



Neutral Citation Number: [2023] EWCA Civ 18

Case No: CA-2021-003434

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT NEWCASTLE UPON TYNE
HHJ FREEDMAN
E27YY493

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 January 2023

Before :

LORD JUSTICE PETER JACKSON
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE WILLIAM DAVIS

Between :

EXCALIBUR & KESWICK GROUNDWORKS LTD **Appellant**
- and -
MICHAEL MCDONALD **Respondent**

Paul Higgins (instructed by **Clyde & Co**) for the **Appellant**
Andrew Hogan (instructed by **Winn Solicitors**) for the **Respondent**

Hearing date: 9 November 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LADY JUSTICE NICOLA DAVIES :

1. The issues in this appeal concern 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).

Factual and procedural background

2. The claimant, born on 21 July 1965, was employed by the first defendant (“the defendant”) as a groundworker at Melbourne House in Newcastle upon Tyne. The second defendant was the main contractor who had engaged the defendant to provide a new drainage system to the wall of the house. It is the claimant’s case that he was climbing up a ladder during the course of his employment when it slipped beneath him causing him to fall and suffer injury.
3. Proceedings were issued on 20 December 2018. The Particulars of Claim dated 12 April 2019 allege negligence and breaches of statutory duty on the part of the both defendants. As to the claimant’s accident, at paragraph 1.2 it is pleaded that:

“In the course of his employment, the Claimant was climbing a ladder to put a string line on the roof in order to put drainage under the roof. The ladder was tied to scaffolding by a piece of string...”

4. In its Defence and Counter Schedule the defendant pleads that it did not provide the ladder, it provided a mobile scaffolding tower for the use of its employees. In its Defence, the second defendant pleads that ladders were not permitted to be used on the site, a scaffold platform had been provided.

5. In his witness statement, the claimant stated in respect of the ladder:

“I didn’t try to move it because I assumed that it was tied on even though I do not subsequently believe it was.... I don’t know if it hadn’t anything on the bottom to keep in in place. I climbed up about 5 to 7 rungs (about halfway up) when my accident happened.”

6. Within the claimant’s medical records one entry (4 May 2016) suggested that he had tripped over a pavement on the construction site, while another entry (5 May 2016) stated that he had fallen off scaffolding.

7. The trial was listed for a remote hearing. On the morning of the trial the District Judge raised issues as to the ownership of the ladder, and the inconsistency in the claimant’s account as between his pleaded case, his witness statement and the entries in the medical records. The District Judge asked the claimant’s counsel if the claimant wished to consider his position. The matter was adjourned for 30 minutes and the claimant made the decision to discontinue. As a result, Notices of Discontinuance were served 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”).

8. The District Judge determined the application in the absence of any citation of authority. It would appear that she did not specifically address the question of whether or not the Notices of Discontinuance should be set aside but proceeded on the basis that they would be and considered the issue of the removal of QOCS protection pursuant to CPR 44.15(c). She noted that the claimant had dropped his claim at the *“eleventh hour and fifty ninth minute ... the inevitable outcome of which would be to increase Costs and take up additional Court time and resources by virtue of additional listings and hearing, using time of both Court staff and the judiciary, in addition to the incurring of today’s costs and use of court resources.”* The District Judge stated that:

“I do not consider that his conduct in that context can be otherwise than to obstruct the just disposal of the proceedings. The matter has been drawn out and I am satisfied costs have incurred needlessly. I am entirely satisfied that had his case been pleaded in accordance with the facts known only to the Claimant, as clarified this morning by Counsel on his behalf, the inevitable consequences would have included, from a significantly earlier time, the prospects of either being struck out on application for summary judgment or, indeed, of the court’s own motion.”

9. At [10] 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. She was satisfied that it was:

“... progressive of the overriding objective, including but not limited to dealing with matters proportionately having regard to the amounts involved, and use of court resources, that it is just and convenient that the court exercise its discretion to set aside the notice of discontinuance with the consequence of disallowing the Claimant protection from costs that would otherwise avail”

