

Preparing and presenting applications in chambers

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Introduction

This paper provides a broad overview of interlocutory procedures and considers the tactical role that interlocutory procedures can play in your overall litigation strategy.

This is a practical seminar. The objective is to give practical tips to help you to prepare for and attend the hearing of interlocutory applications. While the relevant court rules are considered, the focus of this seminar is not on the rules.

Preliminary considerations

In promoting your client's case it is essential to consider the overall strategy to be adopted and then identify tactics that help your client to achieve that objective. You should aim to use all appropriate tactics to manoeuvre your client into the strongest position and to put maximum pressure on the other side. The tactics described below also allow you to assess:

- (a) the strengths and weaknesses of your client's case;
- (b) the merits of the parties' respective arguments; and
- (c) your client's position in the proceedings.

In doing so you must also bear in mind the risks and costs involved with each interlocutory application, including the risk of:

- (a) exposing your client to criticism;
- (b) exposing your client to unwanted costs and delays (HCR 14.8);
- (c) dampening your client's resolve to "press on"; and
- (d) weakening your client's position in the eyes of the other side.

The principal interlocutory applications relating to pleadings, evidence and summary determination are set out below. This is not intended to be a comprehensive assessment of all interlocutory applications that might be available on the facts of a particular case.

Applications on notice, and without notice applications (HCR r 7.46)

Ordinarily, all interlocutory applications should be made on notice (*inter partes*) as it is a basic principle of fairness that an order should not be made against a party without giving that party an opportunity to be heard.

The principal exception to that general principle is that a without notice (*ex parte*) application may be appropriate:

- (a) in a case of urgency where there is some imminent danger and notice is not possible; or
- (b) if notice of an application were to be given, the defendant or others would take action which would defeat its purpose before the order could be made, and any damage could not be compensated (e.g. applications for search orders, freezing injunctions, appointment of interim liquidators, or preservation of property orders (HCR r 7.55)).

An alternative procedure is to serve the papers on a “Pickwick basis” (i.e. a without notice application is served on the other party at short notice). In cases of doubt, the Pickwick procedure is preferable to giving no opportunity to the other party to be heard at all. A defendant given notice of a hearing on a Pickwick basis faces a considerable dilemma. The defendant may either:

- (a) Attend the hearing, sit silently and take no active part in the proceedings. However, if the defendant fails to attend or takes no part, it may appear to the Court that the defendant has little interest in the outcome of the application.
- (b) Treat the hearing as an *inter partes* hearing even if there has been no time in which to prepare evidence in answer. If the defendant takes an active part in the hearing he or she may encourage the Court to make an order at that stage by, for instance, not being able to offer an explanation for an apparently wrongful act. The defendant may also face additional pressure to offer some undertakings rather than face the prospect of emergency relief being granted.

There is a duty of full and frank disclosure in applications made without notice and failure to make proper disclosure may lead to any order being set aside without consideration of the merits of the case.

Pleadings

Requests for further and better particulars (HCR r 5.21)

Every pleading must contain sufficient particulars of any claim, defence or other matter pleaded. Specifically, claims involving misrepresentation, fraud, breach of trust, wilful default or undue influence must be fully particularised.

If the pleading is vague or insufficiently particularised, a party may request further and better particulars in order to understand the scope of the opponent’s case that you have to meet and to avoid unnecessary expense. Initially, a request for further information is made by letter to the other side’s solicitors.

If no adequate response is received within seven days, the requesting party may apply to the Court for further and better particulars. The Court has a discretion whether to order a party to give particulars if it considers the pleading objected to is defective or does not give sufficient particulars.

Further and better particulars are supposed to ensure that the action is conducted fairly, openly and without surprises, so as to minimise costs. However, in reality a defendant may use requests to expose weaknesses in the plaintiff’s case or to tie-up the plaintiff in time-consuming and pedantic details. It is not uncommon for a defendant’s solicitor to serve convoluted and onerous requests for particulars on as many aspects of the plaintiff’s claim as possible.

Whilst many of these requests might ultimately not be upheld, the time and expense involved in answering them, and in dealing with the court hearing (and, frequently, subsequent appeals) over the issue can add enormously to the plaintiff’s costs and significantly delay its case.

Strike-out applications (HCR rr 15.1, 15.2)

Under HCR r 15.1, the Court may at any stage of the proceedings strike out a pleading, or part of a pleading, where a pleading:

- (a) discloses no reasonably arguable cause of action or defence;
- (b) is likely to cause prejudice or delay in the proceeding;
- (c) is frivolous or vexatious; or

(c) is otherwise an abuse of the process of the Court.

