IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Neutral Citation Number: **[2023] EWHC 1464 (KB)**

Case No: QA-2022-000057
Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 28 March 2023

Before:

MR JUSTICE CHOUDHURY

B E T W E E N:

ANDREW KASONGO — Appellant / Claimant

- and -

(1) CRBE LIMITED
(2) TRANSPORT FOR LONDON — Respondents / Defendants

MR B. RODGERS (instructed by NV Legal Limited) appeared on behalf of the Appellant / Claimant.

MR H. COHEN (instructed by Plexus Legal LLP) appeared on behalf of the Second Defendant / Respondent.

APPROVED J U D G M E N T

MR JUSTICE CHOUDHURY:

1 This is the claimant's appeal against the judgment of HHJ Saggerson striking out the claimant's claim against the second defendant, Transport for London ('TfL'), on the grounds that, pursuant to CPR 3.4(2), the statement of case discloses no reasonable grounds for bringing the claim. Permission to appeal was granted by Ritchie J at an oral renewal hearing on 9 September 2022, having initially been refused on the papers by Eyre J.

2 The background to this matter is as follows. The claimant brought proceedings against the defendants following an accident that occurred on 30 August 2018 at his workplace at 14 Pier Walk, London ('the premises'). The claimant's particulars of claim state that the defendants were the occupier of the premises and that he was employed by a company called Interserve Limited as a Security Officer but was sub-contracted to TfL.

3 Paragraph 3 of the particulars of claim states that:

> "(i) On 30 August 2018 at approximately 7.20 am the claimant entered the loading bay area of the said premises when he tripped over a pole that had been left on the floor from an earlier delivery."

4 It was claimed that the pole posed a tripping hazard, and that the accident was caused or contributed to by the negligence and / or breach of statutory duty of the defendants, their employees or agents, acting in the course of employment. It was said in particular that the defendants owed the claimant, as a visitor, the common duty of care under the Occupiers Liability Act 1957 ('OLA'). Several particulars of negligence / breach of statutory duty are pleaded, most of which refer or relate to the leaving and placing of the poles. There are two more generalised allegations of failing to take any, or any adequate, care for the safety of the claimant. Damages limited to £15,000 were claimed for injuries to the claimant's knee said to have been sustained as a result of the fall.

5 Both defendants served defences. Each denied that it was the occupier of the particular loading bay in which the accident occurred. TfL admitted that it was the occupier of the area surrounding the loading bay which was separated from the landlord's area by a low metal barrier, but it claimed to have no control over the loading bay. It said that the poles did not belong to it and that it had no authority or power over them. TfL further denied that the claimant tripped over the pole. It referred to CCTV footage which it claimed showed the claimant fell as a result of clipping his foot on the barrier as he attempted to climb over it. Negligence and breach of statutory duty were denied. The first defendant also denied the claim, asserting that TfL was, in fact, the occupier of the loading bay.

6 It is not in dispute that the particulars of claim were in standard form containing the essential ingredients for a claim of negligence under the OLA. It was not suggested by either defendant in its defence that the pleaded claims were defective on their face.

7 Subsequently the first defendant accepted that it was the occupier of the relevant loading bay. It also became apparent that the poles had in fact been left in the loading

bay on the instruction of one Frank Newman, a Control Room Officer and employee of Interserve Limited.

8 In December 2020, the claim was allocated to the Fast Track, with directions, and the matter was listed for trial on 20 May 2021 for one day. In the event, the trial had to be adjourned, and on 29 July 2021, the matter was given a renewed listing date of 3 March 2022.

9 On 5 October 2021, TfL applied to strike out the claim against it with costs. It also sought an order for the enforcement of any costs order in its favour "to the full extent of such order without the permission of the Court in accordance with CPR 44.15." The relevance of CPR 44.15 is that it provides an exception to the qualified one-way costs shifting ('QOCS') regime that applies where proceedings have been struck out on the basis that there were no reasonable grounds for bringing them. The effect of the exception is that the claimant, who would otherwise be protected from having to pay the defendant's costs, becomes liable for costs in the usual way.

10 The basis for the application was:

(i) That the accident occurred in an area over which TfL had no control and to which it could not authorise the claimant's entry;

(ii) TfL had no involvement in the delivery of the poles, but the claimant was aware of the presence of the poles having been aware of their delivery the previous day;

(iii) As the first defendant is the responsible occupier, it is not clear why TfL remains in the proceedings.

(iv) It had become apparent that the accident occurred while the claimant was attempting to climb over a metal barrier into the retail waste area (that being another term used for the loading bay);

(v) The claimant has no real prospect of succeeding with his claim against TfL and has no reasonable grounds to bring the claim against it.

11 The application was heard by the Judge on 8 February 2022, just a few weeks before trial. The claimant was represented by counsel, Ms Mufti, and TfL was represented by counsel also. Having heard the application, the Judge delivered an *ex-tempore* judgment. There is no transcript of the judgment as the recording was corrupted. However, counsel have agreed a note of the Judgment which is fairly full, and which has been approved by the Judge. References below to the Judgment are to that note.

12 The Judge commences by referring to the plan of the property which marks the area where the accident occurred as a blue rectangle. The Judge continues as follows:

> "5 Both defendants recognise that the second defendant is not therefore an occupier of that relevant blue part of the floor. There are also photographs which show the delineation of the areas. Those show a low barrier about no higher than lower calf length on an average sized person, a metal barrier extending across the boundary

of the orange/pink area of the plan and the blue rectangle which is plainly designed to in part demonstrate the areas of the various occupiers.

6 The circumstances in which the claimant claims to have been injured are as follows. He was employed as a security man for the second defendant. As part of those responsibilities, he had to supervise and monitor deliveries of goods to the building.

7 Although the facts are somewhat opaque, at some time probably the day prior to the claimant's accident, a delivery of pipes was arranged. Those pipes were ultimately placed on the floor of the blue hatched area and marked with a cross area of the floor plan. On the far side of other side of the calf height boundary barrier between the first defendant and the second defendant's areas.

