CITATION: *Michael Tsangaris v Inner Red Shell Pty Limited & Thoephanis Katapodis* [2005] NTMC 013

PARTIES:	MICHAEL TSANGARIS v INNER RED SHELL PTY LIMITED ACN 068 986 363 & THEOPHANIS KATAPODIS
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court
FILE NO(s):	20104985
DELIVERED ON:	4 March 2005
DELIVERED AT:	DARWIN
HEARING DATE(s):	18 February 2005
JUDGMENT OF:	Mr Wallace SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Plaintiff:	A McLaren
Defendant:	Mr Dearn

Solicitors:

Plaintiff:	Asha McLaren
Defendant:	Brian Johns

Judgment category classification:	C
Judgment ID number:	[2005] NTMC 013
Number of paragraphs:	34

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20104985

BETWEEN:

MICHAEL TSANGARIS
Plaintiff

AND:

INNER RED SHELL PTY LIMITED
First Defendant

AND

THEOPHANIS KATAPODIS
Second Defendant

REASONS FOR DECISION

(Delivered 4 March 2005)
(Corrected 18 March 2005)

Mr WALLACE SM:

Introduction

1. On 14 May 2004 the Plaintiff filed an Application seeking an order to transfer this suit to the Supreme Court of the Northern Territory.

2. On 25 May 2004 Ms Fong Lim, Judicial Registrar of this Court, refused that Application and published her Reasons for doing so. On 7 July the Plaintiff filed an Application – in effect an appeal – seeking to have that order of Ms Fong Lim set aside. That appeal – hereinafter "the jurisdiction appeal" – is the first of the matters before me.

3. It appears that, during an course of argument on 24 May 2004, Mr Dearn, counsel for both Defendants, had applied for, or suggested that, if the

Application were refused (as it was), costs should be awarded against the Plaintiff and that the Plaintiff's solicitor (and counsel), Ms McLaren, should be ordered personally liable for these costs. On 25 May Ms Fong Lim adjourned that question for further argument.

4. On 9 June 2004, having heard that further argument on the 7th, Ms Fong Lim did order that Ms McLaren be liable for these costs. On 7 July 2004 the Plaintiff filed an Application – in effect an appeal – seeking to have that order set aside. That appeal – hereinafter "the costs appeal" – is the second of the matters before me. [I suspect that the Application of 7 July required leave, pursuant to Local Court Rule 4.04(4), and I can find no trace of such leave being granted. Nothing has been made of that.]

5. On 14 July 2004 the Defendants filed an Application to strike out the Plaintiff's claim. The affidavit in support of that Application by Mr Johns, solicitor for the Defendants, cites a failure by the Plaintiff to comply with an order for discovery, and a failure by the Plaintiff to provide further and better particulars. That Application is the third of the matters before me.

6. Self-evidently, the third matter is separate and distinct from the first and second. The first and second are closely related to each other.

Background

7. The suit began with a Statement of Claim filed 26 May 2001. That claim was for liquidated damages of $80,919.00. I have not tried closely to analyse that claim, but I think that amount was claimed on a basis something like quantum meruit.

8. An Amended Statement of Claim ("ASOC") was filed on 19 July 2001. In it the Plaintiff sought various remedies: materially an accounting of an alleged partnership between the Plaintiff and the Second Defendant, and half of the profits of that partnership. That claim was entirely unliquidated.

9. A Further Amended Statement of Claim ("FASOC"), was filed on 23 May 2003. This was the claim the Plaintiff sought (and seeks) to have transferred to the Supreme Court, and it remains the operative claim today. The claim takes up some nine pages of fairly closely typed text. I reproduce only the prayer for relief:

