UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendant. This Document Relates To: All Actions	Master File No. 09-cv-118 (VM)

AFFIDAVIT OF ROBERT MILES, Q.C.

Exhibit 6

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BUTTERWORTHS

Swain v Hillman and another

COURT OF APPEAL, CIVIL DIVISION AT CARDIFF
LORD WOOLF MR, PILL AND JUDGE LJJ
21 OCTOBER 1999

Practice – Summary judgment – Principles – CPR 24.2.

Under CPR 24.2[a], the court has the power to dispose summarily of claims and defences which have 'no real prospect' of being successful. The word 'real' directs the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success. It is important that judges in appropriate cases should make use of the power contained in Pt 24. In doing so, they will give effect to the overriding objectives contained in Pt 1. It saves expense, achieves expedition, avoids the court's resources being used up on cases where that serves no purpose and is in the interests of justice. If a claimant has a case which is bound to fail, it is in his interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible. However, it is important that the power under Pt 24 is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at trial. The proper disposal of an issue under Pt 24 does not therefore involve the judge conducting a mini-trial (see p 92 *j*, p 95 *a b*, and p 96 *a c*, post).

Cases referred to in judgments
Taylor v Midland Bank Trust Co Ltd [1999] CA Transcript 1200.

Cases also cited or referred to in skeleton arguments
Lane v Shire Roofing Co (Oxford) Ltd [1995] IRLR 493, CA.

Appeal
By notice dated 15 July 1999 the defendants, Thomas Hillman and Trevor C Gay, appealed with permission of Judge Graham Jones, sitting as a judge of the High Court at Cardiff, from his decision on 17 June 1999, dismissing their application under CPR Pt 24 for summary judgment in proceedings for personal injuries brought against them by the claimant, Terence Paul Swain. The facts are set out in the judgment of Lord Woolf MR.

Neil Bidder QC (instructed by *Palser Grossman*, Cardiff) for the defendants.
Graham Walters (instructed by *Petersons*, Newport) for the claimant.

21 October 1999 The following judgments were delivered.

LORD WOOLF MR. This is an appeal from a decision of Judge Graham Jones, sitting as an additional judge of the High Court, given on Thursday 17 June 1999 at Cardiff. The judge was dealing with a case management conference in respect of a claim by Mr Paul Swain for personal injuries against Mr Hillman and Mr Gay who are builders. The chronology in this case makes sorry reading.

a Rule 24.2 is set out at p 92 *e f*, post

The accident in relation to which Mr Swain brings his claim occurred on 8 March 1989, over ten years ago. The position is complicated by the fact that in 1992 the claimant also had a traffic accident in relation to which the defendants have admitted liability, so there is a possible problem of causation in relation to the claimant's injuries. However, if the claimant is suffering from the injuries he alleges, which cumulatively are fairly serious, it is unfortunate that the claim has not been dealt with before.

As was pointed out by Judge LJ in the course of argument, one of the matters of which the claimant is complaining is depression. Nothing is more likely to aggravate depression than to have a case hanging over the claimant all these years. I would emphasise that the claimant's present legal advisers, both counsel and solicitors, have only been involved in this case since the spring of this year and there can be no criticism made of them for the fact that the claimant's case has not been pursued faster. Fortunately, a relatively early hearing date is anticipated and, if this case is to proceed, it is important that that date should, if at all possible, be adhered to.

Judge Graham Jones had an application before him that the case should be disposed of summarily. He obviously found the case near to the borderline as to whether or not it should be disposed of summarily. I say that because the judge invited the parties to address him as to whether or not he should make a conditional order, which he would only have done if he thought that it was a borderline case. In fact the judge did not make a conditional order, but dismissed the defendants' application that he should dispose of the matter summarily.

The power of a court to make a summary order is now contained in Pt 24 of the Civil Procedure Rules (CPR). CPR 24.2 provides the grounds for summary judgment:

> '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 reason why the case or issue should be disposed of at a trial.'

There is a note to r 24.2 referring to r 3.4. 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.

Clearly, there is a relationship between r 3.4 and r 24.2. However, the power of the court under Pt 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, the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim.

Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr Bidder QC submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success.

