPR 44.15 allows a defendant to enforce a costs order made against a claimant to its full extent without needing permission from the court in three categories of case. These are (1) where the claimant has disclosed no reasonable ground for bringing the proceedings, (2) where the proceedings are an abuse of the court's process and (3) where the claimant is personally responsible for conduct which is likely to obstruct the just disposal of the proceedings.

5. QOCS applies to personal injury cases, but claimants who have suffered personal injury often bring mixed claims, that is to say claims in which they seek damages for personal injury together with damages for other losses. The typical example is the motorist in a road traffic accident who claims damages not only for injuries suffered in the accident but also for damage to his vehicle.

6. The application of the QOCS regime to mixed claims has generated a certain amount of litigation. This appeal is the latest example.

7. The claimant in the present case brought a mixed claim. He claimed damages for alleged psychiatric injury, which is a recognised category of personal injury, but also

for injury to feelings, which is not a claim for personal injury (described as "trite law" in *Brown v Commissioner of Police of the Metropolis* [2019] EWCA Civ 1724, [2020] 1 WLR 1257 at [13]). His claim for psychiatric injury was struck out under CPR 3.4(2)(a) on the ground that the claimant's statement of case disclosed no reasonable grounds for bringing the claim, but his claim for injury to feelings survives and has yet to be tried. An order was made that the claimant should pay the defendant's costs of the claim for damages for personal injury, summarily assessed in the sum of £4,250.

8. The defendant says that this is a case where CPR 44.15 applies. It says that "the proceedings" in CPR 44.15 refers to a claimant's claim for personal injury and that, as that claim has been struck out, the order for costs can be enforced to its full extent now. The claimant disputes that interpretation of the rule, saying that "the proceedings" refers to all claims made by a claimant against a defendant in one action and that, although the claim for personal injury has been struck out, the proceedings as a whole have not been. He says that it is, therefore, premature for the costs order to be enforced against him: whether it should be enforced at all, and if so in what amount, should await the final determination of the action and will be a matter for the discretion of the court under CPR 44.16 – or, in the event he is successful in his remaining claim, the order will be enforceable by way of set off against any damages under the usual rule contained in CPR 44.14.

9. Her Honour Judge Emma Kelly, sitting in the Birmingham County Court, agreed with the defendant's interpretation. The claimant now appeals.

The facts

10. It is unnecessary to say much about the facts of the case, but the following summary puts some flesh on the skeleton just outlined.

11. The claimant, Mr Richard Achille, has had a long-running dispute arising out of events in 2013 and 2014 which led to his expulsion from Moseley Tennis Club in Birmingham. He has brought numerous claims against a variety of defendants, none of which has so far succeeded. This has resulted in an extended civil restraint order being made against him, but the present appeal is not affected by that order.

12. This claim, issued on 9th July 2018, was brought against the Lawn Tennis Association in its capacity as the national governing body for tennis. The claim alleged negligence, racial victimisation pursuant to section 27 of the Equality Act 2010 and breach of the Protection from Harassment Act 1997. The claimant claimed damages for psychiatric injury, relying on a medical report from a consultant forensic psychiatrist. He also claimed damages for injury to his feelings.

13. On 13th May 2019 the claim for damages for psychiatric injury was struck out by District Judge Dickinson pursuant to CPR 3.4(2)(a), which provides that a statement of case may be struck out if it discloses no reasonable grounds for bringing the claim. However, the claim for injury to feelings was not struck out. It remains to be determined.

14. The District Judge ordered the claimant to pay the defendant's costs of the claim for damages for personal injury, and summarily assessed those costs in the sum of

£4,250. She held that the requirements of CPR 44.15(1) had been satisfied, so that the defendant could enforce the order for costs to its full extent without needing the permission of the court.

15. The claimant, acting as a litigant in person, appealed against the striking out of his claim as well as the order for costs. The judge observed that his grounds of appeal lacked clarity. Permission to appeal was initially refused but eventually permission to appeal on the costs issue was obtained and the appeal came before Judge Kelly on 28th September 2021, with the claimant still acting in person.

The QOCS provisions

16. In order to make sense of the parties' submissions, it is convenient to set out the whole of the QOCS provisions in Section II of CPR 44. As this appeal is concerned with the meaning of the word "proceedings" in CPR 44.15, I emphasise the word wherever it appears in these provisions. As I shall explain, it is the defendant's case that the meaning of the word varies from one such provision to another:

> "**44.13 Qualified one-way costs shifting: scope and interpretation**
>
> (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 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 1981or 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.
>
> **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.

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

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

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

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

(c) the conduct of—

(i) the claimant; or

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

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

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 his financial benefit the whole or part of the claim was made.

