IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice,
Strand, London, WC2A 2LL.
Wednesday 26th January 1994.

Before:

THE MASTER OF THE ROLLS

(Sir Thomas Bingham)

LORD JUSTICE ROSE

and

LORD JUSTICE WAITE

CCRTF 91/1411/E

ON APPEAL FROM THE BLACKPOOL COUNTY COURT
HER HONOUR JUDGE HOLT

BEVAN RIDEHALGH

Plaintiff v

NEIL HORSEFIELD
and
CHRISTINE ISHERWOOD

Defendants

CCRTF 93/0800/C

ON APPEAL FROM THE LIVERPOOL COUNTY COURT
HIS HONOUR JUDGE LACHS

PATRICK FRANCIS ALLEN

Plaintiff

v

UNIGATE DAIRIES LIMITED

Defendant

CCRTF 93/0677C

ON APPEAL FROM THE EDMONTON COUNTY COURT
HIS HONOUR JUDGE TIBBER

RONALD ROBERTS

Plaintiff

v

COVERITE (ASPHALTERS) LIMITED

Defendants

CHANF 93/1100/B

ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT
MR. JUSTICE KNOX

PHILEX PLC

Applicant

v

SHAHRDAD GOLBAN
(Trading as Capital Estates)

Respondent

FAFMI 93/0678/F

ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MRS. JUSTICE BOOTH

FRANK MERRICK WATSON

Petitioner

v

BRENDA TERESA SWEENEY WATSON

Respondent

QBENF 93/0195/C

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR. JUSTICE TURNER

SAMUEL THOMAS ANTONELLI (And Others)

Plaintiffs

v

WADE GERY FARR (A Firm)

Defendants

MR. D. MATHESON Q.C. and MR. G. MANSFIELD (instructed by Messrs. Barlow Lyde and Gilbert, London EC3) appeared on behalf of the Law Society.

MR. R. JACKSON Q.C. and MR. D. HODGE (instructed by Ms. J.

Bye) appeared on behalf of the Bar Council.

MR. I. BURNETT and MR. J. LAUGHLAND (instructed by the Treasury Solicitor, London SW1) appeared as Amici Curiae.

MR. BENET HYTNER Q.C (instructed by Messrs. Weightman Rutherfords, Liverpool) appeared on behalf of the solicitors.

MR. F. NANCE (instructed by Messrs. Rawsthorn Edelstons, Preston) appeared on behalf of the appellant solicitors.

MR. D. MATHESON Q.C. and MR. G. MANSFIELD (instructed by Messrs. Barlow Lyde & Gilbert, London EC3) appeared on behalf of the Solicitors and on behalf of the Law Society.

MR. R. JACKSON Q.C. and MR. D. HODGE (instructed by Ms. J. Bye) appeared on behalf of the Bar Council.

MR. I. BURNETT and MR. J. LAUGHLAND (instructed by The Treasury Solicitor, London SW1) appeared as Amici Curiae.

MR. D. MATHESON Q.C. and MR. G. MANSFIELD (instructed by Messrs. Barlow Lyde & Gilbert, London EC3) appeared on behalf of the appellant solicitors.

MR. G. WEDDELL (instructed by Messrs. Colin Bishop & Co, Finchley) appeared on behalf of the Defendants.

MR. D. MATHESON Q.C. and MR. G. MANSFIELD (instructed by Messrs. Barlow Lyde & Gilbert, London EC3) appeared on behalf of the appellant solicitors.

MR. T. OTTY (instructed by Messrs. Iliffes, Chesham) appeared on behalf of the Applicant.

MR. D. MATHESON Q.C. and MR. G. MANSFIELD (instructed by Messrs. Barlow Lyde & Gilbert, London EC3) appeared on behalf of the appellant solicitors.

MR. M. POINTER (instructed by Messrs. Penningtons, Finsbury Square) appeared on behalf of the Petitioner.

MR. R. JACKSON Q.C. and MR. D. HODGE (instructed by Messrs.

Richards Butler, London City) appeared on behalf of the appellant counsel.

MR. G. CHAMBERS (instructed by Messrs. Weightman Rutherfords, Liverpool) appeared on behalf of the Defendants.

(Transcript of the Handed Down Judgment by John Larking,
Chancery House, Chancery Lane, London WC2.
Telephone No. 071 404 7464
Official Shorthand Writers to the Court)

J U D G M E N T
(As approved)

Wednesday 26th January 1994.

THE MASTER OF THE ROLLS: This is the judgment of the Court. Different sections of the judgment have been written by different members. Each of us concurs fully in all sections.

There are six appeals before the Court. All of them (save one, in which this issue has been compromised) raise the same question : in what circumstances should the court make a wasted costs order in favour of one party to litigation against the legal representative (counsel or solicitor) of the other? It is a question of great and growing significance. It is desirable that this Court should give such guidance as it can.

Two of the cases before us come on appeal from the county court. Three come on appeal from the High Court, one from each division. In all of these cases wasted costs orders were made and the legal representatives who were the subject of the orders appeal. In the remaining case, the issue first arose in this Court : on allowing an appeal against the decision of a county court, the Court invited the

solicitors who had acted for the parties in the court below to show cause why they should not be ordered personally to pay the costs thrown away. The solicitors have appeared by counsel in this Court in response to that invitation.

Since the question raised by these appeals is of general concern to their members, both the Law Society and the General Council of the Bar sought and were granted leave to make submissions to the Court. Since the question is also of concern to the public, we offered the Attorney-General a similar opportunity of which he took advantage, and counsel were accordingly instructed to represent the wider public interest. All the parties to the six appeals were also represented, save for one party in the compromised appeal. We gratefully acknowledge the help we have had from all solicitors and counsel involved in mounting and presenting these cases.

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.

Experience has shown that certain safeguards are needed if this system is to function fairly and effectively in the interests of parties to litigation and of the public at large. None of these safeguards is entirely straightforward, and only some of them need be mentioned here :

(1) Parties must be free to unburden themselves to their legal advisers without fearing that what they 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. But the position is different where one or both parties to the case are legally-aided: section 17 of the Legal Aid Act 1988 and Part XIII of the Civil Legal Aid (General) Regulations 1989 restrict the liability of legally-assisted parties to pay costs if they lose. And sometimes the losing party is impoverished and cannot pay.

(3) The law imposes a duty on lawyers to exercise reasonable care and skill in conducting their clients' affairs. This is a duty owed to and enforceable by the client, to protect him against loss caused by his 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 and work closely related to proceedings in court advocates should be accorded immunity from claims for negligence by their clients : Rondel V Worsley [1969] 1 AC 191; Saif Ali v Sydney Mitchell & Co [1980] AC 198; section 62, 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.

It is the scope and effect of this last safeguard, and its relation with the others briefly mentioned, which are in issue in these appeals. We shall hereafter refer to this jurisdiction, not quite accurately, as "the wasted costs jurisdiction" and to orders made under it as "wasted costs orders". These appeals are not concerned with the jurisdiction to order legal representatives to compensate their own client. The questions raised are by no means academic. 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 had (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' 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 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. The reconciliation of these public interests is our task in these appeals. Full weight must be given to the first of these public interests, but the wasted costs jurisdiction must not be emasculated.

The wasted costs jurisdiction

The wasted costs jurisdiction of the court as applied to solicitors is of long standing, but discussion of it can conveniently begin with the important and relatively recent case of Myers v Elman [1940] AC 282. At the end of a five-day hearing before a jury the plaintiff obtained judgment for damages for fraudulent conspiracy against five defendants, with costs. Nothing could be recovered from any of the defendants. Nor, perhaps, was any recovery expected, for at

the end of the trial the plaintiff's counsel applied for an order that the costs of the action should be paid by the solicitors who had acted for the defendants.

Notice was duly given to the solicitors and a further five day hearing followed to decide whether the solicitors or any of them should make payment. In the case of one solicitor, Mr Elman, the trial judge (Singleton J) considered two complaints: that he had filed defences which he knew to be false; and that he had permitted the filing of an inadequate affidavit verifying his clients' list of documents. In considering these complaints the judge had before him a considerable correspondence between Mr Elman and his clients which the plaintiff's advisers had (naturally) not seen before; the reports of the case do not disclose how it came about that the clients' privilege in that correspondence was waived.

Singleton J rejected the complaint relating to the defences but upheld that based on the defective affidavit of documents. Nothing, held the judge, should be said which might prevent, or tend to prevent, either solicitor or counsel from doing his best for his client so long as the duty to the court was borne in mind, but if he were asked or required by the client to do something which was inconsistent with the duty to the court it was for him to point out that he could not do it and, if necessary, cease to act : see

Myers v Rothfield [1939] 1 KB 109 at 115, 117. The judge ordered Mr Elman to pay one-third of the taxed costs of the action and two-thirds of the costs of the application. Mr Elman appealed, and the Court of Appeal by a majority reversed the decision of the judge. It appeared that the work in question had been very largely delegated to a well-qualified managing clerk and the conduct complained of had been his, not Mr Elman's. The majority held that to make a wasted costs order the court must find professional misconduct established against the solicitor, and such a finding could not be made where the solicitor was not personally at fault.

On further appeal to the House of Lords, Lord Russell of Killowen dissented on the facts but the House was unanimous in rejecting the Court of Appeal's majority view. While their Lordships used different language, and may to some extent have seen the issues somewhat differently, the case is authority for five fundamental propositions :

(1) The court's jurisdiction to make a wasted costs order against a solicitor is quite distinct from the disciplinary jurisdiction exercised over solicitors.

(2) Whereas a disciplinary order against a solicitor requires a finding that he has been personally guilty of serious professional misconduct the making of a wasted costs order does not.

(3) The court's jurisdiction to make a wasted costs

order against a solicitor is founded on breach of the duty owed by the solicitor to the court to perform his duty as an officer of the court in promoting within his own sphere the cause of justice.

(4) To show a breach of that duty it is not necessary to establish dishonesty, criminal conduct, personal obliquity or behaviour such as would warrant striking a solicitor off the roll. While mere mistake or error of judgment would not justify an order, misconduct, default or even negligence is enough if the negligence is serious or gross.

(5) The jurisdiction is compensatory and not merely punitive.

When Myers v Elman was decided, the court's wasted costs jurisdiction was not regulated by the Rules of the Supreme Court, although Order 65 rule 11 did provide for costs to be disallowed as between solicitor and client or paid by a solicitor to his client where such costs had been "improperly or without any reasonable cause incurred" or where "by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same". There was also provision in Order 65 rule 5 for a solicitor to pay costs to any or all parties if his failure to attend or deliver a document caused a delay in proceedings. But the rules reflected no general wasted costs jurisdiction. Following the decision the Rules

were not amended to regulate the court's inherent wasted costs jurisdiction, but the jurisdiction itself was preserved by section 50(2) of the Solicitors Act 1957. In 1960 a new rule (which later became Order 62 rule 8(1)) was introduced which did regulate, although not enlarge, this inherent jurisdiction. The new rule provided :

> "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 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) an order -
>
> (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 other parties to the proceedings; or
>
> (c) directing the solicitor personally to indemnify such other parties against costs payable by them."

In (a) and (b) the effect of the old rule was reproduced. In (c) the effect of Myers v Elman was recognised. It is plain that expressions such as "improperly", "without reasonable cause" and "misconduct" are to be understood in the sense given to them by their Lordships in that case.

Both before and after introduction of the new rule, contested applications for wasted costs orders against solicitors did come before the courts. Edwards v Edwards [1958] P. 235, Wilkinson v Wilkinson [1963] P.1, Mauroux v Soc.Com. Abel Pereira da Fonseca SARL [1972] 1 WLR 962, Currie & Co v The Law Society [1977] QB 990 and R & T Thew

Ltd v Reeves (No2) (Note) [1982] QB 1283 are examples. But we believe such applications to have been infrequent. In the course of their practices the three members of this court were personally involved in only one such application.

During the 1980s the tempo quickened. In Davy-Chiesman v Davy-Chiesman [1984] Fam. 48 a legally-aided husband made an application for ancillary relief against his wife. The judge who heard the application dismissed it, observing that it was without any merit, should not have been made and most certainly should not have been pursued to the end. The wife obtained the usual costs order against the husband, not to be enforced without leave of the court. She then sought costs against the legal aid fund. The Law Society, as administrator of the legal aid fund, applied that the husband's solicitor personally pay the costs of both husband and wife. The judge rejected that application and the Law Society appealed. The judgment of the Court of Appeal is authority for two propositions :

(1) Subject to any express provision of the Legal Aid Act or regulations to the contrary, the inter-relationship of lay client, solicitor and counsel and the incidents of that relationship, for instance relating to privilege, are no different when the client is legally aided from when he is not.

(2) Although a solicitor is in general entitled to rely on the advice of counsel properly instructed, he is not

entitled to follow such advice blindly but is in the ordinary way obliged to apply his own expert professional mind to the substance of the advice received.

On the facts, the Court of Appeal held that the solicitor should have appreciated the obvious unsoundness of the advice given by counsel after a certain date, and should have communicated his view to the Law Society. The Court therefore allowed the appeal in part. The Court plainly regarded counsel as substantially responsible, but there was at the time no jurisdiction to make an order against a barrister.

In Orchard v South Eastern Electricity Board [1987] QB 565 the plaintiff was again legally-aided with a nil contribution. His claim failed. The usual order, not to be enforced without leave, was made in the defendants' favour. An application was made against the plaintiff's solicitors personally and this was dismissed both by the trial judge and on appeal. In the course of his judgment on appeal, Sir John Donaldson MR made certain observations about the position of the Bar, but it would seem that these were obiter since no claim was or could have been made against counsel for the plaintiff. The case is notable first for the Master of the Rolls' ruling on the exercise of the jurisdiction under Order 62 rule 8 as it then stood. At page 572 D he said :

> "That said, this is a jurisdiction which falls to be exercised with care and discretion and only in clear cases. In the context of a complaint that litigation was initiated or continued in circumstances in which to do

> so constituted serious misconduct, it must never be forgotten that it is not for solicitors or counsel to impose a pre-trial screen through which a litigant must pass before he can put his complaint or defence before the court. On the other hand, no solicitor or counsel should lend his assistance to a litigant if he is satisfied that the initiation or further prosecution of a claim is mala fide or for an ulterior purpose or, to put it more broadly, if the proceedings would be, or have become, an abuse of the process of the court or unjustifiably oppressive."