10. The claimant appealed the decision and the case was heard by HHJ Freedman (“the Judge”) in the County Court in Newcastle upon Tyne. On 29 November 2021 the Judge handed down a judgment allowing the appeal. The first two grounds of appeal concerned the interpretation and application of CPR 38.4, while grounds 3 and 4 related to the interpretation and application of CPR 3.4(2)(b) and 44.15. In a judgment, notable for its clarity, the Judge essentially addressed two questions: (i) was the claimant guilty of such conduct as to be likely to obstruct the just disposal of the proceedings? and (ii) when can or should the court set aside a Notice of Discontinuance?
11. As to the first question, the Judge noted at [56] that there is no definitive interpretation as to what amounts to: “obstructing the just disposal of proceedings” but stated that he derived “considerable assistance” from the Court of Appeal decision in *Arrow Nominees v Blackledge and Others [2001] B.C. 591*. The Judge stated:

“..... Adopting the approach of the Court of Appeal, in that case, the question is whether the Appellant’s conduct in this case rendered a just or fair trial impossible. To put it another way, the question needs to be asked as to whether his conduct corrupted the trial process so that a just result could not be achieved.

57. Looking at the matter in that way, it seems to me that the Appellant’s conduct in this case was very far removed from what can properly be described as conduct likely to obstruct the just disposal of the proceedings. What the Appellant did in this case was to offer a somewhat different account in his witness statement from that which appeared in the Statement of Case insofar as he was not able to confirm the averment to the effect that the ladder was tied to the scaffold with a piece of string. Indeed, to the contrary, it emerged from his witness statement that he rather thought that the ladder was untied. That was a material inconsistency which undermined the credibility and viability of his claim. It might well have been sufficient to justify judgment being entered pursuant to CPR 24.2(a)(i) on the grounds that the Claimant had no real prospect of succeeding on the claim. However, the mere fact that the claim became unsustainable because of differing accounts as to the precise circumstances of the accident, to my mind, is wholly outwith what is contemplated by conduct likely to obstruct the just disposal of proceedings.....

59. If the Appellant’s conduct is to be regarded as such to obstruct the just disposal of proceedings, I tend to agree with Mr Hogan that the same could be said about the conduct of a multitude of litigants who present claims for personal injuries. As I have already observed, it seems to me that the Rules envisage conduct which jeopardises the fairness of the trial process not run of the mill conduct which amounts to no more than an unreliable or inconsistent account of an accident.”

12. At [61] the Judge observed that the court has a wide and unfettered discretion to set aside a Notice of Discontinuance but:

“...since a Claimant can discontinue as of right (subject to the exceptions laid down in CPR 38.2(2)) and the permission of the Court is not required, there would, as it seems to me, need to be powerful and cogent reasons why a notice of discontinuance should be set aside. Even in the absence of any authority, for my part, I would conclude that the mere fact that, if the Notice of Discontinuance was not set aside, a Claimant would be entitled to QOCS protection, without more, would not justify setting aside a Notice of Discontinuance.”

13. The Judge considered the authorities of *Shaw v Medtronic & Others* [2017] EWHC 1397 and *Mabb v English* [2018] 1 Costs LR 1, decisions respectively of Lavender J

and May J. The Judge at [32] recognised that in *Shaw* the principal reason for serving the Notice of Discontinuance was to maintain QOCS protection but noted that Lavender J did not consider that to be a legitimate basis for setting aside the Notice of Discontinuance. He stated that Lavender J concluded that “...*absent abuse of process or something similar, such as egregious conduct, a Court would not be justified in setting aside a Notice of Discontinuance.*” The Judge agreed with the reasoning of Lavender J and further stated at [65] that “... *if serving a Notice of Discontinuance is perfectly legitimate in these circumstances and within the Rules, then there can be no proper basis for setting aside the Notice of Discontinuance unless, as Lavender J observes, there was an abuse of process or something akin to that.*” He also agreed with the observations of May J to the effect that there was no inherent unfairness in a claimant taking advantage of the result that the Rules permit and that there would need to be some extreme form of conduct on the part of a claimant before a Notice of Discontinuance should be set aside.

14. At [72] the Judge identified what he described as the “correct approach” which should have been taken by the District Judge namely:

“...consider first whether, in its discretion, the Court should set aside the Notices of Discontinuance. With the benefit of the authorities, the District Judge would, I venture to think, have concluded that the mere fact that the Appellant was seeking to retain QOCS protection was not a reason to set aside the Notices of Discontinuance. Further, she would have been persuaded that there was nothing about the conduct of the Appellant which was so out of the ordinary as to warrant the unusual, if not exceptional, course of setting aside the Notices of Discontinuance. Had she reached that conclusion, then there would have been no legitimate basis for her to go on to consider the exceptions to QOCS.”

