8-8-2000

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CICA: 459 OF 1996

GRAND COURT CAYMAN ISLANDS

BETWEEN: ISABELLE AL – IBRAHEEM

AND: 1. BANK OF BUTTERFIELD INTL (CI) LTD.

2. TONY DJJEDAH
(by his guardian ad litem HOWARD REINER)

3. STEVEN BARRIE
(representing the heirs of WOLFGANG ERBSTOESSER)

AUG 2 3 2000
LEGAL DEPARTMENT
CAYMAN ISLANDS

Appearances:

Andrew Simmonds Q.C. and Anthony Arthur instructed by Andrew Jones of Maples and Calder for Maples and Calder (respondents).
Lawrence Cohen Q.C. instructed by William Helfretch of Boxalls for the plaintiff (appearing as amici curiae)
Mr. Kenneth Farrow of Quin & Hampson for the first defendant bank (holding a watching brief).

RULING

On 10th April 2000, this Court directed an enquiry as to whether Maples & Calder ("M&C") should pay the whole or some of the costs of this action on the grounds that they have been guilty of misconduct within the meaning of Myers v Elman [H.L.(E)] 1940 A.C. 282 resulting in wasted costs in the action.

A notice setting out the particulars of misconduct alleged was issued by the Court on the 27th April and served upon M&C (hereinafter "the Notice").

Reasons for the decision taken by the Court of its own motion to issue the Notice were given in writing on the 10th April.

In essence the misconduct alleged is the failure on the part of M&C to inform the Court of crucially important information within their knowledge gained as the legal advisors to the Trustee. This information related to the incapacity and incompetence of the settlor of the Trust. The concern is whether its timely disclosure would have saved significant costs expended in the action.

Complaints by the plaintiff that the settlor, her father, had become incapacitated and incompetent to make decisions about the Trust and to give valid and effective receipt for capital paid out from the Trust ostensibly for his benefit; were the complaints that grounded the plaintiff's Originating Summons by which the action was commenced in September 1996. A particular concern raised in the Originating Summons was whether at the time when he purportedly effected the second amendment to the Trust Deed in July 1996, by which contingent beneficially interests were changed, the settlor had the capacity to do so.

A further ground upon which the Notice directed the enquiry arises from action taken by M & C, or by the Trustees upon M & C's advice, when it was discovered that the second amendment had not been notarised. Although all recognised that the second amendment was invalid without that notarisation required by the Deed of Settlement, M & C advised or took steps to obtain notarisation or to facilitate notarisation without referring the

matter to the Court which had by then time been seized of this action for some two and a half years.

M&C deny that any of the actions, omissions or advice questioned in the Notice can be described as professional misconduct.

They naturally view the allegations with utmost concern as they regard their professional reputation as being at risk. Mr Simmonds affirmed to me that M&C will vigorously defend their conduct at any subsequent hearing.

This is the ruling following the inter partes hearing – taken at the request of M&C - on whether the Notice should have been issued in the first place. I accepted that such an inter partes hearing was appropriate as its purpose was to enable the Court to reconsider whether the enquiry should proceed at all. The hearing was taken over the 17th - 21st July.

Having heard the very full and able arguments on both sides and having given the matter careful consideration, I am of the view that the enquiry must proceed.

M&C's assert is that the Notice is wrong in law and fundamentally misconceived.

Mr. Simmonds in his arguments relied upon the leading English cases on the matter of wasted costs orders decided since Myers v Elman - (cases which were not brought to my attention or considered by me when the Notice was issued) - and which establish that proceedings against lawyers in the exercise of the Court's disciplinary jurisdiction over them as its officers, by which the Court may require them to pay the wasted costs of an action resulting from their misconduct, are proceedings which are only to be instituted in plain and obvious cases where there are no serious issues in dispute and which are amenable to being disposed of in a summary manner.

Mr. Simmonds sought to rely upon the recent cases as authority for the proposition that the limitations described above upon the Court's jurisdiction would apply even in the most egregious circumstances of alleged misconduct once there were serious issues to be enquired into other than summarily. He argued that on any view of the allegations against M&C, the case will not be one which could be described as plain, obvious and summary in procedure.

Mr. Simmonds sought, by reference to the factual assertions raised by the Notice, to show that there were indeed serious issues to be tried and which could not be disposed of within the confines of the procedure laid down by the Notice.

These are issues of fact which fall under three main headings. They were discussed at the inter partes stage but appropriately so only for the purpose of deciding whether they would inevitably give rise to the form of protracted litigation which the recent cases are said to prohibit.

When I come to consider the recent cases, I will explain why I do not accept that the policy considerations which most directly influenced the English Courts in deciding those cases have the same significance in the Cayman Islands. This is notwithstanding that much of the advice given in them is salutary and relevant here.

I will also explain why, in any event, I do not consider that the procedure to be envisaged in this case would necessarily fall foul of what I discern to be the guidance given in the most authoritative of them: Ridehalgh v Horsefeld [1994] Ch. 205

Mr. Simmonds also cited the recent English cases as laying down a clear requirement for the strict proof of a causal link between the impugned conduct of the lawyer and the wasted costs in the action. He submitted that no such causal link can be shown in this

case or, at the very least, if such a link is to be shown, that could only be done by means of a detailed and protracted examination of the proceedings in the action at every stage and by reference to the manner in which those proceedings could have been avoided or shortened had M & C fulfilled the duty of disclosure alleged.

It followed, he submitted, that the enquiry into the casual link would necessarily be very involved and therefore itself run counter to the prohibitive principles laid down in the recent cases.

I take a different view of the legal requirements of causation, one which I consider to be in keeping with the approach which was taken in Myers v Elman itself. This was the view advanced by Mr. Cohen and which will be more fully examined below.

It will be apparent from the issues outlined above that there are two points of principle arising upon this application and which I believe are of first impression in this jurisdiction:

(i) to what extent are the recent English authorities which now govern the procedures to be applied upon a Myers v Elman type of enquiry applicable in the Cayman Islands.

(ii) Whether the requirement laid down in the English cases for strict proof of a causal link between the conduct complained of and the wasted costs applies in the Cayman Islands.

Before addressing these legal issues I will now briefly consider the factual issues with a view to addressing just how complex an enquiry they might involve and, equally

important at this stage, so as to indicate as clearly as I might my own impression of the ambit of the allegations of misconduct.

I emphasise that the views expressed are to be taken as indicating no decided position upon the merits.

While the Notice sets out extensively what I consider to be the salient allegations, a benefit of the inter partes hearing has been the crystallisation of the issues. I consider that M&C are entitled to approach their response with the narrowest possible focus to be afforded. A good deal of time and expense might be saved by that means.

