



THE ETHICS OF THE HOPELESS CASE

By Owen Rogers

Most lawyers will be familiar with this anecdote, the starring role usually attributed to an illustrious barrister from their own jurisdiction:

“My Lords, in this appeal, there are three points. One is arguable, one is unarguable, and one is unanswerable.” The presiding judge politely asks: “Well, why don’t you tell us what your unanswerable point is?” To which counsel replies, “Aah, that is for your Lordships to discover.”

This is bad advocacy for several reasons. I wish to focus on one – the inclusion in counsel’s submissions of the second point. At a recent advocacy training workshop organised by the General Council of the Bar (GCB) there was a seminar on ethics. One question was whether counsel may draft a plea denying a fact which her client admits to be true but which the plaintiff will have difficulty proving. Another question was whether counsel is entitled to withdraw from a case which she believes has no prospects in law or on the facts. I was surprised by the views of experienced practitioners. On the first question many seemed to think a tactical denial was in order. On the second question there was a widespread belief that counsel’s duty was to retain the brief and do the best she could.

Counsel’s ethical duties in relation to the hopeless case must not be confused with the cab rank rule which requires counsel to accept a brief if she is available and offered her usual fee. The purpose of that rule is to ensure that an unpopular litigant or a litigant with an unpopular cause is not prejudiced in obtaining the services of counsel. The rule is at the heart of the independent bar. Its observance may call for considerable courage, particularly in fraught political times. But once a brief has been accepted, counsel’s duties are the same to all clients. Rule 3 of

the GCB’s Uniform Rules of Professional Conduct (‘URPC’) expresses counsel’s duty thus (my emphasis):

“According to the best traditions of the Bar, an advocate should, while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interests of his client without regard to any unpleasant consequences either to himself or to any other person.

Counsel has the same privilege as his client of asserting and defending the client’s rights and of protecting his liberty or life by the free and unfettered statement of every fact, and the use of every argument and observation, that can *legitimately, according to the principles and practice of law*, conduce to this end; and any attempt to restrict this privilege should be jealously watched.”

The question is what restrictions, if any, flow from the words I have underlined. A case is not hopeless just because counsel thinks it will probably fail. Counsel may properly argue a weak case. The young advocate who inadvertently says “I think” rather than “I submit” is quickly told that the court is not interested in what she thinks. Irritable judges are sometimes too quick to assume that submissions in support of a weak case accord with what counsel think and reflect adversely on their competence.

But does there come a point where the case is so weak that it is not proper to advance it? This is an important question, particularly at a time when there is disquiet that well-resourced private and public litigants sometimes drag out cases by pursuing claims or defences which are unmeritorious. If there is a line which counsel should not cross, at least some of these abuses might be curbed.

There is one strand of thinking which supports the view that counsel should do the best she can, however hopeless the

case. In the context of punitive costs orders against counsel, Lord Hobhouse said the following in *Medcalf v Mardell*¹, echoing similar sentiments expressed by the Court of Appeal in *Ridehalgh v Horsefield*:²

"... [I]t is the duty of the advocate to present his client's case even though he may think it is hopeless and even though he may have advised his client that it is ... So it is not enough that the court considers that the advocate has been arguing a hopeless case. The litigant is entitled to be heard; to penalise the advocate for presenting his client's case to the court would be contrary to the constitutional principles to which I have referred. The position is different if the court concludes that there has been improper time-wasting by the advocate or the advocate has knowingly lent himself to an abuse of process. However it is relevant to bear in mind that, if a party is raising issues, always taking steps which have no reasonable prospect of success or are scandalous or an abuse of process, both the aggrieved party and the court have powers to remedy the situation by invoking summary remedies – striking out – summary judgment – peremptory orders etc. the making of a wasted costs order should not be the primary remedy; by definition it only arises once the damage has been done. It is a last resort."

