IN THE DISTRICT COURT
OF NEW SOUTH WALES
CIVIL JURISDICTION

COLEFAX SC DCJ

4 FEBRUARY 2011

ANDREW MARSHALL

v.

STACKS/GOUDKAMP PTY LIMITED

Matter No. 295654 of 2007

REASONS FOR JUDGMENT

The Nature of the Application:

1. By an Amended Notice of Motion ("the Notice of Motion") the applicant, Stacks/Goudkamp Pty Limited ("Stacks"), the defendant in the primary proceedings, seeks an order pursuant to section 348 of the *Legal Profession Act* 2004 and/or sections 98 and 99 of the *Civil Procedure Act* 2005 that the respondent, Keddies Solicitors ("Keddies"), the former solicitors for the plaintiff in the primary proceedings, indemnify Stacks for costs payable or incurred by it in those proceedings.

2. The application is opposed.

Factual Background:

3. Very few of the facts relevant to the determination of the issues raised on the present application were in dispute. They can be summarised as follows.

4. On 19 September 1984 a child (Matthew) was born to Mr & Mrs Marshall.

5. As Matthew entered adolescence difficulties arose in the Marshall household. Ultimately, in August 2000 Matthew commenced living at the Burnside Homes conducted by the Uniting Church at Eastwood.

6. In early December 2001 Matthew was killed in a motor vehicle collision.

7. Matthew's death directly gave rise to three separate sets of "proceedings".

8. First, the driver of the vehicle which killed Matthew was prosecuted. In July 2002 he was committed for trial in this Court and a hearing date was fixed for November 2002 ("the criminal proceedings").

9. Secondly, Mr & Mrs Marshall brought a claim against the third party insurer of that driver ("the Allianz claim"). The Allianz claim was

settled on 11 November 2002 without a Statement of Claim being filed.

10. Thirdly, Mr & Mrs Marshall brought proceedings in this court against the Uniting Church ("the Burnside proceedings"). Those proceedings did not proceed to a hearing but were dismissed on 9 February 2005.

11. At the time the Allianz claim was settled, Mr & Mrs Marshall were represented by Stacks.

12. On 20 December 2007 Keddies acting on the instructions of Mr Marshall filed a Statement of Claim in his name in this Court asserting that Stacks had acted negligently in carrying out Mr Marshall's instructions to settle the Allianz claim and claimed damages (those proceedings are the primary proceedings).

13. The primary proceedings were listed for hearing before me on 29 June 2009. They continued up to and including 2 July 2009. On that latter date, and whilst Mr Marshall (the first – and only witness) was still in cross-examination, the hearing was adjourned part-heard to 2 November 2009.

14. Mr Marshall never returned to the witness box and no further evidence was adduced.

15. On 2 November 2009 Mr Marshall was not present at court. The reasons for his absence were then unknown to his legal advisors. The hearing was therefore adjourned to 4 November 2009.

16. On 4 November 2009 Mr Marshall was present at court. However, at the resumption of the hearing Keddies sought and was granted leave to file a Notice of Ceasing to Act and counsel who had until then appeared for Mr Marshall (Mr Kelvin Andrews) was granted leave to withdraw. I adjourned the hearing of the matter (over the objection of Stacks) to 8 February 2010 to allow Mr Marshall either to obtain further legal representation or to prepare to conduct the case himself.

17. On 8 February 2010 Mr Marshall had not retained further solicitors; nor was he ready to proceed to further prosecute the case. The matter was stood over to 17 May 2010 for Mr Marshall to show cause why the proceedings should not be struck out.

18. Shortly before 17 May 2010 Mr Marshall filed a purported Notice of Discontinuance. This notice was not in proper form because the defendant had not given its consent to it being filed; nor had the court's leave otherwise been obtained. Consequently the notice was rejected. Mr Marshall was not present. In the result, the proceedings were dismissed and an order was made that Mr Marshall pay Stacks' costs. In addition to that order, Stacks sought and obtained leave to

file the Notice of Motion (subsequently amended) to which I referred at the commencement of these reasons.

