

CIVIL PROCEDURE: PART 24 – HOW REAL IS A REAL PROSPECT OF SUCCESS?

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“I . . . propose that the test for summary judgment should be easier for applicants to satisfy than the current test . . . the new test will in fact give effect to the corpus of judicial decisions on the current practice.”¹

INTRODUCTION

AFTER TWO DETAILED REPORTS on the civil justice system in England and Wales, the shape of civil litigation changed fundamentally from 26 April 1999. In this article the writer considers the emerging practice in relation to a single “Part” of the Civil Procedure Rules 1998 (“the CPR”): Part 24 governing the grant of summary judgment.² Further discussion of the apparent differences between the old and new procedure appears below under the heading “The Rule” but in summary they include: the probable shifting of the burden of proof (previously the largest share of the burden was on the defendant as respondent to the application); the opening up of the procedure to defendants for use against claimants (previously “plaintiffs”); the imposition of new criteria on which the application will be granted (a “real prospect” of success in the claim or the defence³); and inclusion of a proviso, of perhaps uncertain scope, to the effect that summary judgment can be avoided if there is some “other reason why the case or issue should be disposed of at a trial”.⁴

The writer began this article with a simple aim in mind: to review the cases on Part 24 that had arisen over the first six months since the implementation of the CPR. A subsidiary aim was to try to achieve a position from which it would be possible to satisfy the natural desire of students for a degree of certainty in relation to the substantive criteria governing the outcome of an application: in short to determine the “X” and “Y” values in the following equations:

X% = the chances of success necessary to avoid summary judgment (“a real prospect of succeeding/successfully defending”⁵)

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¹ Lord Woolf, M.R., Access to Justice, Interim Report, Chapter 6 para 21. There is, of course, an inherent contradiction in the statement: if the new rule is only to consolidate the existing common law, there should be no change in the circumstances when judgment is obtainable, at least on an application by the claimant. Since it was not previously possible for a defendant to obtain summary judgment at all (except in relation to his or her counterclaim), it goes without saying that the new rules will make judgment for defendants easier to obtain.

² Properly now called “summary disposal” as a result of the provision for defendants to use the procedure against claimants. However, the familiar terminology persists and the expression “summary judgment” is used in this article to cover both claimant and defendant applications.

³ CPR r. 24.2(a).

⁴ CPR r. 24.2(b).

⁵ My colleague Maureen Maksymiw points out that there is a third relevant percentage: the level at which a case, aside from being vulnerable to summary judgment, could be struck out under CPR r. 3.4(2)(a).

Y% = the chances of success which will avoid summary judgment but result in a conditional order.

Whilst reviewing the case law (such as it is) it became apparent that there are other questions to which the practitioner even more than the student would like to know the answer. These questions concern the allocation of the burden of proof and the nature of the grounds which must be shown in order to rely upon the proviso.

The Burden Of Proof Questions

This involves consideration of the relevance and effect, during the first four and a half months of the CPR regime, of paragraphs 4.1 and 4.2 of the supporting practice direction. Where exactly does the burden of proof lie in respect of the different limbs of the new rule? Which, if any, of the cases decided whilst that section of the practice direction was in force can safely be relied on?

A further question arises from the extension of the summary judgment jurisdiction to applications made by the defendant. Can it be said that there is any difference in approach to a claimant's application as opposed to a defendant's?⁶ The possibility arises because, among other things, defendants' applications will often be made in tandem with an application to strike out the claimant's case under CPR r. 3.4(2) (a) or (b) so that the mind of the court will be focused on the extreme end of the scale of success (or rather lack of success), whilst a claimant's application is more likely to be considered in isolation.

The "Other Reason" Question

To what extent, if at all, can Part 24 judgment be avoided where the limitations of interim hearings, without the appearance and cross-examination of witnesses, make it difficult to assess the prospects of success?⁷ Have such issues been treated as a failure by the applicant to discharge his or her burden of proof on the substantive application or as some "other reason for trial" within CPR r. 24.2(b) (in which case the burden of bringing oneself within the proviso might seem to fall naturally on the respondent)?

The law stated in this article is believed to be correct as at 18 November 1999 although where possible reference has been made to cases decided after that date.

THEORETICAL BACKGROUND

One might, of course, legitimately ask whether in the CPR's climate of speed and economy, there is a place for a summary judgment procedure at all. If a case can be brought to a full trial more quickly and more cheaply than before, surely many of the justifications for the existence of the procedure, (for example: that it produces judgments at least for claimants which, because they are earlier than might otherwise be expected, are of greater practical benefit,⁸ and that it prevents expenditure by the parties and by the courts on unmeritorious cases) will fall away? Further, there is a

⁶ See further O'Brien, "The New Summary Judgment: Raising the Threshold of Admission"[1999] 18 C.J.Q. 132, an excellent article based on the draft rules prior to implementation.

⁷ A consideration which used to fall within the proviso to RSC Ord. 14 that judgment could be avoided if there was "some other reason" for trial (RSC Ord. 14 r. 3(1)). The writer is obliged to Maureen Maksymiw for the alternative suggestion that the cases on this point under the new law could be treated as involving a failure to discharge the applicant's burden of proof rather than as reinstating the RSC Ord. 14 "other reason" for trial. If this issue falls within Part 24's "other reason" category, however, the burden of proof may then be a positive burden on the defendant to show that there is something that merits investigation at trial.

⁸ This rationale is given in the substantial discussion of this issue, particularly in the context of the interlocutory (under the CPR "interim") injunction, in Zuckerman, "The Case for Commuting Correct Judgments for Timely Judgments" [1994]

fear⁹ that summary judgment, given as it is on paper evidence only, is intrinsically likely to be a less objectively accurate (or “just”) evaluation of the issues in dispute. The latter may perhaps underlie the continued view of the judiciary, discussed under “the limitations of summary process” below that there are disputes which it is inappropriate to resolve other than by a full trial.

In addition, it is suggested that there are wider interests involved in taking some cases to a full trial.¹⁰ The wider interests, not so much of the community at large but of other litigants, are for the first time reflected in the CPR which require that the courts must “[take] into account the need to allot resources to other cases.”¹¹ This is, however, a pragmatic, resource-led approach. Lord Woolf’s approach to the proviso to the new rule (he considers that a full trial can be justified provided that the case raises issues of public interest) does, however, allow for a wider range of interests to be taken into account.

However, it is clear that provision for summary judgment has been retained and expanded in the CPR because the increased speed and economy of the new rules is only a relative change. Even in the fast track, in personal injury cases where the personal injury pre-action protocol may occupy a considerable period before the court becomes involved in the dispute, a case may still take a year before it can come to trial. Clearly many cases will continue to be resolved by negotiation or other means of reaching compromise between the parties without the intervention of the judiciary. The CPR are nothing if not highly pragmatic, especially in terms of the cost of litigation. Dealing with a case “justly” in the words of CPR r. 1 involves an apportioning of resources. In the words of Adrian Zuckerman:¹²

...the needs of the community may be better served by faster and simpler proceedings, albeit at some costs to accuracy, than by a highly accurate procedure in which delays can rob judgments of their utility and in which expense places the protection of the law beyond the reach of the great majority.

Examining the draft rules prior to implementation, Derek O’Brien¹³ wondered whether the application of the new process would operate simply as a procedural filter for obviously unmeritorious cases or as a complete substitute for trial. On the face of it the simple “procedural filter” has clear pragmatic uses. It is in obviously unmeritorious cases that the saving in cost to the litigants, the court and the wider community (including other litigants) most clearly outweighs any potential sacrifice in “justice” in the sense of a correct evaluation of the full merits and evidence. It might also be said that it is easier to identify a clearly unmeritorious case than to evaluate the full merits of the case.¹⁴

If the procedure becomes a full substitute for trial, however, then the significance of any limitations in summary procedure (of which the greatest is likely to be the absence

14 O.J.L.S. 353. The argument that an early judgment is likely to be of greater use is based upon the notion that it is more likely to be enforceable, delay being seen to increase the risk that the defendant might cease to be able to pay and that the claimant might be unable to make use of the money.

⁹ Discussed by Zuckerman, *ibid*.

