Wasted Costs

The power of the court to award wasted costs against a legal representative arises from the Courts and Legal Services Act 1990, s 4(1), which enacted a new s 51 in the Supreme Court '(now Senior Courts)' Act 1981 (SCA 1981), which relates to both the High Court and County Court.

The SCA 1981, s 51(6) defines the concept of 'wasted costs' as being costs incurred by a party resulting from the improper, unreasonable or negligent act or omission of any legal or other representative or anyone employed by the representative, or costs which, in the light of any such act or omission occurring after the costs were incurred, the court considers it is unreasonable to expect that party to pay.

Where the court is considering making a wasted costs order under this section the rule which applies is CPR 48.7 which states as follows:

(1) This rule applies where the court is considering whether to make an order under s 51(6) of the SCA 1981 (court's power to disallow or (as the case may be) order a legal representative to meet, 'wasted costs').
(2) The court must give the legal representative a reasonable opportunity to attend a hearing to give reasons why it should not make such an order.
(3) [Repealed].
(4) When the court makes a wasted costs order, it must–
  (a) specify the amount to be disallowed or paid;
  (b) direct a Costs Judge or a District Judge to decide the amount of costs to be disallowed or paid.

(5) The court may direct that notice must be given to the legal representative's client, in such manner as the court may direct–

  (a) of any proceedings under this rule; or
  (b) of any order made under it against his legal representative.

(6) Before making a wasted costs order, the court may direct a costs judge or a district judge to inquire into the matter and report to the court.

(7) The court may refer the question of wasted costs to a costs judge or a district judge, instead of making a wasted costs order.

1 GENERAL PRINCIPLES

It is the court that makes the order for wasted costs not a costs judge. In the normal course of events it is the trial judge who should make the order. In *Re P (a Barrister), (wasted costs order)[2001] EWCA Crim 1728, [2002] 1 Cr App Rep 207, (2001) Times, 31 July*, the Court of Appeal held that in almost all wasted costs applications

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the trial judge should be the judge to deal with the matter. The court concluded that the jurisdiction was a summary jurisdiction to be exercised by the court which had 'tried the case in the course of which the misconduct was committed'. Although the trial judge could decline to consider an application in respect of costs, it would only be in 'exceptional circumstances' that it would be appropriate to pass the matter to another judge.

Once a judge does deal with the wasted costs order it is difficult to overturn that decision, as in *Persaud v Persaud* [2003] EWCA Civ 394, 147 Sol Jo LB 301 where the Court of Appeal held that it was not right to interfere with the judge's discretion.

The leading authority and guide to wasted costs is *Ridehalgh v Horsefield* [1994] Ch 205, [1994] 3 All ER 848, CA, where in appeals backed by the Bar Council, the Law Society and the Solicitors Indemnity Fund, the Court of Appeal set aside wasted costs orders against two solicitors and a barrister and in the lead case declined to make an order in a case referred to them by a different division of the Court of Appeal. In delivering the judgment of the court the Master of the Rolls said (Page 38 LTL) that while judges must not reject the weapon which Parliament intended to be used for the protection of those injured by the unjustifiable conduct of the other side's lawyers, they must be astute to control what threatened to become a new and costly form of satellite litigation.

Lord Bingham re-iterated this view in *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120, [2002] 3 All ER 721approving the approach of the Privy Council in a New Zealand case that wasted costs orders should be confined to questions which are apt for summary disposal by the court, such as failures to appear; conduct which leads to an otherwise avoidable step in the proceedings; the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument. Such matters can be dealt with summarily on agreed facts or after a brief enquiry. Any hearing to investigate the conduct of a complex action is itself likely to be expensive and time-consuming. Compensating litigating parties who have been put to unnecessary expense is only one of the public interests to be considered.

In future, anyone considering applying for a wasted costs order should think twice.
The Practice Direction supplementing Rule 48.7 helpfully embodies the major findings of the Court of Appeal in *Ridehalgh*. Because wasted costs orders are made under the statute and Rule 48.7 and its supplementary Practice Direction govern merely the practice and procedure, not the principles, this is an area in which decisions made prior to 26 April 1999 are still of relevance and assistance.

In *Harrison v Harrison* [2009] EWHC 428 QB the High Court held that wasted costs were neither a punitive nor a regulatory jurisdiction, but rather a compensatory one and thus as a prerequisite an applicant had to show that the conduct complained of had caused them loss – see *Ridehalgh v Horsefield* [1994] CH 205 CA Civ.

