SUPREME COURT OF QUEENSLAND

CITATION:	*Martinovic v Chief Executive, Qld Transport & Anor* [2005] QCA 55
PARTIES:	**CARL MARTINOVIC** (respondent/appellant/respondent) **v** **CHIEF EXECUTIVE, QUEENSLAND TRANSPORT** (first applicant/second respondent/first applicant) **ATTORNEY-GENERAL OF QUEENSLAND** (second applicant/third respondent/second applicant)
FILE NO/S:	Appeal No 9395 of 2004 Appeal No 9396 of 2004 SC No 952 of 2004 SC No 1018 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application to Strike Out
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 March 2005
DELIVERED AT:	Brisbane
HEARING DATE:	21 February 2005
JUDGES:	McMurdo P, Jerrard JA and White J Separate reasons for judgment of each member of the Court, Jerrard JA and White J concurring as to the orders made, McMurdo P dissenting
ORDERS:	**1. Application to strike out the appeal allowed** **2. Appellant to pay the costs of the second and third respondents of and incidental to the appeal, and to the application to strike out, such costs to be assessed on a standard basis.**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON AN INDEMNITY BASIS – appellant counsel represented a deceased's next-of-kin in coronial inquiry – appellant then appeared in application for judicial review of inquiry – judicial review application dismissed – second and third respondents sought costs in separate applications on an indemnity basis against the appellant personally – judge's orders granting costs made no mention of assessment on an indemnity basis – subsequent application filed by second and third respondents pursuant to r 388 of the *Uniform Civil*

Procedure Rules 1999 (Qld) to insert "to be assessed on an indemnity basis" into costs orders – judge ordered the awarding of indemnity costs on the judicial review proceeding and the subsequent costs applications – appellant's challenge limited to order of indemnity costs on costs applications – s 253 of the *Supreme Court Act* 1995 (Qld) requires leave of the original judge to appeal an order "as to costs only which by law are left to the discretion of the judge" – whether appellant's failure to apply for leave pursuant to s 253 rendered the appeal incompetent

Supreme Court Act 1995 (Qld), s 253
Uniform Civil Procedure Rules 1999 (Qld), r 388, r 689, r 703, r 704, r 743

Colgate-Palmolive v Cussons (1993) 118 ALR 248, cited
Emanuel Management P/L (in liq) & Ors v Foster's Brewing Group Ltd & Ors [2003] QCA 516; [2004] 2 Qd R 11, distinguished
Etna v Arif [1999] 2 VR 353, cited
In re Bradford, Thursby & Farish (1883) 15 QBD 635, cited
Knight v FP Special Assets (1992) 174 CLR 178, cited
Rouse v Shepherd (*No 2*) (1994) 35 NSWLR 277, cited
Steindl Nominees v Laghaifar [2003] QCA 157; [2003] 2 Qd R 683, cited
White Industries (Qld) Pty Ltd v Flower & Hart (a firm) (1998) 156 ALR 169, cited
Wilkinson v Kenny [1993] 1 WLR 963, considered

COUNSEL: S A McLeod for the first applicant/second respondent/first applicant
M J Burns for the second applicant/third respondent/second applicant
P D O'Gorman for the respondent/appellant/respondent

SOLICITORS: Crown Solicitor for the applicants
Terry Fisher & Associates for the respondent

[1] **McMURDO P:** The facts and issues are fully set out in the reasons for judgment of Jerrard JA. I will only repeat or add to these to briefly explain my reasons for reaching a different conclusion, dismissing the applications to strike out the appeals.

[2] Mr Martinovic, the respondent to these applications to strike out his appeals, was counsel in an unsuccessful judicial review: *Milu v Smith & Ors*.[1] The learned primary judge was so dissatisfied with Mr Martinovic's conduct of the case that after hearing submissions in applications for costs of the judicial review he determined on 27 February 2004 that no competent barrister in Mr Martinovic's position giving proper attention to the prospects of success would have pursued the judicial review application and that he either deliberately ignored his professional

1 *Milu v Smith & Ors* [2003] QSC 430; SC No 6077 of 2002, 18 December 2003.

obligations or acted recklessly, heedless of them.[2] His Honour determined that those circumstances warranted an order that Mr Martinovic should personally pay the costs of the respondents in *Milu v Smith & Ors* to be assessed on an indemnity basis.[3] The order taken out in the court that day did not reflect the order that the costs be paid on an indemnity basis and nor did it deal with the costs of the applications for costs.