This passage begs the question. If counsel argues a hopeless case, is she not guilty of improperly wasting court time and of abusing the court's process? The courts exist to adjudicate genuine disputes. Judicial expertise and infrastructure are available at no charge to the litigants but at considerable cost to the public purse. There are many litigants needing the court's attention. Why should we accept that lawyers may take up judicial resources with hopeless cases?

The weight of modern opinion is more nuanced than the one expressed in *Ridehalgh* and *Medcalf*. In England, the ethical rules governing solicitors and barristers now explicitly state that it is improper for a legal representative to make a submission which she does not regard as properly arguable.³ In *Buxton v Mills-Owen*,⁴ where the question arose in relation to solicitors, Dyson LJ said the following:⁵

"... I agree with Mackay J that it may be difficult to draw the line between an argument which can properly be articulated and put forward (but which has little, if any, prospect of success) and an argument which cannot properly be articulated and which is believed to be bound to fail. The Bar Code of Conduct puts the matter very clearly. Counsel may not draft any document (which must include a skeleton argument) containing a contention which he does not consider to be properly arguable; and he may not make any submission in court which he does not consider to be properly arguable. A corresponding provision appears at rule 11.01(3) of the 2007 Code of Conduct for Solicitors. It must be acknowledged that there is no express provision in those terms in the 1990 Rules (as amended). Nevertheless, I am in no doubt that even before the point was spelt out in the 2007 Code, it would have been understood by all solicitors that, as officers of the court, they are under a professional duty (i) not to include in the court documents that they drafted any contention which they did not consider to be properly arguable and (ii) not to instruct counsel to advance contentions which they did not consider to be properly arguable."

Dyson LJ went on to make an important observation about the lawyer's duty where a case is not so weak that he can properly refuse to argue it. He was commenting on a suggestion that even where the lawyer thinks the case is hopeless he should continue to act but adopt the traditional coded message to the court used in these circumstances, "I am instructed to say". Dyson LJ disagreed:

"In my judgment, if an advocate considers that a point is properly arguable, he should argue it without reservation. If he does not consider it to be properly arguable, he should refuse to argue it. He should not advance a submission but signal to the judge that he thinks it is weak or hopeless by using the coded language 'I am instructed that'. Such coded language is well understood as conveying that the advocate expects it to be rejected. In my judgment, such language should be avoided."

I agree. It is bad, even craven, advocacy to 'argue' in this way. If a point is properly arguable (though in counsel's view weak), she can legitimately spend less time on it but she should not semaphore to the judge that it is understood between herself and the bench that the point is bad.

The relationship between counsel's ethical duty not to argue hopeless points and the proper administration of justice was made clear in the Privy Council's recent decision in *Sumodhee v State of Mauritius*.⁶ The grounds of appeal were exposed as baseless. In a post-script to the dismissal of the appeal, Lord Hughes said this:

"[22] In advancing notices of appeal, as in the conduct of trials, the professional duty of counsel lies both to his client and to the court. There ought to be no conflict between these duties, but it is axiomatic that the duty to the court is the overriding one. Part of the duty to the court is the duty not to advance grounds of appeal unless the point is properly arguable. ...

[23] The importance of this duty has nothing at all to do with avoiding occasioning irritation to the court. Judges must and do consider on their merits arguments properly advanced whether they turn out to be good, bad or indifferent. The importance of the duty lies in enabling the court to deal efficiently with the very large number of applications made to it, and to concentrate on those which raise properly arguable points. If the court is pre-occupied with hopeless points, possibly meritorious cases where there are properly arguable issues will be delayed at best and may not receive the time which they deserve. An appellate court needs to rely on the professional duty of counsel to avoid this. ... Happily, the confidence in counsel which courts are able to repose is a major factor in the delivery of justice at all levels."

"If counsel argues a hopeless case, is she not guilty of improperly wasting court time and of abusing the court's process?"