The Court will only strike out pleadings in the most obvious cases (for instance, where those purporting to bring the action have no authority to do so in the name of the plaintiff). Very often they will order amendments to clarify any problems in the pleadings.

A strike-out application can be made at first instance. It may also follow a request for further and better particulars if the defendant maintains that, on the basis of the particulars given by the plaintiff, the plaintiff cannot make out the claim.

Even if a defendant only attacks part of the pleading, the associated costs and delay can be considerable. The striking out of part of a plaintiff's claim can also effectively remove the substance of the plaintiff's case. However, it is important to be mindful that a strike out application can also improve a plaintiff's case by removing the weak aspects.

Additionally, the Court has an inherent jurisdiction to dismiss or strike out the whole action or defence to regulate and control the practice of the Court and compel compliance with its orders (the Court's inherent jurisdiction is now expressly recognised in new r 15.1(4)).

HCR r 15.2 is another useful summary determination procedure, which bears some resemblance to the grounds for strike out under HCR r 15.1. HCR r 15.2 allows a party to apply to Court to dismiss or stay the whole or part of a proceeding where there has been a failure by the other side to prosecute their proceeding or counterclaim (in whole or in part).

The applicant must prove three factors:

- (a) that there has been inordinate delay;
- (b) that the delay is inexcusable; and
- (c) that this has caused serious prejudice to the applicant.

Once this is shown, the Court will stand back and consider whether the overall interests of justice warrant the dismissal of the proceeding or counterclaim. The overriding consideration is always whether justice can be done at trial, despite the delay.

The Court is empowered to make "such order as may be just". In unsuccessful applications, a strict timetabling order is invariably made and costs are occasionally awarded to the applicant.

Evidence

Documents referred to in pleading or other document (HCR r 8.23)

A party may serve a notice on another party who has filed and served a pleading or other document, requiring that party to produce for inspection a document referred to in the pleading or other document. The other side must make the document available for inspection by the parties to the proceeding within 5 working days after service of the notice.

Applications for particular discovery (HCR r 8.24)

Usually (but not always) it is the plaintiff who seeks further discovery of the other side's documents; and usually (but not always) it is the defendant who tries to limit the scope of discovery in order to protect its position. There are two types of application for particular discovery:

- (a) Where the applicant seeks “further and better” discovery on the grounds that the respondent has not sufficiently disclosed all relevant documents in its possession, custody or power; or
- (b) Where the applicant seeks “specific” discovery on the grounds that the respondent has withheld specific documents.

4.3 The second situation frequently leads to a chicken-and-egg situation because an applicant must demonstrate the existence of documents which it does not have in its possession. Although it is generally the plaintiff which seeks particular discovery, the defendant may also make applications of this kind.

Pre-Action Discovery (HCR r 8.25)

A party who intends to start proceedings may apply for pre-commencement discovery where:

- (a) The intending plaintiff is or may be entitled to claim relief against another person;
- (b) It is impossible or impracticable for the intending plaintiff to formulate the claim without the documents sought; and
- (c) There are grounds for belief that the documents may be or have been in the possession of the person concerned.

The application is made on notice to the person from whom discovery is sought. If the person from whom discovery is sought is not the intended defendant, the application should also be served on the intended defendant. If an order is made, the person from whom the discovery is sought is obliged to file and serve an affidavit of documents. Ordinarily the intending plaintiff must pay the non-party's costs of compliance.

Non-party discovery (HCR r 8.26)

A party may apply for an order for discovery against a non-party (e.g. a bank) where the applicant is aware that documents exist, but is unable to use the ordinary discovery procedures because the documents are not under the control of a party to the proceeding.

The applicant must show:

- (a) Grounds for belief that a non-party has or had documents that would be discoverable if the person was a party; and
- (b) That the order is necessary when it is made.

If an order is made, the person from whom the documents are sought must file and serve an affidavit of documents.

Interrogatories (HCR rr 8.1-8.13)

After a statement of defence has been filed, any party may require any other party to answer specified interrogatories in order to dispose fairly of the claim or to save costs.

The purpose of an interrogatory is to let a party obtain from its opponent any admissions or evidence of material facts which are necessary for disposing fairly of the case or for saving costs. Like the discovery exercise, the use of interrogatories should enable a party to assess the strengths and weaknesses of your client's case before trial. As for timing, interrogatories should take place after discovery and the exchange of witness statements.

A party can become quite entangled in providing answers to interrogatories. Again, the expense and delay of arguments over interrogatories may play into the other party's hands. As with requests for

further and better particulars, failure to give satisfactory answers can result in applications for further answers on affidavit or even strike-out applications.

