Strike outs: how to win, when to apply (and when not to!)

foneill@1chancerylane.com
hsoede@1chancerylane.com

10 March 2021

STRIKE OUT – HOW TO WIN, WHEN TO APPLY, (AND WHEN NOT TO!)

- What is it?
- Rules and Procedure
- How to win
- How to defend
- Late service of the Particulars of Claim
- Late service of the Claim Form
- Case law update
- Questions

INTRODUCTION
Court's case management powers: CPR 3.4(2)

The power to strike out is contained in the court's general powers to manage cases – specifically, CPR 3.4(2), which provides:-

(2) The court may strike out a statement of case if it appears to the court—

a) *that the statement of case discloses no reasonable grounds for bringing or defending the claim;*

b) *that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or*

c) *that there has been a failure to comply with a rule, practice direction or court order.*

Note - CPR 3.4(2) does not limit any other power of the court to strike out a statement of case (e.g., automatic strike out for non-compliance with an order). (CPR 3.4(5)).

Court's case management powers: CPR 24.2

IF YOU ARE APPLYING FOR STRIKE OUT, ALWAYS CONSIDER WHETHER ALSO APPROPRIATE TO APPLY FOR SUMMARY JUDGMENT.

The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—

(a) it considers that—

(i) the claimant has no real prospect of succeeding on the claim or issue; or

(ii) the defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.

Although a different test applies, the outcome is similar – a complete determination of the claim without expending further time or cost. Therefore very much worth including -- making any application for strike out with summary judgment in the alternative.

- Strike out is the most draconian action that a court can take in relation to a claim.
- **If a claim is struck out, it ceases to exist.**
- It is therefore a powerful weapon in the arsenal of the court and should be deployed judiciously.
- If you apply for strike out without proper grounds, you will lose and usually be penalized in costs.

Strike out in detail - procedure

Timing – CPR 3APD5.1 requires *"all applications to be made as soon as possible and before allocation if possible"*.

Evidence – many applications can be made w/o evidence but applicant should consider whether facts need to be proved and, if so, whether evidence in support should be filed. In my view, always provide a supportive witness statement with a chronology, brief factual background, and explain why it is in the interests of justice to strike out.

Costs – where a statement of case has been struck out the court may make "any consequential order it considers appropriate".

NO REASONABLE GROUNDS FOR BRINGING/DEFENDING THE CLAIM CPR 3.4(2)(a)

CPR 3.4(2)(a) – the statement of case discloses no reasonable grounds for bringing or defending the claim.

Overview:-

- CPR 3APD1.4 and CPR 3APD1.5 – see examples.
- Claim must be bound to fail: *Hughes v Colin Richards & Co* [2004] EWCA Civ 266.
- Defective pleadings and amendments: *Soo Kim v Toug* [2011] EWHC 1781 (QB).
- Note – no clear dividing line between CPR 3.4(2)(a) and (b), as a statement of case that discloses no reasonable grounds is likely to be an abuse of process.

ABUSE OF PROCESS
CPR 3.4(2)(b)

CPR 3.4(2)(b) – the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings.

Overview:-

• Main categories of cases: a) vexatious proceedings; b) res judicata; c) collateral attacks on earlier decisions; d) pointless and wasteful litigation; e) improper collateral purpose.

An example **at CPR r1.4.15:**

The avoidance of a multiplicity of proceedings is also enhanced by the court's powers to strike out proceedings as an abuse of process in circumstances where the issues sought to be raised might have been dealt with in earlier proceedings. The principal authority on this power is Johnson v Gore Wood & Co ***(No.1) [2002] 2 A.C. 1, HL (in the Court of Appeal proceedings in this case, Ward LJ explained that*** "Henderson v Henderson ***abuse of process" as now understood had become "an increasingly prominent weapon in the arsenal of court control".***

DEFAULTING ON A COURT ORDER
CPR 3.4(2)(c)

CPR 3.4(2)(c) – where there has been a failure to comply with a rule, practice direction or court order.

Overview:-

Most common grounds for application for strike out. But *be careful*, just one small slip is not going to be enough, and if you apply for strike out in those circumstances, you are likely to be sent away from the court with a flea in your ear and an adverse costs order.

THINK: would an application for relief from sanction be effective in these circumstances. If you don't think there's a chance a court would not grant relief, do not apply to strike out. Exceptions are usually to do with service of proceedings – of which, more, later.