Secondly, the decision re-affirms that a solicitor against whom a claim is made must have a full opportunity of rebutting the complaint, but recognises that he may be hampered in doing so by his duty of confidentiality to the client "from which he can only be released by his client or by overriding authority" (page 572 G). Thirdly, the judgments highlight the extreme undesirability of claims for wasted costs orders being used as a means of browbeating, bludgeoning or threatening the other side during the progress of the case (pages 577 G and 580 E). Such a practice, it was pointed out, could gravely undermine the ability of a solicitor, particularly a solicitor working for a legally-aided client, to do so with the required objectivity and independence.

In 1986 the relevant Rules of the Supreme Court were amended. Order 62 rule 8 became Order 62 rule 11, but with some re-wording. It now read :

> "11(1): Subject to the following provisions of this rule, where it appears to the Court that costs have been incurred unreasonably or improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition, the Court may

(a) order -
(i) the solicitor whom it considers to be responsible (whether personally or through a servant or agent) to repay to his client costs which the client has been ordered to pay to any other party to the proceedings; or
(ii) the solicitor personally to indemnify such other parties against costs payable by them; and
(iii) the costs as between the solicitor and his client to be disallowed;
or
(b) direct a taxing officer to inquire into the matter and report to the Court, and upon receiving such a report the Court may make such order under sub-paragraph (a) as it thinks fit."

It is noteworthy that the reference to "misconduct" is omitted, as is the implication that any conduct must amount to misconduct if it is to found a wasted costs order. More importantly, reference to "reasonable competence" is introduced, suggesting the ordinary standard of negligence and not a higher standard requiring proof of gross neglect or serious dereliction of duty.

The Court of Appeal had occasion to construe the new rule in Sinclair-Jones v Kay [1989] 1 WLR 114. In his judgment May LJ read the new rule as substantially different from the old (page 121A), and as intended to widen the court's powers (page 121 F). It was no longer necessary to apply the test of gross misconduct laid down in the older authorities (page 122 A). The Court regarded the new power as salutary, particularly as a means of penalising unreasonable delay (pages 121 H, 122 A, C).

In Holden & Co v Crown Prosecution Service [1990] 2 QB

2 61, the Court's decision in Sinclair-Jones v Kay was criticised and not followed, but the correctness of that judgment was affirmed in Gupta v Comer [1991] 1 QB 629, where Order 62 rule 11 as it then stood was again considered. Part of the Court's reasoning in upholding the earlier decision cannot, it would seem, survive later authority, but there is no ground to question its conclusion that the new rule was intended to cut down limitations hitherto thought to restrict the court's jurisdiction to make wasted costs orders.

In his judgment in Gupta v Comer, Lord Donaldson of Lymington MR referred to legislative amendments to section 51 of the Supreme Court Act 1981 which would enable new rules to be made "imposing an even stricter standard than that which Order 62 rule 11 has been held to impose" (page 635 E). This was a reference to what became the Courts and Legal Services Act 1990. Section 4 of that Act substituted a new section 51 in the Supreme Court Act 1981. Relevant for present purposes are the following sub-sections of the new section :

> "51.-(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in-
> (a) the civil division of the Court of Appeal;
> (b) the High Court; and
> (c) any county court,
> shall be in the discretion of the court.
>
> (6) In any proceedings mentioned in subsection (1) , the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.
> (7) In subsection (6) , "wasted costs" means any costs incurred by a party-
> (a) as a result of any improper, unreasonable or

negligent act or omission on the part of any legal or other representative or any employee of such a representative; or

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

(13) In this section "legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct litigation on his behalf.""

The new subsection (6) of section 51 was extended to civil proceedings in the Crown Court. Section 111 made a similar amendment to the Prosecution of Offences Act 1985, applicable to criminal proceedings in the Court of Appeal, the Crown Court and the magistrates' court. Section 112 of the Act amended the Magistrates' Courts Act 1980 to similar effect. We should also draw attention to section 62 of the Act, which was in these terms:

"62 . - (1) A person-

(a) who is not a barrister; but

(b) who lawfully provides any legal services in relation to any proceedings,

shall have the same immunity from liability for negligence in respect of his acts or omissions as he would have if he were a barrister lawfully providing those services.

(2) No act or omission on the part of any barrister or other person which is accorded immunity from liability for negligence shall give rise to an action for breach of any contract relating to the provision by him of the legal services in question."

With effect from 1 October 1991 Order 62 rule 11 was amended to supplement the new section 51 of the Supreme Court Act. It is enough to summarise the effect of the rule without reciting its full terms. Where the court makes a wasted costs order, it must specify in its order the costs

which are to be paid. As under previous versions of the rule, the court may direct a taxing officer to inquire into the matter and report back or it may refer the matter to a taxing officer. The court may not make an order under section 51(6) unless it has given the legal representative a reasonable opportunity to appear and show cause why an order should not be made, although this obligation is qualified where the progress of proceedings is obstructed by a legal representative's failure to attend or deliver a document or proceed. The court may direct the Official Solicitor to attend and take such part in any proceedings or inquiry under the rule as the court may direct.

Some aspects of this new wasted costs regime must be considered in more detail below. It should, however, be noted that the jurisdiction is for the first time extended to barristers. There can in our view be no room for doubt about the mischief against which these new provisions were aimed : this was the causing of loss and expense to litigants by the unjustifiable conduct of litigation by their or the other side's lawyers. Where such conduct is shown, Parliament clearly intended to arm the courts with an effective remedy for the protection of those injured.

Since the Act there have been two cases which deserve mention. The first is In re A Barrister (Wasted Costs Order) (No.1 of 1991) [1993] QB 293. This arose out of an unhappy

difference between counsel and a judge sitting in the Crown Court in a criminal case. It was held on appeal, in our view quite rightly, that courts should apply a three-stage test when a wasted costs order is contemplated :

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

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

(3) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs? (If so, the costs to be met must be specified and, in a criminal case, the amount of the costs).

We have somewhat altered the wording of the Court's ruling but not, we think, its effect.

The second case, Symphony Group PLC v Hodgson [1993] 3 WLR 830, arose out of an application for costs against a non-party and not out of a wasted costs order. An observation of Balcombe LJ at page 842 G is however pertinent in this context also :

> "The judge should be alert to the possibility that an application against a non-party is motivated by resentment of an inability to obtain an effective order for costs against a legally aided litigant. The courts are well aware of the financial difficulties faced by parties who are facing legally aided litigants at first instance, where the opportunity of a claim against the Legal Aid Board under section 18 of the Legal Aid Act 1988 is very limited. Nevertheless the Civil Legal Aid (General) Regulations 1989 (S.I. 1989 No.339/89), and in

particular regulations 67, 69, and 70, lay down conditions designed to ensure that there is no abuse of legal aid by a legally assisted person and these are designed to protect the other party to the litigation as well as the Legal Aid Fund. The court will be very reluctant to infer that solicitors to a legally aided party have failed to discharge their duties under the regulations - see Orchard v South Eastern Electricity Board [1987] QB 565 - and in my judgment this principle extends to a reluctance to infer that any maintenance by a non-party has occurred."

"Improper, unreasonable or negligent"

A number of different submissions were made on the correct construction of these crucial words in the new section 51(7) of the Supreme Court Act 1981. In our view the meaning of these expressions is not open to serious doubt.

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

"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The

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

The term "negligent" was the most controversial of the three. It was argued that the 1990 Act, in this context as in others, used "negligent" as a term of art involving the well-known ingredients of duty, breach, causation and damage. Therefore, it was said, conduct cannot be regarded as negligent unless it involves an actionable breach of the legal representative's duty to his own client, to whom alone a duty is owed. We reject this approach :

(1) As already noted, the predecessor of the present Order 62 rule 11 made reference to "reasonable competence". That expression does not invoke technical concepts of the law of negligence. It seems to us inconceivable that by changing the language Parliament intended to make it harder, rather than easier, for courts to make orders.

(2) Since the applicant's right to a wasted costs order against a legal representative depends on showing that the latter is in breach of his duty to the court it makes no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that he is also in breach of his duty to his client.

We cannot regard this as, in practical terms, a very live issue, since it requires some ingenuity to postulate a situation in which a legal representative causes the other side to incur unnecessary costs without at the same time running up unnecessary costs for his own side and so breaching the ordinary duty owed by a legal representative to his client. But for whatever importance it may have, we are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

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

competent member of that profession could have made" (Saif Ali v Sydney Mitchell & Co, at pages 218 D, 220 D, per Lord Diplock).

We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings, so as to avoid overlap between the three. We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think any sharp differentiation between these expressions is useful or necessary or intended.

Pursuing a hopeless case

A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail. As Lord Pearce observed in Rondel v Worsley at page 275 B,

> "It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, disreputable and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter."

As is well known, barristers in independent practice are not permitted to pick and choose their clients. Paragraph 209 of their Code of Conduct provides :

> "A barrister in independent practice must comply with the 'Cab-rank rule' and accordingly except only as otherwise provided in paragraphs 501 502 and 503 he must in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is legally aided or otherwise publicly funded:
> (a) accept any brief to appear before a court in which he professes to practise;
> (b) accept any instructions;
> (c) act for any person on whose behalf he is briefed or instructed;
> and do so irrespective of (i) the party on whose behalf he is briefed or instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character reputation cause conduct guilt or innocence of that person."

As is also well-known, solicitors are not subject to an equivalent cab-rank rule, but many solicitors would and do respect the public policy underlying it by affording representation to the unpopular and the unmeritorious. Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it.

It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court.

Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents. It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it.

Legal Aid

Section 31(1) of the Legal Aid Act 1988 provides that receipt of legal aid shall not (save as expressly provided) affect the relationship between or rights of a legal representative and client or any privilege arising out of the relationship nor the rights or liabilities of other parties to the proceedings or the principles on which any discretion is exercised. (The protection given to a legally-assisted party in relation to payment of costs is, of course, an obvious express exception). This important principle has been recognised in the authorities. 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, to which Balcombe LJ adverted in Symphony Group and which recent experience abundantly confirms. It would subvert the benevolent purposes of this legislation if such representatives were subject to any unusual personal risk. They for their part must bear prominently in mind that their advice and their conduct should not be tempered by the knowledge that their client is not their paymaster and so not, in all probability, liable for the costs of the other side.

Immunity

In Rondel v Worsley (above) the House of Lords held that a barrister was immune from an action for negligence at the suit of a client in respect of his conduct and management of a case in court and the preliminary work in connection with it. A majority of the House held that this immunity extended to a solicitor while acting as an advocate. In Saif Ali v Sydney Mitchell & Co (above) a majority of the House further held that the immunity only covered pre-trial work intimately connected with the conduct of the case in court. These decisions were based on powerfully-argued considerations of public policy, which included: the requirement that advocates should be free to conduct cases in court fearlessly, independently and without looking over their shoulders; the need for finality, so that cases are not endlessly re-litigated with the risk of inconsistent decisions; the

advocate's duty to the court and to the administration of justice; the barrister's duty to act for a client, however unsavoury; the general immunity accorded to those taking part in court proceedings; the unique role of the advocate; and the subjection of advocates to the discipline of their professional bodies.

We were reminded of these matters when considering submissions on the interaction of sections 4, 111 and 112 of the Courts and Legal Services Act and section 62 of the same Act. On one submission, section 62 must be read subject to the other sections. On that view, if an advocate's conduct in court is improper, unreasonable or negligent he is liable to a wasted costs order. On a second submission, sections 4, 111 and 112 must be read subject to section 62. On that view, a wasted costs order can only be based on improper, unreasonable or negligent conduct which does not take place in court and is not intimately connected with conduct of the case in court. On yet a third submission, sections 4, 111 and 112 should be read subject to section 62 but in a more limited sense : improper or unreasonable conduct would found an order whether in court or out of it, but negligent conduct would not found an order unless it fell outside the ambit of the recognised immunity for work at the trial and before it.

In our judgment (and subject to the important qualification noted below) the first of these submissions is

correct, and for a number of reasons :

(1) There is nothing in sections 4, 111 and 112 to suggest that they take effect subject to the provisions of section 62.

(2) Part II of the 1990 Act, in which section 62 (but not the other sections) appears, is directed to widening the categories of those by whom legal services are provided. It was therefore natural to enact that those providing services also or formerly provided by lawyers should enjoy the same immunity as lawyers. To the same end, section 63 enacts that such persons should enjoy the same professional privilege as a solicitor. There is nothing in section 62 to suggest that it is intended to qualify the apparently unqualified effect of the other sections, to which (in the scheme of the Act) it is in no way related.

(3) Nothing in the Act warrants the drawing of any distinction between improper and unreasonable conduct on the one hand and negligent conduct on the other. Such a distinction is in any event unworkable if, as we have suggested, there is considerable overlap between these expressions.

(4) If the conduct of cases in court, or work intimately connected with the conduct of cases in court, entitles a legal representative to immunity from the making of wasted costs orders, it is not obvious why sections 111 and 112 were applied to magistrates' courts, where no work would ordinarily be done which would not be covered by the

immunity.

(5) It was very odd draftsmanship to define a legal representative in section 51(13) as a person exercising a right of audience if it was intended that anyone exercising a right of audience should be immune from the liability imposed by section 51(6) .

(6) It would be anomalous to interpret an Act which extended the wasted costs jurisdiction over barristers for the first time as exempting them from liability in respect of their most characteristic activity, namely conducting cases in court and advising in relation to such cases. It would be scarcely less anomalous to interpret an Act making express reference to negligence for the first time as exempting advocates from liability for negligence.

(7) It is one thing to say that an advocate shall be immune from claims in negligence by an aggrieved and unsuccessful client. It is quite another for the court to take steps to rectify, at the expense of the advocate, breaches by the advocate of the duty he owed to the court to further the ends of justice.

(8) It is our belief, which we cannot substantiate, that part of the reason underlying the changes effected by the new section 51 was judicial concern at the wholly unacceptable manner in which a very small minority of barristers conducted cases in court.

