HIGH COURT, QBD, Winchester: 28th June 2002

JUDGMENT : The Hon Mr Justice Turner

Introduction

1. There is an application before the court issued by the Defendants in the action which is brought under section 51 of the Supreme Court Act 1981 (as amended) and CPR 48.7. The notice dated 28 February 2002 arises out of the terms upon which the Claimant's claim was discontinued by order dated 29 November 2001. (The claimant is hereafter referred to as 'B'). Where relevant the terms of settlement provided:
   3. *The Claimant is to pay the Defendant's costs of this action to be determined by detailed assessment, such costs not to be enforced without permission of the court nor prior to the determination by the court of the amount (if any) which it is reasonable for the Claimant to pay under s. 11(1) of the Access to Justice Act 1999.*
   4. *Any application for an order for wasted costs against the Claimant's solicitors ... to be issued before 4pm on the date which is 3 months from the date this order is sealed. [i.e. 28 February 2002].*
2. The proceedings so discontinued had been commenced for the purposes of obtaining an injunction to prevent the defendants publishing any article concerning the personal life of B based on information of a confidential nature imparted by her to the first defendant between August and December 1996. By order dated 22 December 1996, following an ex parte hearing the injunction was granted until further order.
3. The defendants never applied to the court to have the injunction discharged.
4. On 10 January 1997 the defendants wrote to B's solicitors "without prejudice" that they were "quite prepared to leave the injunction unopposed ... provided (the claimant) withdrew the rest of her claim and this action is withdrawn".
5. It is unclear what claims for damages had initially been made in the action brought against the second defendants, since the date upon which the Statement of Claim was served does not appear from the papers now before the court. There were, however, included in the original Statement of Claim some limited losses pleaded which related to B's professional life. It is plain, that in response to that without prejudice letter and with the benefit of Legal Aid funding the claimant's solicitors sought to claim damages as "compensation ... for the very considerable distress that (the defendants) have caused". In a further "without prejudice" letter dated 10 February, B's solicitors some what elliptically wrote

   2.1 We have been explicitly authorised (via the writer) via the Legal Aid Board to obtain financial compensation for our client. Since that has not been accepted we will now obtain authorisation to serve our Statement of Claim and proceed accordingly.

   Until three weeks before the trial date of the action in December 2000, and throughout the proceedings, B had been in receipt of legal aid. The certificate was then discharged. It was only after this event that B sought, and obtained by consent, the order of discontinuance.
6. On 9 June 1999 the court ordered that an amended and consolidated Statement of Claim be served. The need for this was due to the fact that there were proceedings against the separate defendants, those in which the second defendants had been sued (1996 B No 2219) and those against the first defendant (1997 B No 1929). The amended Statement of Claim in the consolidated action was apparently served on 19 March before the order had been made. What was and is of considerable importance, however, is that in addition to amending the narrative sections of the pleading and the unparticularised claims for damages for breach of contract and breach of the duty of confidence there was now a claim for damages in respect of harm "wilfully or negligently done ... calculated to cause (B) physical harm and/or serious mental damage". Special damages were claimed in respect of past and continuing medical treatment and "for general loss of earnings"; see paragraph 12.3. By Order sealed on 29 September 2000, B was ordered to provide discovery in relation to her financial position from 1st January 1992 including accounting records (Schedule B) and documents to support the loss of earnings claim which had been advanced by way of an accountant's report dated 10 May 2000 (Schedule C). The claim so particularised included
   7.1.1 *Alleged loss arising from invested time and expenditure on the Project to be in the range of £92,000 and £180,000.*
   7.1.2 *Alleged loss arising in the period 18 December 1996 to 31 December 1999 the sum of £168,000.*

7.1.5 Alleged further professional loss over a 5 - year period from 1 January 2000 to 31 December to be in the range of £206,000 and £257,000.

together with future losses based on the annual multiplicand of £48,000. The total claimed was valued at £1 to £1.5 million.

7. In the applicants' skeleton argument before this court, the basis of the claim was expressed as

3.4 The Claimant was and is without financial means. The litigation was pursued with the benefit of a Legal Aid Certificate. The defendants were put to great expense in investigating the financial claim - the litigation cost them some £325,000 and, the defendant believes, probably cost public funds rather more than that.

3.5 Three weeks before the proposed trial it emerged that the claimant had, since the early 1990's, been almost wholly unemployed and in receipt of unemployment and DSS benefits. The claim was discontinued and the defendants obtained an order for costs against the claimant which is to all intents and purposes worthless.

