

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO.BVIHC (COM) 2015/0140

**IN THE MATTER OF MING YUAN HOLDINGS LIMITED
AND IN THE MATTER OF SECTION MING YUAN INVESTMENTS GROUP LIMITED**

BETWEEN:

**(1) IU CHUNG A.K.A. YAO YONG
(2) YAO YUAN**

Claimants

-and-

**(1) GREATER ACHIEVE LIMITED
(2) PROVIDENT PACIFIC HOLDINGS LIMITED
(3) TIME HORIZON LIMITED
(4) SHARP COLOUR LIMITED
(5) MING YUAN INVESTMENTS GROUP LIMITED
(6) MING YUAN HOLDINGS LIMITED
(7) CHINABASE HOLDINGS LIMITED**

Applicants / Defendants

(8) MINGYUAN MEDICARE DEVELOPMENT COMPANY LIMITED

Defendant

(9) HARNEY WESTWOOD & RIEGELS

Respondent

Appearances:

John Brisby Q.C., and Richard Baird of Forbes Hare, for the Applicants/Defendants
Matthew Collings Q.C., and Shuvra Debof Harney Westwood Riegels, for the Respondent

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2017: April 10, 11, 12
June 6
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JUDGMENT

Application by defendants for Wasted Costs Order against claimants' legal practitioners arising from ex parte injunction that was discharged for material non-disclosure and from claim that was struck out for not disclosing a cause of action – Deliberate breach of legal practitioners' duties to court not alleged; rather that legal practitioners participated in an abuse of the court's process that could and should have been avoided had they sought proper instructions and given proper consideration to documents obtained – Six "failings" by legal practitioners alleged.

Court's jurisdiction to make costs orders generally is derived from statute and buttressed by the CPR – CPR 64.8 and CPR 64.9 establish two separate bases to make Wasted Costs Order – Court continues to have inherent jurisdiction to make Wasted Costs Orders as part of Court's inherent powers to control its own processes, as jurisdiction preserved by statute.

Whether Wasted Costs Order jurisdiction exists or is being invoked primarily for compensatory or punitive purposes, the jurisdiction is extraordinary, has a significant punitive aspect from the perspective of the legal practitioner, and should be construed narrowly – Test is whether there been an improper, unreasonable or negligent act or omission by legal practitioner and, if so, whether the conduct act or omission caused applicant to incur costs that Court considers it is unreasonable for applicant to pay – Must be causal link between act or omission and the incurring by applicant of costs in question – Must be a serious breach of duty to Court – Simple mistake or oversight or mere error of judgment not, of itself, sufficiently serious – Must be gross negligence – Mere mistake or error of judgment not generally sufficient – Errors of judgment do not attract exercise of the jurisdiction – "Negligent" used in untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession – Wasted Costs Order jurisdiction must be exercised with care and discretion, and only in clear cases – Applicant must satisfy Court, or Court itself must be satisfied, that Wasted Costs Order should be made – Court should not make Wasted Costs Order unless, proceeding with extreme care, it is satisfied there is nothing legal practitioner could, if unconstrained by privilege, have said in order to resist the application – Court must give legal practitioner benefit of the doubt, including in the exercise of its discretion on whether it is unreasonable for applicant to pay the costs in question.

Abuse of process to knowingly fail to make full and frank disclosure on ex parte application – Duty of full and frank disclosure and fairness rests on applicant's legal practitioners as well as on applicant – Duty is heavy one and applies both to written materials and oral submissions – Duty extends not only to material facts known to the applicant, but to additional facts that would have known had proper inquiries been made – Not an answer that insufficient time to investigate matter fully prior to the ex parte application – Duty to present fairly the facts so disclosed – Duty requires applicant to place before Court any relevant legal point – If obvious answer to claim or obvious defect in cause of action, applicant must refer to it – Applicant must identify defences which can reasonably be expected to be raised – Full and frank disclosure matters should be fairly summarized in supporting affidavit, outlined in skeleton, and specifically drawn to the attention of the judge at oral ex parte hearing – Not an answer that relevant information contained in an exhibit especially where exhibit is voluminous – Ex parte applications often dealt with shortly, with judge having limited pre-reading opportunity – Responsibility of ensuring that relevant points presented clearly and distinctly.

Legal practitioner's failure to give full and frank disclosure on ex parte application is established basis for Wasted Costs Order – However, assessing when errors of judgment in relation to non-disclosure cross the line into acts of negligence is often difficult, and the benefit of any doubt must be in favour of the legal practitioner – Not every situation of unintentional failure of legal practitioners in relation to full and frank disclosure will result in Wasted Costs Order, even if a causal connection exists to the wasted costs (e.g.: ex parte order would not have been granted).

Contrary to Overriding Objective of CPR, “to enable the court to deal with cases justly” and its concept of proportionality if applications for Wasted Costs Orders become routine or common tactical steps in litigation to harass or intimidate legal practitioners and opposite parties (which was not the case here) – Applications to discharge ex parte orders commonly include applicant's alleged failure to fully and fairly disclose – Wasted Costs Order should not be sought every time ex parte injunction is dissolved for non-disclosure or pleading struck for not properly pleading a cause of action, or being prolix, unintelligible, or scandalous – Wasted Costs Applications should be brought sparingly and only in the most egregious cases – Must be reserved for situations in which real and reasonable prospect of satisfying heavy requirements.

Wasted Costs Applications (at least ordinarily) are one-stage proceedings, whether brought under CPR 64.8, CPR 64.9 or the Court's Inherent Jurisdiction - No process for initial screening or vetting of Wasted Costs Order Application.

Ex parte applications are important where serious risk that notice would undermine relief sought or injunction sought is to prevent something so imminent that giving informal notice is not practical – However, consequences for party or others subject to ex parte order can be severe – Ex parte proceedings regularly result in allegations of lack of full and frank disclosure – Ex parte applications should be brought only when truly necessary – Even then, 'short notice' or 'informal notice' should be given when insufficient time for formal notice – Respondent can appear without foregoing right to inter parties hearing and draw to Court's attention information that might lead to order not being made and/or result in an order that will be as minimally invasive as possible, will take account of the respondent's practical concerns and needs, will be made subject to fortification, will be made for shorter period, and so forth.

It is fundamental and elementary that the purpose of an affidavit on an application is to provide evidence to the Court, not submissions or argument.

Applicant for a Wasted Costs Order does not need establish that any particular quantum of costs was paid – Legal practitioner has right to participate fully in process of determining quantum to be paid under a Wasted Costs Order made against the legal practitioner.

None of the six alleged failings of the legal practitioners, individually or collectively, meet the requirements for the exercise of this Court's discretion to make a Wasted Costs Order.

Application dismissed.

- [1] **LEON J:** The Applicants/Defendants ("**Applicants**") apply¹ under CPR 64.8 and this Court's inherent jurisdiction for an order that is termed a "**Wasted Costs Order**".
- [2] The Applicants ask that the Respondent Harney Westwood & Riegels ("**Harneys**"), the former legal practitioners for the Claimants, be ordered to pay, as Wasted Costs:
- a. the Applicants' costs incurred in relation to an ex parte injunction issued 23 November 2015 ("**Injunction**") and of this Application,
 - b. the First Applicant's costs incurred in relation to an application to discharge the Injunction ("**Discharge Application**") and an application to strike out the Statement of Claim ("**Strike Out Application**"), and
 - c. the Applicants' costs of these proceedings to the extent not covered by the foregoing.
- [3] The Injunction was discharged on 15 January 2016 for material non-disclosure by the judge who granted it, the Honourable Justice Gerard Farara QC ("**Discharge Judgment**" and "**Discharge Order**").
- [4] The Claim, which had been commenced 19 November 2015, was stayed as against the Second to Seventh Defendants by the Honourable Justice Edward Bannister QC on 28 April 2016 due to the Claimants' failure to comply with an interim costs order.
- [5] The Statement of Claim was struck out against the First Defendant by the Honourable Justice Bernard Eder QC on the Strike Out Application on 28 June 2016 ("**Strike Out Judgment**"), with the Claimants not participating by counsel or in person. Harneys, which had ceased to represent the Claimants in February 2016, was not involved in hearing of the Strike Out Application.
- [6] The Claim against the Eighth Defendant has not been pursued and it did not participate in this Application.

¹ Amended Notice of Application dated 5 October 2016 ("**Amended Application**"); initial Notice of Application dated 15 April 2016. The Amended Notice of Application has not been consented to. The circumstances giving rise to the amendment and the opposition to it are discussed in this Judgment and a ruling is made that the amendments to the Notice of Application are allowed.

- [7] The Claim was part of a broader dispute between the Defendants and the Claimants in relation to the Eighth Defendant, a Bermuda company listed on the Hong Kong Stock Exchange and operating in the healthcare sector. Relevant background to the dispute is summarized below as the basis, context and history of the dispute and the other proceedings in other jurisdictions are relevant, at least in part, to the proceedings in this jurisdiction.
- [8] The Applicants at the hearing of this Application narrowed their grounds for a Wasted Costs Order to six grounds – six alleged ‘failings’ of Harneys:
- a. Misleading the Court on the ex parte injunction application (“**Injunction Application**”) as the financial means of the Second Claimant in relation to the matter of a cross-undertaking in damages (“**Allegedly Misleading About Second Claimant’s Financial Means**”);
 - b. Failing to explain to the Court on the Injunction application the true nature of proceedings in Bermuda, namely being to require the Eighth Defendant to hold an overdue annual general meeting, which purpose was relevant to the granting of the Injunction (“**Bermuda Proceedings**”);
 - c. Failing to disclose to the Court on the Injunction application the true nature of what had been termed the “**Unresolved Matter**”, which occurred while the Eighth Defendant was under the control of the Claimants and related to the auditors of the Eighth Defendant not being able to verify the bank account of one of its subsidiaries, because as it turned out \$66 Million was missing from the subsidiary;
 - d. Failing to consider the Unresolved Matter and the Bermuda Proceedings “in the round”, and thus failing to conclude and inform the Court that the purpose of the Bermuda Proceedings was to change the composition of the Eighth Defendant’s board of directors in light of the Unresolved Matter and the suspension of trading in the Eighth Defendant’s shares (“**Unresolved Matter and Bermuda Proceedings in the Round**”);

- e. Failing to draw the Court's attention to the effect of the First Claimant's bankruptcy was that he had no ability to bring the Claims, absent the consent of his trustee in bankruptcy and the approval of the Hong Kong court ("**Effect of Bankruptcy**"); and
- f. Failings in connection with the preparation of the Statement of Claim which ultimately was struck out by the Court (after the Claim was stayed against the Second to Seventh Applicants by the Court for failing to pay interim costs ordered by the Court; after Harneys had ceased to act for the Claimants; and without the Claimants' responding to the application to strike) as disclosing no cause of action against the First Applicant (and, although not part of this alleged failing, as an abuse of process because the Claimants were in "flagrant breach" of Court orders) ("**Defective Statement of Claim**").

[9] The Applicants submit that they relied on these six alleged "failings" by Harneys because they could be established from the record. As a result, Harneys' inability to use privileged information to defend itself because of the firm's duty owed to its former clients to preserve their confidences could not be argued to have impeded Harneys' full response to the allegations on this Application.²

[10] The Applicants state that they "do not allege that Harneys deliberately sought to breach their duties to the court". They submit that Harneys participated in an abuse of the court's process that could and should have been avoided had they sought to obtain proper instructions from the Claimants, as was their duty in making an ex parte application, and if they had given proper consideration to the documents that they had obtained.³

[11] Each of the six alleged "failings" will be considered in turn, following a consideration of this Court's jurisdiction on this Application, the tests to be applied to the exercise of the Court's discretion to make a Wasted Costs Order, and the background leading to this Application.

²Applicants' Skeleton Argument for hearing on 10 April 2017, dated 6 April 2017 ("**Applicants' Skeleton**"), paragraph 5.

³Applicants' Skeleton, paragraph 5.

[12] The structure of the balance of this Judgment is as follows:

WASTED COSTS ORDERS IN THIS JURISDICTION– *paragraph 13*

- Statutory Jurisdiction for Wasted Costs Orders – *paragraph 15*
- CPR Provisions on Wasted Costs Orders – *paragraph 22*
- Inherent Jurisdiction for Wasted Costs Orders – *paragraph 30*
- Punitive and/or Compensatory Issue– *paragraph 38*

TEST FOR WASTED COSTS ORDER – *paragraph 46*

Two Question Test – *paragraph 46*

Causation Must be Established – *paragraph 50*

Court's Discretion – *paragraph 51*

Policy Purpose of Wasted Costs Orders – *paragraph 57*

Improper, Unreasonable or Negligent– *paragraph 60*

Hopeless Cases Not Abuse of Process – *paragraph 64*

Burden of Proof – *paragraph 70*

Effect of Privilege– *paragraph 71*

LEGAL PRACTITIONER'S DUTY ON EX PARTE APPLICATION – *paragraph 73*

Wasted Costs Orders for Breach of Full and Frank Disclosure Duty– *paragraph 79*

Only in Exceptional Circumstances; Must Not Become Satellite Litigation

or Tactical Proceedings– *paragraph 89*

BACKGROUND OF DISPUTE LEADING TO THIS APPLICATION – *paragraph 103*

THESE PROCEEDINGS– *paragraph 110*

AMENDED APPLICATION FOR WASTED COSTS ORDER– *paragraph 121*

NO TWO-STAGE PROCESS FOR WASTED COSTS ORDER – *paragraph 130*

Hearing Before Judge Who Did Not Hear Matter in Which

Alleged Wasted Costs Occurred – *paragraph 134*

DETAILED CONSIDERATION OF ALLEGED “FAILINGS” BY HARNEYS – *paragraph 139*

- a. First Alleged “Failing” – Allegedly Misleading About Second Claimant's Financial Means– *paragraph 141*
- b. Second Alleged “Failing” – Bermuda Proceedings– *paragraph 174*

- c. Third Alleged "Failing" – The "Unresolved Matter" – *paragraph 193*
- d. Fourth Alleged "Failing" – Unresolved Matter and Bermuda Proceedings in the Round– *paragraph 211*
- e. Fifth Alleged "Failing" – Effect of Bankruptcy– *paragraph 225*
- f. Sixth Alleged "Failing" – Defective Statement of Claim – *paragraph 244*

MISCELLANEOUS MATTERS – *paragraph 281*

Ex Parte Injunction Applications– *paragraph 281*

Interaction Among Legal Practitioners' Offices – *paragraph 291*

Purpose of Affidavits is Not for Argument and Submissions –

Lam Third Affidavit – *paragraph 295*

Quantum and Payment of Fees Incurred by an Applicant – *paragraph 301*

COSTS – *paragraph 305*

ORDERS – *paragraph 308*

WASTED COSTS ORDERS IN THIS JURISDICTION

[13] On this Application there are three significant differences between the positions of the Applicants and Harneys regarding Wasted Costs Orders. Those differences concern the basis and nature of the Court's jurisdiction and the test to be applied by the Court.

[14] More specifically, the key legal issues regarding Wasted Costs Orders in dispute between the Applicants and Harneys on this Application are the following:

- a. whether this Court has an inherent jurisdiction to make a Wasted Costs Order or only as prescribed in the CPR based on statutory jurisdiction ("**Inherent Jurisdiction Issue**"),
- b. whether a Wasted Costs Order can be made where the legal practitioners have been "negligent" (within the meaning of the authorities, as discussed below) or only where they have acted "improperly" or "unreasonably" ("**Negligence Issue**"), and
- c. whether this Court's Wasted Costs Order jurisdiction is primarily (i) punitive (or disciplinary), or (b) compensatory, which it was submit affects the strength of the case that

must be shown for a Wasted Costs Order to be made (**"Punitive or Compensatory Issue"**).

