WRITTEN SUBMISSIONS

COURT DETAILS	
Court	Supreme Court of New South Wales, Court of Appeal
Division	Court of Appeal
Registry	Sydney
Case number	2025/00197791
TITLE OF PROCEEDINGS	
Applicant	**John Atanaskovic**
First Respondent	**Birketu Pty Ltd (ACN 003 832 392)**
Second Respondent	**WIN Corporation Pty Ltd (ACN 000 737 404)**
Number of Respondents	**7**
FILING DETAILS	
Filed for	**Birketu Pty Ltd (ACN 003 832 392),** First Respondent, and **WIN Corporation Pty Ltd (ACN 000 737 404),** Second Respondent
Filed in relation to	Directions of 1 September 2025
Legal representative	Craig Anthony Powell, HWL Ebsworth Lawyers
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CERTIFICATION	

This and the following 10 pages are the First and Second Respondents' Response to Application for Leave to Appeal, which document is suitable for publication pursuant to paragraph 27 of Practice Note No. SC CA 1

Craig Anthony Powell

Solicitor for the First and Second Respondents

JOHN ATANASKOVIC

V

BIRKETU PTY LTD & ORS

NSW Court of Appeal Proceeding No. 2025/00197791

First Respondent's Response to Application for Leave to Appeal

A. Opposing Party's Argument: UCPR r 52.13(b)(i)

Background

1. The history of these proceedings is set out in two judgments of the primary judge in *Atanaskovic Hartnell v Birketu Pty Ltd* [2019] NSWSC 1006 (**first judgment**) and *Atanaskovic Hartnell v Birketu Pty Ltd – Supervisory Jurisdiction* [2020] NSWSC 573 (**second judgment**); and the judgment of the Court of Appeal in *Atanaskovic Hartnell v Birketu Pty Ltd* [2021] NSWCA 201, (2021) 105 NSWLR 542 whereby the applicant's appeal of the first and second judgments was dismissed with costs.

2. The present application is for leave to appeal from the interlocutory judgment of the primary judge on 28 April 2025, where the primary judge ordered, once more, a stay of execution upon judgments entered in favour of the applicant by way of orders made on 16 September 2019 and 3 July 2020 for legal costs claimed by the applicant against its former client, the first respondent (**Birketu**). The orders staying execution of those judgments were entered on 16 September 2019 and 7 July 2020 respectively.

3. It is necessary to briefly traverse the history which, contrary to the matters asserted in the applicant's argument, discloses that the primary judge was well aware of the effect of the orders made on 28 April 2025 and was under no misapprehension as to the orders in respect which his Honour was once more imposing a stay consistent with the finding made by the primary judge on a number of occasions that all accounts in this proceeding be settled once the parties' costs entitlements have been finalised and that the applicant not be entitled to enforce any judgment for its fees or costs until that time.

Initial orders staying execution on 16 September 2019 and 3 July 2020

4. The basis of the orders staying execution of the judgments for the applicant's costs or fees on 16 September 2019 and 3 July 2020 was explained by the primary judge in *Atanaskovic Hartnell v Birketu Pty Ltd – Costs* [2020] NSWSC 779 (**costs judgment**)[1], which paragraphs were expressly referred to by the primary judge when once more ordering the stay in the primary judgment the subject of this application for leave to appeal[2], where his Honour held:

> *[21] Birketu argued that the amount of any costs payable to it be set off against the verdicts AH has obtained. I do not think that this is a matter of set off. However, I consider that in the present case, which is a dispute between a lawyer and his former client where there has been a found breach of professional duty in respect of which the Court has exercised supervisory jurisdiction, all accounts should be brought to finality together.*
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> *[22] There is presently a stay in place, on terms under which Birketu has paid money into court. AH moves that the stay should be dissolved. I do not accept this decision. In my view, the process of assessment should occur first. I would expect the parties to act expeditiously in furthering that process.*
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> *[23] A stay of the additional verdict was not addressed by the parties. I will give them to apply in case they do not reach agreement about what should happen.*
>
> *[24] I also do not consider that the monies in Court should be paid out, unless the parties otherwise agree, until there is finalisation of all accounts between them. The leave to apply which I propose to grant can be utilised in connection with this issue as well.*

5. The parties agreed that the "*additional verdict*" be stayed pending further order of the Court, albeit other orders concerning the funds paid into Court were the subject of argument by way of position paper, and the stay was entered by the Court on 7 July 2020 in the context of a finding, noted on the orders, that the other

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[1] White Folder, Tab K, p. 43.
[2] *Atanaskovic Hartnell v Birketu Pty Ltd* [2025] NSWSC 424 at [7], White Folder, Tab D, p.23.

orders "*proposed by the defendants are inconsistent with the notion that all accounts will be settled at the end*" [3].