In an influential article published in 1998,⁷ David Ipp, a South African lawyer who moved to Australia in 1981 and eventually became a judge of appeal in New South Wales, referred⁸ to thinking from a bygone era in which it was thought proper for counsel to take every possible point and to refrain from acting as a pre-trial screen between his client and the court, an approach typified in the statement, contained in an English judgment from 1871, that a client is entitled to say to his counsel, "I want your advocacy, not your judgment, I prefer that of the court".⁹ The writer contrasted this approach with the requirements of modern case management which depend for their proper functioning on lawyers' taking a sensible, realistic and critical view of the strength of their case:

"In the light of modern conditions it has been recognised that the over-burdened legal system must also take into account the need to do justice to those many persons waiting for their cases to be heard. I suggest it is no longer open to counsel to argue every point indiscriminately. While the duty to take every possible point might be a duty owed by lawyers to the client, the paramount duty to the court is to advance only points that are reasonably arguable. Lawyers should indeed act as a screen so as to exclude unreasonable or hopeless arguments."¹⁰

In a leading Australian case, *Steidl Nominees v Laghaifer*,¹¹ Davies JA disagreed with the suggestion in *Ridehalgh v Horsefield* that it was not improper for a lawyer to present a case which she knows is bound to fail: "[I]t is one thing to present a case which is barely arguable (but arguable nevertheless) but most likely to fail; it is quite another to present a case which is plainly unarguable and ought to be so to the lawyer who presents it". He emphasised that it was counsel's duty to exercise her own

independent judgment on which points to argue, from which it followed that it was also her duty to decide whether there was any point at all to be argued. Since it was not for counsel to sit in judgment on the reliability of her client's witnesses, greater care had to be taken in branding counsel's conduct improper where arguability depended on questions of fact, but Davies JA considered that the question was in principle the same, whether it depended on fact or law: "If the case is plainly unarguable it is improper to argue it."¹²

In relation to appeals, Australian courts have held¹³ that counsel should not advise on an appeal until she has studied the judgment and genuinely concluded that there are proper grounds for an appeal; she acts improperly if she drafts a notice of appeal which is manifestly hopeless or which she knows is being advanced to buy time; she violates her duty to the court if she scatters throughout the notice grounds for which no proper basis exists. (This is regrettably something often encountered here. Once a decision has been made to appeal, counsel trawls through the judgment, identifying every adverse finding as an error by the judge.)

Although the conduct rules for Australian barristers¹⁴ do not explicitly say that it is improper to argue hopeless cases, there are various rules from which this may be inferred. The rules state that the barrister's paramount duty is to the administration of justice;¹⁵ that there is an overriding duty to the court to act with independence in the administration of justice;¹⁶ that the barrister must use her forensic judgment and give advice independently and for the proper administration of justice, notwithstanding the contrary desires of the client;¹⁷ that the barrister should not act as a mere mouthpiece for the client;¹⁸ that the barrister has the right, notwithstanding the client's



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wishes, to confine a hearing to those matters which she believes to be the real issues;¹⁹ and that that, in the service of the efficient administration of justice, she should confine the case to issues which are genuinely in dispute.²⁰ Against this backdrop, rule 60 provides that a barrister must take care to ensure that her advice to invoke the coercive powers of the court is reasonably justified by the material then available to her; is appropriate for the robust advancement of her client's case on its merits; and is not given principally to harass or embarrass a person or to gain some collateral advantage. Rule 64 states that a barrister must not allege any fact in any court document settled by her or make any submission unless she believes on reasonable grounds that the available evidential material provides a proper basis to do so. Commenting on the amendments made in 2007 to the rules in question, Hugh Fraser, a judge of appeal in Queensland, observed that while there was nothing to stop a barrister from “mounting a genuine challenge to orthodox principles”, the greater emphasis placed by the rules on the efficient administration of justice supported the view that a barrister should decline to advocate an unarguable claim, regardless whether it were otherwise an abuse of process.²¹

In Canada, the British Columbia Court of Appeal in *Lougheed v Armbruster*²² observed that in an adversarial system the usual approach of judicial non-intervention presupposes that counsel will do their duty, such duty being (my emphasis):

“...to do right by their clients and right by the court ... In this context, “right” includes taking all legal points deserving of consideration and not taking points not so deserving. The reason is simple. Counsel must assist the court in doing justice according to law.”