The Conduct of the Notice of Motion:

19. The hearing of the Notice of Motion was originally to have taken place on 9 August 2010. Unfortunately it did not proceed on that day because difficulties had been experienced in obtaining Mr Marshall's express waiver of privilege. Ultimately the hearing of the Notice of Motion commenced on 15 November 2010.

20. Directions were made for the evidence in-chief of all witnesses on the Notice of Motion to be given by way of affidavit.

21. In opposing the Notice of Motion the respondent relied upon affidavits sworn by two of the three senior solicitors who had had daily conduct of the matter for Mr Marshall and by the supervising partner in Keddies.

22. The giving of evidence in-chief by affidavit is, and has been for some time, an increasingly common feature of modern litigation and it has a number of clear and well understood benefits. It is not however without its critics (see for example *Thomas & Ors v SMP (International) Pty Limited & Ors* [2010] NSWSC 822).

23. In this present case at least one of the three witnesses relied upon by the respondent (Mr Thornton) did not review Keddies' file before he swore his affidavit – not even that part of it which concerned the period for which he was responsible for the day to day conduct of the matter. The affidavit apparently was prepared for the witness by others who had reviewed the file (Transcript 16 November 2010, page 12).

24. This is a highly unsatisfactory situation because the affidavit cannot truly be said to have been the evidence of the witness.

25. Although in the present case (and with some previously unexpressed hesitation) I permitted the witness to continue his evidence (the revelation as to the manner of the affidavit's preparation only emerging in cross-examination), it cannot be assumed that such a practice would in future result in such a benign result. Depending on the specific circumstances there is a real prospect, at least so far as I am concerned, that in any future instance such an affidavit would be rejected; and it could not safely be assumed that there would be an adjournment (even with costs) to allow the affidavit to be re-drafted; or for the witness to give *viva voce* evidence (cf *AON Risk Services Australia Limited v Australian National University* (2009) 258 ALR 14).

26. The evidence in the primary proceedings occupied one full day and two part days.

27. In the Notice of Motion:

(a) the applicant ultimately relied upon a Further Amended Points of Claim running to 45 pages and 168 paragraphs;

(b) the respondent relied upon a Defence to the Further Amended Points of Claim of 11 pages and 95 paragraphs;

(c) the applicant made an opening which extended for two days;

(d) the taking of evidence on the application occupied five days;

(e) the applicant filed primary Submissions of 110 pages;

(f) the respondent filed primary Submissions of 44 pages;

(g) the applicant filed Submissions in Reply of 8 pages;

(h) the respondent filed Submissions in Reply of some 16 pages.

28. An application for costs, especially in circumstances where no judgment on the merits was involved (and indeed the evidence was stopped at a relatively early stage in the proceedings) is not an appropriate medium for such a detailed analysis of the strength or otherwise of a plaintiff's claim.

29. The history of this application therefore lends considerable force to the warning prophetically given by the Court of Appeal in *Lemoto v Able Technical Pty Limited* (2005) 63 NSWLR 300 per McColl JA (with whom Hodgson and Ipp JJA agreed) at [195] and [196]:

> "Finally, as I earlier noted ..., in *Ridehalgh* (at 238-239) the Court of Appeal warned that judges 'must be astute to control what threatens to become a new and costly form of satellite litigation'. Despite this warning the House of Lords observed in *Medcalf* (at 129[13]): '... [T]he clear warnings given in [*Ridehalgh*] have not proved sufficient to deter parties from incurring large and disproportionate sums of costs in pursuing protracted claims for wasted costs, many of which have proved unsuccessful'.
>
> What has happened in this case is a salutary warning to courts to ensure that Div 5C applications do not assume a costly life of their own."

30. Accordingly, and with due respect to the considerable effort and detail gone into the submissions by the parties, I shall confine these reasons to broader considerations.

The Relevant Principles:

31. The common law is an organic system of law extending back over 1,000 years. A hallmark of that system is its capacity to change over time – sometimes radically and quickly.

