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AWAKENING HONG KONG'S SLEEPING LION: A CASE FOR INCREASED USE OF O 62 r 8

Gregor A. Hensrude

Abstract: Hong Kong, like much of the world, is facing public criticism about the operation and accessibility of its civil litigation system. One judge and scholar has suggested increased use of a litigation rule requiring solicitors to pay any costs wasted by their misconduct. By comparing this rule to its counterparts in the United Kingdom and the United States, it becomes apparent that such a solution could work to improve litigation in Hong Kong. Increased use of the rule would compensate parties injured by abusive litigation tactics and deter solicitors from engaging in misconduct to line their pockets or win for their client through unethical means.

I. INTRODUCTION

The cost of litigation is one of the greatest problems facing the legal world today.¹ The legal system in Hong Kong² is no exception.³ This Comment examines use of Rules of the High Court O 62 r 8 (“the Rule” or “O 62 r 8”),⁴ allowing costs⁵ to be assessed against a solicitor⁶ for misconduct, and concludes it should be used more often. In *Hong Kong Law Journal*, Justice Litton, Non-Permanent Judge of the Court of Final Appeal in Hong Kong, proposed increased use of O 62 r 8,⁷ a rule allowing the court

¹ Cliff Buddle, *Justice for Sale*, S. CHINA MORNING POST, May 11, 2000, at 13.

² For readers questioning the impact of the Chinese takeover on the rule of law in Hong Kong, Hong Kong will maintain its own legal system, the common law framework and all existing laws, provided they do not conflict with the Basic Law, which grants those rights. Joseph R. Crowley Program, *One Country, Two Legal Systems*, 23 FORDHAM INT'L L.J. 1, 10-11 (1999) (giving a detailed analysis of how this guarantee is actually working in Hong Kong).

³ Buddle, *supra* note 1.

⁴ HIGH CT. R. O 62 r 8 (H.K.).

⁵ It is important to note that in Hong Kong and the United Kingdom, the term “costs” has a different meaning than in the United States. In the English system “costs include all legal expenses incurred in the preparation and conclusion of a case. These costs include the legal fees charged by the solicitor and barrister. With rare exception, legal fees constitute the lion’s share of the costs.” John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U.L. REV. 1567, 1606 (1993) (footnotes omitted). In contrast, the American definition generally expressly excludes attorneys’ fees as a part of “costs.” See FED. R. CIV. P. 54(d)(1).

⁶ A solicitor is one of two types of lawyers in the English tradition followed by Hong Kong (the other is a barrister). More specifically, in the United Kingdom a solicitor is “a legal adviser who consults with clients and prepares legal documents but is generally not heard in High Court.” BLACK’S LAW DICTIONARY 1399 (7th ed. 1999).

⁷ Though Justice Litton had other suggestions as well, they are outside the scope of this Comment. See Henry Litton, *Old Wine in New Bottles*, 30 H.K. L.J. 351, 351-53 (2000) (suggesting that judges take a

to order a solicitor to pay for costs wasted through his or her "ignorance or incompetence."⁸ This Comment concludes that increased use of O 62 r 8 will help solve Hong Kong's litigation problem.

Justice Litton notes that the Rules of the High Court of Hong Kong were modeled after the court rules of the United Kingdom, and questions whether Hong Kong would also need to make radical reforms to its system, as Britain has with the Woolf reforms.⁹ A working party was formed in Hong Kong to address litigation problems (i.e. cost, complexity, delay, and a legal system that is not user-friendly),¹⁰ and has endorsed many of the Woolf reforms recently implemented in Britain.¹¹ The reports of the working party suggest, among other things, that courts take into account the conduct of the parties when awarding costs.¹²

Though other reforms may be desirable, even necessary, this Comment examines increased use of O 62 r 8 to deter misconduct and compensate victims of solicitor misconduct as a way to improve civil litigation in Hong Kong. Part II of this Comment analyzes the litigation system in Hong Kong to determine the scope of the problem and examines the current use of O 62 r 8. Part III attempts to predict the efficacy of increased enforcement of the Rule by examining international examples of similar rules, focusing on the United Kingdom and the United States,¹³ and analyzes their effectiveness in curbing litigation abuse and decreasing cost. Part IV examines some possible advantages and disadvantages of increased use of the Rule. Finally, Part V concludes that that increased enforcement of O 62 r 8 in Hong Kong would benefit the civil litigation system.

more commanding role in the future course of action under Order 25 r 1 and that the court analyze the costs of each step before making an interlocutory motion, also under O 25 r 1).

⁸ *Id.* at 352-53.

⁹ Litton, *supra* note 7, at 351. The Woolf reforms are 365 pages of reforms to the Civil Procedure Rules, said to be possibly the "most significant change in civil justice since . . . the 1870s." Colin Passmore & Jonathon Goodlife, *Ten Questions about the Woolf Reforms*, NEW L.J. (Eng.) 280, 280 (1999). They also include hundreds of pages of practice directions, pre-action protocols, and court forms. *Id.*

¹⁰ Magdalen Chow, *High Court Costs "Undermining Competitiveness,"* S. CHINA MORNING POST, Nov. 30, 2001, at 2.

¹¹ See *infra* Part III.A.4 for further discussion of the Woolf reforms.

¹² Magdalen Chow, *Court Costs Shake-up Proposed*, S. CHINA MORNING POST, Nov. 29, 2001, at 1.

¹³ Australia has a comparable rule, Federal Court Rule O 62 r 9, which is supplemented by many others. See AUSTRALIAN LAW REFORM COMMISSION, WHO SHOULD PAY? A REVIEW OF THE LITIGATION COST RULES 11 (Oct. 1994). The Australian method of determining costs is also nearly identical to that of the United Kingdom. Vargo, *supra* note 5. There appears to be substantially less discussion of the impacts of the cost rules in Australia than in the United Kingdom and the United States.

II. CIVIL LITIGATION IN HONG KONG

Justice Litton is not alone in his call to action to reform the litigation process in Hong Kong. Even solicitors are calling for radical changes to the system.¹⁴ Justice Litton analogizes the system to the construction of a building:

Imagine a scenario whereby a proposal is put to a company to erect a building. No time limit is set. No ceiling is put on cost. There is no assurance that, when finished, the building will serve its purpose, or any purpose In the building field it is unthinkable that a project could start without time and cost limits—and perhaps penalties for time overrun. And yet, in the field of litigation, this is a commonplace occurrence.¹⁵

In a book review, David Leonard commented that a layperson might think the subject of the book, *The Professional Conduct of Lawyers in Hong Kong*, was a work of fiction.¹⁶

The extremely high cost of litigation in Hong Kong has several negative effects. First, the high cost makes Hong Kong less attractive for business and undermine its economic competitiveness.¹⁷ Second, the cost of litigation deters those of modest means from pursuing litigation,¹⁸ fueling complaints that the courts are only accessible to the rich.¹⁹ An additional concern is that the 15,170 persons appeared *pro se* in civil cases last year.²⁰ The high number of those proceeding *pro se*, combined with the fact that the system is not user-friendly to unrepresented litigants,²¹ spells disaster. One litigator has called the cost of litigation a “crucial issue” in the public perception of the legal system that the bench and bar must address.²²

¹⁴ See Cliff Buddle, *High Legal Costs Spark Reform Call*, S. CHINA MORNING POST, Oct. 3, 1999, at 2.

¹⁵ Litton, *supra* note 7, at 351.

¹⁶ David Leonard, *Review: The Professional Conduct of Solicitors in Hong Kong*, 27 H.K. L.J. 120, 120 (1997).

¹⁷ Chow, *supra* note 10.

¹⁸ *Access to Justice*, S. CHINA MORNING POST, July 16, 2000, at 12.

¹⁹ Chow, *supra* note 12.

²⁰ Jane Moir, *Laying Down the Lawyer's Bill; Despite Often Prohibitive Costs of Litigation, the Move Towards an Alternative is Slow*, S. CHINA MORNING POST, June 7, 2001, at 2.

²¹ Chow, *supra* note 10.

²² See Cliff Buddle, *Legal Advocates in the SAR Can Command the World's Highest Fees, But Now Judges—and the Public—Are Demanding Better Value*, S. CHINA MORNING POST, May 11, 2000, at 3.