44. 17 Transitional provision

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

The judgment

17. The judge's reason for accepting the defendant's interpretation of CPR 44.15, that is to say that "the proceedings" referred to the personal injury claim alone, was that this interpretation was consistent with and furthered the purpose of the QOCS regime, namely that personal injury claimants with a real prospect of success should have protection from the enforcement of costs, but those with hopeless personal injury claims should not:

"**Conclusion**

50. In my judgment, the construction of the word 'proceedings' in CPR 44.15(1) as meaning the personal injury claim alone rather than requiring the striking out all claims (both personal injury and non-personal injury) is consistent with the context and purpose of the QOCS regime. This purposive construction deters the making of frivolous personal injury claims that have no reasonable prospect of success. There are no sound policy reasons why a claimant pursuing and unmeritorious personal injury claim tacked onto a non-personal injury claim should be in a better position than a litigant pursuing an unmeritorious personal injury claim alone. Furthermore, a purposive construction promotes the overriding objective, particularly the requirement that issues be identified at an early stage and disposed of summarily where they do not require full investigation and trial.

51. Insofar as there are reported decisions on the meaning of the word 'proceedings' in Section II of CPR Part 44, a purposive construction is consistent with those cases. In *Plevin* the 'proceedings' were defined as limited to different stages of the litigation rather than including the first instance and appellate stages as a whole. In *Wagenaar* the 'proceedings' similarly did not include the entire proceedings and excluded the Third Party claim. Likewise, in *Day* and in the context of CPR 44.15(1)(b), the 'proceedings' were given a narrow definition limited to the personal injury claim rather than the entire proceedings that also included a non-personal injury counterclaim. As is clear from the decision in *Jeffreys*, the inconsistent use of the expressions 'proceedings' and 'claim' across Section II of CPR 44 can mean that a literal reading causes a perverse result. In my judgment, the narrower meaning of 'proceedings' in CPR 44.15(1) to mean the personal injury claim alone achieves what is clearly the common-sense outcome that furthers the purpose of the QOCS regime. In other

> words, those personal injury claimants with a real prospect of success have protection from the enforcement of costs but those with hopeless personal injury claims do not."

The parties' submissions

18. For the claimant, Mr Frederick Lyon submitted that "proceedings" in CPR 44.15 means the entirety of the claims brought by a claimant against a defendant in a single action. He accepted that the meaning of the term could vary, depending on the context, but submitted (in outline) that this interpretation (1) was in accordance with the natural meaning of the term, (2) was consistent with the use of the term across CPR 44.13 to CPR 44.17, where a clear distinction is recognised between "the proceedings" and a personal injury claim made within and as part of proceedings, (3) was consistent with the case law on the meaning of "proceedings", and (4) was consistent also with the purpose of the QOCS regime.

19. For the defendant, Ms Helen Bell submitted (again in outline) that the judge's interpretation (1) was consistent with the overall context and purpose of the QOCS regime, (2) was consistent with the overriding objective in CPR 1.1, (3) was consistent with the case law, and (4) was consistent with the source of the strike out power in CPR 3.4. Ms Bell accepted that in some places in the QOCS provisions where the term "proceedings" is used, it does refer to the entirety of the claims brought by a claimant against a defendant, but she submitted that this usage is not consistent across these provisions and that the different purpose of CPR 44.15 (to deter frivolous personal injury claims) justifies giving the term in that rule a different meaning.

Discussion

20. The term "proceedings" is not defined in the Civil Procedure Rules. As Lord Sumption explained while giving the majority judgment in *Plevin v Paragon Personal Finance Ltd (No. 2)* [2017] UKSC 23, [2017] 1 WLR 1249, its meaning in legislation must depend on the statutory context and the underlying purpose of the provision in question. However, the starting point as a matter of ordinary language is that the term "proceedings" is synonymous with "action":

> "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 the claim, and are not over until the court had disposal that claim one way or the other at whatever level of the judicial hierarchy. The word is synonymous with an action. …"

21. The issue in *Plevin* was whether an appeal constituted distinct proceedings from the proceedings in the court below for the purpose of section 46(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which was concerned with costs insurance policies. The context there was therefore different from the context in the QOCS provisions. Nevertheless, Lord Sumption confirms what I would regard in any event as the natural meaning of the term, namely that proceedings are synonymous with an action, which is not concluded until all matters before the court have been concluded. However, this is only a starting point.