We referred above to an important qualification. It is

this. Although we are satisfied that the intention of this legislation is to encroach on the traditional immunity of the advocate by subjecting him to the wasted costs jurisdiction if he causes a waste of costs by improper, unreasonable or negligent conduct, it does not follow that we regard the public interest considerations on which the immunity is founded as being irrelevant or lacking weight in this context. Far from it. Any judge who is invited to make or contemplates making an order arising out of an advocate's conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him.

Privilege

Where an applicant seeks a wasted costs order against the lawyers on the other side, legal professional privilege may be relevant both as between the applicant and his lawyers and as between the respondent lawyers and their client. In

either case it is the client's privilege, which he alone can waive.

The first of these situations can cause little difficulty. If the applicant's privileged communications are germane to an issue in the application, to show what he would or would not have done had the other side not acted in the manner complained of, he can waive his privilege; if he declines to do so adverse inferences can be drawn.

The respondent lawyers are in a different position. The privilege is not theirs to waive. In the usual case where a waiver would not benefit their client they will be slow to advise the client to waive his privilege, and they may well feel bound to advise that the client should take independent advice before doing so. The client may be unwilling to do that, and may be unwilling to waive if he does. 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. In some cases this potential source of injustice may be mitigated by reference to the taxing master, where different rules apply, but only in a small minority of cases can this procedure be appropriate. 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.

Causation

As emphasised in Re a Barrister (Wasted Costs Order) (No 1 of 1991), above, the court has jurisdiction to make a wasted costs order only where the improper, unreasonable or negligent conduct complained of has caused a waste of costs and only to the extent of such wasted costs. Demonstration of a causal link is essential. Where the conduct is proved but no waste of costs is shown to have resulted, the case may be one to be referred to the appropriate disciplinary body or the Legal Aid authorities, but it is not one for exercise of the wasted costs jurisdiction.

Reliance on counsel

We endorse the guidance given on this subject in Locke v Camberwell Health Authority [1991] 2 Med LR 249. A solicitor does not abdicate his professional responsibility when he seeks the advice of counsel. He must apply his mind to the advice received. But the more specialist the nature of the advice, the more reasonable is it likely to be for a solicitor to accept it and act on it.

Threats to apply for wasted costs orders

We entirely agree with the view expressed by this Court in Orchard v South Eastern Electricity, above, that the threat of proposed applications should not be used as a means of intimidation. On the other hand, if one side considers that the conduct of the other is improper, unreasonable or negligent and likely to cause a waste of costs we do not consider it objectionable to alert the other side to that view; the other side can then consider its position and perhaps mend its ways. Drawing the distinction between unacceptable intimidation and acceptable notice must depend on the professional judgment of those involved.

The timing of the application

In Filmlab Systems International Ltd v Pennington (unreported, 2 July 1993) Aldous J expressed the opinion that wasted costs orders should not, save in exceptional circumstances, be sought until after trial. He highlighted a number of dangers if applications were made at an interlocutory stage, among them the risk that a party's advisers might feel they could no longer act, so that the party would in effect be deprived of the advisers of his choice. It is impossible to lay down rules of universal application, and sometimes an interlocutory battle resolves the real dispute between the parties. But speaking generally we agree that in the ordinary way applications for wasted costs are best left until after the end of the trial.

The applicant

Under the rules, the court itself may initiate the enquiry whether a wasted costs order should be made. 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 enquiry. If they do so in cases where the enquiry becomes complex and time-consuming, difficult and embarrassing issues on costs can arise: if a wasted costs order is not made, the costs of the enquiry will have to be borne by someone and it will not be the court; even if an order is made, the costs ordered to be paid may be small compared with the costs of the enquiry. In such cases courts will usually be well-advised to leave an aggrieved party to make the application if so advised; the costs will then, in the ordinary way, follow the event between the parties.

Procedure

The procedure to be followed in determining applications for wasted costs must be laid down by courts so as to meet the requirements of the individual case before them. The overriding requirements are that any procedure must be fair and that it must be as simple and summary as fairness permits. Fairness requires that any respondent lawyer should

be very clearly told what he is said to have done wrong and what is claimed. But the requirement of simplicity and summariness means that elaborate pleadings should in general be avoided. No formal process of discovery will be appropriate. We cannot imagine circumstances in which the applicant should be permitted to interrogate the respondent lawyer, or vice versa. Hearings should be measured in hours, and not in days or weeks. Judges must not reject a weapon which Parliament has intended to be used for the protection of those injured by the unjustifiable conduct of the other side's lawyers, but they must be astute to control what threatens to become a new and costly form of satellite litigation.

"Show cause"

Although Order 62 rule 11(4) in its present form requires that in the ordinary way the court should not make a wasted costs order without giving the legal representative "a reasonable opportunity to appear and show cause why an order should not be made", this should not be understood to mean that the burden is on the legal representative to exculpate himself. A wasted costs order should not be made unless the applicant satisfies the court, or the court itself is satisfied, that an order should be made. The representative is not obliged to prove that it should not. But the rule clearly envisages that the representative will not be called on to reply unless an apparently strong prima facie case has

been made against him and the language of the rule recognises a shift in the evidential burden.

Discretion

It was submitted, in our view correctly, that the jurisdiction to make a wasted costs order is dependent at two stages on the discretion of the court. The first is at the stage of initial application, when the court is invited to give the legal representative an opportunity to show cause. This is not something to be done automatically or without careful appraisal of the relevant circumstances. The costs of the enquiry as compared with the costs claimed will always be one relevant consideration. This is a discretion, like any other, to be exercised judicially, but judges may not infrequently decide that further proceedings are not likely to be justified. The second discretion arises at the final stage. Even if the court is satisfied that a legal representative has acted improperly, unreasonably or negligently and that such conduct has caused the other side to incur an identifiable sum of wasted costs, it is not bound to make an order, but in that situation it would of course have to give sustainable reasons for exercising its discretion against making an order.

Crime

Since the six cases before the Court are all civil cases, our attention has naturally been directed towards the

exercise of the wasted costs jurisdiction in the civil field. Attention has, however, been drawn in authorities such as Holden v Crown Prosecution Service and Gupta v Comer, above, to the undesirability of any divergence in the practice of the civil and criminal courts in this field, and Parliament has acted so as substantially (but not completely) to assimilate the practice in the two. We therefore hope that this judgment may give guidance which will be of value to criminal courts as to civil, but we fully appreciate that the conduct of criminal cases will often raise different questions and depend on different circumstances. The relevant discretions are vested in, and only in, the court conducting the relevant hearing. Our purpose is to guide, but not restrict, the exercise of these discretions.

RIDEHALGH v HORSEFIELD and ISHERWOOD

Mr Ridehalgh ("the landlord") owned a house in Blackpool. In the middle of July 1985 he let it for 12 months to Mr Horsefield and Miss Isherwood ("the tenants"). When the 12 months came to an end the landlord re-let the house to the tenants for a further 12 months. When that 12 months came to an end he again re-let the house to the tenants, this time for 2 months. In October 1987 he let the house to them for a fourth time, again for 12 months. In October 1988 he let the house to the tenants for the fifth and last time, for 12 months expiring in October 1989.

When that letting came to an end the landlord consulted solicitors. They issued county court proceedings seeking possession and alleging various breaches of covenant. The tenants launched a cross action claiming damages for breach of covenant. These actions were fully pleaded, and were eventually consolidated. The consolidated action remains alive and has not yet been heard. It was not alleged by the landlord in those actions that the tenants' original tenancy had been a protected shorthold tenancy. The landlord's solicitor had not been able to obtain a copy of the original tenancy agreement and was therefore unable to establish the nature of that tenancy.

Later he was able to obtain a copy of the original tenancy agreement from the rent officer (although not of the protected shorthold tenancy notice which the landlord instructed him had also been served) . Under cover of a letter dated 4 July 1990 he accordingly served on the tenants a notice dated 5 July 1990 under Case 19 of Schedule 15 to the Rent Act 1977, which had been added to that Act by section 55(1) of the Housing Act 1980. The notice was expressed to expire on 5 October 1990.

On 17 January 1991 the landlord's solicitor issued proceedings claiming possession of the house under Case 19. He pleaded (as was necessary if he was to rely on that Case) that before the original agreement had been made in July 1985

the landlord had given the tenants written notice that the tenancy was to be a protected shorthold tenancy within the meaning of the Rent Act 1977 and the Housing Act 1980.

In their defences the tenants advanced a number of pleas. Relevantly for present purposes, both tenants denied receipt of a protected shorthold tenancy notice.

In the spring of 1991 when this action was proceeding towards trial the solicitors for the landlord and the tenants independently consulted textbook authority. The landlord was a man of limited means. The tenants were legally aided. It is understandable, and it was the case, that neither solicitor undertook profound research and neither consulted counsel (which, indeed, the tenants' solicitor had no authority to do). The tenants' solicitor, however, concluded that the parties' respective cases stood or fell on whether or not (as the landlord contended and the tenants denied) a protected shorthold tenancy notice had been served before the original tenancy had been granted. His analysis was this :

(1) If the notice had been duly served, the subsequent tenancies in 1986, 1987 and 1988 were protected tenancies vulnerable to a claim for possession under Case 19.

(2) The periodic tenancy which arose on expiry of the last fixed term tenancy in October 1989 was accordingly an assured shorthold tenancy pursuant to section 34 of the

Housing Act 1988.

(3) The notice given under Case 19, although inappropriate in form, was effective to determine the assured shorthold tenancy pursuant to section 21(4) of the 1988 Act and to entitle the landlord to possession.

(4) If, however, the notice had not been duly served, the tenants were statutory tenants and the landlord was not entitled to possession.

The tenants' solicitor accordingly telephoned the landlord's solicitor, in a commendable attempt to shorten the forthcoming hearing and avoid unnecessary costs, and suggested that the hearing should be confined to the single, conclusive, factual issue whether the notice had been duly served or not. The landlord's solicitor agreed.

In truth this analysis, and the conclusion drawn from it, were fundamentally unsound. If the notice had been duly served, the original tenancy was indeed a protected shorthold tenancy. But the succeeding tenancies in 1986, 1987 and 1988 were not protected shorthold tenancies but protected tenancies, by virtue of section 52(2) of the Housing Act 1980. It remained open to the landlord to seek possession under Case 19. When the last fixed term tenancy expired in October 1989 the tenants became statutory tenants under sections 2 and 3 of the 1977 Act. Section 34 of the 1988 Act had no application because no new tenancy had been granted after the section came into force in January 1989 and no

tenancy had been entered into on or after that date. As statutory tenants the tenants were vulnerable to a claim by the landlord under Case 19. But that Case requires that proceedings for possession should be commenced not later than 3 months after the expiry of the Case 19 notice, and here the landlord's proceedings were commenced 12 days after the expiry of the 3 month period.

The landlord's solicitor appreciated (after commencement of proceedings) that they had been commenced more than 3 months after expiry of the Case 19 notice, but he did not regard that as a matter of any significance since the solicitors had agreed that that notice was properly to be regarded as a notice under section 21 of the 1988 Act, and section 21 contained no special time limit for bringing proceedings.

The case came on for hearing before Her Honour Judge Holt in the Blackpool County Court on 17 October 1991. The landlord's solicitor opened his case along the lines which the solicitors had agreed. The tenants' solicitor confirmed his agreement on the issue for the court to decide. The judge expressed some bewilderment about the legislation, but did not question the solicitors' agreed analysis even though section 34 was read in detail. The landlord's solicitor acknowledged that his pleaded case was based on Case 19 and not section 21, but neither the tenants' solicitor nor the

judge queried that and it was tacitly agreed that the claim should be treated as if made under section 21.

The factual issue whether the protected shorthold tenancy notice had been served or not was vigorously contested before the judge over two days. At the end of the hearing the judge gave an ex tempore judgment which runs to nearly 30 pages of transcript. She found that the notice had been duly served, thus accepting the evidence of the landlord and rejecting the evidence of the tenants. She accordingly made a possession order in favour of the landlord.

The tenants then consulted new solicitors (whose conduct of the matter is open to no possible criticism) and gave notice of appeal. But the new solicitors were at a disadvantage because they did not have all the papers and did not know the basis of the judge's decision. The notice of appeal, as originally drafted by counsel (who had not of course appeared below), took the point that the Case 19 proceedings were out of time; neither he nor the tenants' new solicitors appreciated that judgment had in fact been given under section 21.

The landlord consulted counsel, who correctly advised that the case had proceeded on a wrong basis in the court below. In a skeleton argument and in a respondent's notice he sought to uphold the judge's order on the basis that the

landlord was entitled to possession under Case 19. He sought to overcome the problem that the action had been commenced after expiry of the 3 month time limit by contending that this was a directory provision, for the benefit of the tenant, which the tenants had waived.

The tenants' counsel had by this time learned of the basis on which judgment had been given below. He accordingly settled an amended notice of appeal and a skeleton argument in which he abandoned reliance on the Case 19 time point. Instead, he contended that the Case 19 notice which had been given was not an effective notice under section 21. But a few days later, when he had seen the landlord's skeleton argument and respondent's notice, he settled a supplemental skeleton argument. In this he revived his argument that, if this was a claim under Case 19, the proceedings were out of time. He met the waiver argument by contending that the time limitation went to jurisdiction and the parties could not confer jurisdiction on the court by consent.

The tenants' appeal against Judge Holt's decision was fixed for hearing on 10 or 11 March 1992. A week before, on 3 March, on the advice of counsel, the landlord's solicitor wrote to the tenants' new solicitors an open letter proposing terms on which the appeal could be compromised. This letter did not in terms concede that judgment had been given below on a false basis nor that the possession order could not

stand, and it sought to maintain Judge Holt's costs order. The tenants had very little time to respond to the letter, and most of the costs of the appeal had by then been incurred anyway.

