IN THE NEWCASTLE UPON TYNE COUNTY COURT
(On appeal from District Judge Searl)

No. E27YY493

Barras Bridge
Newcastle upon Tyne
NE1 8QF

Date of Hearing:15 October 2021

Before:

HIS HONOUR JUDGE FREEDMAN

B E T W E E N :

MICHAEL McDONALD — Appellant/ Claimant

- and -

EXCALIBUR & KESWICK GROUNDWORKS LTD

Respondent/ First Defendant

- and -

INTERSERVE PLC — Second Defendant

MR A. HOGAN (instructed by Winn Solicitors Ltd) appeared on behalf of the Appellant

MR P. HIGGINS (instructed by Clyde & Co) appeared on behalf of the Respondent.

J U D G M E N T

JUDGE FREEDMAN: 29 November 2021

INTRODUCTION

1 This is a "rolled-up" Permission to Appeal/ Appeal Hearing against the decision of District Judge Searl ("the District Judge") made on 17 June 2021 whereby she set aside Notices of Discontinuance served by the Appellant/Claimant (hereafter the Appellant) and struck out the Appellant's claim for damages for personal injuries. The consequence of the District Judge's decision was that, pursuant to CPR 44.15, the Appellant lost Qualified One-Way Costs Shifting ("QOCS") protection, with the result that the Orders for costs made against the Appellant were enforceable against him.

2 The Orders, which were made on the day of the Trial, related to both the First and Second Defendants. Necessarily, therefore, the Appeal named both the Defendants as, respectively, First and Second Respondents. In the event, the Appeal involving the Second Respondent was compromised. Accordingly, this hearing involved only the First Defendant (hereafter the Respondent).

3 The essence of the Appeal is that the Court should not have granted the Respondent's application to set aside the Notice of Discontinuance. Whilst it is accepted that the court has a discretion pursuant to CPR 38.4(1) to set aside a Notice of Discontinuance, it is submitted that the grounds upon which the Judge elected to do so in this instance, namely, that the Appellant's conduct was likely to obstruct the just disposal of the proceedings was wholly unjustified. Further, and as an extension of the argument in relation to the setting aside of the Notice of Discontinuance, it is submitted that the District Judge erred in striking out the claim on the same grounds and thereby depriving the claimant of his entitlement to QOCS protection.

4 The Respondent not only opposes the appeal, but (and somewhat belatedly) it has also filed a Respondent's Notice to the effect that, in the event that permission to appeal is granted, the Court should transfer the appeal to the Court of Appeal pursuant to CPR 52.23(1). It is said

that the Appeal raises an important point of principle and that clarification of the issue by the Court of Appeal would be of general assistance.

THE CLAIM

5 On 4 May 2016, the Appellant (born 21 July 1965) sustained fractures to his left shoulder and heel as a result of an accident during the course of his employment with the Respondent. At the material time, the Appellant was working as a Groundworker at Melbourne House in Newcastle-upon-Tyne. The Second Defendant was the main contractor on site. The Respondent had been engaged by the Second Defendant to provide a new drainage system to an existing wall.

6 At the time of the accident, the Appellant was climbing a ladder for the purposes of placing a stringline on the roof so as to install a drainage pipe. The ladder apparently slipped causing the Appellant to fall approximately five feet to the ground. In the Statement of Case, it was pleaded that, "*The ladder was tied to scaffolding by a piece of string*". His case was that there was a failure adequately to secure the ladder to the scaffolding, amounting to negligence at Common Law and breaches of various statutory duties.

7 Liability was firmly denied by both Defendants on the grounds that there was no need for the Appellant to use ladders, there being an adequate scaffolding platform available .Further and in any event, insofar as the ladders were inadequately secured, it was argued that such was the Appellant's own failure. Both defences pointed to various inconsistencies in the Appellant's pleaded case.

THE HEARING

8 At the outset of the hearing, the Respondent's counsel, Mr Higgins (who appears for the Respondent in this Appeal) raised a preliminary matter in relation to the tying of the ladder.

He pointed out that notwithstanding what was pleaded in the Particulars of Claim, in his witness statement, the Appellant stated as follows:

> "… the ladder I used in my accident was not secured … I did not try to move it because I assumed it was tied, even though I do not actually believe that it was.

Plainly, therefore, there was a tension between what was asserted in the pleading and what the Appellant stated in his witness statement.

9 The Appellant's counsel (with the tacit support of the District Judge) was invited to clarify the matter. Ms Brewis (who does not represent the Appellant in this Appeal) indicated that she had raised the matter with the Appellant prior to the commencement of the trial. Apparently, the gist of the Appellant's instructions was that he was unable to "say for certain if it was tied with string or not …" On that basis, Ms Brewis informed the Court that she was not inclined to seek to amend the Statement of Case. Mr Higgins made it clear that it would be his intention to submit that the claim could not succeed on the case as pleaded, given the inconsistency between the pleading and what the Appellant was now saying about the matter. Reading the transcript, the distinct impression is gained that the District Judge was inclined to agree with the stance adopted by Mr Higgins. She also intimated that she would not be inclined to allow an amendment to the pleadings at this very late stage. As a result of this exchange, Ms Brewis was afforded time to take further instructions from the Appellant.

