



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

S52/2024

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' OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of the propositions the appellants intend to advance in oral argument

1. How the matter is to be dealt with has been sufficiently indicated by the approach of the High Court in *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 (*Bell Lawyers*) (JBA v3, Tab 9). The respondents provided legal services to themselves, partly by their own employees, who were subject to the respondents' lawful directions as to that work.
2. The effect of ss 3(1) and 98(1) of the *Civil Procedure Act 2005* (NSW) (*CPA*) is to be addressed by reference to the common law: *Bell Lawyers* per Kiefel CJ, Bell, Keane and Gordon JJ at [16] (JBA v3, p123); AS [25],[35].

Rationale for the abrogation of the *Chorley* exception

3. The *Chorley* exception was a solicitor's privilege of a kind that is inconsistent with the equality of all persons before the law: *Bell Lawyers* at [24]-[25] (JBA v3, p126).
4. The reasoning of Bowen LJ in *Chorley* which specifically addressed a solicitor being permitted to charge for work "*done by his own clerk*", was rejected as "*not persuasive*": *Bell Lawyers* at [21]-[23] (JBA v3, pp125-6); AS [13(c)].

Self-represented / "unrepresented" solicitor litigants

5. It is "*unacceptable in point of principle*" for the possibility of a solicitor to profit from his or her participation in the conduct of litigation where the solicitor is self-represented: *Bell Lawyers* at [32], [71] (JBA v3, p123, p139); AS [26], [28], [38(a)-(c)], [39].
6. Where a solicitor is both party and lawyer the solicitor is "unrepresented" and the solicitor's role as agent for another is absent: *Bell Lawyers* at [92] (JBA v3, p148); AS [38(f)].
7. 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*" has, at its core, the concept of incurring a liability for the representation of another or conducting litigation for another: *Bell Lawyers* at [33] (JBA v3, p128-9); AS [23], [26], [37].

8. A self-represented solicitor litigant may not obtain any recompense for the value of his or her time spent in litigation. That cost is ordinarily reflected as the lost opportunity to earn profit. There is no basis in policy to treat solicitors in the employ of self-represented solicitor litigants differently where again that cost is reflected as the lost opportunity to earn profit: *Bell Lawyers* at [1]-[3] (JBA v3, pp120-121); AS [38(a)-(c), (g)].
9. 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”: *United Petroleum v Herbert Smith Freehills* [2020] VSCA 15 (**United Petroleum**) at [100] (JBA v4, Tab33 p592); AS [38(c)]. It 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”: *United Petroleum* at [108] (JBA v4, p594); AS [38(c)].
10. There is a distinction between the position where solicitors who are parties represent themselves and the position where a party (such as governments and corporations) is represented by an employed solicitor. In the latter case the party is not unrepresented or self-represented: *United Petroleum* at [103] (JBA v4, p593); AS [37].

In-house lawyer / Employed solicitor rule

11. The abrogation of the *Chorley* exception did not “disturb” the “in-house” lawyer rule concerning solicitors employed by governments and others “where such a solicitor appears in proceedings to represent his or her employer”: *Bell Lawyers* at [50] (JBA v3, p133); AS [38(d)].
12. In the context of the conduct of litigation, the salaried in-house solicitor is independent of his or her (government or corporate) employer, whereas a law firm’s employed solicitors are not: PJ[51] CAB 29, AJ[92] CAB 82-3; AS [38(g)]
13. A solicitor may give lawful directions to his or her employed solicitor concerning the professional conduct of the employer solicitor’s own litigation. It would be unlawful for a non-lawyer employer or manager to assert any such control over an in-house lawyer’s observance of his or her professional duties: Reply at [7].



Bret Walker

16 October 2024