FEDERAL COURT OF AUSTRALIA

Menzies v Paccar Financial Pty Ltd [2011] FCA 1161

Citation:	Menzies v Paccar Financial Pty Ltd [2011] FCA 1161
Parties:	**IAN DAVID MENZIES and COLLEEN ANNE MENZIES v PACCAR FINANCIAL PTY LTD (ACN 005 592 049)** **IAN DAVID MENZIES and COLLEEN ANNE MENZIES v PACCAR FINANCIAL PTY LTD (ACN 005 592 049) & ORS**
File numbers:	VID 495 of 2010 VID 660 of 2010
Judge:	**TRACEY J**
Date of judgment:	21 October 2011
Catchwords:	**COSTS –** indemnity costs orders sought – arising out of bankruptcy proceedings – stay of sequestration order – appeal from sequestration order allowed – contempt charges – motions for removal of trustees - brought for ulterior purpose
Legislation:	*Bankruptcy Act 1966* (Cth) ss 54, 179 *Federal Court of Australia Act 1976* (Cth) ss 24, 37M, 37N, 43 *Federal Court Rules 2010* (repealed) O 62 r 9, Div 1, pt 52 *Revised Professional Practice and Conduct Rules 1995* (NSW) R 23A, pts 22, 23, 35, 36, 37
Cases cited:	*Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 cited, applied *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225 cited *Décor Corporation Pty Ltd v Dart Industries Incorporated* (1991) 33 FCR 397 cited *De Sousa v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 544 cited *Doolan v Dare* [2004] FCA 682 compared *Dowling v Fairfax Media Publications Pty Ltd (No 2)* [2010] FCAFC 28 cited *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 considered, compared *J-Corp Pty Ltd v The Australian Builders Labourers*

Federation Union of Workers (No 2) (1993) 46 IR 301 cited
Lemoto v Able Technical Pty Ltd (2005) 63 NSWLR 300 cited, applied
Levick v Commissioner of Taxation (2003) 102 FCR 155 cited, applied
Menzies v Paccar Financial Ltd [2010] FCA 748 considered
Menzies v Paccar Financial Ltd [2010] FCA 931 considered
Menzies v Paccar Financial Pty Ltd [2011] FCA 460 referred to
Re Alafaci; Registrar in Bankruptcy v Hardwick (1976) 9 ALR 262 cited
Ridehalgh v Horsefield [1994] Ch 205
Ruddock v Vadarlis (No 2) (2001) 115 FCR 229

Date of hearing:	15-16 November 2010
Date of last submissions:	19 November 2010
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	135
Counsel for the First and Second Appellants:	The Appellants appeared in person
Counsel for the First Respondent:	T Davies
Solicitor for the First Respondent:	Hopkins Lawyers
Counsel for the Second and Third Respondents:	S Maiden
Solicitor for the Second and Third Respondents:	Charles Fice Lawyers
Counsel for T Hall	G Craddock SC
Solicitor for T Hall	HWL Ebsworth

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 495 of 2010**

BETWEEN:	**IAN DAVID MENZIES** **First Appellant**
	COLLEEN ANNE MENZIES **Second Appellant**
AND:	**PACCAR FINANCIAL PTY LTD (ACN 005 592 049)** **Respondent**

JUDGE: **TRACEY J**
DATE OF ORDER: **21 OCTOBER 2011**
WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. The appellants pay the costs of Paul Andrew Burness and Morgan Gerard James Lane of and incidental to the appellants' motions, numbered 4 to 7 inclusive, notice of which was given on 13 July 2010.

2. The appellants pay Paul Andrew Burness' and Morgan Gerard James Lane's costs of and incidental to the appellants' motions, numbered 2 and 3, notice of which was given on 13 July 2010 on an indemnity basis.

3. There be no order for costs of and incidental to Paul Andrew Burness' and Morgan Gerard James Lane's motion, notice of which was given on 8 July 2010.

4. Mr Trevor Hall indemnify the appellants against the costs order made in paragraph 2 above.

5. The respondent's motions, notice of which was given on 9 August 2010, otherwise be refused.

6. Paul Andrew Burness' and Morgan Gerard James Lane's motions, notice of which was given on 9 August 2010, otherwise be refused.

7. No order be made in relation to the costs incurred by the parties in relation to the present applications for the payment of costs.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 660 of 2010**

BETWEEN:	**IAN DAVID MENZIES** **First Appellant**
	COLLEEN ANNE MENZIES **Second Appellant**
AND:	**PACCAR FINANCIAL PTY LTD (ACN 005 592 049)** **First Respondent**
	PAUL ANDREW BURNESS **Second Respondent**
	MORGAN GERARD JAMES LANE **Third Respondent**

JUDGE: **TRACEY J**
DATE OF ORDER: **21 OCTOBER 2011**
WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. The appellants pay the second and third respondents' costs of the application.

2. The first respondent's motions, notice of which was given on 8 September 2010, each be dismissed.

3. The second and third respondents' motions, notice of which was given on 18 August 2010, each be refused.

4. The first respondent's motions, notice of which was given on 4 October 2010, each be refused.

5. No order be made in relation to the costs incurred by the parties in relation to the present applications for the payment of costs.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 495 of 2010**
VID 660 of 2010

BETWEEN:	**IAN DAVID MENZIES** **First Appellant**
	COLLEEN ANNE MENZIES **Second Appellant**
AND:	**PACCAR FINANCIAL PTY LTD (ACN 005 592 049)** **Respondent**

JUDGE:	**TRACEY J**
DATE:	**21 OCTOBER 2011**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

1 There are before the Court a series of motions relating to the costs of two proceedings. The Respondents to both of the proceedings were substantially successful in resisting applications brought by Mr and Mrs Menzies. The Respondents are, respectively, the petitioning creditors in bankruptcy proceedings brought against Mr and Mrs Menzies and the appointed trustees of Mr and Mrs Menzies' bankrupt estates. It will be convenient to refer to them separately as "Paccar" and "the trustees". Collectively I will refer to them as the Respondents.

2 The Respondents contend that they are entitled to the usual order for costs in their favour in both proceedings. They further submit that in the extra-ordinary circumstances which, they contend, attended those proceedings they are entitled to an award of indemnity costs against both Mr and Mrs Menzies and the solicitor who acted for them in the proceedings, Mr Trevor Hall. For this purpose they seek orders that Mr Hall be joined as a Respondent to each of the proceedings.

PROCEDURAL HISTORY

3 In order that the context in which the costs orders are sought can properly be understood it is necessary to essay something of the history of the two proceedings. That history begins with the making of a sequestration order against Mr and Mrs Menzies' bankrupt estates. The order was made by the Federal Magistrates Court on 11 June 2010. Mr and Mrs Menzies appealed to this Court against the making of that order and some related orders. Paccar was the only Respondent to that appeal (VID 495 of 2010). While the appeal was pending Mr and Mrs Menzies applied for interlocutory relief including an order staying the operation of the sequestration order and an order that the trustees be removed. These applications were heard by Ryan J on 1 July 2010. One of the orders made by his Honour was that:

> "All proceedings under the sequestration order made on 11 June 2010 be stayed until the hearing and determination of the appeal or further order on condition that each of the appellants [Mr and Mrs Menzies] lodge with the trustee in bankruptcy … a statement of his or her affairs in conformity with s 54 of the *Bankruptcy Act 1966*."

