

## Chapter 34 Summary Judgment

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The following procedural checklists, which are in **appendix 1**, are relevant to this chapter:

- Procedural checklist 23** Application by a party for summary judgment
- Procedural checklist 24** Proposal by court for order for summary judgment

### INTRODUCTION

**34.1** In cases where the defendant fails to defend it is usually possible to enter a default judgment (see **chapter 20**). Where there is no real defence, a defendant may go through the motions of defending in order to delay the time when judgment may be entered. It is possible for defendants to put up the pretence of having a real defence to such an extent that some cases run all the way through to trial before judgment can be entered. The CPR provide several ways of preventing this happening. The court can use its power to strike out (see **chapter 33**) to knock out hopeless defences, such as those that simply do not amount to a legal defence to a claim. Entering summary judgment is a related procedure, and is used where a purported defence can be shown to have no real prospect of success and there is no other compelling reason why the case should be disposed of at trial. Indeed, **PD 3, para. 1.7**, recognises that there will be cases where applications for summary judgment and striking out may be sought in

the alternative (but see *Clarke v Davey* [2002] EWHC 2342 (QB), LTL 11/11/2002, in which it was said that the application should be restricted to summary judgment).

The procedure for entering summary judgment is not limited to use by claimants against defendants. Defendants may apply for summary judgment to attack weak claims brought by claimants. Further, summary judgment can be used by the court of its own initiative to perform the important function of stopping weak cases from proceeding. The procedure can also be used for the purpose of obtaining a summary determination of some of the issues in a case, thereby reducing the complexity of the trial.

### TIME AT WHICH THE APPLICATION MAY BE MADE

Summary judgment can be applied for by a claimant or a defendant (see **procedural checklist 23** in **appendix 1**) or can be proposed by the court of its own initiative (see **34.5** and **procedural checklist 24**).

A claimant may apply for summary judgment only after the defendant has filed either an acknowledgment of service or a defence (**CPR, r. 24.4(1)**). If the defendant fails to do either of these within the time limited by the CPR, the claimant may enter a default judgment, which, depending on the nature of the claim, may require the court's permission (see **chapter 20**). By analogy with **r. 25.2(2)(c)**, a defendant likewise can only apply for summary judgment after either filing an acknowledgment of service or a defence.

Applications for summary judgment should normally be made in the period between acknowledgment of service and filing of the applicant's allocation questionnaire (**PD 26, para. 5.3(1)**). This is normally the appropriate time, because, if the other side have no realistic prospects of success, entering summary judgment early prevents unnecessary costs being incurred. Question D in the allocation questionnaire (**form N150**) specifically asks whether there is any intention of making an application for summary judgment. If for any reason the application is not made before allocation, there is still a general obligation to apply as soon as it becomes apparent that it is desirable to do so (**PD 23, para. 2.7**).

Under the old rules there was nothing to prevent a late application for summary judgment (see, for example, *Brinks Ltd v Abu-Saleh (No. 1)* [1995] 1 WLR 1478), but as a practical matter the judge dealing with a late application might well have felt there was a lack of conviction on the part of the applicant if the application was significantly delayed. For summary judgment at trial, see **59.30**.

#### Summary judgment applications made before filing the defence

If the application is made after filing an acknowledgment of service, but before filing of the defence, there is no need to file a defence before the hearing (**CPR, r. 24.4(2)**). At that stage the court will give directions, which will include providing a date for filing the defence. The permissive wording of the rule confirms *Natural Resources Inc. v Origin Clothing Ltd* [1995] FSR 280, in which it was held that there is nothing to prevent a defendant from serving a defence in the period before the hearing if the defendant chooses to do so.

#### Summary judgment applications made before allocation to a track

**PD 26, para. 5.3(2)**, provides that where a party makes an application for summary judgment before the claim has been allocated to a track the court will not allocate the claim before hearing the application. If a party files an allocation questionnaire stating an intention to apply for summary judgment but has not yet made an application, the

judge will usually direct the listing of an allocation hearing (**para. 5.3(3) and (4)**). The summary judgment application may be heard at the allocation hearing if the application notice has been issued and served in sufficient time.

#### Hearings fixed by the court of its own initiative

- 34.5** The rules specifically mention that the court may fix a summary judgment hearing of its own initiative (**CPR, r. 24.4(3)**), and doing so may further the overriding objective, which includes deciding promptly which issues need full investigation and trial, and accordingly disposing summarily of the others (**r. 1.4(2)(c)**). If the court is minded to make use of this power, it is most likely to do so on the initial scrutiny at the track allocation stage shortly after filing of the defence. If the court uses the power, it will not allocate the case to a track, but instead it will fix a hearing, giving the parties 14 days' notice and informing them of the issues it proposes to decide (**PD 26, para. 5.4**).

### DEFENDANT'S APPLICATION FOR SUMMARY JUDGMENT: NO DEFAULT JUDGMENT

- 34.6** Where a defendant has applied for summary judgment against a claimant, the claimant cannot obtain a default judgment until the summary judgment application has been disposed of (**CPR, r. 12.3(3)(a)**).

### EXCLUDED PROCEEDINGS

- 34.7** Under **CPR, r. 24.3(2)**, an application for summary judgment cannot be brought against the defendant in:
- (a) residential possession proceedings against a mortgagor or a tenant or person holding over whose occupancy is protected by the **Rent Act 1977** or the **Housing Act 1988**; or
  - (b) Admiralty claims *in rem*.

It is also not possible to make an application for summary judgment against the Crown, by virtue of **RSC, ord. 77** in CPR, sch. 1 and **CCR, ord. 42** in CPR, sch. 2.

Summary judgment will not be granted in a libel claim where there is a material issue of fact between the parties, because such issues must be decided by the jury (**Supreme Court Act 1981, s. 69**; and *Safeway Stores plc v Tate* [2001] QB 1120). However, where the evidence, taken at its highest, is such that no properly directed jury could reach a verdict contended for by one of the parties, summary judgment is available (*Alexander v Arts Council of Wales* [2001] 1 WLR 1840).

In applications against claimants there are no excluded types of proceedings (**CPR, r. 24.3(1)**).

### PROCEDURE

- 34.8** The general rules on making interim applications (see **chapter 32**) apply on making an application for summary judgment, with certain refinements. The application is made by application notice, which must be supported by evidence (**CPR, r. 25.3(2)**). The evidence in support is most likely to be contained either in part C of the application notice, or in a separate witness statement. The facts supporting the claim will have been verified by a statement of truth included in the particulars of claim. The evidence in support of an application by a claimant will have to state a belief that there is no defence with a reasonable prospect of success. It may be prudent to go further and to give details of the background facts and to exhibit relevant documentation to show there is no reasonable defence. On an application by the defendant there may or may

not be a filed defence. If not, clearly the evidence will have to explain why the claim is unlikely to succeed, and will probably have to go into the background in some detail.

