

District Court of New South Wales

Matter 224007 of 2010

Eileen Liu

v

Tony Barakat, Russell Walter Keddie and Scott John Roulstone

trading as Keddies Lawyers

8 November 2011

CURTIS J
JUDGMENT

Background

1. On 22 October 2001 the plaintiff, Ms Liu, was injured when her motor vehicle was struck from behind by another vehicle owned by Georgia Lea Turner and insured by Zürich Financial Services Australia Ltd. On 18 April 2002 Ms Liu instructed Daniels Lawyers to claim damages for her injuries. On 11 June 2002 Zürich admitted liability and invited settlement discussions.
2. On 27 September 2005 Ms Liu instructed the defendants, hereinafter referred to as "Keddies", to take over the conduct of the claim. Daniels Lawyers agreed to forward their file to the defendants, upon condition that Ms Liu pay their costs and disbursements in the sum of \$10,168.40 on settlement of the claim.
3. On 30 September 2005 Ms Liu signed a document presented to her by Keddies entitled "*Costs Agreement between Solicitor and Client. Motor Accident Compensation Act 1999*" and another

document entitled "*Meeting the Gap*" in which she acknowledged that the fees charged to her would be "*in accordance with the conditional cost agreement I have signed*" and that she would be liable to pay to the partners the difference between the amount recovered from the other side, and any amount charged in the final invoice from Keddies.

4. The costs agreement relevantly recited that Keddies would charge "*for the work we do*" (clause 2) and that "*we will charge you for the work done*" (clause 9). The agreement authorised Keddies to pay any settlement monies into their trust account and to deduct from that sum their costs and disbursements.
5. On 14 September 2006 Ms Liu, in accordance with the advice of Keddies, settled the matter for the sum of \$140,000, agreeing to accept \$50,000 clear to her. On 20 September 2006 Keddies rendered a memorandum of costs and disbursements to Ms Liu in the total sum of \$63,897.45, in which professional costs were claimed as "*In excess of \$45,000, but to you, \$39,697.45*". This memorandum arbitrarily reduced the costs of Daniels Lawyers, for which Ms Liu remained liable, to "*Nil*".
6. Thereafter, after various statutory deductions, Keddies remitted the balance of \$49,875.20 to Ms Liu.
7. On 12 July 2007, Miss Liu by her then solicitor, Mr Anthony Margiotta, filed in the Supreme Court an application for costs to be assessed pursuant to s199 of the *Legal Profession Act 1987*, upon the ground that the costs charged by Keddies were excessive and unreasonable.

8. On 7 August 2007 a deed, expressed to be between *Keddies Insurance Law Specialists Pty Ltd* as releasee, and Ms Liu as releasor, was executed by Ms Liu. There is no evidence that it was executed by Keddies Insurance Law Specialists Pty Ltd. The deed (ignoring typographical errors) recited that the releasee had provided legal services to the releasor, that a dispute had arisen as to *the entitlement of the releasee to the said costs, fees and disbursements ("the Dispute")*, and that the parties had reached a compromise in respect of the Dispute.

9. The deed then provided that:

The releasee will pay to the releasor the sum of \$15,000 plus costs paid to the Supreme Court for the application for assessment of costs and disbursements in ... full and final settlement of the dispute.

10. The only dispute the subject of the deed was a dispute between Ms Liu and Keddies Insurance Law Specialists Pty Ltd.

11. On 27 August 2007 Ms Liu wrote to the Legal Services Commission in these terms:

I, Eileen Rita Liu, kindly request the Office of the Legal Services Commissioner, withdraw my Complaint against Keddies Insurance Law Specialists Pty Ltd and/or its employed solicitors be withdrawn. (Emphasis added)

I take this opportunity to inform the Office of Legal Services Commissioner that my former solicitors and I have come to an agreement which is acceptable to me.

The Claim

12. Ms Liu now sues Keddie for damages for breach of a contractual term that Keddie would only charge her for work actually performed by Keddie pursuant to the retainer, and also pursuant to s68 of the *Fair Trading Act 1987* (since amended), alleging that she has suffered damage as a result of misleading or deceptive conduct by Keddie in contravention of s42 of that Act.
13. The substance of her complaint is that in calculating the amount of \$39,697.45 charged as professional fees, Keddie included amounts in respect of work that was not done, or was not done at the agreed rates.

