SUPREME COURT OF QUEENSLAND

CITATION:	*Cannon Street P/L & Ors v Karedis & Ors* [2006] QCA 541
PARTIES:	**CANNON STREET PTY LIMITED** ACN 001 302 085 (first plaintiff/first appellant) **MARGARET ELIZABETH KELLY** (second plaintiff/second appellant) **TIMOTHY CHRISTOPHER KELLY** (third plaintiff/third appellant) **v** **THEO KAREDIS** (first defendant/first respondent) **GREGORY KAREDIS** (second defendant/second respondent) **PESUTU PTY LTD** ACN 002 276 208 (third defendant/third respondent) **GTK RETAILING PTY LTD** ACN 002 031 414 (fourth defendant/fourth respondent)
FILE NO/S:	Appeal No 3889 of 2006 SC No 11302 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	8 November 2006
JUDGES:	Williams and Jerrard JJA and Chesterman J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – COSTS STATEMENTS – ACTIONS TO RECOVER COSTS – OTHER CASES – NSW – where at first instance the respondents were entitled to claim (pursuant to s 55B(4) *Judiciary Act 1903* (Cth)) for work done in the Queensland Supreme Court by solicitors who were not admitted to practice in Queensland – whether the trial judge erred in allowing the respondents to recover for work done by New South Wales solicitors who were not the holders of a practising certificate in Queensland *Bankruptcy Act 1869* (UK), s 70

Bankruptcy Act 1883 (UK), s 151
Judiciary Act 1903 (Cth), s 49, s 55, s 78, s 86
Queensland Law Society Act 1952 (Qld), s 48F
Supreme Court Act 1995 (Qld), s 209
Uniform Civil Procedure Rules 1999 (Qld), r 706(3), r 714(3)

APLA Ltd v Legal Services Commissioner (NSW) [2005] HCA 44; (2005) 79 ALJR 1620, applied
Beaton v McDivitt (1985) 13 NSWLR 134, considered
Caboolture Park Shopping Centre (in liq) v White Industries (Qld) Pty Ltd (1993) 45 FCR 224, considered
Ex parte Broadhouse; in re Broadhouse (1867) LR 2 Ch App 655, cited
In re a Debtor [1934] Ch 280, considered
Kay's Leasing Corporation Pty Ltd v Fletcher (1964) 116 CLR 124, considered
Minister for Works v Australian Dredging and General Works Pty Ltd [1986] WAR 235, considered
Re O'Connor's Bills of Costs [1993] 1 Qd R 423, distinguished
Santos Ltd & Ors v Delhi Petroleum Pty Ltd [2005] SASC 242, No SCCIV-98-1315, 30 June 2005, considered
Victoria v The Commonwealth (1937) 58 CLR 618, considered
Western Australian v Ward (1997) 76 FCR 492, considered

COUNSEL: R M Derrington SC for the appellants
B O'Donnell QC, with D G Clothier, for the respondents

SOLICITORS: Mallesons Stephens Jaques for the appellants
Clayton Utz for the respondents

[1] **WILLIAMS JA:** This is an appeal from a decision of a judge of the trial division on a reference from the Deputy Registrar. At first instance it was held that the respondents were entitled to claim by virtue of the provisions of s 55B(4) of the *Judiciary Act 1903* (Cth) for work done in proceedings in the Supreme Court by solicitors who were not admitted to practise in Queensland. In broad terms it was contended on the hearing of the appeal that the judge erred in failing to apply s 209(2) of the *Supreme Court Act 1995* (Qld) and hold that the respondents were disentitled to recover for work done by solicitors who were not the holders of a practising certificate in Queensland.

[2] It is necessary to set out the circumstances in which the reference from the Deputy Registrar came to be made.

[3] In general terms the first and second respondents controlled the third and fourth respondents. The third and fourth respondents owned a number of liquor outlets and hotels throughout Australia. In about August 2002 the respondents were in negotiation with other public companies for the sale of most if not all of those assets. The first and second respondents resided in New South Wales and the companies were located there. The business was carried on from Sydney. On or about 23 August 2002 Clayton Utz in Sydney was retained by the respondents to act on their behalf in relation to what was described as the "CIBC Project", the proposed disposition of the business interests. A document entitled Terms of

Engagement and Costs Agreement which complied with New South Wales law was signed by or on behalf of both Clayton Utz in Sydney and the respondents.

