

---

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CIVIL

**CITATION** : WESTGEM INVESTMENTS PTY LTD  
(RECEIVERS AND MANAGERS)  
(ADMINISTRATORS APPOINTED) & ORS v  
COMMONWEALTH BANK OF AUSTRALIA LTD  
& ORS [No 2] [2019] WASC 377

**CORAM** : REGISTRAR WHITBY

**HEARD** : 2 SEPTEMBER 2019

**DELIVERED** : 21 OCTOBER 2019

**PUBLISHED** : 21 OCTOBER 2019

**FILE NO/S** : CIV 2340 of 2013

**BETWEEN** : WESTGEM INVESTMENTS PTY LTD  
(RECEIVERS AND MANAGERS APPOINTED) IN  
ITS OWN RIGHT AND AS TRUSTEE FOR: (1)  
HOSSEAN POURZAND AND JENNY MARIA  
POURZAND AS TRUSTEES FOR THE HELEN  
TRUST; AND (2) PAKWEST PTY LTD  
(RECEIVERS AND MANAGERS APPOINTED) AS  
TRUSTEE FOR: (A) NEWPORT SECURITIES PTY  
LTD (RECEIVERS AND MANAGERS  
APPOINTED) (CONTROLLERS APPOINTED) AS  
TRUSTEE FOR THE PAKWEST TRUST; AND (B)  
OAKCURE PTY LTD AS TRUSTEE FOR THE  
PARRY TRUST  
First Plaintiff

HOSSEAN POURZAND AND JENNY MARIA  
POURZAND IN THEIR OWN RIGHT AND AS  
TRUSTEES FOR (1) THE HELEN TRUST; AND (2)  
THE SHERIN TRUST (3) THE POURZAND  
FAMILY TRUST  
Second Plaintiffs

PAKWEST PTY LTD (RECEIVERS AND MANAGERS APPOINTED) IN ITS OWN RIGHT AND AS TRUSTEE FOR: (1) NEWPORT SECURITIES PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (CONTROLLERS APPOINTED) AS TRUSTEE FOR THE PAKWEST TRUST; (2) OAKCURE PTY LTD AS TRUSTEE FOR THE PARRY TRUST; (3) WESTVIEW ASSET PTY LTD AS TRUSTEE FOR THE WESTVIEW TRUST; (4) OAKCURE PTY LTD AS TRUSTEE FOR THE ZAHRA NO 2 TRUST; (5) CITYSCAPE INVESTMENTS PTY LTD AS TRUSTEE FOR THE FARAMAZ TRUST; AND (6) RANGEWAY INVESTMENTS PTY LTD AS TRUSTEE FOR THE RANGEWAY INVESTMENTS TRUST  
Third Plaintiff

NEWPORT SECURITIES PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (CONTROLLERS APPOINTED) IN ITS OWN RIGHT AND AS TRUSTEE FOR: (1) THE PAKWEST TRUST; AND (2) THE NEWPORT FAMILY TRUST  
Fourth Plaintiff

OAKCURE PTY LTD IN ITS OWN RIGHT AND AS TRUSTEE FOR THE PARRY TRUST  
Fifth Plaintiff

SEAPORT PTY LTD (RECEIVERS AND MANAGERS APPOINTED) IN ITS OWN RIGHT AND AS TRUSTEE FOR THE SEAPORT TRUST  
Sixth Plaintiff

LUKE SARACENI  
Seventh Plaintiff

AND

COMMONWEALTH BANK OF AUSTRALIA LTD  
First Defendant

BOS INTERNATIONAL (AUSTRALIA) LTD  
Second Defendant

BOSI SECURITY SERVICES LTD  
Third Defendant

MARK FRANCIS XAVIER MENTHA  
First Named Fourth Defendant

CLIFFORD STUART ROCKE  
Second Named Fourth Defendant

THE TRUST COMPANY (AUSTRALIA) LTD AS  
CUSTODIAN OF CHARTER HALL WHOLESALE  
MANAGEMENT LTD AS TRUSTEE OF THE  
RAINE SQUARE TRUST  
Fifth Defendant

---

*Catchwords:*

Costs - Taxation of costs - Application for production of documents prior to  
taxation - Source of funds

