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QOCS and obstructing “the just disposal of proceedings” under CPR 44.15(c) in Excalibur and Keswick Groundworks v McDonald [2023] EWCA Civ 18

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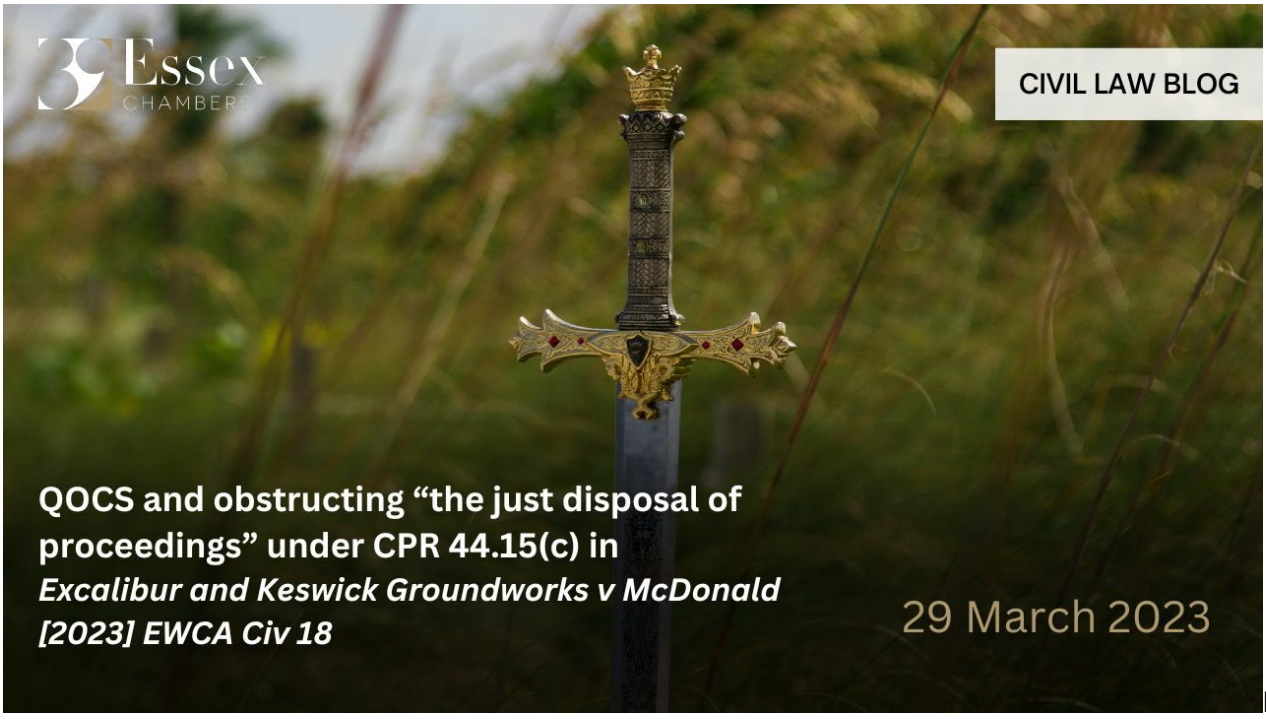

It is a frustrating scenario which will be familiar to many defendant personal injury practitioners. A claimant moments before a trial begins, decides to file a notice to discontinue. The defendant, who has spent years building the defence at significant cost and expense, is unable to recover its legal costs because the claimant is protected under the Qualified One Way Costs Shifting (‘QOCS’) regime. Is a defendant able to set aside this notice of discontinuance on the basis that the Claimant’s last-minute conduct has *“obstructed the just disposal of proceedings”* and thereby remove QOCS protection under CPR 44.15(c)? This issue came before the Court of Appeal in the recent case of *Excalibur and Keswick Groundworks Limited v Keswick* [2023] EWCA Civ 18.

At the first instance trial of this employer’s liability case the District Judge invited the Claimant to consider inconsistencies between his particulars of claim, witness statement and medical records before he commenced giving evidence. After a short period of reflection the Claimant then promptly served notices of discontinuance on the two Defendants in the case. The Defendants then in turn (i) applied to set aside the notices of discontinuance under CPR 38.4 (ii) asked the Judge to strike the proceedings out on the basis the Claimant’s conduct had obstructed the just disposal of proceedings and (iii) lift QOCS protection and award the Defendants their costs of the action.

The District Judge did not focus on the question of whether the notices of discontinuance should in fact be set aside but nonetheless removed the Claimant's QOCS shield. The Judge found the Claimant had dropped his claim at the *"eleventh hour and fifty nineth 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… I do not consider that his conduct in that context can be otherwise than to obstruct the just disposal of the proceedings."*

So far so good for defendant practitioners. However the decision was overturned on the Claimant's appeal to HHJ Freedman sitting in the County Court in Newcastle upon Tyne. The Judge found 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 (a case concerning the phrase in the context of the strike out provisions in CPR 3.4(2) and not CPR 44.15) in which the Judge stated *"the question is whether the Appellant's conduct in this case rendered a just or fair trial impossible."* With the above guidance in mind HHJ Freedman found:

(i) The Claimant's conduct was very far removed from what could properly be described as conduct likely to obstruct the just disposal of proceedings. Offering a different account in his witness statement to his pleaded case might have been sufficient to justify summary judgment being entered on the grounds the Claimant had no real prospect of succeeding in his claim but this did not mean a fair trial had been rendered impossible. Such conduct was instead *"run of the mill"* and would apply to a multitude of litigants who present claims for personal injuries.
(ii) Since a claimant can discontinue as of right without the permission of the court subject to limited exceptions in CPR 38.2 there would need to be *"powerful and cogent reasons"* why a notice of discontinuance should be set aside. The mere fact that a claimant seeks to retain QOCS protection by serving a notice of discontinuance in accordance with the CPR is not a powerful and cogent reason.

On second appeal, the Court of Appeal endorsed HHJ Freedman's approach. It found there was no need to approach CPR 38.4 and the setting aside a notice of a notice discontinuance any differently in a personal injury case to which QOCS applies. The Court of Appeal again highlighted that a Claimant's decision to discontinue having weighed up his prospects of success was a course of conduct taken by many litigants and this *"does not begin to provide the powerful reasons on which a notice of discontinuance could or should be set aside."*

When considering what the phrase "likely to obstruct the just disposal of proceedings" actually means Davies LJ considered the relevant question was not whether it rendered a fair trial *impossible* but whether the litigant's conduct was of such a nature and degree as to corrupt the trial process so as to put the fairness of the trial in jeopardy? Again, the Court of Appeal found the Claimant's conduct did not begin to meet the degree of seriousness which is envisaged in that formulation. The appeal was upheld and the Defendants were therefore unable to displace the mechanical provisions of the QOCS scheme.

Where then does this leave a defendant facing the above scenario? If Excalibur is not a mighty enough sword to break the QOCS shield, what is? The Court of Appeal noted that the defendant did not allege the claimant was fundamentally dishonest ('FD'). Had they done so a different result may have been achieved. In the County Court case of *Asim Brahilika v Allianz Insurance PLC* (Romford County Court, 30.7.2015, District Judge Dodsworth) the Court found a claimant's failure to attend trial meant the defendant was deprived of putting its case on FD and the claimant's conduct had therefore obstructed the just disposal of proceedings. Whilst the above decision was not tested on appeal it nonetheless supports an early avowal of FD if the evidence supports it. Despite the valiant efforts of the defendants in this case it appears FD remains the best weapon in the Defendant's arsenal when seeking to displace the QOCS regime.

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