4 Section 54(1) of the *Bankruptcy Act 1966* (Cth) ("the Bankruptcy Act") requires that a person against whose estate a sequestration order is made must, within 14 days from the day on which notification of the bankruptcy is given, prepare and file a statement of affairs. That 14 day period had expired before Ryan J made his order on 1 July 2010.

5 The parties understood his Honour's orders in different ways. The solicitor for the trustees took the view that, under the order, a stay would never come into effect because Mr and Mrs Menzies could never meet the temporal requirements of s 54. The trustees determined to exercise their powers notwithstanding the order and the pending appeal. By letter dated 2 July 2010, the solicitor for the trustees asked Mr and Mrs Menzies to confirm that they would immediately and voluntarily give the trustees full and free access to their farm and books of account and permit the trustees to seize and remove property from the farm. Certain further legal action was foreshadowed in the event that consent was not forthcoming. It will be necessary to return in greater detail to the terms of this letter later in these reasons.

6 Mr and Mrs Menzies had a different appreciation of the effect of Ryan J's order. They considered that the stay had come into effect immediately but would be dissolved if they failed (after some indefinite period) to file their statements of affairs. They considered

that the solicitor's letter constituted a contempt of Court because the trustee had "purposively and deliberately breached the orders of the Court." On 7 July 2010 they filed a motion seeking orders that the trustees be removed and replaced. On the same day they filed points of claim in which they particularised charges of contempt against the trustees. On 13 July 2010 Mr and Mrs Menzies filed an amended notice of motion in which they sought a declaration that the trustees were guilty of contempt of court and an order that they should be punished for such contempt.

7 On 8 July 2010 the trustees responded by filing their own notice of motion which sought declaratory orders clarifying the effect of Ryan J's order.

8 All of these motions came on before Sundberg J on 13 July 2010.

9 Sundberg J dealt first with the construction point. He declared that the stay, provided for in Ryan J's order, came into effect on the filing and service, by Mr and Mrs Menzies, of their statements of affairs. This had occurred on 7 July 2010. As there had been no stay order in force on 2 July 2010 there was no order in relation to which the trustees could be held in contempt. In any event, his Honour did not consider that, in causing their solicitor to send the letter, the trustees had committed any contempt. This was because Ryan J's order was not coercive or injunctive in nature, there was no evidence that the trustees purposively and deliberately breached the order and because the trustees had acted on legal advice as to the meaning and operation of the order and had no intention of breaching it.

10 On 22 July 2010 Sundberg J made a number of orders and declarations which gave effect to his reasons for decision. He dismissed the contempt and removal motions and declared that the stay order, made by Ryan J, came into effect on 7 July 2010: see *Menzies v Paccar Financial Ltd* [2010] FCA 748. His Honour further ordered that the parties file written submissions as to the orders that should be made as to the costs of the motions.

11 On 9 August 2010 Mr and Mrs Menzies sought leave to appeal from the judgment of Sundberg J. That application came on before Jessup J on 13 August 2010. It was the second and separate proceeding (VID 660 of 2010) in relation to which the present cost orders are sought. Both Paccar and the trustees were named as Respondents. Jessup J dismissed the application: see *Menzies v Paccar Financial Pty Ltd* [2010] FCA 931. His Honour's

principal reason for so doing was that the application for leave to appeal was made out of time and was, therefore, incompetent. His Honour held that, in any event, Mr and Mrs Menzies had failed to satisfy the test propounded in *Décor Corporation Pty Ltd v Dart Industries Incorporated* (1991) 33 FCR 397 at 398-400. He considered that Sundberg J's decision on the construction point was "manifestly correct" and that no substantial injustice would result if the orders made by Sundberg J were left undisturbed. His Honour further ordered that the parties file and serve submissions relating to the costs of the application for leave to appeal.

12 By notices of motion dated 9 August 2010 in proceeding VID 495 of 2010 the Respondents applied for orders that Mr and Mrs Menzies' solicitor, Mr Trevor Hall, be joined to the appeal for the purpose of becoming a respondent to a motion that he be held, with Mr and Mrs Menzies, jointly and severally liable to the trustees for the trustees' costs of the motions which had been dealt with by Sundberg J, such costs to be calculated on an indemnity basis. Jessup J ordered that these motions should be heard and determined together with the arguments relating to the costs of the application for leave to appeal.

13 By notices of motion dated 18 August 2010 the Respondents applied for orders in proceeding VID 660 of 2010 in substantially the same terms as those sought by their notices of motion dated 9 August 2010.

14 By a further notice of motion dated 5 November 2010, brought in both proceedings, the trustees sought orders amending their earlier notices to claim an order under the former O 62 r 9 of the *Federal Court Rules* (see now Rule 40.07) disallowing any costs as between Mr Hall and Mr and Mrs Menzies following the giving of undertakings by Mr and Mrs Menzies to the Court in proceeding VID 495 of 2010 on 1 July 2010.

15 By the time these motions were ready for hearing, Sundberg J had retired and Jessup J was on leave. They were referred to me for hearing as Duty Judge.

16 The evidence relied on by the Respondents in support of each of their motions is substantially the same. It will, therefore, be convenient to deal with the general costs issues and the particular issues raised by each of the motions together.

THE BACKGROUND FACTS

17 The events which bear on the costs issues which I am required to determine commenced on 4 September 2009 when Mr and Mrs Menzies committed acts of bankruptcy. A creditor's petition was filed by BP Australia Pty Ltd on 18 September 2009. On 19 November 2009 Paccar filed an application seeking to be substituted as the petitioning creditor. Paccar also sought sequestration orders against Mr and Mrs Menzies.

18 On 19 and 20 May 2010 a Federal Magistrate heard Paccar's applications. Mr and Mrs Menzies resisted these applications. In doing so they gave evidence relating to their assets and liabilities. On 11 June 2010 the Federal Magistrate made sequestration orders against the estates of Mr and Mrs Menzies. She noted that the relevant date of the acts of bankruptcy was 4 September 2009.

19 On 24 June 2010 Mr and Mrs Menzies filed a notice of appeal against the Federal Magistrate's decision. This appeal became proceeding VID 495 of 2010. The appeal was ultimately allowed by Bromberg J: see *Menzies v Paccar Financial Pty Ltd* [2011] FCA 460.

20 As already noted an application was made by Mr and Mrs Menzies for a stay of operation of the sequestration order pending the hearing and determination of the appeal. Ryan J dealt with that application on 1 July 2010. On 2 July 2010 the solicitors for the trustees wrote to Mr Hall a letter which was to commence an acrimonious exchange of correspondence. The letter asserted that:

> "The condition of the stay [made by Ryan J] has not been satisfied because statements of affairs have not been lodged. The condition can never be satisfied because statements of affairs cannot now be lodged within 14 days of notification of the bankruptcy, as mandated by section 54 [of the Bankruptcy Act] and accordingly there can never be statements lodged in conformity with section 54."

21 The letter accused Mr Hall of failing to inform Ryan J that Mr and Mrs Menzies had already "committed a strict liability offence by contravening section 54" and suggested that Ryan J would not have granted the stay had he been so informed. The letter continued:

> "As there is no stay (and can never be a stay under present orders) and as statements of affairs have not been furnished, the trustees have no option but to continue to carry out their statutory duties, including to ascertain the assets and liabilities of the bankrupts (section 19(1)) and to forthwith take possession of all the property of the bankrupts capable of manual delivery (section 129(1))".

22 The solicitors sought confirmation that, by the close of business on 2 July 2010, the bankrupts would give the trustees free access to their farm and books and would "permit them to seize and remove property of the bankrupts that is stored on the farm." The letter was sent by facsimile transmission at 12:03 pm.

