In the County Court at Liverpool
Case number 047DC564
On Appeal from District Judge Gray (County Court at St Helens)
(Appeal No 18 of 2025):

BETWEEN

JOSEPH STRAIN

Claimant/Appellant

and

TRANSUNION INTERNATIONAL UK LIMITED

Defendant /Respondent

Before **His Honour Judge Graham Wood KC**

Hearing 16th July 2025

Mr Thomas Mason (instructed by Your Lawyers, Solicitors) for the Appellant

Mr James Hughes (instructed by DAC Beachcroft Solicitors) for the Respondent

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APPEAL JUDGMENT

Introduction

1. This is an appeal against the decision of District Judge Gray in St Helens on 27th February 2025 whereby he struck out the Appellant's claim for damages in relation to alleged data breaches, and ordered the Appellant to pay costs in the sum of £40,000 to the Respondent.

2. The appeal proceeds on the basis of the permission granted on the papers by her Honour Judge O'Brien on 14th May 2025. I heard oral argument from counsel on 16th July and indicated that I would reserve my judgment in view of the issues raised and the number of authorities referred to. For ease of understanding and identification, I shall refer to the Appellant as the Claimant, and the Respondents/ Second Defendant as the Defendant.

Background

3. The facts of the underlying claim do not require any great elaboration. In short, the Claimant had originally pursued both Defendants alleging breaches of the Data Protection Act 2018 and the misuse of private information in respect of his credit history. It was alleged that the Defendant, a credit reference agency, had failed to update the Claimant's credit file to record that a loan originally provided by the First Defendant's insured, a loan company, had been written off by agreement. The absence of any update meant that there were blights on the Claimant's credit record, and he was unable to obtain a mortgage. His case was that the Defendant's failures had caused him significant distress (for which he was entitled to general damages on a statutory basis in a data breach claim) and on top of that he had suffered identifiable personal injury in the form of a generalised anxiety disorder. In his claim he relied upon a medical report from a psychologist, Dr Walmsley.

4. The claim was fully defended. In its acknowledgement of service, the Defendant had provided the business address of its solicitor, DAC Beachcroft LLP, as well as an email address, (onewcombe@dacbeachroft.com). I shall return to this aspect later when considering the applicable CPR rules, and counsel's argument.

5. At some point the claim against the First Defendant was discontinued but the matter was case managed and listed for a fast track trial on 27th February 2025 against the present Defendant. Although this court has not been invited to consider the merits of the underlying claim, it has been said that the Claimant's prospects were poor, and it is noted that in the exchanges between Counsel then appearing for the Defendant and District Judge Gray, it was said that the claim had always been "*utterly rubbish*". Despite this, the reference in the defence to a potential strike out application, an earlier invitation to discontinue and a modest nuisance offer which was inclusive of costs, (£4000), there had been no further attempt to

bring the litigation to a close on the part of the Defendant. In the course of the hearing it was suggested that the Claimant's costs of litigation, including potential trial, had been in excess of £85,000.

6. Further, the court has not been provided with any detailed correspondence, nor the disclosure which was to be used in the claim. However, as is highly commonplace in litigation these days where both parties are represented, the solicitors communicated by email. It is likely that some of the communication would have been converted to written correspondence, at least as enclosures to emails. There are two email exchanges included in the bundle to which the court's attention has been drawn, and which now carry some significance. The first is dated 9th December 2024. At 9.03 Mr Newcombe, on behalf of the Defendant, writes to his opposite number, Mr Pal, for the Claimant. It is in these terms:

> "Ahead of disclosure on the above matter, please confirm that you are willing to accept service by email and the email address for service."

7. It is clear that he is referring to the disclosure list. Mr Pal replies at 9.20 am:

> "We confirm that we are agreeable to email service of the list of documents if the agreement is reciprocated. If agreed please confirm your email address to use for service. If serving on us please send the email to debaunkon@yourlawyers.co.uk and cc in charlize@yourlawyers.co"

8. Confirmation is provided by Mr Newcombe at 10:05 AM.

9. There is a similar communication in relation to the mutual exchange of witness statements on the 21st and 22nd January. Both Mr Newcombe and Mr Pal confirm their willingness to accept such mutual exchange by email with the provision of appropriate email addresses.