10 After taking further instructions, Ms Brewis informed the Court that her instructions were to discontinue the claim against both Defendants. Notices of Discontinuance were duly filed.

11 There then followed oral argument as to whether the Appellant should be permitted to file Notices of Discontinuance. In a nutshell, Mr Higgins submitted that the inherent weakness of the Appellant's case was such that it should never have been pursued. More specifically, Mr

Higgins argued that, if the Appellant had made it clear, from the outset, that he had not checked to see whether the ladder was secure, there would have been an application for summary judgment. The result would have been that the costs incurred subsequent to the service of the defence would have been avoided. On that basis, Mr Huggins submitted that the Appellant was guilty of conduct which was likely to obstruct the just disposal of the proceedings. In such circumstances, he argued that the Appellant was not deserving of the protection of QOCS and that his conduct was such as to justify the Court setting aside the Notice of Discontinuance. He invited the Court then to strike out the claim and to disapply QOCS.

12 Ms Brewis argued that, far from obstructing the just disposal of the proceedings, the Appellant had acted in an entirely appropriate way in discontinuing the claim and not wasting the Court's time. The submission was to the effect that, given the indications of the District Judge and the advice which she had received, the Appellant had acted in an entirely reasonable way by discontinuing proceedings. In those circumstances, it was submitted that it would be unfair and unjust to permit an order to be made which resulted in orders for costs being enforced against him. The District Judge was, therefore, invited not to set aside the Notices of Discontinuance.

THE RULES

13 Before turning to the judgment of the District Judge, and in order to understand its context, it is necessary to set out the three applicable rules in the CPR. First, CPR 38.2 provides as follows:

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

There are circumstances, however, where a Claimant requires the permission of the Court if he wishes to discontinue all or part of a claim. Such is the position, for example, where a

Claimant has received an interim payment unless the Defendant who made the interim payment consents in writing. It is appropriate to refer to this exception to the general rule, at this stage, because Mr Higgins, on behalf of the Respondent, seeks to argue that the consequences of this exception should be considered in the context of the criteria to be applied when a Court is invited to set aside a Notice of Discontinuance.

14 CPR 38.6 provides:

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

Any such costs order is, of course, subject to the QOCS regime and it is this matter which lies at the heart of this appeal.

15 CPR 38.4 provides as follows:

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

It is acknowledged by both parties that, whilst the rule provides a procedure and time limit for a defendant to apply to have a notice of discontinuance set aside, it does not in any way fetter the discretion of the Court. It follows that the overarching consideration of the Court must be the overriding objective, but, of course, the correct approach must be informed by previous, binding judicial decisions.

16 In the event that a defendant is successful in setting aside a Notice of Discontinuance, it must be almost inevitable that there then will be an application to strike out the claim; and then to seek to enforce any order for costs made in favour of the defendant. Such, of course, was the

situation which obtained in the instant case. Thus, it is necessary to look first at the Court's power to strike out a statement of case. CPR 3.4(2) provides as follows:

> "(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 of defending the claim;
>
> (b) that the statement of case is an abuse of the court's process was otherwise likely to obstruct the just disposal of the proceedings …"

As stated at [3] above, the District Judge struck out this case because she found that the just disposal of the proceedings was likely to be obstructed.

17 Once proceedings have been struck out, in the context of a claim for personal injuries, the next consideration is whether any of the exceptions to QOCS should be engaged. It should be observed, in passing, that, where QOCS applies, orders for costs can only be enforced without the permission of the Court to the extent that the amount recovered by way of damages does not exceed the amount claimed in costs. CPR 44.15 sets out the exceptions as follows:

> "(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 as an abuse of the court's process; or
>
> (c) the conduct of –
>
> (i) the claimant; or
> …
>
> is likely to obstruct the just disposal of the proceedings."

It is worthy of note that, whereas CPR 44.15 refers to *the conduct of the claimant,* CPR 3.4 makes reference only to *the statement of case*.

19 CPR 44.16 is concerned with the enforcement of costs orders where the Claimant has been found to be *fundamentally dishonest*. Such does not arise in the instant case, but I mention it because this provision of the Rules was referred to in the course of argument.

