Excalibur & Keswick Groundworks Ltd v McDonald

By Oliver Hirsch
3PB

1. Another day, another disappointing decision on QOCS for defendants (who must surely be looking forward to the upcoming rule-change in April).

2. In *Excalibur & Keswick Groundworks Ltd v McDonald* [2023] EWCA Civ 18, the Court of Appeal has confirmed the difficulty of removing QOCS protection from a claimant who discontinues at the last moment. This follows previous decisions in the same spirit, such as *Mabb v English* [2017] EWHC 3616 (QB).

3. Mr McDonald brought a claim against his employer, alleging that he was injured after falling off a ladder. However, his medical records recorded variously that he had tripped over a pavement and fallen off scaffolding. At trial, the district judge raised these inconsistencies, together with a separate issue as to ownership of the offending ladder, and asked if the Claimant wished to consider his position. On doing so, the Claimant duly discontinued the claim that morning. However, on application by the Defendant, the same judge set aside the notice of discontinuance and struck out the claim on the grounds that the claimant's conduct had obstructed the just disposal of the proceedings. This of course removed the Claimant's costs protection, per CPR 44.15(c).

4. The decision was appealed, successfully, before HHJ Freedman in the county court. The Defendant in turn appealed this decision, to the Court of Appeal. The three Justices of Appeal unanimously uphold HHJ Freedman's decision, dismissing the Defendant's appeal.

5. Lady Justice Davies, giving the Court's judgment, held as follows.

    - QOCS was a deliberate departure from the principle that costs follow the event. It would only be removed in certain circumstances, such as where a claimant had been fundamentally dishonest. The Defendant was wrong to submit that the court should

approach discontinuance differently in personal injury claims, since this would undermine the very purpose of QOCS.

- The court has a wide discretion to set aside a notice of discontinuance, there being no particular test. HHJ Freedman was correct to say that there must be *"powerful reasons"* to set aside a notice. Evidence of abuse of process or similarly egregious conduct was required.
- Critically in this case, the Defendant had not alleged fundamental dishonesty, despite the inconsistencies. The situation was therefore that the Claimant had recognised the inconsistencies in his case, weighed his prospects of success and decided to discontinue. That conduct did not begin to provide the powerful reasons required to set aside a notice of discontinuance.
- In considering whether there had been an abuse of process, per CPR 3.4(2)(b), the correct test was this: 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? The Claimant's conduct did not come close, in the Court's view.
- Before CPR 44.15(c) comes into play (deprivation of QOCS protection), the court must first strike out the case. The loss of QOCS protection is not a relevant factor in assessing this: the repetition in rule 44.15(c) of the wording in rule 3.4(2)(b) *'adds nothing to the interpretation of the earlier provision* [that is, 3.4(2)(b)]'. The shared wording is of course *'likely to obstruct the just disposal of the proceedings'*.

6. There are three points to take away for defendants.

- The loss of QOCS protection is not a factor to be considered when assessing whether a case should be struck out. Only after that question has been answered does QOCS come into play. There is nothing inherently illegitimate in a claimant choosing to discontinue in order to retain QOCS protection.
- The Defendant in this case did not allege fundamental dishonesty. It is more likely that in cases where there is clear evidence that the claimant is lying about something fundamental to the claim, QOCS protection will be set aside.
- Davies LJ made the point that it was open to this Defendant to apply for summary judgment, in which case QOCS protection would have been retained. Defendants who wish to save on costs, therefore, would be well-advised to apply for early summary judgment in appropriate cases, rather than relying on the claimant to discontinue, since in either scenario the claimant will not be paying.

7. One final note. Reference was made in the judgment to the fundamental rationale of QOCS: to level the scales between claimants, as individual members of the public, and defendants, typically well-funded or otherwise insured persons and bodies. But what of the impecunious, uninsured defendant? If a claimant brings a weak but not necessarily dishonest claim, hoping that the spectre of legal costs will force the defendant to settle, could discontinuing at the last moment be something *'likely to obstruct the just disposal of the proceedings'*, or indeed an abuse of the court's process? What about where the defendant obviously cannot pay the damages sought, and the litigation is an apparent attempt to bankrupt them in retaliation for a perceived transgression? Perhaps a decision for another day.

March 2023

Oliver Hirsch

Barrister
3PB

01962 868 884
oliver.hirsch@3pb.co.uk

3pb.co.uk