SUPREME COURT OF QUEENSLAND

CITATION:	*Cannon Street Pty Ltd & Ors v Karedis & Ors* [2006] QSC 078
PARTIES:	**CANNON STREET PTY LIMITED** **(ACN 001 302 085)** (first plaintiff) **MARGARET ELIZABETH KELLY** (second plaintiff) **TIMOTHY CHRISTOPHER KELLY** (third plaintiff) **v** **THEO KAREDIS** (first defendant) **GREGORY KAREDIS** (second defendant) **PESUTU PTY LTD** **(ACN 002 276 208)** (third defendant) **GTK RETAILING PTY LTD** **(ACN 002 031 414)** (fourth defendant)
FILE NO:	BS11302 of 2003
DIVISION:	Trial Division
PROCEEDING:	Reference from the Registrar
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	13 April 2006
DELIVERED AT:	Brisbane
HEARING DATE:	15 February 2006; further written submissions 22 February and 1 March 2006.
JUDGE:	White J
ORDER:	**The reference from the Deputy Registrar should be answered as follows:** **1. 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 by virtue of the provisions of s 55B(4) of the *Judiciary Act 1903* (Cth).** **2. Unnecessary to answer.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – COSTS STATEMENTS – ACTIONS

TO RECOVER COSTS – OTHER CASES – N.S.W. solicitors conducting proceedings in Queensland without statutory qualifications – entitlement to recover costs – *Judiciary Act* 1903 (Cth) s 55B – *Supreme Court Act* 1995 (Qld) s 209

CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – INCONSISTENCY OF LAWS (CONSTITUTION, s 109) – State law regarding legal practitioners – whether *Supreme Court Act* 1995 (Qld) s 209 inconsistent with *Judiciary Act* 1903 (Cth) s 55B

Constitution (Cth), s 71, s 74(iv), s75(iv), s 109
Corporations Act 2001 (Cth), s 237, s 1037(2)
Judiciary Act 1903 (Cth), s 55B, s86
Matrimonial Causes Act 1959 (Cth)

Acts Interpretation Act 1954 (Qld), s 35(1)(b)
Arbitration Act 1895 (WA)
Legal Practitioners Act 1974 (NT)
Legal Profession Act 1987 (NSW), Division 3
Legal Profession Amendment (Personal Injury Advertising) Regulation 2003 (NSW)
Partnership Act 1891 (Qld) s 5(1)
Queensland Law Society Act 1952 (Qld) s 38, s 44, s 48
Supreme Court Act 1867 (Qld), s 38A, s 58
Supreme Court Act 1995 (Qld), s 209, s 221
Uniform Civil Procedure Rules 1999 (Qld), r 691, 703, 685, 710(1), 713, 736, 714

Bankruptcy Act 1869 (Eng)
Bankruptcy Act 1883 (Eng), s 151
Solicitor's Act 1957 (Eng)

In Re A Debtor [1934] 1 Ch 280, considered
APLA Ltd v Legal Services Commissioner (NSW) [2005] HCA 44, applied
Australian Mutual Provident Society v Goulden (1986) 160 CLR 330, applied
Cachia v Hanes (1994) 179 CLR 403, cited
De Pardo v Legal Practitioners Complaints Committee [2000] FCA 335, applied
Elders Trustee and Executor Company Ltd as Executors of the Estate of Howard v Estate of Herbert (1996) 111 NTR 25, discussed
Grundmann v Georgeson [2000] QCA 394, cited
Gundry v Sainsbury [1910] 1 KB 645, cited
In Re Hope (1872) LR 7 Ch App 766, cited
Hudgell Yeates & Co v Watson [1978] 1 QB 45, discussed
In re Jones (1869) LR 9 Eq 63, cited
Jumbunna Coal Mine NL v Victorian Coal Miners'

Association (1908) 6 CLR 309, cited
Little v Registrar of High Court of Australia (1991) 29 FCR 544, applied
Maggbury Pty Ltd v Hafele Australia Pty Ltd (No 2) [2002] 1 Qd R 183, followed
McKenzie v McKenzie [1971] P 33, cited
Minister for Works v Australian Dredging and General Works Pty Ltd [1986] WAR 235, discussed
Mitchell v Mitchell (1971) 19 FLR 100, discussed
Re O'Connor's Bills of Costs [1993] 1 Qd R 423, not followed
Santos Ltd v Delhi Petroleum Pty Ltd [2005] SASC 242, discussed
TNT Bulkships Ltd v Hopkins (1989) 65 NTR 1, cited

COUNSEL: R Derrington SC for the applicants/plaintiffs
B O'Donnell QC and D Clothier for the respondents/defendants

SOLICITORS: Mallesons Stephen Jacques for the applicants/plaintiffs
Clayton Utz for the respondents/defendants

[1] A Deputy Registrar of the court had for his consideration objections by the plaintiffs in the proceedings to a costs statement delivered by the defendants who had been successful in the litigation and had obtained a favourable costs order. The plaintiffs raised as a preliminary point that the defendants were not entitled to recover from the plaintiffs the cost of work done in the proceedings by New South Wales solicitors who were not admitted to practise in Queensland.

[2] The Deputy Registrar, being of the opinion that the preliminary issue involved predominantly legal questions and that any decision made by a registrar would likely be the subject of a review application to the court, with the concurrence of the parties, referred the question to a judge of the court pursuant to r 706(3) of the *Uniform Civil Procedure Rules* ("*UCPR*"). That rule provides

> "The registrar may also refer to the court any question of law arising in relation to the assessment."

[3] The reference is in the following terms

> "(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 section 209 *Supreme Court Act 1995* which were operative at the time the costs were incurred."

[4] On 28 October 2005 Clayton Utz, solicitors for the defendants, sent notices pursuant to s 78B of the *Judiciary Act 1903* (Cth) to the Attorneys-General of the Commonwealth, States and Territories. The matter said to arise under the *Constitution* or to involve its interpretation was described to the Attorneys as an inconsistency between the *Judiciary Act* and s 209 of the *Supreme Court Act 1995* (Qld). An aspect of the litigation was a determination under s 237 of the *Corporations Act 2001* (Cth) in respect of which the court was exercising federal jurisdiction pursuant to s 1337B(3) of the *Corporations Act*. Additionally this court was exercising federal jurisdiction pursuant to s 39(2) of the *Judiciary Act* because the proceedings were between the residents of different States within the meaning of s 75(iv) of the *Constitution*. Each Attorney has declined to intervene.

[5] At the conclusion of this hearing counsel for the plaintiffs, Mr Derrington SC, sought to amend the general objection to the costs statement to include a failure by the solicitors on the record for the defendants to comply with the requirements of the *Queensland Law Society Act 1952* to hold a Queensland practising certificate pursuant to s 38 of the Act and the failure of the defendants and their solicitors to comply with the provisions of s 48 of the Act concerning client agreements.