23 Mr Hall responded by e-mail to the trustees' solicitors. The e-mail was sent at 1.28 pm.

24 Mr Hall explained that he had been under a misapprehension that his clients had 28 days in which to file their statements of affairs. He demanded information concerning dealings between Paccar and the trustees. He maintained that there was a stay in place and advised that his clients would defend their property. He said that the letter from the trustees' solicitors constituted a contempt of court and demanded that the trustees resign their appointments. Specifically, the e-mail read:

> "We are also of the view that what is contemplated in your letter is a contempt of Court and we invite you immediately to advise that your client will resign his appointment, and consent to the appointment of the Official Receiver as trustee in the State of New South Wales, or a trustee as my client will nominate who is in Sydney, and has relevant expertise.
>
> Your client should assume that we are proceeding with an application for his removal.
>
> My clients will lodge their statement of affairs with ITSA, and you ought procure your clients (sic) resignation, now.
>
> Do not write to me unless it is to serve Court process. Please answer my questions contained herein, we need responses to them. We are proceeding with your client's removal. If your client wants to write and say that the letter was not sent on his instructions, then we await to hear from him.
>
> …
>
> Meanwhile, tell your client that their (sic) are injunctions in place, my client has been instructed by me to defend his property and if you breach those injunctions or your client does, we will bring the full force of the law to bare (sic) on those matters, I can assure you."

25 The trustees' solicitors replied, later on 2 July 2010, that the trustees regarded Mr Hall's letter as "a veiled threat of violence". They restated their position that there was "no effective stay in place" and they asserted that no basis existed for seeking the removal of the trustees. The letter concluded by telling Mr Hall that he "should pull [his] head in."

26 This letter led to further e-mails from Mr Hall to the solicitors which were sent at various times between 4.26 pm and 9.51 pm on 2 July 2010. Amongst other things these emails:

- Forwarded a notice of motion and draft affidavit which, it was said, would be filed 5 July 2010 if by that time "we have not received the Trustee's (sic) notice of intention to resign."
- Nominated Mr Michael Jones as an alternative trustee and advised of his consent to act in that capacity.
- Said that "if the wording of the orders called for anything, it called for an application under the slip rule or an application in chambers out of the grant of liberty to apply, to have the orders amended."
- Reasserted that a stay was in place.
- Threatened the use of reasonable force to eject the trustees from Mr and Mrs Menzies' property should they attempt entry.

27 On 6 July 2010 the notice of motion which was to come before Sundberg J was served on the trustees.

28 On 7 July 2010 Paccar's solicitors sent a facsimile letter to Mr Hall in which they advised, inter alia, that there was no proper foundation for the issuing of the motion and that it only served to run up legal costs.

29 Later on 7 July 2010 Mr and Mrs Menzies filed their statement of affairs. The statement disclosed an asset and liability position which was substantially different from that deposed to by Mr and Mrs Menzies in previous affidavits and during cross-examination in the Federal Magistrates Court. In particular, it disclosed that Mr Hall's firm, Hall Partners Pty Ltd, was, and had been since 19 December 2009, a secured creditor of Mr and Mrs Menzies in the sum of $250,000 pursuant to a mortgage and that Mr and Mrs Menzies had disposed of their interests in some assets which they had earlier claimed to own.

30 The facsimile letter also cautioned that the legal costs of Paccar and the trustees in responding to the contempt motion would be wasteful and not in the best interests of the

bankrupts' estates. The solicitors invited Mr Hall to discontinue the motion for replacement of the trustees.

TRUSTEES' SUBMISSIONS IN VID 495 OF 2010

31 The trustees submitted that they should receive their costs on an indemnity basis because Mr and Mrs Menzies' contempt and removal motions had no prospect of success and were brought for one or more ulterior purposes.

32 The trustees supported their submission that the motions were bound to fail by reference to the reasons given by Sundberg J for dismissing the motions. These reasons are summarised above at [9]. The trustees noted that Mr and Mrs Menzies had been warned about the deficiencies, both procedural and evidentiary, and invited to withdraw their motions prior to the hearing on 13 July 2010. Despite this warning they had pressed on and their applications had been dismissed.

33 The trustees submitted that the motions had been pursued for one or more ulterior purposes. These ulterior purposes were identified as:

- Deterring the trustees from discharging their duties as trustees of the bankrupts' estates;
- Intimidating the trustees into resigning their appointments; and
- Creating the jurisdiction to bring an interlocutory application to remove the trustees, and justifying the bringing of that application.

34 The trustees emphasised the seriousness of the contempt allegations which had been levelled against them. Those allegations had been unfounded and, in some respects, had been found by Sundberg J to be "seriously overblown": see [2010] FCA 748 at [25]. The allegations had the tendency to harm the professional reputations of the trustees and should never have been made.

35 The trustees conceded that there was no direct evidence that Mr and Mrs Menzies had acted for one or more ulterior purposes. They invited the Court to infer such impropriety having regard to all of the circumstances. The starting point of the argument was that, in persisting with what were described as "manifestly hopeless" applications, they should be

presumed to have commenced and prosecuted the applications for some ulterior motive: cf *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 at 401 (per Woodward J).

36 The trustees accepted that the construction placed upon Ryan J's orders by their solicitors, which was advanced in the 2 July 2010 letter, was not correct. Nonetheless, they contended that a fair reading of the letter did not warrant the reaction it elicited from Mr Hall.

37 The trustees noted that Mr Hall had asserted that the solicitor's letter constituted a contempt of Court and demanded that the trustees resign, only 85 minutes after receiving the letter. They submitted that, given the short period involved:

> "The contempt application cannot have been given the serious consideration which any matter of such gravity demands before it was launched. It confounds belief that in the 85 minutes between [the] letter and Mr Hall's response, Mr Hall could have carefully read the impugned letter, properly considered its legal implications, meaningfully conferred with and advised his clients about the appropriate response and the strengths, weaknesses and potential consequences of a contempt application (particularly given its seriousness) and drawn the three page e-mail. Further, proper consideration of the circumstances would have revealed that the appropriate course for the appellants to take was to seek clarification of the Conditional Stay Order, and invite the trustees to wait the few days it would likely have taken for clarification to be obtained."

38 Indeed, as the trustees pointed out, Mr Hall himself had, on 2 July 2010, accepted that an application might need to be made to the Court to obtain clarification of Ryan J's orders.

39 Instead of making such an application, Mr and Mrs Menzies embarked on a course of action which was designed to persuade the trustees to resign and, if they failed to do so, to have them found guilty of contempt and removed by the Court. It was suggested in argument that, if the trustees either resigned or were removed, they would not have been able to have access to the statement of affairs which was filed on 7 July 2010 and would not, therefore, have become aware of the discrepancies between the contents of that statement and the earlier evidence of Mr and Mrs Menzies.

40 In oral argument the trustees further contended that Mr and Mrs Menzies had sought to secure the removal of the trustees by a procedure which either sought to circumvent or ignored the provisions of s 179 of the *Bankruptcy Act*. That section provides for a bankrupt to apply to the Court for an order removing a trustee from office. Before such an order can

be made the Court is required to inquire into the conduct of the trustee. The procedural requirements which attend the making of such an application are explained by Riley J in *Re Alafaci; Registrar in Bankruptcy v Hardwick* (1976) 9 ALR 262 at 267-8. No such application was made by Mr and Mrs Menzies.

