District Court of New South Wales

Matter No: 15729 of 2011

Stavre Bazdarov

v

Tony Barakat & Russell Walter Keddie & John Scott Roulstone

t/as Keddies Lawyers

24 June 2011

JUDGE ASHFORD
JUDGMENT

1. By amended statement of claim filed by leave on 21 April 2011 the plaintiff claims damages of the defendant for breach of contract or in the alternative breach of s 42 of The Fair Trading Act 1987. Interest is claimed.

2. The action arises as a result of the defendants acting for the plaintiff in a medical negligence claim arising out of the plaintiff's treatment by a Dr Shah and the plaintiff alleges the defendants claim for their costs and disbursements was not in accordance with the plaintiff's instructions and there was an overcharging by the defendants in respect of such costs and disbursements.

3. By amended defence filed 9 May 2011 the defendant denies the allegations made by the plaintiff and denies having overcharged the plaintiff but admits two breaches of contract, one being that some charges made by the defendant as set out in their ledger are at a rate higher than agreed by the plaintiff and secondly that charges in relation to the plaintiff's workers compensation claim wrongly appear on their ledger as charges relating to the medical negligence claim.

4. In that regard the defendant sets out in a schedule unexplained entries which the defendants do not press in the sum of $1,794.10 and the undisputed workers compensation entries in a sum or $7,295.30. As well the defendants agree that there was an hourly rate increase in their time costing from 2 June 2005 which related to the solicitor with conduct of the matter, secretarial rates, and paralegal/clerk rates. The total rate increase for those three persons is the sum of $9,770.20. Thus the total which is not contested as set out by the defendant is the sum of $18,859.60.

5. A number of factual matters are not in dispute and I set these out in short form.

(1) In May 2002 Stavre Bazdarov suffered a hernia in the course of his employment with Metroll Campbelltown Pty Ltd.

(2) On 31 May 2002 Dr Shah performed a hernia repair. Complications followed that repair.

(3) In early 2003 the plaintiff had a right-sided orchidectomy as a result of those complications.

(4) On 22 September 2003 the plaintiff consulted the defendant in respect of both his workers compensation rights and a potential claim for medical negligence.

(5) On 4 December 2003 a "Costs Agreement" was entered into which included an agreement on an hourly rate of charges for professional and administrative staff. The hourly rate for the solicitor handling the claim, Ms Irena Pechanats, was $390 per hour or $39 per six minute unit with the rate for secretarial staff being $16 per unit and $22 per unit for paralegal/clerks.

(6) Between December 2003 and November 2005 proceedings were initiated and investigated and prepared for hearing in respect of both workers compensation and medical negligence claims.

(7) On 14 November 2005 the medical negligence proceedings settled on the first day of hearing with an overall settlement reached of $450,000 inclusive of costs and the plaintiff gave instructions that he would settle his claim for $150,000 clear to him after deduction of costs etc.

(8) On 21 December 2005 the defendants forwarded a memorandum of costs and disbursements to the plaintiff.

(9) The defendants claim for costs and disbursements was in the sum of $290,325.01.

6. The plaintiff's submission is that that sum was based upon the defendant's "Fees Ledger". The defendants say the "Fees Ledger" is an 'aide memoire' and nothing more although it may have obvious anomalies and errors in it. The defendant submits that the Fee Ledger was therefore used as a basis for generating the memorandum of fees and thus the claim for fees is the Memorandum of Costs based upon that Fee Ledger.

7. Stavre Bazdarov gave evidence before me. At the outset, I note that it was clear he is very ill and I am advised that he is presently suffering from lung cancer. He gave his evidence wearing a breathing device and with the assistance of morphine medication. On the first day of hearing he was assisted by an interpreter in the Macedonian language, and I make comment that the particular interpreter appeared to have some difficulties in interpreting. The plaintiff clearly has some knowledge of the English language but due to his present medical condition it was difficult to understand his responses in English and thus the services of the interpreter were utilised as best they could be. On the second day of hearing a new interpreter was sworn and her assistance was to great effect.

8. The plaintiff's recollection in relation to a number of matters was very poor and he freely admitted that he had not kept any papers or diary records of conferences or the like with the defendant. He recalled having seen Ms Irena Pechanats at the defendant's office and that she had care and conduct of his claim. He agreed he had been able to communicate with her in the Serbian language as well as in English and agreed that at the first conference he had discussed with her what had happened in relation to his hernia operation. He agreed that at that time he was receiving workers compensation payments and his medical expenses had also been paid. He agreed that following that initial consultation with Ms Pechanats an investigator had come to speak to him to obtain details about his medical problems and he thought there had been an interpreter at that meeting.