The Court of Appeal (Purchas and Mann L.JJ) heard the tenants' appeal over two days. They held that the agreed basis upon which the case had been fought in the court below was fundamentally unsound for the reasons summarised above. In a reserved judgment handed down on 26 March 1992 Mann LJ held that section 34 of the 1988 Act (which he described as of "a complexity which does not admit of paraphrase") did not apply because no tenancy had been entered into after the commencement of the Act. In October 1989 the tenants became and therefore remained statutory tenants. They did not become assured shorthold tenants and accordingly section 21 of the 1988 Act was of no materiality. But they were vulnerable to a claim properly made under Case 19. Unfortunately for the landlord, however, the proceedings under Case 19 had not been commenced within the 3-month time limit. The Court held that the time limit went to jurisdiction. It accordingly concluded that the judge's decision could not be supported either on the ground on which it had been given or on the ground argued by the landlord on appeal. It allowed the appeal with an expression of sympathy for the landlord "because if his summons had been issued 12 days earlier and his case had then been conducted on the

correct basis, his claim for possession . . . . would on the judge's findings seem to have been unanswerable".

When the Court of Appeal's judgment was handed down there was a discussion of costs. The Court made no order in relation to costs save for Legal Aid taxation of the tenants' (new) solicitors' costs of the appeal. The Court indicated that it was "minded to make an order and will make an order that the solicitors concerned in the court below shall be personally and severally and jointly liable to reimburse the Legal Aid Fund on an indemnity basis for any costs incurred not already met by charges in favour of that fund on the legally assisted parties". Purchas LJ had indicated that the Court was concerned to protect the Legal Aid Fund so far as was proper. The solicitors were given time to show cause why an order should not be made against them.

After the Court of Appeal's decision, the landlord served a further notice seeking possession under Case 19. The tenants did not give up possession. After expiry of the notice (and within the statutory time limit) he issued further proceedings claiming possession under that Case. The tenants served a defence denying that the landlord had served a protected shorthold tenancy notice before the 1985 tenancy agreement had been made and denying that Judge Holt's judgment concluded that issue. At a hearing before His Honour Judge Proctor in October 1992 the tenants sought to

re-litigate that issue, contending that it was not res judicata. The judge rejected the argument and made a possession order under Case 19. The tenants appealed against Judge Proctor's order. In July 1993 their appeal was dismissed.

The solicitors who acted for the landlord and the tenants in the action heard by Judge Holt appeared by counsel in this Court and sought to show cause why the proposed wasted costs order should not be made against them. The landlord himself is to be indemnified by the Solicitors' Indemnity Fund in relation to all costs orders made against him in that action. At issue now are the costs incurred in the action by the Legal Aid Fund.

It has never been suggested that either the landlord's or the tenants' solicitor acted improperly or unreasonably. The question was whether they had acted negligently. In his additional skeleton argument for the solicitors, Mr Hytner QC did not dispute that the landlord's solicitor had been negligent in failing to bring Case 19 proceedings in time and that the tenants' solicitor had been negligent (though not, it was said, actionably so) in failing to take the point. But plainly this negligence, assuming it to be such, did not cause the action to proceed as it did in the county court : that was the result of the solicitors' agreement that if the protected shorthold tenancy notice had been served the

landlord was entitled to possession because section 34 converted the tenants' holding into an assured shorthold tenancy which the notice under Case 19 was effective to determine under section 34. It is now plain that the solicitors' agreement was based on a misunderstanding of the law. Were they negligent in failing to understand the law correctly?

Dismay that a straightforward dispute between landlord and tenant should have led to four county court actions (one still undecided), two appeals to this Court and the passing of 3 years (so far) since the litigation began might well prompt an answer unfavourable to the solicitors. We can well understand why Purchas and Mann L.JJ reacted as they did. But we do not in all the circumstances think it right to stigmatise the solicitors' error as negligent, for these reasons :

(1) This legislation is very far from straightforward. Mann LJ commented on the complexity of section 34. Judge Holt commented that she couldn't make head or tail of it. We sympathise with her. It is unfortunate that legislation directly affecting the lives of so many citizens should not be more readily intelligible.

(2) The solicitors do not appear to have approached the case in a careless way. There is nothing to contradict their statements that the textbooks they consulted did not give a clear answer to their problem. They could not

be expected to bring the expertise of specialist counsel to the case. Nor could they reasonably expect to be remunerated for prolonged research. We do not think their error was one which no reasonably competent solicitor in general practice could have made.

(3) It is significant that a most experienced county court judge saw no reason to cavil at the basis upon which it had been agreed to conduct the case. Had the error been egregious, it is hard to think the judge would not have corrected it.

(4) Counsel appearing for the tenants on appeal from Judge Holt did not regard the basis on which the case had been argued below as unsustainable. On the contrary, he argued (among other things) that the statutory tenancy which began in October 1989 was an assured shorthold tenancy by virtue of section 34 of the 1988 Act, which was the basis of the solicitors' agreement criticised by the Court of Appeal. We think it significant that experienced counsel did not discard the argument as obviously wrong.

After two days of argument by counsel, and having reserved judgment, this Court was able to take a clear view of the legal point at issue. This view was directly contrary to the solicitors', and is plainly right. But it does not follow that the solicitors were negligent in forming the opinion they did. We do not think they were.

There is a further consideration. Had the landlord stuck to his Case 19 claim before Judge Holt, and had the tenants relied on the time point, the landlord would have failed. There might or might not have been an appeal. But it seems clear that the parties would at some stage have wished to litigate the issue whether the protected shorthold tenancy notice had been served before the first letting. This might have been decided on the first, or on a later, occasion. It seems likely, given the history of this litigation, that the tenants would have sought to appeal against an adverse finding on this issue whenever it was made. Thus although the solicitors' mistaken agreement to fight the case on the basis they did must have led to some waste of costs, it would be wrong to regard all the costs incurred before Judge Holt and in the Court of Appeal as wasted.

ALLEN v. UNIGATE DAIRIES LIMITED

The plaintiff's solicitors appeal against the third part of a wasted costs order made at Liverpool County Court on 10th May 1993 by His Honour Judge Lachs. Their appeal against parts one and two of his order has been compromised by agreement between the parties.

The plaintiff who was legally aided claimed damages for noise-induced hearing loss said to have been caused by exposure to a decrater machine at his place of work. On the

day of trial in March 1993, before opening, the claim was dismissed by consent it being then accepted that the plaintiff's workplace was not dangerously noisy. The judge held that the appellants had been negligent in failing to discover this at an earlier stage and ordered, so far as is presently material, that there should be no Legal Aid taxation of their costs after 1st November 1992.

The case for the appellants is that they had relied on the instructions of their client to themselves and to their expert, on the reports of their expert and on counsel and had acted as reasonably competent solicitors.

Before examining the relevant material, a preliminary point arises, under the Legal Aid Regulations, as to the form of the judge's order.

It is apparent from Regulation 107 of the Civil Legal Aid (General) Regulations 1989 that a judge has no power to forbid legal aid taxation. Regulation 107(1) states that costs "shall be taxed in accordance with any direction or order given" and Regulation 107 (3) (b) states that a final judgment decree or Order "shall include a direction...that the costs...be taxed on the standard basis". By virtue of Regulation 107 (4) if such a direction is not given "the costs.... shall be taxed on the standard basis". It follows that taxation of a legally assisted persons costs is mandatory and must take place after final judgment whether or not the judge orders it.

However, a judge does have power, under section 51(6) of

the Supreme Court Act 1981 and regulation 109(1), to order that, on taxation, wasted costs shall be disallowed or reduced after notice has been given by the taxing officer to the solicitor or counsel enabling him to be heard.

In the present case no criticism was made of counsel. But if no taxation took place he could not be paid by the Legal Aid Board.

Accordingly the appropriate procedure, in a legally-aided case, if a judge properly concludes that a wasted costs order is appropriate, is for him to order legal aid taxation, to send, if he wishes, a copy of his judgment to the taxing officer and to direct under section 51(6) that wasted solicitors costs after a particular date be disallowed and consideration be given to whether counsels fees be disallowed or paid by the Legal Aid Board.

The central question in the present appeal is whether there was before the judge material justifying his conclusion that the appellants had been negligent.

He reached this conclusion having regard to the following matters (see transcript pages 3 to 7)

(i) the "extremely skimpy statement" taken from the plaintiff in September 1988;

(ii) the plaintiff's advisors' failure to make appropriate enquiries about the plaintiff's place of work;

(iii) the fact that there was no dangerous level of noise at the plaintiff's place of work;

(iv) the lack of explanation as to why matters were not clear until the morning of the trial;

(v) the failure to obtain counsel's opinion and a full report;

(vi) the failure to enquire as to the significance of a line on a plan, provided by the defendants, which depicted a wall;

(vii) the failure to recognise the confusion between 'decrater' 'recrater' and 'flyer' which was apparent on sight of the defendants' expert's report;

(viii) the failure to take any steps properly to identify the plaintiff's place of work and the effect of noise there.

For the appellants, Mr Mansfield submitted that, on a true analysis of the evidence, there was no substance in any of these criticisms.

In addition to the skimpy statement, the schedule to the questionnaire annexed to the Particulars of Claim gave details about the plaintiff's place of work. The plaintiff's instructions to the appellants and their expert described working in the back bay bottle reception area and used the words "flyer" and "decrater" when referring to the noisy machine. The plaintiff's expert had interviewed the plaintiff in July 1992 and marked the site plan provided by the defendants on his instructions: it was not then suggested that the line to which the judge referred denoted a wall.

The plaintiff's expert referred to the bottle reception area as the back bay where the plaintiff worked, to the machine as a decrater, also known as "the flyer", and to the defendants' disclosed noise level tests as showing in 1986 dangerously excessive levels from the decrater, which the expert assumed was in the bottle reception area. The defendants' expert's Report served in September 1992, far from suggesting any error in this approach, also referred to the decrating machine known as the flyer in the back bay. The plaintiff's expert, to whom the appellants again referred in early 1993, did not suggest that an inspection of the site was necessary: in any event the layout had changed since the plaintiff worked there. There was nothing in the defence or the correspondence from the defendants' solicitors to alert the appellants to the fact that, as was demonstrated on the morning of the trial, there was a de-stacker but no decrater in the back bay and there was a solid wall between the decrater and the plaintiff's place of work. At pre trial conferences with two different counsel, neither had suggested that such a fundamental error had been made. It was not until 6th May 1993, a few days before the hearing on the costs application, that the defendants' solicitors conceded in an Affidavit that their expert was wrong.

In the light of this material this experienced judge in our judgment fell into error. The appellants acted throughout on the plaintiff's instructions and obtained appropriate legal and expert advice on which they were

entitled to rely. With the benefit of hindsight it is clear that the plaintiff was unlikely to have been exposed to excessive noise if there was a wall between him and the decrater. But, in our judgment, there was nothing prior to the date of trial which ought reasonably to have put the appellants on enquiry either as to the significance of the line on the plan or as to the possibility that the plaintiff was not exposed to noise from the decrater. It is, indeed, regrettable, having regard to the present climate favouring a cards-on-the-table approach to litigation, that the defendants' solicitors, if they were aware of it, did not, in correspondence, expressly point out to the appellants the error which they were making. Accordingly, the appellants did not act improperly, unreasonably or negligently.

We are conscious that it is particularly necessary in relation to the many thousands of industrial deafness claims which are being pursued in Liverpool and elsewhere that firm judicial control should be exercised over the parties to such litigation and their legal advisors. We have no doubt that in an appropriate case a wasted costs order or a direction that on legal aid taxation the taxing officer shall disallow or reduce costs, is a useful means for exercising such control. But in the present case, for the reasons given, this was not an appropriate case for such an order. Accordingly, we set aside the judge's order disallowing legal aid taxation and to that extent this appeal is allowed.

The plaintiff's solicitor appeals against an Order made by His Honour Judge Tibber at Edmonton County Court on 14th April 1993 that he should pay the defendants' costs of the Action.

The plaintiff, legally aided with a nil contribution since September 1987, claimed the price of work done by proceedings instituted in the County Court on 10th November 1988. The appellant in accordance with the practice of London practitioners, sent to the Court with the Particulars of Claim, notice of issue of legal aid and the original Legal Aid Certificate. It was the Court's practice to serve a copy of the Notice of Issue with the Summons. The appellant asked in his accompanying letter that one copy of the Notice (which he sent in duplicate) be sealed and returned to him. The Court did not serve a copy of the Notice of Issue on the defendant nor return a sealed copy to the appellant and it was accepted that this was the Court's fault. The appellant assumed that the Court had served the Notice on the defendant, for the claim was served and a defence was filed.

Initially the claim was for a little over £3,000 plus interest. By amendment in September 1989 this became £4,677 and a claim was added on a dishonoured cheque in the sum of £531. No amended defence was served. In February 1990 the defendant admitted that a sum of £232 was due. In March 1990 the plaintiff sought summary judgment for that sum plus the amount of the cheque i.e. £763 but that application was

adjourned and further particulars were twice supplied by the plaintiff. On 25th February 1992, the appellant "reminded" the defendants' solicitors of the plaintiff's legal aid and expressed surprise that no offer had been made, drawing attention to the sum of £763 apparently due. On 26th February the defendants' solicitors replied acknowledging that £232 was due but saying that this would not of itself result in an order as to costs. They said they would amend to deny the claim on the cheque if necessary and stated that the failure to give notice of issue of the legal aid certificate would entitle them to an order against the appellant personally for their costs to date. The appellant did not reply. There were no further negotiations and no payment into Court. There was no application to amend the defence. In September 1992 the appellant filed a certificate of readiness with a time estimate of 1y_2 days and in October 1992 the case was set down for trial on 15th March 1993. On 17th February 1993 the defendants' solicitors wrote to the appellant saying that 5 days would be necessary and seeking a re-arranged date for trial. On 1st March the appellant refused this request. On 3rd March the defendants offered £2,500 including costs in settlement, referring again to the failure to notify the issue of legal aid and to the possibility of an order against the appellant personally for costs under Order 62 rule 11. The appellant replied that the plaintiff would accept £2,500 plus costs which he estimated at £4,500 plus VAT. On 11th March the defendants offered

£5,000 inclusive of costs. On 15th March, at the door of the Court the case settled for £2,500 plus costs on Scale 1 without prejudice to the defendants' application for costs against the appellant.