32. Courts in this country traditionally have been reluctant to impose personal costs orders on solicitors for fear that such costs orders might discourage solicitors from undertaking difficult litigation. Even so,

the common law gave courts jurisdiction to make personal costs orders against solicitors in circumstances where those solicitors brought what has been described as "a hopeless case". An example of such a "hopeless case" is "... where there was no evidence to support an essential element of a cause of action" (see *Lemoto* at 326 [114]).

33. Parliament however has imposed its will on this situation by inserting Division 5C into the *Legal Profession Act*. In doing so Parliament clearly intended to change the practice which obtained before the enactment of that Division.

34. The leading authority on the principles informing the exercise of the discretionary power given in section 348 of the *Legal Profession Act* is *Lemoto*. But as McColl JA makes clear in *Lemoto*, it was not Parliament's intention to sterilise the organic operation of the common law (my words, not her Honour's). As her Honour further made clear, an application of the section requires a balancing of competing public interests; and consequently the circumstances in which a personal costs order will be imposed upon a solicitor must be approached cautiously and availed of only in clear cases (see also *Fowler & Ors v Toro Constructions Pty Limited* [2008] 178).

35. It is important to note that in *Lemoto* the Court of Appeal specifically approved of the judgment of Barrett J in *Degiorgio v Dunn (No. 2)*

(2005) 62 NSWLR 284 in which his Honour, inter alia, considered the meaning of the expression "without reasonable prospects of success". Barrett J held that that expression "equates" with "so lacking in merit or substance as to not be fairly arguable" (see *Lemoto* at 331).

Consideration

36. Stacks were retained by Mr Marshall to act for him in the Allianz claim. Mr Marshall was not suffering from any legal disability.

37. The Allianz claim was a claim for damages for nervous shock and initially included components of economic loss and non-economic loss.

38. Central to a successful claim for nervous shock is proof that the plaintiff suffered from more than a normal grief reaction.

39. Additionally where such a claim arises out of a motor vehicle accident, in order to obtain non-economic loss, the plaintiff must establish a level of disability which exceeds the prescribed threshold for a whole person impairment (10%).

40. Stacks were retained by Mr Marshall on or about 30 June 2002. On 11 November 2002 Mr Marshall, through Stacks, entered into a settlement of the Allianz claim.

41. In the period under consideration, Mr Marshall was subject to understandable emotional stress arising out of or otherwise connected with his son's death. One particular stressor of relevance was the hearing date of the criminal proceedings which had been fixed for November 2002.

42. Also in the period under consideration Mr Marshall's attitude to settlement and/or pressing on with the claim fluctuated markedly – and his written instructions (which I note were "co-authored" with his wife, who may well have been the principal author) were expressed on occasions in an emotional way.

43. That being said, there was nothing remarkable about Mr Marshall's claim compared to many other plaintiffs personal injury claims or any other form of litigation. Experience shows that in almost every litigated case involving individuals, those individuals (as opposed to large corporations) are affected by occasional high emotion and insecurity.

44. The settlement occurred contrary to Stacks' express advice and at the insistence of Mr Marshall. It did not include any component for non-economic loss (Mr Marshall declined to attend any medico-legal examination); and was limited to a very small amount for past economic loss and some out-of-pocket expenses.

45. In November 2004 Mr Marshall was referred to Keddies by a psychiatrist, Dr Hampshire. One of the matters Keddies gave consideration to at the commencement of their retainer was whether Stacks had been negligent in the manner which they settled on Mr Marshall's behalf the Allianz claim.

46. Keddies quickly formed their own view that such a claim was arguable. In May 2005 Keddies sent a brief to advise to Mr Andrews of counsel. He provided advice in conference on 21 September 2005. There is no detailed note of that conference or the advice; however, in a letter to Mr Marshall dated 21 September 2005 Keddies stated that "... Mr Andrews indicated to you that he believed that you certainly had a reasonable case ...". If that were Mr Andrews' opinion at that time it was not so when he wrote a lengthy letter of advice on 11 December 2007 by which stage he had "... had the opportunity of perusing the entirety of the proposed Defendant's file in this matter". Contrary to his earlier advice, Mr Andrews was pessimistic as to prospects but that pessimism did not extend to saying that Keddies could not provide any legal service without breaching section 348 of the *Legal Profession Act*. Indeed, counsel provided Keddies with legal services in the form of a draft Statement of Claim which implicitly conveyed the advice that the claim, although fraught with

difficulties, was not entirely hopeless. Counsel provided the draft Statement of Claim for negotiation purposes only. He did not at that time expect an engrossed version to be filed.