*Legislation:*

*Rules of the Supreme Court 1971 (WA)*

*Result:*

Application refused

*Category:* B

**Representation:**

*Counsel:*

First Plaintiff : Mr N P Gentilli

Second Plaintiffs : Mr N P Gentilli  
Third Plaintiff : Mr N P Gentilli  
Fourth Plaintiff : Mr N P Gentilli  
Fifth Plaintiff : Mr N P Gentilli  
Sixth Plaintiff : Mr N P Gentilli  
Seventh Plaintiff : Mr N P Gentilli  
First Defendant : No appearance  
Second Defendant : No appearance  
Third Defendant : No appearance  
First Named Fourth Defendant : Ms M L Coulson  
Second Named Fourth Defendant : Ms M L Coulson  
Fifth Defendant : No appearance

*Solicitors:*

First Plaintiff : Jackson McDonald  
Second Plaintiffs : Jackson McDonald  
Third Plaintiff : Jackson McDonald  
Fourth Plaintiff : Jackson McDonald  
Fifth Plaintiff : Jackson McDonald  
Sixth Plaintiff : Jackson McDonald  
Seventh Plaintiff : Jackson McDonald  
First Defendant : King & Wood Mallesons  
Second Defendant : King & Wood Mallesons  
Third Defendant : King & Wood Mallesons  
First Named Fourth Defendant : Coulson Legal  
Second Named Fourth Defendant : Coulson Legal  
Fifth Defendant : Not applicable

**Case(s) referred to in decision(s):**

EMI Records Ltd v Ian Cameron Wallace Ltd [1983] Ch 59; [1982] 2 All ER  
980

Saraceni v Mentha [No 2] [2012] WASC 336

Soord v Yacoud [2017] WASC 295

**REGISTRAR WHITBY:**

1           This application relates to the fourth defendants' Bill of Costs filed 29 March 2019 pursuant to the orders of the Honourable Justice Tottle made on 16 May 2018 (Bill of Costs). The plaintiffs sought, by way of preliminary issue, production of documents prior to the taxation of the Bill of Costs. The documents sought fell in the following categories:

- (a)     retainer agreements;
- (b)     solicitors' accounts;
- (c)     counsel fee notes; and
- (d)     documents showing the source of funds used to pay accounts and fee notes.

2           The plaintiffs sought to rely upon the affidavits of Neil Philip Gentilli sworn 2 July 2019 and 26 August 2019 in support of their request for production of documents. The fourth defendants sought to rely upon the affidavit of Christopher Francis McLeod sworn 8 August 2019 in opposition to the plaintiffs' request.

3           On 2 September 2019, the parties appeared before me for hearing of the preliminary issue. During the hearing, the parties advised that the counsel fee notes had been produced and therefore, production of those documents was no longer in issue.

4           By letter dated 9 September 2019, the solicitors for the plaintiffs advised the court that the issues regarding the production of the retainer agreement had been resolved between the parties and had fallen away.

5           The documents which the plaintiffs now seek, prior to the taxation, are limited to the solicitors' accounts and the documents showing the source of the funds used to pay the accounts and fee notes.

**Legal principles - production of documents on a party-party taxation**

6           Order 66 r 42 of the *Rules of the Supreme Court 1971* (WA) (RSC) provides:

**42. Bills of costs content of**

- (1)     A bill of costs for taxation shall be prepared so as to show clearly -

- (a) items consecutively numbered, together with a reference to the item in the scale to which the item in the bill relates; and
- (b) dates of items (specifying years, months and days); and
- (c) where necessary, particulars of the services charged for; and
- (d) disbursements; and
- (e) professional charges.

7 Supreme Court Practice Direction 4.7.3 provides as follows:

- 2. These comments apply to party and party and solicitor and client bills of costs drawn pursuant to the scales enforced from time to time in respect of work performed in the Supreme Court. They also apply to bills drawn pursuant to special costs orders and indemnity costs orders.
- 3. A schedule may be attached to a bill of costs where:
  - (a) an allowance is claimed in a bill by reference to any of the following scale items in the schedule to the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012*:
    - (i) item 10 (chambers proceedings and attending for reserved judgments);
    - (ii) item 11 (originating motions and process);
    - (iii) item 12 (motions not otherwise provided for);
    - (iv) item 16 (getting up a case for trial);
    - (v) item 33 (other work);
  - (b) an allowance is claimed pursuant to a special costs order; or
  - (c) an indemnity costs order has been made.
- 4. The object of a schedule is to assist the taxing officer and the paying party by providing additional information regarding the work carried out in respect of an item and the allowances sought. The schedule should set out the various general heads of work performed in respect of the scale item, the amount of time spent on each head, and the amount allocated to each head. It should not take the form of a breakdown of each and every

piece of work performed in respect of an item in the bill and the cost thereof and nor is it appropriate to attach to the bill a computer printout of time spent on any item in the bill. Overly detailed schedules should be avoided.