THE JUDGMENT

18 I should observe at the outset that the District Judge, of necessity, had to deliver an *ex-tempore* judgment, with very limited time for consideration and reflection, after hearing brief submissions from counsel. It is also the case that no authorities were cited to the District Judge. This was wholly understandable, given the circumstances in which, first, the Notices of Discontinuance were filed and, secondly, the applications were made to set aside the Notices of Discontinuance. Accordingly, no criticism is to be levelled against counsel for not making references to any case law, but the fact remains that the District Judge was required to make a decision without having the benefit of any guidance from the Higher Courts.

19 In the early part of her judgment, understandably, the District Judge focused on the apparent inconsistency which emerged from the Particulars of Claim to the effect that the ladder was attached by a piece of string in contrast to what the Claimant said in his statement, namely that he assumed the ladder was tied but subsequently did not believe that to be the case.

20 She described the two statements as being *mutually conflicting*: she was plainly right to do so. It is clear that this material inconsistency as between the averments in the Statement of Case

and the contents of the Claimant's statement was the basis for her decision both to strike out the claim and to disapply QOCS.

21 In determining the application to disapply QOCS, the District Judge accepted the submission of Mr Higgins that the correct test to apply was *whether the Claimant is deserving of the QOCS shield*. The District Judge went on to make reference to the overriding objective, saying this,

> "It is the claimant's case to progress and his obligation to assist the Court in promotion of the overriding objective, including narrowing the issues and dealing with matters proportionately. He chose, as he is able so to do, to drop his claim at the eleventh hour and fifty nineth minute having made an application in May 2021, the inevitable outcome of which would be to increase Costs and take up additional Court time and resources by virtue of additional listings and hearings, using time of both Court staff and the judiciary, in addition to the incurring of today's costs and use of court resources."

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22 The District Judge went on to conclude that the Claimant's conduct was such as to be likely to obstruct the just disposal of the proceedings. In posing a question as to whether the Claimant was *deserving of leniency in exercise of judicial discretion as to costs*, she decided, unequivocally, that this Claimant was not deserving of such protection. In coming to that view, she made it clear that she had regard to the overriding objective.

GROUNDS OF APPEAL

23 Mr Hogan advances four separate grounds of appeal although there is inevitably some overlap. The first two grounds of appeal concern the interpretation and application of CPR 38.4. Grounds 3 and 4 relate to the interpretation and application of CPR 3.4(2)(b) and 44.15. It is convenient to consider grounds 1 and 2 together and, similarly, grounds 3 and 4.

24 Ground 1 is as follows:

> "… she should have directed herself that late revaluation of the merits of a case by a Claimant or discontinuance to preserve a Claimant's QOCS protection are not adequate grounds in law to set aside Notices of Discontinuance";

and ground 2:

> "… the service of the Notices was a proper procedural step which the Appellant was entitled to take and conversely there was no basis such as an abuse of process upon which the Notices could properly be set aside."

25 In relation to grounds 1 and 2, the first point made by Mr Hogan is that the District Judge did not address, at the outset, the question as to whether there were grounds for setting aside the Notices of Discontinuance. Instead, she focused purely on the question as to whether the Claimant was deserving of QOCS protection. Mr Hogan submits that there should have been a sequential approach, namely, first, to consider whether there were proper grounds to set aside the Notices of Discontinuance and, if so, the District Judge should then, after striking out the claims, have gone on to consider whether QOCS protection should be disapplied. It does seem to me to be clear from her judgment that the District Judge treated the setting aside of the Notices of Discontinuance as a formality, and, instead, asking herself only the question as to whether the Claimant was deserving of QOCS protection.

26 Mr Hogan submits that, if the District Judge had properly considered the legitimacy of the Appellant filing Notices of Discontinuance, on the basis that he no longer had confidence in the success of his claim, there would have been no proper grounds for setting aside the Notices of Discontinuance. It is his contention that filing a Notice of Discontinuance in such circumstances is an *unexceptional use of the power of a discontinuance*. He acknowledges that it was permissible for the District Judge to have in mind that the reason why the Claimant had filed Notices of Discontinuance was in order to preserve his QOCS protection,

but he submits that that was the Appellant's entitlement; and, in any event, it did not provide a legitimate basis for setting aside the Notices of Discontinuance. Mr Hogan submits that just because the Appellant elected not to proceed with his claim on the morning of the trial did not deprive him of his entitlement to file Notices of Discontinuance. Indeed, Mr Hogan argues that, absent abuse of process or something analogous to such conduct, a Court should not set aside Notices of Discontinuance simply to prevent a Claimant from having QOCS protection.

27 Mr Hogan relies on two authorities in support of the proposition that it is permissible and acceptable to serve a Notice of Discontinuance where it is recognised that the claim has little prospects of success; and, further, to rely upon the Notice of Discontinuance to preserve QOCS protection. The first case is *Shaw v. Medtronic* [2017] EWHC 1397 (QB), a decision of Lavender J. This was the second decision of the same judge in respect of the same proceedings. The case concerned a father who died in September 2007 having undergone a heart procedure involving a new type of valve. The allegation was that the deceased had not been informed that the valve had been recently developed and that it had not been formally approved. There was also an issue about whether he had given informed consent. The claim was brought by the deceased's daughter under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934, but there were no dependants so the claim was fairly modest. Subsequently, the deceased's daughter commenced a second action against the manufacturers of the valve (and others) seeking exemplary, aggravated and restitutionary damages.