The rules of professional conduct of the law societies of Canada contain provisions supporting a conclusion that it is improper to advance a hopeless case. In British Columbia and Ontario, the rules say that the lawyer must represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.²³ The commentary on this rule states among other things that the lawyer should avoid and discourage a client from resorting to frivolous or vexatious objections and delaying tactics. Another

rule prohibits the lawyer from abusing the court's process by prosecuting proceedings which, though legal in themselves, are clearly motivated by the client's malice or by assisting the client to do anything dishonourable or by stating as true a fact for which there is not reasonable support²⁴. Lawyers must encourage public respect for, and must strive to improve, the administration of justice.²⁵ In Québec the rules state that a lawyer must withdraw if a client persists in pursuing proceedings that the lawyer considers abusive.²⁶ She is prohibited from acting in a manner detrimental to the administration of justice²⁷ and must avoid all procedures which are purely dilatory.²⁸

In South Africa, the URPC do not contain rules which expressly or even by necessary implication preclude counsel from advancing a hopeless case. However the URPC are not an exhaustive code of ethical conduct. In my view, it is improper for an advocate in this country to act in support of a hopeless case. That this is so may be inferred from various branches of the law, fortified now by the Constitution:

- (i) The court may stay proceedings which are an abuse of process. To advance a claim or defence which is hopeless is one form of abuse.²⁹ It must be improper for a lawyer to assist a litigant to abuse the court's process.
- (ii) The court may order a lawyer to pay costs *de bonis propriis*. Although participation in hopeless cases does not often feature as a reason for such orders, there is no doubt that courts can on this ground mulct a lawyer in costs,³⁰ something which necessarily implies impropriety.
- (iii) Before a person may litigate as a pauper an advocate must submit a certificate of probable cause.³¹ If a lawyer acting in such a matter concludes that the pauper's case is hopeless, her duty is to seek judicial permission to withdraw.³² In order to obtain legal aid in civil cases or in criminal or civil appeals, there must be good or reasonable prospects of success.³³ Why should the affluent litigant and his lawyers have a better right to exploit the judicial process? It is not enough that the affluent litigant, unlike the pauper or legal aid litigant, may be able to pay his opponent's costs (itself often doubtful). What of the cost of the court's service and the time stolen from more worthy litigants?



Stephen Wu

(iv) It is a delict to pursue unfounded litigation, civil or criminal. An aggrieved party can sue for damages if civil proceedings were instituted against him without reasonable and probable cause (which includes lack of a subjective belief that they are justified) and with the intention of injuring him.³⁴ In respect of abusive, malicious or vexatious sequestration and liquidation proceedings, claims for pecuniary damages have been given statutory recognition.³⁵ Where the litigant is guilty of this delict, the probabilities are that his lawyers will be joint wrongdoers by assisting him.

(v) Constitutional reinforcement comes from South Africa's founding values, including the rule of law; everyone's fundamental right to be equal before the law and to have the equal protection and benefit of the law and to have any dispute that can be resolved by the application of law decided in a fair public hearing; the prohibition against interference by anyone with the functioning of the courts; the positive obligation on organs of state to assist and protect the courts to ensure *inter alia* their accessibility and effectiveness; and the command that all constitutional obligations be performed diligently and without delay.³⁶ The importance of effective, efficient and expeditious adjudication finds expression in the Norms and Standards issued by the Chief Justice.³⁷

Before making some concluding remarks, I return to the question of the tactical denial. Such a denial is in my view a breach of counsel's duty not to mislead the court. To deny a fact in a plea is to convey to the court that the defendant says the allegation is untrue. Although rule 22(2) permits

a defendant to state that a fact is not admitted (ie without positively denying it), there must be proper ground for pleading a non-admission, usually that the defendant lacks knowledge of the fact.³⁸ If the client has knowledge of the fact and tells counsel it is true, counsel's only proper course is to admit it in the plea. Motion proceedings are an *a fortiori* case because the affidavits not only constitute the pleadings but contain sworn evidence.