6. There was no separate appeal from the costs judgment or the primary judge's reasoning therein as concerns the orders staying execution of the judgments for the applicant's costs or fees in the applicant's Notice of Appeal filed in respect of the first and second judgments, which appeal was dismissed with costs.

7. Both parties proceeded to assessment of the costs awards in their favour which were ordered in the costs judgment. That assessment was released to the parties on 14 August 2024 with Birketu's costs assessed at $711,401.81 and the costs of the applicant assessed at $493,957.13. On 5 September 2024, Birketu filed an Application for Review as concerns the award in favour of the applicant, pursuant to section 83 of the *Legal Profession Uniform Law Application Act 2014* (NSW) (**LPULA**). Following that appeal being made to a review panel, the operation of the determination of the costs assessor is suspended: s. 86(1) LPULA. The appeal to the Review Panel has not yet been determined and the parties continue to meet requests for information from the Review Panel.

Applicant's application to have moneys paid out of Court

8. On 12 September 2024, the matter was relisted on the application of the applicant seeking orders for the payment out of the funds from Court. During argument at that hearing, the primary judge determined that of the moneys paid into court, $711,401.81 was to be paid forthwith to Birketu and the balance, including any interest, was to be paid forthwith to the applicant[4]. His Honour also vacated the orders staying execution on the judgments entered in favour of the applicant on 16 September 2019 and 3 July 2020 for legal costs in the context of the following exchange (12/09/24 TT 11.44 – 12.41)[5]:

> HUTTON: Your Honour, proposed order one in para 1 of our submissions, there were stays in place--
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> HIS HONOUR: I'll vacate them.
>
> HUTTON: --on my client enforcing its judgment debts. Yes.

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[3] White Folder, Tab J, p.36.
[4] White Folder, Tab P, p.65.
[5] White Folder, Tab O, pp.62-3.

HIS HONOUR: What about that, Mr Vincent?

VINCENT: Yes, that was part of the regime whereby the moneys were paid into Court.

HIS HONOUR: I'll vacate them.

VINCENT: Yes. Just so my friend, obviously there's been occasion to set off by virtue of these amounts. Interesting if execution is subsequently sought. Anyway, - yes.

HIS HONOUR: There's a stay of execution of what?

VINCENT: Of the judgment represented by the moneys paid into Court.

HIS HONOUR: But we all know that these moneys are representative, or supposed to have been, representative of the possible outcome on costs.

VINCENT: Correct.

HIS HONOUR: And you've got an appeal,

VINCENT: Correct.

HIS HONOUR: And so for him to try an execute on those orders now would be not good.

VINCENT: Yes, your Honour.

HIS HONOUR: I'm going to vacate those orders.

VINCENT: Yes.

HIS HONOUR: But I'll give you liberty to apply if somebody tries to execute, you can come straight up here.

VINCENT: Court pleases.

HIS HONOUR: I don't think that'll happen.

VINCENT: Yes, your Honour.

HIS HONOUR: Order number five made on 16 September 2019 and order number seven and order number three made on 7 July 2020, are vacated.

9. The day after this hearing, on 13 September 2024, the applicant proceeded to file an appeal to the Review Panel of the costs assessment determination in favour of Birketu. Both appeals are presently before the same Review Panel and are yet to be determined and as such the operation of all costs assessments in the matter

are suspended under s. 86(1) LPULA and the "*outcome on costs*" has not be finalised.

Applicant proceeds to unsuccessfully execute on the judgment

10. Despite the warning of the primary judge that any attempt to "*execute on*" the judgment debts "*would be not good*", while the costs of those proceedings are subject to an appeal (12/09/24 TT 12.25-26)[6] and correspondence between the parties culminating in a letter from HWLE on 17 February 2025[7], on 24 Aprill 2025 the applicant proceeded to obtain garnishee orders seeking execution on the judgment debts, which were served on Nine Entertainment Co Holdings Ltd (**NEC**) for $495,495.66. On becoming aware from NEC that the garnishee orders had been served, Birketu immediately applied to have the matter relisted before the primary judge pursuant to the grant of leave.

No misapprehension of effect of, or basis for, orders by primary judge

11. The applicant seeks to seize upon the terminology used by his Honour concerning "orders for costs" at [1] of the primary judgment (**PJ**) and "judgment for costs" at [9], as well as the "catchwords to the judgment" to contend that his Honour did not understand that the applicant was seeking to enforce the 'principal judgment' and thus was under a fundamental misapprehension as to the effect of the orders which his Honour made[8]. This is simply not the case.