> AND THE PLAINTIFF CLAIMS AGAINST THE FIRST AND SECOND DEFENDANTS JOINTLY AND SEVERALLY:
>
> (a) An order that the First and Second Defendants and each of them specifically to [sic] all acts and things and sign all documents necessary to make the Plaintiff an owner of 49% of the shares in the First Defendant and further to cause the Plaintiff to be instated with the Second Defendant as a co-director of the First Defendant;
>
> (b) A further order that the making of the Plaintiff an owner of 49% of the shares in and co-director of the First Defendant be so far as possible performed retrospectively as from 1st February 1998;
>
> (c) A Declaration that the property situate at and known as 4 Bridelia Court Rosebery Heights being Lot 5060 Volume 597 Folio 134, Town of Palmerston, is or was at the time of commencement of the proceedings herein the property of the partnership and/or the company business between the Plaintiff and the First and Second Defendants;
>
> (d) An order that the First and Second Defendants effect a sale of the property referred to in (c) above as soon as reasonably possible and at the best price reasonably available and that they jointly and severally pay to the Plaintiff a sum equivalent to one half of the nett proceeds of such sale after making appropriate and proper adjustments;
>
> (e) Alternatively to (d) above if the property referred to therein has already been sold, an order that the First and Second Defendants jointly and severally pay to the Plaintiff a sum equivalent to one half of the proper nett value of the property as at the time of such sale after making appropriate and proper adjustments;
>
> (f) That an accounting of the business of the partnership and/or company business be conducted by the Registrar of this

Honourable Court or by a qualified and competent auditor acceptable to the parties and in default of agreement within 14 days of the Defendants being called upon by the Plaintiff to do so, by a person nominated by the President for the time being of CPA Australia;

(g) That the Defendants jointly and severally forthwith upon completion of the accounting referred to in the last preceding paragraph pay to the Plaintiff one half of the nett profits due or properly due to the partnership and/or the company business;

(h) That the First and Second Defendants jointly and severally pay to the Plaintiff the sum of $75,000 being the value of wages earned or which ought to have been earned by the Plaintiff on a count for unjust enrichment and/or quantum meruit as set forth in the Statement of Claim herein;

(i) Interest at the appropriate Supreme Court scale on the sum or sums found to be due by the First and/or Second Defendants to the Plaintiff from the date upon which each such amount is due to the date of Judgement herein;

(j) Costs.

10. As can be seen the claim now (the Plaintiff may intend to apply to amend, but I deal with the claim as it is) comprises a liquidated element – paragraph (h), for $75,000.00 – and various remedies the value of which is unliquidated. The Plaintiff's contention is that the value of those remedies is great enough to take the claim as a whole beyond the jurisdiction of this Court, which is established by s 14(1) of the *Local Court Act* ("the Act"):

PART III – JURISDICTION

14.. Jurisdiction

(1) Subject to subsections (3) and (7), the Court has jurisdiction to hear and determine –

(a) a cause of action for damages or a debt, or a liquidated demand, if the amount claimed is within the jurisdiction limit;

(b) a claim for equitable relief if the value of the relief sought is within the jurisdictional limit;

(c) a claim concerning the ownership or possession of property if the value of the right to ownership or possession is within the jurisdictional limit;

(d) with the consent in writing of the parties –

(i) a cause of action for damages or a debt, or a liquidated demand, irrespective of the amount claimed;

(ii) a claim for equitable relief, irrespective of the value of the relief sought; and

(iii) a claim concerning the ownership or possession of property, irrespective of the value of the property; or

(e) any other matter or cause of action if it is given jurisdiction to do so by or under an Act other than this Act.

11. Section 3 of the Act lays down that "jurisdictional limit" means $100,000.

Appeals

12. Local Court Rule 4.04(2)(c) provides that appeals from a Judicial Registrar to a Magistrate are to be "by way of a hearing de novo". That provision is easy enough to apply in relation to the jurisdiction appeal, and in my consideration of that appeal I must consider not only the material that was before Ms Fong Lim, but also new evidence, notably an affidavit of Bob Cowling sworn (according to its jurat) on 8 December 2004 and annexing (with annexure clauses dated 17 February 2005) some schedules of costings; and an affidavit of the Plaintiff sworn 17 February 2005.

13. The effect of that provision is less obvious in respect of the costs appeal. Ms Fong Lim in effect foresaw the difficulty when she wrote (in paragraph 20 of her Reasons of 9 June 2004):

> It should be noted that the Plaintiff has filed an appeal of my decision to dismiss the application to transfer proceedings. It is my view, in relation to that appeal, that should the Plaintiff succeed in that de novo appeal because further evidence is put before the court this costs order should not be disturbed. The order should not be disturbed because one of the reasons the order is made is that the solicitor should have realised the evidence as it stood did not support her application.

