**IN THE GRAND COURT OF THE CAYMAN ISLANDS**
**CIVIL DIVISION**

**CAUSE NO. G364 OF 2010**


**BETWEEN:**

**JOHN DOUGLAS HUE**

**Plaintiff**

**AND:**

**PAMELLA JOY LAWRENCE also known as PAMELA J. HUE**

**DAHLIA NICOLA JONES**

**IDATOM LTD.**

**Defendants**

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| **Appearances:** | **Mr. Paul Keeble for the Plaintiff** |
| | **Mr. Clyde H. Allen for the First and Second Defendants** |
| **Before:** | **Hon. Justice Richard Williams** |
| **Heard:** | **11th March 2013** |
| **Draft Judgment circulated:** | **14th March 2013** |
| **Date of Judgment:** | **18th March 2013** |


**JUDGMENT**

1. In a Summons filed on 17th April 2012 the Plaintiff seeks a wasted costs order against Mr. Clyde Allen, attorney for the First and Second Defendants. Mr. Allen is yet to formally come off the record for the Third Defendant. Mr. Allen indicated during the hearing that he now intended to make such an application in a timely manner.

2. At the hearing, I found that the application for the wasted costs order should be heard after the trial of the substantive issues. Ordinarily such an application should not be made until after the trial but, as the application in this matter had been already filed, I adjourned the Summons and gave liberty to restore the same after the trial. I reserved costs. Having regard to the issues raised I indicated that I would provide a reserved written judgment, which I now do.

3. The grounds of complaint against Mr. Allen are set out in the Plaintiff's four page Summons and in the third affidavit of Ms. Kim McLaughlin, sworn on 18th April 2012. The application is based on a claim that:

   (i) Mr. Allen has *"consistently and persistently failed to comply with the listing form process mandated by Practice Direction No. 1/00 and has failed to cooperate with the Listing Officer and the Plaintiff's attorneys in providing his dates to avoid to permit the*


*scheduling of hearing dates in a timely and proper fashion delaying the action and causing the Plaintiff to incur additional and wasted costs unnecessarily".*

(ii) Mr. Allen has *"engaged in an apparently deliberate practice of scheduling conflicting hearings such that the hearing of the Plaintiff's applications has been delayed or held down, wasting the professional time of the Plaintiff's attorneys."*

(iii) Mr. Allen has "*engaged in a deliberate practice of refusing to approve or respond to draft orders prepared by the Plaintiff's attorneys causing the Plaintiff's attorneys to write unnecessary letters and emails on each occasion seeking his approval, and compelling the court to approve the order, causing wasted professional time."*

(iv) Mr. Allen advanced allegations before this court "*which the Plaintiff submits he knew to be false and unsubstantiated with intent to mislead the court and to delay or stall the substantive hearing of the Plaintiff's matters incurring delay and unnecessary expense and wasted costs to the Plaintiff."*

(v) Mr. Allen caused the hearing of 1st September 2011 to be wasted in its entirety due to his conduct at that hearing.

I do not intend to herein explore the merits of the application for a wasted


costs order.

4. Applications for wasted costs orders are ordinarily best left to the end of the trial. The leading authority and guide in relation to wasted costs is ***Ridehalgh v Horsefield*** [1994] Ch 205, [1994]3 All ER 848, CA, where in appeals backed by the Bar Council, the Law Society and the Solicitors Indemnity Fund, the Court of Appeal set aside wasted costs orders against two solicitors and a barrister, and in the lead case declined to make an order in the case referred to them by a different division of the Court of Appeal. In delivering the judgment of the Court the Master of the Rolls said at page 238B that:

> *"In Filmlab Systems International Ltd. V Pennington, The Times, 9 July 1993, Aldous J. expressed the opinion that wasted costs orders should not, save in exceptional circumstances, be sought until after the trial. He highlighted a number of dangers if applications were made at an interlocutory stage, among them being the risk that a party's advisers might feel they could no longer act, so that party would in effect be deprived of the advisers of his choice. It is impossible to lay down rules of universal application, and sometimes an interlocutory battle resolves the real dispute between the parties. But speaking generally we agree that in the ordinary way applications for wasted costs are best left until after the end of the trial."*

[1] See The Supreme Court Practice 1999 – note 62/11/12


In ***Filmlab Systems International Ltd v Pennington*** [1995] 1 WLR 673, there was a claim that the defendant's counsel had acted unreasonably as well as negligently. The court was tasked with deciding whether costs were wasted as a result of any unreasonable or negligent act of counsel and, if so, should those costs or any part be paid by counsel. In that case the court recognised the difficulty of providing the necessary evidence to establish the serious charge of acting unreasonably or negligently. The court also recognised that it was difficult to rely upon inference before the trial had taken place, stating that what may seem to be a misconceived application, could, after trial, be seen as an application which is worth trying as it would have saved considerable time and money if it had succeeded. Having regard to that, the court felt that wasted costs orders should not be sought until after the trial, as it was only at that stage that the conduct of a legal representative could be assessed in a correct context. Mr. Keeble submits that is not the situation here and therefore the allegations can be viewed as being discrete and need not be put in context at the end of the trial. There is merit in the submission that the type of allegations here are different to those as in ***Filmlab***.

