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 JEPPS
Second Respondent

MAURICE JOCELYN CASTAGNET
Third Respondent

APPELLANTS' SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The appeal presents the following issues:
    a. Whether, under ss 98(1) and 3(1) of the *Civil Procedure Act 2005* (NSW) (**CPA**), the liability of a self-represented solicitor litigant to their employee is properly a cost "*payable in or in relation to the proceedings*" where that liability is incurred irrespective of the existence of the proceedings.
    b. Whether the application of the general indemnity principle that "*costs are awarded by way of indemnity (or, more accurately, partial indemnity) for*

professional legal costs actually incurred in the conduct of litigation" is available to entitle a self-represented solicitor litigant to recover costs referable to the liability of that principal solicitor to their employed solicitors when the indemnity or partial indemnity is not available to compensate that self-represented solicitor litigant for his or her time and trouble in participating in litigation.

Part III: Section 78B of the *Judiciary Act* 1903 (Cth)

3. A notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

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Part IV: Citations

4. The citations for the decisions below are: (i) *Birketu v Castagnet* [2022] NSWSC 1435 (**PJ**); and (ii) *Atanaskovic v Birketu Pty Ltd* [2023] NSWCA 312 (**AJ**). The core appeal book is referred to as **CAB**.

Part V: Relevant Facts

5. In 2018, proceedings were commenced by the then six partners of Atanaskovic Hartnell (**firm**), an unincorporated legal practice, as plaintiffs in the Supreme Court of New South Wales (**plaintiffs**) to recover costs for legal services provided for the
20 applicants (**equity proceedings**): AJ[2] (CAB 53). The legal representative identified in the summons and the subsequent commercial list statements was the first respondent, Mr Atanaskovic, a partner of the firm and, at all relevant times, the solicitor on the record for the plaintiffs (and himself one of the plaintiffs): AJ[4] (CAB 53).

6. On 9 August 2019, Hammerschlag J, as his Honour then was, gave judgment in the plaintiffs' favour in the sum of $928,982, plus interest, relating to six of the seven invoices in question and reserved for further consideration the seventh invoice (*Atanaskovic v Birketu Pty Ltd* [2019] NSWSC 1006): AJ[3] (CAB 53).

7. Subsequently, on 15 May 2020, Hammerschlag J held that the plaintiffs were not
30 entitled to recover on the seventh invoice (an invoice relating to a retainer to investigate the circumstances in which a former employee of the firm had perpetrated frauds on the first appellant, Birketu Pty Ltd (**Birketu**), for which the firm was

ultimately held to be vicariously liable), save for a small amount of $14,930 (*Atanaskovic v Birketu Pty Ltd* [2020] NSWSC 573): AJ[3] (CAB 53).

8. On 19 June 2020, after a hearing on the papers, his Honour made a costs order in favour of the plaintiffs, ordering Birketu to pay the plaintiffs' costs of the equity proceedings, up to and including 16 September 2019, attributable to the plaintiffs' claims on six of the invoices, to be assessed on the ordinary basis. His Honour also ordered that the plaintiffs pay Birketu's costs of the equity proceedings from 10 August 2019 (the date of the first judgment), to be assessed on the indemnity basis (see *Atanaskovic v Birketu Pty Ltd – Costs* [2020] NSWSC 779) (**costs judgment**): AJ[5] (CAB 54). His Honour observed at [19] of the costs judgment, that in light of the decision of the High Court in *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 (***Bell Lawyers***), the firm would not be able to recover for time spent by its own employees in bringing the equity proceedings: AJ[6] (CAB 54).

9. On 24 December 2021, the firm served a copy of its proposed application for costs assessment on Birketu claiming costs for work done by the firm's employed solicitors, though not by its partners: PJ[4] (CAB 9).

10. On 1 February 2022, the firm filed an application for costs assessment pursuant to section 74 of the *Legal Profession Uniform Law Application Act 2014* (NSW), claiming the sum of $500,408.11 including $305,463 for professional fees for legal services provided by solicitors employed by the firm. The claim for the firm's professional fees was limited to the services provided by its employed solicitors; and no claim was made for any work performed by any of the firm's partners (whether equity or salaried partners): AJ[7] (CAB 54).