The Conduct

14. The Fee Ledger of Keddie relating to the work done for Ms Liu is in evidence. It comprises 383 items of attendance or work in respect of which charges are made at various rates for work done by partners, solicitors and administrative staff. The charges are calculated in six-minute units. Many entries raise some disquiet. The following instances are not exhaustive.
15. The second item in the Ledger for which the charge is levied is recorded as "*30 September 2005- Letter to client -welcome*". Ms Liu was charged \$36 for 12 minutes of work at the administrative staff rate of \$180 per hour. The short letter is in evidence. Mr Brabazon SC for the partners concedes that the letter is a pro forma letter that required no more than the entry of Ms Liu's name and address.

16. The third item in the Ledger is recorded as "*4 October 2005- Perusing signed authority from client*". That authority is in evidence. It is slightly over three lines long and is signed by Ms Liu. A momentary glance is sufficient to ensure that it was signed. A charge is made in the sum of \$87 for 12 minutes at the Senior Litigation Lawyer rate of \$435 per hour.
17. The sixth item is recorded as "*4 October 2005 - Drafting cost agreement and Gap agreement*". A charge is made for one hour at the Senior Litigation Lawyer rate of \$435 per hour. Mr Brabazon concedes that these documents are pro forma documents, not drafted by the solicitor with carriage of the matter. The only work required was that an administrative assistant should type in the words *Eileen Rita Liu* in four places. Accepting that the minimum charge was six minutes for the services of an administrative assistant, the proper charge for this service pursuant to the cost agreement was \$18. Ms Liu was charged \$435.
18. Curiously, this entry was made four days after Ms Liu signed the costs agreement on 30 September 2005.
19. On 26 October 2005 the Ledger records: "*Letter to client advising of surveillance and medical appointments*". Mr Brabazon also concedes that this is a pro forma letter requiring no more than insertion of Ms Liu's name and address. A charge is made for 12 minutes of an administrative assistant's time, in the sum of \$87.
20. On 30 May 2006 a charge is made for "*E-mail to Matthew Foley - suggesting range of dates for early informal*". The e-mail is evidence. It reads as follows:

Dear Matthew

I note you now act for the insurer.

As discussed this morning, I believe the parties would benefit from an informal in this matter.

Suggested dates:

May 9, 10, 11, 17, 18, 22, 23, 24, 25 (at 4 PM)

Please let me know which suits.

21. For the work involved in composing this e-mail Ms Liu was charged \$138 for 18 minutes at the rate of a Senior Litigation Lawyer, \$435 per hour.
22. On 11 May 2006 an entry is made "*Perusing e-mail results of business name searches - none match our clients nominated business*". The e-mail, from an administrative assistant, is in evidence. It was received at 11:21 am. It reads:

Hey listed before are the results of the search in this matter.

Which company do you want searched?

The attachment comprises a list of four business names. The e-mail and its attachment may be read in moments. A charge is made for 24 minutes perusing the documents.

23. Immediately following is an entry: "*E-mail to Clerk to re-search using historical options and alternative*". That e-mail is also in evidence. It reads:

"Try historical search or the registered businesses.

And

Also try this name

Elegant beauty salon (as an alternative)

For this message a similar charge is made, that is, for another 24 minutes at a cost of \$174.

24. Curiously this e-mail was sent at 11:32 am, 11 minutes after receipt of the e-mail from the administrative assistant, notwithstanding the fact that Ms Liu was charged \$394 for 48 minutes allegedly spent in perusing that document and composing a reply.

25. On 21 June 2006 Ms Liu was charged \$92 for 12 minutes spent in: "Perusing a letter from Vardanega Roberts dated 15 June 2006 enclosing section 83 payments". Vardanega Roberts acted for the defendant in the claim. The letter and its enclosures are in evidence. The letter says simply:

"As requested, we enclose a list of section 83 payments in this matter. Yours faithfully, Vardanega Roberts.

