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By fax: 2185 7845

20 March 2008

Miss Betty Ma
Clerk to Bills Committee
Legislative Council
3/F, Citibank Tower
3 Garden Road
Central

Dear Betty,

Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2007

At the meeting of the Bills Committee on 18 March 2008, upon the initiative of the Hon Emily Lau, Members requested that the Administration check whether there were in other jurisdictions wasted costs provisions relating to lawyers similar to those in England (section 19A of the Prosecution of Offences Act 1985) and Part 7 of the Statute Law (Miscellaneous Provisions) Bill 2007.

A good example (from Australia) is noted at paragraph 4 of the attached judgment (Rule 21.07 of the Federal Magistrates Courts Rules 2001). The grounds for ordering costs include "undue delay, negligence, improper conduct or other misconduct or default" (Rule 21.07(1)). Paragraph 7 of the judgment states, "The court has jurisdiction to award costs in all proceedings."

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General
(General Legal Policy)

#340207

FEDERAL MAGISTRATES COURT OF AUSTRALIA

TAYLOR v CGU INSURANCE LTD *[2005] FMCA 1073*

PRACTICE AND PROCEDURE – Whether unsuccessful party can recover costs ordered to be paid by own solicitor based on negligence – Rule 21.07 *Federal Magistrates Court Rules 2001* – whether separate negligence claim part of the accrued jurisdiction of the Court.

Trade Practices Act 1974
Federal Magistrates Court Act 1999, s.79,
Federal Court of Australia Act 1976, s.43(2)
Fair Trading Act 1987 (WA), s.10, 79

Re Wilcox; ex parte Venture Industries Pty Ltd (No 2) (1996) 72 FCR 151
De Sousa v Minister for Immigration, Local Government and Ethnic Affairs (1993) FCR 544
White Industries (Qld) Pty Ltd v Flower and Hart (a firm) (1998) 156 ALR 169
Lemoto v Able Technical Pty Ltd & Ors [2005] NSWCA 153
Myers v Elman (1940) AC 282
Etna v Arif (1999) 2 VR 353
Abrahams v Wainwright Ryan (1999) VR 102
Harley v McDonald (2001) 2 AC 678
Dempsey v Johnstone (2003) EWCA Civ 1134
Knight v FP Special Assets Ltd (1992) 174 CLR 178
Orchard v South Eastern Electricity Board (1987) 1 QB 565
Taylor v CGU Insurance Ltd (No2) [2004] FMCA 1000
Moorgate Tobacco Co Ltd v Philip Morris Ltd (1980) 145 CLR 457

Applicant:	ROBERT FLYNN TAYLOR
Respondent:	CGU INSURANCE LTD
File Number:	PEG 46 of 2004
Judgment of:	McInnis FM
Hearing date:	18 May 2005
Delivered at:	Melbourne
Delivered on:	2 August 2005

REPRESENTATION

Counsel for the Applicant:	Mr Giles
Solicitors for the Applicant:	Solomon Brothers
Solicitors for the Respondent:	No appearance
Counsel for Talbot & Olivier:	Mr G Pynt
Solicitors for Talbot & Olivier:	Pynt & Partners

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT PERTH

PEG 46 of 2004

ROBERT FLYNN TAYLOR
Applicant

And

CGU INSURANCE LTD
Respondent

REASONS FOR JUDGMENT

1. In this matter the court conducted a hearing of a claim by the applicant against the respondent seeking damages for alleged breach of contract or, in the alternate, damages for breach of the provisions of the *Trade Practices Act 1974* (the TPA). The hearing on 8 December 2004 resulted in a judgment being delivered on 22 December 2004 dismissing the application with costs. A counterclaim not pursued by the respondent was likewise dismissed. After hearing further submissions an order was made on 9 February 2005 in the following terms:-

> *"The applicant shall pay the respondent's costs including reserved costs in accordance with Schedule 1 of the Federal Magistrates Court Rules to be taxed pursuant to Order 62 of the Federal Court Rules."*

2. On 10 March 2005 the applicant filed an application seeking what is described as, "consequential orders concerning costs and other matters between the applicant and his former solicitors specified in annexure A." Annexure A provides:-

"AND THE APPLICANT CLAIMS:

(1) An order pursuant to rule 21.07 of the Federal Magistrates Court Rules 2001 that the applicant's former solicitors, Talbot & Olivier, pay to the respondent the costs that the applicant has been ordered to pay to the respondent;

(2) All solicitor/client costs paid to the applicant's former solicitors, Talbot & Olivier, as damages for contractual or tortious negligence or, alternatively, as moneys paid under a mistake of law or, alternatively, for damages under section 79 of the Fair Trading Act 1987 (WA) for contravention of section 10 of the act;

(3) A declaration that any further costs which may be claimed by the applicant's former solicitors, Talbot & Olivier, for services in or in connection with these proceedings are not recoverable;

(4) Interest on all amounts payable to the applicant pursuant to section 76 of the Federal Magistrates Act 1999 (Cth); and

(5) Costs."

3. The application was listed before a registrar of this court on 29 March 2005 who made orders as follows:-

"(1) The applicant file and serve written submissions on the issue of jurisdiction and power in respect to the orders sought in the interlocutory application filed on 10 March 2005 by 6 April 2005.

(2) Talbot & Olivier file and serve answering written submissions by 13 April 2005.

(3) The matter be listed for further directions and hearing before a federal magistrate on a date and time to be fixed by the registrar.

(4) Costs of today be reserved."

4. Rule 21.07 of the *Federal Magistrates Court Rules 2001* (the Rules) provides:-

"21.07 Order for costs against lawyer

(1) The Court or a Registrar may make an order for costs against a lawyer if the lawyer, or an employee or agent of the lawyer, has caused costs:

(a) to be incurred by a party or another person; or

(b) to be thrown away;

because of undue delay, negligence, improper conduct or other misconduct or default.

(2) A lawyer may be in default if a hearing may not proceed conveniently because the lawyer has unreasonably failed:

(a) to attend, or send another person to attend, the hearing; or

(b) to file, lodge or deliver a document as required; or

(c) to prepare any proper evidence or information; or

(d) to do any other act necessary for the hearing to proceed.

(3) An order for costs against a lawyer may be made on the motion of the Court or Registrar, or on application by a party to the proceeding or by another person who has incurred the costs or costs thrown away.

(4) The order may provide:

(a) that the costs, or part of the costs, as between the lawyer and party be disallowed; or

(b) that the lawyer pay the costs, or part of the costs incurred by the other person; or

(c) that the lawyer pay to the party or other person the costs, or part of the costs, that the party has been ordered to pay to the other person.