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In addition even where "improper, unreasonable and negligent" conduct was shown, an order was within the court's discretion.

Here the applicant applied for a wasted costs order against junior counsel who had acted for the respondent in a without notice application. Costs had been agreed at £205,000.00 of which all but £20,000.00 had been paid by the time of the application and the applicant conceded that the respondent was likely to pay the balance.

The applicant contended that the without notice application had been settled and argued by counsel without any or sufficient regard to her duty to bring to the attention of the court facts or arguments which were adverse to her client's case and thus her conduct had been "improper, unreasonable and negligent" in terms of section 51(6) of the Senior Courts Act 1981.

The court held that on the balance of probabilities the applicant had failed to prove loss even if all of the allegations were proved, and thus no order should be made.

That judgment confirmed a three-stage test to be adopted when considering a costs order as set out in *Re a Barrister (wasted costs order) (No 1 of 1991),* [1993] QB 293, [1992] 3 All ER 429:

(1) Has there been an improper, unreasonable or negligent act or omission?
(2) As a result, had any costs been incurred by a party?
(3) Should the court exercise its discretion to order the lawyer to meet the whole or any part of the relevant costs?

Only if all three questions were answered in the affirmative would an order be made. (See para 53.4 of the Practice Direction about costs supplementing CPR Pts 43–48.)

(a) Improper, unreasonable or negligent conduct

'Improper' covered, but was not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It also covered conduct which according to the consensus of professional, including judicial, opinion could be fairly stigmatised as being improper whether it violated the letter of a professional code or not. (*Page 23 Judgment, Ridehalgh v Horsefield* [1994] Ch 205, [1994] 3 All ER 848, CA.

'Unreasonable' included conduct which was vexatious, designed to harass the other side rather than advance the resolution of the case: it made no real difference that the conduct was the product of excessive zeal and not improper motive.

Legal representatives could not lend assistance to proceedings which were an abuse of process and they were not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for purposes

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unconnected with success in the litigation, or pursuing a case known to be dishonest. Nor were they entitled to evade rules intended to safeguard the interests of justice as by knowingly failing to make full disclosure on an *ex parte* application or knowingly conniving in incomplete disclosure of documents. However, conduct was not unreasonable simply because it led to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test was whether the conduct permitted a reasonable explanation. It is not unreasonable to be optimistic.

'Negligent' did not mean conduct which was actionable as a breach of the legal representative's duty to his own client. There is of course no duty of care to the other party. Negligence should be understood in an untechnical way to denote failure to act with competence reasonably expected of ordinary members of the profession. However, the court firmly discountenanced any suggestion that an applicant for a wasted costs order needed to prove under the negligence head anything less than he would have had to prove in an action for negligence. It adopted the test in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, [1978] All ER 1033, HL, 'advice, acts or omissions in the course of their professional work which no member of the profession who is reasonably well-informed and competent would have given or done or omitted to do'; an error 'such as no reasonably well-infor med and competent member of that profession could have made'.

In *Persaud v Persaud* [2003] EWCA Civ 394, 147 Sol Jo LB 301, the Court of Appeal held that there had to be something more than negligence, more akin to abuse of process or breach of duty to the court, to make a legal representative subject to jurisdiction for a wasted costs order.

However, in *Dempsey v Johnstone* [2003] EWCA Civ 1134, [2004] PNLR 2, [2004] 1 Costs LR 41 the Court of Appeal held that negligence alone would justify the making of a wasted costs order, and the correct test was whether no reasonably competent legal representative would have continued with the action when there was a hopeless case.

Wasted costs orders should carefully balance two important public interests:

(i) that lawyers should not be deterred from pursuing their clients interests by fear of incurring a personal liability to their client's opponents that they should not be penalised by orders to pay costs without a fair opportunity to defend themselves and that such orders should not become a back-door means of recovering costs not otherwise recoverable against a legally aided or impoverished litigant; and
(ii) that litigants should not be financially prejudiced by the unjustifiable conduct of litigation by their or their opponents' lawyers.

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In *Wall v Lefever* [1998] 1 FCR 605, (1997) Times, 1 August, CA, Lord Woolf warned that appeals against wasted costs orders or the refusal thereof should not be used to create subordinate or satellite litigation which was as complex and expensive as the original litigation.

In *Gill v Humanware Europe plc* [2010] EWCA Civ 799, [2010] ICR 1343, [2010] IRLR 877 the Court of Appeal reviewed existing case law, in the context of an appeal from a decision of the Employment Appeal Tribunal.

