

HIGH COURT OF AUSTRALIA

GUMMOW J

Matter No. P1/2001

RE MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS & ANOR

RESPONDENTS

EX PARTE BRIAN GERALD
JAMES GOLDIE & ANOR

APPLICANTS/PROSECUTORS

Matter No. P22/2001

RE MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS & ANOR

RESPONDENTS

EX PARTE BRIAN GERALD
JAMES GOLDIE

APPLICANT/PROSECUTOR

Matter No. P47/2001

BRIAN GERALD JAMES GOLDIE

APPLICANT

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS

RESPONDENT

Re Minister for Immigration and Multicultural Affairs; Ex parte Goldie
Re Minister for Immigration and Multicultural Affairs; Ex parte Goldie
Goldie v Minister for Immigration and Multicultural Affairs
[2004] HCA 27
15 June 2004
P1/2001, P22/2001 and P47/2001

ORDER

- (1) *Application to review taxation granted.*
- (2) *The Minister to recover the items for counsel's fees which were disallowed.*

- (3) *The taxing officer to complete taxation accordingly.*
- (4) *Mr Goldie to pay the Minister's costs of the summons.*

Representation:

H C Burmester QC for the Minister for Immigration and Multicultural Affairs in all matters (instructed by Australian Government Solicitor)

No appearance for Brian Gerald James Goldie

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Re Minister for Immigration and Multicultural Affairs; Ex parte Goldie

High Court – Practice – Costs – Taxation – Counsel fees – Australian Government Solicitor ("AGS") providing services of both solicitor and counsel – Brief marked at a daily rate and an hourly rate delivered by AGS solicitor to AGS in-house counsel – Invoices of fee raised for performance of services in the role of counsel and consolidated with other charges – Whether allowances should be made for AGS in-house counsel fees where in-house counsel acting as counsel – Whether fees allowed under High Court Rules, O 71 r 91 – Whether AGS is a practitioner or firm of practitioners within the meaning of High Court Rules, O 71 r 93 – Whether AGS is the Commonwealth within the meaning of High Court Rules, O 71 r 93.

Words and phrases – "Australian Government Solicitor", "in-house counsel", "practitioner or firm of practitioners", "the Commonwealth".

Judiciary Act 1903 (Cth), ss 55A-55ZI and 64.
High Court Rules (Cth), O 71.

1 GUMMOW J. In three proceedings in this Court instituted in 2001, a lawyer employed by the Australian Government Solicitor ("the AGS") appeared for one of the parties, the Minister for Immigration and Multicultural Affairs ("the Minister"). Two of these proceedings (P1/2001 and P22/2001) were applications by Mr B G J Goldie under s 75(v) of the Constitution and were dismissed by a Justice on 3 September 2001 with costs orders in favour of the Minister. The other proceeding was an application by Mr Goldie (P47/2001) for special leave to appeal against a decision of the Full Court of the Federal Court. That application was not prosecuted and, on 21 June 2002, a Deputy Registrar issued a certificate of deemed abandonment under O 69A r 13(2) of the High Court Rules ("the Rules"). As a result, Mr Goldie was required to pay the costs of the Minister in respect of the special leave application, these to be taxed unless agreed upon between the parties.

2 Section 64 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") provides:

"In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given *and costs awarded on either side*, as in a suit between subject and subject." (emphasis added)

The term "suit" is defined in s 2 as including any action or original proceeding between parties. The Minister is included in the term "the Commonwealth" as used in s 64¹.

3 One effect of s 64 is to make it clear there is no room in federal law for the application of the principle that at common law the Crown neither paid nor received costs, it being in the Prerogative not to pay them to a subject and beneath the dignity of the Crown to receive them². The common law rule had not been completely applicable to Chancery proceedings³ and, in any event, in England general provision to the effect now found in s 64 of the Judiciary Act had been made by legislation beginning with the *Crown Suits Act* 1855 (UK)⁴, s 1.

1 See *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 143 [15], 152-153 [48]; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 582 [43].

2 Robertson, *The Law and Practice of Civil Proceedings by and against the Crown and Departments of the Government*, (1908) at 613.

3 Robertson, *The Law and Practice of Civil Proceedings by and against the Crown and Departments of the Government*, (1908) at 621-625.

4 18 & 19 Vict c 90.

4 Bills of costs were filed by the Minister in respect of each proceeding and the taxation was conducted by a Deputy Registrar. Mr Goldie did not appear at the taxation and had previously, on 24 April 2002, voluntarily departed Australia. The evidence before me indicates that he remains outside Australia.