¹⁰ “The importance of achieving justice between individual litigants is in no way diminished by recognition that the process of litigation, considered as a whole, serves at least two other ends, connected but distinct, and that their attainment should be included in the purposes of procedural law. First, civil proceedings serve to demonstrate the effectiveness of the law; secondly they provide the opportunity for the judges to perform their function of interpreting, clarifying, developing and, of course, applying the law” Jolowicz, “On the Nature and Purposes of Civil Procedural Law”, in *International Perspectives on Civil Justice: Essays in Honour of Sir Jack Jacob*, (Sweet and Maxwell, 1990).

¹¹ CPR r. 1.1(2)(e).

¹² *Op. cit.*

¹³ *Op. cit.*

¹⁴ See the comments by Ward, L.J. in *Day*, discussed below.

of oral evidence and cross-examination) is vastly increased. Any discrepancy between the approach adopted for claimant's applications and for defendant's applications will be heightened. In fact as Adrian Zuckerman¹⁵ and Derek O'Brien¹⁶ have noted, the American system of summary judgment (available both to plaintiffs and to defendants) now demands that each party satisfy the burden of proof that they would have to satisfy at trial. Since, generally speaking, the burden at trial is heavier on the claimant/plaintiff, the result in the United States has been that defendant applications are much more likely to be successful than claimant applications.

Derek O'Brien suggests that the CPR wording offers the opportunity to import precisely that degree of apparent inequality into the system of England and Wales. The "real prospect of success" is a prospect of succeeding in establishing one's case at trial, a task which is more onerous for the claimant (except to the extent that the defendant puts forward an "affirmative defence" such as – broadly speaking – contributory negligence or, as in *Mahon v. Rahn*, discussed below, a claim of privilege in response to an allegation of defamation).

Whether such an approach has materialised in practice will form part of the discussion of the cases which follows. It is fair to say, however, that the writer's survey of Part 24 cases, on a superficial count, does not suggest that defendant's applications have in fact proved to be more successful than claimant's applications: the level of successful applications in both types of application is roughly even.

THE RULE¹⁷

In order to evaluate whether the current rule achieves Lord Woolf's stated aim of making summary judgment (*i.e.* judgment at a pre-trial stage) easier to obtain, it will be instructive for purposes of comparison to deal briefly with the previous rule. Before 26 April 1999, the plaintiff alone had power to apply for summary judgment against the defendant "on the ground that the defendant ha[d] no defence. . ."¹⁸ Provided the plaintiff's application was not inappropriate or procedurally premature¹⁹ and that there was affidavit evidence confirming the lack of defence,²⁰ the burden of proof was on the *defendant* to show that his or her case was good enough to merit "leave to defend."

No precisely similar remedy was available to the defendant faced with an unmeritorious claim unless the defendant could persuade the court actually to strike out the plaintiff's case under RSC Ord. 18 r. 19.

In practice the previous rules, supplemented by the "corpus of judicial decisions" referred to by Lord Woolf, established that the defendant could avoid judgment,²¹ by showing some kind of defence on the merits²² or a "triable issue" or ". . . that there

¹⁵ *Op. cit.*

¹⁶ *Op. cit.*

¹⁷ CPR r. 24.2.

¹⁸ RSC Ord. 14 r. 1.

¹⁹ *I.e.* provided the action was not one of the limited kinds of cases excluded from summary judgment (such as defamation claims), and provided that the statement of claim had been served and an acknowledgement of service filed: RSC Ord. 14 r. 1(1).

²⁰ RSC Ord. 14 r. 2(1).

²¹ Other than by demonstrating that the application was premature or that the plaintiff had failed to satisfy the initial requirements.

²² Wording extracted by the editors of the *Supreme Court Practice, 1999* (1998, Sweet & Maxwell, London) from a series of cases includes: ". . . a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence. . ." (on the basis of credible evidence). Other wording to which they refer includes "more

ought for some other reason to be a trial. . .”²³ The issue was further complicated by the practice of granting leave to defend conditional on payment into court by the defendant of a sum of money, often, in liquidated claims, the entire amount claimed by the plaintiff.²⁴ In cases where the defendant had raised a defence but where the merits or *bona fides* of the defence were regarded with some suspicion, conditional leave would be granted.²⁵

From 26 April 1999, summary judgment may be given “on the whole of a claim or on a particular issue” against a claimant who has “no real prospect of succeeding on the claim or issue” or against a defendant who has “no real prospect of successfully defending the claim or issue” provided in either case that “there is no other reason why the case [sic] or issue should be disposed of at a trial”.²⁶

The wording of the proviso (“there is no other reason why the case or issue should be disposed of at a trial”) is, of course, very similar to the wording of the previous RSC Ord. 14 proviso (“... that there ought for some other reason to be a trial. . .”).²⁷ Despite this similarity in phraseology, it is clear that Lord Woolf considered *his* proviso to apply less to such practical issues as the evaluation of oral evidence or the need to resolve issues by expert evidence as to circumstances where “there [is] a public interest

than shadowy but less than probable”. A detailed discussion appears in the *Supreme Court Practice, 1999* at n. 14/4/9. What has been suggested is that this need not exceed a 50% chance of success (see more detailed comments at n. 41 below).

²³ RSC Ord. 14 r. 3(1). It was accepted that such practical matters as the need to resolve an issue by examination in chief and cross-examination at a full trial rather than on the basis of paper evidence could constitute such a reason, as could the need for discovery or technical evidence. See further, *ibid.* at n. 14/4/10. The existence of a “bona fide” counterclaim could dislodge the judgement: *ibid.*, n. 14/4/14.

²⁴ RSC Ord. 14 r. 4(3).

²⁵ So for example the editors of the *Supreme Court Practice, 1999, op. cit.*, refer at n. 14/4/6 to “a real doubt about the defendant’s good faith”, defences that are “shadowy” and cases that are “almost” suitable for summary judgment to be awarded.

²⁶ CPR r. 24.2(a). It is pointed out by the author of the relevant chapter in *Blackstone’s Guide to the Civil Procedure Rules* (1999, Blackstone, London), that the wording of CPR Part 24 can be traced back to comments in *Alpine Bulk Transport Co Inc v. Saudi Eagle Shipping Co Inc* [1986] 2 Lloyd’s Rep. 221 to the effect that the test for setting aside a default judgment was higher than the mere “arguable case” which would defeat a summary judgment application under RSC Ord. 14 since it required a “real prospect of success”. Note, however, the more recent decision in *Day v. Royal Automobile Club Motoring Services Ltd.* [1999] 1 W.L.R. 2150, C.A., heard prior to implementation of the CPR and discussed further in Browne, “A Matter of Semantics”, (1999) *Litigation* 18(4) 18. Put simply the rationale for the difference between the criteria for setting aside a default judgment and those for the grant of summary judgment was that the defendant in a judgment case did not merit the benefit of any judicial doubt; he or she was already in breach of the rules of court. It is, however, worthy of note that CPR Part 13 governing the setting aside of default judgments against defendants now allows for the judgement to be set aside if “the defendant has a real prospect of successfully defending the claim” (CPR r. 13.3(1)(a)). The use of virtually identical wording - albeit that Part 13 is expressed as a positive (the defendant having to prove a real prospect) and Part 24 is expressed as a negative (the identity of the party bearing the burden of proof is discussed further below) - disposes at a stroke of the rationale for any distinction between the two procedures. The difference between positive and negative phraseology was considered significant at least by Ward L.J. in *Day* on the previous law as to setting aside: “Thus it is usually easy to identify the case which is hopeless and say ‘There is no real prospect of success.’ I add the emphasis to make the point that one is looking at the matter negatively. The approach is distorted if one uses ‘real prospects of success’ as a positive test. That wrongly encourages a test of judging fact on affidavit and then coming to a provisional view of the probable outcome. . .”. These reservations are worth bearing in mind when considering the placing of the burden of proof under Part 24 and of the limitations of summary process generally. For completeness, it should be said that very similar wording is again used in the new practice direction governing appeals: “permission [to appeal] will be given unless an appeal would have no real prospect of success. . . A fanciful prospect is insufficient. Permission may also be given in exceptional cases even though the case has no real prospect of success if there is an issue, which, in the public interest, should be examined by the Court of Appeal.” The rather more explicit wording of this practice direction seems to inform or be informed by Lord Woolf’s approach both as to the nature of the “other reason” within CPR r. 24.2(b) and as to the standard demanded by the substantive criteria (see his comments in *Swain v. Hillman*, below).

