SELBORNE CHAMBERS

For the purposes of CPR Part 36, is a summary judgment hearing a trial?

The Facts

i) The claimant made a Part 36 offer in November 2019 ("the Offer").

ii) In June 2021 the court heard the claimant's application issued in February 2021 to strike out the defence and/or for summary judgment.

iii) Judgment was reserved and a draft judgment finding in favour of the claimant circulated in July 2021.

iv) As a result of certain consequential matters, the handing down of the judgment was deferred.

v) A Notice of Acceptance was served by the Defendant by email on 6 September 2021 ("the Acceptance").

vi) A directions hearing took place in early October where it was envisaged that directions would be given for the disposal of the claim as the judgment did not address the quantum of the claim which was in dispute. However, it was by then apparent that nothing further could occur until the status of the Offer was determined, as if that Offer was capable of acceptance without the permission of the court, rule 36.14(1) provides that if a Part 36 offer is accepted, the claim will be stayed.

2. Where an offer has not been been withdrawn, rule 36.11 (2) provides that an offer may be accepted at any time, subject to rule 36.11 (3), which sets out the circumstances where the court's permission is required to accept a Part 36 offer. The permission of the court is required under rule 36.11 (3)(d), which provides that such permission is required "where a trial is in progress".

3. The Defendant contended that permission was not required, as a trial was not in progress when the Offer was accepted. If that was right, the Acceptance would take effect and the claim would be stayed. If a trial was in progress, then the court's permission would be required before the Defendant could accept the Offer, under CPR 36.11(3).

4. Thus, the question which fell to be determined (but, as it transpired, was not) was whether the summary judgment hearing was a trial.

Relevant Rules

5. CPR 36.11(2) states that:

"Subject to paragraphs (3) and (4) and to rule 36.12, a Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer), unless it has already been withdrawn."

6. CPR 36.3 states that:

"(c) a "trial" means any trial in a case whether it is a trial of all issues or a trial of liability, quantum or some other issue in the case";

(d) a trial is "in progress" from the time when it starts until the time when judgment is given or handed down; and

(e) a case is "decided" when all issues in the case have been determined, whether at one or more trials".

7. CPR 36.12 states:

"(1) This rule applies in any case where there has been a trial but the case has not been decided within the meaning of rule 26.3.

(2) Any Part 36 offer which relates only to parts of the claim or issues that have already been decided can no longer be accepted.

(3) Subject to paragraph (2) and unless the parties agree, any other Part 36 offer cannot be accepted earlier than 7 clear days after judgment is given or handed down in such trial".

Discussion

8. There is no definition of a "trial" in the CPR, or in the Glossary to the White Book, but there are some helpful indications in the rules and elsewhere. First, Part 24, which sets out the rules relating to summary judgment, makes the position clear. Rule 24.1 states:

"This Part sets out a procedure by which a court may decide a claim or a particular issue without a trial."

9. In Vol II of the White Book, in the Procedural Guides Section, Section 4, at pages 17-19, under the heading "Judgment without Trial", both striking out and summary judgment applications are included.

10. In the administration of the Chancery Division or Queen's Bench Division of the High Court, neither strike out nor summary judgment applications are listed in the Trial List, but as interim applications, either before a Master or a High Court judge, and the structure of both the Chancery and Queen's Bench Guides makes this clear.

11. Rule 45.37 expressly excludes an application for summary judgment from the definition of "trial". This rule relates only to fast-track trial costs, but it is an indication of the general position.

2. There are two relevant authorities:

i) Gardener Steel v Sheffield Brothers (Profiles) [1978] 1 WLR 916 a decision of a two-man Court of Appeal, and Alex Lawrie Factors Ltd v Modern Injection Moulds Ltd [1981] 3 All ER 658, where Drake J. followed the reasoning of Ormerod LJ in Gardener Steel. Both these decisions concerned whether the court had power to award interest under section 3 of the Law Reform (Miscellaneous Provisions) Act 1934, which states at ss. 3(1):

"(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit …

13. Both decisions held that the word "tried" should be interpreted to mean "determined", so that a summary judgment and a default judgment was included in the definition.

14. In Gardener Steel, Stephenson LJ recorded that the generally held view under the Rules of the Supreme Court had been that a summary judgment determination was not a trial.He said (at p. 918):

"It has been thought for many years, and enshrined in The Supreme Court Practice , that proceedings under R.S.C., Ord. 14 concluded by summary judgment under that Order were not proceedings tried in a court of record, because there was no trial. That view will be found expressed in the notes to R.S.C., Ord. 6, r. 2 under 6/2/7A at p. 40 of The Supreme Court Practice (1976), and in the notes to R.S.C., Ord. 14, r. 1 under 14/3–4/19 at p. 145. The editors say:

"Interest may not be awarded under Order 14 under the Law Reform (Miscellaneous Provisions) Act 1934, section 3, since the proceedings are not a trial, but an issue may be directed to be tried as to whether the plaintiff ought to be awarded such interest and if so at what rate and for what period.