9. He agreed that he had received correspondence from the defendants and that he had at a later time attended the defendants office and he had been told that the defendants had agreed to do his claim on a "no win/no fee" basis but if he lost the case he may be required to pay Dr Shahs costs. He could not recall signing a costs agreement but it appears that he did sign a Conditional Costs Agreement dated 4 December 2003 noting his signature on each page of that document, although he did not believe the document had been explained to him prior to his signature. He could not recall discussions about retainer of barristers nor in relation to any explanations of fee agreements sent by those barristers. He could recall attending at a settlement conference and recalled that an offer of settlement had been made which he did not think was adequate.

10. He recalled Mrs Pechanats had advised him she thought his claim could be worth $150,000 clear to him but he could not recall being told that workers compensation payments would be deducted from the sum nor being told that costs of the claim would be between $110,000 to $115,0000. He could not recall being told that counsel's fees would be in the order of $35,000 or that if the matter proceeded to hearing those fees would be not less than $100,000. He did not recall conferences with counsel.

11. It seems clear that a letter was sent to him on 24 August 2005. This related to what was apparently an informal settlement conference on 23 August 2005 in the offices of the solicitors for Dr Shah. Ms Pechanats was apparently there together with junior counsel and an interpreter. That letter states. "We confirm the approximate value of the deductions to be taken out from any settlement". This notes inter alia that workers compensation payments to date were the sum of $104,000 and from any settlement and/or verdict this amount would have to be notionally deducted. It also records. "Should your matter settle today our costs would amount to approximately $110,000 to $115,000 clear of GST," and noted that sum did not include barrister fees which at that time were $35,000. It further recorded that should the matter proceed to hearing an estimate of counsel's fees for both junior and senior counsel would amount to no less than $100,000. It also noted that to date approximately $24,000 had been incurred in preparation of the matter from the defendant's own funds and there was approximately $6,000 in outstanding disbursements. It also noted an estimate as to outstanding treatment fees was $10,000 which needed to be further verified and confirmed.

12. Other than the initial document forwarded to the plaintiff on 4 December 2003 setting out an agreement on an hourly rate for professional charges and the document of 24 August 2005 no other documentation in respect of advising the plaintiff as to his likely costs and disbursements appears to have been forwarded to him.

13. I make no criticism of the plaintiff and his lack of recollection of a number of matters noting as I have said before that he is clearly very ill and under medication. He agreed he had told his legal representatives that he would settle the claim for $150,000 clear to him and that he had no particular concerns about other matters at that stage noting he had been advised a bill would be sent to him after settlement.

14. From material tendered it seems that on 10 May 2005 an offer of settlement of $50,000 plus costs was made, open for 28 days from the date of the letter. On 31 October 2005 an offer of compromise was made in the sum of $235,000 plus costs as agreed or assessed, that offer being open to 7 November 2005. On 11 November 2005 the offer of compromise increased to $300,000 plus costs as agreed or assessed open to 5.00 pm that day with the matter listed for hearing on 14 November 2005. The ultimate settlement of course was $450,000 inclusive of costs.

15. The defendants 'Results Form' notes the matter settled by negotiation on the first day of hearing in a settlement amount stated to be $300,000 plus $150,000 in costs with an estimate of fees being made at $140,000. As previously noted the settlement was in reality $450,000 inclusive of costs.

16. The memorandum of costs and disbursements sent by the defendants to the plaintiff and dated 21 December 2005 sets out an itemised account of professional services and disbursements taken from the Keddies ledger and states professional costs to be $184,929.25 inclusive of GST and a 25% contingency fee then stating "But to you say $154,000," comprising the sum of $140,000 plus 10% GST. The disbursements are noted separately in the sum of $136,334.01 making a total bill for costs and disbursements of $290,344.01.

17. Reconciliation statement of 22 December 2005 notes settlement monies to include costs and disbursements, with monies paid to the plaintiff in the sum of

$153,417.94 and deductions to the Health Insurance Commission of $1313.05 and out-of-pocket expenses to Dr V Zepinic of $2925. The sum of $2000 was retained in trust apparently in respect of the workers compensation claim. On 23 February 2006 a reconciliation statement was sent to the plaintiff itemising the fees to counsel, Dr Molloy, Dodkins Litigation Support, interpreters fees and Albert Macri along with other matters previously referred to and the sum of $2000 was noted as a Trust transfer.