Notice to admit facts (HCR r 8.14)

Any party who is entitled to file and serve a notice requiring another party to answer interrogatories, may at any time serve on any other party a notice requiring that other party to admit facts specified in the notice.

This rule enables a party to serve on any other party a notice in the form provided in the Schedule requiring him or her to admit certain facts specified in the notice. If a party neglects or refuses to comply with the notice within 5 working days of service upon them, or within such longer time as may be allowed by the Court, the costs of proving the facts must be paid by them unless the Court otherwise orders.

Search Orders (New Part 33, Form G 39)

Search orders (formerly “Anton Piller orders”) are aimed at preserving evidence for trial which might otherwise be removed, destroyed or concealed, but are normally granted without notice before a proceeding commences (HCR rr 33.1-33.9).

Summary determinations

Default Judgment (HCR rr 15.3-15.4)

In any case where the defendant takes no steps either to defend a claim or to file an appearance, a judgment in default may be entered against the defendant.

Before judgment by default can be sealed, a plaintiff must file an affidavit of service of the statement of claim and notice of proceeding. Judgment by default may be set aside or varied by the court if it appears that there has been, or may have been, a miscarriage of justice (HCR r 15.13).

Summary Judgment (HCR rr 12.1-12.16)

The purpose of the summary judgment procedure is to enable a plaintiff to obtain a judgment when there is no defence to the claim made and to put an end to worthless defences being raised and pursued for the purposes of delay.

The summary judgment procedure is available to a plaintiff where the plaintiff satisfies the Court that the defendant has no defence to a claim in the statement of claim or to a particular part of any such claim. The critical question under HCR r 12.2 is whether the Court is satisfied that the defendant has “no arguable defence” to any cause of action or there is an “absence of any real question to be tried”. As a defendant, your strategy is to file evidence in opposition showing why the claim should be dealt with at trial (e.g. credibility is in issue and requires *viva voce* evidence, or full discovery is necessary).

Summary judgment is appropriate in cases involving discrete legal issues or for straightforward actions where there is no dispute as to facts (for instance, actions based on dishonoured cheques, guarantees or unpaid rent). Generally the procedure is not appropriate in factual disputes, except where the plaintiff’s evidence is overwhelming.

In appropriate cases a summary judgment application is the most effective method of bringing an action to a speedy conclusion. However, where the defendant has an arguable defence and has the

means to appeal, a summary judgment application might hinder the case by incurring delay and costs in circumstances where time and money could have been better spent getting the case to trial.

Summary judgment is now available to defendants as well as plaintiffs. A defendant must satisfy the Court that none of the causes of action in the plaintiff's statement of claim can succeed (HCR r 12.2(2)).

Orders for decision / Determination on a point of law (HCR r 10.15)

Under HCR r 10.15, either party can apply to have a preliminary question, such as an issue of law or construction of a document, determined on a summary basis.

In appropriate cases, it can be used as a shortcut against a party which is stalling. This procedure can be a useful means for a plaintiff to prevent a defendant from escalating a simple matter into a complex one, and similarly for a defendant to undercut a plaintiff that is exaggerating its case. However, the same danger of hindering a case with delays also applies.

The commentary in McGechan at HR 10.15 identifies the key factors which guide the Court's discretion under this rule. These include (among other things):

- (a) Whether a decision one way or the other would result in the end of the litigation; or
- (b) Whether the duration of a subsequent hearing would be shortened by determination of the preliminary question.

The primary purpose of the procedure is to shorten trials and the decision on the preliminary question need not itself dispose finally of the proceeding.

Formal rules concerning interlocutory applications

Notice of Application (HCR r 7.19, Forms G31 and G32)

The application must state the relief sought and the grounds justifying that relief. It should also state the statutory or common law criteria alleged to exist which, if proven, would justify the making of the orders sought.

After the filing of an application, the Registrar will allocate a hearing date (HCR r 7.33). Any application and affidavit must be served as soon as practicable after filing and the hearing date must be provided as soon as practicable after the applicant is notified of it.

Notice of Opposition (HCR r 7.24, Form G33)

The purpose of the notice of opposition is to identify in advance points in dispute, thus avoiding unnecessary time and expense. The essential requirements of the notice of opposition are:

- (a) a statement of the party's intention to oppose (if only certain orders are opposed, that should be made clear); and
- (b) reference to any particular provision of an enactment or principle of law or judicial decision relied upon.

