In Summary: a review of summary disposal in light of recent caselaw, Part 2

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INTRODUCTION

In the past few weeks, there has been a quartet of interesting judgments concerning the summary disposal of claims. This is the second in a series of five parts which consider this important jurisdiction with reference to the four decisions.

This note focusses on the case of *Harrington Scott v Coupe Bradbury* (2022) EWHC 2275 (Ch).

THE APPLICATION

This was a long way from what might be called the paradigm summary disposal case. The application by the Defendant ('the Solicitors') was originally listed for two and a half days before a Master. He concluded that even that was not long enough. He also thought that the application should be heard by a Judge. It was relisted for five days before HHJ Hodge KC (sitting as a High Court Judge). The hearing took place just under two years after the claim had been issued.

The bundle ran to some 2,500 pages, roughly six lever arch files. Thirty-three authorities were cited, adding a further 1,400 pages. 'Skeleton' arguments extended to 66 pages for the applicant and 79 pages for the respondent. There were eleven separate grounds for the application and a further overarching ground that it was impossible for the Solicitors to obtain a fair trial. The facts were substantially disputed.

THE FACTS

The Claimant ('the Company') was a British company which carried on business as a recruitment consultant. It was owned and controlled by a Mr Vickers. He had also owned and controlled a BVI company with a similar name which had since been dissolved.

This was a botched litigation claim. The Company had entered into contracts with Canadian and Russian entities within the Kinross mining group ('Kinross'). It claimed that Kinross had breached them. It retained the Solicitors to advance claims.

They issued proceedings on behalf of the Company. The court gave permission for service outside the jurisdiction. Kinross applied for the order to be set aside. It was successful. The Company was ordered to pay its costs. The claims had by then become time-barred.

The Company then brought a loss of a chance claim against the Solicitors. The Solicitors applied for it to be struck out and/or for summary judgment.

THE LAW

There was no real dispute about the applicable law. A curiosity, however, is that, despite the Judge being taken to over thirty authorities, this did not include what might be thought to be two of the most important cases. These (discussed in Part 1) are *Easyair v Opal* [2009] 339 (Ch) setting out the principles to be followed in a summary judgment application and *Okpabi v Shell* [2021] UKDSC 3 on the importance of not conducting a mini-trial. The Judge, however, referred himself to *Easyair*.

THE JUDGMENT

The judgment ran to 133 pages. It would not be practicable to do more than pick out some of the key points.

The Solicitors argued that the party contracting with Kinross was not the Company but Mr Vickers' BVI company. This point turned on a close analysis of contemporaneous correspondence and invoices.

The Judge found the argument compelling. He indicated that he would have found in the Solicitors' favour had he needed to decide the point. But he concluded that he did not. This was because he was satisfied that there was a triable issue as to whether a reasonable solicitor would have identified this fundamental obstacle to bringing the underlying claim and advised on how it might be overcome.

The second point was that, on a true construction of the underlying contracts, the Company had suffered no loss. The Solicitors submitted that the Company was running an untenable case that it was entitled to a fee if candidates were placed by third parties. The Judge was satisfied that this could be dealt with as a preliminary point of construction.

It was evident that something had gone wrong with the wording of the contracts. The parties put forward competing arguments as to what they *ought* to have said. The Judge preferred the Solicitors' re-writing, which he thought did less violence to the language and was a better fit with the contractual arrangements as a whole. He rejected the Company's fall-back argument that a term should be implied into the contracts to achieve the outcome contended for. This, he concluded, would be inconsistent with the express terms.

The Company fared better with the next point. The Solicitors submitted that any claim by the Company should be limited by reference to Kinross's contractual right to terminate the contracts on 30 days' notice. The Company's Counsel was surely right that this misses the point. It is hard to see how it can be relevant to look at what Kinross *might* have done if it did not *in fact* take that step. The Judge agreed that the Solicitors were not entitled, as he put it, to rewrite history.

