JUDGMENT No. 598 /92

CATCHWORDS

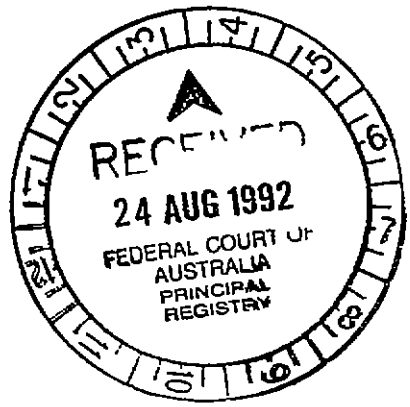
COSTS - solicitor and client costs with respect to contentious business - whether time cost agreement is permissible in the Federal Court - whether court is required to examine the bill for possible overcharging or other unfairness - evidence required for this purpose - whether a Judge as opposed to a taxing officer may and should make the assessment - relevant factual considerations

Legal Profession Act (NSW) (1987)
Drug Misuse and Trafficking Act (NSW) 1985
Drug Trafficking (Civil Proceedings) Act (NSW) 1990
Supreme Court Rules (NSW) Part 52 Division 5
Attorney and Solicitors Act (UK) (1870)

Emeritus Pty Ltd v Michael Mobbs [1991] NSW Conv R 55-588
Singleton v Macquarie Broadcasting Holdings Ltd [1991] 24 NSWLR 103
NSW Crime Commission v Fleming & Anor [1991] 24 NSWLR 116
Chemidry v Johnson Master Windeyer, unreported 1 November 1990
Ilic v Radin Finlay J, unreported 18 December 1991
Major Projects Pty Limited v Sibmark Pty Limited McLelland J, unreported 19 February 1992
Clare v Joseph [1907] 2 KB 369

BURGUNDY ROYALE INVESTMENTS PTY LIMITED (Receivers and Managers Appointed) (In Liquidation) & ORS v WESTPAC BANKING CORPORATION & ORS

G 339 OF 1989



Einfeld J

Sydney

20 August 1992

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY) No G 339 of 1989
GENERAL DIVISION)

BETWEEN:

BURGUNDY ROYALE INVESTMENTS PTY LIMITED (Receivers and Managers Appointed) (In Liquidation)
First Applicant/First Cross-Respondent
THE ESPLANADE PTY LIMITED
Second Applicant/Fourth Cross-Respondent
KOTA NOMINEES PTY LIMITED
Third Applicant/Fifth Cross-Respondent
GOLDEN GLOSS PROPERTIES LTD
Fourth Applicant/Sixth Cross-Respondent

AND:

WESTPAC BANKING CORPORATION
First Respondent/Cross-Claimant
THE NORTHERN TERRITORY OF AUSTRALIA
Second Respondent
THE NORTHERN TERRITORY DEVELOPMENT CORPORATION (now known as the TERRITORY LOANS MANAGEMENT CORPORATION)
Third Respondent
CORPORATION OF THE CITY OF DARWIN
Fourth Respondent
MURLARLI PTY LIMITED & ORS
Second Cross-Respondent
BEAUFORT INTERNATIONAL HOTELS LIMITED
Third Cross-Respondent
GALVESTON INVESTMENT LTD
Seventh Cross-Respondent
DATUK WONG CHIK LIM
Eighth Cross-Respondent/Second Cross-Claimant
TAN SRI WEE BOON PING
Ninth Cross-Respondent
FRANCIS LEE
Tenth Cross-Respondent

REASONS FOR JUDGMENT

EINFELD J SYDNEY 20 AUGUST 1992

This matter originally involved an action for damages and other relief launched by the applicants in 1987 against the

respondents in relation to the construction and financing of a project known as the Darwin Centre. The Centre was to include a theatre and performing arts centre, a convention centre, an international standard hotel, a concourse and public gallery area, and a carpark. All facilities except the theatre and performing arts centre were to be owned and operated by the applicants. The applicants were to build the Centre and run or manage substantial parts of it.

In or about 1980 a mission including representatives of the second and third (and perhaps fourth) respondents undertook an international promotion of the Darwin Centre project. Subsequently the second, third and fourth respondents allegedly represented to agents of the applicants amongst other matters that:

i) an international airport would be constructed in Darwin;

ii) a rail link would be constructed between Alice Springs and Darwin;

iii) the owners of the Darwin Centre would be granted a casino licence; and

iv) no further international hotels would be approved for development until the hotel in the Darwin Centre was viable, had good occupancy and was making a profit.

In January 1985 the applicants borrowed the sum of $23.5 million from the first respondent (Westpac) to enable them to fund the construction of the Centre. In connection with this loan, the applicants alleged that Westpac engaged in conduct which was false, misleading or deceptive, that it made negligent misrepresentations, and that it was in breach of its warranties and fiduciary obligations to the applicants. Against the second, third and fourth respondents, the applicants alleged falsity, negligence, misrepresentations, and breaches of warranty, implied terms and fiduciary obligations. For its part Westpac launched cross claims against the applicants and several other parties including the eighth cross respondent, Datuk Wong, who was one of the guarantors of the loan.

The first applicant was jointly owned by the second and third applicants which were in turn wholly owned by the fourth respondent (Golden Gloss). Wong and his son and members of his family were the only shareholders of Golden Gloss of whose voting shares Wong himself held 75%. Wong and his son appear to have been its directors.

