LC Paper No. CB(2)2737/06-07(01)

Statute Law (Miscellaneous Provisions) Bill 2007: Part 7

Views of the Hong Kong Bar Association

1. The Bills Committee on the Statute Law (Miscellaneous Provisions) Bill 2007 (the Bill) requested the Hong Kong Bar Association (HKBA) to provide its views on Part 7 of the Bill, namely the proposed amendments to the Costs in Criminal Cases Ordinance (Cap 492) relating to wasted costs in criminal proceedings.

2. The proposed amendments in Part 7 of the Bill seek to replace the definition of 'wasted costs' in s 2 and the enabling provisions in s 18 of the Costs in Criminal Cases Ordinance with more wide-ranging provisions.

3. The HKBA notes that similarly wide-ranging provisions were sought to be introduced in 1996. The HKBA resisted that *extreme* proposal and, eventually, the present provisions confining the circumstances for wasted costs orders to failure to appear on time or at all causing an avoidable adjournment were enacted.

4. The HKBA also notes that the proposed amendments in Part 7 of the Bill appear to be as wide-ranging as those originally sought to be introduced in

1996 and that its discussions with the Administration have not resulted in revision of any of the amendments.

The Bar's Preferred Position

5. The Administration considers that the proposed amendments are justified in view of the wasted costs regime to be put in place under Civil Justice Reform and also the intended purpose of deterring extremely deficient work of the nature identified in judgments of the Court of Appeal giving rise to comments urging the expansion of the wasted costs regime in criminal cases.

6. The HKBA submits that the proposed amendments in Part 7 of the Bill should not proceed at all. Justification for amendment by reliance upon the corresponding sections of the civil wasted costs regime is inapt. Not only are the procedural regimes in civil and criminal proceedings fundamentally different, the nature of the role played by counsel is entirely different. In civil proceedings, counsel's duty is to succeed by whatever proper means are at his disposal, subject to his duty to the court and the public (Bar's Code of Conduct: paragraph 135, a copy of which is enclosed for reference). In criminal proceedings, prosecuting counsel presents the factual case for the prosecution fairly and impartially, performing his duty to the court and the public; he should not regard himself as appearing for a party at all (Bar's

Code of Conduct: paragraph 159, a copy of which is enclosed for reference). On the other hand, defence counsel has a duty first and foremost to protect his client from conviction except by a competent tribunal and upon legally admissible evidence; he has very limited duty to the court and the public (Bar's Code of Conduct: paragraph 146, a copy of which is enclosed for reference). The Prosecutions of Offenders Act 1985 of the United Kingdom, though providing for a wasted costs regime in criminal cases that borrows the language of the wasted costs regime in civil cases, has been applied in a wholly different manner; see, for examples, Re a Barrister (No 1 of 1991) [1993] QB 293; Re P (a barrister) [2002] 1 Cr App R 207; Practice Direction (Costs: Criminal Proceedings) [2004] 1 WLR 2657, [2004] 2 All ER 1070.

7. Any conduct which might attract sanction under the proposed amendments should be serious misconduct and as such would almost inevitably be a disciplinary offence. The Bar's self-regulatory processes are a better and more appropriate means of dealing with misconduct. Disciplinary action, having with it the power to order compensation, serves as an effective deterrent against the lack of professionalism that the Court of Appeal sought to highlight in two of the three cases cited as the sources of the judicial comments in favour of expansion of the wasted costs regime in criminal cases; namely Yeung Mok Yeh & Anor v HKSAR [2005] 4 HKLRD 357 and HKSAR v Ho Hon Chung Daniel & Ors (unreported, CACC 269/2000).

Further, it should be noted that no complaint was made to the HKBA in those cases for the matter to be dealt with under the disciplinary regime.

8. The proposed amendments will create more problems than they will solve. Effective communication between bench and bar would address the problem effectively and expeditiously. The issue could be further complicated by the introduction of this wide-ranging jurisdiction. Take for example the proposed amendment which provides the barrister with a right to be heard. There will be many circumstances where his right to be heard will be inconsistent with his client's right to legal professional privilege. A convicted defendant is less likely to waive privilege if he can see the opportunity for appeal. This will hamper representations and create an invidious gulf between client and counsel. It places counsel in a difficult ethical position where the concerns of the court may easily be answered by an exposition of instructions.

9. Further, there is and remains a real risk that the proposed legislation may be applied inappropriately by those in whose hands this new power will rest and will become a form of disguised fine for disagreeable conduct. Although the Bar do and should have every confidence in the Judiciary, this is a risk that the HKBA, looking at the matter from a practical and realistic perspective, cannot lightly ignore.

10. Clause 18(3) of the Bill, which speaks of 'fearless advocacy' does not provide any real protection against misuse and abuse of this new jurisdiction. Paragraph 110 of the Bar's Code of Conduct provides that a barrister has a duty to uphold the interests of his client without regard to his own interests or to the consequences to himself or to any other person (copy enclosed for reference). Both in relation to the specific 'fearless advocacy' clause and in relation to the Bill in general this basic principle of operation of all barristers is potentially placed in serious jeopardy by the proposed amendments. If, on the other hand, a formal complaint is made after the proceedings have been finalized, none of the parties are prejudiced and the practitioner in question can answer for himself before his peers. Where the court feels that the opposing party has been prejudiced as to costs, it can indicate such a view in its formal complaint.

11. In Harley v McDonald [2001] 2 AC 678, the Privy Council observed at [50]-[52] that –

"[50] As a general rule allegations of breach of duty relating to the conduct of the case by a barrister or solicitor with a view to the making of a costs order should be confined strictly to questions which are apt for summary disposal by the court. Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples. The factual basis for the exercise of the jurisdiction in such

circumstances is likely to be found in facts which are within judicial knowledge because the relevant events took place in court or are facts that can easily be verified. Wasting the time of the court or an abuse of its processes which results in excessive or unnecessary cost to litigants can thus be dealt with summarily on agreed facts or after a brief inquiry if the facts are not all agreed. Scope for the making of a costs order that will compensate as well as penalize is then likely to be found in making an order against the practitioner that will indemnify the opposing litigant against costs incurred as a result of the breach of duty that would otherwise not be recoverable.

[51] Circumstances which involve serious breaches of the practitioner's duty to the court may however raise questions about his duty to the client which involve allegations of professional misconduct. They may also raise questions as to whether the practitioner is liable in damages to the client for negligence. But it is not appropriate when considering whether or not to make a costs order for the court to rule upon whether, in addition to a breach of the duty to the court, there has been a breach of the rules of professional conduct. This is a matter which will ordinarily be dealt with by way of complaint under the disciplinary procedures in the 1982 Act. Nor is it appropriate for the court in exercising its summary jurisdiction to make a costs order to say whether the client has a cause of action against his barrister or solicitor for negligence. This is a matter which ought to be dealt with in separate proceedings, in which the issues of fact and law between the client and the practitioner are clearly focused and the practitioner is given a full and fair opportunity to respond to the client's claim.

[52] All this may seem to be elementary. But the distinction which must always be observed between these different processes is fundamental to a proper understanding of the limits of the inherent summary jurisdiction of the court. The court's only concern when it is exercising this jurisdiction is to serve the public interest in the administration of justice."

12. The HKBA is of the view that the proposed amendments obscure the fundamental distinction highlighted in the foregoing paragraphs of the Privy Council's judgment. It does not serve the public interest in the administration of justice to provide the courts of the HKSAR the power to award wasted costs in the extended and wide-ranging scope and manner proposed. The present provisions in the Costs in Criminal Cases Ordinance have already provided for the cases the Privy Council indicated as typical for summary disposal by the court on the question of costs.

