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Setting aside a Notice of Discontinuance and QOCS

Excalibur & Keswick Groundworks Ltd v McDonald (2023) EWCA Civ 18

The issues in this appeal concerned the approach of the court to the setting aside of a Notice of Discontinuance pursuant to CPR 38.4 and the interpretation of the phrase "likely to obstruct the just disposal of the proceedings", in CPR 3.4(2)(b) and 44.15(c).

The claimant/respondent brought a claim against the defendant/appellant alleging that he had been injured during the course of his employment with the defendant, as the result of the negligence and breaches of statutory duty on the part of the defendant and a second defendant, the main contractor on the building site in question.

On the morning of the trial a District Judge raised issues about inconsistencies in the claimant's evidence which led to the claimant deciding to serve Notices of Discontinuance on both defendants that morning. Following service, counsel for the defendants applied to set aside the Notices of Discontinuance (CPR 38.4) and to strike out the claim on the grounds that the claimant's conduct had obstructed "the just disposal of the proceedings", and as a result he was not entitled to the protection of qualified one-way costs shifting ("QOCS").

The District Judge concluded that the claimant, having at first put forward a conflicting account and at a very late stage clarified the position, should not be protected from QOCS exemption. On appeal, a Circuit Judge considered that the decision of the District Judge was wrong and that the appeal should be allowed.

IN BRIEF

The Court of Appeal held that a District Judge had been wrong to set aside a Notice of Discontinuance, served after the trial of a personal injury action had commenced. Accordingly, the claimant did not lose the protection of QOCS

Out of eleven grounds of appeal originally drafted, the defendant identified three points of principle or practice relating to personal injury litigation which were relevant to the appeal, namely:

- (1) The circumstances in which it was legitimate for the court to set aside a Notice of Discontinuance under CPR 38.4 in a QOCS case;
- (2) The proper approach to the power of the court to strike out a claim if "the conduct of the claimant ... is likely to obstruct the just disposal of the proceedings " (CPR 44.15(c));
- (3) Whether it was permissible for the court to use CPR 3.1(2)(m), 38.4 and 44.15 purposively to enable QOCS to be disapplied if that was consistent with, and furthered, the overriding objective.

Dismissing the appeal, the Court of Appeal held that the rationale behind the introduction of QOCS was that it provided a broad scheme of protection for claimants preventing enforcement of costs orders made against them in failed personal injury claims. A common outcome of the QOCS scheme was that a defendant who succeeded would not recover its costs from a losing claimant despite a costs order in its favour. The scope of the scheme was broad. All personal injury claimants qualified; their means were irrelevant. As was stated in *Adekun* the QOCS regime was essentially mechanical rather than discretionary so that the phrase in CPR 44.14(1) "without the permission of the court" did not preserve a general discretionary power to permit a defendant's costs enforcement beyond that expressly provided for by the permission process in CPR 44.16. That process was necessitated only by the need for the court to see whether the qualifying facts existed, such as fundamental dishonesty.

CPR 38.2(1) gave a claimant a right to discontinue all or part of a claim at any time by serving a Notice of Discontinuance subject to limited exceptions such as an interim injunction, undertaking or any interim payment when the court's permission must be given for discontinuance to be affected. What the claimant did, following an intervention by the District Judge, and in all likelihood having received legal advice, was to recognise inconsistencies as between his witness statement and the pleaded case, weigh up his prospect of success and having done so, made the decision to discontinue. It was a course of conduct taken by many litigants and did not begin to provide the powerful reasons upon which a Notice of Discontinuance could or should be set aside.

The court's power to strike out was contained in CPR 3.4. It was in this context that CPR 3.4(2) provided that the court might strike out a Statement of Case if it appeared that it was an abuse of the court's proceeding or is otherwise likely to obstruct the just disposal of the proceedings. Practice Direction 3A provides: "1.5 A claim may fall within rule 3.4(2)(b) where it is vexatious, scurrilous or obviously ill-founded."

The essence of a strike-out under this Rule was that a claimant was guilty of misconduct which was so serious that it would be an affront to the court to permit him to continue to prosecute his claim.

The appellate court accepted the contention made on behalf of the claimant that the wording of CPR 3.4(2)(b) created a high bar for a strike-out with its focus on abuse of process or a Statement of Case which was "otherwise likely to obstruct the just disposal of the proceedings".

What this claimant did was to give a different account in his witness statement from that which was contained in the Statement of Case. It was a material inconsistency and one which had the potential to undermine not only his credibility but also the viability of his claim. What it did not do was to demonstrate a determination by the claimant to pursue proceedings with the object of preventing a

fair trial. If this claimant's conduct was to be regarded as obstructing the just disposal of the proceedings, the same could be said of the conduct of many litigants who presented claims for personal injuries.

It followed that the claimant's conduct did not meet the test of being likely to obstruct the just disposal of the proceedings. It was regrettable that consideration of his differing accounts had not taken place at an earlier stage but the defendant was in possession both of the claimant's witness statement and the Statement of Case and could have applied for summary judgment. Of course, had summary judgment been obtained pursuant to CPR 24, the claimant would have been entitled to QOCS protection.

It was only if a case had been struck out that CPR 44.15(c) became engaged. It created no new principle, rather it prescribed what happened to QOCS protection when the case had been struck out. Consistent with the point that no new principle was created was the fact that it contained the same phrase ("likely to obstruct the just disposal of the proceedings") as that contained in CPR 3.4(2)(b). It added nothing to the interpretation of the earlier provision.

What the defendant had sought to do in this appeal was to remove the substantive right of the claimant to the protection provided by the broad-based and mechanical provisions of the QOCS scheme.

The full judgment is available at: [Excalibur & Keswick Groundworks Ltd v McDonald \[2023\] EWCA Civ 18 \(17 January 2023\) \(bailii.org\)](#)

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