5. A schedule to a bill will not be taxed in the sense of an allowance being made in relation to each item that appears in it.

8 In *Soord v Yacoub*,<sup>1</sup> Registrar C Boyle made the following comments:

... inspections are of little utility on a party-party taxation ... regardless of whether that taxation is on the ordinary party-party basis or on an indemnity basis.

...

... the ultimate question for the taxing officer is whether the amount claimed for an identifiable head of work is properly to be allowed on the applicable test. The paying party must always establish that the work claimed for was done. The question is how that is to be evidenced. In the case of litigation, the first and foremost test is to look at the work product, almost all of which will be on the court file. Pleadings and affidavits will be on the file; so will submissions; and time spent at court will always be evidenced by records on the file. The real weight or difficulty of factual and legal matters that are argued is usually best judged by looking at delivered reasons. There will be transcripts of significant hearings. A claim for time spent in preparing an affidavit can be assessed for its reasonableness by looking at the affidavit that is produced: that is a better test than any number of time sheets.<sup>2</sup>

9 In *EMI Records Ltd v Ian Cameron Wallace Ltd*,<sup>3</sup> Sir Robert Megarry VC made the following observation:

... during a taxation the taxing master sees many things which are not revealed to the party against whom the order for costs has been made, and so that party will lack some of the relevant material. Instead, it is more a question of who gets the benefit of any doubt in the mind of the taxing master. On a party-party taxation, nothing will be included unless the taxing master reaches the conclusion that it satisfies the requirement of 'necessary or proper'.

---

<sup>1</sup> *Soord v Yacoub* [2017] WASC 295.

<sup>2</sup> *Soord* [12] - [13].

<sup>3</sup> *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] Ch 59; [1982] 2 All ER 980.

**Solicitors' accounts**

10 The plaintiffs seek production of the solicitors' accounts for the following purposes:

- (a) to ascertain the time spent, and amount of costs claimed for particular parts of the larger items in the Bill of Costs for taxation;
- (b) to ascertain the dates on which the relevant work was carried out in order to determine the applicable scale; and
- (c) to ensure that no time spent for work of a solicitor-client nature has been claimed in the Bill of Costs for taxation.

11 In response, the fourth defendants submit that:

- (a) the hourly rates claimed in the fourth defendants' Bill of Costs are in accordance with the maxima hourly rates imposed by the relevant Legal Profession (Supreme Court) (Contentious Business) Determinations (the Scale);
- (b) where the costs charged by the solicitors to the fourth defendants were lower than the rates provided for by the Scale, the rates claimed in the bill were reduced to the amounts invoiced;<sup>4</sup> and
- (c) Coulson Legal, on behalf of the fourth defendants, when drafting the Bill of Costs, removed any work of a solicitor-client nature, including those costs in relation to advice and correspondence on whether the fourth defendants should change solicitors.<sup>5</sup>

12 Counsel for the fourth defendants acknowledges that the *Soord* decision was based upon relatively modest bills of costs (\$24,000 and \$8,000 respectively). However, it is submitted that the decision of Registrar C Boyle is based upon general principles that apply to any bill of costs, regardless of quantum.

13 The Bill of Costs is for \$1,078,227. Counsel for the plaintiffs submits that, being such a large Bill of Costs, the plaintiffs can only meaningfully object to items in the Bill of Costs if they are able to

---

<sup>4</sup> Affidavit of Christopher Francis McLeod sworn 8 August 2019 par 8.

<sup>5</sup> Fourth defendants' submissions in reply to preliminary issue dated 8 August 2019 par 39.3.



review the solicitors' accounts. It is therefore not appropriate to apply the *Soord* decision to this situation.

- 14 In my view, the fourth defendants should not be compelled to produce its solicitors' accounts. If the fourth defendants cannot establish that the costs claimed are reasonable, then the plaintiffs receive the benefit of the doubt and those costs will be taxed off the Bill of Costs. This is the case regardless of the size of the Bill of Costs and is consistent with O 66 r 42 RSC, Supreme Court Practice Direction 4.7.3, and the *EMI Records Ltd* and *Soord* decisions.

### **Documents showing source of funds**

- 15 The plaintiffs submit that the fourth defendants' solicitors' fee notes and other disbursements have been paid from the assets of Westgem (the first named plaintiff) in the hands of the company's receivers.<sup>6</sup> This gives rise to the issue as to whether Westgem should pay the costs twice or, if the other plaintiffs should pay the costs at all if Westgem has already paid those costs on a solicitor-client basis.

