Claim No. QB-2018-000796

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

[2022] EWHC 2850 (KB)

Before :

MASTER THORNETT

- -

Between :

STEPHEN HOLDGATE

Claimant

-and-

GEORGETA BISHOP

Defendant

Date: 11 November 2022

- -
- -

Miss Katherine Deal KC (instructed by Summerfield Browne) for the **Claimant**
MR Paul Higgins (instructed by Horwich Farrelly) for the **Defendant**

Hearing date: 14 October 2022

JUDGMENT

1. This is the reserved judgment on the Defendant's Application dated 7 June 2022 for a ruling by way of CPR 24.2 that the Claimant had, in fact, instructed a firm of solicitors in respect of a proposed property transaction before his accident in 2015. For ease of reference, I will adopt the phrase "the land sale issue" used by the Defendant in respect of this transaction.

2. The N244 narrative asks the court to order that the claim proceed on the basis that the Claimant "did instruct Paul Robinson & Co solicitors to act for him in respect of the sale of the Donegal Caravan Park in its undeveloped state to Freshwater Estates (Mildenhall) Ltd and/or J.Nicholson".

   The Defendant makes clear that she in no way seeks any decision reflecting the Claimant's credibility or honesty, all such matters obviously being for trial.

3. Whilst the provisions of CPR 24.2 are familiar, the particular feature of this case is the Defendant's utilisation of the rule to resolve the land sale issue as "a particular issue".

   24.2 The court may give summary judgment against a claimant or defend-
   ant 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; … and
   (b) there is no other compelling reason why the case or issue should be disposed of at a trial.

4. The claim arises out of a road traffic accident on the 12th April 2015. Proceedings were issued on the 19th March 2018. The Claim Form was accompanied by a Schedule of Loss dated 16th March 2018 totalling £5,139,845.79 that was signed by a partner of the Claimant's former solicitors Paul Robinson & Co but there is also a second version signed by the Claimant himself.

   Despite issue over 4½ years ago, the claim has taken a slow and somewhat complicated path. Limited directions and budgeting took place in October 2018. A CCMC listed for December 2019 was vacated because the Defendant amended her Defence and pleaded a Counterclaim to plead fundamental dishonesty. A further CCMC was listed for April 2020 but the Claimant then applied for a general stay of proceedings, his new solicitors expressing reservations about his capacity that, it was said, placed their representation on an uncertain footing. The Order sealed 19 November 2020 set directions for capacity to be considered by way of expert evidence and resolved as a preliminary issue. Some adjustment was required to those directions owing to the way in which the Claimant and his solicitors had set about preparing the expert evidence.

   As reflected in the Order sealed 12 August 2021, on the evidence as assembled from the parties' respective psychiatrists, the Claimant conceded and so instructed that he had capacity to litigate. The preliminary trial of capacity was vacated. The case has

still yet to receive full directions and cost management through to, and listing for, Trial[1].

5. It is clear that there are considerable differences between the parties as to evidence and general preparation required in this claim. In this context, the Defendant maintains her application is both necessary and central to the continuing preparation and ultimate presentation of her Defence and Counterclaim as alleges fundamental dishonesty. It is not, she says, merely an attempt to quibble or point score on a point of evidence as might best be reserved for cross-examination at trial. The Claimant submits it is just that and challenges that CPR 24 is not even procedurally approach for the proposed approach.

6. I am satisfied that it is essential to approach to the declaration sought by a careful review of the preceding Statements of Case and materials.

7. The March 2018 Loss of Earnings claim was based upon Claimant's property development business. On page 7 of his Schedule, he stated:

   'At the date of his injuries, he was in the process of managing a lucrative redevelopment called the Donegal Caravan Park which he had been profitably involved in for many years. At the date of his accident, he and his partners were on the point of constructing 6 houses which would, by that date of drafting or shortly after, have sold for a total of £1.2 million with a net profit to the venture of £600,000, of which he would have taken the lion's share.

   While in hospital, expecting to have his foot amputated, the Claimant received an offer to buy the remaining land to the development for £280,000 which he accepted in order to mitigate his losses. His capital gain was consequently at least £300,000 less than it would otherwise have been, had he been able to continue with his active involvement in it. It is the Claimant's understanding that the purchaser was able to resubmit the project for planning approval with permission to build 8 houses'.