The court accepted that the principles to be applied were the same as in a non-employment case. Employment tribunals and the Employment Appeal Tribunal have their own set of rules but in relation to wasted costs the relevant wording is identical, Rule 34C of the Employment Appeal Tribunal Rules 1993 SI 1993/2854 stating:

> '(1) The Appeal Tribunal may make a wasted costs order against a party's representative.
> (2) ...
> (3) "Wasted costs" means any costs incurred by a party (including the representative's own client and any party who does not have a legal representative):
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any representative; or
> (b) which, in the light of any such act or omission occurring after they were incurred, the Appeal Tribunal considers it reasonable to expect that party to pay.'

Here there was a dispute about the facts of the alleged improper conduct of the respondent's barrister at the Employment Tribunal hearing and the Employment Appeal Tribunal made a wasted costs order against her, without giving her the chance to make oral submission.

The Court of Appeal allowed her appeal and held that the jurisdiction in a wasted costs application should only be exercised in a reasonably plain and obvious case. Courts should think carefully before hearing a wasted costs application in a case in which there is a conflict of evidence to be resolved.

Here a better course would have been to report the matter to the Bar Standards Board, which could have investigated the alleged misconduct properly and, if appropriate, referred it to a hearing before a disciplinary tribunal, which had the power to order compensation.

2 THE TWO-STAGE APPROACH

The court will consider the making of a wasted costs order in two stages. First, the court must be satisfied that the evidence before it, if unanswered, would be likely to

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lead to a wasted costs order being made and the wasted costs proceedings are justified notwithstanding the likely costs involved. Secondly, the court will give the legal representative the opportunity to give reasons or show cause why the order should not be made and then consider, in the light of any such evidence, whether to make the wasted costs order. The Court of Appeal has emphasised that judges should approach their task with caution and, where possible, consider the applicability of other sanctions of a disciplinary nature. (See section 53.6 of the Practice Direction about costs supplementing CPR Pts 43–48.)

In *Gill v Humanware Europe plc* [2010] EWCA Civ 799, [2010] ICR 1343, [2010] IRLR 877 the Court of Appeal said that on the facts of that case the Employment Appeal Tribunal should have referred the matter to the Bar Standards Board, rather than make a wasted costs order, and pointed out that the appropriate disciplinary body had power to order compensation.

In *Re Wiseman Lee (Solicitors) (Wasted Costs Order) (No 5 of 2000)* [2001] EWCA Crim 707 the court made a wasted costs order against the defendant solicitors in their absence with permission to make representations against the order by a given date. When no representations were received, the order was drawn up. The solicitors' appeal was allowed on the ground that a legal representative must be allowed to make representations before a wasted costs order is made under CPR 48.7(2). Although this was a criminal matter the principle applies equally to civil matters.

(a) Threats

The threat of a wasted costs order should not be used as a means of intimidation. However, if one side considered that the conduct of the other was improper, unreasonable or negligent and likely to cause a waste of costs it was not objectionable to alert the other side to that view. There appears to be a fine line between 'threatening' and 'alerting'.

(b) Advocacy

Although the legislation intended to encroach on the traditional immunity of the advocate by subjecting him or her to wasted costs jurisdiction, full allowance must be made for the fact that an advocate in court often had to make decisions quickly and under pressure. Mistakes would inevitably be made, things done which the outcome showed to have been unwise. Advocacy was more an art than a science; it could not be conducted according to formulae. It was only when, with all allowances made, an advocate's conduct of court proceedings was quite plainly unjustifiable that it could be appropriate to make a wasted costs order against him.

3 THE APPLICATION

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Applications for wasted costs are best left to the end of the trial and are governed by CPR Pt 23. Applications can be made orally in the course of any hearing or on application under CPR Pt 23. Such application, and the evidence in support, must identify what the legal representative is alleged to have done or not to have done and the costs that he may be ordered to pay. In addition the court has power to make a wasted costs order on its own initiative. The court should be slow to initiate an enquiry because:

(a) the court does not serve a pleading informing the lawyer of the precise charges to be answered;
(b) the court will be both the prosecutor and the adjudicator;
(c) difficult and embarrassing issues on costs could arise if an order was not made. The costs of the enquiry would have to be borne by someone and it would not be the court.

In *Gill v Humanware Europe plc* [2010] EWCA Civ 799, [2010] ICR 1343, [2010] IRLR 877 the Court of Appeal held that the procedure to be adopted should depend upon the circumstances. Sometimes the application will be made at the end of a substantive hearing; sometimes not. Sometimes the person against whom it is to be made will have been present throughout that hearing; sometimes he or she will not.