Baker & McKenzie were at all relevant times retained by the applicants as their solicitors (the retainer) until their instructions were withdrawn on 16 May 1991. By motion dated 5 October 1990 (the motion), Baker & McKenzie seek an order for costs exceeding half a million dollars for professional fees and disbursements in respect of the retainer for the period

from 8 January 1990 to 16 May 1991. They seek an order that these costs be paid by Wong. Auxiliary declarations are also sought. Baker & McKenzie explain the size of the fees sought by reference, first, to the magnitude of the matter. They say that it was necessary for numerous solicitors and paralegals to work on it at any one time and that solicitors were required to take instructions and statements at several locations overseas. Second, they argue an agreed entitlement under the retainer to their fees on the basis of their usual hourly rate and their disbursements as incurred or customarily charged.

It is apparent that the case involved the discovery and perusal of a huge volume of documents in Darwin, Sydney and overseas. The documents were said to demonstrate the representations allegedly made by the first, second, third and fourth respondents. Baker & McKenzie say that the organisation of the documents in the matter required the establishment of a complex computer index for each document. There were a number of contested interlocutory matters in relation to discovery of documents.

Baker & McKenzie's bill of costs assumes inter alia that:

i) Wong was or stood as if Baker & McKenzie's client and was responsible for payment of their professional costs and disbursements under and in respect of the retainer; and

ii) these professional costs and disbursements are to be calculated and charged by reference to their usual hourly rates for the work of solicitors and paralegals and their usual rates for disbursements.

On 12 July 1990 I held on an earlier motion in the matter dated 5 June 1990 that Baker & McKenzie had, as against Wong, a lien over some or all of the applicants' documents and papers for their professional fees and disbursements under or in respect of the retainer. Wong was then represented by senior and junior counsel instructed by Timothy Glenn of Blake Dawson Waldron solicitors. On 28 February 1991, I held on the present motion that the Court had jurisdiction and power to grant declarations, first, that the second, third and fourth applicants retained Baker & McKenzie to act for them in those proceedings; second, that by agreeing to pay or to indemnify Baker & McKenzie for their costs of so acting (the agreement), Wong stood in relation to Baker & McKenzie as client does to solicitor; and, third, that the agreement was to pay Baker & McKenzie's fees as charged on an hourly basis rather than on a "scale" or schedule basis. Again Wong appeared by counsel and solicitor.

When the substance of the motion came on for hearing on a later date, none of the applicants nor Wong, nor anyone instructed by or representing any of them, participated, despite service of the motion and of its principal supporting on Wong in Hong Kong and Glenn in Sydney. Five affidavits were relied on in relation to service:

Arthur Ng Mou Cheong	sworn 28 November 1991
Michael Charles Hunter	sworn 28 November 1991
Nicholas Peter Stevens	sworn 28 November 1991
Tom Joseph McLoughlin (2)	sworn 28 & 29 November 1991

It is not necessary to set out in detail the evidence of service. Apart from proving service on Wong and Glenn, it established both refusal and apparent avoidance of service as well as non-co-operation in relation to service. Schedule B to these reasons for judgment summarises relevant parts of this evidence.

A reason is proposed by Baker & McKenzie as to why Wong has not co-operated or participated in these proceedings as to costs. It appears from an affidavit of Paul John Carolan sworn 3 October 1990 that Hong Kong permits a judgment of a Commonwealth country to be registered but the registration can be set aside if there was no submission to the jurisdiction in the country where the judgment was pronounced. By not participating in this motion other than to challenge jurisdiction (although this Court's power to make the orders sought, as distinct from its jurisdiction to do so, was also challenged at the same time), it is suggested that Wong hopes to be able to show that he did not submit to the Court's jurisdiction to order costs against him despite his having participated in the earlier stages of the same proceeding. In other words, it is said that his non-appearance in these proceedings has been deliberately undertaken as a tactic to

try to avoid the consequence of any judgment of this Court that Wong pay Baker & McKenzie's costs of representing the applicants in matter number G339 of 1987.

As this argument is or may be a matter for the determination of the courts of Hong Kong, and does not raise a matter for the determination of this Court, I ought not comment on it at all. The nature of the power this Court is exercising here is explained in my judgment of 28 February 1991. In my opinion the second, third and fourth applicants and Wong have been adequately served with the notice of motion and the principal evidence in support thereof, including the bill of costs itself. The first applicant is in liquidation with a substantial capital deficiency.

The first question now before the Court on the motion is whether there is evidence to support the declarations and orders sought. A number of affidavits have been presented to explain or justify the bill of costs filed. The principal affidavits were:

1.	Keith Stevens McConnell	sworn 25 November 1991
2.	Tom Joseph McLoughlin	sworn 25 November 1991
3.	David Ross Nicholas	sworn 25 November 1991
4.	Stephen Mark Rathborne	sworn 25 November 1991
5.	Lisa Gai Martin	sworn 26 November 1991
6.	Suzanne Maria Smith	sworn 26 November 1991
7.	Sarah Whalley	sworn 27 November 1991

It is not necessary for me to set out this evidence in detail. It will suffice to record that David Ross Nicholas, a solicitor with expertise in costing, was the principal in charge of the preparation of the bill. In summary the evidence describes:

a) the way in which the task of drawing the bill of costs was approached;
b) the problems encountered in its preparation;
c) the roles and qualifications of those involved;
d) the control exercised over those persons, and the guidance given to them, by Nicholas and others;
e) the methodology used in the preparation of the bill, including the setting of the hourly rates charged, a comparison with the Federal Court "scale", and manual and computer cross-checking; and
f) the means adopted in dealing with disbursements.

