District Court of New South Wales

# David Brady v Bale Boshev Solicitors [2009] NSWDC 387 (20 November 2009)

Last Updated: 21 April 2010

NEW SOUTH WALES DISTRICT COURT

CITATION:

David Brady v Bale Boshev Solicitors [2009] NSWDC 387

FILE NUMBER(S):

139/09 (Newcastle)

HEARING DATE(S):

19 November 2009 - 20 November 2009

EX TEMPORE DATE:

20 November 2009

PARTIES:

David Brady (Plaintiff/Appellant)

Bale Boshev Solicitors (Defendant)

JUDGMENT OF:

Neilson DCJ

COUNSEL:

F. Kalyk for the Plaintiff

T. Edwards for the Defendant

SOLICITORS:

CATCHWORDS:

COSTS. Costs between solicitor and client. COSTS on NO WIN, NO FEE basis.

Plaintiff retained Defendant to act for him in a claim for damages for personal injury suffered in a motor vehicle accident. The retainer was oral and was on a "no win, no fee" basis. Plaintiff settled his action for $100,000 inclusive of costs.

Defendant initially delivered a bill for $171,179.23 on a without prejudice basis. A bill lodged for assessment claimed $281,649.23.

A Costs Assessor allowed $222,359.

A Review Panel affirmed the Costs Assessor's decision.

Plaintiff sought leave to appeal.

LEGISLATION CITED:

CASES CITED:

Cassegrain v CTK Engineering; Cassegrain v Cassegrain [2008] NSWSC 457

Adamson v Williams [2001] QCA 38

Baker Johnson v Jorgensen [2002] QDC 205

Baker v Legal Services Commissioner [2006] QCA 145

TEXTS CITED:

Dal Pont and Walker, Law of Costs (2003) LexisNexis Butterworths

DECISION:

Held:

1. Leave to appeal ought be allowed as both Cost Assessor and Review Panel erred in law and therefore the Plaintiff/Appellant had in any event an unfettered right of appeal.

2. The proper consideration of the term "no win, no fee" is that "the client will not have to pay the solicitor other than from the proceeds of the claim".

3. Accordingly, Defendant's fees limited to $100,000 plus interest.

JUDGMENT:

**JUDGMENT**

**RELIEF SOUGHT**

1 HIS HONOUR: The plaintiff seeks an order pursuant to the **Legal Profession Act** 2004 s 385 for leave to appeal from a determination of a Costs Review Panel made on 6 February 2009. The Costs Review Panel affirmed the decision of a Costs Assessor made on 22 September 2008. Essentially, the plaintiff asks that the determinations of both the Costs Assessor and the Review Panel be set aside and replaced with an order assessing the fair and reasonable costs payable by the plaintiff to the defendant for work done by the defendant in the plaintiff's personal injury action as being $100,000. The plaintiff settled his personal injury action for $100,000 inclusive of costs. Ancillary relief is also sought which I need not recite at this time. An order has already been made by her Honour Judge Sidis, extending time to file the summons to appeal out of time, to the date of the filing of an amended summons on 6 May 2009. That order was made by her Honour on 8 May 2009.

**FACTS**

2 The plaintiff alleged that he sustained personal injury in a motor vehicle accident on 24 May 2001. As I understand it, the major allegation was of a cervical injury. On 29 October 2002 the plaintiff retained the defendant's firm to act for him in a claim under the **Motor Accidents Compensation Act** 1999. The plaintiff dealt with Mr Stephen Lott of the defendant's firm. The retainer was wholly oral. There is a contemporaneous file note made by Mr Lott at the time; it is Ex B. That which is recorded on Ex B is this:

*"Costs no win/no fee.*

*$275/hour*

*Scale unless exemption MAA*

*Gap any rate*

*Plus 25% if successful of costs assessed"*

I infer that what is recorded by Mr Lott in this file note is what was orally communicated to the plaintiff at the conference which commenced at 2.30pm on 29 October 2002.

3 The nature of the retainer is confirmed in a letter from the defendant to the plaintiff which bears date 9 August 2006. The plaintiff sent to the defendant a letter bearing date 13 July 2006. It commences thus:

*"I note the Retainer Agreement provided by Gary Smith, plus your comments thereto and respond as herein particularised:*

*(1) As per your advice at earliest, it is and remains my understanding that:*

*(a) no win/no fee charged me.*

*(b) under the new Rules if unsuccessful, I incur no fees to pay the defendant's legal costs.*

*(c) If success the defendant pays the legal fees."*

In the defendant's letter of 9 August 2006 the following confirmation was given:

*"(1a) 'No win no fee charged me' this is correct. If you are not successful you do not incur a fee for professional legal costs by this office."*

I do not need to cite the other advice given in relation to other matters that had been raised by the plaintiff. Because of the date of the retainer, matters of substance concerning costs are to be determined under the **Legal Profession Act** 1987 and not the statute of 2004 which came into force on 1 October 2005.

4 The following précis of the history of the plaintiff's matter is taken from the reasons for determination of the Costs Assessor, Mr Peter Rosier. Commencing on page one of his reasons he said this:

*"The injury suffered by the [plaintiff] seems to have been severe, and the loss which he suffered was considerable as, if he were to be believed, he was, at the time of the accident earning amounts of $400,000 per annum. He eventually lost his job as a result of the accident.*

*After a CARS application had been lodged, it became obvious that because of earnings, a CARS assessment was inappropriate and proceedings were commenced in the District Court at Newcastle.*

*After a MAS assessment, the respondent was found not to be entitled to non-economic loss. In 2006, a further assessment confirmed the earlier finding.*

*The defendant admitted breach of duty of care in proceedings, and the matter proceeded on the assessment of the damages to which the [plaintiff] was entitled. There followed a protracted series of interlocutory proceedings, the prolixity of which was, according to [the defendants], exacerbated by the behaviour of the [plaintiff] in failing to provide information which the court [ordered] him to provide to the [tortfeasor]. Additional prolixity was added by the absence of the employer, who was presumably required to verify earnings, from the jurisdiction.*

*The matter appears to have been before the court on 18 times, the last two only being for a substantive hearing. Senior and Junior counsel were involved. There were numerous medical witnesses."*

Later commencing at page 5 Mr Rosier said this:

*"As I have observed [above] there appear to have been 18 appearances before the court of which but two were mentions, motions or directions hearings. There was a mediation. Senior counsel was briefed. The [defendant's] job was made quite difficult by the intransigence of the [plaintiff], with [defendants] themselves being required on one occasion to show cause why they should not be dealt with for contempt for the failure of the [plaintiff] to provide information. I am not being unfair to the [plaintiff] when I say that his behaviour clearly added to the costs incurred."*