The Bar's Alternative Position

13. If members of the Legislative Council consider that the combination of the current legislation and the legal profession's disciplinary mechanisms are insufficient to meet the concerns of the Judiciary, an alternative to the Administration's proposed amendments would be to amend the legislation upon a more limited basis.

14. The HKBA considers that the definition of 'wasted costs' in the proposed amendments is too wide-ranging and uncertain. The benchmark against which any practitioner should be assessed should be that contained within the Bar's Code of Conduct or the Hong Kong Solicitor's Guide to Professional Conduct, as the case may be, for professional misconduct. See, for example, paragraph

7 of the Bar's Code of Conduct (copy enclosed for reference). That being the case, the wording of the proposed definition should reflect that benchmark by providing a much tighter definition than is currently suggested. This would meet the 'summary disposal' situations highlighted by the Privy Council and, at the same time, maintain the focus on what the Administration aims to deter, namely, extremely deficient work; and meet the concerns of the HKBA in respect of standardization.

15. The following wording is suggested:

""wasted costs" means any costs incurred by a party to the proceedings –

(a) as a result of-

(i) any serious improper ~~or unreasonable~~ act or omission; or

(ii) any undue delay or any other misconduct ~~or default~~ on the part of any representative or any employee of a representative; or

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

16. The HKBA further considers that the real and perceived inequality between private practitioners and public officers in the employ of the Government arising out of the continued inclusion in the Bill of s 18(6) of the Costs in Criminal Cases Ordinance is unacceptable and will in implementation be viewed as blatant discrimination. The suggestion that a Legal Officer or Legal Aid Counsel in the employ of the government may face disciplinary action or action taken under the Public Finance Ordinance (Cap 2) is not sufficient reason for the disparity of approach especially in relation to practitioners in private practice who appear on fiat or by assignment; since private practitioners may also face disciplinary action with the possibility of an order of compensation. Accordingly, if the proposed s 18(6) is to remain it must include all Counsel appearing on behalf of the Government or the legal aid fund, whether on fiat or otherwise. The better course would be to delete s 18(6) and for the Administration to take whatever steps it feels necessary to deal with any issues arising from the introduction of such legislation. The private referral Bar will have to take steps to ensure that it is adequately protected under its professional indemnity insurance scheme, so too will the Government in respect of its employees. There is no principle of law which advances this as sufficient reason to place private practitioners at personal risk of financial loss and yet safeguard the interests of practitioners employed by the Government but who are equally culpable. Such blatant inequality must be removed either by deleting the proposed s 18(6) or by providing for the

wasted costs ordered against all Counsel appearing on behalf of the Government or the legal aid fund to be borne by the general revenue.

Concluding Remarks

17. This document sets out in outline the HKBA's position in respect of the proposed amendments in Part 7 of the Bill. The HKBA also considers that the enclosed article of Hugh Evans on the Wasted Costs Jurisdiction in the United Kingdom has identified significant flaws in that jurisdiction in practice, which members of the Legislative Council should bear in mind in considering the proposed amendments. The HKBA would be pleased to elaborate issues raised in this document if asked and may wish to submit further views as the Bills Committee continues its deliberations.

Dated 20 September 2007.

Hong Kong Bar Association

CODE OF CONDUCT

The Bar

DISCIPLINARY PROCEEDINGS

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7. Serious failure to comply with the duties set out in paragraph 6 shall be professional misconduct and, if so found by a Barristers Disciplinary Tribunal, shall render the barrister liable to be punished in accordance with the provisions of the Legal Practitioners Ordinance, Cap. 159. *(Circular No. 57/93)*

8. Any failure to comply with the duties set out in Paragraph 6 which does not, in the opinion of the Bar Council, amount to professional misconduct shall be a breach of proper professional standards and, if established to the satisfaction of the Bar Council, shall render the barrister liable either (a) to be ordered to attend upon the Chairman or some other person nominated by the Bar Council in order that he should be (1) admonished or (2) given appropriate advice as to his future conduct or (b) to be admonished by letter from the Chairman.

[The next paragraph number is 10.]

10. It is the duty of a barrister:

(a) to respond to any requirement from the Bar Council for comments or information or to attend the Special Committee on Discipline or any other nominated or appointed person when required to do so by the Bar Council. (Circular No. 06/94)
(b) to attend proceedings before a Barristers Disciplinary Tribunal when so required.
(c) to attend upon the Chairman or other nominated or appointed person when required to do so by the Bar Council under paragraph 8 above.

11. A barrister must report to the Bar Council if he is convicted of a criminal offence which involves dishonesty or which may bring the profession into disrepute. In case of doubt the offence should be reported.

CODE OF CONDUCT

DUTY OF COUNSEL TO THE LAY CLIENT

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110. A barrister has a duty to uphold the interests of his client without regard to his own interests or to any consequences to himself or to any other person.

111. A barrister has the same privilege as his client of asserting and defending the client's rights by the statement of every fact and the use of every argument that is permitted by the principles and practice of the law.

112. If a barrister forms the view that there is a conflict of interest between his lay client and the person instructing him in the matter or the company, firm or other body of which such a person is a director, partner, member or employee, he should advise that it would be in the lay client's interest to instruct another person authorised to instruct him in the matter. Such advice should be given either in writing or at a conference at which both the person instructing him in the matter and the lay client are present.

113. A barrister instructed to settle a pleading is under responsibilities to the Court as well as to his client. He may not make any allegation unsupported by his instructions. He may not allege fraud unless:
(a) he has clear instructions to plead fraud, and
(b) he has before him reasonably credible material which, as it stands, establishes a prima facie case of fraud.

114. In a criminal appeal to the Court of Appeal a barrister should not settle grounds of appeal unless he considers that the proposed appeal is properly arguable.

115. In legally-aided civil cases a barrister's primary duty remains owed to his lay client but circumstances may arise where a barrister becomes of the opinion that an assisted person, for example, no longer has a reasonable prospect of success, or has required the case to be conducted or continued unreasonably in which case a barrister must comply with the provisions of Regulations 12(7) and (8) of the Legal Aid Regulations, which are reproduced at Annex 10.

116. A barrister employed as Counsel is under a duty not to communicate to any third person information which has been entrusted to him in confidence, and not to use such information to his client's detriment or to his own or another client's advantage. This duty continues after the relation of Counsel and client has ceased. A barrister's duty not to divulge confidential information without the consent of his client, express or implied, subsists unless he is compelled or permitted to do so by law.

[The next paragraph number is 120.]

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CONDUCT AT COURT

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130. A barrister must not knowingly deceive or mislead the Court.

131. In all cases it is the duty of a barrister to guard against being made the channel for questions or statements which are only intended to insult or annoy either the witness or any other person or otherwise are an abuse of Counsel's function, and to exercise his own judgment both as to the substance and the form of the questions put or statements made.

132. A barrister must not, when conducting his case, assert his personal opinion of the facts or the law to the Court.

133. A barrister must at all times act with due courtesy to the Court before which he is appearing. He must in every case use his best endeavours to avoid unnecessary expense and waste of the Court's time. He should, when asked, inform the Court of the probable length of his case; and he should also inform the Court of any developments which affect the information already provided.

134. A barrister should at once inform the Court of a settlement or of an intention to apply for an adjournment or (provided he can do so without prejudice to his client's interests) of any other matter which may affect the estimated length of hearing.

135. Subject to the provisions of this Code, a barrister should conduct cases in such manner as in his discretion he thinks will be most to the advantage of his client.