[4] Some of the liquor outlets in Queensland were owned by The Grape Management Pty Ltd ("Grape"); the third and fourth respondents controlled that company, but interests represented by the appellants held 7.7 percent of the shares. On becoming aware of the proposal by the respondents to dispose of their liquor interests, the appellants engaged their Brisbane solicitors, Mallesons Stephen Jaques. Those solicitors then wrote to Clayton Utz in Sydney seeking an undertaking that the respondents would not sell the liquor outlets owned by Grape. In December 2002 the respondents sold their interests other than those owned by the Grape and that sale was settled on 23 May 2003.

[5] At a board meeting of Grape on 10 November 2003 it was decided to sell certain liquor outlets owned by that company. In consequence on 8 December 2003 Mallesons commenced proceedings in the Supreme Court of Queensland on behalf of the appellants seeking to restrain the sale of assets owned by Grape and other orders. That proceeding was treated by Clayton Utz in Sydney as part of their retainer to act with respect to the CIBC Project. In consequence no fresh client and costs agreement was entered into. When the original notice of intention to defend was prepared that document on its face gave the name of the solicitor acting for the defendants as Nicholas John Mavrakis, and the firm name as Clayton Utz with the address for service being the address in Brisbane of Clayton Utz. Mavrakis was at all material times a partner in the Sydney office of Clayton Utz, and was not the holder of a practising certificate in Queensland. The matter went to trial and ultimately the trial judge dismissed the proceedings; on 21 May 2004 he made the following order: "That the defendants have judgment in the action with costs, including reserved costs, to be assessed on the standard basis."

[6] It is sufficient for present purposes to say that Mavrakis was responsible for most of the preparation for trial, much of which took place in New South Wales because the respondents were centred there. He also instructed counsel during the trial. It is sufficient for present purposes to quote findings in the judgment the subject of this appeal:

> "Here there can be no conclusion other than that the New South Wales solicitors of Clayton Utz were the principals directing the litigation being conducted in this court. … In the present matter, however, it is quite clear that the solicitors in New South Wales 'acted on behalf of another person *in the Supreme Court*'. It cannot be in dispute that, in effect, Mr Mavrakis 'ran' the litigation in Queensland and acted in the Supreme Court."

[7] Bills of costs were prepared for assessment. It was not in dispute that the respondents paid a total of $533,391.10 covering the costs of Clayton Utz Brisbane and Clayton Utz Sydney, including all disbursements. The bill as presented to the assessor showed that the claim made by Clayton Utz Brisbane was for $28,730.67 for its own costs and for disbursements totalling $504,660.43. The latter figure represents the costs (including disbursements) claimed by Clayton Utz Sydney. That was the form required by r 714(3) of the UCPR; it required a costs statement, which included a charge for work done by a solicitor practising outside Queensland, to show that charge as a disbursement. The costs statement dealing with the claim

of Clayton Utz Sydney showed a break up of $188,306.17 for professional fees, and outlays (including counsel's fees) of $314,617.06.

[8] The appellants lodged an objection when the costs statement was submitted for assessment. Relevantly the main objection (as finally amended) provided:

> "The plaintiffs object to any and all costs associated with work done by, or under the supervision or direction of, the New South Wales solicitors. By application of the indemnity principle, the defendants have no entitlement to recover these costs from the plaintiffs.
>
> At all material times, Mr Nicholas John Mavrakis was appearing or acting on behalf of the defendants in the Supreme Court proceedings within the meaning of s 209 of the *Supreme Court Act 1995*. Mr Mavrakis was the solicitor on the record for the defendants and acting as principal with the day to day carriage of the action. The majority of the work performed on behalf of the defendants was performed by Mr Mavrakis, or by lawyers from the Sydney office of Clayton Utz under Mr Mavrakis' supervision or direction … .
>
> At all material times Mr Mavrakis was not a solicitor of the Supreme Court within the meaning of s 209 of the *Supreme Court Act 1995*. Mr Mavrakis operated out of the Sydney office of Clayton Utz, was not admitted to practise as a solicitor of the Supreme Court of Queensland, and did not hold a valid practising certificate entitling him to practise as a solicitor in Queensland as required under s 38 of the *Queensland Law Society Act 1952* …
>
> The effect of s 209 of the *Supreme Court Act 1995* as enforced at the relevant time is that there is no entitlement for the New South Wales solicitors to claim or recover or receive directly or indirectly a sum of money or other remuneration for work done on behalf of the defendants in respect of the proceedings.
>
> …
>
> The defendants have no entitlement to recover costs from the plaintiffs as the Costs Agreement dated 23 August 2002 and 24 June 2003 on which the defendant seeks to rely does not comply with s 48 of the *Queensland Law Society Act* in accordance with s 48F of that Act is rendered void."

[9] It was in consequence of that objection that the Deputy Registrar, acting pursuant to r 706(3) of the UCPR, referred the following questions to the judge:

> "(1) Whether or not, on the assessment of the defendants' costs to be paid by the plaintiffs, the defendants are entitled to claim for the work done in the proceeding by solicitors who were not admitted to practise in the State of Queensland; and
>
> (2) Whether or not the costs, for which the defendants seek indemnity from the plaintiffs are, as between the Defendants and their solicitors who were not admitted to practise in

> Queensland, monies or remuneration 'for appearing or acting on behalf of another person' within the meaning of the provisions of s 209 *Supreme Court Act 1995* which were operative at the time the costs were incurred."

[10] It should also be recorded that it was not in dispute that, because the proceeding was between residents of different states and because it was brought pursuant to provisions of the *Corporations Act 2001* (Cth), the Supreme Court was exercising federal jurisdiction in hearing and determining the matter.

[11] Section 209 of the *Supreme Court Act 1995* relevantly provides:

> "(1) In all matters and proceedings in the Supreme Court a party may appear in person or by a barrister or solicitor or by any person allowed by special leave of the judge in any case.
>
> (2) A person who is not a barrister or solicitor of the Supreme Court shall not be entitled to claim or recover or receive directly or indirectly a sum of money or other remuneration for appearing or acting on behalf of another person in the Supreme Court."

[12] But because the Supreme Court was exercising federal jurisdiction at the material time s 209 is not necessarily determinative of the position. When a Supreme Court is exercising federal jurisdiction provisions of the *Judiciary Act 1903* (Cth) regulate the procedure. As senior counsel for the respondent submitted, it is necessary to look at the amendments leading to the current s 55B of that Act in order to appreciate the significance of that provision.

[13] Section 49 of the original 1903 Act relevantly provided:

> "(1) Any person entitled to practise as a barrister or solicitor or both in any State shall have the like right to practise in any federal court.
>
> (2) Provided that before so doing he shall produce to the Principal Registrar evidence showing that he is so entitled and in what capacity, and the Principal Registrar shall thereupon enter his name in a Register of Practitioners to be kept at the Principal Registry.
>
> …
>
> (3) The High Court may direct the name of any person to be struck off the Register …"

[14] Section 78 of that Act should also be noted; it provided:

> "In every Court exercising federal jurisdiction the parties may appear personally or by such barristers or solicitors as by the laws and rules regulating the practice of those Courts respectively are permitted to appear therein."

[15] Then came the amendments to the *Judiciary Act* effected by Act No 55 of 1966. It repealed s 49 of the original Act and inserted in lieu thereof ss 55A, 55B and 55C; relevantly they provided:

"55A A person who has been admitted to practise as a barrister or solicitor, or as both, … is, … entitled to practise in any federal court as a barrister or solicitor, or as both, as the case may be.

55B (1) Subject to this section, a person who:

(a) is for the time being entitled to practise as a barrister or solicitor, or as both, in the Supreme Court of a State; or

…

has the like entitlement to practise in any federal court.

…

(3) A person is not entitled to practise as a barrister or solicitor in a federal court by reason of sub-section (1) of this section unless his name appears in the Register of Practitioners kept in accordance with the next succeeding section as a person entitled to practise in that capacity.

