WRITTEN SUBMISSIONS

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
Division	Court of Appeal
Registry	Sydney
Case number	2025/197791

TITLE OF PROCEEDINGS

Applicant	**John Atanaskovic**
First Respondent	**Birketu Pty Ltd (ACN 003 831 392)**
Second Respondent	**WIN Corporation Pty Ltd (ACN 000 737 404)**
Number of Respondents	**7**

FILING DETAILS

Filed for	**John Atanaskovic,** Applicant
Filed in relation to	Directions of 1 September 2025
Legal representative	John Atanaskovic, Atanaskovic Hartnell
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CERTIFICATION

This and the following 9 pages are the Applicant's Summary of Argument, which document is suitable for publication pursuant to paragraph 27 of Practice Note SC CA 01.

Torey Politis

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Atanaskovic v Birketu Pty Ltd & Ors

NSW Court of Appeal

Applicant's summary of argument: UCPR r 51.12

28 July 2025

The nature of the applicant's case, the questions involved and the applicant's argument: UCPR r 51.12(4)(a), (b) and (c)

1. On 28 April 2025, the primary judge made orders staying enforcement of final judgments in the applicant's favour made on 16 September 2019 and 3 July 2020.[1] It appears that the primary judge was under the mistaken impression that he was imposing a stay to prevent the enforcement of costs assessments which were the subject of ongoing reviews. However, his Honour in fact ordered a stay to prevent enforcement of the final judgments in the applicant's favour. That misapprehension appears to have also resulted in the primary judge mistakenly concluding that the applicant had engaged in "sharp practice". Further, the primary judge failed to refer to and apply any relevant principles concerning the imposition of a stay, and therefore failed to take into account the fact that the Birketu parties would not suffer any particular prejudice of a kind which could not easily be remedied by orders of the Court, if the stay were not made; and did not consider the balance of convenience.

Factual background

2. On 16 September 2019 and 3 July 2020, the primary judge made orders for judgment in favour of the partners of the law firm Atanaskovic Hartnell (**AH**) for unpaid solicitors' fees and disbursements, in the total sum of $990,802.65. His Honour stayed those judgments pending further order of the Court.

3. On 19 June 2020, his Honour made costs orders both for and against AH (orders 2 and 3 of 19 June 2020): *John Ljubomir Atanaskovic and the persons named in Schedule A trading as Atanaskovic Hartnell v Birketu Pty Ltd – Costs* [2020]

[1] The plaintiffs in the proceedings below were the partners of the law firm Atanaskovic Hartnell. Mr Atanaskovic is now the sole principal of that law practice, and is the sole applicant for leave. The former partners who remained parties to the proceedings below have been named as respondents to the appeal in accordance with UCPR r 51.4.

NSWSC 779 (**2020 Costs Judgment**).

4. Each party has since obtained a first instance cost assessment in its favour, and each party has sought a review of the other's costs assessment pursuant to s 83 of the *Legal Profession Uniform Law Application Act 2014* (NSW) (**LPUAA**). Those Review Panel proceedings are presently on foot.

5. On 19 September 2024, the primary judge vacated the existing stays over the principal judgment. His Honour also ordered that the funds still held in Court be paid out to the parties.

6. The principal issue in the Birketu parties' application for review of the costs assessment in AH's favour was whether AH was entitled to claim the costs of its employed solicitors. On 5 February 2025, the High Court held in favour of AH on that issue: *Birketu Pty Ltd v Atanaskovic* [2025] HCA 2, dismissing the defendant's appeal with costs.

7. On 23 April 2025, AH sought to enforce the principal judgment. At this time, the unsatisfied judgment debt was in the amount of $495,495.66.