- [15] **Statutory Jurisdiction for Wasted Costs Orders.** First, it is necessary to consider this Court's jurisdiction to make costs orders generally.
- [16] The Court's jurisdiction to make costs orders generally is derived from statute and buttressed by the CPR.⁴
- [17] The matter was considered in 2015 by the Court of Appeal in *Halliwel Assets Inc v Hornbeam Corporation ("Halliwel")*⁵ in the context of CPR 64.10 which deals with costs orders against "a person who is not a party to the proceedings nor the legal practitioner to a party". The Court was not dealing with CPR 64.8, nor with CPR 64.9, which are rules dealing with Wasted Costs Orders, although much of what was held by the Court of Appeal is applicable to those two rules as well – with one important exception regarding inherent jurisdiction, discussed below.
- [18] The Eastern Caribbean Supreme Court (Territory of the Virgin Islands) Act (**"Supreme Court Act"**), section 7, provides that the High Court has within the Territory "all such jurisdiction ... and the same powers and authorities incidental to such jurisdiction as on the first day of January, 1940, were vested in the High Court of Justice in England."⁶
- [19] As of that date (1 January 1940), the Supreme Court of Judicature (Consolidation) Act 1925 (**"1925 Act"**) was in force in England. Section 50(1) of the 1925 Act provided that subject to its provisions "and the rules of Court and to the express provisions of any other Act, the costs of an incidental to all proceedings in the Supreme Court were in the discretion of the court of judge and the court or judge shall have full powers to determine by whom and to what extent costs are to be paid."
- [20] The CPR, which was made pursuant to section 17 of the Supreme Court Order 1967, in the context of section 50(1) of the 1925 Act are the "rules of court" contemplated by that provision.

⁴BVIHCMAP 2015/0001, Judgment, October 12, 2015 (CA), at paragraphs 10 – 16; *Olive Group Capital Limited v Gavin Mark Mayhew*, BVIHC (COM) 2015/115, Judgment April 29, 2016, Leon J, at paragraph 51.

⁵BVIHCMAP 2015/0001, Judgment, October 12, 2015 (CA), at paragraphs 10 - 16.

⁶Cap. 80, Revised Laws of the Virgin Islands 1961.

[21] CPR 64.3 "implicitly recognizes the court's costs jurisdiction and further makes clear that the court is empowered to make costs orders in favour of persons who may not be parties to the proceedings."

[22] **CPR Provisions on Wasted Costs Orders.** The provisions of the CPR regarding Wasted Costs Orders read as follows:

64.8 Wasted costs orders

(1) In any proceedings the court may by order –

- (a) direct the legal practitioner to pay; or
- (b) disallow as against the legal practitioner's client,

the whole or part of any wasted costs.

(2) In this rule –

"wasted costs" means any costs incurred by a party –

- (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal practitioner or any employee or the legal practitioner; or
- (b) which, in the light of any act or omission occurring after they were incurred,

the court considers it unreasonable to expect that party to pay.

64.9 Court's powers in relation to wasted costs orders

(1) The Court may make an order under this rule where –

- (a) a party or his legal representative, fails to comply with a rule, practice direction or court order; or
- (b) it appears to the court that the conduct of a party or his legal representative, before or during the proceedings, was unreasonable or improper.

(2) Where paragraph (1) applies, the court may –

- (a) disallow all or part of the costs which are being assessed; or
- (b) order the party at fault or his legal representative to pay costs to the court or which he has caused any other party to incur, or both.

(3) Where –

- (a) the court makes an order under paragraph (2) against a legally represented party; and
- (b) the party is not present when the order is made, the party's legal practitioner must notify his client in writing of the order no later than 7 days after the legal practitioner receives the order.

[23] It is important to note the difference in wording between CPR 64.8(2)(a) where “wasted costs” is defined to include costs incurred by a negligent act or omission, as well as by an improper or unreasonable act or omission, and CPR 64.9, which is not a rule under which this Application is brought, where it is provided(in CPR 64.9(1)(b))that the Court may make an order “under this rule” (that is under CPR 64.9⁷)where it appears to the Court that the conduct was “unreasonable or improper” – that is, with no reference to “negligent”.

[24] Further, CPR 64.9 provides for Wasted Costs Orders based on the conduct of a party or the party's legal representative, whereas CPR 64.8 refers only to conduct of a legal practitioner or any employee of the legal practitioner.

[25] To determine if a Wasted Costs Order can be made under the CPR where a legal practitioner's act or omission has been “negligent”, even if not “unreasonable” or “improper”, the two rules in the CPR concerning Wasted Costs Orders need to be read in the most coherent and consistent manner possible, considering the differences in their respective wording. Also, they must be interpreted in accordance with the directive in CPR 1.1 that the Court must seek to give effect to the overriding objective of the Rules of “enabling the court to deal with cases justly” when it interprets any rule.

⁷ CPR 2.2(2) provides: “A reference to a rule as CPR 2.7 or rule 2.7 is a reference to a rule so numbered in these Rules.”

- [26] The Applicants' position is that this Court may make an order under CPR 64.8, the rule under which they apply, in relation to a negligent act or omission, while Harneys' position, relying on CPR 64.9(1)(b), is that this Court may only make an order in relation to more serious acts or omissions, namely unreasonable or improper acts or omissions; that CPR 64.8 provides a definition and sets up the jurisdiction to make a Wasted Costs Order, while CPR 64.9 sets up how the jurisdiction is to be exercised by the Court to make a Wasted Costs Order.
- [27] This Court is of the view that, while it is not nearly as clear as it could be, the two rules establish two separate bases to make a Wasted Costs Order.
- [28] CPR 64.8 is the more traditional basis for a Wasted Costs Order derived from English law which focuses on the legal practitioner's act or omission in relation to duties owed to the court, and for which he or she has responsibility to the court (discussed below in this Judgment).
- [29] CPR 64.9, on the other hand, focuses on acts or omission of a party, or the party's legal practitioner on behalf of the party, in the legal process that affects the costs incurred by the other party and in some cases the court. The only reference to "Wasted Costs Orders" by that name in CPR 64.9 is in the heading ("Court's powers in relation to wasted costs orders"). The rule itself is primarily focused on adjusting costs as between the parties, based on one party – either by the party's own acts or omissions or acts or omission by the party's legal practitioner taken on behalf of the party "before or during the proceedings." CPR 64.9(3) supports this interpretation by requiring that a party, in not present when the order is made, be notified in writing of the order by the legal practitioner. This shows the focus of the rule being on the conduct taken by the party or by the party's legal practitioner on the party's behalf.
- [30] **Inherent Jurisdiction for Wasted Costs Orders.** The Applicants submitted that in addition the Court has inherent jurisdiction to make Wasted Costs Orders.
- [31] The reason may matter in this case is because of Harneys' submission that by reason of CPR 64.9(1)(b) not including "negligence", a Wasted Costs Order (notwithstanding CPR 64.8) can be made only against a legal representative (legal practitioner) if the legal representative's conduct was "unreasonable" or "improper" – not if the legal representative's conduct was "negligent". While

the Court's determination above that CPR 64.8 and CPR 64.9 are separate bases for a Wasted Costs Order, this Court will proceed to determine this question in the event it is incorrect in that interpretation of the two rules.

- [32] In other words, while this Court does not consider Harneys' submission about the construction of the two rules to be correct – CPR 64.8, pursuant to which this Application was brought, provides that a Wasted Costs Order can be made based on the legal representative's negligence – if this Court's conclusion is incorrect such that the CPR does not enable a Wasted Costs Order to be made based on negligence, the existence of inherent jurisdiction to make a Wasted Costs Order would enable it to be made based on negligence, as submitted by the Applicants and explained below in this Judgment.
- [33] Inherent jurisdiction to make Wasted Costs Orders existed in England well before the House of Lords decided *Myers v Elman* ("**Myers**")⁸ on 5 December 1939. The House of Lords elaborated on the jurisdiction in *Myers*.
- [34] When the Supreme Court Act, section 7, provided that the High Court had within the Territory "the same powers and authorities incidental to such jurisdiction as on the first day of January 1940, were vested in the High Court of Justice in England", the High Court in the Territory obtained the same powers and authorities as the High Court of Justice in England, which included inherent jurisdiction to make Wasted Costs Orders. Thus, the inherent jurisdiction to make Wasted Costs Orders was preserved.
- [35] As Wasted Costs Orders are made in relation to a breach of the legal practitioner's duties to the court, they are part of the Court's inherent powers to control its own processes. The court is sanctioning one of its officers when it makes a Wasted Costs Order.⁹ It does so by imposing a punitive measure (from the perspective of the legal practitioner) and by compensating the party or parties who suffer financially due to the legal practitioner's breach of his or her duties to the court.

⁸[1940] AC 282 (HL). See *Ridehalgh* at 226, lines D – F; 227, lines E – H. Solicitors Act 1957, section 50(2) preserved the wasted costs jurisdiction, and in 1960 a new rule, which later became Ord. 62, r. 8(1) provided for wasted costs orders.

⁹ *Harley v McDonald* ("**Harley**") [2001] UKPC 678, at 703, paragraph 49.

- [36] While grouped in the CPR with other costs provisions, Wasted Costs Orders serve a rather different function in the judicial process. Thus, the overall reasoning of the Court of Appeal in *Halliwel* regarding there being no inherent jurisdiction respecting other forms of costs discretions appears, on a principled basis, not to extend to Wasted Costs Orders.
- [37] *Myers* having recognized that a Wasted Costs Order could be founded on the legal representative's negligence, under the inherent jurisdiction of this Court a Wasted Costs Order may be made based on a legal practitioner's negligence, even if *Harneys* is correct in its submission and negligence cannot found a Wasted Costs Order under the CPR provisions.
- [38] **Punitive and/or Compensatory Issue.** There is a difference between the Applicants and *Harneys* as to whether this Court's Wasted Costs Order jurisdiction is primarily (i) punitive (or disciplinary), or (b) compensatory, which it was submitted affects the strength of the case that must be shown for a Wasted Costs Order to be made.
- [39] The Applicants submit that the Wasted Costs Order jurisdiction is compensatory.
- [40] The Applicants submit as follows:
- The jurisdiction is not punitive or disciplinary: rather, it is there to protect litigants, and if appropriate, to compensate them for losses caused to them by the improper, unreasonable or negligent conduct of a legal practitioner. In this regard, a wasted costs application differs from proceedings for a disciplinary order against a legal practitioner. With a wasted costs order it is not necessary to establish dishonesty, criminal conduct or behaviour that would justify striking off.¹⁰
- [41] From the authorities, it seems clear to this Court that the Court's Wasted Costs jurisdiction is both compensatory, viewed from the perspective of the applicant, and punitive, viewed from the perspective of the legal practitioner against whom a Wasted Costs Order is being sought.¹¹
- [42] The reason for the debate is because it is said in the authorities which describe the purpose as primarily punitive that the result is a narrow construction of the jurisdiction.

¹⁰ Applicants' Skeleton, paragraph 48, citing *Myers* and *Ridehalgh* at 227.

¹¹ *Harley*, at 703; *Myers* at 319, paragraph 49 (The jurisdiction is not merely punitive but compensatory); *Medcalf*, at 138, lines E – F, paragraph 32.

- [43] However, not a lot turns on the difference. Whether the jurisdiction exists or is being invoked primarily for compensatory or punitive purposes, the jurisdiction is extraordinary, has a significant punitive aspect from the perspective of the legal practitioner, and should be construed narrowly.
- [44] Legal practitioners owe no duty to the opposite party but rather they owe a duty to the Court and it is a failing in that duty which leads to a Wasted Costs Order.
- [45] The opposite party's legal practitioners are not ordinarily to be required to 'back stop' their own client's costs obligations to the opposite party. It is only where the legal practitioners' actions or inactions fail to fulfill their obligations to the Court (at the specified level of culpability), that the Court may exercise its discretion to make a Wasted Costs Order. The circumstances giving rise to a Wasted Costs Order will be infrequent.

TEST FOR WASTED COSTS ORDER

- [46] **Two Question Test.** There are two questions to be considered when the Court is assessing whether to exercise its discretion to make a Wasted Costs Order in this jurisdiction, at least when acting pursuant to CPR 64.8 and/or the inherent jurisdiction of the Court:
- First, has there been an improper, unreasonable or negligent act or omission on the part of the legal practitioner?¹²
 - Second, if so, did such conduct act or omission cause the applicant to incur costs that the court considers it unreasonable for the applicant to pay?
- [47] In England and Wales there is three question test, although it appears to be a distinction without a difference. The second question in England and Wales has been put as "cause the applicant to incur unnecessary costs?" The third question has been put as "Is it in all the circumstances just to

¹²In England and Wales, this has been put as "Has the legal practitioner acted improperly, unreasonably or negligently?" See Ridehalgh. In this jurisdiction it is clear that "an omission" as well as an "act" can lead to a Wasted Costs Order.

order the legal practitioner to compensate the applicant for the whole or any part of the relevant costs?"¹³

- [48] In this jurisdiction the concept of "the applicant being caused to incur unnecessary costs" and the concept of "in all the circumstances" it being "just for the legal practitioner to compensate the applicant for the whole or part of the costs", appear to have been married, and arguably somewhat expanded, into the more concise wording in CPR 64.8, "cause the applicant to incur costs that the court considers it unreasonable for the applicant to pay."
- [49] The second test in this jurisdiction, and the second and third tests in England and Wales, articulate the same two important considerations.
- [50] **Causation Must be Established.**First, the test articulates the need for causation – it is necessary that there be a causal link between the act or omission and the incurring by the applicant of the costs in question. The conduct complained of must have caused costs to be wasted. The liability can be only to the extent of such wasted costs. Demonstration of a causal link is essential.¹⁴
- [51] **Court's Discretion.**Second, the test articulates that the court exercising its discretion as to whether it is unreasonable for the applicant to pay those costs.
- [52] Even if the Court is satisfied that a legal practitioner has acted improperly, unreasonably or negligently and the such conduct has caused the applicant to incur Wasted Costs, a court is not bound to make a Wasted Costs Order. In doing so, the court should give sustainable (principled) reasons for exercising the discretion against making a wasted Costs Order.¹⁵
- [53] "Unreasonable", which is used in this jurisdiction, arguably confers a somewhat broader scope for an order than "unnecessary costs" as there may be some other reason why it is unreasonable for the applicant to pay the cost even if they were "necessary", although such circumstances might be rare.

¹³ Ridenhalgh.

¹⁴ Ridehalgh, at 237, lines E – G.

¹⁵ Ridenhalgh, at 239, lines D – F.

- [54] The basis for exercising that discretion does not seem to differ materially from the basis in England and Wales, namely "justice". Would it be just for the legal practitioner to compensate the applicant for all or part of the costs?
- [55] There must be a serious breach of duty to the Court for the act or omission to fall into potential Wasted Cost Order territory. "A simple mistake or oversight or a mere error of judgment will not, of itself, be sufficiently serious ..."The conduct must amount to a serious dereliction of duty; there must be "gross negligence"; "while a mere mistake or error of judgment is not generally sufficient, a gross neglect or inaccuracy ... might suffice. A more precise definition of the level of seriousness is not appropriate. But where negligence or incompetence is alleged the conduct must be put into its proper context."¹⁶"The essential point is that it is not errors of judgment that attract the exercise of the jurisdiction, but errors of a duty owed to the court."¹⁷
- [56] The difficulty for a court is determining whether an act or omission has crossed the line, recognizing that the "line" is seldom a bright line. How serious must the legal practitioner's act or omission be? How clearly must it be established by the applicant?
- [57] **Policy Purpose of Wasted Costs Orders.**In *Ridehalgh v Horsefield* ("*Ridehalgh*")¹⁸, the English Court of Appeal considered at length the principles governing Wasted Costs Orders, with Sir Thomas Bingham M.R. handing down the judgment of the Court.¹⁹ The Court began by setting out the importance safeguards in the English legal system that have been shown to be needed for the adversarial system of justice to function fairly and effectively in interests of parties to litigation and of the public at large, none of which safeguards is entirely straightforward.
- [58] The Court discussed five of those safeguards, one of which is that "[s]olicitors and barristers may in certain circumstances be ordered to compensate a party to litigation other than the client for whom

¹⁶ Harley, paragraph 55.

¹⁷ Harley, paragraph 57.

¹⁸ *Ridehalgh v Horsefield* [1994] Ch 205, at 232 – 233, CA per Sir Thomas Bingham M.R., Rose and Waite L.JJ.