[6] The plaintiffs were given leave to make written application to amend with the defendants being given leave to respond. The defendants by their written submissions do not object to the amendment of the objections and have provided submissions about the application of ss 38 and 48 of the Act. Accordingly, leave is given to the plaintiffs to amend their general objection in order that all bases for objection to the payment of costs which essentially involve questions of law can be heard and determined together.

[7] General Objection 1 as amended (with the amendments in italics) reads

> " The Plaintiffs object to any and all costs associated with work done by, or under the supervision or direction of, the New South Wales (NSW) 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 Section 209 of the *Supreme Court of Queensland* [sic] *Act* 1995 (Qld). 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 Section 209 of the *Supreme Court Act* 1995 (Qld). 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 Section 38 of the Queensland Law Society Act* 1952 ...
>
> The effect of Section 209 of the *Supreme Court Act* 1995 (Qld) as in force at the relevant time is that there is no entitlement for the NSW solicitors to claim or recover or receive directly o[r] indirectly a sum of money or other remuneration for work done on behalf of the Defendants in respect of the proceeding.
>
> The Plaintiffs will make further detailed submissions in relation to this issue on its hearing as a preliminary issue, or alternatively on Assessment.
>
> *The Defendants have no entitlement to recover costs from the Plaintiff as the costs agreement dated 23 August 2002 and 24 June 2003 on which the Defendant seeks to rely does not comply with section 48 of the Queensland Law Society Act and in accordance with section 48F of that Act is rendered void.*"

[8] An item listed as an outlay in the costs statement is described as "Paid: New South Wales Agents their fee." The amount is $502,923.23. The composition of that sum appears in numerous folios set out as a costs statement and described as "Summary of New South Wales Solicitors Professional Fees and Outlays."

[9] The defendants have paid their solicitors.

[10] There is no suggestion that the defendants' solicitors did not carry out their work professionally.

[11] No objection was taken at any time before the objections to the costs statement to Mr Mavrakis' and other NSW solicitors' "involvement" in the litigation.

[12] Prior to July 2000 Clayton Utz was made up of four separate partnerships. The offices of Clayton Utz in Sydney, Canberra and Melbourne operated as a single partnership. The offices of Clayton Utz, Brisbane, Perth and Darwin operated as separate but associated partnerships. On 1 July 2000 Clayton Utz became a single partnership operating nationally.

Background

[13] The litigation which culminated in the order of Muir J of 30 April 2004 (the orders made that day were effectively repeated after receiving submissions about costs on 21 May 2004)

> "That the defendants have judgment in the action with costs, including reserved costs to be assessed on the standard basis." [2004] QSC 104

arose out of a commercial dispute between the plaintiffs and the defendants as minority and majority shareholders over the extent of the plaintiffs' equity in The Grape Management Pty Ltd (including Hotel Wickham Investments Pty Ltd and described in the affidavits and the judgment as "The Grape" which it is convenient to assume in these reasons), directors' and shareholders' voting rights and the disposition of the companies' assets. The companies carried on the business of liquor merchants through numerous retail outlets in Queensland and also owned and operated a number of hotels in Queensland.

[14] Mr Theo Karedis, the first defendant, was the founder and former chief executive officer of a group of companies which carried on the "Theo's" business of wholesale/retail liquor supplies and hotel operations in New South Wales and the ACT. The second defendant, Mr Gregory Karedis, is Mr Theo Karedis' son. The third and fourth defendant companies are controlled by them respectively.

[15] On or about 23 August 2002 Clayton Utz in Sydney was retained by Pesutu Pty Ltd, now the third defendant, on behalf of itself, GTK Retailing Pty Ltd, now the fourth defendant and Mr Theo Karedis and Mr Gregory Karedis as well as other entities within the Karedis Group to act for them in relation to what was described as the "proposed CIBC Project". That was the name given to the sale of the Karedis Group's liquor interests. Pesutu Pty Ltd entered into a letter of engagement and costs agreement with the solicitors in relation to that project. It was signed by Mr Peter Shaw, a partner in the Sydney office of Clayton Utz and the agreement itself was signed on behalf of Pesutu by Mr Theo Karedis. That retainer continued until 30 June 2003 and was renewed for the period 1 July 2003 to 30 June 2004. On this occasion Mr Theo Karedis chose not to execute a fresh agreement but merely to continue the old agreement on the same terms and conditions. It was apparently accepted by the plaintiffs on this hearing that those agreements were costs agreements within the meaning of the *Legal Profession Act 1987* (NSW).

[16] The headquarters of the Karedis Group was in Sydney and Mr Theo and Mr Gregory Karedis resided in Sydney. The registered officers of Pesutu Pty Ltd and GTK Retailing Pty Ltd were in Sydney.

[17] From September to December 2002 the Karedis interests were in negotiations with Woolworths Limited and the Coles Myer Group Limited to sell the Theo's Liquor Group which included The Grape interests in Queensland. Mr Shaw was advising the Karedis interests in respect of these negotiations. The firm of solicitors, Malleson Stephen Jacques, ("Mallesons") in Brisbane, wrote to Mr Shaw at Clayton Utz in Sydney stating that the firm was acting for the now plaintiffs and seeking an undertaking from the Karedis interests that they would not sell the Theo's Liquor Group to Coles Myer. The solicitors alleged that the conduct of the Karedis interests in the sale process was oppressive and would constitute a breach of the fiduciary duties of the directors of The Grape Management Pty Ltd if the sale were to proceed. Mallesons also contended that there was an agreement between the now plaintiffs and the now defendants whereby the plaintiffs would acquire an additional 12.3 per cent of the shares in The Grape Management Pty Ltd.

[18] It was at that point that Mr Nicholas Mavrakis became involved. He was requested by Mr Shaw to assist him to respond to that letter.

[19] Mr Mavrakis was admitted as a solicitor of the Supreme Court of New South Wales on 11 November 1994. He has since held a New South Wales practising certificate continuously. On 15 April 1996 he was admitted to the roll of practitioners of the High Court of Australia. He was employed as a solicitor, then as a senior associate in the Sydney office and worked principally with Mr Dean Jordan, a partner in the firm. He has been a partner of Clayton Utz since 1 January 2004.

[20] Mr Mavrakis obtained witness statements from Mr Theo and Mr Gregory Karedis in respect of the allegations made on behalf of the plaintiffs by Mallesons. Clayton Utz in Sydney retained Mr N Hutley SC, a barrister with chambers in Sydney to advise.

[21] The Karedis interests provided the plaintiffs with an undertaking not to sell The Grape but declined to do so, so far as the balance of the Theo's Liquor Group was concerned, on the basis that Mr Timothy Kelly, the now third plaintiff, had no interest in those businesses. In December 2002 the Karedis interests entered into an agreement to sell the Theo's Liquor Group other than The Grape to Liquorland (Australia) Pty Ltd, a subsidiary of Coles Myer, and settled on that agreement on 26 May 2003.