8 On the day of the accident itself, it is useful to refer to CCTV evidence which for once is of high quality, in colour, and shows over the course of only a few seconds exactly how the claimant claims to have sustained the accident the basis of his claim

10 The CCTV shows without any room for doubt, that for whatever reason, and at whoever's direction, the claimant was making his way over the barrier in order to do something in the blue coloured area on the other side of the barrier. He was going to collect a delivery note/receipt document in respect of the delivery of pipes left on the floor of the blue coloured area. In order to retrieve it, he needed to step over the barrier.

11 The CCTV shows the claimant lifting his left leg over the barrier and placing his left foot firmly and flatly on the concrete floor of the blue coloured area on the plan without being compromised by the pipe/pipes, and having done that, he then unsurprisingly must bring his trailing right leg over the barrier too. In doing that, the video evidence is abundantly plain, he catches or knocks his right heel on the top of the barrier which causes him to lose his balance and subsequently takes the fall and sustains the injuries which are the centrepiece of his claim for damages. That's how the evidence demonstrates what happens."

13 The Judge noted that that this was an application and not a mini-trial and that to the extent that any factual findings were made, particularly any that were adverse to the claimant, it could only be in circumstances "where the facts found brook no room for sensible argument." He concluded that, "the fact that the second defendant is not an occupier of the blue area is a fact beyond the reach of any sensible argument to the contrary." He further concludes that, "The circumstances of the accident are also beyond any reasonable scope of sensible contradiction."

14 The Judge then analysed the claim as set out in the particulars of claim and concluded that the allegations contained therein, "are manifestly unsustainable as the evidence and disclosure has unfolded." Having considered the claimant's submission that the essence of TfL's application was that the claimant cannot win, rather than that the claim disclosed no reasonable grounds for bringing the claim, the Judge concluded:

> "32 There is, it is submitted, no reason to strike out under CPR 3.4(2)(a). However, CPR 3.4(2) extends a little beyond that. It is appropriate and proper to exercise discretionary jurisdiction under this rule where the grounds for bringing the claim are so manifestly unsustainable so as to lead to only one objective conclusion – that the claim, as put forward in the claimant's claim is doomed to fail. It is on that basis that I approach the second defendant's application.
>
> 33 Others might have pursued this as an application for summary judgment.
>
> 34 It is so obvious, without engaging in a fact-finding exercise, that the claimant's claim is doomed to fail against the second defendant that it should be brought to a close now.
>
> 35 This is a case which is as clear as daylight. This claim against the second defendant should be struck out, CPR 3.4(2)(a).
>
> 36 The grounds for bringing the claim were entirely based on OLA. Particularly paragraph 5(h), which is a catch-all seen in the context of the other allegations, all of which are targeted against both defendants.
>
> 37 It is unrealistic to have the claim, as pleaded, construed to eke out from 5(h) a more sustainable type of claim in negligence.
>
> 38 These particulars have to be seen in the context that the claimant has said that he tripped over a pole and that that is the cause of the accident. He didn't trip over a pole. The CCTV demonstrates as much.
>
> 39 However much some might say that these are matters of fact that the court shouldn't investigate at this stage, the facts shown in the video do not lend themselves to any other possible interpretation. He didn't trip over the pipes or poles at all. There is no point pretending there is any other sensible version of events than that he caught his heel on the barrier and lost his balance."

15 The Judge then dealt with costs and concluded as follows:

> "50 This action, although, I did make reference to CPR 3.4(2)(b), (strike out for abuse of court's process), there is no doubt it is struck out pursuant CPR 3.4(2)(a) – 'discloses no reasonable grounds for

> bringing this claim'. The basis on which I came to that conclusion is that the statement of case is unsustainable as it was doomed to fail.
>
> 51 This is maybe more obvious now than when the claim was initiated.
>
> 52 First, subject to enforceability, I do make an order for costs of this action and this application to be paid by the claimant to the second defendant on the standard basis.
>
> 53 The next question is whether those costs are enforceable without permission of court under CPR 44.15. In my judgment they are, because in the context of this rule, the concept of bringing the proceedings encompasses the continuation of the proceedings. The rule-makers clearly envisaged this to extend to circumstances where the claimant has persisted with the claim after – in this case, long after - the fundamental foundations of the statements of case are manifestly unsustainable. CPR 44.15 applies." [*Emphasis added*]

16 The claim against TfL was accordingly struck out and the claimant was ordered to pay TfL its costs summarily assessed in the sum of £12,500.

17 It is against that order that the claimant now appeals. Permission was granted in respect of two grounds of appeal:

(i) The Judge was wrong to strike out the claim in that his conclusion was unsupported by the CCTV footage, or that such finding of fact was contestable and ought not to have been made at an interim hearing without hearing from the claimant.

(ii) The Judge was wrong to declare that the claimant had disclosed no reasonable grounds for bringing these proceedings within the meaning of CPR 44.15. In so doing, the Judge wrongly misapplied CPR 3.4(2)(a) and considered the strength of the evidence in support of the claim (an exercise appropriate to an application for summary judgment, which this was not) rather than whether the claim disclosed reasonable grounds for bringing the claim.

18 Permission to proceed on both of these grounds was, as I have said, granted by Ritchie J. There was a third ground challenging the assessment of costs but this is no longer pursued.

19 The claimant is represented before me by Mr Rodgers of Counsel, and TfL by Mr Cohen of Counsel. I am grateful to both of them for their concise and helpful submissions.

The Legal Framework

20 CPR 3.4 confers a power to strike out a statement of case. So far as relevant, it provides:

"(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case;

(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 cases 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."