41 The trustees contended that Mr Hall should be jointly and severally liable, with Mr and Mrs Menzies, for the trustees' costs. This was because:

- He had failed to give proper consideration to the legal issues involved before asserting that the trustees were guilty of contempt and could and should be removed by orders obtained otherwise than pursuant to s 179 of the *Bankruptcy Act*.
- He had advised his clients to pursue a manifestly hopeless application.
- His intemperate language and threats in his correspondence with the trustees' solicitors.
- He advised and/or accepted instructions from his clients to pursue the contempt proceeding for the inappropriate purposes of dissuading the trustees from discharging their duties, intimidating them so that they would be induced to resign their appointments and/or attempting to create jurisdiction to bring an interlocutory application to remove the trustees and to justify the bringing of that application.

42 The trustees also alleged that Mr Hall had filed a written outline of submissions in support of the motions which misstated the facts and made unfounded allegations. Despite these errors being drawn to his attention, he made no attempt to correct them. In so acting, it was contended, he breached the professional conduct and practice rules of the Law Society of New South Wales. Specific reference was made to Rule 23A, points 22, 23, 35, 36, and 37.

TRUSTEES' SUBMISSIONS IN VID 660 OF 2010

43 The trustees sought indemnity costs orders against Mr and Mrs Menzies and Mr Hall in VID 660 of 2010.

44 They submitted that the application for leave to appeal was no more than an attempt to pursue the objectives which had led to the making of the applications which had been

dismissed by Sundberg J. The trustees, therefore, relied on the same submissions which they had relied on in VID 495 of 2010.

45 In addition, the trustees contended that the application for leave to appeal was plainly incompetent and therefore bound to fail. No application had been made for an extension of time in which to bring the application for leave and, in any event, no evidence was put on to explain the delay in bringing the application.

46 The trustees submitted that Mr Hall was responsible for the time and form of the application for leave to appeal and must have appreciated that the application was deficient and bound to fail. He had manifested "a serious failure to give reasonable attention to the relevant law and facts": see *De Sousa v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 544 at 548. He was aware of the ulterior purposes which allegedly lay behind the attempts to remove the trustees.

PACCAR'S SUBMISSIONS IN VID 495 OF 2010

47 To a large extent Paccar's submissions overlapped those of the trustees. It did, however, advance some additional arguments and suggested additional reasons for drawing the inferences for which the trustees contended.

48 Paccar submitted that the contempt motion was akin to an abuse of process and was issued with an ulterior purpose. It identified the purposes as being to:

- Prevent and/or delay lodgement of a statement of affairs because lodgement would mean that the statement become publicly available;
- Prevent Paccar from seeing the statement because the statement would reveal to Paccar that Mr Hall's firm was a secured creditor of the bankrupts' estate;
- Prevent Paccar becoming aware that evidence, given by Mr and Mrs Menzies in the bankruptcy proceedings, as to their assets and liabilities, was false because it failed to disclose the mortgage granted to Hall's firm and a discretionary trust held by one of their daughters; and
- Prevent Paccar becoming aware that Mr Hall had assisted Mr and Mrs Menzies to prepare the statement;

- Increase the quantum of legal costs payable to Mr Hall's firm and recoverable under the mortgage; and
- Put extraordinary pressure on the trustees to resign so that Mr and Mrs Menzies could appoint their own preferred trustee, Mr Jones, in their stead.

49 Mr Hall had sought Paccar's support for the contempt motion, which support was not forthcoming. Paccar's solicitors had written to Mr Hall on at least three occasions drawing attention to what it said were shortcomings which rendered the contempt motioned doomed to fail. Despite this Mr and Mrs Menzies, supported by Mr Hall, persisted with the prosecution of the motion.

50 Paccar contended that the issues raised by the contempt motion were not seriously arguable and were developed by Mr Hall (rather than Mr and Mrs Menzies) for the ulterior purposes already identified.

51 Paccar also contended that Mr Hall had a personal interest in preventing it from seeing the statement of affairs because the statement disclosed that Mr and Menzies had dissipated assets following their commission of acts of bankruptcy and that this dissipation had not been disclosed by Mr Hall who appeared for Mr and Mrs Menzies before Ryan J.

52 Paccar also contended that it would be futile and unfair to make a costs order against Mr and Mrs Menzies because they were and are impecunious, they had been unable or unwilling to pay earlier costs orders made against them; they acted with the advice of Mr Hall; Mr Hall was the founder, instigator and driver of the contempt motion; the costs incurred by the trustees and Mr and Mrs Menzies would, in the absence of an indemnity costs order, ultimately be a burden on the bankrupt estate; and Mr Hall is a secured creditor of Mr and Mrs Menzies' bankrupt estate and stands to benefit from significant legal costs being expended (regardless of the merit of such proceedings).

53 Paccar submitted that the trustees' motion, which was filed on 8 July 2010, and which sought clarification of Ryan J's orders, should be considered as incidental to the contempt motion because it was necessary for the true meaning and effect of the orders to be determined before any issue of contempt of those orders could arise.

PACCAR'S SUBMISSIONS IN VID 660 OF 2010

54 Paccar also sought indemnity costs orders against Mr and Mrs Menzies and Mr Hall in VID 660 of 2010.

55 Paccar relied on substantially the same arguments as did the trustees in supporting their applications.

MR AND MRS MENZIES' SUBMISSIONS IN VID 495 OF 2010

56 Mr and Mrs Menzies submitted that the appropriate order was that each party pay their own costs.

57 They submitted that Paccar had no interest in the motions considered by Sundberg J and was an inter-meddler.

58 In so far as the trustees were concerned it was submitted that neither party was completely successful before Sundberg J.

59 To a large extent Mr and Mrs Menzies' submissions amounted to a re-agitation of the arguments which they had advanced, largely unsuccessfully, before Sundberg J.

MR AND MRS MENZIES' SUBMISSIONS IN VID 660 OF 2010

60 Mr and Mrs Menzies accepted that costs should follow the event in this proceeding. Given that they maintained that Paccar was also an inter-meddler in this proceeding I understood that they accepted that they should pay only the trustees' costs of the application. They opposed the making of any costs order on an indemnity basis.

61 Again their arguments to a large extent involved the re-agitation of the contentions which they had advanced before Jessup J.

62 A large part of both their written and oral submissions was directed to opposing the making of any orders against their solicitor Mr Hall.

MR HALL'S SUBMISSIONS

63 Paccar and the trustees gave notice to Mr Hall that they proposed to seek indemnity costs orders against him in both proceedings. As a result he sought and was granted leave to appear by counsel and to make submissions in opposition to these applications.

64 Mr Hall denied that his conduct warranted the making of costs orders against him in either proceeding. He emphasised the exceptional nature of such orders. He placed particular reliance on the cautionary principles identified by McColl JA in *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300.

65 Mr Hall acknowledged that the accusations and counter accusations which passed between him and the trustees' solicitors were not helpful and evidenced a lack of professional detachment.

66 Mr Hall submitted that he had not been guilty of any dereliction of duty which would warrant the making of a costs order against him.

67 He said that it was not open to him to disclose the advice which he gave to Mr and Mrs Menzies in either proceeding. Nor was he at liberty to inform the Court about his instructions.

68 Mr Hall submitted that the trustees' complaint that he had been party to the commencement of hopeless proceedings was a judgment made with the benefit of hindsight. Furthermore, the authorities, collected by McColl JA in *Lemoto*, made it clear that something more than the pursuit by a solicitor of a hopeless case had to be demonstrated before a costs order could be made against the solicitor.

