CIVIL PROCEDURE NEWS

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CPR rr.36.14 and 44.3(4). In personal injury claim, claimant (C) not accepting defendant's (D) payment into court of £4,000. After trial of quantum, C entering judgment for sum (in effect) exceeding payment in by only £51. Judge ordering C to pay D's costs for period after time for acceptance of payment in had expired. **Held**, dismissing C's appeal, when contrasted with the rule it replaced, r.36.14 expands the judge's area of discretion. (See ***Civil Procedure 2008*** Vol.1 paras 36.14.1 and 44.3.12.) For account of this case, see "In Detail" section of this issue of *CP News*.

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CPR r.44.3, Supreme Court Costs Office Guide Sect.15. For purposes of funding claim against defendants (D), claimants (C) paying £2m to their solicitors. On April 4, 2007, C making a payment which had the effect of bringing to £1m the total costs paid by them to their solicitors down to that date. C incurring substantial interest charges on borrowings made to provide this funding. After trials (in May, 2007) on liability and (in December 2007) on quantum, judge giving judgment for C, but awarding C only 70 per cent of their costs in respect of their liability claim (subject to certain deductions) and only 80 per cent in respect of their quantum claim, such costs to be agreed. Judge also ordering that C pay part of D's costs. C seeking interest on costs, but only on whatever net sum was found to be due to them by way of costs. **Held**, granting application, (1) para.(g) of r.44.3(6) provides that the court may order that a party must pay "interest on costs from or until a certain date, including a date before judgment", (2) the other paragraphs in r.44.3(6) appear to be concerned with orders the court may make where the matters referred to in r.44.3(4) make them appropriate (namely the conduct of the parties, partial success, and payments into court or admissible offers to settle), (3) in the circumstances of this case, a compensatory order as to interest on C's costs was appropriate at the rate of (as agreed by the parties) 2 per cent over base rate, (4) such interest should run from April 4, 2007, being the midway date. ***Powell v Herefordshire Health Authority*** [2002] EWCA Civ 1786; [2003] 3 All E.R. 253, CA; ***Bim Kemi AB v Blackburn Chemicals Ltd*** [2003] EWCA Civ 889; [2004] 2 Costs L.R. 201, CA; ***Douglas v Hello! Limited*** [2004] EWHC 63 (Ch); [2004] 2 Costs L.R. 304; ***Lloyd v Svenby*** [2006] EWHC 576 (QB); March 21, 2006, unrep., ref'd to. (See ***Civil Procedure 2008*** Vol.1 para.44.3.7, 40.8.1, and Vol.2 para.1C-96.)

■ **GATER ASSETS LTD v NAK NAFTOGAZ UKRAINIY** [2008] EWHC 1108 (Comm), May 21, 2008, unrep. (Beatson J.)

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CPR rr.40.8 and 62.18, Judgments Act 1838 s.17, Arbitration Act 1996 ss.49, 66 and 101(3). Arbitration tribunal (in territory which was party to New York Convention) making award requiring Ukraine company to pay substantial compensation to a re-insurance company (X). Award not ordering that post-award interest should be paid. X going into liquidation and benefit of award assigned to another company (C). On May 23, 2006, judge granting C's ex parte application for permission to enforce the award in the same manner as a judgment. C applying for charging order over shares held by D in a company (Y) and for a third party debt order against Y (which held various dividend payments for D). These applications stating that the total amount owing from D included interest, calculated at the rate of 8 per cent (as specified by s.17) of the judgment debt from May 23, 2006, and amounting to US$12.6m. On April 8, 2008, Master (1) making charging order and third party debt order final, but (2) referring to judge question whether interest should be payable (a question first raised by D on March 26, 2008). **Held**, (1) where, under s.101(3) leave is given and judgment is entered, that judgment takes effect as an English judgment, (2) whether interest is payable on an English judgment debt is a matter for English law as the lex fori, (3) s.17 applies to "every judgment debt" and r.40.8 provides that interest payable under that section shall begin to run from the date of judgment, unless inter alia the court orders otherwise, (4) in the circumstances, it was too late to argue that the court should order otherwise, (5) accordingly, interest as claimed by C was payable. (See ***Civil Procedure 2008*** Vol.1 paras 40.8.3 and 40.8.6, and Vol.2 paras 2E-241, 2E-249, 2E-254, 2E-351 and 9B-49+.)