11. The appellants sought to have the third respondent (costs assessor) immediately determine that the partners of Atanaskovic Hartnell were not entitled to recover the professional costs of the firm's employed solicitors and that the costs assessor immediately cease the assessment of those costs. The third respondent declined to do so and the appellants commenced proceedings by summons in the Supreme Court of New South Wales on 2 August 2022 against the first and second respondents, the then partners of Atanaskovic Hartnell: AJ[8] (CAB 55). The matter was heard before Brereton JA and his Honour delivered judgment on 26 October 2022: *Birketu v Castagnet* [2022] NSWSC 1435 (CAB 5-34).

12. Brereton JA identified the issue in the present case as "*whether abrogation of the Chorley exception involves denying that solicitor litigants can recover costs in respect of work done by their employees (though not of work done by themselves personally); or whether preservation of the employed solicitor exception involves that they are entitled to recover such costs. The reasons of the High Court in Bell v Pentelow do not explicitly address this question*": PJ[24] (CAB 18).

13. Analysing the "*policy and intent that underlies*" the judgment of the plurality and Gageler J, as his Honour then was, in *Bell Lawyers* (PJ[35]-[46] (CAB 24-28), Brereton JA held:

a. the High Court had in mind "in-house" lawyers employed by government departments and corporations, who act as solicitor for the employing department or corporation in litigation (where a party is represented in the proceedings by a solicitor who is an employee of the party) and not employed solicitors in a law firm which as a party to litigation has some or all of the work done by those employees, when confirming that recovery of the costs of "in-house" lawyers is by way of indemnity for professional legal costs: PJ[40] (CAB 26);

b. consistent with the three main considerations which founded the High Court's rejection of the Chorley exception (PJ[41] (CAB 26-27)), to permit a solicitor to recover costs would be to provide an incentive for solicitors to act for themselves, while allocating as much of the work as they could, to their employees; and it would preserve the appearance that a solicitor was in a privileged position as a self-represented litigant in being able to recover costs for work done by his or her own firm: PJ[42] (CAB 27);

c. the plurality in *Bell Lawyers* (at [21]-[23]) rejected the reasoning of Bowen LJ in *Chorley* which specifically addressed a solicitor being permitted to charge for work "*done by his own clerk*" as "*not persuasive*", in doing so repeating the concerns of the majority in *Cachia v Haines*[1] that to allow a solicitor who acts for "*himself 'to charge' for the work done by himself or his clerk ignore[s] the questionable nature of a situation in which a successful*

[1] (1994) 179 CLR 403 (*Cachia v Hanes*) at 412

litigant not only receives the amount of the verdict but actually profits from the conduct of the litigation": PJ[43]-[45] (CAB 27-28).

14. His Honour further held that the Victorian Court of Appeal's decision in *United Petroleum v Herbert Smith Freehills* [2020] VSCA 15 (***United Petroleum***) was precisely on point with the present case (at PJ[65] (CAB 34)). In applying the principles enunciated in *United Petroleum* to grant the declaratory relief sought by the applicants, his Honour held that "*United Petroleum is not only not plainly wrong, so that I should follow it as a matter of precedent, but it is correct in principle*": (at PJ[66] (CAB 34)). His Honour thus found that the first and second respondents were not entitled to recover costs for work done by the employed solicitors of their own firm and made a declaration to that effect. The first and second respondents appealed that decision.

15. By majority (Kirk JA and Simpson AJA; Ward P dissenting), the Court of Appeal allowed the appeal, set aside the orders of Brereton JA and ordered that the summons be dismissed with costs.

16. Kirk JA (at AJ[185] CAB 111) interpreted the reasoning of the joint judgment of Kiefel CJ, Bell, Keane and Gordon JJ in *Bell Lawyers* as being independently based on the statutory text of s 3(1) of the CPA for the conclusions reached. On that basis his Honour interpreted the plurality's "*articulation of the meaning of 'remuneration' in s3(1) of the CPA as part of the ratio of the case and binding*" upon the Court of Appeal. His Honour found (at AJ[179] CAB110) that the plurality's rejection of the *Chorley* exception was also based upon the particular terms of the definition of 'costs' in the CPA on top of being a broader rejection of the principle as a matter of common law by their reference at [44] of *Bell Lawyers* to the inclusion of remuneration in the definition of costs in s 3(1) leaving "*no room for the Chorley exception as a matter of intention*." Kirk JA held (at AJ[188] CAB 112) that "*there is no sound reason of statutory construction to read in a limit to the meaning of "remuneration" in the CPA which excludes employed solicitors of unincorporated law firms. That being so, the meaning of that term adopted at [44] of Bell Lawyers is determinative of this appeal*."