²⁷ Note, however, judicial warnings to the effect that similarity of wording is no guarantee of similarity of interpretation, for example the comments of Hart J. in *Lombard Natwest Factors Limited v. Sebastian Arbis*, *The Times* 10 December 1999, Ch. D., reported by Lawtel, (Document C9200169).

in the matter being tried.”²⁸ Given the different context within which “other reasons” arguments can arise, and for the avoidance of doubt, the following expressions will be used as far as possible in the remainder of this article:

- (i) The words “an RSC Ord. 14 ‘other reason’” will be used to refer to a reason other than one relating to the court’s assessment of the merits of the case which would have displaced the possibility of summary judgment under the old rules;
- (ii) the words “a Woolf ‘other reason’” will be used to refer to a reason which could displace summary judgment according to the particular use of the proviso in CPR r. 24.2(b) envisaged by Lord Woolf; namely recognition of the existence of a public interest in the case proceeding to trial; and
- (iii) the words “a CPR r. 24.2(b) ‘other reason’” will be used to refer to a reason unrelated to the court’s assessment of the merits of the case which will displace the possibility of summary judgment according to the proviso in CPR r. 24.2(b) but *other* than on the public interest grounds envisaged by Lord Woolf.

Before considering the case law, one should finish considering the mechanics and possible outcomes of an application under the new procedure. The application may be made by one of the parties, or the court may exercise its powers to make the order of its own initiative.²⁹ Normally the application will be dealt with on the basis of paper evidence (witness statements and documentary exhibits) and oral argument by or on behalf of the parties³⁰ although the court is entitled to dispose of the application on the papers without an oral hearing if it considers it appropriate.³¹

Such applications are commonly argued in parallel with applications to the court to exercise its power to strike out a statement of case (previously a “pleading”) if it discloses no “reasonable grounds for bringing or defending the claim”; if it is an abuse of process; or if there has been a breach of the rules or an order of the court.³²

If the application is successful, the court’s order will be given as judgment on the claim (in a successful claimant’s application); as the striking out or dismissal of the claim (in a successful defendant’s application); as dismissal of the application (in an unsuccessful application); or as a conditional order.³³

Oddly, those who formulated the practice direction supporting Part 24 thought it necessary to include a specific note to the effect that the court would no longer make orders in the previous form of “leave to defend.”³⁴ Whether this is intended to have any more significant effect than the avoidance of doubt is not clear.³⁵ Its cosmetic effect is of course to suggest that the defendant has every right to defend his or her claim

²⁸ Lord Woolf M.R., *Access to Justice, Final Report*, Section 3b para 34. He would receive support in this approach from Professor Jolowicz, *op. cit.* See n. 26 above for the congruity between this approach and the wording of the practice direction on appeals. It has also been pointed out by District Judge Stephen Gold in “Civil Way”, [1999] N.L.J. 1589 that s. 8 of the Defamation Act 1996, which creates a summary disposal mechanism specific to defamation claims, contains a similar proviso. He points out, however, that in the statutory proviso “other reasons” are explicitly stated to include such matters as conflicts of evidence (*i.e.* they include RSC Ord. 14 “other reasons”). The relevant sections of the Defamation Act are not, at the date of writing, in force but will operate in parallel to Part 24 by virtue of Practice Direction 53; defamation claims.

²⁹ CPR r. 3.3. See also Practice Direction 26, para 5.

³⁰ The “hearing” may take place over the telephone: Practice Direction 23 para 6. Whether the provisions of the Human Rights Act 1998 have any implications for this procedure is beyond the scope of the present article.

³¹ CPR r. 23.8.

³² CPR r. 3.4.

³³ Practice Direction 24, para 5.

³⁴ Although there may be evidence of this terminology being perpetuated. See *Penningtons v. Rabia Abedi*, 30 July 1999, Q.B.D.; and references to the first instance decision in *Monsanto plc v. Tilly and others*, 25 November 1999, C.A., both reported by Lawtel, (Documents C7200194 and C8600624).

³⁵ Gordon Exall considers this issue further in “Civil Litigation Brief: Woolf Reforms” (16), 143 Sol. J. 440.

rather than doing so merely on the sufferance of the court. In fact under the new rules with their explicit emphasis on “deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others”,³⁶ it could be argued that the liberty of both parties to pursue their cases is subject to the permission of the court to an even greater extent than before. However, a similar note explaining that the CPR r. 24.2(b) “other reason” is a different animal to the old RSC Ord. 14 “other reason” (assuming that that is indeed the case) would have been equally if not more welcome to the practitioner.

THE BURDEN OF PROOF AND THE COMPLICATION OF PRACTICE DIRECTIONS

Prior to 26 April 1999, the burden of proof on the plaintiff in relation to an application for summary judgment was very limited. This was demonstrated by the common practice in unliquidated claims of supporting the application with a standard form one-page affidavit verifying that the sums outstanding remained due. The main burden was placed by the Rules of the Supreme Court (“RSC”) on the defendant, who could nevertheless discharge it completely even if all that he or she could show was a defence that was “less than probable.”³⁷ An attempt to understand whether, and if so to what extent, the criteria for success have altered must be informed by consideration of the burden of proof. Although the defendant’s burden under the old rules seemed relatively slight, nevertheless a close-run application (perhaps therefore one that was somewhat speculative on the part of the plaintiff) could be decided against the defendant simply on the basis of a failure to satisfy the burden of showing a positive case. An order for conditional leave to defend, (although on one level a success for the defendant who could only demonstrate a “shadowy” case) nevertheless required the defendant to do in practice precisely what he or she sought to avoid: to pay over, pending trial, all or a large part of the disputed sum.

Analysis of the allocation of the burden of proof is, however, complicated by the fact that, unlike the RSC, the CPR themselves originally contained no explicit provision on the allocation of the burden of proof. However, until 13 September 1999, a practice direction supplementing Part 24 did contain the following

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*:

³⁶ CPR r. 1.4(2)(c).

³⁷ Wording extracted by the editors of the *Supreme Court Practice 1999* from *Radafin Bank v. Agom Universal Sugar Trading Co*, *The Times*, 23 December 1986, C.A.: *ibid.* n. 14/4/9. On this basis it was reasonable to maintain the distinction between the burden placed upon the defendant opposing an application for summary judgment and that placed upon a defendant seeking to have a default judgment set aside. The rationale for such a distinction has been discussed above, n. 26.

- (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.

4.3 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.

(author's emphasis)

Leaving aside the question whether there is any substantial difference between the expressions “that judgment” used a number of times in the paragraph and “judgment” alone, used in paragraph 4.2(1),³⁸ it was worrying that it was thought necessary to express the criteria for a claimant’s application separately from those for a defendant’s application, especially as by the use of the words “and” in paragraph 4.1 and “either” and “or” in paragraph 4.2, one test appeared cumulative and the other disjunctive.

The effect of the words “if unanswered” is also not without difficulty, especially if their meaning is the straightforward “if not responded to” or “if it were to be unopposed”. Indeed, in *Taylor v. Midland Bank*³⁹ on a defendant’s application the majority of the Court of Appeal regarded paragraph 4.2(1) of the practice direction as a matter of correct pleading. Rattee J. stated that “the amended statement of claim in this case does, just, disclose a case that requires to be answered”, a view endorsed by Buxton L.J. A statement of case that fails to demonstrate a case is, of course, already vulnerable to being struck out under the separate jurisdiction of CPR r. 3.4 in any event.

Although *Taylor* involved a defendant’s application, if the same analysis is applied to paragraph 4.1 (and assuming there is intended to be no difference between “that judgment” and “judgment” alone as used in paragraph 4.2) the result would be perilously close to saying that, on a claimant’s application the claimant simply has to satisfy the very limited preconditions required of a plaintiff under the old rules, the principal burden of proof being on the defendant to dislodge the application.⁴⁰

Furthermore, if one uses a strict but extreme analysis of paragraph 4.1, interpreting the proviso as applying only to a Woolf “other reason”, it becomes hard to see how a defendant could defeat the application at all.