55C (1) For the purposes of the last preceding section, the Principal Registrar of the High Court shall cause a Register of Practitioners to be kept at the Principal Registry of the High Court … ."

[16] Significantly those sections inserted by the 1966 Act only applied to a federal court; they did not give any right to appear or any right of audience in a State court exercising federal jurisdiction. But s 78 remained unamended, and pursuant to that provision barristers and solicitors could appear in State courts exercising federal jurisdiction.

[17] The next relevant amendment was made by the amending Act of 1976. It introduced subs (4) to s 55B; it was in the following terms:

> "A person who is, by virtue of this section, entitled to practise as a barrister or solicitor, or as both, in any federal court has a right of audience in any court of a State in relation to the exercise of federal jurisdiction by that court."

[18] That Act also inserted subss (5), (6), (7), (8) and (9). It is not necessary to set out what is contained therein; generally those provisions provide for the State to keep a register of practitioners, but that has not been implemented, at least in Queensland.

[19] The 1976 Act also amended s 78 by inserting the words "this Act or" after the words "as by", so that the section thereafter read:

> "In every Court exercising federal jurisdiction the parties may appear personally or by such barristers or solicitors as by this Act or the laws and rules regulating the practice of those Courts respectively are permitted to appear therein."

[20] Senior counsel for the respondents submitted that s 55B(1) conferred upon a legal practitioner admitted in a State the right to practise in any federal court; that meant, for example, that the practitioner could hold himself out as having a right to practise in that court. But there is no provision in the *Judiciary Act* entitling a practitioner admitted in a State to hold himself out as entitled to practise in another State's court although that court be exercising federal jurisdiction. All that practitioner can do in such circumstances is appear for a party. Section 55B(4) and s 78 are complementary. The former gives the legal practitioner the right of audience in the State court exercising federal jurisdiction, and s 78 gives the party the right to appear by such a practitioner.

[21] As counsel submitted, that construction of the provisions is borne out by a consideration of the Explanatory Memorandum to the 1976 amendments. Section 55B(4) was inserted by cl 8 of the Bill and the amendment to s 78 was made by cl 9. The Explanatory Memorandum dealing with those clauses is in the following terms:

> "[cl 8] The purpose of cl 8 is to give a legal practitioner enrolled in the High Court Register of Practitioners and being entitled to practise in a federal court a right to appear before any State court in the exercise of federal jurisdiction by that court. Such a legal practitioner would not have to comply with the admission requirements of the particular State in order to appear in the State court in a matter of federal jurisdiction.
>
> [cl 9] The amendment made by this clause is consequential upon the amendment made by cl 8. Section 78 of the *Judiciary Act* provides that the right of appearance in a court exercising federal jurisdiction is governed by the laws and rules regulating the practice of that court. The effect of the amendment is that section will provide that the right of appearance in a court exercising federal jurisdiction derives from the *Judiciary Act* or the laws and rules regulating the practice of that court."

[22] The application of s 78 was considered by the Full Court of the Federal Court in *Western Australia v Ward* (1997) 76 FCR 492 by Hill and Sundberg JJ at 501. There it was said:

> "Section 78 confers on parties the option of appearing in person or being represented by barristers or solicitors who are entitled to practise in Federal courts or other courts exercising Federal jurisdiction. … Section 78 confers on a party who does not wish to appear in person the right to the services of lawyers who are admitted to practise."

[23] That point was taken up by the High Court in *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322. At 395 Gummow J said:

> "In *Western Australia v Ward* Hill and Sundberg JJ said of s 78 that it did not confer on a party the right to counsel of the choice of that party; rather, s 78 confers on a party who does not wish to appear in person the right to the services of lawyers who are admitted to practice."