17. In a separate judgment Simpson AJA did not address the issue of whether or not it was necessary to consider the common law and held (at AJ[343] CAB 156) that

"*resolution of the questions in this appeal comes down to the construction of the terms of the s 3 definition. I would give a wider meaning to "costs payable in or in relation to the proceedings", so that the phrase encompasses costs payable to employed legal practitioners.*" Her Honour found (at AJ[344] CAB 156) that such an interpretation was consistent with the indemnity principal.

18. Ward P, dissenting, held (at AJ[155] CAB 103) that the trial judge was correct in rejecting a submission that *United Petroleum* was relevantly "*distinguishable since nothing in the reasoning of the Victorian Court of Appeal placed any significance on the concept of "remuneration" and the Court effectively approached the matter on the premise that costs referable to employed solicitors were capable of falling within the statutory provisions for costs in that State.*"

19. At AJ[157] CAB 104, Ward P held "*that the question thrown up on the present fact situation (which does not involve an incorporated law practice) is best answered by reference to whether the partners of the unincorporated legal practice were, as a matter of substance, effectively acting for themselves*." That question was answered in the affirmative "*because they are seeking in essence to be compensated for the time spent by their employed solicitors in representing the "firm" in the litigation. In that regard, it is significant that the solicitor on the record in the litigation was one of the applicants (and a plaintiff in the proceedings himself). Work done by employed solicitors of the "firm" and for which the partners of the "firm" are ultimately responsible is effectively work of the firm*".

20. At AJ[158] CAB 104-5, Ward P held that "*the concept of independence emphasised by the plurality in Bell Lawyers is one that requires sufficient professional detachment on the part of the lawyers concerned; and the reality is that employed solicitors in an unincorporated legal practice cannot be viewed as sufficiently independent of the partners of the firm to satisfy that requirement*." The President outlined that "*they remain subject to the direction of the partners who have a direct supervisory role and are responsible for the allocation and overview of the legal services performed by them; and those partners have a direct personal interest in the outcome of the litigation (and its costs implications)."*

Part VI: Argument

A. Summary

21. Section 98(1) of the CPA provides:

> *(1) Subject to rules of court and to this or any other Act-*
>
> *(a) costs are in the discretion of the court, and*
>
> *(b) the court has full power to determine by whom, to whom and to what extent costs are to be paid,*
>
> *(c) the court may order that costs are to be awarded on the ordinary basis or on an indemnity basis.*

10 22. The term "costs" is defined in s 3(1) of the CPA as follows:

> *"costs", in relation to proceedings, means costs payable in or in relation to the proceedings, and includes fees, disbursements, expenses and remuneration*.

23. The issues arising in this appeal are as follows:

a. Whether, under ss 98(1) and 3(1) of the CPA, the liability of a self-represented solicitor litigant to their employee is properly a cost "*payable in or in relation to the proceedings*" where that liability is incurred irrespective of the existence of the proceedings.

b. Whether the application of the general indemnity principle that "*costs are awarded by way of indemnity (or, more accurately, partial indemnity) for*
20 *professional legal costs actually incurred in the conduct of litigation*"[2] is available to entitle a self-represented solicitor litigant to recover costs referable to the liability of that principal solicitor to their employed solicitors when the indemnity or partial indemnity is not available to compensate that self-represented solicitor litigant for his or her time and trouble in participating in litigation.

24. As concerns the first issue, the majority of the Court of Appeal erred in its construction of ss 98(1) and 3(1) of the CPA by construing the inclusion of 'remuneration' in s3(1) of the CPA as allowing a self-represented solicitor litigant to recover the liability of that solicitor to their employee where the liability is incurred

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[2] *Cachia v Hanes* at 410, *Bell Lawyers* per Kiefel CJ, Bell, Keane and Gordon JJ at [33], Gageler at [60]

irrespective of the existence of the proceedings, without due regard to the qualifying requirement that the cost must be "*payable in or in relation to the proceedings*".