47. The Statement of Claim was, however, filed (and no draft had been served for negotiation purposes) and ultimately the proceedings were heard by me in June 2009.

48. The Statement of Claim, and the opening by counsel on the hearing of the primary proceedings, were to the effect that in various ways Stacks had been negligent in the manner in which they carried out Mr Marshall's instructions concerning the settlement. Specifically, it was asserted that:

(a) Stacks ought to have insisted on Mr Marshall attending upon a psychiatrist (not that there was any doubt as to his legal capacity);

(b) Stacks ought to have insisted on Mr Marshall seeking a second and independent legal opinion; and

(c) Stacks ought to have ceased to act for Mr Marshall if he did not do either of those things.

49. In a case where a client was informed of all relevant matters; where the solicitor had advised against settlement without further investigations; and where the client ultimately gave clear instructions to settle (all of which features are here present), any action in negligence or breach of retainer against the solicitors would, in general terms, face considerable difficulties.

50. A contention that in those circumstances:

(a) the solicitor should insist on the client obtaining independent legal advice (to be paid for by the client); or

(b) the solicitor should insist on the client undertaking a particular forensic step, also to be paid for by the client (here the undergoing of a psychiatric examination); and,

(c) in default of the client doing those things, the solicitor should cease to act (- and here in circumstances where such conduct would be in breach of the contract of retainer)

would have no real prospects of success (in the sense that it was so lacking in merit or substance as not to be fairly arguable). Any solicitor acting for a client in pursuit of such a claim would therefore contravene section 348 as explained by *Lemoto*. (In this context, I note that one of the experienced senior solicitors who acted for Mr

Marshall, Mr Thornton, admitted in cross-examination on the present application that he had been unable to find any legal authority to support the claim being advanced on behalf of Mr Marshall (neither of the other two solicitors gave evidence either way on this topic); nor had counsel for Mr Marshall been able to point to any such authority in his opening in the primary proceedings. Indeed no such authority was identified by Keddies in their detailed written submissions on the present application.)

51. In my opinion the above conclusion would apply regardless of whether the relevant retainer were a plaintiff's personal injury claim, a commercial claim, an equity suit or otherwise. I see no reason why the obligation on a solicitor acting for a plaintiff in a personal injuries action should relevantly be different to any other retainer.

52. In opposing the Application for Costs, however, Keddies submitted that the difficulties confronting the plaintiff in bringing such an action were not insurmountable and the claim was not hopeless if the plaintiff succeeded in proving that he did not relevantly give informed instructions – and in circumstances where the solicitor knew or ought reasonably to have known that the client was not giving informed instructions.

53. If that had been Mr Marshall's case in the primary proceedings, I would have found that although it would have been a difficult case to run, nevertheless it would have had reasonable prospects of success in the sense that it was fairly arguable.

54. That however was not the plaintiff's case in the primary proceedings. The issue of the plaintiff not giving informed instructions was not raised in the proceedings until the provision of written submissions on behalf of Keddies at the conclusion of the present application. Specifically it was not expressly pleaded in the Statement of Claim (and it ought to have been); it was not articulated in the opening of the primary proceedings; it was not averted to by any of the three solicitors who gave evidence on behalf of Keddies; and it was not expressly raised by Keddies in paragraph 15 of their Points of Defence to the Further Amended Points of Claim (which, if it were being relied upon, it ought to have been clearly and expressly "pleaded"). Indeed, it was inferentially acknowledged in the written submissions by Keddies that the claim so expressed was not previously articulated by Keddies on behalf of Mr Marshall.

55. The contention concerning "an informed instruction" was something raised and relied upon by Keddies for the first time only when they came to prepare their final submissions. In my view it was correctly

characterised by Stacks in their Submissions in Reply as Keddies' "new case".