5 On 26 September 2005 the defendant sent to the plaintiff a letter, the substance of which is this:

*"On review of your file, it appears to us that there is no Fees Disclosure. The Fees Disclosure is required by the Law Society and we enclose for your information our Schedule of Fees."*

Attached to that letter was a document entitled:

*"Pursuant to the Legal Profession Act (NSW) 1987 ("Act")*

*Costs Agreement*

*Between*

*Bale Boshev Lawyers*

*And*

*David Brady"*

6 The first relevant parts of the document commence at clause 2. Clause 2 has a side note of "contingency". It contains the following matter:

*"We will not charge you any professional fees (refer to paragraph 4 below) for acting on your behalf if we are unable to obtain a verdict/settlement.*

*However, we may incur expenses on your behalf which we will ask you to pay (refer to paragraphs 5 & 7 below).*

*Estimates of our professional fees and expenses are contained in paragraph 6."*

7 Clause 3 of the document bears a heading "Success fee". The substance of the paragraph is this:

*"If we achieve a verdict in your favour or a settlement in accordance with your instructions then we will charge you a success fee of 25% of our professional costs."*

8 Clause 4 is headed "Professional Fees" and commences thus:

*"Subject to paragraph 2 and 3 above (that is ... if we obtain a verdict achieved by settlement, an Arbitrator's award or judicial decision in your favour), our costs will be calculated as follows:"*

I do not need to set out the various costs outlined in clause 4 however there is notation at the end which indicates that the defendant's charge rate was based on time units of six minutes at the rate of $275 per hour.

9 Clause 9 is headed "Billing Arrangements". The substance of that clause is this:

*"We assume your authority is given for any settlement monies to be paid directly to our Trust Account and to pay ourselves from this money immediately after sending you our Statement of Account and disbursements ("bill"). Our bill will be paid from the settlement proceeds.*

*If there is no sufficient funds from the settlement proceeds to cover our outstanding expenses (as stated in paragraphs 5 & 7 above) then we will require you to pay same within ten (10) days of receiving a disbursement bill."*

10 It is to be noted that there was no suggestion that, if there were insufficient funds from the settlement proceeds to pay outstanding professional costs, (as distinct to disbursements) that they were to be the subject of a bill to the client. Clauses 13 and 14 of the "costs agreement" are these:

*"(13) ACCEPTANCE OF THIS OFFER*

*We will continue the work in accordance with the terms of this Agreement upon your acceptance of the Offer contained in this agreement. You may accept this offer in one of the following ways:*

*(a) by accepting the Offer orally or in writing;*

*(b) by signing and delivering to us the attached duplicate of this Offer (this is our preferred method of your acceptance of this Offer);*

*OR*

*(c) by giving us further instructions in the matter.*

*(14) TERMINATION*

*(1) We will not continue to do the work if:*

*(a) you fail to pay expenses;*

*(b) you fail to provide us with adequate instructions;*

*(c) you indicate to us that we have lost your confidence;*

*(d) we believe, in our total discretion, that your case does not have reasonable prospects of obtaining a successful verdict in your favour from the Court.*

*We will give you at least fourteen (14) days notice of our intention to terminate our Agreement and the grounds on which the notice is based.*

*(2) If you require your file to be transferred to another legal firm/solicitor or uplifted by yourself, then we will only agree to do so upon payment of our professional fee for work done, and for expenses incurred, up to the date of termination.*

*(3) Subject to sub paragraph (2) hereof you may terminate this agreement in writing at any time."*

Despite the provisions of clause 13(c) both the Costs Assessor and the Review Panel determined that the disclosure in late December 2005 was so late that it could no longer be said to serve the purpose for which disclosure was mandated by the **Legal Profession Act** 1987. Neither the Assessor or the Review Panel accepted that any costs agreement flowed from this disclosure and this determination was not challenged in this Court.

11 It necessarily follows that the defendant can only recover costs under the 1987 Act, essentially assessed on a quantum meruit basis. They may only do so after those costs have been assessed by a Costs Assessor as required by section 174(1)(b) and section 182(1) and after the costs of the assessment are paid by defendant themselves pursuant to section 182(3).

12 In particular, the defendant cannot claim the "success fee" as they called it or a "premium", the terminology of s 187 of the 1987 Act, or an "uplift fee", the terminology of s 324 of the **Legal Profession Act** 2004. That determination of the Costs Assessor and the Review Panel is again not challenged in this Court.

13 On 2 August 2007 the matter was listed for mediation before Hon. M J R Clarke, QC. Mr Kennedy, SC and Mr Gary Smith were retained for the plaintiff.

14 On 17 May 2007 the defendant had sent to the plaintiff a letter detailing the arrangements that had been made for the mediation. The substance of the letter is this:

*"We are pleased to advise the Defendant, albeit reluctantly, has consented to mediation. The mediation will take place before Mr John Clarke on Thursday 2 August 2007. We will write to you in due course when we are aware of Mr Clarke's requirements and the venue of mediation. In the event a mediated settlement is not reached by the parties, the matter is listed for Hearing with priority to commence on Monday 17 September 2007 for five days duration.*

*We believe mediation will present an excellent opportunity for commercial resolution of your matter and as to shedding further light on the Defendant's case. Of course, it remains to be seen how seriously the Defendant conducts itself at any mediation, although the court file will be noted if it does not participate fully in the process.*

*In accordance with our ongoing obligations pursuant to the Legal Profession Act, we confirm recent cost estimates of your Counsel (senior and junior) expected to be in the vicinity of $100,000. We note Senior Counsel has requested this money to be paid into our trust account but this was not further pressed. We further advise, presently we have expended approximately $30,000 in disbursements and we would further estimate our professional legal costs to be between $80,000 and $90,000. Of course, the majority of these expenses will be met by the Defendant, although there will be a 'gap' payable by you, this of course is on the proviso that the matter was to be determined by a Court, that the amount awarded in damages was not less than $100,000 as per the Defendant's previous offer of compromise. We note, however, the advice of Senior Counsel in conference, when pressed, that it is his view that this will be likely, it does however depend on your evidence and the Court accepting same."*

The defendant in the plaintiff's action for damages made an offer of $100,000 inclusive of costs at the time of the mediation. It seems to me that that also involved the waiver of costs orders adverse to the plaintiff which had been previously made and which were estimated to be "up to $70,000" in a letter that the defendant sent to the plaintiff on 3 August 2007. The plaintiff's senior and junior counsel and his solicitor advised the plaintiff not to accept the offer and that he had "reasonable prospects of beating the Defendant's offer of compromise". However, the plaintiff instructed the defendant to accept the offer. It appears from his letter of 3 August 2007 to the defendant that the plaintiff was concerned about the following:

(a) allegations of fraud made by the lawyers for the tortfeasor;

(b) a hearing before a judge of this Court whose identity was known to the plaintiff and which judge had made adverse interlocutory orders against him;

(c) the possible effect of the tortfeasor's offer of compromise which, the plaintiff estimated, if not exceeded, might expose him to a liability of almost half a million dollars in costs.