10. It is important to consider in detail what happened before and on the day of the hearing, in order to contextualise the conclusions that were reached by the learned district judge. For reasons which have not been made apparent, the Claimant did not wish to go ahead with his claim and a decision was made to discontinue. This required the filing and serving of a notice of discontinuance. At 16.12 on 26th February Mr Pal sent an email with the notice of discontinuance attached to it by way of service on the Defendant. It was sent to the two email addresses which had been provided by Mr Newcombe when he dealt with the exchange of witness statements. At 16.17[1] the notice of discontinuance was filed with the

[1] This is the time seemingly agreed between counsel for the filing, although documentation suggests it may have been 16.18. The difference is immaterial

court. The matter had already been listed for the fast track trial which was to take place the following day. However, at some point (as the transcript makes clear) the trial was taken out of the list, and didn't appear on the court room list for 27th February. The district judge had been alerted to the discontinuance as he was leaving the building the night before.

11. On 27th February, Mr Williams of counsel attended on behalf of the Defendant seemingly unaware until he arrived at court that the Claimant had discontinued. Neither the Claimant nor his legal representatives were present. It is not clear in what circumstances the case came to be called on, if it was no longer in the list, but be that as it may, this court has a transcript of exchanges between Mr Williams and the learned District Judge.

12. The first point to note is that at the outset of the hearing, DJ Gray expressed the view that the notice of discontinuance, having been filed at 4.17pm, was after the "*formal close of play*" for the business of the court. I will deal with this in more detail later in this judgment, but regrettably the learned judge was not told that his conclusion in respect of timing was incorrect for the filing and service of documents electronically (CPR 6.26).

13. It is immediately clear that Mr Williams was not agitating to challenge the effectiveness of service of the notice of discontinuance despite identifying what he described as a "*technical argument*". He acknowledged that with discontinuance the Claimant would have a liability to pay the Defendant's costs, but because of the personal injury element and following the Court of Appeal decision in **Excalibur**[2], the Claimant would have some protection because of QOCS (qualified one-way costs shifting). However, in view of the fact that this was potentially a mixed claim, there was an argument available to the Defendant pursuant to **Brown**[3] that the costs protection would be partially lost. Mr Williams suggested that it might be appropriate to list the matter for a costs hearing.

14. The exchanges which followed this are relevant.

> JUDGE GRAY: All right, let us just stop there. You began by saying by reason of service and so forth that there are arguments that they have not discontinued. You then said those arguments are hopeless. Hopeless in what sense?
>
> MR WILLIAMS: In the sense that ---
>
> JUDGE GRAY: Do you mean hopeless as in they cannot succeed or do you mean pointless?
>
> MR WILLIAMS: I mean our argument against it is hopeless in the sense that they have served the notice of discontinuance electronically ---
>
> JUDGE GRAY: Yes.

[2] Discussed in more detail below.
[3] **Brown v Commissioner of Police for the Metropolis [2019] Civ 1724 EWCA**

MR WILLIAMS: --- we have never accepted service electronically but ---

JUDGE GRAY: OK, so you say you are not served.

MR WILLIAMS: We say we are not served but they could easily remedy that ---

JUDGE GRAY: Yes, yes ---

MR WILLIAMS: --- simply by giving it to us.

JUDGE GRAY: --- *I am sort of developing a thought which is this*[4]. As far as you are concerned you not having been served this matter is still active now.

MR WILLIAMS: Those are my instructions.

JUDGE GRAY: And you are here and they are not.

MR WILLIAMS: Yes.

JUDGE GRAY: So why are you talking about me adjourning for another hearing as opposed to you making your pitch in the formalised sense for everything you want now.

MR WILLIAMS: Well I am very happy to do that. My concern was that this case was formally taken out of the list.

JUDGE GRAY: As at - literally as I was leaving the building yesterday with the trial bundle under my arm because I was – I wanted to read more closely the witness statement from your chap ---

15. Thus it can be seen that despite the initial suggestion of counsel that a further hearing was necessary to deal with the potential costs issue, in effect the Defendant was provided with an invitation by the judge to deal with any consequences of the discontinuance, or purported discontinuance at that hearing, even though the matter was no longer formally listed.

16. There is a further exchange a few minutes later when a discussion ensued about whether or not service of the notice of discontinuance had been effective. Because of the timing of the email communication in relation to both service and filing of the notice, the learned judge invited counsel to agree that not only had it been received by the court "*after close of play*" but also by the Defendant. As indicated above, no submissions were made to the judge about the service requirements, nor does it appear that he was taken to Part 6 of CPR. At the top of page 8 of the transcript, there was this exchange:

JUDGE GRAY: Yes, which means that in legal terms you got it today.

MR WILLIAMS: Yes.

JUDGE GRAY: And you are here.

MR WILLIAMS: Yes.

[4] My italicisation/ emphasis

JUDGE GRAY: So it has not been served.

MR WILLIAMS: Yes.

JUDGE GRAY: For those two reasons I am satisfied it has not been served.