136. In civil and, subject to the provisions of paragraph 154, in criminal cases, a barrister must ensure that the Court is informed of any relevant decision on a point of law or any legislative provision, of which he is aware and which he believes to be immediately in point, whether it be for or against his contention.

137. If at any time before judgment is delivered in a civil case, a barrister is informed by his lay client that he has committed perjury or has otherwise been guilty of fraud upon the Court, the barrister may not so inform the Court without his client's consent. He may not, however, take any further part in the case unless his client authorises him to inform the Court of the perjured statement or other fraudulent conduct and he has so informed the Court.

138. In cross-examination which goes to a matter in issue, a barrister may put questions suggesting fraud, misconduct or the commission of a crime if he is satisfied that the matters suggested are part of his client's case and he has no reason to believe that they are only put forward for the purpose of impugning the witness's character.

solely the responsibility of the barrister to decide whether and to what extent the attendance in Court of his professional client or his professional client's representative may be dispensed with. *(Circular No. 85/95)*

143. Notwithstanding that neither the solicitor nor the person instructing the barrister nor their representatives are present:-
(1) if the attendance of the solicitor or the person instructing the barrister or of their representatives has been dispensed with pursuant to paragraph 142A; or, *(Circular No. 85/95)*
(2) if Counsel arrives at Court for a case in which he has been instructed by a person authorised to instruct him in the matter but neither such person nor his representative is present, and if there are no other grounds on which to request an adjournment and no practicable alternative, *(Circular No. 85/95)*

a barrister may:-
(a) conduct the case on behalf of the lay client, and
(b) exceptionally, interview supporting witnesses and take proofs of evidence if these are not already available in which case he should inform his opponent.

144. In a criminal case or in matters where the lay client is detained pursuant to the provisions of the Immigration Ordinance, a barrister may interview the lay client although the person instructing him in the matter or his representative is unable to be present, if such person has given his approval to the interview taking place or the circumstances make it necessary.
(Circular No. 61/90)

145. Save with the consent of Counsel for the opposing side or of the Court, a barrister may not communicate directly or indirectly with a witness, whether or not the witness is his client, once that witness has begun to give evidence until his evidence has been concluded.

Duties When Defending a Person Accused of a Crime

146. When defending a client on a charge of crime, a barrister must endeavour to protect his client from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which his client is charged. A barrister must not provide or devise facts which will assist in advancing his client's case.

147. A barrister may not in cross-examination attribute to another person the crime with which his client is charged unless he can properly do so in accordance with paragraph 138; or in any other part of the trial, unless there are facts or circumstances which reasonably suggest the possibility that the crime may have been committed by the person to whom the guilt is imputed.

148. Subject to paragraphs 21 and 56-63 of this Code, a barrister is under a duty to defend any person on whose behalf he is instructed on a criminal charge irrespective of any belief or opinion which he may have formed as to the guilt or innocence of that person.

149. A barrister to whom a confession of guilt has been made by his client must

with which he is charged but decides not to give evidence himself, it is the duty of his Counsel to put his defence before the Court and, if necessary, to make positive suggestions to witnesses.

157. Defence Counsel should not, in a plea in mitigation, make any allegation which is merely scandalous or calculated to vilify or insult any person. In any case, the naming in open court of third parties, whose character would thereby be impugned, should if possible be avoided. Where necessary, names, addresses or other such details should be written down and handed in to the Court.

158. In normal circumstances, it is the duty of Defence Counsel to see his lay client after conviction and sentence, or if he is unable to do this, ensure that the person instructing him in the matter or his representative does so.

Duties When Prosecuting a Person Accused of a Crime

159. It is not the duty of Prosecuting Counsel to obtain a conviction by all means at his command but rather to lay before the jury fairly and impartially the whole of the facts which comprise the case for the prosecution and to see that the jury are properly instructed in the law applicable to those facts.

160.

(a) Where Prosecuting Counsel has in his possession statements from persons whom he does not propose to call as witnesses, he should regard it as normal practice to show such statements to the Defence. Where, however, the Defence already know of the existence, identity and whereabouts of any such person and are in a position to call him (as, for example, when a notice of alibi has been served, or when such person is married to a Defendant) and in other exceptional circumstances, then Prosecuting Counsel may, in his discretion, refrain from showing the statement to the Defence.

(b) Where Prosecuting Counsel has in his possession a statement from a prosecution witness which differs in a material respect from the evidence being given by the witness or his committal statements, such a statement should be disclosed to the defence.

(c) Where Prosecuting Counsel appears in the Magistrates Court and knows that a copy of the statement of any witness he proposes to call to give evidence has not been served on the Defence, he should regard it as normal practice to show the statement to the Defending advocate.

161. A barrister prosecuting an accused person should be present throughout the trial, including the summing-up and the return of the jury. He may not absent himself without leave of the Court, but if two or more barristers appear for the prosecution, the attendance of one is sufficient.

162. It is the duty of Prosecuting Counsel to assist the Court at the conclusion of the summing-up by drawing attention to any apparent errors or omissions of fact or law which, in his opinion, ought to be corrected.

domination. It was a literate working class which read and talked about politics a lot, but mocked intellectuals. It failed to deliver an egalitarian twentieth century Australia, cut down its own tall poppies, preferring an informal mateship that mocked engaged and disciplined political solidarity. It was more comfortable with defeat at Gallipoli than victory with Fisher, Scullin, Chifley or Whitlam.[195] Then nor would it have tolerated a Hitler, Stalin or Péron. No doubt the light on Australia's hill still has more than a touch of 'convict republicanism'.[196]

This work began by positing five stages in the history of regulation: a pre-state stage when restorative justice and banishment were dominant, a weak state stage where corporal and capital punishment dominated, a strong state stage where professional police and penitentiaries dominated, a Keynesian welfare state stage where new therapeutic professions such as social work colonised what became probation-prison-parole, and a contemporarily evolving new regulatory state phase of community and corporate policing (with a revived restorative justice). I conclude that the rise of the penitentiary is preceded by a period when transcontinental movement of convicts was dominant because of its use (like slavery and indentured labour) as an instrument of imperialism. Restorative justice, corporal/capital punishment, banishment, imprisonment and government at a distance have all, in that order, had their period of dominance. Equally they have all been part of the regulatory story of all periods of recorded history.

For the Foucault of *Discipline and Punish*, the penal divide is between disciplining the body versus the soul, scaffold or penitentiary. Australian history illustrates the richer insight from seeing the most fundamentally recurrent historical tension as between inclusion and exclusion,[197] between the normative ideals of restorative and retributive justice. The way we have construed Heimer and Staffen's theory as relevant to both nineteenth century Tasmanian convicts and twentieth century African-American mothers illustrates the value in generality of explanation from researching the inclusion-exclusion opposition.[198] Heimer and Staffen's general claim, which we have supported, is that when those with the power to stigmatise are dependent on the deviant, they opt for reintegration more than stigmatisation.

195 C.J. Dennis's Ginger Mick believed in livin' and lovin' without holding any hope for the future of Australia. But through Gallipoli he reveals larrikinism in the words of Henry Lawson and Manning Clark as 'chivalry – upside down':

> An' each man is the clean, straight man 'is Maker meant 'im for,
> An' each man knows 'is brother man at last.
> Shy strangers, till a bugle blast preached 'oly brother'ood;
> But mateship they 'ave found at last; An' they 'ave found it good.

196 J.B. Hirst, "The Australian Experience: The Convict Colony" in Norval Morris and David J. Rothman (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society* (New York: Oxford University Press, 1995).

197 See Jock Young, *The Exclusive Society* (London: Sage, 1999).

198 n 1 above.