Instead of the usual notice period of three clear days which applies to most types of interim application, the notice period in applications for summary judgment is 14 clear days (r. 24.4(3)). The 14-day period of notice may be varied by practice directions (r. 24.4(4)), and has been shortened for specific performance claims (see 34.41).

The respondent must file and serve any evidence in reply at least seven clear days before the hearing (r. 24.5(1)). The application notice must inform the respondent of this time limit (PD 24, para. 2(5)). If the applicant wishes to respond to the respondent's evidence, the further evidence must be served and filed at least three clear days before the hearing of the application (r. 24.5(2)).

In cases where the hearing is fixed by the court on its own initiative, all parties must file and serve their evidence at least seven clear days before the return day, and if they want to respond to their opponents' evidence, that must be done at least three clear days before the return day (r. 24.5(3)).

## ORDERS AVAILABLE

Paragraph 5.1 of PD 24 says that the range of orders available on a summary judgment application include: **34.9**

- (a) giving judgment on the claim;
- (b) striking out or dismissal of the claim;
- (c) dismissal of the application; and
- (d) making a conditional order.

Where the defendant has a defence to only part of the claim the most natural order would be to grant judgment for the part of the claim against which there is no defence, and to dismiss the application as to the balance. Although CPR, r 24.2, expressly says that the court can give summary judgment on particular issues, this is most appropriate where resolving the issue or issues will resolve or help to resolve the litigation (*Kent v Griffiths (No. 3)* [2001] QB 36 at p. 51). The court must apply the overriding objective, and may consider that where there are connected issues, some of which should go to trial, summary judgment should be refused on the others as well (*Redevco Properties v Mount Cook Land Ltd* [2002] EWHC 1647 (Ch), LTL 30/7/2002). The court should be slow to entertain an application for summary judgment on certain issues where there is going to be a full trial in any event, particularly where dealing with such an application may delay (because of possible appeals) the final disposal of the claim (*Partco Group Ltd v Wragg* [2002] EWCA Civ 594, [2002] 2 Lloyd's Rep 343, at [27]).

This is not a comprehensive list (note the use of the word 'include' in PD 24, para. 5.1), and the court can make other orders, such as allowing the claim to continue to trial on condition that a party pay money into court as security for costs (*Olatawura v Abiloye* [2002] EWCA Civ 998, [2003] 1 WLR 275).

## TEST FOR ENTERING SUMMARY JUDGMENT

Rule 24.2 of the CPR provides:

**34.10**

The court may give summary judgment against a claimant or defendant 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; or

- (ii) that defendant has no real prospect of successfully defending the claim or issue; and
- (b) there is no other compelling reason why the case or issue should be disposed of at a trial.

An application for summary judgment is decided applying the test of whether the respondent has a case with a real prospect of success, which is considered having regard to the overriding objective of dealing with the case justly. This has been said to be consistent with the need for a fair trial under art. 6(1) of the European Convention on Human Rights (*Three Rivers District Council v Bank of England (No. 3)* [2001] UKHL 16, [2003] 2 AC 1). Whether there is a real prospect of success is the same test as that applied in applications to set aside default judgments (see 20.11 and *E.D. and F. Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, *The Times*, 18 April 2003).

In *Swain v Hillman* [2001] 1 All ER 91 Lord Woolf MR said that the words ‘no real prospect of succeeding’ did not need any amplification as they spoke for themselves. The word ‘real’ directed the court to the need to see whether there was a realistic, as opposed to a fanciful, prospect of success. The phrase does not mean ‘real and substantial’ prospect of success. Nor does it mean that summary judgment will only be granted if the claim or defence is ‘bound to be dismissed at trial’.

A claim may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all the documents or other material on which it is based (*Three Rivers District Council v Bank of England (No. 3)*). The judge should have regard to the witness statements and also to the question of whether the case is capable of being supplemented by evidence at trial (*Royal Brompton Hospital NHS Trust v Hammond* [2001] BLR 297). The question of whether there is a real prospect of success is not approached by applying the usual balance of probabilities standard of proof (*Royal Brompton Hospital NHS Trust v Hammond*). Applying a test of whether the claim is arguable will give grounds for appeal (*Sinclair v Chief Constable of West Yorkshire* (2000) LTL 12/12/2000).

In *E.D. and F. Man Liquid Products Ltd v Patel* Potter LJ at [6] regarded the terms ‘real prospect’ and ‘realistic prospect’ as interchangeable. Lord Woolf MR in *Swain v Hillman* said that summary judgment applications have to be kept within their proper role. They are not meant to dispense with the need for a trial where there are issues which should be considered at trial. Further, summary judgment hearings should not be mini-trials. They are simply summary hearings to dispose of cases where there is no real prospect of success. Without allowing the application to become a mini-trial, there are occasions when the court has to consider fairly voluminous evidence in order to understand the facts that are in issue (*Miles v ITV Networks Ltd* [2003] EWHC 3134 (Ch), LTL 9/12/2003).

### Burden of proof

- 34.11** An important issue on many applications for summary judgment is whether the burden of proof is on the applicant to show the respondent’s case has no real prospect of success, or whether the burden of proof rests with the respondent to establish a case with a real prospect of success. In *E.D. and F. Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, *The Times*, 18 April 2003, Potter LJ said at [9] that the burden of proof is on the applicant to show the respondent’s case has no real prospect of success. Strictly this is no more than an *obiter dictum*, because the learned judge was dealing with an application to set aside a default judgment, and was contrasting his view of the burden of proof on the two types of application. Whether Potter LJ’s view is correct is open to question.

Under the old rules the incidence of the burden of proof was perfectly clear, because RSC, ord. 14, r. 3(1), said in terms: ‘Unless . . . the defendant satisfies the court with respect to the claim, or part of the claim, to which the application relates that there is

an issue or question in dispute which ought to be tried . . . the court may give such judgment for the plaintiff’.

The present rule, **CPR, r. 24.2**, is not explicit on the burden of proof, saying: ‘The court may give summary judgment against a [defendant] . . . if (a) it considers that (ii) that defendant has no real prospect of successfully defending the claim or issue’ (and similarly if the application is against the claimant). Lord Woolf’s *Final Report* says, at p. 123, regarding applications for summary judgment:

The test for making an order would be that the court considered that a party had no realistic prospect of succeeding at trial on the whole case or on a particular issue. A party seeking to resist such an order would have to show more than a merely arguable case; it would have to be one which he had a real prospect of winning.

The wording of PD 24, paras 4.1 and 4.2, when first issued, made it clear that the burden of proof was on the respondent, providing:

- 4.1 Where a claimant applies for judgment on his claim, the court will give that judgment if:
- (1) the claimant has shown a case which, if unanswered, would entitle him to that judgment, and
  - (2) the defendant has not shown any reason why the claim should be dealt with at trial.
- 4.2 Where a defendant applies for judgment in his favour on the claimant’s claim, the court will give that judgment if either:
- (1) the claimant has failed to show a case which, if unanswered, would entitle him to judgment, or
  - (2) the defendant has shown that the claim would be bound to be dismissed at trial.