VID 495 of 2010

69 Mr Hall submitted that the pursuit of the motions seeking the removal and replacement of the trustees and the motions that they be adjudged to have been in contempt of court and punished therefor, had to be considered in the light of the uncertainty attending the construction of Ryan J's order. Mr Hall had formed the view that the order provided for an immediate stay.

70 When confronted by the trustees' solicitor's assertion that there was no stay in place and there never would be, and the foreshadowing of action to seize property belonging to Mr and Mrs Menzies, he acted to protect the interests of his clients. Although the motions were dismissed they had been pursued for this reason and for no ulterior purpose.

VID 660 of 2010

71 Mr Hall acknowledged that he initiated the application for leave to appeal from Sundberg J's judgment, using the wrong form. He had relied on Division 1 of Part 52 of the former Rules which dealt with leave to appeal from judgments other than interlocutory judgments. He attributed these errors to the fact that the orders made by Sundberg J had been in some instances interlocutory, and in others, final, in nature.

72 Although alert to the fact that some of the orders were interlocutory in nature, the application had been filed well outside the seven day limitation imposed by the Rules. The late filing of the application was the principal basis on which Jessup J dismissed the application, holding it to be incompetent. His Honour noted in his reasons that no application had been made by Mr and Mrs Menzies for an extension of time. Such an application could have been made but was not made by counsel appearing for them before Jessup J. This failure occurred despite counsel for the trustees raising the issue in argument.

73 Mr Hall submitted that responsibility for the failure to apply for an extension of time rested with counsel whom he had instructed to appear for Mr and Mrs Menzies. No application for costs had been made against counsel and he (Mr Hall) should not be held accountable for counsel's error.

74 Mr Hall also directed attention to paragraph 5 of the application for leave to appeal. That paragraph read:

> "In the event that an order is required dispensing time as is otherwise required under Order 52, Subrule 5(2), then the applicant(s) seek an order in accordance with subrule 5(3), that compliance with subrule 5(2) is dispensed with."

This intimation, he contended, should have been understood as an application for enlargement of time, albeit on the wrong form and by reference to the wrong rule.

75 Mr Hall also referred to s 24(1C)(b) of the *Federal Court of Australia Act 1976* (Cth) ("the *Federal Court Act*") which provides that leave to appeal from an interlocutory judgment in proceedings relating to contempt of court is not required. This provision had not been drawn to Jessup J's attention.

76 Mr Hall submitted that these procedural errors had not resulted in wasted costs.

77 He also contended that counsel and solicitors acting for the trustees had been aware of his procedural errors prior to the hearing before Jessup J. They did not draw those errors to his attention before the hearing. This conduct, Mr Hall contended, constituted a breach of the terms (or at least the spirit) of ss 37M and 37N of the *Federal Court Act*. Mr Hall implied that, had he been alerted by the trustees' solicitors about the need for an extension of time to be secured, such an application would have been made in advance of the hearing. The trustees' solicitors had chosen, contrary to their obligations under ss 37M and 37N to hold onto what was described as a "forensic advantage". For this reason costs should not be awarded against him and he should have the costs of defending the application for costs made against him.

COSTS – GENERAL PRINCIPLES

78 The Court has a broad and unfettered discretion, under s 43 of the *Federal Court Act* to award costs in proceedings. Within that general discretion it has long been accepted that costs will ordinarily follow the event and that a successful litigant will receive costs in the absence of special circumstances which justify the making of some other order: see *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at 234 (per Black CJ and French J). The ordinary rule recognises that a successful party will have incurred costs in prosecuting or defending the proceeding and is entitled to be compensated. Such compensation will normally be paid on a party-party basis. On this basis a successful party may still not recover all costs expended in defending the litigation.

79 One variant of the usual order which may be warranted in special or unusual circumstances is an order that costs be paid on an indemnity basis. Under such an order the party in whose favour such an order is made will be fully compensated for all reasonable expenses incurred in the litigation. Such an order may be appropriate where a 'hopeless' application is made.

80 The principles which are to be applied when the Court is asked to award costs on an indemnity basis were expounded by Woodward J in *Fountain Selected Meats* at 400-1. His Honour there said:

> "As I said in *Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd* (1986) 71 ALR 287 at 288, concerning this court's discretion in the award of costs:
>
> 'That discretion is 'absolute and unfettered', but must be exercised judicially (*Trade Practices Commission v Nicholas Enterprises* (1979) 28 ALR 201 at 207). Courts in both the United Kingdom and Australia have long accepted that solicitor and client costs can properly be awarded in appropriate cases where 'there is some special or unusual feature in the case to justify the court exercising its discretion in that way' (*Preston v Preston* [1982] 1 All ER 41 at 58). It is sometimes said that such costs can be awarded where charges of fraud have been made and not sustained; but in all the cases I have considered, there has been some further factor which has influenced the exercise of the court's discretion - for example, the allegations of fraud have been made knowing them to be false, or they have been irrelevant to the issues between the parties: see *Andrews v Bames* (1888) 39 Ch D 133; *Forester v Read* (1870) 6 LR Ch App 40; *Christie v Christie* (1873) 8 LR Ch App 499; *Degmam Pty Ltd (In liq) v Wright (No 2*) [1983] 2 NSWLR 354.'
>
> 'Another case cited in argument was *Australian Guarantee Corp Ltd v De Jager* [1984] VR 483 where (at 502) Tadgell J allowed solicitor and client costs because he found the pursuit of the action to have been 'a high-handed presumption'.'
>
> No doubt the expression 'high-handed presumption' was appropriate in the case Tadgell J had to decide, and he needed to go no further; but in order to establish a convenient principle in such cases it is necessary to be a little more prosaic. I believe that it is appropriate to consider awarding 'solicitor and client' or 'indemnity' costs, whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law. Such cases are, fortunately, rare. But when they occur, the court will need to consider how it should exercise its unfettered discretion.

See also *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225 at 230-4 (per Sheppard J); *J-Corp Pty Ltd v The Australian Builders Labourers Federation Union of Workers (No 2)* (1993) 46 IR 301 at 303 (per French J); *Dowling v Fairfax Media Publications Pty Ltd (No 2)* [2010] FCAFC 28 at [42]-[45] (per Graham J), [139]-[140] (per Logan and Flick JJ).

COSTS IN VID 495 OF 2010 - CONSIDERATION

81 Three separate, but related, groups of motions were before Sundberg J. They were Mr and Mrs Menzies' motions seeking orders that the trustees be punished for contempt and

that they be removed and replaced. The third was the trustees' motion which sought orders to clarify the effect of Ryan J's orders. Distinct costs issues arise in respect of each of these motions. I will, therefore, deal with them separately.

82 Ryan J's stay order was, as Sundberg J found, in a critical respect, ambiguous. It was, nonetheless, intended to have a practical effect. The construction placed upon it by the trustees would have rendered the order wholly ineffectual. Their initial determination to proceed with the administration of the bankrupt estates of Mr and Mrs Menzies without first seeking clarification of the stay order and the terms in which that decision was conveyed to Mr and Mrs Menzies were, to say the least, unfortunate. They triggered a series of equally unfortunate responses. Each of the opposing parties considered that their construction of Ryan J's order was the correct one. Mr Hall appeared to recognise that some clarification was desirable but considered that any application should be made by the trustees. He so advised them in one of his e-mails on 2 July 2010. Despite this uncertainty Mr and Mrs Menzies pressed on with their applications and it was left to the trustees to move the Court for a clarifying order.