15. The Judge made the further observations at [73]:

“If, however, contrary to the above, the District Judge had decided that the Notices of Discontinuance ought to be set aside, she then ought to have considered the basis for the application for the claim to be dismissed. She could legitimately have entered Judgment on the grounds that the Claimant had no real prospect of succeeding on the claim. If summary Judgment had been entered in favour of the Defendants, then the exceptions to QOCS could not have been invoked. What she was not entitled to do, for the reasons set out above, was to strike out the Statement of Case on the basis that the Statement of Case was likely to obstruct the just disposal of the proceedings. I should make it clear that, in my view, the Statement of Case was no more likely to obstruct the just disposal of the proceedings as [sic] the conduct of the Appellant himself.”

16. The Judge considered that the decision of the District Judge was wrong and that the appeal should be allowed.

Grounds of appeal

17. Eleven grounds of appeal were originally drafted and permission was given on all. Realistically, the appellant identifies three points of principle or practice relating to personal injury litigation which are relevant to the appeal namely:
- (1) The circumstances in which it is 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 is 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 is consistent with, and further, the overriding objective.

The Civil Procedure Rules 1998

18. The Rules relevant to this appeal are as follows:

“Power to strike out a statement of case....

3.4 (2) The court may strike out a statement of case if it appears to the court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order....

Right to discontinue claim

38.2 - (1) A claimant may discontinue all or part of a claim at any time.

(2) However—

(a) a claimant must obtain the permission of the court if he wishes to discontinue all or part of a claim in relation to which —

(i) the court has granted an interim injunction; or

(ii) any party has given an undertaking to the court;

(b) where the claimant has received an interim payment in relation to a claim (whether voluntarily or pursuant to an order under Part 25), he may discontinue that claim only if—

(i) the defendant who made the interim payment consents in writing; or

(ii) the court gives permission; ...

Right to apply to have notice of discontinuance set aside

38.4 - (1) Where the claimant discontinues under rule 38.2(1) the defendant may apply to have the notice of discontinuance set aside.

(2) The defendant may not make an application under this rule more than 28 days after the date when the notice of discontinuance was served on him.

Liability for costs

38.6 - (1) Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom he discontinues incurred on or before the date on which notice of discontinuance was served on him....

Effect of qualified one-way costs shifting

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 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.

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

44.15 – (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.”

The appellant's/defendant's submissions

19. The defendant contends that the circumstances in which a Notice of Discontinuance may be set aside are unconstrained as CPR 38.4 confers a wide discretion. The Judge erred in stating that such a Notice could not be set aside unless the conduct was “so cynical or egregious as to justify setting aside...”. The Rule provides a broad discretion which can be applied purposively in accordance with the overriding objective which includes ensuring that the case is dealt with justly and at proportionate costs, allocating to it an appropriate share of the court's time and resources.
20. A court should approach CPR 38.4 differently in a personal injury claim to which QOCS applies because of the overriding objective which includes within it the saving of court resources. This claimant was not preventing the future wastage of court's resource by discontinuing as his actions were so late in the proceedings that almost all of the judicial resources required to deal with the case had been spent.
21. There is no duty on any defendant to require a claimant's case to be regularised which would have been the consequence of a defence application for summary judgment. The duty was upon the claimant to regularise his case.
22. Interpretation of the “just disposal of the proceedings” in a strike-out application pursuant to CPR 3.4(2) requires a textured analysis. It is not confined to the question of whether a fair trial is impossible, and it was the error of the judge in determining that strike out was available only if the relevant conduct rendered a fair trial impossible. The defendant contends that conduct which impedes or hinders the just disposal of the proceedings to a high degree would be sufficient for a strike-out. If a litigant conducts themselves in a way that impedes the just disposal of the proceedings to a high degree they should not be able to retain their QOCS protection.
23. Further, in *Arrow Nominees* the litigant wished to continue his claim, unlike the present claimant who had resolved not to continue his claim. It is the appellant's contention that different principles must apply when one is seeking to drive a litigant from “the judgment seat” rather than dealing with, effectively, issues of enforceability of costs in respect of a litigant who cannot reasonably proceed with his claim and no longer wishes to continue with it.

24. CPR 44.15(c) is to be interpreted purposively by reference to CPR 1 and the overriding objective. The resolution of the proceedings should be carried out in a manner consistent with the overriding objective. Running a threadbare case to the doors of the court then discontinuing on the morning of the trial is the antithesis of such an objective.