A. *Elements of O 62 r 8*

Order 62 r 8 is the mechanism the Hong Kong courts use to compensate victims of abuse of the legal process and punish wrongdoers. The Rule states:

- (1) Subject to the following provisions of this rule, wherein any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default, the court may make against any solicitor whom it considers to be responsible whether personally or through a servant or agent an order—
 - (a) disallowing the costs as between the solicitor and his client; and
 - (b) directing the solicitor to repay to his client costs which the client has been ordered to pay to other parties in the proceedings; or
 - (c) directing the solicitor personally to indemnify such other parties against costs payable to them.²³

Examples of application of the Rule shed light on the standard used by the courts to apply O 62 r 8 and demonstrate how it has been used. The proceedings are summary, saving the expense of a possible negligence or breach of warranty action.²⁴

The Rule allows courts to impose costs on solicitors when they act “improperly or without reasonable cause” or where there is “misconduct or default” on the part of the solicitor.²⁵ The Rule is applicable where the conduct of the solicitor amounts to a “serious dereliction of duty.”²⁶ The dereliction of duty must in turn cause the wasted costs the party claims.²⁷ Moreover, the solicitor’s incompetence must take place in the course of

²³ HIGH CT. R. O 62 r 8 (H.K.). The rule goes on to specify the procedure for initiating proceedings and the form the order may take. *See id.*

²⁴ *KB Chau & Co. v. China Fin. Trust & Inv. Co.*, [1996] 1 HKC 420, 1995 HKC LEXIS 797, at *22-23 (H.K. Ct. App. Dec. 13, 1995).

²⁵ HIGH CT. R. O 62 r 8(1) (H.K.).

²⁶ *Que Jocelyn Co. v. Broadair Express Ltd.* (No. 2), [1999] 4 HKC 381, 1999 HKC LEXIS 79, at *7 (H.K. Ct. of First Instance July 30, 1999).

²⁷ *See generally KB Chau*, 1995 HKC LEXIS 797, at *22-23.

litigation; incompetence in conducting a transaction that causes litigation is not within the scope of the Rule.²⁸

As the cost to the solicitor could be significant, the Rule has fairly strict bounds. "Serious dereliction of duty" is a high standard, and authority to invoke the Rule will be exercised "with care and discretion and only in clear cases."²⁹ A "mere mistake or error in judgment is usually not sufficient" to incur sanctions under the Rule.³⁰ A court acts only where a solicitor has failed in his or her duty to the court in a way that would serve to "defeat justice."³¹

To establish the existence of the second element of a violation of the Rule a court must ask, whether the costs "[were] wasted by . . . misconduct or default on the part of the [solicitor]."³² However, the causal link between the solicitor's misconduct and the wasted costs can be fairly weak. For example, in *Yau Siu Yuen*,³³ where litigation services were performed by a clerk, the court acknowledged that there was no guarantee that settlement efforts would have been successful, but nevertheless stated the clients were entitled to counsel from a solicitor instead of from a litigation clerk.³⁴ The court applied a relaxed standard of causation; the mere possibility the misconduct resulted in wasted costs was sufficient to meet the causation prong of the standard. The petitioner did not have to actually prove that assigning the litigation clerk to do the work (the misconduct) caused the settlement to be delayed (and wasted costs).³⁵

The third requirement is that the misconduct complained of must occur in the course of litigation:³⁶

It is not enough that a solicitor's general conduct for a client has been improper, in every case where a solicitor has been made to pay costs, he has been proved of misconduct "*in the matter itself*."³⁷

²⁸ AIE Co. v. Kay Kam Yu, [1997] HKLRD 161, 163-64 (finding that "all of the cases in which solicitors have been ordered to pay costs personally have been cases in which they were acting as solicitors in the litigation in which the costs were incurred.").

²⁹ *Que Jocelyn Co.*, 1999 HKC LEXIS 79, at *7.

³⁰ *KB Chau*, 1995 HKC LEXIS 797, at *14.

³¹ *Id.* at *14-15.

³² *Id.* at *22 (quoting O 62 r 8).

³³ *Yau Siu Yuen v. Shing Cheuk Hing*, [1999] 1545 HKCU 1, 1999 HKCU LEXIS 1316 (H.K. High Ct. of H.K. Special Admin. Region Ct. of First Instance Dec 23, 1999).

³⁴ 1999 HKCU LEXIS 1316, at *17.

³⁵ *Id.*

³⁶ AIE Co. v. Kay Kam Yu, [1997] HKLRD 161, 163-64.

³⁷ *Id.* at 164 (quoting *In re Gregg* [1869] LR Eq 137 *per* Lord Romilly MR, at 141).

Thus, even if a solicitor commits misconduct which gives rise to an action, it is not punishable under O 62 r 8 if he was not at that time acting as an officer of the court.³⁸

Another element in the operation of the Rule is that the court initiates the process.³⁹ This is because there is rarely incentive for the solicitor to apply for a costs order against the opposing solicitor; the initial solicitor does not care if the opposing solicitor or the opposing solicitor's client pays the initial solicitor's costs.⁴⁰ Occasionally, a solicitor will file a motion for wasted costs against the opposing solicitor to guarantee the injured party's costs,⁴¹ as where the client does not have the means to pay for the wasted costs. Though Justice Litton advocates that the courts play an active role,⁴² judges do not initiate a substantial number of wasted costs proceedings. However, if the court does participate, it can ask the solicitor to show why a wasted costs order⁴³ should not be made where the opposing counsel has no motivation to do so.⁴⁴

B. *Application of O 62 r 8*

By way of example, in *Yau Siu Yuen*, costs were imposed against a solicitor who had his litigation clerk handle the case almost entirely, resulting in a mistake of law that may have led to a \$1.2 million settlement at the start of the trial.⁴⁵ The court questioned how the action progressed so far that while the defendant made such a substantial settlement, the plaintiff was still unable to recoup costs.⁴⁶ The court imposed costs under O 62 r 8 personally on the solicitors who had allowed the clerk to handle the case almost entirely on his own.⁴⁷

In *KB Chau*, the court held a solicitor responsible for filing a petition to freeze the assets of a potential defendant in an action for a client who

³⁸ *Id.* at 163-64.

³⁹ Litton, *supra* note 7, at 353.

⁴⁰ *Id.*

⁴¹ *KB Chau & Co. v. China Fin. Trust & Inv. Co.*, [1996] 1 HKC 420, 1995 HKC LEXIS 797, at *15 (H.K. Ct. App. Dec. 13, 1995).

⁴² Litton, *supra* note 7, at 353.

⁴³ "Wasted Costs Order" is the name generally given to an order under O 62 r 8.

⁴⁴ Where a solicitor will already get his/her costs paid under the fee-shifting rule in Hong Kong, there may be little incentive to expose the wrongdoing of opposing counsel. Litton, *supra* note 7, at 353. According to Justice Litton, this is the "contest between the solicitor and his own client." *Id.*

⁴⁵ *Yau Siu Yuen v. Shing Cheuk Hing*, [1999] 1545 HKCU 1, 1999 HKCU LEXIS 1316 (H.K. High Ct. of H.K. Special Adm. Region Ct. of First Instance Dec. 23, 1999).

⁴⁶ 1999 HKCU LEXIS 1316, at *10-11.

⁴⁷ *Id.* at *11.

claimed to own a large bank.⁴⁸ Presumably the solicitor knew that his client did not own the large bank, but nevertheless proceeded to get the defendant's assets frozen in an ex parte hearing by maintaining his client's misrepresentation.⁴⁹ The court found that all fees incurred after this injunction were wasted,⁵⁰ and affirmed the order forcing the plaintiff's solicitor to pay the defendant's costs.⁵¹

In *Que Jocelyn Co.*, a solicitor began a proceeding in the High Court for a client who had expressed concern over keeping legal fees low. The solicitor later failed to comply with an "unless order,"⁵² filed the case in the wrong forum,⁵³ and mishandled the offer to try to settle and reduce costs.⁵⁴ As a result of this misconduct, the court held that the solicitor was not entitled to any pay for the work done⁵⁵ and noted further that such conduct "gives the legal profession a bad name."⁵⁶

Despite these examples, O 62 r 8 is rarely used.⁵⁷ The paucity of authority illustrates this point.⁵⁸ The infrequent use is possibly because the law is a self-regulating profession, with few observers either qualified or able to police solicitors or lawyers. Judges may be hesitant to apply the Rule because of a sense of community and the fact that the bench and bar are in close contact every day. The doctrinal reason that the rule isn't applied often is the "serious dereliction" of duty standard.⁵⁹ A number of observers caution the Rule should be used rarely and only in clear cases.⁶⁰ Thus, a potential solution to Hong Kong's civil litigation woes remains on the books but is almost never utilized.