The Wasted Costs Jurisdiction

*Hugh Evans**

The wasted costs jurisdiction is flawed for six reasons, based on an analysis of all reported cases in the last nine years and five years of statistics provided by the Bar Mutual Insurance Fund Limited, and despite the guidance laid down by the Court of Appeal in Ridehalgh v Horsefield [1994] Ch 205. First, it is very costly proportionate to the amount recovered. Secondly, judges can initiate a wasted costs enquiry, which is unfair and even more disproportionately costly. Thirdly, it is procedurally complex. Fourthly, it is unpredictable whether the client will waive privilege, and what the consequences will be whether or not privilege is waived. Fifthly, it is not possible for solicitors and barristers to make contribution claims against each other. Sixthly, it is mostly used against lawyers representing legally aided litigants from whom costs cannot be recovered.

The summary jurisdiction to order a solicitor to pay wasted costs is an old one.[1] However, the original requirement to show serious misconduct meant that it was infrequently used.[2] The courts decided, after some hesitation, that the (then) new RSC Order 62 rule 11, introduced in 1986, required the applicant to prove only that the respondent solicitor was negligent.[3] Since the introduction of sections 4 and 11 of the Courts and Legal Services Act 1990 on 1st October 1991, the jurisdiction has been expressly based, inter alia,[4] on a requirement to show only negligence, and it has been extended to include barristers and other legal representatives as well as solicitors. As a result of these developments, there have been many judgments by the courts on applications for wasted costs, both reported and unreported. Despite the best endeavours of the Court of Appeal, in the leading case of *Ridehalgh* v *Horsefield*,[5] to place limits and safeguards on such applications, the jurisdiction is frequently used.

This article will argue that both in practice and in principle, the wasted costs jurisdiction is seriously flawed. Some of the reasons are theoretical, and the practical importance of them may be difficult to judge, and some are practical. The objections are based on an analysis of all the reported cases since the new jurisdiction came into force nine years ago,[6] particularly those cases heard after *Ridehalgh*. Those decisions suggest, in particular, that the costs of the wasted costs enquiry very often far outweigh the wasted costs which are either sought or

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1 For an analysis of the law, rather than critical comment on some of its aspects, see my summary in Jackson and Powell *Professional Negligence* (London: Sweet & Maxwell, 4th ed, 1996) paragraphs 4-102 *et seq* and 5-20 *et seq*, and Hendley and Leech *Solicitors' Negligence* (London: Butterworths, 1999) chapter 11.

2 As far as the inherent jurisdiction is concerned, see *Myers* v *Elman* [1940] AC 282.

3 See *Gupta* v *Comer* [1991] 1 All ER 289.

4 There are alternative grounds of improper or unreasonable conduct.

5 [1994] Ch 205.

6 Some 68 cases in all. Section 4 of the Courts and Legal Services Act 1990, which substituted the relevant new provisions relating to costs in s 51 of the Supreme Court Act 1981, came into force on 1 October 1991.

recovered. This impression is strongly reinforced by the figures for the 1994–98 policy years provided by the Bar Mutual Indemnity Fund Limited (BMIF).[7]

Before considering the problems with wasted costs, which I will divide into six areas, it is worth mentioning the competing principles behind the jurisdiction which are clearly set out in *Ridehalgh*:[8]

> The argument we have heard discloses a tension between two important public interests. One is that lawyers should not be deterred from pursuing their clients' interests by fear of incurring a personal liability to their clients' opponents; that they should not be penalised by orders to pay costs without a fair opportunity to defend themselves; that wasted costs orders should not become a back-door means of recovering costs not otherwise recoverable against a legally-aided or impoverished litigant; and that the remedy should not grow unchecked to become more damaging than the disease. The other public interest, recently and clearly affirmed by Act of Parliament, is that litigants should not be financially prejudiced by the unjustifiable conduct of litigation by their or their opponents' lawyers.

Even with the safeguards sensibly imposed by *Ridehalgh*, experience and argument suggests that the first interest is still insufficiently met, and that, with respect to the second interest, the remedy is more damaging than the disease.

A costly jurisdiction

It is all too common for the time and costs of the wasted costs enquiry to be wholly disproportionate to the quantum of the wasted costs. It is perhaps redundant to remark that in these Woolfian days, proportionality is a key ingredient in the legal procedure, and it remains to be seen whether the impact of the Woolf reforms will curb the number of wasted costs applications. In *Ridehalgh*[9] the Court of Appeal commented that:

> Material has been placed before the court which shows that the number and value of wasted costs orders applied for, and the costs of litigating them, have risen sharply. We were told of one case in which the original hearing had lasted five days; the wasted costs application (when we were told of it) lasted seven days; it was estimated to be about half-way through; at that stage one side had incurred costs of over £40,000. It almost appears that a new branch of legal activity is emerging, calling to mind Dickens's searing observation in *Bleak House*: "The one great principle of English Law is, to make business for itself . . . Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it."

The Court of Appeal in *Ridehalgh* was almost certainly referring to *C* v *C (Wasted Costs Order)*,[10] where the wasted costs hearing eventually lasted fourteen days and cost the parties over £150,000, more than the original costs and far more than the costs which the Court determined had been wasted. This is not new. In *Myers* v *Elman*[11] itself, the leading authority on the inherent jurisdiction to order a solicitor to pay costs personally, the original case lasted five days, and the wasted costs hearing another five days, followed, of course, by appeals to the Court of Appeal and House of Lords.

7 I am very grateful to Redvers Cunningham of BMIF for supplying me with the data. I have been unable to obtain figures from the Solicitors Indemnity Fund. Judging by the reported decisions, it would be likely that there are several times the number of wasted costs applications and orders against solicitors than there are against barristers.
8 n 5 above, 226.
9 n 5 above, 225–226.
10 [1994] 2 FLR 34.
11 [1940] AC 282.

To achieve proportionality, the Court of Appeal in *Ridehalgh* considered that hearings should be measured in hours and not days.[12] Similar sentiments are found in subsequent observations of the Court of Appeal: in *Turner Page Music* v *Torres Design Associates Ltd*[13] that the wasted costs procedure is inappropriate if it would result in complex proceedings; in *re Freudiana Holdings Limited*[14] that allegations involving full scale relitigation of the issues in the original trial and which involved dishonesty should not proceed; and in *Wall* v *Lefever*[15] that the wasted costs jurisdiction should not be used to generate substantial additional costs in satellite litigation which was as expensive and complex as the original litigation. These observations continue to be made because the problem has not gone away.

The length of wasted costs hearings still appears to be disproportionate. Anecdotal evidence from practitioners with considerable experience of wasted costs applications suggests that this is very common indeed. When it comes to reported cases, in some instances one cannot discern the lengths of the hearings, and in many cases both the original and the wasted costs hearings lasted all or part of a day or two, and there is not sufficient information to come to any sensible conclusion about their comparative lengths and costs. The relatively few reported cases which I have found in which the respective length of the hearings can be sensibly deduced and compared appear to support the impression gained from practitioners, which is that the burden of the wasted costs application is all too often disproportionate to what was at stake. Indeed, I have found no reported case where it is clear that the costs incurred in the wasted costs application were justified by the amount of wasted costs sought or recovered.