14. Ms Fong Lim was there considering her costs order as ancillary relief to her order refusing transfer, but her point remains valid in my opinion, now that the costs order has become itself the subject of a separate appeal. If, loosely speaking, the application for transfer was rightly refused by Ms Fong Lim, and if costs were rightly ordered by her to be paid personally by Ms McLaren – "rightly" meaning in the light of material then before Ms Fong Lim – then although the jurisdiction appeal might succeed on the basis of new evidence, it is hard to imagine how that new evidence, or any other, could ground a successful appeal against the costs order.

The Jurisdiction Appeal

15. In the application before Ms Fong Lim the Plaintiff relied upon his affidavit sworn 14 May 2004, and on two affidavits which had earlier been filed by the Defendants to support a quite different application (by them, for summary judgment): of Leo Cleanthous, sworn 4 April 2002, and Kristin Bannerman also sworn 4 April 2002.

(i) Ms Bannerman is a Licensed Conveyancer. Her affidavit relates to the property at 4 Bridelia Court, Rosebury Heights ("4 Bridelia"). She received instructions from the Second Defendant (the registered proprietor of 4 Bridelia) to act for him on the conveyance of the property to a purchaser, a Mr I. V. Loganathan. The price agreed was $201,000.00, which included an allowance of $11,000.00 for furniture which was sold with the property – settlement was effected on 14 December 2001. Paragraph 12 of her affidavit outlines where the proceeds of the sale were directed. There

was a payment to a mortgagee of $194,268.23. There were various payments to solicitors, Ms Bannerman's firm, real estate agents, PAWA and the Palmerston City Council. That left $4,915.16 to be applied to the benefit of the Second Defendant. (In fact, that amount was paid out to J Karapodis Nominees Pty Ltd.)

In paragraph 13 of her affidavit Ms Bannerman said:

> "When taking account of the total proceeds of sale and the agreed value of the furniture, the Second Defendant suffered a shortfall on the sale of the property of approximately $5,000.00 to $6,000.00."

Paragraphs (c) – (e) of the FASOC's prayer.for relief refer to the property at 4 Bridelia. Paragraph (d) has been rendered irrelevant by the fact of the sale. Paragraph (c) seeks a declaration that 4 Bridelia was partnership property. The basis for that claim appears at paragraph 13 and 14 of the FASOC.

[I note that it is quite possible that paragraph 17 of the FASOC might be intended to refer to 4 Bridelia, if the words "….the property described in paragraph 12 above…"meant to say "13", not "12". There is a similar question about paragraph 15(f), wherein "11" is almost certainly meant to read "12". This is my own speculation. I have heard no argument on the point and there is not application to amend. I do not think it right to take this speculation any further].

Within the terms of s 14(1)(b) of the Act, Ms Bannerman's affidavit makes it possible to assess "the value of the relief sought", in relation to the declaration claimed in paragraph (c) of the prayer for relief. Within the terms of s 14(1)(c) it likewise makes it possible to assess "the value of the right to ownership". In the absence of any evidence of or pleading of fraud, the value is less that nothing. Paragraph (e) of the prayer for relief makes a claim for "half of the proper nett value of the property as at the time of such

sale after making appropriate and proper adjustments". Ms Bannerman's affidavit establishes that the "proper nett value" is negative.

There is no evidence to the contrary. There is nothing before me to suggest that either of the Defendants did anything except lose money on 4 Bridelia.

Ms McLaren argued that the jurisdictional limits created by s 14(1)(b) and (c) of the Act were exceeded if, in the case of s 14(1)(b), the claims for equitable relief related to property and that property had a value beyond the jurisdictional limit; and similarly in the case of s 14(1)(c). In my opinion she is simply wrong. The jurisdictional limit is concerned with the value of the claim, not the value of the items of property which appertain to the claim.

(ii) Mr Cleanthous is a Certified Practicing Accountant. His affidavit bears on the financial affairs of the First Defendant. In summarising these affairs, Mr Cleanthous has relied upon books and records of the First Defendant supplied to him by the Second Defendant. The summary relates to the First Defendants affairs during the financial years ending 30 June 1998 and 30 June 1999. It appears that the First Defendant has not traded since 30 June 1999. The Plaintiffs claim relates to a period commencing "In or around February 1998" (paragraph 3 of the FASOC). The claim does not make clear when the period ended. An affidavit by the Second Defendant, sworn 18 April 2002 has it that the First Defendant has not traded since 30 June 1999. The Second Defendant is the sole director and shareholder of the First Defendant. There is every reason to believe, and no suggestion to the contrary, that the two years' accounts spoken of by Mr Cleanthous cover the entire relevant period. See also the affidavits of Leonidas Skliros, sworn 29 April 2002, and Eustathios Skliros, sworn 26 April 2002, and the Plaintiff's affidavit sworn 14 May 2004: paragraph 4 "….in partnership between about February 1998 to about July 1999."