If the application is made at the end of a hearing at which the respondent has been present, it may be possible to deal fairly with the whole application there and then. On the other hand it may be necessary to allow an adjournment for the respondent to make representations or even to call evidence from witnesses not then present.

In particular, there is no invariable requirement for a two-stage process, at which the court considers first whether there is a strong prima facie case for the making of a wasted costs order and then at a second stage decides whether it is appropriate to make one.

If the respondent has not been present at the hearing at which his or her conduct has been considered there will have to be an adjournment. Whether or not there will then have to be an oral hearing will depend upon the nature of the issues in question and the way in which they will have to be resolved.
A relevant issue is the amount of money at stake. If it is small then it may be sensible, fair and proportionate to decide matters without an oral hearing. If the sum is large, or if a reputation is at stake, or issues of fact have to be decided then an oral hearing will be necessary.

If no oral hearing is to be held then the respondent to the wasted costs application should be asked if he or she wishes to amplify their written submissions in the light of that decision.

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In *Ridehalgh v Horsefield* [1994] Ch 205, [1994] 3 All ER 848, CA, the Court of Appeal considered some situations where it would be appropriate for the judge to initiate a wasted costs enquiry. These included a failure to appear at court, lateness and negligence leading to an otherwise avoidable adjournment, gross repetition or extreme slowness.

Judges should not make lawyers 'show cause' where the issue went to the merits. This should be left to the parties. An example of a case where the court did intervene was *R v Secretary of State for the Home Department, ex p Abbassi* (1992) Times, 6 April, CA.

On an application under CPR Pt 23, the court may proceed to the second of the two-stage process without adjourning the hearing if it is satisfied that the legal representative has already had a reasonable opportunity to give reasons why the court should not make a wasted costs order; in other cases the court will adjourn the hearing before proceeding to the second stage. (See para 53.7 of the Practice Direction about costs supplementing CPR Pts 43–48).

The court should determine the procedure to be followed to meet the requirements of the individual case. The overriding requirements are that any procedure has to be fair and as simple and summary as the circumstances permit. Elaborate pleadings should in general be avoided. No formal process of discovery or interrogatories would be appropriate. The court could not imagine any circumstances in which the applicant should be permitted to interrogate the respondent lawyer (*Ridehalgh v Horsefield [1994] Ch 205, CA, p 38).*

On the other hand, the respondent must be entitled to present a full defence and must be informed of the conduct complained of, the amount claimed and the alleged causal link between the two. Hearings should be measured in hours, not days or weeks.

One of the drawbacks of the summary procedure was that the lawyers involved were often unable to make use of documents protected by legal professional privilege to justify their actions, it being a matter for the clients alone to decide whether to waive their privilege. The matter was considered by the House of Lords in *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120, [2002] 3 All ER 721on 27 June 2002. The court concluded that a party can seek a wasted costs order against his opponent's legal representatives as well as his own. However, this poses a problem if the opponent does not wish to waive his privilege to assist his legal representative. The legal representative then has no ammunition with which to defend himself. The case centred around allegations of fraud contained in a notice of appeal drafted by leading and junior counsel and whether counsel had before them reasonably credible material which as it stood established a prima facie case of fraud. In order to justify their pleading counsel would need to obtain a waiver of privilege from their clients to release such material: such waiver was not forthcoming. The barristers argued that they could not tell their tale to the court and fairness required all relevant material should be before the court then no order for wasted costs should be made.

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At paragraph 23 Lord Bingham stated:

> 'Where a wasted costs order is sought against a practitioner precluded by legal professional privilege from giving his full answer to the application, the court should not make an order unless, proceeding with extreme care, it is:
>
> (a) satisfied that there is nothing the practitioner could say, if unconstrained, to resist the order; and
> (b) that it is in all the circumstances fair to make the order.'

At paragraph 40 Lord Steyn recognised that the burden of proof is on the party applying for the order. There is no shift in the evidential burden when barristers, and presumably solicitors, are prevented by professional privilege from telling their side of the story. The court should not speculate or guess about the material that was before the lawyers. Lord Steyn observed:

> 'Without knowing the barristers' side of the story, I am unwilling to speculate about the nature of the documents before them … Lawyers are entitled to procedural justice. Due process enhances the possibility of arriving at a just decision. Where due process cannot be observed it places in jeopardy the substantive justice of the outcome.'

It was impossible to determine the issues fairly and the wasted costs order had to be quashed.