I conclude by summarising my views on the two related questions canvassed in this article and making some practical suggestions:

- (i) Pleadings and affidavits must be scrupulously honest. Nothing should be asserted or denied without reasonable factual foundation. Counsel who acts contrary to this standard is guilty of misleading the court and may make herself party to perjury. She also fails to honour her paramount duty to the court and the administration of justice.
- (ii) It is improper for counsel to act for a client in respect of a claim or defence which is hopeless in law or on the facts. Counsel must be able to formulate a coherent argument consisting of a sequence of logical propositions for which there is reasonable foundation in the facts and on the law and which, if they are all accepted by the court, will result in a conclusion favourable to the client. Counsel may properly act even though she thinks one or more of the essential links are likely to fail. But if she is quite satisfied that one or more of them will fail, the case is hopeless.
- (iii) A necessary correlative is that counsel must properly research the law and insist on adequate factual instructions. They must not fill gaps with guesswork or plead denials because their instructions are incomplete.
- (iv) In principle counsel may properly conclude that a case is

hopeless on the facts though in general counsel cannot be expected to be the arbiter of credibility.

- (v) There is an ethical obligation to ensure that only genuine and arguable issues are ventilated and that this is achieved without delay.
- (vi) It would be desirable for the bar to reach consensus on these duties. If, as I hope, they are uncontentious, they should be incorporated into the URPC. Amendments to the URPC in recent decades have been reactive. Rules which were outdated or contrary to constitutional or competition precepts have been deleted or amended, leaving a motley patchwork. Matters of relative insignificance enjoy extensive treatment (eg general and special retainers; relationships between seniors and juniors) and some outdated rules remain (members of the bar will not doubt be relieved to know that it is not improper for them to furnish to their attorneys a typed copy of the pleadings they draft).³⁹ As against this, little is said about counsel's overriding duties and their practical implications; and what is said on these matters has not changed for decades. What is needed is an overhaul of the rules with prominent emphasis on counsel's duties in respect of the efficient and fair administration of justice.
- (vi) Once consensus on the standards has been achieved and incorporated into the URPC, the training of advocates can place appropriate emphasis on these matters. If they are engrained in counsel, discipline should be unnecessary.
- (vi) However if counsel's duties are breached, it may be necessary for a bar council to institute disciplinary proceedings. Because the dividing line between the weak but arguable case and the hopeless case may not always be clear, and because too ready recourse to discipline may have a chilling effect, discipline should be reserved for the clearest cases.
- (vii) Should misconduct of this kind be assessed objectively or subjectively? Not without hesitation, I suggest the test is the latter. The emphasis falls on whether counsel genuinely believes that the case is not hopeless and is thus properly arguable. If the case is objectively hopeless, one could usually infer the advocate's subjective appreciation of this. To ward off this inference, the advocate might have to plead a failure properly to research the case, which would be misconduct of a different kind.
- (vii) In addition or as an alternative to disciplinary proceedings, a court could make a costs order penalising the advocate. This would not necessarily have to be an order that the advocate pay the other side's costs. Where the litigant himself is at fault, it might be more appropriate to make a special costs order against the litigant and a further order that counsel may not recover any fee. [A](#)