6. In ***Filmlab*** the court recognised that, due to the claim against counsel, it was likely that counsel would not be able to continue to represent the defendants, thus depriving them of counsel of their choice by the plaintiff's application. This was viewed as a significant reason why costs should not be sought until after trial. Mr. Allen has told this court that, if wasted costs orders were made against him in the

circumstances of this case, he fears that he would have to come off the record for the first and second defendants. I accept that this may well be the case.

7. Aldous J at page 678D in ***Filmlab*** referred to the following statement of Sir John Donaldson M.R. in ***Orchard v South Eastern Electricity Board*** [1987] Q.B. 565:

> *"There is one final matter which cannot be ignored. Whilst there can be no objection to an application under Ord. 62, r. 8 at the conclusion of a hearing, given appropriate facts, it is quite another matter where such an application is threatened during or prior to the hearing. Objectivity is a vital requirement of professional advisers. Hence, for example, the rejection of contingency fees and the impropriety of a solicitor acting for co-defendants. Threats to apply on the basis that the proceedings must fail not only make the solicitor something in the nature of a co-defendant, but they may well, and rightly, making all the more determined not to abandon his client, thereby losing a measure of objectivity."*

8. Mr. Keeble submits that the wasted costs application should be heard now because, if successful, the court would thereby be effectively case managing the case by sending a clear message to Mr. Allen that his mode of conducting the case is not acceptable and must change. In a case in which the Plaintiff has filed a Notice to Commit Mr. Allen, which the Plaintiff apparently wishes to also have heard before

trial, the court has concerns that the determination of the two applications appear to be gaining greater importance in the Plaintiff's mind than concluding the substantive matter. With that concern in mind, I have regard to the note of caution given by Aldous J in **Filmlab** at 678G when he stated:

> *"The line between what amounts to an act which prejudices, or is an attempt to prejudice, the course of justice and what amounts to the exercise of a route to obtain compensation for wasted costs, it can be difficult to draw. Although the right to seek and obtain wasted costs orders is not limited under the statute, I envisage that it would rarely be wise or right to seek to obtain such an order until after trial. Further I do not envisage that the right to seek and obtain such an order could or should be affected by waiting until after the trial before making a claim; although on rare occasions it might be desirable to inform the legal representative that such an order might be sought."*



9. In ***Phillips and others v Symes and others*** (No.2 ) [2005] 1 WLR 2043 at paragraph 68 Peter Smith J agreed with Aldous J's approach stating that:

> *"In my judgment, the sensible way forward was that provided by Aldous J in Filmlab Systems International Ltd v Pennington [1995] 1 WLR 673, 678H namely that the consideration should take place afterwards "although on rare occasions it might be*

*desirable to inform the legal representative that such an order might be sought."*

10. In ***Melchior v Vettivel*** [2002] C.P. Rep. 24, Patten J was dealing with the issue of whether the court had jurisdiction to apply for a wasted costs order after the order had been entered for payment of costs. During his deliberations Patten J dealt with and confirmed what the courts regard as being the appropriate time for the making of an application for wasted costs orders. Patten J reiterated the extract in ***Ridelhagh***[2] in which the Court of Appeal considered Aldous J's views as to timing of an application in ***Filmlab.*** Patten J went on to observe:

*"Applications for wasted costs orders need not be made, and indeed should not be made normally, during the course of the trial, but can be made at any stage in the proceedings up to and including the detailed assessment of costs.... In my judgment, the argument that Parliament intended the court to deal with all possible aspects of costs, including wasted costs, as a single exercise, with the effect that an application for a wasted costs order cannot be made at any time after the order determining the incidence of costs between the parties has been passed and entered, attributes to Parliament an intention which is, frankly, difficult to make sense of.... I can see no sensible reason, however,*



[2] See paragraph 4 herein.

*consistent with the court's view that wasted costs applications should not take place during the course of the proceedings themselves, why Parliament should have intended in the form of section 51 to introduce what, Mr. Power's argument, would be a positive prohibition on the making of such applications at any time after the original costs orders have been passed and entered."*

11. The consistent approach of the courts in England and Wales leads to a conclusion that they view it as being undesirable for an application for wasted costs against a party's representatives to be considered while the underlying proceedings are still pending. The courts have viewed that there could be a departure from such a course only in exceptional or rare circumstances. For example, in ***B v B (Wasted Costs: Abuse of Process)*** [2001] 1 F.L.R. 843, a case mentioned by this Court to the parties, it was held that a wasted costs application could be heard before the main trial in family proceedings, especially where the respondents had ceased to act for the clients by that stage. The change of legal representative was viewed as amounting to an exceptional circumstance.