Removal and replacement of trustees

83 Against this background I come to Mr and Mrs Menzies' motion seeking the removal and replacement of the trustees. They pursued this application on the basis that the trustees, in deciding to press on with the administration of the estates in the face of Ryan J's order, had demonstrated a lack of impartiality in the performance of their duties. The letter written by the trustees' solicitors on 2 July 2010 was unnecessarily provocative. It alleged that Mr and Mrs Menzies had committed an offence by contravening s 54 of the *Bankruptcy Act*, advanced a literal and narrow construction of Ryan J's order and advised that the trustees proposed forthwith to take possession of Mr and Mrs Menzies' property. It may, however, be doubted that, in deciding to proceed, the trustees did something which would have warranted an enquiry under s 179 of the *Bankruptcy Act*, much less their removal and replacement: cf *Doolan v Dare* [2004] FCA 682 at [49] (per Spender J). Mr and Mrs Menzies' partiality complaint lacked force but was not unarguable. Their application to have the trustees removed was not "hopeless".

84 The means they adopted to achieve their objective did not conform with the Rules. They relied on an interlocutory motion seeking an order for the removal and replacement of

the trustees. The proper course was for an application to be filed seeking an enquiry under s 179. This mistake was made by Mr Hall, not by Mr and Mrs Menzies. In any event, the intention of the motion was clear and the error could have been rectified by amendment without prejudice to the trustees.

85 I do not accept the trustees' submission that Mr and Mrs Menzies pursued this application for an ulterior purpose. That purpose, the trustees said, was to prevent them from becoming aware of the true state of the Menzies' affairs and of the inconsistent evidence which they had earlier given in the Federal Magistrates Court. Those discrepancies would have emerged whether or not the trustees had been removed. Had the application been successful the new trustee would have received Mr and Mrs Menzies' statements of affairs and would thereby have become aware of their indebtedness to Mr Hall and the dispositions of property which had not been earlier declared.

86 The application could have been resisted on the merits by the trustees. The weakness of Mr and Mrs Menzies' case was apparent and the bringing on of an application for their removal was hardly likely to induce the trustees to resign their appointments.

87 In these circumstances costs should follow the event. Mr and Mrs Menzies should pay the trustees' costs of defending the motion for their removal and replacement.

Contempt

88 Different considerations arise in relation to the motion that the trustees be declared in contempt of court and be punished for such contempt.

89 As with the removal and replacement motion, this motion was not brought, as it should have been, strictly in accordance with the Rules of this Court. Nothing turns on this for present purposes.

90 An allegation that a person should be adjudged in contempt of court is an allegation of the utmost seriousness. Such an allegation should only be brought on clear evidence following a careful consideration of all the circumstances including the terms of the relevant Court order and the conduct of the alleged contemnor: see *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 at [94] (per Gillard J).

91 In *Advan Investments* Gillard J identified the elements which are necessary for a complainant to establish in order to make good a charge of civil contempt of court. His Honour there said:

> "[31] In order to prove a civil contempt of court involving a breach of an order of the Court, the plaintiff has to prove the following:
>
> (i) that an order was made by the court;
> (ii) that the terms of the order are clear, unambiguous and capable of compliance;
> (iii) that the order was served on the alleged contemnor or excused in the circumstances, or service dispensed with pursuant to the rules of Court;
> (iv) that the alleged contemnor has knowledge of the terms of the order;
> (v) that the alleged contemnor has breached the terms of the order.
>
> [32] It is necessary for the plaintiff to prove each element beyond reasonable doubt. In accordance with the principles of the criminal law, in proving element (v) it must be proven that the act or omission which constituted the breach of the order was deliberate and voluntary."

92 Following the pronouncement of Ryan J's order on 1 July 2010, there could have been no dispute that elements (i), (iii) and (iv) had been satisfied. There was, however, no reasonable basis upon which Mr and Mrs Menzies or Mr Hall could have formed the view that elements (ii) or (v) could be made out. The terms of the order were not clear or unambiguous. Nor did they require any action or inaction on the part of the trustees.

93 Mr Hall acknowledged on the day after the order had been made that difficulties arose in construing it and suggested that the trustees should exercise liberty to apply with a view to having the order amended. Furthermore, as Sundberg J held, the order was not coercive or injunctive in that it did not require the trustees to do or not to do anything.

94 In any event element (v) could not have been made out even if Ryan J's order could have been understood as imposing obligations on the trustees. If the order was open to the construction that the trustees were restrained from taking any further steps in the administration of Mr and Mrs Menzies' estates, there was no evidence that they had breached an order of this kind. Their solicitor's letter went no further than foreshadowing further steps being taken by them. Such action was to be taken on the basis of their solicitor's advice as to the proper construction of Ryan J's order. There was not, nor could there have been, in these circumstances, a deliberate and voluntary contravention by the trustees of Ryan J's order, even if it were construed in the manner contended for by Mr and Mrs Menzies.

95 The contempt application was, therefore, in my view, hopeless and should not have been instituted.

96 Not only was it hopeless but it was, I consider, brought for the ulterior purpose of persuading the trustees to resign their appointments. The demand that they so resign was made by Mr Hall. In one of his e-mails on 2 July 2010 Mr Hall linked the allegation of contempt of court with the demand that the trustees resign. Specifically, he said:

> "We are also of the view that what is contemplated in your letter is a contempt of Court and we invite you immediately to advise that your client will resign his appointment, and consent to the appointment of the Official Receiver as trustee in the State of New South Wales, or a trustee as my client will nominate who is in Sydney, and has relevant expertise."

97 This amounted to a thinly veiled in terrorem threat to the trustees that if they did not resign they would be prosecuted for contempt. Mr Hall made this veiled threat only 85 minutes after receiving the letter from the trustees' solicitors. It bears the hallmarks of a rushed and ill considered response. Once made, further consideration by Mr Hall (if there was any) did not lead him to a more sober assessment. When the trustees did not resign within a few days the contempt application was made.

98 I have already found that a threat to apply to the Court to have the trustees removed was unlikely to cause them to act as Mr and Mrs Menzies desired. This was because their case was not strong and a Court order removing the trustees for cause could not have prejudiced more than their professional reputations. An allegation of contempt of court, on the other hand, potentially had far more serious implications including the risk of imprisonment. A threat to prosecute for contempt was, therefore, more likely to induce capitulation on the part of the trustees.

99 The contempt motion should not have been filed. It had no chance of succeeding. It was not supported by the known facts and well established law. The trustees should have the costs of defending the contempt charges on an indemnity basis.

The construction application

100 Very soon after Ryan J had made his order it was apparent to all parties that it was necessary and desirable that the effect of that order should be clarified. To this end the

trustees moved the Court for an order for declaratory orders. These orders sought declarations as to when, if at all, the conditional stay granted by Ryan J came into effect.

101 When the application was heard by Sundberg J he agreed that clarification was required. He heard arguments from all parties as to the proper construction of Ryan J's order. He did not accept any of the competing construction submissions in their entirety. The construction which he did favour was, however, closer to the version for which Mr and Mrs Menzies contended than it was to that favoured by the trustees. It involved a rejection of the interpretation which the trustees had advanced in the letter written by their solicitors on 2 July 2010.

102 The trustees succeeded in obtaining clarification of the true meaning and effect of Ryan J's order. This was to the benefit of all parties. Neither the trustees nor Mr and Mrs Menzies were successful in persuading Sundberg J that the construction for which they contended was the correct one. Mr and Mrs Menzies were, however, successful in their fundamental argument that the order made by Ryan J had some effect. On the other hand, this was only determined because the trustees moved the Court for clarification.