   Hence, at Page 8 in his Schedule the Claimant stated that his '*ongoing losses from the date of the accident among (sic) to no less than £260,000 per annum'.* At Page 10, he used this annual amount to advance a claim for loss of future earnings in the sum £3,647,484.00.

8. It need not be pointed out that the plain and obvious implication of the narrative in the Schedule implies that the Claimant had no other or different plans for the land before the accident. No inference to this effect would be plausible. That said, the Claimant's present factual account, as clarified only in clear terms (as I find) during the hearing on 14 October 2022, is that he can neither admit nor deny that he might, in fact, have had incepted other plans for the land before the accident but in respect of which he now simply cannot remember. At my invitation at the outset of the hearing, Miss Deal was both express and explicit that nothing more nor less than this is both the Claimant's position in fact and, moreover, as should be quite apparent from any

[1] Judgment has been entered but the Defendant's allegations of fundamental dishonesty necessitate a trial and so eclipse what otherwise would be an Assessment of Damages.

reasonable reading of both his Statements of Case and other materials submitted by or on his behalf.

9. Given the importance asserted in the Schedule as to the consequence of the Claimant allegedly having to sell the land, post-accident but whilst still in hospital, in an undeveloped state, the Defendant had sought further details by way of a Part 18 Request dated 29 June 2018, to which the Claimant responded three months later on 17 October 2018. In his responses, the Claimant confirmed that:

    a. He had given no consideration as to the sale of the land undeveloped prior to the accident.
    b. He had first received an offer (verbally) to purchase the land undeveloped only on the 28th April 2015.
    c. That offer was from an individual named John Simmons, "a connection of the Claimant's bank manager". It was accepted verbally, via estate agents called Balmforth, and there was no negotiation.
    d. At all times prior to the index accident, his intention had been to redevelop the land himself. He had "never sold off land to others for them to develop".
    e. Immediately prior to the index accident he was taking active steps to proceed with the venture.
    f. At no time prior to the index accident had he marketed the land for sale undeveloped or receive any offer to buy the land undeveloped.
    g. His decision to sell the land undeveloped was made because of his accident-related injuries, and would not have been made otherwise.
    h. The £260,000 annualized estimate of losses was arrived at using the estimated income from the Donegal Caravan Park redevelopment.

10. I note in particular Question 8 very clearly asks the Claimant to confirm that he had no intention before the accident to sell it undeveloped, was not taking any actives steps to proceed to sell in an undeveloped state, had only after the accident marketed the land for sale undeveloped and that his decision to sell undeveloped was because of his accident related injuries and would not have been made otherwise.

    The Claimant's answers to each of these propositions was an unequivocal "yes". The Claimant personally signed off the Part 18 Replies.

11. The Defendant's factual case, crucial both to her Defence (in principle) of the Claimant's financial claim but also pursuit of her positive case as to Fundamental Dishonesty and Counterclaim for the repayment of an interim payment the Defendant maintains should not have been made, given the alleged fundamental dishonesty, the latter of which the Defendant obviously bears the burden of proving, is that the Claimant had, in fact, received a pre-accident offer to purchase the Donegal Park land, undeveloped, for the sum of £250,000, plus a further £67,500 for the "*copyright to the drawings; Building Regulations; site clearance; archaeological report; access to services in adjacent private road*".

12. The Defendant's case is that several months before the accident there was a proposed purchaser for the land, a Mr. J Nicholson, with the purchase to be made in the name of "Freshwater Estates (Mildenhall) Ltd".

    The Defendant says this is evidenced by: -

    a. Memoranda of Sale dated 1.12.14 and 4.12.14, identifying the Claimant as the vendor and Paul Robinson Solicitors as his solicitors;

    b. Correspondence between Balmforth estate agents and Paul Robinson & Co Solicitors dated 4.12.14, 5.12.14 and 12.12.14;

    c. Correspondence between Paul Robinson Solicitors on behalf of the Claimant and the proposed purchaser's solicitors dated 12.1.15, 13.1.15, 10.2.15, 12.2.15, 5.3.15, 12.3.15 and 24.3.15.

    Accordingly, the Defendant submits, the assertion both in the Schedule of Loss and Part 18 replies is objective false, irrespective of the Claimant's subjective explanation for it.