15 However, by the time the plaintiff gave those instructions to the present defendant the tortfeasor's lawyers had withdrawn the offer at noon on 3 August 2007. Eventually the offer appears to have been resuscitated and on 27 August 2007 the plaintiff himself delivered terms of settlement to the Registry. Unfortunately the Registrar has been unable to recent times to find the court's file (matter 331 of 2004).

16 The evidence before me is silent as to what may have occurred between 3 August and 27 August 2007. Neither the plaintiff nor Mr Lott gave evidence about that and I cannot draw any inference adverse to either party. However, it has not been suggested that the defendant gave any notice of ceasing to act to the plaintiff or of filing any such notice. Equally, no evidence has been given that the plaintiff determined the defendant's retainer. The only inference that can be drawn from the fact that the plaintiff himself delivered terms of settlement to the Registry is that the plaintiff may have been concerned to minimise costs by doing some of the legwork himself.

17 On 22 November 2007 the defendant rendered an account to the plaintiff claiming $171,179.23 for costs and disbursements. A copy of that account was sent to Messrs Tregenza Forbes & Associates on 26 November 2007. I can only assume that they were a new firm acting for the plaintiff. That account assessed the defendant's professional costs as being $50,000. In the long narrative preceding that assessment the concluding words are, "due care, skill and consideration on a Solicitor/Client basis far exceeding but reduced in an effort to settle the costs dispute". It is also clear from the letter to Messrs Tregenza Forbes & Associates that the defendant "drastically reduced" their fees simply to dispose of the matter expeditiously and without prejudice to whatever they might be able to recover at a formal costs assessment.

18 The defendant's account was not accepted and the defendant arranged for costs to be assessed by a Costs Assessor. The defendant brought in their bill at $281,649.23. The bill was sent to Mr Peter Rosier for determination. He made that determination on 22 September 2008. The final part of Mr Rosier's reasons for determination are these:

*"In these circumstances and in circumstances where the respondent has made no effective substantive objections to the amount sought, and after examining the more than 2,500 items in the bill, I am satisfied that the profit costs claimed by the applicants are fair and reasonable except:*

*· I disallow the claim for the costs of the application.*

*· I disallow the success fee.*

*I am satisfied that I should allow the disbursements except:*

*· I disallow that claim for the costs of preparing the bill. Such costs are never claimable in a practitioner/client bill.*

*· I also disallow the non-detailed amount of $200 for postage, faxes et cetera. I note that charges have been made throughout for these items.*

*I therefore determine the fair and reasonable costs to be:*

*Profit Costs*

*$108,955.00*

*GST*

*$10,895.50*

*$119,850.50*

*Disbursements*

*$102,508.50*

***Total***

***$222,359.00***

*As I have found that there was no disclosure, the costs applicant is to pay the costs of the assessment.*

*I allow the costs respondent the sum of $1,000 (five hours at $200 per hour) for these costs and reduce the amount payable by the respondent to the applicants accordingly:"*

The costs obviously came to $222,359.00. The defendant were ordered to pay the assessor's costs of $1,443.75.

19 The plaintiff sought a review. As mentioned earlier, the Review Panel comprising, Messrs Robert Webley and Gordon Salier, affirmed the cost assessor's assessment on 6 February 2009. The Review Panel dealt directly with an issue which was only dealt with obliquely by Mr Rosier. It concerns the no-win/no-fee retainer. The panel said:

*"The panel is satisfied that the Review Respondent intended to create a 'No win - No fee' arrangement, which meant that the Client did not have to pay his fees if there wasn't a successful outcome. There was a settlement which would satisfy that criteria [sic]".*

The plaintiff's case as put personally by him to the Costs Assessor and to the Review Panel was that there was a contract made on 29 October 2002 under which the defendant would take 25 per cent of the proceeds of the litigation and no more. Such remained the plaintiff's case in this Court until I granted leave to the plaintiff yesterday to file in court a further amended summons which deleted the limitation of costs recoverable as being $25,000 and substituted the figure of $100,000.

**EVIDENTIARY ISSUE**

20 The plaintiff has not given any evidence. No affidavit sworn by him was relied upon in these proceedings. His correspondence to the defendant such as has been admitted is not admitted as evidence of any fact. The evidence before me suggests that the plaintiff may have been unreliable. That evidence is this:

(1) the tortfeasor's lawyers suggested that the plaintiff had a fraudulent claim for economic loss. Part of the reasons for determination of Mr Rosier refers to comments made by the plaintiff's senior counsel that "there must be merit in the defendant's observations that the [plaintiff] may have been guilty of fraudulent practices";

(2) Mr Rosier's reasons also refer to submissions made by the current defendant "that reflect poorly on the credit of the [plaintiff]";

(3) it is evident that the plaintiff has submitted correspondence to the Costs Assessor which he never sent to the defendant; that is, correspondence bearing date 1 November 2002, 3 October 2006 and 6 July 2006. Such letters were only sent on 20 May 2008. Those letters go to the nature of the agreement reached by the plaintiff with the defendant on 29 October 2002. They suggest that the agreement was that the defendant would take 25 per cent of the proceeds of the litigation and no more. That is champerty. It is unlawful both at common law and under the **Legal Profession Act** 1987 s 188. It is inconceivable that any solicitor would make such an arrangement.

21 However, what was effected on 29 October 2002 was a contract. A client retained a solicitor to conduct his litigation. Contracts must be construed objectively. One well-known rule of construction is that a contract should be construed contra proferentem. Especially is that so when the proferens is a solicitor with knowledge of the law dealing with a lay client. Mr Kalyk, who appeared for the plaintiff, submitted that no evidence was given by the defendant and in particular by Mr Lott. However, Mr Kalyk read parts of Mr Lott's affidavit of 7 August 2009 and some of the exhibits referred to in that affidavit. Those parts of the affidavit read and the exhibits tendered became Ex D. Mr Kalyk made Mr Lott one of his own witnesses. I can draw no adverse inference to Mr Lott. All I can do is state whether the evidence is silent on an issue or not, as I have already mentioned in relation to the time period 3 August 2007 to 27 August 2007.