■ **GOWER CHEMICALS GROUP LITIGATION, IN RE** [2008] EWHC 735 (QB), April 17, 2008, unrep. (Davis J.)

Detailed assessment—disclosure of receiving party's expert reports for which costs claimed

CPR r.44.5, Practice Direction (Costs) para.40.14, Supreme Court Costs Office Guide para.10.2. In proceedings subject to group litigation order, all claims settled either by mediation or by other means before trial. Claimants (C) variously represented by various solicitors. In detailed assessment of costs, upon reaching a particular part of C's Bill of Costs, costs judge ordering that the receiving parties (C), should elect either (1) to disclose to the paying parties (the defendants (D)) certain experts' reports for which they were seeking recovery of significant costs (those reports having not previously been disclosed), or (2) to decline such disclosure and rely on other evidence. Up to that stage in the assessment, parties had been content for costs judge to look for himself at privileged documents and to make his assessment accordingly. Costs judge giving C permission to appeal from this decision. D submitting that if C wished the costs judge to see the reports then privilege in them should be waived and D should be permitted to see them and to make comments on them with regard to the reasonableness of the reports and whether it was worth the money being asked for (likely to be in excess of £30,000). **Held**, dismissing C's appeal, (1) the costs judge was plainly right to proceed on the footing that a genuine issue, resolution of which required reliance on the contents of the reports,

had been identified, (2) as such an issue had arisen, there was no need for the costs judge to inspect the documents himself before deciding whether C should be put to election. Judge commenting that costs judges have wide and flexible discretionary powers, and it is not generally helpful to circumscribe the procedures they may adopt. ***Pamplin v Express Newspapers Limited*** [1985] 1 W.L.R. 689; ***Goldman v Hesper*** [1988] 1 W.L.R. 1238, CA; ***Dickinson v Rushmer*** [2002] Costs L.R. 128; ***South Coast Shipping Co Ltd v Havant Borough Council*** [2002] 3 All E.R. 779, ref'd to. (See ***Civil Procedure 2008*** Vol.1 paras 47.14.3 and 47PD.13, and Vol.2 para. 1C-76.)

■ **ISLAMIC INVESTMENT OF THE GULF (BAHAMAS) LTD v SYMPHONY GEMS N.V.** [2008] EWCA Civ 389, *The Times* April 4, 2008, CA (Tuckey and Rix L.JJ. and Sir Robin Auld)

Oral examination—judgment debtor not attending—suspended committal order

CPR r.71.8. On February 13, 2002, claimants (C) granted summary judgment against individual defendant (D) for US$10m. On January 16, 2007, court making order under r.71.2 for oral examination of D. After taking into account difficulties encountered by D, include difficulties in arranging to travel from India to England to attend, on several occasions court fixing and re-fixing date for questioning of D by court officer. Eventually, on December 6, 2007, Master fixing January 31, 2008, as date. Apparently, Master not informed that, as a consequence of orders involving him made by an Indian court, D would not be able to be out of India beyond January 10, 2008. On January 29, D instructing his London solicitors to seek an adjournment of the January 31 hearing date. On that date, D not appearing and court officer referring matter to duty judge under r.71.8. Judge exercising powers under r.71.8(2) and making committal order in the standard form against D suspended until March 11, 2008, and containing other directions as required by r.71.8(4). D appealing against judge's order and attending for questioning on that date and, on same date, Court of Appeal considering D's appeal. **Held**, allowing D's appeal, (1) as D had now attended for questioning, the suspended committal order fell to be discharged, however (2) if the order should never have been made, D was entitled to have the Court order accordingly, (3) in the circumstances, the order should not have been made because, on January 31, the judge was not in a position to make it, (4) as at that date, a court could not be satisfied on the criminal burden of proof that D was not only in contempt of court (which of course he was) but was contumaciously so and in such a way as to entitle a court, as a matter of justice, to impose upon him an order for committal, (5) the making of a suspended committal order should not be regarded as a matter of form, (6) in particular, such order should not be made for the indirect purpose of ensuring that D (being under threat of imprisonment) attends on the suspended date. (See ***Civil Procedure 2008*** Vol.1, para.71.8.1.)

■ **JOHNSON v EDWARDIAN INTERNATIONAL HOTELS LTD** UKEAT/0588/07/ZT, May 2, 2008, E.A.T., unrep. (Underhill J.)