13. In a Witness Statement dated 7 June 2022 in support from Mr Melia, the Defendant's solicitor observes that the conveyancing documents establish that the Claimant must have given direction instructions on matters only within his knowledge. For example, where an electricity meter was located, whether all rubbish would be removed from the site before completion, whether all covenants had been complied with, confirmation that he was not aware of any breaches, whether he had made the s.103 payment of £33,480 and whether Harrier Way was adopted.

    Mr Melia concludes the statement by stating that if the land sale issue is left undecided, "the Defendant will be put to additional expense and will be required to undertake disproportionate investigations in an attempt to respond to the issue".

14. Mr Higgins on behalf of the Defendant clarified to me during the hearing that the documentation listed above is that provided to his solicitors by the Claimant's former solicitors. It occurred to me, as I expressed, that these documents cannot be taken to constitute a copy of the full conveyancing file. First, because enclosures referred to within the documentation disclosed is not additionally provided, as would include potentially crucial evidence such as the Claimant's signature to the draft contract being submitted to the purchaser. Secondly, there would have been additional documentation to constitute a conveyancing file for any transaction of this type yet this does not appear. I commented and accepted, however, that some of the latter might be subject to solicitor-client legal privilege.

For ease of reference in this judgment, I will refer to the documents referred to by the Defendant in her Application as "the conveyancing file" but on the basis that it is plainly not the full file as would be in the Claimant's former solicitors' possession.

Mr Higgins confirmed that the Defendant had not, at least to-date in the case, enquired further as to what further documentation was available and, in so far as privilege may be relevant, what further documentation might be voluntarily disclosed. However, his principle submission was that on the basis of these documents alone there was sufficient evidence with which to assert there had been a pre-accident transaction as alleged.

Secondly, as is relevant to the question of whether the Defendant had been procedurally justified in pursuing this as a Part 24 Application, to investigate and establish what further documentation might exist would entail expensive and time-consuming enquiries with not only the Claimant's former solicitors but potentially the estate agents and originally intended purchaser. It was not unreasonable to contemplate, Mr Higgins submitted, that may necessitate Third-Party Disclosure interim applications, particularly if there was disagreement as to the scope of disclosure having regard to arguments as to privilege.

Hence why the Defendant submits the Application is accordingly both procedurally recognisable and entirely justified as a step in the litigation.

15. The Defendant's fundamental reliance upon the land sale issue is set out in a detailed and comprehensive Amended Defence and Counterclaim dated 21 November 2019.

    15.1 Para 3 incorporates the assertions featured in both the Claimant's Particulars of Claim and his Part 18 replies by way of a "Summary of the Claimant's case that the Defendant has to meet";

    15.2 Paras 4-7 set out the Defendant's positive case as to the Claimant's pre-accident intentions to sell the land and hence entire inconsistency with his pleaded position. The Part 18 replies are directly quoted;

    15.3 Para 9 asserts that "The Claimant's pleading and subsequent assertions to the contrary, which underpin his entire loss of earnings claim, were deliberately false" such that he has been "fundamentally dishonest in respect of matters going to the very heart of his claim";

    15.4 I find it significant in the context of this Application that Para 23 states:

    In view of the extremely serious allegations that have been made against the Claimant in this Amended Defence, the Claimant is required to file a Reply setting out his response and to verify the Statement of Truth on that Reply personally. That Reply should include (but not be limited to):-

(a) ….

(b) Any explanation which seeks to suggest that the Defendant has misinterpreted the information upon which he relies.

(c) Specific confirmation of the accuracy or otherwise of the conveyancing records which reveal a pre-accident offer to purchase the land undeveloped, and pre-accident steps taken to sell the land undeveloped.

In the event that the Claimant does not do this, Defendant will invite the Court to draw adverse inference from any attempt by the Claimant later to refer to information that could have been included in the Reply.

16. It goes without saying that the effect of the Defence and Counterclaim was to express a very clear invitation to the Claimant fully to set out his position in response to the allegations of inconsistency and dishonesty. Further, such response was near obligatory in terms of needing a Defence to the Counterclaim; at least, that is, if an Application for judgment in default on the Counterclaim was to be avoided. Hence, if a Defence to Counterclaim was required, it followed that such would have to incorporate the same or similar material as might appear in (were it only required) a Reply. Taking the hypothesis of a claimant and legal team in the same scenario, an impression that there would be no call for a Reply and Defence to Counterclaim, which would conveniently avoid condescending to the detailed response clearly invited, would be both irregular and unwise.