Thus, under the old para. 4.1(1), a claimant applying for summary judgment had to adduce evidence establishing his claim (but not disproving any purported defence), as is clear from the phrase ‘which, if unanswered’.

In *Swain v Hillman* [2001] 1 All ER 91 Lord Woolf MR commented on the revocation of the original paras 4.1 and 4.2 of PD 24 as follows:

The reason for that deletion is obvious. It was perceived that there was a conflict between paras 4.1 and 4.2 and the provisions of Part 24. The PD was laying down a different standard which indicated that the approach required was one of certainty. The judge could only exercise his power under Part 24 if he was certain or, to read the actual language of the PD, he thought that a claim ‘would be bound to be dismissed at trial’. If that was thought to be the effect of the PD, that would be putting the matter incorrectly because that did not give effect to the word ‘real’ to which I have already referred.

Paragraphs 4.1 and 4.2 were deleted because they imposed, or were perceived to impose, too high a standard of proof on an application for summary judgment. It was not because they imposed the wrong burden of proof. The true burden of proof, it is suggested, is still on the respondent to show a case with a real prospect of success.

### Complex claims

Complex claims, cases relying on complex inferences of fact, and cases with issues involving mixed questions of law and fact where the law is complex are likely to be inappropriate for summary judgment (*Three Rivers District Council v Bank of England (No. 3)* [2001] UKHL 16, [2003] 2 AC 1; *Arkin v Borchard Lines Ltd (No. 2)* (2001) LTL 21/6/2001). The high standard of proof required at trial in fraud claims means that it will be difficult to succeed on a summary judgment application in such a case (*Allied Dunbar Assurance plc v Ireland* [2001] EWCA Civ 1129, LTL 12/6/2001).

If an application for summary judgment involves prolonged serious argument, the court should, as a rule, dismiss it without hearing the argument, unless it harbours doubt about the soundness of the statement of case and is satisfied that granting summary judgment would avoid the need for a trial or would substantially reduce the

burden of the trial (*Three Rivers District Council v Bank of England (No. 3)*; *Partco Group Ltd v Wragg* [2002] EWCA Civ 594, [2002] 2 Lloyd's Rep 343, at [28]; *Equitable Life Assurance Society v Ernst and Young* [2003] EWCA Civ 1114, [2003] 2 BCLC 603). Summary judgment is also inappropriate in cases in areas of developing jurisprudence, which should only be decided on the basis of actual findings of fact (*Farah v British Airways plc* (1999) *The Times*, 26 January 2000; *Barrett v Enfield London Borough Council* [2001] 2 AC 550).

#### Defence on the merits

**34.13** On an application for summary judgment by a claimant, the defendant may seek to show a defence with a real prospect of success by setting up one or more of the following:

- (a) a substantive defence, e.g., *volenti non fit injuria*, frustration or illegality;
- (b) a point of law destroying the claimant's cause of action;
- (c) a denial of the facts supporting the claimant's cause of action;
- (d) further facts answering the claimant's cause of action, e.g., an exclusion clause, or that the defendant was an agent rather than a principal.

An example under the old rules was *Mercer v Craven Grain Storage Ltd* [1994] CLC 328. The claimant was a farmer who deposited a quantity of grain with the defendant storage company. Later, the claimant requested redelivery, but the defendant was only able to deliver a small fraction of the grain. The defendant alleged that the claimant had entered into an agreement with a marketing company, and that the missing grain had been withdrawn from the store with the authority of the marketing company. By a bare majority it was held that this defence raised triable legal and factual issues, and leave to defend was given. With the change in the test, this case would now perhaps result in a conditional order being made.

#### Points of law and construction

**34.14** Although summary judgment applications should not be allowed to turn into mini-trials, where the case turns on an issue of construction of a term in a contract the court will usually determine the point and give judgment accordingly (*Wootton v Telecommunications UK Ltd* (2000) LTL 4/5/2000).

Where a clear-cut issue of law is raised by way of defence in an application for summary judgment, the court should decide it immediately. This is so even if the question is, at first blush, of some complexity and therefore will take some time to argue fully (see Lord Greene MR in *Cow v Casey* [1949] 1 KB 474). Not deciding a case once full argument has been addressed to the court on the issue will result in the case going to trial, where the argument will be rehearsed again, with consequent delay and unnecessary expense. Likewise, where the point at issue is one of the construction of contractual documents, the court will decide the point on the summary judgment application, provided it is relatively straightforward (*Coastal (Bermuda) Ltd v Esso Petroleum Co. Ltd* [1984] 1 Lloyd's Rep 11). In *GMAC Commercial Credit Ltd v Dearden* (2002) LTL 31/5/2002 summary judgment was given to the claimant against four of the defendants, with a conditional order against the fifth defendant. The claim was to enforce personal guarantees given by directors to secure borrowing by their company. It was held that defences of economic duress had no real prospect of success, the claimant having acted in good faith and its conduct not going beyond what was normal and legitimate in commercial arrangements.

However, it is quite a different matter, per Lord Donaldson of Lymington MR in *R.G. Carter Ltd v Clarke* [1990] 1 WLR 578:

if the issue of law is not decisive of all the issues between the parties or, if decisive of part of the [claimant's] claim or of some of those issues, is of such a character as would not justify its being determined as a preliminary point, because little or no savings in costs would ensue. It is an a

fortiori case if the answer to the question of law is any way dependent upon undecided issues of fact.

Summary judgment should also be refused where the point requires protracted argument (*Home and Overseas Insurance Co. Ltd v Mentor Insurance Co. (UK) Ltd* [1990] 1 WLR 153). Summary judgment was refused in *System Control plc v Munro Corporate plc* [1990] BCLC 659, in which it was held that whether the claimants had irrevocably elected to treat a contract as discharged, or whether they could enforce it, was an issue which should be decided at trial. In *I-Way Ltd v World Online Telecom Ltd* [2002] EWCA Civ 413, LTL 8/3/2002, the claimant sued to recover the benefits it alleged were due to it under an oral variation of a written contract. The defendant resisted the claim relying on a clause of the written contract that there was to be no addition or amendment to the contract unless it was in writing and signed by both parties. An application by the defendant for summary judgment against the claimant was dismissed, because there was no direct authority on the issue whether the parties could prevent oral variations of a contract by use of such a clause, and an important point of principle such as the one in issue needed to be tried rather than determined by summary judgment.

### Disputes of fact

Where there are issues of fact, which, if decided in the respondent's favour, would result in judgment for the respondent, it is inappropriate to enter summary judgment, even if there is substantial evidence in support of the applicant's case (*Munn v North West Water Ltd* (2000) LTL 18/7/2000). Primarily the court will consider the written evidence adduced by the parties, and if it discloses a dispute with a real prospect of success, the summary judgment application will be dismissed. However, the court is not always obliged to accept written evidence at face value, and may disregard evidence which is incredible (see 32.13).