56. In many cases, after the event and with a different set of legal eyes, an alternative approach to a client's case can be constructed. Such an approach however would subvert the clear purpose of section 348.

57. Accordingly, in the filing of the Statement of Claim and the continuation of the proceedings, at least until 3 July 2009, Keddies were in breach of section 348 of the *Legal Profession Act* in that the pleaded case did not have reasonable prospects of success. Prima facie therefore a personal costs order could be made against Keddies. Section 348 however retains a discretion in the court not to make such an order even if the necessary circumstances have been established. No submission was made by Keddies as to why such an order should not be made if the necessary preconditions were established and I can see no reason why it should not be made.

58. Alternatively, if I am wrong in the conclusion I have just expressed, it is not a sufficient discharge of the statutory duty imposed by section 384 if the subject matter of the relevant proceedings is a professional negligence action based on tort to have evidence available which only establishes mere breach of duty. A cause of action of tort is not complete until a plaintiff also proves damage and causation. Here,

however, at no time did Keddies have available to them evidence to prove either of those elements. For example, they had:

(a) no instructions as to whether, if a medico-legal examination with a psychiatrist had been arranged by Stacks, he would have attended such an examination (in fact when evidence was given on this topic during the cross-examination of Mr Marshall he said he would not have attended any such examination);

(b) no instructions as to whether, if Stacks had ceased acting for him, Mr Marshall would not have settled his claim with Allianz in any event;

(c) no instructions as to whether Mr Marshall would have undertaken an assessment MAS in respect of his third party motor vehicle claim;

(d) no instructions as to whether Mr Marshall would have attended a CARS assessment in respect to his third party motor vehicle claim;

(e) no medical evidence to indicate that Mr Marshall suffered from anything other than a normal grief reaction or that he would have exceeded the 10% whole person impairment under the

Motor Accidents Act either at 2002 (the date of settlement) or 2004 (the notional trial date);

(f) no instructions that if Stacks had referred him for independent legal advice he would have attended to receive such advice;

(g) no instructions that if Mr Marshall had obtained independent legal advice in 2002 he would have followed such advice – assuming the advice were different to that provided by Stacks.

59. Where a cause of action is based upon breach of contract, that cause of action is complete upon the plaintiff proving the breach. However, in most cases it would be incumbent upon a plaintiff to also have available to it evidence of damage before commencing proceedings in order to avoid the perils of section 348. (I have said that this is so "in most cases". There may well be situations where it is sufficient in a contract case for a plaintiff simply to prove the breach. This may be so for test cases; or it may be so where there is an ongoing commercial relationship between the plaintiff and the defendant. Other circumstances might be imagined. However that is not this case.)

60. Therefore, even if Keddies could now seek to rely on their "new case" it would still have been brought in breach of section 348.

61. On 2 July 2009 Mr Marshall gave evidence in cross-examination which caused extreme concern to counsel retained on his behalf. Mr Andrews set it out in a detailed letter of advice stated 3 July 2009. It is appropriate to refer to the terms of that letter:

> "...
>
> In relation to the Plaintiff's evidence, it should be noted that it is my opinion that the Plaintiff will not succeed in this claim.
>
> The Plaintiff has now given evidence that he would not have attended upon the psychiatrist for the purpose of obtaining a medico-legal report, even if the Defendants had arranged it. His evidence is, and it has been put to him on a number of occasions, that he did not want to attend any psychiatrist as he did not want to go through relating what had occurred in relation to his dealings with Burnside about the care that had been provided to his son.
>
> ...
>
> The effect of this evidence is therefore that the Plaintiff would not have consented to being examined by a psychiatrist prior to the notional trial date, and accordingly would not be entitled to any non-economic loss. The only medical evidence that would have been available is the medical report of Dr Richardson, who indicated the Plaintiff was improving and he expected total resolution of his symptoms apart from some minor exacerbations at anniversary times in the future.
>
> Leaving aside for one moment Dr Durrell's error in referring to the WorkCover guidelines, it is apparent that at the time Dr Durrell examined the Plaintiff his assessment of his whole person impairment was not correct. Dr Durrell took a history that the Plaintiff was not capable of extensive work at that time but the evidence discloses that the Plaintiff was working extensively at that time. This would therefore mean that even it were shown that Dr Durrell had assessed it pursuant to the *Motor Accident Act* his assessment was wrong, and therefore on

the balance of probability the Plaintiff would not have had a greater than 10% whole person impairment.