103 In these circumstances I consider that there should be no order as to the costs of or incidental to the motions which sought clarification of Ryan J's order.

COSTS IN VID 660 OF 2010 – CONSIDERATION

104 Mr and Mrs Menzies accept that the normal order for costs should be made in favour of the trustees. Such an order should be made.

105 I do not consider that an indemnity costs order should be made against them. The application for leave to appeal failed because of procedural errors for which Mr Hall was responsible. I will deal with those errors later in these reasons when considering Mr Hall's liability. I have concluded that Mr Hall should not be required to pay costs on an indemnity basis in this proceeding. Nor should Mr and Mrs Menzies.

COSTS ORDERS AGAINST MR HALL – PRINCIPLES

106 At the time at which the application was made O 62 r 9 of the *Federal Court Rules 2010* (repealed) provided that:

"**Liability of legal practitioner**

(1) Without limiting the Court's discretion to award costs in a proceeding, if costs are incurred improperly or without reasonable cause, or are wasted by undue delay or by any other misconduct or default, and it appears to the Court that a lawyer is responsible (whether personally or through a servant or agent), the Court may, after giving the lawyer a reasonable opportunity to be heard, do any of the following:

(a) disallow the costs as between the lawyer and the lawyer's client;

(b) if the lawyer is a barrister — disallow the costs as between the barrister and the barrister's instructing solicitor;

(c) direct the lawyer to repay to the client, costs which the client has been ordered to pay to another party;

(d) direct the lawyer to indemnify any party other than the client against costs payable by the party indemnified.

Note A lawyer acting for a party in a civil proceeding must take account of the party's duty to conduct the proceeding consistently with the overarching purpose described in section 37M of the Act, and assist the party to comply with that duty. When deciding whether to award costs, a Court or Judge must take into account any failure by the lawyer to comply with this obligation - see subsection 37N (4) of the Act.

…"

107 As already noted O 62 r 9 has been superseded by r 40.07 with effect from 1 August 2011. Because O 62 r 9 was in operation at relevant times it is that provision which falls to be applied in dealing with the present applications.

108 Equivalent New South Wales provisions were considered by the Court of Appeal in *Lemoto*. McColl JA (with whom Hodgson and Ipp JJA agreed) there summarised the guiding principles for the exercise of the power conferred by this order. Her Honour said (at 320-2) that:

> 92 The new Div 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 (No 2)* (1994) 53 FCR 422, *Deputy Commissioner of Taxation v Levick* (1999) 168 ALR 383 at 389 [11]; 43 ATR 621 at 627 [11], per Hill J, *Levick v Commissioner of Taxation* (2000) 102 FCR 155 at 166 [44]; *Gitsham v Suncorp Metway Insurance Ltd* [2002] QCA 416 at [8], per White J (with whom Davies JA and Williams JA agreed); *De Sousa v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 544; *Money Tree Management Services Pty Ltd and Institute of Taxation Research v Deputy Commissioner of Taxation (No 3)* (2000) 45 ATR 262;
>
> (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* [2003] 1 AC 120 at 143 [56], per Lord Hobhouse of Woodborough; *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169; 29 ACSR 21 (affirmed on appeal; *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134); *Levick v Commissioner of Taxation;* cf *Steindl Nominees Pty Ltd v Laghaifar* [2003] 2 Qd R 683;

(c) the legal practitioner is not "the judge of the credibility of the witnesses or of the validity of the arguments": *Tombling v Universal Bulb Co Ltd* [1951] 2 TLR 289 at 297; [1951] WN 247 at 238; 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) 179 ALR 406 at 413 [34]; 47 ATR 1 at 8 [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 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 134 [23]) per Lord Bingham of Cornhill;

(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] 2 AC 678 at 703 [50]; *Medcalf* (at 136 [24]).

93 The authorities concerning the sparing exercise of the jurisdiction to make wasted costs orders against legal practitioners (sub-par (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 of Chieveley; *Taylor v Pace Developments Ltd* [1991] BCC 406 at 410; *Symphony Group Plc v Hodgson* [1994] QB 179 at 192-193, per Balcombe LJ; *Flinn v Flinn* [1999] VSCA 134 at [24].

109 In *Levick v Commissioner of Taxation* (2000) 102 FCR 155 the need for caution in imposing costs orders on solicitors was emphasised by a Full Court of this Court. The Court said (at [43]) that:

> "We endorse the emphasis on caution in making orders against solicitors, particularly as it will often be difficult for a court to know all the details and circumstances of the solicitor's instructions. We share the concern expressed by Donaldson Mr and Dillon LJ in *Orchard* about the risk of a practice developing whereby solicitors endeavour to browbeat their opponents into abandoning clients, or particular issues or arguments, for fear of a personal costs order being made against them. We agree such conduct might amount to contempt of court."

110 Their Honours nonetheless accepted that there would be cases in which the making of such orders would be appropriate. They quoted with approval from the decision of the English Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205 at 234 where the Court said:

> "It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents. It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it."

111 The Full Court in *Levick* also contemplated the making of such orders in appropriate circumstances. In a passage which immediately followed the one quoted above at [107], it said (at 166) that:

> Having said that, it is equally important to uphold the right of a court to order a solicitor to pay costs wasted by the solicitor's unreasonable conduct of a case. What constitutes unreasonable conduct must depend upon the circumstances of the case; no comprehensive definition is possible. In the context of instituting or maintaining a proceeding or defence, we agree with Goldberg J that unreasonable conduct must be more than acting on behalf of a client who has little or no prospect of success. There must be something akin to abuse of process; that is, using the proceeding for an ulterior purpose or without any, or any proper, consideration of the prospects of success."

COSTS ORDERS AGAINST MR HALL – CONSIDERATION

VID 495 of 2010

112 The trustees and Paccar each submitted that Mr Hall should be required to pay their costs incurred in defending the two sets of motions which had been instituted by Mr and Mrs Menzies in this proceeding. They accepted that the making of such orders should be approached with caution and that a solicitor did not incur personal liability for costs merely by prosecuting a weak or hopeless case on instructions from a client. They submitted that the

motions filed by Mr Hall were bound to fail and that the contempt proceeding was prosecuted for improper purposes. They did not otherwise discriminate, in their submissions, between the two sets of motions. They also relied on the intemperate language employed by Mr Hall in the exchanges which passed between solicitors.

113 The trustees and Paccar also sought an order under O 62 r 9(1)(a) disallowing any costs as between Mr Hall and Mr and Mrs Menzies after 1 July 2010.

114 As I have already indicated, in dealing with the costs orders sought against Mr and Mrs Menzies, I consider that the two sets of motions in this proceeding give rise to different considerations. As a result they merit separate attention.

115 I have already explained (above at [83]-[86]) my reasons for holding that Mr and Mrs Menzies should pay the trustees' costs of the removal and replacement applications on the usual basis. I did not consider that the applications were hopeless or that they had been made for an improper purpose.

116 These findings assist Mr Hall. It cannot be said that he encouraged his clients to pursue an application that was bound to fail and thereby waste the Court's time and the trustees' funds. No ulterior purpose was attributed to him in addition to that alleged unsuccessfully against Mr and Mrs Menzies.

