HONG KONG BAR ASSOCIATION'S VIEWS ON CONSULATION PAPER ON WASTED COSTS IN CRIMINAL CASES

Introduction

1. This consultation paper is a response to the Consultation Paper prepared by the Legal Policy Division of the Department of Justice dated August 2006, which deals with a proposal to amend the definition of "wasted costs" in the Costs in Criminal Cases Ordinance (Cap. 492) ("the CCC Ordinance"). That Consultation Paper was prepared in response to "strong statements" from the Court of Appeal and recommendations made by the Civil Justice Working Party ("CJWP") in S18 of the Civil Justice Reform Final Report ("CJR"). The Administration has now indicated that it considers it undesirable to treat wasted costs in civil and criminal proceedings differently and as a consequence wishes to bring the latter in line with the former.

2. Correspondence indicates a desire on the part of the Administration to include amendments to the CCC Ordinance in an omnibus bill to be promoted by the Department of Justice in early 2007. The Bar submits that the two regimes are not analogous and that no analysis has been undertaken of the wasted costs jurisdiction of the criminal courts by any body let alone a body as auspicious as the CJWP. Proper and timely consideration should be given to the introduction of any amendment to the CCC Ordinance regardless of whether it is intended to be on the same or on some other footing to that outlined in S18 of the CJR and which can be found in O62 r8(1) RHC.

Difference between the Civil and Criminal Jurisdictions

3. Civil procedural law is a separate, distinct branch of the law which exercises a pervasive influence over all the other branches of the law, except criminal law and procedure.[1] In the context of civil procedural law, "civil" is used in contradistinction to "criminal". The distinction between the civil and criminal judicial processes is manifested in many ways: each has its own structure, organization, administration and hierarchy of courts; its own procedure and practices, its own rules of court, its own modes and methods of processing its proceedings, its own rules regulating the place and mode of trial, its own method of adjudicating on and disposing of its proceedings and its own system of appeals. This is because the primary objective of civil procedure is remedial; to make good civil wrongs by compensation, restitution, satisfaction or restraint whereas the primary objective of criminal procedure is penal or punitive.

4. It follows from the above, that the historical basis for the development of the award of costs within each regime has been wholly different. The development of the issue of wasted costs, whilst bedded in the civil wasted costs regime has had a difficult infancy. This is not only because of the entirely different nature of the procedural regimes but also because of the entirely different nature of the role played by counsel.

5. All counsel acting as advocates have a tripartite duty; to their lay client; to the court and to the public. They have the duty to assist the court in the fair administration of justice and not knowingly to deceive or mislead the court. All counsel are bound to promote fearlessly and by all proper means their lay client's interests and to do so without regard to their own interests or to any consequences to themselves or other persons. 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[2]. In criminal proceedings, prosecuting counsel should not regard himself as appearing for a party at all but as providing the means by which all facts are fairly

[1] Halsbury's Laws of England (4th Ed) Vol 37 para1
[2] Rondel v Worsley [1967] 1 A.C. 191; Arthur JS Hall & Co v Simmons [2002] 1 AC 615

and impartially placed before the court. His duty to the court and the public are paramount. Defence counsel, on the other hand, has a duty first and foremost to protect his client from conviction except by a competent tribunal and upon legally admissible evidence. His duty to the court and public are severely limited by the Code of Conduct and by the common law e.g. whilst the prosecution have a wide ranging duty of disclosure analogous to discovery in civil proceedings, the defence do not; the defendant has a right to silence which carries with it very many ethical responsibilities for defence counsel including the right to remain silent as counsel when the prosecution fail to adduce relevant evidence, mislead the court as to fact or misdirect the court on the law; prosecution counsel is expected to assist the court on all points of relevant law, defence counsel need only do so where it would be advantageous to his client which could result in the court entering judgment on a wholly erroneous basis.

6. Added to this, it should be borne in mind that the submissions of the Hong Kong Bar Association in respect of CJR were made for the purpose of civil justice reform and that purpose only. Whilst there may be some submissions which stand the test of either jurisdiction, they were never intended to address the entirely different nature of criminal proceedings and the different role played by counsel and solicitor advocate. This can be illustrated by a more in depth analysis of Ridehalgh v. Horsefield [1994] Ch 205 ,where the essential distinction between the principles to be applied in consideration of the application of civil and criminal wasted costs is all too apparent. At p224F Bingham M.R. makes these opening remarks, "*Our legal system, developed over many centuries, rests on the principle that the interests of justice are on the whole best served if parties in dispute, each represented by solicitors and counsel, take cases incapable of compromise to court for decision by an independent and neutral judge, before whom their relationship is essentially antagonistic: each is determined to win, and prepares and presents his case so as to defeat his opponent and achieve a favourable result. By the clash of competing evidence and argument, it is believed, the judge is best enabled to decide what happened, to formulate the*

relevant principles of law and to apply those principles to the facts of the case before him as he has found them.