⁴⁸ *KB Chau & Co. v. China Fin. Trust & Inv. Co.*, [1996] 1 HKC 420, 1995 HKC LEXIS 797, at *15 (H.K. Ct. App. Dec. 13, 1995).

⁴⁹ 1995 HKC LEXIS 797, at *15.

⁵⁰ *Id.* at *20.

⁵¹ *Id.* at *30-31.

⁵² The "unless order" stated that the plaintiff must serve his statement of claim by October 22, 1996 by 4:15 or the claim would be dismissed. *Que Jocelyn Co. v. Broadair Express Ltd. (No. 2)*, [1999] 4 HKC 381, 1999 HKC LEXIS 79, at *10-11 (Ct. of First Instance July 30, 1999).

⁵³ *Id.* at *13.

⁵⁴ *Id.* at *20-22.

⁵⁵ *Id.* at *30.

⁵⁶ *Id.* at *5.

⁵⁷ *Yau Siu Yuen v. Shing Cheuk Hing*, [1999] 1545 HKCU 1, 1999 HKCU LEXIS 1316, at *17-18 (H.K. High Ct. of H.K. Special Admin. Region Ct. of First Instance Dec. 23, 1999).

⁵⁸ 1999 HKCU LEXIS 1316, at *17-18.

⁵⁹ *See generally* *Que Jocelyn Co. v. Broadair Express Ltd. (No. 2)*, [1999] 4 HKC 381, 1999 HKC LEXIS 79, at *7 (Ct. of First Instance July 30, 1999) (stating that the standard is serious dereliction of duty and that the rule should only be applied in "clear cases").

⁶⁰ 1999 HKC LEXIS 79, at *7. *See also* *Yau Siu Yuen*, 1999 HKCU LEXIS 1316, at *17-20 (explaining why the power to award costs against a solicitor is seldom used).

III. INCREASED USE OF O 62 r 8 AS A POSSIBLE SOLUTION TO LITIGATION ABUSE

Increased use of O 62 r 8 may curb abuses of the litigation system and achieve better client outcomes. There is evidence from similar jurisdictions that it can help solve the problems currently plaguing Hong Kong. The United Kingdom, the primary source of law in Hong Kong, has similar costs rules. In the United States, another product of the British system, there is further evidence of support for the Rule. The problem with providing data to prove the solution will work is apparent by examining any of the three countries; all three use their respective rules rarely. Thus, the examination relies primarily on the effect of any changes to the rules and on the predictions of scholars.

It is also important to note that the Rule has two purposes, to punish the lawyer and to compensate the victim of the lawyer's incompetence.⁶¹ The deterrent effect of punishment is the primary question presented here, because in theory every costs order will compensate the injured party.⁶² Thus, the question is whether the increased use of costs orders will result in a "better" civil litigation system. Both the British and American systems suggest an affirmative answer.

Before analyzing the other systems, a cautionary note should be included about using comparative law as a mechanism to propose reform. An outsider cannot fully understand any foreign system because many factors interplay with the legal system, any of which could jeopardize his or her conclusions.⁶³ As many geographic, economic, political, cultural and sociological factors influence law, legal conclusions made without an understanding of these factors are uncertain.⁶⁴

One author compares the transplantation of law with the transplantation of a kidney versus a carburetor.⁶⁵ While the transplanted kidney faces possible rejection, transplanting a carburetor from one automobile to another is less risky.⁶⁶ Using the British and American examples to provide support for increased use of O 62 r 8 should be seen

⁶¹ *KB Chau & Co. v. China Fin. Trust & Inv. Co.*, [1996] 1 HKC 420, 1995 HKC LEXIS 797, at *14-15 (H.K. Ct. App. Dec.13, 1995).

⁶² Theoretically, this is achieved with every costs order because the court determines the costs wasted by the misconduct and orders the solicitors that caused the waste to pay that amount to the opposing party. Thus, each order serves to rectify the exact amount of financial harm done.

⁶³ *Vargo*, *supra* note 5, at 1598-99.

⁶⁴ *Id.* (quoting O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 2-6 (1974)).

⁶⁵ O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 5 (1974).

⁶⁶ *Id.* at 6-7.

more like the transplantation of a carburetor for two reasons. First, both the United Kingdom and the United States share significant similarities with Hong Kong. Second, this Comment argues simply for an increased use of an existing rule, not wholesale adoption of a foreign rule. In conjunction with support for the same proposal coming from within Hong Kong, these comparisons carry a lesser risk of inaccuracy.

A. *The British System as a Model for Comparison*

The British system provides a clear model to compare with the legal system in Hong Kong because the latter system grew from the former.⁶⁷ More specifically, one of the key cases in English costs jurisprudence, *Myers v. Elman*,⁶⁸ has been called “the leading case on the exercise of costs jurisdiction” by a court in Hong Kong.⁶⁹ Commentators also argue that England has a crisis in its civil litigation system.⁷⁰ Further, the British have a similar rule imposing costs on the solicitor for specified misconduct.⁷¹

Britain is not immune to complaints about the costs and problems associated with civil litigation. The problems in the system are blamed for preventing people from making or defending claims.⁷² The main problems with the civil litigation system are cost, delay, and complexity.⁷³ An engineering firm reported that the fees for litigation were higher in the United Kingdom than any other place they operated, save perhaps the State of California.⁷⁴ One scholar posits that a possible reason for disenchantment with the system is the aggressive approach taken by solicitors who try to bully others into submission, run up costs, and then, on the eve of trial, turn pessimistic and pressure the client to settle on poor terms.⁷⁵

⁶⁷ See Litton, *supra* note 7, at 351 (noting that the Hong Kong Rules of the High Court are modeled after England's rules). See also Joseph S. Daniels, Note: *Comparing U.S. and Hong Kong Public Offering Regulation: How Cost-Effective is China's Primary Capital Market?*, 69 S.CAL. L. REV. 1821, 1832 (1996) (noting that the legal system in Hong Kong is “generally based” on that of the United Kingdom).

⁶⁸ *Myers v. Elman*, 1940 A.C. 282 (Eng.).

⁶⁹ *KB Chau & Co. v. China Fin. Trust & Inv. Co.*, [1996] 1 HKC 420, 1995 HKC LEXIS 797, at *14 (H.K. Ct. App. Dec. 13, 1995).

⁷⁰ John Heaps & Kathryn Taylor, *The Abuser Pays: The Control of Unwarranted Discovery*, 41 N.Y.L. SCH. L. REV. 615 (1997).

⁷¹ Supreme Court Act, 1981, § 51 (as substituted by the Courts and Legal Services Act, 1990, § 4).

⁷² Heaps & Taylor, *supra* note 70, at 616 (quoting LORD WOOLF, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1995)).

⁷³ *Id.*

⁷⁴ *Id.* at 616-17.

⁷⁵ John Fisher, *Strategic Errors Scare off Clients—Businessmen in Britain are Becoming Increasingly Disenchanted with the Litigation System and the Solicitors Involved in It*, L. SOCIETY'S GAZETTE, June 14, 2001, at 15.

1. *The Elements of the British Rule*

The British costs rule is quite similar to the Hong Kong rule. The operative rule is Supreme Court Act 1981, section 51 (as substituted by the Courts and Legal Services Act 1990 section 4) ("British Rule").⁷⁶ Wasted costs are costs incurred "as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such representative" or any costs the court feels under the circumstances are unreasonable to have the aggrieved party pay.⁷⁷ The court has approved a three-part test to determine whether a wasted cost order should be made:

- (1) Had the legal representative of whom the complaint was made acted improperly, unreasonably, or negligently?