5 At the taxation, a question arose as to allowances to be made for fees for "in-house counsel". Claims were made for such fees in the sums of \$8,420.70 and \$4,605.80 in respect of the two applications under s 75(v) and \$5,072.30 in respect of the special leave application. Those fees were disallowed and on 26 September 2003 the Minister sought a review of that ruling. That review was undertaken by another Deputy Registrar who, on 30 January 2004, issued written reasons for his decision that the earlier decision to disallow the fees in question was correct.

6 There is now before the Court a summons filed on 12 March 2004 in each of the proceedings P1/2001, P22/2001 and P47/2001 for an order to review the taxation respecting the disallowance of in-house counsel's fees.

7 Order 71 r 22 provides that every decision of a taxing officer shall be subject to "review by a Justice" and O 71 r 90 contains a more detailed provision for review by a Justice of the taxation in a case such as the present; on such an application (made under O 71 r 89(1)), further evidence may be received on the direction of a Justice. In the present case, such evidence was provided by affidavit of David George Riggs filed on 17 May 2004. Mr Riggs is the Chief Financial Officer at the AGS with responsibility for the practices followed by the AGS in charging for its legal services.

8 In order to appreciate the issues which have arisen on the taxation, it is necessary first to consider the provisions in the Judiciary Act for the establishment and functioning of the AGS.

9 Significant changes were made by the *Judiciary Amendment Act* 1999 (Cth) ("the 1999 Act") and references to the Judiciary Act are to that statute in its form after amendments principally by the 1999 Act. The 1999 Act inserted Pt VIIIB (ss 55I-55ZE), which is headed "The Australian Government Solicitor". The AGS is a body corporate (s 55M(a)). Its functions include the provision of legal services and related services to the Commonwealth (s 55K(a)), and in performing that function the AGS may provide services to a Minister of the Commonwealth (s 55N(1)(c)). The AGS may charge fees in relation to the provision of those services, including for disbursements (s 55P(1)). Section 55P(2) states:

"If the AGS has charged a client an amount under subsection (1), the amount may be recovered by the client as costs incurred by the client."

3.

The Explanatory Memorandum for the Bill which became the 1999 Act indicates that the intended operation of s 55P was that a client may recover costs in the same way as the client of a "private" legal practitioner subject to the usual rules and principles relating to costs and the taxation of costs⁵.

10 The function of managing the AGS is entrusted to a Chief Executive Officer ("the CEO") who is appointed by the Attorney-General and the Finance Minister (ss 55S, 55T). An "AGS lawyer" means the CEO or an employee of the AGS whose name is on a roll of barristers and solicitors of this Court kept under the Rules or the roll of barristers, solicitors, barristers and solicitors, or legal practitioners of the Supreme Court of a State or Territory (ss 55I, 55D(1)). An AGS lawyer acting in that capacity has the entitlements conferred by s 55Q(1). These are:

- "(a) to do everything necessary or convenient for that purpose; and
- (b) to practise as a barrister, solicitor, or barrister and solicitor in any court and in any State or Territory; and
- (c) to all the rights and privileges of so practising".

11 The AGS is a Commonwealth authority within the meaning of the *Commonwealth Authorities and Companies Act* 1997 (Cth) ("the CAC Act"), being a body corporate incorporated for a public purpose by a statute of the Commonwealth (s 7(1)(a)). It is also a "GBE" or "government business enterprise" for the purposes of the CAC Act⁶. Following the repeal of the *Audit Act* 1901 (Cth)⁷, the CAC Act and related legislation, the *Financial Management and Accountability Act* 1997 (Cth) ("the FMA Act"), provide detailed rules concerning reporting and accountability in respect of the financial affairs of Commonwealth authorities.

12 The Judiciary Act provides that the AGS may be required to pay a dividend to the Commonwealth and to make a payment of a specified amount to ensure that it does not enjoy "net competitive advantages" over its competitors by virtue of "its public sector ownership" (s 55ZE(3)). The Attorney-General may

5 Explanatory Memorandum for the Judiciary Amendment Bill 1998 at 6.

6 Section 5 (definition of GBE or government business enterprise) and Commonwealth Authorities and Companies Regulations 1997, reg 4.