17. In any event, consequent upon permission to the Defendant to amend and plead a Counterclaim, by Order dated 27 December 2019 the court directed that any Reply and Defence to Counterclaim be filed and served by 4 pm on the 24th February 2020.

18. For reasons that remain unexplained, the Claimant did not file or serve any Reply or Defence to Counterclaim over the two years that followed. He instead pursued an Application dated 7 January 2022 for additional medical evidence to comment upon the Claimant's cognitive perception and presentation of matters, such as might answer the allegations of dishonesty. It was in the context of that Application the court concluded that seeking elucidation by way of medical opinion as to the Claimant's understanding and presentation of his case was premature if it was still not clear precisely as to what case he was in reply to the Defence and Counterclaim. The Application was dismissed (on terms) and the Claimant given a month from the hearing to file and serve a Reply and Defence to Counterclaim.

19. In terms of required specificity of pleading, a Defence to Counterclaim is the same as a Defence and CPR 16.5(1) equally applies.

> (1) In the defence, the defendant must deal with every allegation in the particulars of claim, stating—
> (a) which of the allegations are denied;
>
> (b) which allegations they are unable to admit or deny, but which they require the claimant to prove; and
>
> (c) which allegations they admit.
>
> (2) Where the defendant denies an allegation—
> (a) they must state their reasons for doing so; and
>
> (b) if they intend to put forward a different version of events from that given by the claimant, they must state their own version.
>
> (3) If a defendant—
> (a) fails to deal with an allegation; but
>
> (b) sets out in the defence the nature of their case in relation to the issue to which that allegation is relevant,
>
> the claimant is required to prove the allegation.

20. The Reply and Defence to Counterclaim is dated 21 March 2022 and signed by the Claimant. In it, the Claimant:

20.1 Alleges he has "genuine, significant and progressive memory problems and has done for several years". Accordingly, he denies any fraud or knowing dishonesty and any "factual inaccuracies were inadvertent and/or resulted from his memory problems";

20.2 Admits that his case about developing the plots on the Donegal Caravan Park was "(in short form)" that he would have developed the remaining plots himself before selling it and that had had no pre-accident intention to sell the land undeveloped;

20.3 Admits that "in the property file held by the Claimant's then solicitors" there is documentation relating to an offer received to purchase the Park prior to the accident and correspondence passing between his then solicitors and proposed purchasers, including a draft memorandum of sale in December 2014;

20.4 However, Paragraph 4.c seems to qualify that admission in commenting that:

It is observed that none of the documentation shows that the Claimant was cc-ed, none of the emails include him, and none of the documents bear his signature. For the avoidance of doubt, none of the documentation relating to the apparent proposed sale is in the Claimant's possession other than via the conveyancing file disclosed in these proceedings.

20.5 Para 4d. iterates that it was the Claimant's usual practice prior to the accident of developing land before sale and provides evidential examples.

20.6 Paragraph 4e. seems to mix assertion of fact, as applicable to CPR 16.5(1) and commentary appropriate to submission on evidence rather than that that should appear in a Statement of Case:

When providing information which was then incorporated into the schedule of loss and further information, the Claimant (probably due to the progression of his memory deficits and/or the psychiatric effect on him of the accident and injuries he sustained) had no recollection of the previous offer to purchase or any discussions which had led to that offer;

20.7 Para 4f similarly seems to qualify the association between the Claimant and the conveyancing file by adding that his former solicitors in the litigation (being the same as the transaction) had never reminded him of the transaction and he is uncertain how the conveyancing file came to be obtained between fee earners at the former firm;

20.8 At Para 5, the Claimant "does not dispute" that the documents in the conveyancing file are genuine but adds that "they run counter to his ordinary business practice, as he recalls it".

21. I describe parts of the above as featuring qualifications of the land sale issue because they are difficult objectively to read as merely gratuitous detail. If merely this, conventional rules of pleading would deem them to be irrelevant and so should not have appeared in the Statement of Case. However, whether intentionally or not, on an objective reading they create at least the impression that a counter-factual position is being reserved, even if one not entirely easy to decipher.