⁷⁶ Supreme Court Act 1981 provides:

- (1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in:
 - (a) the civil division of the Court of Appeal;
 - (b) the High Court; and
 - (c) any county court, shall be in the discretion of the court.
- (2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings including, in particular, prescribing scales of costs to be paid to legal or other representatives [or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs]
- ...
- (5) Nothing in subsection (1) shall alter the practice in any criminal cause, or in bankruptcy.
- (6) In any proceedings mentioned in subsection (1), the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.
- (7) In subsection (6), "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 or other representative or any employee of such a representative; or
 - (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.
- (8) Where—
 - (a) person has commenced proceedings in the High Court; but
 - (b) those proceedings should, in the opinion of the court, have been commenced in a county court in accordance with any provision made under section 1 of the Courts and Legal Services Act 1990 or by or under any other enactment, the person responsible for determining the amount which is to be awarded to that person by way of costs shall have regard to those circumstances.

Supreme Court Act 1981, s 51 (as substituted by the Courts and Legal Services Act 1990 § 4).

⁷⁷ Jean Cowley, *Wasteland of Costs*, NEW L. J., Apr. 26, 1996, at 597, 597 (quoting Supreme Court Act 1981 § 51(7) (as substituted by Courts and Legal Services Act 1990 § 4)).

- (2) If so, did such conduct cause the applicant to incur unnecessary costs?
- (3) If so, was it in all the circumstances just to order the legal representatives to compensate the applicant for the whole or part of the relevant costs?⁷⁸

As in Hong Kong, courts in England can initiate costs orders.⁷⁹ Also similar to the rule in Hong Kong, the British rule is intended to punish the wrongdoer and compensate the victim.⁸⁰

The first requirement for imposing a wasted costs order in Britain is that the solicitor's conduct was improper, unreasonable, or negligent.⁸¹ Each word encompasses a distinguishable behavior. "Improper" conduct is conduct that would ordinarily justify a serious professional penalty or be considered by the consensus of professional opinion to be improper.⁸² Circumstances under which impropriety can be found are rare, as the standard "consensus of professional opinion," is fairly ambiguous.⁸³ "Unreasonable" conduct is that which does not have a reasonable explanation.⁸⁴ "Negligent" conduct is the most controversial of the terms.⁸⁵ The test is one of reasonable competence, but there is some leeway for solicitors because they are in the "fog of war."⁸⁶ The court must also examine the possibility of using other sanctions instead of awarding wasted costs.⁸⁷

The second requirement is that the lawyer's misconduct caused the wasted costs. "Without establishing this link the court has no jurisdiction to make an order."⁸⁸ The causal link must be established by the applicant.⁸⁹ If the necessary link cannot be established, the case is appropriate for

⁷⁸ *Id.* (citing *Re a Barrister (Wasted Costs Order (No 1 of 1991))*, 1993 Q.B. 293)).

⁷⁹ District Judge Michael Walker, *Benchmarks—Rules of Engagement—A Look at the Eleventh Update to the Civil Procedure Rules Amendments*, L. SOCIETY'S GAZETTE, Feb. 10, 2000, at 42.

⁸⁰ John Lambert, *Bad Conduct—Court Approval of Wasted Costs Orders*, L. SOCIETY'S GAZETTE, July 5, 1995, at 23.

⁸¹ Cowley, *supra* note 77.

⁸² Patti Brinley-Codd & Penny Lewis, *Making a Case for Wasted Costs—Claims for Wasted Costs Present the Courts with the Problem of Balancing the Public Interest against the Profession's Reputation*, L. SOCIETY'S GUARDIAN GAZETTE, Feb. 23, 1994, at 17.

⁸³ Lambert, *supra* note 80.

⁸⁴ Brinley-Codd & Lewis, *supra* note 82.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Cowley, *supra* note 77.

⁸⁹ Brinley-Codd & Lewis, *supra* note 82.

disciplinary authorities, "but is not one for exercise of wasted costs jurisdiction."⁹⁰

The third requirement is that, considering the totality of circumstances, justice would be served by awarding costs to the injured party.⁹¹ This element seems to allow the court to use its discretion by refusing to apply sanctions where the technical test is met but the court concludes there are circumstances that make sanctions inappropriate. The court has stated there is a difference between the degree of negligence necessary to establish a claim for wasted costs and that which the court needed before making a finding of wasted costs.⁹² Thus, even if a court finds that the first two elements have been satisfied, the court still has discretion to order or refuse to order costs paid by a solicitor.⁹³

2. *Application of the British Rule*

An important case for wasted costs jurisdiction, in Britain as well as Hong Kong,⁹⁴ is *Myers v. Elman*.⁹⁵ *Myers* held that a solicitor who had his clerk handle a case was liable for costs.⁹⁶ The court first noted that the appropriate standard in costs indemnity was negligence⁹⁷ and that the solicitor was liable for the actions of his clerk.⁹⁸ The court determined that the solicitor was guilty of professional misconduct for resisting some discovery and filing false affidavits.⁹⁹

A more contemporary example of British wasted costs jurisprudence is *Re a Company (No. 006798 of 1995)*.¹⁰⁰ In this case the solicitor filed a winding up petition¹⁰¹ on his client's request, perhaps to put pressure on the company.¹⁰² The court held that a solicitor acts unreasonably if he or she signs the affidavit accompanying the winding up petition where he or she has no grounds to believe that the company is insolvent based on the facts

⁹⁰ *Case Comment: Ridelagh v. Horsefield*, J.P.I.L., May 1995, at 57, 59.

⁹¹ Cowley, *supra* note 77.

⁹² *Case Comment: Ridehalgh v. Horsefield*, *INSOLV. INT.*, 1993, 6(10), at 76.

⁹³ Brinley-Codd & Lewis, *supra* note 82.

⁹⁴ See note 69 (noting the case is the leading case on costs jurisdiction in Hong Kong).

⁹⁵ *Myers v. Elman*, 1940 A.C. 282 (1939).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Re a Company (006798 of 1995)* 1996 All E. R. 417, 1996 1 WLR 491.

¹⁰¹ Such a petition requires the creditor to show that the petitioner is a creditor of the company and that the company is unable to pay its debts. *Id.*

¹⁰² *Id.*

known to him or her.¹⁰³ The court found that the creditor's solicitor in that case had acted unreasonably, causing wasted costs incurred in opposition to petition, and held her liable for those costs under section (6) of the Supreme Court Act of 1981.¹⁰⁴

3. *Comparing the British and Hong Kong Rules*

The only significant difference between the British rule and the Hong Kong rule is the standard of proof. In Hong Kong serious dereliction of duty is must be shown,¹⁰⁵ but in Britain mere negligence will suffice.¹⁰⁶ The Hong Kong court has explicitly rejected negligence as creating liability under the Rule.¹⁰⁷ In theory this means the rule should be applied more often in Britain, because negligence is a much lower standard than serious dereliction of duty. At least one author feels the courts in Britain use the wasted costs jurisdiction wisely, balancing the clients' interests and those of solicitors.¹⁰⁸ Thus, the British Rule provides a good benchmark for analyzing O 62 r 8, as it is used more often than the Hong Kong rule in a very similar civil litigation system.

4. *Lessons Learned from the British Experience*

Jean Cowley has made a list of things solicitors must avoid "at all costs" to escape wasted costs orders.¹⁰⁹ The list includes pursuing hopeless cases, acting without authority of the client, failing to consider whether settlement is reasonable, failing to adhere to the trial timetable, not having a full grasp of the legal issues, misleading the court, failing to consider the consequences of litigating over-aggressively, and making procedural applications which are misconceived.¹¹⁰ If articles advising solicitors on appropriate conduct arise from the use of wasted costs orders, the orders seem to be serving their purpose. The intent is to clean up the litigation

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Que Jocelyn Co. v. Broadair Express Ltd. (No. 2)*, [1999] 4 HKC 381, 1999 HKC LEXIS 79, at *7 (Ct. of First Instance July 30, 1999).

¹⁰⁶ See Cowley, *supra* note 77 (citing *Re a Barrister (Wasted Costs Order No. 1 of 1991)*, 1993 Q.B. 293).

¹⁰⁷ *Yau Siu Yuen v. Shing Cheuk Hing*, [1999] 1545 HKCU 1, 1999 HKCU LEXIS 1316 (H.K. High Ct. of H.K. Special Admin. Region Ct. of First Instance Dec. 23, 1999).

¹⁰⁸ Jacquetta Castle, *Liability for Lawyers: A Review of Recent Developments*, INT'L INS. L. REV. 1993, 1(12), at 413, 416.

¹⁰⁹ Cowley, *supra* note 77.

¹¹⁰ *Id.*

process, and avoiding the actions listed above is undoubtedly progress toward that goal.

