



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **BIRKETU PTY LTD (ACN 003 831 392)**
First Appellant

WIN CORPORATION PTY LTD (ACN 000 737 404)
Second Appellant

and

JOHN LJUBOMIR ATANASKOVIC
First Respondent

LAWSON ANDREW JEPPE
Second Respondent

MAURICE JOCELYN CASTAGNET
Third Respondent

FIRST AND SECOND RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline is in a form suitable for publication on the internet.

Part II: Outline of Propositions

2. The **general indemnity principle** is that “*costs are awarded by way of ... partial indemnity ... for professional legal costs actually incurred in the conduct of litigation*”: *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 (***Bell Lawyers***) at [33], [60].
3. The **general rule** (now effectively the universal rule) is that a litigant is not entitled to recover, as a purported “cost” of litigation, an amount said to correlate to that person’s own work or wasted time: *Cachia v Hanes* (1994) 179 CLR 403 at 410. That is a corollary of the general indemnity principle: *Bell Lawyers* at [22], [33]; CA [197] (Kirk JA), [318] (Simpson AJA).

4. The **employed lawyer rule** is that a litigant may recover the costs of professional legal services rendered by an employed lawyer in relation to proceedings.
5. A related aspect of the rule is that such costs are ordinarily quantified by reference to the costs that would have been incurred and allowed had an independent solicitor been engaged: *Bell Lawyers* at [47]-[48], approving *CBA v Hattersley* (2001) 51 NSWLR 333 at [11] and *Ly v Jenkins* (2001) 114 FCR 237 at [160]; CA[200] (Kirk JA).
6. The employed lawyer rule is not an exception to the general indemnity principle, it is an application of it. Although the costs of salaried lawyers are incurred in the form of an overhead, they are nonetheless a cost payable, which engages the indemnity principle: *Bell Lawyers* at [44], [47], [67]-[68].
7. The continued existence of the “well-established” employed lawyer rule was expressly recognised in *Bell Lawyers*: [50]. That implicitly included the treatment of employed lawyers in legal practices: [46]-[47], [50]-[51], [53]; CA[202] (Kirk JA); First and Second Respondents’ Written Submissions (**RWS**) at [18]-[19].

Proper construction of ss 3 and 98 of the *Civil Procedure Act 2005* (NSW)

8. For the Supreme Court of NSW, the provisions governing the awarding of costs are harmonious with the general rules and principles as we have articulated them.
9. The definition of “costs” in s 3 of the CPA is a “means and includes” definition which is an exhaustive explanation of the content of the term: *Bell Lawyers* at [43]. “Costs”, in relation to proceedings means “costs payable in or in relation to the proceedings, and includes fees, disbursements, expenses and remuneration”.
10. The general indemnity principle finds reflection in the notion of costs “payable in or in relation to the proceedings”: *Bell Lawyers* at [44], [67]; CA[343]-[344] (Simpson AJA).
11. The reference to “remuneration” provides a firm textual foundation for the employed lawyer rule: *Bell Lawyers* at [44]. The statutory definition encompasses the cost of professional legal services rendered by an employed solicitor: *Bell Lawyers* at [44], [47].

There is no reason why employed lawyers in law firms should be uniquely excluded from the employed lawyer rule

12. As a matter of statutory construction, “remuneration” payable by a litigant to an employed lawyer for work in relation to proceedings is a species of cost for the purposes of s 98 of the CPA.

13. The appellant accepts that to be true where the litigant is a bank, the Crown and presumably any corporate entity other than a legal practice, yet seeks recognition of a unique exception for legal practices, so as to exclude from the definition of “costs payable” or “remuneration”, the cost of employing a lawyer to work on proceedings for the benefit of the legal practice.
14. There is nothing in the text, context or purpose of the CPA to support such a limitation: CA[186]-[188] (Kirk JA), [342]-[343] (Simpson AJA); see RWS[28], [41].
15. There is no aspect of the general rules or general principle, as considered in *Bell Lawyers* or otherwise, to support such a limitation.
16. The appellant’s attempt to recast the principles in terms of who is “representing” the litigant is unsound. Nothing in the CPA or the authorities supports recasting the general indemnity principle in this way: CA[260]-[261], [306] (Kirk JA), [355]-[357] (Simpson AJA); see RWS [42]-[47].
17. Distinctions between the litigant and the persons who perform work are fundamental and cannot be collapsed: *Bell Lawyers* at [44], [47], [50]; [65]-[68]. Contrast the approach of Ward P at CA[157], [161] and *United Petroleum v Herbert Smith Freehills* [2020] VSCA 15 (*United Petroleum*) at [98], [120]; see RWS[69]-[73].
18. The application of the employed lawyer rule to the employees of legal practices does not offend any overriding principle as to the avoidance of profiting from the conduct of litigation: *Bell Lawyers* at [47]-[50]; CA[269] (Kirk JA), [346] (Simpson AJA); *United Petroleum* at [118], see RWS[54]-[62].
19. There is no overriding principle of requiring professional detachment or independence as a criterion of recovering costs. Such an approach is not supported by the authorities. It does not provide a sound basis to draw a distinction between employed solicitors of legal practices and employed solicitors of other employers: CA[262]-[267], [303]-[304] (Kirk JA); see RWS[63]-[66].

Dated: 17 October 2024



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