Koo Golden East Mongolia (A Body Corporate) v Bank of Nova Scotia [2008] APP.L.R. 05/20

JUDGMENT : Mr Justice Silber: Administrative Court. 20th May 2008

I. Introduction.

1. This judgment relates to an application for wasted costs, which raises interesting issues and which was made after KOO Golden East Mongolia ("the claimant") had commenced proceedings against the Bank of Nova Scotia and Scotia Capital (Europe) Ltd (hereinafter collectively referred to as "the Bank") and the Central Bank of Mongolia ("MongolBank"). The proceedings have terminated and the Bank now seeks an order that the solicitors for the claimant, Squire, Sanders and Dempsey ("SSD") show cause why they should not be ordered to pay the Bank's wasted costs of the action.

2. This matter was listed before me for the present hearing in order to ascertain if there is a case for SSD to answer on the wasted costs application. Both the Bank and SSD have adduced evidence and have served lengthy written skeleton arguments. Neither side objected to my suggestion based on the need to reduce costs that if I decided that there was a case for SSD to answer, I should then proceed to determine the matter as if there had been a substantive hearing.

3. The thrust of the claim for wasted costs made by the Bank is that SSD's "*conduct has been persistently negligent (as to both procedure and substantive law) and unreasonable*". This allegation is strenuously denied by SSD.

II. The Main Litigation.

4. The claimant is a Mongolian mining company, which deposited around 3 metric tonnes of gold with "MongolBank" under a "Safe Custody/Sale" agreement. The terms and effect of the claimant's agreement with MongolBank are complex but they provide that disputes between the claimant and MongolBank should be resolved in the Mongolian courts. At the centre of the dispute is the claimant's allegation that MongolBank breached the agreement by exporting the claimant's gold overseas for refinement. The claim was brought after the claimant realised that its gold had passed into the possession of the London branch of the Bank. The claimant's objective in the proceedings was to recover the physical possession of its gold.

5. The claimant's first step in this action was to make an application without notice on 19 October 2007 to Saunders J for an order that the Bank and MongolBank be restrained from moving or otherwise dealing with the gold. Saunders J declined to make such an order on the grounds that there was no good reason why the Bank and MongolBank should not be put on notice of this application.

6. An application was then duly made on notice to the Bank although not to MongolBank. The matter came before Lloyd Jones J on 25 October 2007 and as he explained in paragraph 3 of his judgment *"I drew the attention of the parties to certain provisions of the State Immunity Act 1978* ("the 1978 Act")". He duly adjourned the hearing for a short time in order (in the words again of paragraph 3 of his judgment) "*to allow the parties to consider further this aspect of the case."*

7. The Judge then later heard these submissions and he held that an injunction should not be granted against MongolBank because of the effect of the 1978 Act. So although MongolBank was not represented, the Judge declined to grant an injunction against it.

8. The Judge at the same hearing adjourned the claimant's application against the Bank for an injunction restraining them from moving out of the jurisdiction or otherwise dealing with the claimant's gold but he expressed doubts as to whether he could grant this injunction in the light of sections 13 (2) (b), 13 (4) and 14(4) of the 1978 Act. Lloyd-Jones J also expressed some concern as to whether the claimant could meet any undertaking in damages.

9. The Judge then considered a further application by the claimant that the Bank should swear and serve an affidavit relating to its knowledge of the gold. Mr. Andrew Fulton, who then appeared on behalf of the Bank, did not object to an order that the appropriate officer of the Bank should produce such a witness statement. It is noteworthy that the Bank did not then contend that because of the connection with MongolBank, it was not obliged to make this statement or more significantly that it was immune from any claim. So the Judge ordered the Bank:
" to swear and serve an affidavit identifying to the [claimant] in Schedule form each and every unrefined or refined gold ingot, including the identifying marks, the weight of each ingot and its refined and unrefined gold content where known, deposited by [MongolBank] with either of them or any other depository if held on their behalf between July 2006 and the date of this Order together with the date(s) upon which the ingots were removed from the custody of the [Bank] and the details of the persons and/or locations by whom and to which the said ingots were removed (if known)".

10. The Judge also directed the service of a claim form in 7 days. On 31 October 2007, the claimant's solicitors SSD issued a claim form naming the Bank and MongolBank as defendants. The claim was against the Bank and MongolBank for the delivery up of the gold, for damages and for other relief in relation to the gold. No claim was then made for ***Norwich Pharmacal*** relief and MongolBank was not then or at any time served with the claim form.

11. In the meantime, Mr Simon Weeks who is a director of the Bank made a witness statement dated 29 October 2007 pursuant to the order of Lloyd Jones J. It included the assertion that in the period from July 2006, MongolBank had not deposited with the Bank any gold ingot whether refined or unrefined. The witness statement also stated that MongolBank did not hold an allocated account with the bank but that it did hold an "*unallocated"* account. The claimant's solicitors complained that the statement did not comply with the Judge's order.

12. By a letter dated 1 November 2007, the Bank's solicitors confirmed that it had received no physical gold from MongolBank during the period in question. By a letter dated 16 November 2007, the claimant again asked MongolBank for the whereabouts of the gold. It replied on 19 November 2007 stating that :

"With the purpose of increasing the state currency reserves MongolBank when purchasing from business entities purified gold produced by them would calculate its pure weight according to common practice of the international financial market and would make settlements for the value of the gold based on the markets price of the gold as of a particular day.

"Given that MongolBank has an obligation to refine the purified gold purchased into the state currency reserves and place the same in the international financial markets pursuant to the most favourable arrangements, MongolBank refined 3.1 tons of your gold, being in possession of MongolBank in accordance with the law.

"With this please be informed that as of November 16, 2007 out of the total amount of gold delivered by your company under the agreement, 190.8 kg are kept in custody of MongolBank as 43 unrefined gold bullion bars, whereas 3,.109 kg of 999.9 fineness are held in our metal account in London.

"If your party wishes to rescind the agreement, we ask that a formal request be submitted in accordance with the law of Mongolia. We are prepared to resolve this issue expeditiously within the framework of Mongolian law."

