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COMMERCIAL DISPUTES **KNOW-HOW GUIDES**

SUMMARY JUDGMENT

Summary judgment is a means by which the court can give judgment on a claim (or a particular issue within a claim) without the need for a trial.

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PROCEDURE

The procedure is set out in Part 24 of the Civil Procedure Rules (CPR). Either the claimant or defendant may make an application for summary judgment. The grounds on which summary judgment may be granted are that (a) there is no real prospect of the claimant succeeding on, or the defendant successfully defending, the issue or claim and (b) there is no other compelling reason why the case or issue should be disposed of at trial (CPR 24.2).

(A) 'NO REAL PROSPECT' OF SUCCESS OF THE CLAIM/DEFENCE

In *Swain v Hillman* [1999] EWCA Civ 3053, Lord Woolf said that 'the words "no real prospect of being successful or succeeding" do not need any amplification, they speak for themselves ... they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success.' While this may appear to be a relatively low hurdle to cross, some later case law indicates that to be considered 'realistic', a case has to be more than merely arguable (*ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472).

The hearing of a summary judgment application will not be conducted as a 'mini-trial', but matters of evidence are often considered to establish whether or not a party has a real prospect of success. The burden of proof rests with the applicant, but if they present credible evidence the respondent will need evidence sufficient to rebut it.

Where there is a short and contained point of law or legal construction at issue in the application, and the

court considers that it has all the relevant evidence at hand and the parties have been afforded the opportunity to address it, the court should 'grasp the nettle' and decide the matter. 'If the ... case is bad in law, the sooner that is determined, the better.' (*ICI Chemicals & Polymers Limited v TTE Training Limited* [2007] EWCA Civ 725). On the other hand, determination by summary judgment may not be appropriate where there is at issue a question of law in a developing area (*Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804).

(B) 'NO OTHER COMPELLING REASON' FOR A TRIAL

If a respondent to a summary judgment application is not able to show that it has a real prospect of success, it may still avoid summary judgment by showing that there is another compelling reason why the matter should be decided at a trial. This is often because oral evidence is required and the need for cross-examination but it could be, for example, because further time is needed to investigate the claim – and doing so might afford the respondent the necessary real prospect of success.

More broadly, particularly complex types of cases are not usually suitable for summary judgment, such as those where expert evidence is likely to be critical or there is contested evidence which would need consideration at a full trial. That said, even in a complex case, where the court considers that there is sufficient evidence before it to meet the 'no real prospects' test, an applicant may nonetheless be able to obtain summary judgment.

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TIMING AND TACTICS

A claimant cannot (subject to some exceptions) make an application for summary judgment until the defendant has filed an acknowledgment of service or a defence. A defendant can make an application for summary judgment at any time.

Making an application for summary judgment can be tactically advantageous. Even if the application is unsuccessful, resisting the application will have forced the other party to set out its position at an early stage in proceedings. On the other hand, an unsuccessful application may lead to the applicant being penalised in costs, depending on the circumstances.

INTERPLAY WITH A STRIKE OUT APPLICATION

Summary judgment is linked particularly closely with the strike-out procedure set out in CPR 3.4, and applications for both can, and frequently are, made alongside each other (a claimant applying for summary judgment and/or to strike out the defence, for example). The difference is that strike-out relates specifically to parties' statements of case, whereas with a summary judgment application the court also considers matters of evidence.

This is part of a series of practical know-how guides for those involved in commercial disputes whether the dispute has led to litigation or not. They provide basic information on a wide range of disputes topics but are not a substitute for specific legal advice. For further guidance on the topic please contact Rhianna Thompson at rhianna.thompson@collyerbristow.com or on +44 (0) 7734048799 or contact any member of the commercial disputes team.



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