**GENERAL PRINCIPLES**

22 Some general principles concerning the relationship of a solicitor and his client need to be considered. I turn to the judgment of the Court of Appeal of Queensland in **Baker v Legal Services Commissioner** [2006] QCA 145. The judgment of McPherson JA commences with his reciting the issue thus:

*"Michael Vincent Baker, the practitioner and a member of the firm of solicitors Baker Johnson, appeals against a decision of Moynihan SJA, sitting with Mr K Horsley and Dr S Hayes as the Legal Practice Tribunal, that the appellant's name be removed from the local roll of legal practitioners."*

Commencing at [3], his Honour said this:

*"[3] In the case at least of a retainer in respect of relatively uncomplicated litigation, such a contract is entire; that is to say, the solicitor is, apart from any agreement to the contrary, bound to do what it is necessary to institute (or defend) the action and to bring it to a conclusion before becoming entitled to payment of any of his professional fees, as distinct from outlays made on behalf of his client in the course of the litigation. This has been settled law for some two centuries or more. See, for example, Bluck v Lovering and Co (1887) 35 WR 232-233 and the authorities cited there and in Underwood,*

*Son & Piper v Lewis [1894] 2 QB 306, 311-312, 314; Gamlen Chemical Co Limited (UK) v Rochem Ltd [1980] 1 WLR 614, 624; Re Elfis & Somers (OS270 of 1982) 7 May 1982 (Qld Sup Ct: unreported); and Cachia v Isaacs (1985) 3 NSWLR 366, 376, 377. Characterising the contract as entire also has the consequence, as those and many other decisions show, that the solicitor is not entitled to unilaterally terminate the retainer unless there is what is sometimes described as 'reasonable cause' or 'just cause', involving a breach or a repudiation of the retainer by the client: Underwood, Son & Piper v Lewis [1894] 2 QB 306, 314. In circumstances such as those, the right of the solicitor, like anyone else, to recover his professional costs or fees for work done before termination of the retainer or contract rests on a quantum meruit, or, as it would now be described in restitution: see Planché v Colburn [1831] EngR 856; (1831) 8 Bing 14.*

*[4] There may on occasions be differences about the applicability of the rule governing entire contracts in the case of retainers for some types of litigation, but not in the case of relatively uncomplicated litigation at common law. As to each of the four clients in respect of whom charges succeeded against the practitioner, the retainer here was of the latter kind. That this was so is confirmed by the terms of each of the retainers, which was made expressly on the footing of a 'no win, no fee' or more expansively, that no fee would be chargeable or charged until the litigation was brought to a successful conclusion. The contract of retainer was therefore 'entire' within the meaning of that expression as used here except to the extent that there may have been specific provisions to the contrary in the individual retainer agreements."*

At [31] his Honour said this:

*"[31] It may be asked why a solicitor should be compelled to forego charges for work done under retainer which, through no fault on his part, has been brought to an unexpected and premature end. It may equally well be asked why in the same circumstances the client should be obliged to pay for it. The answer lies in the character of the contract to do work on a 'no win, no fee' basis. In this respect it resembles to some extent a 'no cure no pay' agreement for salvage services in Admiralty in which no payment is recoverable unless the salvage efforts are successful; cf Kennedy's Civil Salvage (4th edition), at 335. If you make an agreement like that, you are stuck with it. The analogy between the risks of litigation and the perils of the sea may not be wholly inappropriate."*

23 One can understand in the current matter that the defendant and counsel retained by them may have felt aggrieved that the plaintiff brought an unexpected and premature end to his litigation by accepting the tortfeasor's offer of settlement contrary to their advice. However, the plaintiff was entitled to do so. It was the plaintiff's cause of action, it was not the defendant's cause of action. The plaintiff presumably knew more about his case than the lawyers retained by him and indeed the lawyers of the tortfeasor.

24 The existence of a "no win, no fee" retainer can often give rise to a conflict of interest on the part of a solicitor between his own interest and that of his client. Here it would have been in the interest of the solicitors for the litigation to continue and for the plaintiff to recover more than he actually recovered under the settlement that he accepted.

**NO WIN, NO FEE RETAINERS**

25 The first decision that has been drawn to my attention is another decision of the Queensland Court of Appeal, **Adamson v Williams** [2001] QCA 38. That was a joint judgment of McMurdo P, Thomas JA and Mullins J. The judgment commences thus:

*"This is an application for leave to appeal under s 118 District Court Act 1967 from a decision of the District Court at Southport dismissing an appeal from a magistrate's decision to dismiss the claim of the applicant, a solicitor, ('the solicitor') for the recovery of legal fees and outgoings from the respondent ('the client')."*

The solicitor had rendered an account to the client for $9,437.82 for "solicitor's costs and outlays". The account was in a taxable form and was delivered to the client on 25 July 1997. It was not clear from the pleading whether the claim was based on contract or a quantum meruit. According to the solicitor there was an oral agreement that he would act for the client in relation to the obtaining of damages for a back injury that the client received on a boat. The instructions were to pursue legal proceedings against the owner of the boat and that the work would be done on "the usual basis", which was according to the judgment, on the Supreme Court scale.

26 The defence filed by the client denied the debt and alleged that the basis of the retainer was, "no win, no fee". There appears to have been a large number of factual issues in dispute. Commencing at [8], the Court said:

*"[8] The condition that the client must 'win the case' before being liable for fees is to say the least vague. If that was the arrangement, it would be necessary for the Court to determine whether it means that damages had to be obtained in court before the condition would be satisfied, or whether something less, such as an acceptable settlement would suffice. The uncertainty of such an arrangement underlines the desirability that it be made in writing. Indeed at the relevant time in 1996, s 23 of the Legal Practitioners Act 1995 provided some incentive to solicitors to make such agreements in writing: cf Re Central Queensland Developments Pty Ltd (1988) 2 QdR 476, although courts have always carefully scrutinised such arrangements, particularly if the remuneration exceeded what might ordinarily be expected from a proper taxation: Clare v Joseph [1907] 2 KB 369; Wolf v Trebilco [1933] VicLawRp 29; [1933] VLR 180. Subsequent legislation has emphasised this need still further.*