At paragraph 61, Lord Hobhouse reiterated the observations in *Ridehalgh v Horsefield* [1994] Ch 205, [1994] 3 All ER 848, CA that the respondent lawyers are entitled to the benefit of any doubt. He stated:

> 'The answer given therefore was not to treat the existence of privileged material as an absolute bar to any claim by an opposing party for a wasted costs order but to require the court to take into account the possibility of the existence of such material and to give the lawyers the benefit of every reasonably conceivable doubt that it might raise.
>
> So, all that the lawyer has to do is to raise a doubt in the mind of the court whether there might not be privileged material which affected its decision whether or not to make a wasted costs order and, if so, in what terms and the court must give the lawyer the benefit of the that doubt in reaching its decision, including the exercise of its statutory discretion. I see nothing unfair about this approach.'

The Court of Appeal followed this approach in *Dempsey v Johnstone* [2003] EWCA Civ 1134, [2003] All ER (D) 515 (Jul)where a costs order was made against the

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defendant solicitors for pursuing a hopeless case. It was held that in the absence of privileged material it is not possible to reach a conclusion adverse to the defendant on the question of whether no reasonably competent legal adviser would have evaluated the chance of success as justifying continuation of the proceedings. Without any waiver of privilege in relation to counsel's advice, it was impermissible to infer from the continuance of legal aid that the claimant's legal representatives were asserting good prospects of success.

The House of Lords concluded that it should not make an order unless (Medcalf v Mardell *[2002] UKHL 27, [2003] 1 AC 120, [2002] 3 All ER 721)*:

(1) it is satisfied there is nothing the lawyer could say, if privilege had been waived, to resist the order; and
(2) that it is in all the circumstances fair to make the order.

In this case, the court concluded it was impossible to determine the issues fairly as they were unaware of the nature of the documents before the barristers and consequently quashed the wasted costs order.
[1]

(a) Solicitor's liability for costs when representing a bankrupt

In *Nelson v Nelson* (7 February 1996, unreported), CA, a firm of solicitors instituted proceedings, including obtaining a Mareva Injunction, on behalf of a client whom they were unaware was an undischarged bankrupt. A bankrupt was not entitled to bring an action relating to his property, the cause of action having vested in his trustee in bankruptcy. Nevertheless, he had the capacity and authority to retain solicitors, and solicitors acting for him without knowledge of his bankruptcy were saying no more than that they had a client and that the client had authorised the proceedings. The solicitors did not represent that a client had a good cause of action, and in commencing the proceedings warranted no more than they had authority from the client to do so. In those circumstances there had been no breach by them of their duty to the court, nor had they been negligent, and thus the court should exercise its discretion in their favour when considering an application for costs against them personally by a defendant.

(b) No wasted costs on ex parte application

There is no power in the court to make a wasted costs order in favour of, or (by parity of reasoning) against, a person who elected to oppose an *ex parte* application for leave to apply for judicial review. In *R v Camden London Borough Council, ex p Martin*, [1997] 1 All ER 307, [1997] 1 WLR 359 such a person was not a party for present purposes. The modern practice of the court in regularly hearing and sometimes inviting the participation of such persons could not make it otherwise; only legislation or a rule change could make it so.

(c) Stay need not be lifted to seek wasted costs order

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It a case is settled and stayed by way of consent order, it is still possible for a party to make an application for a wasted costs order. In *Wagstaff v Colls* [2003] EWCA Civ 469, (2003) Times, 17 April, 147 Sol Jo LB 419, the Court of Appeal reversed a judgment that disallowed a parties application to lift a stay so an application for wasted costs could be made. The court held it to be unnecessary to require the stay to be lifted for the purpose of bringing a wholly different claim which might be connected with the stayed proceedings but where the connection was wholly tangible. There was thus nothing to prevent an application for a wasted costs order being made and entertained after a final order had been made and perfected entering judgment for or against the claimant.

(d) Consideration of the issue of whether wasted costs should be awarded was only sensible if the scope of the costs sought was narrow and clear

In *(1) Regent Leisuretime Ltd (2) Stephen Amos (3) Peter Barton v (1) Philip Skerrett (2) Ken Pearson & Reynolds Porter Chamberlain* [2006] EWCA Civ 1032, [2006] All ER (D) 34 (Jul), the appellant third party firm of solicitors (R) appealed against the judge's decision that the issue as to whether R should be liable for wasted costs should be investigated. The first claimant company (L), the second claimant (D) and the third claimant (B), who were directors and shareholders of L, had issued proceedings against the first and second defendant solicitors (S and P), alleging professional negligence in the performance of their duties in earlier proceedings. R, who had been instructed to act in the matter by P's insurers, acknowledged service of the claim form on behalf of both S and P, although R had no instructions from S and did not contact him in connection with the matter. R subsequently served a defence, and further amended defences on behalf of both P and S. When P informed S of R's actions, S contacted R and stated that they had no authority to act for him. As S had not been served personally with the claim, he then assumed that it was not proceeding against him. However, R later contacted S informing him to prepare for trial in the matter. S applied for the claim against him to be struck out. The judge granted that application on the grounds that:

(i) S had been an undischarged bankrupt at the time the claim was issued and no permission had been sought from or given by the court to bring proceedings against him; and
(ii) the proceedings had never been served on S.

S then applied for an order that R pay all his costs lost, wasted or thrown away on an indemnity basis. D and B made a similar application on their own behalf. The judge found that it was obvious that R had had no authority to act as they had, and considered that the issue as to whether R should be liable for wasted costs should be investigated. R contended that the judge had erred in his decision because he had not received the required quantification of the costs sought to decide whether they were likely to be awarded, or whether a separate hearing would be proportionate. D and B

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submitted that, if R had not acknowledged service on S's behalf, they would have served him another way, so that their pre-trial costs had been wasted. S submitted that, as a result of R's conduct, he had incurred costs in trying to extricate himself from the action.

HELD: *Appeal allowed*.

The referral to the second stage of the issue as to whether wasted costs should be awarded was only sensible if the scope of the costs sought was narrow and clear. In the instant case, there had been insufficient material for the judge to make that determination. S, D and B were all litigants in person and their recoverable costs would, in any event, be limited. Further, both D and B had, in any event, incurred costs in pursuing the action against P, and their wasted costs in respect of the claim against S were likely to be modest. Moreover, so far as S was entitled to recover his costs in applying for the claim to be struck out, the parties liable for those costs were D and B, as in the light of S's status as an undischarged bankrupt, no claim against him should have been made in any event. The judge's order for assessment of wasted costs was, accordingly, set aside.

4 JURISDICTION

In *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120, [2002] 3 All ER 721, the House of Lords had to consider whether s 51(6) of the SCA 1981 conferred a right on a party to seek an order against the legal representative of the other party. The court upheld an earlier decision of *Brown v Bennett (No 2*) [2002] 2 All ER 273, [2002] 1 WLR 713where Mr Justice Neuberger concluded that s 51(6) should be construed on a wide basis to cover the legal representative of any party to the proceedings. The House of Lords affirmed that judgment. Wasted costs orders are likely to become more common.

5 UNSUCCESSFUL APPLICATIONS

If the application is unsuccessful it is clear that the unsuccessful applicant can expect to pay the costs. In *Bellamy v Central Sheffield University NHS Trust* [2003] All ER (D) 50 (Jul), CA, the Court of Appeal upheld the principle that an unsuccessful applicant should normally pay the costs to the respondent. Denial of a successful party's costs of success had to be explained. Some idea of the costs that can be incurred in a wasted costs application can be gathered by the estimates in *Chief Constable of North Yorkshire v Audsley* [2000] Lloyd's Rep PN 675. The costs of the wasted costs application were estimated to be £130,000 when the amount in dispute was £169,000. Unsurprisingly the judge declined to issue a Notice to Show Cause on the grounds that the costs of the application were likely to be disproportionate.

In *Hallam-Peel & Co v Southwark London Borough Council* [2008] EWCA Civ 1120, [2008] All ER (D) 200 (Oct), the Court of Appeal held that a wasted costs order

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should not have been against solicitors who raised a new point in possession proceedings which led to further adjournments.

The judgment points out that different lawyers will look at the same case in different ways and have thoughts and ideas about them that others will or may not have. The same lawyer may also see it differently six months on and consider investigating an angle which had not previously occurred to him or her.

Here it meant that the solicitor should not be penalised by a wasted costs order when their counsel thought of a new point which they have not previously considered.

In *Koo Golden East Mongolia v Bank of Nova Scotia [2008] EWHC 1120 (QB), [2008] All ER (D) 254 (May)*the defendant bank claimed a wasted costs order against the solicitors who had acted for the unsuccessful claimant in a claim to trace and recover missing gold. It contended that it was entitled to a wasted costs order because the solicitors' conduct was persistently negligent and unreasonable in making and continuing to have the Central Bank of Mongolia as a party to the action because the solicitors should have appreciated that the bank was immune from suit because of the provisions of the State Immunity Act 1978. In dismissing the claim the court gave the following reasons:

- a bill of costs should have been served before making the application;
- the claimant should have been given a proper opportunity to pay the costs;
- the absence of an application to strike out the claim was hardly consistent with the submission that it was misconceived;
- the suggestion that 'no reasonable solicitor could have been optimistic' was well below the threshold for sufficient negligence or unreasonableness to justify a wasted costs order;
- even a binding authority fatal, or almost fatal, to the client's case might not justify a wasted costs order.