22. When I put this to Miss Deal at the hearing, she was clear and emphatic that the Claimant's position on his personal involvement was entirely factually neutral because he could not remember it. It was therefore a pure non-admission. There was no intention to reserve any point or points and this would remain the case through to trial. Indeed, it is the clarity and simplicity of this pleaded position, Miss Deal submits, that clearly establishes the Defendant's Application to be pointless, if procedurally recognisable at all.

23. I have given careful thought as to these submissions but do not agree the Reply and Defence is as straightforward as portrayed at the hearing. Indeed, as Mr Higgins commented, had the Defendant received such express assurance before that date, the first sentence of his skeleton argument would have made mention of it.

24. First and perhaps most importantly, Paragraph 6 of the Reply and Defence pleads:

In the premises, the Claimant requires the Defendant to prove his personal knowledge of <u>and involvement in</u> [my underlining] *the dealings referred to at paragraphs 4 to 7 of the amended defence. Whilst the documents may well be genuine, he cannot admit that which he does not recall, and he has no recollection of negotiating for the sale of the Park in an undeveloped state prior to the accident.*

25. The requirements of this first sentence are quite specific in seeking to place the burden of proof upon the Defendant on this issue. I note the submission in the Defendant's 21 April 2022 Reply to the Claimant's Defence to Counterclaim where, at Para 12, she denies she bears a burden of proving the Defendant's "personal

knowledge" of the dealings. Appropriately refuting this rather odd proposition from the Claimant aside, however, Para 6 still requires the Defendant to prove the Claimant's "involvement in" the transaction, in respect of which documents that *"may well be genuine"* occupy an evidential middle ground.

26. Even this stance, once appropriately highlighted, is far from clear cut. I agree with the Defendant's submission that the documents within the conveyancing file create a rebuttable presumption that they are evidence of the Claimant's intended transaction. It would ordinarily therefore fall to the Claimant, as the person at the centre of that presumption, either to do nothing that suggests the presumption is unreliable or, in the alternative, to set out a positive case rebutting the presumption; and so have done so in the clearest terms in his Reply and Defence to Counterclaim.

27. Such is an entirely reasonable and ordinary expectation how such a Statement of Case should be pleaded. I disagree that there is any case for doubt being permitted to remain for clarification in, say, witness statements and still less for trial. The Claimant's Reply and Defence at Para 6 does not approach the ostensible evidential meaning of the conveyancing file in a straightforward way, either as portrayed by Miss Deal or otherwise.

28. Because of this, earlier paragraphs in the Reply seem less clear than they might if read in isolation. For example, the confirmation at Para 5 that the Claimant "*does not dispute that the documents are genuine*". Care must always be taken to distinguish between admission of authenticity of a document and admission as to its contents. Taking Paragraphs 4, 5 and 6 together, the comment in Para 5 that the documents "*run counter to his ordinary business practice, as he recalls it"* seems to endorse the similar qualified effect of Para 4c; that is, that the Claimant is disassociating himself from that clearly evidenced in writing.

29. I agree with Mr Higgins that matters would have been much more simple and easier to follow had the Claimant alleged "I did not instruct my former solicitor Paul Robinson Solicitors in respect of the sale of the land". If he had, then that would amount to a defence as needs to go to trial and the Defendant's Application would never have needed to be issued. To the contrary, however, his position is unclear and so an interim decision is called for, to avoid the time and expense as will otherwise follow.

30. Both parties and the court are entitled to rely upon the Statements of Case as the definitive record of the parties' positions. Be that as it may, I have considered both extracts from party-party correspondence relied upon by the Defendant and the 11 May 2022 Witness Statement from Mr Essat, the Claimant's legal representative in reply to the Application.

31. Para 13 of the Defendant's Reply to the Claimant's Defence to Counterclaim is very specific:

> *…unless the matters raised in paragraphs 3 to 6 of the Reply (which are expressly incorporated into the Defence to Counterclaim) are formally withdrawn within 14 days of service of this statement of case then the Defendant will apply for summary judgment on the issues raised on those paragraphs".*

32. I note in May 2022 the Defendant's solicitors drew the Claimant's solicitors' attention to this paragraph and their intended Application. Mr Essat's reply on 11 May 2022 was to express perplexion and suggested the points were for trial. On the assumption it was needed, he invited further elaboration from the Defendant why the paragraphs should be withdrawn.