[22] According to Mr Mavrakis, throughout 2003 both through their solicitors and directly, the now plaintiffs repeated the allegations contained in the Mallesons' letter of 12 December 2002. Mr Mavrakis, Mr Shaw and Mr Jordan in Sydney and Ms Anna Sharpe, a partner in Clayton Utz's office in Brisbane, assisted the Karedis interests.

[23] By resolution of the board of 10 November 2003 The Grape Management Pty Ltd resolved to sell The Grape.

[24] For completeness something may be said about the plaintiffs. Mr Timothy Kelly, the third plaintiff, was at the relevant time the controller of Cannon Street Pty Ltd, the first plaintiff, and the beneficial owner of all its shares. Mrs Margaret Kelly, the second plaintiff, his mother, held her shares in Cannon Street Pty Ltd in trust for Mr Kelly. Mr Kelly was the beneficial owner of 7.7 per cent of the shares in The Grape Management Pty Ltd. The balance were held equally by Pesutu Pty Ltd, the third defendant and GTK Retailing Pty Ltd the fourth defendant which, as I have noted, were controlled by each of Mr Theo and Mr Gregory Karedis.

The litigation

[25] It is unnecessary to articulate in detail the issues raised by Mr Kelly and his interests which are set out in the judgment of Muir J. Suffice it to say that the Karedis interests declined to give an undertaking not to implement the sale process. On 8 December 2003 Ms Sharpe received from Mallesons by way of service on the

defendants in the Brisbane office of Clayton Utz a claim and statement of claim seeking certain relief filed that day in the Supreme Court. I have taken the summary of what was sought from paras 6 and 7 of the judgment of Muir J

> "Cannon Street and Mrs Kelly claim –
>
> (a) a declaration that they have an option to purchase from Pesutu and GTK 12.3% of the issued share capital in TGM [The Grape Management Pty Ltd] for the sum of $2.6 million;
>
> (b) a declaration that in order to be validly passed, any resolution proposed at a meeting of shareholders of TGM or HWI [Hotel Wickham Investments] must be passed unanimously.
>
> Mr Kelly claims –
>
> (a) a declaration that in order to be validly passed, any resolution proposed at a meeting of directors of TGM or HWI concerning the sale of the business of either company must be passed unanimously;
>
> (b) an order permanently restraining the implementation of a resolution for the adopting of a sale process for the sale of the business of TGM and HWI purportedly passed by a majority of directors of each of TGM and HWI on 10 November 2003."

[26] The plaintiffs sought leave pursuant to s 237 of the *Corporations Act 2001* (Cth) to bring proceedings on behalf of and in the name of each of The Grape Management Pty Ltd and Hotel Wickham Investments Pty Ltd against Mr Theo and Mr Gregory Karedis for an order permanently restraining the implementation of the resolution relating to the sale of The Grape interests on 10 November 2003. That application was heard as part of the principal proceedings.

[27] On 8 December 2003 consent orders were made by Mackenzie J that the application for an interlocutory injunction be set down for hearing on 12 December 2003. The application was further adjourned by consent to 19 December 2003. Mr Mavrakis attended the hearing of the application in Brisbane instructing Mr Hutley SC and Mr D Clothier of the Queensland Bar. Muir J made consent orders restraining any further steps to sell The Grape until the hearing and determination of the proceedings which he set down for trial on 29 March 2004.

[28] On 12 February 2004 the defendants filed and served a notice of intention to defend. Mr Mavrakis was named on the pleading as the defendants' solicitor and the firm of solicitors was named as Clayton Utz. The solicitor's business address was the firm's Brisbane address in accordance with the requirements of r 139 and Form 6 of the *UCPR*. The notice of intention to defend was not signed by Mr Mavrakis but by, it may be inferred, someone in the Brisbane office.

[29] Mr Mavrakis was involved in assembling evidence and conferred regularly with the defendants and counsel in Sydney through February and March 2004.

[30] An interlocutory application relating to further disclosure by the plaintiffs was heard on 15 March 2004. That application was signed by Mr John Powell, a partner in the Brisbane office of Clayton Utz. Mr Mavrakis instructed counsel on the hearing of that application.

[31] The trial was held over six days in March and April 2004. Mr Mavrakis and Ms Fiona Boyce, a solicitor in the Sydney office of Clayton Utz, attended and instructed counsel. Apart from these attendances all work undertaken by partners and employed solicitors based in the Sydney office of Clayton Utz was undertaken in New South Wales.

[32] Other work performed for the defendants in the litigation by Clayton Utz was carried out by partners and employed solicitors based in the Brisbane office. All of those persons were admitted to practice in Queensland and held Queensland practising certificates. All of the partners and employed solicitors in the Sydney office were, at the relevant time, admitted to practice in New South Wales, held the necessary practising certificate, were relevantly on the roll of legal practitioners of the High Court and, in one case, admitted to practice in Victoria, South Australia and the ACT.

[33] Mr Mavrakis deposed in para 52 of his affidavit filed 28 September 2005 that the costs statement was prepared in the following manner

> "(a) All professional work performed by partners and employed solicitors based in the Brisbane office of Clayton Utz has been itemised in the costs statement as professional fees. The total amount claimed for this work is $28,730.67;
>
> (b) All professional work performed by partners and employed solicitors based in the Sydney office of Clayton Utz has been itemised in the costs statement as disbursements. This is so whether or not the partner or solicitor was in Sydney or Queensland at the time the work was performed and whether or not the partner or solicitor was admitted to practice in Queensland at the time the work was performed. The total amount claimed for work performed by partners and employed solicitors based in the Sydney office of Clayton Utz who were admitted to practice in NSW and performed in Sydney is $159,937.37. The total amount claimed for work performed by partners and employed solicitors based in the Sydney office of Clayton Utz who were admitted to practice in NSW but performed in Queensland is $28,468.80.
>
> (c) All other disbursements have been itemised as disbursements in the costs statement."

[34] The costs statement has been prepared in conformity with r 714 of the *UCPR* which provides

> "(1) If a costs statement includes a charge for work done by a solicitor practising in Queensland and acting as agent for a party's solicitor, the charge must be shown as a professional charge, not as a disbursement.
>
> (2) The registrar may assess and allow a charge mentioned in subrule (1) even though it is not paid before the assessment.
>
> (3) If a costs statement includes a charge for work done by a solicitor or barrister practising outside Queensland, the charge must be shown as a disbursement.
>
> (4) If the registrar allows a charge mentioned in subrule (3) when assessing costs, the amount the registrar allows must, so far as practicable, be an amount appropriate in the place where the solicitor or barrister practises."