The attachment lists only 10 items. The letter and its attachment may be read in less than 30 seconds.

26. The very next item reads: "Considering letter from Vardanega Roberts dated 15 June 2006 enclosing section 83 payments." A further charge of \$92 for 12 minutes is made in respect of this entry.

27. On 28 June 2006 Vardanega Roberts sent by facsimile to Keddiess this letter:

We refer to our correspondence of 14 June and advise that we have been able to arrange an appointment with Dr Lewin as follows:

Date: 16 July 2006

Time: 10:30 AM

Address: Edgecliff Road Bondi Junction

Please ensure your client's prompt attendance and request that x-rays and reports be made available at that time. We have arranged for a Mandarin interpreter to be in attendance.

Yours faithfully,

Vardanega Roberts.

28. On 30 June 2006 the following entries were made in the Ledger:

"Perusing letter from Vardanega Roberts, dated 29 June 2006, advising of def medical".

"Considering letter from Vardanega Roberts, dated 29 June 2006 advising of def medical".

"Letter to client advising of def medical".

Ms Liu was separately charged for 12 minutes of time at the administrative rate of \$180 per hour for each item, a total of 36 minutes for an administrative assistant to advise her of medical appointment.

29. On 30 July 2006 the partners received the following letter from Vardanega Roberts:

We enclose authority for execution by your client to enable us to obtain documentation from the Department of Immigration and multicultural and indigenous affairs.

Please have your client sign the authority and returned to ourselves as soon as possible.

On 5 July 2006 Ms Liu was charged \$92 for 12 minutes at the rate of \$460 per hour, for the work of:

"Perusing letter from Vardanega Roberts dated 29 June 2006, requiring authority to Department of immigration be signed by client."

And further charged \$92 for an additional 12 minutes in:

"Considering letter from Vardanega Roberts, dated 29 June 2006, requiring authority to Department of immigration be signed by client."

Ms Liu was charged for \$184 for 24 minutes of time to read and digest this short note of five lines.

30. On 4 August 2006 Ms Liu was charged for 36 minutes at the rate of \$460 per hour. The attendance is described as "*Considering letter from Greg Hickey (advice) dated 28 July 2006*". The letter is less than a page and a half in length, and with the exception of one short paragraph, merely confirms items of quantum, which had been earlier agreed between the solicitor with the carriage of

the matter and Mr Hickey. Its contents may be digested within one minute.

31. The last example is the most blatant.

At 10:14 am on 5 September 2006. The solicitor with carriage of the matter sent the following e-mail to the Acting Case Manager of the Motor Accident Authority:

Dear Ruwan

I refer to our telephone call this morning.

I have been directed by Assessor J Snell, to inform CARS:

1. The CARS hearing date on 14 September 2005 has been vacated-please cancel the interpreter organised by CARS.

2. The CARS hearing date has been rebooked for 17 November 2006 at 10 AM-please rebook a Mandarin interpreter.

Kind regards,

(name)

For this Ms Liu was charged for 18 minutes at the rate of \$460 per hour, in the sum of \$130.50.

32. At 10:39 AM on the same day, the Acting Case Manager replied:

Re-: Eileen Liu-2205/12/429 5AB re Interpreter

Rcvd

Kind Regards.

On receipt of this e-mail the solicitor with carriage of the matter entered into the Ledger:

"Perusing e-mail from CARS 1. Cancel interpreter from 14/9.2. Rebook interpreter for 17 November-acknowledged".

33. For this "work " of perusing the abbreviation "Rcvd" Ms Lu was again charged for 18 minutes of time at the rate of \$460 per hour, in the sum of \$130.50.

34. A more serious breach of contract is revealed by other entries in the Ledger. The costs agreement provided that:

We will charge you the following rates for the work we do.

Partner, \$460 per hour

...

Administrative staff \$180 per hour

35. The Ledger identifies the author of the attendances for which charges were made by their initials. The initials RFS refer to Rosanna Santese who, Mr Brabazon concedes, was at the time a secretary.

36. The Ledger records that, prior to 1 June 2006, Ms Santese performed administrative work for which her time was charged at a rate of \$180 per hour.

