

# Wasted Costs

---

Martyn Griffiths & Priya Gopal

19<sup>th</sup> October 2023

# What this webinar will cover

- Procedure for making an application
- The impact of privilege on wasted costs applications
- Practical considerations as to when an application will be brought
- How the test for wasted costs is applied

# Procedure

---

# Back to basics

- **Senior Courts Act 1981 s.51(6) and (7):**

(6) In any proceedings mentioned in subsection (1), the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.

(7) In subsection (6), “wasted costs” means any costs incurred by a party—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.

# The Rules – CPR r46.8

(2) The court will give the legal representative a reasonable opportunity to make written submissions or, if the legal representative prefers, to attend a hearing before it makes such an order.

(3) When the court makes a wasted costs order, it will –

(a) specify the amount to be disallowed or paid; or

(b) direct a costs judge or a district judge to decide the amount of costs to be disallowed or paid.

(4) 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.

# Procedure (1)

- Nb: Court can make a wasted costs order on its own initiative (**PD46, paragraph 5.3**)
- Part 23 or orally (**PD46, paragraph 5.4**)
- If the application is made under Part 23, application notice/evidence **must** cover:
  - Act/omission by the legal representative
  - Costs sought against the legal representative**(PD46, paragraph 5.9)**

# Procedure (2)



- 2-stage process (**PD46, paragraph 5.7**)
- First stage – court to be satisfied that:
  - (i) it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made; and
  - (ii) the wasted costs proceedings are justified notwithstanding the likely costs involved.
- Second stage – court will consider, after giving the legal representative an opportunity to make representations in writing or at a hearing, whether it is appropriate to make a wasted costs order.

# Procedure (3)

- Consider whether the action is justified or suitable
- Proportionality – ***Kagalovsky v Balmore Invest Ltd [2015] EWHC 1337 (QB)***
- Summary process v complex professional negligence action – ***Lakatamia Shipping Co and others v Baker McKenzie LLP [2021] EWHC 2072 (Comm)***
- Court will consider complexity and number of allegations – ***King v Stiefel [2023] EWHC 453 (Comm)***
- Note **PD46, paragraph 5.8** - The court may proceed to the second stage described in paragraph 5.7 without first adjourning the hearing if it is satisfied that the legal representative has already had a reasonable opportunity to make representations.

# The privilege problem

- Belongs to the client and can only be waived by the client.
- What if the client declines to waive privilege and that is a key part of the legal representative's answer to the allegations?
- ***Ridehalgh v Horsefield* [1994] Ch. 205** – full allowance for the inability of the lawyers to tell the story.
- ***Medcalf v Mardell* [2002] UK HL 27** – court to be satisfied that there is nothing the practitioner could say, if unconstrained, to resist the order and that it is in all the circumstances fair to make the order.

# Timing

- **Practice Direction 46, paragraph 5.2**
  - Any stage in the proceedings up to and including the detailed assessment proceedings
  - Generally after trial but applicants are not restricted to this
- Promptness - ***Sharma v Hunters (Wasted Costs)* [2011] EWHC 2546** (Fam)
- Still possible where proceedings are stayed – ***Wagstaff v Colls* [2003] EWCA Civ 469**



# Which judge?

- ***Mengiste and Another v Endowment Fund For the Rehabilitation of Tigray* [2013] EWCA Civ 1003:**
  - Generally judge who heard the substantive application
  - Could have a case where there is bias requiring the judge to recuse themselves



# Costs of the application

- If the application succeeds, costs will be dealt with on the usual basis but conduct may justify indemnity costs – ***R (on the application of Grimshaw) v Southwark London Borough Council [2013] EWHC 4504 (Admin)***.
- If unsuccessful, there is a risk of indemnity costs – see ***Rybak v Langbar [2011] EWHC 452 (Ch)***, where D sought wasted costs of over £1m and made very serious allegations against C's solicitors. Indemnity costs were ordered. Morgan J clarified that this did not mean every applicant who makes a wasted costs application faces indemnity costs but the decision is a warning to proceed with caution.