28 In his first decision, Lavender J set aside an Order which had permitted service out of the jurisdiction on two defendants and, further, he struck out the claim against the Fourth Defendant as disclosing no reasonable cause of action. Following that decision, the Claimant resolved to discontinue her claim against the Fifth Defendant. She duly filed a Notice of Discontinuance. The Fifth Defendant applied to set aside the Notice of Discontinuance.

29 Lavender J held as follows:

> "52. The Fifth Defendant seeks an order setting aside the notice of discontinuance, so that I can then hear and allow the Fifth Defendant's application issued on 16 October 2016 for an order striking out the proceedings. The effect of this would be to bring the Fifth Defendant within the scope of the exception in CPR 44.15.1(a) to the general rule concerning qualified one-way costs shifting.
>
> 53. I am not persuaded that it would be appropriate to do this. Prima facie, the Claimant had a right to discontinue under CPR Rule 38.2. It was a proper use of that power, and to be encouraged, for the Claimant to recognise, in light of the First Judgment, that her claim against the Fifth Defendant was not sustainable and to discontinue that claim.
>
> 54. The court has power under CPR Rule 38.4 to set aside a notice of discontinuance. That paragraph does not identify the circumstances in which the power should be exercised. The only guidance on that point in paragraph 38.4.1 of the White Book is to be found in two cases which are cited for the proposition that a court may set aside a notice of discontinuance as an abuse of the process of the court, but there was no abuse of process in the present case."

30 Pausing there, understandably, Mr Hogan emphasised that the Rule providing for the service of a Notice of Discontinuance was held to have been correctly used in circumstances where a claim ceased to be sustainable. He also highlights the observations of Lavender J to the effect that the Court has an unfettered discretion; and that other authorities are only of application where there has been an abuse of the process of the Court.

31 Of further relevance to the instant Appeal, Lavender J went on to say:

> "57 Mr Riley-Smith submits that I can infer from those circumstances that the Claimant's intent in serving notice of discontinuance was to avoid the exception to the qualified one-way costs shifting regime. He submits that it

> is difficult to draw any other conclusion. However, it is striking that the Claimant has decided to discontinue against the Fifth Defendant, but is still, notwithstanding the First Judgment, seeking to maintain her claims against the First, Third and Fourth Defendants by way of an application to the Court of Appeal for permission to appeal."
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> 58. In those circumstances, the possibility that the Claimant has simply recognised, in the light of the First Judgment, that the claim against the Fifth Defendant will not stand remains a real one. That is perhaps a realisation which should have occurred to the Claimant earlier, but it does not, in those circumstances, strike me that this is a case of abuse of process or anything sufficient to justify setting aside the notice of discontinuance."

32 Mr Hogan makes the valid point that in *Shaw*, as in the instant case, the principal reason for serving the Notice of Discontinuance was to maintain QOCS protection, but Lavender J did not consider that to be a legitimate basis for setting aside the Notice of Discontinuance. That was so even though the Claimant in *Shaw* probably should have appreciated somewhat earlier that her case against the Fifth Defendant was unsustainable. Effectively, 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.

33 Mr Hogan derives further support for his arguments from the decision of May J in the case of *English v. Mabb* [2017] EWHC 3616 (QB). This was a Clinical Negligence claim whereby the Claimant sought damages from a consultant gynaecologist arising out of the alleged negligent performance of a hysterectomy. In the course of the litigation, the Claimant found it necessary to revise substantially the allegations of negligence. Ultimately, this led to an application by the defendant to strike out the claim. That application was refused by Judge Colthart QC. The Defendant appealed the refusal to strike out. Langstaff J gave permission to appeal. Eight days before the date set for the hearing of the Appeal, the Claimant filed a Notice of Discontinuance. The Defendant then applied to set aside the Notice of Discontinuance. That application was the subject matter of the judgment of May J.

34 The Judge refused to set aside the Notice of Discontinuance. Her reasoning was as follows:

"33. Mr Mallalieu accepted, as he was bound to do, that there was nothing inherently abusive or contrary to the overriding objective in a party taking steps to avoid a costs liability. The problem here, he said, was the circumstances in which the Claimant had sought to do it. I examined with Mr Mallalieu what the implications of his argument might be, to try to identify that point in proceedings when, on his case, a Claimant would effectively be precluded from discontinuing. Understandably, he sought to avoid being tied to any general rule, although he did suggest at one stage that strike-out application had been issued, and a claimant ought to be prevented from discontinuing, particularly in a case like the present. I asked him to consider what the likely outcome would have been of an application to Langstaff J made at the time of applying for permission, seeking to prevent the Claimant from issuing a notice of discontinuance, He agreed that Langstaff J would almost certainly not have made any such order. He suggested that this was because a judge considering permission would be unable to consider then the reasons why a Claimant may have wanted to discontinue.