In attempting to reconcile the rule with the practice direction, and to accommodate the reference in the rule (but not in the practice direction) to a “real prospect of success” a complex series of tests might have to be erected even before the “other reason” proviso was considered. Indeed in *Taylor v. Bank of England* Buxton L.J. stated that the issue was initially one of considering the case as pleaded and asking “. . . whether in the words of paragraph 4.2(1) of the Part 24 Practice Direction, the claimant has failed to show a case which, if unanswered, would entitle him to judgment”. He concluded that:

The plaintiffs have not so failed. The terms of the pleading are, however, also relevant to the further issue of whether the defendant has shown that the claimant has no real

³⁸ The distinction being presumably that “that judgment” is capable of referring specifically to judgment on the part or parts of the claim actually applied for in the Part 24 application notice and, conceptually, judgment on a summary, pre-trial basis with paper evidence only. The word “judgment” alone in the circumstances would then appear to refer to judgment at trial. It is fair to say that the reported cases do not appear to have made any such distinction.

³⁹ *Taylor and others v. Midland Bank Trust Co Limited and others*, 21 July 1999, C.A., reported by Butterworths Direct and Lawtel, (Document C7200123).

⁴⁰ What exactly the defendant would have to show to satisfy that burden is discussed elsewhere. The practice direction suggests that the defendant could only avoid judgment by showing an “other reason”.

prospect of succeeding at trial. In that enquiry the substance rather than just the form of the case is in issue, and for that reason evidence can be considered. . .

. . . There are two limbs to that enquiry. First, can the basis of the plaintiffs' claim as set out in the pleading be shown to be so mistaken that it will be impossible to rely on it at the trial? Second, even if there is some substance in what the plaintiffs allege, are there other elements in the case that will nonetheless lead to the dismissal of the claim?"

Where it was the defendant who had applied for summary judgment, the wording of paragraph 4.2 omitted any reference to the "other reason" set out in the proviso to CPR r. 24.2 and equated the claimant's "no real prospect of succeeding" with a claim that was "bound to be dismissed".⁴¹ A claim with an unrealistic but conceivable prospect of success is, of course, not necessarily one that is "bound to be dismissed".⁴² This variation, phrased in the practice direction as an *alternative* to the claimants' failing "to show a case which, if unanswered, would entitle him to judgment" was not explicitly discussed in *Taylor*.⁴³

Put simply, then, paragraph 4.1 caused potential difficulty where a defendant could raise a "real prospect" of a defence on the merits, whilst paragraph 4.2 caused difficulty where the claimant could raise some "other reason why the claim should be dealt with at trial" and where the claimant's case, though weak, was not "bound to be dismissed". Further uncertainty lay in defining what exactly would constitute a "reason why the claim should be dealt with at trial" within CPR r. 24.2(b).

From 13 September 1999, the first two sub-paragraphs of paragraph 4 of the practice direction were deleted, rendering further discussion of little practical interest. In reviewing the cases, however, it is necessary to bear in mind the level of potential uncertainty which had been raised by the wording of the practice direction. In the absence of these sub-paragraphs with their well-meaning attempt to allocate and define the burdens of proof however, we are left to seek from the courts not only guidance on the standard of proof involved in the application but also the allocation of the burden of proof.

THE CASES

How Are The Criteria Applied? What Is A "Real Prospect" Of Success?

Clearly it can be counterproductive to draw too many conclusions from the words used by individual judges or reporters to describe the chances of success in any given case.

⁴¹ Colloquially, perhaps, would it be unreasonable to describe a case with "no real prospect of success" as being one that was, say, 75-90% likely to fail, while a case that is "bound to be dismissed" is one that is 100% likely to fail? A case that is "improbable" and might therefore attract a conditional order could perhaps then be put at 55-75% likely to fail. Derek O'Brien, *op. cit.*, has located authority describing a "triable issue" or "arguable case" meriting unconditional leave to defend under RSC Ord. 14 as being more than 50% likely to fail. Note, however, comments on this particular issue in *Surrey Oaklands* and in *Swain v. Hillman*, discussed below.

⁴² After the deletion of this section from the practice direction, Lord Woolf M.R. confirmed in *Swain v. Hillman* (below) that there was a conflict between the rule and the practice direction's use of the expression "bound to be dismissed" "which indicated that the approach required was one of certainty . . . If that was thought to be the effect of the practice direction, that would be putting the matter incorrectly because that did not give effect to the word 'real' . . .". Unfortunately, later in his judgment, his more general comments were phrased in precisely that degree of certainty: "If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise if a claim is bound to succeed, a claimant should know that as soon as possible". No-one can dispute this (except perhaps when acknowledging that matters of public interest, which Lord Woolf himself considered to be within the "other reason" category, might lead to a different conclusion). The difficulty, however, when seeking to establish the criteria to be applied, and the meaning of "a real prospect of success" is in establishing in what circumstances, short of certainty, the rule operates.

⁴³ The dissenter, Stuart-Smith L.J., circumvented the difficulties of the practice direction by regarding it as "giving instances where the court will exercise its power under the rule. It does not follow that there may not be other cases where the court should perfectly properly exercise its power".

In the absence of detailed psychological and linguistic data the best one can do is to examine words used as synonyms for the express criteria in CPR r. 24.2 to see what light, if any, they cast on the judicial approach. Similarly, although continued use of the older terms “triable issue” and “arguable case” might be considered to demonstrate a degree of congruity between the old law and the new, such use may in fact be nothing more significant than a judge inadvertently using familiar terminology.⁴⁴ With these caveats in mind, a chronological examination of the cases may still prove instructive.

In *Hofer v. Strawson*⁴⁵ heard in early March 1999, Neuberger J. was asked to decide whether the existence of a counterclaim could be relied on to set aside a statutory demand based on a stopped cheque. In holding that it could, in principle, do so an analogy was drawn with CPR r. 24.2. Having set out the test in the wording of the CPR and described the approach to be taken in such insolvency cases as “not dissimilar” to it, the judge then gave his judgment in the terms of there being a “genuine triable issue”; that being the wording of the relevant rule of insolvency procedure. Clearly, if the test under CPR r. 24 were to be one of triable issue in the old sense, then nothing had changed, except that the defendant now had the option of applying against the claimant.⁴⁶

Nevertheless, as we will see, the old terminology is remarkably persistent: in *AB Volvo*⁴⁷ in early May 1999, the test for a claimant’s application was reported as being satisfied because there was no “arguable” defence.⁴⁸

A more pragmatic judicial approach was taken in a case to which the CPR had expressly been applied early: *Gray v. Gray and another*.⁴⁹ Here the court was asked either to strike out the claim as an abuse of process or alternatively to grant summary judgment to the defendant under CPR r. 24. It was alleged that the basis of the claimant’s current action was inconsistent with sworn testimony he had given in a previous action. The evidence did not justify either a strike out or summary judgment and Neuberger J. refrained from delving into the precise wording of either the rule or the practice direction.

In *Waters v. Maguire*,⁵⁰ however, the claimant’s claim was struck out under CPR r. 3.4(2)(d)[sic] but could, it was said, equally have been disposed of under CPR r. 24.2(a)(i) on the basis of that limb of the practice direction referring to a claim that was “bound to be dismissed”. In an extreme case, clearly this is right. Note however that in at least one respect the jurisdiction for strike out does not overlap that for

⁴⁴ In cases falling within the transitional provisions of the CPR there is the additional complication that terminology that was appropriate when the application was made may not be strictly appropriate when the application was heard or appealed. The extent to which the CPR apply to pending applications is defined by CPR Part 51 and the supporting practice direction provides that: (a) in paragraph 14: in an existing case any new application for summary judgment made after 26 April 1999 must be made according to the criteria in Part 24, and (b) in paragraph 15: where an application for summary judgment in an existing case is made before 26 April 1999 but heard afterwards there is a “general presumption” that the criteria in Part 24 will be applied to it.

⁴⁵ *Hofer v. Strawson, sub nom In Re A Debtor* (no SD27 of 1988) *The Times* 17 April 1999, (1999) 5 C.L. 412, Ch. D. The explicit reference to CPR rule 24.2 does not appear in the *Times* report but is in the Lawtel summary (Document C9200082) and in the Butterworths Direct material.

