

## FAMILY LAW COMMITTEE MINUTES

Start : 5.30pm  
At Martineau, 1 Colmore Square, Birmingham.

### In attendance

Mary Kaye	Martineau	Chairman
Marc Saunderson	Mills & Reeve	
District Judge Dowding	Birmingham County Court	
Cathy Price	Price Mistry	
Zahra Pabani	Shakespeare Putsman	
Stephanie Brown	No 5 Chambers	
Philip Barnsley	Higgs & Son	
Mike Follis	Davies & Partners	
Mark Mansell	St Philips Chambers	
Claire Darley	Martineau	
Marie Kilgallen	Martineau	Minutes
Karen Moores	Sydney Mitchell	
Sue Daniels	Birmingham County Court - In place of Lorraine Bayliss	
Harry Cottam	Cottams Solicitors	Guest - speaker

### 1. APOLOGIES

Vanessa Meachin, Martin Canning, John Akers, Lorraine Bayliss, Victoria Green, Helen Dickens, Jane Robson

### 2. SPEAKER - HARRY COTTAM - WASTED COSTS

The following handouts were circulated:

1. "Question of Wasted Costs and Alleged Judicial Inconsistency of Approach". Notes by H Cottam.
2. Persaud v Persaud and others [2003] EWCA Civ 394.
3. Equity Solicitors v Mohammed Rassul Javid [2009] EWCA Civ 535.

Harry Cottam (HC) led a discussion about Wasted Costs. He was not seeking to raise a political point. He was discussing an inconsistency in the judicial approach, rather than to try and suggest the law is wrong. One of his concerns was that solicitors and barristers are penalised for their mistakes, but other civil servants involved in the Court process are not.

It was accepted that the law on wasted costs was not entirely clear and therefore, it was difficult for the Judges to apply the case law. HC stated that there is an inconsistent approach, particularly in Birmingham. There is some guidance needed as to what level of behaviour is required to make a Wasted Costs Order. HC suggest that it should be more than simple mistakes.

Discussion about Equity Solicitors v Mohammed Javid.

HC seeking guidance on how to apply the law on wasted costs. He seeks a resolution from the committee to ask the court to make to a local practice direction.

Discussion centred on the interpretation of when wasted costs orders should be made. District Judge Dowding (DJD) confirmed that they were made in rare circumstances. Although she made one last week, this is the only Wasted Costs Order she can recall ever making.

Local practice directions are not encouraged by the President of the Family Division.

Discussion about the danger of codifying law when the law has already been laid down in case law which simply requires judicial interpretation. That is how our system works.

DJD was asked if there was any guidance currently in existence and she confirmed that there was none. In any event, any guidance or even a local practice direction would have no binding effect. It was suggested that any comments could be raised with the designated Family Judge (Her Honour Judge Hindley). However, it was agreed that any decision will ultimately remain with the individual Judge. The designated Family Judge can, if there is an issue, give guidance but is unknown whether she will.

HC suggested that Wasted Costs Orders are a direct form of action against the solicitor and, inevitably, in those sort of cases, the solicitor will be penalised twice by having to write down the bill for the client.

DJD commented that the situation on Wasted Costs Orders can be considerably avoided by solicitors doing what they should have done, or what they have been ordered to do. It is generally only if a Hearing cannot proceed that the issue of Wasted Costs will arise, but most solicitors will do what is expected of them and, if something hasn't been done, the parties, Judges and barristers will work together, where possible, to ensure that the Hearing can proceed in the absence of any information.

#### Action

Marc Saunderson (MS) and HC to prepare guidance notes to be formulated into an article to be submitted to the Law Society Bulletin addressing circumstances where a Wasted Costs Order is appropriate. This will ensure that the situations in which a Wasted Costs Order may be made are summarised and circulated to as many people as possible.

#### **4. SERVICE OF DIVORCE PETITIONS**

It has been noted that on occasions a request is made that a divorce petition be personally served, but divorce petitions are being posted to the Respondent. This is even the case where it is stated in the letters and clearly marked in bold.

It was noted that the covering letter, which usually has the cheque attached to it, and the divorce petition and accompanying documents are separated. This means that the court staff do not know that the petition is to be personally served.

The issue will be raised with the court staff. In the meantime, it may be sensible to ensure that the divorce petition has a front sheet (not attached to the divorce petition itself, but secured) which states that the Respondent is to be personally served or not to be served by post and the petition is to be returned to solicitors. This will not become detached from the petition and should ensure that the court staff process it as a petition not to be served.

5. **FORMATS AND DATES FOR MEETINGS IN 2010**

Everyone was happy for the meetings to continue to take place every two months. MDK will circulate dates. MDK will also ensure that the format remains and each meeting will focus upon ancillary relief/children alternatively.

Future topics were suggested as:

1. A view from Counsel (Stephanie Brown)
2. A view from Counsel's Clerk (Mark Mansell)
3. Any relevant case law issues.

Action

Dates to be circulated.

6. **ANY OTHER BUSINESS**

Birmingham Family Group

The next meeting is 28 January 2010. It is at the offices of Martineau at 1pm. It was confirmed that anybody could attend the Birmingham Family Group meeting.

Guidance for Judges where there are Litigants in Person

Discussion as to whether the Court have any specific guidance as how to deal with Litigants in Person. Save as to the leaflets produced by the Court which advise Litigants in Person, the Judges have only their Bench Books as guidance. Resolution does provide some guidance for solicitors.

