IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A5 of 2011

BETWEEN:

PETER NICHOLAS MOLONEY t/a MOLONEY & PARTNERS

Appellant

and

WORKERS COMPENSATION TRIBUNAL

First Respondent

and

ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA

Second Respondent

APPELLANT'S REPLY

Filed by:
Moloney & Partners
Solicitor for the Appellant

Address for Service:
22 Waymouth Street
ADELAIDE SA 5000
Telephone: (08) 8231 0771
Facsimile: (08) 231 0578

The meaning of "costs"

1. The second respondent submits (Respondent's Submissions ("RS") [13]) that the rule-making power in section 88E (1) (f) should not be "*read down*" to refer only to party-party costs. The appellant does not submit that it should be "*read down*" or impliedly limited. The appellant submits that the issue is not whether a limitation on the power should be implied, but rather the identification of the subject matter of section 88E (1) (f) and that it is wrong to start from the position that "costs" means costs in both senses: see Appellant's Submissions ("AS") [10.1] and [19].

2. The second respondent submits (RS [13.1]) that the grant of the rule-making power in section 88E (1) (f) should be construed liberally so as to confer "ample power" to regulate the operation of the Tribunal. As to the authorities cited:

   2.1. The passage in the judgment of Kirby J in *Harrington v Lowe* (1996) 190 CLR 311 at 341 relied upon (presumably the following: "2. In any case, the sole grant of power which supports the subject rule is one confined to matters 'in relation to the practice and procedure to be followed in the Family Court'. That compendious phrase has conventionally been given a broad operation. Especially in the context of a power to make rules, to cover the multitude of subsidiary matters which can arise in the operation of a court with a complex jurisdiction, the phrase should not be narrowly construed.") does not assist in relation to the meaning of the word "costs" in section 88E (1) (f). It may be relevant to the meaning of "practice and procedure" in section 88E (1) (c), but the second respondent does not assert that the rule can be supported by that sub-section. In any event, the passages from the judgment of Kirby J immediately following at 341 -342 support the appellant's contention that the rule goes well beyond matters of practice and procedure and is a rule with respect to the substantive rights of solicitors and representatives and is therefore beyond the power given by section 88E (1) (c).

   2.2. The passage in the judgment of Isaacs J in *Bull v Attorney-General(NSW)* (1913) 17 CLR 370 relied upon (presumably the following: "In the first place, this is a remedial Act, and therefore, if any ambiguity existed, like all such Acts should be construed beneficially (*per* Lord *Loreburn* L.C. in *Bist v. London and South Western Railway Co.*). This means, of course, not that the true signification of the provision should be strained or exceeded, but that it should be construed so as to give the fullest relief which the fair meaning of its language will allow.") does not assist the second respondent. Here, on the proper interpretation of section 88E (1) (f), there is no ambiguity as to the word "costs". Its meaning is clear. Even if there is ambiguity, "the true significance of the provision would be strained or exceeded" if it were interpreted to include solicitor-client costs.

   2.3. The passages in the judgment of Kirby J in *Re JJT* (1998) 195 CLR 184 at [14] and [64] do not assist the second respondent. His Honour was in dissent; he construed the power to make orders as to costs much more broadly than the rest of the Court. The passage at [64] relied upon is irrelevant and in any event was reasoning to

support His Honour's rejection of the argument based on *Ascot Investments* which he summarised at [63], an argument accepted by Callinan J at [134] with whom Gummow J agreed.

2.4. While it is acknowledged that section 117 (2) considered in *Re JJT* dealt with party-party costs (see RS [17]), the appellant's point in citing *Re JJT* and *Richfort* (at AS [19]) is that since the Statute of Gloucester, "costs" in statutes such as the Act has had a well-defined meaning as stated by Hayne J at [91] with whom Gaudron J agreed. The historical context was also stressed by Callinan J at [135] – [138] with whom Gummow J agreed, culminating in the statement at [138] that "explicit language to achieve such a purpose which would alter the historical rules regarding costs, would be required". This may be adapted to the present case: explicit language would be required in section 88E (1) (f) to displace the usual meaning of "costs" in such a context as referring only to party-party costs.

3. The second respondent submits (RS [13.2]) that the Act expressly deals with solicitor-client costs, referring to section 95 (2) (a). Section 95 (2) (a) does not do so in any relevant sense. It says nothing about what costs the legal practitioner or officer is able to charge the worker (solicitor-client costs). It deals only with the costs payable by the relevant compensating authority (party-party costs).

4. The second respondent submits (RS [13.2]) that to limit the rule-making power to the making of rules regulating party-party costs would be "anomalous" because it would confer power to make rules with respect to only one category of costs dealt with by the Act. However, even if there would be a need for a power to make rules in relation to a section 88G scale, should one be fixed by regulation (see AS [14.8.8] and footnote 6), and in relation to the quantification of costs under section 95A, it does not follow that section 88E (1) (f) empowers the making of rules dealing *generally* with solicitor-client costs. Rather, it is submitted that it would do so only so far as is reasonably necessary for the purposes of sections 88G and 95A: see AS [12.3].

5. As to the submission (RS [13.3]) that there is "no novelty" in the regulation of solicitor-client costs in the context of the Act and its predecessors, the appellant submits there is novelty in the way it is provided for in the Act compared with its predecessors. The Act abandoned the previous regime (which had regulated solicitor-client costs by *express* statutory provisions). It chose to regulate solicitor-client costs only in so far as section 95A does, and it chose *expressly* to give to the Executive Council the power to regulate solicitor-client costs by section 88G. It did not grant power to the President to do so by a side wind in the form of section 88E (1), whether sub-section (c) or (f).