The inter partes hearing served to identify that there are three main aspects to the factual allegations:

(i) The letter of 12th September 1996 from M&C on behalf of the Trustee in response to Boxall's of 9th September 1996 by which Boxall's notified the Trustee of the commencement of this action and of the matters raised by the plaintiff in the Originating Summons. In the letter of 12th September 1996 M&C stated that "the Trustee has, as you know, been aware of issues which might arise from Mr. Djjedah's ill health and has monitored the position very carefully. It has seen no evidence of incapacity".

By his ninth affidavit filed by Mr. Robert Forster (a trust manager of the Trustee) in the proceedings, it is accepted on behalf of the Trustee that the statement that the Trustee "has seen no evidence of incapacity" is not correct. Mr. Forster speaking of his own understanding as the officer of the Trustee who succeeded to primary responsibility for this trust in November 1994; states in his affidavit that "I had seen, in the sense of read reports of evidence of both capacity and

incapacity. I had also personally witnessed what might be regarded as evidence of incapacity. However, I now have no personal recollection of appreciating at the time I first read the letter (of 12th September) which was probably on 13th September 1996, that the statement was erroneous."

Mr. Forster does go on however to explain in his affidavit that in a letter of 19 September 1996 to M&C he did bring the error to their attention by enclosing copies of the letters dated 17 March 1994 and 28th January 1993 respectively from a Dr. Largen and the American Hospital in Paris which expressed opinions of the settlor's incapacity at those times, some 2 and 2 1/2 years respectively before the second amendment and before the action was instituted.

Another letter of 7th October 1996 from Mr. Forster to M&C made still further reference to the error contained in M&C letter of 12th September 1996.

No explanation for the error has been proffered directly to the Court by M&C. In light of the ground for their challenge to the Notice at the inter partes hearing, that may be understandable at this stage.

There was, however, some explanation proffered during the arguments by Mr. Simmonds. This was to the effect that Mr. Timms of M&C who signed the letter will say that the assertion that the trustee had seen "no evidence of incapacity" was not intended to relate to the general state of the trustee's knowledge of the settlor's mental state throughout its administration of the Trust but instead only to the trustee's knowledge of his mental state as at the time of the execution of the second amendment; ie: on 9th of July 1996. He will say that the letter of 12th of September 1996 when taken in its factual context - as a reply to Boxall's of 9th of

September 1996 giving notice of the plaintiff's intention to bring the action- should be seen as intended in that way. Boxall's letter of 9th of September made specific reference to the plaintiff's assertion that her father, the settlor, had lacked the capacity to validly exercise the power of amendment in July 1996 as the result of the decline in his mental faculties.

The context to be considered also includes the further assertions of the plaintiff also stated in Boxall's letter: "Moreover, we are further instructed that the Second Amendment was the product of undue influence over the settlor by his wife, Mrs. Luz Djjedah".

Although the claim of undue influence was not advanced in the action, it was a live issue at the time.

Those will be the main circumstances or the factual matrix in which M&C assert that their letter of 12th of September 1996 was written. The issue as I understand it from Mr. Simmonds' arguments will be one of construction as to what Mr. Timms intended by the statement which all have now come to regard as an incorrect description of the state of the Trustee's general knowledge of the settor's mental state.

It is also to be argued on behalf of M and C that their letter of the 12th of September 1996 is in any event to be regarded as irrelevant to the present inquiry into wasted costs because it was addressed to the plaintiff's attorneys - and the plaintiff's attorneys could not have been misled because they had knowledge of at least some of the medical opinions then available to the trustee. It therefore cannot be said that the letter misdirected the proceedings of the action.

I can properly state now that I would regard that as too narrow a view to be taken of this matter.

The letter of 12th September was in fact brought to the attention of the Court as an exhibit to Mr. Forster's second affidavit.

M&C as the legal advisors to the trustee had their own duty to this Court not to mislead the Court or parties enjoined in the action before the Court. I regard it as a matter to be enquired into whether in fact Boxall's were mislead and, if so, whether the timely correction of the erroneous statement would have altered in a beneficially way, the course of the proceedings.

It will be a matter for inquiry whether the timely correction would not have resulted in the Court itself being made aware of what the trustee knew. And it is not to be forgotten that the duty is also owed to the other parties through the Court. In In re Jones (1870) L.R. 6 Ch. 497 (cited with approval by Viscount Maugham at pp 289-290 in Myers v Elman) it was stated by Lord Hatherley LC: "I think it is the duty of the Court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned".

Viscount Maughan added (ibid): "It is hardly necessary to point out that Lord Hatherley's phrase implying the solicitor's duty to parties for whom he is not acting is founded in his duty to the Court".

I do not regard the issue as necessarily involving the showing of a deliberate intent on Mr. Timms' part to mislead the Court. The fact of the matter is that the misleading statement was made and never corrected. It may have actually misled

and may have resulted in a certain course of conduct taken by the Court and the parties as a result of which costs may have been wasted.

Moreover, it is to be considered in the light of Mr. Timms' acknowledged understanding of the duty which his client the Trustee owed to the Court as stated by him, for example, during the hearing of 28 February 1997:

> "As to the question of the settlor's capacity - the trustee's position is that that is an issue upon which the plaintiff and Mr. Djjedah must carefully place their evidence before the Court. *The Trustee's duty is to place the facts as it knows it before the Court* but it cannot assist in the determination whether there has been a conspiracy to defraud and it does not seek to displace the Court's view and ultimately it must be a matter to be determined with the Court deciding on the evidence of the other parties" (emphasis supplied).

It may be that that statement gives some indication of the thinking that led Mr. Timms to the stance he took in the proceedings: While recognising the Trustee's clear and incontrovertible duty to put what it knew before the Court, the view is nonetheless there being expressed that the matter of the settlor's competence was to be determined with the Court deciding on the evidence to be put before it by the other parties.

I am concerned to have M&C's explanation about the matter. I am concerned whether that emphasis on the other parties' role unreasonably and improperly led the trustee and M&C away from fulfilling their acknowledged duty of full and frank disclosure to the Court.

(ii) Among the exhibits to Mr. Forster's 9th affidavit is a draft affidavit which had been prepared by M&C as long ago as 9th October 1996 on behalf of the Trustee intended to be sworn by Mr. Forster and filed in these proceedings for the benefit of the Court.

This was never done despite the following passage from paragraph 3 of the draft affidavit which further illustrates the Trustee's, - and implicitly M & C's, understanding of their proper duty of disclosure to the Court: " - - the Trustee will render such assistance as it can to the Court in determining the issue of Mr. Djjedah's mental competence at relevant times or any other relevant issue and provide such information as the Court considers useful".

The draft affidavit then goes on in paragraph 4 and subsequent paragraphs to give the Trustee's views on the state of such evidence as tended to suggest that the settlor had become incompetent or had been competent at the time of the crucial and impugned second amendment.