The respondent's/claimant's submissions

25. It is the claimant's contention that the defendant had no continuing legitimate interest in the continuation of the proceedings, and its purpose in seeking to have the Notice of Discontinuance set aside was to resurrect the proceedings for the purpose of striking them out. It was not done for reasons of case management.
26. As to strike-out, the claimant submits that the essence of an application pursuant to CPR 3.4 is for a legitimate case management purpose in order to stop proceedings continuing to a trial, prevent the further waste of resources on proceedings in which the claimant has forfeited the right to have determined and to avoid an unjust determination where a party's conduct has made a safe determination impossible. A case management power should not be used with the intention of depriving the claimant of substantial legal rights.
27. The applicability of CPR 3.4(2)(b) arises from a focus on whether the claimant's conduct was such as to constitute an abuse of process or otherwise obstruct the just disposal of the proceedings. The essence of strike-out under CPR 3.4(2)(b) is that the claimant is guilty of misconduct which is so serious that it would be an affront to the court to permit him to continue prosecuting his case. Put another way, there has been conduct sufficiently egregious such that the claimant has forfeited his right to a trial. There is no principle, enunciated in the authorities, that bringing a case or maintaining a case that it is more likely than not to be lost either at trial or on an application for summary judgment is conduct that is an "abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings."
28. The claimant submits that CPR 44.15(c) does not provide an independent power to strike out a claim but rather deals with the consequences for a claimant's costs protection where it has been struck out. CPR 44.15 has been deliberately drafted to mirror the provisions of CPR 3.4 and was drafted on the premise that by the time of its application, the proceedings have been struck out. The key phrase "obstruct the just disposal of the proceedings" is in identical terms in each of the rules.
29. It is an unexceptional feature of the QOCS scheme that a defendant will win at trial because the claimant misjudged the strength of his case but the defendant must still bear its own costs. The policy behind the introduction of QOCS into the civil justice system is premised on the basis that defendants who win at trial, save for a very narrow category of exceptions, including the fundamental dishonesty exception, will have to bear their own costs as the practical consequence.

Discussion

QOCS

30. The QOCS scheme was part of the package of reforms introduced on 1 April 2013 following the implementation of the Legal Aid Sentencing Punishment of Offenders Act 2012 together with amendments to the Civil Procedure Rules 1998. Its focus was upon personal injury claimants, and it introduced a bar against enforcement of costs orders made against them should their claims fail.
31. The purpose of the QOCS regime was identified by Vos LJ (as he then was) in *Wagenaar v Weekend Travel Ltd (trading as Ski Weekend)* [2015] 1 WLR 1968 at paras 26 and 36:

“26. It is worth mentioning also that, as was pointed out in argument, the introduction of the QOCS regime is part of a wholesale reform of the funding of personal injury litigation. It is just one of a raft of interconnected changes. If QOCS were to be struck down, there would need to be a complete rethink of the entire Jackson reform programme as it affects personal injury litigation. It will be noted also that the changes in respect of the recoverability of success fees under conditional fee agreements and of ATE premiums were effected by primary legislation as they needed to be: see sections 44 and 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which amended the CLSA 1990.

...

36. I should start by referring briefly to the Jackson Report, pursuant to which QOCS was introduced ... the rationale for QOCS ... was that 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, Sir Rupert thought, far preferable to the previous regime of recoverable success fees under CFAs and recoverable ATE premiums.....”

32. It is accepted that the QOCS regime represented a major departure from the traditional principle that costs follow the event. The regime provides, subject to limited exceptions (CPR 44.15 and 44.16), that a claimant in a personal injury claim is able to commence proceedings knowing that if they are unsuccessful they will not be obliged to pay the successful defendant’s costs.
33. In *Adelekun v Ho* [2021] 1 WLR 5132 the Supreme Court (paras 1 to 5) considered the QOCS regime and stated:

“1....There has always been , and probably always will be, an inherent inequality of arms between claimants and defendants in personal injuries ... cases. This is because the defendants in most cases have the benefit of insurance or, in the case of the NHS, large resources, whereas claimants are in general ordinary members of the public, only a few of whom have the benefit of legal expenses insurance or other sources for the

funding of litigation. English procedural rules have for many years sought to ameliorate this imbalance, in particular by rules about costs.....