¹⁹ Aff'd in *Medcalf v Mardell and others* ("*Medcalf*") [2003] 1 AC 120 (HL) at 129, paragraph 13, subject to *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 and subject to a strengthened statement regarding the effect of privilege, at paragraph 23, discussed in this Judgment in connection with privilege.

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.”²⁰

[59] The Court quoted, seemingly with approval, the obiter statement that “this is a jurisdiction which falls to be exercised with care and discretion and only in clear cases.”²¹

[60] **Improper, Unreasonable or Negligent.** Largely the parties to this Application were not apart on the meaning of “improper”, “unreasonable” and “negligent” in relation to Wasted Costs Orders.

[61] Ridehalgh set out the meaning of those terms, and how they interrelate, in a manner that has largely been followed since then. The Court held as follows:

“Improper” means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatized as such whether or not it violates the letter of a professional code.

“Unreasonable” also means what it has been understood to mean in this contest for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and a reflecting on a practitioner’s judgment, but not unreasonable.

The term “negligent” was the most controversial of the three. It was argued ... “negligent” [involves] the well known ingredients of duty, breach, causation and damage. Therefore, it was said, conduct cannot be regarded as negligent unless it involves an actionable breach of the legal representative’s duty to his own client, to

²⁰ Ridehalgh at 225, line F.

²¹ Ridehalgh, at 229, lines A – B, citing *Orchard v South Eastern Electricity Board* [1987] 1 Q.B. 565, at 572, line E, CA per Sir John Donaldson M.R., Dillon and Croom-Johnson L.JJ.

whom alone a duty is owed. We reject this approach. ... (2) Since the applicant's right to a wasted costs order against a legal representative depends on showing that the latter is in breach of his duty to the court it makes no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that he is also in breach of his duty to his client.

... we are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

In adopting an untechnical approach to the meaning of negligence in this context, we would however wish firmly to discountenance any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence: "advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do;" an error "such as no reasonably well-informed and competent member of that profession could have made:" see *Saif Ali v Sydney Mitchell & Co.* [1980] A.C. 198, 218, 220, *per* Lord Diplock.

We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings so as to avoid overlap between the three. We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think that any sharp differentiation between these expressions is useful or necessary or intended.²²

- [62] The concluded paragraph of this quotation from *Ridehalgh* is consistent with the Applicants' submission that it is not useful or necessary to draw a sharp differentiation between the expressions "improper", "unreasonable" or "negligent" as they will frequently overlap. Broadly, impropriety encompasses any conduct which would incur a serious professional penalty or would be regarded as improper according to the consensus of professional opinion. Unreasonableness describes conduct which is vexatious or designed to harass the other side. Negligence should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.²³

²² *Ridehalgh* at 232, line C – 233, line F.

²³ *Ridehalgh*, at 232 – 233.

[63] Importantly, a distinction has been drawn between an error in judgment and negligence: ...what should properly be regarded as an error in judgment should not be condemned as negligence ...²⁴

[64] **Hopeless CasesNot Abuse of Process.**Ridehalgh went on to hold that a legal practitioner is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or defence which is plainly doomed to fail.²⁵ It then discussed the duty of barristers to comply with the 'Cab-rank rule' accept briefs in his or her filed appropriate to his or her experience and seniority, and the fact that solicitors [like legal practitioners in this jurisdiction] are not subject to an equivalent rule although many would and do respect the public policy underlying it.²⁶

[65] The Applicants submit that the absence of a 'Cab-rank rule' governing BVI legal practitioners might affect their position in relation to a Wasted Costs Order application, as they are able to decline matters more readily. It seems doubtful that such a different standard should be imposed – it would be open to a BVI legal practitioner, where the facts justify it, to explain that the matter was taken on out of a desire to see the client have legal representation (which in an era of growing self-represented litigants is beneficial to the judicial system). In this case, the point seems to have no relevance as there was no such response advanced by Harneys.

[66] Ridehalgh continuedby discussing that taking a case bound to fail differs from assisting in an abuse of the court's process:

It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of process of the court. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, such as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, by knowingly failing to make full disclosure on ex parte application or knowingly

²⁴Lowline (PSV) Ltd v Direct Aviation Ltd ("Lowline") at 10, 8 March 1999, Queen's Bench Division, Commercial Court per Rix J., All England Official Transcripts (1997-1998); [1999] Lexis Citation 3101.

²⁵ Ridehalgh at 233, line F.

²⁶ Ridehalgh at 233, line F – 234, line D.

conniving at incomplete disclosure of documents. It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it.²⁷

[67] The foregoing passage makes two points that are particularly relevant to this Application. the first, which is not controversial, is that is an abuse of process to “knowingly failing to make full disclosure on ex parte application”, and the second, which is important to keep in mind, is that “if there is doubt the legal representative is entitled to the benefit of it.”

[68] The latter point was re-emphasized in *Medcalf*: “The court must give the lawyer the benefit of the doubt in reaching its decision, including the exercise of its statutory discretion.”²⁸

[69] An observation of Lord Mance about hindsight is valuable to keep in mind:

Once unsuccessful litigation has been brought to an end, hindsight is likely to encourage suggestions that the legal advisers to those who pursued or defended it should not have lent their assistance, or should not have done so for as long as they did.²⁹

[70] **Burden of Proof.** As 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 legal practitioners is not obliged to prove that it should not be made.³⁰

[71] **Effect of Privilege.** The Applicants submit, and this Court agrees, that on a Wasted Costs Application the court should bear in mind that the legal practitioner may be constrained in what he or she can say to defend the application in circumstances where the legal practitioner’s client has not waived privilege.

[72] Where a legal practitioner is in that position, the Court should not make a wasted costs order unless, proceeding with extreme care, it can say that it is satisfied there is nothing that the legal

²⁷ *Ridehalgh* at 234, lines D – F.

²⁸ *Medcalf*, at 146, lines C – D, paragraph 61.

²⁹ *Dempsey v Johnstone (Wasted Costs Order)* [2003] EWCA Civ 1134; [2004] P.N.L.R. 2, at 41, paragraph 34.

³⁰ *Ridehalgh* at 239, lines B – D.

practitioner could, if unconstrained by privilege, have said in order to resist the order.³¹ Full allowance must be made for the inability of a respondent to tell the whole story. Where there is room for doubt, the respondent legal practitioners are entitled to the benefit of it. It is only when, with all allowances made, a legal practitioner's conduct of proceedings is found to have been quite plainly unjustifiable that it can be appropriate to make a Wasted Costs Order.³²

LEGAL PRACTITIONER'S DUTY ON EX PARTE APPLICATION

- [73] The Applicants submit, correctly, that the duty to give full and frank disclosure rests on an applicant's legal practitioners as well as on the applicant and is a high duty.
- [74] Justice Farara articulated this point in his Discharge Judgment that "This duty extends to the lawyers for the Applicant".³³
- [75] On an ex parte application, those acting for the applicant have a personal responsibility to take reasonable steps to ensure that there is full and frank disclosure to the court on the application.³⁴ The personal duty extends to ensuring that there is full and frank disclosure at the hearing of the application.³⁵ If a legal representative finds out later that disclosure was not made, as soon as he is aware of this, he must advise his client immediately to correct the position and that he cannot continue to act unless that is done.³⁶

³¹ Applicant's Skeleton, paragraph 53, citing *Medcalf*.

³² *Ridehalgh*, at 237, lines B – D. *Ridehalgh* must be read subject to the stronger statement in *Medcalf*, paragraph 23: where there was no waiver, first, "the court must be very slow to conclude that a practitioner could have had no sufficient material [respecting instructions received and material before him] and second, "The Court should not make an order against a practitioner precluded by legal professional privilege from advancing his full answer to the complaint made against him without satisfying itself that it is in all the circumstances fair to do so."

³³ Discharge Judgment, page 21, lines 6 – 12: "An applicant must present fairly the facts disclosed and observation of the duty is essential to securing the integrity of the Court's process. This duty extends to the lawyers for the Applicant and materiality is to be decided by the Court and not by the assessment of the Applicant or his legal advisers."

³⁴ *Gee*, Commercial Injunctions, 6th Ed., 2016 ("*Gee*"), at 9-015; *O'Regan v Lambic Productions* ("*O'Regan*") (1989) 139 NLJ 1378: Sir Peter Pain held "the court must rely on its officers to be very careful and lean over backwards to make sure there is full disclosure, especially if it is to the client's disadvantage. The point is that it is the duty of the solicitor to apprise the court of the facts so that the court can make up its own mind."

³⁵ *Art Corp v Schuppan*, *The Times*, 21 January 1994.

³⁶ *Myers v Elman* ("*Myers*") [1940] AC 282, at 293 – 294; 322 – 323.

[76] The duty to give full and frank disclosure – the duty of candour – on an ex parte application is a heavy one. It extends not only to material facts known to the applicant, but to additional facts that he would have known had he made proper inquiries. The applicant is under a duty to present fairly the facts so disclosed.

The rationale for the duty is that the court is being asked to grant relief in the absence of the Defendant and is wholly reliant on the information provided by the Claimant. Other parties do not have the opportunity to [correct] or supplement the evidence which has been put before the Court. Observance of the duty is essential to secure the integrity of the Court process and to protect the interest of those potentially affected by whatever order the Court is invited to make.³⁷

[77] The duty of full and frank disclosure and fairness requires the applicant to place before the Court any relevant legal point. If there is an obvious answer to the claim or an obvious defect in the cause of action, the applicant must refer to it. The applicant must identify defences which can reasonably be expected to be raised. They should be fairly summarized in the affidavit, outlined in the skeleton, and specifically drawn to the attention of the judge at the ex parte hearing.³⁸

[78] It is not an answer to an allegation of non-disclosure that the relevant information was contained in an exhibit,³⁹ especially where the exhibit voluminous as is often the case in this Court. Because ex parte applications are often dealt with shortly, and the judge may not have had the opportunity of pre-reading, there is a responsibility of ensuring that the relevant points are presented clearly and distinctly.⁴⁰ Equally, it is no answer to say that there was insufficient time to investigate the matter fully prior to the ex parte application.⁴¹

[79] **Wasted Costs Orders for Breach of Full and Frank Disclosure Duty.** A legal practitioner's failure to give full and frank disclosure on an ex parte application is an established basis for a Wasted Costs Order.⁴²

³⁷ Commercial Bank - Cameroun v Nixon Financial Group Limited, HCVAP 2011/005, at [17(4)] (CA); Independent Asset Management Co Ltd v Swiss Forfaiting Ltd BVIHC(COM), Judgment, 29 January 2016, Farara, J.

³⁸ Gee, at 9-006 and 9-007; CEF Holdings v Munday [2012] EWHC 1254 at [175] – [178].

³⁹ Gee, at 9-005.

⁴⁰ O'Regan; Siporex Trade SA v Comdel Commodities [1986] 2 Lloyd's Rep 428 at 437.

⁴¹ Behbehani v Salem [1989] 1 WLR 723 at p.729 C – D.

⁴² Ridehalgh, at page 234D; Gee at 9-015 to 9-017.

[80] A Wasted Costs Order arising from an ex parte injunction can be made based on the applicant's legal practitioner's participation in breaches of the duty of full and frank disclosure and fairness, namely the legal practitioner's failure to investigate matters, and overlooking the materiality of the legal practitioner's knowledge of relevant matters,⁴³ including the injunction applicant's ability to satisfy a cross-undertaking.⁴⁴

[81] Assessing when errors of judgment in relation to non-disclosure cross the line into acts of negligence is often difficult, and as stated above, the benefit of any doubt must be in favour of the legal practitioner. Referring to two court of first instance judgments, one in which a Wasted Costs Order was made based on negligence and one in which it was not, illustrates the difficulty of a court assessing when errors of judgment cross the line into acts of negligence.

[82] An illustration of the exercise of the discretion to make a Wasted Costs Order can be seen in *Lowline*. Justice Rix rejected the submission that any errors by the solicitor were errors of judgment, not negligence, holding as follows:

It does not, I think, necessarily follow from a solicitor's involvement with a material non-disclosure that, because he knew or ought to have known the facts, or knowing them, ought to have appreciated their materiality, that he has been negligent. But making every appropriate allowance in his favour that I think I can, I would regard Mr. David as having been negligent in the preparation of Mr. Grimes' affidavit and in permitting that affidavit to be put before the court ... There was a failure to act with the competence reasonably expected of ordinary members of the profession. In this connection it seems to me pertinent to remind myself what Woolf L.J. said in *Behbehani v Salen*⁴⁵ ...

It is preferable, in my view for each case to be considered on its own merits taking into account the public interest which exists in protecting the administration of justice from the harm that will be caused if applicants for the draconian relief of Mareva and Anton Piller orders do not, on an ex parte application, make disclosure of all material facts whether or not the non-disclosure is innocent. I recognize the strain placed on legal advisers

⁴³ *Lowline*.

⁴⁴ *Gee*, at 11-025; *K.B. Chau & Co v China Finance Trust and Investment Corporation* [1995] HKCU 0462 citing *Myers and Ridehalgh*, upheld a wasted costs order against a lawyer who obtained a freezing injunction based on a cross-undertaking in damages that was "not worth the paper it was written on".

⁴⁵ (1989) 2 All ER 143; [1989] 1 WLR 723 at page 729C/D.

and the pressure under which they have to work, especially in large commercial actions, where prompt steps sometimes have to be taken in order to protect their client's interests. However, if the court does not approach the question of the non-disclosure of material matters in the way that has been indicated in earlier decisions, there will be little hope of solicitors who are subjected to such pressures appreciating the importance of making disclosure and, more important, bringing home to the clients the serious consequences of non-disclosure."⁴⁶

- [83] Justice Rix concluded that in the solicitor had been negligent "not just one respect, but in many" including participating in his client's failure to disclose matters which he investigated with the client, failing to investigate a crucial aspect of the dispute, overlooking the materiality of his own knowledge of the company's financial difficulties, and failing to follow that up by asking proper questions as to the financial viability of the charter vessel in issue.⁴⁷
- [84] However, not every situation where there is an unintentional failure of a legal practitioners in relation to full and frank disclosure will result in the Court exercising its discretion to make a Wasted Costs Order, even if there is a causal connection to the wasted costs in the sense that had there been full and frank disclosure the ex parte order would not have been granted.
- [85] An illustration of the exercise of the discretion not to make a Wasted Costs Order can be seen in *Glengate-KG Properties Ltd. v Hogue*.⁴⁸ There had been an ex parte hearing on an application for an Anton Pillar Order before a different judge. The judge's attention was not drawn to certain facts and documents. Had counsel drawn them to the judge's attention it would have been apparent to the judge that an allegation of non-disclosure of a director's interest in the applicant company was false. Also, the judge's attention was not drawn to the standard form of Anton Pillar injunction which provide for a supervising solicitor for the execution of the order, or the inadequacy of the cross-undertaking in damages.
- [86] After referring to *Ridehalgh*, and its statements about the meaning of "improper", "unreasonable" and "negligent", Justice Rattee found that he had "no doubt that none of the conduct constituted

⁴⁶ at pages 14 – 15.

⁴⁷ at pages 15 – 16.

⁴⁸ Chancery Division, 2 February 1996, per Rattee J.

improper or ... unreasonable conduct” and that “[t]he real question is: Was such conduct or any part of it negligent?”⁴⁹

- [87] He found that the legal representatives had not appreciated the significance of certain notes in the Directors’ Report and the accounts of the applicant company” for the year in question:

With the benefit of hindsight, it is a pity that neither solicitors nor counsel appreciated that these notes might provide an explanation [for a large payment] ... However, in considering the failure of Mr. Hogue’s lawyers to appreciate the significance of the notes ... I must bear in mind the urgency with which ... they prepared the application.”⁵⁰

He continued:

... some solicitors and counsel would have appreciated the significance ... It is a pity that these respondents did not do so.”

He concluded that even if he was wrong in his conclusion he was “not satisfied that, had the point been appreciated, no Anton Pillar order would have been made.”