7. It is from this historically civil approach that Bingham M.R. goes on to discuss the reasoning for the introduction of the wasted costs order. *"Experience has shown that certain safeguards are needed if this system is to function fairly and effectively in the interests of the parties to litigation and of the public at large."* Hence the need for protection on costs. But he goes on to say "*None of these safeguards is entirely straightforward, and only some of them need to be mentioned here. (1) Parties must be free to unburden themselves to their legal advisors without fearing that what they may say may provide ammunition for their opponent. To this end a cloak of confidence is thrown over communications between client and lawyer, usually removable only with the consent of the client. (2) The party who substantially loses the case is ordinarily obliged to pay the legal costs necessarily incurred by the winner. Thus hopeless claims and defences are discouraged, a willingness to compromise is induced and the winner keeps most of the fruits of victory ..... (3) The law imposes a duty on lawyers to exercise reasonable care and skill in conducting their client's affairs. This is a duty owed to and enforceable by the client, to protect him against loss caused by the lawyer's default. But it is not an absolute duty. Considerations of public policy have been held to require, and statute now confirms, that in relation to proceedings in court advocates should be accorded immunity from claims for negligence by their clients: Rondel v Worsley [1969] 1 A.C. 191; Saif Ali v Sydney Mitchell & Co [1980] A.C. 198; S62 of the Courts and Legal Services Act 1990. (4) If solicitors or barristers fail to observe the standards of conduct required by the Law Society or the General Council of the Bar (as the case may be) they become liable to disciplinary proceedings at the suit of their professional body and to a range of penalties which include fines, suspension from practice and expulsion from their profession. Procedures have changed over the years. The role of the courts (in the case of solicitors) and the Inns of Court (in the case of barristers) has in large measure been assumed by the professional bodies themselves. But the sanctions remain, not to compensate those who have suffered loss but to compel observance of prescribed standards of professional conduct. Additional powers exist to order barristers, solicitors and those in receipt of legal aid to forgo fees or remuneration otherwise earned. (5) Solicitors and barristers may in certain*

circumstances be ordered to compensate a party to litigation other than the client for whom they act for costs incurred by that party as a result of acts done or omitted by the solicitors or barristers in their conduct of the litigation."

8. Sub paragraph (1) refers to legal professional privilege and is applicable to both civil and criminal lawyers. One obvious difference, for the purposes of the instant debate, is that a convicted defendant is less likely to waive privilege if he can see the opportunity for appeal as a result of the apparent conflict between bench and the bar. This places counsel in a difficult situation where the frustration of the bench may easily be answered by an exposition of instructions. This jurisidiction should not be applicable to actions or omissions that may be as a direct consequence of those instructions and to the exercise of his professional judgment. Some consideration needs to be given to the type of situation this will cover[3].

9. Sub paragraph (2) refers to costs. The award of costs in criminal proceedings is wholly dissimilar to those of civil proceedings. More often than not it is not in issue as both parties are publicly funded. A successful defendant who has privately funded his defence is usually entitled to his costs. There is less of a tendency to make costs orders against convicted defendants. In both instances however there is a discretion to reduce or disallow costs in certain circumstances but in none of these instances would this approach affect the decision to prosecute and there is no evidence to suggest it affects the decision to defend. It must be remembered that fundamental to the defence of criminal proceedings is not simply whether the defendant is guilty of the offence but rather, whether the prosecution can prove it. In the civil jurisdiction the issue of costs is paramount from day one, in the criminal jurisdiction it normally only requires consideration after the disposal of the proceedings.

10. The law has moved on from Rondel v Worsley [1969] 1 A.C. 191 and is now, in the United Kingdom at least, covered by Arthur JS Hall & Co v Simmons [2002] 1 A.C. 615. The first part of sub paragraph (3) is correct.

[3] Harley v. McDonald [2001] 2 A.C.678

All counsel owe a duty to exercise reasonable care and skill in the conduct of their clients affairs both inside and outside court. As a consequence, any breach, from which the client suffers loss, is actionable in tort by the lay client. Consideration should be given to situations where the criminal court imposes a wasted costs order on Counsel made payable to the defendant and the possibility of a separate action in tort. Issues of finality of litigation should be considered as well as issues of the collateral challenge as an abuse of process[4]. To what extent could any application of the wasted costs jurisdiction be prayed in aid by an appellant?

11. Sub paragraph (4) refers to the disciplinary powers of the Bar Council. It is always open to the public, and to any member of the judiciary, to make a complaint against any Counsel. These are investigated and, where appropriate charges are laid and heard by the Bar Disciplinary Tribunal. Under S37 of the Legal Practitioners Ordinance (Cap 159) counsel can be censured, suspended, struck off, order to pay the complainant, or ordered to pay a penalty (to the revenue) of up to $500,000.00. The Bar Disciplinary Tribunal also has a discretion to make any other order which it thinks fit.

12. Sub paragraph (5) is a direct reference to the wasted costs regime where a "winning" barrister may nevertheless be required to compensate a "losing" party for wasted costs. Costs in civil proceedings provide an area of law on their own account. As costs usually follow the event, the whole idea of how much and to whom it is to be paid, is widely understood. The mechanisms for it are in place and well rehearsed. The only live issue is the "default" and the test to be applied. But in the criminal arena, costs have been a minor issue. Not well canvassed with very little case law, certainly not as to amount and definitely not as to the mechanism to be employed. At present there is a facility for any award of costs to be taxed if not agreed but this is rarely exercised simply because costs are awarded only rarely. Considerable thought must be placed on the mechanism to be introduced in this regard.

