Recent Cases on Civil Procedure: what might you have missed?

By David Holland QC

The recording of the full webinar may be accessed here.

1. *(1) GANI ABAIDILDINOV (2) LONDON INFRASTRUCTURE LTD v AFZAL AMIN* [2020] EWHC 2192 (Ch): **The court set out the approach to deciding whether summary judgment should be granted where the relief sought was a declaration.** Where CPR r.24.2(a)(ii) stated that the court could give summary judgment where the defendant had no real prospect of successfully defending the claim or issue, "claim or issue" referred only to the underlying facts or matters which were the subject of the declaration. Once it was shown that the defendant had no real prospect of showing that those matters were wrong, the court should exercise its discretion as to whether to make the declaration in the normal way, not by reference to the summary judgment test.

APPEAL

2. *LM ASSOCIATES LTD v WILLIAM GIBBESON* [2020] EWCA Civ 1460: **The Court of Appeal had no jurisdiction to entertain an appeal against a High Court judge's decision**, having found on the papers that an application for permission to appeal from a County Court decision was totally without merit, **to order under CPR r.52.4(3) that the applicant could not request the decision to be reconsidered at an oral hearing.**

3. *R (on the application of ELIZABETH WINGFIELD) v (1) CANTERBURY CITY COUNCIL (2) REDROW HOMES (SOUTH EAST)* [2020] EWCA Civ 1588: The Court of Appeal considered the purpose and parameters of the jurisdiction provided by **CPR r.52.30, which allowed for an appeal to the High Court or the Court of Appeal to be re-opened in very rare circumstances.**

PLEADINGS

4. *SATYAM ENTERPRISES LTD V BURTON* [2021] EWCA Civ 287: **A judge had erred in dismissing a company's claim against its former sole director and shareholder for damages in respect of an alleged transaction at an undervalue on a basis that had not been pleaded or canvassed before him.** He had also given insufficient reasons for his alternative decision that the director had a defence pursuant to the principle in *Duomatic Ltd, Re* [1969] 2 Ch. 365, [1968] 11 WLUK 45. The case would have to be remitted.

5. *UK LEARNING ACADEMY LTD V SECRETARY OF STATE FOR EDUCATION* [2020] EWCA Civ 370: The Court of Appeal held that if there was "a prevailing view that parties should not be held to their pleaded cases", that was wrong. That did not mean that technical points could be used to prevent the just disposal of a case, nor that a trial judge could not permit a departure from a pleaded case where it was just to do so, though it was good practice to amend the pleadings, even at trial. **Statements of case played a critical role in civil litigation which should not be diminished.**

6. *RG CARTER PROJECTS LTD V CUA PROPERTY LTD* [2020] EWHC 3417: **Where a claimant had amended its claim pursuant to CPR Pt 17 so as to abandon a cause of action in misrepresentation, it was akin to a partial discontinuance under Pt 38**. The appropriate costs order was to award the defendant not just the costs of and caused by the amendment, but also the costs in respect of the abandoned misrepresentation claim.

SERVICE

7. *DIRIYE V BOJAJ & ANOR* [2020] EWCA Civ 1400**: The Royal Mail's "signed for 1st class" service was within CPR r.6.26** so that service was deemed to have taken place the second working day after the item was posted.

8. *IDEAL SHOPPING DIRECT LTD V VISA EUROPE LTD* [2020] EWHC 3399: Claim forms in proceedings for breach of competition law had **not been validly served as the sending of unsealed amended claim forms did not constitute good service.** The court declined to grant relief to the claimants under CPR r.6.15, r.6.16 or r.3.10 (appeal outstanding).

COSTS AND ADR

9. *DSN V BLACKPOOL FOOTBALL CLUB LTD* [2020] EWHC 670 (QB): A defendant which had refused to engage in mediation because it was confident in the strength of its defence was required to pay some of the costs on the indemnity basis when the claimant beat its Part 36 offer. **No defence, however, strong, justified on its own a failure to engage in alternative dispute resolution.** Regarding Part 36, it was an inherent feature of indemnity costs that proportionality was not a factor on assessment. Its removal as a consideration was part of the incentive for parties to make and accept Part 36 offers.

10. *BXB v (1) WATCH TOWER & BIBLE TRACT SOCIETY OF PENNSYLVANNIA (2) TRUSTEES OF THE BARRY CONGREGATION OF JEHOVAH'S WITNESSES* [2020] EWHC 656: **The defendants had** breached a court direction given in standard form, to serve a statement explaining their refusal to participate in a joint settlement meeting. That was unreasonable conduct **and the costs incurred by the claimant from the date of that refusal were assessed on an indemnity basis.**

LITIGATION PRIVILEGE

11. *AHUJA V VICTORYGAME* [2021] EWHC 1543 (Ch). In that case the Claimant sued the Defendants for alleged fraudulent misrepresentations following the purchase of a commercial property by the Claimant from the Defendants. The Claimant had instructed solicitors for the transaction and had disclosed its entire solicitors file. So no question of legal advice privilege arose. However the Claimant wished to obtain further information from its former solicitors to enable it to contest the claim against the Defendant. It had had to make an application to court to obtain its former solicitors file and there had been a compete lack of cooperation from the former solicitors so, having taken advice form counsel, it was felt that the only way in which the former solicitor would provide the additional information was to write a letter in the Form of a Pre-Action Protocol letter threatening proceedings for professional negligence. That it did and it eventually elicited a response. The Defendant applied for specific disclosure of this correspondence and the Claimants resisted asserting that it was covered by litigation privilege. The key issue was whether the "dominant purpose" of the correspondence was the conduct of the claim against the Defendant. Despite the form of the letter threatening a claim in professional negligence, the Claimants solicitors stated that the sole purpose was in fact to obtain further information from the former solicitor and there was never any intention of issuing proceedings against the former solicitors. The Master, relying on the earlier case of *PROPERTY ALLIANCE GROUP V RBS* [2016] 4 WLR 3, held that, because there was a form of deception in writing the letter, no privilege attached. The Deputy Judge allowed the Claimant's appeal. He held that the key was the dominant purpose of the sender or initiator of the correspondence: i.e. the Claimant. The subjective intention had to be objectively viewed but there was no reason here to go behind the statements made by the Claimants solicitor. Further, he doubted whether there was any principle by which a claim to privilege could be disallowed on the ground of deception but held, in any event, that the relevant deception was here of a different sort than that practised in the *PAG* case.

Monday 14 June 2021