Upgrade to Court Computer Systems

There is to be an upgrade to the Court's computer system. This means that on 5 February 2010, the Court will not have full access to their computer systems. It was discussed whether the upgrade would mean that e-filing would now be possible at Birmingham County Court and it was confirmed that the upgrade was to do with the computer system only and not for the provision of any additional e-filing services. Any emails are to be sent to the individual Judge if Counsel has been provided with the email address by the Judge or alternatively, to the email addresses for Birmingham County Court.

7. **NEXT MEETING**

Tuesday 9 March 2010 at 5.30pm at the offices of Martineau. Please see attached document for all 2010 dates.

## **Dates for Family Law Committee Meetings**

- Tuesday 9 March 2010 at 5.30pm at Martineau
- Tuesday 11 May 2010 at 5.30pm at Martineau
- Tuesday 13 July 2010 at 5.30pm at Martineau
- Tuesday 14 September 2010 at 5.30pm at Martineau
- Tuesday 9 November 2010 at 5.30pm at Martineau

**QUESTIONS OF WASTED COSTS AND ALLEGED JUDICIAL  
INCONSISTENCY OF APPROACH**  
**By H F Cottam of Cottams Solicitors Ltd**

Who is in the most danger of a wasted costs orders being made.

I would firstly make the point that wasted costs orders are an extremely heavy sanction to bear for anyone. It appears on the part of the authorities to be unthinkable for wasted costs orders to be made against a civil servant, i.e. a court officer other than a solicitor or barrister, a judge, a witness or any other participant in court proceedings other than solicitors and barristers. I do not understand the rationale of this as why should solicitors and barristers be penalised for mistakes made whereas other individuals in the court process who are equally capable of making mistakes should not be so penalised.

The second point I would like to make is that although I have not obtained figures (since I don't have the professional time to do so) on the basis of the anecdotal evidence I have before me, it would appear that solicitors rather than barristers seem to be more in danger of wasted costs orders being made against them. The reason for this is that as a rule a wasted costs order is normally made when an adjournment has to take place because something hasn't or may be shouldn't have been done. The steps taken in proceedings are normally taken by solicitors rather than counsel and it is counsel who advises or represents at hearings and settle documents rather than taking substantive steps in the proceedings. I would therefore guess that the vast majority of wasted costs orders are made against solicitors rather than barristers.

The third question is on what sort of solicitors the average wasted costs order is made. Normally wasted costs orders are made against solicitors in my experience who run small general practices (none-specialist solicitors) like mine especially solicitors undertaking publicly funded work as the client in those circumstances doesn't have the resources to meet a wasted costs order. Large practices and niche practices specialising in one particular area of work usually have the resources and specialist knowledge to be able to avoid such difficulties.

The effect of a wasted costs order upon a business

Small businesses are most adversely affected by financial liabilities that are not foreseen. Negligence actions for instance are easy to foresee and there is usually more than substantial effective assistance that can be brought to bear to assist the average solicitors practice facing any form of negligence claim. Wasted costs orders are far less easy to foresee and budgeted for and therefore they play havoc with a solicitor's firm's finances although of course it is the case that they are insurable and most solicitors firms are covered for these eventualities under their insurance policies.



I believe the problems that arise and in my view are particularly apparent in Birmingham County Court are illustrated by the reported case of Equity Solicitors v.

Javid 2009 EWCA Civ 535 determined by the Court of Appeal which in that case is an appeal by Equity Solicitors who had formerly represented the respondent in divorce proceedings against whom a wasted costs order was made by Judge Cardinal.

You will note that there are considerable criticisms of the way in which Judge Cardinal applied the appropriate test for wasted costs orders to be made. I was the solicitor representing Mr Javid who was the beneficiary of the wasted costs order made by Judge Cardinal.

By disclosing this case I am in no way seeking to criticise Judge Cardinal in particular. What I criticise is the apparent lack of judicial consistency and lack of application of what the law in fact states in what I can only describe as what appears to be an orchestrated campaign by certain members of the judiciary who “punish” solicitors who they consider to be errant in applying court directions.

My suggestion to the committee is that a resolution be adopted that there be a submission made on behalf of the committee or by nominated person to request that there be a local practice direction as to the circumstances when wasted costs orders should be made, i.e. outlining the examples given in Persaud so that the law relating to wasted costs orders may be consistent and that unnecessary satellite litigation be avoided. I wish to again make clear I am not seeking to change the law relating to wasted costs orders but simply to ensure there is judicial consistency in this issue.

WF

Case 1  
Persaud

v

Persaud and Others

Neutral Citation Number: [2003] EWCA Civ 394  
Court of Appeal (Civil Division)  
6 March 2003

Before:

Peter Gibson and Mummery LJ, Blackburne J

Headnote

The difficult question of when it is appropriate to make wasted costs orders, in this case against counsel, was discussed by the Court of Appeal. The court re-emphasised that even though counsel in this case did not appear to have taken properly into account the legal aid guidelines published by the Bar Council, the court concluded that it was concerned not with any breaches of counsel's duty to the Legal Services Commission but only with a breach of counsel's duty to the court and the question of negligence had to be determined in the context of that duty.

Judgment

1. PETER GIBSON LJ: On 7 August 2000 after a five day trial his Honour Judge Simpson in the Mayor's and City of London Court dismissed an action brought by two sons against their father and a company owned by the father; a third son was also a defendant. Costs were awarded against the three sons to be assessed on an indemnity basis. On 13 February 2001 the father and the company applied for a wasted costs order against the barrister who had throughout

105  
106  
107  
108  
109  
110  
111  
112  
113  
114  
115  
116  
117  
118  
119  
120

103

61