[4] Hunter v Chief Constable of the West Midlands Police [1982] A.C. 529; Arthur JS Hall & Co v Simmons supra

13. It can be seen from the above that, even before the recent shift in approach on professional immunity, there were, and continue to be, several safeguards in place to protect a party to litigation for loss incurred as a result of the acts or omissions of barristers or solicitors in the conduct of litigation. What must be understood is that the historical basis of this jurisdiction is civil. It was not until the advent of the Prosecution of Offences Act 1985, and subsequent amendments to it, that the criminal jurisdiction for wasted costs was actively pursued. When it was pursued it was not surprising to find an adoption of the original language of the civil wasted costs regime but its application thereafter has been wholly different owing to the fact that the nature of the proceedings and the parties is wholly different. It has not been without difficulty in its application[5]. The rare instances of use of the regime have highlighted the difficulties for the bench in its approach and have indicated that, without careful thought and preparation, the costs of application are high and injustice to individuals may still be done.

14. The suggestion that such consideration can be given in time for submission in early 2007 is pre-emptive and will result in producing lacunae in the law, if it is not the subject of wide ranging and in depth analysis. Less haste, more speed.

Background

15. S18 of the CJR sought to consider the remit of O62 r8(1) of the RHC under a proposal (Proposal 33) to extend the court's power to make wasted costs orders against solicitors where wasted costs are incurred as a result of any *improper, unreasonable* or *negligent* act or omission on the part of a solicitor or employee of such solicitor..." (Interim Report paras 463-467). This reflects the wording of the regime in the United Kingdom. Proposal 34 was to consider the extension of the regime to barristers.

[5] In re A Barrister (No 1 of 1991) [1993] Q.B. 293; Re P (A Barrister) [2002] 1 Cr.App.R. 207; Practice Direction (Costs: Criminal Proceedings) [2004] 2 All E R 1070 at Part VIII.

16. The court's jurisdiction to make wasted costs orders in civil proceedings in Hong Kong is encapsulated in O62 r8 RHC which provides:-

(1) "Subject to the following provisions of this rule, where in any proceedings costs are incurred *improperly* or *without reasonable cause* or are wasted by *undue delay* or by *any other misconduct* or *default* , the Court may make against any solicitor whom it considers to be responsible whether personally or through a servant or agent –

(a) disallowing the costs as between the solicitor and his client; and
(b) directing the solicitor to repay to his client costs which the client has been ordered to pay to the other parties to the proceedings; or
(c) directing the solicitor personally to indemnify such other parties against costs payable by them.

(2) No order under this rule shall be made against a solicitor unless he has been given a reasonable opportunity to appear before the Court and show cause why the order should not be made (with certain exceptions)".

17. The CJR accepted the definitions of "improper" and "unreasonable" in the current O62 r8 to be satisfied by the explanation for those terms given in Ridehalgh v. Horsefield [1994] Ch 205 at p 232D-233B which had directed its mind to the UK wording of the rule. In essence it was considering lowering the threshold of liability to cases where wasted costs were incurred as a result of negligence but which did not include some form of misconduct. This concept was also taken from the judgment of Bingham M.R. in Ridehalgh supra where he said "*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*: see R v H 232G-3B. No discussion of the test for "undue delay", "without reasonable cause" or " misconduct or default" can be found in the Final Report. In the event the CJR rejected the idea of lowering the threshold to include

negligence not amounting to misconduct and was in favour of maintaining the status quo in that regard whilst extending the remit of O62 r 8 to include barristers. It is assumed for the purposes of this paper that "undue delay' requires no further explanation and that misconduct means professional misconduct. The meaning of "default" remains at large. What is the difference between "improper", "misconduct" and "default"? Can you act or omit to act improperly if you have reasonable cause?

18. Importantly the CJR noted that there was a risk of increasing satellite litigation in respect of wasted costs[6] and it was conscious of the possibility of the power being misused to apply pressure on the opposite party[7]. As a result, the CJR was at pains to suggest safeguards[8] which could be put in place to encourage the jurisdiction to be used sparingly and only in the clearest of cases[9]. One question which arises is whether, by analogy with the civil jurisdiction, an application will be able to be made by any party to proceedings or whether it is envisaged that it will be a power that can be invoked by the court only. It is submitted that if the legislation does not make it clear that all counsel/solicitor advocates fall within the scope of the order in their personal capacity including those employed by the government, the Bar would oppose most strenuously the imposition of any wasted costs regime which fell within the remit of the court and the court alone.

Relevant legislation

19. S18 of the CCC Ordinance provides that:

> (1) In any criminal proceedings a court or a judge may order the legal or other representative concerned to meet the payment of any wasted costs or any part thereof.

[6] Medcalf v Mardell [2002] 1 A.C. 120
[7] Orchard v. South Eastern Electricity Board [1987] QB 565
[8] CJR Recommendation 94 §562 and 95 §570
[9] Harley v McDonald [2001] 2 A.C. 678 at 703 §50

(2) No order under subsection(1) shall be made unless the legal representative concerned has been given a reasonable opportunity to appear before the court or the judge and show cause why the order should not be made.

(3) Any wasted costs ordered to be paid by a legal or other representative under subsection (1) shall be a debt due to the party to the proceedings in whose favour such order was made from the legal or other representative and enforceable as a civil debt, and where the legal or other representative concerned was a Legal Officer or Legal Aid Officer having or exercising a right of audience or conducting litigation on behalf of the Government, shall be charged to the revenue.