*[9] Arrangements for speculative actions between solicitors and clients are now by no means uncommon. It should not be thought that solicitors who make such arrangements thereby achieve some dominance over the client in the future conduct of the action. The client does not surrender control of the proceedings to the solicitor. The client retains the power to give instructions as to the further conduct of the action, including the right to settle it or terminate it. As an action proceeds it may become increasingly clear to a client that the prospects of success are negligible and that the dangers of proceeding further outweigh the potential benefits. Ordinarily, the client (not the solicitor) is the person who will have to bear a possibly crippling burden of cost in favour of the other party if the litigation proceeds to an unsuccessful outcome.*

*[10] What costs then is a solicitor who is on a speculative retainer entitled to if a client decides to settle or withdraw before the action is concluded? Commonly a consensual arrangement is reached at such a point between solicitor and client. In the absence of such an arrangement, unless the original contract of retainer covers the situation, the answer will depend on the circumstances. If the client terminates the retainer before it is apparent that he will not win, he will have deprived the solicitor of the opportunity of completing the retainer and earning the right to charge fees. Prima facie the solicitor will be entitled to be remunerated on the basis of a quantum meruit in respect of services rendered up to that time. An alternative approach would be to regard the client's premature termination of proceedings as a prevention of performance, or a breach of implied duty to do all such things as are necessary on his part to enable the other party to the benefit of the contract: Secured*

*Income Real Estate (Australia) v St Martin's Investments Pty Ltd [1979] HCA 51; (1979) 144 CLR 596. Different assessments are conceivable according to whether the claim proceeds upon a claim for damages for breach of contract or upon a quantum meruit. If the plaintiff elects to proceed on quantum meruit, prima facie the scale or method of calculation for costs prescribed in the original retainer should be applied to the work so far done."*

27 The problem in **Adamson v Williams** was that the reasons of the magistrate did not result in findings of relevant facts or in any clear resolution of the conflicts in the evidence. The Court pointed out that the issues were too broadly stated in the plaint in the magistrate's court and the defence was never particularised. Their Honours pointed out that the parties seem to have been content to tell their stories with an expectation that the magistrate would apply whatever law might apply to the facts that were found. Essentially that did not enable the Court of Appeal to come to any concluded view. Commencing at [19] the Court said this:

*"[19] The magistrate clearly misdirected herself in her approach to findings of credit. There was a contest between a solicitor on the one hand and a client on the other. Her Worship observed 'an oath taken before any court by ... a legal practitioner is never lightly taken, and ordinarily the evidence of a solicitor must be heard by the court and accepted as evidence given seriously, truthfully and honest (sic).' This suggests an incorrect approach. Courts have taken a fairly hard attitude towards solicitors who come before them relying on oral retainers. Cordery on Solicitors 10th ed para E 424 suggests that more weight is given to the client's affidavit than to that of the solicitor. Denning LJ in Griffiths v Evans [1953] 2 All ER 1364 stated:*

*'On this question of retainer, I would observe that where there is a difference between a solicitor and his client on it, the courts have said for the last one hundred years or more that the word of the client is to be preferred to the word of the solicitor, or, at any rate more weight is to be given to it ... The reason is plain. It is because the client is ignorant and the solicitor is, or should be, learned. If the solicitor does not take the precaution of getting a written retainer, he has only himself to thank for being at variance with his client over it and must take the consequences.'*

*[20] Such an approach originated in courts confronted with a task of deciding which affidavit to rely upon when there was a conflict between affidavits and no oral evidence: cf Allen v Bone [1841] EngR 1203; [1841] 49 ER 429; re Gray v Coles [1891] 65 LT 743; Morgan v Blyth [1891] 1 Ch 337. The above statements are perhaps more reflections on matters of policy than directives to a court to favour one party over the other when such contests emerge. However, plainly the magistrate's approach in the present case was conducive to error.*

*[21] Finally, the magistrate did not advert to the question whether it had become clear to the parties prior to the termination of the retainer that the client could not 'win'. If such was the position and the retainer provided for the solicitor's costs on a contingency fee basis, the solicitor would have no entitlement to fees except for outlays that were expressly agreed to be paid. It would have been demonstrated, after the passage of a reasonable time, that the solicitor could not satisfy the condition necessary to entitle him to fees. It is unnecessary to decide whether 'win' includes the reaching of a settlement in which the client might obtain some damages over and above his obligation for fees. At best for a solicitor, assuming such a settlement could be regarded as a 'win', it would be a legitimate defence for the client to show that no such settlement was reasonably possible in view of his complete recovery."*

I observe here that the Court thought that a "win" included a "settlement in which the client might obtain some damages over and above his obligation for fees". The current "win" was not such a "win", if it be a "win" at all. Because of the lack of sufficient findings, the Court allowed the appeal, set aside the judgment of the District Court of Queensland and also the judgment of the Magistrates Court and ordered a new trial.

28 The next decision to which I was referred is **Baker Johnson v Jorgensen** [2002] QDC 205, a decision of McGill DCJ. The judgment commences thus:

*"[1] This is an appeal from a decision of a magistrate who on 13 February 2002 dismissed the appellant's claim against the respondent. The appellant is a firm of solicitors, and the respondent had retained the appellant to act in connection with a claim for damages in the District Court at Brisbane for personal injuries suffered in the course of her employment. That claim was ultimately settled on terms that the respondent would be paid $10,000 inclusive of costs, but after deducting the amount refundable in respect of worker's compensation: Ex 2. The $10,000 was paid to the appellant's trust account; of that sum $334.40 was refunded to the Health Insurance Commission on behalf of the respondent, and the balance was applied by the appellant towards the payment of the amount payable to it by the respondent for professional costs and outlays. The total amount claimed by the appellant for costs and outlays was $18,616.65: Ex 1. Accordingly the appellant sued the respondent for the balance, $8,951.05.*

*[2] The magistrate found that the retainer of the appellant was on a "no win, no fee" basis and rejected the respondent's evidence that that was qualified by the further expression "no cost to me". The appellant had argued before the magistrate that, because the respondent's claim had been settled for a payment of $10,000 this meant that she had won and was therefore required to pay the normal professional costs as outlined in the itemised account, Ex 1. That argument was rejected by the magistrate who described it as "misleading and inequitable and bordering on unconscionable". The magistrate regarded it as ludicrous to suggest that the retainer entitled the solicitors to the full costs if for example, the client recovered a nominal amount only, and found that that was not the intention of the parties to the agreement. The appellant's claim was therefore dismissed; although the magistrate did not say so expressly, this must have been on the basis that, on the true instruction of the retainer, the appellant was not entitled to recover from the respondent more than the respondent in fact recovered by the settlement."*

I interpolate that the words "the true instruction of the retainer" may have been meant to be "on the true construction of the retainer". In the next paragraph of his reasons, McGill DCJ pointed out that the appellant's arguments before him were essentially a repetition of the arguments that had been put before the Magistrate.

