

ASMITH

Summary of problem(s)

Can Gideon ('G') be held liable for Compu-Fit Ltd.'s ('C') wasted legal costs incurred by proceedings negligently issued by G, without the authority of G's client, Software Solutions Ltd. ('S')?

If so, on what basis will a court determine G's liability? And if not, are there alternative cost claims that C might bring against G based on G's breach of its implied authority to act?

Search terms

Wasted Costs
Implied Authority
Costs Claim
Liability

Issues/client objectives

Is it possible for a court to order G to pay C's legal costs based on G's breach of its implied authority to act.

If so:

- (a) On what basis will the court determine this?
- (b) What is the CPR?

If not:

- (a) Are there any alternative cost claims that C might bring against G?

Record of research undertaken**Secondary sources**

Practical Law (online) > All Content > Searched "Wasted Costs" > "Wasted Costs" by Laura-May Scott, Reed Smith LLP

Wasted costs is a procedure under a statutory power (under **section 51(6) of the Senior Courts Act 1981 (SCA 1981)**, by which a solicitor, barrister or other representative whose conduct in proceedings can be shown to have been improper, unreasonable or negligent can be ordered by the court to pay the costs incurred by his own client or another party as a result of that conduct.

The court has also always had the power to award wasted costs against solicitors under its inherent jurisdiction (for example, see **Babury Ltd v London Industrial (1989) The Times, 20 Oct 1989**, where costs were awarded against a solicitor on the basis of lack of authority). This was extended to apply against barristers on Oct 1991.

Practitioners and parties should think carefully before embarking on an application for a wasted costs order. After applications for wasted costs (mainly against representatives of legally aided litigants) grew during the 1980s and early 1990s, the Court of Appeal set out to deter satellite litigation in **Ridehalgh v Horsefield and another [1994]**...House of Lords reinforced approach and made clear that wasted costs orders should be confined to a small number of specific instances.

West African Gas Pipeline Company Ltd. V Willbros Global Holdings Inc [2012] Ramsey J stated that it was the position that 'only generally, in cases where there had been a mistake or error which has had significant consequences in terms of time and cost, that the court will generally make an order for costs which have been wasted'

Court's power to award wasted costs is contained in **section 51(6) of the SCA 1981**

This is supplemented by **CPR 46.8** and **PD 46 para.5**, which apply where the court is considering making an order under section 51(6)

The power is statutory and the CPR only sets out the practice and procedure

>"The three-elements test"

PD 46 paragraph 5.5 sets out the principles established in **Re A Barrister (Wasted Costs Order)(No 1 of 1991)[1993] QB 293**, and applied in **Ridehalgh**, namely that it is appropriate to make a wasted costs order against a legal representative only if the following three-elements test is met:

- The legal representative or other representative has acted improperly, unreasonably or negligently
- Their conduct has caused a party to incur unnecessary costs or has meant that costs incurred by a party prior to the improper, unreasonable or negligent act or omission have been wasted.
- It is just, in all the circumstances, to order the legal representative to compensate that party for the whole or part of those costs.

Meaning of 'improper', 'unreasonable' or 'negligent' conduct

Ridehalgh is the leading authority and guide to the test for 'improper, unreasonable or negligent' conduct in the context of wasted costs.

- "Improper" means a significant breach of substantial professional duty and conduct that would be regarded as improper by a consensus of professional, including judicial, opinion. This includes, but is not limited to, conduct which would justify suspension, striking off and disbarment from the legal profession, or other serious professional penalty.
- "Unreasonable" means vexatious, designed rather to harass the other side, than progress the case. The test is whether the conduct permits a reasonable explanation.
- "Negligent" should be understood in an un-technical way, to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

In **Hedrich and another v Standard Bank London Ltd and another [2008] EWCA Civ 905**...The court confirmed that it must judge negligence for such applications by the standards of solicitors of ordinary competence and this meant: "those of a typical, reasonably well-informed high street solicitor, [like the one in the case], not the Rolls Royce standards which the big City firms [the bank's solicitors] must and do uphold."