21 The notes to that rule in the White Book provide:

"Grounds (a) and (b) cover statements of case which are unreasonably vague, incoherent, vexatious, scurrilous or obviously ill founded and other cases which do not amount to a legally recognisable claim or defence. This power can be exercised by a Judge acting on their own initiative at the stage of issuing a claim, or perhaps with a court officer referring the case to the Judge under rule 3.2, and thus defendants against whom an ill-founded action is sought to be brought will be spared needless expense of having to initiate strike out proceedings; see PD3A …."

22 The notes also provide that:

"While many applications under rule 3.4(2) can be made without evidence in support, usually if the statement of case discloses no reasonable grounds for bringing or defending a claim, the applicant should consider whether facts need to be proved and, if so, whether evidence in support should be filed and served…"

23 At CPR 3.4.2, the notes provide:

"Statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (*Harris v Bolt Burdon* [2000] CP Rep 70, [2000] CPLR 9]. A claim or defence may be struck out as not being a valid claim or defence as a matter of law ... However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact … A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence (*Bridgeman v McAlpine-Brown* (19 January 2000 unreported CA). An application to strike out should not be granted unless the court is

certain that the claim is bound to fail (*Hughes v Colin Richards & Co* [2004] EWCA Civ, 266, [2004] PNLR 35) ..."

24 At 3.4.21 the notes deal with the overlap between CPR 3.4 and Part 24 (Summary Judgment). The notes state as follows:

> "3.4.21 The rules give the court two distinct powers which may be used to achieve the summary disposal of issues which do not need full investigation at trial. Rule 3.4 enables the court to strike out the whole or part of a statement of case which discloses no reasonable grounds for bringing or defending a claim (r.3.4(2)(a)), or which is an abuse of the process of the court or otherwise likely to obstruct the just disposal of the proceedings (r.3.4(s)(b)). Rule 24.2 enables the court to give summary judgment against a claimant or defendant where that party has no real prospect of succeeding on their claim or defence. Both those powers may be exercised on an application by a party or on the court's own initiative; see para.1.2 of the PD (Striking Out a Statement of Case). Many cases fall within both r.3.4 and Part 24 and it is often appropriate for a party to combine a striking out application with an application for summary judgment. Indeed, the court may treat an application under r.3.4(2)(a) as if it was an application under Part 24. *Moroney v Anglo-European College of Chiropractice* [2009] EWCA Civ 1560; and see, *Taylor v Midland Bank Trust Co Ltd (No.2)* [2002] WTLR 95. However, in *Ministry of Defence v AB* [2010] EWCA Civ 1317*;* [2011] 117 BMLR. 101, summary judgment sought in respect of test cases in group litigation was refused on procedural grounds: in the circumstances of that case, an informal application for summary judgment in the course of a strike out application was held to be unfair. (This point was not raised in the further appeal in this case; see *AB v Ministry of Defence* [2012] UKSC 9; [2012] 2 W.L.R. 643; [2012] 3 All E.R. 673.) Similarly in *St Clair v King* [2018] EWHC 682 (Ch) an appeal was allowed in respect of an order granting summary judgment made on an application to strike out; the hearing had been unfair to the claimant because she had not been given the 14-day notice period which is stipulated for a summary judgment application and the consequences of allowing the application to proceed as one for summary judgment had not been properly or fairly explained to her (and see also *Saeed v Ibrahim* [2018] EWHC 3 (Ch) at [7]–[9] (Chief Master Marsh)).
>
> A party may believe that they can show without a trial that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law (including the construction of a document). In such a case the party concerned may make an application under r.3.4 or Part 24 (or both) as they think appropriate; see para.1.7 PD (Striking Out a Statement of Case), para.3APD.1.
>
> However, the overlap between r.3.4 and Part 24 is not complete:

(1) unlike Part 24, r.3.4 also applies to cases of non-compliance with a rule, practice direction or court order;

(2) unlike r.3.4, Part 24 also applies to the summary disposal of issues including preliminary issues;

(3) there are various procedural requirements in Part 24 which do not apply to r.3.4;

(4) unlike Part 24, r.3.4 applies to all proceeding. Thus, an order akin to summary judgment may be obtained under r.3.4 in proceedings which are excluded from Part 24 (*Shephard v Wheeler Times*, 15 February 2000 noted in para.24.3.1).

In *Independents' Advantage Insurance Co Ltd v Cook* [2003] EWCA Civ 1103*;* [2004] PNLR. 3, CA, the defendant applied to strike out the claim under r.3.4(2)(a), i.e. that, even assuming the claimant could prove the facts alleged in his particulars of claim, he had no reasonable grounds for bringing a claim. The defendant did not allege any additional facts so as to justify a strike out on any other ground but did make a second application for summary judgment under r.24.2. The Court of Appeal considered the application under r.24.2 to be superfluous: if the particulars of claim had disclosed reasonable grounds for bringing a claim, both applications would fail; if the particulars of claim disclosed no reasonable grounds for bringing the claim, the court would have ample power to strike it out and enter judgment for the defendant, thereby making any recourse to r.24.2 quite unnecessary."

25 The Practice Direction to the rule, PD3A, contains some relevant material. Paragraphs 1.4 and 1.5 provide:

"1.4 A defence may fall within rule 3.4(2)(a) where:

(1) it consists of a bare denial or otherwise sets out no coherent statement of facts, or

(2) the facts it sets out, while coherent, would not amount in law to a defence to the claim even if true.

1.5 A party may believe they can show without a trial that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law (including the interpretation of a document). In such a case the party concerned may make an application under rule 3.4 or apply for summary judgment under Part 24 (or both) as they think appropriate."

26 It is also relevant to refer to CPR 24, which deals with summary judgment. CPR 24.2 provides:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial.
>
> (Rule 3.4 makes provision for the court to strike out a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim)"

It can be seen from the part in parentheses in rule 24.2 that there is an overlap with rule 3.4. Indeed, the notes to Part 24 refer to there being "substantial overlap" between the two powers.