MR WILLIAMS: Yes.

JUDGE GRAY: *So therefore it is live so you make whatever application you think you need to make*.[5]

MR WILLIAMS: Thank you very much indeed, judge. Well in those circumstances 38.6, judge, I would respectfully submit, well, in those circumstances given there is no liability, forgive me, given there is no valid discontinuance ---

JUDGE GRAY: Mmm.

MR WILLIAMS: --- and there is non-attendance ---

JUDGE GRAY: Mmm.

MR WILLIAMS: --- I think I am bound in those circumstances to seek a strike out of the case ---

17. Mr Williams then made his application in the face of the court and the learned judge agreed to strike out the claim under CPR 3.4 bringing into play CPR 44.15, which is concerned with a potential piercing of the shield of protection afforded by QOCS. Having struck out the claim, the learned judge made a further order for payment by the Claimant of the Defendant's costs of the action which were summarily assessed in the sum of £40,000 inclusive of VAT. The order stated that the costs order was enforceable under CPR 44.15 (c).

Judgment of District Judge Gray

18. The learned judge's judgment was relatively short, perhaps unsurprisingly bearing in mind that he had only received brief submissions from counsel for the Defendant, and the hearing does not appear to have lasted longer than about 15 minutes.

19. In relation to service of the notice of discontinuance, the judge dealt with this in paragraph 1:

> "1. I am satisfied that the notice of discontinuance has not served to discontinue these proceedings before you have appeared before the court. I say that, firstly, because they have been served by email and I understand that DAC Beachcroft do not accept service by email. I make in passing the observation that many solicitors have on their correspondence something that expressly says that. I cannot see that in the one sheet of DAC headed notepaper albeit itself emailed, but nonetheless I understand that their position is that they do not accept service by email. But even were that not to be the case the simple fact is that the email has been sent to

[5] As above, my emphasis

> them at 4.12 and indeed filed at court at 4.17 so, in other words, after close of play. So I am satisfied that it has not been effective to discontinue these proceedings."

20. Having referred to the relevance of CPR 44.15 the learned judge went on to consider the process of a potential strike out which might engage CPR 44.15. It would appear that the absence of the Claimant at the hearing, and the manner in which he had attempted to discontinue were decisive factors for the application of 44.15 (c). At paragraphs 4 and 5, the learned judge put it in these terms:

> "4. I am satisfied first of all in the absence of the Claimant that the claim should be struck out, that therefore engages 44.15. I am satisfied not as to 44.15(a) in terms of disclosing no reasonable grounds.....
>
> 5. But the conduct of the Claimant in pursuing this case to today purporting to discontinue in the way that I have indicated at such a last gasp moment it seems to me is conduct likely to obstruct the just disposal of the proceedings and I am satisfied that the Claimant must know of this, it cannot have been a decision to discontinue without his knowledge, and in any event both (i) and (ii) are engaged, the person acting on the Claimant's behalf with the Claimant's knowledge of such conduct has acted in a way which in my view prevents the proper or just disposal of the proceedings."

Grounds of Appeal

21. Permission was granted by Judge O'Brien on all three grounds. In relation to the first ground, the Claimant contended that the learned judge failed to apply the electronic service rules by considering practice direction 6A, and paragraph 4.2 (c) CPR 6.23 (6).[6] This, it is said, amounted to an error of law, and if the relevant service rules and practice direction had been considered by the judge, he would have been bound to conclude that the notice was validly served. I shall refer to this as the "*e-mail service*" ground.

22. The second ground of appeal challenges the learned district judge's consideration of the timing of service whereby he failed to take into account that service by email was governed by CPR 6.26, which permitted service electronically provided this was achieved by 4.30 pm on a business day. It is said that the learned judge was in error by concluding that the notice of discontinuance had been served after "close of play" when clearly it was not. I shall refer to this as the "*time of service*" ground. I note in passing that for the purposes of the appeal before me the Defendant, through counsel Mr Hughes, did not seriously challenge the application of 6.26, and the learned district judge's error, if e-mail service was valid and permitted.

[6] Both considered in more detail in the next section of this judgment.

23. The third ground relates to the process of strike out, and the application of CPR 44.15 (c) and CPR 3.4. It is said that the learned district judge should have taken into account the decision of the court in **Excalibur & Keswick Groundworks Ltd v Michael McDonald [2023] EWCA Civ 18**, which would have precluded any strike out in the face of the court and accordingly his determination, including the enforceability of the costs order as an exception to QOCS was wrong in law. I shall refer to this as the "strike out" ground.