13. In giving the reserved judgment of the Court of Appeal which was handed down on 21 December 2007 ([2007] EWCA Civ1443) and to which I will refer in greater detail in paragraphs 20 to 23 below, Sir Anthony Clarke M.R. explained that the words in that letter *"our metal account in London"* was a reference to MongolBank's unallocated account with the bank. When however, the claimant's solicitors wrote to MongolBank on 20 November 2007 asking who was holding the 3,109 kilograms of gold in London, MongolBank replied on 22 November 2007 as follows:

"In response to your letter ref 1440/05 dated November 20, 2007. Pursuant to section 1.1 of the Agreement for Safe Custody, Purchase and Sale of Precious Metal, which reads that: 'The Seller shall deliver into custody of and subsequently sell to the Bank … gold bars', 3109 kg of gold deposited by you were refined in accordance with international standards and are kept in custody with Bank of Nova Scotia/Scotiamocatta/London GB."

14. As a result of receiving this information, the claimant then decided to restore the application which had been adjourned by Lloyd-Jones J. It did so because the contents of the letter of 22 November 2007 appeared to be inconsistent with Mr Weeks' statement that MongolBank had not deposited any gold at the Bank. The claimant accordingly issued an application in which it sought injunctive relief against the Bank and an affidavit in relation to the physical gold in its possession. The application did not include an application for ***Norwich Pharmacal*** relief of the kind later ordered by Royce J.

15. Mr Weeks then made a second witness statement on 6 December 2007 in which he exhibited a letter he had written to MongolBank asking for an explanation of the statement about the physical gold in the letter from MongolBank dated 22 November 2007 from which I have just quoted in paragraph 13 above. This letter included the sentence that:

"I would therefore be most grateful if you could help us bring this matter to a speedy conclusion and clearly demonstrate that BNS [which must be the first defendant] *is no way involved in physical gold activity with the CB of Mongolia."*

16. On 5 December 2007, MongolBank replied clearly stating that it had never delivered any physical gold to the Bank. MongolBank did however decline to answer another question in Mr Weeks' letter which asked what had happened to the physical gold, where it was refined and who took the physical outturn in exchange for a *"loco London credit"* into MongolBank's account with the Bank. MongolBank declined to answer this question because:

"We believe based on the current situation that we are not obliged to release such information."

17. Mr Weeks, however, described in his second statement what was likely to have happened to the gold. He explained that MongolBank probably placed the claimant's gold over a period of time with a European refinery to be refined. The European refinery would then place the refined gold with a European, possibly an English, bank. The European bank then arranged for a credit of the equivalent number of ounces to MongolBank's unallocated account with the Bank. The European bank would do this either on its own account if it were a clearing bank or via a clearing bank. Mr Weeks added that once the material was refined, it may become co-mingled with other similar material and therefore it would be impossible specifically to identify the original material. Thus where a bank takes physical possession of refined outturn, the material may come from a variety of sources.

18. Counsel for the Bank Mr Fulton prepared a skeleton argument dated 7 December 2007 for the hearing to which I referred in paragraph 14 above and which was then limited to the injunctive relief claimed. He did not address any **Norwich Pharmacal** application because none had then been made. However in the light of Mr Weeks' second statement, the claimant not surprisingly abandoned its claim for injunctive relief but it instead sought ***Norwich Pharmacal*** relief. Mr Andrew Miller (who appeared then for the claimant and today appears for SSD) in his written skeleton argument on behalf of the claimant which was also dated 7 December 2007 explained that in the light of Mr Weeks' second statement, the claimant had to accept that the Bank did not physically hold the gold. The claimant accordingly abandoned its claim for injunctive relief and instead it sought ***Norwich Pharmacal*** relief in order to try to discover who the refiner was, what had happened to the gold and what had happened to the proceeds of sale of the gold through the international banking system.

19. In a nutshell, the submission made to Royce J as set out in paragraph 24 of Mr Miller's skeleton argument was that the Bank, possibly through no fault of its own, has been mixed up in the tortious act of MongolBank and possibly others involved in the conversion of the gold with the consequence that it has facilitated wrongdoing by allowing credits to be made on MongolBank's account with the Bank. The only case relied upon by the claimant's counsel in

his written skeleton argument was ***Norwich Pharmacal Company v Commissioners of Customs and Excise*** [1974] AC 133. The judge essentially accepted Mr Miller's submissions and he then made the order sought for ***Norwich Pharmacal*** relief.

20. The Bank appealed to the Court of Appeal on the grounds that first that the conditions for obtaining **Norwich Pharmacal** relief had not been satisfied, second that the court was not entitled to grant such relief because of the State Immunity of MongolBank and third that relief should be refused in the exercise of the court's discretion. In the reserved judgment handed down on 21 December 2007, the Court of Appeal (Sir Anthony Clarke M.R., Smith and Pumfrey LJJ) unanimously rejected the first ground but it unanimously upheld the second and third grounds. I should explain that I have gratefully used the chronology from the Master of the Rolls' judgment.

21. The Court of Appeal also held that the action should be dismissed and that the Bank's costs of the appeal, which were summarily assessed in the amount of £34,444.50, should be paid within 21 days. It is noteworthy that these sums were duly paid by the claimant.

22. The claimant was also ordered to pay the Bank's cost of the action with such costs to be assessed on an indemnity basis as when the claimant decided in the light of Mr. Weeks' second witness statement to pursue its claim for **Norwich Pharmacal** relief, it had then abandoned its existing claims. The Bank's costs that were then outstanding after the claimant had paid the costs of £34,444.50 are in respect of the hearings in front of Lloyd-Jones J and Royce J together with the earlier costs but they then still had to be assessed in default of agreement in accordance with Court of Appeal's order. Indeed the Bank only served its bill of costs some weeks after it had commenced the present wasted costs proceedings.

23. In relation to an application from the Bank that the claimant's solicitors should show cause the Court of Appeal also held, that the Bank's solicitors should send a letter to SSD, the claimant's solicitors identifying the precise nature of relief. This has been duly done and I shall return to describe that and the present proceedings in greater detail shortly. Permission to appeal to the House of Lords was refused by the Court of Appeal.

24. The claimant duly petitioned for appeal to the House of Lords and significantly an oral hearing was ordered at which the application for leave was refused after the Appellate Committee had heard submissions from both counsel for the claimant and for the Bank. I will return in paragraph 54 below to explain what Lord Bingham of Cornhill said in giving this decision.

III. The Claim for Wasted Costs and the Issues on this Application.

25. The costs being sought against SSD in this wasted costs application are the Bank's costs of the action up till but excluding the costs of the Court of Appeal hearing which have been paid. This claim is for £32,143.40. The Bank also seeks to recover costs totalling £ 33,190.50 in respect of its costs in resisting the claimant's application for leave to appeal to the House of Lords against the order of the Court of Appeal on the ***Norwich Pharmacal*** issue. I am only concerned at this stage with the issue of liability for wasted costs but I must express my great surprise that for the inevitably short hearing of the application for permission to appeal that 74.9 hours time of the Bank's solicitors' employees were needed especially as the same lawyers had been involved in the Court of Appeal hearing which dealt with the same issue and that it was inevitably a short hearing lasting under an hour for which relatively little preparation was needed.

