39 Essex Chambers
Tel: +44 (0)20 7832 1111
Email: clerks@39essex.com

Civil litigation: does it have to be all or nothing?

By Scarlett Milligan

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Personal Injury

We have all seen it: lengthy pleadings, unfounded allegations, heated correspondence, protracted judgments. Unless well managed, civil litigation can easily turn into a quest to dispute every minor detail of a case at whatever cost, making it hard – if not impossible – to see the wood for the trees.

Although the overriding objective requires cases to be dealt with justly and at proportionate cost, it is not uncommon for that guiding principle to be forgotten, or perhaps unappreciated by one's opponent. However, that does not mean that you and your client must suffer a continually oppressive approach to the litigation through to trial: there are several, often underused, tools within the CPR which can help parties bring litigation firmly back on track, saving time, costs, and a judge's patience.

Three recent judgments on interlocutory applications demonstrate the point well.

Summary Judgment: Holdgate (2022) and Anan Kasei (2021)

Holdgate v Bishop [2022] EWHC 2850 (KB) concerned an underlying claim for damages following a road traffic accident. H claimed he had lost c.£3.6m in earnings: his injuries had prevented him from working on a lucrative redevelopment opportunity; he had no choice but to accept a low offer on the undeveloped property to mitigate his loss; and he had thereby forgone the profits he would have made had he been able to develop the land. The pleadings put it beyond doubt that H's case was that:

(a) The offer received on the property was made after the accident; and
(b) H's decision to accept the offer was solely attributable to his accident-related injuries; and
(c) but for the accident, H would not have accepted the offer.

B's case, in reliance on conveyancing documents disclosed by H's former solicitors, was: H had been negotiating a sale of the property several months prior to the road traffic accident; that it had always been H's intention to sell the land as undeveloped; and, accordingly, H's claim for loss of earnings was fundamentally dishonest. H's response to this was that he had memory problems and could not recall having been involved in any pre-accident negotiations in relation to the land. His pleadings were, however, equivocal on whether or not pre-accident negotiations had been conducted with his knowledge and/or authority.

B made an application for summary judgment on this issue, seeking a finding that H had instructed solicitors in respect of a property transaction prior to the accident. In his judgment, Master Thornett rejected H's contention that this should simply be a matter for trial. He agreed with B that the documents created a rebuttable presumption on the question of H's pre-accident intention and that the *"…parties and the court are entitled to rely upon the Statements of Case as the definitive record of the parties' positions*" (§§26 and 30). Noting the "*lack of clarity and transparency in the Claimant's case*" on this issue, he granted the interim declaration sought by B.

The *Holdgate* judgment considered the case of Anan Kasei Co Ltd v Neo Chemicals [2021] EWHC 1035 (Ch), in which Fancourt J ruled on the issues amenable to summary judgment applications. He stated (at

§82) that summary judgment can be given on an issue in the claim which is either a "*severable part of the proceedings*", such as a distinct head of loss, or "*a component of a single claim*", such as the existence of a duty of care, breach of duty, causation, or loss. However:

- "*It is not any factual or legal issue that is one among many that would need to be decided at trial to resolve such a claim or part of a claim. If the determination of an issue before trial has no consequences except that there is one fewer issue for trial then the court has not given summary judgment and the application was not for summary judgment. If it were otherwise, parties would be able to pick and choose the issues on which they thought their cases were strong and seek to have them determined in isolation, in an attempt to achieve a tactical victory and cause the respondent to incur heavy costs liability at an early stage."*

Thus parties considering an application for summary judgment must consider whether there are "consequences" of a finding in their favour. The time and costs of additional disputes would clearly qualify, but the court will be alive to whether savings will actually take place with the proposed declaration, or whether the application is, in fact, an example of cherry picking of issues. Put another way, as per Master Thornett in *Holdgate* (at §44), would the elimination of the issue have *"meaningful and purposive effect on the litigation having regard to the Overriding Objective*"?

Vardy v Rooney [2021] EWHC 1888 (QB) is an example of a case where summary judgment was refused on the grounds that it "…*would have no consequence other than reducing the number of issues to be determined at trial"* (§76). Steyn J characterised the application as being, in effect, for the preliminary determination of an issue which the court would never have set down as a preliminary issue, given that it was not decisive or potentially decisive of the claim (see McLoughlin v Grovers [2001] EWCA Civ 1743).

Strike Out and Exclusion Under CPR 3.1– Vardy (2021)

The *Vardy* case is also a helpful authority on the use of the court's strike out powers in respect of particular pleadings or issues. After analysing the parties' pleaded cases and the relevance of particular pleadings to the overarching issues in dispute, the court ruled that pleadings which were: irrelevant; of such peripheral relevance as to "*unnecessarily distract the parties and the court from the real issues that require to be determined*"; or otherwise not probative of the truth should be struck out as disclosing no reasonable grounds for defending the claim (CPR 3.4(2)(a), and because their continued inclusion was likely to obstruct the just disposal of proceedings (CPR 3.4(2)(b)).

Those principles will be particularly acute when considering alleged wrongdoing, bearing in mind the time and complexity that such pleadings necessarily add to a case. For example, in Polly Peck v Trelford [1986] Q.B. 1000, the court held that although:

- "*[t]here may be cases where the court would allow the inclusion of some minor matters that are, on a strict view, immaterial… where the irrelevant pleading makes serious allegations of wrongdoing which are partly implicit, unclear, lacking in the essential particulars, and likely to cause a significant increase in cost and complexity the case for striking out is all the clearer*".

In *Vardy*, C's application was also made on the alternative footing of the court's general case management power under CPR 3.1(2)(k) to exclude issues from consideration. In that case, Steyn J considered that this power did not add anything further to her consideration of the strike out application (see §68). Nonetheless, litigators should be alive to this alternative basis for controlling the pleadings and issues in any given case.

Conclusion

As always, much will turn on the particular facts of a case: both the facts in dispute between the parties, as well as how the particular litigation has developed and is progressing. However, parties should always have the court's powers to curate and curtail pleadings at the forefront of their mind: too often these tools are only considered in respect of the entire claim. We would all do well to remember that, at least in this sense, civil litigation need not be all or nothing.

London
81 Chancery Lane,
London
WC2A 1DD
Tel: +44 (0)20 7832 1111
DX: London/Chancery Lane 298
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester
M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
Maxwell Chambers,
28 Maxwell Road,
WC2A 1DD
04-03 & 04-04, Maxwell Chamber Suites
Singapore 069120
Tel: +65 6320 9272

KUALA LUMPUR
#02-9, Bangunan Sulaiman
Jalan Sultan Hishamuddin,
50000 Kuala Lumpur,
Malaysia
Tel: +60 32 271 1085