[3] On 29 September 2004, his Honour heard applications from the applicants to this application (the respondents to the judicial review) to amend the order of 27 February 2004 so that it ordered that the costs of the judicial review were to be assessed on an indemnity basis and that Mr Martinovic pay the costs of the applications for costs on an indemnity basis. His Honour made those further orders. Mr Martinovic's counsel asked the judge to give reasons why Mr Martinovic should be ordered to pay the costs of the costs application on an indemnity basis. His Honour noted:

> "Well, I can't, at the moment, see that I'd say more than I said in the reasons I published in the 27th of February which were intended and which were expressed to be disposing of that issue in each of the three sets of proceedings."

[4] Those reasons dealt only with Mr Martinovic's unprofessional conduct warranting costs against him on an indemnity basis.

[5] Mr Martinovic does not appeal from the order that he pay the costs of the judicial review on an indemnity basis. He appeals only from the learned primary judge's order that he pay each applicant's costs of and incidental to the costs applications on an indemnity basis.

[6] The facts here differ in a significant way from those in *Wilkinson v Kenny*.[4] There, the order that the legal practitioner pay the costs of the costs application was apparently made on the standard basis and in the exercise of the court's ordinary discretion to award costs; it does not seem to have been referable to the court's disciplinary function. Here, the learned primary judge appears to have ordered that Mr Martinovic pay costs not on the standard basis but on the more exceptional indemnity basis under his inherent jurisdiction to discipline legal practitioners because of Mr Martinovic's unprofessional conduct in the judicial review. As a result, the costs orders from which Mr Martinovic appeals were not made under the court's general discretionary jurisdiction as to costs referred to in s 253 *Supreme Court Act* 1995 (Qld) requiring leave to appeal from the primary judge: see *Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd*[5] and *Etna v Arif*.[6]

[7] My conclusion is that in these unusual circumstances Mr Martinovic does not require leave of the trial judge under s 253 to appeal from the costs orders and the appeals are competent. I would refuse the applications to strike out the appeals with costs to be assessed.

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2 *Milu v Smith & Ors* [2004] QSC 027; SC Nos 6077 of 2002, 952 of 2004, 1018 of 2004, 27 February 2004, paras [33]-[37].

3 Above, para [39].

4 [1993] 1 WLR 963.

5 [2004] 2 Qd R 11, 16.

6 [1999] 2 VR 353, 379.

[8] **JERRARD JA:** In these appeals numbered 9395 and 9396 of 2004 Carl Martinovic is the appellant, and the Chief Executive of Queensland Transport, and the Attorney-General of Queensland, are respectively the second and third respondents. They will be referred to by those titles throughout this judgment. The first respondent is Mr W J Smith, a previous Queensland Coroner. The notices of appeal are in identical terms, but respectively challenge in CA No 9395 of 2004 an order made in the following terms by the learned trial judge in SC 952 of 2004 on 29 September 2004:

> "The Respondent to application SC 952 of 2004 pay the Applicant's costs of and incidental to that application to be assessed on an indemnity basis.";[7]

and in CA No 9396 of 2004 challenge an order in the same terms that the respondent to application SC 1018 of 2004 pay the like costs. That respondent to those applications SC 952 and SC 1018 is the appellant, Mr Martinovic.

[9] The second and third respondents filed an application in each appeal dated 15 December 2004 asking for an order that the notice of appeal be struck out; and seeking costs of and incidental to those appeals, and of the application to strike them out, on an indemnity basis. Those respondents contend that the orders under appeal were "as to costs only" within the meaning of s 253 of the *Supreme Court Act* 1995 (Qld), that leave must first be had and obtained before instituting appeals, and that it has neither been obtained nor sought from the learned trial judge, despite the fact that the Crown Solicitor had drawn s 253 to the attention of the appellant's solicitors on 19 November 2004, inviting them to discontinue each appeal. The appellant's counsel, Mr O'Gorman, opposes the strike out applications, contending that each order under appeal raises, as a substantive issue, whether indemnity costs should have been awarded against a legal practitioner; and are thus not an appeal against "orders as to costs only which by law are left to the discretion of the judge", as that term in s 253 should correctly be understood.