26. The basis of the application for wasted costs is that SSD's conduct was *"negligent and unreasonable"* Mr. Roderick McAlpine, who is a partner in the firm of solicitors acting for the Bank, explained in a witness statement that:
"the short point is that solicitors acting competently would have advised [the claimant] on the effect of MongolBank's state immunity. They would have appreciated that any attempt to interfere abroad with a central bank's property and affairs was doomed. All of the Bank's costs of the proceedings can be attributed to SSD's negligent failure to give that straight forward advice at the outset."

27. He proceeds to say that "*it is fair to point out that it still remains to be seen whether [the claimant] will pay the costs voluntarily*". As I will explain, this is a surprising but an important aspect of this application as at the time when the application for wasted costs was made, no bill for costs had been sent to the claimant and even now the Bank's solicitors have not answered a series of sensible queries raised by the claimant's solicitors in relation to the outstanding costs. The claimant's written skeleton argument on the present application also explains that:
"*the reason behind the application is that [the claimant] is a Mongolian entity with no U.K. assets and has pointedly to offer an assurance that the Bank's costs will be paid*".

28. SSD deny that their conduct has been negligent as to entitle the claimant to a wasted costs order and that in any event it would not be appropriate to make such an order as there is no reason to believe that the claimant would not pay any costs due once the Bank had dealt with the queries raised on their bill. Indeed this bill was only submitted about four weeks after the present application for wasted costs was launched. It is also true that the claimant agreed the Bank's costs for the appeal hearing and also paid them.

29. The claim for wasted costs in respect of the application for leave to appeal to the House of Lords is misconceived as those costs were incurred after the application for wasted costs was made and in any event, it does not appear to be the subject of a witness statement. There are many other additional reasons why the claim for wasted costs in respect of the application for leave to appeal to the House of Lords must fail.

30. In its letter of 8 February 2008 responding to the letter from the Bank's solicitors, SSD explained to the Bank's solicitors that it awaited receipt of the Bank's bill before dealing with the outstanding costs. SSD stress that the

costs order made by the Court of Appeal for a payment of £34,444.50 (which is the only order that has been made against the claimant for it to pay any specific sum of costs) was complied by the claimant. I assume that the case for the claimant must be that a foreign entity with no assets in the United Kingdom is under an obligation to give some sort of undertaking to the opposing party to pay its costs. No authority has been put forward to justify this position, which fails to take account of the fact that the Bank could always have asked for security for costs or asked the Court of Appeal to assess its pre- Court of Appeal costs.

31. There are the following issues are to be determined:
    - **i.** Was SSD's conduct so negligent or so unreasonable in making and continuing to have the Bank as a party to the action that the pre-condition for a wasted costs order has been satisfied? **(Issue A);**
    - **ii.** Was SSD's conduct so negligent or so unreasonable in not accepting as correct Mr. Weeks' first witness statement and requesting a further witness statement? **(Issue B);**
    - **iii.** Was SSD's conduct so negligent or so unreasonable in failing to serve MongolBank? **(Issue C)** and
    - **iv.** If so, is the Bank entitled to an order for wasted costs even though (i) the costs order made by the Court of Appeal for a payment of £34,444.50 (which had not been disputed by the claimant) was satisfied by the claimant;(ii) at the time when the application was made for wasted costs, the claimant's solicitors SSD had explained to the Bank's solicitors that the claimant awaited receipt of the Bank's bill before dealing with the outstanding costs and the claimant had not in any way disputed its liability to pay the proper sum due in respect of these costs; and (iii) (in respect of the costs in the House of Lords) these costs were incurred after the application for wasted costs was made and the claimant's application for leave to appeal to the House of Lords took place four weeks before the present hearing and has not been the subject of a bill from the Bank's solicitors ? **(Issue D).**

IV. Issue A. Was SSD's conduct so negligent or so unreasonable in making and continuing to have the Bank as a party to the action that the pre-condition for a wasted costs order has been satisfied?

(i)Introduction

32. The Bank submits that the principles which determine whether a party's conduct reaches the threshold for making an order for wasted costs were explained by Lightman J in ***Morris v Roberts*** [2005] EWCA 1040 in his judgment and I am content to assume that they are correct; I have set out the relevant principles in an Appendix to this judgment. I should explain that counsel for SSD has submitted that the threshold is higher because in ***Dempsey v Johnstone*** [2003] EWCA Civ 1134 it was said by Latham LJ (paragraph 28) that in respect of the question of whether a legal representative pursued a hopeless case:

    "it is difficult to see how that question can be answered affirmatively unless it can be said that the legal representative acted unreasonably which is akin to establishing an abuse of process."

33. I need not decide if these submissions are correct because even on the lower threshold put forward by Mr. Fulton, the claim must fail. As I have explained at the heart of the Bank's case is the suggestion that SSD should have appreciated first that MongolBank was immune from suit because of the provisions of the 1978 Act and second that the Bank as a bailee for that party was also entitled to a similar immunity. Mr. Fulton accepts that different considerations apply in respect of the claim for wasted costs for the ***Norwich Pharmacal*** claim from the earlier claim for injunctive relief and I am content to consider them in this way.

(ii) The Injunction Claim against the Bank.

34. This entails consideration of the claim being pursued until 7 December 2007 when in Mr. Miller's written skeleton argument, the claimant abandoned this claim in order to pursue the ***Norwich Pharmacal*** remedy. Mr. Fulton in support of the application seeks to derive support from the statement of Latham LJ in ***Dempsey v Johnstone*** [2003] EWCA Civ 1134 (which was followed by Gross J in ***The Isaacs Partnership v Umm Al-Jawaby Oil Service*** [2003] EWHC 2539 QB [25]) that:

    "*negligence could be the appropriate word to describe a situation in which it is abundantly plain that the legal representative has failed to appreciate that there is a binding authority fatal to the client's case. That may, of itself, justify making a wasted costs order"*

35. Mr. Fulton contends that the decision of the House of Lords in ***United States of America v Dollfus*** [1952] AC 582 is a binding authority fatal to the claimant's case with the result that a claim can be made for wasted costs. In essence, he contends that the case for the claimant was totally misconceived. I do not agree for nine reasons which individually and cumulatively satisfy me that this submission is not correct and which I will now set out in no particular order of importance.