Opinion evidence was also provided by some of the deponents as to the accuracy of the work included in the bill, the absence of any duplication, and the reasonableness of the charges made. Comparisons were submitted of the charges of other comparable legal firms in Sydney. Schedule A to this judgment contains references to relevant parts of the evidence in these respects, together with an explanatory glossary of abbreviations or new names used in the schedule. Some typographical errors in the schedule are also attached.

There was also presented at the hearing a number of affidavits filed and submissions made in the proceedings concerning the lien. The submissions summarised the affidavits. This evidence was read at the hearing on that matter but was not tested at that time because the parties only sought a judgment then on the availability of the lien at law. I was, however, asked by the parties at the time to accept the submissions as establishing basic common ground as to the facts summarised in them. That evidence satisfactorily establishes that the applicants retained Baker & McKenzie as their solicitors in proceedings number G339 of 1987, and that Wong agreed to pay their costs or indemnify them for their costs in connection with the retainer, standing in this respect in relation to Baker & McKenzie as if he was their client.

I find on the evidence that the retainer was to pay Baker & McKenzie their costs at their normal hourly rates on the basis of all work done, and their disbursements as incurred or usually charged. I also find that the agreement contained a term that Datuk Wong would pay or indemnify the applicants in respect of those costs as so charged.

The second issue on the motion is what costs should be ordered. In this regard an amendment to the motion was granted to substitute a request that I allow or find the costs due in lieu of the filed request for a reference to a taxing officer. Service of the amendment was dispensed with. This aspect of the case raises the question whether the bill itself

admits of any critical examination by the Court as to the fairness or reasonableness of the amounts charged so as, in effect, to invalidate the agreement or, if it seems appropriate, to reduce or otherwise interfere with any of those amounts. A related question is whether, despite the amendment to the motion, the bill should be referred to a taxing officer for consideration of the details of the bill.

After examining in some detail the history of this subject and the provisions of the rules of Court, Justice Studdert in the Supreme Court of New South Wales on 27 June 1991 decided in Emeritus Pty Ltd v Michael Mobbs [1991] NSW Conv R 55-588 that in litigious matters:

> *The ability of solicitor and client to negotiate an agreement governing the solicitor's remuneration* [which had been part of the common law] *survived the passing of the Legal Profession Act of 1987. Such an agreement will be enforceable provided the remuneration agreed upon is not exorbitant, but is fair and reasonable in the circumstances. I would also add the qualification that there must be no unfair advantage taken of the client by the solicitor in the circumstances.*

His Honour's reference to the Legal Profession Act was a reference to the provisions of sections 173, 179-81 and 194 of that Act. These sections, while expressly permitting agreements between clients and solicitors on fees in non-contentious matters, do not either prevent or allow such agreements in contentious matters, meaning, in the main, litigation.

A month later in Singleton v Macquarie Broadcasting Holdings Ltd [1991] 24 NSWLR 103, Justice Rogers, Chief Judge of the same Court's Commercial Division, agreed with Justice Studdert. His Honour held that in litigious matters:

> 1. *There is nothing in the Act or in the Rules which forbids a time cost agreement either expressly or by implication.*
>
> 2. *The Court should not hold that oral time cost agreements are necessarily unenforceable.*

In the particular case, Justice Rogers found that the person responsible for the costs, who was not the client litigant, did not have the opportunity of deciding whether or not to agree to the time cost arrangements. Nonetheless his Honour held that:

> *...it may well be reasonable to require* [the person] *to pay costs calculated in accordance with it. It is of course open to* [the person] *to satisfy the Taxing Master that the result of the time cost agreement is unreasonable whereupon by the very words of* [the relevant rule], *liability is avoided.*
>
> *...it seems to me inappropriate that a judge...should rule that such agreements are necessarily unenforceable as being against public policy.*

The common law seems to have been best expressed by the English Court of Appeal in Clare v Joseph [1907] 2 KB 369. That case involved an attempt by a client to enforce a verbal agreement permitting him to pay less than would normally have been required. In the course of discussing the general principles of law applicable, Buckley LJ said at 378:

> *The law in existence when the Act of 1870 was passed is clear: the solicitor could not charge his client more than the amount of his bill of costs when taxed and it was his duty to advise his client that it was contrary to his interest to pay more. Further, if there were an agreement between them by which the client was to pay less, the solicitor, being in a fiduciary relationship to him, owed the duty of advising him that he ought not to enter into such an agreement if other provisions in it were contrary to the client's interest. The solicitor was under these disabilities when bargaining with his own client, because it was his duty to guard him from acting in a way prejudicial to his interest.*

The 1870 Act referred to was the Attorneys and Solicitors Act 1870 (UK). Buckley LJ noted that the effect of that Act was to permit the solicitor, in relation to non-contentious business, to enter into such an agreement provided the solicitor complied with the requirements of the Act, in particular that the agreement be in writing and be fair and reasonable. The provisions, then found in section 4 of the UK Act, are now to be found in New South Wales in sections 195-197 of the Legal Profession Act 1987.