(5) Before making an order for costs, the Court or Registrar:

(a) must give the lawyer, and any other person who may be affected by the decision, a reasonable opportunity to be heard; and

(b) may order that notice of the order, or of any proceeding against the lawyer be given to a party for whom the lawyer may be acting or any other person."

5. In support of the application now before the court the applicant has relied upon an affidavit sworn by him on 9 March 2005. The respondent has yet to provide any affidavit material in reply and it is understood that no further material is required by the parties pending determination by this court of the threshold issue of whether indeed it is appropriate for this court to make orders of the type sought by the applicant.

6. In his affidavit the Applicant refers to advice allegedly received from his former solicitors who acted on his behalf throughout the substantive hearing. It is perhaps sufficient to note that the Applicant asserts that had he been informed by his then solicitor that the claim against the respondent involved "a high risk of losing" he would "not have proceeded with it". It is not necessary to refer in detail to other parts of the affidavit material for the purpose of the issue before this court for determination. It is sufficient, however, to note that having failed in his claim against the respondent, the main thrust of the submissions made for and on behalf of the applicant is that the solicitors then acting for and on his behalf ought properly to have advised him not to proceed with the application at the outset and/or ought to have discontinued and/or accepted offers from the respondent which included an offer that each party bear their own costs and the matter be discontinued.

The Rule 21.07 claim

7. The court has jurisdiction to award costs in all proceedings. The award of costs is in the discretion of the presiding Federal Magistrate. Section 79 of the *Federal Magistrates Act 1999* (the FMC Act) which appears to be almost identical with s.43(2) of the *Federal Court of Australia Act 1976*, confers an absolute and unfettered discretion to award costs, though the discretion must be exercised judicially (*Re Wilcox; ex parte Venture Industries Pty Ltd* (No 2) (1996) 72 FCR 151 per Black CJ at 152-153).

8. Rule 21.07 provides a broad power to make an order, relevantly for the present purposes, for costs against a lawyer who has caused costs to be

incurred, in this instance by the applicant, because of undue delay, negligence, improper conduct or other misconduct or default. There is no claim by the Applicant that the solicitors have caused costs to be incurred because of undue delay. In Rule 21.07(2) 'default' includes "failure to attend or send another person to attend a hearing, to file, lodge or deliver a document as required or prepare any proper evidence or information or do any other act necessary for the hearing to proceed". Those matters are not evident in the present application. Hence, I interpret the present application as relying upon that part of Rule 21.07(1) which refers to there being costs incurred by the applicant because of '**negligence**, improper conduct or other misconduct' (emphasis added) of the solicitors who had acted for and on behalf of the applicant.

9. I accept as submitted by the applicant that the power to order costs is not limited to the parties on record though the solicitors representing the parties may be the subject of a costs order against non-parties (see *De Sousa v Minister for Immigration, Local Government and Ethnic Affairs* (1993) FCR 544 at 546) (De Souza). It should be noted that in *De Souza* the Court considered the application of Order 62 Rule 9 of the Federal Court Rules which then provided as follows:-

> *"The Court or a Judge may, after reference to and report by the taxing officer, order a solicitor to repay his client costs ordered to be paid by the client to another party where those costs had been incurred by that party in consequence of delay or misconduct on the part of the solicitor."*

10. It is noted that since *De Souza* Order 62 Rule 9 was amended and a new Rule 9 was inserted by Statutory Rule 206 of 2003 which became operational on 11 August 2003. However, the new rule unlike Rule 21.07(1) of the Federal Magistrates Court Rules does not use the word "negligence". I accept however that in any event Order 62 Rule 9 and likewise Rule 21.07(1) of the Rules do not operate in a way which would constrain the powers conferred by s.43 of the Federal Court Act or s.79 of the FMC Act to award costs against a solicitor in *De Souza* at p.546 the Court in referring to the rule states, *"I cannot accept that it was intended to so constrain the broad power conferred by s.43"*.

11. The type of order now sought by the applicant against his solicitors could not have been included in any claim prior to judgment. The issue of costs remains alive as between the parties and I accept that although judgment has been given and an order for costs made, it remains open to the applicant to seek a further order in relation to costs of the kind now sought to be obtained pursuant to Rule 21.07. I further accept that the rule contemplates an order for costs against a solicitor may be sought after judgment has been given. Subrule 21.07(4) sets out the contents of the order and contemplates that in some instances an order may be made that a lawyer pay costs or part of the costs incurred by the other person, which in this case means the lawyer of the applicant pay costs incurred by the applicant. The costs may include those costs that the applicant incurred by engaging his own lawyers, together with costs that he has been ordered to pay to the respondent.

12. It is noted and I accept that Rule 21.07 certainly makes provision for a costs order to be made in circumstances where the court can be satisfied that the lawyer has caused costs by 'negligence', 'improper conduct' or 'other misconduct'. In this instance the primary claim of the applicant is negligence. In brief terms it has been submitted that a proper reading of the material at all material times would lead a lawyer to conclude that the application was doomed to failure and/or was hopeless and without merit from the outset. The material relied upon by the applicant could not have sustained a cause of action of the kind claimed, either in contract or under the TPA.

13. It is argued by the applicant and I accept that an order pursuant to Rule 21.07 may be appropriate in some circumstances where negligence on the part of the solicitor of an unsuccessful applicant is alleged. I further note that as submitted by the applicant, it has been held that a "serious dereliction of duty", which is a prerequisite for an order to be made pursuant to Rule 21.07, may be constituted by a failure to give reasonable or proper attention to the relevant law and facts. In *De Souza* French J stated the following at page 548:-

> *"… I accept the proposition that the jurisdiction is to be exercised with care and discretion and only in clear cases. The mere fact that litigation fails is plainly no ground for its exercise. There has*

to be something which amounts to a serious dereliction of duty: Edwards v Edwards [1958] P 235 at 248. …"

14. It is conceded by the applicant that the primary object of the jurisdiction is to reimburse a party to proceedings costs which the party has incurred because of the default of the practitioner, that is, it is a jurisdiction which is compensatory rather than punitive or disciplinary (see *White Industries (Qld) Pty Ltd v Flower and Hart (a firm)* (1998) 156 ALR 169 at 230).