25. Further, by concluding the analysis at s 3(1) of the CPA and the definition of remuneration, the majority failed to take into account that s 98(1) of the CPA provides the court with an unfettered discretion and full power to determine "*by whom, to whom and to what extent costs are to be paid"*. The statutory power conferred by s 98(1) of the CPA permits "*an approach by which the judiciary develops and applies the rules on costs in a principled and coherent manner*"[3] in the context that the "*principles according to which statutory authority to award costs has been exercised have been left to exposition and development by the courts themselves*."[4] The proper effect of ss 3(1) and 98(1) of the CPA is to be addressed by reference to the common law[5]. The majority erred in failing to address the effect of ss 3(1) and 98(1) of the CPA without reference to the common law.

26. As concerns the second issue, for the reasons that follow below, the general indemnity principle that "*costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation*"[6] has, at its core, the concept of incurring a liability for the representation of another or conducting litigation for another. Where there is legal representation distinct from the identity of a solicitor litigant, the unacceptable possibility of allowing a solicitor litigant to profit from his or her conduct of the litigation is avoided[7]; there is sufficient professional detachment such that the solicitor representing a party can be characterised as acting in a professional legal capacity[8]; and the in-house solicitor rule is understood as enabling recovery of costs by a government or corporate litigant that has been represented by an employed solicitor[9].

27. The majority of the Court of Appeal erred in finding that the general principle that costs are awarded by way of indemnity or partial indemnity enabled a self-

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[3] *Bell Lawyers* per Edelman J at [83]
[4] *Bell Lawyers* per Gageler J at [59]
[5] *Bell Lawyers* per Kiefel CJ, Bell, Keane and Gordon JJ at [16]
[6] *Cachia v Hanes* at 410, *Bell Lawyers* per Kiefel CJ, Bell, Keane and Gordon JJ at [33], Gageler at [60]
[7] *Bell Lawyers* per Kiefel CJ, Bell, Keane and Gordon JJ at [32], Nettle J at [71]
[8] *Bell Lawyers* per Kiefel CJ, Bell, Keane and Gordon JJ at [51]
[9] *Bell Lawyers* per Kiefel CJ, Bell, Keane and Gordon JJ at [47]

represented solicitor litigant to recover costs referable to the liability of that principal solicitor to their employed solicitors. In such circumstances the solicitor litigant is not represented by that employed solicitor but conducts the litigation themself. The employed solicitor of a litigant firm or principal solicitor is not a separate entity of the firm or solicitor but is an agent, at least professionally, whereas the employed solicitor of a government or corporation is not an agent of the litigant organisation in respect of work performed in the litigation. An employed solicitor of a litigant firm or solicitor is required to comply with all lawful directions from the firm or solicitor. Accordingly, there is no professional detachment between the litigant firm or principal solicitor and their employed solicitor in the conduct of the litigation.

28. Further, an outcome "*unacceptable in point of principle*"[10] is obtained, as the law firm or principal solicitor makes a profit on the conduct of the litigation where time is claimed for the employed solicitor, insofar as the indemnity principle is concerned, on a charge rate which is set by the firm at a level to make a profit and, as found by Simpson AJA, costs "*assessed at usual commercial rates*" include "*an element of profit*": AJ[346] CAB 157.

B. Statutory Text

29. As identified by Simpson AJA (at AJ[330] CAB 153), the starting point is that pursuant to s 98(1) of the CPA, an order was made that the appellants pay the firm's costs of the equity proceedings up to and including 16 September 2019, assessed on the ordinary basis. By s 3(1) of the CPA, the costs in relation to the equity proceedings "*means costs payable in or in relation to the proceedings, and includes fees, disbursements, expenses and remuneration."*

30. The ordinary and contextual meaning of "*costs payable in or in relation to the proceedings"* does not encompass a liability of a principal solicitor or firm of solicitors to their employee comprised in a salary that is payable irrespective of the existence of proceedings. The salary does not constitute "*costs payable by the party in whose favour the order is made to another person for services rendered.*"[11] Ordinarily a firm is liable to pay the salary of an employed solicitor in a manner entirely unconnected with the existence (or not) of any proceedings or, indeed, any