The matter is further exacerbated by the fact that the Plaintiff has given evidence that prior to his son's accident there had been substantial trauma in the house which had created an extremely stressful environment. This stressful environment is contrary to the history that was provided to Dr Durrell, and therefore contrary to his assessment, which requires a reduction for pre-existing conditions.

...

As can be seen from the above analysis, in my view the Plaintiff's claim is very small indeed.

In relation to the question of liability, the evidence is clear that the Plaintiff would not have followed the advice, even if he had not the strain of the criminal proceedings, as clearly after those proceedings he still refused to follow the advice of his solicitors.

In my view the court would have to find on the current evidence that the Plaintiff would not have followed his Solicitor's advice, and would have continued to have insisted that the matter settle without appropriate evidence. If the solicitors had ceased to act, which would have been their only course of action, then on the balance it is my view the court would find the Plaintiff would have continued to negotiate with Allianz himself and eventually resolve the matter.

Accordingly, it is my opinion that the plaintiff should not pursue this claim any further.

...

Accordingly, it is my opinion that instructions need to be taken to endeavour to resolve this matter at all costs, as any result, assuming a breach of duty can be found, will be minimal, and would not certainly not result in any damages being awarded to the Plaintiff and on the balance of probability there will be a verdict in favour of the Defendant with the resultant costs orders." (emphasis added)

62. It has been submitted by Keddies that because counsel did not expressly advert to section 348 in the letter of advice of 3 July 2009 and further gave advice as to steps to be taken between July and the resumed hearing date, he necessarily could not have been of the view that section 348 was in danger of being breached.

63. I reject that submission. Although counsel did not expressly refer to section 348, his intention was plain. This conclusion is reinforced by the consideration that nothing forensically significant occurred between 3 July and 2 November 2009 when counsel and Keddies ceased to act. If the conditions in November were such that the provision of legal services constituted a breach of the section, then the same consideration applied in the period between July and November.

64. The statement in the preceding paragraph is subject to the following proviso. Some latitude must necessarily be given to allow solicitors to seek to extricate clients and not to suddenly abandon them if, as in the instant case, counsel formed the view in the light of evidence given that the case became hopeless. But that is not what here occurred. Surprisingly, Keddies deliberately withheld Mr Andrews' important advice from Mr Marshall for months whilst unrealistic settlement offers were made. This conduct was an unacceptable departure from proper practice. Counsel had been involved in the case for a very long

time. The relevant solicitor had only been involved in the matter for a very few days and had an incomplete knowledge of the evidence and the case. He had undertaken no review of the relevant legal principles. No proper basis for withholding counsel's advice from the client was provided. It was submitted that the fact that the client was in cross-examination was such a reason. However, the client was still in cross-examination when a copy of that very same advice was given to him some months later. There was no proper excuse for the delay in conveying Mr Andrew's advice – or even an edited version if some parts were considered problematic.

65. By their conduct between July and November 2009, I am satisfied the solicitors had continued to breach section 348. Prima facie the personal costs order should be made which covers the period and there is no factor which persuades me not to make such an order.

66. In the alternative to the claim based on section 348 of the *Legal Profession Act*, Stacks submitted that a personal costs order ought be made pursuant to section 99 of the *Civil Procedure Act*. Given my conclusions regarding section 348, it is not strictly necessary to consider that alternative basis. However in the event that this matter proceeds further, I should say something briefly about this alternative claim.

67. The alternative claim had two discrete bases.

68. First, that the proceedings had been brought and continued for an improper purpose, viz Keddies agreed to bring the claim against Stacks on behalf of Mr Marshall in exchange, in effect, for Mr Marshall discontinuing a professional conduct complaint against Keddies in connection with their brief handling of the Burnside proceedings. I am not satisfied on the balance of probabilities that that was so. Rather, I am satisfied that it is most improbable that Keddies acted in that way for the reasons advanced by Keddies in their written submissions in this application.