Mobbs and Singleton are among a number of decisions in the Supreme Court of New South Wales in recent years upholding the capacity of a solicitor to enter into an agreement with respect to contentious business, subject to the power of the Court to set aside an agreement which was not fair and reasonable: see also Chemidry v Johnson Master Windeyer, unreported 1 November 1990; Ilic v Radin Finlay J, unreported 18 December 1991.

The position apparently accepted by those authorities was emphasised and summarised by Chief Justice Gleeson in NSW Crime Commission v Fleming & Anor [1991] 24 NSWLR 116. Restraining orders were obtained ex parte by the New South Wales Crime Commission against two persons charged with offences under the Drug Misuse and Trafficking Act 1985 (NSW). The orders provided for the forfeiture of all their property and its vesting in the Crown. Application was made to vary the orders so as to permit the release of moneys to meet the persons' reasonable legal expenses of the criminal proceedings. The expenses sought were for an hourly rate for the solicitor, a fixed daily rate for senior and junior counsel, and other disbursements. These charges were said to have been agreed between the persons and their solicitor. The trial judge acceded to the motion and ordered that the expenses be taxed under the Supreme Court rules. But the order fixed as the scale for taxation the rates sought in the motion. The appeal challenged the finding that the scale requested and fixed was "reasonable".

Because the ownership of the forfeited property was mixed as between the persons concerned, Fleming was, like Singleton and the present case, a case where the question directly under consideration involved the reasonableness or otherwise of an agreed basis for charging where the relevant costs were or would be payable by a third party, or out of assets in which a third party had an interest. Because of the terms of the particular statute under consideration, the application in

Fleming involved a degree of prospective operation in contrast to a normal solicitor and client taxation which takes place after legal proceedings are completed.

The Chief Justice's observations in part derived from a power his Honour appears to have inferred from Part 52 Division 5 of the Supreme Court Rules, although those rules seem to be restricted to agreements on non-contentious business, subrule (1) of rule 32 being subject to subrule (2). Of course, those rules have no direct application in this Court in any event. Moreover, Chief Justice Gleeson's observations were made in the context of the particular legislation. Nevertheless, they are of considerable importance on the issue of principle. At 124B, his Honour said:

> *...I do not consider that in the context of the provisions of* [certain sections of the Drug Trafficking (Civil Proceedings) Act 1990], *an agreement between solicitor and client can be conclusive on the question of the reasonableness of legal expenses for which provision is to be made out of the assets the subject of a restraining order. The reason for this is that the interests of third parties are, or may be, involved. When a court is considering the question whether particular expenses are reasonable for the purposes of the Act, the court is not merely concerned with protecting the interests of the solicitor's client, although those interests are plainly a relevant consideration.*
>
> *An agreement between the solicitor and client as to the costs which the solicitor will be entitled to charge will be relevant if there is a dispute as to the reasonableness of the legal expenses in question, but it will not be conclusive. The court will be required to consider what is reasonable, not only from the point of view of the client, but also having regard to the public interest, bearing in mind the possibility that an order for confiscation or forfeiture may be made.*

I do not intend to suggest that a judge, or a taxing officer, is at liberty to give effect to an individual opinion, formed by reference to some personal standard of social justice, that fees charged by solicitors or barristers are generally "too high".

A primary factor affecting the reasonableness of the legal expenses for which provision is sought will be the market for legal services in which the client, as a consumer, is obliged to seek such services. Underlying the policy of [the relevant provisions] *is a recognition that justice requires that persons accused of criminal offences, or confronted with a threat of forfeiture of their property, should not be unfairly deprived of the means of defending themselves, and it would be inconsistent with that recognition to adopt an approach to the question of reasonableness of legal expenses which had the practical consequence of depriving persons of the opportunity of obtaining proper legal representation.*

Furthermore, the efficient working of the justice system depends heavily upon litigants being professionally and capably represented, and it would not assist the administration of justice to deprive litigants of the means of securing adequate professional assistance.

The most recent of the Supreme Court decisions, which refers to the earlier decisions, is that of Justice McLelland in Major Projects Pty Limited v Sibmark Pty Limited (unreported, Equity Division, 19 February 1992). His Honour pointed to the need to examine such agreements for their potentiality for overcharging. Among the criteria mentioned in relation to the bill under consideration were:

In the first place it fails to specify to whose time, or in respect of what kinds of work, the charging rate of $165.00 per hour is to apply. Is it, for example, to apply only to the time spent by a partner of the firm or some other professionally qualified person, or is it to include time spent by secretarial, clerical or unskilled staff as well? Again, is it to apply only to work requiring

> *professional care, skill and responsibility, or is it to include work such as typing letters and other documents and routine attendances at the Court registry? If in either of these examples chargeable time were to include the latter categories of persons or work, there would in my view be grounds for considering the charging rate to be excessive. Secondly, the agreement may operate to reward inefficiency or incompetence. If a particular task could be performed by any reasonably efficient and competent solicitor within some given number of hours, and it in fact takes a substantially greater time, the charge at the stipulated rate for the whole time taken might fairly be regarded as excessive.*

Dealing with the particular case, his Honour remarked that the solicitor's accounts to the client did not indicate "whose time, or what work is comprised in the number of hours specified. Nor do they indicate how many hours were devoted to any particular task."