24. As I indicated in the course of exchanges with counsel, if the Claimant is successful on the first two grounds, and the notice of discontinuance was validly served, consideration of the third ground becomes academic.

The relevant CPR provisions and Practice Directions.

25. The court's focus has been on the service provisions, those which deal with qualified one-way costs shifting and strike out. Starting with CPR part 6, the practice direction should be the first port of call. Dealing with the service by fax or other electronic means, 6 APD.4. Paragraph 4.1 provides:

> "(2) the following are to be taken as sufficient written indications for the purposes of paragraph 4.1(1) –
>
> (a) .....;
>
> (b) an e-mail address or e-mail addresses set out on the writing paper of the solicitor acting for the party to be served but only where it is stated that the e-mail address or e-mail addresses may be used for service; or
>
> (c) a fax number, e-mail address or e-mail addresses or electronic identification set out on a statement of case or a response to a claim filed with the court."

26. As will be seen, much of the argument in relation to the validity of email service related to what was said to be a precondition in paragraph 4.2 of the practice direction, which provides:

> **4.2** Where a party intends to serve a document by electronic means (other than by fax) that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means (for example, the format in which documents are to be sent and the maximum size of attachments that may be received).

27. Turning to the service rule itself, CPR 6.23(6) dealing with deemed service provides a qualification to the application of practice direction 6A.

(6) Where a party indicates in accordance with Practice Direction 6A that they will accept service by electronic means other than fax, the e-mail address or electronic identification given by that party will be deemed to be at the address for service.

28. Finally in relation to service, and the timing of that service, the table provided at CPR 6.26 is relevant. This deals with 6 separate methods of service for deeming the time of such service, namely first class post, document exchange, delivery at a permitted address, fax, other electronic method, or personal service. The relevant section in the table is "5. *other electronic method"*:

"If the e-mail or other electronic transmission is sent on a business day before 4.30p.m., on that day; or in any other case, on the next business day after the day on which it was sent"

29. Because the strike out of the claim lay at the heart of the learned district judge's decision, it is necessary to consider the court's powers, as well as the application of qualified one-way costs shifting and the exception in the context of a strike out.

30. The primary provision is contained in CPR 3.4, which is in effect a gateway to CPR 44.15:

Power to strike out a statement of case

3.4

(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 or defending the claim;

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

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

31. Where a party has brought a claim for personal injuries, they have the benefit of a protection from the enforcement of an adverse costs order CPR 44.14. However, there are exceptions. This court is only concerned with the exception which does not require the permission of the court for enforcement contained within CPR 44.15 which provides:

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

44.15 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.

32. It can be seen that CPR 44.15 mirrors closely, but not precisely CPR 3.4, providing, in effect, that if there has been a strike out of the claim either on the basis of (a) no reasonable grounds, (b) abuse of process or (c) conduct, the QOCs shield is pierced. However, the wording is not identical, in that the obstruction of the just disposal of the proceedings is linked to all three bases for strike out as opposed to an abuse of process, and the third element of conduct has replaced the non-compliance with a practice direction, rule or court order. This may be a distinction without any real difference and the court did not receive any submissions on this appeal to suggest that 44.15 is intended to do anything other than remove the protection of the claim when it has come to an end by being struck out, rather than through final determination or discontinuance.

33. In respect of the rules dealing with discontinuance, it is to be noted that save for the exceptions set out in CPR 38.2, the permission of the court is not required. The liability for costs is stated in CPR 38.6 which confirms that this arises in favour of the Defendant up to the date upon which the notice of discontinuance was served:

> "...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 notice of discontinuance was served on the Defendant."

34. It should be noted that CPR 39.3, which was referred to briefly during the course of arguments on this appeal, deals with the situation in which a party fails to attend a "trial" whereby the court is empowered to strike out the claim or the defence. Although the learned district judge referred to the absence of the Claimant being relevant to his decision to strike out, it seems to me that this was a conduct consideration (CPR 44.15) and the judge was not invoking his power under CPR 39.3, although this is not entirely clear from the judgment. For the sake of completeness, I set out the provision:

"**39.3**—(1) The court may proceed with a trial in the absence of a party but—

(a) if no party attends the trial, it may strike out(GL) the whole of the proceedings;

(b) if the Claimant does not attend, it may strike out his claim and any defence to counterclaim; and

(c) if a Defendant does not attend, it may strike out his defence or counterclaim (or both)."

The respective arguments

35. Both counsel provided helpful skeleton arguments and made reference to a number of authorities. These were supplemented by oral submissions. I am grateful for their assistance and the proportionate elucidation of the relevant points, as the court was taken through various cases, and in particular the potential conflict in respect of the authorities dealing with the electronic service provisions and paragraph 4.2. I do not intend to repeat the submissions in detail for the purposes of this judgment, but I will summarise the headline points and identify the relevant parts of the authorities relied upon.