12. I am also aware that Smith LJ in ***Gill v Humanware Europe plc*** [2010] ICR 1343 at 1351G considered that the procedure to be adopted in a wasted costs application should depend upon the circumstances. Smith LJ said that sometimes such

applications before the Employment Appeal Tribunal "*will be made at the end of a substantive hearing; sometimes not.*"

13. Mr. Keeble referred the Court to Smellie CJ's ruling in ***Al-Ibraheem v Bank of Butterfield International (Cayman) Limited*** [2000 CILR 277] in which the court was dealing with an application to set aside a notice of inquiry into wasted costs. The court ordered an inquiry off its own initiative into the allegations that substantial costs had been unreasonably and improperly incurred at a cost hearing. This was not a case dealing with the issue as to the appropriateness of a party making an application for costs before completion of the trial. Mr. Keeble submitted that this case was authority for the proposition that the Grand Court should deal with such applications at an early stage and not feel fettered by the general English principle that such applications should be left until after trial.


14. The ***Al-Ibraheem*** case came about when wasted costs applications were viewed as being "*a relative novelty*"[3] in the Cayman Islands. In this important decision, the Chief Justice held that the court had power to make a wasted costs order against an attorney who had acted in breach of his duty to promote the course of justice within his field of competence. The Chief Justice indicated that the discretion to order a wasted costs inquiry should be exercised sparingly and that only the trial judge would be qualified to initiate such proceedings of the court's own motion. It

was held that, although it was in the public interest to discourage a flood of wasted cost proceedings, the guidelines in England and Wales, where such litigation was more common, did not apply as procedural rules to the Cayman Islands. The Chief Justice felt that there was not a similar concern as to opening the floodgates for wasted costs application in the Cayman Islands. The Chief Justice highlighted that the Grand Court has a unique disciplinary role in relation to attorneys which does not exist in England and Wales. The Chief Justice rightly indicated that:

> *"In my view, the discretionary nature of the wasted cost jurisdiction calls for more urgent application where the court has the sort of immediate responsibility which it has in the Cayman Islands for discipline and for maintaining proper professional standards."*

15. Having carefully considered the Chief Justice's guidance, and the submissions made thereon by Mr. Keeble, I am of the view that the case does not support a proposition that the courts in the Cayman Islands should depart from the established and sensible practice that wasted costs application should ordinarily be made at the end of a trial unless there were exceptional circumstances.

16. In the matter before me, I am not satisfied that there are exceptional circumstances. I find this although acknowledging that the Plaintiff's case is that Mr. Allen has behaved in so unreasonable and irresponsible a manner that a decision on his

conduct in the form of a wasted costs order was necessary in order to enable the case to proceed justly. I see a degree of force in such a submission, especially as the court is responsible for ensuring effective case management pursuant to the overriding objective.

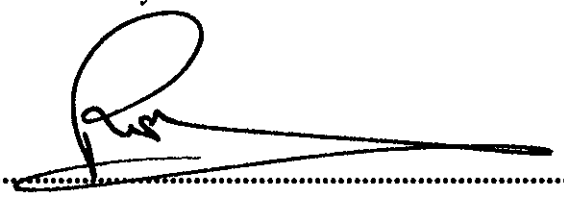
17. However, I am conscious that the making of a wasted costs order may mean that Mr. Allen could no longer represent his client. That would not be in the interests of justice in this case. Also, it is clear that the hearing of the wasted costs application would not in any way resolve the real dispute between the parties.

18. I am also conscious of the recently filed Notice to Commit Mr. Allen, resulting from an alleged non- procedural breach of a court order by the First Defendant. The timing of the Notice to Commit, which Mr. Keeble sought to bring on for mention on the same day as this application, causes me concern that, at this stage of the proceedings, the Plaintiff seeks the Court to take up a disproportionate time considering Mr. Allen's role rather than concentrating on the substantive issues. I am unable to determine at this stage whether the applications relating to Mr Allen are being pursued in tandem at this time for tactical reasons by the Plaintiff. That said, I fully accept that litigants should not be financially prejudiced by the unjustifiable conduct of the litigation by their opponent's attorney. I fully accept that the Plaintiff is entitled to have his allegations carefully considered if he has

suffered loss by the Defendants' attorney's actions. Those considerations, if the application is pursued, should be at a hearing following the conclusion of the trial.

19. I reserve the costs of today. I will be in a better position to determine in an informed manner what orders in relation to costs, if and when the Summons for wasted costs orders is heard.

Dated this 18th day of March 2013.

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**The Honourable Mr. Justice Richard Williams**
**JUDGE OF THE GRAND COURT**