117 Two additional matters were raised in relation to Mr Hall. The first was his use of intemperate language in his communications with the other solicitors involved in the proceeding. These were extra curial communications. Whilst they gave rise to an antipathetic and unnecessarily adversarial environment which, in turn, may have had an impact on decision-making on both sides, these communications cannot be said to have caused costs to be improperly incurred or wasted. It may also be observed that the language employed by the trustees' solicitors was, at times, susceptible to the same complaint which is levelled against Mr Hall.

118 It was also said that Mr Hall erred by prosecuting the removal and replacement applications by motions seeking orders to that effect rather than by making an application for an inquiry under s 179 of the *Bankruptcy Act* and following the procedures appropriate to

such an application. This was, however, a procedural error and one which could have been corrected, if need be, by amendment. More importantly, for present purposes, the error did not add to the costs in the proceeding.

119 No order should be made against Mr Hall in respect of this application.

120 I have already held that Mr and Mrs Menzies should pay the trustees' costs of defending the contempt charges on an indemnity basis. My reasons for so holding appear above at [88]-[99]. In doing so I have already made some reference to the role played by Mr Hall in relation to these applications.

121 Mr Hall first made the allegation that the trustees were guilty of contempt of court shortly after receiving the letter from the trustees' solicitors on 2 July 2010. The allegation was made in an e-mail. It was plainly made without proper reflection or careful research. Mr Hall, as a solicitor, must be taken to have been well aware of the seriousness of such an allegation. The allegation should not have been made.

122 Mr Hall's angry reaction to the contents of the trustees' solicitor's letter may be understandable. Had he reflected on the gravity of the allegation, undertaken the necessary research and withdrawn the allegation matters would have, in all likelihood, rested there. Instead, Mr Hall advised Mr and Mrs Menzies (according to an affidavit filed by Mr Menzies in proceeding VID 660 of 2010) that "the letters appeared to be a contempt of Court." So advised Mr and Mrs Menzies instructed Mr Hall to file the amended notice of motion seeking contempt findings and penalties against the trustees.

123 For the reasons already given in relation to Mr and Mrs Menzies, I consider that the contempt applications should never have been made and that they were made for an ulterior purpose. They were made because of Mr Hall's advice to Mr and Mrs Menzies. That advice was not given with the appropriate degree of professional detachment. It reflected his personal anger (and anger on behalf of his clients) in response to some of the contents of the trustees' solicitor's letter. Mr Hall considered that the trustees had displayed a degree of partiality against his client's interests which warranted their removal. He saw the threat of contempt action as a means of procuring their resignations.

124 In advising Mr and Mrs Menzies to pursue the contempt applications and in prosecuting them on their behalf Mr Hall engaged in misconduct within the meaning of O 62 r 9(1). He was guilty of a serious failure to devote reasonable attention to the relevant law and facts before filing the applications. He should be required to indemnify Mr and Mrs Menzies for the costs order made against them in relation to the contempt applications. I do not consider that an order under O 62 r 9(1)(a) is also required.

VID 660 of 2010

125 It might have been expected that Mr Hall would have devoted a higher standard of care in Mr and Mrs Menzies' interests when he sought to obtain leave to appeal from the orders made by Sundberg J. He did not do so. He made a series of procedural errors, one of which proved fatal to the application, even though that error could perhaps have been overcome by an oral application (which was not made) at the hearing before Jessup J. Mr Hall's failure to give sufficient attention to detail saw him use the wrong form and seek orders under the wrong rule. He also appears to have been unaware of s 24(1C)(b) of the *Federal Court Act*. These errors do not appear to have been identified by counsel instructed by him to appear for Mr and Mrs Menzies before Jessup J.

126 Although the failure by counsel for Mr and Mrs Menzies to make an oral application for an extension of time within which to seek leave to appeal led to the refusal of the application, Jessup J also gave consideration to the contention that Sundberg J's judgment was attended by sufficient doubt as to warrant its review by a Full Court. He rejected the arguments. He found Sundberg J's decision on the construction of Ryan J's order to be "manifestly correct". He further held that, even assuming the sending of the trustees' solicitor's letter of 2 July 2010 constituted a contempt of court, neither Mr or Mrs Menzies' rights nor the practical incidents of their positions in their bankruptcies were affected by it and, as a result, no substantial injustice would result if Sundberg J's orders were left undisturbed. Significantly, however, Jessup J did not describe the application for leave to apply, in so far as the substantial issues were concerned, as being unarguable or bound to fail.

127 Mr Hall's conduct of this proceeding on behalf of Mr and Mrs Menzies fell short of appropriate standards in many respects. Again he failed to give adequate consideration to the relevant facts and law. The result was that the application was inadequately prepared and failed for want of a properly framed application for an extension of time supported by an

affidavit explaining the reasons for the lateness of the application. At the hearing he failed to instruct counsel engaged by him to make an oral application for enlargement of time or to draw the Court's attention to s 24(1C)(b) of the *Federal Court Act*. These deficiencies, whilst being serious, were not, in my view, sufficiently egregious to warrant the making of an order against Mr Hall.

128 A further issue arises as to whether the application was made without reasonable cause. Although Jessup J agreed that Sundberg J had been correct in his interpretation of Ryan J's order he did not treat the point as being unarguable. On the contrary, he spent some pages of his reasons explaining why it was that he came to the same view as Sundberg J. Jessup J did not find it necessary to consider whether there was any merit in the contempt allegations. The arguments relating to the contempt issue did not prolong the length of the hearing before Jessup J to any significant extent. No additional costs were thereby incurred.

129 For these reasons I do not consider that the case for the awarding of costs against Mr Hall personally in respect of this proceeding has been made out. Nor should the trustees or Paccar be required to pay his costs because they failed to draw to his attention, before the trial, the need to apply for and support an application for an enlargement of time. Although he implied, in submissions before me, that he would have done so had he been so advised, when the issue was raised before Jessup J by counsel for the trustees, Mr Hall failed to instruct counsel to make such an application. In any event there was no evidence before me to indicate how soon before the hearing (if at all) the trustees' legal advisers were alert to the deficiency which proved fatal before Jessup J.

PACCAR

130 Once the trustees had been joined as parties in proceeding VID 495 of 2010 they carried the burden of resisting the various applications made by Mr and Mrs Menzies both in that proceeding and, subsequently, in VID 660 of 2010.

131 Paccar remained a respondent and was not, as Mr and Mrs Menzies suggested, a mere intermeddler.

132 Paccar made submissions in both proceedings in opposition to Mr and Mrs Menzies' applications. They also made submissions on the costs issue before me. Its role was

subordinate to that of the trustees. To a large extent it adopted and supplemented, to a limited degree, the submissions made on behalf of the trustees. Paccar was not alleged to have been in contempt of court and was not called on to resist those charges.

133 In those circumstances I do not consider that Mr and Mrs Menzies should be required to pay any of the costs incurred by Paccar in supporting the trustees in the proceedings.

COSTS OF THE COSTS APPLICATION

134 The bulk of the written submissions and the time spent in oral argument was devoted to consideration of the trustees and Paccar's contentions that Mr and Mrs Menzies and Mr Hall should pay their costs of the two proceedings on an indemnity basis. Mr and Mrs Menzies resisted the making of any costs orders in proceeding VID 495 of 2010 but conceded that they should be ordered to pay the trustees' costs in proceeding VID 660 of 2010.

135 Mr Hall resisted all costs applications made against him and sought the making of a costs order in his favour in VID 660 of 2010.

I certify that the preceding one hundred and thirty-five (135) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tracey.

Associate:

Dated: 21 October 2011