69. Secondly, that there were many instances in the conduct of the matter generally by Keddies in which there were substantial departures from acceptable professional conduct.

70. Unfortunately in my opinion it is correct to say that there were many disturbing departures by Keddies during the course of their retainer from what I regard as acceptable and proper conduct as a solicitor. Those matters included (somewhat ironically given the nature of Keddies' "new case" in the present application):

(a) failing to provide Mr Marshall with a copy of Mr Andrews' heavily qualified letter of advice of 11 December 2007 or otherwise informing him of the contents of the advice;

(b) commencing the proceedings without the express instructions from Mr Marshall (and given that Mr Marshall did not have Mr Andrews' advice without his informed instructions);

(c) commencing the action against Stacks without an appropriate expert's report;

(d) failing to inform Mr Marshall of the difference of opinion held by counsel retained in the matter and a preliminary informal opinion of the proposed expert witness and that of the instructing solicitor;

(e) failing to advise Mr Marshall at any time of the absence of any legal authority to support his claim (as drafted);

(f) failing to inform and advise Mr Marshall of the expert opinion obtained by Stacks;

(g) failing to inform Mr Marshall of the reasons why senior counsel had declined to accept a brief to appear;

(h) failing to promptly inform Mr Marshall after 3 July 2009 of Mr Andrews' advice so that Mr Marshall's subsequent instructions as to settlement could be informed instructions.

71. Those breaches, however, whether singularly or collectively, are not of the kind contemplated by section 99. They are more relevant in my view to a potential professional negligence case or a conduct investigation by the Legal Services Commissioner. I accept Keddies' submissions in reply that these breaches did not result in "wasted costs" (with which section 99 is concerned, compared to costs incurred where the proceedings had no reasonable prospects of success).

Conclusion:

72. In the circumstances, I have concluded that pursuant to section 348 of the *Legal Profession Act* an order ought to be made for Keddies to indemnify Stacks in relation to the primary proceedings and (subject to the qualification below) the (amended) Notice of Motion.

73. Insofar as the Notice of Motion is concerned, I have earlier noted the length of the interlocutory hearing for costs. It developed into a level of detail which I think ultimately was unnecessary and irrelevant to the issues which I have considered. It would not be reasonable to

require Keddies to totally indemnify Stacks for the totality of the Amended Notice of Motion. Accordingly, I shall order that only a proportion of those costs should be paid by Keddies.

74. However, the court cannot ignore the many serious departures from satisfactory professional conduct which have been revealed in the interlocutory application. Accordingly, I shall direct the Registrar of the court to provide the Legal Services Commissioner with a copy of these reasons.

Orders:

(1) Pursuant to section 348 of the *Legal Profession Act*, and subject to Order (2), Keddies Solicitors to indemnify Stacks/Goudkamp Pty Limited for costs payable or incurred by Stacks/Goudkamp Pty Limited in the proceedings brought in matter No. 295654 of 2007.

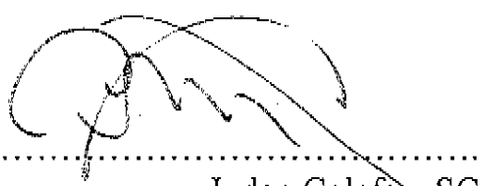
(2) Keddies to indemnify Stacks/Goudkamp Pty Limited for two-thirds of the costs payable or incurred by Stacks/Goudkamp Pty Limited in the Notice of Motion initially filed 17 May 2010 and amended on 12 August 2010.

(3) Direct the Registrar to provide the Office of the Legal Services Commissioner with a copy of these Reasons in order that the Commissioner may consider whether any legal practitioner

acting on behalf of Mr Marshall has engaged in professional misconduct or unsatisfactory professional conduct.

(4) Exhibits to be returned after 28 days.

DATED: 4 February 2011



Judge Colefax SC