36. On behalf of the Claimant, Mr Mason's overarching submission was that the service provisions, insofar as there was any lack of clarity or conflicting authority providing different interpretations, should be given a purposive construction.

37. In respect of the email service ground, he placed heavy reliance upon the acknowledgement of service which was filed on 13th February 2023. It would have been open to the Defendant not to complete that section which allowed the inclusion of an email address. However, because it was provided, this brought the Defendant squarely within Practice Direction 6A paragraph 4.1.(c), because it amounted to an acceptance of email service. Not only did the judge fail to consider this, but also it was never brought to his attention, and if it had been, he would have been bound to conclude that email service of the notice of discontinuance was valid, and the Defendant had not indicated that it would *not* accept service by email.

38. He referred also to the correspondence between the respective fee earners in relation to the disclosure list and the mutual service of witness statement evidence. It was clear, he submitted, that this also amounted to an indication not only of a willingness to accept service by email, but also a preference. It was relevant to the Defendant's argument that there was a qualification to paragraph 4.1(c) that in those email exchanges there have been no discussion about size or format.

39. Acknowledging that CPR 4.2 was not complied with, and which he accepted was the key battleground in respect of ground 1, Mr Mason submitted this was not fatal to the validity of email service. He referred the court to the decision of a deputy High Court judge, the Chief Insolvency and Companies Court judge, Judge Briggs, sitting in the Business and Property Court in **Entertainment One UK limited v SConnect Media LLC and Others [2022] EWHC 3295 (Ch)**. Whilst the facts of that case which related to intellectual property were somewhat complex, the judge had been called upon to address the validity of the service of

the claim, which was highly document heavy, in the context of paragraph 4.1 of PD6 A and the potential qualification in paragraph 4.2. This court was taken to paragraph 60ff of that judgment, where a detailed review was undertaken by Judge Briggs of authorities which had discussed whether compliance with paragraph 4.2 was fundamental to effective service. Whilst the several authorities identified by the judge dealt mainly with paragraph 4.1 (b) and not (c), Mr Mason submitted that his approach, which required a purposive interpretation of the service provisions, following **Barton v Wright Hassall LLP [2018] UKSC 12**, was to be commended, to the effect that the non-compliance with mandatory language did not necessarily mean that service was rendered invalid. In particular, he referred to paragraph 95 of the judgment in **Entertainment One**:

> 95. The language used in PD6A is mandatory but the task for the Court is to focus on the consequences of failure. PD6A does not spell out the consequences of a failure to comply. It would, my judgment, be wrong to imply into the wording that a failure to inquire about limitations would be fatal. As Fraser J observed,[7]such a failure cannot be properly categorised as fundamental.

40. Mr. Mason observed that the 2 conflicting authorities relied upon by Mr Hughes, namely **Kostakpoulou v University of Warwick & Others [2025] EWHC 342 (KB)** and **R (Karanja) v University of West Scotland [2022] EWHC 1520 (Admin)** were readily distinguishable. In neither case was the court referred to any competing authorities, and the latter was a matter of judicial review. It was clear, he said, that in **Kostakpoulou**, the service of the claim on all five Defendants had been purportedly affected by email service on the first Defendant in-house counsel. Further, it is to be noted that an indication had been provided previously by the University that it did not have instructions to act on behalf of any other party. Thus the attempted service in that case was vastly different to the procedure which was followed in the present case, where it was plain that service of important documentation (disclosure lists and witness statements) was effected by the preferred method, namely email.

41. In short, he submitted that that non-compliance with mandatory language in PD6A paragraph 4.2 should not render email service invalid if the overall purpose of the service provisions is met.

42. In relation to the second ground (time of service) there was a complete answer in the table set out at CPR 6.26. If this had been referred to by the Defendant's counsel, the judge's error would have been readily identified, and apart from any issue in relation to the acceptance of email service, the filing and serving of the notice by 4.12 and 4.17 respectively would have been acceptable.