15. The parties both referred the court to a decision of the Court of Appeal of New South Wales in *Lemoto v Able Technical Pty Ltd & Ors* [2005] NSWCA 153 (Lemoto) where the jurisdiction to make a costs order against solicitors was discussed in detail at paragraphs 83 to 115 as follows:-

> *"**The jurisdiction to make costs orders against legal practitioners***
>
> *83 The issues raised by the appeal require the Court to determine the proper construction of Part 11, Division 5C of the Act. Before turning to the detail of that exercise it should be observed that Division 5C represents a substantial departure from the ambit of the power hitherto available to courts to order legal practitioners to pay the costs of legal proceedings in respect of which they had provided legal services.*
>
> *84 Historically courts which possessed inherent jurisdiction had power, exercised summarily, to order a solicitor to pay the costs of legal proceedings in relation to which he or she provided legal services. Misconduct, default or serious or gross negligence in the course of the proceedings was sufficient to justify such an order, which while being penal in nature, was made to protect the client who had suffered and indemnify the party injured: Myers v Elman [1940] AC 282 at 289, 303, 318, 319. The jurisdiction is not "a modern invention". It can be traced to the mid-eighteenth century: Myers v Elman (at 290, per Viscount Maugham). The cases traceable to that period demonstrate that a costs order might be made against a solicitor on the basis of "mere negligence of a serious character, the result of which was to occasion useless costs to the other parties": ibid.*

85 The summary jurisdiction to order a solicitor to pay costs was an aspect of the court's disciplinary jurisdiction. It was based on the court's right and duty to supervise the conduct of its solicitors: Myers v Elman (at 302 per Lord Atkin, at 318 - 319 per Lord Wright, at 334 – 336 per Lord Porter). Lord Wright pointed out (Myers v Elman at 318 - 319):

> *"... [A]longside the jurisdiction to strike off the Roll or to suspend there existed in the Court the jurisdiction to punish a solicitor or attorney by ordering him to pay costs, sometimes the costs of his own client, sometimes those of the opposite party, sometimes, it may be, of both. The ground of such an order was that the solicitor had been guilty of professional misconduct, (as it is generally called) not, however, of so serious a character as to justify striking him off the roll or suspending him. This was a summary jurisdiction exercised by the Court which had tried the case in the course of which the misconduct was committed. It was a summary jurisdiction, in which the intervention of the judge was invoked at the conclusion of the case either by motion in the Chancery Court or by a motion or application for a rule in the Courts of Common Law. Though the proceedings were penal, no stereotyped forms were followed. Hence now the complaint is not treated like a charge in an indictment or even as requiring the particularity of a pleading in a civil action.* ***All that is necessary is that the judge should see that the solicitor has full and sufficient notice of what is the complaint made against him and full and sufficient opportunity of answering it. Thus, formal amendments of the complaint are not necessary, so long as variations of the charge are sufficiently defined and the solicitor is given sufficient liberty to make his answer. The summary jurisdiction thus involves a discretion both as to procedure and as to substantive relief, though there was and is an appeal.***
>
> *The cases of the exercise of this jurisdiction to be found in the reports are numerous and show how the Courts were guided by their opinion as to the character of the conduct complained of. The underlying principle is that the Court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of*

such a nature as to tend to defeat justice in the very cause in which he is engaged professionally, as was said by Abinger C.B. in Stephens v. Hill. ... The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice. ... It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity. The term professional misconduct has often been used to describe the ground on which the Court acts. ***It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the Court and to realize his duty to aid in promoting in his own sphere the cause of justice.*** *This summary procedure may often be invoked to save the expense of an action. Thus it may in proper cases take the place of an action for negligence, or an action for breach of warranty of authority brought by the person named as defendant in the writ. The jurisdiction is not merely punitive but compensatory.* ***The order is for payment of costs thrown away or lost because of the conduct complained of. It is frequently, as in this case, exercised in order to compensate the opposite party in the action.****" (emphasis added)*

86 *The summary jurisdiction did not extend to barristers who were not regarded as officers of the court "in the same sense [as] a solicitor": Rondel v Worsley [1969] AC 191 at 282.*

87 *In 1990 the English Supreme Court Act 1981 was amended by the insertion of a new s 51 which expanded the court's power to make costs orders against solicitors and, for the first time, made barristers subject to the power. Section 51 provided (inter alia) that:*

> *"... (6) ... the Court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of Court (7) In subsection (6), 'wasted costs' means any costs incurred by a party – (a) as a result of any improper or unreasonable or negligent act or omission*

on the part of any legal or other representative or any employee of such representative; or (b) which, in the light of any such act or omission occurring after they were incurred, the Court considers it is unreasonable to expect that party to pay."

88 *The Supreme Court of New South Wales exercised the inherent jurisdiction to order solicitors to pay the costs of proceeding: Attorney-General v Wylde (1946) 47 SR (NSW) 99 at 113 – 114, 117 - 119. Absent legislation, however, the District Court could not exercise such a power as it had no disciplinary jurisdiction over a legal practitioner: Knaggs v J A Westaway & Sons Pty Ltd (1996) 40 NSWLR 476 at 485 per Simos AJA (with whom Giles and Abadee AJJA agreed).*

89 *In 1991 provisions in identical terms were inserted in theSupreme Court Act1970 (s 76C) and the District Court Act 1973 (s 148E) which enabled each court "to penalise a solicitor whose serious neglect, incompetence or misconduct delays proceedings ... by making orders about the payment of costs": Courts Legislation (Civil Procedure) Amendment Act 1991, Schedule 1, Part 5 cl (2); Schedule 2, cl (8). Before those amendments the rules of both courts included provisions conferring power to penalise a solicitor by way of costs orders where "costs [were] incurred improperly or without reasonable cause, or [were] wasted by undue delay or by any other misconduct or default" for which the solicitor was responsible: Supreme Court Rules 1970 Pt 52, r 66 (see now Pt 52A, r 43); District Court Rules 1973 Pt 39, r 6 (see now Pt 39A, r 14). In 1994 Pt 52A of the Supreme Court Rules was amended by the insertion of r 43A which empowered the court to make costs orders against barristers. A like rule was inserted in the District Court Rules in 2001: Pt 39A, r 14A. The rules dealing with solicitors reflected the English RSC O 62, r 8(1), which "confirm[ed] the ancient jurisdiction of the court to exercise control over its own officers": Orchard v South Eastern Electricity Board [1987] QB 565 at 569 per Sir John Donaldson MR.*

90 *In Wentworth v Rogers[1999] NSWCA 403 at [41] the Court of Appeal (Handley and Stein JJA, Sheppard AJA) said that there was no difference in substance between the approach taken in the United Kingdom and the approach taken in Australia concerning the power to order a solicitor to pay the costs of proceedings. The court also observed the English authorities were more comprehensive than the*

Australian authorities. A brief reference to the principles developed concerning the exercise of that power by reference to authorities in both countries provides a useful background to a consideration of the power conferred by Part 11, Division 5C: CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCA 2; (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