HOW TO WIN

- Strike out can have more than the purpose for which is it intended:
- You may apply for strike out in order to force a party to clarify their case, to force compliance with directions orders, especially where the other side of your case is a litigant in person.
- This is why you should always provide a draft order with your application that has an alternative position: unless orders.
- Unless orders are a last chance saloon, and you will want to qualify any order made therein with “failure to comply will result in the claim being struck out without further order”
- This way, you force compliance with the rules and (usually) get your costs from the other side too

HOW TO WIN
Practical tips

Remember to always couch your applications in terms of the overriding objective –

CPR 1.2
(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—
(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate—
(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
(f) enforcing compliance with rules, practice directions and orders.

HOW TO WIN
Practical tips

Of course, we most commonly see Defendants apply to strike out claims where there has been a series of defaults/failures to comply with court orders/conduct that would lead to a strike out in order to remove a Claimant's QOCS protection.

Exceptions to qualified one-way costs shifting where permission not required

44.15(1) Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that—
(a) the claimant has disclosed no reasonable grounds for bringing the proceedings;
(b) the proceedings are an abuse of the court's process; or
(c) the conduct of—
(i) the claimant; or
(ii) a person acting on the claimant's behalf and with the claimant's knowledge of such conduct, is likely to obstruct the just disposal of the proceedings.

HOW TO WIN
Practical tips

- The other place to focus if you are applying on ground (a) is going to be CPR r.16, and especially with reference to the Practice Direction which gives concrete guidance on what must be included in a statement of case.

- This is about the balance of prejudice: has your side been prejudiced in being able to respond to the other side's position because of a failure to comply with CPR r16?

HOW TO WIN
Litigants in person

Courts need to be frequently reminded that this applies equally to litigants in person. It is not a proportionate allocation of the court's resources to always allow LIPs to amend unclear pleadings or give endless chances to comply with court orders.

The way that I usually phrase this in a skeleton argument is:

A lack of legal representation will often justify making allowances in making case management decisions and in conducting hearings. However, following the decision of the Supreme Court in* Barton v Wright Hassall LLP *[2018] UKSC 12, it will not justify allowing litigants a lower standard of compliance with rules or orders of the court. The rules provide a framework within which the interests of both sides must be balanced.

Don't worry, there's more…

Defending a strike out application (I)

- Cross apply for relief from sanction – try to do this before the default has occurred if you can
- Be honest and take responsibility for defaults
- Cite the overriding objective!
- Propose alternative: provide a draft order with unless provisions
- Make it easy for the judge to allow you another chance!

Defending a strike out application (II)
Consequences

- Both the Applicant and the Defendant in a strike out application are going to want to consider costs.
- Parties applying to strike out: has all this been the fault of the solicitors rather than the lay claimant or defendant? Is it fair for the client to possibly have to pay out? If not, you should consider wasted costs and this involves asking the court to make an order requiring the solicitors to file a witness statement ”showing cause” why they should not personally be liable for those costs.
- If you are on the wrong end of a strike out and want to avoid this, make sure that your witness statement in response is full, frank and be prepared to deal with this explicitly.
- If you’re faced with an unless order, consider whether you really want to provide a show cause statement or simply acknowledge that you/your firm will be liable for the costs penalty.

CASE STUDIES
(I) LATE SERVICE OF THE PARTICULARS OF CLAIM
(II) LATE SERVICE OF THE CLAIM FORM

- I am going to discuss 2 cases in which I was instructed to represent a party seeking to strike out a claim.
- In both cases, we were successful in striking out, but because they both featured special elements that frequently cause problems, we thought it was worth spending some time on them.
- More than one question sent in advance of this webinar has focused on late service of pleadings and the Claim Form…

Case study 1: late service of the Particulars of Claim

The Claim Form was served on the 21st May 2019, stating "Particulars of Claim to follow". Despite the Defendant's solicitors writing to ask when they might expect the Particulars of Claim, none were forthcoming. They were eventually served with a covering letter on the 25th July 2019, so approximately 7.5 weeks out of time.

CPR **7.4(1): Particulars of claim must—**
(a) be contained in or served with the claim form; or
(b) subject to paragraph (2) be served on the defendant by the claimant within 14 days after service of the claim form.

The Defendant solicitors served an acknowledgment of service disputing jurisdiction and applied to strike the claim out by way of CPR 3.4.(2)(c): failure to comply with an order.

Case study 1: late service of the Particulars of Claim

In *Associated Electrical Industries Ltd -v- Alstom Ltd* [2014] EWCA Civ 4330 (Com), the facts were similar: the Particulars of Claim were served 20 days late. The claimant made an application for an extension of time, the defendant made an application to strike out the claim.

After hearing the applications, Mr Justice Smith dismissed the application for an extension and struck the claim out. He followed the decision in *Price v Price* that the correct test to apply in respect of applications for an extension of time to serve Particulars was akin to an application for relief from sanctions under CPR r3.9.