34. However, that would put the onus on a Claimant to establish a reason in order to be permitted to discontinue and the rules do not require a Claimant to provide any. The problem for Mr Mallalieu's argument is that there is no rule preventing a Claimant with QOCS protection from taking steps to secure the benefit of that protection whilst it still exists. CPR Rule 38 does provide for some restrictions on the right of a Claimant to discontinue. The Court's permission is required, for instance, when an (interim injunction has been issued. Nothing is said in the rule about discontinuance in the context of QOCS, Nor was there any provision in Part 44 itself, although there is provision, in Rule 44.16, for permission of the Court to be sought for a costs order to be enforced where a claim has been fraudulently (as opposed to merely incompetently) pursued.

35. Accordingly, whilst I can see that the effect of Rules 38 and 44.15 taken together can give rise to a situation which a Defendant, as here, loses the opportunity to obtain the benefit of the exception, I cannot conclude that there is any inherent unfairness in a Claimant taking advantage of the result that the Rules together permit, at least in their current form. I would not rule out the possibility of a case falling short of fraud in which the behaviour of the Claimant or the solicitors might on the facts be so egregious or cynical as to justify setting aside a notice of discontinuance in accordance with the overriding objection (sic), but this case is not so extreme as to lead me to that conclusion. The conduct of these proceedings on behalf of the Claimant does appear to have been dilatory and lacking in many respects, but not to the extent that requires me to reinstate proceedings by setting aside the notice of discontinuance. Accordingly, I decline to do so."

35 Mr Hogan, therefore, submits that, as in the cases of *Shaw* and *English*, there was no justification for the District Judge to set aside the Notices of Discontinuance just because to do otherwise would mean that the Appellant retained the protection of QOCS. Further, he argues that the case of *English* is authority for the proposition that a *late* recognition of the strength of a Claimant's case is not a proper basis for setting aside a Notice of Discontinuance.

36 Grounds 3 and 4 relate to the alleged misinterpretation by the District Judge of what conduct amounts to the obstruction of the just disposal of the proceedings. In short, Mr Hogan argues that the District Judge fell into error in concluding that the Appellant's conduct here could properly be described as conduct which was likely to obstruct the just disposal of the proceedings and, specifically, that the mere service of a Notice of Discontinuance could not be categorised as such conduct.

37 Mr Hogan's first point can be briefly summarised. This relates to what needs to be demonstrated if it is to be found that the Statement of Case is likely to obstruct the just disposal of the proceedings. In reliance upon the decision of *Atos Consulting v. Avis Europe* [2005] EWHC 982, Mr Hogan submits that a Statement of Case will only give rise to a finding that it is likely to obstruct the just disposal of the proceedings if the pleading impedes, to a material degree, the resolution of the claim. Put shortly, he says that whatever criticisms are made of the Particulars of Claim in the instant case, it cannot be said, of itself, to be capable of preventing the just disposal of the proceedings.

38 The second aspect, namely whether the Appellant's conduct was such as to be likely to obstruct the just disposal of the proceedings requires separate consideration. Whilst there does not exist an exhaustive definition of what would amount to an obstruction of the just disposal of the proceedings, Mr Hogan does place heavy reliance upon the decision of the Court of Appeal in *Arrow Nominees v. Blackledge and Others* [2001] BC 591. In that case,

the Court had to rule upon a situation where forged documents were produced. It was argued that such would corrupt the trial process so that the proceedings should be struck out. The Court of Appeal concluded that such conduct rendered a fair trial impossible. Chadwick LJ made the following observations:

> "54. It would be open to this Court to allow the appeal against the judge's refusal to strike out the petition on that ground alone. But, for my part, I would allow that appeal on a second, and additional, ground. I adopt, as a general principle, the observations of Millett J in Logicrose Ltd v Southend United Football Club Limited (The Times, 5 March 1988) that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the Court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules - even if such disobedience amounts to contempt for or defiance of the court - if that object is ultimately secured, by (for example) the late production of a document which has been withheld. 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."

39 In this instance, Mr Hogan submits that there was no conduct on the part of the Appellant which came close to being properly described as being likely to obstruct the just disposal of the proceedings. The mere fact that he brought a claim which was likely to fail on the merits was not what was envisaged by the Rule. Indeed, he says that the contrary is true, in that, if a weak claim fails, then there has been a just disposal of the proceedings. He argues that before the Court can conclude that a party has been guilty of obstructing the just disposal of the proceedings, there must be evidence of vexatious or scurrilous conduct; alternatively, evidence of an attempt, in some way, to corrupt a trial process per *Arrow Nominees*.