20. S2 of the CCC Ordinance currently defines wasted costs as:-

(a) any costs incurred by a party to the proceedings as a result of-

(i) any failure to appear; or
(ii) lateness,

without reasonable cause leading to an otherwise avoidable adjournment on the part of any legal or other representative or any employee of a legal or other representative; or

(b) any costs incurred by a party to the proceedings which, in the light of such failure or lateness occurring after they were incurred, the court or the Judge considers it unreasonable to expect that party to the proceedings to pay.

21. The equivalent UK legislation is S19A of the Prosecution of Offences Act 1985 as amended which provides:-

(1) In any criminal proceedings-

(a) the Court of Appeal;
(b) the Crown Court; or
(c) the Magistrates' 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 regulations.

22. Under S19A(3) "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 representative or any employee of a 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.

23. The UK legislation does not include "misconduct or default", there will need to be a clear guideline as to what these terms mean.

Proposal

24. The Administration proposes that S2 of the CCC Ordinance be amended to provide that "wasted costs" means-

"any costs incurred by a party"-

(a) as a result of any improper or unreasonable act or omission; or

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

(c) which, in the light of any such act, omission, delay, misconduct or dealt occurring after they were incurred, the court considers it unreasonable to expect that party to pay"

25. This is not a direct adoption of O62 r8(1) as can be seen from a comparison with paragraph 16 above. In the section "unreasonable" is used which is not contained in O62. O62 refers to "without reasonable cause". "Unreasonable" is to be found in the UK legislation and it is "unreasonable" which is defined by Bingham M.R. in R v H at p 232F. "Unreasonable" is said to cover conduct which is vexatious, designed to harass the other side rather than advance a resolution of the case, and it is said to make no difference if such conduct is the product of excessive zeal and not improper motive. Some criminal practitioners may see it as part of their duty to harass the prosecution, most would certainly not see any part of their duty to be cooperative with them. Some consideration must be given to the adoption of this word rather than the wording in O62.

26. In the light of the rejection of the CJR of proposal 33 to extend the civil jurisdiction to cover negligence, and assuming that the standard of negligence in question was the "untechnical" standard as adumbrated in Ridehalgh v Horsefield, what standard is to be implied into the word "default". If misconduct covers professional conduct what conduct comprises "default" which is not already covered by misconduct?

Purpose of reform

27. The purported purpose of the proposed reform is to "arm the courts with an effective remedy so that any costs incurred by a party to criminal proceedings as a result of "unjustifiable" conduct on the part of his or her legal or other representative will be borne by that lawyer or representative . " The provisions are not intended to penalize lawyers, but to compensate the injured party for the loss where it would be reasonable to expect him to pay.

28. If the sole purpose of the amendment is "compensatory", then this objective illustrates perfectly the thrust of the Bar's submission that this amendment, in its present form, is wholly misconceived. Who is to be compensated and by whom?

29. In its simplest form, criminal proceedings have a prosecution and defence. The prosecution is almost always (with rare exceptions) a government or quasi governmental body and is usually the Department of Justice ("DOJ"). For the sake of argument therefore the Bar will assume that the prosecution is the DOJ. The prosecution is therefore always publicly funded. Where loss is occasioned as a result of the acts or omissions of the legal representatives of the defence, then it will always be a loss to the public purse. Accordingly, in circumstances where the infringement is by the legal representative of the defence, the DOJ will be compensated. Is it envisaged that the defence representative will also compensate the defendant for his loss?

30. The defendant may be a private individual or corporation but, again for the sake of argument, the Bar will assume that the defendant is a private individual. The defendant may be legally aided or privately funding his defence. The former is the more common although the latter is not a rarity. Where the loss is occasioned by the legal representative of the defendant (in what ever capacity he receives his instructions) has any loss been occasioned by the defendant. Either the Director of Legal Aid ("DLA") has a liability to pay counsel's fees or the defendant has such liability. Neither is likely to have paid at the time that the issue of wasted costs arises, and in some instances there is no defined sum attributable to defence counsel's refresher where he is engaged upon a lump sum payment. How is that to be determined? Is it envisaged that counsel will be ordered to forego fees for X refreshers/ part of the brief? Or is it envisaged that a full fee note is submitted which is then to be repaid? Perhaps the DLA will be required to exercise a discretion to pay a lesser sum where work has not been reasonably undertaken? If so, under what mechanism is he to do this? Where counsel is privately funded, what

mechanism will be in place to ensure that the loss to the defendant is made good and not circumvented. Is the court to administer the payment of the "compensation" to the defendant/legal department?