37. On 1 June 2006 the Ledger records three attendances by Ms Santese, of 12 minutes, 12 minutes, and six minutes respectively. These attendances were charged at \$460 per hour, a rate appropriate for the work of a partner.

38. The entries made on 21 June 2006 pursuant to which Ms Liu was charged \$184 for 24 minutes time at the partner's rate of \$460 an hour for *perusing* and *considering* a two line letter from Vardenega Roberts referred to in paragraphs 25 and 26 above, record Ms Santese as the author.
39. Between 27 June 2006 and 4 August 2006, Ms Santese appears to have sole carriage of the matter. Charges for her work are made at the rate appropriate to a partner, that is \$460 per hour. Interspersed with these charges are records of administrative work performed by Ms Santese at the administrative rate.
40. No evidence is called by Keddies to indicate that a mistake was made in the preparation of the Ledger, nor any suggestion made that Ms Santese did not do the work attributed to her.
41. In response to this material the defendants in the course of the trial tendered a schedule of 259 attendances said to be unrecorded in the fee Ledger. The schedule includes estimates of the reasonable time and cost of these attendances. The total cost is \$8,417.50. The schedule and its attachments are 427 pages long, and the solicitor for the plaintiff did not have the opportunity to closely examine this material before the end of the hearing.
42. Within minutes of the tender however, that solicitor at the bar table noticed that on the very first page (item 18) a claim was made in respect of an attendance on 22 March 2006 requesting a report from Dr John Lee. This attendance was in fact recorded in the fee Ledger on page 9.

43. Tellingly, the defendants schedule estimated that the reasonable cost of preparing the request was \$87. The fee Ledger raised a charge of \$261.
44. Similarly, the defendants schedule records an attendance on 11 July 2006 (item 55) "*Perusing letter received from Vardenega Roberts dated 10 July 2006 enclosing authority for execution addressed to Concord hospital.*" The estimated time for this attendance was one unit, (six minutes or less), and the reasonable cost is stated to be \$46.

The letter from Vardenega Roberts reads:

We enclose authority for execution by your client to enable us to obtain documentation from Concord hospital.

Please have your client sign the authority and return to us as soon as possible.

As I noted in paragraph 30 above, on 5 July 2006, six days earlier, Ms Liu was charged by the same solicitor \$184 for 24 minutes of time for the work of *Perusing* and *Considering* an almost identical letter.

45. The defendants' Schedule does not assist their case.
46. I find that, in calculating the amount of \$39,697.45 charged as professional fees, Keddie included amounts in respect of work that was not done, or was not done at the agreed rates.

How Much Was Keddies Entitled to Charge?

47. The entitlement of a legal practitioner to claim fees and disbursements for legal services provided to a claimant in a motor accident matter is regulated by **Part 11** of the *Legal Profession Act 1987*, and **Division 2** of the *Motor Accidents Compensation Regulation 2005*, promulgated pursuant to **s149** of the *Motor Accidents Compensation Act 1999*.
48. **Regulation 9** of the *Motor Accidents Compensation Regulation 2005* provides that the maximum costs for legal services provided to a claimant are to be costs set out in **Schedule 1** to the regulations, except as otherwise provided.
49. **Regulation 11** otherwise provides in these terms:

11 Contracting out-solicitor/client costs

(1) This clause applies in respect of costs in a motor accidents matter if a legal practitioner:

(a) makes a disclosure under Division 2 of Part 11 of the Legal Profession Act 1987 (sections 180 and 181 excepted) to a party to the matter with respect to the costs, and

(b) enters into a costs agreement (other than a conditional costs agreement, within the meaning of that Part, that provides for the payment of a premium on the successful outcome of the matter concerned) with that party as to those costs in accordance with Division 3 of that Part, and

(c) before entering into the costs agreement, advises the party (in a separate written document) that, even if costs are awarded in

favour of the party, the party will be liable to pay such amount of the costs provided for in the costs agreement as exceeds the amount that would be payable under the Act in the absence of a costs agreement.

(2) Schedule 1 does not apply to the costs concerned to the extent that they are payable on a solicitor and client basis.