Misapprehension of orders made

8. On 28 April 2025, the primary judge granted a stay over "orders 1 and 2 of the orders of 16 September 2019" and "order 2 of the orders of 3 July 2020". The primary judge fundamentally misunderstood the effect of this stay. In the primary judge's reasons for judgment, his Honour said at [1]: "The defendants seek a stay of operation of <u>orders for costs</u> made in favour of the plaintiffs". The primary judge held at [9] that: "there should be no enforcement of <u>any judgment for costs</u> between [the parties]". The catchwords to the judgment similarly describe the Birketu parties' application as an "application for stay of costs judgments in favour of the plaintiffs which are under challenge and where the defendants have costs orders against the plaintiffs which are also under challenge".

9. However, the orders which the primary judge stayed were not orders for costs. Orders 1 and 2 of the orders of 16 September 2019 and order 2 of the orders of 3 July 2020 were the orders constituting the <u>principal judgment</u> in the applicant's favour.

10. The primary judge's discretion therefore miscarried because the primary judge was under a fundamental misapprehension as to the effect of the orders which his

Honour made.

11. The Birketu parties' written submissions of 28 April 2025 made it plain that the applicant had sought to enforce the principal judgment (see e.g. [10]: "the plaintiffs have sought amounts in the garnishee orders for the full putative outstanding amounts of the judgment debts ($495,495.66)"), and what the Birketu parties sought was a stay of the principal judgment: see e.g. [3]. The applicant's written submissions also made it plain that the outstanding principal judgment was $495,495.66, being the amount sought in the garnishee orders which the primary judge set aside.

12. Further, his Honour did not say anything in the short exchange of oral argument that demonstrated that he was under the misapprehensions as to the orders which the applicant had attempted to enforce, and the orders which his Honour in respect of which his Honour was imposing a stay, as set out above.

13. This fundamental error on the part of the primary judge as to the effect of, and basis for, the orders which he made constitutes a *House v The King* error.

Error in conclusion as to "sharp practice"

14. The sole basis which his Honour gave for ordering a stay was that the applicant's attempt to enforce its principal judgment constituted "sharp practice": at [8]. His Honour reached that conclusion because his Honour noted that the costs assessment in the applicant's favour was under challenge by the Birketu parties: at [2]; and the primary judge had previously indicated on the transcript that there should not be enforcement of any costs orders until finality on the amounts payable each way had been reached: at [4].

15. Had the applicant indeed been attempting to enforce the costs assessment in its favour, he accepts that a stay ought to have been granted. Such an attempt would have been impermissible by operation of s 86 of the *Legal Profession Uniform Law Application Act 2014* (NSW) (**LPUAA**), which suspends the operation of a first-instance costs assessor's determination in while the Review Panel conducts its review. However, as noted above, the applicant had sought to enforce the primary judgment in his favour, not an award from a costs assessment.

16. At the time of his original judgment in 2020, the primary judge ordered that the existing stay of AH's final judgment remain in place so as to prevent AH from enforcing its judgment while the costs assessment process was on foot. His

Honour did so on the basis of his view that "all accounts should be brought to finality together": 2020 Costs Judgment at [21]. His Honour expressed his expectation that the parties would "act expeditiously in furthering that process".

17. However, by the time of a hearing in September 2024, the primary judge accepted that that position could no longer be maintained in light of the passage of time. Rather, his Honour proceeded on the basis that "fairness dictated" that the stays be lifted and some money be payable to AH, with the amount of that money calculated by so as to protect the Birketu parties having regard to the possible outcome of the costs dispute, and in particular, the outcome of the Birketu parties' extant High Court appeal: T8.5-11.

18. The calculation of the amounts payable from the sum in Court was done on the approximate basis that (see T6-10):

    (a) the amount held in Court was approximately $1,020,000;

    (b) the net amount of the existing judgment debt and interest was $774,454.69;

    (c) the net position of the costs assessment was presently $217,444.68 in Birketu's favour;

    (d) however, if Birketu's High Court appeal was successful, the net position would be $432,507.23 in Birketu's favour;

    (e) in that case, the net amount payable to AH would be approximately $340,000 (i.e. the figure in (b) – the figure in (d) above): see esp. T7.20.