An important and telling extract is taken from paragraph 4 of the draft affidavit. It was written at a time when the settlor, who recently died aged 88 would have been 84 years old::

> "The Trustee has been concerned with and has carefully monitored Mr. Djjedah's health for a number of years. Mr. Djjedah is obviously frail and needs continuing care and medical attention. He has been confined to a wheelchair. The most recent diagnosis is that he suffers from Grand Mal

Epilepsy but also has periodic ailments such as intestinal problems which require urgent attention. It appears from reports to the Trustee and its own observations that his state of physical and mental health is variable. On occasions it has deteriorated so that he has episodes during which his cognitive functions have been so impaired that it [(the Trustee)] could not rely on his mental capacity. It was the Trustee's view, however, on the material before it, that he was competent at the time of the second amendment to the Corduroy Trust".

I gather from the arguments before me that all are now agreed that the information in this draft affidavit should have been revealed to the Court at the earliest opportunity.

M&C will be saying that as is apparent from the fact of the draft having been prepared, it was their intention that the information in it be brought to the attention of the Court.

They will also be saying, however, that matters intervened which affected the course of the proceedings such that their obligation to disclose was either hindered or altered.

They will say that for some months their attempts to obtain the settlor's consent to the disclosure of the medical information which they had which was confidential and which was to be disclosed in the draft affidavit, met with no success.

They will also be saying that the joinder of the settlor in the action in his own right and the fact that attorneys - Hunter and Hunter - claiming to act for him, had indicated in November 1996 that he wished to give effect to the second amendment were clear indicia which everyone, including the plaintiff and the Court, accepted as requiring that the issue of the validity of the second amendment was going to be at least arguable.

Whether these and the other factors cited by M&C were such as to justify or excuse the failure to disclose to the Court all the relevant information known to the Trustee will be very much the focus of the wasted costs proceedings based upon the allegations of misconduct.

The view I take is that these allegations have been prima facie made out.

Of course, a failure due to slight negligence would not amount to misconduct for these purposes. Nor, it must follow, would a failure due to bona fide advice taken or given as to what the trustee's proper duties of disclosure to the Court and to other parties through the Court was, at any given important point in time.

As matters stand before me now however, what we see is a protracted failure over the course of some two and a half years - until M&C were no longer allowed to act for the Trustee - to disclose information which, by any measure, was relevant to the most important issue in the proceedings: the capacity or incapacity of the settlor at times before, leading up to and at the time of the second amendment.

On behalf of M&C Mr. Simmonds also submitted that the enquiry should not proceed because whatever the nature of their failure, no wasted costs can be

shown to have resulted therefrom. That the incapacity issue was always going to be an arguable issue.

As this is the causation issue to be more fully considered below, all I think I need note at this stage in this regard is that that view of the proceedings presumes the view the Court would have taken at the earliest opportunity, not only as to whether the issue of incapacity should have been argued, but also as to how, when, by whom and at whose expenses. What concerns the Court in this context is the fact that these protracted proceedings have been conducted entirely at the expense of the Trust.

If the foregoing is an accurate description of M&C's stance, then it should also, in my view, serve to describe the nature of the allegation of misconduct which they should be prepared to answer - ie: the interference with the exercise of the discretion of the Court.

(iii) When discovery was given by the Trustee upon the Order of the Court of December 1998, it was realised that the second amendment had not been notarised as required by the Deed of Settlement and was therefore not validly executed.

All who became aware of this agreed that this meant that the second amendment was not valid.

M&C were included.

The question now is whether the conduct of M&C which followed upon the realisation that the second amendment was invalid was misconduct and if so whether it resulted in wasted costs of the subsequent proceedings.

The notarisation of the second amendment was attempted with the intention, on M&C's advice, to ensure that beneficial interests purportedly created by it "should not be defeated".

This occurred without reference to the Court notwithstanding the fact that in correspondence to Boxall's dated 23 February 1999, M&C advised that the absence of notarisation "raises important matters which the Trustee will investigate and consider. It (the Trustee) may then require directions from the Court."

This Court after arguments which lasted a number of days determined (per Murphy J.) that the attempted notarisation was ineffective and that the second amendment remained invalid.

Considerable costs were incurred at the expense of the trust in the proceedings leading to that determination.

I can say now that it is simply not good enough, as Mr. Simmonds has argued, that M&C should be heard to say - as an end to the matter - that at worse their conduct in taking steps to obtain or to assist in obtaining notarisation was ill-advised. That might or might not be an acceptable response coming from the Trustee who also sought to facilitate the attempted notarisation on M&C's advice.

It will be a matter for the Court's determination whether the costs of the proceedings before Murphy J. could have been avoided by the invalidity being immediately brought to the attention of the Court. There can be no tenable argument that this was not the correct thing to do. The very matter of the validity of the second amendment was already before the Court and the entire issue of what beneficial entitlements may have been affected by it was the single most important concern of the Court.

M&C's conduct in advising and participating in a course of action intended for the preferment, by way of preservation, of the interests of those taking under the second amendment in the circumstances of this case, is a matter of serious concern to this Court.

As advisors to the Trustee and as officers of the Court, they were duty bound to bring the absence of the notarisation and its effect to the attention of the Court. They have admitted as much. I mean to enquire into why and with what intention they failed in that duty.

I do not regard it as a forgone conclusion that proceedings, leading to the determination by the Court of the effect of the lack of notarisation, were inevitable. This is what Mr. Simmonds argued on the basis that there had been obtained on behalf of the third defendant an opinion of leading Counsel to the effect that valid notarisation could have been obtained ex post facto. It will be a matter for consideration by the Court after enquiry whether, had the ex post facto validation not been attempted, the

inevitable and proper acceptance of invalidity would have happened and so avoiding altogether the trial of the issue.

If upon further enquiry it turns out that those proceedings were avoidable, then it would follow that the costs would have been avoided had M&C done what it was their duty to do and bring the matter to the attention of the Court immediately.

The nature of the proceedings on the Court's own motion

There was a procedural point raised during the arguments on the law which can be dealt with conveniently here. It relates to the appropriateness of the Court ordering this enquiry of its own motion.

The concern raised by Mr. Simmonds in this regard was that the plaintiff whom he described – inaccurately in my view - as alone standing to benefit from the enquiry as a consequence of the Court's motion, would be unfairly advantaged by M&C having to state their defence before first being able, through the Court, to require the plaintiff to file her evidence. That M&C should instead be entitled first to see how the claim is made out, including as to the causal link between their alleged misconduct and the wasted costs at each stage of the proceedings.

While I am concerned to ensure that M&C clearly understand the nature of the case they must meet; the scope of the enquiry and the manner in which the wasted costs resulted; this is not to be seen as a case by way of claim by the plaintiff to which they are to respond.