3.6 The defendant contended that this situation could not have happened without improper conduct on the part of the claimant's solicitor: he knew or ought to have known, had he made those enquiries that he should have made, that the quantum of the claim was totally unrealistic, that the manner of its presentation was grossly misleading having regard to the underlying realities and that considerable cost would be incurred by the defendant in investigating it.

8. There is no scope for avoiding the applicants' implicit, if not explicit, proposition that the claimant's solicitor has been not only negligent but also dishonest in his conduct of B's affairs.

Submissions

9. In his skeleton opening, counsel for the applicants sought to detail the case which he sought to make against the solicitors in order to persuade the court that this was a proper case for the solicitor to be ordered to show cause why a wasted costs order should not be made. These were

1. The failure of the solicitor to take proper instructions from B as to the `without prejudice' offer of the defendants dated 10th January 1997. Had these been taken, the proceedings would have been settled at that stage and almost no legal costs would have been incurred on either side.

2. The obstructiveness of the solicitor to the proposals for mediation during the early part of 1999.

3. The presentation of the exaggerated claim in the amended Statement of Claim.

It is submitted that there is a connection between the allegations. The failure to accept the without prejudice offer led to the need to institute proceedings. This required legal aid funding. The longer the litigation continued, the greater the need there was for a substantial financial claim to justify the continuation of funding.

It can readily be seen that the scope of any enquiry necessary to assess these claims would be extensive. After observations from the court on this point, counsel for the applicants in his reply sought to limit the issues by the omission of serial 2 (mediation issue) above.

10. To such a case, the respondent solicitor submits that the true basis for the making of a wasted costs order is that the legal representative has been in breach of some duty towards the court, in contradistinction to his opposite number. The nature of the remedy is summary and those cases alone which are capable of summary disposal will be considered appropriate for the making of the relevant order. The converse of this proposition is that if detailed evidence, including oral evidence and crossexamination, is required in order to dispose of the application the court should not make the order to show cause. The rationale underlying this approach is that wasted costs orders should not be made in cases otherwise than in those in which the process of assessing whether to make such an order can be carried out summarily and without risk of injustice or such that they would amount to satellite litigation.

11. In the present case substantial costs have already been incurred by both parties to the application which, as will emerge later, is still far from ready for determination. When opening the applicant's case, counsel sought to introduce fresh evidence, principally in the form of a statement made by B to the applicants' solicitors. The principal content of her evidence is to the effect that she had now waived privilege. If allowed into the proceedings at this stage, this waiver would enable the applicants to controvert some of the evidence already provided by the solicitor and to make good those parts of his evidence which were deficient because he was still bound by the privilege of his former client. Such evidence, if admitted,

would arguably permit the solicitor fully to defend himself unhampered as he now is because of the existence of privilege.

12. The appearance of the fresh evidence followed an agreement made between B and the second defendant's on 23 May 2002, days only before the hearing of this application. Under that agreement the applicants indicated that on the condition that B waived privilege as between herself and the solicitor they would not seek to recover from her the costs incurred by them in defending her original claim. This agreement is subject to the proviso that the court which comes to determine the wasted costs application makes *"no finding ... that her evidence was not only untrue but was dishonestly given"*. Quite clearly negotiations must have taken place between the applicants and B, but it is far from clear what if any, legal advice she took or was given over what might be the consequences to her of the waiver of privilege. It is manifestly the case that the applicants contemplate a hearing based on contested evidence in which the credibility of the solicitors and B will be central to the resolution of the issue.

13. The solicitor objects that this fresh evidence should not be admitted, since
    1. There is no provision in the Rules for the admission of fresh evidence.
    2. If the fresh evidence were to be admitted, it would inevitably mean that the present hearing would have to be adjourned so that solicitors could meet the thrust of this new evidence.
    3. The consequence of admitting the evidence would be that the solicitors would be required to (re)familiarise himself (as would his legal advisers) with what was said to be a total of 100 files or so. The context of this submission that to date costs incurred on the solicitors' behalf are said to amount to some £80,000.

    In addition
    a. The solicitor would have to be free to reply to the privileged material as well as
    b. be able to rebut it
    c. much of the material goes to credibility
    d. evidential conflict between the solicitor and his former client (B) will be inevitable
    e. given that the application was made only days before the hearing was due to take place, it is too late and that as a matter of discretion the court should not therefore admit the fresh evidence.

Decision on Fresh Evidence

14. For reasons which will shortly appear, having also had the advantage of reading it, I have decided that the fresh evidence should be admitted at this stage in order best to determine whether, and if so on what basis, this application should proceed.

