

Editor's note:

ESSAR Insurance Services Limited, Managers of the Professional Indemnity Scheme, in collaboration with Panel Solicitors Dentons Hong Kong LLP, issue this quarterly bulletin to highlight risk management issues learned from their handling of claims.

Wasted costs orders against solicitors

Wasted costs orders are often made as a result of procedural mistakes which delay proceedings (e.g. missing deadlines, forgetting to serve on the other side, forgetting to seek leave of court), so it is important that solicitors are vigilant about deadlines, correspondence and disclosure and that they check clients are properly authorised to give instructions to the solicitor. Solicitors should be aware of the fact that they can still be liable for wasted costs, even if they have since come off the record, in respect of conduct which took place while they were still on the record.

Given the seriousness of the allegation, solicitors are reminded to give detailed consideration to the hurdles that need to be overcome before making a wasted costs application, noting the potential issues relating to privilege and that the applicant will be required to particularise the solicitor's misconduct in its application and identify any evidence or other materials to support the application. The applicant should bear in mind the costs consequences if the application is not successful.

The legal principles on wasted costs

The relevant legal principles are set out in Section 52A of the High Court Ordinance (Cap.4)¹ (“HCO”) and Order 62, Rule 8 of the Rules of the High Court (Cap. 4A)² (“RHC”). Procedural guidance is set out in Practice Direction 14.5 (“PD 14.5”). Where a solicitor³ has ‘wasted’ costs in proceedings as a result of an improper or unreasonable act or omission, unreasonable delay or any other misconduct or default⁴, the Court has a discretion to make an order against the solicitor to shoulder all or part of such ‘wasted’ costs.⁵ The Court may either exercise this jurisdiction on its own motion or on an application by a party. The order may disallow a solicitor from seeking payment of the wasted legal costs from their client or require the solicitor to indemnify their client's costs or other parties' costs.⁶

Examples of where a wasted costs order have been made

For the Court to make an order for wasted costs against a solicitor, the misconduct on the part of the solicitor must be sufficiently serious; it must be more serious than mere

¹ Also see Section 53 of the District Court Ordinance (Cap.336) (“DCO”).

² Also see Order 62, Rule 8 of the Rules of the District Court (Cap. 336H) (“RDC”).

³ This also applies to barristers and to any solicitors acting through their employees or agents (including clerks) (Civil Justice Reform Report 2006).

⁴ ‘Wasted Costs’ are defined in Section 52A(6) of the HCO and Section 53(5) of the DCO.

⁵ Section 52A(4) HCO and Section 53(3) of DCO.

⁶ RHC and DHC Order 62, Rule 8(2).

negligence⁷, but less serious than the requirements to suspend a solicitor from practice⁸. However, negligence may be enough if the Court finds the solicitor has also shown “*gross naivety*” and a “*cavalier attitude*” towards his duty of care to the client.⁹ Conduct that has been found to lead to a wasted costs order includes:

- defending or starting proceedings without authority from the client – even if the solicitor has been deceived into acting¹⁰;
- ignoring correspondence from the opponent for a significant amount of time (e.g. 7 months), with no justifiable reason¹¹;
- forgetting to check an expert or witness’ availability for a hearing¹²;
- inexcusable and inordinate delay. However, missing a deadline may not always justify wasted costs (e.g. when the deadline for notice of appeal had been reduced to 28 days, a solicitor had not acted unreasonably in assuming the previous deadline applied¹³);
- unreasonable omission (e.g. failing to disclose important documents or failing to fully disclose which assets were encumbered)¹⁴;
- failing to provide counsel with proper documentation to enable them to assess the strength of the case;
- wrongfully disclosing documents in discovery (in this case privileged documents without the client’s consent)¹⁵;
- failure to inform the other side of a withdrawn application;
- pursuing proceedings in the improper forum (in this case the High Court, when it should have been the District Court)¹⁶; and
- continuing with a claim when it was obvious, after discovery, that the client would be unable to establish his case. Pursuing a hopeless case which is doomed to fail is not sufficient to grant a wasted costs order, but it would be if the solicitor knew the case was dishonest or that it was an abuse of process (e.g. it was solely used as a delay tactic, or as a means of pressuring the other side to settle for a lower amount).¹⁷

Defending a wasted costs application

Wasted costs orders will only be made in “*reasonably plain and obvious cases*”, bearing in mind the need for solicitors to practise without fear of personal liability, whilst still ensuring litigants are not financially prejudiced by unjustifiable litigation conduct of the

⁷ Note that the English equivalent (CPR Practice Direction 46, paragraph 5.5) includes negligence, but the HK judiciary did not decide to follow suit (Civil Justice Reform Report 2006).

⁸ *KB Chau & Co (a firm) v China Finance Trust and Investment Corp* [1996] 1 HKC 420.

⁹ *KB Chau & Co (a firm) v China Finance Trust and Investment Corp* [1996] 1 HKC 420.

¹⁰ *Grand Field Group Holdings Ltd v Tsang Wai Lun & Ors* [2010] 4 HKLRD 487.

¹¹ *Lo King Hung v Eternal Richest Ltd* [2021] 6 HKC 537.

¹² *Limbu Netra Kumar v Yau Lee Construction Co Ltd & Anor* [2006] HKCU 1241.

¹³ *Chung Fai Engineering Co v Maxwell Engineering Co Ltd* [2001] 3 HKC 24.

¹⁴ *Yau Chiu Wan v Gold Chief Investment Ltd & Anor (No 2)* [2003] 3 HKC 91.

¹⁵ *Lam Rogerio Sou Fung v Ku Ling Yu John, t/a Messrs John Ku and Co* [2009] HKCU 2110, but note that the order was then appealed and set aside on the basis that the Master had acted outside of the jurisdiction of Order 62, Rule 8 by conducting a full hearing of the facts (*Lam Rogerio Sou Fung v Ku Ling Yu John T/A Messrs John Ku & Co* [2011] 5 HKC 205).

¹⁶ *Que Jocelyn Co (t/a Scented Delights) v Broadair Express Ltd* [1999] 4 HKC 381.

¹⁷ *Chiu Sui Ching, the administrator of the estate of Leung Ho Tin, deceased v Cheng Kwai Hung t/a Hang Nagi Works & Ors* [2023] HKCFI 1417.

opponent’s solicitors.¹⁸ The Court will consider whether it is just in all the circumstances to order the solicitor to compensate the party for its costs or to disallow costs.¹⁹ The overarching principles in this determination are causation and proportionality. The Court must consider: would the delay and/or costs have occurred anyway? And would the costs of litigating a wasted costs application surpass the actual amount of costs sought? If the answer is yes to either of those questions, a wasted costs order will not be appropriate.

Privilege is an important defence that may be available in some circumstances. In a wasted costs application made by a client against their solicitor, a waiver of legal professional privilege in relation to all relevant matters will be implied by law. However, where an order is sought by a party against an opposing party’s solicitor, the position is fundamentally different since the opposing party (i.e. the client) might be unwilling to waive the privilege. The Court will take into account the fact that solicitors will have their hands tied when defending themselves. The Court will need to be “*satisfied that there is nothing the practitioner could say, if unconstrained, to resist the order*” and “*that it is in all the circumstances fair to make the order.*”²⁰

¹⁸ *Chiu Sui Ching, the administrator of the estate of Leung Ho Tin, deceased v Cheng Kwai Hung t/a Hang Nagi Works & Ors* [2023] HKCFI 1417, [39].

¹⁹ RHC and DHC Order 62, Rule 8(1).

²⁰ Civil Justice Reform Final Report 2006.