In *Public Trustee v Williams* (2000) LTL 10/2/2000 the claimant sought to recover for a deceased's estate the sum of £74,000 which was received by one of the defendants and used by her to buy a house. The evidence of the recipient filed in response to an application for summary judgment was at its best unclear and at its worst confusing as to where she thought the money had come from. However, there was no clear evidence that the money had come from the estate, and it was held it was not a suitable case for summary judgment. In *Bates v Microstar Ltd* (2000) LTL 4/7/2000 summary judgment had been granted based on a purported contract written on hotel notepaper. There were two other documents purporting to be the contract between the parties, and a number of the terms in the hotel notepaper document were arguably too vague. The judgment was set aside on appeal. In *Mehdi v Bates* (2001) LTL 3/12/2001 the contractual documentation was unclear on the issue of whether the contract had been entered into by the defendant personally or by the defendant's company. It was held that the judge had not been justified in entering summary judgment against the claimant on the basis that it was unlikely that businessmen would have entered into this contract personally.

Claims involving allegations of fraudulent or deceitful misconduct which are not admitted and which are not capable of being substantiated by inference from the documentary or written evidence are inappropriate for summary judgment (*Esprit Telecoms UK Ltd v Fashion Gossip Ltd* (2000) LTL 27/7/2000).

Cases involving disputes over whether employers are vicariously liable for the tortious acts of employees who might not be acting in the course of their employment are fact-sensitive and inappropriate for summary judgment (*Cercato-Gouveia v Kiprianou* [2001] EWCA Civ 1887, LTL 30/11/2001).

In a proprietary estoppel claim, where the context and meaning of the words used needs to be investigated, summary judgment is inappropriate (*Century (UK) Ltd SA v*

*Clibbery* [2003] EWCA Civ 1374, LTL 17/7/2003). Where there is no arguable evidence on an essential element of the claim (or defence), or where a claimant will be unable to establish any loss flowing from a breach not actionable per se, summary judgment should be entered (*Morshead Mansions Ltd v Langford* [2003] EWHC 2023 (QB), LTL 29/8/2003). In *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* [2003] EWHC 2118 (Comm), LTL 1/8/2003, a defence to a claim by the bank for repayment of moneys lent was that there was an oral agreement suspending payment until a further agreement had been reached. This was dismissed as fanciful, as it made no commercial sense for a bank to enter such an arrangement, because if the parties failed to reach a further agreement the defendants would be released from liability.

### **Negligence claims**

- 34.16** Although there is nothing in principle preventing a claimant from applying for summary judgment in claims seeking damages for negligence, such cases invariably involve disputed factual issues, so it is rare for a court to find there is no real defence once liability is denied. An exception was *Dummer v Brown* [1953] 1 QB 710, where summary judgment was given against the defendant, a coach driver, who had previously pleaded guilty of dangerous driving in respect of the accident giving rise to the claim. Even if there is a conviction, summary judgment may be refused if there are good reasons for believing the conviction was erroneous (*McCauley v Vine* [1999] 1 WLR 1977).

### **Evidence not yet investigated**

- 34.17** Summary judgment was regarded as inappropriate in *Derksen v Pillar* (2002) LTL 17/12/2002 because evidence was still being acquired or investigated and the claim raised complex issues. On the other hand, in *Mancini v Telecommunications UK Ltd* [2003] EWHC 211 (Ch), LTL 16/1/2003, the lack of evidence produced by the claimant resulted in the claim being struck out. It was reasonable to expect the claimant to have numerous documents, and to be able to produce witnesses, to explain what had happened in relation to the key issue. The court was not impressed by the explanation, first raised on appeal, that the documents had been destroyed in a flood, and there was no explanation for not adducing witness statements dealing with the facts.

### **Conduct**

- 34.18** In *Penningtons v Abedi* (1999) LTL 13/8/99 there had been ongoing litigation in which the defendant had advanced a series of defences which had each been shown to be false. An application was made for summary judgment, and it was held that the defendant's conduct of the litigation was such that there was no realistic prospect of her successfully defending the claim.

### **Contemporaneous documentation**

- 34.19** There are cases where the contemporaneous documentation shows that the respondent will never be able to establish its case at trial, and in those cases, such as *Collins v Union Bank of Switzerland* (2000) LTL 25/5/2000, summary judgment will be entered. In *Abelene Ltd v Cranbrook Finance Inc.* (2000) LTL 25/8/2000 it was held that although it was open to a court to accept documents produced at the last moment by a respondent to an application for summary judgment, if there was no explanation as to the circumstances in which the documents were executed or why they were not produced at the proper time, it would also be open to the court to be sufficiently suspicious of their genuineness to disregard them. Summary judgment was entered in *Musical Fidelity Ltd v Vickers* (2002) LTL 2/12/2002 where the contents of the defendant's website established a clear case of infringement of the claimant's trade mark. Likewise, in *National Westminster plc v Szirtes* (2003) LTL 27/6/2003, the cumulative effect of all the evidence, and in particular the correspondence between the parties, strained the

credibility of the defendants' evidence that they were unaware of the guarantees relied upon by the bank to such an extent that they had no real prospect of success. A slightly different formulation was applied in *Hussain v Cuddy Wood and Cochrane* (2000) LTL 17/11/2000, where it was said in a professional negligence claim against a barrister that, from a consideration of the voluminous documentation available, it was 'difficult to see how the claimant could establish' his claim, and summary judgment was entered in favour of the defendant.

### Amendment

There are many cases where the defective nature of one side's statement of case becomes clear at the hearing of an application for summary judgment. If the defect is one of how the case is put rather than of substance, the court has a wide power to allow an amendment to correct the problem, which can be exercised at the hearing (*Stewart v Engel* [2000] 1 WLR 2268). **34.20**

## ADMISSIONS

In *E.D. and F. Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, *The Times*, 18 April 2003, a defence which might have had a real prospect of success was destroyed by clear, written admissions made by the defendant. In *Equant SAS v Ives* [2002] EWHC 1992 (Ch), LTL 4/10/2002, the defendant was permitted to resile from an admission in the defence, and on the amended case there were disputes of fact which resulted in summary judgment being refused. **34.21**

Whether an apparent admission is binding on a party and such as to justify the entry of summary judgment is considered further at **34.22** to **34.26**.

### Whether the admission binds the other party

In the case of parties which are artificial bodies, such as registered companies, an issue arises as to whether the individual said to have made the admission was authorised in fact or in law to bind the party in question in this way. Much depends on the seniority of the individual within the body in question, and on the nature of the relationship between the individual and that body. So, a limited company's directors or solicitor would have authority to bind it when making an admission, whereas an ordinary employee would not in the absence of express authority from the directors. Questions of actual, apparent or ostensible and usual authority of agents may arise, for which see the general works on agency. **34.22**

Under the general law of evidence, binding admissions can sometimes be made by persons connected with a party. Typical examples are admissions made by partners (see the Partnership Act 1890, s. 15), predecessors in title and referees.