> "Summary and Detailed assessment"

The court may make a costs order where a party for their legal representative:

Fails to comply with a rule, practice direction or court order in connection with a summary assessment or detailed assessment

Acts unreasonably or improperly before or during the proceedings giving rise to the detailed assessment proceedings. (This is under **CPR 44.11**)

CPR 44.11 provides that the court may –

- (a) disallow all or part of the costs which are being assessed; or
- (b) order the party at fault or that party's legal representative to pay costs which that party or legal representative has caused any other party to incur.

Note that **CPR 44.11** and **CPR 46.8**, which governs wasted costs, are different rules. **CPR 44.11** only applies to assessment proceedings and is penal, rather than compensatory like **CPR 46.8**. The criteria for the two rules is also very different. For a wasted costs order the can be unreasonable, improper or negligent. For an order under **CPR 44.11** negligence alone is not enough. In **Gempride Ltd v Bamrah and another [2018] EWCA Civ 1367**, Hickenbottom LJ said that "Mistake of error of judgment or negligence, without more, will be insufficient to amount to 'unreasonable or improper' conduct."

Primary Sources Found:

s.51(6) of Senior Courts Act 1981

Ridehalgh v Horsefield and another [1994]

Medcalf v Weatherill and others [2002] UKHL 27, [2003] 1 AC 120, 3 All ER 721, (para 58)

West African Gas Pipeline Company Ltd v Willbros Global Holdings Inc [2012]

Gempride Ltd v Bamrah and another [2018] EWCA Civ 1367

Hedrich and another v Standard Bank London Ltd and another [2008] EWCA Civ 905

CPR 46.8
CPR 44.11

Halsbury's Laws of England (online)

Searched ('Quick') 'wasted cost' > 1171. Personal liability of legal representative for costs; procedure for wasted costs orders.

[Location: Civil Procedure (Volume 12A (2020), paras 1207-1740) > 27.Costs > (7) Costs in Special Cases > (ii) Costs relating to Solicitors and other Legal Representatives]

The information from Practical Law is confirmed with the addition of the following:

A party may apply for a wasted costs order, or the court may make a wasted costs order against a legal representative on its own initiative.

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

- (a) at the first stage, the court must be satisfied 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 that the wasted costs proceedings are justified (notwithstanding the likely costs involved);
- (b) at the second stage, the court will consider, after giving the legal representative an opportunity to make representations in writing or at a hearing, whether it is appropriate to make a wasted costs order in accordance with heads (1) to (3) above.

Where a party applies for a wasted costs order against the opposing party's legal representative, the opponent may not be willing to waive his privilege, leaving the legal representative at a disadvantage since he will be hampered in his defence, not being able to reveal privileged communications indicating what advice he gave to his client or what instructions he received.

An application for a wasted costs order against another party's legal representative is unlikely to succeed as the opponent's legal representative will be given the benefit of the doubt unless his conduct can be shown to have been improper without recourse to privileged material. (*Medcalf v Mardell*)

Para 613. Personal liability of legal representative for costs in civil proceedings
[Location: Legal Professions (Volume 66 (2020), paras 515-1079)> 3. Solicitors > (7) Professional Conduct, Practice and Redress > (viii) Liability to Third Parties]

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) the legal representative's conduct has caused a party to incur unnecessary costs, or has meant that costs incurred by a party prior to the improper, unreasonable or negligent act or omission have been wasted
- (3) it is just in all the circumstances to order the legal representative to compensate that party for the whole or part of those costs

Additional primary sources found:

CPR 46.8(2) – Wasted costs order defined

CPR Pt 23 – Filing an application for a wasted costs order

Primary sources

The primary sources below were located and read using Westlaw.

CPR 44.11: The commentary above was confirmed

CPR 46.8: The commentary above was confirmed

s.51(6) of Senior Courts Act 1981 – Costs in civil division of Court of Appeal, High Court and county courts

(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

Meaning of '**wasted costs**':

s.51(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 unreasonable to expect to that party to pay.

PD 46 paragraph 5.5: The commentary above was confirmed.

Ridehalgh v Horsefield and another [1994] Ch 205

The leading authority on the qualified terms in the statute of 'improper, unreasonable and negligent'. The wasted costs order in this case were outside of the scope of being "improper, unreasonable or negligent". This criteria was further defined here. The court in this case also established a 'three-stage test' for deciding whether wasted costs should be made.