43. If it was necessary for the court to consider the strike out ground, Mr. Mason relied upon the decision of the Court of Appeal in **Excalibur & Keswick Groundworks Limited v**

[7] **In LSREF 3 Tiger Falkirk Limited v Paragon Building Consultancy Limited [2021] EWHC 2063**

Michael McDonald (supra), which it is submitted was on all fours with the present case, at least in relation to the applicable principles. In the first instance trial, an employers' liability case involving a fall from a ladder, the claim was discontinued on the day of the trial after the district judge had invited the Claimant to consider his position after identifying inconsistencies between his medical records, the pleadings and his witness statement. Immediately thereafter the Defendant's counsel applied to set aside the notice of discontinuance to enable an application to strike out, and thus bring the Claimant within the exception to QOCS under CPR 44.15. The district judge acceded to this, finding that the Claimant's conduct (and that of his advisers) had obstructed the just disposal of the proceedings. Thus he was deprived of the protection from enforcement afforded by QOCS. The Claimant appealed to a circuit judge, and was successful, and the Defendant further appealed to the Court of Appeal. Mr Mason relied upon the observations of Nicola Davies LJ in relation to the QOCS regime, and also to the high bar which she set for an application to strike out under CPR 3.4 (2) in relation to "otherwise likely to obstruct the just disposal of the proceedings", and where she concluded that the conduct necessary was that which jeopardised the fairness of the trial process. Reliance was placed upon the paragraphs 51 and 53 of that judgment:

> "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.
>
> 53. What the Defendant has sought to do in this appeal is to remove the substantive right of the Claimant to the protection provided by the broad-based and mechanical provisions of the QOCS scheme. For the reasons given, and subject to the views of Peter Jackson LJ and William Davis LJ, it has failed to do so and the appeal is dismissed."

44. Mr Hughes on behalf of the Defendant, as indicated, relied upon paragraph 4.2 of PD6A, as the mainstay of his challenge. This required an enquiry to be made of the Defendant's solicitor, prior to the service of any documentation, as to whether there was any limitation on email service. Although the Claimant had sought to rely upon the earlier examples (disclosure lists and witness statement exchange) to indicate a willingness to accept service by email, in fact those examples demonstrated precisely what was required, namely a request of the receiving party as to whether email was acceptable. Although there was no specific question asked in the terms set out in CPR 4.2, it could be implied that an enquiry was being made about limitations.

45. In respect of those mandatory requirements, as indicated above, he relied upon the two High Court decisions of **Kostakpoulou** and **Karanja** in particular. He referred to the judgment of Bourne J in **Kostakpoulou** in respect of the mandatory requirements of paragraph 4.1 and 4.2. At paragraph 119 he said:

> "I therefore return to the question of whether there was valid service by email on 28 May 2024. It is quite clear that there was not. The requirements of paragraphs 4.1 and 4.2 of Practice Direction 6A are mandatory and are not subject to exceptions."

46. A similar approach was taken by the court in **Karanja** and Mr Hughes relied upon the observation of DHCJ Michael Ford QC:

> "Paragraph 4.2 requires an express prior question about any limitations on the acceptance of service, such as the format of documents. All Ms Cuckow did was to say she would pass the e-mail onto Ms Thomson. She was not asked anything in advance about limitations on what would be accepted as e-mail service."

47. It was submitted that insofar as there appeared to be conflicting authorities, noting the **Entertainment One** case relied upon by the Claimant, it was open to this court to prefer those decisions that were made by full-time High Court judges over a decision made by a deputy, even though all the determinations were made in courts of parallel jurisdiction.

48. Although paragraph 4.1 (2) (c) appeared to render service on an email address in an acknowledgement of service a sufficient indication of the Defendant's agreement, it was not accepted that this was enough to indicate valid service throughout the course of the litigation. If it were to be acceptable to imply from an email address provided in an acknowledgement of service that the same email address was to be used for the service by email on every other occasion, not only does this ignore the mandatory requirements of 4.2, but also raises the possibility that fee earners on subsequent occasions might not have access to the same email address at a key point in the litigation.

49. Mr Hughes purported to accept that the learned district judge had not given consideration to CPR 6.26 in terms of the timing of service/filing (16.12 and 16.17) during the course of oral discussion, but he stood by his general submission that the judge was right in respect of taking into account that the timing of service was relevant to the Claimant's conduct for the purposes of the application to strike out.

50. He acknowledged that the case of **Excalibur** provided an authority which emphasised the protective nature of the QOCS regime and provided a high bar for the striking out of a claim after the court had set aside a notice of discontinuance, but submitted that that decision was made on a wholly different set of facts and was easily distinguishable. However, if it provided any assistance at all, it was in relation to the confirmation that where the Claimant's conduct makes a fair trial impossible, he faced the prospect of the claim being struck out.

51. In the context of a Claimant who chose not to attend the trial, and had provided a notice of discontinuance extremely late in the day, when it was open to the Defendant to set

aside a notice of discontinuance or make a determination that a claim was a mixed claim as understood by **Brown v Commissioner of Police of the Metropolis**, the learned district judge was entitled to take this conduct into account in determining that a fair trial was not possible.