31. Where loss to the defence is occasioned by an act or omission of the prosecution, then it will either be a loss to the public purse (DLA) or a loss to the private individual. The legal representative of the prosecution may be a government lawyer or counsel/solicitor advocate acting on fiat. In the latter case there can be no issue but that counsel acting on fiat stands pari passu with his government counter part. That being the case, how can it be correct to treat counsel acing on behalf of the Department of Legal Aid any differently? It is suggested at para 18 (3) of the Consultation Paper that the ambit of the regime is such that it is possible for it to bite over government lawyers representing government departments in their personal capacity. They "could" be subject to disciplinary proceedings and/or under S32 of the Public Finance Ordinance (Cap.2) ("PF Ordinance") the Finance Secretary "may" surcharge the government lawyer who has improperly incurred expenditure. This is not the situation at present where S18(3) allows for the costs to be charged to the revenue. Thereafter one supposes that there is a further exercise of discretion within the government department concerned as to what action to take personally against the individual. This cannot be right. Either the "infringing" legal representative is personally liable under any new regime regardless of their employment status (on the basis that this is a personal act or omission), or, they are covered by their government instructions (and it is a global act or omission attributable to the department). If the former, then guidelines must be in place to ensure equality of arms as between the two types of prosecutor. It would be a breach of natural justice if the government employed lawyer were to escape financial penalty/disciplinary censure for the very same transgression that his privately paid counter-part would be penalized for. If counsel for the defence was acting on instructions of the DLA, why should he not have the benefit of the same protection as counsel on fiat if counsel on fiat has the same protection as government counsel?

32. There is, in the circumstances, a clear and obvious need to define the type of situation in which this regime is likely to bite and, having done so, to assess the nature of the likely transgressor. If it is envisaged that this is a "personal" liability to be borne by the legal representative no matter what their professional status, then this must be taken into account at an early stage. It is not simply a case of adopting the most obvious language and waiting to see the consequences of such adoption.

Previous Debate

33. The background to the CCC Ordinance is adequately outlined at para 17 to the Consultation Paper of August 2006. The grounds of objection to the introduction of a wide wasted costs regime hold good today in that:

As to paragraph (1) of the Bar's submissions

" There was no demonstrated need for the provisions nor evidence that there was a real problem to be addressed or that with the provisions in place, the "problem" could be cured."

As to the response of the Administration

"The inability of the Court of Appeal to make a wasted costs order in circumstances illustrated by the above three cases highlights the insufficiency of the existing provisions"

The Bar submits:

(a) The problems as described in the cases cited could have just as easily been addressed by reference to the Bar Council by way of complaint. Although not pursued in the present instances,this is a step regularly taken by the judiciary at all levels and action is timeously taken by the Bar. This would address any "punitive" element. The Bar Council also has power to order compensation in appropriate circumstances to a complainant. The courts also have power under S17 of the CCC Ordinance to address any

compensatory element against a party to the proceedings which could then be the subject of civil action by that party against counsel in the light of the change in the law following Arthur JS Hall & Co supra.

(b) One way to "solve" the problem of (for want of a better word) "incompetent" Counsel is to encourage government departments and private solicitors to exercise better judgment in the instruction of counsel. The Legal Aid Department admits to exercising no judgment at all in circumstances where the legally aided party has requested particular counsel. The active use of S17 would address their minds to the issue but would also protect the individual legal representative whose apparent misconduct was actually caused by the instructions of his instructing solicitor/client.

(c) Many members of the judiciary take the view that they can manage their own courts without the need to resort to this jurisdiction. They consider judicial intervention, in public or in private, is effective if properly considered and feel the recipient of the judicial "advice' will see the error of his ways and correct his behaviour accordingly. Often a word in the ear of the representative's Head of Chambers or the Chairman of the Bar will also result in the individual realizing that his performance may need to be enhanced. There is nothing to stop the judiciary taking the age old step of having all counsel into chambers to express his displeasure and to ask for clarification. It is very unlikely that the transgressor will repeat his misconduct and if he does so, a written complaint will see the matter dealt with officially.

(d) In what way will penalizing the individual in costs address that individual's lack of professionalism unless it is also intended that disciplinary action should be taken. If the standard to which an individual is to be held is one which indicates that he is failing in his professional duty towards the court and his client, then that is a matter which should be properly brought before the profession. If

the legal representative is financially insured against a wasted costs order (and it is likely that the solicitor advocate will be covered by his firm and the government lawyer by his department) then how does this ensure that the problem is resolved. If uninsured, it could lead to financial ruin and that is probable if the intention is to adequately compensate the loser. If insured, the loss is born by the insurer who may increase the premiums required by the individual or across the profession. The latter may spur the profession to take an even more proactive part in its standards than it already does but it is surely not intended that the already over stretched junior bar should bear the costs of the one or two individuals who transgress.

(e) If the raison d'être is actually "compensatory", professional indemnity insurers will come to the rescue but the transgressor will continue to practice.

(f) It should not be assumed that the only transgressors are legal representatives in private practice. There are many occasions when employed lawyers have been the subject of criticism from the bench. The risk of a financial penalty upon the private lawyer will make practitioners in private practice all the more willing to point out and publicise the transgressions of the employed profession.

<u>As to paragraph (2) of the Bar's submissions</u>

"There might be an inhibitive effect on a legal representative in the conduct of the defence case which would be detrimental to a defendant. In the light of the public interest, lawyers should be able to conduct a case without inhibition or pressure".

<u>As to the response of the Administration</u>

"The public interest in the ability of legal representatives to conduct their cases fearlessly does not confer freedom to conduct cases in an improper, unreasonable or negligent way. On the contrary, the public interest requires that barristers should conduct cases not only fearlessly but also to the highest professional standards. Moreover in

Ridehalgh v. Horsefield [1994] Ch 205, the Court held that, before making a wasted costs order, it will make full allowance for the fact that an advocate in court often has to make decisions quickly and under pressure."

