

Summary judgments: 'realistic prospects' revisited

Sophia Purkis sets out the test for a successful application, following the *Ticketus* ruling



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Summary judgment applications are an established tool to seek determination of suitable claims relatively quickly. The case of *Ticketus LLP and another v Whyte and Ors* [2013] EWHC 4069 (Ch) recently provided a helpful synopsis of what must be demonstrated to stand the best chance of success.

Ticketus was an appeal against an award of summary judgment in favour of the claimants for more than £18m for fraudulent misrepresentation. The judgment summarised the applicable test from the perspective of an application by the claimant. However, the issues apply conversely to a defendant application.

CPR 24.2 provides that the court may give summary judgment if it considers the defendant has 'no real prospect of successfully defending the claim' and 'there is no other compelling reason why the case should be disposed of at trial'.

Real prospect of success

In deciding whether the defendant has a 'real prospect of success', the court in *Ticketus*, cited the summary of the applicable law given in *FG Wilson (Engineering) Ltd v John Holt & Co Liverpool Ltd* [2013] 1 All ER (Comm) 223:

- (1) The defendant must have a 'realistic' rather than 'fanciful' prospect of success
- (2) The defence must be more than arguable
- (3) The court must not conduct a mini-trial, which does not mean the court must take the defendant's statements at face value, particularly if they are contradicted by contemporaneous documents
- (4) The court must take into consideration the evidence that can reasonably be expected to be available at trial
- (5) The court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist to believe a fuller investigation would reveal evidence at trial which would affect the outcome
- (6) However, should there be a short point of law or construction and the court be satisfied it has the evidence necessary to determine the issue properly, it should proceed and decide it. It is not

enough to argue that the case should be allowed to go to trial because 'something might turn up'



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All surmise

The judge emphasised the last point when dealing with the requirement that there was 'no other compelling reason for a trial' by reference to the famous observation in *Lady Anne Tennant v Associated Newspaper Group Ltd* [1979] FSR 298 that 'You do not get leave to defend by putting forward a case that is all surmise and Micawberism'. He further held that CPR1.1, the overriding objective of enabling the court to deal with cases justly, permeates the CPR and reinforces the warning against 'Micawberism'.

In response to submissions made concerning the availability of documentary evidence mentioned in witness summaries, the judge said that "if the party ... is in a position to mention a document, even without the co-operation of the witness, he should be required to produce it". He did not accept that the publicity the case had

attracted and the nature of the claims meant there was compelling reason for a trial.

Ticketus provides a useful summary for those bringing or defending applications for summary judgment, the principles of which are now firmly established. **SJ**

SUMMARY JUDGMENT ESSENTIALS

- The decisions in *FG Wilson* and *Ticketus* succinctly summarise the requirements for summary judgment
- *Ticketus* is also a salutary warning that it is relatively unusual for a party to avoid summary judgment in a case where it has no real prospect of success
- A respondent to an application for summary judgment cannot rely upon the complexity and value of a case or lack of access to documents or legal resources as reason for the matter to proceed to trial, unless they can show that their case is one of more than 'Micawberism'
- The judge's statement about seeking disclosure of documents mentioned in, but not exhibited to, witness summaries encourages requests for disclosure (e.g. under CPR31.14), which might separately assist a party defending an application to support their position that the application is premature and does not reflect the evidence which should be available at trial.