91 *The jurisdiction conferred by the English Supreme Court Act to make what have come to be known as "wasted costs orders" was considered by the Court of Appeal (Sir Thomas Bingham MR, Rose and Waite LJJ) in Ridehalgh v Horsfield [1994] Ch 205 which concerned six cases in each of which the s 51(6) power was exercised. The case raised the question, "in what circumstances should the Court make a wasted costs order in favour of one party to litigation against the legal representative (counsel or solicitor) of the other": see Ridehalgh at 224. The court reviewed the history of the exercise of the jurisdiction to order payment of costs by legal practitioners whose conduct had led to the incurring of unnecessary costs. Any consideration of the principles which have emerged from Ridehalgh and other authorities should be prefaced by the court's observation (Ridehalgh at 226):*

> *"The argument we have heard discloses a tension between two important public interests. One that is lawyers should not be deterred from pursuing their client's interests by fear of incurring a personal liability to their client's opponents; that they should not be penalised by orders to pay costs without a fair opportunity to defend themselves; that wasted costs order should not become a back-door means of recovering costs not otherwise recoverable by a legally-aided or impoverished litigant; and that* ***the remedy should not grow unchecked to become more damaging than the disease.*** *The other public interest, recently and clearly affirmed by Act of Parliament, is that litigants should not be financially prejudiced by the unjustifiable conduct of litigation by their or their opponent's lawyers. The reconciliation of these public interests is our task in these appeals.* ***Full weight must be given to the first of these public interests, but the wasted costs jurisdiction must not be emasculated.****" (emphasis added)*

92 The new Division 5C should be construed against the background of the following principles which can be gleaned from the English and Australian authorities which have considered the power to order legal practitioners to pay the costs of proceedings in which they have represented parties:

(a) The jurisdiction to order a legal practitioner to pay the costs of legal proceedings in respect of which he or she provided legal services must be exercised "with care and discretion and only in clear cases": Ridehalgh (at 229), Re Bendeich (1994) 53 FCR 422; Deputy Commissioner of Taxation v Levick [1999] FCA 1580; (1999) 168 ALR 383 per Hill J at [11]; Levick v Deputy Commissioner of Taxation [2000] FCA 674; (2000) 102 FCR 155 at [44]; Gitsham v Suncorp Metway Insurance Ltd [2002] QCA 416 at [8] per White J (with whom Davies and Williams JJA agreed); De Sousa v Minister for Immigration (1993) 41 FCR 544; Money Tree Management Service Pty Ltd v Deputy Commissioner of Taxation (No 3) [2000] SASC 286;

(b) A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he or she acts for a party who pursues a claim or a defence which is plainly doomed to fail: Ridehalgh (at 233); Medcalf v Mardell [2002] UKHL 27; [2003] 1 AC 120 at [56] per Lord Hobhouse; White Industries (Qld) Pty Ltd v Flower & Hart (a firm) (1998) 156 ALR 169 (affirmed on appeal, Flower & Hart (a firm) v White Industries (Qld) Pty Ltd [1999] FCA 773; (1999) 87 FCR 134); Levick v Deputy Commissioner of Taxation; cf Steindl Nominees P/L v Laghaifar [2003] QCA 157; [2003] 2 Qd R 683;

(c) the legal practitioner is not "the judge of the credibility of the witnesses or the validity of the argument": Tombling v Universal Bulb Co Ltd [1951] 2 TLR 289 at 297; the legal practitioner is not "the ultimate judge, and if he reasonably decides to believe his client, criticism cannot be directed to him": Myers v Elman (at 304, per Lord Atkin); Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation [2001] HCA 26; (2001) 47 ATR 1 at [34] per Callinan J;

(d) *A judge considering making a wasted costs order arising out of an advocate's conduct of court proceedings must make full allowance for the exigencies of acting in that environment; only when, with all allowances made, a legal practitioner's conduct of court proceedings is quite plainly unjustifiable can it be appropriate to make a wasted costs order: Ridehalgh (at 236, 237);*

(e) *A legal practitioner against whom a claim for a costs order is made must have full and sufficient notice of the complaint and full and sufficient opportunity of answering it: Myers v Elman (at 318); Orchard v South Eastern Electricity Board (at 572); Ridehalgh (at 229);*

(f) *Where a legal practitioner's ability to rebut the complaint is hampered by the duty of confidentiality to the client he or she should be given the benefit of the doubt: Orchard v South Eastern Electricity Board (at 572); Ridehalgh (at 229); in such circumstances "[t]he court should not make an order against a practitioner precluded by legal professional privilege from advancing his full answer to the complaint made against him without satisfying itself that it is in all the circumstances fair to do so": Medcalf (at [23] per Lord Bingham);*

(g) *The procedure to be followed in determining applications for wasted costs must be fair and "as simple and summary as fairness permits...[h]earings should be measured in hours, and not in days or weeks... Judges ... must be astute to control what threatens to become a new and costly form of satellite litigation": Ridehalgh (at 238 – 239); Harley v McDonald [2001] UKPC 18; [2001] 2 AC 678 at 703 [50]; Medcalf (at [24]).*

93 *The authorities concerning the sparing exercise of the jurisdiction to make wasted costs orders against legal practitioners (sub-paragraph (a)) are consistent with cases in which orders are sought that a lay non-party pay the costs of litigation; such an order is exceptional: Aiden Shipping Co Ltd v Interbulk Ltd [1986] AC 965 at 980 per Lord Goff; Taylor v Pace Developments Ltd [1991] BCC 406 at 410; Symphony Group Plc v Hodgson [1994] QB 179*

at 192-3 per Balcombe LJ; Flinn v Flinn [1999] VSCA 134 at [24].

The expeditious administration of justice

94 The passage from Lord Wright's speech in Myers v Elman I have extracted earlier in this judgment emphasises that the historical jurisdiction to order a solicitor to pay costs was exercised in circumstances where the solicitor had failed to fulfil his or her duty to the court in the administration of justice. If the misconduct of the solicitor led to a person suffering loss, the court had power to order the solicitor to make good the loss occasioned by the breach of duty: Marsh v Joseph [1897] 1 Ch 213, 244-245, per Lord Russell of Killowen C.J.

95 In Ketteman v Hansel Properties Ltd [1987] AC 189 at 220 Lord Griffiths spoke of the "pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently." The days when the suit of Jarndyce v Jarndyce wound its apocryphal way through the pages of Dickens' Bleak House are long gone – if they ever were.

96 The prompt and efficient disposal of litigation is a core aspect of the administration of justice. In the Supreme Court that objective has been enshrined in the statement that the overriding purpose of the court's rules, "... in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in such proceedings": Supreme Court Rules Pt 1, r 3. Section 76A Supreme Court Act 1970 and s 68A of the District Court Act 1973 give the respective courts power "from time to time, [to] give such directions as the Court thinks fit (whether or not inconsistent with the rules) for the speedy determination of the real questions between the parties to a civil action."