All work performed by partners and employed solicitors based in the Sydney office of Clayton Utz but in fact performed in Queensland was work connected with appearances in this court.

[35] The objections concern three issues

(1) Whether s 209 of the *Supreme Court Act* 1995 (Qld) precludes the defendants from being indemnified by the plaintiffs in respect of costs charged by Clayton Utz for legal work concerning the litigation performed by solicitors in the Sydney office of the firm who were not admitted to practise in Queensland and who did not hold a Queensland practising certificate.

(2) Whether any costs are due in respect of the work done by the NSW solicitors for their clients because there is no valid Queensland client agreement pursuant to s 48 of the *Law Society Act* 1952 (Qld).

(3) Whether those NSW solicitors were entitled to act for the defendants and be remunerated therefore by virtue of s 55B of the *Judiciary Act* 1903 (Cth) and, if not, is there relevant inconsistency between that provision and s 209 of the *Supreme Court Act* 1995 (Qld).

Costs generally

[36] The general power to award costs in Queensland was originally in s 58 of the *Supreme Court Act 1867* and has been relocated as s 221 in the *Supreme Court Act 1995*. As the majority of the High Court observed in *Cachia v Hanes* (1994) 179 CLR 403 at 410, costs are awarded by way of partial indemnity to a successful party for professional legal costs actually incurred in the conduct of litigation. If a successful party is not liable to that party's solicitor for costs those costs may not be

recovered from the opponent, *Grundmann v Georgeson* [2000] QCA 394 and see also *Gundry v Sainsbury* [1910] 1 KB 645 at 649 and 653.

[37] By r 691 of the *UCPR* a party to a proceeding cannot recover any costs of the proceeding from another party other than under the rules of court or an order of the court. If, pursuant to the rules or an order of the court, a party is entitled to costs the costs are to be assessed costs, r 685. Unless the rules or the court otherwise provide the costs must be assessed on the standard basis which was previously known as party and party costs. The old taxation of costs equates to the new assessment of costs under the *UCPR* which were introduced in 1999, r 703. When assessing costs on the standard basis a registrar must allow all costs "necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed", r 703(2).

[38] The procedure for assessing costs is set out in Chapter 17, Part 2, Division 5 of the *UCPR*. By r 710(1) a costs statement which initiates the assessment process must have attached to it when it is filed originals or copies of receipts for disbursements or, if a disbursement has not been paid, originals or copies of all relevant accounts. By s 713 if a party's costs statement includes an account which has not been paid a party may claim the amount as a disbursement and the registrar may allow the amount as a disbursement but only if it is paid before the registrar signs the order for the amount of the costs under r 736. As has been mentioned the amount identified as "disbursements" in the costs statement relates to the professional costs of Clayton Utz in the Sydney office. I have already set out the provisions of r 714 relating to professional charges and disbursements.

Section 209 of the Supreme Court Act 1995

[39] What is now s 209 of the *Supreme Court Act 1995* was introduced into the *Supreme Court Act* of 1867 as a new provision - s 38A. As Wilson J observed in *Maggbury Pty Ltd v Hafele Australia Pty Ltd (No 2)* [2002] 1 Qd R 183 at 187 when the *Supreme Court Act Amendment Bill 1973* containing the proposed s 38A was introduced the Minister for Justice said

> "This amending Bill has one objective, namely, to enable solicitors to have a right of audience in the Supreme Court of Queensland." *Hansard* 18 September 1973 p 580.

On the second reading of the Bill he said:

> "This Bill will amend the Supreme Court Act of 1867 by inserting a new section that will give a solicitor a statutory right of audience in the Supreme Court of Queensland ... The Bill provides that any party appearing before the Supreme Court will, after the date of assent to the Bill, be able to appear either in person or by a barrister or a solicitor, or by any person allowed by special leave of the judge. Under the Bill, the only person able to claim or recover a fee for appearing or acting on behalf of a party to a matter or proceeding in the Supreme Court will be a barrister or a solicitor.
>
> ...

> The ideals of any judicial system are cheaper and speedier justice under the law, and I believe that by giving solicitors a right of audience in the Supreme Court, the Bill will go some way towards achieving these ideas." *Hansard* 25 September 1973, p 673.

[40] Section 209 as it was at the time of this litigation (it has since been amended but not so as to affect the issues to be decided here) provided

> "(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 on money or other remuneration for appearing or acting on behalf of another person in the Supreme Court.
>
> (3) In this section –
>
> "**party**" includes a person served with notice of or attending a matter or proceeding although not named in the record."

[41] Section 44 of the *Queensland Law Society Act 1952* provides

> "(1) No person acting as a solicitor for a client shall sue, prosecute, defend, or carry on any action or suit or any proceedings in any court without having previously obtained a practising certificate which shall be then in force, or shall be capable of maintaining any action or suit for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by the person as a solicitor whilst the person shall have been without such practising certificate."

[42] Section 209 concerns business "in the Supreme Court" and precludes any person who appears for another from being remunerated unless "a barrister or solicitor of the Supreme Court". This, *inter alia*, prevents non-legally trained persons who might, under the *McKenzie's Friend* principle (*McKenzie v McKenzie* [1971] P 33), be given leave to appear, from receiving or seeking remuneration from those whom they assist. Section 209 thus catches a wider group of persons, albeit in respect of a narrower range of conduct, than those contemplated by s 44 of the *Queensland Law Society Act* which was confined to a person "acting as a solicitor."

(i) ***The single partnership***

[43] The prohibition in s 209 is in respect of a person who is not a barrister or solicitor of the Supreme Court of Queensland claiming or recovering directly or indirectly remuneration for appearing or acting on behalf of another person in the Supreme Court. It is the individual who is admitted to practice as a barrister or a solicitor (or

lawyer in the present nomenclature) of the Supreme Court of which institution they are officers and subject to the court's inherent power to control and discipline its officers. The Supreme Court holds out those who are on its roll of practitioners as fit and proper persons to carry out the work of legal practitioners. It is the individual who is required to hold a practising certificate demonstrating professional competence and it is the individual solicitor who is identified on the originating notice of claim and notice of intention to defend and defence. This is so because it is over such a person that the Supreme Court of Queensland exercises authority either expressly or through its inherent power to control its own process.