36. First, ***Dollfus*** deals with the position at common law where the claim was not as in the present case against a foreign bank but instead against a foreign sovereign. The significant difference between the ***Dollfus*** case and the present case is that there was an important issue as to whether MongolBank was entitled to immunity under the 1978 Act and not as in ***Dollfus's*** case a common law immunity against a foreign sovereign. In any event there was a difficult issue as to whether the Bank was acting as agent of MongolBank and that was a fact-specific issue about which the Master of the Rolls explained at paragraph 47 of his judgment that "*on the facts of this case the Bank was an agent of MongolBank".*

37. Second, I am by no means satisfied that the **Dollfus** case assists the Bank because although the House of Lords held that an action in respect of 51 bars had to be stayed because the United States Government had deposited

them and had the right to immediate possession of them, the position was different in respect of a further 13 bars. Those 13 bars were part of a pool of the Bank of England and so were in a form of an unallocated account. The House of Lords allowed the case to continue in respect of the 13 bars because the bank by its own act of mixing the 13 bars with the pool put an end to the bailment and the protective umbrella of immunity. There are similarities between the position of the 13 bars in the ***Dollfus*** case and the gold which is the subject-matter of the present claim. I need not decide whether an English court would have relied on that analogy but it suffices for present purposes to say that it is certainly not negligent for any lawyer not to regard the ***Dollfus*** case as having the meaning and authority which leads Mr. Fulton to contend that it was negligent for SSD not to rely on it.

38. Third, in any event Latham LJ did not say in the passage set out in paragraph 34 above that if the legal representative has failed to appreciate that there is a binding authority fatal to the client's case that would automatically lead to a wasted costs order being made. He said that those circumstances (with my emphasis added) "*may, of itself, justify making a wasted costs order*".

39. Fourth, the question of the immunity of the Bank was not considered clear-cut by Lloyd Jones J when he dealt with the application for an injunction against it because as I explained in paragraphs 7 to 9 above. It is significant that while the Judge *dismissed* the application against MongolBank, he *adjourned* the application against the Bank. The Judge was very familiar with the application of the 1978 Act not only as a former distinguished member of the Law Faculty of Cambridge University where he taught International Law for many years but also as somebody who had acted as leading counsel in one of the leading cases on the application of the 1978 Act to a central bank (see, for example, ***AIG Partners Inc v Republic of Kazakhstan*** [2005] EWHC 2239 (Comm); [2006] 1 WLR 1420).

40. Fifth, it is noteworthy that as I explained in paragraph 9 above, Lloyd Jones J made an order that the Bank should swear an affidavit giving details of its dealings with the claimant's gold. This shows that the Judge did not consider that any immunity of the Bank meant that the claimant was thereby precluded from obtaining relief from the Bank. I should add that the Bank's lawyers have said that this order was only made because it consented to it. If this is so, it means that the Bank's solicitors, who are well-known for their banking expertise, also believed that the claimant was entitled to obtain relief from them as otherwise I cannot believe why consistent with their duties to the Bank, they would have agreed to a course which would have (and actually did) put their client the Bank to expense and inconvenience.

41. Sixth, if the claimant's claim against the Bank was so obviously doomed to failure as Mr. Fulton now contends to be the position, it is surprising that no application was made by the Bank to strike out the claim or at least to threaten to do so at any time after the hearing in front of Lloyd Jones J on 25 October 2007 especially as the claimant was pressing for further disclosure as I have explained. Thus the Bank and its legal advisers must have been considering what it could do to avoid incurring more costs and the possibility of striking out the claim or of threatening to do so must have been two of the alternatives open to them if the claimant's claim was as misconceived as they now submit it was; yet they did not avail themselves of it.

42. I suspect one of the reasons why neither step was taken was that it was by no means clear to the Bank or its legal advisers that the claim was misconceived. It must not be forgotten that the Bank's solicitors have great experience in banking law and practice and this makes this omission all the more surprising in the light of the Bank's submissions on the present application. Indeed, it supports the conclusion that a reasonable lawyer might well have considered that the claimant was entitled to relief against the Bank or that such a claim was not demurrable.

43. Seventh, I do not consider that the law relating to the liability of the Bank to the claimant was so straightforward that the claimant can be criticized for pursuing it. The law was the subject of prolonged argument followed by a lengthy and impressive judgment of Aikens J in ***AIG Partners Inc v Republic of Kazakhstan*** (supra). Indeed it was considered in some detail by the Court of Appeal in the present case at paragraphs 39 to 48 of the reserved judgment of the Master of the Rolls.

44. I accept that on that appeal to the Court of Appeal, the court was considering the issue in relation to ***Norwich Pharmacal*** relief but much of its reasoning was applicable to the original claim against MongolBank and the Bank. Indeed matters such as the impact of Article 6 (2) (b) of the *2004 United Nations Convention on Jurisdictional Immunities of States and their Property* are complex not least because the Convention is still not part of English municipal law and there are problems caused by the standard terms of the UPMAA as the Master of Rolls pointed out in paragraph 48 of his judgment. Similar issues might well have been relevant to the injunction claim against the Bank and prevented the Bank from claiming immunity.

45. Eighth, if the ***Dollfus*** case was so crucial to showing that the claim against the Bank was misconceived, it is very significant that, as I understand it, the Bank's lawyers did not rely on it until they brought it to court after the mid-day adjournment towards the end of the present wasted costs application. They had not, as I understand it, referred to it in any of the court hearings in front of Lloyd Jones J or in front of Royce J or in front of the Court of Appeal or in any correspondence in the previous six months when they were first instructed. Finally, the important if not crucial statement made by Lord Bingham when refusing leave to appeal that the appeal raised "*important and interesting questions as to the scope of the immunity in relation to agents*" also undermines the Bank's case on this point.

46. In reaching these conclusions, I have not overlooked two points pressed by Mr. Fulton. The first was that leading counsel for the claimant conceded in the Court of Appeal that it could not succeed against MongolBank. So it is said that this shows that an order for wasted costs should be made as the claim was misconceived from the outset. This point fails to appreciate that it is extremely common for counsel to abandon an argument on appeal which

had been pursued earlier in the litigation because on mature reflection and after further research, it had become clear that it was wrong. That concession by the claimant does not mean that it was negligent for counsel to pursue it earlier especially as the law on this aspect of the case was not straightforward for the reasons which I have sought to explain and so I am unable to accept this submission of Mr. Fulton.