Relevant background matters

The review application

[10] The appellant had appeared as counsel in a coronial inquiry conducted by W J Smith as Coroner, inquiring into the death of an 18 year old person killed in a motorcycle accident in December 2000. Mr Martinovic represented the deceased's next of kin. The primary issue agitated at the coronial inquiry was whether mechanical defects in the imported second hand motorcycle contributed to the accident causing the death, and whether Queensland Transport had negligently permitted Australian Design Rules compliance plates to be fitted to that motorcycle. The Coroner's decision recommended that the Commonwealth Department of Transport and Regional Services investigate the manner of importation of used motorcycles under import approvals, to ensure the imported motorcycles actually comply with provisions of the *Motor Vehicle Standards Act* 1989 (Cth) before sale to consumers and registration.

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[7] The Court had the benefit of extensive and duplicitous appeal records, including both a three volume applications book and a three volume appeal record. The relevant notices of appeal can be found in the appeal record, volume 3, at pages 488 (appeal No 9395/04); and 492 (appeal No 9396/04). The actual orders made, the subject of those notices of appeal, are in the same volume at pages 483 and 484 respectively

[11] The Coroner did not find that mechanical defects in the motorcycle contributed to the death. An application for judicial review was brought, seeking review of the Coroner's decision that the death was caused by the motorcycle rider's inexperience. Review was sought on eight grounds, of which five raised an apprehension of bias in the Coroner. The other grounds complained respectively of the Coroner preventing Mr Martinovic from cross-examining the driver of another vehicle, of the Coroner not allowing Mr Martinovic an opportunity to address on the issues, and of the Coroner not requiring the police to properly investigate the matter. Mr Martinovic appeared as counsel for the applicant for judicial review, the deceased's father, on the hearing of the application for review.

[12] The learned judge hearing that application considered each ground in turn in detail, and dismissed all of them. The judge's reasons referred to Mr Martinovic's final submission to the Coroner, which included the submission that:

> "…Your Worship … has been … entirely impartial in this particular case … been fair and reasonable in all the circumstances and in some respects, even overarching in terms of your – in terms of your impartiality to the benefit – to the benefit of my clients."

Despite that express acknowledgement of matters which meant that there was no basis for a claim of bias, Mr Martinovic made that the basis of five grounds for review. In dismissing those grounds the learned judge did not rely simply on Mr Martinovic's waiver before the Magistrate of any claim of bias, but specifically examined each of the matters alleged to raise apparent bias. The judge found that there was no merit in any of them, and that there was no substance in the other three other grounds of complaint. For example, regarding the complaint of inadequate investigation, it was that a sketch diagram not drawn to scale had been tendered by the investigating police officer. That had been done without Mr Martinovic having objected that the sketch was inadequate in any way, and without Mr Martinovic submitting to the Coroner that a scale map was necessary. Mr Martinovic did not tender a scale map himself. The absence of a scale map was relied on in support of the complaint that the police had not been required to investigate properly, but no attempt was made to demonstrate that a scale map, if tendered, would have led to a different outcome.

The costs application

[13] The learned judge delivered the reasons for judgment on the review application on 18 December 2003, dismissing it. No order was made for costs. On 29 January 2004 the third respondent Attorney-General filed an application (SC 952/04) seeking orders that Mr Martinovic pay the Attorney-General's costs of and incidental to the application for judicial review, to be assessed on an indemnity basis; and an order that Mr Martinovic pay the Attorney-General's costs of application SC 952/04 itself (the costs application). An identical application (SC 1018/04) was made by the second respondent Chief Executive on 10 February 2004.[8] Those applications did not ask for indemnity costs from Mr Martinovic in respect of the costs applications. Those applications were heard on 7 November 2003, 18 December 2003, and 10 February 2004. On 27 February 2004 the learned judge published reasons for judgment and made orders on those applications.

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[8] Those applications can be found in the appeal record, volume 3, at pages 469 and 471

[14] The reasons for judgment published on 27 February 2004 expressed the conclusion that Mr Martinovic had acted unprofessionally in the proceedings before the Coroner and in the judicial review proceedings. The learned judge referred to the judgment of Goldberg J in *White Industries (Qld) Pty Ltd v Flower & Hart* (*a firm*) (1998) 156 ALR 169, and to the statement therein at 236 that:

> "The authorities do not support the proposition that simply instituting or maintaining a proceeding on behalf of a client which has no or substantially no prospect of success will invoke the jurisdiction. There must be something more, namely carrying on that conduct unreasonably."