I accept and respectfully agree with these approaches. Although there may be some differentiation between their Honours on the applicable criteria of unenforceability, in the absence of Wong being present to argue for such a result, there is nothing before me under any of the sets of criteria to establish a basis for holding the agreement between Wong and Baker & McKenzie to be unenforceable. The case was complex and involved large claims. The evidence suggests that Wong, an experienced businessman, was a knowledgeable negotiating participant in the agreement, well informed about the case and its potential cost. He would certainly have been party to, in the sense of having been consulted on and having agreed to, the retainer. There is reason to accept that he

would have known that Baker & McKenzie were a large international legal firm whose charges were not likely to be small. The evidence establishes that Wong had available to him a number of advisers, colleagues and employed persons, both within the companies he controlled and outside them. One of them was an experienced partner of a large and well regarded firm of solicitors in Hong Kong. The evidence shows that Wong received advice from a number of these people prior and in relation to the retainer and the agreement, and that he paid substantial fees to Baker & McKenzie before the current dispute arose.

There is in principle nothing exorbitant about an agreement to charge a regular hourly rate appropriate to the skills and experience of the "fee earner" and to the work involved. But the existence of an agreement does not exempt it from examination as to fairness, possible overcharging and therefore enforceability. As Chief Justice Gleeson said in Fleming at 123C:

> *Such agreements, if properly entered into, are binding on the client, but that proposition is subject to the over-riding capacity of the court to scrutinise the conduct of solicitors to ensure that they do not charge exorbitant fees or otherwise take improper advantage of their clients...*

In dealing with the particular order on appeal, and by implication therefore the identical term of the agreement which the order endorsed, his Honour went on at 126D:

> *I understand it to have been conceded on this appeal, and in any event it is the case, that a bare order providing for solicitor's costs "for preparation, instructing (and) acting" at an hourly rate of $200, or any other single fixed hourly rate, is unsustainable. To take a simple example of the problem involved, according to the terms of the order the hourly rate specified would apply to the time spent by a junior solicitor travelling to and from a gaol to interview a prisoner and obtain instructions, or sitting in a barrister's waiting room waiting for the commencement of a conference. The order pays no regard to the kind of activity involved in "preparation" or "acting", or the seniority or experience of the particular solicitor doing the work. If, for example, the "preparation" involved looking up a point of law, a solicitor who knew where to look would be paid less than a solicitor who was less knowledgeable or efficient. An inexperienced solicitor might well charge much more than an experienced solicitor. It is true, as was noted earlier, that it would still be open to a taxing officer to treat particular time as having been spent unnecessarily, and therefore not reasonably chargeable to the client, assuming, of course, that the officer had the requisite information. Even so, to allow a simple, flat, hourly rate as the basis for charging for anything, of whatever character, done by any solicitor of whatever seniority and experience in relation to the matter, is difficult to justify.*

Similar observations, including as to counsel's fees, are made with even more specificity and emphasis at 127-8.

I accept the evidence as to the means by which the content of Baker & McKenzie's bill of costs in the present case was arrived at and that the work charged for was done. While the costs charged are very high, I must take into account the context of the agreement and the features of the retainer and of the case itself. This costs agreement did not provide for an hourly rate to be charged indiscriminately. In the light of the work done, and of the way in which the bill was drawn and the fees were calculated and charged, and considering the rates charged by comparable firms for similar work and the opinion evidence tendered on the motion, I have concluded that

the agreement and the fees and disbursements claimed under the retainer were in the circumstances fair and reasonable. For that reason there is no purpose in inviting a taxing officer to consider the incidents of the bill. As Gleeson CJ said in Fleming at 125D:

> *I do not agree with the suggestion that judges, as compared with taxing officers, lack the qualifications to determine what might constitute reasonable legal expenses. The judges of whom we are speaking are the very people who ultimately determine appeals from taxing officers in relation to disputes as to taxation.*

I can see no cause for concluding that the bill amounts to a breach by Baker & McKenzie of their fiduciary duties to the applicants or to Wong.

I therefore find that the costs due to Baker & McKenzie pursuant to the retainer and the agreement are $454,989 plus disbursements of $121,641.60, a total of $576,630.60. Wong will therefore be ordered pay that sum to Baker & McKenzie together with the costs of the motion.

I direct that Baker & McKenzie submit to me in Chambers a form of declarations and orders to embody these conclusions and intentions.

I certify that this and the eighteen preceding pages are a true copy of the Reasons for Judgment herein of his Honour Justice Einfeld

Associate

Dated: 19/8/92

SCHEDULE A

SCHEDULE OF EVIDENCE RE PREPARATION OF BILL OF COSTS

1. Description scope of Work performed in Bill of Costs

* Work performed: McConnell affidavit 25/11/91 para 5(i) - (xiv).

* Tasks Undertaken described in Schedule of Tasks: McConnell affidavit 25/11/91 (Annexure A). Chronology of Tasks annexure to Nicholas, Whalley, Martin, Smith affidavits.

2. Non access to primary documents

* Could not uplift, documents disordered, huge number: Nicholas affidavit 25/11/91, para 6, 7.

3. Ross Nicholas expertise

* Nicholas affidavit 25/11/91, para 1-3

4. Control, guidance, instructions by Ross Nicholas of preparation of Bill.

* to Tom McLoughlin re amend rates: Ross Nicholas affidavit 25/11/91, para 10(e).

* paralegals to use reference material: Nicholas affidavit 25/11/91, para 10(k).

* paralegals assigned time using Schedule of Tasks: Nicholas affidavit 25/11/91 para 10(l).