33. Much of Mr Essat's witness statement comprises unnecessary recitation of the Statements of Case and the Claimant's witness statement. In terms of answering the Application, he explains that because the Claimant has not *denied* he instructed his former solicitors, then he is not required to prove the absence of instruction. According to Para 10 b "*The documents say what they say, Inferences to be drawn from the documents are, with respect, for the trial judge"*.

34. With respect, I find this explanation difficult to follow; certainly if it not to be taken as proof that the Claimant does indeed reserve his position. Either way, it runs in complete contradiction to the open confirmation of uncomplicated non-admission presented by Miss Deal in her submissions.

35. Following his remarks above, Mr Essat repeats the pleaded point that none of the documents were CC-ed to the Claimant and none bear his signature. He suggests that this accordingly indicates why a decision about the land sale issue is not appropriate for a summary judgment application but because [Para 10 d.] *"It would be striking for the court to conclude on a summary basis, as the Defendant seeks, that the Claimant __did__* [my underlining] *give instructions"*. Determination of the land sale issue is [Para 11] "*one small part of these complex and intertwined issues*".

36. I again express difficulty in both understanding this as a commentary but also how it can be consistent with Miss Deal's version of the Claimant's case.

37. Despite Mr Essat's emphasis upon the apparently complex overall evidential picture, he questions why [Para 10e.] the Defendant had not simply served a Notice to Admit facts under CPR 32.18.

38. Given my analysis so far, I follow why the Defendant did not think this would suffice.

39. In summary, Mr Essat illustrates – and so the Claimant maintains - a somewhat contradictory position. It serves only to endorse the sense of ambiguity and potential reservation of alternative position(s) in the context of the Claimant's Reply.

40. This is not a helpful response to the Application, given the single issue put by the Defendant before the court. I agree with, as highly pertinent, the question posited in Mr Higgins' skeleton argument: if the Claimant is *not* seeking to pursue an argument that he had never instructed his former solicitors in respect of the land sale issue, and so is *not* proposing to rebut the contents of the conveyancing file, on what realistic basis might the court at trial conclude that the land sale issue was independent of the Claimant's instructions at the time?

41. It is appropriate only following an understanding of the issues raised in this Application to consider the Claimant's procedural challenge whether CPR 24 is appropriate in principle, regardless of asserted merits. Miss Deal submits the very basis of the Application is procedurally misconceived because it seeks to conclude an issue amongst the many that will still need to be determined at trial. Further, determination of this issue if in favour of the Defendant will not assist the parties to settle. The land sale issue would not, by analogy, have been suitable for the trial of a preliminary issue and so neither should Part 24 be used, as here, to deal with a selected small part of a party's case purely to serve the purposes of perceived tactical advantage.

42. Miss Deal referred me to various cases she maintains are binding authority for her proposition as to inapplicability of Part 24 for these purposes.

43. In *Anan Kasei Co Ltd v Neo Chemicals & Oxides (Europe) Ltd* [2021] EWHC 1035 (Ch), the defendant (Neo) applied for permission to withdraw admissions made in relation to an alleged infringement of patents held by the claimant patentee (Rhodia), and for summary judgment on three legal issues. The issues in Neo's summary judgment application were connected to the admissions it sought to withdraw [para 9]. Similarly, in the context of the summary judgment application, the possibility of overlap or alternative reliance on a trial of preliminary issues was apposite [79-80].

    Mr Justice Fancourt emphasised that whilst the procedural application of summary judgment of CPR 24.2 embraced "issue(s) of law, fact or mixed fact and law" [80], an "issue" to which the rule is applied must still be part of the claim, whether entirely severable (e.g. a particular claim for damages) or "a component of a single claim (e.g. the question of infringement, or the existence of a duty, breach of a duty, causation or loss)" [82]. Hence, in continuing at [82]:

    > "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".

44. I find it difficult to categorise these obiter comments in *Kasei* as having the clear cut and concrete application Miss Deal argues they have in submitting that the Defendant's application is not procedurally recognisable. Quite to the contrary, this case is support for utilising Part 24 if the applicant conversely can show that, if judgment on the issue is granted, "consequences" would arise in the case beyond merely reducing the scope of scrutiny at trial and hence would be progressive in terms of the preparation of the case.