In November 1988 the relevant regulations were the Legal Aid (General) Regulations 1980. Regulation 51 provided:-

"(1) Whenever an assisted person becomes a party to proceedings, or a party to proceedings becomes an assisted person, his solicitor shall forthwith -

(a) serve all other parties to the proceedings with notice of the issue of a certificate; and

(b) if at any time thereafter any other person becomes a party to the proceedings, forthwith serve similar notice on that party.

(2) Copies of the notices referred to in paragraph (1) shall form part of the papers for the use of the court in the proceedings.

(3) Where an assisted person's solicitor -

(a) commences any proceedings for the assisted person in the county court; or

(b)

and at the same time files a copy of the notice to be served in accordance with paragraph (1), the registrar shall annex a copy of the notice to the originating process for service".

For the appellant, Mr Mansfield submitted that paragraph

(1) to the Regulation must be read with paragraph (3), so that where proceedings are commenced in the County Court by someone who is already legally aided compliance with Regulation 51(3) is a complete performance of the solicitor's obligation. On this basis the appellant was not in breach of Regulation 51. In any event, even if he was in breach of that obligation by not serving the notice personally and direct, he was acting in accordance with the practice of other solicitors in the London area. As the appellant in due course received a defence, there was no reason for him to suspect that only part of the documents which should have been served had been served, save that a sealed Notice of Issue of the Legal Aid Certificate was not returned to him, as he had asked. The learned judge, submitted Mr Mansfield, placed too much weight on this and failed to give any weight to the fact that the Court itself had failed to serve the Notice. The appellant's failure to realise that this had not been returned to him does not, submitted Mr Mansfield, amount to culpable behaviour within Saif Ali because other Solicitors had adopted the practice. In any event, submitted Mr Mansfield, even if the appellant's conduct was properly categorised as negligent, the Judge failed to give any proper consideration to the question of causation. A wasted costs order can only be made if costs have been wasted by reason of the culpable conduct. Here, the costs were incurred by defending the claim. It was not sufficient for the Judge to be satisfied that the defendants would have sought to settle

at the outset if they had known that the plaintiff was legally aided; it also had to be established on the balance of probability that, with that knowledge, they would either have made an acceptable offer or paid into Court a sufficient sum to win on costs at the end of the day. In February 19 92 when the defendants' solicitors knew that the plaintiff was legally aided, no payment was made into Court nor was any attempt at settlement made by the defendants' solicitors. It was not until one week before the hearing that they made their first offer of settlement and although, in February 1992, the defendants' solicitors acknowledged that £252 was due, that sum was not paid into Court.

For the defendants, Mr Weddell submitted first that Regulation 51(1) (a) imposes an absolute duty on a solicitor to serve a Notice of Issue of a Legal Aid Certificate personally and that Regulation 51(3) is, as the judge found, a belt and braces provision. He points out that (3) refers to "a copy of the Notice" whereas (1) refers to the Notice. Regulation 8 which relates to service of Notices under the Legal Aid Regulations refers only to Notices not copies of Notices.

In our judgment, so far as notification of issue of a Legal Aid Certificate is concerned, there is no significant difference between a Notice and a copy of a Notice. The solicitor for the legally assisted person receives from the Law Society a Legal Aid Certificate. He prepares a notice of its issue and he must serve notice of its issue on the other

party: whether he does so by a document properly described as an original or a copy is in our judgment entirely immaterial.

Mr Weddell further submitted that the appellant did not send the Notice to the Court for service but sent it for return to himself. This in our view overlooks the fact that, as is apparent from the accompanying letter, he sent two copies of the Notice only one of which was to be returned to him.

We are unable to accept Mr Weddell's submission that the appellant's conduct here amounted not to mere negligence but to recklessness. Clearly the appellant was in error in failing to observe that the sealed copy of the Notice had not been returned to him and in assuming that the Court would have effected service of the Notice. But we are wholly unpersuaded that this amounted to improper, unreasonable or negligent conduct.

In any event, we are unable to accept Mr Weddell's submissions on causation. He said that the judge, having accepted the evidence of the defendants' director Mr Speroni and the defendants' solicitor, that advice to settle would have been followed, was entitled to conclude that settlement would have been made at an early stage. Mr Weddell also pointed out that settlement was ultimately achieved at a figure in the region of 1/3 of the value of the claim including interest. But in our judgment the conclusion is inescapable that the judge did not properly address the question of causation. We accept Mr Mansfield's submission

that the history of events between February 1992 and March 1993 which we have earlier set out makes it impossible to conclude on the balance of probabilities that with knowledge that the plaintiff was legally aided in November 1988 the defendants would have made either a successful payment into Court or an acceptable offer earlier than they did.

Accordingly, we take the view that there was no proper basis here for the judge to make a wasted costs order against the appellant. We add only this. When a solicitor opts for the Court to serve process he should expressly inform the Court that he wishes Notice of Issue of Legal Aid to be served by the Court.

In the light of this conclusion, it is unnecessary to determine the difficult question as to whether the judge had any jurisdiction to make the order he did, having regard to the fact that the act or omission relied on occurred prior to October 1991 when the Courts and Legal Services Act came into force, but complaint was not made until March 1993. This Court held in Fozal v Gofur (unreported 21 June 1993) that the Act is not retrospective, so section 51(6) would not provide jurisdiction. Order 62 rule 11, under the old form of which the County Court had jurisdiction (see Sinclair-Jones v Kay [1989] 1 WLR 114), was amended from 1st October 1991 to refer to section 51(6). But there are no transitional provisions in the Act or the rule. The answer depends on whether, on the proper construction of section 16 of the Interpretation Act 1978, there was, on 1st October

1991, an accrued right capable of enforcement by legal proceedings. Having regard to the view which we have formed on the merits of this matter, it is unnecessary for us to embark on answering that question.

This appeal will accordingly be allowed and the judge's order set aside.

PHILEX PLC V S GOLBAN

The appellants in **Philex PLC v S Golban (trading as Capital Estates)** are solicitors against whose firm a wasted costs order was made in the Companies Court. Their client had claimed to be a creditor of the company, which was solvent. The debt was disputed. The client had nevertheless made use of the statutory demand procedure as a means of pressure to force payment. The company applied for and obtained an injunction to restrain the issue of a winding-up petition, and an order for their costs of that application against the client on an indemnity basis. Having reason to doubt the solvency of the client, the company applied further that their costs should be made the subject of a wasted costs order against his solicitors. The judge made such an order, not upon the ground that the solicitors were open to any criticism for issuing the statutory demand in the first place, but because at a later stage (when the payment time allowed by the statutory demand had expired) they were parties to a negotiating offer which made unreasonable or improper use of the implied threat of a winding-up petition

as an inducement to the company to compromise the claim.

The facts, which are helpfully set out in the full and careful judgment of Knox J., were these. On or about 18 December 19 92 the alleged debtor company Philex Pic ("Philex") completed the purchase of a property in north west London ("the property") for a price in the region of £370,000. The alleged creditor Mr. S. Golban ("Mr. Golban") claimed to be entitled to an introduction fee or commission on the purchase, in respect of which he invoiced Philex as follows on 22 December 1992:

> "For introduction of the above property purchase from L & S Properties at purchase price £370,000 and completion taken place on 21 December 1992. Agreed commission of 3%: £11,100."

The claim was promptly denied on behalf of Philex, whose Finance Director, Mr. Torbati, replied on 24 December:

> "We are in receipt of your invoice . . . . which we do not understand. So far as we are aware we have no liabilities outstanding to yourselves."

On that same day (24 December) the appellant firm (acting as solicitors for Mr. Golban through a partner to whom it will be convenient to refer as "the solicitor") served on Philex a Statutory Demand in the approved Form 4.1. That Form has indorsed upon it in heavy black type the warning "Remember! The company has only 21 days after the date of service on it of this document before the creditor may present a winding-up petition." It was signed by Mr. Golban, who designated the

solicitor as the person to whom any communications were to be addressed. The Demand re-asserted the commission claim in the sum of £11,100 and alleged that Philex had refused to pay it. The letter from the solicitor's firm covering service of the Statutory Demand included a note that their offices would be closed from 1.30 pm that day (24 December) to 9.30 am on Monday 4 January 19 93.

On Thursday 31 December 1992 Iliffes, solicitors acting for Philex, wrote to the solicitor's firm in response to the Statutory Demand. They disputed that Mr. Golban had at any time acted for or been engaged for any purpose by Philex, which did not deny that he had been concerned in discussions with it about the purchase but contended that the company had been given to understand that he was acting exclusively on behalf of the vendors. The letter continued:

> "Our client is a solvent company. The reason that our client refuses to pay your client the sum claimed or any other sum is that your client has no entitlement to be paid. The alleged debt is disputed by our client and your client's statutory demand is an abuse of the process of the Companies Court. Unless we receive your client's undertaking by 4 pm on Monday 4 January 1993 *[which was the first working day after the date of that letter and was also the day on which the solicitor's office was due to re-open]* that he will take no further steps in relation to the statutory demand and that he will not issue a winding-up petition in respect of it our client will make an immediate application to the Companies Court to restrain your client from presenting a petition and will apply for its costs on the indemnity basis in accordance with the principles laid down in Re a Company". . . . . *[a reference to Hoffmann J's re- affirmation in* ***Re a Company No 0012209 of 1991*** *1992 1 WLR 351 at 354 of*

the principle that it is an abuse of the process of the companies court to present a winding up petition to secure payment of a debt concerning which there is a genuine dispute]

The solicitor duly found that letter of 31 December waiting for him when he returned to his office on 4 January, and sent a copy of it (together with a copy of the law report of **Re A Company)** to his client Mr. Golban, whom he knew to be abroad and not due to return until 5 or 6 January. He did not feel that he could give the required undertaking without instructions from his client. The 4 pm deadline allowed by Iliffe's letter of 31 December accordingly passed, and on 5 January Iliffes issued an Originating Application in the Companies Court returnable on 25 January and seeking an order for an injunction restraining Mr. Golban from presenting any petition to wind up Philex based upon the Statutory Demand. That application was served on the solicitor's firm the same day (5 January) under cover of a letter which stated that the affidavit in support would be served shortly.

This supporting affidavit was in fact served on the solicitor's firm on Friday 8 January. It was sworn by Mr. Torbati, who stated Philex's general case as follows. Mr. Golban had indeed introduced the property to Philex's managing director (Mr. Sabourian) and had acted as an intermediary to convey to the vendors certain offers that were initially made for it by Philex. Those offers did not, however, bear fruit. Philex thereafter entered into direct

negotiations with the vendors which led eventually to an agreement for sale in which Mr. Golban had played no part. Mr. Torbati went on to describe Mr. Sabourian as having expressed the wish, nevertheless, to make some *ex gratia* payment to Mr. Golban for his introduction. He had suggested a figure of £2000, which Mr. Golban had rejected as wholly inadequate.

The solicitor did not read this evidence on the Friday on which it was served, but considered it on Monday 11 January (having in the meantime sent a copy of it without comment to Mr. Golban) . It should be noted that the judge had no criticism to make, down to that point, of the solicitor's conduct in any respect whatsoever.

On that same day (Monday 11 January) the solicitor wrote a letter to Iliffes which contained no more than a simple acknowledgment of receipt of the affidavit. His client's comments on that affidavit were received on 13 January: it may safely be assumed (although privilege has not been waived) that those comments dissented strongly from Mr. Torbati's version of events.

Thursday 14 January was the expiry date of the 21 day period allowed by the Statutory Demand. On that day the solicitor was telephoned by Mr. Evered of Iliffes, who asked him whether Mr. Golban was intending to resist the pending

application for an injunction against presentation of a petition (due to be heard on 25 January), pointing out at the same time that it was now crystal clear that there was a genuine dispute about the claim and that Mr. Golban was at risk of having to pay costs on an indemnity basis if he invoked the winding up procedure. The solicitor replied that he had explained this to his client, who was nevertheless adamant that he was owed the money and wanted to go ahead. When Mr. Evered asked him whether he intended to issue a petition, because (if he did) Philex would apply immediately for an ex parte injunction to restrain its advertisement, the solicitor replied that he would have to take instructions and would get back to him on that point. After that conversation, the solicitor had to leave immediately to attend a court engagement, and when he returned to his office he found a fax copy of an ex parte injunction which had been obtained by Iliffes that day prohibiting the issue by Mr. Golban of any petition to wind up Philex until the conclusion of the hearing due to take place on 25 January.

On Friday 15 January at the latest (it was possible according to the finding of the judge that the relevant advice had been given two days earlier on 13 January) the solicitor advised Mr. Golban specifically that in the current state of the evidence a genuine dispute existed as to the subject matter of the Statutory Demand, and that it would be an abuse of the process of the court to present any petition

founded upon it. Mr. Golban accepted that advice, but at the same time gave the solicitor certain instructions, as to which there has, again, been no waiver of privilege, but it may safely be assumed from what followed that they included a request to see if something in the nature of a compromise could be salvaged from the existing situation. The solicitor accordingly that same day drafted a letter to Iliffe's to which reference will be made shortly, but did not post it that day because he wanted to have it approved by counsel to whom he submitted the draft for consideration over the week-end.

On Monday 18 January Iliffes faxed a letter to the solicitor seeking to substantiate a suggestion previously made that Mr. Golban had become the subject of bankruptcy proceedings, and giving him notice that:

> "unless terms can be agreed for the relief sought and payment of our client's costs prior to the hearing of the application on 25 January we shall seek that an order be made against your firm personally to pay our client's costs on the indemnity basis."

On 19 January the solicitor sent to Iliffes the letter which had been submitted in draft to counsel. It included the following passages:

> "It appears from your client's affidavit that he has offered payment of £2,000 to our client in satisfaction of the claim. Whilst our client wishes to reserve his rights to pursue the full claim he is nevertheless prepared to accept payment of £2,000 together with our reasonable costs if this can be agreed

before 25 January. If not, our client intends to issue proceedings for the full amount of his claim and seeks your confirmation that the sum of £2,000 will be paid into court in such proceedings.