* paralegals avoid duplication within bill or with billed time: Nicholas affidavit 25/11/91, para 10(m)

* paralegals to avoid inconsistency, use appropriate apportionment of work time/work tasks to Fee Earners. Paralegals noted instructions: Nicholas affidavit 25/11/91 para 10(o).

* style, consistency, content, no duplication in Bill: Smith Affidavit 26/11/91, para 11.

* correction of methodology of paralegals if necessary: Smith affidavit 26/11/91 para 4, annexure B (last sentence), annexure C (last sentence) re more research.

* Nicholas meetings on style, consistency and content of Bill to avoid duplication: Martin affidavit 26/11/91 para 9 (last sentence), annexure C (last sentence) re more research. Whalley affidavit 27/11/91 para 9.

* Nicholas meet with Alison Norbury to instruct: Martin affidavit 26/11/91, para 9.

* Nicholas meets fortnightly with paralegals:
  Martin affidavit 26/11/91 para 9, Whalley affidavit 27/11/91 para 9, Smith affidavit 26/11/91 para 11.

5. Methodology of preparation of bill of costs

(i) Design formulated by Nicholas from primary material - time sheets, accounting records, correspondence: Nicholas affidavit 25/11/91 para 8.

(ii) Correspondence provided to Nicholas:
Nicholas affidavit 25/11/91, para 9, annexure A(Fee Earner identity).

(iii) Correspondence used for backbone of Bill of Costs by Nicholas:
Nicholas affidavit 25/11/91, para 10(a).

(iv) Method of assessing perusal and drawing by content, Federal Court Scale, rate of Fee Earner by identity in Schedule of Tasks.
Nicholas affidavit 25/11/91 para 10(a)(b)(c). Identity Fee Earner drawing correspondence by initials: Nicholas affidavit 25/11/91 para 10(f)

(v) Rates from Schedule of Rates used:
- Nicholas affidavit 25/11/91, para 10(d)(k)(iii) annexure B,
- Smith affidavit 26/11/91 para 3, para 9(c),
- Martin affidavit 26/11/91 para 3, para 7(b),
- Whalley affidavit 27/11/91 para 3, para 7(c),
- annexure A of these affidavits.

(vi) Rates for McConnell, Svehla, Broune reduced for lower usual rate early in period by McLoughlin,
Nicholas instructed and checked McLoughlin work:
Nicholas affidavit para 10(e), McLoughlin affidavit 26/11/91 para 3.

* Exclusion of non-significant Fee Earners from Bill of Costs:
  Nicholas affidavit 26/5/91 para 10(g)

(vii) Balance of time apportioned by paralegals after Nicholas processed correspondence, tapes transcribed, using reference materials:
- Nicholas affidavit para 10, (h) - (k),
- Smith affidavit 26/11/91 para 9, (a) - (f)
- Martin affidavit 26/11/91 para 8, (a) - (e)
- Whalley affidavit 27/11/91 para 8 (a) - (e)

(viii) Paralegal work on Bill

* Fee Earners assigned to separate paralegals:

- Smith affidavit 26/11/91, para 4 annexure B,
- Martin affidavit 26/11/91, para 4 annexure B,
- Whalley affidavit 27/11/91 para 4 annexure B,
- Smith affidavit 26/11/91 explains identities of Fee Earners assigned para 5 and 6.

* Fee Earners specifically worked on -

- Smith affidavit 26/11/91 para 7, 8,
- Martin affidavit 26/11/91 para 6,
- Whalley affidavit 27/11/91 para 5.

(ix) Paralegal primary reference documents:

* Timesheets

- Nicholas affidavit 25/11/91 para 10(l),
- Smith affidavit 26/11/91 para 7, 8
- Martin affidavit 26/11/91 para 6, 7
- Whalley affidavit 27/11/91 para 5 and 6.

* Day Files

- Smith affidavit 26/11/91 para 7, 8
- Martin affidavit 26/11/91 para 6,
- Whalley affidavit 27/11/91 para 5

* Timesheet and dayfiles explained:

- Smith affidavit 26/11/91 para 7.

(x) Other reference materials Used in support by paralegals

* Kota pre-bills, Unbilled Kota Pre-bill (exhibits SMR-1 to SMR-4 of Rathborne affidavit 25/11/91):

- Nicholas affidavit 25/11/91 para 10(k) (i,
- Smith affidavit 26/11/91 para 9(a)
- Martin affidavit 26/11/91 para 8(a),
- Whalley affidavit 27/11/91 para 8(a)

* Unpaid Memoranda of Fees of Baker & McKenzie:
Nicholas affidavit 25/11/91 para 10(k)(ii) annexures C, D & E,
Smith affidavit 26/11/91 para 9(b) and annexured
Whalley affidavit 27/11/91 para 7(b), and annexures D, E & F

* chronology of Tasks undertaken:

- Nicholas affidavit 25/11/91 para 10(k)(iv) annexure F,
- Smith affidavit 26/11/91 para 9(d) annexure ?,
- Martin affidavit 26/11/91 para 7(c), annexure D
- Whalley affidavit 26/11/91 para 7(d), annexures G.

* schedule of Tasks (by JTS)

- Nicholas affidavit 25/11/91 para 10(k)(v) annexure A,
- Smith affidavit 26/11/91 para 9(e), annexure H,
- Martin affidavit 26/11/91 para 7(d), annexure E,
- Whalley affidavit 26/11/91 para 7(e), annexure H.