Mr Cleanthous's conclusions are embodied in paragraph 8 of his affidavit:

> The overall financial and trading results for the Company for the above mentioned financial years are extremely poor considering the net loss of $13,544.00 for the financial year ending 30 June 1998, the gross trading loss and net loss of respectively $21,644.00 and $106,322.00 for the financial year ending 30th June 1999 and the net profit of $Nil for the financial year ending 30th June 2000 when the Company showed no trading profit.

The Plaintiff, in paragraph 4 of an affidavit sworn 19 April 2004 (in connection with a different application) stated "… I deny that I had equal access to the office premises and documents of the partnership or at all …" The Plaintiff is his affidavit sworn 14 May 2004 (in conjunction with his application to transfer the proceedings to the Supreme Court) stated (paragraphs 4 – 6):

> 4. I conducted a building development business in partnership between about February 1998 to about July 1999. During the partnership we constructed the buildings described in my amended statement of claim dated 23 May 2003.
>
> 5. I have inspected the documents discovered by the defendants the inspection shows that the partnership business earned a sum of $749,563.16 gross during the course of the partnership. This money was deposited into the A N Z and N A B bank accounts for the first defendant company which was used in the partnership.
>
> 6. I say that in order to ascertain my half share in the profits the partnership an accounting of $749.562.16 will have to be conducted.

16. Again, Ms McLaren argued that, there being partnership revenues of $749,563.16, and that figure being well in excess of the jurisdictional limit, the claim was outside the jurisdictional limit. Again in my opinion, she is simply wrong. Again the jurisdictional limit, in my opinion, applies to the value of the claim, not to the value of matters appertaining to the claim, that is to profits, not turnover.

17. The claim in paragraphs (a) and (b) of the FASOC's prayer for relief is for a 49% shareholding in the First Defendant. The claim in paragraphs (f) and (g) is for an accounting and for a share of the profits of the First Defendant.

What profits? According to Mr Cleanthous's affidavit, the First Defendant made losses in both relevant years. As for the value of the shareholding, the First Defendant appears to be a company with assets of $5,858 and liabilities (virtually all owed to the Second Defendant, its director and shareholder) of $125,723. That is to say, worthless.

18. The material just discussed was available to Ms Fong Lim. The Plaintiff filed – or if not filed, handed up to me at the date of my hearing the appeals – new evidence in the form of an affidavit (sworn, as I noted above, I'm not sure when) of Bob Cowling. Mr Cowling is a Chartered Accountant. His affidavit speaks of his consideration of a series of reports by Rider Hunt NT Pty Ltd, Property and Construction Consultants, whose reports are annexed to Mr Cowling's affidavit. Rider Hunt surveyed three properties with a view to estimating the cost of construction of buildings on those properties erected by the First Respondent. The buildings comprise a house for Mr Leonidas Skliros, a house for Mr Eustathios Skliros, and seven units at the Sundowner Caravan Park. These three projects, together with 4 Bridelia, constitute the entirety of the work done by the First Respondent in 1998 and 1999 and which is the subject of the dispute between the parties.

19. Mr Cowling had no new information as to the income of the First Defendant during that period. He relied on the information in the affidavit of Mr Cleanthous. Mr Cowley attests that, if Rider Hunt's estimates are correct, the costs of completing the three projects would have exceeded the amount recouped as sales by $259,064. Mr Cowling's affidavit, therefore, provides a reason to suspect that the losses on these projects may have been greater that was previously known. It provides no reason at all to suspect that the projects may have produced profits for the First Defendant.

20. In my judgment on the evidence before me, there is no evidence at all that any of the remedies claimed in paragraphs (a), (b), (c), (d), (e), (f), or (g) is of any positive value. I am therefore of the opinion that the value of the

claim does not exceed the jurisdictional limit. The jurisdiction appeal is dismissed.