[44] Mr O'Donnell QC who with Mr Clothier appeared for the defendants submitted that the "claimant for the costs" is the partnership of Clayton Utz and not Mr Mavrakis. A partnership is merely the relation which subsists between persons carrying on a business in common with a view to profit, s 5(1) *Partnership Act 1891*. The rules concerning proceedings brought in a partnership name and so on are, in a sense, distracting when sought to be applied to these proceedings. Even if, the submission went, one or more of the solicitors was not entitled to claim remuneration for acting on behalf of another person, the firm being a national firm with qualified solicitors in Brisbane, could do so. Mr O'Donnell referred to the analysis in *Hudgell Yeates & Co v Watson* [1978] 1 QB 451. In that case a partner in a firm had inadvertently failed to renew his practising certificate during a period when another partner in a separate part of the firm carried out work for a client. The firm sought to recover its costs from the client who took the point that since a partner in the firm was not qualified to act and the *Solicitors Act 1957* (Eng) precluded an unqualified person from recovering costs, the firm was precluded from recovering. A solicitor was unable to share fees with an unqualified person and where any partner did not hold a current practising certificate the effect was that the partnership became illegal and was dissolved. The Court of Appeal held that a new partnership by conduct came into being which did not include the solicitor without the practising certificate for the period during which he was uncertified. Although the unqualified solicitor was held out as a partner, since he took no part in any matter covered by the bill there were no costs claimed in respect of anything done by him in the course of acting as an unqualified solicitor. The position here is quite the reverse. It is the cost of the unqualified solicitor's work which is sought to be recovered from the opposite party.

[45] The cases which discuss the position of an interstate firm of solicitors engaging a firm of solicitors within the jurisdiction to be the solicitors on the record for a client do not discuss with particularity the qualification of the individual solicitor in the interstate firm who did the work. Reference is generally made compendiously to the interstate firm name as indicating that no member of the firm who did the work held the relevant qualification in the jurisdiction in which costs were sought to be recovered, see *Santos Ltd v Delhi Petroleum Pty Ltd* [2005] SASC 242 where Bleby J spoke of the "status" of the partners of an interstate firm, at para 20. It is, therefore, in my view, irrelevant to the question whether the defendants are entitled to seek the costs of their NSW solicitors from the plaintiffs that Mr Mavrakis was a partner in a single partnership embracing solicitors admitted to practice and holding relevant practising certificates in several jurisdictions of Australia but not, relevantly, in Queensland.

(ii) Disbursements

[46] Rule 714(3) clearly recognises that "party and party" costs may include the cost of an interstate or, indeed, a foreign, in the sense of non-Australian solicitor or barrister, charging for work done and permitting those charges to be recovered on a costs assessment. Those costs are appropriately characterised as disbursements. The reasonableness of the amount charged is judged by the place where the solicitor or barrister practises. In *Santos Ltd v Delhi Petroleum Pty Ltd* a Victorian firm of solicitors were at all material times the principal solicitors for the successful party in the litigation. Bleby J found at para 6 that

> "In effect, they conducted the action. They drew pleadings, took instructions from Delhi and briefed counsel at various stages during the action, including the trial and on appeal. At all material times [the South Australian solicitors were] instructed by [the Victorian firm] to provide an address for service in South Australia and to undertake any legal work necessary to be performed in South Australia in connection with the litigation."

[47] The bill of costs bore something of the imbalance of the costs statement here in as much as the total disbursements being the Victorian solicitors' costs were approximately $1.9 million and the South Australian solicitor's fees were some $34,000. His Honour concluded that the principal solicitors were the Victorian solicitors and the South Australian solicitor their agent so that the proper allowance of an interstate solicitor's costs as a disbursement was not the issue but rather, the status of the interstate solicitors in South Australia. His Honour concluded, relevantly for these proceedings, at para 43 that

> "It is understandable that interstate solicitors, not registered in this State when such registration was necessary, acting as the principals of solicitors who were, should not have been entitled to claim their costs on taxation in this State. They were not legal practitioners with any standing in this State. They were not officers of the Court and were not subject to any disciplinary or other control by the Court. The interstate practitioners, so far as the law of this State were [sic] concerned were in no better position than a lay client."

[48] To similar effect is the decision of the Full Court of the Supreme Court of Western Australia in *Minister for Works v Australian Dredging and General Works Pty Ltd* [1986] WAR 235. A submission to arbitration was contained in an agreement between the Minister and the company whereby the company was to carry out dredging work within the port of Albany. The arbitration was governed by the *Arbitration Act 1895* (WA). The company employed a Melbourne firm of solicitors and through them, counsel, none of whom was a certificated practitioner within the meaning of ss 76 and 77 of the *Legal Practitioners Act 1893* (WA). The company was successful in the arbitration and the arbitrator awarded costs, to be taxed by the taxing officer of the Supreme Court of Western Australia. The Melbourne solicitors had instructed Western Australian solicitors at a very late stage in the arbitration and only in respect of minor matters. The *Arbitration Act* provided that the costs of arbitration proceedings should be the same as costs in an action. The *Legal Practitioners Act 1893* (WA) provided that no person other than certificated

practitioners could commence, carry on or appear in any proceedings in any court whatever in Western Australia. The Full Court held that the Victorian solicitors and counsel were not entitled to any costs on taxation. Burt CJ and Kennedy J concluded that solicitors' costs and counsels' fees could only relate to costs and fees of persons who were certificated practitioners or who otherwise had a right of audience before the Supreme Court of Western Australia.

[49] The Court of Appeal of the Northern Territory in *Elders Trustee and Executor Company Ltd as Executors of the Estate of Howard v Estate of Herbert* (1996) 111 NTR 25 held that professional fees in respect of work done by South Australian solicitors who had acted as principals and had instructed Northern Territory solicitors as their agents were permitted to recover their costs from the estates. Gallop J, with whom Thomas J agreed, concluded on a construction of the relevant Northern Territory legislation, that there was no restriction on a lawyer from another State or Territory conducting litigation in the Northern Territory and any distinction between principal and agent was irrelevant. The earlier decision of *TNT Bulkships Ltd v Hopkins* (1989) 65 NTR 1, a decision of Kearney J, who was also a member of the court in *Howard*, was not followed insofar as he had concluded that the costs of an uncertificated interstate practitioner could not be recovered on a party and party taxation.

[50] 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. The question then becomes whether the New South Wales solicitors' status was such as to entitle them to deliver a costs statement that could be assessed.

(iii) Status of the New South Wales solicitors in Queensland

[51] In *Maggbury* Wilson J considered the meaning and effect of s 209(2) of the *Supreme Court Act 1995*. Victorian solicitors had acted for the defendants, one of whom was a company carrying on business in Victoria and the subsidiary of a German company, the other defendant, in respect of litigation conducted in the Supreme Court of Queensland. Those solicitors engaged Queensland solicitors as solicitors on the record who carried out work in respect of the litigation. No member of the Victorian firm had been admitted to practice in Queensland. The subject costs orders were made against the plaintiffs. The costs statements contained particulars of professional fees charged by the Queensland solicitors and particulars of outlays which included the fees of the Victorian solicitors which had been paid by their clients. The plaintiffs argued that since no solicitor in the Victorian firm was admitted to practice in Queensland or held a current practising certificate those charges could not be recovered. Her Honour concluded, at 188, that the Queensland solicitors "as solicitors on the record" performed work "in the Supreme Court" and thereby assumed certain obligations to the court but

> "... the work of the Victorian solicitors, who admittedly played the major role the preparation of the second defendant's defence, is properly characterised as work 'in relation to' proceedings in the Supreme Court rather than as work 'in the Supreme Court'."