Role of Official Solicitor—tribunal proceedings

CPR Pt 21, Supreme Court Act 1981 s.90. Employee (C) presenting claim for unfair dismissal against employers (D). At preliminary hearing on July 27, 2007, tribunal accepting D's submission that Official Solicitor should be invited to investigate whether C (acting in person) had sufficient capacity to conduct the proceedings, and adjourning C's claim in the meantime. On October 3, 2007, Master making similar order in High Court claim brought by C against other parties. C appealing against tribunal's decision. On ground that his functions did not extend to tribunals, OS declining tribunal's invitation. **Held**, allowing appeal, the refusal of the OS to make a report for the benefit of the tribunal meant that the order could not be sustained in the basis that it was made. Observations on the powers of a tribunal in cases of suspected mental incapacity and on contrast with powers of courts. (See ***Civil Procedure 2008*** Vol.1 para.21.0.3, and Vol.2 para.9A-311+.)

■ **R. (COMPTON) v WILTSHIRE PRIMARY CARE TRUST** [2008] EWHC 880 (Admin), April 22, 2008, unrep. (Holman J.)

Judicial review claim—protective costs order application

CPR rr.44.3, 44.5 and 54.4. Individual (C) commencing judicial review claim against hospital trust (D) challenging decisions as to services offered at a particular hospital. C a member of a group campaigning for the retention of such services. At hearing of application for permission to proceed, barrister acting pro bono for C making application on her behalf for protective costs order (PCO). **Held**, granting permission to proceed, in the circumstances it was appropriate to make a PCO in the following terms: (1) that in any event (a) C is not permitted to recover from D any part of her costs, (b) D is not permitted to recover from C costs in excess of £20,000, and (2) that these orders should not apply to any proceedings in the Court of Appeal. Judge observing that oral hearings for reconsideration of PCO applications refused on paper should be limited to an hour (including judgment). ***R. (Corner House Research) v Secretary of State for Trade and Industry*** [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600, CA, ref'd to. (See ***Civil Procedure 2008*** Vol.1 paras 3.1.8, 48.15.7 and 54.6.3.)

■ **WHITECAP LEISURE LTD v JOHN H. RUNDLE LTD** [2008] EWCA Civ 429, April 28, 2008, CA, unrep. (Ward, Wall and Moore-Bick L.JJ.)

Adjournment of quantum hearing—permitting claimant to advance alternative claim

CPR rr.1.1, 1.4 and 3.1(2)(b). Leisure industry company (C) bringing claim against suppliers of equipment for water sport system, claiming damages for D's failure to deliver equipment in accordance with the contract. C advancing claim solely on basis that they were entitled to reject the goods. At trial of liability and quantum, judge (1) finding (a) that the goods were not of satisfactory quality and were not fit for purpose, but (b) that C had accepted the goods, and (2) holding that, as C had lost the right to reject the goods, their claim was limited to a claim for breach of warranty (and therefore they could not recover damages for non-delivery). Judge also adjourning trial of quantum and in doing so (1) expressing preliminary views (a) that damages for breach of warranty under the Sale of Goods Act 1979 s.53 was the proper basis on which to award damages, and (b) that C were entitled to recover the cost of a replacement system, (2) directing that, for those purposes his judgment was to be treated as a judgment on liability only, and (3) giving directions for service of further statements of case relating to damages. At quantum hearing, judge holding that C were entitled to recover the whole cost of the replacement system. On D's appeal to Court of Appeal against liability, **held**, allowing appeal, C were not entitled to recover damages as D were entitled to rely on a time-bar clause in the sale contract having the effect of limiting their liability for any defects in the goods. On D's appeal against quantum, **held**, (1) although nowadays judges are expected to take a more active role in managing and controlling proceedings than was once the case, it is important that they should be seen to remain scrupulously impartial, (2) it would have been better had the judge limited his first judgment to issues of liability and, in adjourning the hearing of quantum, invited submissions on the need for any further pleading, thereby giving C the opportunity to apply for permission to advance an alternative claim for breach of warranty, however (3) the judge had not acted unfairly as he had given both parties a proper opportunity of dealing with the issues and D had suffered no prejudice. (See ***Civil Procedure 2008*** Vol.1 paras 3.1.3, and Vol.2 para.11-8.)