21. This being an appeal de novo I have not referred to the Reasons given by Ms Fong Lim. Reading them now, it seems to me that there are two matters of fact found by me which differ from those found by her. First, in paragraph 6 of her Reasons, addressing Mr Cleanthous's financial statements, Ms Fong Lim wrote: "It is interesting to note that the net liability of 1999 included a loan to the Second Defendant of $125,636". I yield to none in my ability to misread a balance sheet, but my interpretation of the Cleanthous material is that it was the Second Defendant who had loaned the money to the First Defendant. Secondly, in paragraph 11 of her Reasons, writing of the sale price of 4 Bridelia sold to Mr Loganathan, Ms Fong Lim records a figure first of $201,000 (which I believe is correct) and then a figure of $210,454.82. The $454.82 is, I believe, a correct recording of the adjustments on settlement spoken of by Ms Bannerman. The substitution of $210,000 for $201,000, however, I believe to be a slip, which has in term produced Ms Fong Lim's surplus figure of $16,186.59. That figure should be $9,000 less (and also in my opinion should be reduced by taking into account the costs of solicitors, conveyancers etc).

22. It will be seen that Ms Fong Lim's conclusion on those points produce positive figures for the value of the First Defendant and for the surplus after sale of the house. Even if she is right on both points, and I am wrong, the positive figures added together amounts to less than $21,000, and even if the figure were added to the liquidated damages claim of $75,000 from paragraph (h) of the FASOC's prayer for relief, (a dubious addition, paragraph (h) being, it seems, in the alternative, not additional, to the other claims for relief) – the jurisdictional limit would still not be reached.

The Costs Appeal

23. For the reasons given above in paragraph 14 herein, I am of the opinion that, despite this appeal being, pursuant to Rule 4.04, an appeal de novo, it ought to be considered, de novo, on the material which was before the Judicial Registrar, Ms Fong Lim. In any event, as it happens, there is not any new evidence which could have a bearing on the appeal.

24. The making of a costs order against Ms McLaren personally seems first to have been raised in written submissions prepared by Mr Dearn and signed by Mr Johns, solicitor for the Defendants, for the argument before Ms Fong Lim on the Plaintiff's application to transfer the matter to the Supreme Court. In paragraph 3 of those submissions the author wrote:

> "The application ought to be dismissed with costs against the solicitor for the Plaintiff, due to the application being devoid of any merit on its face and unsupported and representing an unreasonable and unnecessary cost imposition on the Defendants who have had properly respond to it."

25. I have no reason to believe that Ms McLaren was made aware of that application at any time before 24 May 2004, the date the application for transfer was argued before Ms Fong Lim. As I recounted in paragraph 3 of these Reasons, Ms Fong Lim adjourned that question for later argument: having heard that argument on 7 June 2004, she made her order and published her Reasons on 9 June.

26. At the hearing of the appeal against that order, Ms McLaren submitted at length that she had not been offered sufficient opportunity to respond to the application that costs be awarded against her personally (see s 32(3) of the Act). In my judgment these submissions are not only wrong – the procedure adopted by Ms Fong Lim gave Ms McLaren ample opportunity – but also irrelevant, given that this appeal is "by way of a hearing de novo" Similarly, I am of the opinion that Mr Dearn's submission (which I paraphrase) – that the appellant must demonstrate error in the judgement

appealed from, and that it is not the function of an appellate court to substitute an exercise of discretion for a (different) exercise of discretion by the court below – is not apposite to an appeal de novo.

27. Section 32 of the *Local Court Act* provides:

> 32. **Costs liability of legal practitioner**
>
> (1) Where a legal practitioner for a party to a proceeding, whether personally or through a servant or an agent, has caused costs to be incurred improperly or without reasonable cause or to be wasted by undue delay or negligence or by any other misconduct or default, the Court may make an order that –
>
> (a) all or any of the costs between the legal practitioner and the client be disallowed or that the legal practitioner repay to the client the whole or part of any money paid on account of costs;
>
> (b) the legal practitioner pay to the client all or any of the costs which the client has been ordered to pay to any party; or
>
> (c) the legal practitioner pay all or any of the costs payable by a party other that the client.
>
> (2) Without limiting the generality of subsection (1), a legal practitioner is in default for the purposes of that subsection if a proceeding cannot conveniently be heard or proceed, or fails or is adjourned without any useful progress being made, because the legal practitioner failed to –
>
> (a) attend in person or by a proper representative;
>
> (b) file document which ought to have been filed;
>
> (c) lodge or deliver a document for the use of the Court which ought to have been lodged or delivered;
>
> (d) be prepared with proper evidence or an account; or
>
> (e) otherwise proceed;
>
> (3) The Court shall not make an order under subsection (1) without giving the legal practitioner a reasonable opportunity to be heard.
>
> (4) The Court may order the notice of a proceeding or order against a legal practitioner under this section be given to the client in such manner as it directs.