* discussions with Fee Earners

- Nicholas affidavit 25/11/91 para 10(k)(vi)
- Smith affidavit 26/11/91 para 9(f),
- Martin affidavit 26/11/91 para 8(e),
- Whalley affidavit 27/11/91 para 7(f).

(xi) Observation of Work of Paralegals by other paralegals/Nicholas

* all paralegals observed receiving and using timesheets/dayfiles of relevant fee earners: Smith affidavit 26/11/91, Whalley affidavit 27/11/91 para 5, 6, 10 para 7,8.

* all paralegals observed using other reference materials for Bill: Smith affidavit 26/11/91, para 9, Martin affidaivt 26/11/91 para 8 (first), 10. Whally affidavit para 7.

* attendance Norbury, Whalley, Martin, Dunford at Nicholas meetings re instructions Smith affidavit 26/11/91 para 11. Norbury observed: Martin affidavit: 26/11/91 Whally affidavit: 27.11.91 para 9.

* of Norbury work for JTS and Norbury's work in the period, use of reference material: Smith affidavit 26/11/91, para 9.

* of all paralegals use reference material for fee earners assigned to draw descriptions for Bill: Smith affidavit 26/11/91 para 12.

* of all paralegals check descriptions produced with available fee earners: Smith affidavits 26/11/91 para 16.

* of meetings of paralegals to discuss uniformity: Martin affidavit 26/11/91 para 12.

* Meetings with Nicholas: Nicholas affidavit 25/11/91 para 10(n)

  time sheet total not exceeded, no duplication within Bill with invoices paid: Nicholas affidavit 25/11/91 para 10(m).

(xii) Disbursements

* Responsibility to Smith, bundle of invoices at exhibit SMS-1 used to check disbursements in Memoranda of Fees and Unbilled Kota Pre-bill:
  Smith affidavit 26/11/91 para 17, Smith affidavit 27/11/91 para 2 & 3, annexure A.

* See 7. below.

6. Reliability of Methodology for preparation of Bill

(i) Source materials used.

* Correspondence and extensive reference materials used: Nicholas affidavit 25/11/91 para 10 (k) (i) - (vi) para 10 (d)

* correspondence using Federal Court Scale and content reviewed and very conservative; para 10(b)

* see also paralegals affidavits above for reference material used including Timesheets and dayfiles.

(ii) Cross checking of entries in Bill of Costs

* Review of items by Nicholas;

* Nicholas affidavit 25/11/91 para 10(o), (p), (re-ordering of items by Nicholas: Nicholas affidavit 25/11/91 para 10(p) deletion of duplication for correspondence in early part of Period by Nicholas: Nicholas affidavit 25/11/91 para 10(q) to 10 hours a week by Nicholas for 2 months inter alia reviewing: Nicholas affidavit 25/11/91 para 10(r)

* confirm entries with Blessington, (Hayes had left); Smith affidavit 26/11/91

* special care to avoid duplication within Bill or between Bill and invoices paid: Smith affidavit 26/11/91

* new entry disbursements checked for accuracy: Smith affidavit 26/11/91, para 17 and
Smith affidavit 27/11/91 para 3,

* recognised hand writing in Timesheet of Fee Earner: Smith affidavit 26/11/91 para 10, Martin affidavit 26/11/91 para 7, Whalley affidavit 27/11/91 para 8.

* special care to avoid exceeding time sheet total, avoid duplication within Bill: Smith affidavit 26/11/91 para 14, Martin affidavit 26/11/91 para 11, Whalley affidavit 27/11/91 para 12,

* paralegals to cross check each other: Martin affidavit 26/11/91 para 8 (second), Smith affidavit 26/11/91 para 15, Whalley affidavit 27/11/91 para 13

(iii) Internal checks by computer.

* Daily batches of time entries flagged so cannot be reposted Rathborne affidavit 25/11/91 para 7(c), para (d) (at start),

* Features of the Baker & McKenzie computer accounting systems: Rathbourne affidavit 25/11/91 para 18

* Fee Earners required to keep time sheets: Connell affidavit 25/11/91, para 4.

7. Disbursements

* System of recording: Rathborne affidavit 25/11/91 para 8(a) - (h) Pre-bills accord with B & M practice: Rathbourne affidavit 25/11/91, para 10.

* Baker & McKenzie have paid all disbursements in the Bill of Costs: Rathborne affidavit 27/11/91 para 2 hourly rates in preparation of the Bill

* Normal rates applied for disbursements in the Memoranda of Fees, and the Unbilled Koto Pre-bill: Rathbourne affidavit 27/11/91, para 6.

8. Hourly rates in preparation of the Bill

(i) refer to Methodology in Preparation of Bill above for rates used by paralegals, Nicholas, McLoughlin

(ii) alteration of rates for McConnell, Broune, Svehla - refer to Methodology for Preparation of Bill above.

(iii) rates in Bill equal to or less than hourly rates at which Fee Earners charged out in the relevant period generally and in particular the Memorandum of Fees to client and the Unbilled Kota Pre-Bill:
Rathborne affidavit 25/11/91 para 11 and annexure "A" para 17,
Rathborne affidavit 27/11/91 para 5.

9. Opinions of Deponents

(i) Work undertaken in the Bill reasonable and necessary: McConnell 25/11/91 para 6, para 7.

(ii) Bill of Costs accurately reflects costs and work done:
McConnell 25/11/91 para 8.