97 An integral aspect of the legal practitioner's duty to the court is to ensure the business of the courts is conducted with the expediency consistent with the due administration of justice. The role of the legal profession in this respect, with particular focus on the role of counsel, was referred to by Mason CJ in Giannarelli & Shulkes v Wraith [1988] HCA 52; (1988) 165 CLR 543 at 556. His Honour said:

> *"The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. ...*
>
> *It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear.* ***The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the court epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice.*** *In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case. In such an adversarial system the mode of presentation of each party's case rests with counsel. The judge is in no position to rule in advance on what witnesses will be called, what evidence should be led, what questions should be asked in cross-examination. Decisions on matters such as these, which necessarily influence the course of a trial and its duration, are made by counsel, not by the judge. This is why our system of justice as administered by the courts has proceeded on the footing that, in general, the litigant will be represented by a lawyer who, not being a mere agent for the litigant, exercises an independent judgment in the interests of the court."*

98 While this passage is expressed in terms of the barrister's duty to the court, there is no doubt that the solicitor's duty to the court is co-extensive with counsel's.

99 In this light, the principle to which I have referred in para [92] (b) requires some elaboration. The proposition that a

legal practitioner would not be subjected to a personal costs order simply because he or she acted for a party who pursued a claim or a defence which was doomed to fail reflected the first of the tensions referred to in Ridehalgh, "that lawyers should not be deterred from pursuing their client's interests by fear of incurring a personal liability to their client's opponents." In Ridehalgh (at 234) the Court said:

> *"Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it."*

100 *Accordingly, subject to the Court's power to dispose summarily of matters where no cause of action or defence was disclosed, which were frivolous or vexatious or were an abuse of process (Supreme Court Rules Pt 13 r 5; Pt 15, r 26; District Court Rules Pt 9, r 17; Pt 11A, r 3), "every litigant ha[d] a right to have matters of law as well as matters of fact decided according to the ordinary rules of procedure, which give him full time and opportunity for the presentation of his case to the ordinary tribunals": see Burton v Shire of Bairnsdale [1908] HCA 57; (1908) 7 CLR 76 at 92 per O'Connor J. Every citizen was entitled to his or her day in court. Hopeless claims and defences were thought to be discouraged by the fact that the losing litigant was obliged to pay the legal costs incurred by the successful party: Ridehalgh (at 225).*

101 *The proposition that a lawyer who acted for a party who pursued a claim or a defence "plainly doomed to fail" had not acted improperly (Ridehalgh at 233) has been expressed in more qualified terms. In Re Cooke (1889) 5 TLR 407 at 408, Lord Esher MR said:*

> *'[I]f the solicitor could not come to **the certain and absolute opinion that the case was hopeless**, it was his duty to inform his client of the risk he was running, and, having told him that and having advised him most strongly not to go on, if the client still insisted in going*

on the solicitor would be doing nothing dishonourable in taking his instructions.' "

102 In Edwards v Edwards [1958] P 235 at 248 Sachs J said that it was clear from the authorities that unreasonably to initiate or continue an action when it had no or substantially no chance of success may constitute conduct justifying an order that a solicitor pay the costs of the other party. Acting in such circumstances, in his view, was regarded as a "serious dereliction of duty" attracting the exercise of the court's jurisdiction. In Orchard v South Eastern Electricity Board (at 579) Dillon LJ said:

> *"**It may well be the duty of counsel primarily, but also of the solicitor with due regard to the views expressed by experienced counsel, to weigh the evidence available to his client, if a plaintiff, to see whether the plaintiff's claim raises a triable issue.** It is not the duty of the solicitor to endeavour to assess the result where there is a likelihood of a conflict of evidence between his client's witnesses and those of the other side: per Sachs LJ in Carl Zeiss Stiftung v Herbert Smith & Co (No 2) [1969] 2 Ch 276, 297D." (emphasis added)*

103 In Australia there is a tension between decisions of the Federal Court and decisions of state appellate courts concerning the propriety of legal practitioners acting for litigants with hopeless cases.

104 In White Industries (Qld) Pty Ltd v Flower & Hart (a firm), Goldberg J considered the authorities supporting the proposition that it is not improper to act for a party with a hopeless case and concluded (at 237) that:

> *"Those principles are, put shortly, that a solicitor does not act improperly or in breach of his or her duty to the court by acting for a party with a hopeless case. In order to affix liability for costs to a solicitor there must be something further added in the nature of acting unreasonably or for reasons unconnected with success in the litigation or for an otherwise ulterior purpose resulting in an abuse of process or in circumstances resulting in a serious dereliction of duty or serious misconduct in promoting the cause of and the proper administration of justice."*

105 His Honour observed (at 236), referring to Sachs J's statement in Edwards v Edwards, that it was not clear what was "encompassed by 'unreasonably' initiating or continuing proceedings if they have no or substantially no chance of success" and concluded that such conduct involved "some deliberate or conscious decision taken by reference to circumstances unrelated to the prospects of success with either a recognition that there is no chance of success but an intention to use the proceeding for an ulterior purpose or with a disregard of any proper consideration of the prospects of success." Accordingly, his Honour rejected (at 237) a submission that "the law is that because a solicitor's duty is to the court he or she should refuse to pursue, on behalf of a client, a case which he or she knows to be hopeless". While he acknowledged "that the fact that a client insists on pursuing a hopeless case will raise an issue or inquiry as to whether the reason for pursuing the case is the pursuit of an ulterior purpose", he observed that "an ulterior purpose or an abuse of process cannot ... be assumed simply because ... the case is hopeless".

106 In Levick v Deputy Commissioner of Taxation (at [44]) the Full Court of the Federal Court referred with approval to Goldberg J's conclusion (White Industries (Qld) Pty Ltd v Flower & Hart (a firm) at 236) that "a solicitor does not act improperly or in breach of his or her duty to the court by acting for a party with a hopeless case" unless that conduct was "unreasonable", and observed that "[w]hat constitutes unreasonable conduct must depend upon the circumstances of the case; no comprehensive definition is possible".