28. In the terms of s 32(1), there can be no doubt that costs – the costs of the transfer application – have been incurred and wasted. The complaint the Defendants make is that Ms McLaren, in making or pursuing that application, was "negligent", within the meaning of that word in this context.

29. In a collection of six separate appeals reported under the name *Ridehalgh v Horsefield* [1994] Ch 205 – the Magistrates' library does not run to authorised English reports and I (grateful to have access to any books at all in these degenerate times) will be citing the report in [1994] 3 All ER 848 – the Court of Appeal (Bingham MR, Rose and White LJJ) consciously sought to pronounce authorititivly and exhaustively on the question of the circumstances in which it is appropriate to make an order that a solicitor personally pay the costs of a proceeding. The court was assisted by counsel briefed not only by most of the parties to the six cases, but also by the Law Society and the General Council of the Bar. By way of introduction, Bingham MR, delivering the judgement of the Court, said (at p 855 – 6):

> "The argument we have heard discloses a tension between two important public interests. One is that lawyers should not be deterred from pursuing their clients' interests by fear of incurring a personal liability to their clients' opponents; that they should not be penalised by orders to pay costs without a fair opportunity to defend themselves; that wasted costs orders should not become a back-door means of recovering costs not otherwise recoverable against 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 opponents' 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."

30. The Master of the Rolls then goes on to consider the House of Lords decision *Myers v Elman* [1940] AC 282, from which his Lordship derives "five fundamental propositions" (p 856 – 857):

(1) "The court's jurisdiction to make a wasted costs order against a solicitor is quite distinct from the disciplinary jurisdiction exercised over solicitors.
(2) Whereas a disciplinary order against a solicitor requires a finding that he has been personally guilty of serious professional misconduct, the making of a wasted costs order does not.
(3) The court's jurisdiction to make a wasted costs order against a solicitor is founded on breach of the duty owed by the solicitor to the court to perform his duty as an officer of the court in promoting within his own sphere the cause of justice.
(4) To show a breach of that duty it is not necessary to establish dishonesty, criminal conduct, personal obliquity or behaviour such as would warrant striking a solicitor of the roll. While mere mistake or error of judgement would not justify an order, misconduct, default or even negligence is enough if the negligence is serious or gross.
(5) The jurisdiction is compensatory and not merely punitive."

31. The judgement then follows various changes to the Rules of the Supreme Court, and to the Supreme Court Act 1981, which, in s 51(7) defined "wasted costs" to mean

> "any costs incurred by a party – (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or (b) which in the light of such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay"

and, on p 861 – 862, the Court says:

"Improper, unreasonable or negligent

> A number of different submissions were made on the correct construction of these crucial words in the new s 51(7) of the Supreme Court Act 1981. In our view the meaning of these expressions is not open to serious doubt.
>
> 'Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgement limited to that. Conduct which would be regarded as improper according to the consensus of professional

(including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.

'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather that advance the resolution of the case and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautions legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgement, but it is not unreasonable.

The term 'negligent' was the most controversial of the three. It was argued that the 1990 Act, in this context as in others, used 'negligent' as a term of art involving the well known ingredients of duty, breach, causation and damage. Therefore, it was said, conduct cannot be regarded as negligent unless it involves an actionable breach of the legal representative's duty to his own client, to whom alone a duty is owed. We reject this approach. (1) As already noted, the predecessor of the present Ord 62. R11 made reference to 'reasonable competence'. It seems to us inconceivable that by changing the language Parliament intended to make it harder, rather than easier, for courts to make orders. (2) Since the applicant's right to a wasted cost order against a legal representative depends on showing that the latter is in breach of his duty to the court it makes no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that he is also in breach of his duty to his client.

