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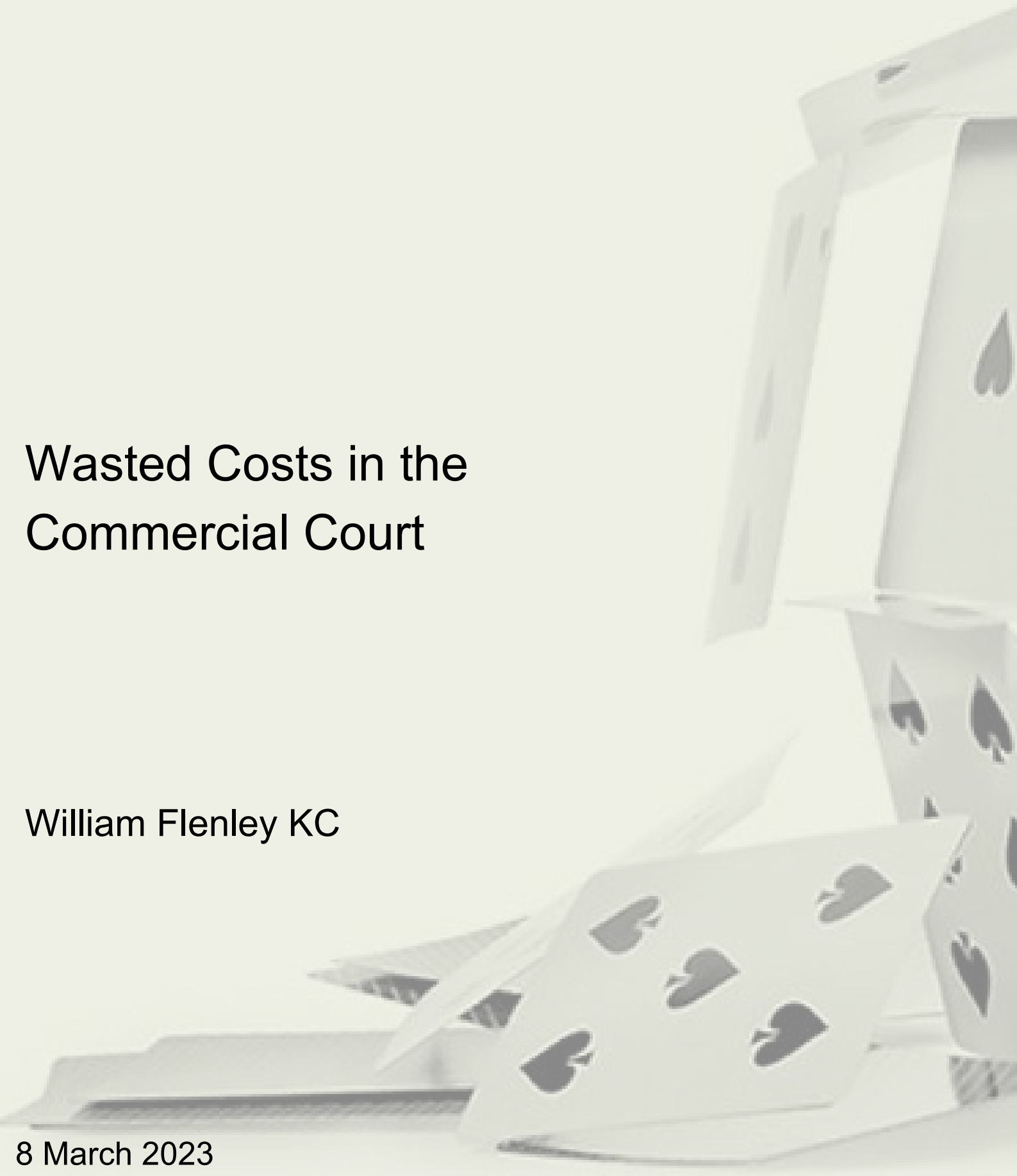
Wasted Costs in the Commercial Court

William Flenley KC



8 March 2023

Wasted Costs in the Commercial Court
An Emphatic Decision in Favour of the Respondent Lawyers

In *King v Stiefel (Wasted Costs)* [2023] EWHC 453 (Comm), the Commercial Court emphatically rejected applications for wasted costs against a barrister and his instructing solicitors, in relation to a claim which had been struck out. The case is a good example of how difficult it is to obtain a wasted costs order against lawyers. William Flenley KC acted for the successful solicitors.

The case followed from Mrs Justice Cockerill's decision, in a 93 page judgment following a 6 day hearing, to strike out the claimants' particulars of claim even before defences had been served. The defendants obtained a costs order against the claimants but the claimants were not good for the money, so the defendants instead sought wasted costs orders against the barrister and solicitors who had represented the claimants.

Mr Justice Jacob had to decide whether to let the wasted costs applications go beyond 'stage one', to a full hearing. He declined to do so. His principal ground of decision was that, in every case, including expensive litigation in the Commercial Court, a wasted costs application must be a simple and summary procedure, and that hearings should be very short. The judge rejected an argument that that rule did not apply in some cases. He considered that the applications in the *King* case were not capable of being decided in a simple and summary way, and, as result, the applications failed at the outset.

The applicants had produced statements of grounds which were 44 pages long, and referred to 16,000 pages of documents. They advanced at least 8 alternative cases on causation. Faced with the argument that resolving those issues would not be a simple and summary procedure, the applicants invited the judge to use his case management powers to prune their own allegations into a more manageable form. The judge rejected that suggestion. It was for the claimants to decide the form of their applications for wasted costs. If they produced excessively long statements of grounds then the court would not bail them out by ignoring parts of them.

The judge also rejected a submission by the applicants to the effect that the barrister and solicitors were bound by Mrs Justice Cockerill's original decision. They had not themselves been parties to that decision, they had only been legal representatives in relation to it, and so they were not bound by it. They were entitled to argue that Mrs Justice Cockerill had been wrong.

Further, the judge applied the general principle that, if a lawyer's client has not waived privilege, then a court should be very slow to conclude that a lawyer who advanced a 'hopeless case' was necessarily acting improperly, unreasonably or negligently. If privilege has not been waived then the judge cannot know whether the lawyer had advised the client that the case was hopeless, but the client insisted on proceeding. If that were the case then the lawyer would not have acted improperly, unreasonably or negligently, so that there would be no basis for a wasted costs order.

The general message of this case is that anyone thinking of applying for a wasted costs order should proceed with extreme care.

William Flenley KC
Hailsham Chambers
8 March 2023

Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.