[24] Callinan J at 488 said:

> "Section 78 of the *Judiciary Act* does no more than give litigants in all courts exercising federal jurisdiction the right to be represented by such legal practitioners as 'by this Act or the laws and rules regulating the practice of those Courts respectively are permitted to appear therein'. Representation is one thing, soliciting people to engage particular representation is another. Section 55A permits persons admitted to legal practice in the High Court to practise in any federal court. Section 55B entitles persons who are entitled to practise in the Supreme Court of any State or Territory to practise in any federal court, … any courts of a State in relation to the exercise by that court of federal jurisdiction … and in any court of any internal Territory in relation to the exercise of 'federal type jurisdiction'."

[25] Although in dissent what Kirby J said at 434-435 is also significant:

> "By s 55B(1) of the [*Judiciary Act*], a person who is entitled to practise as a barrister or solicitor in the Supreme Court of a State … has like entitlements to practise in any federal court. Such a person also has a 'right of audience' in any court of a State in relation to the exercise by that court of federal jurisdiction. By s 78 of the [*Judiciary Act*] a correlative right is enacted, permitting litigants in every court exercising federal jurisdiction to appear in person or by 'barristers or solicitors as by this Act or the laws and rules regulating the practice of those Courts respectively are permitted to appear therein'. … the foregoing provisions of the [*Judiciary Act*] explicitly confer rights both on litigants and on legal practitioners as defined. The existence of such statutory rights necessarily charts a boundary that marks the extent to which, relevantly, any State law may affect the operation of the rights, privileges and remedies conferred by federal law. Thus, whilst the State law affords the general prescription of the regulation of the legal profession in that State, such State law may not validly alter, impair or detract from the operation of the conferral of any federal entitlements, such as those afforded by or under the [*Judiciary Act*]."

[26] It seems clear from those passages that when the statute speaks of a right of audience it is conferring a right to appear on behalf of a party.

[27] Derrington J considered s 55B(1) and s 55B(4) of the *Judiciary Act* in *Re O'Connor's Bills of Costs* [1993] 1 Qd R 423. At 427, after referring to those provisions, he said: ". . . the right of audience referred to in the latter subsection means what it says, a right of audience in the court; it does mean, as it was argued, the right to practise in relation to the performance of all the work of a solicitor in the preparation for and conduct of a trial to be heard by the court." Insofar as his Honour drew a distinction between holding oneself out as having a right to practise in a particular court and the right of audience before a court he was correct. That is the distinction between s 55B(1) and s 55B(4). But insofar as he limited a right of audience to a right of speaking in the court rather than a right of performing all of the work necessary in the preparation for and conduct of the trial he was wrong; reading s 55B(4) and s 78 together, as was recognised in the passages from the judgment of the High Court quoted above, the right of audience confers a right on

the legal practitioner to do all that is necessary to appear for the party in the particular matter.

[28] Such an approach is consistent with a number of decisions under general law. White J in the present case cited with approval the decision *In re a Debtor* [1934] Ch 280. There Lord Hanworth MR said at 291-292:

> "But Mr Geddes said that s 151 referred only to a right of audience and not to a right to practise. I think that argument involves some confusion of thought. The audience which is given to solicitors is in respect of their own clients. They are not entitled to appear for persons who are not their own clients. They are not barristers. The distinction, I think, is well explained in *Ex parte Broadhouse* (1867) LR 2 Ch 655. … It is not a general right to appear and to be heard on behalf of any person whom the solicitor may choose to represent. It is a right limited to appearing for persons for whom he is acting in his character of a solicitor."

[29] It is true that none of the provisions of the *Judiciary Act* refer to a practitioner's entitlement to recover fees. That is understandable, because such entitlement essentially comes from the contract between the client and his solicitor. There is certainly nothing in the *Judiciary Act* which suggests that a practitioner's right to charge and recover fees for appearing in a State court exercising federal jurisdiction is in any way restricted. Kennedy J in *Minister for Works v Australian Dredging and General Works Pty Ltd* [1986] WAR 235 at 242 expressed the view, albeit obiter, that a legal practitioner appearing in a State court relying on the provisions of the *Judiciary Act* could recover his fees and costs as allowed.