Although compensatory in objective, these are proceedings instituted by the Court in the exercise of its inherent jurisdiction over attorneys who are its officers and which has the primary objective of ensuring that they recognise, respect and fulfill their important duties owed to the Court. In this case, those duties include the duty not to mislead the Court and not to be party to any action or inaction which is likely to result in the Court being misled in the conduct of proceedings joined before it and in which they appear for parties – in this case the Trustee - owing the duty of disclosure. This emphasises, most importantly, the Court's duty to preserve the integrity of the administration of justice.

Whether or not opposite parties were themselves misled is of secondary concern.

In this case, if the state of their knowledge becomes relevant - in response to M&C's defence - then the Court can give the appropriate directions for disclosure from other parties.

M&C are well advised to have it firmly in mind that these have been trust administration proceedings, which, although instituted by the plaintiff, primarily proceeded under the aegis of the Court's protective jurisdiction.

At an early stage (on 4.3.97) this Court made orders allowing the Trustee to continue in its administration of the trust without having to have regard to the allegations raised by the plaintiff. Protected by and relying on this Order, the trustee continued to pay out both income and capital. Part of my concern now is whether such an order would have been appropriate had all the relevant information been put before the Court then and whether had such an order been refused, the course of the proceedings and the costs flowing therefrom would have been fundamentally different.

Risk as to the costs of these proceedings

A further concern raised by Mr. Simmonds to be addressed here relates to the risk of the costs of these proceedings to be assumed by M&C.

As the proceedings have been instituted by the Court of its own motion, even if M&C succeed upon the enquiry they may not recover their costs against anyone. Thus, the plaintiff will have the benefit of participating ultimately with the hope of recovery for the Trust and herself as beneficiary, without the risk of paying the successful party's costs. This is a matter of some concern to the Court as well, and weighed heavily with me when first arriving at the decision to direct this enquiry.

It no doubt is a primary reason why the case law advises that the Court should act of its own motion only in exceptional cases.

It is one of the important policy considerations that have emerged in England and which I accept as applicable equally in Cayman, that lawyers should not be deterred from pursuing their clients interests by the fear of personal liability. See Wall v Lefever [1998] 1 FCR 605.

While the procedural nature of the jurisdiction being exercised will be examined below, it is appropriate that I should here record my view and intention that this enquiry is not to become protracted litigation. M&C should not be at risk of the sort of costs which usually attend such litigation.

The issues of concern to the Court I consider to be clearly enough defined in the Notice and now further explained in this ruling. Directions will be given including, so far as is necessary, for the filing of evidence and so as further to narrow the issues.

The Law

There is no challenge to the Court's jurisdiction to raise the enquiry of its own motion. The authority of Myers v Elman - which was also discussed and applied in the earlier ruling of 4th April - is acknowledged by Mr. Simmonds to be still the leading authority on the matter of the Court's inherent jurisdiction.

Mr. Simmonds argued however, that the modern case law developed since Myers v Elman governs the procedure and lays down that only in exceptional circumstances, in cases where the breach of duty of the attorney is plain and obvious and the wasted costs can clearly and specifically be shown to have been caused by that breach, should the Court embark upon an enquiry of its own motion. The criteria that the breach be plain and obvious and casual link clear, would also require on the basis of the recent cases that the case be one which can be determined in a brief enquiry – one lasting only hours, not days.

Having reviewed the cases cited, beginning with the seminal and still most authoritative pronouncements of the House of Lords in Myers v Elman, and the arguments of Counsel, I can see no reason why the enquiry which I have directed should not be confined within limits which generally, if not strictly, stay within the procedural guidelines which they lay down.

Some of the more recent cases - which go so far as to suggest that an enquiry which would involve discovery and cross – examination of witnesses is never to be permitted - I regard as engrafting upon the Myers v Elman jurisdiction strictures which would be unwarranted in the context of the disciplinary relationship between the Court and its officers in the Cayman Islands.

I say specifically the Cayman Islands context for two main reasons of distinction which I discern from those English cases. First, unlike in the United Kingdom where the recent cases have proscribed the wasted costs proceedings as to be allowed only in the cases amenable to be disposed of summarily, without discovery, cross – examination and interrogatories -(see for example Turner Page Music (infra))- there is as yet no urgent concern here at the likelihood of the Court becoming overwhelmed by a floodgate of wasted costs applications.

My own research and that of Counsel before me confirmed that this is the first enquiry of the kind to be directed here in the Cayman Islands.

Accordingly, the public interest to be emphasised here might well resonate in different concerns to that which has emerged in the United Kingdom as primary. The primary concern which has gained ascendancy in the United Kingdom, as we will see, is to suppress the proliferation of wasted costs litigation.

A primary concern here must be to remind attorneys by use of the jurisdiction to be even more vigilant than they would otherwise be to guard against wasted costs where – as so often happens - they find themselves in charge of conducting litigation for clients who are not present within this jurisdiction and all the moreso dependent upon their proper conduct.

This, as one would expect, also remains a concern in the United Kingdom notwithstanding the different emphasis there. Lord Woolf M.R. recently observed that "The power of the Court to make a wasted costs order is intended to be a deterrent against improper practices or improper conduct by lawyers engaged in litigation": Manzanilla Ltd v Corton Property. The Times, 4 August 1997.

The second reason for the different emphasis in our approach is that the duty of our Courts to respond may well be perceived as more direct and immediate because the regulation of the professional conduct of Cayman attorneys remains a matter exclusively within the province of our Courts. This is unlike the position in the United Kingdom where, as a matter of statute, the profession is largely self-regulated, albeit subject to the same inherent jurisdiction of the Court as its officers.

In my view, the discretionary nature of the wasted costs 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.

That the exercise of the jurisdiction is a matter firmly within the discretion of the Court and that the strictures which have been applied upon its exercise in the United Kingdom are bred of judicial policy concerns there about the abuse of the Court process; are factors which are evident from the cases themselves.

While Myers v Elman itself was not primarily concerned with the nature of the procedure of wasted costs proceedings - (the main question was whether a solicitor was liable to be penalised in wasted costs for the conduct of his clerk) - there are dicta from the speeches which explain that the House of Lords regarded both the exercise of the jurisdiction and the procedure to be adopted as being within the discretion of the Court. At page 318 of the report, the following appears from the speech of Lord Wright: It is a passage already quoted in extenso in the ruling of 10th April herein, but requiring to be repeated here. It appertains to all legal issues raised in the present application:

> "--- alongside the jurisdiction to strike off the Roll or to suspend, there existed in the Court the jurisdiction to punish a solicitor or

attorney by ordering him to pay costs, sometimes the costs of his own client, sometimes those of the opposite party, sometimes it may be of both. The ground for such an order was that the solicitor had been guilty of professional misconduct (as it is generally called) not, however, of so serious a character as to justify striking him off the Roll or suspending him. This was a summary jurisdiction exercised by the Court which had tried the case in the course of which the misconduct was committed. It was clearly preserved to the Court by S.5, sub s. 1, quoted above. It was a summary jurisdiction, in which the intervention of the judge was involved at the conclusion of the case either by motion in the Chancery Court or by a motion or application for a rule in the Courts of Common Law.