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When Pt 24 came into force, and when the matter was before the judge, it was supported by a practice direction which has since been amended. It stated in para 4 1:

> 'Where a claimant applies for judgment on his claim, the court will give that judgment if: (1) the claimant has shown a case which if unanswered would entitle him to that judgment, and (2) the defendant has not shown any reason why the claim should be dealt with at trial.'

Paragraph 4.2 dealt with the obverse position as to a defendant. In similar terms it dealt with a defendant's right to apply for judgment if—

> '(1) the claimant has failed to show a case which, if unanswered, would entitle him to judgment, or (2) the defendant has shown that the claim would be bound to be dismissed at trial.'

I now refer to para 4 3, not because it is, in view of the judge's decision, directly relevant, but because it provides confirmation for what I previously referred to as to his state of mind. Paragraph 4 3 states: 'Where it appears to the court possible that a claim or defence may succeed but improbable that it will do so, the court may make a conditional order, as described below.'

Because the judge was considering making a conditional order in this case, it is fair, as Mr Bidder submits on behalf of the defendants, to take the view that the judge regarded this as a case where he thought that it was possible, but improbable, that the claim or defence would succeed.

Since the judge's decision, the practice direction to Pt 24 has been amended by deleting paras 4.1 and 4.2. The reason for that deletion is obvious. It was perceived that there was a conflict between 4.1 and 4.2 and the provisions of Pt 24. The practice direction was laying down a different standard which indicated that the approach required was one of certainty. The judge could only exercise his power under Pt 24 if he was certain or, to read the actual language of the practice direction, 'he thought that a claim would be bound to be dismissed at trial'. If that was thought to be the effect of the practice direction, that would be putting the matter incorrectly because that did not give effect to the word 'real' to which I have already referred.

It is not necessary to have viewed the practice direction in that way. In the (so far) unreported case of *Taylor v Midland Bank Trust Co Ltd* [1999] CA Transcript 1200 (Stuart-Smith and Buxton LJJ and Rattee J), Stuart-Smith LJ in a minority judgment, but a judgment which was not in the minority on this particular point, rationalised the possible conflict between Pt 24 and the practice direction in its original form by saying that the correct view of the effect of the practice direction is to be gleaned from the heading to the paragraph to which I have been referring which reads 'The court's approach'. It indicates no more than examples of situations where it could be right to give summary judgment in favour of one party or the other.

It is not necessary to say any more about Stuart-Smith LJ's approach, which may well be right, since Mr Bidder accepts, in my view properly, that we now have to apply the practice direction in its present form, in which only para 4.3 survives. It is however right, as Mr Bidder submits, that it appears that the judge, through no fault on his part, was misled by the language of the practice direction in its original form. I detect from the judge's judgment that he was looking at the matter on the basis that he had to be certain that the case could not succeed and

was bound to fail before he could appropriately accede to the defendant's application

Although I consider that the judge therefore adopted the wrong approach for that reason, I am quite satisfied that he came to the right decision. It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible.

In my view the judge was right to come to the conclusion which he did, it follows that I take the view that, on the material which was before the judge, this case will proceed. That being the position, it is important that I do not say anything more than necessary about the facts of the case because, unless the parties sensibly compromise the present proceedings, the result will be that another judge on the date to which I have referred will have to try the issues.

However, it would be wrong of me not to give some indication of my reasons for rejecting the attractive and careful arguments advanced by Mr Bidder. They focus on the fact that in this case the claimant is saying that a plank, which was standing upright against a fence, fell on him suddenly without warning, although the plank had apparently been in that position for three days. One immediately appreciates that, if a plank has been in a position for three days, something must have happened to cause that plank to fall on the claimant, a fact which is not in dispute.

The defendants dispute that they were in occupation of the site where the accident occurred but, on the evidence which was before the judge and is before this court, that is an issue which is controversial, requiring investigation at the trial. However, putting that matter on one side, Mr Bidder still contends that the claimant should do more than he really is able to do at the present, which is merely to say that the defendants were in control of this site and the plank fell on him. He should say more to the defendants than, 'You explain how this happened without you [the defendants] being negligent, or for somebody for whose act you are responsible being negligent'.

