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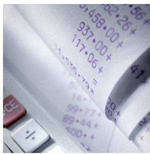
The ambit of QOCS considered (again): who can recover costs in cases outside the straightforward Claimant v Defendant scenario? - Alice Nash, Hailsham Chambers



28/01/19. In *Cartwright v Venduct Engineering Limited* [2018] EWCA Civ 1654, decided in July 2018, the Court of Appeal held that in a QOCS case with multiple defendants, the ability to recover costs from damages pursuant to CPR r.44.14(1) extended to all the defendants, not just the defendant who paid those damages. *Cartwright* has subsequently been relied upon, with conflicting results, in two County Court cases addressing the slightly different question of whether a counterclaiming defendant is entitled to the protection of QOCS in relation to all the costs of the action in which the claim and counterclaim were brought.

Multiple defendants

In *Cartwright*, the Claimant had sued several defendants for noise-induced hearing loss. He compromised his claim against certain of the defendants by way of a Tomlin order which provided for the payment of damages, and discontinued his claim against Venduct, meaning that a deemed award of costs arose in Venduct's favour. Venduct sought to recover their costs from the payment made from the other defendants.

The Court of Appeal held that there was nothing in the wording of CPR r.44(1) to suggest that the fund from which a costs order could be met was specific to damages and interest payable by the defendant seeking to enforce the costs order. The language of the rule was wide and could plainly encompass the situation in which Defendant B had an order for costs against the Claimant which did not exceed the amount of the order for damages and interest made in the Claimant's favour against Defendant A (see paragraphs 23-26 of the judgment).

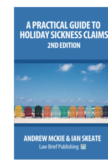
However, the Court of Appeal went on to hold that it was not possible to read the rule as permitting recovery where the damages and interest are payable pursuant to a Tomlin order. Essentially "an order for damages and interest" means what it says: it does not mean "an order, or confidential schedule to an order" or "a settlement ultimately enforceable by a court order." Such an approach would also create practical difficulties when cases were settled on a costs-inclusive basis (see paragraphs 47-48 of the judgment).

Given that there had not, in fact, been an order in the Claimant's favour in Cartwright, the Court of Appeal's reasoning in relation to the enforceability of costs under r.44.14(1) by wholly successful defendants is, strictly, *obiter*; but it does of course have considerable persuasive force. It is notable, however, that in reaching its decision the Court of Appeal stated that the purpose of QOCS was to protect claimants in personal injury cases from incurring a net loss. Is that wholly correct?

Certainly it seems clear that the rules are intended to have that effect, but the general effect of the rules is also that a wholly successful defendant cannot expect to recover any costs – the quid pro quo being that it is at no risk of paying success fees or ATE premiums. Further, if the interpretation of Cartwright in the subsequent case of *Waring* (see below) is correct, the reasoning does not appear to extend to circumstances where it is the defendant who brings in the additional party (because the additional claim is a separate claim). It might be thought that the position should be no different where the claimant happens to have chosen to sue another party at the same time – although it is of course arguable that the claimant takes such a step at his or her own risk. It would presumably, though, be open to a claimant – subject to the difficulties imposed by the limitation period – to avoid this result by pursuing the defendants sequentially, in separate sets of proceedings.

It was submitted on behalf of the Claimant, and accepted by the Court of Appeal, that the same reasoning would apply if the settlement arose as the result of acceptance of a Part 36 offer: the effect of that is that the claim is stayed, and no order of the court is required in order for the obligation to pay the settlement sum to come into effect.

However, under r.36.15(2), if a claimant has sued multiple defendants jointly or in the alternative, and wishes to accept a Part 36 offer made by one, but not all of them, then unless the other defendants consent to the acceptance of the offer, the court's permission must be obtained to accept the offer. This may afford an opportunity for the other defendants to argue that they should be paid costs from the proposed settlement; but it is not obvious whether a court, asked to grant permission for the acceptance of the offer, would have any power to order that acceptance was conditional upon the



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successful defendants being able to enforce the deemed costs order that would arise on discontinuance of the claim against them.

Counterclaiming defendants

Cartwright was relied upon in *Ketchion v McEwan* [2018] 6 WLUK 625 in support of a submission, which was accepted by HHJ Freeman, that a wide meaning was to be afforded to the term "proceedings" in the QOCS rules, such that the claim and counterclaim were to be regarded as one set of proceedings and the defendant was entitled to QOCS protection in relation to all the costs of the action. The claimant, who had succeeded both in his claim against the defendant and in defeating the defendant's counterclaim (which included a claim for personal injuries and was therefore a claim to which QOCS applied) was therefore not able to enforce the costs of his own successful claim. However, two months later in *Waring v McDonell* [2018] 11 WLUK 203, HHJ Venn reached the opposite conclusion. Following a careful analysis of *Cartwright* and *Wagenaar v Weekend Travel Ltd* [2014] EWCA Civ 1105, she concluded that whilst the claim in *Cartwright* was one claim against six defendants, such that costs could be enforced against damages by any one of the defendants, the claim and counterclaim in the instant case were two "claims" for the purposes of the rules. The defendant was entitled to QOCS protection only in relation to the costs of the counterclaim.

Leaving aside the question of whether the decision in *Cartwright* is correct, the interpretation of that decision by HHJ Venn in *Waring* is, in the author's view, to be preferred to that in *Ketchion*. There seems no reason in principle why a defendant who would ordinarily expect to pay a successful claimant's costs should be able to escape that consequence purely by bringing a counterclaim for personal injuries, and should the issue arise for decision at appellate level, it seems likely that her interpretation will be endorsed.

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