Though the proceedings were penal, no stereotyped forms were followed. Hence now the complaint is not treated like a charge in an indictment or even as requiring the particularity of a pleading in a civil suit. All that is necessary is that the judge should see that the solicitor has full and sufficient notice of what is the complaint made against him and full and sufficient opportunity of answering it. Thus, formal amendments to the complaint are not necessary, so long as the variations of the charge are sufficiently defined and the solicitor is given sufficient liberty to make his answer.

> The summary jurisdiction thus involves a discretion both as to procedure and as to substantive relief, though there was and is an appeal.
>
> The cases of the exercise of the jurisdiction to be found in the reports are numerous and show how the Courts were guided by their opinion as to the character of conduct complained of. The underlying principle is that the Court has a right and a duty to supervise the conduct of its solicitors and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally ---. It would be --- accurate to describe it as conduct which involves a failure on the part of a solicitor to fufill his duty to aid in promoting in his own sphere the cause of justice. This summary procedure may often be invoked to save the expense of the action. Thus it may in proper cases take the place of the action for negligence, or an action for breach of warranty of authority brought by the person named as defendant in the writ. The jurisdiction is not merely punitive but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of. It is frequently, as in this case, exercised in order to compensate the opposite party in the action".

At page 302 of the report Lord Atkin stated:

"If the Court is deceived or the litigant improperly delayed or put to unnecessary expense, the solicitor on the record will be held responsible and will be admonished or visited with such pecuniary penalty as the Court thinks necessary in the circumstances of the case".

Viscount Maugham (at p292) stated:

" - - I entirely agree with the contention that the jurisdiction in question might to be exercised only when there has been established a serious dereliction of duty as a solicitor either by himself or by his clerks.

The findings of Singleton J; after a long and patient enquiry and after hearing the evidence of Mr. Elman and his managing clerk, would seem to settle that question".

The English Court of Appeal (per Bingham LJ) has subsequently in Ridehalgh v Horsefeld (supra) (at p227) come to summarise what it describes as the five fundamental propositions for which Myers v Elman stands as authority:

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

(2) whereas a disciplinary order against a solicitor requires a finding that he has been personally guilty of serious

professional misconduct the making of wasted costs order does not.

(3) The Court's jurisdiction to make a wasted costs order against a solicitor is founded on breach of the duty owed by the solicitor to the Court to perform his duty as an officer of the Court in promoting within his own sphere the cause of justice.

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

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

I think it is appropriate to note that nothing about the procedure or the time taken for the actual enquiry in Myers v Elman, was deprecated by the learned Law Lords. Rather, the "long and patient" enquiry undertaken at first instance by Singleton J. was treated as necessary and justified given the nature of the alleged misconduct (in effect collusion in fraud) and the complexity of the issues involved in showing it.

In Myers v Elman the procedure adopted (see p287) - as in this case - involved the judge directing a notice to be served on the solicitor (s) and, this having been done, a rehearing of the application for the notice (presumably on the inter partes basis) and the directions for an inquiry into the conduct which, after further and better particulars had been

delivered, was specially fixed to be heard by the learned judge who had conduct of the main action.

Lord Wright said that:

> "the cases of the exercise of the jurisdiction to be found in the reports are numerous--"

And although the case before the House was not primarily concerned with procedure, his review of the jurisdiction clearly involved a review of the history of that procedure used and expressly confirmed that procedure was a matter within the province of the discretion of the Court.

It appears from the speech of Viscount Maugham (at p 287) that the hearing on wasted costs in Myers v Elman lasted 5 days.

I do not envisage the inquiry into this matter lasting so long. And even if it is to be measured in one or two days instead of hours that, it seems to me, would be no reflection on the merits or demerits of the inquiry; only on its complexity. As I have already indicated and for reasons which follow, that, to my mind, is not to be the only decisive factor.

Mr. Simmond's further argument was that non-intervention by the Court would not mean the plaintiff would be left without recourse; she can recover against the Trustee who could in turn recover against M & C.

I must recognise that the traditional caution with which the Courts approached the exercise of this jurisdiction remains applicable.

I accept that the showing of a prima facie case notwithstanding, the Court has a discretion to discontinue the Notice if, for example, I were to be satisfied or in doubt that the costs

of the Notice proceedings would be disproportionate to the amount to be recovered or that issues which fall to be determined in the main action would have to be relitigated here with the risk of conflicting results.

I am however satisfied that if the concerns I have sought to identify above are focussed upon by M & C, the costs of these Notice proceedings can be confined within strict bounds so that no real fear of them becoming disproportionate to a fair recovery for the Trust should arise.

Similarly, as to the issues properly to be determined here - if the focus is kept upon the nature of the duty owed by M&C to the Court of which I believe the prima facie breach is shown; there can be no danger of litigating now issues properly to have been determined in the main action. For instance: the issue is not now whether the settlor's capacity at relevant times was always arguable; the issue is whether there was a duty to disclose the state of the Trustee's knowledge which duty was breached.

The Myers v Elman approach has been confirmed by the English Court of Appeal in more modern times. In Bahai v Rashidian [1985] 1 WLR 1337 the following helpful passages appear from the judgement of Parker L.J. (at p. 1345):

> "The distinction between this compensatory (wasted costs) jurisdiction and the punitive jurisdiction to strike a solicitor off the Roll or to suspend him is made clear by Viscount Maugham in Myers v Elman -- and by Lord Denning M.R. in R&T Thew Ltd. V Reeves (No. 2) - - [1982] Q.B. 1282, 1286. In the latter judgment it is emphasised that the compensatory jurisdiction still retains a disciplinary slant, since it is exerciseable only where the conduct of the solicitor is such as to merit re proof.

The exercise of this summary jurisdiction is now regulated by the provision of R.S.C., Ord. 62 r.8. Rule 8(2) requires the solicitor to be given a reasonable opportunity to appear before the court and show cause why the order should not be made, *but otherwise the procedure to be followed is left to the judge who hears the application:* Brendon v Spiro [1938] 1 K.B. 176.

In particular he will have to consider whether he should direct oral evidence, and how far he can properly refresh his mind from his notes of the hearing of the case, and dispense with additional or new evidence to prove facts which were already established in the course of the proceedings: per Scott L.J. in Brendon v Spiro [1938] 1. K.B. 176, 192". (emphasis supplied).