### Formal and informal admissions

Admissions may be formal or informal. As discussed in **chapters 17, 26** and **27**, the statements of case, and in particular the defence and any reply, may well contain admissions. These reduce the area of dispute, and can be very helpful in summary judgment applications. Admissions in statements of case are one example of formal admissions, which have the effect of establishing the facts admitted without the need to call evidence, and which can only be withdrawn with the permission of the court. Other examples of formal admissions are admissions made and recorded at a case management conference or pre-trial review, admissions made in reply to a notice to admit facts (see **47.8**) and admissions made by counsel at trial (for which see *Worldwide Corporation Ltd v Marconi Communications Ltd* (1999) *The Times*, 7 July 1999). **34.23**

Informal admissions, on the other hand, are merely items of evidence and may be disproved or explained away by other evidence at trial. Informal admissions may be oral statements made by a party or person connected to a party which are at least partially adverse to that party's case, or may be made in correspondence. Admissions made in statements of case in other proceedings, or by witnesses called by a party in other proceedings, are not binding as informal admissions in the present proceedings (*British Thomson-Houston Co. Ltd v British Insulated and Helsby Cables Ltd* [1924] 2 Ch 160). Rather inconsistently, it was held in the old case of *Brickell v Hulse* (1837) 7 Ad & El 454 that reliance on written evidence in earlier proceedings can amount to an informal admission of anything contained in that evidence. Possibly this can be explained on the basis that by relying on written evidence the party is to be taken as adopting it, whereas the details of oral testimony are uncertain until the evidence has been called, and that statements of case are delivered for the purposes of the present litigation only. Admissions made in answers to requests for further information in the present action are probably formal admissions because of the need to include a statement of truth.

#### Permission to withdraw admissions

- 34.24** Permission to withdraw a formal admission, such as an admission made in a statement of case, is considered applying the overriding objective. Permission may be granted when the admission was made by mistake (*Hamilton v Hertfordshire County Council* [2003] EWHC 3018 (QB), LTL 19/12/2003). Permission to amend so as to withdraw an admission may be refused where, for example, the circumstances in which the admission was made give rise to an estoppel (*H. Clark (Doncaster) Ltd v Wilkinson* [1965] Ch 694).

An important decision in this area is *Bird v Birds Eye Walls Ltd* (1987) *The Times*, 24 July 1987. The claimant was claiming damages for personal injuries. In its defence the defendant denied liability and disputed quantum. After preliminary investigation of the facts the defendant wrote to the claimant admitting liability. In such circumstances it is rare for the parties to worry about amending the defence or entering judgment for damages to be assessed, as doing so will simply waste costs. Eighteen months after making the admission the defendant purported to resile from it. It was held that the admission was equivalent to an admission on the statements of case and could be withdrawn only if the court granted permission. Permission to withdraw the admission would only be granted if it was just to allow the defendant to change the nature of its case in the manner desired having regard to the interests of both sides. On the facts there was some risk of prejudice to the claimant's investigations on liability given the lapse of time and there was no satisfactory explanation for the defendant's decision to withdraw its admission. Permission was refused.

The opposite set of facts occurred in *Gale v Superdrug Stores plc* [1996] 1 WLR 1089. Before proceedings were issued, the defendant made an admission of liability and made voluntary interim payments on account of damages. Just before the limitation period expired proceedings were issued. The defence denied liability. The claimant applied to strike out the defence as an abuse of process. It was held that in determining the application the court would consider the defendant's explanation for its change in stance, and, most importantly, whether the party resisting the retraction could adduce clear and cogent evidence of prejudice in prosecuting the claim on liability. The latter requirement was based on *Hornagold v Fairclough Building Ltd* [1993] PIQR P400, a case on dismissal for want of prosecution which was subsequently explained by *Shtun v Zalejska* [1996] 1 WLR 1270 and almost certainly imposes too high a standard of proof on the party resisting the retraction. In cases where the parties have followed the **Pre-action Protocol for Personal Injury Claims**, there is a presumption that the defendant will be bound by an admission if the value of the claim does not exceed £15,000 (Protocol, **para. 3.9**).

**Admissions made without knowledge and as to law**

An 'admission' made without knowledge of the facts said to have been admitted has little if any evidential value (see *Comptroller of Customs v Western Electric Co. Ltd* [1966] AC 367). Also, the 'admission' must be one of fact, not law. In *Ashmore v Corporation of Lloyd's* [1992] 1 WLR 446 the House of Lords held that statements made by members of the Committee of Lloyd's said to be admissions that the defendants owed a duty of care to 'names' (members of underwriting syndicates) concerned a question of law and so the statements were neither relevant nor admissible. **34.25**

**Obtaining judgment on admissions**

There is rarely any doubt about formal admissions, although occasionally points of construction are taken in respect of admissions said to have been made in statements of case. Informal admissions, on the other hand, need to be proved. In *Re Beeny* [1894] 1 Ch 499 judgment was entered on the basis of informal oral admissions made by the defendant to the claimant's solicitor. The admissions were proved by an affidavit sworn by the solicitor, the court having to decide whether the admissions were sufficiently proved and sufficiently clear. As North J said in this case: **34.26**

No doubt, if the alleged admission is only verbal, there is more difficulty in treating it as sufficient, if there be any dispute as to the fact of its having been made.

**CONDITIONAL ORDERS**

**PD 24, para. 4**, provides that where it appears to the court possible that a claim or defence may succeed but improbable that it will do so, the court may make a conditional order. **Paragraph 5.2** provides that a conditional order is an order which requires a party: **34.27**

- (a) to pay a sum of money into court, or
  - (b) to take a specified step in relation to his claim or defence, as the case may be,
- and which provides that that party's claim will be dismissed or his statement of case will be struck out if he does not comply.

Conditional orders are appropriate for cases in the grey area between granting judgment and dismissing the application.

**Amount to be paid in**

If the court decides to make the respondent to the application pay money into court under a conditional order, it must decide how much should be paid in. The starting point has traditionally been the full amount of the claim. However, the court has a discretion, which it will exercise in accordance with the overriding objective. Obviously, the more uncertain the defence, the more likely it is that the court will order the full amount to be paid in. Another factor is the defendant's ability to pay. Under the old rules (and similar principles are applied under the CPR, see *Sweetman v Shepherd* (2000) *The Times*, 29 March 2000), Lord Diplock in *M.V. Yorke Motors v Edwards* [1982] 1 WLR 444 endorsed the following principles: **34.28**

- (a) Defendants seeking to limit a financial condition must make full and frank disclosure of their finances. This is done on affidavit or witness statement. It is common for defendants who realise that a conditional order may be made to produce such written evidence in advance of the summary judgment hearing, and to disclose it to the claimant on the claimant undertaking not to refer to it unless a conditional order is made.
- (b) Reliance on a legal aid certificate as evidence of impecuniosity is not enough.

- (c) The test is whether it will be impossible for the defendant to comply with the financial condition, as opposed to merely finding it difficult. An impossible condition is tantamount to entering judgment.

