

**In borderline cases, what tips the balance when arguing for special costs orders?**

Alice Nash

# Special costs orders

- **Wasted costs**
- **Non party costs**
- **Security for costs**

# Wasted costs

- Improper, unreasonable or negligent act or omission
- Per Lord Woolf MR in *Wall v Lefever* [1998] 1 FCR 605, at 614:

*‘a summary remedy which is to be used in circumstances where there is a clear picture which indicates that a professional adviser has been negligent etc.’*
- Usually unsuitable for very serious allegations: *Kagalovsky v Balmore Invest* [2015] EWHC1337 (QB)

# The hopeless case

*Ridehalgh v Horsefield [1994] Ch 205 BUT*

*Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they are not intended, 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, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents.*

# A high test

• *MAD*

• *BAD*

• *DANGEROUS*

# So...

- Completely hopeless case
- Judicial indications that case is hopeless ignored
- Vexatious litigation
- Direct evidence of improper motive (of solicitor, or if solicitor should have realised client's motives improper)
- Solicitor knows client cannot/will not pay
- Solicitor has not properly advised claim/application hopeless
- **You need several of these features**

# Non-lawyers?

- *MA Lloyd & Son (In Administration) v PPC International Ltd* [2016] EWHC 2162 (QB)
- *Malik v Wales* [2012] EWHC 4281 (QB)
- *Awuah v Secretary of State for the Home Department* [2017] UKFTT 555 (IAC)
- *Assaubayev v Michael Wilson and Partners Ltd* [2014] EWCA Civ 1491

# Non-party costs - solicitors

- If litigators, wasted costs: *Tolstoy*
- Not funders: *Germany v Flatman* [2013] EWCA Civ 278; *Heron v TNT* [2013] EWCA Civ 469
- *Myatt v National Coal Board (No 2)* [2007] EWCA Civ 307

# Non-party costs - solicitors



## Non-party costs - insurers

- *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12 (cf *Murphy v Youngs Brewery* [1997] 1 WLR 1591)
- *Citibank NA v Excess Insurance Co Ltd* [2002] Lloyd's Rep IR 398

*Travelers Insurance Company v XYZ* [2018] EWCA Civ 1099



1000 claims  
623 claims v Transform  
197 claims insured by Travelers  
426 uninsured claims



Travelers pay 20%  
Transform liable for 42%  
Transform insolvent

*Travelers Insurance Company v XYZ* [2018] EWCA Civ 1099

- Exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense: *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39
- Insurers conducted claim and stood to benefit (by avoiding having to pay damages and costs if successful)

## *Various Claimants v Giambrone & Law (a firm) and others* [2019] EWHC 34 (QB).

- Quasi-group litigation
  - Cs knew coverage in dispute
  - Aggregation dispute settled; insurers continued to fund defence of claim
  - Defence conducted unreasonably by insured – but insurer could have pulled the plug
- ⇒ Insurer ordered to pay 50% of costs



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Thank you

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13 March 2019