40 Mr Hogan makes the point that, even if the Respondent had sought summary judgment pursuant to CPR 24.2(a)(i) on the grounds that the Appellant had no reasonable prospect of succeeding on the claim, QOCS would have continued to apply. He asks rhetorically why the Appellant should be worse off because he has chosen to discontinue the claim rather than being the subject of summary judgment. Equally, if the Appellant had elected not to serve a Notice of Discontinuance but had continued with the trial and, if then, the claim had failed, QOCS would have still applied. It is submitted that he should not be penalised because he appreciated, albeit at a late stage, that his claim was unlikely to succeed.

RESPONDENT'S SUBMISSIONS

41 Mr Higgins' primary position is that permission to appeal ought to be refused. In this regard, and in submitting that the appeal has no real prospects of success, he reminds me that the District Judge was making a decision in exercise of her judicial discretion. Accordingly, he says that the well-known observations of Lord Woolf in *Tanfern v. Cameron-Macdonald* [2000] 1 WLR 1311 are apposite. In short, it is now well established that an Appellate Court should only interfere with the exercise of its discretion if the decision of the Court below can be said to be wrong insofar as it has exceeded the generous ambit of discretion conferred upon a Judge at first instance.

42 In the alternative, and if I am inclined to grant permission to appeal, as set out in the Respondent's Notice, Mr Higgins urges me to transfer the appeal to the Court of Appeal so that authoritative guidance can be provided.

43 Mr Higgins also raises a preliminary point in relation to the citation of authorities. He reminds me of the criteria which need to be satisfied before an Appellate Court will allow a

party to rely on points of law, which were not taken in the Court below, as propounded by Haddon-Cave LJ in *Singh v. Dass* [2019] EWCA Civ. 360.

44 Turning to the substance of the Appeal itself, and on the assumption that I do have regard to the case law relied upon by Mr Hogan, Mr Higgins seeks to persuade me that I am not bound to follow the decisions reached, respectively, in *Shaw* and *Mabb*. He argues that the extracts relied upon by the Appellant were essentially obiter and that I am not bound by what was said in either of those two cases. Furthermore, and to the extent that I conclude that *Mabb* and *Shaw* provide some general guidance, then it is submitted that such guidance is, at the very least, of questionable validity and, therefore, this Appeal should be referred to the Court of Appeal.

45 As to *Shaw*, Mr Higgins makes the point that Lavender J was dealing with a "hard" case where the Court was clearly striving not to impose additional costs penalties on the deserving Claimant. I infer, therefore, that Mr Higgins is submitting that the case of *Shaw* is fact specific and that, accordingly, it cannot be relied upon for the purposes of providing general guidance. Mr Higgins also noted that Lavender J specifically invited the Rule Committee to consider amending the Rules to cover the situation where a Claimant discontinues his case in order to secure QOCS protection. Although Mr Higgins has to concede that Lavender J was of the view that, absent any change in the Rules, he was prevented from disapplying QOCS, but he argues that, in so tying his hands, Lavender J fell into error.

46 Mr Higgins makes not dissimilar observations in relation to the decision in *Mabb*. He describes this as also being a "hard" case insofar as any Court would have been anxious to protect the Claimant from a costs liability. He also points out that in *Mabb*, the Judge refused an appeal against the decision not to strike out the claim (such is to be contrasted with the instant claim) and that, accordingly, any observations made by May J about setting aside a Notice of Discontinuance should be seen in that context and were, in any event, obiter.

47 At all events, and more generally, Mr Higgins submits that CPR 38.4 confers upon a Judge the widest possible discretion to set aside a Notice of Discontinuance. He argues that the only limiting factor is that a court, when determining whether or not to set aside a Notice of Discontinuance, must act in accordance with the overriding objective. In this regard, he relies upon the observations of Henderson J in *The High Commissioner for Pakistan in the UK v. National Westminster Bank* [2015] EWHC 55 (Ch):

> "… I consider that the court should approach an application to set aside a notice of discontinuance under CPR 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 a case justly at proportionate costs. 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 abuse of process as either a necessary or an exclusive criterion which has to be satisfied if the application is to succeed."

48 Mr Higgins also makes reference to the observations of Aikens J in *Sheltan Rail Company (Proprietary) Limited v. Mirambo Holdings Limited* [2008] EWHC 829 (Com.), at para.34:

> "Instead of the old practice of applying to strike out a notice of discontinuance as an abuse of process, CPR Part 38.4(1) now specifically provides for an application to be made to set the notice aside. The wording 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 …"

49 Accordingly, Mr Higgins stresses that there is no need to demonstrate an abuse of the Court's process or, indeed, cynical or egregious conduct before a Court sets aside a notice of discontinuance. Inferentially, Mr Higgins appears to be arguing that a Court is entitled to have regard to the provisions which govern the disapplication of QOCS when considering whether to set aside a Notice of Discontinuance. Thus, he argues that if the Court concludes that the

Claimant is guilty of conduct likely to obstruct the just disposal of proceedings, it would be a proper exercise of a Court's discretion to set aside a Notice of Discontinuance.