⁴⁶ The expression was used again by Lawrence Collins QC sitting as a Deputy High Court Judge in *Artistic Upholstery* discussed below.

⁴⁷ *AB Volvo and another v. Heritage (Leicester) Limited* [1999] All E.R. (D) 478, Ch. D.

⁴⁸ But see *The Saudi Eagle*, (discussed above, n. 26) and the discussion of the possible percentage values which could be attributed to an “arguable case” and a case with a “real prospect of success”. Just as the terms “triable issue” and “leave to defend” are still being used, so the expression “arguable case” is still to be found in the reports: for example *Mace and others v. Rutland House Textiles Limited (in administrative receivership)*, 15 November 1999, Ch. D., reported by Lawtel (Document C7200546).

⁴⁹ 12 May 1999, Ch. D. reported by Butterworths Direct and Lawtel (Document C7600281).

⁵⁰ 13 May 1999, Q.B.D. reported by Butterworths Direct and Lawtel (Document C8600485).

summary disposal – under CPR r. 3.4(2)(c) a statement can be struck out on a purely punitive basis for failure to comply with the rules, practice directions or orders of the court.

It should also be remembered that under the common law, in a line of cases developed by Lord Woolf⁵¹ prior to implementation of the CPR, cases which might conceivably have had a real prospect of success on the merits were struck out on a punitive basis (usually as a result of delay) as an abuse of process. It is suggested that although the jurisdictions are complementary, they are necessarily not identical and that this should be borne in mind especially by those seeking to make tandem applications.

In *Surrey Oaklands NHS Trust v. Hurley and others*⁵² the first defendant had applied for a stay pending the outcome of criminal proceedings and had refused to serve a fully pleaded defence until the criminal proceedings had been dealt with. The claimant applied for summary judgment against all defendants. The first defendant was given more time to file a defence. The remaining defendants did not deny that sums were due, but alleged that the sums were not in fact due to the claimant. It was held that it was “improbable to say the least” that another body was entitled to the outstanding sums and a conditional order⁵³ was made against the remaining defendants. So an “improbable” defence may still have a “real prospect of success”. This echoes the wording of Practice Direction 24 para. 4.3, despite the fact that something that is “improbable” carries a chance of success that is less than 50%. Can an allegation whose chances of success are less than 50% really be said to have a “real prospect of success” even though it might still constitute an “arguable case”?⁵⁴ If this is the case, the CPR have failed to implement Lord Woolf’s intentions that summary judgment should be easier to obtain. The court again did not consider it necessary to distinguish between the tests for striking out a claim as an abuse under CPR r. 3.4 and the Part 24 test.

As will have been apparent from the outset, despite the caveats set out at the beginning of this chapter, the writer has an interest in the words used to describe the “real prospect” as an indicator, however rough, of the percentages involved. It is not impossible that a considerable section of the profession and the judiciary are sensitive to the semantic aspects of the problem. So, for example, in *Barrett v. Inntrepreneur*,⁵⁵ decided in June 1999, Park J seems to have avoided the difficulties inherent in the use of “arguable” or “triable” by approving the submission that the claimants (this being an application by defendants for summary judgment on their counterclaim) had no “maintainable” defence.

In the commercial court, later that month, in a defendant’s application which would previously have fallen under RSC Ord. 14A⁵⁶ the judge in finding for the defendant commented that “nothing turns on any difference between the two sets of procedural

⁵¹ Of which the most recent example, discussing the place of this line of cases within the CPR context is *UCB Corporate Services Limited (formerly UCB Bank plc) v. Halifax (SW) Limited*, 6 December 1999, C.A., reported by Lawtel (Document C9500503).

⁵² 20 May 1999, Q.B.D. reported by Lawtel (Document C7200046).

⁵³ The writer has only successfully identified one other case during the period in which a conditional order was made, on that occasion as a result of “the unattractiveness of the defence and the court’s suspicion that [the defendant] was seeking to avoid resolution of the central issues”: *Teleglobe International (UK) Limited v. Nacamar Limited* 22 July 1999, Q.B.D., reported by Lawtel (Document C7200129).

⁵⁴ See the percentage values proposed in n. 41 above.

⁵⁵ 23 June 1999, Ch. D., reported by Butterworths Direct and Lawtel (Document C8600530).

⁵⁶ *Western Digital Corporation and others v. British Airways plc*, 28 June 1999, Q.B.D. Commercial Court, *The Times* 23 July 1999, otherwise reported by Butterworths Direct and Lawtel (Document C7200050). The fact that CPR Part 24 was intended to encompass both RSC Ord. 14 and RSC Ord. 14A had previously been confirmed in *Securum Finance Limited v. Ashton and another* [1999] All E.R. (D) 594, Ch. D.

rules”. Under RSC Ord. 14A, it will be recalled, an application for the disposal of a case on a point of law could in any event be made by either party and in the absence of any specific provisions about burdens of proof, the burden would be assumed to have been on the applicant. Consequently an application under RSC Ord. 14A bore some resemblance to the current Part 24 procedure. On the facts of the case there may therefore indeed have been no appreciable difference, but the absorption of the previous RSC Ord. 14A into Part 24,⁵⁷ did bring with it the application of the criteria in r. 24.2 and, at that date, the wording of the practice direction.

A further variation on wording appeared in *Viridi v. Law Society*⁵⁸ where the claimant’s case was said to raise “a purely academic question”. Whilst this is probably a straightforward synonym for the “no real prospect of success”⁵⁹ what is significant, and may isolate this case from the mainstream, is the context in which this statement was made. The claimant had applied for withdrawal of a notice of intervention in a solicitor’s practice. As defendant, the Law Society sought to have this application struck out as an abuse of process or under Part 24. In the circumstances the court was being asked to decide whether the intervention should *continue* rather than whether the notice of intervention had been correctly issued at the outset. It was held that by now, even if the notice were to be withdrawn, the practice only contained one active file and that therefore determination whether or not the intervention should *continue* was the purely academic question.

In *Mahon v. Rahn*,⁶⁰ decided in July 1999, a defendant’s application was considered in the context of a libel case where it was said that there was a defence of absolute privilege. It is significant, in the context of practitioner and judicial response to the new rule and Lord Woolf’s intentions as to its application, that counsel had begun by describing the threshold for success under Part 24 as being lower than the test under the previous rules.⁶¹ Eady J. noted the use in the practice direction of the words “bound to be dismissed” as a “very high hurdle” but took a pragmatic approach since it was known by then that the practice direction was intended to be amended to reflect the “lower threshold”. Deciding that the test to be applied was whether the defence of absolute privilege was bound to succeed or “at the least that there was no realistic prospect of its failing”, the judge concluded on examination of the law that the defence was not available in the circumstances, refusing the defendant’s application.

In *Hall v. Bank of England*,⁶² Neuberger J.⁶³ dealt with a defendant’s application to dismiss the claimant’s action for damages arising from an alleged misfeasance in public office. The application was coupled, as seems to be becoming normal practice, with alternative applications based on want of prosecution and abuse of process. The case is most interesting, however, for a comment made *obiter* in relation to two issues on

⁵⁷ Practice Direction 24, para 1.3(1).

⁵⁸ 30 June 1999, Ch. D., *The Times* 20 July 1999, otherwise reported by Lawtel (Document C9200126).

⁵⁹ Unless you might consider a case with no “real prospect of success” to be 75-90% likely to fail and a “purely academic” case to be over 90% likely to fail. Again, as with the cases which were so weak they could be struck out under CPR r. 3.4, the extremes are comparatively easy to identify. So decisions were comparatively straightforward in a number of the cases discussed in this article. It is the borderline that is, as always, much more difficult – a difficulty which underpins Ward L.J.’s reservations about requiring a positive case to be proven in *Day* – see n. 26 above.

⁶⁰ 1 July 1999, Q.B.D. reported by Butterworths Direct.

⁶¹ The previous test being described as whether or not there was an “arguable case”; see *The Saudi Eagle* discussed above. This does appear to be the judicial view, expressed again in *Monsanto plc v. Tilly and others*, 25 November 1999, C.A., *The Times* 30 November 1999, otherwise reported by Lawtel (Document C8600624). However, in *Hall v. Bank of England*, below, Neuberger J. expressly refused to give his views on the point.