[10] *Bell Lawyers* per Kiefel CJ, Bell, Keane and Gordon JJ at [32]
[11] *Bell Lawyers* per Kiefel CJ, Bell, Keane and Gordon JJ at [15]

work at all. An employed solicitor's salary is not payable in or in relation to proceedings. There is no reason or scope to widen the operation of the ordinary language used in the CPA. The liability or loss to the employer in the present context is really only the loss of opportunity of the salaried employee to potentially earn a profit for the employer by working on alternative fee paying matters. That loss is not within the meaning of costs in s 3(1) of the CPA and is certainly not payable in or in relation to proceedings.

31. At AJ[336] CAB 154, Simpson AJA held that, in the present case, the costs claimed were not costs payable to the employed legal practitioners who performed the work. It would follow that the costs claimed do not constitute "*costs payable by the party in whose favour the order is made to another person for services rendered.*"[12] Her Honour, however, found that the salaries paid to the employed solicitors, albeit not dependent on the quantity or nature of the work in this particular litigation, were nevertheless paid by the firm for the professional legal work they undertook and that "*to the extent that they covered the legal professional work involved in the litigation…are properly characterised as 'professional legal costs actually incurred in the conduct of [the] litigation'*", quoting the statement of the general (indemnity) principle of the majority in *Cachia v Hanes* (at 410) rather than the statutory definition of costs in the CPA. Her Honour has erred in impermissibly eliding the two concepts.

32. At AJ[337] CAB 154, her Honour held that her determination was "consistent" with the observation of Gageler J in *Bell Lawyers* at [68] concerning the recovery of costs by a party using an employed solicitor. In that passage, his Honour was not dealing with the question of whether a salary paid to an employed solicitor by a self-represented firm or principal solicitor constitutes costs "*payable in or in relation to proceedings*" for the purpose of s3(1) of the CPA but rather a more general proposition concerning the engagement of the general rule enabling the recovery of costs by a party using an employed solicitor. His Honour cited two cases, the first[13], where the Crown solicitor and Solicitor-General and Crown counsel represented the

[12] *Bell Lawyers* per Kiefel CJ, Bell, Keane and Gordon JJ at [15]
[13] *Registrar of Titles v Watson* [1954] VLR 111

Registrar of Titles, and the second[14], where the employed solicitors represented their employer bank.

33. Kirk JA did not specifically consider whether a salary paid to an employed solicitor by a self-represented firm or principal solicitor constitutes costs "*payable in or in relation to proceedings*" for the purpose of s3(1) of the CPA, as Simpson AJA did. At AJ[178] CAB 110, his Honour relied upon the plurality's finding at [44] of *Bell Lawyers* that the inclusion of "remuneration" in s3(1) of the CPA makes plain that the "*legal services rendered by an employed lawyer is included in the definition of 'costs'*". The present focus is not whether remuneration encompasses the notion of remuneration for professional services rendered under a contract, but rather whether such costs are "*payable in or in relation to proceedings*" for the purpose of s3(1) of the CPA. His Honour erred in failing to address this aspect of the definition.

34. Ward P addressed the issue at [152] CAB 102 on the basis that "costs" includes remuneration which encompasses remuneration paid under a contract for services and the provision of legal services by employed solicitors in an appropriate case. Her Honour highlighted that "*costs are awarded to compensate for actual costs incurred in relation to the provision of professional legal services (and not as compensation for lost time or the like)*". Her Honour did not specifically address whether or not remuneration paid under a contract for services and the provision of legal services by employed solicitors in the present case were "*payable in or in relation to proceedings*" for the purpose of s3(1) of the CPA, instead finding that the costs claimed fall outside the scope of the general indemnity principle because "*they are seeking in essence to be compensated for the time spent by their employed solicitors in representing the "firm" in the litigation…. Work done by employed solicitors of the "firm" and for which the partners of the "firm" are ultimately responsible is effectively work of the firm*": AJ[157] CAB 104.