[52] 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. He was not qualified to do so.

(iv) Is the debt extinguished?

[53] The further question then arises whether the defendants may recover as costs sums already paid against the plaintiffs. This will depend on whether s 209(2) extinguishes the debt otherwise owing by the defendants to their New South Wales solicitors so far as the law of Queensland is concerned or merely bars the remedy. If the former, the defendants may not recover the costs whether or not they have been paid. If only the remedy is barred, on the indemnity principle, the defendants may recover the fees and charges on a costs assessment since they have already been paid. Wilson J in *Maggbury* concluded at 189, *obiter*, that s 209(2) "strikes not just at receipt of remuneration but at entitlement to receive remuneration. In other words, it extinguishes the debt of a client to an unqualified person who acts for him or her in the Supreme Court."

[54] The argument put by the plaintiffs is that since the defendants are not required to pay the New South Wales solicitors because they may not sue in Queensland for the work done in the Supreme Court there can be no indemnification. This is a reference to s 44 of the *Queensland Law Society Act 1952*. Wilson J referred to a number of English authorities such as *In Re Jones* (1869) LR 9 Eq 63 and *In Re Hope* (1872) LR 7 Ch App 766 with provisions similar to s 44 where it was held that although an uncertificated solicitor could not maintain an action to recover fees, to the extent that the fees had been paid, the client could enforce a costs order against the other party to the litigation. Similarly, in *The Estate of Howard*, the Court of Appeal in the Northern Territory in respect of a provision similar to s 44 in the *Legal Practitioners Act 1974*, concluded that costs and disbursements already paid by the client were recoverable. Gallop J added, "all the old cases support that proposition", at 33.

[55] But the inquiry must be directed to s 209(2), as was recognised by Wilson J. Mr O'Donnell submitted that whether a person is entitled to claim will depend on the proper law of the retainer which he contended is New South Wales. No basis has been advanced for the defendants being able to avoid their contractual obligations under that retainer. In my view, that is not the point. The width of the expressions employed in s 209(2) preclude any recovery "directly or indirectly" in respect of work done "in the Supreme Court" and all of the work the subject of the costs statement must necessarily relate thereto. I respectfully agree with the conclusion, albeit *obiter*, made by Wilson J in *Maggbury*.

Section 38 of the Queensland Law Society Act 1952

[56] By amendment to the General Objection the plaintiffs object that Mr Mavrakis did not at the relevant time hold a valid practising certificate as required by s 38(1) of the *Queensland Law Society Act 1952*. The consequence of practising in the

absence of such a certificate in Queensland is to be guilty of an offence. At the commencement of the hearing Mr Derrington for the plaintiffs said that no finding of the commission of an offence was invited. Mr Mavrakis was not represented before the court. A consideration of s 38 is unnecessary for the disposition of this matter other than to note, as has already been related, that none of the NSW solicitors who worked on the litigation held Queensland practising certificates.

Client agreements – Section 48 of the Queensland Law Society Act 1952

[57] By amendment to the General Objection the plaintiffs contend that since the client agreements between the defendants and their solicitors do not conform with s 48 of the *Queensland Law Society Act 1952* they are rendered void by virtue of s 48F of that Act. In that circumstance, the plaintiffs contend, there can be no obligation on the defendants to pay their solicitors and therefore no indemnity.

[58] Mr O'Donnell has made extensive submissions in writing as to why s 48 has no application to these agreements. To dispose of the issue it is not necessary to consider the arguments in detail.

[59] Each of the two agreements was made in New South Wales between the defendants and their Sydney solicitors relating, initially, to non-litigious work and entered into well before the Queensland litigation had commenced. Those agreements were in conformity with Division 3 of the *Legal Profession Act 1987* (NSW) concerning costs agreements between solicitors and their clients. The law of the agreement was agreed to be New South Wales and the parties submitted to the exclusive jurisdiction of the New South Wales courts.

[60] The presumption must be against the extra-territorial operation of the Queensland Act, *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309. Further, s 35(1)(b) of the *Acts Interpretation Act 1954* (Qld) confines a reference to "… other thing" in a Queensland Act to the thing being in Queensland which, I am prepared to accept, could apply to a client agreement. The law of the agreements is clearly New South Wales. Much, if not most, of the retainer was performed in New South Wales. Provisions about client agreements whether made in this State or New South Wales are for the benefit of the client. The client has not sought to set aside the agreement. In view of my approach to s 55B of the *Judiciary Act 1903* (Cth) it is unnecessary to resolve this issue further but it is my tentative view that s 48 does not affect these agreements between the solicitors and the defendants, their clients, and not at the behest of the plaintiffs.

Section 55B of the Judiciary Act 1903 (Cth)

[61] Section 55B of the *Judiciary Act* provides

> "(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

(b) is for the time being entitled, under a law (including this Act) in force in a Territory, to practise as a barrister or solicitor, or as both, in the Supreme Court of that Territory;

has the like entitlement to practise in any federal court.

(2) A person is not entitled to practise in a federal court as a solicitor by reason of paragraph (b) of the last preceding subsection unless:

(a) he or she has been admitted to practise as a solicitor or legal practitioner by the Supreme Court of the Territory; or

(b) he or she practises as a solicitor in the Territory and his or her sole or principal place of business as a solicitor is in the Territory.

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

(4) A person who is, under subsection (1), entitled to practise as a barrister or solicitor, or both, in any federal court has a right of audience:

(a) in any court of a State in relation to the exercise by the court of federal jurisdiction; and

(b) in any court of an internal Territory in relation to the exercise by the court of federal-type jurisdiction.

(5) The Chief Justice of the Supreme Court of a State or an internal Territory may direct the Registrar or other proper officer of that Supreme Court to keep a Register of Practitioners for the purposes of subsection (4) and, where such a Register is kept in a State or Territory, a person is not entitled, in a court of that State or Territory, to the right of audience referred to in subsection (4) unless he or she is registered in that Register.

(6) Where a Register is kept in a State or Territory in accordance with subsection (5), a person who satisfies the Registrar or other officer keeping the Register that he or she is a person referred to in subsection (4) is entitled to be registered in that Register.