27 The notes to CPR 24 at 24.2.3 summarise the principles to be applied in determining applications for summary judgment. These provide as follows:

> "The following principles applicable to applications for summary judgment were formulated by Lewison J in *EasyAir Limited v Opal Telecom Limited* [2009] EWHC 239 (Ch) at 15 and approved by the Court of Appeal in *AC Ward & Sons Limited v Catlin (Five) Limited* [2009] EWCA Civ 1098, [2010] Lloyd's Rep IR 301 at 24.
>
> (i) The court must consider the court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91 ...
>
> (ii) A 'realistic' claim is one that carries some degree of conviction. This means the claim is more than merely arguable, *ED& F Man Liquid Products v Patel* [2003] EWCA Civ 472 at 8.
>
> (iii) In reaching its conclusion the court must not conduct a 'mini-trial.' *Swain v Hillman*
>
> (iv) This does not mean that that Court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by the contemporaneous documents. *ED& F Man Liquid Products v Patel* at 10 ..."

28 In *King v Steifel* [2021] EWHC 1045 (Comm), Cockerill J held as follows:

> "21 The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that - even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial.
>
> "22 So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up."

29 CPR 44.15 provides, as I have said, an exception to the QOCS regime. It provides:

> "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."

30 CPR 44.16, which I will not set out in full here, provides for another exception where it is found on the balance of probabilities that the claim is fundamentally dishonest.

31 The QOCS regime is pithily summarised by Males LJ in *Achille v LTA Services Ltd* [2022] Costs LR 1553:

> "2. CPR 44.15 is part of the QOCS regime in Section II of CPR 44."QOCS" stands for Qualified One-Way Costs Shifting, a term which cannot be described as self-explanatory, but which is intended to promote access to justice in personal injury cases. It deals with the problem that an individual who had suffered personal injury could be deterred from bringing proceedings by the prospect of liability to pay the defendant's costs in the event that his claim failed, a prospect which it is often difficult to rule out in view of the uncertainty inherent in litigation. The solution adopted in CPR 44.14 was to place

a cap on the claimant's liability to pay the defendant's costs, so that any order for costs made against a claimant can only be enforced up to the amount of any damages and interest ordered in his favour. Thus, an unsuccessful claimant would not have to pay any costs ordered in favour of the defendant, while even a successful claimant who obtained an order for damages would not have to pay any costs (for example of interlocutory hearings) ordered in favour of the defendant in the course of the proceedings to the extent that they exceeded the damages and interest payable by the defendant. The result was that a personal injury claimant would never be out of pocket as a result of bringing legal proceedings. Any damages recovered might be eaten up by liability to pay the defendant's costs, but the claimant would not be worse off financially as a result of bringing the claim (liability to pay his own costs being addressed in other ways).

3. However, a disadvantage of this scheme, if unqualified, is that it promotes access to the courts not only for meritorious claims (by which I mean claims which it was reasonable to bring, whether or not they ultimately succeed) but also for claims which are frivolous and should never have been brought in the first place. Accordingly, the basic rule just described was qualified so that, in such cases, an order for costs in favour of the defendant can be enforced to its full extent, sometimes without needing the permission of the court and sometimes only with such permission. The provisions which strike this balance are CPR 44.15 and CPR 44.16. [*Emphasis added*]

4. CPR 44.15 allows a defendant to enforce a costs order made against a claimant to its full extent without needing permission from the court in three categories of case. These are (1) where the claimant has disclosed no reasonable ground for bringing the proceedings, (2) where the proceedings are an abuse of the court's process and (3) where the claimant is personally responsible for conduct which is likely to obstruct the just disposal of the proceedings."

Grounds of Appeal

32 I begin by considering Ground 2, which was the first and principal ground argued by the parties. Mr Rodgers submits that strike out under CPR 3.4(2)(a) requires the Court to focus on the statement of case alone. If, as in this case, the statement of case contains all the necessary elements of a cause of action entitling the claimant to the relief sought, then it ought to be considered as disclosing reasonable grounds for bringing the claim. The Judge fell into error, he submits, by basing his decision as to whether or not the particulars of claim disclosed reasonable grounds for bringing the claim not on the statement of case itself, but on an analysis of the evidence and its strengths and demerits. Such analysis, submits Mr Rodgers, is relevant to summary judgment and in deciding whether there are real prospects of success, but not to an application to strike out under CPR3.4(2)(a). The distinction is important because of the consequences under the QOCS regime. The fact that a claim might be weak and liable to be dismissed on an application for summary judgment does not deprive the claimant in a personal injury claim of that costs protection. It is only where the claim should never have been

brought in the first place, or where there is some abuse of process or non-compliance that the protection is lost. He submits that this is not such a case. The claimant honestly believes in the claim that he brings, and he reminds me that there is a statement of truth to that effect. In circumstances where the Judge never heard the claimant's account of how he fell, the CCTV footage was not as conclusive as the Judge held.

33 Mr Cohen submits that the claimant knew from the earliest post-accident point that the cause of his fall was not the poles as alleged, but the fact, evident from the CCTV footage, that he caught his heel on the metal barrier. Mr Cohen referred me to other matters in evidence in support of the contention that the claimant had, at the time, not sought to blame the poles as the reason for his accident. He submits that the Judge was entitled to make the findings that he did as these were uncontestable and the factual basis for the claim was without foundation from the outset. It is further submitted that the claimant had no reasonable grounds for bringing an OLA claim, or a claim under the OLA, against TfL as it would have been clear to him from the outset that TfL was not and had never been an occupier of the loading bay where the index accident took place.

34 Mr Cohen submitted that there were various provisions in the Rules which entitled the Judge to go beyond the mere face of the pleading and that the decisions reached were open to the Judge to reach and were entirely proper. The Judge's conclusion that the claim was doomed to fail and was unsustainable leads, he submits, to the conclusion that the particulars of claim disclosed no reasonable grounds for bringing the claim. The Judge reached that decision having considered the CCTV footage.