3. The central rationale behind QOCS was that the burden falling on defendants and their insurers would be less if they were to forego costs recovery from claimants when the claim was dismissed than the burden they were forced to bear when they had to pay claimants not only their costs but also recoverable success fees and ATE premiums when the claimants were successful. The effect of success fees on defendants was replaced by a 10% uplift in certain categories of recoverable damages: see *Simmons v Castle (Practice Note) [2013] 1 WLR 1239*, para 50. Removing the risk of the claimant becoming liable to pay costs if they lost the claim was expected to enable claimants to do without ATE insurance, at least for covering defendants' costs. But costs recovery by defendants was not to be removed entirely. Responses to the Government's consultation expressed concern that adopting such an inflexible stance would mean that there would be no constraints on claimants pursuing dishonest or hopeless claims, and little incentive on claimants to settle. Hence the inclusion of "Qualified" in the title.

4.nothing in the QOCS scheme affects in any way (directly at least) the orders which a court may make in favour of defendants in PI cases, applying the general rules in CPR Pt 44, the scheme focuses entirely upon what a defendant can do by way of enforcement of a costs order in its favour once obtained."

34. The rationale behind the introduction of QOCS is that it provides 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 is that a defendant who succeeds will not recover its costs from a losing claimant despite a costs order in its favour. The scope of the scheme is broad. All personal injury claimants qualify, their means are irrelevant. As was stated in *Adelekun* (para 33) the QOCs regime is 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.

Notice of Discontinuance

35. CPR 38.2(1) gives 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 effected.

36. CPR 38.4 provides a procedure and a time limit for a defendant to apply to have a Notice of Discontinuance set aside. In approaching applications to set aside a Notice, the court has a discretion which should be exercised so as to give effect to the overriding objective of dealing with a case justly and at a proportionate cost. In *Sheltam Rail Company (Proprietary) Ltd v Mirambo Holdings Ltd* [2008] EWHC 829 (Com) at para 34 Aikens J stated in respect of CPR 38.4(1):

“The working of the Rule does not impose any particular test that has to be satisfied before the court will set aside a notice of discontinuance that has been issued under 38.2(1) without the court’s permission...”

37. Henderson J (as he then was) in *High Commissioner for Pakistan in the United Kingdom v National Westminster Bank* [2015] EWHC 55 (Ch) stated at para 46:

“... I consider that the court should approach an application to set aside a notice of discontinuance under CPR rule 38.4(1) on the basis that the court has a discretion which it should exercise with the aim of giving effect to the overriding objective of dealing with the case justly and at proportionate cost. If the facts disclose an abuse of the court’s process that will, no doubt, continue to be a powerful factor in favour of granting the application but it would, in my view, be wrong to treat abusive process as either a necessary or an exclusive criterion which has to be satisfied if the application is to succeed.”

38. Given the breadth of the discretion accorded to the court to set aside a Notice of Discontinuance, coupled with the fact that a claimant can discontinue as of right subject to limited exceptions, in my view the Judge was right to state that there need to be powerful reasons why a Notice of Discontinuance should be set aside. Further, I agree with the reasoning of Lavender J in *Shaw* and May J in *Mabb* that evidence of abuse of the court’s process or egregious conduct of a similar nature is required on an application which has the effect of depriving a claimant of his right to discontinue.
39. I do not accept the defendant’s contention that a court is required to approach CPR 38.4 differently in a personal injury claim to which QOCS applies. If that were so, it would in my view defeat the purpose of the QOCS regime which is an attempt to correct the financial imbalance as between claimants and defendants in personal injury claims.
40. It is of note that the defendant has not alleged that the claimant was or might be fundamentally dishonest. The defendant’s purpose in seeking to set aside the Notice of Discontinuance was in order to facilitate an application to strike out the claim and thereafter seek an order for costs in favour of the defendant.
41. What the claimant did, following an intervention by the District Judge (para 7 above), 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 is a course of conduct taken by many litigants and in my judgment does not begin to provide the powerful reasons upon which a Notice of Discontinuance could or should be set aside.