In *Re a Company (No 006798 of 1995)*,[16] a petition to wind up a company was struck out within a day, but the subsequent (successful) application for the solicitor who swore the affidavit in support of the petition to pay the wasted costs appears to have taken all or part of four days (presumably the last day being judgment and therefore brief), with leading counsel appearing for the respondent. In *Flimlab Systems International Ltd* v *Pennington*[17] a 'wholly misconceived' application for discovery took one and a half hours. The subsequent wasted costs application was successfully resisted on behalf of the respondent by leading counsel. While the report only indicates that the hearing took all or part of two days, the length and detail of the judgment suggests that it must have taken many times longer than the discovery application. In *Re Freudiana Holdings Limited*[18] the order that the lawyers should show cause was not allowed to proceed at a stage when the respondents' costs had reached £400,000 before the wasted costs hearing itself had been reached. However, the original case did last 165 days, with the respondent lawyers being dismissed on day 85. *In Re Merc Property Ltd*[19] Ferris J commented that far longer had been spent on the wasted costs application than on the substantive proceedings, and in future applicants for a wasted costs order had to bear in mind the principle of proportionality. In *Warren* v *Warren*[20] the costs

12 n 5 above, 238, a passage repeated and emphasised by Lord Woolf MR in *Warren* v *Warren* [1997] QB 488, 495.
13 *The Times* August 8 1998.
14 *The Times* December 4 1995.
15 [1998] 1 FCR 605.
16 [1996] 1 WLR 491.
17 [1995] 1 WLR 673. The case was decided before *Ridehalgh* was reported.
18 *The Times* December 4 1995. The figure of £400,000 does not appear in this report, but is found in Flenley and Leech, n 1 above, paragraph 11.8. For a similar recent case see *Chief Constable of Yorkshire* v *Audsley* [2000] Lloyds' Rep PN 675.
19 *The Times* May 19 1999. The short report gives no details of the time spent.
20 [1997] QB 488.

wasted concerned a committal hearing which, after a number of adjournments, was dismissed by consent. The wasted costs hearing, which was successful at first instance (but not on appeal), took three days before the Judge, and caused the Master of the Rolls to comment that both the committal proceedings and the wasted costs proceedings were 'totally disproportionate' to the nature of the proceedings involved.[21]

In *Re G and ors (children)*[22] the wasted costs hearing took half a day. It was preceded by written submissions, followed by further 'substantial' written submissions and a statement from a solicitor exhibiting a bundle of correspondence, with judgment a few weeks later. While this surprised the judge, one may think that the time spent was modest compared with other cases. However, the application was against four barristers, one a silk, and concerned delays at the hearing caused by two experts not having seen all the relevant documents. In the case of one of the experts, although the judge held that Counsel had acted unreasonably and negligently, he was not confident that any costs had been thrown away, as the wasted time was so insignificant. In the other case, a wasted costs order was made against only one of the barristers, and the costs wasted were those of securing the attendance of one expert witness for half a day. The time spent in the wasted costs hearing[23] was therefore wholly disproportionate to the wasted costs in question. If the point of the wasted costs enquiry, which was initiated by the Court, was to have been to remind the Family Bar in general about their obligations to the Court, that could have been done in a far more economical way.

There are other cases where the wasted costs sought or awarded were specified and were trivial. In *Re Harry Jagdev & Co*,[24] the court ordered the respondent solicitors to pay £1,816.09, but the Court of Appeal considered that the order was fatally flawed and quashed it. A similar result was reached in *R* v *Lawrence*,[25] where the Court of Appeal quashed an order for wasted costs in the sum of £1,500. In two cases where the lawyers failed to turn up to a hearing, wasted costs orders were made, £250 in *R* v *Rodney*,[26] and £750 in *R* v *Secretary of State of the Home Department, ex p Mahmood*.[27] The wasted costs in *re Sternberg Rood Taylor & Gill (a Firm)*[28] were £1,237.48, and in *Re a Solicitor (Wasted Costs Order)*[29] £727.88; both orders were unsuccessfully appealed. If such sums were claimed in ordinary litigation, they would be small claims cases, the costs of fighting them would not be recovered, and it is highly unlikely that anyone would actually think it cost-effective to bring them. Nor would any appeal be made, whatever the result.

The impression derived from the reported cases is that the costs of the wasted costs enquiry often outweigh the amount awarded, although it is based on relatively few cases. The experience of BMIF, which insures all barristers, is much better evidence. Their figures for the five policy years 1994 to 1998, net of any recoveries, are as follows.

21 *ibid* 495l
22 [2000] 2 WLR 1007.
23 Not costs, as the Court did not allow any of the barristers to claim fees for the wasted costs hearing.
24 *The Times*, August 12 1999.
25 [1996] CLY 1016.
26 [1997] PNLR 489, CA.
27 [1999] COD 119.
28 *The Times*, July 26 1999. The case is reported as *R* v *Qadi* at [2000] PNLR 137, which records the wasted costs as £1,300.
29 [1996] FLR 41.

Year	Number of claims	Successful claims (judgment or settlement)	Average payment per successful claim	Number of claims where costs incurred	Average costs of those where incurred
1994	102	33	£5,855	25	£6,800
1995	85	23	£4,423	27	£5,663
1996	104	18	£5,866	23	£9,261
1997	99	22	£2,709	40	£5,497
1998	85	20	£5,434	12	£16,128

Thus over five years, BMIF have paid out in claims £568,748, at the cost of £848,868, which is £1.49 for each pound recovered.[30] The true position is surely very much worse, because in most cases the applicant fails to obtain any award, but will incur costs in attempting to do so. The small size of many of the claims is also noteworthy. Of the 475 applications, the wasted costs sought were less than £2,000 in 197 cases, and between £2,000 and £20,000 in a further 216.[31] It should be emphasised that these figures are for the five years after the Court of Appeal in *Ridehalgh* had attempted to lay down guidelines to discourage applications which would be more expensive than the wasted costs which were in issue.

Judge-initiated applications

Compared with ordinary litigation, the wasted costs jurisdiction has a number of serious hurdles, which affect the applicant probably more than the respondent, quite apart from the disproportionate costs involved, and I will consider them in this and the following sections.

The first hurdle is that wasted costs jurisdiction can be out of the control of the litigants, as the Court itself can initiate a wasted costs application. The non-respondent party will almost inevitably be committed to the expenditure of costs which he did not choose and does not arise from any conceivable fault on his part.[32] The Court of Appeal in *Ridehalgh* cautioned against judge-initiated enquiries in moderate terms:[33]

> In straightforward cases (such as failure to appear, lateness, negligence leading to an otherwise avoidable adjournment, gross repetition or extreme slowness) there is no reason why it should not do so. But save in the most obvious case, courts should in our view be slow to initiate the inquiry.

I have found only one reported example where it is entirely clear that judges initiated the enquiry, which may suggest that the courts have properly followed the indications in *Ridehalgh*. However, in very many reports it is just not clear whether

30 The figures may be distorted by the fact that costs applications or orders may not be reported to BMIF, particularly in small cases where there is £250 deductible.
31 There were also 49 cases were the costs sought were between £20,000 and £90,000, and the remaining 13 were over £90,000. Over the same five year period, claim payments were made in: 48 cases where the costs sought were less than £2,000, at an average per case of £930; 56 cases where the costs sought were between £2,000 and £20,000 at an average of £4,194; 11 cases were the costs sought were between £20,000 and £90,000 at an average of £21,779 per case; and one payment where more than £90,000 was sought which was settled at £49,750.
32 Given the BMIF figures set out in the next paragraph, one would expect that the costs greatly outweigh the likely recovery.
33 n 5 above, 238.

the Court or a litigant is responsible, and it must be highly likely that the Court did initiate the enquiry in a large proportion of them, particularly criminal and family cases. *Re G and ors (children)*,[34] where the Judge did launch the enquiry, had a mixed outcome and it is a salutary example which suggests that Courts should be very cautious before doing so. It concerned a case of negligence leading to an otherwise avoidable adjournment, and arguably fell squarely within what *Ridehalgh* permitted. However, after the Judge initiated the enquiry, he was surprised with the substantial submissions generated from what he thought was a simple point, and made a wasted costs order against only one of the four barristers and in respect of only one of the two charges. The time spent in the wasted costs hearing far outweighed the wasted costs.