50 As to the Appellant's conduct in this case, Mr Higgins submits that the assertion that the ladder was tied to the scaffold, when, apparently, it was not, amounts to conduct likely to obstruct the just disposal of the proceedings. In support of the latter, he submits that the false allegation in the Statement of Case caused the Respondent to face a collateral and hypothetical claim, not the actual claim, and, as such, the just disposal of the proceedings was being frustrated.

51 Although not mentioned by the District Judge, Mr Higgins also places some reliance upon inconsistent accounts contained within the Appellant's medical records. In particular, there was a note in the hospital records made on the day of the accident which read, "*Today slipped and went backwards (full heel hit floor at force unable to wait there"(?)).* Later the same day, there is another description of the accident in the hospital records, which is again inconsistent with him having fallen off a ladder. Mr Higgins suggests that these entries in the medical records call into question whether the Appellant sustained any accident at all involving a ladder and that this tends to support the proposition that his conduct was such as to obstruct the just disposal of proceedings.

52 Mr Higgins also points to what he describes as the flaw in the line of reasoning adopted by May J stop in *Mabb*. Since the Court's permission is required to discontinue a claim once an interim payment has been made, Mr Higgins submits that this could potentially lead to an absurd outcome if the Court's hands are tied when it comes to exercising its discretion to set aside a notice of discontinuance. He takes the example of a single action where Claimant A has received an interim payment but Claimant B, whose claim is weaker, has not received an interim payment. In such circumstances, a Court could refuse permission to discontinue

Claimant A's claim, which might then lead to Claimant A having to meet the costs of the defendant, in the event of a successful application to strike out. Whereas, if Claimant B was able to resist the notice of discontinuance being set aside, any adverse costs order against B could not be enforced.

53 When it came to disapplication of QOCS, Mr Higgins submits that the District Judge was perfectly entitled to deprive the Appellant of QOCS protection on the basis of 44.15(1)(c)(i), namely that his conduct wa*s* likely to obstruct the just disposal of the proceedings. Furthermore, Mr Huggins submits that the District Judge was correct to ask herself the question whether the Appellant merited QOCS protection, it being the intention of Jackson LJ that only deserving claimants should not have to meet the costs of the other party. (see, Sir Rupert Jackson's *Review of Civil Litigation Costs*: December 2009) He argues that the overriding objective dictates that the Court should do only what is just and if, as in the instant case, a claimant brings an unsustainable claim, then he should be deprived of QOCS protection. To put it another way, he submits that the District Judge, in setting aside the Notices of Discontinuance and removing COQS protection, dealt with this case justly and in accordance with the overriding objective.

DISCUSSION

54 As I read the District Judge's judgment, it is clear that what underpins the decision to set aside the Notices of Discontinuance and to deprive the Appellant of QOCS protection was her finding that his conduct was such as to be likely to obstruct the just disposal of the proceedings*,* although by way of a collateral finding, she did also conclude that he was not deserving of COQS protection, when proper account was taken of the overriding objective.

55 On that analysis, the first and fundamental question is whether it can properly be said that the Appellant was guilty of such conduct as to be likely to obstruct the just disposal of the

proceedings. Even if the District Judge's findings on that point can he upheld, of course, it does not follow that she was thereby entitled to set aside the Notices of Discontinuance.

56 As I have already observed, and somewhat inevitably, there is no definitive interpretation to be found in case law as to what amounts to obstruct the just disposal of the proceedings, but I do derive considerable assistance from the Court of Appeal decision in the *Arrow Nominees* case. 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.

58 It seems to me to be helpful to test the matter in this way. Suppose that the matter had proceeded to trial and the District Judge had been asked to give judgment, the overwhelming likelihood is that the claim would have failed. In that event, objectively, it could properly be

said that a just outcome had been achieved. Nothing would have occurred which could be regarded as unsafe or amounting to an abuse of the process. In short, the inconsistencies would have been flagged up, the Appellant's reliability called into question and submissions would have been made to the effect that the Appellant was not able to make good his claim; and doubtless, the District Judge would then have entered judgment in favour of the Respondent.

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.

60 In one sense, that finding that disposes of the appeal because the District Judge did not provide any other reason for setting aside the Notice of Discontinuance and, indeed, she did not deal specifically with that aspect of the case. Nevertheless, it would be disingenuous to ignore what also lay behind her decision to set aside the Notice of Discontinuance, namely that she considered he was not deserving of QOCS protection. Certainly, it is Mr Higgins' submission that the District Judge was right to pose the question as to whether the Appellant was deserving of QOCS protection and, if she concluded that he was not, then she was entitled to set aside the Notice of Discontinuance.