Strike-out

42. The court's power to strike out is contained in CPR 3.4 which is to be found in Part 3 of the Civil Procedure Rules, section 1 of which is entitled "Case Management". It is in this context that CPR 3.4(2) provides that the court may strike out a Statement of Case if it appears that it is 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."
43. The essence of a strike-out under this Rule is that a claimant is guilty of misconduct which is so serious that it would be an affront to the court to permit him to continue to prosecute his claim.
44. In *Arrow Nominees v Blackledge and others* [2001] BC 591 which involved the falsification of disclosed documents, Chadwick LJ in considering a strike-out application under s.459 of the Companies Act 1985 stated at para 54:

"... But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled - indeed, I would hold bound - to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."
45. In *Masood v Zahoor Practice Note* [2009] EWCA Civ 650 the Court of Appeal considered *Arrow Nominees* and stated at paras 71 and 73:

"71. In our judgment, this decision is authority for the proposition that, where a claimant is guilty of misconduct in relation to proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute his claim, then the claim may be struck out for that reason. In the *Arrow Nominees* case [2000] 2 BCLC 167, the misconduct lay in the petitioner's persistent and flagrant fraud whose object was to frustrate a fair trial. The question whether it is appropriate to strike out a claim on this ground will depend on the particular circumstances of the case. It is not necessary for us to express any view as to the kind of circumstances in which (even where the misconduct does not give rise to a real risk that

a fair trial will not be possible) the power to strike out for such reasons should be exercised. There is a valuable discussion of the principles by Professor Adrian Zuckerman in his Editor's Note entitled "Access to Justice for Litigants who Advance their case by Forgery and Perjury" in (2008) 27 CJQ 419.

....

73. One of the objects to be achieved by striking out a claim is to *stop* the proceedings and *prevent* the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined."

46. In *Hughes Jarvis Ltd v Searle* [2019] 1 WLR the Court of Appeal considered earlier authorities including *Arrow Nominees* and *Masood*, Patten LJ stated at para 47:

"Although as these judgments make clear, the exercise of the strikeout power contained in CPR r 3.4(2) does involve as a relevant consideration wider questions such as the use of court time, the proper exercise of the jurisdiction will usually depend upon conduct by the claimant or other party which makes the conduct of a fair trial and therefore a judgment on the merits practically impossible. In *Arrow Nominees* [2000] 2 BCLC 167 where the petition was struck out the forgery of the disclosed documents coupled with the petitioner's own false evidence made it impossible for the trial judge to distinguish between forged and authentic evidence and created a real risk of substantial injustice."

47. The authorities are consistent in their approach not only as to the wider approach which would include consideration of the overriding objective but also as to the serious nature of such conduct as would warrant a strike-out.
48. I accept the contention made on behalf of the claimant that the wording of CPR 3.4(2) (b) creates a high bar for a strike-out with its focus on abuse of process or a Statement of Case which is "otherwise likely to obstruct the just disposal of the proceedings". In addressing the issue of whether the claimant was guilty of conduct which is likely to obstruct the just disposal of the proceedings the Judge, relying upon the authority of *Arrow Nominees*, at [56] posed the relevant questions as follows: "whether the appellant's conduct in this case rendered the just of fair trial impossible or whether his conduct corrupted the trial process so that a just result could not be achieved". At [59] he stated that what the Rules envisage is conduct "which jeopardises the fairness of the trial process".
49. I accept the contention made on behalf of the defendant that the approach of the court to this issue, as identified by the Court of Appeal in *Arrow Nominees*, was not whether the litigant's conduct rendered a just or fair trial *impossible*. Reflecting the approach of the court in *Arrow Nominees*, in particular as stated at [54], I would formulate the question thus: is the litigant's conduct of such a nature and degree as to corrupt the trial process so as to put the fairness of the trial in jeopardy? In my

judgment, the claimant's conduct did not begin to meet the degree of seriousness which is envisaged in this formulation.

50. 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 is to be regarded as obstructing the just disposal of the proceedings, the same could be said of the conduct of many litigants who present claims for personal injuries.
51. It follows, and I so find, that the claimant's conduct did not meet the test of being likely to obstruct the just disposal of the proceedings. It is 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 be entitled to QOCS protection.

CPR 44.15(c)

52. It is only if a case has been struck out that CPR 44.15(c) becomes engaged. It creates no new principle, rather it prescribes what happens to QOCS protection when the case has been struck out. Consistent with the point that no new principle is created is the fact that it contains the same phrase ("likely to obstruct the just disposal of the proceedings") as that contained in CPR 3.4(2)(b). It adds nothing to the interpretation of the earlier provision.
53. What the defendant has sought to do in this appeal is to remove the substantive right of the claimant to the protection provided by the broad-based and mechanical provisions of the QOCS scheme. For the reasons given, and subject to the views of Peter Jackson LJ and William Davis LJ, it has failed to do so and the appeal is dismissed.

William Davis LJ:

54. I agree.

Peter Jackson LJ:

55. I also agree.