In spite of his reservations arising from the discrepancy between what you have stated on behalf of your client and what your client states in his affidavit our client accepts that the evidence contained in the affidavit establishes, prima facie, a dispute rendering inappropriate the continuation of the winding-up procedure and confirms that he does not intend to present a winding-up petition.

We note your comments regarding our position and the alleged bankruptcy of our client. He has, as you know, denied to us that he is bankrupt and in view of your persistence in asserting this we have made a search against our client which has disclosed that there are no subsisting entries. We are therefore unable to agree with your contention that we should be personally liable for costs and will certainly oppose any such application."

The proposal in that letter for settlement of Mr. Golban's claim for £2000 and his costs was rejected by Iliffe's on 21 January. No agreement was reached as to how matters should proceed at the hearing on 25 January. The upshot was that counsel attended that hearing, on the instructions of the solicitor on behalf of Mr. Golban, and offered no resistance to an order for an injunction in the terms prayed by the Originating Application. An order was made that Mr. Golban should pay Philex's costs of the Application on an indemnity basis. An application intimated at that hearing for such costs to be paid by the solicitor's firm personally was adjourned to a later date, and was dealt with by Knox J on 30 June 19 93 when he made the wasted costs order now under appeal. This was an order that the

solicitor's firm:

> "do pay the wasted costs incurred by [Philex] after 13 January 1993 to be taxed if not agreed but credit should be given for such costs as would have been incurred in disposing of the [application] by consent."

The judge's reasons for treating the costs incurred by Philex from and after 14 January 1993 as "wasted"for the purposes of section 51 (6) and (7) were expressed in these terms:

> **"I have come to the conclusion that it was unreasonable and indeed improper to use proceedings which by 11 January 1993 [the solicitor] should have realised and did realise amounted to an abuse of the process of the court as a vehicle to secure a compromise on the basis of the £2 000 claim which at one stage was offered. [The solicitor] did indeed, on his own evidence, advise his client Mr. Golban not to proceed with the statutory demand on 15 January. He should, and indeed may, have done so, when Mr. Golban gave [the solicitor], on or about 13 January, his comments on Mr. Torbati[1]s affidavit. The fact that Mr. Golban continued to believe in the merits of his case for commission is not any justification for not accepting that the winding up procedure was inappropriate and should not be followed."**

This passage makes it clear that the conduct of the solicitor which the judge regarded as unreasonable or improper for the purposes of section 51 (7) consisted of his adoption on Mr. Golban's behalf from and after 14 January 1993 of the tactic of threatening the use of a winding-up petition, presented in abuse of the process of the court, as a bargaining counter to improve his client's prospects of

persuading Philex to accept a compromise of the claim at the suggested figure of £2000 plus costs.

The appellant firm submits that this finding of misconduct was not open to the judge on the evidence and can only have been founded on a misreading of the correspondence. It points out:

(1) That the relevant compromise was proposed in the letter of 19 January, in which it was quite clearly and unconditionally stated that Mr. Golban accepted that the evidence established a bona fide dispute making the continuance of the winding-up procedure inappropriate, and confirmed that he did not intend to present a winding-up petition. There was therefore no question of the solicitor using potentially abusive proceedings as "a vehicle to secure a compromise".

(2) That the compromise proposal was in any event contained in a letter whose text had been approved by counsel on whose advice the solicitor was entitled to rely.

With every respect to the views of a judge with wide experience in this field of the law who had obviously given the case detailed and careful attention, these submissions are in our judgment well-founded. We do not suggest that

there could never be circumstances in which a solicitor who advised his client to make use of a threat of proceedings that would (if brought) amount to an abuse of the process might be found to have been guilty of improper or unreasonable conduct. It is simply that we are unable to find any evidential basis for the judge's conclusion that misconduct of that sort had occurred in the present case. The solicitor was, moreover, entitled to rely upon the fact that from 15 January onwards he was acting on the advice of counsel, both generally in regard to the prosecution of Mr. Golban's claim to commission and specifically in regard to the compromise proposal, the terms of which (as proposed in the letter of 19 January) had been approved by counsel.

Mr. Otty, arguing in support of the Notice to Affirm which has been served in the appeal by Philex, suggested that there was an alternative ground on which the judge could (and in his submission should) have based a wasted costs order. From 14 January onwards the solicitor had a client who was eligible in law (the 21 days of the Statutory Demand having expired) to present a winding up petition, and who - although willing to acknowledge that the debt demanded was a disputed debt, and willing even to accept that to present a petition would involve abuse of the court process - was nevertheless not prepared to take the crucial step of instructing his solicitor to give a formal undertaking to the court that no petition would be presented. From that point, therefore, so

Mr. Otty argued, it became the solicitor's duty to stop acting altogether, and to tell Mr. Golban that he must either take different advice or act in person. Had the solicitor ceased to act from 14 January onwards, the wasted costs would, it is asserted, have been saved.

We are unable to accept that argument. The solicitor was not criticised by the judge for anything he did (or omitted to do) down to and including 13 January. It would involve setting an over-scrupulous standard for the solicitor, as well as running some risk of unfairness to the client, if the solicitor were to be expected to terminate his retainer abruptly on 14 January, with the hearing only eleven days away, solely upon the ground that the client, although willing to give appropriate assurances, was unwilling to authorise the formal undertaking which would make any contest at that hearing unnecessary. Nor does it appear to us that the costs of a contested hearing on 25 January would necessarily have been saved by his ceasing to act. It is by no means unlikely that Mr. Golban, deprived of his solicitor, would have insisted upon maintaining his opposition and would have resisted the application thereafter as a litigant in person. The same objection applies to Mr. Otty's alternative submission (to which it is unnecessary to refer in detail) that costs could have been avoided if advice that presentation of a petition would be abusive of the process had been given to Mr. Golban by the solicitor on 13 January

instead of 15 January 1993.

For these reasons the appeal will be allowed and the wasted costs order discharged.

WATSON V WATSON

The appeal in **Watson v Watson** lies against a wasted costs order made in financial proceedings between former husband and wife. The wife, on legal advice, had persisted in maintaining a technical point of law which, when litigated at a contested hearing, was found to be wholly without merit. The specific default on the part of her solicitor which gave rise to the order had been his failure to answer adequately a letter from the husband's solicitors in which his attention had been drawn to a point which the court was later to find wholly conclusive against the wife's objections. The judge considered that a full and proper answer to that letter would greatly have improved the prospects of the matter proceeding by consent, and would thus have saved the expense of a contested hearing to debate what turned out in the end to be an unarguable point. She therefore made a wasted costs order against the wife's solicitor in respect of part of the costs of the contested hearing at which the wife's objections had been over-ruled.

A brief reference needs first to be made to the legal background against which the proceedings had arisen. In the

Family Division - unlike other areas of the law where parties *sui juris* can obtain an order by consent disposing of the action on terms which involve no consideration by the court of their fairness - the court retains a supervisory jurisdiction to approve proposed financial compromises between spouses on their merits **(Jenkins v Livesey** 1985 AC 424) . Where a "clean break" compromise is to be effected on the basis of a payment of capital in extinguishment of future rights of maintenance, the terms for which the court's approval is sought may provide for the capital to be transferred to the maintained spouse outright, or for it to be settled on trust for that spouse for a life interest only, with remainder to the children of the family. If the capital is to be settled, the court will either approve a trust deed already tendered to it in draft, or else (if no draft has yet been agreed) approve the proposed trust provisions in principle, leaving the parties to agree the details between themselves. In the latter case, the court retains a residual jurisdiction to approve the terms of the trust deed in default of agreement between the parties.

In cases where the capital is to be settled, the best practice (as the judge observed in the present case) is undoubtedly to follow the course of having a draft trust deed ready for court approval at the time when the consent order is made: there can then be no scope for argument about trusts which are already defined at the point of compromise

in a definitive instrument which itself forms part of the terms of settlement expressly approved by the court. There may however be circumstances in which that proves impracticable, and agreement has to be obtained in principle for trusts which are to be worked out in detail later. Though that is a sensible procedure, and may in some circumstances be the only possible one, it is a course fraught with risk of future dispute. Opposing views are liable to arise, for example, as to when the primary trusts declared on the face of the court order take effect: do they vest an immediate interest in the beneficiaries from the moment that the order is perfected, or do they remain inchoate until incorporated in the proposed trust deed?

It was the emergence of difficulties such as these which underlay the proceedings in the present case. Mr and Mrs Watsons' marriage had taken place in November 1974. Their only child Robert was born in April 1976. By July 1977 the parties had separated, and they never again lived together, despite attempts at reconciliation. The husband was a man of some wealth. The wife suffered (and still suffers) from a drug dependency problem which was a principal cause of the failure of the marriage and was sufficiently acute to require Robert to be brought up by his father from the age of 3. In July of 1977 the parties had signed a Deed of Separation which contemplated arrangements under which the wife would become entitled to have properties purchased for her

occupation during her life by trustees who would hold the reversion for Robert if he attained the age of 25, and subject to that upon such trusts as the husband should appoint.

Divorce proceedings were started by the husband in 1988 on the ground of their long term separation. In October of that year the wife claimed financial relief in the same proceedings. She was slow in pursuing her claim, and no hearing date was fixed before 2 March 1992 (one month before Robert's sixteenth birthday). On 21 February 1992 the husband's solicitors wrote to the wife's solicitors with proposals for a clean break settlement of all the wife's outstanding claims for maintenance from the husband (or his estate) upon terms that the wife's current home (a London flat) should be settled, together with a fund of £150,000, upon trust for her for life. It was proposed that "the ultimate beneficiary of the Trust" should be Robert "who will be entitled, providing he has attained the age of 25 years, to the capital fund on the earlier of your client's remarriage or her death".

That proposal was not accepted, and the parties came to court prepared for a contested hearing on 2 March 1992. Their professional advisers began to talk. Door-of-the-court discussions, always by nature urgent, had in this case a particular immediacy because no one had been able to predict

with any confidence that the wife would attend the hearing at all: she had nevertheless come to court on this occasion, and if the matter was to be compromised on her instructions it would be necessary to take advantage of her presence by concluding a firm agreement there and then.

The discussions bore fruit. A compromise was agreed, very much on the lines of the letter that had been written by the husband's solicitors, in that it provided for a fund of realty and investments to be settled on the wife for life. Because this had been expected to be a contested hearing, there was as yet no draft trust deed in being. Provision would therefore have to be made in the Order for such a deed to be drawn up later. In the course of the negotiations the wife's advisers had pressed hard for the agreement of the husband to pay her future costs of approving the ultimate form of the trust deed. This was refused, and the wife submitted to a direction that each party should (in this as in all other respects) bear their own costs.

A draft order was written out in counsel's handwriting, and the parties then went before the judge (Judge Wilcox sitting as a deputy High Court Judge) where the nature and effect of the order were explained to him, and he approved it. That consent order of 2 March 1992 (perfected on 4 March) reads (so far as relevant) as follows:

"By consent it is ordered:

(1) That the Petitioner [Husband] do as soon as is practicable effect two settlements upon and for the benefit of the Respondent [Wife] as follows:

(a) the flat at 8 Stafford Mansions London SW11 shall be held by trustees who shall hold the property upon terms that:

(i) the Respondent may occupy the property during her lifetime and following her death the property shall pass to the child of the family Robert Watson absolutely and

(ii) the Trustees shall have power upon request being made to them by the Respondent [to invest in an alternative property] and

(b) the sum of £150,000 shall be settled upon the trustees upon terms that the whole of the income arising therefrom shall be payable to the Respondent during her lifetime with reversion following her death to the child of the family Robert Watson absolutely:…

(2) that both of the trusts described in the preceding paragraph shall be subject to the following additional terms:

(a) the trusts shall be established in the Cayman Islands

(b) the Trustees shall be Ansbacher Ltd or a similar trust company established there, at the nomination of the Petitioner

(c) the cost of establishing the two trusts shall be borne by the Petitioner, and

(d) in the event that the Respondent dies before the child of the family Robert attains the age of 25 years, then his reversionary interests shall be accumulated (subject to a power in the Trustees to advance capital in their discretion) until he shall attain the age of 25, whereupon he shall be entitled to the capital of both trusts absolutely."

The Order further provided for payment by the Husband to the Wife of a lump sum of £2500, and that each party should bear his or her own costs.

There had been one oversight in the drafting of the consent order, in that it omitted a provision (which had been common ground in the negotiations) that her life interest should subsist only until remarriage. The Order was amended by consent under the slip rule on 6 April 1992 to make good this omission.

Later that month the husband's solicitors sent to the wife's solicitors a first draft, and in June a second draft, of a trust deed which contained two provisions that were to prove controversial. These were that Robert's reversionary interest should not be vested in him absolutely, but should be made contingent:

> (a) upon his attaining the age of 25 (we shall refer to this as "the age contingency"); and
>
> (b) upon his being alive at the date of the falling in of the prior income interest given to his mother - i.e. at the date of her death or remarriage (we shall refer to this as "the survivorship contingency");

with an ultimate gift over to the husband in the event that Robert failed to fulfil either contingency.

The wife's solicitor referred the drafts to the wife's matrimonial counsel, who advised that they should be submitted to specialist trust counsel in the same chambers.

On 7 July 1992 the wife's solicitor wrote to the husband's solicitors objecting, on counsel's advice, both to the age contingency and to the survivorship contingency (and consequently to the gift over to the husband) upon the ground that they represented a cutting down of the interests

provided for Robert under the original consent Order interests which (as they contended) were vested and indefeasible. In their reply of 16 July 1992 the husband's solicitors maintained a contrary view of the construction of the Order, asserting that both contingencies were already implicit in its terms. This was referred by the wife's solicitor to counsel, on whose advice he wrote to the husband's solicitors on 6 September asserting that the interests to be taken by Robert under Clause 1 of the consent Order were "immediately vested remainder interests" unaffected by the subsequent trust for accumulation of income up to the age of 25, and citing authority of some antiquity for that proposition.

