

PRACTICE DIRECTION 14.5

APPLICATION FOR WASTED COSTS ORDER UNDER ORDER 62 RULE 8

1. The Court of Final Appeal in *Ma So So Josephine v Chin Yuk Lun Francis and Chan Mee Yee* [2004] 3 HKLRD 294, has given guidance on applications for wasted costs orders under O 62 r 8. This practice direction addresses certain procedural aspects of such applications. It applies to all civil proceedings in the High Court and District Court.

When the application is usually made

2. While the court has power to make wasted costs orders at any time, an application should usually only be made and dealt with after the relevant proceedings have concluded. This is to avoid disruption of those proceedings and, in relation to an application against an opposite party's solicitor, to avoid any risk of it being used as a means of intimidation.

To whom it is made

3. The application should be heard by the judge who dealt with the proceedings unless there are exceptional circumstances which render this inappropriate; for example where apparent bias is established. Where the trial judge is disqualified, in exercising its discretion whether the application should proceed further before another judge, the court would have to take into account the likely increased costs as the judge will be starting afresh without any knowledge of the proceedings.

General approach to procedural questions

4. The jurisdiction is intended only for clear cases, that is, cases where there is *prima facie* liability unless the charge is answered. This fact, together with the fact that the application is usually made at the conclusion of the proceedings before the judge who tried the matter,

enables a summary procedure to be adopted. The facts will in most cases already be within the judge's knowledge because the relevant events took place in court or will be facts that can readily be ascertained.

5. The court must decide the appropriate procedure to be followed to meet the requirements of procedural fairness in the individual case. However, the need for a simple, summary and fair procedure must always be borne in mind. It would defeat the purpose of the jurisdiction, which is to compensate for wasted costs, if such proceedings were allowed to become themselves an elaborate and costly form of satellite litigation.
6. Procedural issues arise at three stages: (i) when the O 62 r 8 summons is issued; (ii) at the first stage hearing when the court decides whether the proceedings should proceed further; and (iii) at the full substantive hearing.

The summons

7. The application is commenced by an inter partes summons in the proceedings in which wasted costs are alleged to have been incurred. It is served by the applicant on the solicitor against whom an order is sought. Other parties to those proceedings do not need to be joined unless there is some particular reason for joining them.
8. The summons, which seeks an order that the solicitor show cause under O 62 r 8, should be accompanied by particulars clearly identifying the conduct of the solicitor complained of and stating what wasted costs are alleged to have been caused by that conduct and are being claimed by the applicant.
9. The less clear the complaint is and/or the more complicated and wide-ranging the particulars are, the less likely it will be that the court would be prepared to allow the matter to proceed under O 62 r 8.

10. The applicant's affidavit should generally be confined to verifying the facts alleged in the particulars. But if any further evidence is required, for example, to exhibit a document which was not before the court and which is crucial to the application, it should be exhibited or referred to in the affidavit. The solicitor is under no obligation to file any evidence but is free to do so if it is desired to place some important item of evidence before the court for the purposes of its first stage decision.
11. Since the particulars and any affidavit should make the case against the solicitor clear, there usually should be no need for any preliminary directions hearing before the first stage hearing. If the complaint is unclear or plainly unsustainable, objection can be taken or directions sought at the first stage hearing itself.

At the first stage hearing

12. At the first stage hearing, the court decides whether the matter should be allowed to proceed further. The court will only allow it to proceed if satisfied:
 - (a) that it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made; and
 - (b) the wasted costs proceedings are justified notwithstanding the likely costs involved.
13. Both parties are given an opportunity to be heard at this hearing, but submissions should be short and to the point, bearing in mind the judge's familiarity with the matter and the papers instituting the application. It would be helpful for both parties to indicate to the court the extent of any genuine factual or legal disputes.
14. If the judge decides that wasted costs proceedings are justified, directions to ensure that the solicitor is afforded a reasonable opportunity to show cause why a wasted costs order should not be

made will be considered. The solicitor should come to the hearing prepared to apply for any desired directions, eg, to be allowed to give evidence or to recall witnesses who gave evidence in the relevant matter or to make reference to particular documents, etc. Pleadings and discovery would not generally be appropriate as part of the summary procedure.

15. The judge will consider the extent to which the evidence and his findings in the matter in question are relevant and can fairly be used for the purposes of the O 62 r 8 proceedings.

The full hearing

16. The jurisdiction is discretionary and, after hearing the applicant and the solicitor and taking into account relevant materials before the court, the judge will decide whether he ought to exercise his discretion in favour of making an order. If he decides to make an order, he will consider how much of the wasted costs are the responsibility of the solicitor, specifying the extent of the costs recoverable in the award.
17. The costs of the wasted costs hearing itself are also discretionary. Where an order is made such costs would normally be payable by the solicitor on a party and party basis. However, account should be taken of any conduct on the part of the solicitor or the applicant which may indicate that a different order should be made.
18. This practice direction comes into effect on 1 March 2005.

Dated this 23rd day of February 2005.

Andrew Li

(Andrew Li)
Chief Justice