M.V. Yorke Motors were suing Mr Edwards for breach of warranty of title in relation to a contract for the sale of a car for £23,520. Conditional leave to defend was given, because the court was sceptical about his defence that he was only acting as the agent for a foreign buyer. By the time of the hearing Mr Edwards was unemployed, living with his father, and in receipt of legal aid with a nil contribution. The House of Lords substituted a condition of bringing £3,000 into court.

A claimant who intends to invite the court to make a conditional order if summary judgment is not granted should give the defendant notice of that intention in advance of the hearing. If this is not done, the judge should not make such an order without giving the defendant an opportunity to be heard (and adduce evidence) on questions such as whether the defendant has the means to pay the amount contemplated (*Anglo-Eastern Trust Ltd v Kermanshahchi* [2002] EWCA Civ 198, LTL 22/2/2002).

Where money is paid into court in compliance with a conditional order, the claimant is a secured creditor for that amount in the event of the defendant's bankruptcy (*Re Ford* [1900] 2 QB 211).

## CROSS-CLAIMS

**34.29** Cross-claims fall into three categories. Where the only answer to the claim is a cross-claim, the nature and effect of the three types are as follows:

- (a) Cross-claims unconnected with the claim. Here, summary judgment should be entered. An example is *Rotheram v Priest* (1879) 41 LT 558, where the claimant claimed arrears of rent, and the defendant counterclaimed in libel. It was held that the counterclaim was totally foreign to the claim, so summary judgment was given to the claimant. The result would be the same under the CPR.
- (b) Counterclaims linked to the claim. The appropriate order used to be for judgment subject to a stay of execution pending trial of the counterclaim. In *Drake and Fletcher Ltd v Batchelor* (1986) 130 SJ 285 Sir Neil Lawson said that in considering whether to grant a stay of execution, 'The question is whether the two contracts are so closely linked that it would be fair and equitable to deprive the [claimant] of the fruits of its judgment until resolution of the counterclaim'. The judge said there were three matters which needed to be considered:
- (i) The degree of connection between the claim and the counterclaim.
  - (ii) The strength of the counterclaim. The weaker it was, the weaker the case for granting a stay.
  - (iii) The claimant's ability to satisfy any judgment on the counterclaim. Any doubt on this matter strengthened the case for granting a stay.

There is some doubt about how cases where the only matter raised by the defendant is a connected counterclaim should be dealt with under the CPR. There is no longer any equivalent to the former RSC, ord. 14, r. 3(2), which provided for a stay of execution in summary judgment applications where there was a connected counterclaim. Early drafts of the CPR had a directly equivalent provision, and the probable consequence of removing it from the final version of the rules is that the court should simply enter judgment for the claimant. If this is correct, there is no longer any practical difference between this type of counterclaim and totally unconnected cross-claims.

- (c) Set-offs. Where a counterclaim amounts to a set-off it is a defence to the claim and any summary judgment application should be dismissed, provided the value of

the set-off is at least equal to the value of the claim. Where a set-off is not worth as much as the claim, the appropriate order is for summary judgment for the undisputed balance. The nature of set-offs is considered in [34.30](#).

### Set-offs

The following are established set-off situations:

34.30

- (a) Mutual debts. By virtue of the 18th-century Statutes of Set-off, mutual debts owed between the claimant and the defendant can be set off against each other. There is no need for the transactions giving rise to the debts to be connected other than through the parties. They need not be debts, strictly so-called, but may sound in damages provided they are capable of being ascertained with precision at the time of the application (*Morley v Inglis* (1837) 4 Bing NC 58, applied in *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 WLR 270). A former partner was held in *Hurst v Bennett* [2001] 2 BCLC 290 to be unable to set off claims for money allegedly owed to him on the taking of partnership accounts against the claim of certain of the former partners to be indemnified against expenses they had incurred on the ground of lack of mutuality.
- (b) Sale of goods. By virtue of the **Sale of Goods Act 1979, s. 53(1)**, a buyer may set off counterclaims for breach of the statutory implied conditions about satisfactory quality, fitness for purpose and correspondence to description against a claim by the seller for the price.
- (c) On a claim for the price of services, for example, where a builder is suing for the price of building work done, the defendant can set off a counterclaim for damages for poor workmanship in respect of the contract the claimant is suing on (*Basten v Butler* (1806) 7 East 479).
- (d) Arrears of rent. Where a landlord brings a claim for arrears of rent, the tenant is allowed to set off a counterclaim for damages against the landlord for breach of a covenant in the lease in respect of which the landlord is claiming (*British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137, not following *Hart v Rogers* [1916] 1 KB 646, confirmed by *Agyeman v Boadi* (1996) 28 HLR 558). A tenant does not have a similar right of set-off in respect of a counterclaim for breach of repairing obligations against a claim for service charges as against a manager appointed by the court under the Landlord and Tenant Act 1987, s. 24(1) (*Taylor v Blaquiére* [2002] EWCA Civ 1633, *The Times*, 21 November 2002).
- (e) Equitable set-off. Although it is clear that an equitable set-off is a defence, and hence is a defence to a claim, it is difficult to be precise about the ambit of the doctrine. Nevertheless, 'One thing is clear — there must be some equity, some ground for equitable intervention, beyond the mere existence of a cross-claim' (per Lord Wilberforce in *Aries Tanker Corporation v Total Transport Ltd* [1977] 1 WLR 185). Perhaps the leading case is *Hanak v Green* [1958] 2 QB 9, where the claimant sued her builder for breach of contract for failing to complete certain building works at her home. The defendant sought to set off counterclaims for a *quantum meruit* for extra work done outside the original contract, for damages for loss sustained through the claimant's refusal to admit his workmen, and for damages for trespass to his tools. It was held that all three cross-claims were equitable set-offs, because the courts of equity before the Judicature Acts would have required the claimant to take the cross-claims into account before insisting on her own claim. Broadly, what is required is a sufficient degree of connection between the two transactions such that the one should not be enforced without taking the other into account (*Dole Dried Fruit and Nut Co. v Trustin Kerwood Ltd* [1990] 2 Lloyd's Rep 309). It does not matter whether or not either or both claims are unliquidated (*Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 WLR 270). Overpayments

of rent can be set off against claims for rent as an equitable set-off (*Fuller v Happy Shopper Markets Ltd* [2001] 1 WLR 1681).

Mutual debts amount to set-offs whether or not the relevant transactions are connected, but they must be liquidated. Set-offs in categories (b) to (d) above involve liquidated claims and unliquidated cross-claims arising from the same transaction. Equitable set-offs can arise where both the claim and the cross-claim are unliquidated, but there must be a sufficient connection between the two.

- 34.31 Parties to set-off** Although set-offs usually arise between the immediate parties to a transaction, this is not always the case. A defendant who has guaranteed payment of a debt owed to the claimant by a principal debtor can rely on set-offs and cross-claims available to the debtor. This principle extends to certain types of bonds entered into in building contracts (whereby the party giving the bond promises to pay a specified sum to the claimant if one of the contractors fails to perform) provided the bond is construed as a guarantee, see *Trafalgar House Construction (Regions) Ltd v General Surety and Guarantee Co. Ltd* [1996] AC 199.