18. In support of the plaintiff's case the plaintiff relies upon the expert opinion of Mr Stephen Boyd-Boland, solicitor, who prepared a report of 5 April 2011. He had access to the defendants file. The plaintiff also relies upon a report of Mary Whelan, solicitor, of Gillespie Whelan Legal Costs dated 10 March 2011. I shall deal with their evidence later. The defendant did not call any expert evidence.

19. The defendant called evidence of Irena Pechanats, solicitor. She presently works as a sole practitioner but during the relevant period was employed by the defendant primarily in personal injury litigation. It appears her description of employment was in the category of partner/accredited specialist/special counsel and thus her charges were $390.00 per hour or $39.00 per 6 minute units. That would imply a high level of competence

20. She described the system of time costing which the defendant operated, all tasks being charged in six minute units. She said she had a computer at her desk and would enter units into the system by reference to the file number. Sometimes she would do that directly or sometimes that would be done by others in her support group. At times the entry was done contemporaneously and at other times at the end of the day. In relation to documents such as mail or documents which had been served she said her practise was to read them and put a 'post-it' sticker on it with instructions to staff to cost the documents to her, noting the time cost, and the number of units or description of what she wanted done as a time costing. This was placed in a tray and her secretary would clear the tray and enter the time costing arrangements.

21. She could not recall the specifics of the first meeting with the plaintiff but recalled that he spoke in a mixture of Macedonian, Serbian or English and she accepted that their first meeting was on 19 September 2003. She said at that first meeting she was unsure whether he had a workers compensation claim or a common law

claim combined and she said it was not clear to her at that time whether there was any claim for medical negligence available. To that end she decided to brief counsel early and accordingly briefed both junior and senior counsel.

22. She said she formed the view that it was a complex matter and thus she arranged a conference with junior counsel and Dr Darvenezia. She could recall that a number of medical practitioners were required to provide reports. She agreed that she had not always made file notes at great length nor had she always taken notes.

23. In cross-examination when referred to the Keddies ledger she agreed that certain matters on the ledger having been pointed out to her it was clear that the hourly rate had been increased to a rate higher than that previously agreed, and she also agreed that it appeared the concurrent workers compensation matter also appeared on the ledger and also on the memorandum of costs which constituted a breach by charging for a workers compensation matter and including it on the medical negligence account. She agreed that it appeared there were duplicate entries on the costs assessment including one pointed out by senior counsel for the plaintiff being a duplicated entry on 4 December 2003.

24. The evidence of Ms Pechanats was to the effect that the fee ledger was an unreliable source upon which to base any claim for costs and disbursements and that of course is supported by the documentary evidence clearly showing hourly rates being applied other than those which had been agreed. She could not explain how items such as consideration of a cheque occupying three six minute units could be substantiated nor perusal of a cheque for a period of six minutes and said that such items were not originated by her.

25. In relation to counsels fees, noting that junior and senior counsel had charged fees for attendance for five days of hearing when the matter had settled on the first day, she could not recall having made any enquiry as to whether either counsel had the benefit of other work on those days.

26. Mary Whelan provided a report dated 10 March 2011. Her CV was attached. The defendant objected to the tender of her report on the grounds that she did not articulate the reasoning leading to her conclusions, and also her qualifications are as a costs consultant rather than as a costs assessor. Having reviewed her

qualifications I was satisfied her qualifications are such that she is eminently qualified to give an opinion as an expert in relation to a matter such as this, noting that she was employed from 1979 to 1993 as a solicitor and from 1981 as a partner in legal practice and as such was involved in taxations in the Supreme Court and the Compensation Court. From 1993 she was contracted to D G Thompson as a legal cost consultant and her duties there included preparation of bills of costs, notices of objection and cost submissions generally. From 1994 she was a senior costs consultant with that practice. From 1996 she was employed by Abbott Tout as the in-house legal costs consultant/solicitor managing costs assessments and conducting costs negotiation in that practices' personal injury group. She presented costs seminars. From 2000 she was employed and later contracted to Firths The Compensation Lawyers as the in-house legal costs consultant/solicitor. She became a founding member of the Supreme Court legal costs subcommittee representing New South Wales legal practitioners for two years. Her role on that subcommittee was to examine all aspects of the costs assessment system including drafting and recommending legislative changes. From 2005 to the present time she has worked in the legal costs consulting practice of Gillespie Whelan Legal Costs and in that position provides services including preparation of bills of costs, notices of objection, responses to objections, taxation/assessments in the Federal and ACT jurisdictions and costs advices.