15. By way of introduction, it is to be noted that the hearing of the present application to show cause has occupied two full court working days. The nature of the proceedings foreshadowed by the documents submitted by both parties is that, if not controlled by the court using its case management powers, the issues arising on the application will be more akin to a negligence action with live evidence and extensive disclosure. If the court does exercise its case management functions, and limits the issues and or alternatively the evidence which may be given the possibility, amounting to a near certainty, is that an injustice will be done to one or other if not both of the principal protagonists, both of whose credibility will be under challenge. It will not escape attention that B, as one of them, will be challenging evidence given by her former solicitor, who is being charged with fraudulent and not just negligent conduct. B will not be legally represented, except by the applicants who will, in effect, be acting as her surrogate.

16. The decision to admit fresh evidence has been influenced by the need to expose the true nature of what is proposed by the applicants in order to assess the appropriateness of the process. It is clear that the proceedings would be unwieldy and, given the apparent conflict of evidence, would also have great potential for unfairness if curtailed in terms of issues or evidence. But this is to anticipate.

The jurisprudence

17. The starting point can usefully be taken from the judgment of Sir Thomas Bingham MR (as he then was) in ***Ridehalgh v Horsefield*** [1994] Ch 205. Having referred to the need for safeguards if the adversarial system of litigation adopted in our common law jurisdiction was to "*function fairly and effectively*" (p224) he said at p225 *(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.

and at p226 *The argument we have heard discloses a tension between two important public interests. One is that lawyers should not be deterred from pursuing their client's 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 the 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.*

Later Sir Thomas Bingham adverted to particular issues which may arise in proceedings of the kind now contemplated. Thus at p236, he said *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.

At p239, Sir Thomas Bingham added *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 vise 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 Ord.65, r. 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 inquiry 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.

18. Since Ridehalgh (above) there have been a number of cases in which the question has been whether, and if so upon what terms, the wasted costs procedure should be involved. In this context, it is apposite to note the provisions of CPR PD 53.6 which makes provision for the determination whether a wasted costs order should be made or not. PD Section 53 provides

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 the costs.

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

(b) the wasted costs proceedings are justified notwithstanding the costs involved.

(2) at the second stage ... the court will consider, after giving the legal representative an opportunity to give reasons why the court should not make a wasted costs order... .

19. It is evident that the process and procedure envisaged in the Practice Directions is not readily to be equated with what is involved on a trial of issues. The phrases "*simple and summary as the circumstances will permit*" (PD 53.5) and "*after giving the legal representative an opportunity to give reasons*" (PD 53.6 (2)) do not lend themselves as appropriate to a disputed trial involving consideration and resolution of complex and disputed evidence. More especially will this be the case if allegations of fraud are bound up with the case to be made against the solicitor. The Practice Direction correctly, in my view, reflects the jurisprudence of the courts as it had developed prior to the CPR coming into force.

20. In ***Manzanilla v Certon Property and Investments*** and others (transcript 23 April 1997) Lord Woolf MR (as he then was) said *This is a directions hearing in a troubling matter. The Court of Appeal decided it was appropriate that there should be an investigation as to whether a wasted costs order should be made against solicitors and counsel who were involved in proceedings bought by Manzanilla in which a firm of solicitors, Halliwell Landau, who had previously acted for Manzanilla, became a party. As this is only a directions hearing, I propose to restrict what I have to say. I should however explain why the directions which I am giving are nowhere near as extensive as those which Mr Pollock, on behalf of Halliwell Landau, would like the court to make.*

The ability of the court to make a wasted costs order can have advantages, but it will be of no advantage if it is going to result in complex proceedings which involve detailed investigation of facts, and indeed actions of dishonesty, then it may well be that the wasted costs procedure is largely inappropriate to cover the situation, except in what would be an exceptional case.

Mr Pollock submits that this is such an exceptional case. However I do not so regard it. It seems to me that having read the judgments of the Court of Appeal, both in relation to the merits of the appeal which was before them and as to whether or not this was a case where there , as cause shown, which justified investigation as to whether a wasted costs order should be made, the case is an unusual one but not one which should be dealt with other than in a summary way. If this limits the ability of someone in the position of Halliwell Landau to obtain a wasted costs order, then in my judgment that is a restriction inherent in the nature of the remedy which they are seeking to receive. It would destroy that remedy if the court did not, except in an exceptional case, insist upon the matter being dealt with summarily.