19. Consequently, on 19 September 2024, the Court ordered that, out of the money standing in Court pursuant to the orders made by the Court on 6 December 2019, $711,401.81 was forthwith to be paid to the defendants; and the balance was forthwith to be paid to AH.

20. In the course of vacating the existing stays, the judge commented at T12.26 that: "But we all know that these moneys are representative, or supposed to have been, representative of the possible outcome on costs … And you've got an appeal … And so for him to try an execute on those orders now would be not good." The only extant appeal at the time of the primary judge's comments was the Birketu parties' High Court appeal. His Honour referred to this discussion at [4] of his April 2025 reasons, but erroneously characterised his previous view as being that there "should not be enforcement by either party <u>of any costs orders</u> until finality on the

amounts payable each way had been reached" [emphasis added]. This appears to have been the second component of his Honour's conclusion that the issuance of the garnishee order constituted "sharp practice".

21. As at April 2025, the "possible outcome on costs" had substantially changed, compared to the situation at the September 2024 hearing. By then, the Birketu parties' High Court appeal had been dismissed, so that the principal basis for the Birketu parties' review against the costs assessment in AH's favour could no longer be sustained. Further, AH had the benefit of costs orders in its favour from the Supreme Court of NSW, Court of Appeal and High Court proceedings. AH had commenced the process of having those costs assessed. AH's claim for those three costs orders totalled $385,402.17, the overwhelming majority of which were barristers' fees (in respect of which one would expect little if any reduction in a costs assessment).

22. Accordingly, the analysis which the primary judge had employed in the September 2024 hearing was no longer in the Birketu parties' favour. Rather, the presumptive costs position was now $167,957.49 in favour of AH. In those circumstances there was no longer any reason why the applicant should not proceed to enforce its entitlement to the principal judgment.

23. At [5] of his reasons, the primary judge dismissed this analysis on the basis that: "On one version and one version only, the presumptive net cost position might ultimately turn out to be in favour of the plaintiffs, but then again, it may not." However, this was precisely the analysis which his Honour had employed in the September 2024 hearing in determining the amount of the money to be paid to AH, from the total funds held in Court at the time, as set out in paragraphs 18-19 above. The applicant did not engage in sharp practice in causing a garnishee order to be issued in those circumstances.

24. Accordingly, the applicant's issuance of a garnishee order to seek to enforce the outstanding principal judgment did not constitute sharp practice that it was an attempt to enforce an award from a costs assessment which was presently under review, nor on the basis of an inconsistency with the primary judge's comments on transcript from the September 2024 hearing.

Failure to advert to relevant principles, including failure to advert to lack of remediable prejudice to Birketu parties and balance of convenience

25. The primary judge did not advert to, nor apply, any relevant principles as to whether to grant a stay of the principal judgment. His Honour made it clear very early in oral argument that he had determined to grant the stay.[2] Had the primary judge adverted to the relevant principles, it would have been apparent that the stay ought not to have been granted.

26. The principles to be applied when exercising the Court's power to grant a stay pending an appeal are well known. The principles to be applied where there is no anticipated or pending appeal are less clear. The applicable principle appears to be that set out by Garling J in *Young v Hones (No 5)* [2016] NSWSC 822 at [65], as cited with approval by Gleeson JA in *Collier v Country Women's Association of New South Wales* [2017] NSWCA 303 at [30] (emphasis added):

> By analogy, when a stay of a final order is sought, pending an appeal, or the prosecution of a cross-claim, <u>or the determination of some other cognate proceedings</u>, the Court will ordinarily require proof, by acceptable means, of the following:
>
> (a) that the appeal, or cognate proceedings, are properly pleaded, and disclose an arguable case;
>
> (b) that the applicant for the order would sustain prejudice of a kind which could not easily be remedied by orders of the Court, if the stay were not made; and
>
> (c) the balance of convenience favours the making of the order.