⁶² 14 July 1999, Ch. D. reported by Lawtel (Document C7200111). The pragmatic approach of Neuberger J. was adopted and followed in *Milner Neocal Limited v. Ellen Milner (as executrix of Jeremiah Milner, deceased)*, 10 September 1999, Ch. D. reported by Lawtel (Document C8300110).

⁶³ Responsible for a considerable number of decisions interpreting the effect of the CPR generally in the first six months after implementation.

quantum: that the claimant's case, although "weak and speculative" did have a real prospect of success. This may be the first attempt to define the attributes of a case at the opposite end of the spectrum from those that are equally at risk of striking out under CPR r. 3.4.

In *Project Consultancy*⁶⁴ the defendant's case was, however, described as being "at least arguable" with the proviso, discussed below, that the issue was not susceptible to resolution on a summary basis.

In *Artistic Upholstery*,⁶⁵ the claimant's application was successful, causing the relevant parts of the counterclaim to be dismissed.⁶⁶ The test applied was, on the face of it, one of triable issue. Lawrence Collins QC, sitting as a Deputy High Court Judge, said that: "I have to decide whether the validity of the expulsion is relevant and if not whether Art Forma's position raises a triable issue. . .". An alternative claim that the defendant's trademark application had been made in bad faith was not successful, less on the merits than because the court was not "convinced that the factual and legal issues associated with this aspect of the case are suitable for summary determination."

In *Qazi*⁶⁷ there was "nothing in any of the matters pleaded which warranted the conclusion" that there was any liability on the part of the defendant.

Thus far, it is submitted, the cases have established that if a case is, on the basis of the evidence available at the hearing, doomed to failure, summary judgment will be given. So, if the case could be struck out under Part 3.4(2)(a) as "disclosing no reasonable grounds for bringing or defending the claim", it can equally be disposed of under Part 24 in the absence of an effective "other reason". If the case is improbable a conditional order can be made.

The one case that does clearly trespass over the boundary into the difficult area where the respondent's case is not on the face of it doomed (or all but doomed) to failure, is *Hall*; although the comment that a case which is "weak and speculative" might still be capable of surviving the application (presumably at severe risk of a conditional order) is *obiter*. The continued use of the word "arguable" in a number of these cases suggests, however, that there is no appreciable difference in practice between the old law and the new,⁶⁸ despite the semantic difference described above.⁶⁹

In *Customs and Excise Commissioners v. Lacara Limited*,⁷⁰ in early October, the word used seems to have been "untenable". Consequently, the issue of application and of appropriate terminology was still open when the question came before a Court of Appeal including Lord Woolf himself in *Swain v. Hillman and another*.⁷¹ The defendants' application for summary judgment had been dismissed at first instance. They were no more successful before the Court of Appeal, Lord Woolf categorically describing the test as "a realistic, as opposed to a fanciful, prospect of success". Later,

⁶⁴ *Project Consultancy Group v. Trustees of the Gray Trust*, 16 July 1999, T.C.C., [1999] All E.R. (D) 842 also reported by Lawtel (Document C7100266).

⁶⁵ *Artistic Upholstery Limited (on behalf of itself and all other members of the Long Eaton Guild of Furniture Manufacturers) v. Art Forma (Furniture) Limited*, 29 July 1999, Ch. D., *The Times* 21 July 1999, [1999] 4 All E.R. 277, otherwise reported by Butterworths Direct and Lawtel (Document C8300100).

⁶⁶ So at least in the circumstances of this case the mere existence of a counterclaim is no protection against the remedy.

⁶⁷ *Qazi and another v. London Borough of Waltham Forest*, 3 August 1999, Q.B.D. Commercial Court, reported by Lawtel (Document C7200195).

⁶⁸ So, for example, *Mace and others v. Rutland House Textiles Limited (in administrative receivership)*, 15 November 1999, Ch. D. reported by Lawtel (Document C7200546).

⁶⁹ See n. 41 above, discussing the possibility that an arguable case could well be weaker than a case having a "real prospect of success".

⁷⁰ 11 October 1999, Q.B.D. reported by Lawtel (Document C7300153).

⁷¹ 21 October 1999, *The Times* 4 November 1999, [1999] All E.R. (D) 1210, C.A. also reported by Lawtel (Document C8001279).

in *SIF v. Paul*⁷² where the defence was one of set-off, it was held that the defendant had a real prospect of success. However, in *Glaxo*,⁷³ where *Swain* was applied, the discussion was initially phrased in terms of an “arguable” case and a “triable issue” before the term “fanciful” derived from Lord Woolf’s judgment in *Swain* was finally used. It is relevant to the discussion of borderline cases, however that on one issue where the evidence was described as “thin” it was held, by Laddie J., that the underlying allegations were not “so insubstantial that they do not merit being tried”. The final word on the subject in the period under discussion, is, however, a return to the old terminology when in *French Connection*⁷⁴ the claimant’s application failed because the defendant had a case described as “really arguable”.

In conclusion, despite the intentions of Lord Woolf and judicial comment to the effect that the new test was intended to be easier to establish than the old, the persistence of the old terminology at the very least⁷⁵ might suggest that in some cases judges are in practice applying the same parameters as they did under RSC Ord. 14. However, it is suggested that comparison of old and new regulatory wording should produce different results as to the percentage prospects of success required to succeed. On this analysis, then, those cases where conditional leave to defend might previously have been given might now fail to survive the application whilst the lower end of the spectrum of cases that would previously have obtained unconditional leave to defend could now expect a conditional order. Clearly hopeless cases would now, as then, be disposed of summarily.

ALLOCATION OF THE BURDEN OF PROOF

The significance of the allocation of the burden of proof in the application produces two concerns, both related to the fact that the application is dealt with on a summary basis, and, under the new system, may be dealt with entirely on the papers. First there is Ward L.J.’s concern expressed in *Day*⁷⁶ to the effect that it is possible on a summary basis to establish a negative (that the respondent has no real prospect of success *i.e.* to identify a hopeless, or all but hopeless, case) but that trying to establish the positive merits of a case (that the respondent has a real prospect of success) involves considerations unsuitable for summary process and suitable only for trial. Secondly there is Derek O’Brien’s concern that the placing of the burden of proof could itself demand a mini-trial and produce inequality by requiring the claimant in all cases to prove his or her positive case.

In addition, whatever the position in relation to the substantive merits of the case, one cannot ignore the CPR r. 24.2(b) proviso: is it for the respondent to prove that there is an “other reason” or for the applicant to prove that there is not? Whether Ward L.J.’s reservations about the proving of positive allegations on a summary basis would also be significant on this point will depend, of course, on the nature of an acceptable “other reason”.

⁷² 11 November 1999, C.A., reported by Lawtel (Document C9500482) and Butterworths Direct.

⁷³ *Glaxo Group Limited and another v. Dowelhurst Limited*, 18 November 1999, Ch. D., Patents Court, [1999] All E.R. (D) 1288, also reported by Lawtel (Document C8300119).

⁷⁴ *French Connection Limited v. Sutton*, 2 December 1999, Ch. D., reported by Lawtel (Document C9200187).

⁷⁵ The fact that the summary judgment provisions of the CPR originally appearing at Part 14 in the early drafts were re-numbered Part 24 in the final version suggests that the framers of the rules were prepared to take positive symbolic steps to distance the CPR procedure from the old RSC Ord. 14.

⁷⁶ See the quotation at n. 26 above.

The question first fell to be discussed in *A & D Maintenance*,⁷⁷ where the claimant was said to have discharged its burden of showing the lack of a real prospect of success in the defence, whilst the defendant had failed to discharge its burden of showing an “other reason” for the case to go to trial. The court thus applied the wording of the rule rather than the practice direction, placing the principal burden of proof on the applicant to prove the negative.

In *Taylor v. Midland Bank*,⁷⁸ which has already been discussed to some extent, Part 24 came before the Court of Appeal for the first time.⁷⁹ The defendant had initially applied to strike out the claimant’s case under the old rules as disclosing no cause of action or as an abuse of process. Once the CPR had come into force, counsel adopted an argument under CPR r. 24.2, suggesting that the new rule “enables the court to apply a somewhat less stringent test than that applicable to strike out under the old rules”. The Court of Appeal, by a majority, dismissed the defendant’s application.