27. Ms Whelan's report sets out the documentation which was provided to her which is comprehensive. She notes that there was no differentiation between costs for work done in the 2004 workers compensation claim and the costs for work done in the medical negligence claim and as I have previously noted this is accepted by the defendant. There is a difference however in the costings in respect of the workers compensation claim, the defendants concession being that the sum $7295.30 inclusive of GST related to the workers compensation proceedings and was allocated to the medical negligence ledger. The defendants however say that many of the reports to which Ms Whelan refers at page 8 of her report were obtained for the medical negligence claim and their deployment in the workers compensation proceedings does not change their character as disbursements properly incurred in those proceedings. Ms Whelan calculates the costings relating to the workers compensation proceedings to be a total sum of $19,485.40, which includes professional costs at $13,850.

28. The calculation of costs by Ms Whelan in relation to the workers compensation matter includes medical reports of Dr Shah in support of the workers compensation claim, Dr Zepinics report of 5 December 2003, served with the s281 notice of 12 May 2004, report of Dr Ellard obtained in 2004 in respect of the workers compensation claim and a letter from Dr Ellard clarifying determination of facts, Dr Mohammed production fees for clinical notes and records for production to the Workers Compensation Commission, Dr M Acar medico legal report and WPI assessment, Albert A Macri solicitors costs and disbursements (I note these were the plaintiff's prior workers compensation solicitors), workers compensation production fees and in all the total as I said is the sum of $19,485.40. In addition there is a sum of $2000 which was transferred from the trust account relating to expenses in the 2007 workers compensation claim.

29. In respect of the overall professional costs and disbursements Ms Whelan calculates the sum of $100,542.10 as fair and reasonable for work reasonably done and in a reasonable manner in the medical negligence matter calculated as follows:

Professional costs	$51,500.00
GST on professional costs	$5,150.00
Total professional costs	**$56,650.00**
Disbursements including GST	
E Romaniuk	$12,000.00
J Donohue	$605.00
R Taylor	$2,640.00
Dr I Mohammed	$770.00
SSWPH Clinical Notes	$214.50
Dr Zaki	$786.50
St George Private Hospital Clinical Notes	$110.00
Dr Wines	$1,210.00
Prof Tracy – 5 medical reports	$3,625.00
Dr T Hugh	$1,787.50
Dr A Conway	$880.00
Dr P Jungfer	$2,090.00

Dr Breslin	$1,138.50
Dr Molloy	$962.50
Dr Darveniza	$440.00
Dr Mohammed – teleconference with D A Wheelahan QC (have allowed his fee for a conference with Irena Pechanats in lieu of D A Wheelahan QC)	$100.00
Interpreter fees	$5,006.65
District Court – filing fees and hearing allocation fee	$2,870.65
Registration and Service fees (less duplication of District Court filing fee on statement of claim which Kedsec charged to Keddies)	$444.60
Conduct money	$512.00
Facsimiles – not including workers compensation related faxes, faxes to C Dodkin, faxes to D A Wheelahan QC, say	$500.00
Courier expense	$198.70
Photocopying – not including workers compensation related faxes, faxes to C Dodkin, faxes to D A Wheelahan QC, say	$5,000.00
Sundries – nil. Expenses under this heading are an office overhead factored into hourly rates charged for fee earners	$0.00
Total disbursements	$44,892.10
Total costs and disbursements	$100,542.10

30. I note in that assessment of costs and disbursements no fees are included for senior counsel, and in relation to junior counsel only advices and conferences, preparation for hearing, and attendance on one day of the hearing is allowed. In that regard I note that counsel's fees thus excluded were in the sum of $55,000 for senior counsel, and $24,850 in respect of junior counsel's fees. Those fees were not allowed on the basis that the matter settled on day one of the hearing. Ms

Pechanats was unable to say whether she had ascertained whether either junior or senior counsel had other matters listed for hearing or attended to other matters on the days they thus did not attend in respect of this matter. I note there was a costs agreement in respect of counsel's fees and they had been retained at an early time as Ms Pechanats had formed the view that it was a complex matter. The conditional costs agreement did make provisions for retention of both junior and senior counsel. The arrangements for payment of counsel's fees were between counsel and the defendant and not the plaintiff. The contractual entitlement of the defendant to engage counsel is set out in paragraph one of their conditional costs agreement.