47. The second submission of Mr. Fulton which I cannot accept is that an order for wasted costs should be made because MongolBank should not have been sued and the English proceedings were misconceived because first it could not be shown that MongolBank had breached the agreement and second there were also insurmountable difficulties for the claimant because of issues of *forum non conveniens*, choice of jurisdiction as well as state immunity.

48. I cannot accept the submission that any failure on the part of SSD to appreciate these issues was, as Mr. Fulton now contends, so negligent or so unreasonable that a wasted costs order should be made. Again it is noteworthy that none of these points were taken first when the matter initially came in front of Lloyd Jones J or second when the claimant's solicitors sought and obtained the order for a representative of the Bank to swear an affidavit as I have explained in paragraph 9 above or third when in the period of almost six weeks from 29 October 2007 until 6 December 2007 the claimant's solicitors were seeking a further witness statement from a representative of the Bank.

49. The inevitable inference is that the Bank's solicitors did not then believe that the claims as originally formulated were misconceived or that the claimant had (as the Bank's written skeleton argument graphically puts it) "*set off on a hopelessly misguided trajectory*". If the Bank's solicitors had held that view, they would surely have applied to strike out the present action or not prepared the second witness statement. Their failure to do so indicates that even experienced banking solicitors did not reach that conclusion and this further undermines the Bank's submissions. In those circumstances, this second point does not assist the Bank in its claim for wasted costs.

(iii) The Norwich Pharmacal claim.

50. I have already explained how this claim came to be made and how the Court of Appeal dealt with it. In the light of this and the approach of the Law Lords to which I referred in paragraph 45 above. I was frankly surprised that this point was still being pursued. In order to ensure that I understood this claim, Mr. Fulton helpfully submitted a further short written skeleton argument which explained his case and it stated that the approach that the hypothetical solicitor should have adopted was that:

"Having properly identified that no substantive relief was available against either MongolBank or the Bank, the advice might then have turned to a claim for information. Even though state immunity was not so clear cut in this context, the outlook was still bleak (not least for the discretionary reasons identified by the Master of the Rolls at para 49 and upheld by the House of Lords as the basis for dismissing the petition). The advice might have identified some prospect of success but no reasonable solicitor could have been optimistic"

51. I have no hesitation in rejecting this claim for wasted costs for this claim for at least five reasons apart from the reasons which I have set out in relation to the injunction claim. First, even on the Bank's own case their criticism of SSD ("*The advice [of SSD] might have identified some prospect of success but no reasonable solicitor could have been optimistic*") goes nowhere near showing that the threshold for a wasted costs order had been reached. After all, merely not being optimistic about a course of conduct does not mean that it is negligent to pursue it.

52. Second, the Court of Appeal required a full day and a reserved judgment to show why the ***Norwich Pharmacal*** claim had to fail. There is nothing whatsoever in their judgment to show that the claim should not have been brought. Mr. Fulton seeks to derive assistance from the comment (paragraph 51(1) of the Master of the Rolls "*by way of postscript*" that "*I wonder whether the claimant would have ever embarked on a Norwich Pharmacal application if they had known from the outset that the bank was not in possession of physical gold*". I do not consider that statement to be any criticism of the claimant for pursuing that claim.

53. Third, it is clear that neither the Law Lords nor the Court of Appeal made any criticism of the claimant for pursuing the ***Norwich Pharmacal*** claim.

54. Fourth, and very importantly when the petition for leave to appeal was heard by the House of Lords, Lord Bingham of Cornhill explained in his oral reasons for dismissing the application on the discretion issue that the case did raise "*important and interesting questions as to the scope of the immunity in relation to agents*". It is extremely difficult to understand how a claim for wasted costs can be pursued in the light of this comment from the Senior Law Lord, who had after all considered it necessary to call on Mr. Fulton who was counsel for the Bank to explain why leave to appeal ought not to have been granted.

55. Fifth, the only reason why the bank incurred costs for the House of Lords hearing was because the Law Lords took the view that this was an exceptional case in which an oral hearing was required. It is clear from the Practice Direction relating to the House of Lords that they will only direct oral hearings of applications for leave "*where the members of the Appeal Committee are not unanimous or where further argument is required*" (**House of Lords Practice Direction applicable to Civil Appeals Paragraph 4.16**).

56. Whichever reason triggered the need for an oral hearing, it is clear that the application for leave was regarded as a serious application worthy of consideration by the Appellate Committee. In other words, the Law Lords clearly did not regard the ***Norwich Pharmacal*** claim to be misconceived as Mr. Fulton now considers it to be. I suspect that the Law Lords who heard the application for leave to appeal would be at least very surprised that the Bank is now seeking an order for wasted costs. That would be an additional reason concluding that there was nothing negligent about the claimant's action in petitioning the House of Lords for leave.

57. At the end of the day, I concluded without any hesitation whatsoever that the claim for wasted costs in respect of the ***Norwich Pharmacal*** claim must be rejected.

V. Issue B. Was SSD's conduct so negligent or so unreasonable in not accepting as correct Mr. Weeks' first witness statement and requesting a further witness statement?

58. The case for the Bank is that a solicitor acting reasonably would have accepted that Mr. Weeks' first witness statement destroyed the factual basis of the claimant's claim by stating that the Bank did not hold any "*physical gold*" on behalf of MongolBank with the consequence that demands for a further statement would not have been made and so the Bank would not have incurred any further costs following his statement.

59. I am unable to accept this contention that the claimant should have abandoned its claim after receiving Mr. Weeks' first witness statement for at least six reasons, which I will now set out in no particular order of importance and which individually and cumulatively lead me to this conclusion.

60. First, as Mr. Cowper of SSD explains in his witness statement the decision to return to court and also to press for a further witness statement from Mr. Weeks was made after the claimant had received information from MongolBank that its gold was being held by the Bank in London. I have already explained in paragraph 13 above what the claimant was being told by MongolBank and in particular that in its reply to the claimant of 22 November 2007 it affirmed that the gold was *"kept in custody with Bank of Nova Scotia / Scotiamocatta/ London GB*".

61. Faced with a straight conflict of evidence, there is no reason why SSD should have advised the claimant not to renew its application for an interim order or why such an application could be deemed improper or an abuse of process. After all, the first witness statement of Mr. Weeks did not establish beyond doubt that the evidence received by the claimant from MongolBank was incorrect.

62. Second, the first witness statement of Mr. Weeks did not rule out the possibility that the gold was held by another depository on behalf of the Bank. That was a significant omission especially as the order of Lloyd Jones J required the Bank to give details of any gold deposited with them including that in "*any other depository if held on their behalf*".