(The jurisdiction referred to is the power to make a costs order against a legal representative of a party). The learned judge then referred to the approval of that passage by the Full Federal Court in *Levick v Deputy Commissioner of Taxation* (2000) 102 FCR 155 at 165, and the application of both those cases by this Court in *Steindl Nominees v Laghaifar* [2003] 2 Qd R 683, at [23], [40] and [44].

[15] The learned judge then went on to observe that to found a costs order against an advocate, the advocate's conduct must relate to fault in relation to the advocate's duty to the court, citing from a passage in *Medcalf v Mardell* [2003] 1 AC 120 approved by Williams JA and Philippides J in *Steindl Nominees*. That passage, from the judgment of Lord Hobhouse of Woodbrough, holds that the conduct giving rise to the claim for costs against the advocate must "relate clearly to a fault in relation to the advocate's duty to the court not in relation to the opposing party, to whom [the advocate] owes no duty"; and Lord Hobhouse made the further observation, cited with approval in *Steindl:*

> "So it is not enough that the court considers that the advocate has been arguing a hopeless case. The litigant is entitled to be heard; to penalise the advocate for presenting [the] client's case to the court would be contrary to the constitutional principles to which I have referred. The position is different if the court concludes that there has been improper time-wasting by the advocate or the advocate has knowingly lent [herself or] himself to an abuse of process".

[16] The learned trial judge noted that the objective of an order that a legal representative pay the costs of a party, although the order is penal in its consequences, is to protect the client and indemnify any party who has been injured as a consequence of the conduct. For those propositions the judge cited *Myers v Elman* [1940] AC 282 and *Medcalf v Mardell*. The reasons for judgment then relevantly read, in paragraphs 1, 7, and 39:

> "[1] These reasons and orders dispose of costs in the original application for judicial review and in the subsequent applications brought by the second and third respondents in the review application for costs to be ordered against the respondent to their applications."
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> "[7] These reasons deal with the issue of costs in the judicial review application and with the second and third respondents' applications for costs against Mr Martinovic."

> "[39] The considerations being those I have canvassed the second and third respondent are entitled to orders that Mr Martinovic pay each of their costs assessed on an indemnity basis."

Orders made on the costs application

[17] Despite those clearly expressed conclusions that costs would be awarded on an indemnity basis against Mr Martinovic, and inferentially in respect of both the application for judicial review and the costs application itself, the order made by the learned judge on 27 February 2004 merely read that:

> "1. The Respondent to applications SC 952 of 2004 and SC 1018 of 2004 pay the costs of the Second and Third Respondents to SC 6077 of 2002.
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> 2. No order as to costs in respect of the Applicant in SC 6077 of 2002."

[18] SC 6077 of 2002 was the judicial review application. The Applicant in that proceeding had been the deceased's father. The effect of the orders made was to confine the order for costs, against Mr Martinovic and in favour of the second and third respondents, to the costs of the judicial review proceedings, and those were not ordered on an indemnity basis, although the reasons for judgment had unambiguously described an intention to order indemnity costs. No order was made with respect to the costs of the costs applications themselves, numbers 952 and 1018 of 2004.

The slip application

[19] The next step was an application filed seven months later on 24 September 2004 by the second and third respondents, for orders pursuant to r 388 (the slip rule) of the *Uniform Civil Procedure Rules* 1999. The first order sought was one inserting the words "to be assessed on an indemnity basis" at the end of paragraph 1 of the orders made on 27 February; the second order sought in the September 2004 application was to amend the February 2004 orders pursuant to the slip rule, by the insertion of a new paragraph worded:

> "That the respondent in S952 of 2004 and S1018 of 2004 pay the costs of the applicants in each of those matters to be assessed on an indemnity basis."

[20] On 29 September 2004 the learned judge heard submissions and made orders in accordance with those applications. Mr Morris QC for the appellant readily conceded to the judge that it was appropriate, pursuant to the slip rule, to amend the order for costs of the judicial review proceedings to make those an order against Mr Martinovic for indemnity costs of and incidental to those review proceedings. But he contested the applicability of the slip rule to the orders then being sought for indemnity costs in respect of the hearing of the costs application itself. Mr Morris QC submitted that the applications to which Mr Martinovic had responded had not sought indemnity costs against him for that costs application, and further submitted that neither counsel for the applicants for those costs orders against Mr Martinovic had sought indemnity costs in their submissions in respect of the costs application itself. Mr Morris QC submitted that while the judge may have had a private intention to make an order for indemnity costs in respect of the costs application,

that had not been clearly reflected in the published reasons, and the slip rule was inapplicable.