A much clearer picture is given by BMIF's statistics between 1994 and 1998 inclusive. In that period, the number of judge-initiated enquiries were 4, 5, 10, 14, and 16. This is a little over 10 per cent of the total of wasted costs applications. One would expect that the greatest impact of the Woolf reforms on this jurisdiction would be to encourage judges to initiate wasted costs applications, given the emphasis on the court being proactive, and thus the figures since 1998 may well be very much worse. The outcome of such enquiries has been very poor. Of the 49 applications, wasted costs orders were made in only 6 cases, ignoring those quashed on appeal, a success rate of 12 per cent compared with 24 per cent for the wasted costs jurisdiction as a whole. BMIF paid £13,450 in wasted costs, with total defence costs of £287,078.[35] This is a cost of £21.34 for each pound recovered, compared with £1.49 for the wasted costs jurisdiction as a whole. This is wholly unacceptable.

The party in whose favour a wasted costs order might be made may well not wish a Court to initiate a wasted costs enquiry, because it may rightly feel that it is not economic to do so, but it can do little to prevent the Court embarking on a frolic of its own. But the greatest injustice is to the respondent lawyer. The same judge will both initiate the enquiry and come to a conclusion at the end of it. No other tribunal would be allowed to be prosecutor, witness and judge, and it is in principle wrong that our courts should be forced to act in a way which is arguably in breach of natural justice. It may also be in breach of Article 6 of the European Convention on Human Rights,[36] now enshrined in English law by the Human Rights Act 1998. These problems appear in a lesser way if the Court suggests the making of an enquiry. Even if the enquiry is wholly driven by the applicant, the judge may still be a witness. The law requires that the judge who dealt with the underlying action should also hear the wasted costs application.[37] The reason behind this rule is the laudable aim of saving costs,[38] and because the judge will be in the best position to assess the lawyers conduct,[39] but the result is that the hearing does not appear to be as impartial as it otherwise would be. We have thus ended up with a jurisdiction in which justice is administered less fairly than in normal litigation, but which in practice is far more expensive for the benefits gained. Appeals are discouraged,[40] which attempts to save costs at the price of

34 See text at n 22 above.
35 The other party to the litigation will normally also incur costs, so the true position is very much worse.
36 For an analogy, see the courts-martial case of *Findlay* v *UK* (1997) 23 EHRR 221.
37 *Bahai* v *Rashidian* [1985] 1 WLR 1337; *Re Freudiana Holdings Ltd, The Times*, December 4 1995; *Re Merc Property Ltd, The Times* May 19 1999.
38 *Bahai* v *Rashidian* [1985] 1 WLR 1337, 1346.
39 *Fryer* v *RICS* [2000] Lloyd's Rep PN 53, para 40.
40 *Wall* v *Lefever* [1998] 1 FCR 605, *Fryer* v *RICS* [2000] Lloyd's Rep PN 534 at para 39, both CA.

further potential injustice. If the wasted costs application is before the Court of Appeal, then it is difficult to see how the loser can even appeal in any sensible way.

Procedural difficulties

It would appear that a number of wasted costs applications fail, at least on appeal, as a result of a failure to follow the correct procedure. Thus in *Re Harry Jagdev & Co*[41] the amount awarded was not specified, in *Livingstone* v *Frasso*[42] the solicitors were not given an opportunity to show why the wasted costs order should not be made, in *Kilroy* v *Kilroy*[43] the judge had failed to identify the conduct which was improper, unreasonable or negligent, and had failed to assess the costs which had been wasted, and in *R* v *M (Wasted Costs Order)*[44] the judge had failed to address the issue of causation. One may think that this is the fault of the lawyers, rather than the inherent nature of the wasted costs jurisdiction, as the procedure is laid down in the cases, in particular in *Ridehalgh*,[45] and it is hardly a criticism of the necessary and proper procedural safeguards if advocates and judges do not adequately look up the law[46] before embarking on an enquiry. However, it is fair to say that 'making an application for a wasted costs order is not straightforward.'[47] Such difficulties can only encourage appeals on technical procedural grounds, although some of them fail.[48]

Procedural defects can sometimes result from the fact that an apparent error comes to light, and an application is then immediately made for wasted costs. An example is *S* v *M*,[49] where the application was made near the start of a hearing after a vital allegation of forgery had been withdrawn, without any or much notice, due to lack of expert evidence. The order to show cause was made without a statement of what the lawyers had done wrong, and without satisfying the requirement that a strong prima facie case had been made before the respondent lawyers were called upon.

The wasted costs jurisdiction is summary. This should mitigate against the costs of the exercise being greater than the benefits, but it does not mean that the procedure is not without its complexities. Indeed, under the Civil Procedure Rules there are four stages (although the second and third may be combined): the applicant notifies the respondent of what he has done wrong and the costs sought; the court gives directions for summary disposal; the Court should then consider the application and be satisfied that there is material so that a wasted costs order is likely and the proceedings are justified; and there is finally further consideration of the matter after the respondent has put his case.[50]

41 *The Times*, August 12 1999.
42 [1997] CLY 604.
43 [1997] PNLR 66.
44 [2000] PNLR 214.
45 n 5 above. There are, of course, genuinely difficult jurisdictional and procedural issues which do arise from time to time, compare *R* v *Camden London Borough, ex p Martin* [1997] 1 WLR 395 and *R* v *Immigration Appeal Tribunal, ex p Gulbanar Gulsen* [1997] COD 430.
46 Set out in the old and new White Books (except in the first edition of the latter), and the old and new Green Books.
47 Flexley and Leech, note 1 above, paragraph 11.3.
48 Eg *Re a Solicitor (Wasted Costs Order)* [1996] 1 FLR 40; *Woolwich Building Society* v *Fineberg* [1998] PNLR 216.
49 [1998] 3 FCR 665.
50 CPR part 48 practice direction section II.

There are four consequences of this summary procedure which should give serious concern to any litigant considering making an application. First, the application may be struck out if it becomes too complicated. As the Court of Appeal stated in *Ridehalgh*,

> at the stage of initial application, when the court is invited to give the legal representative an opportunity to show cause ... [t]he costs of the inquiry as compared with the costs claimed will always be one relevant consideration ... judges may not infrequently decide that further proceedings are not likely to be justified.[51]

At least at such an early stage, the applicant should have spent comparatively little in costs. In complex cases, this sort of consideration may take place later, the outstanding example of this being *re Freudiana Holdings Limited*.[52] At the stage the application was struck out the respondent's costs had reached £400,000. The applicant's lawyers were blamed for making the application too complicated, with many allegations including ones of dishonesty. It has been rightly pointed out, though, that 'it will be in the interests of those defending such applications to emphasise the extent to which a hearing will be long and cumbersome, dealing with many issues, and ultimately unlikely to produce a clear conclusion.'[53] Indeed, the effect of the law is to encourage respondent lawyers to take as many points as they can.

Secondly, even at the final stage, the court is not obliged to make an order, even if improper, unreasonable or negligent conduct and the causation of wasted costs is made out, although there have to be sustainable reasons to do so.[54] It must be unusual for an application to fail for this reason, but it is a further hazard the applicant must face. A rare example is *R* v *Secretary of State for the Home Office, ex p Tim Fat Wong*,[55] where the respondent acted unreasonably in failing to come off the record when legal aid was withdrawn, but no wasted costs order was made because otherwise the point which caused the applicant to win might never have come to light and an injustice would have been done.

