In Summary: a review of summary disposal in light of recent caselaw, Part 1

Caytons
Changing Perceptions

INTRODUCTION

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

THE POWERS

An application for summary disposal is a powerful weapon in a litigant's arsenal. When used properly, it has the potential to bring proceedings to a close at an early stage and at relatively minimal costs.

'Summary disposal' is used here as an umbrella term for two separate powers which are often invoked together. The relationship between the two was reviewed in *Ogdedegbe v Simplyhealth* [2022] EWHC 2694 (KB) in which judgment was handed down last week. The case will be looked at in detail later in this series.

A: Striking out

The first power is to strike out a statement of case. CPR 3.4 (2) provides that:

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

In contemplating whether to strike out a statement of case under (2) (a), the court must assume that the facts pleaded by the respondent are correct. It will make the order if it concludes that the case is unwinnable for the respondent. Examples might be because the claim is time-barred or incoherent, as alleged in the recent case of *Morris v Knights* (Business and Property Courts at Newcastle, 5 October 2022) which we will go on to consider.

Notably, it is a *statement of case* which is struck out. The court may allow the claim to survive but strike out unsatisfactory Particulars of Claim. It will be more likely to adopt this course if the claimant

is a litigant in person. But if the new Particulars are little better, the court is likely to be receptive to striking out the claim as a whole, or technically the claim form and Particulars.

Abuse of process under the first part of 2(b) can take several forms. This might include 'warehousing' as in *Morris v Knights*, That is, issuing proceedings with no intention of progressing them. It might involve seeking to re-litigate matters which were or should have been disposed of in earlier proceedings as in the case of *Margulies v Margulies* [2022] EWHC 2843 (Ch), which we will also review. See also our previous note on the law of collateral attack.

In *Harrington Scott v Coupe Bradbury* [2022] EWHC 2275 (Ch), the final case on which we will focus, the applicant invoked the second part of 2(b) in its overarching argument that it was impossible for the defendant to obtain a fair trial.

Successful applications under 2(c) are frequently what bring about the demise of proceedings in 'botched litigation' claims where deadline after deadline has been allowed to go by. *Morris*, however, illustrates that the court will be slow to strike out a claim for a first offence.

B: Summary judgment

The second power is contained in CPR Part 24.2, which provides that:

> *"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –*
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> *(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."*

The approach which the court should adopt was outlined by Lewison J in *Easyair v Opal Telcom* [2009] EWHC 339 (Ch) (approved by the Court of Appeal in *Ward v Catlin* [2009] EWCA Civ 1098):

a. It must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success

b. A realistic claim is one which carries some degree of conviction. This means a claim which is more than merely arguable.

c. In reaching its conclusion, the court must not conduct a 'mini-trial'.

d. But that does not mean that the court must take at face value and without analysis everything that a claimant says in its statements before the court. In some cases, it may be clear that there is no real substance to factual allegations made, particularly if contradicted by contemporaneous documents.

e. The court must take into account, not only the evidence placed before it in the application, but also the evidence that can reasonably be expected to be available at trial.

f. The court should hesitate about making a final decision without a trial where reasonable grounds exist for believing that a fuller investigation into the facts would add to or alter the evidence available and so affect the outcome of the case.

g. Conversely, if the court is satisfied that it has all the evidence necessary for it to decide a short point of law or construction, it should do so. It is not enough for a respondent to argue that something may turn up at trial which might have a bearing on the point in issue.

That the court should not conduct a mini-trial is something of a mantra in the authorities. In *Okpabi v Shell* [2021] UKSC 3, the Supreme Court concluded that the courts below had erred by doing just that. Lord Hamblen (giving the judgment of the court) said that the analytical focus should be on the statements of case and that, save in cases where the allegations of fact are demonstrably untrue or unsupportable, it is generally inappropriate for a defendant to dispute the facts through evidence of its own. To do so may well demonstrate that there is a triable issue.

In that case, in the view of the Supreme Court, the Judge had been drawn into an evaluation and judgment of the weight of evidence. The Court of Appeal, in rejecting the complaint that he had conducted a mini-trial, was itself drawn into an evidential enquiry.

There is, however, a fine line between this and what the Court of Appeal referred to as subjecting evidence to critical analysis. Unlike in a strike out application, the court need not assume that the facts pleaded by the claimant are correct. As we have seen, it is entitled to conclude that there is no real substance to factual allegations, particularly if contradicted by documents.

In *Wards Solicitors v Hendawi,* [2018] EWHC 1907, the court reached the conclusion that, in the absence of cross examination a court is not entitled to reject written evidence as untrue *unless* it considers the evidence simply incredible. This was the conclusion to which the Judge came in *Harrington Scott*, "*even though this involves a finding of dishonesty*".

DISCUSSION

Cases suitable for summary disposal are relatively rare, but the opportunity should not be overlooked when it arises.

In the ideal case, the application will be made at an early stage, possibly even before a Defence is filed. The point in issue will be short and clear. The facts will not be in dispute. The court will not need to delve deeply into the evidence. There will be little room for the claimant to persuade the court that it is all too complicated to be dealt with summarily, that the court should see what comes out on disclosure and in witness statements before it determines the matter, or that it can rescue the case by amending the Particulars of Claim.

As we will see, however, applications are sometimes made, and can succeed, in circumstances far removed from this scenario.

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