[21] The learned judge referred in response to that argument the terms of the earlier described paragraphs [1], [7], and [39], rejecting the suggestion that the judge had had a secret intention, and holding that the effect of all three paragraphs was to inform the appellant that orders were being made disposing of costs in all matters, and that those would be indemnity costs. The judge proceeded to make the orders sought, and was then asked by Mr Morris QC to provide reasons for the conclusion that Mr Martinovic should be liable on an indemnity basis for the costs in the two application proceedings, as compared with the initial review proceedings. The judge responded that the reasons published on 27 February 2004 were intended and expressed to dispose of that issue in each of the three sets of proceedings.

[22] Those reasons for judgment did not distinguish between situations in which an order for costs might be made against a legal practitioner assessed on the standard basis pursuant to r 703 of the *UCPR*, and those in which an order might be made for costs assessed on the indemnity basis pursuant to r 704. Rule 743 provides that for s 133(b) of the *Supreme Court of Queensland Act* 1991 (Qld):

> "(a) party and party basis equates to standard basis.
> (b) solicitor and client basis equates to indemnity basis."

Nor did the judgment refer to the discussion by Sheppard J, in *Colgate-Palmolive v Cussons* (1993) 118 ALR 248 at 256, 257, of the conduct considered sufficient to warrant the exercise of a discretion to order costs on an indemnity rather than a standard basis. That conduct, conveniently summarised in the judgment of Badgery-Parker J in *Rouse v Shepherd* (*No 2*) (1994) 35 NSWLR 277 at 279-280,[9] includes the following:- misconduct that causes loss of time to the court and to other parties; making allegations which ought never to have been made, or unduly prolonging a case by groundless contentions; commencing or continuing an action for some ulterior motive, or with wilful disregard of the known facts or the clear law in circumstances where the applicant, properly advised, should have known there was no chance of success; and abusing the process of the court, in the sense that the court's time, and the litigants' money, has been wasted on totally frivolous and thoroughly unjustified proceedings. Badger-Parker J provided citations from both *Colgate-Palmolive Pty Ltd v Cussons* and the cases cited therein, and from other judgments, supporting those examples.

These appeals

[23] These appeal proceedings are limited to a challenge to the order that Mr Martinovic pay the second and third respondents' indemnity costs of the costs applications. The argument Mr Martinovic made in response to the strike out applications, and his grounds of appeal, do not reveal grounds to challenge an order that he pay the costs of the costs applications, if assessed on the standard basis. There is no appeal against the order that Mr Martinovic pay the second and third respondents' indemnity costs of the judicial review proceeding. It must follow that Mr Martinovic accepts that there was a proper basis for the judge ordering that costs of the judicial review proceeding be assessed on the indemnity basis, as opposed to the standard basis. Presumably that was accepted because the grounds on which

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[9] As noted by Robertson DCJ in *Carr & Anor v Anderson* (No. 2) [2001] QDC 305 at [6]

indemnity costs may properly be ordered, referred to above, include conduct which would justify an order for costs being made against a legal practitioner, and which grounds were cited by the learned judge, namely that the advocate's conduct must relate to fault in relation to the advocate's duty to the court, and that the advocate unreasonably carried on proceedings with no prospects of success. The learned judge wrote in the reasons published on 27 February 2004 at [37] that:

> "In my view, any competent barrister in Mr Martinovic's position giving proper attention to the prospects of success would have concluded that there was no arguable basis for the review; see the reasons published on 18 December. In pursuing the review and arguing as he did, Mr Martinovic either deliberately ignored his professional obligations or acted recklessly, heedless of them."

That is a description of conduct which would justify an order for indemnity costs, on the *Colgate-Palmolive* basis. It explains why the order in all applications was that costs be assessed on an indemnity basis; and, oddly enough, why Mr O'Gorman now argues that Mr Martinovic can appeal the indemnity costs ordered on the costs application, without leave of the learned trial judge.

The s 253 argument

[24] Section 253 of the *Supreme Court Act* 1995 reads:

> "No order made by any judge of the [Supreme] Court by the consent of parties or as to costs only which by law are left to the discretion of the judge shall be subject to any appeal except by leave of the judge making such order".