- [88] With respect to the second allegation, he found “it would have been better” if the legal representatives had checked the veracity of certain allegations. “However, again bearing in mind the inhibitions placed on the respondent’s evidence by privilege, I am not satisfied that, in the context of the urgency of mounting an application for an Anton Pillar order ...” that the legal representatives “can be said to be clearly negligent in not insisting on checking the veracity of their instruction by obtaining a copy of the relevant document. Had they checked, they would have found that the point made by Mr. Hogue was a bad one.”

- [89] **Only in Exceptional Circumstances; Must Not Become Satellite Litigation or Tactical Proceedings.** From a policy perspective, it would be contrary to The Overriding Objective of the CPR, “to enable the court to deal with cases justly”⁵¹ and its concept of proportionality if applications for Wasted Costs Orders were to become routine or common tactical steps in litigation to harass or intimidate legal practitioners and opposite parties.

⁴⁹ At 13.

⁵⁰ At 14 – 15.

⁵¹ CPR 1.1.

- [90] There is that risk, particularly in a jurisdiction such as ours in which Commercial Division cases often involve significant monetary and non-monetary issues and are vigorously contested by parties, sometimes with motivations extending beyond what an economic business analysis might objectively justify.
- [91] To be clear, this Court is not suggesting that is the motivation here. Rather, the Court is drawing to the attention of legal practitioners and litigants that tactical applications for Wasted Costs Orders may be dealt with firmly, including possibly with full indemnity costs orders and possibly Wasted Costs Orders against the legal practitioners for the failed tactical Wasted Costs Order applicant.
- [92] Applications to discharge ex parte orders commonly include as a ground the applicant's failure to fully and fairly disclose. By their nature, ex parte applications involve tight timing to prepare materials and sometimes tight timing to make submissions to the judge. However, with the benefit of time and hindsight, the party against whom the injunction was granted will develop a number of allegations of non-disclosure. This does not take away from what Lord Woolf (quoted above) about the importance on an ex parte application of disclosure being made of all material facts and his recognition of "the strain placed on legal advisers and the pressure under which they have to work, especially in large commercial actions, where prompt steps sometimes have to be taken in order to protect their client's interests."
- [93] Wasted Costs Orders should not be sought every time an ex parte injunction is dissolved for non-disclosure. As pointed out in the authorities and by counsel on this Application, non-disclosure may arise from an error of judgment by the legal practitioner, not an act of negligence; may be the fault of the client, not the legal practitioner; and may be difficult to defend when non-waive of privilege impedes, perhaps seriously, the legal practitioners' ability to answer the allegations.
- [94] Likewise, it is not uncommon for a pleading to be struck because it has not properly pleaded a cause of action, particularly in areas of law where pleading is more complex or where the cause of action is pushing up against established causes of action or pressing a novel cause of action. Wasted Costs Orders should not be sought every time a pleading is struck out even though it might

be argued that a careful and competent legal practitioner would have pleaded the cause of action properly or would not have pleaded it at all

- [95] The same might be said about pleadings that are alleged to be prolix, unintelligible, scandalous and so on. It might be argued that a careful and competent legal practitioner would not have pleaded in any of those ways.
- [96] The English and other authorities are mindful of the concern that Wasted Costs orders not become satellite litigation.
- [97] In *Ridehalgh* the Court said that it had material before it which showed that the number and value of wasted costs orders applied for, and the costs of litigating them, had risen sharply.
- [98] The hearing of this Application took somewhat over two days, which the Respondent submit is in and of itself sufficient to show that this was not a clear case for a Wasted Costs Order, being a summary proceeding.
- [99] In *Myers*, the original hearing before a jury had been five days and the Wasted Costs Order hearing had taken a further five days. In *Ridehalgh* the Court noted that in one of the six cases before it the original hearing had lasted five days and the Wasted Costs Order application had lasted seven days, leading to the Court remarking that it called to mind Dicken's searing observation in *Bleak House*.⁵²
- [100] In *Medcalf*, Lord Hobhouse of Woodborough returned to theme of satellite litigation "which too easily gets out of proportion to the litigation which has spawned it". In that case, the wasted costs application occupied two years with a further full hearing in the Court of Appeal and an appeal to the House of Lords. "If the policy of the wasted costs jurisdiction is to reduce the costs of litigation and save court time, too often it fails to achieve this objective ... The jurisdiction is discretionary and should be reserved for those cases where the unjustifiable conduct can be demonstrated without recourse to disproportionate procedures."⁵³

⁵² *Ridenhalgh* at 226, lines A – B ("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.").

⁵³ *Medcalf*, at 144, paragraph 57.

[101] Also, courts must be mindful of the risk that the possibility of facing an application for a Wasted Costs Order may serve to chill the vigour with which a legal practitioner pursues or defends a case.⁵⁴

[102] Wasted Costs Applications should be brought sparingly and only in the most egregious cases. They must be reserved for situations in which there is a real and reasonable prospect of satisfying the heavy requirements.⁵⁵ A Wasted Costs Order generally requires that there have been impropriety, unreasonableness or negligence to a high degree, not a minor impropriety, unreasonableness or negligence. Negligence is measured on a continuum with terms like “willful neglect” and “gross negligence” being used in other contexts. “Would have been better” is not negligence. The authorities speak in terms of “knowingly fail”, which knowingly often meaning deliberate, although each situation must be viewed in its overall context. Similar conduct (act or omission) in one context may lead to a different finding in a different context. Hindsight, and putting an alleged act or omission under the microscope of a Wasted Costs Application, risks an unrealistic result.

BACKGROUND OF DISPUTE LEADING TO THIS APPLICATION

[103] The Claimants are brothers who live in Hong Kong. Before the events which formed the subject of the proceedings, they each had a 50% shareholding in the Sixth Applicant, a BVI company, which had in turn a wholly-owned subsidiary, the Fifth Applicant, also a BVI company. The Fifth Applicant had a 22% shareholding in Eighth Defendant which gave them control due to the balance of the shares being held by small investors.

[104] The dispute arose out of the enforcement of loan security over shares at two levels in the corporate structure through which the Claimants formerly held their interests in (i) the Eighth Defendant; and (ii) a joint venture with the Seventh Defendant in respect of a real estate project in the PRC.

⁵⁴ Gee, at 0-016, at page 278.

⁵⁵ Consideration should be given to ordering unsuccessful tactical applicants to compensate, as generously as the CPR permit, successful respondents against whom these serious allegations were made, as the price of their misadventure.

- [105] The Defendants' position was that when the loans were overdue in May 2015, the lenders exercised their power of sale under the loan security and sold the stake in Eighth Defendant to the First Applicant to the First Applicant. By July 2015 the Seventh Defendant had not been paid its guaranteed return under the Joint Venture, so it enforced the Joint Venture security, dating instruments of transfer that had been executed, in blank, in its favour. It thereby became the owner of the Fifth and Sixth Applicants.
- [106] In these proceedings, the Claimants challenged certain actions outlined above, alleging that the loans had been repaid. They relied not on payments made to the lenders but on payments allegedly made to parties said to be associated with the lenders. They asserted that a Mr Liu (who was not a director of any of the lenders) had agreed that the loans were in effect to be repaid by this mechanism.
- [107] Also in these proceedings the Claimants alleged that the lenders had participated in an unlawful means conspiracy by selling the shares in the Eighth Defendant formerly held by the Fifth Applicant under their power of sale to the First Applicant (who was also alleged to be party to the conspiracy); and further that the lenders had unlawfully converted the shares in the Eighth Defendant. Further, they alleged that the Seventh Applicant's security rights under the Joint Venture had not been triggered since (i) the Seventh Applicant had failed to make the requisite capital contributions and (ii) the Seventh Applicant's interests in the Joint Venture had been bought out. The Defendants denied both allegations. On this basis, the Claimants asserted that the Seventh Applicant had wrongfully converted the shares in the Fifth and Sixth Applicants to its own use.
- [108] The dispute spawned litigation in other jurisdictions, including Bermuda (where the Eighth Defendant is incorporated) and Hong Kong. The events giving rise to the Bermuda proceedings are relevant to the matters raised by the Applicants on this Application and are described more fully below.
- [109] Subsequent to the Discharge Order, the Bermuda Court required the Eighth Defendant to convene an annual general meeting. After the Eighth Defendant failed to do so, the Bermuda Court authorised the applicants before that court to hold an annual general meeting and shareholders voted to remove from the board of directors the Second Claimant and other directors.

THESE PROCEEDINGS

- [110] As stated above, these proceedings were commenced on 19 November 2015. At the time, the First Claimant was an undischarged bankrupt in Hong Kong.⁵⁶
- [111] On 23 November, the Claimants applied ex parte for and obtained the Injunction and for permission to serve out of the jurisdiction on the Eighth Defendant.
- [112] The Injunction restrained the First Applicant from exercising any voting rights or passing any resolution in its capacity as a shareholder of the Eighth Defendant and from disposing of its shares in the Eighth Defendant, and it restrained the Seventh Defendant from disposing of its shares in the Fifth and Sixth Defendants.
- [113] As regards the restraint on voting, the Claimants justified the need for the Injunction by reference to proceedings brought in Bermuda by three other shareholders in the Eighth Defendant seeking the convening by the Bermuda Court of an annual general meeting of the Eighth Defendant, at which changes to the composition of its board of directors would be proposed. The Claimants asserted that this was part of a “cynical ploy” to deprive them of their assets and take control of the Eighth Defendant. The First Applicant was alleged to be acting in concert with the Bermuda applicants. The Bermuda application was also used to justify the alleged urgency of the Injunction application.⁵⁷
- [114] On 11 December 2016, the First Applicant applied to discharge the Injunction and applied for security for costs, and on 16 December 2016 amended its application to include the Strike Out Application. The Discharge Application and the Strike Out Application were listed for 14 and 15 January 2016. On 8 January 2016, the Second Claimant was ordered to pay \$150,000 by way of security within 14 days; no order was made against the First Claimant because of his bankruptcy. The \$150,000 security has never been paid.

⁵⁶ Matters relating to the effect and disclosure of the First Claimant’s bankruptcy are discussed later in this Judgment.

⁵⁷ Certificate of Urgency, paragraph 3(b).

- [115] The Defendants filed their Defence on 22 December 2015. No Reply was filed.
- [116] On 6 January 2016, Harneys informed the legal practitioners for the Defendants that they accepted that the First Claimant was unable to bring these proceedings without the consent of the Hong Kong Trustee in Bankruptcy and the approval of the Hong Kong Court. Harneys proposed to remove him as Claimant, which required leave of this Court to discontinuance.
- [117] On 12 January 2016, Harneys informed the Defendants' legal practitioners that it had received instructions to discontinue the proceedings against all Defendants, however, the terms of the discontinuance and the discharge of the Injunction were not agreed.
- [118] On 14 January 2016, just before the hearing commenced, the Claimants served a skeleton argument explaining that the Second Claimant no longer intended to discontinue the Claim, and that he would be opposing the Discharge Application.
- [119] On 14 and 15 January, the Court dealt with the First Claimant's discontinuance application, which was granted⁵⁸, and the Discharge Application, which was granted, with costs to the First to Seventh Applicants.⁵⁹ The Strike Out Application was adjourned to a date to be fixed due to a shortage of time.⁶⁰
- [120] At the request of the First to Seventh Applicants, they were given liberty to apply for a Wasted Costs Order against Harneys within three months of the date of the Discharge Order.⁶¹ The reason for the request was debated at some length at the hearing of this Application and is discussed and determined below.

AMENDED APPLICATION FOR WASTED COSTS ORDER

- [121] The Application was brought on 15 April 2016, within the three-month period provided in the Discharge Order for the Applicants to apply for a Wasted Costs Order.

⁵⁸ Discharge Order, paragraph 1.

⁵⁹ Discharge Order, paragraphs 2 – 5.

⁶⁰ Discharge Order, paragraph 7.

⁶¹ Discharge Order, paragraph 8.

- [122] As noted above, the Applicants sought to amend this Application, to which amendment Harneys did not consent.
- [123] An Amended Application dated 15 October 2016 was before this Court at the hearing of the Application and the matters in the amendments fully argued.
- [124] The amendments seek Wasted Costs of the First Applicant in relation to the Strike Out Application, and of the First to Seventh Applicants in these proceedings to the extent not otherwise covered by the other Wasted Costs Orders sought on this Application.
- [125] The parties differed on the reasons for paragraph 8 of the Discharge Order which gave the First to Seventh Applicants “liberty to apply for a wasted costs order against [Harneys] within three months of the date of this order.”
- [126] The Applicants submit that it was included because of their concern that the First Claimant would discontinue his Claim and arguably the Court would be functus officio (CPR 37.5(3) – Effect of discontinuance, and in particular the whether the saving provision in (c) that discontinuance does not affect any proceedings relating to costs) and therefore could not entertain a Wasted Costs Application. Justice Farara raised a concern that “the specter of an application for wasted costs would be hanging over [Harneys] heads indefinitely”, at which point counsel for the Applicants proposed a reasonable time limit.⁶²
- [127] This Court accepts the reasons for the imposition of the three-month period for applying for a Wasted Costs Order as advanced by the Applicants. As the Application was commenced within the time allowed, the Applicants were able to proceed to amend their Application in the ordinary way (without the Court’s permission or Harneys’ consent, unless there was prejudice to Harneys from not having an adequate opportunity to consider the Amended Application and respond). In this case, the amendments largely are based on matters occurring after the three-month period.
- [128] The Court does not see any basis not to allow the amendments and consider the Amended Application. It is just that the Amended Application be considered by the Court, particularly as to

⁶² Transcript, 14 January 2016, page 48, line 17 – page 50, line 17; page 68, line 22 – page 69, line 19; page 81, line 25 – page 82, line 19.

matters arising after the 3-month period – the hearing of the Strike Out Application and the Strike Out Judgment – which comprise almost all of the amendments (save paragraph 1(d) which seeks costs of these proceedings (to the extent not recovered under the requests for costs of the Injunction, Discharge Application and Strike Out Application)). Harneys had an adequate opportunity (since 5 October 2016) to consider the Amended Application and supporting evidence and to respond. It has done so.

- [129] The amendments to the Application are allowed and this Application will be determined on the basis of the Amended Application.

NO TWO-STAGE PROCESS FOR WASTED COSTS ORDER

- [130] Harneys submit that Justice Farara did an initial screening or filtering of the contemplated Wasted Costs Application to determine if there was a prima facie case, akin to the procedure that had been followed in England and Wales at one time in relation to Wasted Costs Orders.

- [131] It is clear from the foregoing, and the proceedings before Justice Farara in relation to the Discharge Application, that no such process was being followed, nor did such a process need to be followed. Indeed, counsel for Harneys raised the concern that the grant of liberty to apply not be the “giving of some sort of a suggestion of a judicial imprimatur, that the merits of any such application are met.”⁶³

- [132] Further, even if Justice Farara was doing some type of screening, which he was not, it could not apply to proceedings occurring after his order (i.e. the Strike Out Application).

- [133] Wasted Costs Applications in this jurisdiction, at least ordinarily, are one-stage proceedings, whether brought under CPR 64.8, CPR 64.9 or the Inherent Jurisdiction of the Court. There is no process for an initial screening or vetting of a Wasted Costs Order Application.

- [134] **Hearing Before Judge Who Did Not Hear Matter in Which Alleged Wasted Costs Occurred.** Some might say that ideally the judge before whom the alleged cost wasting occurred should hear

⁶³ Transcript, 14 January 2016, page 69, lines 4 – 7.

the Wasted Costs Order application. Certainly that would result in efficiencies. However, often that does not occur, as is evident from several the reported judgments, and as is the case here.

[135] In this case, Harneys had sought Justice Farara hear this Application however his Appointment of a Justice of the High Court had ended.

[136] There may be advantages and there may be disadvantaged to a different judge hearing the application for a Wasted Costs Order that is not initiated by the court itself.

[137] Be that as it may, the reality is that in some cases a different judge will hear the application.

[138] In this case, Justices Farara, as well as Justices Bannister and Eder, had sat on temporary appointments to this Court and were no longer judges of this Court when the application came on for hearing.