29 There is a remarkable factual similarity between the current matter and the facts in **Jorgensen**. There was put into evidence a memorandum by the solicitor handling the matter that indicated that the plaintiff, the respondent in the appeal, had a conference to discuss settlement and complained that "the only people who are going to benefit out of her claim is Baker Johnson". His Honour pointed out that the respondent's evidence was that the retainer of the appellant was on the basis of "no win, no fee, no cost to me". According to his Honour that was the evidence of the respondent and it was uncontradicted. The appellant admitted that the original retainer of the appellant was on a "no win, no fee" basis.

30 Commencing at [17] his Honour said:

*"[17] I am unaware of any authority on the correct interpretation of this expression, and neither advocate was able to assist me with any. In Adamson v Williams [2001] QCA 38, the Court of Appeal found it 'unnecessary to decide whether 'win' includes the reaching of a settlement in which the client might obtain some damages* over and above *his obligation for fees.' (emphasis added). The terms used by the Court suggest that their Honours would not have regarded a less favourable settlement as a win. In my opinion it is a matter of determining objectively the meaning of the expression, by reference to what ordinary people in the position of the parties would have understood it to mean.*

*[18] In my opinion the construction placed on the expression by the magistrate was correct. I do not consider that an outcome can properly be characterised as a win from the point of view of the respondent, unless the respondent actually recovers something herself. In my opinion, properly understood, the expression 'no win, no fee' is a succinct way of saying 'the client will not have to pay the solicitor other than from the proceeds of the claim'. It is not necessary, for present purposes, for me to consider whether the expression implies that there will be no liability on the part of the client for any costs to any other party to the proceedings. I am only concerned with the position as between the solicitor and the client. In my opinion the ordinary meaning and true construction of a retainer on a 'no win, no fee' basis is that a solicitor is saying in effect: 'You will not have to pay me any fees except out of whatever I can recover for you'. The effect is that the client will not have to pay anything out of the client's own pocket. On the basis of the retainer found by the Magistrate therefore his decision was correct."*

Were I to follow this decision of the Queensland District Court, the costs recoverable by the present defendant would be limited to $100,000, the sum for which the plaintiff settled the action.

31 The decision in **Jorgensen** has been cited with approval in a monograph, "Law of Costs", published by LexisNexis Butterworths in 2003, written by G E Dal Pont, Associate Professor, Faculty of Law at the University of Tasmania, and by R J Walker, the Deputy Registrar and Taxing Officer of the Supreme Court of Tasmania. Under the heading "Speculative Fee Agreements", the authors state this:

*"[2.50] Where a lawyer considers that the client has a reasonable cause of action (or defence) and does not bargain for an interest in the subject matter of the litigation, there is in Australia no impediment at general law for the lawyer to charge the clients on a* speculative *fee basis. The leading judicial statement of this is that of the Full High Court in Clyne v The New South Wales Bar Association [1960] HCA 40; (1960) 104 CLR 186 at 203:*

*'...it seems to be established that a solicitor may, with perfect propriety, act for a client who has no means, and expend his own money in payment of counsel's fees and other outgoings, although he has no prospect of being paid either fees or outgoings except by virtue of a judgment or order against the other party to proceedings. This, however, is subject to two conditions. One is that he has considered the case and believes that his client has a reasonable cause of action or defence as the case may be. And the other is that he must not in any case bargain with his client for an interest in the subject matter of the litigation, or (what is in substance the same thing) for remuneration proportionate to the amount which may be recovered by his client in a proceeding...'*

*In fact, it has been said '[j]ustice would very often not be done if there were no professional man to take up the cases and take the chance of ultimate payment'. The taking of such a chance is not champerty and has been described as conduct 'consistent with the highest professional honour'. To*

*this end, judges have queried 'a widespread reluctance in the legal community to recognise, if not to commend, a speculative action'.*

*[2.51] Speculative fee agreements are often described as 'no win no fee'. Aside from an express definition in the retainer, such a phrase is open to be interpreted as the solicitor saying, in effect: 'You will not have to pay me any fees except out of whatever I recover for you' (Baker Johnson Lawyers v Jorgensen, McGill DCJ). The solicitors had taken the case on a 'no win, no fee' basis, and had not defined in the retainer what was meant by 'win'. McGill DCJ rejected the solicitors' claim to recover the shortfall from the plaintiff on the ground that an outcome cannot properly be characterised as a 'win' from a plaintiff's point of view unless he or she actually recovers something. Implicit in this logic is that if solicitors wish to protect their entitlement to costs, it is within their power to state expressly what constitutes a 'win' via the terms of the retainer, which may then be assessed as to fairness and reasonableness. In the absence of a specific provision, a retainer is interpreted by reference to 'what ordinary people in the position of the parties would have understood it to mean'.*

*[2.52] There is no relaxation of professional standards required from lawyers who act on a speculative basis. In this regard, the extent to which the lawyer's own interest in a speculative claim may interfere with the duties to the client and the lawyer's professional duties must be considered. Re Robb (1996) 134 FLR 294 highlights some of the dangers of speculative fee agreements. The solicitors ran a personal injury practice where they acted for plaintiffs on a 'no win no fee' basis. As the solicitors in effect financed the litigation disbursements, they were necessarily out of pocket until the final and successful resolution of the plaintiff's claim, and 'had a substantial personal interest in the successful outcome of their clients' cases and the monies that thereby became payable to the clients'. This created a conflict between their interests and those of the clients in being properly advised in relation to settlements and the profit costs and disbursement. This conflict obscured the solicitors' perceptions of their fiduciary duties, leading them to treat settlement monies as their own rather than on trust for their clients."*

32 Finally, it will not have escaped a careful listener's observation that the solicitor involved in **Jorgensen's** case was the same solicitor who was struck off as the result of the decision of the Queensland Court of Appeal in **Baker v Legal Services Commissioner**. One of the charges against the solicitor involved Ms Jorgensen's case. Mr Davis SC was the leading counsel for the appellant. At [21] McPherson JA said this:

*"On this appeal, Mr Davis SC accepted that Judge McGill was correct in his reasons on the appeal to him. He did not challenge the decision because, he conceded, his Honour's reasoning was 'clearly right' in the context of a settlement 'when there can't possibly be a discharge of the fiduciary obligations of the solicitor to advise the client to take that particular settlement, which for financial reasons does nothing more than expose her to a solicitor's bill'. This, said Mr Davis, left only the question whether the charging by the solicitor of a fee in breach of that fiduciary duty amounted to professional misconduct."*

In the same decision, Jerrard JA said at [71]:

*"It is unnecessary in this appeal to decide whether McGill DCJ was correct in the view that an outcome cannot properly be characterised as a win from the point of view of the client unless the client actually recovers something herself. It is unnecessary to do so because neither party on the appeal challenged the correctness of that view, and in any event Mr Davis SC accepted during submissions on the appeal that it was a breach of the fiduciary duty owed by the solicitor with the*

*conduct of the matter not to advise Mrs Jorgensen in the terms recommended by McGill DCJ; that is, the solicitor was obliged to explain to her that it was better for her to put her interests before the firm's, and to accept an outcome in which she was under no obligation to pay any costs to the firm. Mr Davis SC also accepted that it followed that suing her for costs in excess of the small damages obtained, all of which had been swallowed by the firm, was itself conduct in breach of the fiduciary duty owed to Mrs Jorgensen. Far from being assisted to understand the issues, with her interests put first, Mrs Jorgensen had her interests ignored and she was exploited for the firm's ultimate financial benefit."*

It is to be noted that the silk involved in **Baker v Legal Services Commissioner** did not challenge the interpretation of McGill DCJ of what a 'no win, no fee' retainer means.

33 The only other decision which is relevant is a decision made in the present matter by her Honour Judge Sidis on 8 May 2009. Her Honour has set aside that decision because the solicitor who appeared for the plaintiff misunderstood what her Honour was doing, that is, dealing with the whole matter at once. He thought her Honour was only dealing with the matter on an interlocutory basis. However, one must have regard to her Honour's reasoning. Her Honour said this:

*"The question therefore remains whether the no-win, no-fee agreement was more than an arrangement or whether it represented an agreement that served two purposes, namely to allow the defendant to recover costs and disbursements only if they pursued the plaintiff's claim to a successful conclusion, and to restrict the defendant's rights, if they pursued the plaintiff's claim to the successful conclusion, to recover costs and disbursements only to the amount recovered by the plaintiff through an award of the court or agreed by way of settlement.*

*It was argued for the plaintiff that the second of these conditions should be implied into the agreement. In my view there was no basis for such an implication. In BP Refinery Western Port Pty Limited v Hastings Shire Council [1977] HCA 40; (1977) 52 ALJR 20, the High Court set out the following essential requirements before an implied condition will be imported into a contract:*

*(1) The asserted condition must be reasonable and equitable.*

*(2) It must be necessary to give business efficacy to the contract.*

*(3) No term will be implied if the contract is ineffective without it.*

*(4) It must be so obvious that it goes without saying.*

*(5) It must not contradict any express term of contract.*

*In Codelfa Constructions Pty Limited v State Rail Authority of New South Wales (1981) 149 CLR 377 at 345, Mason J said that an implied term was one that the parties would have agreed upon if they had turned their minds to it. He pointed out that courts are slow to imply a condition and said it was not enough to say that it was reasonable to imply the term. It was necessary that the BP Refinery test be satisfied.*

*Therefore, while the plaintiff argues that as a matter of reason and equity the arrangement he had with the defendants was that he would not under any circumstances be out of pocket if an award of damages was made in his favour, it cannot be said that this condition meets the test set out in BP Refinery. In particular, it cannot be said with any certainty that it was a term to which the defendants would have agreed, if they had turned their minds to it. Such a condition would potentially place them*

*in situations where they were deprived of the right to recover substantial costs in circumstances where a client acted unreasonably, or even dishonestly, in pursuing a claim."*

Her Honour in those circumstances found no error of law in the reasons given by either the Costs Assessor or the Review Panel. However, it is clear that the case law from Queensland and the monograph to which I have referred were never referred to her Honour, and her Honour's decision is per incuriam of those decisions. Essentially in Queensland the "no win, no fee" retainer has been interpreted to mean that the client would not have to pay the solicitor other than from the proceeds of the claim. If one interprets the "no win, no fee" retainer, which was the explicit retainer in the current matter, in that fashion, it is not necessary to imply any terms at all.

34 There is no common law of New South Wales, there is no common law of Queensland and there is no common law of Tasmania. There is the common law of Australia. I have to interpret matters governed by the common law in the same way as they are interpreted in other States and territories. Legislation, of course, may vary the law from jurisdiction to jurisdiction. The question for me is whether I should follow the decision of McGill DCJ in **Baker Johnson v Jorgensen** as it has been referred to in **Baker v Legal Services Commissioner** and as it has been cited with approval in the monograph of the Tasmanian authors which I have cited.

35 As a matter of comity, I follow the decisions of my colleagues in the District Court of New South Wales unless their decisions are at variance with other persuasive decisions or were per incuriam of certain case law or were clearly erroneous. There is no reason for me not to apply the same reasoning process in looking at the decisions of the judges of the District Court of Queensland, a coordinate jurisdiction with the jurisdiction of this Court. Accordingly, I adopt the reasoning of McGill DCJ in **Baker Johnson Lawyers v Jorgensen**. Accordingly, the costs recoverable by the defendant are limited to the amount recovered by the plaintiff in the settlement, that is, $100,000. I do so with unfeigned respect to my learned colleague Judge Sidis but her Honour clearly did not have the benefit of the authorities which have been cited to me in this matter.

36 I should point out, because it is mentioned in passing in the authorities I have cited, that there was no suggestion in the current matter that the plaintiff would not be liable for the tortfeasor's costs if the plaintiff was unsuccessful in the action. The plaintiff read paragraph 4 of Mr Lott's affidavit, which is in the following terms:

*"The plaintiff attended my office on 29 October 2002 and on that occasion I informed him of my firm's then hourly fee of $275 per hour, that such costs were on a 'no win, no fee' basis, that he was responsible for payment of the defendant's legal costs if he loses the case and that there was a gap on the legal fees recovered from the defendant (in the motor accident case)."*

Because of the reasoning adopted by McGill DCJ it is accordingly not necessary to go to an implied term.