22. Case law has established that the term "proceedings" as used in the QOCS rules does not bear this natural meaning in its full sense. It requires some qualification in this context in order to give effect to the purpose of the QOCS regime. Thus it does not apply to a claim made by a defendant to a personal injury claim against a third party or against another defendant for contribution (*Wagenaar v Weekend Travel Ltd* [2014] EWCA Civ 1105, [2015] 1 WLR 1968) or to a counterclaim against a personal injury claimant (*Day v Bryant* [2018] EWHC 158 (QB)). These qualifications are appropriate because such claims or counterclaims have nothing to do with the purposes of the QOCS regime, which are, first, to promote access to justice in personal injury cases by removing the deterrent of potential liability for a defendant's costs and, second, to deter frivolous personal injury claims.

23. But the QOCS regime does apply to appeals as well as to proceedings at first instance (*Blair v Wickes Building Supplies Ltd (No. 2)* [2020] EWCA Civ 17, [2020] 1 WLR 1246). There is no need in this context to qualify the natural meaning of the term, because the cost protection which a claimant needs is equally needed at the appellate stage.

24. In *Wagenaar* Lord Justice Vos (with whom Lord Justices Laws and Floyd agreed) said at [38] that "the proper meaning of the word 'proceedings' in CPR Pt 44.13 has to be divined primarily from the rules on QOCS themselves". I respectfully agree. It is these rules which provide the context within which, and demonstrate the purpose for which, the term is used. It is therefore unlikely to be helpful to seek the meaning of the term "proceedings" as used in the QOCS provisions elsewhere in the Civil Procedure Rules, where the usage is not necessarily consistent.

25. Lord Justice Vos concluded:

> "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. 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 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 Rule 44.13(1)(b) and (c) is made."

26. This is a clear decision that the term "proceedings" in CPR 44.13 refers to all of the claims made by a claimant against a single defendant, when one such claim is a claim for personal injury. Thus, in a mixed claim case, QOCS applies pursuant to the basic rule in CPR 44.14, unless one of the exceptions in CPR 44.15 or CPR 44.16 applies.

27. Ms Bell accepts that this is so. Indeed, in a case like the present (but unlike *Wagenaar*) of a single claimant and a single defendant, without complications such as third-party proceedings or counterclaims, it would be impossible to contend otherwise. The QOCS regime recognises the concept of a mixed claim and distinguishes between "the proceedings" and claims for personal injuries (using that term to encompass all claims described in CPR 44.13(1)), as is obvious from the language of CPR 44.13 ("proceedings which include a claim for damages … for personal injuries …"). Ms Bell accepted that the same is true of CPR 44.16.

28. The issue, therefore, is whether "proceedings" in CPR 44.15 should be given a different meaning from that which it bears elsewhere in the QOCS rules. That is not a promising submission. As Lord Sumption explained in *Plevin*:

> "22. … In the ordinary course, there is a presumption that the same expression used in different provisions of a statute has the same meaning wherever it appears. There is also a presumption that differences in the language used to describe comparable concepts are intended to reflect differences in meaning. But the latter presumption is generally weaker than the former, because the use of the same expression is more likely to be deliberate. …"

29. While I would accept that it is possible that the term "proceedings" has a different meaning in CPR 44.15 from that which it bears elsewhere in the QOCS rules, I would not accept that this is so unless it is necessary in order to give effect to the purposes of the QOCS rules. In general, we should proceed on the basis that the term has been used consistently across the QOCS rules unless the contrary is clearly shown. The natural meaning of the term "proceedings" should not be qualified further than the context and purposes of the QOCS regime require.

30. Ms Bell submitted that it is necessary to give "proceedings" in CPR 44.15 a narrower meaning in order to give effect to what I have described as the second purpose of the QOCS regime, namely to deter frivolous claims. It should be noted, however, that this purpose is not to deter claims which fail or are likely to fail, or even claims which are susceptible to reverse summary judgment under CPR 24. The deterrent aspect of CPR 44.15 is confined to claims which have been struck out on one of the three grounds set out in the rule. Essentially these are claims which should not have been brought in the first place, or where the claimant's conduct of the claim merits the severe sanction of striking out.

31. I would note in passing, therefore, that it may be important whether a personal injury claim has been struck out or whether it has been dismissed by way of reverse summary judgment. Sometimes defendants seek to get rid of unmeritorious claims at an early stage, without distinguishing between these two procedures. But it is only when the claim has been struck out on one of the grounds there mentioned that CPR 44.15 applies.