The notice of opposition is to be filed or served within the earlier of 10 working days after being served with the application or 3 working days before the hearing date for an application. Unless the

notice of opposition is served in accordance with the rule, the respondent will not be entitled to be heard in opposition.

Affidavits (HCR rr 7.20, 7.25-7.32, 9.75-9.88)

Any evidence in support of an application must be filed at the same time as the application. Similarly, any evidence in support of the notice of opposition is to be filed at the same time as the notice of opposition.

Affidavits in reply to a notice of opposition or affidavit filed by a respondent are to be filed and served within the earlier of 5 working days after being served with the notice of opposition or 1 pm on the working day before the hearing date for the application. An affidavit in reply must be limited to new matters raised in the notice of opposition or in any affidavit filed by the respondent.

The general rules for affidavits (HCR rr 9.75-9.88) apply in interlocutory applications “with all necessary modifications”. Therefore, a party is not entitled to file affidavits containing hearsay matters or other inadmissible evidence. A deponent must state solid grounds for his or her belief. The Court may refuse to read into evidence affidavits containing hearsay, or may reduce the weight to be given to the evidence.

Timetable Orders

Instead of relying on the default provisions in the court rules, you should consider whether the better course is to agree suggested timetable orders with the other side. This will enable you to build more time into the timetable and to control the process, and will avoid any uncertainty or argument about the steps required to be taken and the deadlines for each step.

An applicant should strive to comply strictly with the timetable orders. Failure to comply may be seen as a sign of weakness and a lack of resolve to press on with your application. It may also mean that you are off-side with the Court before the hearing takes place.

Drafting considerations

Become familiar with any relevant law – but do not go overboard on this. Any research that you do should have clear and defined objectives. You should be familiar with any rule under which the application is to be made and any specific points or formalities that need to be included.

Consider how the pleading is presented. Remember that pleadings are “persuasion in print” and give the opportunity for some tactical advantage. Make sure that court documents are clearly presented, appealing to the eye, easy to follow, carefully planned and well thought out. Be concise and use plain English.

Notice of Application

The notice of application sets out the nature of the application, the grounds upon which the application is based, and the order which is being sought. Your object in drafting the relief sought is to set out the precise terms of the order which the Court is being asked to make. Precision is required for two reasons:

- (a) The lack of precision in the application notice may mean the Court will not grant the order.

- (b) If the order is drafted imprecisely, then it may be unenforceable either for technical reasons or because loose drafting allows the respondent to claim that they have complied with the order or that it does not apply to them.

Drafting a notice of application involves the following steps:

- (a) Identify the rule under which the application is to be made.
- (b) Check any commentary or procedural notes for guidance on special requirements as to the contents of the application, time for service, etc.
- (c) Draft the precise terms of the order which the Court is being asked to make.
- (d) Include a paragraph dealing with the costs of the application.

Be able to seek out and use precedents (e.g. *Bullen & Leake, Atkin's Court Forms*). Precedents are especially useful for identifying the ingredients or elements which should be included in a draft, the order in which they should appear, and suggested wording of each paragraph. There are a number of potential drawbacks in using precedents. Do not slavishly copy out or rely too heavily on precedents as the "right" answer. Precedents must be properly adapted to fit your case.

Supporting affidavit evidence

The purpose of the affidavit is to provide the Court with evidence of the facts and matters relevant to the application. Therefore, you must take great care to ensure that the rule under which the application is made is carefully considered to identify what facts have to be proved, and that those facts are then dealt with in the affidavit itself.

The contents of an affidavit should be the facts which the party wishes to put before the Court either to establish his or her own application or to damage the other side's case. The affidavit should not contain:

- (a) Argument, propositions of law, or submissions to the Court; or
- (b) Irrelevant evidence that is not admissible;
- (c) Evidence which would be inadmissible under the normal rules of evidence:
 - (i) Hearsay statements which the applicable court rules do not require or permit to be made in affidavits or which do not state the grounds for any statements of belief and the sources of information;
 - (ii) Opinion evidence of lay persons who do not have specialised knowledge or skill to qualify as experts.

(Evidence Act 2006, ss 7, 8, 17-20, 23-24; HCR rr 7.30, 9.76).

An important exception to the rule that only admissible evidence may be given in an affidavit is that an affidavit sworn for use in interlocutory proceedings may contain statements of information or belief as long as the sources and grounds are cited (HCR r 7.30). Solicitors should take great care to ensure that it is clear in an affidavit whether the facts set out are known personally by the deponent and, if not, what is the source of his information or the reason for him believing the facts to be true. Where possible, best practice requires the person, who has first-hand knowledge of the facts being deposed, to swear the affidavit. A person who has sworn an affidavit may be required by the other party to attend the hearing and be cross-examined (HCR r 9.74).