The Bar submits:

(a) It is trite to say that paragraph 21 of the Code of Conduct of the Bar requires the criminal practitioner to accept instructions which are within his professional competence and that the consequences of this are that Counsel must defend the most unsavoury of characters and the most devious. Often instructions are inadequate or misleading and there is little even the most experienced Counsel can do in the face of instructions intended to deceive until the moment arrives in the evidence where the deception becomes apparent. His response to any criticism from the bench may be subject to legal professional privilege and he may find himself professionally embarrassed, not able to answer for what appear to be his shortcomings rather than the shortcomings of his instructions. Where the tribunal is the tribunal of both fact and law, the situation is all the more difficult. Counsel does not have the benefit of the type of discovery available in civil proceedings. There will be full disclosure from the prosecution but a dishonest defendant will often not make full and frank disclosure to his Counsel.

(b) The Bar does not condone conduct which is improper, unreasonable or negligent (although it is noted that this is not the test suggested by the Administration). That is why it has a strict disciplinary regime. A regime that can only be implemented if it is informed of a transgression. High standards are required of all who seek to advocate before our courts. Professional misconduct is already accounted for within that regime. What acts, outside of professional misconduct, is it said should be dealt with by way of

wasted costs? Presumably a "default" is something that falls short of professional misconduct?

(c) Private practitioners are not the only advocates who pay too little attention to typographical errors; fail to understand legislation and become double booked. Individual practitioners do not have the back up that government departments have, yet time and again those government departments have the ear of the administration and the bench when seeking to adjourn or refix matters that the private practitioner does not have! And it is not only defence counsel who may find themselves in difficulty. There are occasions when prosecution witnesses do not come up to proof or are hostile; when police officers have failed to disclose evidence; when applications are made by prosecuting counsel which are spurious and ill thought out and evidence is relied upon which wastes valuable court time because of an inability to see the issues, let alone the multitude of times when witnesses have not been made available.

(d) Counsel regularly faces a hostile bench as well as hostile witnesses and it is not uncommon to see junior members of the Bar (and government lawyers) acquiesce the moment the bench appears to be frustrated. Such a reaction is likely to be magnified if the individual in question is faced with financial as well as verbal censure. The lay client is not best served by the reluctance of counsel to stand their ground and argue a point properly made.

(e) It would be wholly inappropriate to raise the issue of wasted costs during proceedings. This would place increased and unwarranted pressure on counsel to appease the bench.

<u>As to paragraph (3) of the Bar's submissions</u>

"There was inequity arising from the difference in treatment in respect of lawyers in private practice and government lawyers".

<u>As to the response of the Administration</u>

"In cases where any wasted costs are ordered to be paid by the Government, disciplinary proceedings may be instituted against the relevant government lawyer for unjustifiable conduct. Further, under section 32 of the Public Finance Ordinance (Cap 2) (" PF Ordinance"), the Financial Secretary may surcharge the relevant government lawyer who has improperly incurred expenditure or is responsible for any loss such sum as the Financial secretary may determine. "

The Bar submits:

(a) Much of this has already been rehearsed above. There will be complete inequity between the status of the private and public Bar unless any wasted costs sanction is to be ordered to provide for personal liability only. This is not an issue which has required scrutiny within the civil jurisdiction. The availability of the sanctions described above allow for a further arbiter over and above the judge. The Administration is requested to submit evidence of these sanctions ever being applied in a context akin to the one discussed here.

<u>As to paragraph (4) of the Bar's submissions</u>

"Adjournment of cases was often initiated by the court rather than on the request of the defence or prosecution".

<u>As to the response of the Administration</u>

"If the court initiates an adjournment without any improper, unreasonable or negligent act or omission on the part of counsel, no wasted costs order will be made".

The Bar submits:

(a) It should not be assumed that adjournments are regularly caused by the personal misconduct of legal representatives. These are rare. A great many adjournments are applied for by the prosecution because they are not ready, especially in the Magistracy. It is not

enough to say that the issue of wasted costs would not arise in this or other analogous events. Can the defence apply for the costs wasted by lack of progress? Many adjournments are ordered because of the lack of court time? Where is the compensation to the parties in these circumstances? Why should parties not be compensated in this situation but be compensated when, because of late court listing counsel finds themselves with a clash of engagements. With a little sympathy many of these situations could be dealt with efficiently and without any adverse effect upon the administration of justice. There are occasions without number in which cases, which have over run clash with other engagements of counsel. The bench is wholly unsympathetic to the difficulties of the private bar in this regard even where the cause of the overrun has been the judge's annual holiday or the intervention of numerous medical appointments. This in turn leads to difficulties with the instructions which have to be returned and for counsel who must pick up a brief at a late stage. How is the public being served in these instances.

(b) Many adjournments are ordered as a result of more than one application or by consent. Has any research been carried out to establish how often there has actually been loss to either party as a result of perceived misconduct by an individual legal representative?

(c) What is the "mischief" it is said needs to be addressed? The mischief which needed to be addressed within the civil jurisdiction of the courts was historically somewhat different and was not solely directed at incompetence but rather at the dishonest manipulation of the process of the court to gain advantage over an opponent. This is not the issue at hand here.

<u>As to paragraph (5) of the Bar's submissions</u>

The perceived problem of a defendant having to pay wasted costs incurred by his legal representatives could be dealt with by other means such as disciplinary proceedings".