61 It is true 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. Although not overtly stated, I infer from the District Judge's judgment that, although her reasoning was clothed in a finding that the Appellant had been guilty of conduct likely to obstruct the just disposal of the proceedings, the reality was that she did not think that he was entitled to QOCS protection.

62 But I do, of course, turn to the authorities. The first question which arises is whether I should have regard to the cases of *Shaw* and *Mabb*, given that they were not cited to the District Judge. I can dispose of that matter very shortly. I am entirely satisfied that the three criteria laid out in *Singh v. Dass* are satisfied. Equally, I am willing to have regard to the dicta of Henderson J in the *National Westminster Bank* case and Aikens J in the *Mirambo* case.

63 The next question which arises is whether the dicta of Lavender J and May J in relation to the setting aside of a notice of discontinuance were obiter or formed part of the ratio. If the latter, then the Doctrine of Precedent applies and I am bound by the decisions in those two cases.

64 Of course, Mr Higgins is correct to point out that the factual background in both cases is different and also, in the *Mabb* case, the Judge had refused an appeal against a decision not to strike out the claim. It is also right to observe that, doubtless, in both cases, there was some sympathy for the Claimants and neither Judge would have wanted to visit enforceable orders for costs on the Claimants.

65 Nevertheless, I am entirely satisfied that the observations of Lavender J to the effect that it was a proper use of the power conferred by CPR Rule 38.2 to discontinue a claim when it became apparent that the claim was no longer sustainable formed part of the ratio of the case. Equally, when Lavender J says that serving a Notice of Discontinuance so as to avoid being caught by one of the QOCS exceptions is legitimate, that, too, is part of the ratio in the case. It seems to me 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.

66 Similarly, I find myself bound by the observations of May J. In particular, it seems to me that it is not open to me to go behind 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 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.

67 Furthermore, I see nothing inconsistent in the decisions in *Shaw* and *Mabb* and the observations of Henderson J in the *National Westminster* case or, indeed, the observations of Aikens J in the *Mirambo* case. Neither Lavender J nor May J stated that there would have to be evidence of an abuse of process before setting aside a Notice of Discontinuance, but they did make it clear that, in their judgment, something approaching egregious conduct would need to be demonstrated: but that does not amount to a departure from the dicta of Henderson J or Aikens J.

68 I should add that I see no force in the argument advanced by Mr Higgins to the effect that the reasoning adopted by May J would be capable of leading to absurd results. To my mind, his analogy is not a good one. The reality is that, if the hypothetical situation which he contemplates arose, then a Court would find a way to achieve parity, probably by granting permission for the Claimant, who had received an interim payment, to discontinue. In any event, as it seems to me, the scenario described by Mr Higgins is highly unlikely to arise.

69 In summary, I consider myself bound by the reasoning in both cases relied upon by the Appellant. Further, for what it is worth, with all due respect, I agree with the reasoning set out in both cases. It seems to me that, if it is intended that a Claimant who serves a Notice of

Discontinuance should be denied QOCS protection, then that should be incorporated within the Rules. There could, for example, be a proviso that, where a Claimant would normally be entitled to QOCS protection on serving a Notice of Discontinuance, he should only be allowed to do so with the permission of the Court. Similarly, there could be an amendment to the QOCS provisions so that service of a Notice of Discontinuance created another exception along with abuse of the process, fundamental dishonesty and conduct likely to obstruct the just disposal of the proceedings.

CONCLUSION

70 Plainly, in the light of my observations above, I consider this appeal stands real prospects of success and that, therefore, permission should be granted. In granting permission, I have well in mind the fact that I am hearing an appeal which involves the exercise of a discretion of the Judge below.

71 It will also be apparent that I consider that the decision of the District Judge was wrong and that this Appeal should be allowed. It is, of course, unfortunate, but understandable, that the relevant authorities were not cited to her: had she had the opportunity to consider the decisions in *Mabb* and *Shaw*, I am inclined to think that she might have come to a different conclusion.

72 It is also regrettable that the District Judge did not follow a three-stage process. Difficulties arose because she conflated the setting aside of the Notices of Discontinuance, the striking out of the claim and the disapplication of QOCS. The correct approach would have been to 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.

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 the conduct of the Appellant himself.

74 One final matter arises. It will be evident that I have declined the Respondent's invitation to transfer this case to the Court of Appeal. In my judgment, the authorities are sufficiently clear to permit me to come to a reasoned decision; and I am unpersuaded that the Appeal raises an important point of principle.

75 In conclusion, therefore, this Appeal is allowed. I invite counsel to agree consequential costs orders. If that proves not to be possible, then there will need to be a hearing and I will hear further submissions.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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