We cannot regard this as, in practical terms, a very live issue, since it requires some ingenuity to postulate a situation in which a legal representative causes the other side to incur unnecessary costs without at the same time running up unnecessary costs for his own side and so breaching the ordinary duty owed by a legal representative to his client. But for whatever importance it may have, we are clear that 'negligent' should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

In adopting an untechnical approach to the meaning of negligence in this context, we would however wish firmly to discountenance any suggestion that an applicant for a wasted costs order under his head

need prove anything less that he would have to prove in an action for negligence –

> 'advice, acts of omissions in the course of their professional work which no member of the profession who was reasonable well-informed and competent would have given or done or omitted to do…[an error of judgement] such as no reasonably well informed and competent member of that profession could have made.' (See *Saif Ali v Sydney Mitchell & Co* [1978] 3 All ER 1033 at 1041, 1043, [1980] AC 198 at 218, 220 per Lord Diplock).

We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings, so as to avoid overlap between the three. We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think any sharp differentiation between these expressions is useful or necessary or intended."

32. It seems to me that the wording of s 51(7) of the English Supreme Court Act is close enough to the wording of s 32 of the Act that I must regard *Ridehalgh v Horsefield* as very persuasive authority. I say that having compared the two sections: I note that, in the cases I have looked at, the principles adumbrated for such matters, and the standards applied, appear to be fairly uniformly arrived at, whatever the exact wording of the statute or Rule – or even when there is no relevant wording, as was the case in England in 1939 in *Myers v Elman*. See, for example the judgement of French J in *Da Sousa v Minister of State for Immigration, Local Government and Ethnic Affairs* (1993) 114 FLR 708, at a time when the relevant Federal Court Rule spoke only of "delay or misconduct on the part of the solicitor" (p 711).

33. The "complaint" against Ms McLaren was and is that she lodged and pursued an application to transfer this suit to the Supreme Court when at no time did she present any evidence that the value of the claim was beyond the jurisdictional limit. She did so because she fundamentally misunderstood

what a claim is. If her arguments before me were sincere, she persists in that fundamental misunderstanding. It appears to me that an error as elementary as this comes well within the field of "negligence" as that term is explained in *Ridehalgh v Horsefield*, that it falls far short of what is expected of ordinary members of the legal profession, that i evidences "a serious failure to give reasonable attention to the relevant law and the facts" (*Da Sousa* at p 713). For that reason, and notwithstanding the force of the policy considerations that always militate against making such an order, I am of the opinion that it is appropriate to order that the Plaintiff's solicitor pay to the Defendant the costs of and incidental to the application to transfer the Plaintiff's proceedings to the Supreme Court. Such costs, given the complexity of the matter, should be at 80% of the Supreme Court scale. The costs appeal is dismissed, (or leave to appeal is refused, if I am right about non-compliance with Rule 4.04).

34. Two incidental matters remain:

(1) In the course of argument, Mr Dearn from time to time referred to the fact that the Defendants had, in writing, consented, pursuant to s 14(1)(d) of the Act, to the full value of the Plaintiff's claim being litigated in this Court, whether it was within the jurisdictional limit or not. (That consent appears in written submissions filed for an earlier application). I must confess that I was never confident that I understood what use Mr Dearn was suggesting I make on that fact. If, by chance, he was arguing (and I do not believe he was) that the Plaintiff's baseless attempt to transfer the proceedings was, in the light of the Defendant's consent, not only doomed to failure for lack of evidence, but also somehow in bad faith, the Plaintiff having nothing to lose by staying in the Local Court, then I do not accept that argument.

As far as I can see, when a claim exceeds the jurisdictional limit a plaintiff has an unfettered right to elect to pursue it in the Supreme Court,

irrespective of the desires and consents of the defendant. Such a plaintiff may expect a higher standard of justice in the Supreme Court, and, for all I know, a quicker process to hearing. I am not persuaded by this factor or any other of any impropriety on Ms McLaren's part. My dismissal of the appeal is based upon my conclusion that in her pursuit of this application she has been negligent etc, as explained above.

(2) In the course of argument before me, Mr Dearn applied that the costs of the appeals be ordered to be paid by Ms McLaren personally. By reason of s 32(3) of the Act I do not believe I should consider that application without giving Ms McLaren a reasonable opportunity to be heard. I should also be grateful for any guidance counsel can give as to whether an appeal from the Registrar under Rule 4.04 is in any way governed by Rule 37, because if it is, the impact of Rule 38.09 will have to be considered.

Dated this 4th day of March 2005.

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R J WALLACE

STIPENDIARY MAGISTRATE