Discussion

35 CPR 3.4(2) confers on the Court the power to strike out a claim on three grounds, namely: (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 likely to obstruct the just disposal of proceedings; or (c) there has been a failure to comply with a rule, practice direction or court order.

36 There is, as set out above, a substantial overlap between this power and the power to give summary judgment under CPR 24. However, the language of CPR 3.4(2), and in particular that of sub-paragraphs (a) and (b) thereof, refers to the statement of case. The significance of the use of that language was highlighted by Lord Woolf in *Swain v Hillman*, where it was said at 92H:

> "Clearly, there is a relationship between r.3.4 and r.24.2. However, the power of the court under Part 24, the grounds are set out in r.24.2, are wider than those contained in r.3.4. The reason for the contrast in language between r.3.4 and r.24.2 is because under r.3.4, unlike r.24.2, <u>the court generally is only concerned with the statement of case</u> which it is alleged discloses no reasonable grounds for bringing or defending the claim." [*Emphasis added*]

37 Thus, the focus of the Court on an application under CPR 3.4(2)(a) will be the statement of case. That this is so confirmed by the notes explaining the effect of the rule and which state that "Grounds (a) and (b) cover statements of case which are unreasonably

vague, incoherent, vexatious, scurrilous or obviously ill founded." In the generality of cases, such questions ought to be capable of being determined by considering the Statement of Case alone. In the *Independents' Advantage Insurance Company Limited v Cook* [2004] PNLR 44, referred to at CPR 3.4.21, the application before the court was made both under Part 3.4 to strike out, and under Part 24 for summary judgment, and there was some discussion as to whether that was appropriate: Chadwick LJ said as follows:

> "8 For my part, I have difficulty in understanding why – in a case in which (i) it is accepted (for the purposes of the application) that the claimant will be able to establish all the facts pleaded; and (ii) there are no additional facts upon which the defendant/applicant seeks to rely in support of the application – it was thought necessary or appropriate to couple an application under CPR 24(2)(a) with an application under CPR 3.4(2)(a) . If the particulars of claim disclose no reasonable grounds for bringing the claim, the court has ample power to strike out the pleading and to enter judgment for the defendant – see CPR 3.4(3) and paragraph 4(2) of the Practice Direction which supplements that rule (3PD.4). No recourse to CPR 24.2(a) is required. But if the pleading does disclose reasonable grounds for bringing the claim, then – on the hypothesis that the claimant will be able to establish the facts pleaded and in the absence of other facts to rebut the claim – it is impossible to hold that the claimant has no real prospect of succeeding. In those circumstances the existence of reasonable grounds for bringing the claim leads, necessarily, to the conclusion that there is a real prospect of success. There is no scope for recourse to CPR 24.2(a). In the present case the relevant test is that posed by CPR 3.4(2)(a): do the particulars of claim disclose reasonable grounds for bringing the claim?"

38 Thus, where an applicant on an application under CPR 3.4(2)(a) accepts that the claimant will be able to establish all the facts pleaded and does not seek to rely on any additional facts in support of the application, there is no scope for recourse to CPR 24.2. The application can be determined by considering whether the particulars of claim disclose reasonable grounds for bringing the claim. That might suggest that where an applicant does seek to rely on additional facts that go beyond those set out in the statement of case, the appropriate course would be to make the application under CPR 24.

39 I was referred to the case of *Harris v Bolt Burdon* [2000] CPLR 9 in which the Court of Appeal considered an application to strike out a claim for non-compliance with an order of the court in circumstances where it had become apparent by the time the matter was heard that the claim was unwinnable. There Sedley LJ said as follows:

> "27 ... I have, nevertheless, reached the conclusion that the unanswerable reason for upholding the district judge's decision to strike out the claim is that it is absolutely unwinnable for the reasons which I have considered. The default in compliance with the court's direction is undoubted. It might well, had this been a viable case, not have been such a default as to justify striking out, and I have gone through the

history of the case in some detail in order to explain why. But the underlying reason why the courts' 'unqualified discretion' -- the phrase is that of Lord Woolf in *Biguzzi* at page 1993 -- to strike out for non-compliance ought, quite exceptionally, to be exercised against the claimant is that to let her case go on would simply be to allow more and more money to be spent by public funds on one side and insurance funds on the other without any possible ultimate benefit to the claimant. It may be that the non-compliance of her solicitors with the court's direction is in this situation less the reason than the opportunity for taking this step, but that seems to me to be neither here nor there."

40 Stuart Smith LJ in the same case added the following:

> "33 I should add that, in my judgment, if a case is manifestly weak, although perhaps not entirely hopeless, that may be a consideration which the court can properly take into account, because it seems to me that it is greater prejudice to a defendant to have to meet a very weak claim, possibly by a legally aided plaintiff, or one from whom there is no prospect of recovering his costs, than it is to have to meet a case of substance.
>
> 34 In this case instead of proceeding under the new Civil Procedure Rules the judge addressed the question under the old law. In my view, it is a great pity that he did so. However, as became apparent in the early stages of the argument, the real question in this case was whether or not the claimant had any prospect of succeeding at trial at all. Not only do I think that that is a consideration which can be considered under the rule to which I have just referred, but there is now provision under Part 24 Rule 2, a procedure whereby the defendant may obtain summary judgment against a claimant where there is no real prospect of succeeding in the claim. That rule provides as follows:
>
> 'The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if --
>
> (a) it considers that --
>
> (i) that claimant has no real prospect of succeeding on the claim or issue.'
>
> 35 Strictly speaking, in my judgment, rather than applying to strike out for want of prosecution, it might have been preferable, at any rate before the judge when these rules had come into force, for the defendant to have applied under that rule so that the real issue to which my Lord has referred could have been considered. Unfortunately, that was not done. But in my view, and particularly having regard to the court's powers of case management, it is right that when the real issue becomes apparent to the court that it should embrace it and should take the appropriate steps.
> [*Emphasis added*]

41 By the highlighted words, Stuart-Smith LJ is clearly indicating that the better course would have been for the matter to have been addressed under CPR 24.2 so that the real issue (i.e. the lack of underlying merit) could be considered. The final sentence of Stuart-Smith LJ's judgment suggests that the Court should be proactive, in the circumstances, in dealing with the matter under the appropriate rule.