32. In my judgment it is not necessary to interpret "proceedings" in CPR 44.15 as referring to the personal injury claim alone in order to give effect to this deterrent purpose. CPR 44.16 enables this purpose to be achieved in a mixed claim case where the personal injury claim is struck out. Mr Lyon accepted and indeed urged this analysis upon us, albeit that this was contrary to the position taken by the claimant in the court below. Thus, in a mixed claim case where the personal injury claim is struck out at an early stage but the proceedings continue, CPR 44.16(2)(b) enables the court to order that a costs order made against the claimant may be enforced to its full extent. That is because such a case is one where "a claim is made for the benefit of the claimant other than a claim to which this Section applies", that is to say, a non-personal injury claim is made (*Brown v Commissioner of Police* at [31] to[33]).

33. There is, therefore, no reason why the judge striking out the personal injury claim should not make an order for costs and assess those costs summarily, if it is appropriate to do so. That will often be the convenient course. The question of enforcement of the order can then be deferred to the conclusion of the proceedings, to be dealt with pursuant to CPR 44.16 – or, if the surviving claim succeeds, by being set off against any damages pursuant to CPR 44.14.

34. It is true that in such a case the permission of the court must be obtained before enforcement under CPR 44.16 can take place, and that permission will only be given to the extent that the court considers it just to do so. Accordingly, it follows that a claimant in a mixed claim case where the personal injury claim is struck out is not in quite as good a position as a claimant where a personal injury claim is struck out and there is no other claim. However, as the court has power in the mixed claim case to make whatever order it considers will meet the justice of the situation, it is impossible to say that the claimant's interpretation results in injustice or defeats the purpose of the QOCS rules.

35. I respectfully disagree, therefore, with the judge's view that her interpretation is necessary to further the purposes of the QOCS regime. CPR 44.16 can bear the load which the judge envisaged could only be borne by CPR 44.15.

36. For the same reason, the defendant derives no assistance from resort to the overriding objective in CPR 1.1. CPR 1.2 requires the court to interpret the rules in order to give effect to the overriding objective, but as the objective is "to deal with cases justly and at proportionate cost", and as CPR 44.16 enables the court to make whatever order it considers just in a mixed claim case where the personal injury claim is struck out, there is no need to give "proceedings" in CPR 44.15 a different meaning from that which it bears elsewhere in the QOCS rules in order to do so.

37. The decision of this court in *Brown v Commissioner of Police* describes how the CPR 44.16 discretion should be exercised in a mixed claim case. Lord Justice Coulson (with whom Lord Justices McCombe and David Richards agreed) explained that the QOCS protection which would have been available for the personal injury claim if it had stood alone will be a relevant and often important factor to take into account:

> "57. But in such proceedings, the fact that there is a claim for damages in respect of personal injury, and a claim for damage to property, does not mean that the QOCS regime suddenly becomes irrelevant. On the contrary, I consider that, when

> dealing with costs at the conclusion of such a case, the fact that QOCS protection would have been available for the personal injury claim will be the starting point, and possibly the finishing point too, of any exercise of the judge's discretion on costs. If (unlike the present case) the proceedings can fairly be described in the round as a personal injury case then, unless there are exceptional features of the non-personal injury claims (such as gross exaggeration of the alternative car hire claim, or something similar), I would expect the judge deciding costs to endeavour to achieve a 'cost neutral' result through the exercise of discretion. In this way, whilst it will obviously be a matter for the judge on the facts of the individual case, I consider it likely that, in most mixed claims of the type that I have described, QOCS protection will – in one way or another – continue to apply. …
>
> 58. It is however important that flexibility is preserved. It would be wrong in principle to conclude that all mixed claims require discretion to be exercised in favour of the claimant, because that would lead to abuse, and the regular 'tacking on' of a claim for personal injury damages (regardless of the strength or weakness of the claim itself) in all sorts of other kinds of litigation, just to hide behind the QOCS protection (as Foskett J warned in *Siddiqui* [2018] 4 WLR 62)."

38. It is clear from this guidance that, when the court comes to consider what order to make under CPR 44.16 at the conclusion of the present proceedings, it will be able to take account of the fact that the personal injury claim was struck out on one of the grounds identified in CPR 44.16 and make whatever order is just in the light of that fact, together with all the other circumstances of the case.

Disposal

39. For these reasons I accept the submissions of Mr Lyon as I have summarised them at [18] above and would therefore allow the appeal.

40. Finally, I would like to record my appreciation of the considerable assistance received from both counsel in their clear and succinct submissions, written and oral. I pay particular tribute to Mr Lyon, who (with Mr Ryan Ross) appeared *pro bono*, instructed via Advocate, formerly the Bar Pro Bono Unit. I think it very likely that if the judge had received the same assistance as we have received in this court, she would have reached the same conclusion as we have.

Lord Justice Edis:

41. I agree.

Lord Justice Baker:

42. I also agree.