31. Paragraph three of the Fees Agreement and Disclosure as prepared by senior counsel states, "The agreement will be between me and my instructing solicitors. This is not an agreement with the client".

32. Junior counsels fees agreement notes,

Liability for costs.

"In accepting this retainer costs agreement my instructing solicitor, if a sole practitioner, or my instructing solicitors firm, is liable for payment of my fees as described above.

My method of practice is not designed for dealing direct with the client and I have no trust account".

33. He also noted his view there was nothing to suggest the plaintiff's claim was unusual.

34. In relation to the retention of C N Dodkin Litigation Support it appears Mr Dodkin obtained a statement from the plaintiff and from his daughter. It is contended by Ms Whelan that Keddies had ample opportunity in conference to cover the matters which were covered in their statements and as such it was unreasonable for Keddies to duplicate as the material covered by him was in essence the material obtained or which should have been obtained at initial consultation with Ms Pechanats and from the medical reporting. That cost was therefore not allowed and in lieu thereof she estimated a cost which she felt would have been reasonably incurred in the defendants taking reasonable statements from the plaintiff and his daughter. That was the sum of $2337.50.

35. The defendant says this work was necessary and it was within the discretion of Ms Pechanats to determine how best to take statements from witnesses either by doing the work at an hourly rate or delegating to another and that those statements were taken at an early preliminary stage when prospects were not at all clear and no determination had been made on liability.

36. Whilst solicitors engaged in litigation ordinarily undertake the obtaining of statements from a plaintiff in great detail, the evidence of Ms Pechanats was that she felt this was a proper manner in which to obtain a detailed statement from the plaintiff. On that basis I am prepared to allow that disbursement.

37. As previously noted the plaintiff also relied upon the evidence of an expert Mr Stephen Boyd-Boland, solicitor. He prepared a report of 5 April 2011 and was also called to give evidence. The defendant criticises his evidence principally upon the basis that whilst he is a solicitor who has some experience in negligence claims he does not have any relevant experience in medical negligence claims and also on the basis that Mr Boyd-Boland gave an opinion without examining any of the material relating to the medical negligence claim and based his opinions largely on Ms Whelan's report as to what were appropriate charges. His opinion was also criticised on the basis that the exercise he was tasked with was an exercise in hindsight. That was a criticism which Mr Boyd-Boland was prepared to accept.

38. Mr Boyd-Boland reviewed the file and also had the benefit of Ms Whelan's reporting. He concluded that in his opinion professional costs in a range from $40,000 to $60,000 would have been reasonable and he criticised the initial report from Professor Tracy, which he thought was inadequate and required numerous revisions. He also noted there was duplication of costs in the drafting of the Statement of Claim including joinder of a second defendant to the proceedings which he thought was as a result of failure to properly investigate the relationship with the second defendant and thus thought those costs should be excluded.

39. He concluded that the retention of senior counsel was unnecessary although conceding that counsel's fees are an issue of difficulty. In cross-examination he agreed that his opinions were based on assumptions about the nature of the issues raised in the claim.

40. The plaintiff submits that the Keddies Memorandum of Costs and Disbursements was based upon its Fees Ledger. It is submitted by the defendant that the Fee Ledger does not determine whether there was any overcharge but rather it is the Memorandum of Fees which is the relevant document. The defendant submits that fees were reduced in comparison to the Fee Ledger together with a 25% uplift. It was further submitted the reasons behind that reduction were not explored in the evidence but were a downward adjustment of considerable margin and may have been made to address errors or omissions.

41. The defendant submits that the Fee Ledger is nothing more than an 'aide memoire' and does not of itself reflect a charge to the client. That may well be so. However clearly the Fee Ledger is an unreliable source upon which to base any claim for costs and disbursements and clearly many entries on that Ledger are incorrect, double costed and based upon an incorrect hourly rate. As well it is clear that the amounts included work relating to the workers compensation claim and in truth all entries relating to all of the plaintiffs claims were included on one Ledger and nothing appears to have been done to differentiate between workers compensation and medical negligence matters. As noted many of the charges were at an hourly rate higher than had been agreed.