That has been the usual cumbrous and expensive practice where a party who obtains summary judgment under Order 14 wants interest on his judgment as well."

15. Ormerod LJ based his decision on his interpretation of the statute, stating (at p. 918):

"There seems to be no logical reason at all for construing that statutory provision in such a way as to draw a distinction between proceedings in which the court hears oral evidence and those in which the court gives judgment on affidavit evidence. There can be no possible reason for allowing interest in the one case and not in the other."

16. The decision in Alex Lawrie Factors was concerned with interest on a default judgment rather than summary judgment. Drake J. referred to Stephenson LJ 's reliance in Gardener Steel on a definition of "trial" in Stroud's Judicial Dictionary of Words and Phrases 4th edn. The current 10th edition (p.919) gives the same definition as is recorded in Drake J.'s judgment:

"A "trial" is the conclusion, by a competent tribunal, of questions in issue in legal proceedings, whether civil or criminal."

17. The judge rejected the plaintiff's argument that that a default judgment fell within that definition, but adopted and agreed with the construction of s. 3 of the 1934 Act by Ormerod LJ in Gardener Steel, namely that "tried" meant "determined", and held that:

"s. 3 covered any situation in which proceedings in a court of record have been started by writ or other originating process and ended by a judgment, irrespective of how the judgment is arrived at."

18. It is clear from Drake J.'s comments at p.663d that the illogicality and unfairness of awarding a successful plaintiff interest on a judgment after a full trial, but not after judgment by any other interlocutory means, was the issue sought to be addressed.

19. However, these cases are not determinative of the issue as they are considering the question of whether something has been "tried" in a section concerning the ability to award interest in a statute that is no longer in force, and where the unfairness that they were seeking to address is no longer the position under the current statute (Law Reform (Miscellaneous Provisions) Act 1970). The decisions do not consider the meaning of the word "trial" in any other context.

20. In Houghton v PB Donoghue (Haulage & Plant Hire) Ltd and ors [2017] EWHC 1738] the court refused to give permission, under CPR r.36.11(3)(d), for a claimant to accept a Part 36 offer while a trial was in progress. Where a claimant decided to take his chances with a trial but then repented of his earlier decision to turn down an offer of settlement because the trial was not going as well as predicted, the court would often take the view that it was not right to give permission to impose a settlement which the defendant no longer agreed to. In reviewing previous authorities, Morgan J stated, at [7]:

"They indicated in strong and, I have to say, persuasive terms that if an offeree, when he sees the way the wind is blowing in the trial changes his attitude and wants to accept an offer that he previously did not want to accept, that is a change of circumstances which means that it may no longer be appropriate to allow the offeree to accept the offer which is still on the table subject to the court's permission."

and further (at para 10):

"I think that the philosophy exists that where a claimant decides to take his chances with the trial and then repents of his earlier decision to turn down the offer of settlement because the trial, he thinks, is going less well or more badly than predicted, that the court will often take the view that it is not right to give permission to impose a settlement on the reluctant defendant.

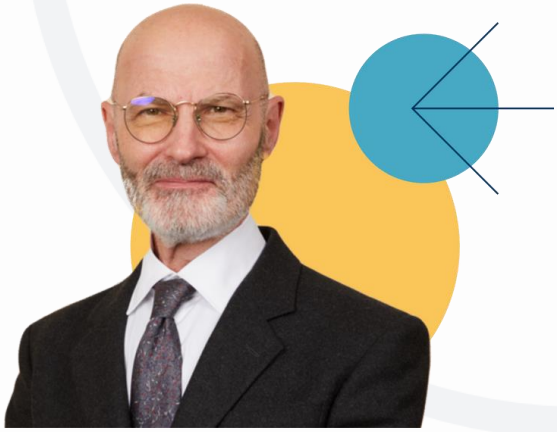
21. Clearly, a defendant would have an entirely different perception of the strength of the claim and of his defence after receipt of the draft judgment, and that the purpose of Part 36 in encouraging settlement of disputes would be entirely undermined if the Defendant was nevertheless permitted to accept the Offer. The logical result would be that the Claimant would have had to withdraw the Offer before the summary judgment hearing.

Conclusion

22. Although the hearing in June 2021 led to a determination of the issue of liability, there is a strong argument that it cannot be described as a trial, as all the indications, save those authorities dealing with a discrete point on the power to award interest, and which pre-date the introduction of the CPR, clearly point to that not being the case. In particular, Part 24, which sets out the rules for summary judgment applications, states in terms that the procedure is for a court to decide a claim "without a trial".

23. Further, Part 36 is a "self-contained procedural code": rule 36.1(1) which was reviewed and updated in 2015.This may be a lacuna in the rule, or it may be that the drafters of the rule did not intend that summary judgment hearings should attract the same consequences as a trial, but in any event the rules are clear.

24. It follows that parties would be wise to withdraw a Part 36 Offer before embarking on a summary judgment application, or at the conclusion of the hearing.



STEPHEN BOYD