    Of course, the Claimant is entirely open to submit that, as a question of discretion, the court ought not to find evidential and time savings (as "consequences") avoided by acceding to the Defendant's application sufficient to grant the Application. But that is a very different stance and argument.

    Significantly, the judge in *Kasei* did not seek to amplify what "consequences" might be apposite for such an application but no reader would, I would have thought, have expected an attempt to define them. To do so would obviously run the risk of a prescriptive definition of the limitations of Part 24 when the rule has been drafted with conscious flexibility according to the facts of the particular case and Application.

    I entirely accept that no court will invite the use of Part 24 for the purposes of mere "cherry picking" issues upon which an applicant feels confident and yet which serve as merely tactical or strategic achievements, as may enhance the perceived merits of a party's case. The distinction evident from the observations in *Kasei*, however, is between (i) the elimination of an issue that has meaningful and purposive effect on the litigation having regard to the Overriding Objective and (ii) the mere tactical selection of an issue that would not have such effect. Litigation, in this context, of course includes the preparation for trial as well as at trial. So, as acknowledged in the first quotation in *Kasei* from [82], Part 24 might still be entirely procedurally sustainable if the issue is only but a component of a single claim and, as such, will not have the sweeping dispositive effect of, say, judgment on the entire claim or an entire head of loss.

45. In the context of the facts of *Kasei* case and the drafted declarations sought by way of the summary application, the court happened not to be satisfied that the application was appropriate because pertinent questions would still arise at trial [85]. There were [90] "factual questions at the heart of the resolution of the alleged infringement", such that the "declaration sought by way of summary judgement is too general to determine any of the issues in the claim"; "the meaning of the statute and the application of principles of EU law should be examined on the basis of the facts found at trial, and with the benefit of a more through analysis of the laws of EU member states".

    I find nothing in the reasoning for dismissal of a summary judgment application in *Kasei* that firmly establishes a principle by which the Defendant's Application in this case must fail as a matter of procedural definition. The only support *Kasei* provides is to illustrate how the court on such an application must balance the factors of

advantage and disadvantage in seeking on an interim application to pre-empt an issue at trial.

Put in that way, it seems unnecessary to have referred to this case at all and still less cite it, as Miss Deal did, as a binding authority "as to the approach to be taken to applications under CPR Part 24".

46. It is also important not to seek draw too much from cases where the appropriateness of summary judgement was very much linked to similar questions as to the applicability of directing a trial of preliminary issue because, on the facts of those cases, both might have been a possibility. The two are not procedurally contiguous, although there may well be a sufficient element of overlap that consideration of one might be considered in the context of the other (irrespective whether the comparison is by way of analogy or because applications for both are before the court). This is what happened in *Kasei* and also in *Vardy v Rooneyi* [2021] EWHC 1888, another case Miss Deal asserts is binding upon me.

47. In *Vardy*, Mrs Justice Steyn was entirely clear at [76] that whether approached on the basis of summary judgment or trial of preliminary issue, the issue relied upon "is one of many factual issues to be resolved at trial in determining whether the truth defence is made out. It seems highly unlikely that resolution of this issue would assist the parties to settle the claim". In that case, the summary judgement application sought to strike out 5 sub-paragraphs within some 47 sub-paragraphs extending to 32 pages.

48. These decisions reflect consideration of issues interlinked with others. Further, where the resolution of such issues might be argued as also suitable for resolution by way of preliminary issue because the factual and evidential enquiry would be limited. Save to iterate the ultimate feature of discretion on the facts of a given case they do not assist the Claimant, however, to argue that Part 24 simply has no application where, on the face of it, there is only one rational interpretation yet an opposing party has sought to obfuscate that interpretation.

49. *Conclusion*

The Defendant's Application is granted because I am satisfied that:

(i) Part 24 is procedurally available and arguable;

(ii) There is a sufficient lack of clarity and transparency in the Claimant's case about the land sale issue, in his Statements of Case through to his response to the Application, that it justifies an interim declaratory decision;

(iii) It is entirely consistent with the Overriding Objective that the Defendant should not be put to the time expense of proving something that, but for the Claimant's stance, ought not to need proving;

(iv) Such declaration does not affect, undermine or qualify the separate ongoing process of exploring the Claimant's range of injuries and medical condition(s), or the allegation of fundamental dishonesty, neither will it fetter the trial of them.