42 The question here is whether, as Mr Rodgers submits, the focus under CPR 3.4 on the statement of case precludes consideration of anything other than the statement of case. In other words, does the fact that the statement of case on its face discloses a coherent cause of action mean that it cannot be struck out pursuant to CPR 3.4(2)(a)? In my judgment, such a rigid interpretation of the rule would not be correct. The statement of case cannot be read in a vacuum. The fact that the statement of case must disclose reasonable grounds for bringing the claim, imports an objective assessment, which may take account of factors known to the Court even if not acknowledged in or obvious on the face of the statement of case. Thus, a statement of case that is reliant on an allegation of fact that is plainly and unarguably unsustainable (perhaps because it is contradicted by an unambiguously contradictory contemporaneous document) might be said not to disclose reasonable grounds for bringing the claim. The notes to the rule which refer to a case as falling within (a) if it is "obviously ill-founded" are consistent with such an approach.

43 However, the extent to which and the circumstances in which the Court should look to matters beyond the statement of case on an application under CPR 3.4(2) are limited. If that were not so then the distinction, deliberately drawn, between the two powers would reduce to nothing. The Courts are warned against being drawn into a mini trial on an application for summary judgment, where the test is whether there is a realistic, as opposed to a fanciful, prospect of success. That warning carries even more force on an application under CPR 3.4(2)(a) where the focus of the analysis is generally on the statement of case.

44 Of course, in most litigation, it will not matter to the parties whether the application is brought under CPR 3.4 or CPR 24: a successful application will generally entitle the winning party to its costs. However, that is not the position in respect of personal injury claims to which the QOCS regime applies. CPR 44.15 makes it clear that the costs protection afforded to a claimant by QOCS is lost where the proceedings have been struck out on the grounds that the claim has disclosed no reasonable grounds for bringing the proceedings. By contrast, where summary judgment is entered against a claimant, that costs protection is not lost. This was confirmed by the Court of Appeal very recently (albeit in an obiter remark) in the recent case of *Excalibur and Keswick Groundworks Limited v McDonald* [2023] EWCA Civ 18 at 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." [*Emphasis added*]

45 CPR 44.15 only bites where the proceedings have already been struck out on one of the prescribed grounds. Where proceedings have been so struck out, orders for costs against the claimant may be enforced to their full extent without the permission of the court. In other words, CPR 44.15 does not confer on the Court any separate additional power to strike out a claim. Instead there is an automatic removal of the costs protection under QOCS where the proceedings have been struck out on one of the prescribed grounds. Those grounds reflect the grounds on which claims may be struck out pursuant to CPR 3.4(2). There are some differences in phraseology, but it does not seem to me that these give rise to any substantive difference. For example, CPR 44.15 refers to the "proceedings" having been struck out, whereas CPR 3.4(2) refers to the striking out of a "statement of case". It was confirmed in the *Achille* case that the term "proceedings", as used in CPR 44.15, referred to all of the claims made by a claimant against a single defendant, when one such claim was a claim for personal injury. Thus, the striking out of a statement of case in respect of a claim against a defendant will amount to the striking out of proceedings against that defendant within the meaning of CPR 44.15. A further difference of language is that 44.15 refers to the "claimant" disclosing no reasonable grounds whereas CPR 3.4 refers to the "statement of case" not doing so. Mr Rodgers submits that that difference is explained by the fact that the latter provision must cater for defences as well, whereas CPR 44.15 only affects the position of claimants whose proceedings have been struck out. I agree with that submission.

46 The position, therefore, is that CPR 44.15 will only apply where there has been a strike out pursuant to CPR 3.4, whereas the entering of summary judgment against a claimant pursuant to CPR 24 will not have that effect. The significance of this for claimants and defendants in personal injury claims is obvious: a successful application to strike out a claim will result not only in the dismissal of the claim, but also in an enforceable costs order against the claimant. The obtaining of summary judgment would only result in the dismissal of the claim.

47 Given this significance, courts should be especially astute in personal injury claims in ensuring that an application that is made under CPR 3.4(2), but which ought properly to have been brought under CPR 24, is dealt with as if brought under the latter. Such a course is permitted, as confirmed by CPR 3.4.21 and the cases cited therein:

> "Many cases fall within both rule 3.4 and Part 24, and it is often appropriate for a party to combine the striking out application with an application for summary judgment. Indeed, the court may treat an application under rule 3.4(2)(a) as if it was an application under Part 24 - *Moroney v Anglo-European College of Chiropractice* [2009] EWCA Civ 1560, and see *Taylor v Midland Bank Trust Company Limited (No 2)* [2002] WTLR 95 (see *Moroney* at 23)."

If the courts were to too readily permit applications for summary judgement to be pursued as strike out applications that would erode the protection to claimants afforded by QOCS.

48 In the present case, Mr Rodgers submits that the Judge went far beyond any consideration of the statement of case (as is appropriate for a CPR 3.4 application) and conducted an evaluation of the evidence. Had the focus remained on the statement of

case, it would have been clear that it did disclose reasonable grounds for bringing the claim and the application ought to have been dismissed, or alternatively, the application ought to have been treated as having been made under CPR 24.2.

49 The particulars of claim in the present case are in standard form. This case does not fall into any of the examples set out in Practice Direction 1.4 of cases that would fall within CPR 3.4(2)(a). Thus, the particulars of claim do set out facts indicating what the claim is about. They are not incoherent, and those facts do disclose a legally recognisable claim. These examples are, of course, only illustrations but they do serve to indicate the kind of deficiency on the face of the pleadings that could lead to a strike out. There were no such deficiencies here.