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Notes

- 1 [2002] UKHL 27; [2002] 3 All ER 721 (HL) para 56.
- 2 [1994] EWCA Civ 40; [1994] Ch 205 at 234.
- 3 Rule 1B 5.7(a) of the Solicitors' Code of Conduct 2011; Rule C9(2)(b) of the Code of Conduct contained in the Bar Standards Handbook 3 ed April 2017.
- 4 *Buxton v Mills-Owen* [2010] EWCA Civ 122; [2010] WLR 1997 (CA).
- 5 Para 43.
- 6 *Sumadhee & others v The State of Mauritius* [2017] UKPC 17.
- 7 *David Ipp Lawyers' Duties to the Court (...)* 114 *Law Quarterly Review* 63-107
- 8 At pp 98-100.
- 9 *Per Bramwell B in Johnson v Emerson* (1871) LR 6 Ex 329 at 467.
- 10 At p 99, citation of authority omitted.
- 11 *Steidl Nominees v Laghaifer* [2003] QCA 157 paras 24-27.
- 12 For cases expressing agreement with this approach, see *Carson v Legal Services Commission* [2000] NSWCA 308 para 113; *Lemoto v Able Technical Pty Ltd* [2005] NSWCA 153 paras 92-114; *Tran v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* [2006] FCA 199 para 15. In *Lemoto* the court used the test 'plainly unarguable' and 'futile' as the basis for determining whether a legal practitioner should be ordered to pay the other party's costs. See also *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1 para 111 per McHugh J.
- 13 See Ipp op cit at 79-80 and cases cited in his fns 107, 108 and 113.
- 14 The Legal Professional Uniform Conduct (Barristers) Rules, 2015.
- 15 Rule 4(a).
- 16 Rule 23.
- 17 Rules 4(e).
- 18 Rule 42.
- 19 Rule 43.
- 20 Rule 58.
- 21 *Fraser The Ethics of the Advocate* (speech delivered at the Bar Practice Course, 17 February 2012) para 53, <http://archive.sclqld.org.au/judgepub/2012/Fraser170212.pdf>.
- 22 *Lougheed Enterprises Ltd v Armbruster* 1992 CanLII 1742 (BCCA); (1992) 63 BCLR (2d) 317 (CA) at 324-325.
- 23 Rules 5.1-1.
- 24 Rules 5.1-2.
- 25 Rule 5.1-6.
- 26 Rule 49(4).
- 27 Rule 111 of the Code of Professional Conduct.
- 28 Rule 113.
- 29 See, eg, *Ravden v Beeton* 1935 CPD 269 at 275-277; *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565D-E; *Golden International Navigation SA v Zebra Maritime Company Ltd* 2008 (3) SA 10 (C) para 9.
- 30 See, eg, *Webb & others v Botha* 1980 (3) SA 666 (N); *Mahlangu & another v Mahlangu & others* [2017] ZASCA 81 paras 20-21; *Engen Petroleum Ltd v Moodley NO & another* [2017] ZAGPJHC 78 paras 51-52. Cf *De Lacy and another v South African Post Office* [2011] ZACC 17; 2011 (9) BCLR 905 (CC) paras 118-122.
- 31 Rule 40(2)(c) of the Uniform Rules of Court.
- 32 *Nkosi v Caledonian Insurance Co* 1961 (4) SA 649 (N) at 660 2G-H.
- 33 Legal Aid Regulations, R745 of 26 July 2017.
- 34 See *Moaki v Reckitt and Colman (Africa) Ltd & another* 1968 (3) SA 98 (A) at 103E-104D; *Young v McDonald* [2010] ZAWCHC 537 (WCC) para 17; *Specialised Edible Oils and Fats (Pty) Ltd v Eezi Food Imports and Exports (Pty) Ltd* [2015] ZAWCHC 187 paras 19-21; Visser & Potgieter *Law of Damages through the Cases* 2 Ed at 475).
- 35 Section 15 of the Insolvency Act 24 of 1936 and s 347(1A) of the Companies Act 61 of 1973.
- 36 See ss 1, 9(1), 34, 165(3), 165(4) and 237.
- 37 Norms and Standards for the Performance of Judicial Functions, GN 147 of 28 February 2014, promulgated in terms of s 165(6) of the Constitution read with s 8 of the Superior Courts Act 10 of 2013.
- 38 *Wilson v SAR & H* 1981 (3) SA 1016 (C); *N Goodwin Design v Moscak* 1992 (1) SA 154 (C).
- 39 Rule 2.9.