The Solicitors had framed the underlying claim by reference to the placement of 21 candidates. The Company maintained that this was wrong. It said that it should have been 32. The Solicitors argued that the point could be decided on the papers. The Company accepted that its case was contradicted by some of the documents but relied on a witness statement from Mr Vickers which explained away the discrepancies. The Solicitors contended that his evidence could not be sustained.

The Judge found the Solicitors' submissions *"entirely unanswerable*". He cautioned himself against conducting any form of mini-trial, although acknowledged that he had been *"taken at great (some might even say, tedious) length, and in considerable detail"* through the contemporaneous documents.

He concluded that the Company's case on this issue was, "*entirely fanciful…and…so devoid of any element of reality that it is completely unsustainable, and is bound to fail at trial".* Mr Vickers' evidence was, he found, "*utterly incredible*". Even though, as he acknowledged, this involved a finding of dishonesty on the part of Mr Vickers, he was satisfied that this was one of the *"very rare, and elusive cases*" where it is possible for the court to disbelieve a witness' evidence without cross-examination because it is so utterly unreconcilable with the contemporaneous documents to be incapable of rational explanation or belief.

Despite this, he was prepared to accept Mr Vickers' evidence when considering the separate question of whether, as alleged by the Solicitors, the Company had waived its rights to certain payments. This did not assist the Company. The Judge preferred the Solicitors arguments on the point. The same applied to the Company's claim that it was entitled to charge a fee for finding a replacement for a candidate who had left within 12 months, notwithstanding a contractual obligation on it to do so. The Judge found this aspect of the claim to be, *"wholly fanciful, lacking in any reality, without any substance, and bound to fail".*

The underlying contracts provided for interest on late payments at what amounted to 52% a year. The Solicitors submitted that this was an unenforceable penalty clause, but the Judge concluded that this was not a suitable point for summary disposal. He dismissed that part of the application. He also dismissed as *"surreal"* an argument that a claim to recover interest at judgment rate was implausible and advanced *in terrorem*.

Turning to the Solicitors' overarching case, the Judge accepted their submissions that, "*this is one of those rare cases where it is entirely appropriate for the court to strike out the claim for abuse of the court's process. These are exaggerated and dishonest claims which have no real prospect of success*". He went on to roast Mr Vickers for producing a false deed of assignment, lying to the Solicitors in the underlying action and to the court in the instant proceedings.

He added, however, that striking out the claim on this basis should be avoided if a less drastic course is open to the court. His provisional conclusion was that the claim should be allowed to proceed on conditions, including a comprehensive redrafting of the Particulars and security for costs.

However, he went on to accept written submissions made in response to the draft judgment that his conclusions on other aspects of the claim meant that the potentially triable point must also fail. He, therefore, dismissed the claim.

DISCUSSION

This was a bold application which could easily have gone the other way and almost did. That said. its success shows that the court's summary disposal powers are more versatile than might be assumed. They are not exclusively of application in the paradigm case which can be disposed of by deciding a short point on limited evidence and uncontested facts.

The case also warns of the risk of a summary disposal application taking on a life of its own and the scale of a full trial. Cost effectiveness needs to be kept firmly in mind.

At first sight, it might be thought that the detailed analysis of the evidence was the very exercise which the Supreme Court deprecated in *Okpabi*. But, while the case might not have been cited to the Judge, he cautioned himself twice against conducting a mini-trial.

There is, as we observed in Part 1, a fine line between what the court can and cannot do in determining a summary judgment application. The Supreme Court did not interfere with existing authority which allows the court to test the claimant's account against contemporaneous documents and reject it if it feels able to do so. The position is different in a strike out application, which is one reason why the two are commonly made together.

The courts are always hesitant to make findings of dishonesty. As the Judge acknowledged, it will be very rare case in which such a finding is reached on a summary disposal application. But the judgment shows that those cases exist.

It is unsurprising that the Judge would not summarily dispose of the claim to interest at 8%. This is, as he observed, routinely pleaded. But the fact that the Solicitors felt emboldened to take the point underscores how unrealistic this will be in the overwhelming majority of cases.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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