In Detail

Costs where judgment "more advantageous" than offer

Until recently, in Pt 36 of the CPR a distinction was drawn between payments into court and offers to settle. An offer to settle a money claim would not have the consequences set out in that Part unless it was made by way of a Pt 36 payment. Paragraph (1) r.36.20 stated that the costs consequences referred to in that rule followed where at trial a claimant "(a) *fails to better* a Part 36 payment; or (b) fails to obtain a *judgment which is more advantageous* than a defendant's Part 36 offer". Paragraph(2) of the rule stated:

> "Unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without needing the permission of the court."

Under those rules it was the generally accepted practice that beating the payment-in by as little as £1 was doing better than the payment into court and the cost consequences followed; the claimant was always at risk.

With effect from April 6, 2007, payment into court has no longer played any role in the Pt 36 offer to settle procedure. Now where an offer is or includes an offer to pay a single sum of money that sum must be paid within 14 days of the date of acceptance and if not so paid judgment may be entered for the unpaid sum (see paras (6) and (7) of r.36.11). The costs consequences following judgment are now set out in r.36.14. That rule applies where upon judgment being entered "(a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or (b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer." Paragraph (2)(a) of r.36.14 plays a similar role to that formerly played by r.36.20(2).

In effect, these changes to Pt 36 replaced the old system of "payment in" with "offers to settle" and applied the same costs consequences irrespective of whether the offer was for the payment of a sum of money in a money claim or an offer of terms and conditions on which to settle non-money claims. Thus, the previous practice for the latter—the "more advantageous" approach—became the uniform approach for both. For money claims as well as for non-money claims the same questions arise under r.36.14(1), namely, under (a) whether the judgment is "more advantageous" than the offer, and under (b) whether the judgment is "at least as advantageous" as the offer.

The effect of these changes to Pt 36 were considered by the Court of Appeal in ***Carver v BAA Plc*** [2008] EWCA Civ 412, April 22, 2008, CA, unrep. This was a personal injuries case which went to trial on quantum. On June 6, 2006, the defendant (D) made a Pt 36 payment of the sum of £4,000 into court, subsequently making it plain that the payment into was in addition to the interim payment previously made, thus making a total offer of £4,520. That offer was rejected by the claimant (C) on September 18, 2006.

At trial, for general damages the judge awarded C £3,500, and for special damage and future loss £935.50. Judgment was accordingly entered for £4,686.26, inclusive of interest. Counsel agreed that, making allowance for the interest at the date of payment in and at the date of judgment, the judgment exceeded the payment in by £51. It was common ground that the new Pt 36 rules governed the matter of costs. After considering representations as to the effect of the new rules on the facts of this case, the judge ordered C to pay D's costs of the claim after the time for accepting the payment had expired. A single lord justice granted C permission to appeal against the costs order to the Court of Appeal. The Court (Ward, Rix and Keene L.JJ.) dismissed the appeal.

Under the old rule C would have recovered her costs. On the appeal, counsel for C submitted that, giving the language of r.36.14(1)(a) its ordinary meaning, a claimant does not fail to obtain a judgment more advantageous than the defendant's Pt 36 offer if the judgment is for a penny more than the offer, albeit that the advantage there is a slim one. The purpose of Pt 36 (so it was argued) is "to draw a clear line in the sand" so that the parties know where each stands and the court can determine the costs consequence with ease and without all the uncertainty attendant upon an analysis of non-monetary advantage and disadvantage inherent in the trial process. On the other hand, counsel for D argued that the change in the wording of the rules must involve a change in approach to the issue of costs and submitted that the new rule expands the judge's area of discretion beyond a strictly financial comparison of payment in and judgment debt.

In dismissing the appeal, Ward L.J. stated that, in the context of the new Pt 36, where money claims and non-money claims are to be treated in the same way, the "more advantageous" yardstick permits a more wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment, which is the fruit of the litigation, was worth the fight. His lordship added (para.31):

> "The Civil Procedure Rules, and Part 36 in particular, encourage both sides to make offers to settle. Compromise is seen as an object worthy of promotion for compromise is better than contest, both for the litigants concerned, for the court and for the administration of justice as a whole. Litigation is time consuming and it comes at a cost, emotional as well as financial. Those are, therefore, appropriate factors to take into account in deciding whether the battle was worth it. Money is not the sole governing criterion."