In the United Kingdom according to Mr. Simmonds, the procedure adopted in Myers v Elman would nonetheless now be regarded as belonging to a bygone era.

He cited as the modern locus classicus on wasted costs orders, the English Court of Appeal judgement in Ridehalgh v Horsefeld (supra). In that matter the Court heard six consolidated appeals from five decisions in which wasted costs orders had been made and a sixth in which solicitors had been ordered to show cause why such orders should not be made.

Five of the six orders were made in response to applications by litigants in their respective causes. These applications were brought pursuant to section 51(6) of the Supreme Court Act 1981 as substituted by Section 4 of the Courts and Legal Services Act 1990.

The sixth, that in Ridehalgh v Horsefeld itself, requiring the solicitors to show cause, was raised by the Court (the Court of Appeal) of its own motion.

On the consolidated appeal the five orders made below were overturned and that in Ridehalgh itself refused.

The Court of Appeal, in its careful and comprehensive judgement, considered issues similar to some of which affect the exercise of my discretion now; and several others. Matters considered included the nature of the jurisdiction vested in the English Courts by the statutory provisions cited above.

These new provisions allowed the English Courts to make wasted costs orders in respect of costs incurred by any party to the action "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" (subsection (6) of section51)

In describing the intent behind this legislation, the Court of Appeal had this to say at page 231 D - E in terms which, when contrasted with the procedural strictures advised by the same justice of Appeal and subsequently reinforced by and enlarged by the English Court of Appeal, to my mind can only be explained and understood by reference to the policy considerations which underscored them:

> "There can in our view be no room for doubt about the mischief against which these new provisions were aimed: this was the causing of loss and expense to litigants by the unjustifiable conduct of litigation by their or the other sides' lawyers. Where such conduct is shown Parliament clearly intended to arm the Courts with an effective remedy for the protection of those injured."

This Parliamentary intent notwithstanding a primary concern of the policy which has gained ascendancy is to discourage the wasted costs jurisdiction from being used to

spawn a proliferation of satellite litigation – litigation which could be unreasonably expensive for parties and consume inordinate amounts of Court time. At pages 225 - 226 Lord Justice Bingham noted:

> "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 pounds. It almost appears that a new branch of legal activity is emerging; calling to mind Dicken's searing observations in Bleak House:
>
> "The one great principle of English law is, to make business for itself---. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it."
>
> The argument we have heard discloses a tension between two important public interests. One is that lawyers should not be deterred from pursuing their clients interest by fear of incurring a personal liability to their clients' opponents; that they should not be penalised by orders to pay costs without a fair opportunity to defend themselves; that wasted costs orders should not become a back-door means of recovering costs not otherwise recoverable against a legally-aid 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."

I emphasise again here that the present case is not one which can justifiably be criticised as prone to abuse as a means of "recovering costs not otherwise recoverable" against an opposite litigant.

This has been a trust administration action; not party and party litigation. The wasted costs in issue here would be costs lost to the Trust which has had to bear all the costs of the proceedings. This was a primary factor in my decision to direct the inquiry. These were proceedings in which M & C; the Trustee and all other parties owed a primary duty to the Court to disclose all relevant information. A primary concern of the Court has been and remains the proper and fair administration of the Trust which has been brought before it.

The Court of Appeal in Ridehalgh went on to pronounce on the checks and balances which reflect the competing policy concerns by considering the various principles which apply. Primarily for the purpose of containing the spiralling growth of satellite litigation, procedural benchmarks were laid down at pp238 - 239. They must, in my view, be taken

against the background of the rules in England which vest the much wider jurisdiction to make wasted costs orders - going beyond the Myers v Elman meaning of "misconduct" - and so carrying the greater potential for the proliferation of applications which has become of such great concern:

> "Procedure. The procedure to be followed in determining applications for wasted costs must be laid down by Courts so as to meet the requirements of the individual case before them. The overriding requirements are that any procedure must be fair and that it must be as simple and summary as fairness permits. Fairness requires that any respondent lawyer should be very clearly told what he is said to have done wrong and what is claimed. But the requirement of simplicity and summariness means that elaborate pleadings should in general be avoided. No formal process of discovery will be appropriate. We cannot imagine circumstances in which the applicant should be permitted to interrogate the respondent lawyer, or vice versa. Hearings should be measured in hours, and not in days or weeks.
>
> Judges must not reject a weapon which Parliament has intended to be used for the protection of those injured by the unjustifiable conduct of the other sides' lawyers, but they must be astute to control what threatens to become a new and costly form of satellite litigation"

When viewed as guidelines, it is difficult to find anything about those statements with which to disagree, even by reference to the relative novelty of wasted costs applications

in the Cayman Islands and the absence of the same public policy concerns materialised here to underscore them.

The statements are not expressed in mandatory prohibitive terms but rather, in my view, as appropriate when addressing discretionary procedural concerns; in terms of advice. No one could gainsay that the procedure should of course be as "simple and summary as fairness permits".

Even the disapproval of elaborate pleadings and discovery is expressed, not strictly in prohibitive terms, but as guidance. This again is as one would expect if the procedure "must be laid down by Courts so as to meet the requirements of the individual cases before them."

I must confess that I find it difficult to glean from this passage the sort of shibbolethic code which the subsequent cases have developed from it so as to arrive at procedural rules which are, in my view, nothing short of incapable of redressing what will be some of the most egregious cases of wasted costs when once a degree of complexity is to be involved in proving them.

The inflexibility of the new policy was recognised with concern by Laddie J. in the English High Court in his judgement given in Robertson Research International Limited (unreported 13th October 1999). At page 9 of the transcript (New Law Online Cases 2991017404 Judgement) he repeated concerns earlier raised throughout his judgement about the emergence of the inflexible policy in these terms:

> "It appears that the case law has moved on from Ridehalgh and Manzanilla. The obvious desirability of dealing with wasted costs

applications as summarily as the circumstances allow has changed into a rule that unless they can be dealt with summarily they will be dismissed without regard to the merits. However - - Now there is a practice direction which sets out the approach which all courts must adopt [(a reference to post Woolf Reform practice direction)]. – Now Courts are obliged to give directions in each case which ensure that the issues are dealt with in a way that is "fair and as simple and summary as the circumstances permit." These are the words used by Bingham MR in the passage at Ridehalgh cited at paragraph 20 above. It appears to me that there is an argument that it is not now open to the Court to refuse to deal with an application simply on the basis that it is not capable of being dealt with summarily. However the interrelationship between these four decisions of the Court of Appeal [(Ridehalgh, Manzanilla, Turner Page Music (unreported 24 June 1998) and Wall v Lefever)] and the Practice Direction is a matter which should be considered by the Court of Appeal in a case dealing with wasted costs, not by a judge of first instance dealing with (an application for third party costs). For the purpose of this application I accept that Turner Page Music and Wall set out a mandatory requirement for wasted costs applications that they must be capable of being disposed of in summary proceedings or they will not be entertained."