> (7) Where it is proved to the satisfaction of the Supreme Court of a State or Territory constituted by 2 or more Judges that a person who is registered in the Register kept in that State or Territory in accordance with subsection (5) has been guilty of conduct that justifies it in so doing, the Supreme Court may order that person's registration be cancelled or be suspended for a specified period, but the Supreme Court may, at any time, order that the registration of the person be restored or that the suspension be terminated.
>
> (8) The Registrar or other proper officer of the Supreme Court shall make such alterations and notations in a Register kept by him or her as are required by reason of orders of the Supreme Court under subsection (7).
>
> (9) Notwithstanding subsection (6), where the registration of a person has been cancelled in accordance with subsection (7) and has not been restored, or is for the time being suspended, that person is not entitled again to be registered in the Register except pursuant to an order under subsection (7).
>
> (10) In this section:
>
> ***federal-type jurisdiction***, in relation to a court of an internal Territory, means jurisdiction conferred on the court by or under a law of the Commonwealth, but does not include jurisdiction conferred on the court under an Act providing for the acceptance, administration or government of that Territory."

[62] Federal jurisdiction as referred to in s 55B(4)(a) was conferred on the Supreme Court of Queensland because the proceedings were between residents of different states within the meaning of s 75(iv) of the *Constitution* and pursuant to s 1037(2) of the *Corporations Act 2001* (Cth). The Supreme Court is not a "federal court" within the meaning of s 71 of the *Constitution*. Mr Mavrakis and the several Sydney-based partners and solicitors who performed work for the defendants in relation to the proceedings had their names recorded in the Register of Practitioners kept by the High Court.

[63] The issue on this application is what is encompassed in the expression "a right of audience". Mr Derrington submitted that it was limited to the right to appear in court and be heard or to instruct in court. Mr O'Donnell contended that it necessarily extended to the entitlement to be paid for the work associated with that right of audience but nothing more. In *Re O'Connor's Bills of Costs* [1993] 1 Qd R 423 Derrington J drew a distinction between the right to practice permitted by s 55B(1) in any federal court and the right of audience granted by s 55B(4). His Honour concluded at 427 that

> "... the right of audience referred to in the latter subsection [(4)] means what is says, a right of audience in the court; and it does not mean, as it was argued, the right to practice 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."

[64] His Honour derived support for this construction of "right of audience" by reference to subsection (5) which provides that the Chief Justice of the Supreme Court of a State may direct the Registrar of that court to keep a Register of Practitioners for the purpose of subsection (4). Where such a Register is kept a person is not entitled in a court of that State to the right of audience referred to in subsection (4) unless so registered. It is common ground that there is no such Register in Queensland. His Honour concluded at 428 that that approach to s 55B(4) establishes that

> "… except to the extent that the Act [*Judiciary Act*] provides, the law, rules and conventions relating to the practise by a practitioner in the state court still apply in such circumstances."

Accepting that there is a clear distinction to be drawn between the right to practise in federal courts in s 55B(1) and the right of audience in a State or Territory court exercising federal jurisdiction I am of the respectful view that his Honour drew the boundary too narrowly. Before elaborating I will mention some of the other authorities.

[65] In *Minister for Works v Australian Dredging and General Works Pty Ltd* Kennedy J, speaking of the Rules of the Supreme Court (WA) where solicitors and counsel are referred to in O 66 said *obiter* at 242

> "… they will be persons who are permitted to act in legal proceedings in the Supreme Court. Only certificated practitioners may so act – see s 76 of the *Legal Practitioners Act* – unless, of course, the court is, in a particular matter, exercising federal jurisdiction, in which event any person entitled to act as a barrister or solicitor in any federal court has a right of audience – s 55B(4) of the *Judiciary Act* 1903 (Cth) – and in consequence, it may be accepted, his fees or costs, as allowed, may be recovered."

So, too, in *Santos* where Bleby J approved the observation of Kennedy J at para 41.

[66] *Mitchell v Mitchell* (1971) 19 FLR 100, a decision of Neasey J in the Supreme Court of Tasmania, concerned proceedings under the *Matrimonial Causes Act 1959* (Cth) which had been commenced by a practitioner in Darwin on behalf of the husband. The respondent wife was resident in Brisbane and instructed Queensland solicitors who instructed a Darwin firm of solicitors to act for her in the Northern Territory. The proceedings were transferred to the Supreme Court of Tasmania because the husband moved to Tasmania. The wife's Queensland solicitors instructed a Hobart firm to act. Costs in the proceedings were awarded to the wife. Two bills of costs were filed for taxation, one from the Hobart solicitors for the wife and one from the Queensland solicitors. There were no rules under the *Matrimonial Causes Act* about costs. Provision was made for costs to be regulated by the rules of those courts exercising jurisdiction under the Act. The claims for costs were therefore to be determined in accordance with the Tasmanian rules of court. While Neasey J made no mention of it, as Bleby J observed in *Santos,* at para 46

> "[T]he unstated but necessary assumption was that the Supreme Court of Tasmania was exercising federal jurisdiction, and that therefore solicitors in Queensland were entitled to conduct litigation under the *Matrimonial Causes Act* in Tasmania."

[67] In the Second Reading speech to the *Judiciary Amendment Bill* in the House of Representatives in June 1976 Mr Ellicott, the Minister, said

> "A new provision is to be inserted giving a barrister or solicitor who is on the High Court Roll and entitled to practice in a federal court a right of audience in any State court exercising federal jurisdiction.
>
> The general effect of the changes will be to provide some relief to the High Court, by restricting the appeals that come to it as of right and enabling it to remit to other courts for trial matters commenced in the original jurisdiction of the High Court. It will provide a firm and more appropriate framework within which the High Court and other courts can operate in the future. The changes will also enhance the jurisdiction of State courts, particularly the State Supreme Courts. The existing provisions forbidding State courts from dealing with *inter se* questions have operated to prevent State courts from making a substantial contribution to the interpretation of the Constitution, since most constitutional issues involve *inter se* questions. Furthermore, the provision that an appeal does not lie as of right to the High Court directly from a single judge of the State Supreme Court or from a lower court of a State will give greater authority to the State Full Courts and Courts of Appeal." *Hansard* House of Representatives 3 June 1976 2945-6.

[68] In *APLA Ltd v Legal Services Commissioner (NSW)* [2005] HCA 44, McHugh J speaking generally of the likelihood that most litigants and potential litigants will be advised and represented by legal practitioners in courts and that the functioning of courts exercising federal jurisdiction will be more efficient if those litigants were advised and represented by lawyers said at 427; para [83]

> "Long ago, the Parliament recognised the central part that legal practitioners play in enforcing federal rights and obligations by legislating to give practitioners entitled to practice in a State or Territory jurisdiction the right to practice in *any* State or Territory court exercising federal jurisdiction."

His Honour was there referring to the several provisions of the *Judiciary Act* to which reference has been made. His Honour's use of the expression "right to practice" was clearly an inadvertence. It would be an unlikely result that, although given a right of audience those legal practitioners were to be limited to charging only for their appearance in court either as an advocate or as instructing solicitor. The right given is not a general right to practise and explains the different expressions used in ss 55B(1) and (4).