The power to make a wasted costs orders is discretionary. In *R (on the application of Hide) v Staffordshire County Council* [2007] EWHC 241 (Admin), [2007] All ER (D) 402 (Oct) the claimant's advocate had engaged in behaviour which could properly be regarded as improper, unreasonable and/or negligent. The proceedings were entirely unnecessary and were doomed to failure and a reasonably competent solicitor would have known that. Nevertheless, the judge concluded that no wasted costs order should be made against the solicitor as it was likely to result in the solicitor's bankruptcy and that would be a disproportionate consequence.

6 TRIBUNALS

From 3 November 2008 the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care

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Chamber) Rules 2008 provide that a tribunal shall not make an order in respect of costs other than for wasted costs or if the tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings. The Upper Tribunal may also make an order in respect of cost in proceedings on appeal from another tribunal, to the extent and in the circumstances that the other tribunal had the power to make an order in respect of costs. Either tribunal may make an order for costs on an application or on its own initiative. The amount of cost to be paid may be ascertained by:

(a) summary assessment;
(b) agreement of a specified sum by the paying person and the person entitled to receive the cost;
(c) assessment as the whole or a specified part of the costs incurred by the receiving person, if not agreed.

Following an order for assessment, the paying person or the receiving person may apply to the High Court in the Upper Tribunal and to the county court in the First-Tier Tribunal for a detailed assessment of costs in accordance with the Civil Procedure Rules 1998 on the standard basis or, if specified in the order, on the indemnity basis.

CPR 44.14 provides that on an assessment of costs between the parties where a party or his legal representative fails to comply with a rule, practice direction or court order or it appears to the court that the conduct of a party or his legal representative, before or during the proceedings which gave rise to the assessment proceedings, was unreasonable or improper the court may:

(a) disallow all or part of the costs which are being assessed; or
(b) order the party at fault or his legal representative to pay costs which he has caused any other party to incur.

However, unlikely section 51 of the Senior Courts Act 1981, CPR 44.14 contains no provision preventing the solicitor from rendering a charge to his or her client in respect of any between-the-parties costs which have been disallowed. This is the case even though CPR 44.14(3) requires the solicitor to notify the client in writing of any order based upon his misconduct no later than seven days after the solicitor receives notice of the order if the party is not present when the order is made. One possible remedy is for the court to ask the solicitor to undertake not to render a charge to the client as an alternative to the court initiating an investigation under section 51 of the Senior Courts Act 1981.

In *Godfrey Morgan Solicitors Ltd v Cobalt System Ltd* - 31 August 2011 - the Employment Appeal Tribunal gave guidelines on the proper approach to applications for wasted costs orders.

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The appellant solicitors (G) appealed against a wasted costs order made against them by an employment tribunal. They had been acting under a contingency fee agreement for an employee (C) in an unfair dismissal claim against the respondent employer (X).

The claim was listed for a two-day hearing. When the solicitors told C that he would have pay for counsel, C stated that he had understood that he would not have to pay anything upfront and that he could not afford to proceed with the claim.

The solicitors did not inform X's solicitors that the claim had been withdrawn until a few days before the hearing. X's solicitors applied for a wasted costs order against G. The tribunal found that G had wanted a settlement but when that was not available, they had failed promptly to advise C about his position and had failed to implement C's instruction to withdraw the claim.

The tribunal ordered G to pay the costs incurred by X's solicitors from the date at which it became clear that the case would not settle. G submitted that the judge had (1) erred in refusing to allow them to produce documents which cast doubt on criticisms made about their advice to C; (2) acted contrary to the rule laid down in *Ratcliffe Duce & Gammer v L Binns t/a Parc Ferme* (unreported, April 23, 2008 EAT) by allowing X to cross-examine them and to make submissions on the wasted costs issue.