42. The Fee Ledger identifies numerous examples of overcharging, double charging, and entries which could clearly not be substantiated. I have come to the opinion the Memorandum of Costs and Disbursements was based upon the Fee Ledger and it was considered by the defendants to be much more than an aide memoire. It appears to have been substantially relied upon by the defendant in preparation of their Memorandum of Fees.

43. Ms Whelan was of the opinion the Conditional Cost Agreement did not comply with the disclosure requirements nor the right of the plaintiff to receive a bill of costs in accordance with the Legal Profession Act 1987 ("LPA") which has now been repealed. Section 175(1) is in mandatory terms that:

> 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 solicitors.
>
> (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 clients rights under Div 6 in relation to a review of costs
(e) the clients rights under Div 4 to receive a bill of costs,
(f) any other matter required to be disclosed by the regulation.

44. Senior counsel for the plaintiff submits that billing arrangements were not included on the Conditional Costs Agreement nor was it explained that he had a right to receive a bill of costs and the time limit provided in the LPA..

45. Section 177 relates to the obligation to disclose estimated costs. It is submitted this was not done and this was a mandatory obligation. It is submitted that the legal consequences of that failure to comply with the LPA means that the defendants are only entitled to costs which are fair and reasonable. It is thus submitted that when the defendant made a representation to the plaintiff by presenting the bill to him that this was a sum to which they were entitled they had breached their agreement and were also involved in conduct which was false and misleading even if not deliberate.

Section 208A relates to assessment of bills generally and notes:

(1) when considering an application relating to a bill of costs, the costs assessor much consider:
   (a) whether or not it was reasonable to carry out the work to which the costs relate, and
   (b) whether or not the work was carried out in a reasonable manner, and
   (c) the fairness and reasonableness of the amount of the costs in relation to that work.

46. It is on the basis of whether the work was fair and reasonable that Ms Whelan makes her assessment, coming to the opinion that a fair and reasonable sum for costs and disbursements in the circumstances is $100,542.10.

47. The defendants failed to make disclosure as to an estimate of costs as required by s177 (1). In addition s177(3) of the LPA requires a solicitor to continually disclose to the client any significant increase in an estimate provided in a cost agreement. It seems to me the defendants failed to disclose to the plaintiff either an amount of costs to be charged or an estimate of those costs until 24 August 2005. The Conditional Costs Agreement of 4 December 2003 stated, "Because of the nature of your case it is not possible to give an estimate of the total costs which we will

charge at this stage but will do so prior to settlement", but this does not obviate the defendants from their obligation to disclose. The Conditional Costs Agreement was not provided to him until a substantial amount of professional costs had already been incurred and the next notification was not until August 2005. The Fee Ledger as of 28 November 2003 disclosed disbursements of $3,819.92. There was no continual disclosure despite the significant costs being incurred. Thus the mandatory requirement was not fulfilled.

48. As a result of failure to comply with the LPA then a costs assessor assesses costs on the basis of fair and reasonable costs for work reasonably done and in a reasonable manner. Ms Whelan therefore assessed the costs on her estimate of work done in a fair and reasonable manner. She sets out in full her reasoning, saying that practically speaking if full and proper disclosure is not made in accordance with s175 then a cost assessor would assess on the basis of fair and reasonable. She also notes that s182 provides that if a solicitor fails to make disclosure then the client need not pay the costs unless the costs have been assessed under Division 6 noting s208C(4).

49. Counsel for the defendant submits Ms Whelan has used a methodology which changes the contractual terms on the basis of what is fair and reasonable. It is submitted she changed the contractual terms relating to the retainer of counsel and in respect of the discretion of the solicitor to be able to call for counsel's assistance for certain tasks and has also changed the contractual terms relating to the hourly rates of people in the class of solicitors, paralegals and administrative support. It is further submitted she has changed the contractual provisions in so far as they relate to the capacity to charge a success fee being a 25% uplift on professional costs and on paid disbursements and that there is no doubt the outcome of the plaintiff's medical negligence claim was successful. It is submitted the reason this distinction may be important is that the plaintiff had the opportunity to make an application to have a bill of costs assessed. It is therefore submitted that having cast his claim in contract, the question should be asked as to whether costs should be assessed in accordance with a fair and reasonable assessment under the LPA or done in accordance with ordinary contractual principle

50. It is submitted that if the matter is assessed on ordinary contractual principles then what must be paid to the plaintiff is the amount of fees in relation to the workers

compensation claim which were charged, and in respect of the obvious errors in relation to time entries, and also any duplication of matters set out in the fees ledger. As well, a repayment should be made relating to the increase in fees from 2 June 2005 to the conclusion of the matter. I should here note that whilst some obvious errors in respect of time entries and of duplications were pointed out by senior counsel for the plaintiff and agreed by Ms Pechanats, the Fee Ledger is some 118 pages long and to analyse each entry was clearly not able to be done during this trial. It is enough to say there were many obvious errors.