On the evidence, there is an indication that quite apart from the defendants, there were other sub-contractors working on the site. As I understand the evidence, it is also clear that the claimant is entitled to say that the work was coming to an end; there was no need for planks to be on site at all; that there was rubble on the site, albeit that the defendants say that the site had been cleared up. The claimant is thus entitled to argue that that plank had no reason to be standing on end for two or three days against the fence. While he cannot say who caused the plank to be in an insecure position, perhaps put at too acute an angle against the fence, or precisely when that happened, this is a matter for which the defendants are responsible and, in the circumstances, they do have, on the material which he can put forward, a responsibility for explaining what occurred.

The claimant has two witnesses, his father and another person. He does not allege that his father was responsible for what went wrong, although he was there at the time. If the judge accepts the evidence of the claimant's witnesses and the claimant, the inference would be that someone else was responsible for the plank being removed and that person could have been negligent. Likewise, the defendants

could be negligent because they left a plank in a position which was inappropriate as a result of which it was interfered with, thus resulting in the accident.

Those are matters which will have to be considered carefully by the judge at the trial. I am not seeking to indicate what his view should be on those facts. It is a matter to be dealt with by the judge at a trial and not at a summary hearing. Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.

I would dismiss the appeal.

PILL LJ. What has concerned me about this case is the state of the evidence as to how the accident occurred. I accept that the judge was entitled to find that there was evidence which was not intrinsically incredible that the plank fell on the claimant. I also accept that there is a real prospect of establishing that the defendants had responsibilities as main contractors for the condition of the building site in this comparatively small contract.

Mr Bidder QC has analysed the pleadings and the evidence. It is alleged against the defendants that they failed to remove the plank, permitted the plank to be positioned where it was and failed to have a sufficient system of inspection and maintenance on the site. That is elaborated in further particulars wherein it is said that the plank of wood was leaning upright against the fence. It is said that: 'The Plaintiff will allege that a plank of wood was placed against the fence by one Paul Gay. It was so placed 3 days prior to the Plaintiff sustaining his injury.' And that: 'Nobody was present in the garden when the accident occurred. People were present at the side of the house and in the house.'

What is conspicuously absent from the pleading is an allegation that someone for whom the defendants were responsible negligently displaced the plank. Mr Bidder has referred to the evidence before the judge of the claimant's father, Mr Albert George Swain, that the plank was a scaffolding board approximately 12 feet long and had been leaning against the coal bunker for two to three days. The building owner, Mr Malacrino, said that he believed that those boards had been lying around for quite some time, and Mr Dyer, a supporting witness, said that he would confirm that there was plenty of room to pass by the boards without knocking them or brushing past them at all.

The claimant needs to establish, first, that there was negligence in the manner pleaded. It appears to me to be placing a very high standard of care upon a building contractor simply to allege that a plank should not be left upright on a building site such as this.

The second question is to consider how the plank fell in the absence of any allegation in the pleading that it was pushed.

Two suggestions have been raised in argument. The first was that a short time before someone may have dislodged it; the second (Mr Walters) was that it may have been a puff of wind which did so. These seem to be very unlikely possibilities on the material at present before the court.

However, having expressed my misgivings in that way, I have come to the conclusion, as has Lord Woolf MR, that the judge was entitled to hold in this case that there was a real, as distinct from a fanciful, prospect of success within the

meaning of CPR 24.2. There are matters of fact for trial by a judge and on those grounds, like Lord Woolf MR, I would dismiss this appeal.

JUDGE LJ. To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step. The interests of justice overall will sometimes so require. Hence the discretion in the court to give summary judgment against a claimant, but limited to those cases where, on the evidence, the claimant has no real prospect of succeeding.

This is simple language, not susceptible to much elaboration, even forensically. If there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable. If that were the court's conclusion, then it is provided with a different discretion, which is that the case should proceed but subject to appropriate conditions imposed by the court.

As there is to be a trial, I deliberately and expressly do not have any comment to make on the factual issues which have been canvassed in argument before us.

I agree with the judgment of Lord Woolf MR and the reasons he has given for dismissing the appeal

Appeal dismissed.

Kate O'Hanlon Barrister.