Limitation on MIB liability for untraced drivers

In ***Byrne v Motor Insurers' Bureau*** [2008] EWCA Civ 574, May 22, 2008, CA, unrep., the facts were that, on July 13, 1989, when the claimant (C) was three years old, he was knocked down in a hit-and-run accident. In October 2001, C's parents submitted a claim on his behalf to the Motor Insurers' Bureau. It was rejected by the MIB on the ground that the claim had been made outside the three-year time limit set by cl.1(1)(f) of the Untraced Drivers Agreement 1972. In March 2006, C began proceedings against the MIB and the Secretary of State for Transport.

It was claimed (1) against the MIB that the 1972 Agreement, interpreted in accordance with Community law, conferred a right to make an application to the MIB within time limits no less favourable than those contained in the Limitation Act 1980 ("the limitation issue"), or (2) against the Secretary of State for damages for breach of statutory duty in failing properly to implement Art.1(4) of Dir. 84/5/EEC of December 30, 1983 ("the Second Directive") on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1984 L 8, p.17) ("the liability issue"). On June 28, 2007, Flaux J. made two declarations in favour of C on these issues and gave the defendants permission to appeal ([2008] EWHC 1268 (QB); [2008] 2 W.L.R. 234). The Court of Appeal (Waller, Keene and Carnwath L.JJ.) dismissed the appeal and upheld the declarations made by the judge.

The limitation issue

Carnwath L.J. explained that, before the Untraced Drivers Agreement 1969, the MIB protected victims of untraced drivers on an ex gratia basis. This was superseded by further Agreements in 1972, 1996 and 2003. The relevant Agreement in this case was that of 1972. In that Agreement, cl.1(1)(f) stated that the application must be made within three years from the date of the event giving rise to the injury and there was no provision for extension. The 2003 Agreement continues to have a limit of three years for claims for personal injury; but, unlike the 1972 Agreement, it provides for an extension of time, subject to a "longstop" of 15 years, for cases where the applicant could not reasonably have been expected to become aware of the existence of bodily injury (cl.4(3)).

It was common ground that, had the negligent driver been traced but uninsured, C could have brought an action within three years of attaining his majority (that is, any time prior to his 21st birthday in 2010), and, if successful could have made a claim against the MIB under the Uninsured Drivers Agreement.

The First Directive (Dir.72/166/EEC of April 24, 1972) required Member States to take appropriate measures to ensure that civil liability in respect of the use of motor vehicles was covered by insurance. The Second Directive (Dir.84/5/EEC of December 30, 1983) added detail to the insurance obligation, and also provided for the establishment of bodies to take responsibility for meeting liabilities of unidentified drivers.

Carnwath L.J. explained that the 1972 Untraced Drivers Agreement was considered by the European Court of Justice in ***Evans v Secretary of State for the Environment, Transport and the Regions*** (Case C-63/01) [2004] 1 C.M.L.R. 47, ECJ. The principal issue in that case was whether the MIB agreement was defective in failing to provide for payment of legal costs and interest on an award. However, the Court was also faced with more general questions as to the conformity of the MIB procedure with the obligations of the Directive, and as to the consequence of non-compliance. His lordship said the judgment "can be seen therefore as a template for consideration of the closely related issues arising in the present appeal". Of particular relevance were the general comments made by the ECJ in that case on the effect of the Second Directive; especially the following passage:

> "It is thus clear that the Community legislature's intention was to entitle victims of damage or injury caused by unidentified or insufficiently insured vehicles to protection equivalent to, and as effective as, that available to persons injured by identified and insured vehicles."

Carnwath L.J. explained that the "principle of equivalance" encapsulated in that passage is well-established in Community law. It raises two sub-questions: (i) is there a "similar domestic action"? and (ii) are the rules applicable to the Community right "not less favourable"? As to the first sub-question, the Court of Appeal agreed with the judge and held that the appropriate comparison for the principle was the system of remedies available for insured drivers. In doing so, the Court rejected the appellants' submission to the effect that a claim in tort in court proceedings against an uninsured, identified driver, was very different from an application brought to enforce the MIB's contractual liability under its agreement with the Secretary of State concerning unidentified drivers. As to the second sub-question, the Court also agreed with the judge and held that, in order to meet its intended role as implementing the Second Directive, the MIB agreement should be subject to a limitation period no less favourable than that which applies to the commencement of court proceedings by a minor under s.28 of the Limitation Act.

