

Dealing a double blow

Michael Dimas makes the case for simultaneous applications for summary judgment and strike out



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An application might be considered where the statements of case are an abuse of the court's process

Summary judgment is a well-known procedure intended to quickly and efficiently determine an entire claim or an issue in dispute in appropriate circumstances.

Strike out is a procedure whereby a party in litigation can apply to strike out an opponent's statements of case, either in part or in their entirety.

It can be advantageous for a litigant to make a simultaneous application for summary judgment and strike out. There are important practical points to consider when making an application for both forms of relief in a claim for damages.

A court may give summary judgment against a party in respect of the entire proceedings, or on a particular issue if the party has no real prospect of succeeding in or defending the claim and there is no other compelling reason why the case or issue should be disposed of at trial.

A court can exercise its case management powers under Civil Procedure Rule (CPR) 3.4 to strike out part or all of a party's statements of case on the grounds set out in CPR 3.4(2).

Generally speaking, an application for summary judgment/strike out should be considered in situations where the opponent's statements of case do not disclose any reasonable grounds for a claim or defence; and proceeding to trial is unlikely to produce evidence which will help the court or the parties resolve the issues in dispute.

For example, the procedure may be appropriate where a party to a settlement agreement commences or resumes a claim which was compromised by the that agreement. Alternatively, an application for summary judgment/strike out might be considered where the

statements of case are an abuse of the court's process or are otherwise likely to obstruct the just disposal of the proceedings.

APPLICATION

The application papers and procedure must comply with CPR 23. The application notice should seek summary judgment with an order for strike out in the alternative (or vice versa). This should be supported by a witness statement which states the grounds upon which the applicant is seeking summary judgment/strike out, together with an explanation as to their connection to the application.

The applicant's solicitor should reflect on the content and length of the witness statement. If the statement is long and consists mainly of pleadings-style arguments, it is unlikely to add value to the applicant's case. It also risks creating the impression that there are factual and or legal issues which are better resolved at trial, which could potentially jeopardise the application.

Particular consideration should be given as to whether any submissions which the applicant and or their solicitor may wish to make in the witness statement can instead be made in a skeleton argument for the hearing, or in oral submissions at the hearing itself.

It is also worth considering whether to seek a conditional order under practice direction (PD) 24 paragraphs 4 to 5.2 as part of the relief sought for the summary judgment element of the application. These provisions allow the court to make a conditional order which can require the respondent to pay a sum of money into court or take a specified step in relation to the proceedings (such as file an amended particulars of claim or defence), backed up by an unless order. Such a conditional order could

be particularly useful where the applicant is dealing with a litigant in person.

If the applicant is the defendant, care should be exercised to ensure the application does not put the defendant at risk of default judgment. Although CPR 12.3(3) prevents the claimant from obtaining default judgment if an application for summary judgment/strike out is outstanding, the defendant must still file a defence within the usual timeframe.

In that situation, the applicant can either submit its defence (and any potential counterclaim) at the same time as, or before, making the application; or it can ask the court to retrospectively extend the time to file and serve the defence (and any potential counterclaim) if the application is unsuccessful. The latter approach could save the applicant the cost of preparing a defence if the application is successful – but the court does not have to grant the extension.

The application notice should also ask the court to make a costs order against the respondent in the event the application for summary judgment/strike out is successful.

TIMING

The application should be filed and served together with, or before filing, the directions questionnaire (PD26 paragraph 5.3). The appropriate stage at which the application is actually filed and served will depend on whether the applicant is the claimant or defendant.

If the applicant is the claimant, they may wish to wait for the parties to file and serve all of their statements of case before submitting the application, notwithstanding the fact that the claimant may believe they have a robust claim. This is because a statement of case may reveal

a weakness in the claim or raise a factual and or legal issue which makes summary judgment/strike out inappropriate.

If the applicant is the defendant, it may be prudent to submit an application for summary judgment/strike out before its defence is due. This approach could save the cost of preparing the defence, which may be unnecessary if the application is successful.

The defendant will have to consider this approach carefully. In particular, the risk that if the application is unsuccessful, the claimant could request default judgment if a defence has not been filed in time.

The respondent to an application for summary judgment/strike out may apply to amend its statements of case to remedy the cause of the application. Their application will be subject to the usual rules governing such applications. The new factual and or legal issues raised by the respondent's application may be sufficient to derail the summary judgment/strike out application, regardless of its potential merits, on the basis that the amended statements of case may raise new factual and or legal issues which require a trial to resolve.

Such competing applications will be decided in the order in which they were filed and served. Although the application will be determined first, the reality may be that a judge will grant the respondent permission to amend their statements of case.

Given the risk involved, the applicant may wish to consider submitting a costs protective proposal to the respondent to withdraw its application and consent to the requested amendments to the respondent's statements of case, provided the respondent pays the applicant's costs. ^{SJ}



It may be prudent for a defendant to submit an application for summary judgment/strike out before its defence is due