7 *Audit (Transitional and Miscellaneous) Amendment Act* 1997 (Cth), s 3 and Sched 1, Item 1. See *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133 at 269 [402].

issue directions applying to any work performed by or on behalf of the AGS in performance of its function (s 55ZF).

13 Since the commencement on 1 September 1999 of the 1999 Act, the AGS has not been funded by any appropriation by the Parliament. A significant proportion of its revenue, \$96.8 million for the financial year 2002-2003, is derived from fees rendered to clients.

14 Mr P J Corbould is a solicitor employed in the Perth office of the AGS. He had the care and conduct on behalf of the Minister of the three proceedings in question here. The terms and conditions of staff of the AGS are determined by the CEO (s 55ZB(2)) and those terms and conditions provide for the remuneration of AGS lawyers by salary.

15 The CEO also has decided that certain lawyers on the staff of the AGS are available to perform, if briefed, the functions normally performed by a barrister practising at the independent bar of the Supreme Court of a State or Territory when briefed by a solicitor of that Court. Generally, these lawyers are senior lawyers within the AGS who have responsibility approximating to those of a partner in a private firm of practitioners.

16 To an AGS lawyer performing the role of counsel, a brief is delivered marked at a daily rate and an hourly rate. At an appropriate time an invoice of fees will be raised for the performance of services in the role of counsel and will be consolidated with the other charges for which the client is invoiced. Funds collected by the AGS in payment of the invoice to the client, including fees for in-house counsel, become part of the funds which are held by the AGS on its own account and such revenue is applied to meeting the running costs of the AGS, as well as to make payments to the Commonwealth under s 55ZE(3).

17 Mr Peter Macliver is one of the AGS lawyers whom the CEO has decided to allow to perform the role of counsel just described. He has performed that role on a number of occasions as a member of the staff of the AGS in Perth. The invoices and fees in issue here are of the type described above with respect to an AGS lawyer performing the role of counsel.

18 Order 71 r 74 is a general provision for the allowance of taxation of "all such costs, charges and expenses as appear to [the taxing officer] to have been necessary or proper for the attainment of justice or for maintaining or defending the rights of a party". Order 71 r 91 states:

"Such fees may be allowed to counsel as in the circumstances of the case the taxing officer thinks reasonable."

5.

Order 71 r 94 states:

"When a practitioner acts in the capacities of both barrister and solicitor, or appears as counsel instructed by his partner acting as solicitor, neither he nor his partner may make a charge for 'instructions for brief' or for 'drawing' or 'engrossing brief', but, in lieu of those charges, the practitioner or partner, as the case may be, is entitled to such fees as are allowed by the taxing officer for 'preparing for trial' and for 'preparing brief notes for use on trial'."

Order 71 r 93 was given particular consideration on the taxation and on the review. It states:

"A counsel's fee shall not in any case be allowed to a practitioner who is a paid clerk of, or is in receipt of a salary from, a practitioner or firm of practitioners, or the Commonwealth or a State."

Reference also should be made to r 103 of O 71. It states:

"A fee to counsel (other than to a practitioner acting as both solicitor and counsel) shall not be allowed on taxation unless unconditional payment is vouched by the signature of counsel or otherwise proved to the satisfaction of the taxing officer."

19 The Rules were adopted in 1952. The power to make the Rules was that conferred by s 86 of the Judiciary Act. The power is expressed in terms of that which is "necessary or convenient to be made for carrying into effect the provisions of [the Judiciary Act] or so much of the provisions of any other Act as confers jurisdiction on the High Court or relates to the practice or procedure of the High Court". The provisions of the Judiciary Act there mentioned include Pt VIIIB.

20 In the submissions for the Minister, two points of immediate importance were made. The first is that the Rules are to be given an ambulatory interpretation in the sense that they should be read, if possible, in a fashion which accommodates changes made from time to time to the principal statute, the Judiciary Act, by such legislation as the 1999 Act read in conjunction with the CAC Act and the FMA Act. Thus, it is said, the general provision for the allowance of costs made in O 71 r 74 should be read so as to accommodate changes in legal practice made from time to time by the Judiciary Act itself.

21 The second submission focuses upon r 93 of O 71. This is a limitation or qualification to the general principles otherwise to be applied on taxation. It is submitted that when r 93 is read in context, particularly with rr 91, 94 and 103, the practitioners and firms of practitioners there referred to are individuals and partnerships in accordance with the general understanding in 1952 and thereafter

as to the organisation of the legal profession and the conduct of the practice of law. This did not allow of receipt of instructions, and appearance on the court record, by corporate practitioner entities.