21. There is further authority for the proposition that the procedure is of limited scope in cases of disputed fact. In a case which went before the Privy Council on appeal from New Zealand and which concerned the duty of counsel against whom a costs order was sought. In New Zealand there is no statutory power to make such an order, the power is part of the inherent jurisdiction of the court. In ***Harley v McDonald*** [2001] 2AC 678 at p 703 Lord Hope of Craighead when delivering the judgment of the Board said

50 As a general rule allegations of breach of duty relating to the conduct of the case by a barrister or solicitor with a view to the making of a costs order should be confined to questions which are apt for summary disposal at court. Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples. The factual basis for the exercise of the jurisdiction in such circumstances is likely to be found in facts which are within judicial knowledge because the relevant events took place in court or are facts that can easily be verified. Wasting the time of the court or an abuse of its processes which results in excessive or unnecessary cost to litigants can thus be dealt with summarily on agreed facts or after a brief inquiry if the facts are not all agreed. Scope for the making of a costs order that will compensate as well as penalise is then is likely to be found in making an order against the practitioner that will indemnify the opposing litigant against costs incurred as a result of the breach of duty that would otherwise not be recoverable.

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

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

53 Their Lordships do not say that the court had no jurisdiction to make a costs order in favour of the client against his own barrister or solicitor. But in cases where an order to that effect is contemplated the court must take great care to confine its attention to the facts which are clearly before it or to facts relating to the conduct of the case that are immediately and easily verifiable. Allegations that may raise questions about duties owed to the client by the barrister or solicitor and the conduct of the case outside the courtroom are unlikely to be of that character. They are likely therefore to fall outside the proper scope of that inquiry. The court must bear in mind that it is not its function, in the exercise of this jurisdiction, to adjudicate on the position as between the client and his barrister or solicitor.

> *54 The court must have particular regard in cases of this kind to the factual basis upon which the jurisdiction is to be exercised. It cannot rely on its own knowledge when it is faced with issues about the nature or scope of the instructions which the client has given about the conduct of the litigation or the advice that may have been tendered to the client by his barrister or solicitor. Fairness to the barrister or solicitor requires that notice should be given of allegations about breaches of duty which raise these issues and that an opportunity should be given to them to challenge the allegations, if so advised, by cross-examining witnesses and leading evidence. These procedures are inconsistent with the summary nature of the jurisdiction. Bearing in mind the extra cost which an investigation of that kind may involve, and the overriding requirement of fairness to those who are at risk of being penalised, the court may well conclude that further investigation under this procedure is not appropriate. This need not be seen as a surrender by the court of its responsibility. The client may have other remedies. A complaint may be made to the Law Society leading to disciplinary sanctions against the barristers' or solicitor, or a claim may be made by the client against the solicitor in damages for negligence.*

Discussion

22. The limitations on the scope of the wasted costs jurisdiction which are necessarily imposed by the manner in which the jurisdiction has developed have been clearly recognised. See by way of illustration Lord Woolf in ***Manzanilla*** (above) and Lord Hope in particular at paragraph 54 in Harley (above).

23. As against the cases referred to in paragraphs 20 and 21 above is the case of ***Medcalf v Mardell and Others*** [2001] Lloyds Law Reports 146 upon which the applicants placed substantial reliance. In fairness, it should be said that it was one paragraph of the judgment of Peter Gibson LJ to which reference was made. At paragraph 65, he said *We add a footnote. We are uncomfortably aware that this ancillary litigation has occupied the court for a full day at the final stage, that the material put before us has been voluminous and that this judgment is a lengthy one. All this might seem a far cry from the summary procedure envisaged in Ridehalgh v Horsefield. But it cannot be right that a legal representative can escape the consequences of the wasted costs jurisdiction by the mere fact that the litigation in which his conduct is challenged is complex. As we have pointed out, the guidance given in* ***Ridehalgh v Horsefield*** *is that the over-riding requirement is for the procedure to be as simple and summary as fairness permits. We are extremely grateful to counsel appearing before us for assisting us to that end.*

    It has to be noted that the decision in the case went against the barristers who had signed draft amended grounds of appeal but in their submissions before the Court of Appeal had not sought to justify many of those new grounds. In reality, it was possible in those circumstances for the court, sitting on the wasted costs application, to determine those matters on a summary basis, and this notwithstanding the complexity of the underlying action. Peter Gibson LJ's observation in paragraph 65 of his judgment must be read in that context. So read, they do not, in my judgment, qualify or relax the already established limits of the jurisdiction now in issue.