Mr O'Gorman argues that the notices of appeal against the order for indemnity costs in the costs proceedings should be treated in the same way as they would be if they were a notice of appeal against the order for costs (whether indemnity or standard) in the judicial review proceeding. In respect of the latter, his submission was that because that order could only be founded on a finding of fault in relation to Mr Martinovic's duty to the court (and in the circumstances that would be his having unreasonably carried on that review proceeding heedless of, or deliberately ignoring, his professional obligations), the ordinary rule provided by s 253 does not apply.

[25] Mr O'Gorman contended that there is a well understood principle, referred to with approval by this court in obiter remarks in *Emanuel Management P/L (in liq) v Foster's Brewing Group Ltd* [2004] 2 Qd R 11 at [11], which principle holds that provisions such as those in s 253 do not apply to a costs order made against a legal practitioner based on a finding of fault. In *Emanuel Management* this Court cited with apparent approval from, inter alia, *In re Bradford, Thursby and Farish* (1883) 15 QBD 635 at 636, and from *Etna v Arif* [1999] 2 VR 353 at 379. In the latter case Batt JA wrote that:

> "It is established that an order that a solicitor personally pay costs is not an order 'as to costs only' which are in the discretion of the court, but rather is an order in the disciplinary jurisdiction of the court (even though the main object of the order may be compensatory)."

In *Emanuel Management* this Court wrote that to warrant a costs order against a legal practitioner:

> "…the court must necessarily be satisfied there has been some dereliction on the part of the solicitor, and that may be regarded as the feature to which the order primarily relates. That approach is therefore distinguishable because historically considered as uniquely referable to the disciplinary jurisdiction of the court, and not to the court's general discretionary jurisdiction as to costs. It is accepted that there must be an appeal without leave in respect of a finding of professional misconduct or negligence. (*Etna v Arif*, p 379)."

[26] Mr O'Gorman submitted that because the learned trial judge gave one and the same set of reasons ordering indemnity costs in respect of both the judicial review proceeding and the costs hearing, the basis for the order in respect of the costs proceeding must of necessity have been a finding of professional misconduct and dereliction on Mr Martinovic's part. It was that feature to which that order for indemnity costs primarily related. Applying the principle referred to with approval in *Emanuel Management*, Mr Martinovic could appeal that order without leave.

[27] Both respondents submitted that the decision in *Emanuel Management* itself was an express authority applying to s 253 to orders for costs (and in that case too, indemnity costs) against a non party. In any event, Mr Martinovic was a party to the costs applications. Counsel submitted that r 689 of the *UCPR* applied to the costs of those proceedings, with the result that in them costs would follow the event, unless the learned trial judge had otherwise ordered. The orders for costs in those proceedings were therefore examples par excellence of orders as to costs which by law are left to the discretion of the judge. So likewise was the order those costs be assessed on an indemnity basis, albeit that order was based on identical grounds to those justifying the order against Mr Martinovic in the judicial review proceedings to which he was not a party. In making the costs order in respect of the costs application the learned judge had not been exercising the court's disciplinary jurisdiction, but was simply applying r 689. Counsel for both respondents submitted that it was significant Mr Martinovic had not appealed the order that he pay the respondents' costs of the review proceeding. Absent such appeal, there was no challenge to the underlying finding that his conduct had been heedless of his professional obligations and at fault. Absent such a challenge, Mr Martinovic could not bring himself within the umbrella of the protection given by the principle recognised in *Emanuel Management*.

[28] Both respondents' counsel referred the court to the judgment in *Wilkinson v Kenny* [1993] 1WLR 963, where the relevant facts were identical to those in these appeals. A solicitor had been ordered to pay the costs of certain items in litigation in which the solicitors were acting, and also ordered to pay four-fifths of the costs of the application for those orders. The solicitors appealed the second order, not the first; and the Court of Appeal held that the similarly worded provisions of s 18(1)(f) of the *Supreme Court Act* 1981 (UK) meant that leave was required. As expressed by Rose LJ, omitting the citations:

> "The judge's decision on the plaintiffs' application that the defendants' solicitors should personally pay part of the plaintiffs' costs was, as it seems to me, susceptible to challenge by way of appeal without the leave of the judge for it did not relate in the terms of s 18(1)(f) of the Supreme Court Act 1981 'only to costs'.