C. Application of the Common Law

35. By concluding the analysis at s 3(1) of the CPA and the inclusion of remuneration in the definition of costs, the majority of the Court of Appeal failed to take into account that s 98(1) of the CPA provides the court with an unfettered discretion and full power to determine "*by whom, to whom and to what extent costs are to be paid"*. As

[14] *Commonwealth Bank of Australia v Hattersley* (2001) 51 NSWLR 333

stated above, the statutory power conferred by s 98(1) of the CPA permits "*an approach by which the judiciary develops and applies the rules on costs in a principled and coherent manner*"[15] in the context that the "*principles according to which statutory authority to award costs has been exercised have been left to the exposition and development by the courts themselves*."[16] Thus, the effect of ss 3(1) and 98(1) of the CPA, once properly construed, is to be addressed by reference to the common law[17]. The majority erred in failing to address the effect of ss 3(1) and 98(1) of the CPA without reference to the common law and by concluding their determination on the basis of the inclusion of remuneration in the definition of costs in s 3(1) of the CPA.

D. General Rule – Indemnity Principle

36. The general indemnity principle that "*costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation*"[18] has, at its core, the policy that the costs incurred must arise from the representation of another or conducting litigation for another. In *United Petroleum*, the Court (at [103]) held that "*all of the members of the Court in Bell Lawyers recognised a distinction between the position where solicitors who are parties represent themselves, and the position where a party is represented by an employed solicitor. In the latter case the party is not unrepresented or self-represented. It is represented by the employed solicitor*".

37. The distinction drawn between the position where solicitors who are parties represent themselves, and the position where a party is represented by an employed solicitor is apparent from the following:

    a. The plurality, at [32] in Bell Lawyers, made plain that it was "*unacceptable in point of principle*"[19] for a solicitor to profit from his or her participation in the conduct of litigation[20]. Where a solicitor or firm is self-represented that outcome is avoided by the application of the general rule that a self-represented litigant, including solicitors (following the abrogation of the

[15] *Bell Lawyers* per Edelman J at [83]
[16] *Bell Lawyers* per Gageler J at [59]
[17] *Bell Lawyers* per Kiefel CJ, Bell, Keane and Gordon JJ at [16]
[18] *Cachia v Hanes* at 410, *Bell Lawyers* per Kiefel CJ, Bell, Keane and Gordon JJ at [33], Gageler at [60]
[19] *Bell Lawyers* per Kiefel CJ, Bell, Keane and Gordon JJ at [32]
[20] See also *Bell Lawyers* per Kiefel CJ, Bell, Keane and Gordon JJ at [32], Nettle J at [71]

Chorley exception), may not obtain any recompense for the value of his or her time spent in litigation[21].

b. However where a self-represented solicitor or firm utilises the services of an employed solicitor to perform services in the conduct of litigation then necessarily the principal solicitor or firm shall profit from his, her or its participation in the conduct of the litigation, through claiming for the costs of that employed solicitor on a charge rate which is set by the principal solicitor or firm at a level to make a profit and, as found by Simpson AJA, costs "*assessed at usual commercial rates*" include "*an element of profit*": AJ[346] CAB 157.

c. The firm in the present case eschewed any entitlement to costs representing the value of time spent by partners and salaried partners and only claimed the costs of time spent by its employed solicitors working on the litigation. It is accepted that a self-represented solicitor litigant cannot recover for time spent in the litigation despite clearly losing an opportunity to earn profit from performing other work. There is no basis in policy to treat solicitors in the employ of self-represented solicitor litigants differently. In *United Petroleum* the Court of Appeal held (at [108]) that allowing a self-represented solicitor litigant to recover fees "*would perpetuate the unequal treatment that Bell Lawyers sought to eradicate. The fact that work was done by an employee is not, in that respect, significant*" and (at [100]) "*that to allow a solicitor to recover costs referable to the work done by its employees would recompense that solicitor for its time spent in litigation*."

d. The plurality in *Bell Lawyers* (at [50]) made clear that the abrogation of the *Chorley* exception did not "*disturb the well-established understanding in relation to in-house lawyers employed by governments and others, that where such a solicitor appears in proceedings to represent his or her employer the employer is entitled to recover costs in circumstances where an ordinary party would be so entitled by way of indemnity".* At [51] the plurality found that even when a solicitor represents his or her employer where the solicitor is "*employed by an incorporated legal practice of which he or she is the sole*