As Laddie J. observed elsewhere in his judgement what is "summary" may well depend on the circumstances of the case. I take no such evasive tack, however, from the strictures of the latest pronouncements of the English Court of Appeal

which specifically prohibit proceedings which would involve discovery, cross – examination and interrogatories. The position I take is that I am not bound to follow them in this jurisdiction where the same need for the strictures do not exist. Moreover the case law which has " moved on from Ridehalgh and Manzanilla" (per Laddie J.) will soon have to be reconciled with the new Rules post Woolf Reforms which more closely reflect the obvious and sensible requirement first expressed in Ridehalgh that, within the Court's discretion, the procedure should be as "fair and as simple and summary as the circumstances permit".

The post-reformatory outcome in England may yet be the reversion to that good advice, leaving the matter to the discretion of the judge to ensure that there is no abuse on a case by case basis.

The further cautionary advice given in Ridehalgh (at page 238 letter E) - that the Court should be slow to initiate an inquiry of its own motion, is also to be observed in its proper context. It certainly is to be considered in the exercise of the discretion that "If they do so in cases where the inquiry becomes complex and time consuming, difficult and embarrassing issues on costs can arise: if a wasted costs order is not made, the costs of the inquiry will have to be borne by someone and it will not be the Court; even if an order is made the costs ordered to be paid may be small compared with the costs of the inquiry. In such cases courts will usually be well advised to leave an aggrieved party to make the application if so advised; the costs will then, in the ordinary way, follow the event between the parties."

I have already touched upon this aspect, recognising the need to minimise the risk to M & C.

In the exercise of the discretion in this case, the nature of the issues likely to impact upon the costs of the inquiry has been considered by comparison to the costs which have been lost. That must surely be a factor to be borne in mind in the circumstances of each case. I agree with Mr. Cohen that it is not to be too readily anticipated in the inquiry here that the costs to be incurred could be disproportionate to those to be recovered. The costs in the action have been massive and extremely deleterious to the Trust.

In the exercise of the discretion whether or not to initiate and whether or not to continue the inquiry in light of the prima facie evidence of Myers v Elman misconduct already described, the further advice given at page 239 letter P of Ridehalgh had also to be observed: "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*". (emphasis supplied).

While a final determination of that kind has been made here a prima facie is shown and I consider that very good reason would have to be shown for not continuing the requiry.

Taken in the context of the present state of the law and practice in the Cayman Islands, and being satisfied that the ambit of the procedure could be reasonably

contained, I felt unable to regard the sort of public policy concerns applicable in the United Kingdom as that good reason for not directing the inquiry.

Having concluded that the fears of this becoming too complex and unwieldy a matter are unfounded, I should not be understood as saying that there could never be a case in the Cayman Islands when an application for wasted costs or a direction of an inquiry of the Court's own motion would be inappropriate for those reasons. The learning from Myers v Elman and Ridehalgh (see in particular p239) confirms that this remains a discretionary remedy.

Causation

Mr. Simmonds' concerns notwithstanding, I do not regard this issue as presenting a particular difficulty.

There obviously must be a casual link between any misconduct found and wasted costs in the action before the court might require an attorney to compensate for them.

The issue here seems to be what proof there needs be of the link between the misconduct and the wasted costs and how does the court go about assessing whether the link is shown.

As to the first issue - surely the standard of proof can only be on the balance of probabilities. The cases provide some guidance as to the general correctness of this view:

> "The burden of proof in relation to an application for a costs order against a Solicitor ultimately rests on the applicant, but it is a swingeing burden and the circumstances disclosed in the action where a solicitor is on the record may place a burden on him of rebutting a prima facie case; ie: showing cause. [(This is the

stage where we have reached with M&C here)]. If the application can only be sustained by proof of serious misconduct or crime, the standard of proof will be higher than would otherwise be the case, but subject to that, the application should be dealt with in the same way as would any other application for costs against a solicitor" Bahai v Rashidian (C.A.) (supra) per Sir John Donaldson M.R. pp. 1342-1343.

As to the second issue- the methodology – my own view, with nothing appearing in the case authorities to suggest otherwise – is that it must be for the judge to assess having regard to his overall knowledge of what transpired in the action, what steps or proceedings were taken which would not have been taken and how, overall, the action could reasonably have been contained or sooner determined.

It will be a matter of apportionment of what costs were wasted and what costs were not. After that apportionment the actual quantum may well be amenable to taxation relative to the overall costs in the action to be identified after taxation, if not agreed.

The suggestion that the casual link itself must be amenable to proof in the manner of proof upon the taxation of bill of costs is untenable.

Mr. Simmonds' relied here in particular upon the 1998 decision of the English Court of Appeal in Turner Page Music (supra) in support of two of his propositions. The first was that there needs be shown a strict casual link between the misconduct and the wasted costs. The second was that if the enquiry for those purposes would be other than summary then it would be further indication of the likelihood of unwarranted litigation and would not be allowed.

This was a case decided under the current English statutory provisions: Section 51 (6) and (7) of the Supreme Court Act 1981 (as amended). The terms of Section 51 (6) and (7) require to be more fully set out here:

> "(6) In any proceedings mentioned in subsection (1) the Court may disallow or (as the case may be) order the legal or other representative solely to meet, the whole of any wasted costs or such part of them as may be determined in accordance with the rules of Court.
>
> (7) In subsection (6) 'wasted costs' means any cost 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 representatives or any employee of such a representative, or
>
> (b) which, in light of any such act or omission occurring after they were incurred, the Court considers it unreasonable to expect that party to pay"

These statutory provisions may suggest a strict methodology 'in accordance with the rules of Court' although no case was cited in the arguments which specifically required such an approach; ie: as if upon taxation.

In Turner it is clear that the Justices of Appeal all concluded that the case was not only to be dismissed for being unamenable to the strict summary procedure now generally adhered to in England, but also because on it's merits it was misconceived - there simply could not be shown any casual link between the misconduct complained of and any wasted costs in the action. As Lord Justice Roch observed at the conclusion of his opinion: "this was not an application which was suitable for the summary procedure

which the rules made under Section 51 (6) contemplate. Moreover, it is an application which in my view has no prospect of succeeding".

The approach taken in their judgements indicate that the Justices of Appeal themselves analysed the steps taken in the main action to see whether there could be any linked between them and the wasted costs complained of.