Unliquidated damages claims which can be set off as between the original parties can also be set off against an assignee (*Hanak v Green* [1958] 2 QB 9), because an assignee of a chose in action takes subject to all rights of set-off available against the assignor (*Roxburghe v Cox* (1881) 17 ChD 520). A tenant is therefore entitled to set off any damages for disrepair due from the original landlord against a claim for arrears of rent brought by the landlord's assignee (*Smith v Muscat* [2003] EWCA Civ 962, *The Times*, 12 August 2003).

- 34.32 Excluding rights of set-off** It is open to the parties to a contract to exclude any right to set-off by an express term to that effect (*Hong Kong and Shanghai Banking Corporation v Kloeckner & Co. AG* [1990] 2 QB 514), but it is possible that such a term may be unreasonable and rendered ineffective by virtue of the **Unfair Contract Terms Act 1977**, as happened in *Stewart Gill Ltd v Horatio Myer and Co. Ltd* [1992] QB 600.

#### The cheque rule

- 34.33** Cheques are one form of bill of exchange. Where goods or services are paid for by cheque, two contracts are entered into by the parties. The first contract is the underlying contract for the sale of goods or for the provision of services. The second contract is contained in the cheque, whereby the drawer of the cheque undertakes to pay the payee the sum stated. If a cheque is dishonoured, the seller has the option of suing on the underlying contract or on the cheque. If the seller sues on the underlying contract, the buyer is entitled to rely on any set-off that may be available in respect of that contract by way of defence to an application for summary judgment. However, if the seller sues on the cheque, the buyer is only permitted to raise defences relating to the cheque itself. The reason probably stems from the unconditional nature of a bill of exchange, as provided by the Bills of Exchange Act 1882, s. 3(1). As Lord Wilberforce said in *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 WLR 713, bills of exchange 'are taken as equivalent to deferred instalments of cash. Therefore English law does not allow cross-claims or defences to be made.' The rule is regarded as being of considerable importance to the business community, and the courts will not 'whittle away [the] rule of practice by introducing unnecessary exceptions to it under influence of sympathy-evoking stories' (per Sachs LJ in *Cebora SNC v SIP (Industrial Products) Ltd* [1976] 1 Lloyd's Rep 271). It is only in exceptional circumstances that the court will allow a stay of execution when entering summary judgment for non-payment of a cheque. The fact the claimant is a company in administration is not an exceptional circumstance (*Isovel Contracts Ltd v ABB Building Technologies Ltd* [2002] 1 BCLC 390).

The cheque rule applies to:

- (a) cheques and bills of exchange;
- (b) direct debits (*Esso Petroleum Co. Ltd v Milton* [1997] 1 WLR 938);
- (c) letters of credit (*SAFA Ltd v Banque du Caire* [2000] 2 All ER (Comm) 567); and
- (d) performance bonds (*Solo Industries UK Ltd v Canara Bank* [2001] 1 WLR 1800).

The cheque rule does not apply in the context of statutory demands (*Hofer v Strawson* [1999] 2 BCLC 336, a case which turns on the wording of the Insolvency Rules 1986 (SI 1986/1925), r. 6.5(4)).

There are some exceptional cases where summary judgment will not be given in a claim on a bill of exchange (see 34.35 to 34.37). Before looking at these it is necessary to consider the nature of the claimant's title to the bill of exchange.

**Types of holder of a bill of exchange** Under the Bills of Exchange Act 1882 there are four types of holder of a bill of exchange. A mere holder is a person in possession of the bill. Although a mere holder can sue on the bill and give a valid discharge (s. 38), any claim is prone to be defeated for want of consideration. A holder for value is a person in possession of a bill who has given consideration sufficient to support a simple contract, or who derives title directly or indirectly from a previous holder who gave value for the bill (s. 27). A holder for value cannot be defeated on the ground of want of consideration. A holder in due course is broadly a holder of a complete and regular bill who gave value for it in good faith without notice of any defect in the title of the person who negotiated it (s. 29). A holder in due course obtains title to the bill free from equities and defects in the title of the transferor. The fourth type of holder is one who derives title through a holder in due course, and who broadly has all the rights of a holder in due course (s. 29(3)). **34.34**

An application for summary judgment by a mere holder will always be defeated by a plea of want of consideration, whereas an application by a holder in due course should always succeed as such a holder takes free of equities. If the claimant's title as a holder in due course is challenged by the defendant, judgment will only be given for the claimant if the claim to be a bona fide holder for value is supported by unchallenged or unchallengeable contemporary documents (*Bank für Gemeinwirtschaft AG v City of London Garages Ltd* [1971] 1 WLR 149). Holders for value are the most problematic category. They are also the most numerous, given that an immediate party to a bill cannot be a holder in due course (*R.E. Jones Ltd v Waring and Gillow Ltd* [1926] AC 670).

**Fraud, duress and illegality** To amount to a defence against a holder for value, an allegation of fraud, duress or illegality must be supported by evidence. A mere allegation in the defendant's written evidence is insufficient (*Bank für Gemeinwirtschaft AG v City of London Garages Ltd* [1971] 1 WLR 149). Such a defence will not, however, avail against a holder in due course (see the Bills of Exchange Act 1882, s. 30(2)). **34.35**

**No consideration** As explained in 34.34, there will be a defence where the claimant is a mere holder who has given no consideration for the bill sued on. A total failure of consideration arises where a buyer lawfully rejects goods sold, the buyer being entitled to recover the price from the seller. Again summary judgment should be refused. Likewise, a liquidated partial failure of consideration is a defence *pro tanto* (*Thoni GmbH & Co. KG v RTP Equipment Ltd* [1979] 2 Lloyd's Rep 282). In *Isovel Contracts Ltd v ABB Building Technologies Ltd* [2002] 1 BCLC 390 the defendant countermanded a cheque given to a subcontractor in payment of the sum due under an interim certificate in a building project. The certificate had been issued by the main contractor, and, before payment of the cheque, had been shown to be wrong, because later certificates showed no money at all was due at the time the cheque was given. The subcontract provided that in this event any overpayment would be deducted from the amounts payable under subsequent interim certificates. It was held that in these circumstances the defendant **34.36**

could not rely on failure of consideration as a defence to an application for summary judgment.