50. The disclosure under **Division 2 of Part 11** of the *Legal Profession Act 1987* is that required by the following provisions:

s175 Obligation to disclose to clients basis of costs

(1) A barrister or solicitor must disclose to a client in accordance with this Division the basis of the costs of legal services to be provided to the client by the barrister or solicitor.

(2) The following matters are to be disclosed to the client:

(a) the amount of the costs, if known,

(b) if the amount of the costs is not known, the basis of calculating the costs,

(c) the billing arrangements,

(d) the client's rights under Division 6 in relation to a review of costs,

(e) the client's rights under Division 4 to receive a bill of costs,

(f) any other matter required to be disclosed by the regulations.

(3) ...

s177 Obligation to disclose estimated costs

(1) *A barrister or solicitor must disclose to a client in accordance with this Division an estimate of the likely amount of the costs of legal services to be provided to the client by the barrister or solicitor, if the amount of the costs is not disclosed under section 175.*

(2) ...

(3) ...

51. The cost agreement signed by Ms Liu does not discharge these obligations.

52. The costs agreement fails to disclose:

(a) An estimate of the likely amount of costs (**s177(1)**).

(b) The billing arrangements (**s175(1)(c)**).

(c) The client's right to receive a Bill of Costs before costs can be recovered (**Division 6, s192**).

53. Further, the document "*Meeting the Gap*" also signed by Ms Liu does not comply with the requirements of **r11(1)(c)** of the *Motor Accidents Compensation Regulation 2005* that she be advised that even if costs are awarded in her favour, she would be liable to pay such amount of the costs provided for in the costs agreement *as exceeds the amount that would be payable under the Act* in the absence of the costs agreement. "The Act" in this context is the *Motor Accidents Compensation Act 1999*, **s149** of which effectively limits the costs recoverable to those provided in

Schedule 1 of the *Motor Accidents Compensation Regulation 2005*.

54. That document signed by Ms Liu is in these terms:

I understand that, should I win my case, the costs recoverable from the other side will only be 15 - 30% of the fees I will be charged.

I understand that the fees charged to me will be in accordance with the conditional costs agreement I have signed and I will be liable to pay Messrs Keddies the difference between the amount recovered from the other side, and the amount charged to me in my final invoice from Messrs Keddies

55. This document advises Ms Liu, not of the relevant gap, but of the gap between costs recovered from the other side, and the amount to be charged by Keddies.

56. In consequence of a failure to comply with r11, the entitlement of Keddies to costs is regulated by **Schedule 1** of the *Motor Accidents Compensation Regulation 2005*.

57. Ms Mary Louise Whelan, an experienced solicitor and costs consultant, has calculated the entitlement of Keddies to costs and disbursements in accordance with that schedule to be \$20,923.98 inclusive of GST. Ms Whelan was not required for cross-examination upon her report, and no contrary evidence is called. I find \$20,923.98 to be the amount that Keddies were entitled to charge Ms Liu. She was charged \$63,897.45. The difference is \$42,973.47. Ms Liu has received \$15,000 from Keddies

Insurance Law Specialists Pty Limited, leaving a balance of \$27,973.47.

Conclusions

Claim in contract

58. I find that Keddies are in breach of the contractual terms that Ms Liu would only be charged for work done and at the rates agreed in the costs agreement. I find the measure of damages to be \$27,973.47 plus interest.

Claim pursuant to the Fair Trading Act 1987

59. I find that, in contravention of s42 of the *Fair Trading Act 1987*, the partners in the course of trade or commerce engaged in misleading and/or deceptive conduct in that they:

(a) On 30 September 2005 represented to Ms Liu that she would be charged only for work done, and at the rates prescribed in the costs agreement. An overwhelming inference arises that the present intention of the partners on that date, was that she should be charged, as she was, for time spent in drafting the costs agreement and other pro forma documents when to the knowledge of the partners those documents already existed.

(b) Between 3 September 2005 and 12 September 2006 by their servants made, or themselves permitted, false or misleading entries into the Ledger.

(c) On 15 September 2006 represented to Ms Liu, in the "*Authority to Settle*" document that the legal fees to which Keddies were properly entitled, in combination with outstanding

medical expenses and Medicare, and Social Security deductions, reduced the offer of settlement of \$140,000 to \$50,000 clear to Ms Liu.