22 Mr Macliver was in the receipt of a salary but was that salary received from "a practitioner or firm of practitioners" within the meaning of r 93? The practitioners there referred to are those persons whose names are entered in the Register of Practitioners kept at the Registry of the Court under s 55C of the Judiciary Act. Subject to what may be wider rights conferred on them by s 55Q(1)(b), set out above, AGS lawyers who practise in the High Court would be expected to appear in that Register (ss 55C, 55D and 55I). The AGS itself, as a corporate entity, is not such a person and is not a "practitioner or firm of practitioners" within the meaning of r 93.

23 Was Mr Macliver "in receipt of a salary from ... the Commonwealth"? The term "the Commonwealth" is used in various senses particularly in Ch III of the Constitution and the Judiciary Act⁸. In r 93, the term "the Commonwealth or a State" is used to identify the body providing the salary to the practitioner whose fee is in question and attention thereby is directed to the party in contract with the practitioner to whom the salary is provided. Here, that entity is a corporation and there is no contract between Mr Macliver and the Commonwealth.

24 In this regard, it is to be noted that the provisions of Pt VIIIB stand in the Judiciary Act separately and apart from Pt VIIIA (ss 55A-55H) which is headed "Legal practitioners". Part VIIIA contains in ss 55E-55G special provisions relating to "Attorney-General's lawyers". The latter are persons who, if not the "Secretary to the Attorney-General's Department", are "in" that Department and are "engaged under the *Public Service Act 1999* [(Cth)]" (s 55E(1)(b)(ii)). In respect of provision of services of a legal professional nature provided by such lawyers, it is "the Commonwealth" which may charge fees which may be recovered by the client as costs incurred by the client (s 55G). That provision may be contrasted to s 55P respecting the charging of fees by the AGS. With respect to the charging and recovery of fees, the Judiciary Act thus distinguishes between the AGS and the Commonwealth. Rule 93 should be read in the light of that distinction.

25 It is unnecessary for present purposes to discuss the relationship between O 71 r 93 and the empowering provision in s 86 of the Judiciary Act, and the provisions in Pt VIIIA dealing with "Attorney-General's lawyers". In particular,

8 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 581-582 [42]-[43].

7.

it is unnecessary to consider for O 71 r 93 the impact upon the rule-making power of ss 55G and 64 of the Judiciary Act⁹.

26 It is sufficient for present purposes to indicate that in r 93 the term "the Commonwealth" is not used in any expanded sense which would embrace the AGS. Were the contrary construction to be adopted, a question would arise as to whether the rule altered, impaired or detracted from the operation of s 55P dealing with the charging of fees by the AGS and their recovery by the client of the AGS as costs incurred by the client.

27 A contrary interpretation of r 93 would also raise a question respecting the operation of s 64 of the Judiciary Act. Counsel for the Minister pointed out in his submissions that as an incorporated legal practice the AGS now is not unique in that regard. As is indicated above, r 93 does not apply to a practitioner who is in receipt of a salary from a "private" incorporated legal practice. If the AGS, a body corporate, fell within the term "the Commonwealth" in r 93, then parties such as the Minister who engage the AGS would be, in respect of recovery of costs, in a different position to private parties who engage another incorporated firm of practitioners. Section 64, which extends to the Minister, gave the Minister in the proceedings in question the same rights, as nearly as possible, as those of the other parties and provided for the award of costs as in a suit between subject and subject.

28 The decision on review of the original taxing officer's decision was on the basis that the disallowance was supported because the AGS is "the Commonwealth" for the purposes of O 71 r 93. The Court having reached the contrary conclusion, an order should now be made in the form indicated by *Guss v Veenhuizen [No 2]*¹⁰.

29 On the summons filed on 12 March 2004, I make the following orders:

- (1) Grant the application to review taxation.
- (2) Declare that the Minister is entitled to recover the items for counsel's fees which were disallowed.
- (3) Direct the taxing officer to complete taxation accordingly.
- (4) Mr Goldie pay the Minister's costs of the summons.

9 Rule 93, in any event, would not apply to a counsel's fee rendered by the Solicitor-General of the Commonwealth. The holder of that statutory office receives such remuneration as is determined by the Remuneration Tribunal (*Law Officers Act* 1964 (Cth), ss 5, 6 and 7) and is not "in receipt of a salary".

10 (1976) 136 CLR 47 at 61.