Rattee J., as we have seen, dissected the appropriate parts of the practice direction, placing a very limited burden of proof on the claimant apparently equating to an adequately pleaded case. It was for the defendants to show “that the claimants have failed to show a case . . . or that the claim would be bound to be dismissed”. A conditional order was not appropriate “if the claimants have pleaded a case they ought to be allowed to pursue”; an approach which, to say the least, appears to concentrate on the form of the case whilst overlooking the reference in the practice direction to the substance of the claim. Nevertheless, this approach does place the principal burden on the applicant in a defendant’s application to demonstrate a negative.

Buxton L.J. took a similar two-stage approach, beginning with the adequacy of the pleading⁸⁰ before considering the substance of the claim, but again placing the burden of proving the negative on the defendant. He concluded that, as the evidence available was limited “it would have to be a clearer case . . . before in these circumstances it is possible to say *before trial* (author’s emphasis) that 24(2)(a)(i) is fulfilled”. Thus Buxton L.J. clearly considered that the claimant’s inability to prove its case on paper evidence at an interlocutory hearing was a failure to satisfy the burden of proof under the first limb of the rule. An alternative view would, however, have been to regard the need for further evidence as an “other reason” justifying the case to go to trial within the proviso of r. 24.2(b).

As paragraph 4.2 made no reference to the second limb of the rule, however it is difficult to assess the significance of this aspect of the decision in terms of whether the burden is on the applicant to establish that there is no “other reason” or on the respondent to prove that there is. We will return to this issue below.

*Swain v. Hillman*⁸¹ was the second, and the more significant, Court of Appeal decision⁸² this time unarguably after the alteration of the practice direction. Lord

⁷⁷ *A & D Maintenance and Construction Limited v. Pagehurst Construction Services Limited*, 23 June 1999, T.C.C., reported by Lawtel (Document C7100260).

⁷⁸ *Taylor and others v. Midland Bank Trust Co Limited and others*, 21 July 1999, C.A., reported by Butterworths Direct and Lawtel (Document C7200123).

⁷⁹ *Agency Press Limited (trading as Sold Out) v. Cohen*, 29 June 1999, C.A., reported by Lawtel (Document C8400472) although decided within the period under consideration was an appeal from a decision made in 1998 under RSC Ord. 14.

⁸⁰ He asked “[c]an the basis of the plaintiff’s claim as set out in the pleading be shown to be so mistaken that it will be impossible to rely on it at the trial?”

⁸¹ 21 October 1999, C.A., *The Times* 4 November 1999, otherwise reported by Butterworths Direct and Lawtel (Document C8001279). The approach adopted here was expressly applied in *Glaxo Group Limited and another v. Dowelhurst Limited*, *supra*, n. 73. Again there appears to be some potential confusion caused by the use of the expression “triable issue” as shorthand for the test under the CPR.

⁸² A number of other summary judgment cases did in fact come before the Court of Appeal in the period but are omitted from this discussion as being appeals from decisions undeniably under RSC Ord. 14 and consequently as shedding no light on the subject under discussion.

Woolf, considering *Taylor*, exerted control over the standard demanded by the substantive criteria. As we have seen, he held that the test was of a “realistic” as opposed to “fanciful” prospect of success. He also acknowledged the limitations of summary process and held that there were issues in the case which needed to be investigated at a trial. As we have seen, this test was subsequently applied in *Glaxo*. However, although Lord Woolf in *Swain* discussed the amendment of the practice direction, he made no comment on the fact that the amendment had deprived practitioners of any explicit allocation of the burden of proof. Later, in *French Connection*, however, the burden was clearly stated, in a claimant’s application and after the amendment of the practice direction, to be on the claimant to demonstrate that the defendant had no real prospect of defence. The writer has been able to locate no similar statement in respect of a defendant’s application apart from the *dicta* of Buxton L.J. in *Taylor* to the effect that the burden is on the defendant.

If one acknowledges that the burden of proof in interlocutory applications is normally on the applicant then this is consistent with the normal state of things. Since, however, the summary judgment application does to some extent rehearse the issues for trial, which might cause it to be considered an exception to general approach, it is submitted that, adopting Ward L.J.’s view as expressed in *Day* as to the comparative simplicity involved in requiring a party to prove a negative in these circumstances, this is an appropriate approach. Indeed, as we will see below, Lord Woolf’s view, expressed in *Swain*, was that the application should be anything but a mini-trial.

In respect of the proviso,⁸³ further discussion is necessary. There is a certain attractiveness in suggesting that it should be for the party with the weak case to justify, in accordance with the overriding objective, why that admittedly weak case should be permitted to use court resources in proceeding to trial. As has already been suggested, however, that might depend on the nature of the proviso: we have already seen in *Taylor* one instance of circumstances that would have constituted an RSC Ord. 14 “other reason” apparently being treated as a failure to satisfy the substantive burden of proof on the merits of the application.

THE LIMITATIONS OF SUMMARY PROCESS AND SOME “OTHER REASON” FOR TRIAL

The courts (including the Court of Appeal in *Taylor* and in *Swain*) were quick to acknowledge that there were limitations in the nature of summary process and the fact that some issues that cannot be adequately resolved outside the full trial mechanism. What is more difficult to establish is whether such limitations (when they are operative) are to result in the applicant being regarded as having failed to prove the grounds for his application under r. 24.2 (a), or whether they are to constitute an “other reason” justifying a full trial under r. 24.2 (b). Allied to this uncertainty is the question of allocation of the burden of proof. Is it for the applicant to prove positively that the case can be dealt with at an interlocutory basis or is it for the defendant to prove that it cannot?

The CPR r. 24.2(b) proviso was first considered in *Gray v. Gray and others*⁸⁴ in which Nicholas Warren QC, sitting as a Deputy High Court Judge, referred to the need to cross-examine witnesses at trial. He said that “[t]here is nothing which would justify

⁸³ The burden of establishing the proviso was placed on the defendant in a claimant’s application in *A & D Maintenance*, discussed further on this point below.

⁸⁴ *Supra*, n. 49.

me in rejecting the evidence of Mr Yerbury and Mr Cornberg. Their evidence together with that of Wade and Young is something which must be tested in cross examination at trial”.

Subsequently, in *A & D Maintenance*⁸⁵ the Technology and Construction Court came very close to having to consider the position of the “bona fide counterclaim” which under previous practice,⁸⁶ disqualified the plaintiff from obtaining summary judgment. Might a counterclaim (specifically a counterclaim which did not constitute a set-off and therefore a substantive defence) constitute “some other reason”?⁸⁷ Or would the application of the proviso in practice be confined to such rare matters as cases of public interest (the Woolf “other reason”)?

The claimant had sought to enforce an adjudication award by summary judgment. The defendant had claimed that the dispute did not fall within the adjudication jurisdiction and that the existence of substantial claims in other litigation (not a set-off but equally not a counterclaim) constituted a reason under CPR r. 24.2(b) why the case should go to trial. It was held that although the claimant had discharged its burden of showing the defendant had no real prospect of success,⁸⁸ the defendant had not discharged its burden of showing “some other reason” to go to trial. Here, therefore we find a judge at least contemplating the idea that something analogous to a counterclaim might fall within the proviso; *i.e.* that the proviso might apply to matters other than the Woolf “other reason”.

In *Project Consultancy*⁸⁹ where the claimant applied (unsuccessfully) under Part 24 to enforce the decision of an adjudicator (who had no jurisdiction to make the initial award if the defendants’ submission as to the date of the underlying contract was accepted) Dyson J. considered the limitations of summary process more explicitly. He said that “. . .it is at least arguable⁹⁰ that no contract was concluded on 10 July, and that no contract was ever concluded between the parties. . . I am quite satisfied that it is not possible to resolve these issues by summary process, and without full evidence and argument.”