The husband's solicitors then, for their part, consulted counsel, on whose advice they wrote to the wife's solicitor on 16 October 1992. In their first paragraph they stated that they were willing to delete the age contingency. In the remainder of the letter they concentrated upon the survivorship contingency. It was pointed out that if Robert was treated as taking an immediate and indefeasible reversionary interest, then in the unfortunate event that he should predecease his mother - dying either under the age of 18 or over that age unmarried and intestate - the reversion would pass to his next of kin under his intestacy. One of his next of kin would be the wife, whose life interest would become enlarged *pro tanto* into an interest in capital. The

whole basis (it was pointed out) of the negotiations which had resulted in the wife being given an income interest only in the relevant trust property was that she ought not to be given access to any substantial sums of capital because of the risks to which capital would be subject in her hands as a result of her addiction.

The letter therefore proposed that the Consent Order should be further amended by introducing the words "if then living" into the relevant provisions of paragraph (1), so as to put it beyond doubt that Robert's interests were to be subject to the survivorship contingency. The relevant passages of the letter ended by saying:

> "If we cannot agree, it will be necessary to issue a summons before a High Court Judge for directions to be given as to the appropriate construction, implementation or amendment of the Order of 2 March 1992. We understood . . . that you would be making an application. If we do not hear from you within 14 days with your confirmation that we have reached agreement on the outstanding issues, we shall issue a summons ourselves."

On 14 December 1992 the wife's solicitor replied:

> "We have had an opportunity of speaking with counsel concerning this matter who has advised that it must be brought back to court under the liberty to apply provision. We are accordingly obtaining a date as speedily as possible as our client has been substantially prejudiced by the inaccurate drawing up of the trust and your client does not seem prepared in any way to be of any assistance in the interim."

After the husband's solicitors had replied on 17 December refuting the suggestion of prejudice to the wife's interests and stating that they had hoped that the matter could have been dealt with by consent and a "substantive response" received to their letter of 16 October, the wife's

solicitor responded on 23 December by saying:

> "Your hope that this matter could have been dealt with by consent has been prevented by your intransigence in respect of the question of costs. We do not see why our client should have a further charge in respect of her costs hanging over her head by virtue of your mistake, not the first in this case in relation to this settlement. If your client is prepared to undertake our costs in relation to these matters, our counsel may take a different view in relation to the way that this matter can be dealt with. We take the view that we are entitled to an Order for costs and returning the matter to court is the only way in which this can be dealt with."

The correspondence was brought to an end by the husband's solicitors who wrote on 6 January 1993:

> "Our client is not prepared to pay your client's costs in relation to our unnecessarily extensive correspondence over this issue. You could have limited your client's costs by accepting long ago the proposals which we put forward. We are not prepared to engage in any further correspondence with you regarding this matter."

The wife's solicitor accordingly took out a summons claiming the court's approval of a form of trust deed which would give Robert an absolute and indefeasible interest in reversion. It was supported by an affidavit exhibiting the correspondence from which we have quoted. The summons came before Booth J on 10 March 1993 and was dismissed by the judge, who made an order authorising the settlement to proceed in the form proposed by the husband's solicitors. The judge made it plain that she regarded the objections taken by the wife's advisers to any provision making Robert's reversionary interest contingent upon surviving his mother's death or remarriage as wholly without merit. Firstly it was quite wrong, she said, to subject a consent order negotiated outside the court door to the very strict rules of construction that would be appropriate to a most carefully drafted deed or other legal document. Secondly, on construing any consent order in matrimonial proceedings it

was essential to look behind the words of the order to see what the parties desired to achieve, and the possibility of the wife becoming entitled to a capital interest in any circumstances lay wholly outside the contemplation of both parties at the time.

The wife was at all material times legally aided. After Booth J had delivered judgment, Mr. Pointer, counsel for the husband, asked for a wasted costs order against the wife's solicitor in respect of the husband's costs of the application. He made no corresponding application against either of the counsel who had advised the wife. There was some discussion with the judge as to the basis on which a wasted costs order might be made. Mr. Pointer said that he relied firstly on the fact that the wife's solicitor had sought a form of trust deed which was unsupportable on any proper interpretation of the consent order, and secondly on his failure at any time "properly to address the substance" of the letter of 16 October 1992. The judge expressed some doubts about the first ground, but described herself as "appalled" by the lack of response to the letter of 16 October. She acceded however to the objection by the wife's counsel that a wasted costs order should not be made without giving the wife's solicitor a proper opportunity of answering the complaint on which it was founded, and she adjourned the application to be restored in the near future, with leave to the wife's solicitor to file an affidavit in the meantime if

so advised. According to the note of the judge's remarks made by the husband's solicitor, counsel for the wife asked the judge at that point:

> "whether she could advise that the charges against those instructing her were for a contribution to the husband's costs because of the failure to [answer sensibly the letter of 16/10/92 and] negotiate upon the terms of the letter dated 16 October 1992. Mrs. Justice Booth confirmed this."

Pending the adjourned hearing of the application for a wasted costs order, the wife's solicitor swore an affidavit in which he expressed his understanding that Booth J had accepted at the main hearing that her rejection of the substantive arguments raised on behalf of the wife was not a ground on which she would make a wasted costs order: he therefore concentrated on the criticism of his failure to answer specifically the points raised in the letter of 16 October. He confirmed that he had at all times acted, in connection with the approval of the terms of the draft deed, on the advice of matrimonial and trust counsel. He had referred the letter of 16 October to counsel and received advice which made it clear to him that there was no question of any agreement or compromise in relation to the construction of the trust deeds. He said:

> "The reason for rejecting any proposals in the letter of 16 October were the same as before and the same as advanced at the Hearing namely that [the husband's solicitors] were introducing into the trust deed a contingency not provided for in the Court Order."

He added that even if his answers to the 16 October letter were thought to have been inadequate, no costs had been

wasted in consequence: the only answer he could have given was the one advised by his counsel - namely a repetition of the contention that the consent Order had created vested rights in his client and her son to the removal of which he could not agree unless the court were so to direct.

The hearing of the wasted costs order application took place on 7 April 1993. Mr. Pointer relied upon the two grounds he had already indicated at the main hearing, namely:

(a) The intransigent pursuit by the wife's solicitor of a case that he knew, or ought reasonably to have known, was hopeless; and

(b) The failure by the wife's solicitor to deal in specific detail with the terms of the letter of 16 October.

The judge expressed strong sympathy, in the course of her judgment, with ground (a) , but in the end she refrained from basing any wasted costs order upon it. Her forbearance in this respect was in our opinion fully justified for the following reasons:

(1) The practice of stating trusts in principle on the face of a consent order, the details of which are to be

set out in a formal trust instrument for subsequent agreement and execution is one which (as we observed at the start of our judgment on this particular appeal) opens up hazardous territory in which there is wide scope for dispute and misunderstanding. The absence of any authority cited to us as to how the court acts in such circumstances suggests, moreover, that it is territory uncharted by any guidance as to principle. The wife's solicitor had every justification, therefore, for taking a strict and cautious view of his client's rights (and those of Robert) . The fact that the judge in the upshot was prepared to view the case robustly and to brush his scruples aside as pedantic does not mean that the solicitor was wrong to prepare himself for the possible doubts of a more cautious and less confident tribunal by insisting that his client's apparent vested rights should be defended at a contested hearing.

(2) The wife's solicitor did not maintain his stance independently. He was at all material times advised by both matrimonial and trust counsel, neither of whom was sought to be made a respondent to the wasted costs order application. If the judge intended, by her references in the judgment to the case of **Davy Chiesman v Davy Chiesman**, to suggest that there were analogies between that case and this, we would respectfully disagree. Counsel's views may not in the end have prevailed before

the judge, but they were cogent and clear, and it was entirely reasonable for the wife's solicitor to have acted on them.

(3) The judge had already committed herself, by her remarks at the end of the main hearing, to absolving the wife's solicitor from liability to a wasted costs order on this ground.

We therefore hold, despite Mr. Pointer's able argument in support of the Respondent's Notice which has been served by the husband, that the judge was right not to base any wasted costs order on ground (a).

We turn to ground (b), on which the husband was successful. The judge repeated her earlier strictures on the failure of the wife's solicitor to deal more fully with the letter of 16 October. The fact that it had always been common ground between the parties that the wife would take no interest (vested or contingent) in the capital to be settled under the "clean break" agreement was (as she had held at the substantive hearing) the crucial factor in the case. It was nevertheless not a factor to which either side had previously referred in correspondence. When, therefore, the husband's solicitors raised it for the first time in their letter of 16 October, it became the duty of the wife's solicitor to take it up, bring a fresh mind to bear on it, and make use of it

to give a new turn to the negotiations. Had he followed that course, there would have been an improved chance that common sense would have prevailed on both sides and a basis reached for an unopposed application to the court to have a draft trust deed incorporating the survivorship contingency formally approved. Those views were summarised by the judge in the following terms:

> **"In my judgment the matter that was raised by [the husband's solicitors] was a matter of importance which had not been addressed before, as [the husband's solicitors] point out, by the court order, by the parties or indeed by their advisers. It was a matter which was relevant and should have been resolved. I accept the submission of Mr Pointer that it was inadequate for [the wife's solicitor] on behalf of the wife once the matter was raised merely to say that the question should be placed before the court without more ado. It is a very different matter to place an application, if there had to be an application, before the court on a consent basis, which could have been done by one solicitor without representation by the other side but with a letter indicating consent, from the matter being raised in court where the issue is in conflict and where both parties have to be represented by counsel and solicitors, thereby incurring very substantial costs indeed. If this matter had been discussed in the way that the first matter in issue between the parties had been (that is, deferring Robert's interests until the age of 25), agreement might have been reached. If not, at least the husband and his advisers would have known the practical objections raised by the wife to their very sensible suggestion of how that matter should have been resolved. As it was, the wife's case was not clear until the hearing or shortly before it.**
>
> **There is a responsibility upon all legal practitioners, to take every step possible to avoid a contested court hearing, thereby incurring additional costs. As I said during discussion of these matters following upon my judgment of 10th March, I was, and continue to be, appalled by the fact that that letter of 16th October 1992, was not answered and was not dealt with. That seems to me to be a very serious omission which comes within the guidelines given in the criminal case of Wasted Costs Order No. 1 of 1991, reported in the Times,**

6th May 1992 and referred to in the Supreme Court Practice Supplement for 1993. I think that that was an unreasonable omission. It amounted to a failure properly to negotiate a clearly relevant matter which could then have been dealt with without incurring the substantial costs that ultimately followed."

Those conclusions, reached by a judge with unrivalled experience in the field of matrimonial finance, are entitled to the fullest respect. Nevertheless the reasoning which they incorporate was in our judgment unsound in two respects.

Firstly, the conduct of the wife's solicitor in regard to the 16 October letter was not conduct which could in our judgment be properly described (whatever criticisms may be made of it in other respects) as unreasonable. The original agreed intention to ensure that the wife had no capital under the proposed settlement was not a surprise factor in the case: indeed the very fact that this intention had been fundamental to the negotiations which led up to the consent order provided the chief reason for the court's conclusion at the main hearing. The only effect, therefore, of the letter of 16 October was to give this factor a specific emphasis which it had not so far received in correspondence. Such emphasis certainly required the wife's solicitor to give it renewed and serious consideration. It is difficult, however, to think of any way in which he could have done that more effectively than by taking the step (which he did) of passing

the letter on to counsel for his further specific advice. Once counsel had advised that his views were unchanged - i.e. that the terms of the original consent Order were nevertheless still to be regarded as creating an interest in capital which (although reversionary) was free of the survivorship or any other contingency and was immediately and immutably vested in Robert or his estate - the wife's solicitor was entitled to construe his duty to his client as leaving him with no alternative but to continue his opposition to any proposal that Robert's vested rights should be cut down by agreement. This does not mean that he was entitled to escape criticism altogether. The judge had ample justification for finding the wife's solicitor's replies to the letter of 16 October too grudging, perfunctory, and generally unhelpful to be acceptable when judged according to the highest standards of the profession. But those are not the standards which the Court has to apply when considering whether a solicitor's conduct has been sufficiently unreasonable to merit the making of a wasted costs order against him. When the criterion which we have described in our statement of general principles as the acid test is applied to the conduct of the wife's solicitor in regard to the answering of the letter, we regard it as conduct which, although undeserving of praise, does nevertheless permit of a reasonable explanation.

Secondly, on the question of causation, the judge's

remarks appear to us to go no further than to say that a fuller response to the letter would have improved the prospects of an uncontested hearing. They fall substantially short of any finding sufficient to establish that causal link (which we have described in our statements of principle as essential) between the conduct complained of and the costs alleged to have been wasted. Nor would there have been scope, in our judgment, for any such finding to have been made. It could not be assumed that if the factor introduced into the correspondence by the letter of 16 October had been specifically addressed, there would have been no need for a contested hearing. A specific response could only have proceeded, in the light of counsel's latest advice, on the lines of "We are sorry: we have carefully considered the factor you mention and taken advice about it, but we are advised that we have no option in our client's best interests but to persist in our objections." The matter would still have had to come back to court on a contested basis.

For these reasons the appeal in **Watson v Watson** will be allowed and the wasted costs order made against the wife's solicitor will be discharged.

ANTONELLI and OTHERS v WADE GERY FARR (a firm)

In the summer of 1987 Mr Antonelli, a property developer of somewhat unsavoury reputation, and two of his companies (we shall refer to them compendiously as "Mr Antonelli") wished to buy a property called Ermine Court in Huntingdon.

The property consisted of a number of flats, a shop and some space used for car parking. Mr Antonelli wished to intensify the development of the site, in particular by building on the car parking space. His offer was accepted and he instructed the defendant, a local firm of solicitors, to handle the conveyancing of the transaction. Although Mr Antonelli paid the vendor the balance of the purchase price in March 1988 the sale was not completed until July 1990.

By then Mr Antonelli and the defendant solicitors had long fallen out. On 12 June 1990 he issued a writ against them, accompanied by a statement of claim settled by counsel. It had become plain that the property could not be developed, partly because the car parking bays had been let to the owners of the flats, and also that the date for serving a rent review notice on the shop had passed. A number of complaints were accordingly pleaded against the defendant solicitors, including failure to complete on time and failure to make proper enquiries, and a very large claim was made. The statement of claim was amended in September 1990 by different counsel.