**34.37 Misrepresentation** In *Clovertogs Ltd v Jean Scenes Ltd* [1982] Com LR 88 the Court of Appeal held that an allegation that the claimant had procured two cheques by misrepresentation amounted to a defence in an application for summary judgment. This decision was described as surprising in *Famous Ltd v Ge Im Ex Italia SRL* (1987) *The Times*, 3 August 1987, and should be regarded as wrongly decided as it is inconsistent with other cases on bills of exchange. Following *SAFA Ltd v Banque du Caire* [2000] 2 All ER (Comm) 567 and *Solo Industries UK Ltd v Canara Bank* [2001] 1 WLR 1800, a distinction needs to be drawn between:

- (a) Cases where there is a misrepresentation by a beneficiary which was made directly to induce the execution of the bill of exchange (or other payment obligation covered by the cheque rule). In such cases, provided there is a real prospect of establishing the misrepresentation, summary judgment on the cheque (or other payment obligation) should be refused.
- (b) Cases where an allegation of misrepresentation is in reality an allegation relating to the underlying contract of services or sale on which the payment obligation is based. In these cases summary judgment should be entered on the cheque (or other payment obligation), with no stay of execution. The courts need to be particularly astute in ensuring the cheque rule is not diluted by treating cases in this category as ones affecting the cheque or other payment obligation.

#### **International trade**

**34.38** Irrevocable letters of credit are treated as cash and must be honoured. If the bank refuses to honour such a transaction, the court will grant summary judgment to the claimant (*Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233). Summary judgment will also be given on a claim for freight even if there is a cross-claim relating to the cargo (*Aries Tanker Corporation v Total Transport Ltd* [1977] 1 WLR 185).

### **SOME OTHER REASON FOR A TRIAL**

**34.39** Summary judgment will be refused if there is some other compelling reason why the case should be disposed of at a trial (**CPR, r. 24.2(b)**). An assertion that pleading a defence would infringe the defendant's privilege against self-incrimination does not amount to a compelling reason for a trial, nor for staying or adjourning a summary judgment application (*Versailles Trade Finance Ltd v Clough* [2001] *The Times*, 1 November 2001). The privilege does not amount to a defence in civil proceedings, nor does it provide a right not to plead a defence. It does not, therefore, provide any basis for resisting an application for summary judgment (although the defendant in *Versailles Trade Finance Ltd v Clough* was allowed 14 days to file a full defence). Reasons for going to trial include:

- (a) The respondent is unable to contact a material witness who may provide material for a defence.
- (b) The case is highly complicated such that judgment should only be given after mature consideration at trial.
- (c) The facts are wholly within the applicant's hands. In such a case it may be unjust to enter judgment without giving the respondent an opportunity of establishing a defence in the light of disclosure or after serving a request for further information (*Harrison v Bottenheim* (1878) 26 WR 362). However, summary judgment will not necessarily be refused in cases where the evidence for any possible defence could only lie with the applicant if there is nothing devious or artificial in the claim (*State Trading Corporation of India v Doyle Carriers Inc.* [1991] 2 Lloyd's Rep 55).

- (d) The applicant has acted harshly or unconscionably, or the facts disclose a suspicion of dishonesty or deviousness on the part of the applicant such that judgment should only be obtained in the light of publicity at trial. An example is *Miles v Bull* [1969] 1 QB 258, where possession proceedings had the appearance of a device to evict the defendant.

### DIRECTIONS ON SUMMARY JUDGMENT HEARING

If a summary judgment application is dismissed or otherwise fails finally to dispose of the claim, the court will give case management directions for the future conduct of the case (**PD 24, para. 10**), which may include directions for filing and service of a defence (**CPR, r. 24.6**), and may dispense with allocation questionnaires and allocate the case to a case management track. **34.40**

### SPECIFIC PERFORMANCE, RESCISSION AND FORFEITURE IN PROPERTY CASES

An even speedier process for obtaining summary judgment is available by virtue of **PD 24, para. 7**, in claims for specific performance and similar claims arising out of the sale, purchase, exchange, mortgage or charge of any property, or for the grant or assignment of a lease or tenancy of any property. Specific performance as a remedy requires an exceptional case (*Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1), and the same applies on an application for summary judgment. The judge is not entitled to enter into a mini-trial on an application for summary judgment, and it is wrong to attempt to resolve disputes of fact on such an application on the balance of probabilities (*North East Lincolnshire Borough Council v Millenium Park (Grimsby) Ltd* [2002] EWCA Civ 1719, *The Times*, 31 October 2002). Summary judgment was not appropriate in *Greenacre Properties Ltd v Tower Hamlets London Borough Council* (2002) LTL 24/7/2002 where it was arguable that the sale of land was beyond the council's power as it had not obtained ministerial consent. **34.41**

Where there is no defence, summary judgment can be sought at any time after the claim is served, rather than having to wait until after acknowledgment or defence, and the application can be made even in the absence of particulars of claim. The application notice, evidence in support and a draft order must be served no less than four clear days before the hearing.

### SUMMARY ORDERS FOR ACCOUNTS AND INQUIRIES

By **CPR, r. 25.1(1)(o)**, the court may make an interim order directing accounts to be taken or inquiries to be made. The application notice seeking such an order should ask: **34.42**

- (a) for specified accounts to be taken or specified inquiries to be made;
- (b) for directions for the taking of the account or for making the inquiries; and
- (c) for payment of the amount found to be due on taking the accounts.

Written evidence is not always required in support, but if the matter is at all contentious such evidence should be filed and served with the application. The court may refuse to make the order if there is a preliminary question that ought to be tried, such as whether the defendant is under a duty to account.

The practice on taking accounts and conducting inquiries is dealt with by **PD 40**. When making an order for accounts and inquiries the court may also at the same time or later give directions as to how the account is to be taken or the inquiry conducted (**PD 40, para. 1.1**). Among the directions that may be made are the following:

- (a) that the relevant books of account shall be evidence of their contents, subject to the parties having the right to make objections (**para. 1.2**);
- (b) that an accounting party must make out his account and verify it by exhibiting it to an affidavit or witness statement (**para. 2(1)**); and
- (c) that, if appropriate, and at any stage in the proceedings, the parties must serve points of claim and points of defence (**para. 5**).

A party alleging that an account drawn by an accounting party is inaccurate (or making similar allegations) must give written notice of the objections to the accounting party (**para. 3.1**). These objections must give full particulars, specify the grounds on which it is alleged the account is inaccurate, and be verified by a statement of truth (or exhibited to an affidavit or witness statement).

Unless the court orders otherwise, accounts and inquiries are conducted by a master or district judge (para. 9). Detailed provisions dealing with inquiries into estates, trusts and for beneficiaries and next of kin can be found in paras 10 to 15.

### **SUMMARY DETERMINATION OF CONSTRUCTION OF WILLS**

- 34.43** The High Court may make an order authorising trustees or personal representatives to act in reliance on an opinion of counsel of 10 years' call on the construction of a will or trust (Administration of Justice Act 1985, s. 48). Applications under s. 48 are made in the Chancery Division without notice supported by written evidence stating the names of all persons who may be affected by the order sought; all admissible surrounding circumstances; counsel's call and experience; the value of the fund; and details of any known dispute. Instructions to counsel, counsel's opinion, and draft minutes of the order sought must be exhibited to the evidence in support. The papers are considered by a judge without hearing argument, who will make the order sought if that order is appropriate and if there appears to be no tenable argument contrary to counsel's opinion.