27. The commentary in *Ritchies* concerning s 135 of the Civil Procedure Act provides some further examples of circumstances in which such stays can be granted (other than in the context of an appeal): where a defendant has a right of set off against the plaintiff's judgment; where a defendant has an outstanding cross-claim involving a related subject matter; where the judgment debt does not finally determine the parties respective entitlements and the judgment creditor is insolvent. None of those circumstances was applicable in the present case. In particular, there was no right of set-off between the judgment and the costs orders. The primary judge expressly declined the Birketu parties' application for such an order: 2020 Costs Judgment at [21].

28. The primary judge never found that the Birketu parties would suffer any particular

[2] T2.6-8: "I just don't like this. Until all of this is resolved, I'm just not going to permit this. So, you and I can argue about it all day but I'm just not going to allow it."

prejudice of a kind which could not easily be remedied by orders of the Court, if the stay were not made. His Honour did not address the issue at all in his April 2025 judgment. Nor could the primary judge have made any such finding: in the 12 September 2024 hearing, his Honour expressly rejected the Birketu parties' concerns about the applicant's solvency and hence his ability to repay any amounts if ultimately so ordered: T10.50-T11.20.

29. Similarly, the primary judge never addressed the question as to whether the balance of convenience favoured the granting of a stay. The balance of convenience did not favour the grant of a stay. The applicant is the judgment creditor and is ordinarily entitled to the fruits of victory. Aside from the period when the stay was lifted from 19 September 2024, he has been unable to enforce the judgments in his favour since 2019 and 2020.

30. The parties are presently in the process of cost assessment reviews under s 83 of the LPUAA. The parties would then have a right of appeal de novo against the review panel's decision to the District Court or Supreme Court: s 89(1) of the LPUAA. Given the pace to date, it may be several more years before the net position of the parties' costs entitlements under the costs orders in the present proceedings is resolved to the point where no further appeal is available. The imposition of a stay over the primary judgment does not incentivise the Birketu parties to act expeditiously in the cost assessment process. The primary judge appears to have acknowledged the force of these concerns in vacating the stay by his orders on 19 September 2024.

31. The balance of convenience weighs more heavily towards the applicant now that, following the refusal of the Birketu parties' High Court appeal, the presumptive result of the costs assessment processes is now significantly in the applicant's favour.

Reasons why leave should be granted: UCPR r 51.12(4)(d)

32. The order sought to be challenged is an interlocutory order, so the applicant requires leave to appeal: *Supreme Court Act 1970* (NSW), s 101(2)(e).

33. The applicant for leave ought to establish that there is an issue of principle, a question of public importance or a reasonably clear injustice going beyond something that is merely arguable: *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 at [46].

34. In this case, the Court should be satisfied that there is a reasonably clear injustice going beyond something that is merely arguable. The applicant, as a successful plaintiff with an outstanding judgment in his favour of nearly $500,000, has been prevented from enforcing that judgment 6 years later in circumstances where the Birketu parties have: (a) never sought to appeal against those judgments, and (b) never demonstrated that they would suffer prejudice of a kind which could not easily be remedied by orders of the Court if the stay were not made.

35. Further, this Court does not appear to have recently considered the principles applying to a decision whether to order a post-judgment stay in the context of the determination of some other cognate proceedings.

Costs: UCPR r 51.12(4)(e)

36. The applicant does not contend that there are any reasons why an order for costs should not be made in favour of the respondent if the application is refused.

Whether the applicant consents to the application for leave being dealt with in the absence of the public and without attendance of any person: UCPR r 51.12(4)(f)

37. The applicant does not consent to the application for leave being dealt with in the absence of the public and without the attendance of any person.

Whether the application should be heard with the argument on the appeal: UCPR r 51.12(4)(g)

38. The application for leave should be heard with the argument on the substantive appeal.

A list of relevant authorities and legislation: UCPR r 51.12(4)(h)

39. N/A

Summary

40. For the reasons set out above, leave to appeal should be granted.

David Birch

per J.L.

J.L. Atanaskovic
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28 July 2025