(d) On 20 September 2006 represented to Ms Liu that the memorandum of costs and disbursements rendered to her on that date was calculated in accordance with the costs agreement.

(e) On 26 October 2006 represented to Ms Liu in the Reconciliation Statement sent to her on that day, that Keddies were entitled to deduct from the settlement monies \$63,897.45 in respect of professional costs and disbursements.

60. An inference arises, drawn from common sense, that, Ms Liu would not have retained Keddies, if she had known that she would be charged for work that was not done. A similar inference arises that she would not have signed instructions to accept \$50,000 clear if she knew that the fees and disbursements properly charged by Keddies were not \$63,897.45, but rather \$20,923.98.
61. I find that Ms Liu suffered loss by the conduct of Keddies in contravention of the *Fair Trading Act 1987*. I find that the measure of her damages is the sum of \$27,973.47 plus interest.

Is There a Remedy?

62. Mr Brabazon for Keddies submits that Mrs Liu has no remedy, because:
- (a) There has been an accord and satisfaction between the plaintiff and the defendants by which the plaintiff has compromised all claims she may have had against the

defendants in respect of costs and disbursements charged by the defendants to the plaintiff.

(b) The plaintiff is estopped by the Deed of 7 August 2007 from maintaining any claim in these proceedings,

(c) The *Legal Profession Act 1987* (the effect of which was in this case preserved by transitional provisions in the *Legal Profession Act 2004*) provided an exclusive code for the recovery of legal costs, and impliedly abolished all other causes of action.

Accord and Satisfaction

63. The difficulty with the first submission is that there is no evidence of any accord with the partners. They were not parties to the deed, and do not call any evidence as to the circumstances in which it was executed. There is no evidence as to what, if any, conversations were held between Ms Liu and the partners, let alone any evidence of what if anything was agreed. There is no evidence that the partners paid any money in satisfaction of the claim.

64. Although Ms Liu in her letter to the Legal Services Commission of 27 August 2007 wrote that: *My former solicitors and I have come to an agreement which is acceptable to me*, that letter was written after she had been led to believe that work had been done for her by Keddie Insurance Law Specialists Pty Ltd.

65. In circumstances where the partners bear the onus and decline to give evidence upon which they may be cross-examined, this letter of Ms Liu does not lead me to actual persuasion that she reached

accord with the partners rather than Keddies Insurance Law Specialists Pty Ltd, or that such any such accord was satisfied.

Estoppel by Deed

66. Similarly, although the defendants plead that Keddies Insurance Law Specialists Pty Ltd entered the deed as agent for the defendants, or was, by mutual mistake, named as the counterparty in place of the defendants, they called no evidence in support of those assertions. In any event, as the High Court said in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] 219 CLR 165 at 179:

It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe

67. The costs agreement, while identifying Ms Liu as the client, did not reveal the name of the entity that was to provide the legal services. Neither the partners, nor Keddies Insurance Law Specialists Pty Ltd, are named in that document. There may have been good reasons for the partners to subsequently represent to Ms Liu that some or all of the work was performed by Keddies Insurance Law Specialists Pty Ltd. It is unnecessary to speculate.
68. The defendants have not sought rectification, and the deed must stand in accordance with its terms.

The Causes of Action Have Been Abolished

69. **Part 10A** of the *Legal Profession Act 1987*, (the effect of which was in this case preserved by transitional provisions of the *Legal Profession Act 2004*) provided a mechanism for the recovery of overpaid legal costs.
70. The Act relevantly provided that a client who was given a bill of costs may apply to the Manager, Costs Assessment for an assessment of the whole of, or any part of, those costs, even if the costs have been wholly or partly paid, (**s199**), and that the Manager, Costs Assessment was to refer the application to a costs assessor for determination: (**s206**).
71. **S208J(1)** provided that upon making a determination, the costs assessor was to issue a certificate setting out that determination. Where the costs had been paid, the amount by which the amount paid exceeded the amount specified in the certificate was recoverable as a debt in a court of competent jurisdiction: **S208J(2)** .
72. An application for an assessment of costs was to be made within the period prescribed by the regulations: (**S199(2)**). **Regulation 52** of the *Legal Profession Regulation 2002* relevantly prescribed the period of 12 months after the bill was given to the client. Ms Liu is out of time to pursue that remedy.
73. Has this legislation supplanted other common law and statutory remedies?
74. A fundamental principle of statutory interpretation is that: "*No statute could be construed as abrogating a fundamental principle*