107 In two state appellate decisions, the view has been expressed that it is improper for a legal practitioner to commence or present a case which is doomed to fail. In Carson v Legal Services Commissioner [2000] NSWCA 308 at [113] Sheller JA (with whom Giles JA agreed) said:

> *"...[O]rdinarily the solicitor who begins proceedings on the client's instructions does so for the purpose of the client.* ***If the client's immediate purpose is within the scope of the proceedings instituted and assuming the proceedings are not futile or foredoomed to fail, there can be no impropriety by either the client or the solicitor in instituting them.*** *It is the solicitor's duty to institute the proceedings in accordance with the client's instructions."*

108 In Steindl Nominees P/L v Laghaifar (at [24]0 Davies JA (with whom Williams JA and Philippides J agreed) accepted Goldberg J's conclusion that the jurisdiction to order costs against an unsuccessful party's solicitors was enlivened when they had unreasonably initiated or continued an action which had no or substantially no prospects of success. He also accepted the reasoning of Goldberg J generally and that of the Full Court of the Federal Court in Levick v Deputy Commissioner of Taxation subject to the qualification that he rejected "statements [in them which] state or imply that it is not improper for a legal representative to present a case which he or she knows to be bound to fail." He said (at [24]):

> *"I would prefer to say that it is one thing to present a case which is barely arguable (but arguable nevertheless) but most likely to fail; it is quite another to present a case which is plainly unarguable and ought to be so to the lawyer who presents it. In my opinion, with respect, it is improper for counsel to present, even on instructions, a case which he or she regards as bound to fail because, if he or she so regards it, he or she must also regard it as unarguable."*

109 After referring to the passage in Mason CJ's statement in Giannarelli & Shulkes v Wraith (at 556) concerning the importance to the administration of justice of the "exercise by barristers of [an] independent judgment in the conduct and management of the case", Davies JA observed (at [27]):

> *"[27] If it is counsel's duty to exercise his or her own independent judgment upon which points will be argued it must also be his or her duty, in the exercise of that judgment, to decide whether there is any point which can be argued. Greater care must be taken, in judging the conduct of a lawyer for a party in litigation, where the arguability of that party's case depends on a question of fact than where it depends on a question of law, for it is not for counsel or solicitor to sit in judgment on the reliability of his or her client's witnesses. Nevertheless the question, in my opinion, is the same whether it depends on fact or law. If the case is plainly unarguable it is improper to argue it."*

110 Although Williams JA agreed with Davies JA, he also expressed his agreement with Lord Hobhouse of Woodbrough's statement in Medcalf (at [56]) concerning the entitlement of litigants to be heard notwithstanding the fact the court considered the advocate had been arguing a hopeless case. Philippides J agreed with Davies JA's reasons and also with Williams JA's further reasons.

111 It is plain, as Goldberg J accepted in White Industries (Qld) Pty Ltd v Flower & Hart (a firm) (at 231), that the proposition that "commencing or maintaining proceedings with no or no substantial prospects of success enlivens the jurisdiction to order a solicitor to pay the costs of a party" is expressed at a dangerous level of generality. Something more is required as both Goldberg J and Davies JA accepted. Sheller JA in Carson characterised it as improper for a solicitor to commence proceedings which were "futile or foredoomed to fail". This accords with Davies JA's proposition.

112 It is not necessary for the purpose of this judgement to resolve the tension between these decisions. Suffice it to say that Sheller JA's observation in Carson and Davies JA's qualification in Steindl appear to presage the philosophy underpinning Division 5C.

113 The cases in which legal practitioners have been ordered to pay the other party's costs of the proceedings costs bear out the "plainly unarguable" and "futility" test. In Deputy Commissioner of Taxation v Levick Hill J ordered the solicitor for the respondent, who was seeking to resist a creditor's petition filed by the Deputy Commissioner, to pay the applicant's costs of the proceedings. His Honour held that the order was warranted because the solicitor had advanced arguments as to whether the Australian Taxation Office existed for legal purposes, whether a delegate of the applicant was authorised to file creditor's petitions and whether the Income Tax Assessment Act 1936 (Cth) was invalid. His Honour concluded (at [34]) that those arguments "untenable ... indeed ... nonsense". He pointed out (at [19]) that the same arguments had been rejected as being "untenable and obviously so" by Hayne J when advanced by the same solicitor in Helljay Investments Pty Ltd v Deputy Commissioner of Taxation of the Commonwealth of Australia [1999] HCA 56; (1999) 74 ALJR 68 at [26] – although it should be noted that Hayne J refused (at [22]) to order the solicitor to bear the costs

because he had not been given proper notice of the application.

114 Another illustration of the sort of hopeless case which might attract the court's jurisdiction to impose a personal costs order on the legal practitioner responsible for the proceedings would be one where there was no evidence to support an essential element of a cause of action.

115 The discretionary nature of the jurisdiction is illustrated by Steindl in which Davies JA concluded that a personal costs order should not be made against a "young and inexperienced" barrister who was taking instructions directly from a lay client in a factually complex matter of some years standing, and who apparently ascertained on or shortly before the hearing of an application for an extension of time within which to appeal, that his main argument was unarguable."

16. It is noted from the lengthy extract from *Lemoto* that due consideration was given to the apparent tension between State and Federal Courts concerning the test to be applied when considering whether to make an order that a solicitor pay the costs of a party.

17. Specific reliance was particularly placed upon paragraph 85 and the passage from the judgment of Lord Wright in *Myers v Elman* (1940) AC 282 set out above.

18. Particular emphasis was placed by the applicant on paragraph 114 in *Lemoto* referring to the situation "where there is no evidence to support an essential element of a cause of action". It was argued that the applicant's case corresponds to that example and it is submitted that even if the trial judge had accepted the applicant's version of the facts, there was no statement made which was promissory in nature which could have found a claim for breach of contract and accordingly there was no evidence to support an essential element of that cause of action. Hence, this case should be the subject of the court's jurisdiction to impose a personal costs order on the legal practitioner in question.

19. As I understand the argument of the applicant, it is not conceded that for the court's jurisdiction to award costs against the solicitor the case has to be hopeless from the start and that the lawyer failed to advise the applicant of that fact. Rather, it is claimed that the proceedings against

the respondent were unreasonably initiated and had little or no prospect of success. It is the unreasonableness of the lawyers to give proper attention to the relevant facts and law relating to the case where if such attention had been given, it would have been apparent that there were no worthwhile prospects of success. On that basis, the claim if made out would be sufficient to enliven the jurisdiction of the court to award costs against the lawyer.