6. The submission (RS [13.4]) that the notion of "costs" may be broader than the conventional categories because the Act permits workers to be represented by certain non-lawyers and permits those no-lawyers to charge "costs", is irrelevant. The appellant distinguishes between a meaning of "costs" in section 88E (1) (f) that is confined to party-party costs, and one that includes "solicitor-client costs", whether charged by a legal practitioner or an "officer". The Act does so expressly by sections 88G and 95A. The second respondent submits that section 95 (2) (b) contemplates the making of regulations

to identify costs other than the costs of representation. This submission is beside the point. Section 95 (2) (b), like section 95 (2) (a), deals with costs payable by the compensating authority (party-party costs), not solicitor-client costs.

7. As to the submission (RS [14]), that the Rule may be supported by section 88E (1) (g), it is submitted that this relates to practice and procedure and does not extend to making rules affecting the substantive rights of parties and certainly not third parties such as workers' representatives. The appellant refers to the judgment of Kirby J in *Harrington v Lowe* (1996) 190 CLR 311 at 341-342 identified above.

8. As to the submission (RS [15]):

10 8.1. The appellant relies upon the legislative history set out at AS [14] mainly for the proposition stated at AS [13] and [14], although he does also for the proposition put at AS [14.9.2].

8.2. Section 95 (2) deals with party-party costs, not solicitor-client costs. The appellant does not dispute that section 88E (1) (f) empowers the making of rules to tax party-party costs i.e. those to which a worker claims to be payable by the relevant compensating authority.

8.3. If a scale were fixed by regulation made pursuant to section 88G, it does not follow that the Act contemplates that the President should have the power pursuant to section 88E(1)(f) to make rules as to such solicitor-client costs. Section 88G
20 provides for an offence by way of sanction for charging over such scale as may be fixed. It does not follow that the Tribunal would have any business making rules taxing such costs. The only purpose of such a taxation would be with a view to ascertaining whether or not it appeared that the representative had charged too much. The Tribunal would have no jurisdiction to take any consequential steps. Regardless of any such taxation, the commission of an offence would have to be proved in the appropriate court.

8.4. Assuming, however, that the Act contemplates that section 88 (1) (f) would empower the making of rules providing for the Tribunal to tax solicitor-client costs with a view to ascertaining whether section 88G (2) has been breached, it does not
30 follow that section 88E (1) (f) must be construed as empowering the President to make rules when no such scale had been fixed under section 88G: see AS [12.3], [14.8.14], [16] and [17].

9. As to the submission (RS [16]) that the presumption against interference with common law rights has little force, the reliance upon the legislative history to support that submission is misplaced. The historical regime was effected by express statutory provisions and was abandoned when the Act was enacted. In light of that legislative history, it is to be presumed that the Act was not intended to interfere with common law rights unless expressly or by manifest intention. The presence of sections 88G and 95A serve only to reinforce this presumption because in so far as they interfere with common law rights (or in

the case of section 88G, empower the Executive Council to make regulations doing so), they do so by express statutory provision.

10. The submission (RS [18] – [21]), that the *Anthony Hordern* principle does not apply is premised on the assertion that the "special power" conferred by section 88G is limited to the "subject matter" stated in RS [18].

11. However, the second respondent's constriction of the "subject matter" is untenable. The obvious intention of the Legislature in enacting section 88G was to empower the Executive Council to make a regulation setting a scale and to prevent representatives from charging more than scale. Such a regulation would, if made, be a large intrusion on the rights of representatives. It imported the negative proposition that representatives' costs were not to be regulated in any other way. It was certainly not the Legislature's intention that the Tribunal have power to limit the rights of representatives even further.

12. The second respondent's submission seeks to equate the policy behind scales for party-party costs with the scale contemplated by section 88G. Scales for party-party costs are designed to set a maximum which a party can be responsible to pay. The court may award less than scale if the charges claimed by the opponent are unreasonable or not authorised by the scale. Thus, a power to make rules regulating party-party costs is not inconsistent with a power to make a regulation fixing a maximum scale. That was the basis of the decision in *Jacobs v OneSteel.* By contrast, the purpose of a scale under section 88G would be to fix a maximum *up to which* a representative could charge. It would leave no room for the court to have power to decide that the solicitor could only charge something less than provided for by the scale, much less for the President to make a rule barring representatives' common law rights to recover their fees and claim their liens.

13. The submission (RS [24]) states that the Rule "imposes a procedure for the judicial assessment and adjudication of the entitlement to recover costs pursuant to the solicitor's retainer". It does do that, but the "procedure" involves first, the eradication of common law rights and, second, the grant of power to the Tribunal which it never had before. The Rule is clearly a substantial erosion of common law rights for which the Act contains no express words or necessary implication of power.

14. As to the submissions that Rule 31(2) is proportionate to the rule making power (RS [27]-[28]):

    14.1. It is submitted that even if section 88 (1) (f) empowers the making of rules regulating solicitor-client costs, the ambit of the power is limited to making rules relating to the assessment of costs in accordance with any scale made pursuant to section 88G and the assessment of costs ordered pursuant to section 95A.

    14.2. The second respondent's submissions do not accept the relevance of examining the practical consequences of the Rule which are pointed out in AS [45]. It is submitted that such consequences must be assessed because they are the practical consequences of the direct abrogation of substantive legal rights which the Rule effects.

Dated the 13th day of April, 2011

Mr H.A.L. Abbott SC
Telephone: 8231 2344
Facsimile: 8212 3232
DX 158 ADELAIDE
Email: HAbbott@jeffcottchambers.com.au

10

Mr A.J. Crocker
Telephone: 8231 2344
Facsimile: 8212 3232
DX 158 ADELAIDE
Email: acrocker@jeffcottchambers.com.au