DETAILED CONSIDERATION OF ALLEGED “FAILINGS” BY HARNEYS

[139] The Court now turns to a detailed consideration of the six alleged “failings” by Harneys that the Applicants submit support the exercised of this Court’s discretion to make a Wasted Costs Order against Harneys.

[140] In doing so, the respective positions of the Applicants and the Respondents will be considered in the context of this Court’s jurisdiction, as outlined above.

a. First Alleged “Failing” – Allegedly Misleading About Second Claimant’s Financial Means

[141] It is not disputed that on an ex parte injunction application the applicant’s ability to satisfy the cross-undertaking in damages, and thus the financial means of the applicant, are material factors.⁶⁴

[142] The Applicants submit on this Application that Harneys materially misled the Court on the Injunction Application as to the financial means of the Second Claimant in relation to the cross-undertaking in

⁶⁴Gee, at 11-023: “If an applicant may not be good for damages on the undertaking, this is a material fact which must be disclosed to the court on the ex parte application.”

damages. They expressly say that while they alleged that the misleading of the Court was "active", they do not allege that it was deliberate.⁶⁵

[143] The Applicants first point to the statement in the Ex Parte Notice of Application for the Injunction that:

The Applicants' proffered cross-undertaking in damages provides the Respondents protection if the injunctive relief sought herein is granted which, following trial proves to have been wrongly granted."

The Applicants submit that this was a representation to the Court by Harneys that the Second Claimant would be able to satisfy any order made.

[144] The Applicants submit that this "representation by Harneys" was confirmed, and extended, at the Injunction Application hearing when "counsel from Harneys"⁶⁶ submitted to the Court that the Claimants were "extremely wealthy and sophisticated investors", and more importantly, when he said to the Court:

There is an undertaking in damages. Your Lordship has noted that the duty of good faith and disclosure would be that given evidence of ... the First Applicant [Claimant] is subject to a bankruptcy order, but that doesn't affect the Second Applicant [Claimant] and clearly from the papers that Your Lordship has, he is a man of considerable assets.

The statement about the Second Claimant being "a man of considerable assets", the Applicants submit, was "untrue" and was a "material misrepresentation", and that such conclusion was not clear "from the papers".

[145] It is accepted that the materials submitted to the Court on the Injunction Application did not contain evidence of the Second Claimant's financial position, nor evidence that would substantiate that the Second Claimant was "a man of considerable assets", whatever that phrase may mean, or

⁶⁵ Third Affidavit of Lam Ping Cheung, sworn 1 June 2016 ("Lam Third Affidavit"), paragraph 12 and footnote 1.

⁶⁶ "Counsel from Harneys" is the phrase used by the Applicants to refer to the Harneys legal practitioner, based in BVI at the time, who appeared at counsel before Justice Farara on the ex parte Injunction Application on 23 November 2015 and on the initial return date hearing on 17 December 2015. He is referred to in this judgment as "F".

evidence of the ability of either Claimant to satisfy the cross-undertaking in damages. In his Discharge Judgment, Justice Farara stated:

It is common ground that the Claimants did not put before the court at the ex parte hearing and has not done so since, any evidence of either Claimant to satisfy the cross-undertaking in damages. Certainly the affidavit of the Second Claimant is completely devoid of such evidence even though he addressed at paragraph 54 the important question of the adequacy of damages in respect of the Claim.

[146] It is not clear whether the Second Claimant was not at the time of the Injunction Application “a man of considerable assets”. However, to the extent he may have been, it was not in the evidence before Justice Farara on the Injunction Application or indeed on the Discharge Application.

[147] Justice Farara, in the statement quoted above, appears to say that he did not take the statement of counsel from Harneys about the Second Claimant being “a man of considerable assets” as being a conclusion from evidence in the record (which would mean the “papers” to which counsel from Harneys had referred) that he could satisfy the cross-undertaking in damages. In the statement just quoted, Justice Farara notes that there was no such evidence.

[148] The Applicants submit that on the Injunction Application, Justice Farara “clearly took on board” the submissions about the Second Claimant’s “alleged wealth” since shortly after the remark about his “considerable assets”, Justice Farara said:

I don’t think we can consider the cross-undertaking in relation to the First Claimant having regard to his current status [as an undischarged bankrupt]. But you’ve made the point in relation to the Second Claimant.⁶⁷

[149] To be clear, the “alleged wealth” submission, based on the transcript before Justice Farara on the Injunction application, was the “man of considerable assets” submission.

⁶⁷Transcript of Injunction Application Hearing, 23 November 2015 (“Injunction Transcript”), page 64, line 12 – 16.

- [150] The Applicants submit that if Justice Farara had not been given the comfort that was given by counsel from Harneys as to the Second Claimant's financial means, he would have either (a) declined to make the injunction or (b) required fortification of the undertaking.⁶⁸
- [151] This Court does not consider that is what Justice Farara necessarily would have done based on what he said in his Discharge Judgment, after the focus was clearly on the ability or lack of ability of the Second Claimant to satisfy the cross-undertaking.
- [152] Justice Farara appreciated the need for an applicant for an ex parte injunction to address in the evidence and in submissions the applicant's ability to satisfy the cross-undertaking in damages, and thus the financial means of the applicant. He makes it clear in his Discharge Judgment, and certainly it appears that he would have been aware when he heard the Injunction Application and granted the Injunction, that:
- [i]t is incumbent on an applicant for interim injunctive relief to demonstrate to the Court by cogent evidence that it can satisfy the cross-undertaking in damages. This is one of the important protections of the interests of a Defendant especially on an ex parte application.⁶⁹
- [153] However, Justice Farara exercised his discretion to grant the ex parte Injunction knowing that he did not have before him cogent evidence about the financial means of the Second Claimant. He found in his Discharge Judgment that "[i]t is clear that no such evidence was offered by the Second Defendant [sic. Claimant]".⁷⁰
- [154] Moreover, by the time of the hearing of the Discharge Application, the Second Claimant "had failed to pay judgment debts against him in the People's Republic of China amounting to \$7 million" and had "been place on an official list of dishonest persons."⁷¹
- [155] Even when aware of the lack of evidence supporting the cross-undertaking, even though he considered the absence of such evidence "serious omissions", and even though he had this further

⁶⁸ Applicants' Skeleton.

⁶⁹ Discharge Judgment, page 14, lines 5 – 10.

⁷⁰ Discharge Judgment, page 14, lines 11 – 12.

⁷¹ Discharge Judgment, page 14, lines 12 – 16.

information that made the Second Claimant's financial means more questionable, Justice Farara was "not prepared to discharge the injunction purely on that basis alone"; "that the Applicants/Claimants failed to provide evidence of their ability to support and to satisfy the cross-undertaking in damages." ⁷²

[156] The most he considered may be appropriate would be fortification:

In my respectful view, this is a matter which can be properly addressed by the Court with an appropriate order for fortification of the undertaking, with the consequence of failure to do so resulting in the immediate discharge of the injunction.⁷³

[157] Indeed, in the Claimants skeleton for the Injunction Application, counsel from Harneys had submitted that "if the Court has any concerns as to the strength of the cross undertaking in damages that this can be fortified at the return date if required ...".

[158] In the evidence on this Application⁷⁴, counsel from Harneys gave evidence (by affidavit⁷⁵) that he did not have "the opportunity to speak to the clients directly and for this reason I had to rely on my instructions and evidence in support of the application for an injunction." He said that from his "consideration of the papers ... it was obvious that the Court would be concerned as to a cross-undertaking in damages." As a result, he "had to rely on my instructions and evidence in the affidavit in support of the application for an injunction." He took from his instructions and the papers "that the Second Claimant was a man of considerable assets". He pointed to the exhibit to the Injunction affidavit containing "evidence of the quantum of commercial dealings in which the Second Claimant was involved." He also pointed to "the instructions from the client ... that they had the benefit of a substantial beneficial interest in the Eighth Defendant."

[159] The Applicants point out, correctly, that the "substantial beneficial interest in the Eighth Defendant" is illusory protection for the Applicants in terms of the cross-undertaking because if the Applicants were to succeed in defending the Claim, the Claimants would not be able to rely on that interest to

⁷²Discharge Judgment, page 15, lines 6 – 11.

⁷³Discharge Judgment, page 15, lines 2 – 16.

⁷⁴Affidavit of F., sworn 16 May 2016 ("F. Affidavit"), paragraphs 21 – 24.

⁷⁵F. Affidavit.

satisfy any damages award under the cross-undertaking as the Claimants would have been found not to have their alleged interest in the Eighth Defendant.

[160] However, what this Court considers most important in relation to this First Alleged “Failing” is that Justice Farara did not suggest that he considered he had been misled by the Claimants– or by counsel from Harneys – on the ex parte Injunction Application.

[161] For example, Justice Farara did not say anything such as “counsel for the Claimants told me on the Injunction Application that the Claimants were ‘extremely wealthy and sophisticated investors’ and the Second Claimant ‘is a man of considerable asset’, and those statements were not only unsubstantiated in the evidence but were untrue and misled me.”

[162] In his Discharge Judgment, Justice Farara simply focused on the financial means disclosure that should have been made and was not made and held that he would not discharge the Injunction “purely on that basis alone”.

[163] If he did not say that he considered that he had been misled by the Claimants about their financial means in these circumstances, he could not have considered he was misled by their counsel about the Claimants’ financial means. Nothing in his Discharge Judgment can lead to such a conclusion on a reasonable basis. He simply accepted that there was no evidence before him on the Injunction regarding the financial means of the Claimants, and there should have been.

[164] Importantly, Harneys maintained on this Application that the Second Claimant as follows:

The presentation of [the Second Claimant] as a wealthy man at the *ex parte* hearing, and following service of Mr Lam’s First Affidavit was, and remains accurate. Whilst I am unable to disclose the instructions at the [the Second Claimant’s] financial position which were provided to us during the course of our retainer, Harneys would not have made representations without proper instructions.⁷⁶

[165] This appears to be conclusive on this issue, as the evidence is uncontradicted (Mr. Lam’s response to the main point made by Harneys was that “[n]o such assets were referred to in the evidence in

⁷⁶ N. Affidavit, paragraph 19.

support of the injunction application.")⁷⁷ and the fact of the privilege impediment must in any event give Harneys the full benefit of any doubt on this Application.

[166] Accordingly, the first alleged failing by Harneys cannot and does not lead to a Wasted Costs Order.

[167] In addition, while the Applicants submit that counsel from Harneys was not accurate in saying what he said about the Claimants' financial means, if Justice Farara did not base his granting or setting aside of the Injunction on those apparently inaccurate statements, even if they were negligently made by counsel – a matter on which I need not and do not make a finding – they cannot be a causal connection between the costs incurred by the Applicants. Hence, those costs cannot be Wasted Costs which Harneys caused the Applicants to incur or Wasted Costs that Harneys should be ordered to pay.

[168] Had Justice Farara held that he had been misled to believe that the cross-undertaking was supported and would not have granted the Injunction if he had not been misled in that manner, there may be a causal connection. But without that causal connection, this alleged "failing" by Harneys cannot support a Wasted Costs Order against Harneys.

[169] A further point raised by the Applicants in relation to this alleged "failing" is that when Harneys received the Defendants' evidence on the Injunction application by 14 December 2015, Harneys was aware that the Second Claimant's affidavit from the ex parte Injunction Application had been misleading by omission and that counsel from Harneys submissions on the ex parte Injunction Application were "actively misleading". As a result, Harneys should have (a) had the Claimants provide correcting evidence and withdrawn if they would not do so, and (b) in any event, drawn the matter to the Court's attention on the initial return date of 17 December 2017, being the earliest opportunity to do so.

[170] Had this been done, submit the Applicants, they would have been spared the expense of the fully contested Claimants' application to continue the Injunction and Defendants' Discharge Application.

⁷⁷ Lam Third Affidavit, paragraph 9.

[171] While it may well be that the matter should have been raised by Harneys at the 17 December 2015 irrespective of whether counsel for the Applicants raised it, the fact that counsel for the Applicants did not raise it at all with Justice Farara on that occasion, neither in their skeleton or at the oral hearing, not only undercuts this further submission about Harneys thereby occasioning allegedly Wasted Costs but undercuts the Applicants' professed concerns about the alleged misleading of Justice Farara on the Injunction Application.

[172] Even if there was insufficient time on 17 December 2015 to make any lengthy submissions, and even if the practicalities of scheduling meant that an agreement to continue the ex parte Injunction until the new return date was reasonable in the circumstances, one would have expected counsel for the Applicants, at some point during a one hour hearing, to flag the issue with Justice Farara. Indeed, one would have expected at least a brief submission from counsel for the Applicants that the ex parte Injunction should be varied (a) to require some fortification pending the new return date in mid-January 2016 or (b) at least to require that the Second Claimant serve an affidavit before the new return date fleshing out details of the financial means available to him to satisfy a cross-undertaking as to damages. The Applicants had an opportunity to try to eliminate or limit what they assert gave rise to Wasted Costs but did not take advantage of it.

[173] The holding that this alleged "failing" does not give rise to a Wasted Costs Order should not in any way be read to be a lowering of the obligations of an applicant for an ex parte injunction, or the obligations of the applicant's counsel, in terms of full and frank disclosure.

b. Second Alleged "Failing" – Bermuda Proceedings

[174] The Applicants submit that Harneys misled the Court on the Injunction Application as to the true nature of proceedings in Bermuda Proceedings, namely three minority shareholders seeking to require the Eighth Defendant to hold an overdue annual general meeting, which purpose was relevant to the granting of the Injunction.

[175] Justice Farara held in the Discharge Judgment that "the failure to disclose correctly and fully the Bermuda proceedings and why this action was commenced as it related to the failure to call an AGM of the Eighth Defendant" was a material non-disclosure by the Claimants, was part of "egregious breaches of duty of full and frank disclosure on the part of the Claimants", was

"deliberate and designed to ensure that the Claimants obtained a most distinct advantage against the Defendants and seemingly to prevent the calling of the AGM of the Eighth Defendant."⁷⁸

[176] On the Discharge Application, the Defendants submitted in their skeleton as follows (at paragraphs 118-120):

The Claimants referred to the Bermuda Application, but gave a wholly misleading impression of its nature. [The Second Claimant] said that he was "*concerned that the applicants in that action are simply abusing corporate and court procedure in order to force out the current directorship of [the Eight Defendant] and replace them with directors affiliated to Mr Liu and his associated companies*"... However, he failed to explain that the reason why the Bermuda Applicants had been forced to apply for relief was that [the Eighth Defendant's] board was refusing, in breach of the company's articles and the relevant legislation, to hold an AGM.

[The Second Claimant] exhibited only the originating summons, but importantly omitted Mr Hung's affirmation. If that had been shown to the Court, it would have understood why the Bermuda Application had been made, and would have appreciated that it was not an abuse of corporate or court procedure. Further, in his affidavit, [the Second Claimant] asserted that Mr Hung's affirmation "*set out a number of unsubstantiated claims, for example as to the corporate governance of [the Eighth Defendant]*"... If Mr Hung's affirmation had been put before the Court it would have been clear that, far from being unsubstantiated, Mr Hung's account was entirely based on [the Eight Defendant's] own public announcements (most of which are signed by [the Second Claimant] as CEO and Chairman).

The Claimants' oral presentation in respect of the Bermuda Application was also unfair. ... their advocate gave the impression that the Bermuda Applicants' shareholding in [the Eighth Defendant] was tainted by the current dispute, which is incorrect. Further, their advocate characterised the Bermuda Application as an attempt to wrest control of the board, or a tightening of the noose. Such emotive language was not appropriate given that the Bermuda Applicants are applying to the court in Bermuda in order to protect their rights as shareholders to have an AGM, in the face of an unjustified refusal by the company to hold such a meeting.⁷⁹

[177] The evidentiary disclosure of the Bermuda Proceeding that was made is in the affidavit of the Second Claimant filed for the Injunction Application stated as follows:

On 12 October 2015, an action was brought in the Supreme Court of Bermuda, with short title 411/2015, by three Applicants ... seeking *inter alia*, that an annual general

⁷⁸ Discharge Judgment, page 24, lines 14 – 15; page 25, lines 4 – 14.