Lord Woolf has led the British system toward increased use of costs orders, which he sees as “controlling the excesses of parties battling in an adversarial system.”¹¹¹ Woolf’s reforms are substantial; among them he maintains the wasted costs jurisdiction, but clears up the mechanics of its use.¹¹² He sees costs orders as having a “salutary effect” on “members of the legal profession.”¹¹³

While the final effect of the Woolf reforms has yet to be seen, they were enacted after substantial inquiry with the intent to streamline litigation, make it more responsive to the needs of the parties, and, where possible, to encourage the parties to avoid litigation altogether.¹¹⁴ Preliminary reports suggest a reduction in the number of cases coming to solicitors as it is easier to settle cases.¹¹⁵ Others suggest this reduction is not due to the Woolf reforms, but is a result of people using other means to solve disputes because of the high cost of litigation.¹¹⁶ Some have said that the Woolf reforms have resulted in speedier, but more expensive justice.¹¹⁷ Even critics recognize the Woolf reforms as attempting to bring justice to the system immediately, for present litigants, though some critics call for more effective monitoring of the results of the reforms.¹¹⁸

It should be noted that the Woolf reforms are substantially broader than those proposed in this Comment, so data on their aggregate efficacy is not decisive. In other words, even if the reforms as a whole prove to be ineffective, it does not follow that increased use of costs orders would be ineffective. Indeed, in light of the evidence presented in this Comment, the opposite appears to be true, both in Britain and Hong Kong. For example, at least one author believes that while the current rules in Britain are akin to a straitjacket and the old rules akin to the courts doing virtually nothing,¹¹⁹ there is a compromise to be had. He argues that while a litigant doing too

¹¹¹ Heaps & Taylor, *supra* note 70, at 634.

¹¹² Walker, *supra* note 79.

¹¹³ Heaps & Taylor, *supra* note 70, at 634 (quoting LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1996)).

¹¹⁴ *Id.* at 628.

¹¹⁵ Lucy Hickman, *Solicitors Take Cover—as Insurance Companies are Reeling from the Fall-out of the Terror Attacks on U.S., How a Shaky Market Could Lead to Fiercer Competition among Law Firms*, L. SOCIETY’S GAZETTE, Nov. 8, 2001, at 20.

¹¹⁶ Fisher, *supra* note 75.

¹¹⁷ Martin Mears, *Woolf: the Jury is Still Out?*, NEW L.J. (Eng.), Nov. 24, 2000, at 1731.

¹¹⁸ Nick Armstrong and Irwin Mitchell, *Standards of Judgment—Effective Monitoring Must be Introduced in Order to be Able to Judge the Success of the Reforms to Civil Justice*, L. SOCIETY’S GAZETTE, June 21, 1995, at 10.

¹¹⁹ Martin Mears, *Not Altogether a Success Story*, NEW L.J. (Eng.), July 6, 2001, at 1008.

little discovery is subject to an action by the client, a solicitor doing too much might be "visited with a wasted costs order."¹²⁰ Increasing the use of wasted costs orders might increase the incentive for the solicitor to seek the middle position.

Given the number of extrinsic variables, gauging the effect of the Woolf reforms will be difficult. It will be even more difficult to isolate the increased use of costs orders against solicitors. Though aggregate data on the results of the Woolf reforms is necessary to evaluate the reforms being considered in Hong Kong, it is not crucial for assessing the increased use of O 62 r 8. The specific data presented, both before and after the Woolf reforms, suggests that wasted costs orders will be effective in Britain.

B. *The United States as Mode 1 for Comparison*

The United States is also a good mode 1 because it also largely adopted the English system. The primary difference between Hong Kong and the United States is that Hong Kong, like Britain, imposes litigation costs on the losing party,¹²¹ whereas the general rule in the United States is that each party bears its own costs.¹²² However, this difference should have little impact on evaluating the goals or efficacy of the Rule, as the Rule has two purposes: to compensate the injured party and punish the wrongdoer.¹²³ The added risks of costs under the Hong Kong rule do not alter that calculation; the "loser pays" costs rule probably even helps in controlling satellite litigation, as explained below.

In addition, when a party pursues a frivolous claim, the English rule merely creates a redundancy.¹²⁴ The frivolity of the claim must be judged by objective criteria other than the outcome of the case.¹²⁵ Then, the costs are payable to the injured party under the U.S. bad faith standard.¹²⁶ This

¹²⁰ *Id.*

¹²¹ For the English Rule, see Vargo, *supra* note 5. For the Hong Kong rule, see Carole J. Petersen, *Preserving Institutions of Autonomy in Hong Kong: The Impact of 1997 on Academia and the Legal Profession*, 22 S. ILL. U. L.J. 337, 347 (1998).

¹²² For background on the American Rule, see Vargo, *supra* note 5. It should be noted, however, that the United States has 200 federal fee-shifting statutes and 2000 state fee-shifting statutes, so there are numerous exceptions to the "American Rule." *Id.* at 1588.

¹²³ *KB Chau & Co. v. China Fin. Trust & Inv. Co.*, [1996] 1 HKC 420, 1995 HKC LEXIS 797, at *22-23 (H.K. Ct. App. Dec. 13, 1995).

¹²⁴ Vargo, *supra* note 5, at 1633.

¹²⁵ *Id.*

¹²⁶ *Id.* at 1632-33. The "bad faith standard," as used here, is different, but closely related to the bad faith standard under 28 U.S.C. § 1927. It rests on the court's inherent authority to impose sanctions against its officers. See Joan Chipser, *Attorney's Fees and the Federal Bad Faith Exception*, 29 *Hastings L.J.* 319, 323-24 (discussing the history of the power). An attorney's fee award is appropriate under the federal bad faith exception where "a party clearly violates the law and in the face of this clear violation obstinately

argument is even more persuasive in the context of a rule, like that in Hong Kong and the United Kingdom, which does not require a showing of bad faith. In short, the method of paying for attorney's fees matters little in the context of comparing sanctions, because sanctions create specific rules for liability (apart from loss of the case) and impose specific penalties (i.e., the costs wasted by a frivolous motion). This answers the argument that the English method of awarding costs to the winner has "mystical curative powers to deter nonmeritorious claims or defenses."¹²⁷ In addition, its curative ability is questionable in light of the data regarding problems in both Hong Kong and the United Kingdom. Thus, despite their different costs rules, Hong Kong can be compared with the United States.

Litigation in the United States is criticized on the same grounds as in Hong Kong and England. The American legal system is seen as in need of reform.¹²⁸ It is criticized for being inefficient, unfair, and uncertain.¹²⁹ The United States has a higher rate of civil litigation than other industrialized nations.¹³⁰

Lawyers bear the brunt of the criticism for the problems with the U.S. litigation system. They are criticized for being self-interested, greedy, deceptive, amoral, immoral, incompetent, and self-indulgent.¹³¹ Lawyers are accused of letting their own greed thwart needed reform.¹³² This negative perception of lawyers has practical implications. Some authors claim that the situation in civil litigation threatens to undercut the civil basis of society.¹³³ The legal profession has also paid a toll; lawyers are the most depressed profession, and a significant number of lawyers leave the profession every year.¹³⁴ Solving these problems will allow lawyers to focus on justice and public welfare, restore the public trust, and maintain the current disciplinary system.¹³⁵

forces the plaintiff to expend time and effort in preparing or conducting a lawsuit" or "a plaintiff brings a groundless suit, a defendant asserts a baseless defense, a party proposes unnecessary petitions and motions, or a litigant generally pursues a course of conduct that is vexatious or oppressive to his opponent." *Id.* at 329-30.

¹²⁷ *Id.* at 1632.

¹²⁸ Mary J. Davis, *Summary Adjudication Methods in United States Civil Procedure*, 46 AM. J. COMP. L. 229, 230 (1998).

¹²⁹ *See Id.*

¹³⁰ W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in How it Pays its Lawyers?*, 16 ARIZ. J. INT'L & COMP. LAW 361, 363 (1999).

¹³¹ John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio's Struggle to Reform its Disciplinary System*, 68 U. CIN. L. REV. 65, 66 (1999).

¹³² George McGovern, *It's High Time We Reformed America's Runaway Lawsuit Industry*, DENV. POST, Mar. 5, 1995, at E4.

¹³³ *Id.*

¹³⁴ Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 647 (1998).

¹³⁵ Sahl, *supra* note 131, at 68-69.