<u>As to the response of the Administration</u>

" Disciplinary proceedings may act as a deterrent. However a defendant who has incurred unnecessary costs, wants to recover the costs concerned.

The Bar submits:

(a) The existence of established disciplinary proceedings adequately addresses any desire to see trangressors take account for their actions and allows for compensation. It is only right that defendants who privately fund their defence should receive recompense when costs have been thrown away as a result of the actions of others and where they are in no way to blame. This must include the acts or omissions of the prosecution and the recompense in question should be commensurate with outlay. The privately paying client is more likely to be able to seek civil redress than the publicly funded defendant. Will the DLA always make an application for wasted costs in these situations? Why can't the DLA make a complaint? Will the court always make an order where the defendant is legally aided? Or, will it always be the case that such orders will only be contemplated when the defendant is paying personally? If so, why should counsel who is acting for the DLA be held to a lesser standard than counsel who is being paid privately? In the United Kingdom in criminal proceedings counsel invariably appear publicly funded. If they are liable and if Crown Prosecutors and national Defence service lawyers are liable, why should they have some form of protection here.?

<u>As to paragraph (6) of the Bar's submissions</u>

"S17 of the CCC Ordinance empowers the court to make orders on costs in favour of a party to the proceedings as a result of an unnecessary or improper act or omission by or on behalf of the other party. That provision could serve the purpose of covering any wasted costs incurred by a party to criminal proceedings as a result of an

unjustifiable act by the other party. Moreover, under the existing law, subject to an advocate's immunity from being sued, a client might take legal action against his legal representative for any improper act."

<u>As to the response of the Administration</u>
" S17 of the CCC Ordinance only applies to parties to the proceedings, not counsel. It is unrealistic for most defendants to sue their counsel for costs incurred by their improper act.

The Bar submits:

(a) S17 of the CCC Ordinance is a remedy currently available to the courts against a party to the proceedings and is drafted widely. Following the House of Lords decision in Arthur JS Hall & Co v Simmons [2002] 1 A.C. 615, the client could now seek redress from Counsel in the tort of negligence. This would address and protect against situations where Counsel's apparent misbehaviour is actually a direct result of instructions given but subject to legal professional privilege Counsel cannot adequately explain them to the court. For which defendants is it unrealistic to take civil action? The majority are publicly funded and therefore the DLA could take action. The few that fund their defence privately may have the resources to take civil action and certainly have the ability to make a complaint to the Bar. This is a litigious community which is not shy of enforcing their rights. The lack of litigation post Hall, and the nature of the complaints to the Bar in recent times, indicates that the public makes use of the remedies available to it and is satisfied with those remedies for the most part. The true complainant here is the Court of Appeal. No complaint was made by that court to the Bar Council in respect of the matters raised by the administration which would have brought these matters to the attention o the profession. If the court had done so, action could have been taken.

As to paragraph (7) of the Bar's submissions

"There might be possible abuse of wasted costs provisions. The mere existence of the provisions might provide an avenue to the losing party to turn to his legal representatives for possible compensation.

As to the response of the Administration

The English provision can only be invoked when the costs incurred are a result of any improper, unreasonable or negligent act or omission on the part of counsel. S18 provides a safeguard in that the order is not to be made without giving counsel an opportunity to be heard.

The Bar submits

(a) There are situations in which it is possible that the extension of the regime could be open to abuse. Is it envisaged that it is available only at the discretion of the court or also upon application by the parties?

(b) The English regime is narrower than that suggested here. For what purpose has it been considered that S2(b) should be introduced other than it is similar to O62 r8(1)? If S19A of the Prosecution of Offences Act 1985 (as amended) has been implemented and refined in the UK based upon a considerable amount of authority, why is it considered necessary to extend the language of Hong Kong legislation further than that of the UK and against what extra mischief is this directed? Before any question of amendment can arise, the Administration must consider the mischief it seeks to protect more fully and the standard below which a practitioner will be held accountable.

The Mischief

Compensatory or Punitive?

34. The entire thrust of the criticisms made by the Court of Appeal is aimed at penalizing Counsel for unprofessional work and not at compensating the defendant or prosecution for loss occasioned by their infringing acts. In HKSAR v Yeung Mok YEH [2005] 4 HKLRD (CACC 483/2004) Counsel failed to address himself in part (or perhaps at all) to the relevant provisions upon which he wished to rely when seeking leave to appeal to the CFA. The Court of Appeal made several remarks about the lack of professionalism of Counsel and its inability to take any action in respect of that lack of professionalism. These criticisms of the current state of affairs in respect of wasted costs were not addressed as the need to compensate any party but to the need to indicate their displeasure to counsel. They were intended to discipline. In HKSAR v Ho Hon chung, Danel & Others (CA 269/2000) the CA wanted to "condemn" a practitioner for having double booked himself and thereby caused the adjournment of an appeal in which two other appellants were parties. Whilst the comments came about as a result of an application for costs made by the other appellants which the court had no power to entertain, the thrust of their comments indicated their desire to punish as well as to compensate. It was only in HKSAR v Cheung Kwok- kuen & others (CA 171 /2002) that the CA indicated its thought process was directed to compensating the public purse rather than punishing the infringing solicitors.

35. All of the case law in this area allows for the fact that this regime is both compensatory and punitive. It would be naïve to ignore this essential element and to try to dress it up otherwise.