50 It was not suggested in the defence of either defendant that the particulars of claim were defective on their face. Indeed, that suggestion has not been made at any stage. The Judge also considered (at 17 of the note of the judgment) that the particulars of claim "take a proportionate approach whereby allegations are brought against the first and second defendants jointly." The Judge also appeared to consider that the particulars of claim disclosed reasonable grounds, at least when the claim was first initiated. Thus at 51, the Judge stated that his conclusion that the claim was unsustainable "may be more obvious now that when the claim was initiated", and at 53 that "the claimant had persisted with the claim after – in this case, long after - the fundamental foundations of the statement of case are manifestly unsustainable."

51 The question here is whether it was appropriate to go beyond the particulars and consider, as the Judge did, such matters as the CCTV footage, on this application to strike out. I have already said that the court is not confined to looking solely at the statement of case on a CPR 3.4 application, but the extent to which it may do so is limited. Mr Rodgers submitted that the mere fact that CCTV footage was being considered ought to have alerted the Judge that this was going beyond a strike out application based on the statement of case. I do not think it would be correct to take that approach. There may well be cases where such evidence is akin to a contemporaneous written document which wholly undermines an otherwise plausible assertion of fact in the pleaded case. For example, CCTV footage demonstrating conclusively that there was no accident at all could be taken into account in assessing whether the Statement of case was obviously ill-founded.

52 The Judge in the present case took the view that the CCTV footage fell into that category, saying that the circumstances of the accident are beyond any reasonable scope of sensible contradiction. Having viewed the footage, it is difficult to be as confident as the Judge was. The footage shows the presence of poles on the floor in the loading bay. It also shows that the claimant placed his foot near the poles as he stepped over the barrier with his other foot to enter the bay. That much is not in dispute. What is in dispute is the cause of the fall. The claimant pleaded that it was the poles, and he maintains that view. The Judge took the view that it was the claimant failing to clear his trailing foot over the barrier. That, it seems to me, evidences a dispute of fact and causation on which the Judge decided against the claimant. It does not establish that the statement of case disclosed no reasonable grounds for bringing the claim in the first place. The Judge's findings might well suffice in showing that the claim has no real prospect of success, or that its chances of success are fanciful. I express no view on that at this stage; but, given the necessary focus on the statement of case, the grounds

for striking out on that basis are not present. In my judgment, the Judge was wrong to take the approach that he did; that is to say, the Judge wrongly applied an approach appropriate for a summary judgment application to a rule 3.4 application to strike out. The Judge acknowledged at para.33 that others might have pursued this as an application for summary judgment. Having so acknowledged, it was incumbent on the Judge, especially in the context of a personal injury claim where QOCS protection can fall away in the event of a strike out, to consider whether the application ought in fact to be treated as one made under CPR 24.2 (see the discussion above).

53 It was not only the CCTV footage that led the judge to conclude as he did, but also his finding that TfL was not the occupier of the loading bay in which the accident occurred. It seems to me that the points made in the preceding paragraph apply *a fortiori* to this aspect of the judgment. Once again there was no suggestion prior to the application that the pleaded case was defective in asserting liability on the part of both defendants jointly. Indeed, the judge himself considered that to be proportionate. Moreover, this is a case where the first defendant had initially pleaded in its defence that the loading bay is under the control of the second defendant. If the first defendant could reasonably hold that view, albeit subsequently amended, then it can hardly be said that the claimant, in asserting the same, disclosed no reasonable grounds for doing so.

54 The judge concluded that it "appears obvious that the blue rectangle [in the lease plan] is not a part of the property that forms any section under the control or supervision of the second defendant", and that "both defendants recognise that the second defendant is not therefore an occupier of the relevant blue part of the floor." As already mentioned, that was not the first defendant's position at the outset. On that basis, and not, it would appear much else, apart from the absence of any positive evidence from the claimant as to the occupier of the part marked in blue, the Judge felt able to conclude that "the fact that the second defendant is not an occupier of the blue area is a fact beyond the reach of any sensible argument to the contrary." In my view, the Judge was entitled to conclude that the second defendant was not the occupier, but that did not mean that the statement of case disclosed no reasonable grounds for asserting that it was. The Judge has, once again, reached a view on the merits, having reviewed the evidence, an exercise which is appropriate to a summary judgment application, and incorrectly applied that to this strike out application. In doing so, the Judge erred in law.

55 These errors arose at least in part because of the way in which the application was made. This was one of those cases, unlike the position in the *Independents' Advantage* case, where the defendant was seeking to rely on additional facts over and above those asserted in the claimant's statement of case. The appropriate course, therefore, was for the defendant to make a summary judgment application under CPR 24 instead of, or in addition to, the strike out application under CPR 3.4. Mr Rodgers submits that the reason for not taking that course was tactical and suggested that this is a course often taken by defendants in personal injury claims. I heard no evidence as to that and I make no findings as to the defendant's motive for pursuing only a strike out. However, it is clear that it may be an advantage for some defendants in approaching what is really a summary judgment application as a strike out application given the costs consequences under QOCS. As I have said already, the court should be astute in this context to deal with applications which are, in reality, applications on the merits for summary judgment

on the basis that there is no real prospect of success, as applications under Part 24 are not as applications under CPR 3.4.