Conclusion

24. In the present case, there is the added practical difficulty represented by the fact that no court has yet pronounced any decision in relation to the underlying facts of the case between B and the applicants. This feature may represent no more than a factual distinction between the present and the earlier cases. On the other hand it may point towards the conclusion that in a case in which there has been no adjudication of the primary facts the court should be even more resistant to the notion that it should enquire into a state of affairs in which it has no solid foundation from which the process of analysis essential to the wasted costs procedure can proceed. For the reasons which follow, I incline to this view.

25. It is axiomatic that a solicitor is bound by the instructions of his client. He is not obliged to act as a filter between the instructions provided by the client and the opposing party. Quite simply, a solicitor owes no duty to the opposing party although he does, of course, owe such a duty to the court. These propositions were clearly recognised, if not decided, in the case of ***Orchard v Southeastern Electricity Board*** [1987] QB 565 in which the holding in the headnote reads *Although solicitors owed a duty to the court to conduct litigation with due propriety, it was doubtful whether they owed any such duty to the opposing party; that the jurisdiction to order a solicitor to pay costs of the opposing party under R.S.C., Ord, 62 r.8 could be exercised only where it was clear that he was guilty of a serious dereliction of duty or serious misconduct, and should be exercised with care and discretion; that, although a solicitor should not assist a litigant where prosecution*

of a claim amounted to an abuse of process it was not his duty to attempt to assess the result of a conflict of evidence or to impose a pretrial screen on a litigant's claim or defence; that such a charge of misconduct against a solicitor ought not to depend on inference without direct evidence and that, in the circumstances, since the plaintiff's claim had been supported by independent witnesses and expert evidence it was impossible to assail the judge's conclusion that legal aid had been properly granted and that the solicitors and counsel had acted properly (post pp. 571D-F, 572C-G, 577D-G, 579G - 580C, 581C-D).

At page 229 in ***Ridehalgh*** Sir Thomas Bingham cited from page 572 in Orchard with approval. The passage reads *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 counsel to impose a pre-trial screen through 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 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.*

I am content to assume, but without deciding, that the allegations which the applicants seek to make against B's former solicitor are true although this is, of course far from being established as the probable result, it is strikingly obvious that there is a formidable challenge to the accuracy, as well as the significance of those allegations if proved, which make it wholly inappropriate to resolve those issues in proceedings which must be as summary as the circumstances will allow. The fact that impropriety and fraud are inextricably bound up with those allegations make the case against making an order to show cause one which would be both wrong in principle and lead the court to a wrong exercise of discretion, even at the first stage; see PD 53.5 and 53.6, above.

26. At one stage, it had occurred to me that it would not be expedient to deliver this judgment before their Lordships' House had pronounced judgment in **Mardell** (above) because on one reading of paragraph 65, Peter Gibson LJ might be seen to have departed from the reasons for decision in **Ridehalgh Manzanilla and Hartley** (above). But on a full reading of his decision, I respectfully do not think that it does. He was able to reach his decision in that litigation in the way and for the reasons he expressed because of the exceptional features which enabled both him and Schieman LJ summarily to reach conclusions about the barristers conduct without having to perform a complex investigation of facts which had not been determined.

27. For the reasons given, I am satisfied that it would be quite wrong if the court were to allow this application to proceed any further whether to the first or second stage envisaged in PD 53.6. In reaching this conclusion, I am not insensible to the apparent paradox (conundrum as it was expressed in submission) that in a complex case in which there are complex areas of disputed fact and possible fraud which would call for decision, the legal representative may appear to be in a more comfortable position than is the case in a simpler, and almost certainly less expensive, situation where, as here the costs of deciding the issue will be reflected in some hundreds of thousands of pounds if a fair and just result is to be had, if it can, for both parties. In case that should be thought to be an anomalous result, I would say that it is in the `nature of the beast' as has been recognised in the earlier cases.

28. Let it not be thought that this result signifies approval or disapproval of anything which the solicitor has done or omitted to do in the conduct of the original litigation. There are matters of grave concern, but which may be capable of yielding to innocent explanations, which would be worthy of preliminary investigation by the appropriate professional body. These matters relate to the circumstances in which the *`without prejudice'* offer was handled, as well as those in which the claim for substantial professional losses came to be included in the claim, their particularisation and disclosure in relation thereto. But these are matters which it may be for others to decide.

Bernard Livesey QC (instructed by Reynolds,Porter&Chamberlain) for the Claimant
Guy Mansfield QC & William Edis (instructed by Barlow,Lyde&Gilbert) for the Defendant