Restricting evidence & cross-examination

Daniel Lightman QC & Stephanie Thompson put the case for a robust approach to costly side issues

IN BRIEF

- The costs of determining side issues raised in statements of case and evidence can often be disproportionate to their assistance in deciding a claim.
- Where one party raises potentially costly side issues, the other party should consider invoking the court's case management powers: (i) to strike out the relevant passages from a statement of case; (ii) to exclude those issues from consideration; (iii) to prevent evidence on these issues being included in witness statements; and/or (iv) to prevent cross-examination on these issues at trial.

While the law reports are replete with examples of statements of case being struck out for failing to disclose reasonable grounds for bringing or defending a claim—or for abusing the court's process, failing to comply with the CPR or inadequate particularisation—there are far fewer cases of parts of a pleading being struck out on the basis that their contents are 'likely to obstruct the just disposal of the proceedings' (CPR 3.4(2)(b)). Even rarer are instances of courts exercising their powers under CPR 3.1(2)(k) to 'exclude an issue from consideration' or under CPR 32.1 to 'control the evidence by giving directions as to… the issues on which it requires evidence', 'to exclude evidence that would otherwise be admissible' or to limit the cross-examination which may be conducted at trial.

So it is noteworthy that within a fortnight two High Court judgments were recently handed down in which pre-trial orders of this nature were made: *HRH The Duchess of Sussex v Associated Newspapers Limited* [2020] EWHC 1058 (Ch), [2020] All ER (D) 09 (May), a decision of Warby J, and *Christoforou v Christoforou* [2020] EWHC 1196 (Ch), a decision of HH Judge Eyre QC (sitting as a High Court Judge).

The Duchess of Sussex

This case needs no introduction: the Duchess of Sussex (pictured) sued the publisher of the *Mail on Sunday* for misuse of private information, copyright infringement and breach of data protection rights in relation to the publication of a letter she had written to her father. Her Particulars of Claim included allegations that the defendant had chosen deliberately to omit parts of the letter 'in a highly misleading and dishonest manner', that it had been deliberately seeking to stir up issues between the Duchess and her father, and that a series of other articles (not the subject of the claim) betrayed its 'obvious agenda' of publishing offensive stories intended to portray the Duchess 'in a false and damaging light'.

The publisher successfully applied to strike out those allegations from the Particulars of Claim and a Response to a Request for Information, principally on the basis that they were irrelevant to the Duchess's case: as a matter of law, dishonesty, malice and bad faith are not ingredients of liability for misuse of private information.

Warby J concluded that were the allegations to remain, they would be likely to obstruct the just disposal of the proceedings by 'calling for an investigation which can have no bearing on the decision as to liability'. He pointed out that Order 18, Rule 19(1)(b) of the old Rules of the Supreme Court, the predecessor to CPR 3.4(2)(b), allowed the court to strike out 'anything in any pleading' that was 'scandalous', 'a term which covered allegations of dishonesty or other wrongdoing that were irrelevant to the claim', and that while that language was 'outmoded', nonetheless 'the power to exclude that material remains'. The overriding objective, as Warby J pointed out, requires the court to decide which issues need full investigation—and to ensure that peripheral issues do not assume excessive importance.

While the striking out of wholly irrelevant matters is unsurprising, more interesting was that Warby J went on to observe that he would also have been minded to strike out the 'stirring up' allegation on the ground that even if relevant it called for enquiries which would be disproportionate to their value in supporting the claimant's case for misuse. The same analysis applied to the Duchess's reference to other newspaper articles in support of her contention that the defendant had an agenda: 'The costs and time that would be required to investigate and resolve the factual issues raised by the case as currently pleaded bear no reasonable relationship of proportionality with the legitimate aim of recovering some additional compensation for emotional harm.'

Christoforou

Christoforou is an even more striking example of the court adopting an interventionist approach. HHJ Eyre QC struck out from a defence, purely on case management grounds, allegations which were found to be of at least some relevance to the parties' cases. Unlike Warby J, who also relied on inadequate particularisation, HHJ Eyre QC expressly found that the contention that the allegations amounted to unparticularised allegations of fraud did not justify a strike-out.

In the proceedings, the claimant sought a declaration that he was the beneficial owner of a London property held by a company of which his father was the sole shareholder. The defendants (being the father and the company) had consented to the claimant's amendments to his Particulars of Claim on the proviso that they would have permission to file an Amended Defence. Paragraph 9 of that Amended Defence alleged that the claimant's litigation was 'yet another episode in a series of attempts by the Claimant… to harass [the father] and deprive him of his assets' and went on to list 14 alleged examples of such attempts.

The claimant applied for orders striking out these 14 allegations from the

Amended Defence, excluding them from consideration at trial, and preventing the calling of evidence or cross-examination in relation to them. His application was successful, save for a carve-out for three allegations in respect of which cross-examination in relation to credit only would be permitted to the extent allowed by the trial judge.

HHJ Eyre QC agreed that the new allegations ought to be treated as 'similar fact evidence', so that the two-stage test set out in *O'Brien v Chief Constable of South Wales Police* [2005] 2 WLR 1038, [2005] 2 All ER 931, as applied in *JP Morgan Chase v Springwell Navigation* [2005] EWCA Civ 1602, [2005] All ER (D) 293 (Dec), governed (although he considered that test applied more generally to questions of exclusion of evidence). The allegations readily passed stage 1 of the test: they were potentially probative of one or more issues in the case —if there were previous examples of the claimant attempting to misappropriate his father's property, then that would tend to show he might be doing the same in the instant claim.