56 Mr Cohen did make a number of points in support of a submission that it was "perfectly clear that even at the point that the claim was brought, there were no reasonable grounds for bringing it". He submits that the claimant knew that his accident was neither caused nor contributed to by the poles and that, as such, he knew his claim was groundless. He further submits that it would have been obvious to the claimant before issuing proceedings that TfL was not the occupier of the loading bay. These would appear to be allegations that the claimant knowingly brought an untruthful or dishonest claim. The same was asserted below. However, the Judge made no findings on honesty. At 45 of the note of the judgment, the Judge said this:

> "I do want to underscore what I said in the course of submissions. Allegations are made of fundamental dishonesty. I am not trespassing on that territory. There is still room for someone to be simply mistaken about how something happened, particularly in the circumstances of this case, and then to be shown to be mistaken by clear, unarguable, CCTV evidence. It is quite possible we are in that territory in this case. I make no findings about it today."

57 Accordingly, these points which appear to go to the honesty of the claimant, or the good faith in which the claim was brought, do not advance Mr Cohen's submission that the particulars of claim disclosed no reasonable grounds for bringing the claim. If allegations of dishonesty are made out, whether after trial or otherwise, then of course the claimant is liable to lose QOCS protection under CPR 44.16.

58 In summary, this is a case where the pleaded statement of case disclosed all the necessary elements of a cause of action under the OLA 1957 and in negligence. Being unable to make good his pleaded case on the evidence does not detract from that. Where a defendant in a personal injury claim considers that a claim is weak and has no real prospect of success, the appropriate course will generally be to make an application under CPR 24.

59 Whilst it is implicit in parts of the judgement that the particulars of claim were considered to disclose reasonable grounds for bringing the claim, the Judge took the view, in determining that CPR 44.15 applies, that the concept of "bringing the proceedings" within the meaning of that rule encompasses the continuation of them. The Judge reasoned as follows:

> "53 …The rule-makers clearly envisaged this to extend to where the claimant has persisted with the claim after – in this case, long after - the fundamental foundations of the statements of case are manifestly unsustainable."

60 The natural and ordinary meaning of the term "bringing proceedings" denotes their commencement. The continuation of proceedings denotes a separate act post-commencement. If the intention had been to include that separate act within the meaning of the provision, then the rule could readily have said so.

61 Mr Cohen submitted that another equally plausible interpretation is that it includes the initiation and maintaining of those proceedings. However, I was not taken to any contextual material or rule of statutory interpretation that would entitle the court to read in such words which would, in my judgment, significantly expand the scope of the natural and ordinary meaning of the term. It was suggested that if the term were not broadened to include continuation of a claim that proved, as a result of disclosure or evidence, to be unmeritorious, then there would be little protection against weak claims being maintained without regard to cost and inconvenience to other parties. However, that is not the case, as the defendant could, in those circumstances, make an application for summary judgment. Similarly, if the court is faced with an application to strike out which is, in reality, a claim that a statement of case that was adequate when brought has been rendered inadequate by subsequent developments, the appropriate course might be to treat it as an application for summary judgment, or alternatively, that the pursuit of the claim amounts to an abuse of process within the meaning of rule 3.4(2)(b). That is especially so in the personal injury context where there are, as discussed, material costs consequences dependent on which rule is invoked.

62 For these reasons, Ground 2 of the appeal is upheld.

63 **Ground 1**: Mr Rodgers submits that the Judge erred in proceeding to stop the claim without trial given that the claimant's account of how he fell was never heard. He says the CCTV footage is not as conclusive as the Judge found. As to the lease plan, he says too much weight was placed on this and the Judge overlooked the evidence that the poles had been placed where they were by TfL. In any event, given that the matter was listed to be heard only three weeks later, the Judge should have allowed the matter to proceed to trial. The latter point, it seems to me, is without substantial merit. Proximity to trial will not be a major factor in applications of this sort if substantial savings may still be achieved with the striking out of the claim. Obviously, the position may be different if the application were to be made on the eve of trial, or after the trial has commenced, where different considerations would apply.

64 Mr Cohen directed me to the case of *Haringey LBC v Ahmed and Ahmed* [2017] EWCA Civ 1861 where it was said that an appeal court will only interfere with a trial judge's finding of fact, and thus allow an appeal on the basis of a challenge to such a finding, where it properly determines that:

> "the finding of fact is unsupported by the evidence or where the decision is one which no reasonable judge could have reached."

65 Of course, that high test applies to the findings of a trial judge, having heard all the evidence. The appeal here is concerned with the findings of fact made at an interlocutory stage before full trial. Moreover, those findings in respect of the CCTV footage were made without hearing from the claimant. In particular, it was not put to the claimant, in order for him to answer the point, that the cause of the fall was as the Judge found and not as the claimant had alleged.

66 That said, in my judgment, whilst it would have been preferable for the claimant to be heard before the Judge expressed the views that he did, I do not consider that he erred in law in doing so. The Judge had viewed the CCTV footage and was entitled to reach views on it. The conclusions that he reached, namely that the fall was caused by the

claimant catching his trailing foot on the railing, was one that was open to him on that evidence.

67 I do not go as far as the Judge who said that the evidence was such as to "brook no room for sensible argument." In my judgment, it was at least possible to conclude that the poles played some part in causing the fall, by preventing the claimant from regaining his balance by hopping forward once his other foot clipped the railing. However, it cannot be said that the Judge's conclusion was one that was one that was not open to him, or was one that no reasonable Judge could have reached on the evidence available.

68 As to the failure to hear the claimant on this issue, this amounted to an irregularity but not a serious one in the circumstances. The Judge had the claimant's pleaded case and his statement, both of which were taken into account. These clearly set out his case which is that "the discarded pipes caused me to lose my balance when my foot came into contact with them and made me fall." It is unlikely that the claimant would have had anything substantially more to say than that, even if he had been given an opportunity to do so at the hearing.

69 Similarly, with the lease plan, the findings reached by the Judge were ones that were clearly open to him to reach.

70 In these circumstances, Ground 1 of the appeal fails and is dismissed.

Conclusion

71 For these reasons, Ground 2 of the appeal is upheld and the order of HHJ Saggerson dated 8 February 2022 is set aside. The case is remitted to the County Court at Central London for further directions as may be appropriate.