Determination

52. It seems to me appropriate to address the second ground of appeal first, that is the time of service ground, because the approach of the learned judge was undoubtedly influenced by his belief that the Claimant had been too late in his attempt to discontinue the proceedings, with the notice served "*after the close of play*". At no point is it indicated either by counsel or by the learned judge as to what would have been an effective time for service, in other words *before* the close of play. On reading the transcript of the exchanges, it is plain to me that Mr Williams of counsel was not arming himself to make a point about late service rendering the notice of discontinuance invalid, so much as to raise a potential point about the method of service. I will return to that shortly.

53. The learned judge's conclusion in relation to the timing was wrong. However, in a busy list it cannot be expected that a district judge, who is clearly attempting to deal with matters proportionately and expeditiously (especially when the list had probably been rearranged to take into account the fact that this case was no longer proceeding) would have at his fingertips all the necessary time requirements and service rules, and as I have stated above it was clearly incumbent upon counsel to ensure that the judge was taken to the right section, here the table for deemed service in CPR 6.26. Whilst it cannot be said that if this had been drawn to his attention, a different course of action would have been followed, the reference by the learned judge on subsequent occasions to the service after "*the close of play*" and in particular the reliance placed upon timing as one of the justifications for striking out the claim in his judgment, this appellate court cannot have any confidence that the decision was based upon a sound footing.

54. It is also relevant that there is no procedural rule or practice direction which states when a notice of discontinuance must be served. It can be served at the door of the court, or in the middle of the trial. Under CPR 38.6, subject to any exceptions that might apply, there are costs consequences of discontinuing, and it seems to me that a party who would otherwise be liable to costs on the discontinuance (ie a claimant) could have no complaint if those costs included the attendance of counsel or solicitor at trial. In **Excalibur**, the Claimant purported to discontinue after he had started giving evidence. The circumstances in which the permission of the court is required is set out in CPR 38.2 (2) and none of those circumstances applied here.

55. In relation to the service issue generally covered by the first and second grounds of appeal, this court is left with the impression that counsel for the Defendant was jumping on bandwagons which were pushed in his direction by the learned judge. He acknowledged that any argument in relation to the non-service of the notice of discontinuance was likely to be "*hopeless*", because as he put it "*it was clear that the other side want to discontinue*". Further, as Mr Hughes accepted on this appeal the obvious approach which was being taken by his predecessor was to obtain some sort of determination by the court that this was a mixed claim, so that a **Brown** type assessment could be made, and the QOCS shield penetrated at least in part. It was clearly in the learned judge's mind that any application in relation to costs should be dealt with on a proportionate basis, but it is a concern of this appellate court that he may have gone too far in attempting to achieve that aim, by inviting counsel to go down a particular route. It has not been suggested by Mr Mason that the learned judge entered the arena, so to speak, but there are two places in the exchanges where it might be considered that he had been zealous in encouraging applications to be made, and the matter disposed of that day. I have identified these in the italicised sections of the transcript set out in paragraphs 15 and 16 above.

56. Further, it cannot be ignored that there was a claimant in the background, unrepresented and not in attendance, potentially facing an order for costs of up to £50,000, when doubtless he had been advised that his discontinuance would be of no cost to him (unless the QOCS protection was removed, because of the personal injury claim he had pursued.

57. It is also to be noted that although the learned judge said on more than one occasion both in the exchanges and in the judgment that the Defendant did not accept service by email despite the absence of any reservation on any template correspondence, seemingly relying upon counsel Mr Williams' indication, in fact the brief history of the litigation to which I have been referred indicates quite the contrary. Not only did the acknowledgement of service contain an email address, thus bringing paragraph 4.1 of the practice direction into play, but also on the two occasions in which it was necessary for documentation to be served (mutually) DAC Beachcroft were clearly happy to receive service this way.

58. In the circumstances, in my judgment, despite any instruction which Mr Williams may have received, it was not open to the Defendant to argue that email service was invalid in principle, because the service of the notice of discontinuance by that method was justified under paragraph 4.1 (2) (c). The only question which would then arise whether that service had been invalidated by non-compliance with paragraph 4.2; in other words in view of the mandatory language, was it a precondition of reliance on email service that the necessary questions had been asked of the party to be served? Of course this was never raised before District Judge Gray.