(4) the Courts and Legal Services Act 1990, s.62, must be read in line with ss.4,111 and 112 of that Act such that the traditional immunity of an advocate in respect of conduct and management of a case in court and certain pre-trial work was compromised by subjecting the advocate to the wasted costs jurisdiction, but only where the conduct was plainly unjustifiable (*Rondel v Worsley* [1968] C.L.Y 3054, *Salif Ali v Mitchell (Sydney) & Co. (A Firm)* [1978] C.L.Y. 2323 applied).

Medcalf v Weatherill and others [2002], UKHL 27 para 58

Another significant case where the court sought to impose a wasted costs order against counsel because of counsel's improper allegations of fraud in the absence of

reasonable credible evidential material. The court allowed the appeal based on counsel being precluded from giving a full answer to a wasted costs application because of legal professional privilege.

Result to supervisor/advice to client

Under **CPR 44.2** the court has discretion as to awarded costs. **CPR 44.11** provides that the court may make an order in relation to misconduct where it appears to the court that the conduct of a party or that party's legal representative was unreasonable or improper.

G's negligence would have to be established against the standard laid out in *Ridehalgh* and meet the requirements set out for conduct that is deemed 'improper, unreasonable and negligent'.

If G is unable to satisfy this test and C is unable to claim costs under **CPR 44.2**, **CPR 46.8** provides an alternative and applies where the court is considering whether to make an order under section 51(6) of the **Senior Courts Act 1981** in regards to personal liability of legal representative for costs – wasted costs orders.

Though the case law in this area shows appeals against wasted costs orders prevail, Compu-Fit's case is unique enough to the case law to still explore a wasted costs order as an option. This is additionally supported by the evidenced by the proceedings being struck out due to improper authority.

Sources

Practical Law
Halsbury's Laws of England
Westlaw UK
Legislation as cited
Case law as cited

Word count: (maximum 1,400)

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5 February 2021

Dear Mr Jones

Wasted Costs

I write further to our recent meeting in which you asked for advice on Compu-Fit Ltd.'s ('C') ability to bring a court order for wasted costs against Gideon ('G') as a result of G commencing proceedings without Software Solutions Ltd. ('S') authority, and if so what might the process might be.

You explained that G issued proceedings, on S's behalf, against C in 2018 regarding a dispute on unpaid invoices. Although C wanted to defend the claim, it transpired that G had acted without appropriate authority.

I have set out my detailed advice below, including, as requested, the relevant law. However, in summary, the court has the general power to order costs against a legal representative who has acted unreasonably and improperly. The case law surrounding this area supports the possibility for issuing an order, though, in most cases the courts have allowed appeals.

Wasted Costs Order – Special Cases – CPR 46

A wasted costs order is an order where the legal representative is required to pay a sum in respect of costs to a party under a Civil Procedure Practice Direction for Special Cases (CPR. 46.8(2)).

Wasted costs are any costs incurred by a party as a result of improper, unreasonable or negligent act or omission on the part of any legal or other representative; or where in light of any such act or omission the court considers it unreasonable to expect a party to pay (s.51(6) of Senior Courts Act 1981).

Under this, an application for a wasted costs order may either be filed or given orally during the course of any hearing, as this particular case it will be filed. Upon application evidence must be provided which identifies what the legal representative is alleged to have done or failed to do and the costs that the representative may be ordered to pay.

The court will then make a wasted costs order in two stages; the first stage will require evidence that would be likely to lead to a wasted costs order being made (i.e. the approved application to strike out proceedings) and that the wasted costs proceedings are justified. At the second stage, the court will consider whether it is appropriate to make a wasted costs order.

Wasted Costs Order – CPR 44

Alternatively, under CPR 44.11 the court has the power to make an order in relation to misconduct. Under this CPR the court may make an order where the court feels that a party's legal representative, before or during the proceedings, was unreasonable or improper.

The court may order the party at fault, or that party's legal representative to pay costs which that party or legal representative has caused any other party to incur. Additionally, under this, we would need to notify G of the order and submit our order to the court no later than seven days later.

Advice

Yours sincerely

Jay Simmons
Partner

The partners in the firm are solicitors or registered foreign lawyers or registered European lawyers.
A list of the partners and their professional qualifications is open to inspection at the above address.

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