⁷⁹ Defendants' Skeleton, Discharge Application, paragraphs 118 – 120.

meeting of [the Eighth Defendant] is called and that the Applicants to that action be permitted to convene an annual general meeting themselves in the absence of [the Eighth Defendant] convening an AGM.

.....

I am concerned that the Applicants in that action are simply abusing corporate and court procedure in order to force out the current directorship of [the Eighth Defendant] and replace them with directors affiliated with Mr. Liu and his associated companies. It is unclear in respect of the pledged shares how they should be voted in such an annual meeting, if at all (emphasis added in original).⁸⁰

[178] As is evident, there was disclosure to the Court on the Injunction Application of the direct purpose of the Bermuda Proceedings, namely to have the court order a meeting. However, what it is alleged was not made clear to the Court on the Injunction Application was the reason the Defendants were applying to the Bermuda court, namely because the Eighth Defendant's board, controlled by the Claimants, was refusing, in breach of the Eighth Defendant's articles and the relevant legislation, to hold an annual general meeting.

[179] Moreover, the Applicants' complain that the Claimants indicated to the Court on the Injunction Application that the reason the Defendants sought the meeting was to wrest control of the board, or tighten the noose; to force out the current directors and replace them with directors affiliated with Mr. Liu and his associated companies.

[180] The failure to disclose fully and fairly on the Injunction Application that the Bermuda proceedings were brought because of the failure of the Eighth Defendant to call an annual general meeting is what Justice Farara found in his Discharge Judgment to be a material non-disclosure by the Claimants⁸¹ aimed at obtaining a most distinct advantage against the Defendants and seemingly to prevent the calling of the annual general meeting of the Eighth Defendant.

[181] Much of the response of Harneys evidence and submissions on this alleged failing was directed to whether there was inadequate disclosure, referring to the evidence and submissions on the Injunction Application, some of which are quoted above.⁸²

⁸⁰ Affidavit of Yao Yuan sworn 19 November 2015 ("Yao Affidavit"), paragraph 39.

⁸¹ Discharge Judgment, page 25, lines 4 – 7.

⁸² F. Affidavit, paragraphs 16 – 19.

[182] The Applicants' position regarding this alleged failing focuses to a significant degree on the failure of Harneys to obtain and consider the evidence of the applicants in the Bermuda Proceedings (Mr. Hung's 1st affirmation, to which the affidavit of the Second Claimant in support of the Injunction Application made reference)⁸³ so that they would know what the Bermuda Proceedings were about and could disclose same on the Injunction Application. The Applicants submit that Harneys had Mr. Hung's 1st affirmation but chose not to include it in the Injunction Application evidence; Harneys did not ask for it; or Harneys asked for it but the Claimants declined to provide it, and Harneys did not so inform the Court on the Injunction Application.

[183] The explanation for the underlying evidence in respect of the Bermuda Proceedings not being disclosed was in the evidence of a Harneys legal practitioner in Hong Kong, that:

I am unable to respond to this allegation without breaching legal privilege but the fact of the Bermuda Proceedings was of course disclosed. Again, the matter could not be addressed by reference to the materials on the Court file because our former clients [the Claimants] did not file any evidence in response to Mr. Lam's first affidavit.⁸⁴

[184] It is unclear to this Court how this explanation assists with the fundamental complaint about Harneys not including the Bermuda evidence leading to a lack of full and frank disclosure by the Claimants on the Injunction Application.

[185] Most telling, in the opinion of this Court, having had the benefit of considerably more time to review in greater detail and consider the evidence than Justice Farara may have had on the Discharge Application, is the portion of the transcript of the Injunction Application quoted by counsel from Harneys in his affidavit on this Application:

Mr. [F]: The Eighth [Defendant] is a Bermudian company. And further on in the bundle you have at page 554 a letter from Lam & Co and Your Lordship will have seen reference to Mr. Lam in the papers. Mr Lam is the lawyer and what appears to be business advisor to Mr Liu. So an AGM is being requisitioned. And you'll see from page 557, My Lord, which was Schedule 2, and that's referred to in the last paragraph on the first page of that letter from Lam & Co.

⁸³ Yao Affidavit, paragraph 44.

⁸⁴ Affidavit of N., sworn 17 May 2016 ("N. Affidavit"), paragraph 29(e).

The Court: Yes, "proposed resolutions."⁸⁵

- [186] The letter from Lam & Co at page 554 of the Injunction Application bundle to which counsel from Harneys took Justice Farara was dated 16 September 2016 and is addressed to the Company Secretary of the Eighth Defendant. It stated that it was written on behalf of named shareholders. It referred to the requirement of the Eighth Defendant's Bye-laws to hold an annual general meeting within 12 months of the prior one, with the possibility of a three-month extension, and continued as follows:

The Company last held the AGM on 12 June, 2014 and the extended deadline fell on 12 September 2015, which the Company has defaulted to do so.

Pursuant to Section 72 of the Companies Act 1981 of Bermuda (the "Act"), we hereby on behalf of the enlisted shareholders demand you to immediately convene an AGM within the prescribed time of notice to pass the propose [sic. proposed] resolutions as appeared in attached Schedule II.

- [187] The letter concludes by stating "[i]f we do not hear from you that you shall accede to the shareholders' demand within the next 5 days, we have standing instructions to see the court's sanction pursuant to Section 7 of the Act."

- [188] At page 565 of the Injunction Application bundle, following the CVs of the proposed directors, is a copy of the Originating Summons in the Bermuda Proceedings which claims, in its paragraph 1:

1. An Order under the Section 76 (or alternatively Section 72(3)) of the *Bermuda Companies Act 1981* to compel the [Eighth Defendant] to forthwith give notice of the 2015 Annual General Meeting of the [Eighth Defendant] to be held on a date not more than 25 days from such notice (or on such date as to the Court seems fit) for the purpose of considering the resolutions ...

- [189] Counsel from Harneys on the Injunction Application concluded his affidavit evidence on this Application as follows:

⁸⁵ F. Affidavit, paragraph 17.

It is therefore strongly denied that I failed in my duties to the Court to represent with full disclosure matters known to me at the time as set out in the skeleton argument, affidavit and exhibit to that affidavit that were all before the Court.⁸⁶

[190] The submissions on the Injunction Application appear to have included, as they needed to, submissions based on the theory of the Claimants' case at that stage: that despite the Eighth Defendant being offside on convening an annual general meeting, the meeting was sought to be convened to take control of the Eighth Defendant at a time when the right to vote the pledged shares was unsettled.

[191] Reviewing the conduct of Harneys with the benefit of the materials available on this Application, hindsight, and time to reflect, this Court cannot find that the alleged failing on the part of Harneys in relation to the reason for the Bermuda Proceedings is made out. In terms of the Applicants' alleged failing, it is difficult to see what the affidavit from the Bermuda Proceedings could have added to what was in the Lam & Co letter and the Originating Summons. Counsel from Harneys drew Justice Farara's attention to those documents during the Injunction Application hearing.

[192] While this Court respects and accepts Justice Farara's holdings regarding the Bermuda Proceedings as related to the Claimants, this Court must assess on this Application whether Harneys conduct in relation to the Second Alleged Failing was wanting such as to open the possibility of a Wasted Costs Order. It was not.

c. Third Alleged "Failing" –The "Unresolved Matter"

[193] The Applicants submit that Harneys misled the Court on the Injunction Application as to the true nature of the "Unresolved Matter".

[194] While the Eighth Defendant was under the control of the Claimants, the auditors of the Eighth Defendant had not been able to verify the bank account of one of its subsidiaries, because as it turned out \$66 million was missing from the subsidiary.

⁸⁶F. Affidavit, paragraph 18.

- [195] The Applicants assert on this Application that submitting to Justice Farara on the Injunction Application that there was an “Unresolved Matter” without disclosing its true nature, which would include its materiality and relevance, was misleading.
- [196] Justice Farara held in the Discharge Judgment that “the failure to disclose the missing \$66 million from one of the companies which the Second Claimant is an executive director, as the true reason for the unresolved matter when addressing this at paragraphs 40 to 43 of the Second Claimant’s Affidavit” was a material non-disclosure by the Claimants, was part of “egregious breaches of duty of full and frank disclosure on the part of the Claimants”, was “deliberate and designed to ensure that the Claimants obtained a most distinct advantage against the Defendants and seemingly to prevent the calling of the AGM of the Eighth Defendant.”⁸⁷
- [197] The Second Claimant’s affidavit on the Injunction Application disclosed that trading in the shares of the Eighth Defendant were suspended on the Hong Kong Stock Exchange and the circumstances and status of the suspension, and referred briefly to the Unresolved Matter in the following terms, when explaining a delay in the release of MMD’s most recent annual report:
- The delay in publication of the 2014 Annual Report resulted from [the Eighth Defendant’s] auditors, Deloitte Touche Tohmatsu, being unable to verify details of a bank account of one of [the Eighth Defendant’s] subsidiary companies in the PRC due to incorrect information having been given to Deloitte upon its investigations with the Beijing bank in question (the *Unresolved Matter*).⁸⁸
- [198] The Exhibit to the Second Claimant’s affidavit included two documents relating to the suspension of trading, one of which used the term “Unresolved Matter” as a defined term and set out the amount of the Unresolved Matter, being RMB420 million (which was approximately US \$66 million). The documents were found at pages 571 – 573 of the Exhibit, adjacent to documents relating to the Bermuda Proceedings matter.
- [199] The Applicants submit to this Court that the passage in the Second Claimant’s affidavit quoted above gave no impression of the true seriousness of the Unresolved Matter: neither that money

⁸⁷ Discharge Judgment, page 24, line 14 – page 25, line 20, and especially page 24, line 23 – page 25, line 3.

⁸⁸ Yao Affidavit, paragraphs 40 – 43.

appeared to have gone missing nor of the amount involved. The submission continued by stated that the Unresolved Matter was highly material. The Claimants were seeking an Injunction restraining voting of shares in the Eighth Defendant and thereby potentially bringing about a change in control of its board of directors. It was a relevant consideration, the Applicants submit, whether the Eighth Defendant was being properly managed under the Claimants' control, or whether, as the Defendants contended, it was being very seriously mismanaged, having lost control of assets representing over half of its market capitalisation through the Unresolved Matter.

[200] The Applicants further submit that relevant material (reference above) was available to Harneys in the Exhibit to the Second Claimant's affidavit so Harneys cannot avoid responsibility for the nondisclosure. The true nature of the Unresolved Matter was evident from a public announcement of the Eighth Defendant regarding the conditions of the Hong Kong Stock Exchange for resumption of trading in its stock (Resumption Conditions, dated 15 July 2015) exhibited to the Second Claimant's evidence on the Injunction Application⁸⁹. Trading had been suspended with effect from 1 April 2015 because of the Unresolved Matter (which, as noted above, was the defined term contained in the announcement).

[201] The Applicants pointed out that, as noted above, the announcement made clear the scale of the problem – that is, the Unresolved Matter involved a bank balance of RMB420 million (i.e. c US\$66 million) that was supposedly owned by one of the Eighth Defendant's subsidiaries, and it explained that the Eighth Defendant's auditors were unable to verify that its subsidiary owned that bank balance.

[202] Thus, submit the Applicants, Harneys knew the true position and were in a position to give the full and frank disclosure that the Court needed on the basis of material contained in the papers before the Court at the Injunction hearing.

[203] There is no indication that the skeleton or oral submissions on the Injunction Application drew to Justice Farara's attention the scale of the problem.

⁸⁹Yao Affidavit, Exhibit, page 571.

- [204] Harneys' evidence (three affidavits) in response to the present Application does not explain how the true nature of the Undisclosed Matter, including its materiality and relevance, was made known to Justice Farara beyond referencing and partially quoting two paragraphs of the Second Claimant's affidavit (partly quoted above). The affidavit of counsel from Harneys simply states "Further details were set out in paragraphs 42 to 44 and the matter was therefore brought to the Court's attention in the Affidavit".⁹⁰
- [205] In fact, the materials before Justice Farara also included the pages of the Exhibit referenced above.
- [206] By reading the affidavit of the Second Claimant, Justice Farara would not have known the quantum in issue. The main 'red flags' about the Undisclosed Matter in the affidavit were the fact that trading was suspended on a public stock exchange (at the Eighth Defendant's request), the conditions set out by the exchange for resumption of trading, and the fact that the company's auditors and an independent board committee were engaged in investigating the matter.
- [207] It would have been easy for the person or persons who assisted the Second Claimant in the preparation of his affidavit to refer to the quantum in issue.
- [208] As the Applicants submit to this Court, whatever might have been said about the Unresolved Matter in the Second Claimant's evidence, first, it should have been referred to and expanded upon in the Claimants' skeleton for the Injunction Application, and second, counsel from Harneys should have made reference to it in oral submissions so that its true nature, including its materiality and relevance, was made known to Justice Farara.
- [209] In respect of this alleged failing, it is clear that the documents that Harneys had and used in preparing the Second Claimant's affidavit provided it with the information. Likewise, counsel from Harneys had the documents in the Exhibit when he prepared for the hearing, even if the die was cast in terms of the contents of the affidavit when he received the papers.

⁹⁰ F. Affidavit, paragraph 15.

[210] Harneys conduct in relation to the Third Alleged Failing was wanting such as to open the possibility of a Wasted Costs Order. However, this Court does not consider that the extent of Harneys' neglect in relation to this alleged failing was of a magnitude to exercise the Court's discretion in favour of making a Wasted Costs Order. Further, the causal connection with the costs incurred by the Applicants flowing from this alleged failing in and of itself is not sufficiently clear. Also, it is not sufficiently clear to this Court that had Justice Farara been informed on the Injunction Application of the Unresolved Matter he would not have granted the Injunction in all the circumstances.

d. Fourth Alleged "Failing" – Unresolved Matter and Bermuda Proceedings in the Round

[211] The Applicants submit that Harneys misled the Court on the Injunction Application as it failed to consider the Unresolved Matter and the Bermuda Proceedings "in the round", and thus failed to conclude, and failed to inform the Court, that the underlying purpose of the Bermuda Proceedings was to change the composition of the Eighth Defendant's board of directors in light of the Unresolved Matter and the suspension of trading in the Eighth Defendant's shares on the Hong Kong Stock Exchange as a result of the Unresolved Matter – that is, to avoid having the Eighth Defendant's board of directors being in the hands of directors who would peruse the investigation and resolution of the Unresolved Matter.

[212] In relation to this Fourth Alleged Failing, the Applicants set out the chronology of events and related documents concerning the Unresolved Matter and the Bermuda Proceedings, and submit that an "obvious inference" can be drawn "that the Claimants were seeking an injunction in order to frustrate shareholders' attempts to change the Eighth Defendant's board of directions, so that there could be a proper investigation into the Unresolved Matter. They submit that this "obvious inference" should have been referred to a part of the duty of full and frank disclosure.

[213] Interestingly, the Second Claimant's affidavit for the Injunction Application weaves the events relating to the Undisclosed Matter into the story of the Applicants call for an annual general meeting of the Eighth Defendant and the Bermuda Proceedings.⁹¹

⁹¹Yao Affidavit, paragraphs 36 – 46 and Exhibit, pages 554 – 582.

[214] In his Discharge Judgment, Justice Farara did not appear to have focused on this alleged underlying purpose of the Claimants in resisting the holding of an annual general meeting of the Eighth Defendant.

[215] This Court accepts that as part of full and frank disclosure Justice Farara should have been made aware in the Claimants' skeleton and in oral submissions by counsel from Harneys of the anticipated position of the Defendants, which is a broader way of referring to the asserted underlying purpose.

[216] Having said that, it is difficult to see this "in the round" alleged failing is sufficiently distinct from the alleged failings respecting the Bermuda proceedings and the Undisclosed Matter to constitute a separate alleged failing, or perhaps there was one alleged failing encompassing the Second, Third and Fourth alleged failings: allegedly not presenting Justice Farara on the Injunction Application the anticipated position of the Defendants, and the factual and motivational bases for it.