> …
> But the solicitors have not appealed against that decision. What they seek to challenge, the judge having refused leave to appeal, is the judge's order in relating to the costs of that application. This, as it seems to me, is an appeal relating 'only to costs'."

[29] Mr Burns for the Attorney-General advanced a further argument, namely that it is difficult to justify any special rule for legal practitioners, particularly in the post *Knight v FP Special Assets*[10] era. He pointed to the fact that the observations in *Emanuel Management* were obiter, and submitted that the cases cited therein in support of the principle simply expressed it, rather than providing reasoned justification. As to that submission, the observations in *Emanuel Management* repeat a principle of long standing, established by the cases cited therein, and which explain that it is not ordinarily within the discretion arising for exercise by a judge as to costs of a proceeding to make an order for payment of costs against a party's lawyer. That power depends on a finding that the lawyer has been guilty of misconduct, and on the latter question there ought to be an appeal[11] without leave. In any event, this Court should follow its own recently expressed approval of that principle.

[30] The facts which would justify an order for indemnity costs against Mr Martinovic in respect of the costs application are not as obvious as those justifying the order for indemnity costs of the review application. He was entitled to defend the application for costs of the latter application, and to resist a finding his conduct was unprofessional and at fault. The costs proceedings themselves were not obviously prolonged by any untoward behaviour by him. An argument is certainly available that his unprofessional conduct during the review application ought not to have been imported into the costs applications.

[31] The key to the strike out application lies in the grounds of appeal. Those largely attack the process by which indemnity costs were ordered. Mr Martinovic contends there was no obvious error which invoked the application of the slip rule to make those orders; that the orders had not been sought in the applications originally filed nor on the hearing of those applications and would have been contested if they had been, and that Mr Martinovic was therefore denied an opportunity to be heard on the question of indemnity costs both on 10 February 2004 and 29 September 2004; and that the judge failed to give reasons why indemnity costs should be ordered for the costs application. The appellant's written submissions argue in addition that Mr Martinovic was denied natural justice, because indemnity costs of the costs applications were not sought until September 2004.

[32] Those grounds of appeal do not claim that the learned trial judge lacked grounds for ordering indemnity costs of the costs application, as opposed to arguing that the judge gave insufficient reasons. The absence of any ground of appeal arguing that an order for indemnity costs was not justified necessarily concedes there was a basis for the published finding of unprofessional conduct and fault, by conduct heedless or in deliberate disregard of Mr Martinovic's professional obligations. I agree with the respondents that that takes the appeal out from under the cloak of the principle approved in *Emanuel Management*, and reveals the orders appealed as ones

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10 (1992) 174 CLR 178

11 In *re Bradford* at 636-637

following the event, and therefore left to the discretion of the judge within the meaning of s 253. Mr Martinovic can be in no better position than he would be if the order for costs in the costs proceedings had been for costs assessed on the standard basis; if he could not challenge that order without leave, as his counsel's argument really concedes, then he cannot challenge as of right the one actually made. The conclusion may have been different if his grounds of appeal had challenged an order for indemnity costs on the basis that there had been no unprofessional conduct or fault by him which justified those orders, but that is not his appeal. He may or may not have a good argument that the slip rule was inapplicable to the order actually made, and likewise that there should not have been an order for indemnity as opposed to costs assessed on the standard basis, but it necessarily followed from the decision in *Emanuel* that Mr Martinovic cannot appeal without leave the order that he pay those costs assessed on an indemnity basis.

[33] Mr Martinovic's appeals, being without leave and contrary to s 253, are incompetent and should be struck out. It is up to Mr Martinovic whether he makes an application for leave. Regarding the costs of the strike out application, and of the appeals to date, the appeals were not devoid of any merit, and nor were the appellant's arguments on the strike out application. Accordingly, I would order in each appeal:

1. that the appeal be struck out;
2. that the appellant pay the costs of the second and third respondents of and incidental to the appeal, and to the application to strike out, such costs to be assessed on a standard basis.

[34] **WHITE J:** I have read the reasons for judgment of Jerrard JA and agree with his Honour for the reasons that he gives that the orders below from which Mr Martinovic wishes to appeal were orders about costs which were left to the discretion of the judge within the meaning of s 253 of the *Supreme Court of Queensland Act* 1995 (Qld) and the appeal therefore is incompetent without leave having first been granted by the primary judge. Accordingly the application to strike out the appeal should be granted.

[35] I agree with the orders proposed by Jerrard JA.