20. In considering the issue of unreasonableness it is perhaps also useful to note the following passages from *Lemoto* where the court states the following:-

> *"132 Barrett J's construction of the expression "without reasonable prospects of success" appears to me to accommodate both the purpose of Division 5C and to reflect the language of s198J. The test, whether a claim or a defence was "so lacking in merit or substance as to be not fairly arguable", must be applied, however, in the context of the constituent components of s 198J. In that context the question becomes whether the solicitor or barrister held a reasonable belief that the provable facts and a reasonably arguable view of the law meant that the prospects of recovering damages or defeating a claim or obtaining a reduction in the damages claimed were "fairly arguable". These are matters about which reasonable minds might differ. The question will be whether the solicitor or barrister's belief that they had material which objectively justified proceeding with the claim or the defence "unquestionably fell outside the range of views which could reasonably be entertained": Medcalf at [40] per Lord Steyn.*
>
> *133 Although it might be assumed that the question whether a S 198M order should be made will ordinarily arise where a litigant has been unsuccessful, it needs to be emphasised that the mere fact litigation is resolved adversely to a party does not mean costs should, in consequence, be ordered against the legal adviser, whether he or she be a solicitor or a barrister: Deputy Commissioner of Taxation v Levick per Hill J at [11]; applied Gitsham v Suncorp Metway Insurance Ltd at [8]; Commonwealth of Australia (Department of Defence); Ex parte Marks [2000] hca 67; (2000) 75 ALJR 470 at [27].*

> *134 As Gibbs J said in R v Moore; Ex parte Federated Miscellaneous Workers Union of Australia [1978] HCA 51; (1978) 140 clr 470 at 473 dealing with the court's power under s 197A of the Conciliation and Arbitration Act 1904 as amended (Com):*
>
> > *'... a party cannot be said to have commenced a proceeding 'without reasonable cause', within the meaning of that section, simply because his argument proves unsuccessful. In the present case the argument presented on behalf of the prosecutor was not unworthy of consideration and it found some support in the two decisions of this court to which I have referred. The fact that those decisions have been distinguished, and that the argument has failed, is no justification for ordering costs in the face of the prohibition contained in s 197 A'".*

21. The representative of Talbot & Olivier relied upon an outline of submissions dated 3 May 2005 and a list of authorities. In those submissions and before the court it was argued that the purpose of Rule 21.07 is to compensate a party to proceedings for costs wasted because of a breach by his lawyer or the opponent's lawyer of the lawyer's duty to the court to conduct the proceeding with propriety and to promote in this particular sphere "the cause and proper administration of justice" (see *Myers v Elman* (1940) AC 282 per Lord Wright at 319; *White Industries (Qld) Pty Ltd v Flower and Hart (a firm)* (1998) 156 ALR 169 per Goldberg J; *Etna v Arif* (1999) 2 VR 353 per Batt JA at paragraph 82). It was argued that this is why such an order can be made on the motion of the court or registrar (Rule 21.07(3)).

22. It was submitted that jurisdiction and power to grant the relief sought in a case of this kind is confined to an application of the rule and what could properly be described as "summary relief" (see *Abrahams v Wainwright Ryan* (1999) 1 VR 102 per Phillips JA at paragraph 49). Dealing with rule 63.23 of the Supreme Court Rules which is similar to Rule 21.07 of the Federal Magistrates Court Rules, reference was made to the Privy Council decision in *Harley v McDonald* (2001) 2 AC 678 where at paragraph 50 it was stated:-

> *"As a general rule, allegations of breach of duty relating to the conduct of the case by a barrister or solicitor with a view to the*

making of a costs order should be confined strictly to questions which are apt for summary disposal by the court. Failure to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples. A factual basis for the exercise of the jurisdiction in such circumstances is likely to be found in facts which are within judicial knowledge because the relevant events took place in court or are facts that can easily be verified. Wasting the time of the court or an abuse of its processes which results in excessive or unnecessary cost to litigants can thus be dealt with summarily on agreed facts or after a brief inquiry if the facts are not all agreed."

23. Other authorities were referred to in support of the submission that the exercise of the court's discretion pursuant to Rule 21.02 is one which provides for summary relief.

24. It was argued for and on behalf of the applicant's former solicitors that negligence for the present purposes must be determined on the basis that the case was hopeless. It was noted that no application was made for summary dismissal and the failure of the respondent in the substantive proceeding to make that application in part provides some basis upon which the court should conclude that the application is not hopeless or at least not so hopeless as to encourage the respondent to make application for summary dismissal. It was argued that the case needed to be hopeless from the outset. Reference was made to the decision *Dempsey v Johnstone* (2003) EWCA Civ 1134 per Latham LJ at paragraph 238 as follows:-

> *"Negligence could be the appropriate word to describe a situation in which it is abundantly plain that the legal representative has failed to appreciate that there is a binding authority fatal to his client's case. That may of itself justify making a wasted costs order, although in practice it is difficult to envisage a case in which that situation would have persisted to trial without the other party having drawn the case to the other side's attention."*

25. Further in *Dempsey* the following passage at paragraph 36 appears per Mance LJ where the court states:-

> *"An example of negligence leading to the pursuit of litigation having no prospect of success might, however, be a legal*

representative pursuing a claim or a defence in ignorance of an authority at the highest level from which no-one aware of it could sensibly have thought that any future court would depart. One would not, I think, speak of the solicitor having abused the process in this context but his or her negligence could, in my view, be relevant to an application for a wasted costs order."

26. It was argued for the applicant's former solicitors that orders for costs against non-parties are exceptional (see *Knight v FP Special Assets Ltd* (1992) 174 CLR 178). The jurisdiction to order costs against a solicitor must be exercised sparingly and with great caution and only in clear cases (see *Orchard v South Eastern Electricity Board* (1987) 1 QB 565 and *De Sousa* per French J at 547-8).

27. After reviewing other authorities to which reference has already been made, it was submitted on behalf of the applicant's former solicitors that the Rule 21.07 claim is misconceived because it is not:-

- founded on a breach of Talbot & Olivier's duty to the court;
- founded on a serious dereliction of Talbot & Olivier's duty to the court;
- appropriate for it to be dealt with summarily;
- made in relation to an interlocutory matter.

Reasoning

28. Whilst an argument was presented that the order made under Rule 21.07 relates to wasted costs and, as noted above, a summary matter, it is clear and I accept that more often than not such orders are made in interlocutory proceedings. However, I do not accept that Rule 21.07 on a proper reading is confined to interlocutory proceedings.

29. In my view, whilst theoretically a claim may be made in negligence which would enliven the operation of Rule 21.07 at this stage of the proceeding, it could only do so in clear circumstances where the court can be satisfied on the material that there has been a serious dereliction of duty. Whilst a serious dereliction of duty may, as submitted by the applicant, be constituted by a failure to give reasonable or proper attention to the relevant law and facts, great care must be taken in

deciding whether the jurisdiction should be applied in the circumstances of a case of the present kind. I accept, applying the principles conveniently summarised in *Lemoto*, that something more is required than simply commencing or maintaining proceedings with no or no substantial prospects of success and that that may properly be regarded as being characterised as a solicitor commencing proceedings which were "futile or foredoomed to fail". I accept that it is reasonable for the Court to consider whether the case advanced in this instance on behalf of the Applicant was “plainly unarguable” or futile. In my view mere unreasonableness is not sufficient.