Poor drafting might attract criticism from the Court or, at worst, lead to an application by the other party to strike out portions of the affidavit.

Draft within your client's instructions. Any assumption or theory should be tested with the client, and only pursued if the client can produce factual information to support it. At the end of the day, you will

have to prove what you have alleged. Identify any lack of information and discuss this with your client.

Commonly, it will be necessary to refer to documents in an affidavit. Copies of any such documents should be exhibited to the affidavit. Also, if you refer to a document but do not produce it as an exhibit, the other side has a right to compel you to produce the document (HCR r 8.23). You should take care not to inadvertently waive privilege in a document.

Preparing for and attending hearings

Preparation

Preparation is an essential prerequisite for good advocacy. Build your presentation around the task that the judge is set to embark upon.

Be concise in your written and oral submissions. You should be able to write down the essence of your application on one sheet of paper, including evidence and relevant principles.

You must know the evidence in detail. Know the strengths and weaknesses of your case. You must be able to refer the Court immediately to the relevant passages in the affidavits and the hearing bundle. Your ability to master the facts and demonstrate this level of knowledge will convey confidence and impress the Court.

You must also know the relevant law. This requires you to identify the legal issues and familiarise yourself with the law as it relates to those issues. Present the legal framework of your case in terms of principles, not cases. Provide the best authority, not necessarily the most recent. Do not provide every case decided in that area, or which you have no intention of relying upon or have not read.

Synopsis of argument

For every defended interlocutory application, the applicant must file and serve a synopsis of argument on every other party 2 or 3 working days before the hearing (HCR r 7.39). The applicant's synopsis must not exceed 10 pages and must:

- (a) identify the general nature of the case;
- (b) include a chronology of the material facts;
- (c) outline the applicant's principal submissions;
- (d) attach an indexed and paginated hearing bundle of documents; and
- (e) attach a list of authorities.

The respondent must file and serve a synopsis of argument on every other party at least one working day before the hearing.

The synopsis should set out your submissions first and then put forward your argument in support of each of your separate submissions. While there is no strict formula, a good skeleton argument will usually:

- (a) Set out the nature of the application.
- (b) State briefly what the case is about (if necessary).
- (c) Summarise the issues between the parties (if necessary).
- (d) Set out the argument in the form of a series of legal propositions and submissions supported by legal authority and by evidence (with page or paragraphs references).

- (e) Identify precisely what the Court is being asked to do.

Hearing of interlocutory application

Apart from summary judgment applications, every other interlocutory application must be heard in Chambers unless the Court otherwise directs (HCR r 7.34). Hearings in Chambers may either be in the Chambers of a Judge or an Associate Judge or in Court.

Your role as an advocate is to present your client's case in the most persuasive manner possible. This involves all aspects of your presentation, including your personal presentation (dress and posture), speaking clearly, and your ability to depart from your written submissions.

A general structure for such a hearing could be:

- (a) Introduce parties, the case, and the application briefly.
- (b) Check that the court has all of the relevant papers.
- (c) Briefly state the order in which you propose to present argument.
- (d) Explain the background to the application, if appropriate.
- (e) Argue the substance of the application:
 - (i) Set out the arguments in support of your application. Argue in terms of principle, rather than authorities:
 - State your main submission or argument.
 - Identify the legal proposition on which you rely.
 - Refer to any authorities that support or illustrate your proposition.
 - Apply the law to the facts in your case.
 - (ii) Anticipate and deal with your opponent's arguments. Prepare answers to those questions in advance.
- (f) Summarise your strongest arguments by way of a conclusion, and offer to assist the Court with any questions that it might have.
- (g) Allow your opponent to make his or her arguments to the Court.
- (h) Ask to be allowed to reply to your opponent's arguments, if necessary.

Always be courteous to all those involved in the court process, and observe the niceties of court etiquette. Be as persuasive as possible. Speak to your submissions rather than read them. Do not take unnecessary points and make appropriate concessions.

Embrace questions from the Bench. It means the judge is interested in a proposition and probably still uncommitted and wants to know your answer. Listen carefully to a judge's questions and take your time to respond to them, preferably as they arise.

Post-hearing matters

Consider whether it is necessary or desirable to draw up and seal a minute of order, for instance, where it is likely that the interlocutory order will need to be enforced or it affects a third party who is not a party to the proceedings (HCR r 7.47, Form G34).

Any party may now draw up the interlocutory order after it is made. Generally, best practice would suggest that the successful party should draw up the order.