63. Third, Royce J considered it appropriate to make the order for ***Norwich Pharmacal*** relief and thereby considered that the first witness statement of Mr. Weeks was not adequate as otherwise he would not have ordered that relief. In my view, it is difficult to consider a stance by solicitors as justifying a wasted costs order when an experienced High Court judge reaches that conclusion.

64. Fourth, it is noteworthy that the Bank did not apply to dismiss the claim after serving Mr. Weeks' evidence but if it had, I have no doubt that such an application would have failed in the light of the statement from MongolBank that the gold was *"kept in custody with Bank of Nova Scotia / Scotiamocatta/ London GB*". In those circumstances, I fail to see how an order for wasted costs can be made in respect of conduct which would not have led to a claim being struck out.

65. Fifth, neither the House of Lords nor the Court of Appeal criticised the claimant or SSD for pursuing their claim after receipt of Mr. Weeks' statement and I would have expected some such comment if they had any criticisms of SSD's conduct on this or for that matter on any other issue.

66. Sixth, if the claimant was clearly not entitled to seek a further witness statement from Mr. Weeks, I would have expected the experienced lawyers representing the Bank to have politely but curtly stated this in a short letter. The fact that they did not do so provides further support for my conclusion that this contention of Mr. Fulton must be rejected.

VI. Issue C. Was SSD's conduct so negligent or so unreasonable in failing to serve MongolBank as to justify making an order for wasted costs?

67. It is true that SSD failed to serve MongolBank as they should have done but it is difficult to see how this has led to increased costs. It is said that this meant in the words of Mr. Fulton's written skeleton argument:

"MongolBank's absence from the proceedings meant that the Bank was forced to argue the state immunity points itself and with minimal opportunity for preparation".

68. I am bound to say that I do not understand this point because I do not see why MongolBank's lawyers would have been in a better position to argue the immunity point than the solicitors for the Bank who are after all an international firm with many banking clients. In any event, no costs would have been saved but on the contrary the proceedings were likely to be longer and more expensive if there were three parties represented (i.e. the claimant, the Bank and MongolBank) than if as actually occurred there were just two parties, namely the claimant and the Bank.

69. The second way in which it is said that the failure to serve MongolBank led to increased costs is that in the words again of Mr. Fulton's written skeleton argument "the *application to serve out would have alerted SSD and the court to the problems of state immunity and jurisdiction*". If SSD had served the application on MongolBank within 3 working days of 25 October 2007 as they were required to do, then none of the previous costs would have been saved and it is unclear what steps would then have been taken. My strong suspicion is that MongolBank would have waited to see if the claimant would take further action and would have taken no step in the meantime.

70. If that is incorrect and MongolBank would on considering the matter have taken steps to end their involvement, it is unlikely that a summons could have been returnable and heard before the matter came before Royce J or more likely the Court of Appeal. So no costs would have been saved.

71. I have therefore reached the conclusion that the failure of SSD to serve MongolBank although an error has not led to any wasted costs and does not justify any order being made.

VII Issue D. If so, is the Bank entitled to an order for wasted costs even though (i) the costs order made by the Court of Appeal for a payment of £34,444.50 (which had not been disputed by the claimant) was satisfied by the claimant;(ii) at the time when the application was made for wasted costs, the claimant's solicitors SSD had explained to the Bank's solicitors that the claimant awaited receipt of the Bank's bill before dealing with the outstanding costs and the claimant had not in any way disputed its liability to pay the proper sum due in respect of these costs; and (iii) (in respect of the costs in the House of Lords) these costs were incurred after the application for wasted costs was made and the claimant's application for leave to appeal to the House of Lords took place four weeks before the present hearing and has not been the subject of a bill from the Bank's solicitors ?

Introduction

72. It is settled law that a wasted costs order can only be made if the wrongful conduct of a solicitor (which in this case is said to be negligence) has caused the applicant for the wasted costs order to incur costs which cannot be recovered. SSD contend that the claimant cannot satisfy the court on this point because of the history of this litigation and how the claimant has behaved.

73. To understand this dispute, it is necessary to recall that the order of the Court of Appeal made provision for payment by the claimants of the Bank's costs of £34,444.50 within 21 days of the date of the order. Those costs have been paid. The Court of Appeal ordered that the remainder of the costs of the action were to be paid by the claimants to the Bank to be assessed on the indemnity basis in default of an agreement. (The reason why they were to be assessed on an indemnity basis was because, as I have explained, the claimant had abandoned all its existing claims just before the matter came in front of Royce J). I was told that when judgment was handed down, the Bank's solicitors told the Court of Appeal that they wished to obtain their costs against SSD and then directions were given without much discussion which required the solicitors for the Bank to send a letter to SSD identifying the nature of the relief they sought by 11 January 2008.

74. No order for security was made but apparently the Master of Rolls hoped that security could be given as a pragmatic solution because at that time (unlike at the present time) the claimant had not paid any costs and indeed none had by then become payable. So it was then uncertain if the claimant would pay any costs of the Bank.

75. The Bank's solicitors sought from SSD security pending the assessment or agreement of the costs of the action but none was forthcoming. After the claimant paid the costs of £34,444.50 which the Court of Appeal had ordered to be paid as costs of that appeal, the Bank's solicitors on 15 January 2008 informed SSD by letter that they were going to make an application for wasted costs for all the other costs of the present action even though the claimant had complied with the only order that had been made against it for assessed costs. Significantly the claimant and its solicitors had not by then been served by the Bank's solicitors with a bill in respect of its unassessed costs ordered by the Court of Appeal to be paid by the claimant.

76. SSD responded on 25 January 2008 explaining that the threatened application was wholly disproportionate and that the application for wasted costs was:
"a device to obtain security for costs. … [The claimant] has paid the sums so far ordered to be paid and that conduct shows that there is no reason to expect that it will not meet any obligations that may subsequently be found to have to pay costs in future if and when they were quantified. We note that you have no steps to pursue the proportionate avenue of an assessment".

77. In January 2008, the claimant presented its petition for leave to appeal to the House of Lords. Nevertheless even though no bill for the Bank's costs had been sent to the claimant or to SSD and the application to the House of Lords for leave to appeal was pending, the Bank's solicitors made the present application for wasted costs on 11 February 2008. On 7 March 2008, which was a month after the application for wasted costs had been made, the Bank's solicitors finally sent their bill of costs and it then also gave notice of commencement for the assessment of bill of costs. In response on 28 March 2008, SSD wrote a letter raising their points of dispute and to the best of my knowledge, it has not been suggested that any of their points are frivolous or are challenged.