[217] In short, with the benefit of all that this Court has heard and read, the anticipated position of the Defendants may be said to have been as follows:

- the Bermuda proceedings were brought to compel the holding of an annual general meeting of the Eighth Defendant which under the bye-laws was overdue to be held;
- the Eighth Defendant, under the Claimants' control, had continued to decline to hold the annual general meeting; and
- thereasons of the Claimants for not wanting the annual general meeting to be held apparently included that:
 - there was a substantial sum (approximately US\$66 million) missing in a subsidiary of the Eighth Defendant, known as the Unresolved Matter;
 - the Unresolved Matter had resulted in suspension of trading of the Eighth Defendant's shares on the Hong Kong Stock Exchange and investigations by the company's auditors and an independent board committee;

- the Claimants sought to frustrate the investigations and resolution of the Unresolved Matter by maintaining control of the board of directors of the Eighth Defendant; and
- the relevant Applicants sought to have the investigations and resolution of the Unresolved Matter pursued by taking control of the board of directors of the Eighth Defendant.

[218] If Harneys appreciated that this anticipated position, or something along those lines, was the anticipated position of the Defendants, Harneys should have made Justice Farara aware of it on the Injunction Application as part of full and frank disclosure, both in the skeleton and in oral submissions.

[219] As noted in the separate consideration above of the Second and Third Alleged Failings, this Court considers that from Harneys perspective on this Wasted Costs Application there was adequate disclosure of the Bermuda Proceedings but not of the Unresolved Matter.

[220] While Harneys did not outline to Justice Farara the above anticipated position of the Defendants, to do so would have “connected the dots” for him.

[221] This Court cannot conclude it was negligent for Harneys, by the time of the Injunction Application hearing, not to have connected the dots. Not doing so falls more in the category of “with hindsight, and perhaps in any event, it would have been better to have do so.” However, it is not neglect that should give rise to a Wasted Costs Order against Harneys.

[222] Nor can this Court in any way conclude that Harneys did connect the dots but intentionally did not include this anticipated position of the Defendants in its written and oral submissions to Justice Farara.

[223] Situations leading to injunction applications are pressured situations (even noting the comment by Lord Woolf in this regard, quoted above). In respect of this alleged failing, Harneys can rightly point, as it does, to non-waiver of privilege by the Claimants.⁹² While the Applicants sought to

⁹² N. Affidavit, paragraph 8.

present their case to this Court on a basis that would not open up that response – by relying on matters in the record for the Injunction Application, when it comes to connecting the dots, it may well be that what occurred in privileged communications made it less likely that Harneys, or any law firm in the position of acting for the Claimants in the circumstances, would reasonably connect the dots to arrive at the above anticipated position of the Defendants.

[224] This Court must assess on this Application whether Harneys conduct in relation to the Fourth Alleged Failing was wanting such as to open the possibility of a Wasted Costs Order. It was not.

e.Fifth Alleged “Failing” –Effect of Bankruptcy

[225] The Applicants submit on this Application that Harneys failed to draw to the Court’s attention on the Injunction Application that the effect of the First Claimant’s bankruptcy was that he had no ability to bring the Claim, absent the consent of his trustee in bankruptcy and the approval of the Hong Kong court.

[226] They submit that Harneys were aware of the First Claimant’s bankruptcy and had ample opportunity to consider whether a claim could properly be made on his behalf, or an injunction obtained on the basis of that claim.

[227] At the Injunction hearing, counsel from Harneys did not explain to the Court that the First Claimant had no cause of action, since he had no title to sue, and that if there was a serious issue to be tried, it was only in respect of the Second Claimant’s claim.

[228] The Applicants submit that it was not sufficient for Harneys to accept that the First Claimant could not be relied on for a cross-undertaking in damages.

[229] The Injunction Application was made in the name of both Claimants, and counsel from Harneys told the Court that he appeared on behalf of both Claimants in making the Injunction Application.⁹³

[230] Harneys later came to accept the consequence of the First Claimant’s bankruptcy, and on 6 January 2016, Harneys responded to the Defendants’ legal practitioners saying:

⁹³ Injunction Transcript, page 3, line 10.

... we accept that [the First Claimant] is unable to bring these proceedings in the BVI without the consent of the Hong Kong Trustee in Bankruptcy and the approval of the Hong Kong Court.⁹⁴

[231] A Harneys legal practitioner in Hong Kong stated in his affidavit as follows:

[t]here appears to be no merit to a claim for wasted costs by reason of an alleged failure to inform the Court of the effect of [the First Claimant's] bankruptcy since that alleged failure was not of any material effect or causative of any loss to the [Applicants].⁹⁵

[232] Counsel from Harneys stated in his affidavit as follows:

... there appears to be no merit in an argument that failure to disclose the *effect* of the bankruptcy led in any way to the grant of the injunction as the Second Claimant's cause of action is maintainable even if the proceedings of the First Claimant are stayed.⁹⁶

[233] Neither of them raised privilege as an impediment to responding to this alleged failing although the Harneys legal practitioner in Hong Kong had made the general point that the Claimants had declined Harneys request that they waive privilege in respect of matters relevant to this Application and they have not acceded to that request. "I am therefore markedly constrained by the fact that these matters are covered by legal professional privilege."⁹⁷

[234] Harneys' skeleton on this Application⁹⁸ outlines Harneys position on this alleged failing as being that, first, the First Claimant's bankruptcy was disclosed, but its effect on his standing "was not explored". Second, that the claim was in any event also pursued by the Second Claimant who had no such impediment. Third, that the effect of the bankruptcy was accepted when raised, and the claim by the First Claimant was discontinued. Fourth, there is no material justifying an assertion that Harneys knew that the submissions on the Injunction Application were incorrect. Fifth, that Harneys cannot go into any further detail because of privilege, but should in any event be given the

⁹⁴ Letter from Harneys to Forbes Hare dated 6 January 2016, page 1, paragraph 3.

⁹⁵ N. Affidavit, paragraph 26.

⁹⁶ F. Affidavit, paragraph 12.

⁹⁷ N. Affidavit, paragraph 8.

⁹⁸ Skeleton Argument of the Respondent, dated 7 April 2017 ("Respondent's Skeleton"), paragraphs 6.3 – 6.5.

benefit of any doubt. Sixth, it is not appropriate to suggest what Harneys ought to have known on the basis of taking "proper" instructions, or on the basis of undertaking its own researches, as "[t]his too impinges on privilege, or suggests a non-existent obligation on the part of lawyers to check up on their clients."

- [235] The Applicants submitted in the Applicant's Skeleton that if the Court had been told that the Injunction was being sought on a defective claim because of the First Claimant's bankruptcy, it would no doubt have treated the Injunction Application (and the Claim itself) with a degree of caution, and would have been less likely to grant the injunction. When taken cumulatively with the other points relied on by the Applicants on this Application, they submit that this point would have led to the injunction being refused.⁹⁹
- [236] Justice Farara held in the Discharge Judgment that "the failure to disclose that the effect of [the First Claimant] being an undisclosed [sic. undischarged] bankrupt in that he had no authority to bring the claim and to apply for the injunction" was a material non-disclosure by the Claimants, was part of "egregious breaches of duty of full and frank disclosure on the part of the Claimants", was "deliberate and designed to ensure that the Claimants obtained a most distinct advantage against the Defendants and seemingly to prevent the calling of the AGM of the Eighth Defendant."¹⁰⁰
- [237] There is no question but that the First Claimant's bankruptcy was disclosed to the Court. However, no consideration appears to have been given by Harneys as to its effect, nor was its possible effect raised with Justice Farara in relation to whether the First Claimant had standing or without something more, an ability to be before the Court or any prospect of succeeding in his Claim.
- [238] In terms of full and frank disclosure, that the Second Claimant could bring the claim is irrelevant. Nor does it matter that the effect of the bankruptcy was accepted when raised after the Injunction was granted, and the claim by the First Claimant discontinued.
- [239] A BVI legal practitioner should be conscious that bankruptcy of a claimant may affect the person's ability to bring or pursue a claim, and should make enquiries under the applicable law. This Court cannot envision what privileged information would impede that consciousness or the need to

⁹⁹ Applicants' Skeleton, paragraph 111.

¹⁰⁰ Discharge Judgment, page 24, line 14 – page 25, line 20, and especially page 24, lines 16 – 19.

enquire. If a claim cannot be brought on behalf of a bankrupt without something further, it is hard to imagine how a privileged communication could affect a legal practitioner's need to enquire, and either take the necessary steps to enable the claim to be brought or not bring it.

[240] Surprisingly, it seems that the question of the effect of the bankruptcy of the First Claimant, other than in relation to the cross-undertaking, did not cross anyone's mind at Harneys in Hong Kong or BVI.

[241] There is no basis to conclude that Harneys intentionally misled the Court but it was 'negligent' in not informing the Court in the sense that term is used on a Wasted Costs Application.

[242] However, had disclosure been made to the Court, or had the Claim and Injunction Application brought by the Second Claimant alone, it seems unlikely that the Court would not have granted the Injunction, all other things being equal. This alleged failing does not have a sufficiently strong causal connection with costs that Applicants incurred.

[243] Those things being so, this alleged failing cannot give rise to a Wasted Costs Order as it is probable the Injunction would have been granted in any event, and no material costs appear to have been wasted because of the alleged failing.

f. Sixth Alleged "Failing" – Defective Statement of Claim

[244] The Applicants submit that Harneys' Sixth Alleged Failing was preparing, presenting and relying on a Statement of Claim, including for the Injunction Application, that was fundamentally flawed.

[245] The Statement of Claim ultimately was struck out by Justice Eder on 28 June 2016 as disclosing no cause of action against the First Applicant (the only one of the Applicants that remained as a Defendant by that time as the Claim was stayed against the Second to Seventh Applicants by Justice Bannister on 28 April 2016 for failing to pay interim costs ordered by the Court).

[246] Justice Eder's second basis for striking the Statement of Claim was as an abuse of process because the Claimants were in "flagrant breach" of Court orders and had taken no steps in support

of their claims.¹⁰¹The “abuse of process” striking out is not relied upon in this Application. The other two grounds are expanded upon below.

- [247] The Claimants did not appear on the hearing of the Strike Out Application and in any event Harneys had ceased to act for the Claimants well before the hearing of that application.¹⁰²
- [248] The Applicants submit that the defective Statement of Claim caused Wasted Costs both because it founded the Injunction Application, and it resulted in the costs of the Strike Out Application and generally the costs of defending the Claim. They submit that Harneys should have appreciated that it was “legally incoherent”, and liable to be struck out (at least so far as concerns the first Applicant).
- [249] In respect of the Injunction Application, the Applicants submit that if Harneys was in any doubt about the Statement of Claim, as part of the duty of full and frank disclosure it should have drawn the defects to Justice Farara’s attention since they were relevant as to whether there was a serious issue to be tried, and thus whether an injunction should be granted. Instead, the Applicants submit that the Claimants’ skeleton misrepresented the strength of the pleaded case, saying that “[i]t is submitted that the papers at this stage disclose a serious issue to be tried”.
- [250] If the true position had been explained to Justice Farara, it is said that the Injunction against the First Applicant would not have been granted since there was no pleaded cause of action against it. It would have been spared the costs of the Discharge Application and the Strike Out Application.
- [251] The Applicants submit that it is unclear whether the Injunction Application against the remaining Applicants would have been pursued since the real prize from the Claimants’ perspective was the Injunction preventing the First Applicant from voting its shares in Eighth Defendant.
- [252] Prior to the Discharge Application, the Defendants pointed out the defects in the Statement of Claim to the Claimants in the context of the Statement of Defence served on 22 December 2016; Harneys took no steps to address the defects but instead at the hearing of the Discharge

¹⁰¹ Strike Out Judgment.

¹⁰² Harneys applied to come off the record on 26 January 2016 and was removed by order dated 10 February 2016. The Order was deemed served pursuant to an alternative serve order on 23 February 2016.

Application the Claimants' counsel sought to establish that the Statement of Claim raised a triable issue. The Claimants' skeleton for that hearing stated as follows:

It will be appreciated that the Court's response to complaints of non-disclosure must be proportionate. Given the strength of the claim, none of the alleged instances of material non-disclosure justify the discharge of the injunction.

[253] Justice Farara in his Discharge Judgment, the Strike Out Application having been adjourned, concluded in relation to the strength of the Claimants' case in relation to the "serious issue to be tried" part of the injunction test, that "the Claim has these serious inherent difficulties as it currently stands". Those serious inherent difficulties included that certain claims were of a derivative nature such that they could only be brought by certain of the Defendants or by the Second Defendant as a derivative claim with the Court's permission, and that claims that were not caught by the derivative requirement would be met by a defence based on the reflective loss principles, unless brought within an exception on the basis that the wrongdoers were in control of the company.¹⁰³

[254] Justice Eder held on the Strike Out Application by the First Applicant that "there is no legal basis for saying that the loans have been repaid, and thus, no basis for the claim against the [First Defendant]."

[255] Further, he held that the Claimants had not explained in their Statement of Claim the basis upon which they purported to have brought a claim on the Fifth Defendant's behalf. The nearest they came was pleading that they were the 100% beneficial owner of the issued share capital of the Sixth Defendant and that in turn it was the 100% beneficial owner of the issued share capital of the Fifth Defendant. Justice Eder held as follows:

That assertion is disputed – but even if it were right, it would not give the Claimants a right to sue unless they obtained permission for a double derivative action. They had neither applied for nor obtained such permission and "it is now far too late for them to do so. In my judgment this is a further reason the SOC should be struck out."¹⁰⁴

¹⁰³ Discharge Judgment, page 18, line 20 – page 19, line 25.

¹⁰⁴ Strike Out Judgment, paragraphs 13 – 16.

- [256] This Court must assess on this Application whether Harneys' conduct in preparing, presenting and relying on the Statement of Claim with the defects that have been found was wanting such as to open the possibility of a Wasted Costs Order. It was not.
- [257] For a Wasted Costs Order to be considered, the defects in the Statement of Claim, prepared in the context of an intention to commence urgent proceedings, and/or Harneys conduct in persisting in advancing the defective Statement of Claim, must be materially beyond the ordinary cases that come before the Court not infrequently on applications to strike pleading based on fundamental defects such as not demonstrating the necessary elements of a cause of action or advancing a claim that the claimant lacks standing or a necessary permission to advance.
- [258] The Applicants referred the Court to a paper which raised the question whether a successful application to strike out a pleading on the basis that there was no reasonable ground for bringing or defending a claim¹⁰⁵ should automatically raise the question of why the claim was brought or the defence mounted in the first place, and whether the legal practitioner may be liable for a Wasted Costs Order.¹⁰⁶
- [259] While the paper focuses on no "reasonable ground for bringing or defending a claim", it seems the same reasoning could be applied to most of the basis for striking set out in CPR 26.3, except where the client brought about the failing (for example, the non-compliance with "a rule, practice direction, order or direction given by the court.")¹⁰⁷ But many of the other situations covered in CPR 26.3 focus on the legal practitioner's work product: either the legal practitioner is responsible to the document (such as if it does not comply with a pleading rule, or is prolix).
- [260] Of course there would be some cases in which the legal practitioner's advice (which the legal practitioner may not be able to rely upon) was that the claim or defence is novel and there is at best a small prospect of it succeeding, yet the client chose to proceed.

¹⁰⁵ CPR 26.3(1)(b).

¹⁰⁶ Anthony Gonsalves, OECS Bar Presentation: "Developments in the Court's Attitude Towards Frivolous and Vexatious Matters – Costs Awards Against Attorneys Personally", 8 June 2013.

¹⁰⁷ CPR 26.3(1)(a).