Thirdly, one effect of the summary nature of the wasted costs procedure is that it is difficult to settle applications. There is a good reason why they should be disposed of swiftly, which is that everyone, including the judge, will still recall the details at the hearing, so less will need to be explained to the judge and there will be less room for dispute about what was said.[56] Furthermore, it is of course permissible for the parties to settle a wasted costs application,[57] and the Court of Appeal has approved a procedure for informing the court of such a settlement by short written statements.[58] But in practice compromise is much harder to achieve because of the summary nature of the procedure. While sheer lack of time is probably the most important factor, the absence of the normal provisions for mediation or part 36 offers or payments does not help. It is common experience in most actions which are fought that the costs are significant compared with what is at stake, and it is therefore extremely important that the parties should have every

51 n 5 above, 239.
52 *The Times* December 4 1995. The figure of £400,000 does not appear in this report, but see Flenley and Leech, n 1 above, at 11.8.
53 Flenley and Leech, *ibid* at 11.9.
54 see *Ridehalgh* v *Horsefield*, 5 above, 239.
55 [1995] COD 331.
56 See *In Re Merc Property Ltd, The Times* May 19 1999.
57 Though presumably not an application initiated by the judge, see *Re a Barrister (Wasted Costs Order) (No 1 of 1991)* [1993] QB 293.
58 *Manzanilla Ltd* v *Carton Property and Investments Ltd* [1997] 3 FCR 387.

opportunity to settle their dispute. Wasted costs applications, which are in any event more expensive for the sums at stake than normal professional negligence actions, do not have such effective opportunities.

Fourthly, a wasted costs order is only made in a clear case.[59] In practice this is likely to mean that it is harder to establish negligence in a wasted costs application rather than a normal action. A dispassionate consideration of the six appeals in *Ridehalgh*,[60] where none of the lawyers were considered to have acted unreasonably, improperly or negligently, suggests to me at any rate that the Court was being charitable to many of the respondent lawyers, and that the same result may not have been reached in an ordinary negligence action. The position is perhaps more complicated in the substantial body of cases where the respondent lawyers are criticised for bringing actions which are an abuse of process. *Ridehalgh*,[61] suggests that it is not easy to define a case which is an abuse, rather than merely being hopeless, but it is not hard to say which is which. I do not think that experience bears this out: it is in practice quite difficult to determine whether a case is an abuse of process.[62]

Privilege

In the rare case in which the lawyer's clients initiate an application for wasted costs, privilege will have been waived. In the more normal case, where the application is made by the opposing party, the privilege will not be for the lawyer to waive, and his client may often be unwilling to do so. The consequences were made clear in *Ridehalgh*:

> So the respondent lawyers may find themselves at a grave disadvantage in defending their conduct of proceedings, unable to reveal what advice and warnings they gave, what instructions they received ... Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of respondent lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order.[63]

I do not think that these principles could be faulted. However, the difficulty caused by privilege fundamentally remains. The respondent lawyer may still suffer from not being able to explain what happened. On the other hand, the applicant is in an even less enviable position. He has no idea whether privilege will or will not be waived, and if waived what it might show; it is difficult to predict how the respondent lawyers might attempt to rely on privilege, impossible to know whether privileged material actually provides a defence, and in principle unpredictable how the Court will make allowances for privilege.

Privilege is relied on from time to time.[64] Two cases in particular illustrate the problems which may occur. In *Walter* v *Neville Eckley*,[65] the plaintiff sued the

59 *Wall* v *Lefever* [1998] 1 FCR 604, 614C.
60 n 5 above. The five cases are summarised in Jackson and Powell, n 1 above, para 4–58, 4–88, 4–107, 4–147 and 5–23.
61 n 5 above, 234.
62 See the cases collected in Jackson and Powell, n 1 above, at para 4–106 and 5–22, and also *Fletamentos* v *Effjohn*, Court of Appeal 10 December 1997, unreported, summarised in Flenley and Leech, n 1 above, para 11–31 and 11–32.
63 n 5 above, 237.
64 See eg *S* v *M* [1998] 3 FCR 664.
65 [1997] BCC 331.

defendant liquidator for selling at an undervalue the premises belonging to his company which was in liquidation. An application for discovery was dismissed as misconceived, and another application was made against the plaintiff's solicitors to pay the wasted costs personally. The registrar made a wasted costs order despite the solicitors swearing that they had relied on Counsel's opinion, which was privileged. Sir Richard Scott V-C held that the registrar was wrong to make a costs order based on speculation that counsel's opinion would not have helped the solicitors. By the time of the appeal, however, privilege had been waived. The Judge held that the solicitors were entitled to rely on counsel's two opinions, although they were wrong in material respects. However, after the last of the opinions, further evidence came to light which should have caused the solicitors to reconsider the decision to make a discovery application, with or without counsel, and the wasted costs order was therefore affirmed on different grounds. Thus the registrar was right for the wrong reasons, as the perfectly proper reliance on privilege, which should have prevented an order being made, did not in fact relate to matters which would provide the solicitors with a defence.

In *Tolstoy-Miloslavsky* v *Aldington*,[66] the different views of the first instance judge and the Court of Appeal on the fact that there had been no waiver of privilege was a very significant factor in reaching opposite conclusions. The Court of Appeal made a wasted costs order against Count Tolstoy's solicitors for improperly running a hopeless case in very exceptional circumstances. The question in that case was whether privileged matter might provide any exculpation or suggest that there was additional material which had not been placed before the Court. In principle, surely, this might just be relevant. It is not perhaps entirely fanciful to suggest that a witness supported the claimants admittedly very weak case, but was unwilling to swear an affidavit to help resist the application to strike out.

The solution adopted in the new Civil Procedure Rules, part 48.7(3), was to permit the court to direct that privileged documents were to be disclosed. This solution rides roughshod over an important principle of justice, and, it may be thought, replaces one injustice with a greater one. In *General Mediterranean Holdings* v *Patel*,[67] Toulson J held that privilege was not a rule of evidence, but a fundamental principle of the substantive law, which could not be overridden save by express language or necessary implication, which he could not find in the Civil Procedure Act 1997. As a result, he struck out the new rule.

Contribution

This objection to the wasted costs jurisdiction is perhaps the least important because I have found no reported case where it appears to have been a real issue, and in practice there is a solution to what would appear to be a mostly theoretical difficulty. Suppose one legal representative, say the solicitor, is the respondent to a wasted costs order, and he seeks a contribution from another legal representative, say a barrister. How can he do this?

The normal method in an ordinary action would be to seek a contribution under the Civil Liability (Contribution) Act 1978. This might be done at the time of the wasted costs application. Alternatively the respondent solicitor has two years

66 [1996] 1 WLR 736, 746, 748, and 749.
67 [1999] 3 All ER 673.

thereafter before his action is statute-barred: this will mean he does not have to launch into contribution proceedings without time for considering whether it is cost-effective; on the other hand it contradicts the spirit of the wasted costs jurisdiction, which is in favour of a summary determination. However, it is very doubtful whether any such action is possible as a matter of law. The Act states in subsection 1(1):

> any person liable in respect of and damage suffered by another person may recover contribution from any other person liable in respect of the same damage.

Subsection 6(1) provides that:

> A person is liable in respect of any damage for the purposes of this Act if the person who suffered it ... is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability whether tort, breach of contract, breach of trust or otherwise).