The liability issue

Carnwath L.J. said that it is clear from the case-law of the ECJ that three conditions must be satisfied for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible. They are: (1) the rule of law infringed must have been intended to

confer rights on individuals; (2) the breach must be sufficiently serious; and (3) there must be a direct causal link between the breach of the obligation resting on the State and the loss or damage sustained by the injured parties. In this case, the second condition was the key issue: was the United Kingdom's failure to comply with the Second Directive "sufficiently serious" to expose it to a claim for damages? In the Evans case, the principal factors relevant to establishing liability were summarised as follows:

> "…the clarity and precision of the rule infringed, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law."

The Court held (agreeing with the judge, but for slightly different reasons) that, in the circumstances of this case, liability in principle was established.

Inequality of arms

In ***Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi ve Pazarflama AS*** [2008] EWHC 659 (Ch), April 9, 2008, unrep., the facts were that a foreign bank (C) commenced a claim for debt against a foreign company (D) arising out of a written loan facility agreement pursuant to which C agreed to provide trade finance to D up to an aggregate of US$35 million. In addition C made claims in conversion and deceit against other foreign companies, who were also made defendants, with whom D had had dealings.

Certain individuals were also made defendants, including a businessman (X) (added as a defendant in February 2007). The claim against X was in conspiracy. Specifically claims in conspiracy were made against him, a company controlled by him (also a defendant), and also against members of the family that controlled D. C's claims against X were set out in re-amended particulars of claim, pursuant to permission to re-amend given by the court on May 10, 2007. The proceedings were listed for an eight-week trial, commencing in October 2008.

On November 30, 2007, X applied to the judge for an order striking out C's claims against him pursuant to CPR r.3.4(2) and, in the alternative, for defendant's summary judgment on all claims against him pursuant to r.24.2. The application was based upon several grounds. In particular, X submitted that, for reason of "inequality of arms", it would be "oppressive and unfair" to require X to defend the claims. On this point, counsel for X noted that, viewed as whole, these proceedings constituted very heavy, long and complex commercial litigation and contrasted his client's position with the positions of C and the other parties in the proceedings. X was an individual of relatively limited financial means, his assets consisting of illiquid interests in real property amounting to less than £400,000; he had funded his defence to the proceedings thus far by means of borrowings from his family and a former business associate (now deceased) in an aggregate amount well in excess of his net assets; he doubted his ability to fund a full and comprehensive defence to the claim all the way to the conclusion of an eight-week trial. By contrast, relatively C had unlimited resources and the other active defendants were also well-resourced. The likelihood was that even sympathetic case management would make it difficult for X to absent himself without some risk from large parts of the trial, if the case were to proceed against him. Counsel for X submitted that, taking those factors together, the overriding objective as stated in CPR r.1.1 required the court to apply a more than usually stringent standard or test to the questions whether, under r.3.4(2) the particulars of claim against X disclosed reasonable grounds for bringing the claim, or whether, under r.24.2, C could show that they had a real prospect of succeeding on their claim against him.

The judge dismissed both applications. In dealing with the "inequality of arms" point, Briggs J. stated (para.6):

> "While I have considerable sympathy with the plight of any private individual (other than perhaps the most wealthy) drawn into a long and complex conflict between sophisticated and well-resourced companies, I have not been persuaded that those considerations call for some different or more rigorous test to be applied on applications under r.3.4(2) or r.24.2 than those which are now the subject of substantial, consistent and well-settled authority."

His lordship added (para.7):

> "In my judgment the overriding objective is achieved, both under r.3.4(2) and r.24.2, by ensuring that unreal, fanciful or hopeless cases (or defences) are dealt with without the effort and expense of a trial, for the simple reason that a trial has been shown to be unnecessary. By contrast, where a statement of case discloses reasonable grounds for a claim or the evidence relied upon in answer to a claim for defendant's summary judgment discloses a real prospect that the claim will succeed, then the core of the overriding objective, namely enabling the court to deal with cases justly, set out in r.1.1(1), can only be achieved by a trial, albeit that the court will use its case management powers to minimise inequality of arms, and to ensure that the case is dealt with proportionately, expeditiously and fairly."

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