30. In the present case it is clear from the judgment of this court (see *Taylor v CGU Insurance Ltd* (No2) [2004] FMCA 1000) that issues were agitated which included consideration by the court of competing facts. Indeed, the court preferred evidence of one witness over another and then was required to interpret the material provided by the applicant to determine whether the claim succeeded. Issues of law were considered by the court in its decision and interpreted in the context of the claim. The Court considered correspondence and conflicting evidence concerning representations allegedly made which were then claimed to constitute misleading and deceptive conduct. Whilst with hindsight the Applicant may now assert that there was never any prospect of success, it is noted that the Court ultimately made a decision after assessing the evidence and analysing the nature of the agreement between the Applicant and the Respondent.

31. I do not regard the material before this court and the claim made under Rule 21.07 as being one which could properly be regarded as misconduct of a kind which would lead to a conclusion that the solicitor then acting for the applicant had failed to discharge a duty to the court. I accept and apply the decision of French J in *De Sousa* and in particular the passage where His Honour states, having accepted that the jurisdiction is to be exercised with care and discretion and only in clear cases, that "the mere fact that litigation fails is plainly no ground for its exercise".

32. It is in that way that there is a limited application for an order for costs arising out of Rule 21.07. Whether it is described as a summary

disposition of a matter or otherwise, it is evident that it would only be a discretion exercised in a clear case.

33. Whilst I accept that the discretion to award costs pursuant to s.79 of the FMC Act is not constrained by the operation of Rule 21.07 it is clear as stated earlier that the discretion must be exercised judicially. Having regard to the authorities to which I have referred and in particular the decision of the Court in *Lemoto* I am satisfied that in this case it would be wrong to conclude that the claim advanced for and on behalf of the Applicant was one which could properly be characterised as futile or foredoomed to fail.

34. Accordingly, whilst I accept that the applicant is entitled to seek the relief set out in the application at this stage for an order for costs under Rule 21.07 and the court has jurisdiction and power to grant the relief sought, on the material before this court this case is not of a kind which could be described as clear having regard to the authorities. It is not one where it is evident that there has been a dereliction of duty. The assessment of the dereliction of duty includes, in my view, an assessment of whether or not it could properly be concluded that the case by the applicant against the respondent was hopeless from the start and/or foredoomed to fail or futile. As indicated I am not prepared to make that finding.

35. Other issues arose as to whether or not any claim by the applicant against his former solicitors should be pursued as a fresh matter in other courts. An argument was advanced that the additional claims fall properly within the accrued jurisdiction of the Federal Magistrates Court. In my view, the accrued jurisdiction does not apply in a matter of this kind where to invoke the accrued jurisdiction would effectively mean to invoke it after the substantive application has been heard and determined. I am satisfied that the claim now sought to be pursued by the applicant against his former solicitors is properly a separate and discrete claim either in negligence and/or contract of a kind which should be pursued in a court of competent jurisdiction. It should be the subject of separate proceedings with the solicitors Talbot & Olivier named as a party to those proceedings. It is not an appropriate matter to be pursued as part of the court's jurisdiction to make a costs order under Rule 21.07. I am not satisfied in the circumstances that this

court's jurisdiction is enlivened by application of the principles which apply to accrued or associated jurisdiction. It could not be properly argued in this case that there has ever been a claim pursued in the course of the proceedings against the former solicitors of the applicant whereby the application as argued in the substantive hearing could properly be regarded as dealing with the same substratum of facts as the claim now sought to be pursued against the solicitors. The claim against the solicitors arises directly and solely out of the court's judgment and a retrospective assessment of the prospects of success of the application before the court. I cannot see any or any proper basis upon which the claim as framed could be regarded as being within the jurisdiction of the court as part of its accrued jurisdiction.

36. In the present case the allegations now made by the Applicant against his former solicitors could not be regarded as matters arising out of the substratum of facts in a manner which would attract federal jurisdiction (see *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 472).

37. In this application it is my view that this court on the material before it should not make a costs order against the former solicitors of the applicant pursuant to Rule 21.07 or the general power of the Court to award costs pursuant to s.79 of the FMC Act.

38. Further the Court does not have jurisdiction specifically to award damages for contractual or tortious negligence or money paid under mistake or law or, alternatively, damages under s.79 of the *Fair Trading Act 1987* (WA) or contravention of s.10 of that Act or power to provide declaratory relief referred to by the applicant for further costs which may be claimed by Talbot & Olivier for services in or in connection with the proceedings. Those additional claims, in my view, do not fall within the accrued or associated jurisdiction of the court. To hold otherwise would be to extend this court's jurisdiction beyond what would be regarded as the proper accrued or associated jurisdiction of the court.

39. A discretion to award costs against a non-party, including a lawyer of a party, does not, in my view, give rise to extended jurisdiction of the kind sought to be argued for and on behalf of the applicant. Further I am not satisfied that in this case the jurisdiction under Rule 21.07

extends to the claim currently made for and on behalf of the applicant against his former solicitors.

40. This costs application should not be regarded as analogous to a claim in negligence. A costs order pursuant to Rule 21.07 is of necessity a summary process and the rule must be considered in context namely the consideration of the role of solicitors in the presentation of the case which in some instances may lead to delay and unnecessary costs.

41. The broader issues concerning a claim for negligence including negligent advice are matters which are more properly determined by another Court vested with the appropriate jurisdiction to consider such claims.

42. The power of the Court to award costs under s.79 of the FMC Act and/or Rule 21.07 of the Rules should not be regarded as a substitute for a party's rights to pursue a claim in negligence and/or contract against a solicitor. Whilst I note that in support of his application the Applicant in an affidavit sworn 9 March 2005 refers to advice being given by his solicitors that he had 'a simple and very strong claim against CGU' and the assurance that his case was 'very strong', it is my view that those matters are evidentiary issues to be deal with in a claim in negligence and/or contract against the former solicitors. Those claims may constitute substantive issues to be tried in the normal manner in a Court of competent jurisdiction rather than be relied upon in supporting an application of costs of the kind currently before this Court.

43. It follows that the application for costs should be refused.

44. The orders made by the Registrar on 29 March 2005 referring the matter to this Court for hearing clearly raised the issue of jurisdiction and power in respect to the Applicant's application then described as "interlocutory" is appropriate in the circumstances for this Court to consider as it has the jurisdiction clearly available in appropriate cases to make an award of costs. It is equally appropriate however for the Court to finally determine the matter by refusing the application for the reasons given. Hence, whilst I have found there is jurisdiction to grant the relief sought I have concluded that in this instance it is not appropriate to grant that relief. The solicitors having been placed on

notice concerning the application and in this instance providing detailed submissions does not need to be joined as a party to these proceedings. I shall hear the parties in relation to the precise form of orders and any additional orders for costs arising out of this judgment.

I certify that the preceding forty-four (44) paragraphs are a true copy of the reasons for judgment of McInnis FM

Associate:

Date: 2 August 2005