

Wasted costs applications on the rise?

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We have seen an increase in wasted costs applications against solicitors; whether this is a result of the pandemic or not it is difficult to say. However, it is easy to see how the disruption of a move to working from home and furloughed staff can lead to errors in litigation or conduct that might then result in a wasted costs application, especially when parties to the litigation are in a difficult financial position themselves.

What is a wasted costs application?

It is an application against a legal representative whose conduct in proceedings has been shown to be “improper, unreasonable or negligent” to “show cause” why they should not be responsible for the costs incurred as a result of that conduct.

The jurisdiction to award costs to be paid personally by a legal representative is conferred by s51(6) of the Senior Court Act 1981. The procedure is now enshrined in the Practice Direction to CPR Part 46. Paragraph 5.7 states that as a general rule the court will consider whether to make a wasted costs order in 2 stages:

(a) at the first stage the court must be satisfied—

(i) 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

(ii) the wasted costs proceedings are justified notwithstanding the likely costs involved;

(b) at the second stage, the court will consider, after giving the legal representative an opportunity to make representations in writing or at a hearing, whether it is appropriate to make a wasted costs order in accordance with paragraph 5.5 above.

Ridehalgh v Horsefield

The leading authority is the Court of Appeal decision in Ridehalgh v Horsefield [1994] Ch 205.

Wasted costs applications are for allegations of a summary nature. This means that wasted costs orders should be limited to issues that can be dealt with summarily, such as failures to appear or conduct which leads to an otherwise avoidable step in the proceedings.

An example of a recent decision is that of Razaq v Iqbal & Ors [2019] EWHC 3924 (QB). D sought a wasted costs order against their solicitors, C, for failing to pass on a “drop hands” settlement offer to the claimant. The application was refused on the basis that D had not established that the claimant would have accepted the offer even had it been made.

It is also important to bear in mind in making a wasted costs application that the respondent legal representatives are likely to be bound by their client’s privilege. This will entitle the legal representative to be given the benefit of the doubt as to the basis of their instructions.

They are not easy applications to succeed with and we have successfully defended a number of these applications on behalf of our solicitor clients with assistance from the insurers. They are ordinarily covered by professional indemnity insurance as an application would amount to a ‘Claim’ and civil liability arising from private legal practice in connection with the firm’s practice.

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