of the common law unless an intention to do so is clearly expressed" (*Davern v Messel* (1984) 155 CLR 21 at 31 per Gibbs CJ). Similarly, a statute will not be held to remove a remedy available to a civil party, unless that intention is expressed in the clearest terms (*Brighams's Creek Farms Ltd v New Zealand Milk Board* [1974] 1 NZLR147 at 150).

75. Where a statute confers a novel right and provides a remedy for the enforcement of that right, no other remedy is open (*Josephson v Walker* 18 CLR 691). Nevertheless, if the right addressed by the statute is a right known to the common law the right is enforceable in the ordinary way in the ordinary courts, unless there is some provision to the contrary in the Act (*Mallinson v Scottish Australian investment Co Ltd* [1920] 28 CLR 66).

76. In *Northwind Pty Ltd v Proprietors Strata Plan 3143* [1981] 2 NSWLR 809 the defendants argued that the Supreme Court had no jurisdiction to entertain a claim to restrain a party from encroaching on the air space of the common property, because the *Strata Titles Act* provided recourse to the Strata Titles Commissioner or a Strata Titles Board. Rath J said at 812:

Thus, if the right conferred by the by-law in the present case is a novel right, in the sense of the principle stated by Lord Tenterden in doe d Bishop of Rochester v Bridges [1831] 109 ER at 106 then prima facie the remedy provided by the Strata Titles Act would be exclusive. But if the right created is designated as a right known to the common law, then it seems to me that the principle of Mallinson's case [1920] 28 CLR 66 is to be applied, and the right

is enforceable in the ordinary way in the ordinary courts, unless there is some provision to the contrary in the Act.

77. The Queensland Court of Appeal in *Edwards v Bray* [2011] QCA 72, considered the entitlement of a solicitor to sue in a magistrates court for his professional costs where defendants pleaded a time bar contained within the *Queensland Law Society Act 1952*. That Act provided a regime similar to that of the *Legal Profession Act 1987* (NSW) for the assessment and recovery of costs.
78. Section 6ZE(2) of the Act provided that "a binding costs assessment" obtained pursuant to the Act might be "enforced as a debt for the assessed amount". The Court held that this provision was not the source of the solicitor's right of recovery, merely providing an appropriate procedural mechanism for the resolution of quantum that was alternative to, and less formal and expensive than court proceedings. The right to recover fees and costs was conferred by contract and the *Limitation of Actions Act* (Qld) applied, with the applicable limitation being six years from the accrual of cause of action.
79. In like manner, although the remedy provided to Ms Liu by s199 and s208J (2) of the *Legal Profession Act 1987* is time-barred by r 52 of the *Legal Profession Regulation 2002*, her rights of action under the contract, and pursuant to s68 the *Fair Trading Act 1987* endure.

Orders

80. The plaintiff is entitled to judgement in the sum of \$27,973.47 plus interest.

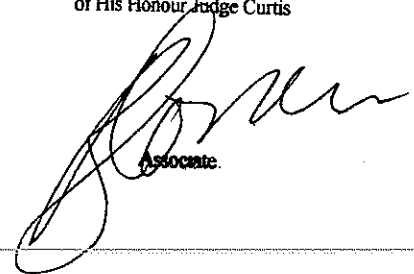
81. The parties are to calculate interest and bring in short minutes of order for judgement.

82. I will hear the parties on costs.

Mr G M Watson SC with Mr G J O'Mahoney instructed by Firths Compensation Lawyers appeared for the plaintiff.

Mr M L Brabazon SC with Ms M Castle instructed by Verekers Lawyers appeared for the defendants

I certify that the previous ⁸²
paragraphs are the Reasons for Judgement
of His Honour Judge Curtis



Associate.