59. In this respect, I agree with both counsel that the answer to this question depends upon whether a purposive or literal approach is to be taken to its interpretation and application. I acknowledge that there are conflicting authorities on this issue, all within courts of higher jurisdiction than this one, although it seems to me that I can look at the circumstances which led to the differing conclusions. It is correct that in both **Karanja** and **Kostakpoulou** not only were the circumstances in which the party attempting to serve documents egregious and in complete disregard of the purpose of the prescribed service provisions, which was to ensure that the necessary documents relied upon was served on the party(ies) in a timely and efficient way, but also in neither of those cases was there a detailed analysis of case law or a reasoned process for conclusion. In **Entertainment One**, on the other hand, Judge Briggs chose to review all the authorities which were available to him at the time, and considered the matter himself by adopting a purposive approach, which also took into account the service failures which were relied upon.

60. Whilst it is not possible to elicit from these authorities any general rule which enables a conclusion that paragraph 4.2 is a precondition which frustrates email service if there has been non-compliance, it seems to me that each case must be looked upon by reference to its own particular facts. As Judge Briggs pointed out, it is the consequences of non-compliance which should be the focus, and it is only where the failure has been fundamental that the court should be imposing any form of sanction. It is to be noted that the wording of paragraph 4.2 does not specify exhaustively the type of questions relating to limitations on email which should be asked, although there will be cases where this is obvious. In the present case it was the single document of a notice of discontinuance which was served without any question being asked by the Claimant's solicitors. It should be borne in mind (whatever the stance of DAC Beachcroft in relation to email service generally may have been) that it would have been clear to the Claimant from previous email exchanges, which included lists of documents and witness statement evidence, that there could be no real issue with the receipt of the notice of discontinuance in terms of capacity.

61. In my judgment the purpose of paragraph 4.2 was undoubtedly to ensure that email service was effective, and that there was no frustration of the overriding objective by the service of material electronically which the other party did not have the capacity to receive. Further, the inescapable fact, as Mr Williams appeared to acknowledge before District Judge Gray until he was driven down a different track, was that a notice of discontinuance can be served at any time. It is simply a process by which a claim is brought to an end other than by determination of the court on the merits, or by striking out.

62. Accordingly, the question posed can be answered in this way. Paragraph 4.2 of the practice direction does not frustrate the notice of discontinuance served in this case. It was validly served under paragraph 4.1, even if the question was not asked, and therefore ground one of the appeal challenge succeeds.

63. Although the allowing of the appeal on grounds one and two makes further consideration of the challenge academic, I should nevertheless deal briefly with the arguments advanced in relation to the strike out ground.

64. In this respect, and had it been necessary to consider whether the learned district judge was right to strike out the claim once he had determined that email service of the notice of discontinuance had not been achieved and that the principal claim was extant, I would have allowed this challenge. Despite the valiant effort of Mr Hughes to distinguish **Excalibur** on the basis that the decision was made in a trial which was already underway, in my judgment the process involved in that case was on all fours with the present case, and the principles established in circumstances where an application is made to set aside a notice of discontinuance to strike out a claim is of equal application. In paragraph 49 of **Excalibur**, the approach was succinctly identified by Nicola Davies LJ:

> 49. I accept the contention made on behalf of the Defendant that the approach of the court to this issue, as identified by the Court of Appeal in Arrow Nominees, was not whether the litigant's conduct rendered a just or fair trial impossible. Reflecting the approach of the court in Arrow Nominees, in particular as stated at [54], I would formulate the question thus: is the litigant's conduct of such a nature and degree as to corrupt the trial process so as to put the fairness of the trial in jeopardy? In my judgment, the Claimant's conduct did not begin to meet the degree of seriousness which is envisaged in this formulation.

65. The reasoning of the learned district judge appears to elevate a procedural failure in respect of service to a level which in my judgment could not be justified, by determining that it was conduct was "*likely to obstruct the just disposal of the proceedings*". If this could amount to a basis for striking out a claim, on the setting aside of a notice of discontinuance, it would have a chilling effect on any Claimant who chose to abandon a claim for a variety of reasons. The type of conduct envisaged by CPR 44.15, and anticipated by the court in **Excalibur** required a far greater degree of seriousness than in the present case.

66. In the circumstances, I allow the appeal, vary the order striking out the claim, which is reinstated. The notice of discontinuance can also be reinstated, enabling this matter to be brought to an end by that process.

67. However, the allowing of this appeal should not preclude the Defendant, if so advised, from considering its position in relation to the potential QOCS protection afforded to the Claimant because of the personal injury element that was pursued. In other words, it should remain open to the Defendant if it wishes, to pursue any potential argument in relation to a **Brown** type mixed claim.

68. I invite the parties to agree any consequential orders in respect of this judgment. If agreement cannot be reached, I am content to receive a brief written submissions.

HHJ Graham Wood KC,

24th July 2025