[69] A distinction of that kind was discussed in *In Re A Debtor* [1934] 1 Ch 280. A solicitor conducted some proceedings in bankruptcy in a county court which had

bankruptcy jurisdiction. The county court rules did not permit a solicitor to appear for any person in a court unless he had signed a roll of practitioners. Objection was taken to the solicitor's bill because he had not signed the relevant roll. The county court judge allowed the objection. There was an appeal to the Divisional Court sitting in bankruptcy and thence to the Court of Appeal sitting in bankruptcy. Section 70 of the *Bankruptcy Act 1869* (Eng) provided

> "Every attorney and solicitor of the Superior Court shall be, and may practise as a solicitor of, and in the Court of Bankruptcy, and in matters before the Chief Judge or Registrars, in the London Court of Bankruptcy, in court or in chambers, may appear and be heard without being required to employ counsel."

That section was subsequently repealed but s 151 of the *Bankruptcy Act 1883* (Eng) provided

> "Nothing in this Act, or in any transfer of jurisdiction effected thereby shall take away or affect any right of audience that any person may have had at the commencement of this Act, and all solicitors or other persons who had the right of audience before the Chief Judge in Bankruptcy shall have the like right of audience in bankruptcy matters in the High Court."

[70] Lord Hanworth MR concluded that s 151 safeguarded the position and preserved for the solicitor the same rights he had under s 70 of the previous Act. Of the submission that s 151 referred only to a right of audience and not to a right of practise his Lordship said at 292

> "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. When that definition of a solicitor's position is applied to s 151 of the Act of 1883 it becomes apparent when it refers to solicitors 'who had the right of audience' the phrase 'right of audience' is used as a term of art and in the qualified sense referred to."

[71] Lord Romer in the same case said at 297

> 'It is no doubt strange that the right of practising is not in terms referred to but only the right of audience. Yet it does seem to me necessary to follow that if the solicitor's right of audience in the county court is to remain unaffected, necessarily his right of practising must also remain unaffected. His right of audience depends upon his right of practising because it is a limited right of audience, limited in the sense pointed out by the Master of the Rolls."

[72] A solicitor granted the right of audience by s 55B(4) is not thereby granted a general right of practise as a solicitor in that State or Territory. But the right of audience will necessarily encompass an entitlement to recover all the costs related to the preparation for and hearing of the matter which is before the Supreme Court by virtue of the exercise of federal jurisdiction and for which the solicitor is retained.

It therefore follows that the defendants are entitled to seek indemnity for their costs from the plaintiffs.

Inconsistency between s 209 and s 55B

[73] The defendants submit that if there can be no harmonisation between s 209 and s 55B(4) then s 209 is inconsistent with s 55B(4) and is an invalid exercise of the State's legislative power. The inconsistency which is relied upon by the defendants is inconsistency of the kind identified in *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330. That inconsistency is an impairment of or a detraction from a Commonwealth scheme of legislation and of rights, remedies and jurisdiction confirmed by such legislation. The issue was considered recently in relation to legal practitioners by the High Court in *APLA*. The State legislation under consideration was the *Legal Profession Amendment (Personal Injury Advertising) Regulation 2003* (NSW) made under the *Legal Profession Act 1987* (NSW) prohibiting the advertising of legal services in relation to instances of personal injury. The plaintiff organisation challenged the constitutional validity of the regulation in the original jurisdiction of the High Court. The majority, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ (McHugh J not deciding and Kirby J dissenting) concluded that the regulation was not invalid as being inconsistent with s 109 of the *Constitution* as it did not impair federal law.

[74] Gleeson CJ and Heydon J in their joint judgment discussed the regulation of the legal profession in Australia, noting that it is organised and regulated primarily on a State or Territory basis and that each had its own regulatory regime commonly involving a principle statute and rules made pursuant to that statute. Whilst noticing a substantial and increasing degree of uniformity and reciprocity in those regulatory regimes nonetheless their Honours observed that the right to practise and the right of audience in a State or Territory court depended upon admission by a State or Territory Supreme Court and, generally, the holding of a current practising certificate.

[75] Their Honours observed that while the High Court is described in s 71 of the *Constitution* as the "Federal Supreme Court", the court does not admit people to practise as legal practitioners and although s 86 of the *Judiciary Act* envisages the possibility of the Rules of the High Court providing for the admission of persons to practise as barristers or solicitors in any federal court there are no such rules. Their Honours said at para 22

> "Rather the *Judiciary Act* in ss 55B and 55C accommodates the State and Territory based scheme of admission and regulation in the following manner. Section 55B(1) provides that, subject to s 55B(3), a person who is for the time being entitled to practise as a barrister or solicitor or both in the Supreme Court of a State or Territory has the like entitlement to practise in any federal court. Section 55B(3) provides that such entitlement depends upon a person's name appearing in the Register of Practitioners kept at the Registry of the High Court. … Entry in the Register is determined by reference back to s 55B which, in effect, means entitlement to practise in the Supreme Court of a State or Territory. Section 55B(4) provides that

> a person who is entitled to practise in a federal court has a right of audience in any State or Territory court exercising federal or "federal-type" jurisdiction ..."

[76] French J observed in *De Pardo v Legal Practitioners Complaints Committee* [2000] FCA 335 at 594; para 49

> "The scheme of the *Judiciary Act* in relation to rights of practise in federal courts and courts exercising federal jurisdiction is, as noted earlier, complementary to the various State and Territory arrangements for the admissions of practitioners within their several jurisdictions."

His Honour quoted with approval from *Little v Registrar of High Court* (1991) 29 FCR 544 at 552

> "It is apparent that the entitlement created by ss 55B and 55C to practise in federal courts is ambulatory. It operates on the range of legislative schemes which from time to time regulate the right to practise in State and Territory courts."

That passage from *De Pardo* was quoted with approval by Gummow J in *APLA* at paras 185-186.

[77] Preventing barristers and solicitors from claiming or recovering or receiving directly or indirectly remuneration for appearing or acting on behalf of another person in the Supreme Court does not impair the operation of the *Judiciary Act* insofar as it relates to the right of audience of practitioners on the Register of Practitioners of the High Court where a State court is exercising federal jurisdiction. Section 209 simply does not apply in that circumstance. It is otherwise part of a well-recognised scheme for regulating the legal profession which has evolved since the inception of the federal system.

Conclusion

[78] In summary, had the Supreme Court not been exercising federal jurisdiction in the proceeding s 209(2) would operate to preclude the defendants from recovering the costs incurred in respect of their NSW solicitors from the plaintiffs. Since the court was exercising federal jurisdiction s 55B(4) of the *Judiciary Act* enables the defendants to recover those costs.

[79] The reference from the Deputy Registrar should be answered as follows:

1. 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 by virtue of the provisions of s 55B(4) of the *Judiciary Act 1903* (Cth).

2. Unnecessary to answer.