[30] In my view s 209 of the *Supreme Court Act*, properly construed, does not operate to in any way restrict the right of a practitioner to recover fees where the right to appear in the State court exercising federal jurisdiction is governed by the *Judiciary Act*. It is clear, as White J pointed out at first instance, that s 209 was essentially an enabling provision conferring rights of appearance in the Supreme Court. As counsel for the respondents submitted before this Court, s 209(2) is ancillary to subs (1), and is intended to prohibit the recovery of remuneration by persons whose right of appearance depends upon subs (1), that is non-lawyers granted special leave to appear.

[31] If, contrary to those propositions, s 209 of the *Supreme Court Act* operated to restrict the right to appear in the Supreme Court exercising federal jurisdiction by preventing practitioners not admitted in Queensland from recovering fees, then s 209 would be inconsistent with the provisions of the *Judiciary Act* and by operation of s 109 of the Constitution would, to the extent of the inconsistency, be invalid (see, for example, *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466). That would be the consequence because the State law would detract from the operation of a law of the Commonwealth.

[32] Given the foregoing analysis and conclusion it is not necessary to consider the implications of a "national partnership" when seeking to reconcile s 209 of the *Supreme Court Act* with the applicable provision of the *Judiciary Act*.

[33] Where the court is concerned with a New South Wales solicitor appearing and conducting a case in the Supreme Court of Queensland exercising federal

jurisdiction, and where the practitioner's right to so act is governed by the provisions of the *Judiciary Act*, the provisions of the *Queensland Law Society Act 1952* (Qld), such as s 48F, have no application. The client agreement and the costs agreement is between the solicitor and client in New South Wales, and New South Wales law is the proper law of that contract.

[34] It follows that Justice White was correct in concluding, for the reasons which she published, that the questions submitted for determination should be answered as she proposed.

[35] It follows that the appeal should be dismissed with costs.

[36] **JERRARD JA**: In this appeal I have read, and agree with, the reasons for judgment of Williams JA. I add the following reasons, adopting His Honour's descriptions of the relevant facts.

Section 55B(4) *Judiciary Act 1903* (Cth)

[37] The critical issue is whether s 55B(4) of the *Judiciary Act 1903* (Cth) allows the New South Wales admitted solicitors, not admitted in Queensland, to claim fees and costs incurred in acting for their client in the litigation conducted in Queensland. Much of the work done by the New South Wales solicitors would have been done before the litigation began, and would have been concerned with the mercantile transaction conducted in New South Wales. Focussing on whether the New South Wales solicitors could charge for work done both in New South Wales and in Queensland in respect of the litigation after it commenced, and for appearing to instruct et cetera in Queensland, I observe as follows.

[38] The history of s 55B(4) and of s 78 of the *Judiciary Act*, which Williams JA has described, shows that the right of "audience" granted by s 55B(4) included or equated to a right in the client to appear by a solicitor. That latter right would include a right to have the solicitor address the court (in those States where legislation gives a solicitor that right), and to have the solicitor file documents, sign pleadings, and provide an address for service. It is not limited to a right to have the solicitor examine and cross-examine witnesses, and address the court.

[39] The appellant argues that the right given by s 55B(4) is so limited, relying on statements by Derrington J in *Re O'Connor's Bills of Costs* [1993] 1 Qd R 423 at 427. But the history of s 55B(4) was not cited to Derrington J in argument, and no reference was made to s 78. Nor was the construction of "right of audience" in *Re a Debtor* [1934] Ch 280 and in *Ex parte Broadhouse; in re Broadhouse* (1867) LR 2 Ch App 655 at 658 explained to Derrington J. In the latter case Lord Cairns LJ, when considering the proper construction of the right given by s 212 of the *Bankruptcy Act 1861* (UK) to a solicitor to "practise" and "appear" in a Court of Bankruptcy, if admitted as a solicitor of the High Court of Chancery, wrote to the effect that the ordinary character in which a solicitor appears in any court is as the solicitor of a particular client. His Lordship explained that the reason for allowing a solicitor to appear and represent another person is that the court has before it a person who, on the one hand, is under an obligation to the court because the solicitor is one of the officers of the court; and on the other hand, the solicitor is

under an obligation to the client because "he is in privity with him, and is the actual person who represents him."[1]

[40] Regarding that power in the court to control a solicitor, the judgment of the Full Federal Court in *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224 at 233 holds that the fact the Federal Court did not maintain a roll of practitioners, and could not strike-off a name, did not mean that practitioners did not owe the Federal Court a duty nor did it mean that the Federal Court could not discipline a practitioner who breached the practitioner's duty to the court. The Full Federal Court held that for example, the Federal Court could refuse to let such a person represent a client, or could otherwise discipline the practitioner.