- [261] Would a “member of the profession who was reasonably well-informed and competent”¹⁰⁸ have proceeded or declined the instructions?
- [262] If the legal practitioner appreciates that the outcome of taking a “doomed to fail” step may be a need to defend a Wasted Costs Application that, even if successfully defended eventually, will have cost money, taken time, created stress, and perhaps had reputational consequences.
- [263] In other cases under CPR 26.3, the legal practitioner ordinarily would have been in a position to decline instructions (an abuse of process of the court or likely to obstruct the just disposal of the proceeding). Those cases may be different when it comes to the potential for a Wasted Costs Order.
- [264] It seems difficult to reconcile a legal practitioner being free to act in pursuit of “a claim or a defence which is plainly doomed to fail”, which the Court of Appeal in Ridehalgh concluded is not problematic, with a legal practitioner facing a Wasted Costs Order for doing something “which no member of the profession who was reasonably well-informed and competent would have ... done”.¹⁰⁹
- [265] A liberal approach to Wasted Costs Orders for negligence would mean that the ‘safe harbour’ that was confirmed in Ridehalgh for a legal practitioner who “pursues a claim or a defence which is plainly doomed to fail”¹¹⁰ would be largely limited to claims or defences that are legally intact but depend of being able to marshal evidence and/or on issues of credibility.
- [266] Whether a more liberal use of Wasted Costs Orders for negligence would be desirable, it would change the practice of litigation considerably, shifting the risks considerably, likely affecting the types of claims that would be brought and the types of defences that would be advanced, and having advantages that may be better in theory than in practice. For example, if a claim is struck with a Wasted Costs Application being brought or foreshadowed, the incentive to appeal may rest with the legal practitioner who has been ordered to pay, whereas the client may be happy to forget the appeal and move forward in some other way.

¹⁰⁸Ridehalgh at 233, line D.

¹⁰⁹ Ridehalgh at 233, line D and line F.

¹¹⁰ Page 233, line F.

- [267] As outlined above, Justice Eder found that “as pleaded, there is no legal basis for saying that the loans had been repaid” as at the date on which the lenders exercised their security rights. The submission on behalf of the First Defendant’s counsel was that the repayment “is not supported by the facts [the Claimants] plead because they alleged various arrangements for repayment without pleading that the lenders or anyone who had the power to bind the lender were parties to the agreement to treat the loans as having been repaid as a result of informal set-off arrangements.”¹¹¹
- [268] Yes, the pleading was defective as it stood but it cannot be said that there were no facts that could have been pled by way of an amendment that alleged a “legal basis for saying that the loans have been repaid.” Had the Strike Out Application been heard at a time the Claimants were represented and participating, as Harneys points out, leave to amend to cure the defect was a distinct possibility. The recognition of revisions was noted by counsel to the Claimants before Justice Farara on 15 January 2016¹¹², as was the possibility of an application for leave to bring a derivative action, but obviously events in the relationship overtook matters. While the Defendants had raised those concerns in earlier correspondence, the same impediments that may have existed earlier would be subjects to privilege and so could not be disclosed by Harneys on this Application.
- [269] Justice Eder also found, as outlined above, that the Claimants had not pled “the basis on which they purport to have brought a claim on the [Fifth Defendant’s] behalf”, and that “the nearest they came is the pleading ... that the Claimants are the 100% beneficial owner of the issued share capital of the [Sixth Defendant], and that the [Sixth Defendant] is 100% beneficial owner of the issued shares of the [Fifth Defendant] ...[and] even if it were right, it would not give the Claimants a right to sue unless they obtained permission for a double derivative action.” They hadn’t done so, and by the time of the application before Justice Eder it was “far too late for them to do so.”¹¹³
- [270] Harneys not appreciating the need for permission to bring the double derivative claim was not materially beyond the ordinary cases that come before the Court on applications to strike pleading based on the claimant lacking a necessary permission to advance. Not appreciating the point in the haste and pressure to launch the proceeding and seek urgent relief is something that a member of

¹¹¹ Strike Out Judgment, paragraph 13.

¹¹² Discharge Judgment, page 32, line 18 – page 33, line 12.

¹¹³ Strike Out Judgment, paragraphs 15 – 16.

the profession who is reasonably well-informed and competent might not appreciate in those circumstances. It was a matter that could have been sought to be fixed by a subsequent application for permission.

[271] Harneys' conduct in preparing, presenting and relying on the Statement of Claim with the defects that have been found was not so wanting as to open the possibility of a Wasted Costs Order.

[272] Full and frank disclosure should include disclosing legal and factual weaknesses that may exist, or that a respondent may alleged exists, in a cause of action or in a pleading that may affect the assessment of the strength of a claimant's case in relation to the "serious issue to be tried" part of the injunction test. Also, as noted earlier in this Judgment, the pressured situation of an urgent injunction does not lessen the disclosure obligation.

[273] It is most likely Harneys did not appreciate the challenges facing the Statement of Claim, particularly the derivative claim challenge. This Court cannot conclude that Harneys recognized them and then failed to present them to Justice Farara as part of the full and frank disclosure.

[274] Not appreciating the need for permission, while somewhat troubling, is something that a member of the profession who is reasonably well-informed and competent might not appreciate in the circumstances. It was not negligence that crosses the line to open the possibility of a Wasted Costs Order.

[275] The failure to apprise Justice Farara, as part of full and frank disclosure, of the potential response of the Defendants – namely, that permission to bring a derivative claim had not been obtained – does not warrant a Wasted Costs Order.

[276] While Harneys prepared, presented and relied on the Statement of Claim, the Court is mindful that Harneys asserts that privilege restrictions may have affected its actions in defending the Statement of Claim.¹¹⁴ The Applicants eschew any possibility that privileged information could affect the situation because the Claim was struck for two reasons solely in the hands of legal practitioners. That may be so in relation to the defects but not necessarily so in relation to the Statement of

¹¹⁴ N. Affidavit, paragraph 8.

Claim not being amended and derivative permission not being sought after the fact, which was a matter also raised by the Applicants.

[277] The Court is mindful that Harneys ceasing to represent the Claimants in February 2016 meant that opportunities to remedy the defects may have been hampered before that time and certainly were lost after that time.

[278] Finally, Harneys did not have an opportunity to respond to the adjudication to the defects on the Motion to Strike. While Harneys did not submit that it had substantive responses that were not raised before Justice Eder, had it remained counsel for the Claimants in normal circumstances, it appears that there would have been earlier opportunities to seek to remedy the problems in the ordinary course.

[279] **Six Alleged Failings Collectively.** Having found that only one of the six alleged failings on the part of Harneys meet the requirements for the exercise of this Court's discretion to make a Wasted Costs Order, there remains the question whether if viewed collectively, or to use the expression that was used for two of the alleged failings – viewed “in the round” – the requirements for the exercise of this Court's discretion to make a Wasted Costs Order are met. Is the whole greater than the sum of the parts?

[280] The answer is that viewed collectively the whole is not greater than the sum of the six alleged failings on the part of Harneys. There is nothing about taking such an overall assessment of the alleged failings that leads this Court to conclude that the requirements for the exercise of its discretion to make a Wasted Costs Order are met.

MISCELLANEOUS MATTERS

[281] **Ex Parte Injunction Applications.** This jurisdiction regularly sees urgent ex parte applications.

[282] Of course, the ex parte avenue is important in situations in which there is a serious risk that notice to the opposite party or others would undermine the relief sought or the injunction sought is to prevent something so imminent that giving any form of informal notice is not practical.

- [283] The consequences for a party or others who are subject to an ex parte order can be severe, despite the courts' efforts to be proportional. Often the courts simply do not know enough about the potential consequences, even when the duty of full and frank disclosure has been met.
- [284] Ex parte applications should be brought only when truly necessary. Even then, 'short notice' or 'informal notice' should be given unless it would undermine the relief sought or the injunction sought is to prevent something so imminent that giving any form of informal notice is not practical.
- [285] The practice followed in some other jurisdictions is to give short notice or informal notice when there is insufficient time for formal notice. This practice is seldom followed in BVI, and indeed respondents to ex parte applications when notified may be hesitant to respond in haste if there is a risk of the ex parte hearing becoming inter parties and the respondent losing the opportunity for a fully prepared response at an inter parties hearing within 28 days (although scheduling difficulties often mean that the ex parte order beyond the 28 day period).
- [286] However, that concern can be overcome by such means as limited respondent's submissions at the "ex parte hearing" (i.e. not two full "kicks at the can") designed to draw to the attention of the court information that might lead to the order not being made and/or designed to result in an order, if it is to be made at all, that will be as minimally invasive as possible, will take account of the respondent's practical concerns and needs, will be made subject to fortification, will be made for shorter periods, and so forth.
- [287] Legal practitioners for prospective ex parte applicants would be well advised to fully assess and advise their clients on all the pros and cons of proceeding on an ex parte basis. For example, it is frequently the case on the inter parties hearing that the respondent will allege a lack of full and frank disclosure, thereby expanding the risk to the applicant and complicating the issues needed to be overcome for an injunction until trial.
- [288] Clients may be willing to run those risks because of the tactical advantage that securing an ex parte injunction can provide, which is why the duty of full and frank disclosure is so high, and why courts should be hesitant to proceed without any notification to the respondent (as discussed above) except in situations where it is likely that if notice is given there will be the serious harm that

the injunction seeks to prevent or the injunction is sought to prevent something so imminent that the giving of any form of informal notice is not practical.

- [289] What should be clear to legal practitioners acting for an intended ex parte injunction applicant is that they owe a duty to the Court to (a) probe their client diligently to seek to bring about full and frank disclosure by the client, (b) push a client that is not forthcoming for material and information that is important to a fair and full understanding of the situation to which the intended injunction relates (and to consider withdrawing if it is not forthcoming without a sound explanation) and (c) assess critically materials and information provided by the client and stand back to do a 'reality check' on information and conclusions provided by the client. Each member of the legal practitioners' team can contribute to this process – a junior member who may be doing what may seem to be 'grunt work' can add real value by keeping his or her mind engaged on the bigger picture of the client's case, and a counsel who is brought in after materials are drafted (and hopefully before they are finalized) can and should bring 'fresh eyes' to looking at the client's case, and the case for an ex parte injunction.
- [290] There is a risk, of course, that down the line when there is an assessment of costs in favour of the legal practitioners' client, the paying party will complain about duplication ("Why did three (of whatever the number) people need to review the draft affidavit?"). Some courts may be more taken by this argument than others. Part of the remedy (which is difficult in situations of urgency) is to document why time was taken for the further review in the text of time entries (dockets).
- [291] **Interaction Among Legal Practitioners' Offices.** It appears that what occurred in relation to the Injunction Application is that the materials were prepared within a Harneys' office outside the Virgin Islands, in Hong Kong, with limited (perhaps no) input from legal practitioners on the ground in the BVI, and particularly possibly with no input from counsel from Harneys on the Injunction Application.
- [292] While this Court cannot conclude that was the case here, the under-involvement of legal practitioners who are resident and practising in BVI seems to have become too frequent of a manner of operating in several law firms with offices in onshore jurisdictions, giving rise to failings of one kind or another, or to counsel from the BVI office lacking instructions or background.

[293] Of course, there may be offsetting considerations in terms of client contact, location of witnesses and documentary evidence, efficiency and time-pressure (particularly in urgent applications). Perhaps in some less common situations there is 'competition' among offices of a firm, with incentives not necessarily operating to maximize 'efficient integrated team' operations for the benefit of the client and the courts.

[294] It may be an appropriate opportunity for law firms practising in BVI and other jurisdictions to reassess these matters internally, as they may be contributors to the firm sometimes unintentionally not doing its best for its client and the courts. Of course, if a self-assessment does not indicate any problems or potential problems, the clean audit should give comfort to all concerned.

[295] **Purpose of Affidavits is Not for Argument and Submissions – Lam Third Affidavit.** It is rather fundamental and elementary that the purpose of an affidavit on an application is to provide evidence to the Court.

[296] CPR 30.3 provides as follows:

(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.

(2) An affidavit may contain statements on information and belief –

...

provided that the affidavit indicates –

(i) which of the statements in it are made from the deponent own knowledge and which are matters of information and belief; and

(ii) the source of any matters of information and belief”.

(3) The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit.

[297] An affidavit is not to be a version of a skeleton argument. It is to provide evidence, not argument. The witness cannot argue the case in an affidavit anymore that he or she could do so in the witness stand.

- [298] Lam Third Affidavit of Lam Ping Cheung contains extensive argument. His 21-paragraph affidavit is almost entirely argument save for his introduction of himself and some qualifying statements about his own knowledge and hearsay, and him not accepting matters to which he does not respond (paragraphs 1 – 3) and save for his evidence of his dealings with a Harneys' legal practitioner (paragraph 6) and his setting out the Applicants position regarding Harneys participation in the assessment of costs (paragraph 5(b)).
- [299] Harneys did not object or ask that it be struck, and accordingly the Court has read and considered the paragraphs of argument as argument, not evidence. Nothing turns on whether the paragraphs of argument are before the Court or not, although the Applicants' 34-page Skeleton Argument more than adequately presented the Applicants' written submissions.
- [300] The practice of blatant argument in an affidavit is bad form and should be discouraged. It adds nothing to the process of adjudicating cases efficiently and fairly and is not effective advocacy.
- [301] **Quantum and Payment of Fees Incurred by an Applicant.** Harneys position was that given the "astronomical level of fees the Applicants appear to have incurred in the space of approximately 7 weeks (estimated at around USD 640,000) (see letter from Forbes Hares dated 15 March 2015) the Applicants will on that basis alone, have considerable difficulty in establishing a causal link between Harneys conduct (which I maintain was entirely proper) and the costs purportedly incurred."¹¹⁵
- [302] It may be that if a Wasted Costs Order were made, the Applicants would have difficulty establishing the causal link, or in any event that Harneys should pay the full amount of the quantum incurred. However, quantum is not an issue to be dealt with at this stage, if at all. The Court only needs to say that there was a causal link between a ground for a Wasted Costs Order and the incurring of those costs. Later it would be determined how much Harneys should be required to pay in that regard, if a Wasted Costs Order were made.

¹¹⁵ N. Affidavit, paragraph 7(g).

[303] Harneys took the position that there needs to be evidence that the costs sought have been paid.¹¹⁶ This Court does not consider that an applicant for a Wasted Costs Order needs to establish that any particular quantum of costs were paid for the Court to make a Wasted Costs Order. If a Wasted Costs Order were to be made, in the process of determining the quantum that the legal practitioner is to pay to the applicant, the applicant would need to establish that the quantum of costs sought was incurred (in the sense that the costs sought were paid or there is a liability to pay them). However, this is not a matter that should affect the making of the Wasted Costs Order, at least not in any circumstances that the Court may envision at present.

[304] The legal practitioner has a right to participate in the process of determining the quantum that is required to be paid under a Wasted Costs Order made against the legal practitioner, at least in any circumstances that the Court may envision at present. In some circumstances that do not arise in this case so far as this Court has been informed, the legal practitioner may have represented the legal practitioner's client or former client in a process to determine the costs of a proceeding covered by a Wasted Costs Order, in which case the legal practitioner may have exercised its participation right.¹¹⁷ In this case, the Applicants accepted Harneys right to participate in the assessment of costs process which had begun.¹¹⁸

COSTS

[305] The costs of this Application are reserved to be determined following submissions thereon, unless agreed.

[306] While this Application is being dismissed, the Court is mindful that Harneys has a responsibility for the facts giving rise to the Application and the grounds upon which it was based, even though at the end of the day this Court has found that they fall somewhat short of leading this Court to make a Wasted Costs Order.

[307] The Applicants and Harneys should consider and address this in their submissions on costs, and in addressing the matters in CPR 64.6.

¹¹⁶ N. Affidavit, paragraph 7(g).

¹¹⁷ This concern was raised on behalf of Harneys in the N. Affidavit, paragraph 7(h).

¹¹⁸ Lam Third Affidavit, paragraph 5(b).

ORDERS

[308] Accordingly, for the reasons set out above in this Judgment, this Court orders as follows:

1. The amendments to the Application, as set out in the Amended Notice of Application, shall be allowed effective 5 October 2016, notwithstanding the time for applying for a Wasted Costs Order set out in paragraph 8 of the Discharge Order, and to the extent necessary (if at all), paragraph 8 of the Discharge Order shall be amended *nunc pro tunc* to extend the time for applying for a Wasted Costs Order to 6 October 2016.
2. This Application, as set out in the Amended Notice of Application, is dismissed.
3. The costs of this Application are reserved to be determined following submissions thereon, unless agreed.


Justice Barry Leon
Commercial Court Judge
6 June 2017