51. It is further submitted by the defendant that in respect of the Conditional Costs Agreement the defendant's were entitled to enter into that agreement in reliance upon Sections 186 and 187 of the LPA. It is accepted that under Sections175 and 176 of the LPA there was an obligation to make disclosure, with such disclosure being in writing either separately or in a costs agreement or in any other contract relating to the provision of the services of the legal services concerned. In respect of Section 175 (2)(a) which requires a disclosure of the amount of costs if known, I am referred to an exception to disclosure in Section 180. This states that disclosure is not required to be made under that division if in the circumstances it is not reasonably practicable to do so. Ms Pechanats said in evidence that she was unable to assess the costs at that time as she was still exploring whether there was a claim available at all and the fee agreement as sent notes the defendants was unable to estimate costs at that time. However that situation continued with no attempt at disclosure until August 2005.

52. In relation to Counsel's fees the defendant says that it was not possible for the defendant's to estimate what fees were about to be incurred as it was impossible to determine how much work would need to be done to prepare the claim for hearing and thus it was not practicable to give an estimate of fees. In all it is submitted by the defendant that there has been sufficient disclosure of matters contained in Sections 175 and 176 of the LPA.

53. As at July 2005 it is submitted by the defendant the evidence was substantially complete and the matter was listed for directions in the District Court. It was then set down for hearing and a settlement conference took place on about 23 August 2005. It is submitted that at that time a disclosure was made as to the estimated costs and the likely exposure to Counsels fees should the matter proceed to

hearing. It is submitted that is a significant issue, which stands to the credit of the defendants in that the plaintiff was kept informed at that time. I do not agree.

54. I am satisfied the costs agreement did fail to comply with the LPA as detailed by Ms Whelan.

55. In relation to some of the disbursements relating to medical reports, Ms Whelan disallowed a number of reports because she attributed them to the workers compensation proceedings. However the defendant says whilst they may have been deployed in the workers compensation proceedings, the reports were prepared for the medical negligence proceedings and the fact that all the same reports were used does not mean they are not claimable as an expense or a disbursement. It is conceded that there is a degree of overlap.

56. In relation to Counsel's fees it is submitted this was a complicated matter, which required extensive use of Counsel. I advised the parties that I though it eminently reasonable to engage the service of senior counsel in a medical negligence matter. The real issue in relation to Counsel's fees is whether the contingency fees for the days set aside ought to be allowed or not. It is not known if any enquiry was made of Counsel as to their commitments for the further days of hearing which were not utilised. Of course, given the status of Ms Pechanat's description of her classification as partner/accredited specialist/special counsel it could reasonably be assumed she was familiar with both medical negligence litigation and workers compensation matters and would thus be competent in those areas without unnecessary reliance on Counsel for a lot of the work required.

57. It was submitted by counsel for the defendant that the Conditional Costs Agreement advised the plaintiff that he was entitled to have the charges made in a bill of costs assessed for their fairness and reasonableness by an assessor appointed by the Supreme Court, and that it was not necessary for the defendants to advise him of the time limit in which any application to have those costs assessed should be made. It is common between the parties that such time limit is 12 months. Counsel for the defendant submits that the disclosure required advising the client of a right to have a bill assessed rather than to set out in full all the associated regulations including time limits and on that basis says that there has been sufficient disclosure of the matters contained in s175 and s176 of the

LPA. On that basis he is of the opinion that there is a limitation on assessing on a fair and reasonable basis and thus any costing should be assessed on the basis of contractual entitlements bearing in mind the concessions made by the defendant.

58. I accept the submissions of senior counsel for the plaintiff that clearly this is a claim for breach of contract claiming damages, and as such noting the breaches of the LPA I am satisfied that the legal consequences are that failure to comply with the LPA are that the defendant is only entitled to costs which are fair and reasonable.