Hand-in-hand with the criticism of lawyers is the concern over frivolous lawsuits and defenses. Observers suggest that the high cost in time and money of litigation forces a high settlement rate that promotes the filing of bogus claims.¹³⁶ Lawyers are further encouraged by the improbability of sanctions for filing a frivolous lawsuit.¹³⁷ By some estimates, one-quarter of all suits filed in the United States are frivolous, with even higher percentages in certain areas of the law.¹³⁸ Frivolous suits are blamed for causing many other problems in the United States justice system, such as backlogs, delays and high trial costs.¹³⁹ American authors are also calling for increased sanctions to keep frivolous and fraudulent cases out of court.¹⁴⁰

1. *The Current Rules in the United States*

The United States has two federal rules that are equivalent in many respects to O 62 r 8. The traditional rule is "Rule 11,"¹⁴¹ which has been

¹³⁶ Davis, *supra* note 128, at 231-32.

¹³⁷ Vairo, *supra* note 134, at 628 (noting that lawyers file "stupid, senseless and baseless lawsuits" because they get away with it).

¹³⁸ McGovern, *supra* note 132.

¹³⁹ See Robert Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 520 (1997).

¹⁴⁰ McGovern, *supra* note 132.

¹⁴¹ FED. R. CIV. P. 11 provides:

Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions:

- (a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of attorney or party.
- (b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
 - (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
 - (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
 - (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
- (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below,

amended significantly twice in the last twenty years,¹⁴² at least once in an attempt to curb the very abuses this comment examines.¹⁴³ The closer analogue to O 62 r 8 is 28 U.S.C. § 1927,¹⁴⁴ a little-used rule that reads:

impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

FED. R. CIV. P. 11.

¹⁴² See *infra* Part III.B.1.a.

¹⁴³ The drafters of the 1983 amendment had two motives: "(1) to deter dilatory or abusive behavior; and (2) to streamline litigation." Edward D. Cavanagh, *Frivolous Litigation: Developing Standards under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 500 (1986).

¹⁴⁴ See discussion *infra* Part III.B.1.b. In general, § 1927 is quite similar to O 62 r 8 where Rule 11 can apply to parties and is written and used more like a sanction than a compensatory measure. In its present form, Rule 11 is intended almost entirely as a punishment measure.

An attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.¹⁴⁵

The standards for Rule 11 and section 1927 vary by jurisdiction and by the version of Rule 11 in effect at a given time.

a. Rule 11

Rule 11 of the Federal Rules of Civil Procedure has been significantly amended twice since 1983. The first amendment, effective in 1983, featured mandatory sanctions designed to streamline litigation and deter abuse of the litigation process.¹⁴⁶ This version of Rule 11 eliminated judicial discretion; violations such as abusive filings carried mandatory sanctions.¹⁴⁷ The judge had explicit authority to award the injured party attorneys' fees.¹⁴⁸ The 1993 amendment scaled back the 1983 amendments.¹⁴⁹ The 1993 amendment included a "safe harbor" provision and de-emphasized compensatory sanctions.¹⁵⁰ Currently Rule 11 does not allow a judge, on the court's own motion, to make the wrongdoing party compensate the other party.¹⁵¹ Contrasting the 1983-1993 period with the post-1993 period demonstrates the effectiveness of increased sanctions against attorneys, though it should be noted that not all sanctions were compensatory.

i. Examples of use of Rule 11

A good example of the application of Rule 11 during its mandatory sanctions period is *Childress v. Kansas City*.¹⁵² In *Childress*, the court held that the plaintiff's answer to defendant's summary judgment motion was

¹⁴⁵ 28 U.S.C.S. § 1927 (2001).

¹⁴⁶ Cavanagh, *supra* note 143, at 511.

¹⁴⁷ Kimberly A. Stott, *Proposed Amendments to Federal Rule of Civil Procedure 11: New, but not Necessarily Improved*, 21 FLA. ST. U. L. REV. 111, 120 (1993).

¹⁴⁸ Cavanagh, *supra* note 143, at 500.

¹⁴⁹ Vairo, *supra* note 134, at 594.

¹⁵⁰ *Id.* at 624.

¹⁵¹ *Hutchinson v. Pfeil*, 208 F.3d 1180, 1184 (10th Cir. 2000) (citations omitted).

¹⁵² *Childress v. Kansas City*, No. 91-2255-L, 1992 U.S. Dist. LEXIS 14097 (D. Kan. Aug. 26, 1992) (unpublished op.).

legally frivolous.¹⁵³ Plaintiff's counsel alleged that he was unable to answer adequately because he had failed to get the cooperation of his client.¹⁵⁴ The court held the appropriate action in such a circumstance would be for the attorney to secure plaintiff's permission to withdraw the suit or to withdraw as counsel.¹⁵⁵ The court awarded attorney's fees to the defendant for responding to plaintiff's answer because the award served the purposes of Rule 11, to deter abusive litigation, punish abusers, compensate victims and facilitate case management by streamlining dockets.¹⁵⁶

In contrast,¹⁵⁷ in *Whitehead v. Food Max of Mississippi*, the Fifth Circuit recently overturned a district court decision awarding sanctions for admittedly abusive conduct.¹⁵⁸ In *Whitehead* the plaintiff, after receiving a judgment, sought and attained a writ of execution from the district court.¹⁵⁹ Within three days, he marched into the nearest Kmart with the news media and U.S. Marshals to seize funds to satisfy the judgment.¹⁶⁰ While the majority and dissent disagreed as to the reasonableness, given existing law, of the plaintiff's assessment that there was no stay,¹⁶¹ both sides agreed that the plaintiff's actions in enforcing the judgment were "patently inappropriate."¹⁶² However, the Fifth Circuit refused to sanction the plaintiff either for attaining or enforcing the judgment and reversed the district court's order that the plaintiff pay the defendant's attorney's fees accrued in opposition to the execution of judgment (about \$8,000).¹⁶³ The dissent disagreed, calling this attempt to "harass the defendant" an "affront to the judicial process" and "a mockery of the rule of law."¹⁶⁴

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at *4.

¹⁵⁶ *Id.* at *2 (outlining the goals of Rule 11).

¹⁵⁷ This language does not suggest that this decision is a result in the change of the rules and that the pre-1993 amendment would not have yielded the same result. That would be both nearly impossible to determine and incredibly presumptuous. Rather, this case is offered to show an application of the new version of the Rule, whether or not it is unique to this version.

¹⁵⁸ *Whitehead v. Food Max of Mississippi*, No. 00-60153, 2002 U.S. App. LEXIS 458 (5th Cir. Jan. 11, 2002).

¹⁵⁹ *Id.*

¹⁶⁰ The attempt stopped only after the district court got word and ordered the plaintiff to stop and participate in a conference call later that day. *Id.* at *2.

¹⁶¹ See *id.* at *13-14 (majority) and *24-32 (dissent).

¹⁶² *Id.* at *15.

¹⁶³ See *id.* at *21.

¹⁶⁴ *Id.* at *17.

ii. *The efficacy of Rule 11*

During the 1983-1993 period of mandatory sanctions, Rule 11 litigation increased dramatically, leading some to declare the "experiment" was a partial success in punishing violators.¹⁶⁵ Sanctions were imposed for "misstating the law, bringing suits for revenge, and for failing to allege facts necessary to state a particular cause of action."¹⁶⁶ Sanctions were also sought for legal errors like bringing groundless claims or improperly citing the law.¹⁶⁷

While the 1983 version was not a cure-all, it was "a necessary tool to encourage lawyers to devote close attention to litigation at the pre-filing stages."¹⁶⁸ A non-scientific study reported that most attorneys found the rule had forced attorneys to "stop and think" before signing pleadings.¹⁶⁹ Every empirical study confirms that lawyers conducted significantly more pre-filing research than they had before the amendment,¹⁷⁰ and that they did so based on the threat of Rule 11 sanctions.¹⁷¹ Such results cut across every line of geography and type of law practice.¹⁷² Additionally, at least one study found the 1983 version of Rule 11 decreased filing of boilerplate defenses and counterclaims.¹⁷³

The emergence of Rule 11 after the 1983 amendments also raised the consciousness of the bench and the bar as to abuses in civil litigation.¹⁷⁴ Judges used Rule 11 to remind attorneys of their obligations and to deal effectively with frivolous cases.¹⁷⁵ In turn, that "consciousness raising" may have motivated the profession to develop positive strategies for improving its image and restoring public confidence.¹⁷⁶

In addition, a study after the implementation of the 1993 amendments showed the bench and the bar overwhelmingly supported a rule with both

¹⁶⁵ Stott, *supra* note 147, at 129.