The applicant solicitor would not have been 'entitled' to recover compensation from the barrister, as the jurisdiction is discretionary. The wording of section 51(6) of the Supreme Court Act 1981 states that the 'the Court *may* disallow or (as the case may be) order the legal or other representative concerned to meet ... wasted costs'. There is also express reference to discretion in *Ridehalgh* and other cases. The word 'entitled' would appear to be important.[68]

It can be argued that there is an alternative to a normal contribution claim. Pursuant to section 51(6) of the Supreme Court Act 1981,[69] the Court might make in the applicant solicitor's favour a further costs order by way of contribution or indemnity against the barrister, as such an order would be in respect of wasted costs "incurred by a party". In the unreported case of *Fletamentos* v *Effjohn*,[70] Simon Brown LJ thought this was not correct; Morrit LJ considered that it may be; but both opinions were brief and *obiter*. Certainly, any such argument faces the formidable difficulties that a wasted costs order cannot be made in favour of a non-party,[71] save under the inherent jurisdiction,[72] which of course requires the proof of serious misconduct.

There may be practical solutions to these difficulties. Two possibilities were raised by Counsel in *Fletamentos*, and are mentioned without comment by Simon Brown LJ. The court can initiate a wasted costs application against the second lawyer of its own motion. However, the Court would normally be interfering with the decision of the applicant that it was not worthwhile to seek costs from the second lawyer as well as the first. Alternatively, the applicant should be taken to have waived such part of their entitlement as would properly have been recoverable from counsel. This is even more objectionable: it in no way solves the problem; it is wholly contrary to normal common law rules in contract and tort; and it encourages the proliferation of parties and thus costs in this already costly jurisdiction.

In practice, it is not that uncommon for a Court to order that one legal representative pays x per cent and another y per cent of the wasted costs. For instance, in *R* v *Secretary of State of the Home Department, ex p Begum*, [73] the solicitors wrongly relied on Counsel's opinion in a judicial review application that

68 *See Lister* v *Thomson* [1987] 1 WLR 1614.
69 ie the statutory section concerning wasted costs orders.
70 Court of Appeal, 10 December 1997.
71 *R* v *Camden London Borough Council ex parte Martin* [1997] 1 WLR59.
72 *R* v *Immigration Appeal Tribunal ex p. Gulbenar Gulsen* [1997] COD 430.
73 [1995] COD 176.

material letters did not have to be put before the Court. The barrister had to pay three-quarters of the wasted costs, and the solicitors a quarter.

An illogical solution

Perhaps the fundamental flaw of the Wasted Costs jurisdiction is that it is an attempt to remedy what have been two other defects in the legal system. First, there is the principle of advocate's immunity. There is a fundamental contradiction between this immunity, and permitting the recovery of wasted costs against an advocate for his conduct in court and what is intimately connected with it. There is a similar tension between denying any duty of care by a lawyer to his client's opponent (save in exceptional cases), and permitting the latter to recover wasted costs from the lawyer. It is no real justification to say that the duty is owed to the Court. Secondly, there is the unjust legal aid provision that neither the Legal Aid Board nor the legally aided litigant who loses will normally have to pay costs to his successful opponent, which has little more logic than saying that a legally aided defendant should not have to pay damages.

Without these two principles, the wasted costs jurisdiction would be invoked far less often.[74] Absent the protection of legal aid (now community legal service funding), the injured litigant could recover costs from his opponent, and through him, by way of assignment or bankruptcy if necessary, he could acquire a cause of action against his opponent's lawyers. Without immunity, the opponent could recover the costs he has had to pay to the injured litigant, and his own wasted costs, from his lawyers.

As it has existed up to now, the wasted costs jurisdiction is fundamentally an additional liability a lawyer will have to bear if he acts for a legally aided litigant. The Court in *Ridehalgh* was alive to this issue: 'It is incumbent on courts to which applications for wasted costs orders are made to bear prominently in mind the peculiar vulnerability of legal representatives acting for assisted persons'.[75] But the point remains that most applications are by one party against the legal advisers of his legally aided opponent, and that it is difficult to see why a party would ever make a wasted costs application against his opponent's lawyers unless the opponent was legally aided or impecunious.

Now advocates' immunity has been abolished, one part of this fatal mechanism will go. The government's preferred solution to the problems of legal aid is conditional fees. While this has received widespread opposition, one small incidental benefit should be to reduce the number of applications for wasted costs made by parties against their opponents' solicitors, because the litigant himself should have insurance to cover such costs. It is to be hoped that the courts will also curb their enthusiasm for a jurisdiction which has been shown by experience to be inherently defective.

74 There are a few cases where the losing party is impecunious, such as *Tolstoy-Miloslavsky* v *Aldington* [1996] 1 WLR 736.

75 n 5 above, 234. A point repeated in *Wall* v *Lefever* [1998] 1 FCR 605.

LEGISLATION

Democracy by Default: The Representation of the People Act 2000

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Electoral law reform plays a significant part in the current government's programme of constitutional development. The devolution settlements, reform of the voting system for European Parliamentary elections, and the report of the Neill Committee on political party funding and election campaign expenditure have all necessitated consequential changes to the law governing elections.[1] Perhaps less visible, however, are the changes to the law governing parliamentary and local government elections which have been enacted in the Representation of the People Act 2000.[2] This statute implements the recommendations of the Howarth Working Party on Electoral Procedures, established by the government in early 1998 to conduct a broad review of electoral law and procedure, with particular emphasis on declining rates of participation at elections.[3] The RPA 2000 seeks to encourage voter participation by modernising the system of electoral registration, by providing for postal ballots on demand, and by authorising the use of experimental methods of vote-casting and counting at local elections.[4] The statute does not consolidate the law contained in the earlier Representation of the People Acts, instead making major amendments to the RPA 1983. This note comments on the main provisions of the Act, offering the view that its reforms, while generally welcome, may be undermined by their neglect of basic issues of principle concerning the enjoyment and exercise of the right to vote.

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1 Scotland Act 1998, ss 1–18; Government of Wales Act 1998, ss1–15; Northern Ireland (Elections) Act 1998, ss1–5; European Parliamentary Elections Act 1999. The proposals of the Committee on Standards in Public Life (Neill Committee) in its 5th report, *The Funding of Political Parties* (October 1998, Cm 4057) are implemented by the Political Parties, Elections and Referendums Bill 2000.

2 Hereafter 'the Act' or 'the 2000 Act' or 'RPA 2000'. 'RPA' is used throughout to denote a Representation of the People Act.

3 *Final Report of the Working Party on Electoral Procedures* Home Office October 1999. The Government clearly directed the Howarth Working Party to have regard to 'the Government's concerns that interest in the democratic process, as measured in part by participation in elections at all levels, has shown a steady decline over a number of years', para 1.1. The Select Committee on Home Affairs issued a report on electoral law during the deliberations of the Working Party, which was also focused on the need to increase voter turnout: *Electoral Law and Administration*, Select Committee on Home Affairs Fourth Report 1997–98.

4 The Act also contains more minor provisions which are not discussed. They concern service voters (s7) assistance for partially-sighted voters (s13) and free delivery of election addresses at Greater London Authority elections (s14). In addition, the Act amends the RPA 1983 to add a new offence of making false statements about a candidate's name or address in nomination papers (RPA 1983, s63A inserted by RPA 2000, Sched 6 para 5): this *is* to plug a gap left by the Registration of Political Parties Act 1998, which tackled only the problem of misleading *party* names or descriptions. (The 1998 Act will be superseded by Part II of the Political Parties, Elections and Referendums Bill 2000.) Forging the signature of an assentor to a nomination, or extracting it duplicitously is also made an offence by RPA 2000, Sched 6 para 5.