Discussion

78. The issue is therefore whether an application for wasted costs can be made against the solicitors of a foreign company which had *previously* paid all orders for assessed costs but which had failed to provide security for further costs in respect of which no bill for costs had then been supplied to that foreign company.

79. The starting point is that an application for costs should only be made if the person or entity against whom the costs have been ordered cannot or will not pay. Indeed if this was not so, where a solvent English company A lost a case and had an order for costs made against it and in favour of the opposing party B, it cannot be right that B could seek to enforce the claim for costs against A's solicitors before proceeding against A. The reason why B could not adopt that strategy is that in the words of Sir Thomas Bingham M.R. in ***Ridehalgh v Horsfield*** [1994] Ch 205 giving the judgment of the Court of Appeal (which also included Rose and Waite LJJ) where he explained at page 231 about the wasted costs regime:

"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 by their or the other side's lawyers" (emphasis added)

80. In my view, there can be no "*causing of loss and expense*" to the Bank in the present case until the claimant fails or refuses or indicates an unwillingness or an inability to pay assessed or agreed costs and this position had not occurred either at the time when the wasted costs proceedings were commenced or when they were heard. This point still has not been reached. Indeed the history of this case with the claimant first not challenging the bill in the Court of Appeal, then second paying it and finally third making points about the present bill which have not been challenged satisfies me that there has been no "*causing of loss or expense*" to the Bank by SSD. That is an additional reason why this application has to be refused. I should add that even on the Bank's case, there is only a vague possibility that loss might be suffered as Mr. MacAlpine, the solicitor for the Bank could not put the Bank's case on this issue more forcefully than to assert that that "*it is fair to point out that it still remains to be seen whether [the claimant] will pay the costs voluntarily*".

81. A further or an alternative reason why this application has to be refused is to be found in the speech of Lord Hobhouse in ***Medcalf v Mardell*** [2003] 1AC 120 when he said in a passage with which other members of the Appellate Committee agreed (with my emphasis added) that:

"56…The making of a wasted costs order should not be the primary remedy; by definition it only arises once the damage has been done. It is a last resort"

82. Applying that principle to the present case, the Bank's claim for wasted costs must fail as first, the Bank has not suffered damage as the claimant has not failed or refused to pay assessed or agreed costs; second the costs which are the subject of the wasted costs application have not been assessed or agreed either at the time when the wasted costs proceedings were commenced or when they were heard; third the claimant has not defaulted on any obligation to pay the costs of the Bank and fourth the claimant paid the assessed costs of the Court of Appeal proceedings. As I have already stated, Mr. McAlpine the solicitor for the Bank has explained in his witness statement that "*it is fair to point out that it still remains to be seen whether [the claimant] will pay the costs voluntarily*". It seems that the basis of the application for wasted costs was and remains no more than a possibility that the claimant would not pay the Bank's costs.

83. The Bank justifies its application for wasted costs because they have asked the claimant for security but the claimant has not provided this. This presupposes that the Claimant was under an obligation to give security. For the avoidance of doubt, I repeat that the claimant was under no obligation to give security for the Bank's costs as the Bank's solicitors considered wrongly in my view to be the case. There was no order for them to give security and indeed the Bank has not relied on any provision in the CPR which would have entitled them to an order for security. If there had been, the Bank would have sought to obtain this remedy.

84. I only came across the passage in Lord Hobhouse's speech from which I quoted in paragraph 81 above when I was preparing this judgment and I duly asked counsel for their observations. SSD contended that this meant that the present claim must fail as the Bank had not taken any steps to pursue its claim for costs against the Bank.

85. Mr. Fulton disagreed as he submitted that it was not open to the Bank to enforce its rights against the claimant before applying for wasted costs for two reasons.

86. First, he contends that the Court of Appeal had directed that any wasted costs application had to be made by 11 February 2008. I am unable to agree that this means that the Bank was entitled to bring its case against SSD without bothering to obtain its costs against the claimant first. It cannot have been the intention of the Master of the Rolls in his comment in the post-judgment discussion to make a claim against SSD for wasted costs the primary remedy of the Bank and thereby to enable it to act in disregard of Lord Hobhouse's statement which I set out in paragraph 81 above.

87. In any event, this order of the Court of Appeal did not mean that an application for wasted costs *had* to be made by that date irrespective of whether the claimant had paid any costs as the Bank should have considered before making the application if it could or should be made. In this case, the claimant had by then paid £34,444.50 costs which exceeds the costs of £32,413.40 claimed in the letter before action to SSD from the Bank's solicitors of 15 January 2008. I have no doubt that the Court of Appeal would not have expected a wasted costs application to have been made if, as was the case, the claimant had paid all the assessed costs and as it was still waiting for a proper bill from the Bank's solicitors. As I have already explained the claimant was under no legal obligation to give security for costs. In so far as Mr. Fulton relies on the order of the Court of Appeal requiring any application for wasted costs to be made by 11 February 2008, I have no doubt that any application for an extension would have been granted.

88. Mr. Fulton's second point is that the Bank would have had no enforceable right against the claimant until after detailed assessment and he appears to rely on the statement in paragraph 48.7.12 of the White Book and paragraph 53.1 of the Practice Direction made as part of CPR Part 53.1 which states that wasted costs orders "*can be made … up to and including the proceedings relating to the detailed assessment of the costs*".

89. This provision does not undermine the point that the claim for wasted costs in Lord Hobhouse's words which I have already quoted in paragraph 81 above "*should not be the primary remedy; by definition it only arises once the damage has been done. It is a last resort*". In the present case the assessment of the Bank's costs has not yet taken place and indeed no bill has been presented in respect of the Bank's costs in the House of Lords. So I do not

understand why the Bank could not have waited before issuing the present application for wasted costs to see if, for example, it could not have reached agreement with the claimant on the amount of costs payable. After all, the claimant agreed with the Bank on the amount of costs which were to be paid in respect of the Court of Appeal hearing.

VIII. Conclusion

90. In spite of the sustained and far-reaching submissions of Mr. Fulton, this claim for wasted costs is doomed to failure as SSD's conduct of the claimant's case does not fall into the categories which enable a court to award wasted costs. In so far as I have not dealt specifically with any of the many points raised by Mr. Fulton in this judgment, I should confirm that I have considered but rejected them.

91. The claim in respect of the costs incurred in challenging the grant of permission to appeal to the House of Lords is misconceived not only in the light of Lord Bingham's comments on the application for leave to appeal but also because they post-date the present application and do not appear to be the subject of a supporting witness statement.