¹⁶⁶ *Id.* at 120.

¹⁶⁷ *Id.* at 121.

¹⁶⁸ *Id.* at 129.

¹⁶⁹ *Id.* at 116 (citing *Results of Rule 11 Litigation News Fax Poll*, LITIG. NEWS, June 1991).

¹⁷⁰ Vairo, *supra* note 134, at 621.

¹⁷¹ *Id.* at 622.

¹⁷² *Id.* at 622-23.

¹⁷³ *See id.* at 632.

¹⁷⁴ *Id.*, at 590.

¹⁷⁵ *Id.* at 625.

¹⁷⁶ *Id.*

compensatory and deterrent effect.¹⁷⁷ As explained above, O 62 r 8 also serves these dual purposes, thus garnering additional positive endorsement based on empirical opinion data.

Although the 1983 version was eventually repealed, perhaps because it went too far in making the sanctions mandatory,¹⁷⁸ the experience in the United States with the Rule 11 amendment sheds light on the increased use of sanctions. Rule 11 achieved partial success in improving litigation, and as many of its drawbacks have been addressed in Hong Kong's costs rule, the principle of increased use of sanctions could be extended there with good results.

b. 28 U.S.C. § 1927

Another basis for making lawyers pay for wasted costs is 28 U.S.C. § 1927. This statute, only applicable in federal courts, is rarely used because it often requires a showing of bad faith.¹⁷⁹ The party seeking fees must usually clearly prove bad faith and multiplication of litigation.¹⁸⁰ It is also unpopular because of its penal nature.¹⁸¹

i. The standard under section 1927

The Federal circuits are split on what standard should be used in applying section 1927.¹⁸² Some courts hold the court must find bad faith or recklessness by the attorney,¹⁸³ while others use a lower standard.¹⁸⁴ In the Seventh Circuit the standard is that the attorney, "though not guilty of any conscious impropriety, 'intentionally . . . pursues a claim that lacks plausible or factual basis.'"¹⁸⁵ "Bad faith" is probably a higher standard than Hong

¹⁷⁷ See Theodore C. Hirt, *A Second Look at Amended Rule 11*, 48 AM. U. L. REV. 1007, 1028 (1999) (citation omitted) (discussing a study showing that two-thirds of the bench and bar, and nearly half of plaintiffs attorneys support Rule 11 having a compensatory purpose).

¹⁷⁸ The 1983 version was criticized because it raised a contradiction with the liberal pleading rules otherwise present in the Federal Rules, was inconsistently interpreted and applied, generated expensive satellite litigation, had a chilling effect on civil rights, contained inappropriate sanctions to cure incompetence, and has been administered as a fee-shifting provision. See Stott, *supra* note 147, at 122-23 (citations omitted).

¹⁷⁹ *Id.* at 130.

¹⁸⁰ *Id.*

¹⁸¹ Cavanagh, *supra* note 143, at 508.

¹⁸² Jones v. Continental Corporation, 789 F.2d 1225, 1230 (6th Cir. 1986).

¹⁸³ *Id.* (citing Suslick v. Rothschild Securities Corp., 741 F.2d 1000, 1006 (7th Cir. 1984)); United States v. Blodgett, 709 F.2d 608, 610 (9th Cir. 1983).

¹⁸⁴ *Id.* (citing Lewis v. Brown & Root, Inc., 711 F.2d 1287, 1292 (5th Cir. 1983), *aff'd in part on reconsideration*, 722 F.2d 209 (5th Cir.), *cert. denied* 467 U.S. 1231 (1984)).

¹⁸⁵ *Id.* (quoting Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 226-27 (7th Cir. 1984)).

Kong's standard of "serious dereliction of duty," whereas the lower standard applied in some American courts is probably quite similar to the Hong Kong standard. However, given the differences in the two systems and the ambiguity of the language, it is almost impossible to compare the respective standards. As already noted, both of the rules are used infrequently.

ii. *Examples of the use of section 1927*

In a rare example of section 1927 jurisprudence, sanctions were upheld for filing a groundless summary judgment motion in *Home Indemnity Company v. Arapahoe Drilling Company*.¹⁸⁶ In *Home*, the plaintiff had filed a complaint in district court and then agreed to submit to the jurisdiction of the New Mexico Department of Insurance.¹⁸⁷ After the claim was decided against the plaintiff and an appeal was pending, plaintiff filed for summary judgment in the original district court action, arguing that some of the claims had not been decided by the Department, or alternatively, that the Department did not have jurisdiction.¹⁸⁸ The district court found the filing of the summary judgment motion had "unreasonably and vexatiously" multiplied litigation and that filing the motion was not warranted by existing law.¹⁸⁹ The Tenth Circuit affirmed, finding that sanctions under section 1927 are appropriate where the "attorney seeks to resurrect matters already concluded."¹⁹⁰ It should be noted that both courts used Rule 11 almost interchangeably with section 1927,¹⁹¹ again raising questions as to their separate functions.

2. *Lessons Learned from the American Experience*

Before attempting to draw lessons from the experience with costs rules in the United States, it is important to note that the standards for applying attorney sanctions are slightly different in Hong Kong and the United States. For example, the scope of Rule 11 is narrower than O 62 r 8,¹⁹² though section 1927 is similar in scope to O 62 r 8. The other

¹⁸⁶ *Home Indemnity Company v. Arapahoe Drilling Company, Inc.*, No. 92-2123, 1993 U.S. App. LEXIS 21937 (10th Cir. Aug. 27, 1993) (unpublished op.).

¹⁸⁷ *Id.* at *2-3.

¹⁸⁸ *Id.* at *3-4.

¹⁸⁹ *Id.* at *7 (quoting 28 U.S.C. § 1927). Sanctions under 28 U.S.C. § 1927 are reviewed for abuse of discretion.

¹⁹⁰ *Id.* at *10.

¹⁹¹ See *id.* at *2, *5, *6, *7.

¹⁹² See NOTES OF ADVISORY COMMITTEE ON 1993 AMENDMENTS TO FRCP 11 (for example, "this rule applies only to assertions contained in papers filed with or submitted to the court"). While FRCP 11 only

differences and similarities between the three rules have been used to attempt to predict the efficacy of increased use of O 62 r 8 in Hong Kong.

The first lesson is that Rule 11 is superior to section 1927 in curbing abusive behavior because Rule 11 does not require the "subjective" element of bad faith for the court to award sanctions.¹⁹³ The objective standard is the "hammer" that causes attorneys to file meritorious claims.¹⁹⁴ This reflects well on the Hong Kong solution, because "serious dereliction of duty" is an objective standard. Second, increased use of sanctions has beneficial impacts on lawyers and the legal system, as illustrated above by contrasting the United States' experience with Rule 11 in its different forms. However, Rule 11, and sanctions in general, are criticized for chilling creativity in advocacy, generating satellite litigation, for being mandatory and thus decreasing the probability of uniform enforcement, and creating a muddy area of law.¹⁹⁵

The problem of satellite litigation must be primarily solved through summary proceedings and court management,¹⁹⁶ though hearings and ongoing appeals will continue to be a problem. Indeed, the excessive number of filings under Rule 11 was one of the significant problems with the 1983 amendments.¹⁹⁷ However, the large number of claims was possibly because attorney's fees would not have been otherwise available under the American rule.¹⁹⁸ As Hong Kong follows the English rule, the winning party will receive attorney's fees anyway, so there is generally no motivation to file such claims.¹⁹⁹

As to the other criticisms, the Rule is not mandatory in Hong Kong, so the third criticism fades away. The law in Hong Kong concerning O 62 r 8 is not nearly as muddy as Rule 11 case law, and is sufficiently settled to provide solicitors with adequate notice. The one potential problem that remains is the possibility of dampening creativity. This possibility calls for effective enforcement, which will again benefit from a uniform standard that does not require mandatory wasted costs orders in certain situations. An added advantage of wasted costs orders in Hong Kong is that they

applies to written documents, O 62 r 8 theoretically covers all oral activity as well. While FRCP 11 can also be applied to parties (*see* FED. R. CIV. P. 11(c)), this Comment has attempted to moot that difference by only examining the rule when applied to lawyers.