[41] I also note that ss 55B(5) to 55B(7) of the *Judiciary Act* do provide a statutory basis for keeping a roll of solicitors who are admitted interstate and entitled to be heard when a Queensland court is exercising Federal jurisdiction; in fact, Queensland does not maintain such a roll. That fact does not detract from the capacity given in the *Judiciary Act* to the Registrars of State Supreme Courts to maintain interstate rolls for the purpose of disciplining solicitors. That capacity to discipline exists in any event, because of the matters explained by the Full Federal Court in *Caboolture Park Shopping Centre (in liq) v White Industries*.

[42] Returning to the issue, in *Re a Debtor* the relevant County Court rules provided that a solicitor was not allowed to appear in that court unless the solicitor had signed the local roll. Objection was taken by a party that a solicitor not on the roll could not practise and could not claim the costs of practising in the Bankruptcy Court. Section 70 of the *Bankruptcy Act 1869* (UK), and s 151 of the *Bankruptcy Act 1883* (UK) gave solicitors a right to "appear and be heard." An argument was advanced that this only gave to a solicitor not on the local county roll a right of audience, and not a right to practise. Lord Hanworth MR wrote that the right of audience given to solicitors was in respect of their own clients, quoting from the judgment of Lord Cairns in *Ex parte Broadhouse*.[2] Romer LJ (at 297) agreed with Lord Cairns that the solicitor not on the roll could practise in the Bankruptcy Court and claim the costs of practising, remarking that if a solicitor's right of audience was unaffected, so too was the solicitor's right of practise.

[43] To the same effect is the judgment of Young J in *Beaton v McDivitt* (1985) 13 NSWLR 134 at 160, where his Honour wrote:

> "The whole essence of appearances by solicitors in the court is that they are the retained representative of the client, and the client is protected from excessive fees etc by the statutory provisions set out in the *Legal Practitioners Act*. … a retainer is of the essence of the relationship."

His Honour added that the right of audience is given to the solicitor on the record.

[44] That approach is supported by the obiter in *Minister for Works (WA) v Australian Dredging & General Works Pty Ltd* [1986] WAR 235 at 242. What Kennedy J

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1 (1867) LR 2 Ch App 655 at 658-659.

2 [1934] Ch 280 at 292.

wrote there supports the claim by the New South Wales admitted solicitors in this matter, based on s 55B(4): His Honour wrote:

> "… (if) the court is 'exercising federal jurisdiction' … any person entitled to practise as a … solicitor … has a right of audience … and in consequence his fees or costs … as allowed may be recovered."

[45] Obiter in *Santos Ltd & Ors v Delhi Petroleum Pty Ltd* [2005] 240 LSJS 366; [2005] SASC 242[3] at [42] and [46] also supports a claim by the New South Wales admitted solicitors in this proceeding. So too does the manner in which Callinan J described the right given to solicitors by ss 55B(4) in *APLA Ltd and Ors v Legal Services Commissioner (NSW) and Anor* (2005) 224 CLR 322[4] at 488 in [481], as "a right to practise … [in] any courts of a state in relation to the exercise by that court of federal jurisdiction…"

[46] It follows that the legislative history of s 55B(4) and s 78 of the *Judiciary Act*, the interpretation of similarly worded statutes in the United Kingdom, obiter dictum from the High Court, the South Australian Full Court and the Western Australian Court of Appeal, all support the view that the right of "audience" is a right to appear as the solicitor on the record with a retainer from the client, and according a right to claim proper costs for so acting. It was described as a right to "practise" by Callinan J, which must include the right to file documents, to appear on the record as the solicitor, to instruct counsel, to take proofs of evidence from witnesses, and to claim proper fees for doing all those things.