[21] *Bell Lawyers* per Kiefel CJ, Bell, Keane and Gordon JJ at [32]

director and shareholder", the costs of the employed solicitor may not be recovered by way of indemnity with the issue to be determined by reference to the question "*whether such a solicitor has sufficient professional detachment to be characterised as acting in a professional legal capacity when doing work for the incorporated legal practice*." The approach thus differs depending on the quality of professional detachment. Adopting this analysis, if it is inappropriate to talk of "*professional detachment*" where the solicitor is "*employed by an incorporated legal practice of which he or she is the sole director and shareholder"* then an employed solicitor of a self-represented litigant solicitor or firm who is required to comply with all lawful directions from the solicitor or firm who employs them must be in an equal position.

e. Gageler J, at [68] of *Bell Lawyers*, held that recovery of costs by a party "*using an employed solicitor*" predated the introduction of the *Chorley* exception and recovery is based on the application of the general (indemnity) principle rather than an exception to it. The authorities cited by his Honour all address the position where a party is represented in litigation by a solicitor who is an employee of the party where the party is a government or corporation and not a solicitor or law firm: *United Petroleum* at [105].

f. As concerns the other members of the High Court in *Bell Lawyers*, Nettle J, at [75], considered that employers who were represented by employed solicitors were able to recover for the work performed by those solicitors under the *Chorley* exception and not under the indemnity principle, however the requirement of representation was stated. Edelman J, at [92], emphasised that where a solicitor is both party and lawyer the solicitor is "unrepresented" and the solicitor's role as agent for another is absent.

g. At first instance in the present case, Brereton JA held, *"[i]n cases of solicitors employed by government departments or corporations, the litigation is being prosecuted or defended for the benefit of the department or corporation that is the employed solicitor's client, albeit that it is also his or her employer. That employed solicitor is on the record as the solicitor acting for the client/employer. The employer is not self-represented: it has a solicitor acting*

for it, who has his or her own independent professional obligations. It is therefore not self-represented, but represented by a solicitor in the litigation, albeit one that is "employed" rather than "retained". In the case of a law firm's own employed solicitors, however, the position is otherwise. The litigation is being prosecuted or defended for the benefit of the firm; the partners in which do not engage their employees to act for them, but merely allocate the work to them. The firm does not have a solicitor as a distinct entity acting for them; the firm is acting for itself, albeit that some of the work is performed by employees of the firm. Although some of the work may be performed by its employed solicitors, the firm is acting for itself ... In the context of the conduct of litigation, in the eyes of the law the salaried in-house solicitor is independent of his or her employer, whereas a law firm's employed solicitors are not": PJ[51] CAB 29. This passage was cited by Ward P at AJ[92] CAB 82-3.

38. Of the majority in the present case, Simpson AJA did not place any significance on the distinction drawn between the position where solicitors who are parties represent themselves, and the position where a party is represented by an employed solicitor: AJ[357]-[358] CAB 159-160. Her Honour failed to refer to the judgment of the plurality in this regard but only the passage in the judgment of Gageler J that recovery of costs by a party using an employed solicitor is an application of the general rule rather than the exception to it. No attempt was made by her Honour to explain the finding of the plurality that the indemnity principle does not automatically apply to enable a litigant employer of solicitors to recover the costs of its employed solicitors even where that litigant employer is "*an incorporated legal practice of which he or she is the sole director and shareholder",* and that the issue is to be determined by matters including "*whether such a solicitor has sufficient professional detachment to be characterised as acting in a professional legal capacity when doing work for the incorporated legal practice*."

39. Her Honour, at AJ[346] CAB 157, did acknowledge that her conclusions were contrary to the judgment of the plurality when it made plain that it was "*unacceptable in point of principle*" for a solicitor to profit from his or her participation in the

conduct of litigation[22]. Nonetheless her Honour held that it did not overcome other powerful reasons for accepting that recovery of costs for work done by an employed legal practitioner is an example of an indemnity for costs incurred in the conduct of litigation. It is not readily apparent from her Honour's judgment what those powerful reasons are.

40. Kirk JA dealt with the operation of the employed solicitor rule at AJ[201]-[241], [273]-[276] CAB 116-128, 136-137, and, in essence, found that it applied to employees of unincorporated legal practices as the rule was affirmed in *Bell Lawyers*; it would ordinarily apply to any employed solicitor; is not subject to any analysis as to whether the employed solicitor represented the unincorporated legal practice; and it was not excluded in the judgment of the plurality and Gageler J.