Stage 2 involved a balancing exercise: was the potential probative value of the evidence worth the burden in time and costs it would impose on the claimant and the risk it entailed of distracting the attention of the trial judge and distorting the trial?

HHJ Eyre QC decided that it was not. Weighing heavily in his decision was the fact that the allegations had been pleaded by way of amendment rather than in the original Defence; their complexity; and the fact that they were likely to cause the loss of the trial date, because of both an increase in the trial estimate and the need to afford the claimant sufficient time to respond to the allegations. He cited *Springwell* for the proposition that the defendants could not try to minimise the disruption to the trial by limiting the manner in which the claimant responded to the new allegations.

Particularly noteworthy were the judge's comments on cross-examination. The defendants' counsel had submitted that the application was 'unprecedented in English civil litigation' in seeking to restrict the scope of cross-examination. HHJ Eyre QC disagreed. He observed that cases which emphasised the forensic value of cross-examination 'did not establish that a party should be allowed to ask in cross-examination questions about any topic which he or she wishes. The true position is the reverse of that and the court has power to limit cross-examination to those topics which are properly in issue between the parties'.

A tool for litigators

In suitable cases, parties should be alive to the utility of making applications of the sort successfully made in these two recent cases. Prospective applications, should, however, bear the following in mind to maximise their chances of success:

1) Do not delay. If there are matters pleaded which you wish to exclude from consideration at trial, make a strike-out application now—do not wait until after disclosure/exchange of witness statements, by which time it could be said that you have had an opportunity to address the allegations and that much of the costs caused by them has already been incurred. As Green J stated in *MacLennan v Morgan Sindall (Infrastructure) Plc* [2014] 1 WLR 2462, [2013] All ER (D) 154 (Dec), at [11]–[12]: 'A court which seeks to regulate the nature and extent of witness evidence will generally wish to do so at an early stage, before the preparation of the witness statements themselves and before costs are incurred needlessly.'
2) Be as detailed as you can in estimating the cost of the additional evidence, disclosure and trial days that will be needed if the contested allegations remain in the statement of case and fall to be determined at trial—but do not over-egg it. And how does the additional cost compare to the value of the claim?
3) If the new allegations have been made by way of amendment, can you properly contend that and explain why permitting the allegations to remain will (as opposed to may) cause an adjournment of the trial date? If so, that will be more persuasive.
4) Focus on why the contested allegations are unnecessary for the determination of the claim: is the claim a commonplace one, rather than an unusual one or one involving allegations of a gravity which need to be clearly proved? In *O'Brien,* because the claimants faced the uphill battle of proving that a police officer had framed them, the court was more sympathetic to admitting similar fact evidence. Is there substantial other evidence on which the opposing party can rely, or would your application, if successful, remove their main line of defence?

In an age in which more documentary records are available to litigating parties than ever before and the costs of litigation are spiralling, parties are often tempted to expand the scope of the proceedings to encompass side issues in the hope that success on those side issues will bolster the claim or defence. Side issues are frequently pleaded for fear that failing to do so will prevent a party from calling evidence or cross-examining on them. That fear is usually well-founded: in *Christoforou*, HHJ Eyre QC held that cross-examination on the matters pleaded in the amendments would not have been open to the defendants on their original pleading. A similar approach was taken in *BGC Brokers LP v Tradition (UK) Ltd* [2019] EWHC 3588 (QB), where Eady J held that had the claimant wished to rely on the defendant's behaviour during earlier events similar to the one that was the subject of the claim, the claimant would have needed to plead it.

If such an expansionist approach is taken in statements of case and evidence, the *Christoforou* and *Duchess of Sussex* cases suggest that the parties on the receiving end need not resign themselves to the cost and delay associated with such an approach: the court's powers to exclude issues from consideration and limit evidence and cross-examination can have real teeth. An interventionist approach is consistent with the court's obligations to allot cases only 'an appropriate share of the court's resources, while taking into account the need to allow resources to other cases', and to further the overriding objective by 'deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others' (CPR 1.1 and 1.4).

Such an interventionist approach would accord with what, in a recent talk to the Chancery Bar Association via Zoom, Sir Geoffrey Vos QC, the Chancellor of the High Court, described as 'the new normal in the Business and Property Courts post Covid-19'. While he stated that he was sure that live hearings and live discourse between the Bar and Bench will survive, what he thought would be 'less justifiable in the modern world is the lengthy trial, with lawyers allowed to ask questions in cross-examination that can go on seemingly forever, so long as they have given a reliable estimate in advance'. He went on stress the importance of 'more hands-on judicial case management' and of courts analysing the issues in every case at the earliest possible stage and devising the most cost-effective and efficient way of resolving each of those issues. **NLJ**

Daniel Lightman QC and **Stephanie Thompson**, both of Serle Court Chambers, represented the claimant in *Christoforou* (*www.serlecourt.co.uk*; *dlightman@serlecourt.co.uk* and *sthompson@serlecourt.co.uk*).