59. Having considered the submissions made it is my view that the plaintiff must succeed in his claim for breach of contract, thus I do not turn to consider the alternative breach alleged of s42 of the Fair Trading Act 1987.

60. Quite clearly the defendant has overcharged the plaintiff. As noted before the total which is not contested is the sum of $18, 859.60. As well it does not appear to me that the sum of $2,000 which was transferred from the trust account and is noted on the reconciliation statement as trust transfer from 31237 to 60164 is properly accounted for and appears to be an extra amount charged to the plaintiff. As well the item noted as out of pocket expenses Dr V Zepenic, $2,925.00 does not appear to be explained in any manner.

61. I have come to the conclusion that in respect of counsel's fees I should allow some of D Wheelahan QC fees as follows:

Brief on hearing	$7,920.00
Conference 19 December 2003	$990.00
Summary/schedule/assessment	$3,960.00
Preparation/opening/conference/advice	$7,920.00
Conference 8 November 2005	$2,475.00
Total	**$23,265.00**

62. My reasons for allowing those matters are that I believe medical negligence matters are a proper matter in which to brief senior counsel, even considering that

the practitioner having conduct of the claim was one whose professionalism was adjudged to be of a high standard reflected in her hourly rate.

63. In relation to junior counsel E. Romaniuk I am prepared to allow the following matters:

Brief on hearing	$3,300.00
Conference and preparation 11 November 2005	$1,320.00
Conference Dr Darveniza & Ms Pechanats	$880.00
Conference Prof Tracy & Ms Pechanats	$660.00
Advice	$330.00
Draft pleadings	$1,760.00
Advice on liability	$330.00
Response to particulars	$1,760.00
Schedule relating to quantum	$880.00
Conference in respect of settlement negotiations	$2,200.00
Conference/consultation with senior counsel	$880.00
Total	**$14,300.00**

64. All of those costings appear to me to be reasonable given the circumstances of the claim and were in my view properly incurred.

65. In relation to professional costs I am guided by the opinions of Ms Whelan and Mr Boyd-Boland. To that end I have come to the conclusion that I should allow professional costs in the sum of $60,000 with GST of $6,000 making a total sum of $66,000. I therefore set out my calculations in respect of costs and disbursements calculated on the basis of the comments of Ms Whelan and the schedule prepared by her set out on the basis of these being fair and reasonable costs.

Professional costs	$60,000.00
GST on professional costs	$6,000.00
	$66,000.00
Disbursements incl. GST	
E. Romaniuk	$14,300.00
D. Wheelahan	$23,265.00
J. Donohue	$605.00
R. Taylor	$2,640.00
Dr Mohammed	$770.00
S.S.W.P.H. Clinical notes	$214.50
Dr Zaki	$786.50
St George Private Hospital clinical notes	$110.00
Dr Wines	$1,210.00
Prof Tracy – 5 reports	$3,625.00
Dr Hugh	$1,787.50
Dr A Conway	$880.00
Dr P Jungfer	$2,090.00
Dr Breslin	$1,138.50
Dr Molley Dr Daveniza	$962.50 $440.00
Dr Mohammed – teleconference with D. Wheelahan	$100.00
Interpreters fees	$5,006.65
District Court filing fees	$2,870.65
Registration & service fees	$444.60
Conduct money	$512.00
Facsimiles (not incl w/c) related faxes	$500.00
Photocopying	$5,000.00
	TOTAL $135,258.40

The calculation is thus:

Settlement of medical negligence claim inclusive of costs	$450,000.00
(Less) Defendants professional costs and disbursements	$135,258.40
(Less) Payment to Health Insurance Commission	$1,313.05
(Less) Payment made to S. Bazdarov	$153,417.94
Balance	**$160,010.61**

66. Accordingly there will be a verdict and judgment for the plaintiff in the sum of $160.010.61 together with interest on that amount calculated by reference to s100 of the Civil Procedure Act 2005.

67. No submissions were made in respect of interest. The order I propose is that the parties are to provide a short minute of interest calculations prepared in accordance with District Court practice note 15 (a copy of which is annexed) and subject to any submission to the contrary the interest is to date from 23 February 2006 (being the date of reconciliation statement sent to the plaintiff) up to the date of judgment.

68. Defendant to pay plaintiff's costs.

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

Mr J Morris appeared for the defendant instructed by Verekers Lawyers