**POLICY**

37 Of course there is much force in the observations of my learned colleague Judge Sidis that the interpretation that I have adopted potentially places the solicitors in a situation where they are deprived of the right to recover substantial costs where a client might act unreasonably or might act even dishonestly in pursuing a claim. What immediately springs to mind is an old case where a plaintiff alleged that he was severely injured and entitled to substantial damages because of injuries sustained in a motor vehicle accident. He recovered a nominal settlement. I cannot recall whether it

was $20 or $50 or $100, but that was merely for the inconvenience of getting out of his car, inspecting the rear bumper bar to see if it had been damaged and obtaining details of the other motorist, for getting back into his car and continuing on his journey. His claim to have been suffering from personal injury was rejected by the tribunal of fact. In such a case, one might believe that where solicitors had performed substantive work, it is quite unreasonable and unjust that they not recover fees for the work they performed on behalf of a person who could be described as a "fraudster".

38 However, a solicitor always has a remedy for overcoming such a position. A prudent solicitor can put in place a costs agreement that has been mandated by both the **Legal Profession Act** 1987 and the **Legal Profession Act** 2004. A solicitor can define what is meant by "a win", whether it refers to the recovery of any damages or any settlement, and he can specifically provide that the fees may exceed what has been recovered in such a judgment or settlement. It may be that, if such were disclosed, the client might not engage the solicitor to act for him in a speculative action. However, the solicitor has his remedy and the remedy is one which is clearly mandated by the statutes governing the legal profession.

39 If it be thought unjust to the current defendant to have their costs limited, they can be seen to be the authors of their own misfortune in not putting in place a costs agreement in which their relationship with their client was regulated by the agreement rather than by the common law interpretation of what a "no win, no fee" agreement is.

**LEAVE TO APPEAL**

40 Finally, it will not have escaped the listener that this is an application for leave to appeal. It probably could have been brought as an appeal as of right because of error of law committed by the Costs Assessor and the Review Panel.

41 The principles governing the granting of leave to appeal in cases of this nature has been considered by White J in **Cassegrain v CTK Engineering**; **Cassegrain v Cassegrain** [2008] NSWSC 457. Commencing at [110] his Honour said this:

*"[110] In Chapman's Ltd v Yandell [1999] NSWCA 361, Fitzgerald JA, with whom Mason P and Davies AJA agreed, said of the predecessor provision (s 208M of the Legal Profession Act 1987) (at [11] and [12]):*

*'On the other hand, it is important to keep in mind the purpose of a requirement of leave to appeal. It is intended to act as a filter to ensure that unsuitable appellant proceedings which are not able to be brought with the demands which that places upon the resources of the court and the burden which it places upon other parties and the delays which it causes to other litigants. See for example Coulter v Regina (1988) 166 CLR 350 about 359.*

*It is also in my opinion important to keep in mind that s 208M must be considered in the context of s 208L, which restricts an appeal as of right to matters of law. In considering whether or not leave to appeal is granted, it must be decided whether or not, there not being a matter of law arising in the proceeding and there being an appeal as of right only as to a matter of law, there is some other matter which in justice requires that leave to appeal be granted to allow that matter to be relitigated. The party seeking leave to appeal obviously bears the burden of establishing that justice does require that leave to appeal be granted. Further, the master when considering whether to grant leave to appeal obviously has a very wide discretion: see CDJ v VAJ [1998] HCA 67 per McHugh, Gummow and Callinan JJ.'*

*[111] In Wentworth v Rogers, Santow JA (at 491 [65]) warned that the costs assessment process would become trammelled by unnecessary litigation if leave to appeal were allowed too readily. Basten JA said that to require an applicant for leave to establish an obvious error on the face of the record and substantial injustice if the determination were allowed to stand would be too inflexible and restrictive a test (at 517-518 [194]-[195]). The question whether leave should be given should be approached on the broad basis of whether or not justice so requires (Chapman's Ltd v Yandell at [12]; Wentworth v Rogers at 519 [202])."*

Here the plaintiff has established an error of law so that theoretically leave is not required at all. However, justice does in this case in any event require that this Court intervene on appeal. The matter that has been litigated is an important one, the amount of speculative litigation in this State is large, and the current matter is the first to be decided in this State. The question is of great interest not only to litigants but also to members of the legal profession. Accordingly, I grant leave to the appellant to appeal.

**ORDERS**

42 I allow the appeal. I set aside the determination of the Costs Review Panel made on 6 February 2009. I set aside the decision of the Costs Assessor made on 22 September 2008. I determine that the fair and reasonable amount of costs to be paid by the plaintiff to the defendant is the sum of $100,000.

COUNSEL ADDRESSES

43 HIS HONOUR: I give verdict and judgment for the defendant against the plaintiff for $109,536.

44 The remaining issue concerns costs. The normal principle is that costs follow the event. The plaintiff has been successful in that the burden of costs which he has been required to pay has more than halved. However, the plaintiff could have put the authorities put to me to the Costs Assessor, but did not. The plaintiff could have put to the Costs Review Panel the authorities cited to me, but did not. The plaintiff could have put to her Honour Judge Sidis on 8 May 2009 the authorities cited to me, but did not.

45 Up until yesterday morning when the hearing commenced before me the plaintiff was still arguing that the costs ought be reduced to $25,000 rather than to $100,000 plus the interests thereon. However, I am told that notice was given to the defendant in late September that the summons might be amended to increase the amount which the plaintiff was arguing the costs should be reduced to. However, the authorities upon which the plaintiff relied before me were never referred to the defendant or to the defendant's counsel. Essentially the plaintiff has only succeeded on a case that was first pleaded and argued at 10am yesterday morning. The defendant argue that in the circumstances of this case that each party should pay his or their own costs of the proceedings. Clearly, in my view, the costs should be limited. I take the view that the plaintiff ought be entitled to the costs of the trial.

46 I therefore order the defendant to pay the plaintiff's costs of the trial, which is to include counsel's fees for preparing for trial and the costs of both solicitor and counsel since 10am on 19 November 2009.

COUNSEL ADDRESSES

47 HIS HONOUR: As a consequence of the orders I have made this day, it becomes necessary that the judgment entered in favour of the defendant against the plaintiff in matter 355 of 2008 based on the certificate of the Costs Assessor and the Costs Review Panel be set aside. In matter 355 of 2008 I set aside the judgment entered on 10 November 2008.

COUNSEL ADDRESSES

48 I note that the earlier judgment, which has now been set aside, has in some method been satisfied but that moneys are being held in a holding account by a stakeholder. I grant the parties liberty to apply in the event that no agreement can be reached as to the disposal of the moneys. That liberty to apply is to the Registrar of the Court at Newcastle who is in as good a position as anybody to make any ancillary orders that might be necessary.

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LAST UPDATED:

7 April 2010