* Reasonable in comparison with other city law firms: McConnell 17/11/91 para 2, 3, and annexure A.
Rathborne affidavit 27/11/91 para 3.

* Bill of Costs accurately reflects work by Fee Earners, hourly rate applicable, and no duplication: Nicholas affidavit 25/11/91 para 11.

10. Miscellaneous

(i) Rates of Fee Earners determined by market forces and partners of Baker & McKenzie for all clients:
Rathborne affidavit 25/11/91 para 9.

(ii) Explanation of exhibit SMR-3 re paralegal rates reduced to $50.00: Rathborne affidavit 25/11/91 para 13, exhibit SMR-5;

(iii) Office practice re Memoranda of Fees to clients plus protection from duplication by computer: Rathborne affidavit 25/11/91 para 14, and 15.

(iv) Accounting records indicate Fee Earners no longer employed: Rathborne affidavit 27/11/91 para 4.

(v) Numbers of people representing and assisting other parties in the proceedings: McConnell affidavit 27/11/91 para 4.

(vi) Computer data based used by Freehills and Allens:
McConnell affidavit 27/11/91 para 3.

(vii) Billing History of Baker & McKenzie for Wong:
McLoughlin affidavit 26/11/91 para 2 annexure A,
exhibit TJM-1.

(viii) Paralegals no longer employed:
Smith 26/11/91 para 19

SCHEDULE B

Service of documents on Wong

(i) Service on Wong in Hong Kong

* Bill of Costs, personal service on secretary on 25/11/91 on behalf Wong at HK office: Ng Mou Cheong affidavit 27/11/91 paragraph 1, 2. Covering letter McLoughlin affidavit, para 2, Annexure H;

* Service of supporting affidavits and exhibits, personal service on 27/11/91 on secretary for Wong: Ng Mou Cheong 28/11/91 para 1, 2, 3. Supporting Affidavits were:

  - McConnell 25/11/91
  - Nicholas 25/11/91
  - Rathborne 25/11/91, exhibits SMR-1 to SMR-5
  - Smith 26/11/91, exhibit SMS-1
  - Martin 26/11/91, exhibits LGM-1, LGM-2
  - McLoughlin 26/11/91, TJM-1

Covering letter: McLoughlin affidavit: 28/11/91 para 2 Annexure N.

* Service by facsimile of Supplementary Bill of Costs to HK Office: McLoughlin affidavit 28/11/91 para 2, Annexure R.

* Service by facsimile of Whalley affidavit: McLoughlin affidavit 28/11/91 para 2 Annexure Q.

* Service pursuant to Einfeld J Order 12/11/91 on Glenn (BDW).

(ii) Service pursuant to Einfeld J Order 12/11/91 on Glenn (BDW).

* Personal service of Bill of Costs on 22/11/91: McLoughlin affidavit 29/11/91 para 1, McLoughlin affidavit 28/11/91 para 1, Annexure E.

* Service of Supporting affidavits and exhibits (referred to above for Wong) except Whalley affidavit) at reception of BDW: Stevens 18/11/91 para 2-5, affidavit , McLoughlin affidavit 28/11/91 para 2 Annexure K.

* Service Supplementary Bill of Costs at reception BDW: Hunter affidavit 28/11/91 para 1, 2.

(iii) Refusal to assist service on Wong:

* by Bradley of Deacons: McLoughlin affidavit 28/11/91 para 2 Annexures B, G, I, M.

* by Glenn of BDW:

  - McLoughlin affidavit of 29/11/91 para 1
  - Stevens affidavit 28/11/91, para 3, 4
  - Hunter affidavit 28/11/91 para 2-3, Annexure A
  - McLoughlin affidavit para 2 annexures C, F, L, O.

(iv) Non cooperation by Wong

* no response to letter requesting appointment: McLoughlin affidavit 28/11/91 para 2, Annexure A;

* Apparent avoidance of personal service:

  - Ng Mou Cheong affidavit 27/11/91 para 1 and 2;
  - Ng Mou Cheong affidavit 28/11/91 para 2 and 3
  - McLoughlin affidavit 28/11/91 para 2 Annexure J

GLOSSARY OF TERMS
(Schedules of Evidence)

JTS and Svehla	Julian Terrance Svehla, a solicitor with Baker & McKenzie at the relevant time, now a member of the Bar
Kota	Kota Nominees Pty Ltd, the third applicant in matter number G339 of 1987
Broune	Linden Broune, a solicitor with Baker & McKenzie at the relevant time
Blessington	John David Blessington, a partner at Baker & McKenzie
Hayes	Paul Hayes, a solicitor at Baker & McKenzie
BDW	Blake Dawson Waldron, Sydney solicitors for Wong

TYPOGRAPHICAL ERRORS
(Schedules of Evidence)

page 2	item 5(vi)	Nicholas affidavit 25/11/91 para 10(g)
page 4	item 5(xi)	Martin affidavit
		Whalley (for Whally) (twice)
page 5	item 6(ii)	inter alia
	item 6(iii)	Rathborne (for Rathbourne)
		McConnell (for Connell)
pages 5-6	item 7	Kota (for Koto)
		Rathborne (for Rathbourne) (twice)

Counsel and solicitor for the applicant	Mr R T McKeand & Mr J T Svehla instructed by Baker & McKenzie solicitors
Date of Hearing	28 November 1991
Date of Judgment	20 August 1992