¹⁹³ Stott, *supra* note 147, at 130.

¹⁹⁴ *Id.*

¹⁹⁵ Cavanagh, *supra* note 143, at 501-02.

¹⁹⁶ Litton, *supra* note 7, at 351 ("Procedural steps in litigation must henceforth serve these objectives: they must not be allowed to spin off to become pieces of satellite litigation.")

¹⁹⁷ Vairo, *supra* note 134, at 590.

¹⁹⁸ *Id.* at 599.

¹⁹⁹ Litton, *supra* note 7, at 353.

compensate the injured party,²⁰⁰ which is not always the case under Rule 11 sanctions.²⁰¹

Beyond these problems, the arguments for increased use of sanctions are "sound, if not compelling."²⁰² The lessons of both Britain and the United States demonstrate that the Rule can serve as an effective deterrent because the bar takes notice when sanctions are imposed.²⁰³

IV. ADDITIONAL ISSUES IN THE CONTEXT OF HONG KONG

While both the American and British experience with costs rules tend to support the proposition that Hong Kong should increase its use of sanctions, there are additional issues specific to Hong Kong.

In Hong Kong, there is little discussion of use of Order 62 r 8. Justice Litton has suggested "it may well be this mechanism should be used more frequently," as it has an "immense advantage" of being "cheap and easy to operate."²⁰⁴ More recently, the working party analyzing litigation in Hong Kong has suggested refining the existing costs rules to "take into account the conduct of the winning party."²⁰⁵ Though different from Justice Litton's proposal, the implication of the working party's suggestion is very similar. Thus, there is support for increased use of focused costs orders, and O 62 r 8 specifically, in Hong Kong.

O 62 r 8 is not a perfect solution, and certainly will not solve every problem in civil litigation in Hong Kong. For example, an attorney cannot recover his or her costs for defending against a wasted costs application.²⁰⁶ Also, increased use of the Rule might encourage firms to require some measure of indemnity for new solicitors.²⁰⁷ Further, if used too often, costs orders distract the solicitor from litigation.²⁰⁸ Finally, costs orders may not always be effective.²⁰⁹

²⁰⁰ See *KB Chau & Co. v. China Fin. Trust & Inv. Co.*, [1996] 1 HKC 420, 1995 HKC LEXIS 797, at *22-23 (H.K. Ct. App. 1995).

²⁰¹ See FED. R. CIV. P. 11(c)(2), *supra* note 141 ("A sanction imposed for violating this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.").

²⁰² Cavanagh, *supra* note 143, at 533.

²⁰³ *Id.* at 516 (noting that even unpublished opinions "nevertheless have an impact on the bar").

²⁰⁴ Litton, *supra* note 7, at 353.

²⁰⁵ Chow, *supra* note 12.

²⁰⁶ Brinley-Codd & Lewis, *supra* note 82, at 17.

²⁰⁷ *Yau Siu Yuen v. Shing Cheuk Hing*, [1999] 1545 HKCU 1, 1999 HKCU LEXIS 1316, at *18 (H.K. High Ct. of H.K. Special Admin. Region Ct. of First Instance Dec. 23, 1999).

²⁰⁸ *Id.* at 17-18.

²⁰⁹ Iain Goldrein, QC & Margaret de Haas, QC, *Winning on a Conditional Fee—P1 and Clinical Negligence*, 2, NEW L.J. (Eng.), Feb. 4, 2000, at 129 (quoting *Rose, LH in Freudania Holdings Ltd.*, TIMES, Dec. 4, 1995).

First, while the system in Britain and Hong Kong generally awards the costs to the winning party,²¹⁰ the same mechanism does not exist in wasted costs orders. Thus, a lawyer may choose to pay a wasted costs claim rather than risk both reputation and billable hours.²¹¹ The proceedings are often more expensive than the amount at stake.²¹² There are two answers to this problem. First, the Rule envisions a summary proceeding,²¹³ which reduces the cost to both parties (solicitor and client) in a wasted costs proceeding. Second, the court must be trusted with the discretion to either make the solicitor show cause or choose not to require a showing. Judges make these decisions every day, and are presumed qualified to do so by virtue of their position. Admittedly, it is a "tightrope between . . . protection of the public . . . and the protection of the profession from unmeritorious claims,"²¹⁴ but that is an acceptable risk.

Second, it is also possible that wasted costs orders could have a disproportionate impact on young solicitors because firms will force them to get additional liability insurance.²¹⁵ There is no empirical evidence to support this theory. There is no evidence of differential treatment of young solicitors in the three countries surveyed. There is also no evidence to show that an increased use of these sanctions would have this effect.

Third, at least one judge has suggested the reason costs orders are rarely used is that they distract attorneys who should be concentrating on litigation.²¹⁶ The theory is that a solicitor would then spend time considering the consequences if he loses the case, afraid to make any false step.²¹⁷ While this concern is valid, it also supports the theory that the sanctions would be useful. Some amount of thinking about the results of one's actions—analogue to the "stop and think" under Rule 11—will improve the civil litigation system. Otherwise, the Rule serves only to issue retribution and recompense. The goal is the prevention of misconduct, the elimination of backlog, and the assurance that every action taken by a solicitor is both for the good of the client and not an abuse of the legal system. Moreover, judges must be trusted to exercise appropriate discretion in using the Rule. The proposal is for increased use of the Rule, not mandatory use of the Rule.

²¹⁰ See note 121.

²¹¹ Brinley-Codd & Lewis, *supra* note 82.

²¹² *Id.*

²¹³ Litton, *supra* note 7, at 353.

²¹⁴ Brinley-Codd & Lewis, *supra* note 82.

²¹⁵ Yau Siu Yuen v. Shing Cheuk Hing, [1999] 1545 HKCU 1, 1999 HKCU LEXIS 1316, at *18 (H.K. High Ct. of H.K. Special Admin. Region Ct. of First Instance Dec. 23, 1999).

²¹⁶ 1999 HKCU LEXIS 1316, at *17-18.

²¹⁷ *Id.* at *18.

Finally, critics in America and Britain argue that costs orders against solicitors are not always effective.²¹⁸ Not even the most die-hard advocate of wasted cost orders would assert that they could single-handedly solve the problems inherent in litigation. Indeed, it is too early to determine whether sanctions are in fact an effective deterrent.²¹⁹ Further, given the number of variables, it will be difficult to ever know whether and to what extent sanctions are effective. However, it is also very possible that the result of consistently and properly imposed sanctions will bring "marked improvement in our backlogged calendars, thus enabling better access to our courts by deserving litigants."²²⁰

V. CONCLUSION

Justice Litton's suggestion that Order 62 r 8 should be used more often to streamline the justice system in Hong Kong is a good one. First, the Rule is simple and easy to apply. Next, there is evidence of some enthusiasm for this solution in Hong Kong. Looking at the rules in United States and Britain, there is evidence that similar rules in Hong Kong could improve the system. Where an hourly fee is charged, litigation is not a zero-sum game, for both sides benefit from a solution that reduces their legal costs.²²¹ This is exactly the goal of Order 62 r 8. Most litigation, where the solicitors are acting responsibly, would not see any increased risk. However, in those few cases where solicitors are purposefully driving up the cost, to intimidate the other party or line their own pockets, the Rule is relevant. Use of O 62 r 8 *will* compensate the victim and will *probably* deter similar conduct in the future.

The only question that remains is how to increase use of the Rule. Increased use could be accomplished by lowering the standard by which a costs order can be applied (i.e., lowering it from the serious dereliction of duty standard to the English standard of negligence) or codifying the increased use (i.e., in a way analogous to the 1983 version of Rule 11). The increased use of O 62 r 8, in whatever form, is a proposal worth serious consideration.

²¹⁸ See, e.g., Goldrein & Haas, *supra* note 209.

²¹⁹ Thomas E. Baker, *Proposed Intramural Reforms: What the U.S. Courts of Appeals Might Do to Help Themselves*, 25 ST. MARY'S L.J. 1321 (1994).

²²⁰ Fred Woods, *Sanctions—Stepchild or Natural Heir to Trial and Appellate Court Delay Reduction*, 17 PEPP. L. REV. 665, 681 (1990).

²²¹ William Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. DISP. RESOL. 367, 396 (1999).