HELD: (1) The correspondence and attendance notes G sought to produce showed them in a less bad light. However, the judge's decision not to allow those documents in so late in the day was within his discretion. (2) There was no general rule as Elias J. appeared to propound in *Ratcliffe.* His observations were on any view obiter and were made in the context of a very different procedural situation. As regards the making of submissions, it was standard practice in the context of other kinds of issue for one party to be able to comment on the other party's submissions; there was nothing different about a wasted costs application. As for cross-examination of the representative against whom costs were sought, it was a fair and proportionate way of helping the tribunal get the right result in the instant case. (3) Save in straightforward cases tribunals should be reminded not only of the terms of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 Sch.1 para.48 but also of the Court of Appeal's guidance in *Ridehalgh v Horsefield* (1994) (Ch 205 CA (Civ Div) at pp.226-239 and to refer to the relevant aspects of that guidance in its reasons.

Second, it was always wise to follow the three-stage approach outlined in *Ridehalgh* at p.231 F-G.

Third, as emphasised in *Ridehalgh*, the right procedure for determining claims for wasted costs would depend on the circumstances of the particular case. Proportionality was an important consideration. The only essential requirement was that the representative had a reasonable opportunity to make the representations as to

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whether an order should be made. That could mean that an application for wasted costs could not be dealt with in the substantive hearing.

Tribunals would often understandably wish to deal with such applications there and then in the interests of economy. However, sometimes that would simply not be fair, and the representative would be entitled to more time to make representations.

As the Court of Appeal said in *Ridehalgh*, although the procedure had to be as simple and summary as possible, that could only be so far as fairness permitted.

Applications for wasted costs orders would often involve not only quite large sums but also what might be very serious criticisms of the representative's competence or conduct which might have serious repercussions. Judges had to resist the temptation to treat wasted costs issues as matters of ancillary significance.

Fourth, in any case where privilege had not been waived the tribunal had to give full weight to the warnings in *Ridehalgh* and ought to make clear that it had done so. However, it would not always be necessary for a tribunal to consider privileged material in order to decide whether a representative was at fault.

Fifth, the amount of detail required in written reasons in relation to a wasted costs order would vary enormously. The issues would sometimes be important and would not always be straightforward. In such cases, thorough treatment would be required.

Wasted costs orders were also disproportionately likely to generate appeals, so the Employment Appeal Tribunal would need to have a clear account of the tribunal's reasoning, *Ridehalgh* applied (para.36). Appeal dismissed.

Amercing

In the 15th Century a litigant who had wasted the court's time, for example by failing to attend a hearing or to comply with an interim order, could be amerced by being ordered to pay compensation to the Crown. Indeed both parties could be amerced if, say, they had settled the matter but not let the court know thus leaving the judge with nothing to do. Given that the court service is now required to be a profiteering sector, some would say racketeering given the astronomical court fees and poor service, it is surprising that the revival of amercing has not found its way in to the Jackson/Clarke reforms.

Employment Tribunals have a significant personal injury jurisdiction in their own right but decisions on wasted costs are also relevant to cases conducted in the ordinary courts.

In *Wilsons Solicitors (In a Matter of Wasted Costs) v Craig and Sybil Johnson and Others* UK EAT/0515/10/DA the Employment Judge had made a wasted costs order

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on the ground that a Case Management Discussion had been abortive due to the Appellant's solicitors not having properly prepared the case.

On appeal the Employment Appeal Tribunal upheld the order and gave the following guidance:

> "Wasted costs orders are always, as the cases emphasise, a serious matter, involving as they do a finding of negligence (at least) on the part of the representative. We have observed a tendency among some judges to deal with them without full reasoning. That is to be deprecated. In every case where a wasted costs order is made the judge should remind himself or herself of the terms of rule 48 and of the relevant principles appearing from the authorities; and it is good practice to do so explicitly in the reasons given. But the Judge's reasons here have to be assessed in the light of the submissions made. It is clear from the materials that we have set out above that Mr Wilson took no point before the Judge about the extent of his own responsibility for the defects in the presentation of his clients' case: rather, he attempted to defend his pleadings and his conduct of the hearing on their merits. There are of course strict limits on what he could have said: the whole point about privilege is that the representative is unable to disclose what passed between him and his client. But in our view it would have been perfectly proper for Mr Wilson, as he did before us, to draw the Judge's attention to the well-known passages in *Ridehalgh* and/or *Ratcliffe* and to have made the point, as a matter of principle, that the Judge could not assume that deficiencies in the way the case was formulated where his responsibility rather than his clients.
>
> He did not do so. Instead his case apparently was that his pleadings had been satisfactory and the case sufficiently clarified. In those circumstances we do not think that the Judge can be blamed for not explicitly addressing the question of whether Mr Wilson might not have been responsible for the defects which she found".

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