The trial was fixed to begin on Monday 6 April 1992. On 16 March 1992 a third member of the Bar, whom we shall call "C", became involved on Mr Antonelli's side. She was instructed to resist an application for security for costs. In the event the application was never heard, but C kept the

pleadings in the action.

On Wednesday 1 April 1992 C was asked if she would represent Mr Antonelli at the trial due to begin in 5 days' time. She said she would. On that day, and on the following days, she pressed for a conference to be arranged with her client, even going to the length of telephoning the solicitor in charge of the case at his home. But no conference was, as we understand, arranged. On Friday 3 April Mr Antonelli, who had received legal aid up to but not including the trial, was refused legal aid for the trial. By Friday evening, with the case due to begin first thing on Monday, C had received no brief and no witness statements. She had seen a copy of her expert's report, but this had been taken away again and she had no copy. She had that day received a bundle of documents prepared by the other side; those acting for Mr Antonelli had not prepared a bundle. Thus all C had to prepare over the week-end for her opening of the case on Monday morning was the pleadings and the defendant solicitors' bundle of documents.

When C arrived at court on Monday morning she received from Mr Antonelli a copy of a bundle of documents which he had himself prepared. Its contents differed from the defendant solicitors' bundle; many of the pages were illegible; and C had no time to familiarise herself with it before the court sat. C was expressly instructed by Mr

Antonelli not to seek an adjournment, because he was under financial pressure and wanted a result. But, appreciating that her claim for damages was quite inadequately particularised, C did ask the trial judge (Turner J) if he would agree to determine liability first and then quantum if it arose. This course was resisted by the defendant solicitors and the judge did not agree. He did however direct the defendant solicitors to serve a request for further and better particulars at once and C to reply to it by 10.30 a.m. the next day. This was done.

It is unnecessary to rehearse the full history of the trial. It became clear that the basis on which part of Mr Antonelli's damages had been claimed was still unsatisfactory. Further pleading was needed. At 10.30 a.m. on the morning of Wednesday 8 April the judge accordingly indicated that he would dismiss that damages claim "unless full and proper particulars setting out precisely how the claims are made up are served by ten-thirty on Monday morning". Counsel originally instructed for Mr Antonelli and the defendant solicitors (neither of whom appeared at the trial) had estimated the length of the trial at 5 and 7 days respectively, and it seems clear that at this stage the hearing was expected to last until Monday 13 April. C was also seeking to re-amend her statement of claim to plead a new head of damage, as a result of answers given by Mr Antonelli which made it hard to sustain the original basis of

claim; the judge did not refuse leave finally, but he made clear that he would not grant leave unless the claim was more fully particularised.

In a commendable endeavour to complete the case expeditiously, the judge announced on Wednesday 8 April that the court would sit at 10.00 o'clock on Thursday, Friday and Monday. With the same end no doubt in view, he indicated when the court sat on Thursday morning that he would be assisted by counsel putting their submissions in writing. He added that he would not prevent oral submissions but would not encourage them. Counsel for the defendant solicitors agreed. C did not demur. When the court adjourned on Thursday, it was expected that the evidence would be completed by mid-morning the next day. The judge indicated that when the evidence had finished he would adjourn until 2.00 o'clock before receiving submissions. Both parties agreed. The judge observed that on that basis "we will just about finish this case, the oral part of it, tomorrow".

As hoped, the oral evidence finished by about 11.30 on the morning of Friday, 10 April. Counsel for the defendant solicitors handed up to the judge a copy of his closing submissions in manuscript. He also gave C a copy, but the copy was neither complete nor legible. C, who indicated some unfamiliarity with this procedure, said she was still working on her submissions. The judge handed down to the parties a

note he had prepared entitled "Principal Issues of Fact", intended to indicate to counsel the areas in which he would welcome submissions. The first of these was directed to the development potential of the site. The judge then adjourned until 2.0 o'clock.

When the court sat again at 2.0 o'clock, C had still not received a full and legible copy of the written submissions of counsel for the defendant solicitors. He then made relatively brief oral submissions. When he had finished C handed up her own written submissions, to the extent she had completed them. She made some oral submissions. She then indicated that she wished to have the opportunity to make further submissions on Monday morning. At 3.17 p.m. on Friday afternoon the court adjourned until 10.00 o'clock on Monday.

On Monday 13 April the hearing opened with discussion of the re-amendment C was seeking to make to the statement of claim. The judge deferred ruling on this until liability had been determined. C gave the judge her further written submissions prepared over the week-end, and addressed the court on the issues. At 11.15 the judge reserved judgment and adjourned.

On Friday 22 May 1992 the judge gave his reserved judgment. In this he made various comments critical of the

defendant solicitors' handling of the case, but dismissed the action. He rejected Mr Antonelli's evidence and held that the defendant solicitors' defaults had not caused him damage. On behalf of the defendant solicitors an application for a wasted costs order was then made against Mr Antonelli's solicitors and C, his counsel. The judge directed that the claim and the answer to it should be properly pleaded, and this was duly done.

The application came on for hearing by the same judge on 3 August 1992. After an hour's adjournment, the claim against the solicitors was compromised on the solicitors' undertaking to pay a sum equal to the excess payable by them under their policy of insurance. Those underwriting the defence of the defendant solicitors accepted this settlement because they were also underwriting the claim against Mr Antonelli's solicitors and would, by continuing, have been claiming against themselves. But, as the judge later observed,

> "... it is in the highest degree improbable that the sum offered and accepted is other than a small fraction of what was likely to have been the effect of an order (if any) made at the end of the current proceedings."

So the application went on against C alone. At the end of a full day's hearing the judge again reserved judgment, which because of other commitments he was not able to deliver until 27 November 1992.

The defendant solicitors based their application against

C on six grounds. Two of these the judge in his judgment rejected and no more need be said about them. Of the four grounds the judge upheld, counsel for the defendant solicitors has in this Court found it impossible, having heard the argument for C, to maintain his reliance on one. This related to the rent review of the shop. We consider that this concession was rightly made, since the argument advanced by C in the court below, although unlikely to succeed, could not properly be abandoned without Mr Antonelli's consent. There remain three grounds upon which the judge found against C. These were

(1) C's failure to complete her written submissions on Friday 10 April, obliging the court to sit again on Monday 13 April.

(2) C's pursuit of the claim relating to the development potential of Ermine Court.

(3) C's unreasonable slowness in the conduct of the proceedings.

We shall return to these three grounds below.

But the judge also held against C on a more fundamental, far-reaching ground. Earlier in his judgment he had referred to the following parts of paragraphs 501 and 601 of the Bar's Code of Conduct :

> "501. A practising barrister must not accept any brief or instructions if to do so would cause him to be professionally embarrassed:
>
> (b) if having regard to his other professional commitments he will be unable to do or will not

have adequate time and opportunity to prepare that which he is required to do;"

"601. A practising barrister
(a) must in all his professional activities ... act..with reasonable competence and take all reasonable and practicable steps to avoid unnecessary expense or waste of the court's time...;
(b) must not undertake any task which:
(i) he knows or ought to know he is not competent to handle;
(ii) he does not have adequate time and opportunity to prepare for or perform;"

Then, having dealt with the various complaints one by one, the judge said:

> "In summary then, a number of areas have been identified in which, due to the conduct of counsel, the time of the court and thus of the defendants was expended unnecessarily. Before that can justify an award of costs being made against counsel personally on the application of the opposing party, I would have to be satisfied that the conduct giving rise to the complaint fell in one or more of the categories (a) negligent, (b) unreasonable or (c) improper. Having regard to the nature of the action and the volume of potentially relevant evidence, both oral and documentary, for counsel to have accepted an "unseen" brief at the time and in the circumstances already described, despite the submissions made to me this afternoon, was "unreasonable" and was likely to and did give rise to "improper" conduct on her part. The unreasonableness stems from the manifest improbability of counsel being able to achieve an adequate grasp of the broad issues involved in the case, quite apart from the absolute necessity of having a full and adequate grasp of the details of the evidence. In my judgment, for counsel to have accepted such a "brief" at such short notice was, on any showing, both improper as well as being unreasonable. All the matters identified above as being open to substantial criticism were the direct consequence of those faults."

In the result, the judge held that the several failures of C which had been discussed in his judgment had unnecessarily prolonged the proceedings to the extent of at least one full court day. He accordingly ordered that the

costs of one full day of the trial be paid by C personally to the defendant solicitors to the extent that such costs were not recovered from the plaintiffs or their solicitors. The order made plain that the sums recovered from the plaintiffs' solicitors under the settlement of the wasted costs application against them were to be treated as discharging the order against C to the extent that those sums exceeded the taxed costs of the preparation and delivery of trial bundles. The judge also ordered that the costs of the application for a costs order against C be paid by her to the defendant solicitors save to the extent that such costs had been increased by the adjournment of one hour of the hearing of the application. In practical terms, the principal sum which C (or, in truth, her insurer) is at risk of having to pay under the wasted costs order is about £1100. The costs of the application for both sides (increased on C's side by changes of solicitor) are estimated to exceed £40,000.

Counsel for the defendant solicitors expressly abandoned on appeal the fundamental, far-reaching ground on which the judge had found against C, which indeed had not been advanced on their behalf before the judge. The extract from paragraph 501 of the Bar Code which the judge cited, presumably because he regarded it as relevant, is in truth irrelevant. The cited extract prohibits barristers accepting work which, because of other professional commitments, they are too busy to handle properly. That was not C's position and it was

never suggested that it was. Paragraph 601 does, it is true, require barristers to show reasonable competence and avoid unnecessary expense and waste of court time, and also requires barristers not to undertake work beyond their competence or which they have inadequate time to prepare. But the judge omitted all reference to the cab-rank rule, paragraph 209 of the Bar Code, which we have cited above. When C was asked on Wednesday 1 April to conduct this case on the following Monday she was not in our judgment entitled to refuse. She did not then know how inadequate her instructions would be (and she tried to procure reasonable instructions), but even if she had known she would not have been entitled to refuse. By Friday the inadequacy of her instructions was only too plain, but she would not even then have been entitled to refuse to act, unappetising though the prospect was. Paragraph 506 of the Bar Code provides :

> "A practising barrister must not:
>
> (d) except as provided in paragraph 504 return any brief or instructions or withdraw from a case in such a way or in such circumstances that his client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client."

In short, C could not properly let Mr Antonelli down at the eleventh hour. There was no reason to think that anyone else would be better placed to conduct the case than she. She was professionally obliged to soldier on and do the best she could. The judge's failure to appreciate this vitiates not only his fundamental criticism, but also the three specific

criticisms, since he held these to be the direct consequence of C's improper and unreasonable conduct in accepting instructions at all at such short notice.

That conclusion enables us to deal briefly with the judge's three specific criticisms. But we must consider those criticisms, since the defendant solicitors served (with leave) a respondent's notice contending that even if C did not act improperly or unreasonably in accepting the trial brief at short notice the judge's specific grounds of criticism remained independently valid and were not the result of late delivery of the brief.

(1) We do not share the judge's conclusion that C is to be blamed for the court's sitting on Monday 13 April. The judge's earlier order had plainly contemplated a sitting on that day. The timetable had altered, but the order had never been varied or revoked. That apart, the judge (probably because he blamed C for accepting the brief at all) made inadequate allowance for the difficulties under which C laboured throughout, having during the hearing to settle further and better particulars, re-amend her statement of claim, familiarise herself with a new bundle, collect the evidence from her witnesses, try and make good the effect of damaging answers by her witnesses in evidence and, as the week wore on, prepare to cross-examine the opposing witnesses during a lengthened hearing day. It

is unnecessary to consider whether the judge had power to direct that closing submissions should be in writing, since neither counsel objected. But C was fully entitled, indeed bound, to ensure that adoption of that procedure did not put her client in a worse position than if the conventional procedure had been followed. Before answering submissions on behalf of the defendant solicitors she was entitled either to hear them or, if they were in writing, study them. When counsel for the defendant solicitors sat down on the afternoon of Friday, 10 April, she had not had the chance to study the written submissions. Nor, in fact, had she been able to complete her own written submissions. Had her submissions been oral she would not have completed them that afternoon. Justice plainly demanded that the hearing be adjourned until Monday 13 April.

(2) We cannot, again, share the judge's view that C acted unreasonably in pursuing the claim for loss of development potential. In his judgment the claim rested on the assertion of Mr Antonelli and never had an outside chance of success. He noted that in C's closing submissions no substantive argument was advanced. It is certainly true that this was a most unpromising head of claim. But Mr Antonelli was himself a property developer. He was entitled to seek the court's ruling on the issue, with such little support as his expert gave him. The judge treated Mr Antonelli's knowledge on

this aspect as a principal issue of fact. In the absence of any waiver by Mr Antonelli, we do not know what (if any) advice C gave on pursuit of this claim or what instructions he gave. We do not, however, think that this was one of those situations in which C was entitled simply to decline to pursue the claim if her instructions were to do so. In our judgment she should not be held liable under this head.

(3) In upholding the complaint that C's conduct of the proceedings had been unreasonably slow, the judge said :

"Point (iii) is made good by a reading of the transcripts. On many occasions it was quite unclear to what issues either individual questions or sections of examination or cross-examination were directed. Moreover, there was a number of instances where questions were long, rambling and inchoate. There were no less than seven occasions upon which there were embarrassing pauses while counsel appeared not to know what the next question should be or topic to be investigated. Counsel's uncomprehending reply to this point merely serves to underline its validity."

The transcript certainly shows that the judge was on occasion tried by C's conduct of the proceedings; he was on occasion critical of her opponent also. But this is the sort of question on which very great weight must be given to the judgment of the trial judge. From his vantage point he can observe signs of unfamiliarity, lack of preparedness, laziness, incompetence and confusion with much greater perspicacity than an appellate court with only a transcript to work on. Very rarely could an appellate court be justified in

interfering. But with some hesitation we feel we should do so here : first, because it might well be unfair to leave this criticism standing when the judge's fundamental criticism has been rebutted; and secondly, because (as indicated above) we think the judge made insufficient allowance for the great difficulties under which C laboured in presenting this ill-prepared and anyway very difficult case.

We would set aside the judge's order, quash the order against C personally and order that the defendant solicitors pay C the costs of the application against her.