This is a clear indication that an application can fail if the issue involved is not susceptible of resolution on an interlocutory basis. There are, it is submitted, two possible analyses of the above quotations. These are;

- (i) that the defendant’s case was no more than “arguable” and therefore in principle had no real prospect of success, but that the limitations of summary process demanded that the question should be resolved at trial (*i.e.* an application of the proviso when judgment would otherwise have been given); or
- (ii) that the defendant’s case was, in a looser sense, “arguable” and had some real prospect of success but that in any event the issues were unsuitable for summary process (*i.e.* that the claimant had failed to satisfy its burden of proof of showing on the papers that the defendant had no real prospect of success).

It is fair to say that the tone of the judgment favours the latter analysis.

Further reference to this issue, although *obiter*, can be found in *Artistic Upholstery*⁹¹

⁸⁵ *Supra*, n. 77.

⁸⁶ *Supreme Court Practice, 1999* at n. 14/4/14.

⁸⁷ See also *Hofer v. Strawson* above on the setting aside of a statutory demand because of the existence of a counterclaim.

⁸⁸ Not on this occasion, as it would be later in *Taylor*, treated as a simple matter of pleading.

⁸⁹ *Project Consultancy Group v. Trustees of the Gray Trust, supra*, n. 64.

⁹⁰ See above for a reservation as to whether a case that could only be described as “arguable” should, all other things being equal, have been allowed to survive the new Part 24 test.

⁹¹ *Artistic Upholstery Limited v. Art Forma (Furniture) Limited, Ch. D., supra*, n. 65.

where a subsidiary issue on which the claimant sought summary judgment was related to an allegation of bad faith and Lawrence Collins QC, sitting as a Deputy High Court Judge, commented that “. . . I am not convinced that the factual and legal issues associated with this aspect of the case are suitable for summary determination”.

A clearer indication as to this aspect of the workings of the rule may perhaps be found in *Milner Neocal*.⁹² This case involved an unsuccessful defendant’s application in considering which the court expressly followed *Hall v. Bank of England*, whilst ignoring the practice direction (which was about to be amended). The court concluded that there was a real prospect that either side might succeed. The court could not be confident that it knew what was going to happen at trial and considered that the “factual analysis” involved in assessing the issues would be appropriate only for trial. The court seems therefore to have considered the issue of the “real prospect of success” (under r. 24.2 (a)) separately from the question whether the issues could be resolved other than by a full trial. This might, then, suggest that the need for complex factual analysis is a CPR r. 24.2 (b) “other reason”.

It is perhaps unfortunate that, in taking control of the Part 24 mechanism in *Swain*, where Lord Woolf himself recognised that certain issues were only suitable for trial that he did not also provide guidance on the application of the proviso in CPR r. 24.2(b). We do, however, already have Lord Woolf’s views, which the writer has defined above as the “Woolf ‘other reason’”. Since His Lordship in *Swain*, had adopted the language of the Court of Appeal Practice Direction to define the substantive criteria it might fairly be inferred that he would endorse the approach explicitly taken in that practice direction to its own proviso, which applies only to matters of public interest. In fact, of course, the proviso was not discussed in *Swain* because it had no application to those circumstances.

Significant as the approach in *Swain* may be in this context, *Price v. Lloyd’s*⁹³ is one of the final cases in this context within the period under consideration. Here, in a case involving a counterclaim, both parties made applications under Part 24 in respect of both main claim and counterclaim. The judge considered that “I am entirely unpersuaded that there is any prima facie case. . . for these reasons this ground of claim has no real prospect of success” and ultimately that the claimants’ allegations were “misconceived and have no real prospect of success”. He stated categorically that even if any of the claimants’ claims had been “sustainable” that would not be a ground for granting a stay of execution on the counterclaim because on the facts the relevant contract precluded it. The court therefore raised the possibility that the mere existence of a counterclaim could prevent or in some other way suspend the operation of Part 24. The position is necessarily clearer when the counterclaim is a set off: *SIF v. Paul*.⁹⁴

Consequently, although the analytical basis of the argument is unclear, as is the allocation of the burden of proof in respect of the proviso, one can at least provisionally conclude that;

- (i) complex factual and/or evidential matters may preclude the resolution of an issue under Part 24, especially where the respondent’s case appears to have some prospect of success;

⁹² *Milner Neocal Limited v. Ellen Milner (as executrix of Jeremiah Milner, deceased)* 10 September 1999, Ch. D., Patents Court, reported by Lawtel (Document C8300110).

⁹³ *Price and another v. Society of Lloyd’s*, 22 October 1999, Q.B.D., Commercial Court, reported by Butterworths Direct.

⁹⁴ *Supra*, n. 72.

(ii) courts may be prepared to consider argument that matters other than the Woolf “other reason” may fall within the proviso; and

(iii) it is not impossible that the existence of a counterclaim might serve to displace a Part 24 judgment. A real prospect of success in a claim of set-off (which is, of course, a defence to the claim) does displace the judgment.

CONCLUSIONS

The Substantive Criteria

The effect of the wording of the practice direction has clearly and inevitably muddied the waters, particularly to the extent that it has led to issues being considered, in part at least, as a matter of form rather than substance. Ultimately, however, the effect is that cases prior to the amendment of the practice direction cannot be relied on, even on a persuasive basis, with any degree of confidence. For the same reason it is not yet possible to say whether there is any difference in approach between claimant’s and defendant’s applications; one has to compensate for the difference in approach enshrined in the first version of the practice direction. It may also be the case that summary judgment is so much a part of the claimant’s established armoury that claimants will almost inevitably consider making such an application whilst the defendant’s application, being new, has yet to be fully exploited as anything other than as backup to the more familiar application to strike out, now appearing in CPR r. 3.4. Nevertheless what appears to be the persistence of terminology specific to the old rules does not assist the analysis.

However, the degree of probability of success on the merits necessary to avoid summary judgment (the “X%” value in our initial equation) was perhaps most reliably, since the amendment of the practice direction, described by Lord Woolf in *Swain* in identical words to those of the Court of Appeal practice direction (shortly to become Practice Direction 52). A case that can be struck out under CPR r. 3.4 will clearly not survive. A “real prospect of success” should not, it is suggested, be casually regarded as identical to the previous “arguable case”, especially as there is persistent judicial comment that the new test is easier for the applicant to satisfy. The degree of probability of success on the merits which, although sufficient to avoid summary judgment, will result in a conditional order (the “Y%” value in our equation) is, on the basis that conditional orders were made in only two of the cases under discussion, very difficult to define. Clearly it operates at the lower end of the scale of cases good enough to survive the application, the question is, as we have seen, whether a conditional order case would, under the old law, have escaped an order for conditional leave to defend.

The Burden of Proof

Again, the debate surrounding the effect of the practice direction has rendered clear analysis difficult. It is suggested that the substantive burden rests most happily on the applicant and the burden of the proviso on the respondent.

“Other Reasons”

The courts are prepared to prevent the hearing becoming a mini-trial or a substitute for full trial and it is clearly possible to prevent summary disposal of a case where there are matters requiring cross-examination or complex factual analysis. This does, however, seem to be operated by the courts more as a product of their approach to the

allocation of the burden of proof than to the Part 24 proviso. Who bears the burden of proving that the case is or is not suitable for summary process is not yet clear; nor is the nature of the “other reasons” capable of making a case unsuitable for summary disposal. Nevertheless it seems to be the case that the prudent practitioner should be prepared, as he or she always was, to deal with the suggestion that the case is too complex to deal with on a summary basis and or that the issues can only properly be resolved by oral evidence at a full trial. Whilst none of the cases under discussion raised matters of “public interest” it is clearly right that such cases should be permitted to proceed to trial. Even if, as seems to be the case, the courts do not wish to use the mechanism as a substitute for trial there may, of course, be circumstances – such as those which used to fall under the provisions of RSC Ord. 14A – where treating the application as if it were a trial of the substantive issues would not be wholly objectionable. In questions, for example, of interpretation, the difference between the way in which the matter can be handled on an interim basis and the way in which it would be handled at a full trial will be negligible.

Whilst it is only to be expected that the courts will wish to retain a general discretion to deal with applications on the merits of individual cases, this is an area which will need further monitoring. It is to be hoped at least that in the near future some consistency of terminology will be adopted and that further guidance will be received, ideally from the Court of Appeal, on the nature and application of the CPR r. 24.2(b) proviso.