[47] Against that is the view of Derrington J, to whom *Re a Debtor* and s 78 were not cited. There seems no reason to distinguish the cases to which Derrington J was not referred, or to limit or cut down the right given by s 55B(4). I agree with Williams JA that some of the views expressed in *Re O'Connor's Bills of Costs* were wrong.

Application of s 48F to the costs agreement

[48] Turning to a different issue, the question whether or not the costs charged were proper depends on the terms of the client agreement between the firm of solicitors and the client, made in New South Wales, and on the amount of the fees charged. Section 48F of the *Queensland Law Society Act 1952* (Qld) is irrelevant to whether or not the costs agreement made in New South Wales was valid or not. That matter is governed by the laws of New South Wales. The Queensland legislation is both properly assumed to be restricted to agreements for which the law of Queensland is the law of the agreement, and is in fact in various ways expressed to be so restricted. (For example "practitioner" is defined to mean a solicitor admitted in the Supreme Court of Queensland, the "Important Notice to Client" in the Schedule invites the reader to contact the Queensland Law Society, and the notice refers to the Solicitors Complaints Tribunal established under the Act). Nothing in the decision in *Kay's Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124 at 134 to 135, on which the appellant's senior counsel relied, changes that position: in fact the joint judgment at those pages makes clear that in this matter whether the statute law of Queensland controls the validity of the costs agreement depends on whether the agreement was made in Queensland.

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3 SCCIV-98-1315, 30 June 2005.

4 [2005] HCA 44; S202 of 2004, 1 September 2005.

[49] It follows that the New South Wales based solicitors, admitted only in that State, could charge for their services provided in Queensland to their client for the litigation the client was conducting in Queensland in the Supreme Court, by reason of s 55B(4). They could charge for their services in New South Wales, by reason of the client agreement they entered into.

Section 209(2) *Supreme Court Act 1995 (Qld)*

[50] Regarding s 209(2) of the *Supreme Court Act 1995* (Qld), its history is relevant to its construction. It returned – in 1973 – a right of audience to solicitors, first given to them in 1874, and then repeated in 1881, in the *Legal Practitioners Act 1881*. That right was then taken away in 1938, and finally returned in 1973. The parliamentary debates show that that was the object of the 1973 amendment inserting ss 209(1) and 209(2).

[51] It is therefore appropriate to interpret s 209(2) as enacted to ensure that those given special leave to appear (under s 209(1)) did not charge fees for so appearing, or for acting in court. It was not intended to apply to interstate practitioners with a right of audience in courts in those other States, or to partnerships of solicitors, but to individuals.

[52] A number of interesting problems result from attempting to apply s 209(2) to partnerships, but it is unnecessary to consider those matters, or the judgments in *Martin v Sherry* [1905] 2 IR 62 or *Hudgell Yeates & Co v Watson* [1978] QB 451.

Inconsistency

[53] There is an inconsistency in outcome in the application of s 209(2) in its literal terms, and in the exercise of the rights given by s 55B(4). To that extent s 209(2) is inoperative. It does not apply to lawyers exercising a right of appearance given by s 55B(4): if it did, there would be an operational inconsistency of the variety described in *APLA v Legal Services Commissioner (NSW)* at [201] and [206]. That is because applying s 209(2) of the State legislation in its literal terms would impair or detract from the right given to a solicitor when appearing in the Supreme Court (or a State court) exercising Federal jurisdiction if the solicitor could not charge an appropriate fee for representing the client. Recognising that inconsistency is justified by the approach taken in *Victoria v The Commonwealth* (1937) 58 CLR 618 at 631. The inconsistency exists even though there is no inconsistency per se in the terms of either legislation.

[54] These reasons assume and conclude that the solicitors admitted in New South Wales were exercising a right of audience when carrying on the litigation in Queensland and acting for the client in the Supreme Court in Queensland. So also was Mr Powell, the solicitor admitted in Queensland, who signed the pleadings et cetera. I agree the appeal should be dismissed with costs.

[55] **CHESTERMAN J:** I have read the reasons for judgment of Williams and Jerrard JJA and agree with what their Honours have written.