- 16 Counsel for the plaintiffs submits that, if the plaintiffs succeed in the main action, then the amount of monies subject to bank security may be significantly less than what is claimed by the banks. The result is that payments to the fourth defendants' solicitors would have been made out of Westgem's money in the receivers' accounts, not from money the subject of bank security.<sup>7</sup>

- 17 The fourth defendants contend that the plaintiffs are raising an issue that had already been raised before his Honour Justice Tottle prior to his Honour delivering his orders on costs on 16 May 2018 (Costs Orders).<sup>8</sup> The fourth defendants submit that his Honour made the Costs Orders without any limitation on the right of the fourth defendants to recover its costs from Westgem or the other plaintiffs. The Costs Orders have not been appealed and have the effect of a judgment pursuant to O 66 r 57 RSC.

- 18 The fourth defendants rely upon the doctrine of res judicata, in particular issue estoppel, to estop the plaintiffs from re-agitating this issue again before the taxing officer.

---

<sup>6</sup> Affidavit of Neil Philip Gentilli sworn 2 July 2019 pars 10-12.

<sup>7</sup> ts 1512.

<sup>8</sup> Plaintiffs' submissions on costs dated 3 May 2018 par 12; Plaintiffs' submissions in reply dated 15 May 2018 par 5. The fourth defendants responded to this issue at par 2.3.5 of the fourth defendants' submissions filed 11 May 2018.

19 Further, the fourth defendants submit that the submissions made by the plaintiffs, that Westgem is being asked to pay costs twice, is factually and legally flawed for the following reasons:<sup>9</sup>

- (a) the plaintiffs' litigation funder has agreed to indemnify the plaintiffs in respect of the fourth defendants' costs;<sup>10</sup>
- (b) as Westgem is in liquidation it will not pay the fourth defendants' costs following the conclusion of the taxation, the litigation funder will do so;
- (c) the contention that Westgem has already paid the fourth defendants' costs following their appointment as receivers rests on the proposition that the payment of their costs has been made from the free and unencumbered assets of Westgem, which it was entitled to use for its own purposes and it is therefore, unjust to require it to comply with the Costs Orders;
- (d) the true position is that all of the assets of Westgem are charged in favour of the third defendant consequent upon a fixed and floating charge created by a deed pursuant to which, following default by Westgem, the fourth defendants have been appointed as receivers and which appointment has been held by this honourable court to be valid;<sup>11</sup> and
- (e) therefore, the assets of Westgem used to pay the fourth defendants' costs are not Westgem's free or unencumbered assets. They are assets that are charged in favour of the third defendant and can be used in accordance with the terms of the deed following default by Westgem.

20 There is clearly an issue between the plaintiffs and the fourth defendants as to whether or not the assets of Westgem are encumbered. In my view, this is not an issue that I am required (nor one that it is appropriate for me) to determine as a preliminary issue of the taxation of the Bill of Costs.

21 The Costs Orders include, inter alia, the following order:

1. The plaintiffs pay the first, second, third and fourth defendants' costs of the action, to be taxed if not agreed.

---

<sup>9</sup> Fourth defendants' submissions in relation to preliminary issue dated 8 August 2019 par 44.

<sup>10</sup> Affidavit of Neil Philip Gentilli sworn 2 July 2019 par 14.

<sup>11</sup> *Saraceni v Mentha [No 2]* [2012] WASC 336.

22 It is the taxing officer's role to tax a bill of costs in accordance with the order of the court. Any issue as to whether the costs of the fourth defendants have already been paid out of the assets of Westgem is an issue that is properly raised at the time of the making of the Costs Orders. In the event that the plaintiffs wish to assert (after the Costs Orders were made) that those costs have already been paid from the assets of Westgem, then it may be appropriate to seek a variation of the Costs Orders.

23 Therefore, I refuse to order the fourth defendants to produce documents showing the source of funds used to pay the accounts or fee notes of the fourth defendants' solicitors.

**Summary**

24 In relation to the preliminary issue, I dismiss the plaintiffs' application for production of the fourth defendants' solicitors' accounts and for documents showing the source of funds used to pay those accounts.

25 The costs of the plaintiffs' application are reserved to the taxation of the Bill of Costs.

26 I indicated to the parties that, upon receiving my reasons, they should confer in relation to orders to program the hearing of the taxation. I request the plaintiffs and fourth defendants file a memorandum of consent orders or, in the event that a consensus cannot be reached, opposing minutes of proposed orders.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

EP  
Associate to Registrar Whitby

21 OCTOBER 2019