92. A second reason for rejecting the claim for wasted costs is that (even if contrary to my conclusion, SSD's conduct fell within one of the categories which could lead to an order for wasted costs) the Bank has not suffered any loss as there is every chance that the claimant will pay their costs especially as the claimant had paid a previous order for assessed costs and had promptly put forward some queries on the only other bill put forward by the Bank and these queries have not been challenged or answered to the best of my knowledge. Indeed if the Bank had been concerned about the claimant's ability or willingness to pay the Bank's costs, they could have (and would have) sought security earlier in the proceedings or sought an order of the Court of Appeal assessing those costs as well as the costs in the Court of Appeal

93. In addition or in the alternative, a wasted costs order is a remedy of last resort and it should not now be used as the primary remedy of the Bank, which is what is occurring.

94. So I have reached the clear conclusion that this claim for wasted costs must be dismissed.

Appendix

The agreed approach to wasted costs as set out in the judgment of Lightman J in Morris and Morris v Roberts [2005] EWHC 1040 (Ch) [paragraphs 45 to 53]

"1. The Court's power to grant a wasted costs order is governed by section 51 of the Supreme Court Act 1981 as amended, together with CPR Part 48.7 and its associated Practice Direction. Section 51(1) of the 1981 Act gives the court a general and wide discretion over costs. Sections 51(6) and (7) provide:

"(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—

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

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."

2. CPR Part 48.7 provides that, where the court is considering whether to make an order under section 51(6) of the Supreme Court Act 1981 , the court must give the legal representative a reasonable opportunity to attend a hearing to give reasons why it should not make such an order. . Paragraph 53 of the Practice Direction to CPR Part 48 provides so far as material) as follows:

"53.4 It is appropriate for the court to make a wasted costs order against a legal representative, only if—

(1) the legal representative has acted improperly, unreasonably or negligently;

(2) his conduct has caused a party to incur unnecessary costs, and

(3) it is just in all the circumstances to order him to compensate that party for the whole or part of those costs.

53.5 The court will give directions about the procedure that will be followed in each case in order to ensure that the issues are dealt with in a way which is fair and as simple and summary as the circumstances permit.

53.6 As a general rule the court will consider whether to make a wasted costs order in two stages—

(1) in the first stage, the court must be satisfied—

(a) that it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made; and

(2) at the second stage (even if the court is satisfied under paragraph (1)) the court will consider, after giving the legal representative an opportunity to give reasons why the court should not make a wasted costs order, whether it is appropriate to make a wasted costs order in accordance with paragraph 53.4 above.

53.7 On an application for a wasted costs order under Part 23 the court may proceed to the second stage described in paragraph 53.6 without first adjourning the hearing if it is satisfied that the legal representative has already had a reasonable opportunity to give reasons why the court should not make a wasted costs order. In other cases the court will adjourn the hearing before proceeding to the second stage."

3. In the leading authority of ***Ridehalgh v. Horsefield*** [1994] Ch 204 ("Ridehalgh") at 232-233, the Court of Appeal considered the meanings of "*improper*" "*unreasonable*" or "*negligent*" in the context of section 51(7) of the Supreme Court Act 1981. After giving guidance as to their meanings, Sir Thomas Bingham MR then stated:

   "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."

4. He went on to consider circumstances in which the conduct of proceedings may constitute an abuse of process: unconnected with the success of the litigation. In ***Ridehalgh*** at 234 Bingham MR stated:

   "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." (p.234).

5. Further, in considering whether a solicitor has acted in proceedings that constitute an abuse of process in this context, it is relevant to consider the ability and/or willingness of his client to: (a) bear the costs consequences of those proceedings, and/or (b) give effect to previous orders made against him in connected litigation: (see ***Tolstoy-Miloslavsky v. Aldington*** [1996] 1 WLR 736 at 747F-747G per Rose LJ); and the fact that there is some small prospect of success in proceedings or on an appeal does not preclude a finding that the proceedings are abusive and this is most particularly the case where the solicitor knows that his client "*cannot or will not pay*": see ***Fletamentos Maritimos SA v. Effjohn International BV*** [2003] Lloyd's LR (PN) 26 at 44 per Morritt LJ.

6. Actual knowledge on the part of a legal representative that the litigation he is conducting is an abuse of process is sufficient to render a legal representative liable for wasted costs.

7. But a legal representative will also be liable to a wasted costs order if, exercising the objective professional judgment of a reasonably competent solicitor, he ought reasonably to have appreciated that the litigation in which he was acting, constituted an abuse of process. This conclusion is supported by the following authorities: see ***Tolstoy-Miloslavsky v. Aldington*** [1996] 1 WLR 736 at 746F-747G per Rose LJ; 749H to 750B per Roch LJ; and 752B-E per Ward LJ; In ***re A Company (No 006798 of 1995)*** [1996] 1 WLR 491 at 505C per Chadwick J; ***Woolwich Building Society v. Fineberg*** [1998] PNLR 216 per Peter Gibson LJ; and **Dempsey v. Johnstone** [2003] EWCA Civ 1134 [2004] PNLR 2, 25 ("Dempsey"); at paras 25-28 per Latham LJ; and paras 41-42 per Mance LJ. (The stricter test laid down by Peter Gibson LJ in ***Persaud v. Persaud*** [2003] PNRL 26 at paras 23 and 27 relied on by Mr Philpott was disapproved of in Dempsey and is no longer the law.) The circumstances may be such as to impose a duty on solicitors to investigate with the greatest care their clients' motives for launching proceedings or an appeal: see Roche LJ in ***Tolstoy v. Miloslavsky*** above at 749D.

8. It is no answer for a solicitor who has improperly, unreasonably or negligently lent himself to such an abuse to say that he was instructed to do so; this is because the solicitor's duty to his client is always subject to his duty to the Court: ***Medcalf v. Mardell*** supra at 142 per Lord Hobhouse. The fact that the solicitor may not, by reason of legal professional privilege, be able to explain what his instructions were or what advice he gave, means that a Court should not make a wasted costs order unless satisfied that there is nothing the practitioner could say, if unconstrained, to resist the order. But privilege is not a trump card which will always preclude the making of a wasted costs order: ***Medcalf v. Mardell*** supra at 146 per Lord Hobhouse. The acid test in all cases is whether the conduct of the solicitor permits of a reasonable explanation: see **Ridehalgh** at 232 and ***B v. B*** [2001] 1 FLR 483 at para 22"

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The Claimants and the Third Defendant did not appear and were not represented.