Early tests – Compensatory v Punitve

36. In Myers v Elman [1940] A.C. 282 at p289 per Viscount Maughan: "*The jurisdiction as to costs is quite different "Misconduct or default or negligence in the course of the proceedings is in some cases sufficient to justify an order. The primary object of the court is not to punish the solicitor but to protect the clients who have suffered, and to indemnify the party who has been injured".*

37. At p318 per Ld Wright: '....*there existed in the Court the jurisdiction to punish a solicitor or attorney by ordering him to pay costs, sometimes the costs of his own client, and sometimes the costs of the opposite party, sometimes, it may be, of both. The ground of such an order was that the solicitor had been guilty of professional misconduct (as it is so called) not, however, of so serious a character as to justify striking him off the Roll or suspending him. This was a summary jurisdiction exercised by the Court, which had tried the case in the course of which the conduct was committed...Though the proceedings were penal, no stereotyped form was followed. Hence now the complaint is not treated like a charge in an indictment or even as requiring the particularity of a pleading in a civil action. All that is necessary is that the judge should see that the solicitor has full and sufficient opportunity of answering it...The underlying principle is that the court has the right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally. The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice... The term professional misconduct has often been used to describe the ground on which the Court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfill his duty to the court and to realize his duty to aid in promoting in his own sphere the cause of justice. This summary jurisdiction may often be invoked to save the expense of an action. Thus it may in proper cases take the place of an action for negligence. ...The jurisdiction is not merely punitive but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of."*

38. Compare this to Ld Denning in R and T Thew Limited v Reeves (No 2) [1982] Q.B. 1283 at p1286D "*Our old books show that if a solicitor for one side has done something wrong – which has caused useless costs to the other party- he could be ordered personally to compensate the other party....It was a summary jurisdiction without pleadings. All that was necessary was notice telling the solicitor what was alleged against him and giving him an opportunity of answering it...This jurisdiction still exists in full force. As a rule*

the party- who has incurred useless costs- will himself make the application. But this is not invariable. Sometimes the court may act of its own motion. ..This compensatory jurisdiction still contains, however, a disciplinary slant...The cases show that it is not available in cases of mistake, error of judgment or mere negligence. It is only available where the conduct of the solicitor is inexcusable and such as to merit reproof.."

39. See also Privy Council decision in Harley v McDonald [2001] 2 W.L.R. 1749 at 1768D per Ld Hope: "*A costs order against on of its officers is a sanction imposed by the court. The inherent jurisdiction enables the court to design its sanction for a breach of duty in a way that will enable it to provide compensation for the disadvantaged litigant. But a costs order is also punitive. Although it may be expressed in terms which are compensatory, its purpose is to punish the offending practitioner for a failure to fulfill his duty to the court."* At 1768F he states: *"The jurisdiction is compensatory in that the court directs its attention to costs that would not have been incurred but for the failure in duty. Punitive in that the order is directed against the practitioner personally, not the party to the litigation who would otherwise have had to pay the costs. As a general rule allegations of breach of duty relating to the conduct of the case by a barrister or solicitor with the 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 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 which can be easily verified".*

40. See the much more recent decision of the English Court of Appeal in RE P (A Barrister) [2002] Cr App R 19 at p219 per Kennedy LJ at paragraph 44 *" The three cases which we have cited thus far concern solicitors because until recently orders could not be made against barristers, but the message is clear namely-*

(1) the primary object is not to punish, but to compensate, albeit as the order is sought against a non party it can from that perspective be regarded as penal

(2) the jurisdiction is a summary jurisdiction to be exercised by the court which has tried the case in the course of which the conduct was committed.

(3) Fairness is assured if the lawyer alleged to be at fault has sufficient notice of the complaint made against him, and a proper opportunity to respond to it

(4) Because of the penal element a mere mistake is not sufficient to justify an order. There must be a more serious error.

(5) Although the trial judge can decline to consider an application in respect of costs for example on the ground that he or she is personally embarrassed by an appearance of bias, it will only be in exceptional circumstances that it will be appropriate to pass the matter to another judge, and the fact that, in the proper exercise of his judicial functions, a judge has expressed views in relation to the conduct of a lawyer against whom an order is sought does not of itself normally constitute bias or the appearance of bias so as to necessitate a transfer

(6) If the allegation is one of serious misconduct or crime, the standard of proof will be higher but otherwise it will be the normal civil standard of proof.

The Appeals Process

41. S19(3) will require amendment. What appeal will lie from an order for wasted costs made by the Court of Appeal? For the avoidance of doubt consideration should also be given for proper powers to be vested in each appellate court to order costs of the appeal as appropriate[10].

[10] Practice Direction (Costs:Criminal Proceedings) [2004] 2 All E.R.1070

Conclusion

42. It is submitted that the following steps should be taken:

(a) Identify the mischief against which legislation is needed in order to protect the public and uphold the maintenance of justice.

(b) Set the benchmark against which the practitioner is to be measured.

(c) Categorise those parties who may exercise this power.

(d) State against whom and in what capacity a practitioner is liable.

(e) Outline the proceedings to be used to hear such application and the timing, burden and standard of proof.

(f) Set out the appeals procedure; and

(g) Provide a mechanism for recovery and taxation.

9 October 2006
Hong Kong Bar Association