## ss.51(6) and (7) Senior Courts Act 1981

(6) ... the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined...

(7) In subsection (6), “wasted costs” means any costs incurred by a party –

- (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative...; or
- (b) which in the light of any such act or omission occurring after they were incurred, the court considers it unreasonable to expect that party to pay.

# *Ridehalgh v Horsefield* [1994] Ch 205

Where the Court is considering making a wasted costs order the following must be met:

(1) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?

(2) If so, did such conduct cause the applicant to incur unnecessary costs?

(3) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

# Improper conduct

***Ridehalgh*** at 232:

*'Improper' means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. **It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct.** But it is not in our judgment limited to that. Conduct which would be **regarded as improper according to the consensus of professional (including judicial) opinion** can be fairly stigmatised as such whether or not it violates the letter of a professional code.*

# Improper conduct

## ***Re A Company*** [1996] 2 All ER 417

A solicitor would be acting improperly where he swore an affidavit in support of a winding up petition asserting that a debt is owing and that the company is insolvent where he did not have that belief.

## ***Thomas Chambers Solicitors v Miah*** [2013] EWHC 1245 (QB)

Solicitors acted improperly where they continued a claim on behalf of a party who had been declared bankrupt without obtaining the consent of the trustee in bankruptcy

# Unreasonable conduct

***Ridehalgh*** at 232:

*'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is **vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive.** But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. **The acid test is whether the conduct permits of a reasonable explanation.** If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.*

# Unreasonable conduct

## ***Abbassi v Secretary of State for the Home Department*** [1992]

Imm AR 349

A costs order was made against solicitors and counsel where a frivolous appeal was pursued despite the fact that the tribunal had made clear that it was ill-advised.

# Negligence

***Ridehalgh*** at 233:

*"negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.*

*In adopting an untechnical approach to the meaning of negligence in this context, we would however wish firmly to discountenance any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence: "advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do;" an error "such as no reasonably well-informed and competent member of that profession could have made"*

# Negligence

However, negligence does require a breach of a duty to the Court – per Neuberger J in ***Charles v Gillian Radford & Co*** [2003] EWHC 3180 (Ch)

This case contrasts with ***Adegbulugbe v Nursing & Midwifery Council*** [2014] EWHC 405 (Admin)

# Negligence – hopeless cases

***Persaud v Persaud*** [2003] EWCA Civ 394 per Peter Gibson LJ:

*"I accept Mr Stewart's submission that there **must be something more than negligence** for the wasted costs jurisdiction to arise: there must **be something akin to an abuse of process** if the conduct of the legal representative is to make him liable to a wasted costs order."*

# Negligence – hopeless cases

***Dempsey v Johnstone*** [2003] EWCA Civ 1134 per Latham LJ at 28:

*“In cases where the allegation is that the legal representative pursued a hopeless case, the question was correctly identified by the judge as whether no reasonably competent legal representative would have continued with the action. It is **difficult to see how that question can be answered affirmatively unless** it can also be said that the **legal representative acted unreasonably**, which is akin to establishing an **abuse of process.**”*

# Causation

s.51(7) Senior Courts Act 1981:

*In subsection (6), “wasted costs” means any costs **incurred by a party** –*

*(a) **as a result of** any improper, unreasonable or negligent act or omission on the part of any legal or other representative...;*

# Discretion

The final stage of the test is to determine whether it is just in all the circumstances that the representative pay the costs in full or in part.

***R (on the application of Hide) v Staffordshire CC*** [2007] EWHC 2441 (Admin)

# Final thoughts

- Consider the impact of the procedural elements on the substantive.
- Work through each of the procedural and substantive elements of the jurisdiction before launching an application
- We may see increased attempts to use the jurisdiction with the expansion of fixed costs on the horizon

# Thank you!

Any questions?

---

[Martyn.Griffiths@gatehouselaw.co.uk](mailto:Martyn.Griffiths@gatehouselaw.co.uk)

[Priya.Gopal@gatehouselaw.co.uk](mailto:Priya.Gopal@gatehouselaw.co.uk)