Case study 1: late service of the Particulars of Claim

We relied on the reasoning of Mr Justice Smith in the *AEI* case, where he said:

However, I cannot accept that, given the approach to non-compliance that decisions of the Court of Appeal require. , a default of 20 days in serving particulars of claim is to be categorised as trivial In Mitchell itself the claimant was five days late with the costs budget but was not considered to have missed the deadline narrowly. In Raayan al Iraq Co Ltd v Trans Victory Marine Inc, [2013] EWHC 2969, I granted an application for a retrospective extension of time when particulars of claim were served two days late, and my decision was criticised in Mitchell *…AEI's failure to apply for an extension before 29 October 2013, or even to ask Pinsent Masons for one, reinforces my view that this is not a case where the* de minimis *doctrine applies." [emphasis added]*

Case study 1: late service of the Particulars of Claim

Further, there was no good reason for the default (taking the next step of the *Denton* criteria): "*But there is another answer to the submission that there was an acceptable explanation for the non-compliance, to which I have already referred.* ***If difficulties in investigating the claim do justify the particulars being late, a timely request for an extension should have been sought from Alstom and if necessary a timely application to the court should have been made.[emphasis added]"***

A particularly interesting facet of the *AEI* judgment was the extent to which the Judge decided that – even if it appeared to be unfair – strike out was the correct approach. The Judge said: *If my decision depended only on what would be just and fair between* ***AEI*** *and* ***Alstom****, I would not strike out the claim form and I would grant a retrospective extension of time for service of the particulars…*

LESSON:

- What is fair or unfair will not always save you even in circumstances where the default is relatively minor.
- Bear the relief from sanctions guidance in mind when cross-applying.
- Recall the advice already given earlier: get your cross application in as quickly as possible and ideally before any default

Case study 2: late service of the claim form

In this clinical negligence claim, the Claimant asserted that he had contracted a serious infection in hospital such that his hip replacement surgery had to be redone and had caused serious (and unnecessary) pain and suffering.

The Claimant's solicitors had served the Claim Form by email the day before the expiry of the limitation period.

The Defendants disputed jurisdiction, on the basis that there was no agreement that the Claim Form could be served electronically. They made an application to strike the claim out, and for the Court to find that there had not been valid service of the Claim Form.

Case study 2: late service of the claim form

On the face of it, this seems unjust.

The Defendants were expecting service of the Claim Form, and received the email. Further, a telephone call between the parties' legal teams had resulted in the Claimant's solicitors believing that permission had been given for electronic service (backed up by an attendance note).

No written permission had been granted.

HHJ Saunders agreed with the Defendant, albeit expressing sympathy to the Claimant who may have had a good claim for damages. Why?

Case study 2: late service of the claim form

Methods of service

6.3 *(1) A claim form may (subject to Section IV of this Part and the rules in this Section relating to service out of the jurisdiction on solicitors, European Lawyers and parties) be served by any of the following methods -*
[…]

(a) fax or other means of electronic communication in accordance with Practice Direction 6A;

Practice Direction 6A further provides:

Service by fax or other electronic means

4.1 *Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means -*
(b) an e-mail address set out on the writing paper of the solicitor acting for the party to be served but only where it is stated that the e-mail address may be used for service; or

Case study 2: late service of the claim form

The Supreme Court considered this very issue in *Barton (Appellant) v Wright Hassall LLP (Respondent)* [2018] UKSC 12 where it found that inappropriate service of the Claim Form by email was invalid, and the claim could not proceed. Lord Sumption said:

Although the purpose of service is to bring the contents of the claim form to the attention of the defendant, the manner in which this is done is also important. Rules of court must identify some formal step which can be treated as making him aware of it. ***This is because a bright line rule is necessary in order*** *to determine the exact point from which time runs for the taking of further steps or the entry of judgment in default of them.*

LESSON:

1. Again, fairness is not determinative;

2. Parties are entitled to know when time limits start running, so don't try to do things at the last minute;

3. Making applications to strike out on this basis is partly a commercial decision but one that should be seriously considered: it's a "bright line" rule

Case law update

Case 1: Udeshi & Ors v Sieratzski [2021] EWHC 213 (Ch) (payment of incorrect issue fee)

Case 2: Alba Exotic Fruit SH PK v MSC Mediterranean Shipping Company S.A. [2019] EWHC 1779 (failure to progress)

Questions sent in advance

Q1 – when to apply for a strike out due to a claimant's failure to progress litigation?

Q2 – relatedly, what sort of time lapse is needed before a court will consider whether to strike out the claim?

Q3 – what is the procedure where the defendant seeks to strike out parts of the Particulars of Claim?

Q4 – to what extent would you adjust strategy when dealing with LiPs?

If you're not sure, just ask…

foneill@1chancerylane.com
hsoede@1chancerylane.com