41. His Honour also disagreed with the emphasis placed by the Victorian Court of Appeal on the issue of whether or not the law firm was self-represented on the basis that the decision of the High Court did "*not turn on attaching the label "self-represented litigant" to a claimant*". Instead he found that it did not matter whether a party was self-represented if they used employed solicitors then they have incurred an actual cost (at AJ[260-1] CAB 133). His Honour considered the question of the treatment of the rule following the decision in *Bell Lawyers* that the *Chorley* exception should not be recognised as part of the common law of Australia. He found that the operation of the employed solicitor rule is based, first, upon his assumption that the ratio of *Bell Lawyers* does not permit reference to the common law to determine whether the unincorporated legal practices in the present case may be an exception to the rule and, next, due to *Bell Lawyers* confirming the existence of the rule, then finding that it operates to recover the costs of all employed solicitors, despite reservations about one incorporated legal practice. That proposition cannot be made out from the divergent judgments in *Bell Lawyers* particularly the plurality which considered the recoverability of costs of "in-house" solicitors in the context of solicitors employed by government bodies or corporations ("and others" – not all others) and raised particular concern in relation to the position of incorporated legal practices where the employed solicitor was the sole director and shareholder thereby

[22] See also *Bell Lawyers* per Kiefel CJ, Bell, Keane and Gordon JJ at [32], Nettle J at [71]

making plain that the indemnity principle does not automatically apply to enable a litigant employer of solicitors to recover the costs of its employed solicitors.

42. When the rationale behind the general rule and the indemnity principle is understood in the context of employed solicitors as set out in [37] above, it is readily apparent that Kirk JA erred in his approach to the issue at hand.

43. It is respectfully submitted that Ward P, dissenting, adopted the correct approach to the issues at hand at AJ[155]-[158] CAB 103-105.

E. Conclusion

44. It is accepted that there is no entitlement for a partner of the firm to recover for his or her time and trouble in participating in litigation, despite clearly losing an opportunity for profit earning. There is no difference in principle between the situation of the partner and that of his or her employee, who is salaried whether or not they perform any work. They are on staff and in no sense delivering a bill to the partner or firm for what they have done and neither does the partner. Any policy in observing the indemnity principle distinction between a partner (profit) and the employee (wage), imports no sense of principle.

45. The position is clearly different with in-house lawyers of governments and corporations that are not legal practices. Those employers cannot do legal work themselves and the employed solicitors relevantly represent the employer in the litigation. One cannot simply analogise the position of solicitors employed by governments and corporations that are not legal practices, with the position of solicitors employed by firms.

46. The first respondent, Mr Atanaskovic, was a partner of the firm and at all relevant times, the solicitor on the record for the plaintiffs (and himself one of the plaintiffs) and the firm: AJ[4] CAB 53. It is readily apparent that the partners of the unincorporated legal practice were, as a matter of substance, acting for themselves when they prosecuted the equity proceedings. Work done by employed solicitors of the "firm" and for which the partners of the "firm" are ultimately responsible is effectively work of the firm: AJ[157] CAB 104. The first and second respondents were self-represented litigants and may not recover the costs of their employed solicitors.

Part VII: Orders sought

47. The appellants seek the following orders:

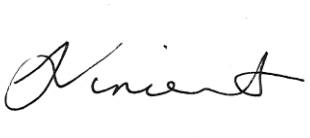
1. The appeal be allowed with costs.
2. The orders of the Court of Appeal dated 15 December 2023 be set aside, and in lieu thereof order:
    a. Appeal dismissed.
    b. The appellants pay the respondents' costs of the appeal.

Part VIII: Time estimate

48. The appellants estimate that no more than 2 hours will be required for their oral argument.

Dated: 22 May 2024

Counsel for the appellants



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ANNEXURE TO THE APPELLANTS' SUBMISSIONS

List of statutes referred to in appellants' submissions:

Civil Procedure Act 2005 (NSW) – ss 3 and 98, current version.

Legal Profession Uniform Law Application Act 2014 (NSW) - s 74, current version.