What I think remains clear from the cases when viewed in the round is that the assessment primarily is one for the Court and subsection (7) (b) of the English statute indicates that that remains the position in England. So also did R.S..C 62 Rule 11 (1)(a) of the pre Woolf Supreme Court Rules. This is also in keeping with the general run of the cases which support the view that it is best for the judge who was seized of the main action to hear any wasted costs application. Certainly only that judge would be placed to be able to bring an inquiry of the Court's own motion. See, as the case most directly on point Bahai v Rashidian (supra).

There in terms similar to those used by the other Justices of Appeal Parker L.J. stated (at p.1343):

> "--- save in exceptional circumstances, it will be for the judge, who heard the case and made the order to show cause or the rule nisi, to determine the matter on the subsequent hearing pursuant to the order or the return to the rule nisi as the case maybe.
>
> There can be no doubt of this, for the judge is dealing with the costs of an action which he has himself heard".

In Ridehalgh the later views expressed on this aspect of the matter do not dissuade me from the view I have taken. At page 231 letter F:

'Since the (Supreme Court 1981 as amended) Act there have been two cases which deserve mention. The first is In re A Barrister (Wasted Costs Orders) (No 1 of 1991) [1993] Q.B. 293. This arose out of an unhappy difference between counsel and a judge sitting in the Crown Court in a criminal case. It was held on appeal, in our view quite rightly, that courts should apply a three-stage test when a wasted costs order is contemplated.

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

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

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

And at page 237 letter F

" - - the court has jurisdiction to make a wasted costs order only where the improper --- conduct complained of has caused a waste of costs and only to the extent of such wasted costs. Demonstration of a causal link is essential".

There is nothing in those passage which suggests to my mind, the strict line by line approach of taxation, - rather only that the causal link must be shown. The requirement that the costs be specified is so that the lawyer knows exactly what liability he has to meet and does not suggest that the amount might not be assessed by the judge taking an

overview – or "broad brush approach" as Mr. Simmonds described it – of what costs were wasted.

In Myers v Elman itself the decision suggested that such an approach would be appropriate. There the House of Lords approved of the judge's approach where by taking an overview of the action he awarded one-third of the costs. I accept, as Mr. Simmonds pointed out, that the point in issue in Myers v Elamn was not causation; but the point did not go unnoticed.

At page 289 Viscount Maugham noted:

> "The primary object of the Court is not to punish the solicitor but to protect the client who has suffered and to indemnify the party who has been injured. Order LXV, S.11 of the Rule of the Supreme Court provides the necessary machinery where the person injured is the client of the solicitor. It is a rule supplementary to the summary jurisdiction of the Court. It is not limited to misconduct or default, but expressly extends to costs incurred improperly or without reasonable cause, or which have proved fruitless by reason of undue delay in proceeding --. The jurisdiction to order the solicitor to pay costs to the opposite party is exercised on similar grounds".

And at page 319 Lord Wright emphasised that:

> "the jurisdiction is not merely punitive but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of."

I think that in light of those reflections on the issue of causation; in applying the principles of Myers v Elman I am entitled to observe that the absence of any suggestion of a strict methodology, implied the acceptance of the approach taken by the judge below (Singleton J.) in arriving at the quantum which he awarded.

I might add that the "broad-brush approach" to the award of costs is not uncommon in the context of modern litigation. It is often applied by the Court where an apportionment of costs is required as happens upon the trial of events the merits of which are variously determined as between the parties. See for example R v Immigration Board, ex parte Kirk Freeport Plaza Ltd and Island Companies Limited 1996 CLR N.1 (written ruling delivered in Causes 267 and 345 of 1996 on 19.12.96) I am satisfied that it is legitimate to adopt an approach which would allow an apportionment of the costs having regard to the overall significance of the misconduct complained of to the outcome.

Summary of Conclusions

1. The jurisdiction of the Court to make wasted costs orders against attorneys who are its officers is the inherent jurisdiction described in Myers v Elman. It is based upon misconduct as defined by the House of Lords in that case.
2. It is a jurisdiction to be cautiously and sparingly exercised. In the Cayman Islands this is primarily in recognition of the public interest in not impairing the duty of attorneys to act in matters on behalf of clients without fear of being too readily exposed to liability for the costs particularly of opponent litigants. This restraint is also necessary

in the public interest to discourage the possible proliferation of satellite litigation for wasted costs.

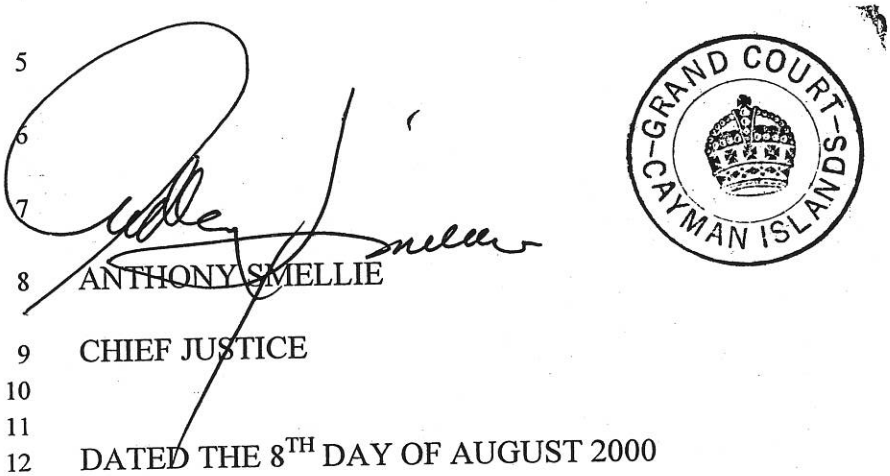
3. In the exercise of discretion the judge must be mindful to ensure that the wasted costs proceedings will not be so complex and time-consuming as to render disproportionate the costs to be recovered in comparison with the costs of the wasted costs proceedings.

Ultimately it is within the discretion of the judge (usually necessarily the same judge who tried the action) whether proceedings should be allowed. The overriding requirements are that any procedure has to be fair and as simple and summary as fairness permits.

4. If after inquiry (with proper notice of the alleged misconduct and opportunity having been given the attorney to participate) an order for recovering of wasted costs is to be made, the judge in his discretion will assess what those costs will be from his overall knowledge of the conduct of the proceedings in which they were incurred.

The process itself of inquiry into the causation and quantum of costs should not be allowed to become so complex and unwieldy so as to add to the length and costs of the wasted costs proceedings.

5 After apportionment of the wasted costs relative to the overall costs of the action, the judge if he considers it appropriate, may refer the assessment of the actual quantum of wasted costs to taxation.



ANTHONY SMELLIE

CHIEF JUSTICE

DATED THE 8TH DAY OF AUGUST 2000