12. First, at [4] PJ[9], his Honour made reference to matters he had raised (on the transcript) at the hearing conducted on 12 September 2024, namely that there "*should not be enforcement by either party of any costs orders until finality on the amounts payable each way had been reached*": at [4]. The only exchanges at the hearing on 12 September 2024 concerning enforcement are as set out above, and were for the orders for judgment in respect of which the moneys paid into Court for the previous stay of "those orders" were described by the primary judge at the hearing on 12 September 2024 as "*moneys … representative, or supposed*

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[6] White Folder, Tab O, pp.63.
[7] Affidavit of Alyssa Emery dated 27 April 2025 at Annexure E, pp.22-4; Respondent's Supplementary Material pp.28-30.
[8] Applicant's Summary of Argument [**ASA**] at [8]-[10], White Folder, Tab C, pp.13-14.
[9] White Folder, Tab D p.23.

to have been, representative of the possible outcome on costs" (12/09/24 TT 12.16-17)[10].

13. Second, the primary judge, (at [6]-[7] PJ) made specific reference to his previous costs judgment in the following terms:

> "[6] In these circumstances and, surprisingly, the plaintiffs saw fit to issue a garnishee order to a debtor of the defendant, seeking to obtain enforcement of their full claim.
>
> [7] I regard this as entirely unacceptable in the context of proceedings between a lawyer and his former client where all accounts between them should be brought to finality together: see *Atanaskovic Hartnell v Birketu Pty Ltd – Costs* [2020] NSWSC 779 at [21] and [24]."

14. The reference at [6] to the applicant seeking to obtain enforcement of his full claim and the reference to the costs judgment makes plain that the primary judge well knew that the applicant was seeking to enforce the 'principal judgment' and the effect of his Honour's orders was to stay such enforcement. The reference in the judgment to costs orders in this context is to be understood where:

(a) the 'principal judgment', as described by the applicant in present argument, was for costs or fees claimed by the applicant against its former client, comprised in two 'orders' namely of 16 September 2019 and 3 July 2020;

(b) the primary judge referred to the 'principal judgment' in terms of "*those orders*" on 12 September 2024 when warning the applicant that to "*execute on those orders now would be not good*" (12/09/24 TT 12.25-6)[11];

(c) the primary judge referred to the transcript of the hearing on 12 September 2024 at [4] of the primary judgment;

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[10] White Folder, Tab O, pp.63.
[11] White Folder, Tab O, pp.63.

(d) on 12 September 2024 the primary judge granted "*liberty to apply if somebody tries to execute*" and said "*I don't think that will happen*" (12/09/24 TT 12.3425-6)[12];

(e) the moneys paid into Court for the previous stay of "*those orders*" were described by the primary judge at the hearing on 12 September 2024 as "*moneys …representative, or supposed to have been, representative of the possible outcome on costs*" (12/09/24 TT 12.16-17)[13];

(f) the primary judge had made previous findings that all accounts as between the parties should be brought to finality together: see *Atanaskovic Hartnell v Birketu Pty Ltd – Costs* [2020] NSWSC 779 at [21] and [24][14] and the notation to the orders of 3 July 2020 entered on 7 July 2020[15].

15. The primary judge was under no misapprehension whatsoever as to the effect of, and basis for, the orders made on 28 April 2025, which orders were to give effect to the previous clear findings of the primary judge and in respect of conduct which the applicant had been well warned against on 12 September 2024, some seven months earlier. Contrary to the submission of the applicant at [13] ASA, no *House v The King* error was made by the primary judge as alleged by the applicant.

16. Further, there were simply no costs orders to execute on other than the 'principal judgment' due to the operation of the costs awards of the costs assessor being suspended under s. 86(1) LPULA where both parties had filed applications for review of those awards to the Review Panel on 5 and 13 September 2024 which matters were addressed in Birketu's note to the primary judge at [8][16] and where the primary judge had regard to the parties notes during the hearing: TT 2.17-21 and the applicant's counsel confirmed to his Honour during that hearing that "*neither party is capable of presently enforcing the costs assessments arising from your Honour's orders*": (TT2.34-5).

17. Lastly, the primary judge had previously ordered a stay of the orders made 16 September 2019 and 3 July 2020 (without complaint from the applicant) and was

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[12] White Folder, Tab O, pp.63.
[13] White Folder, Tab O, pp.63.
[14] White Folder, Tab K, p. 43.
[15] White Folder, Tab J, p.36.
[16] White Folder, Tab G, pp.30-31

aware of the nature of the application being made and the effect of the orders sought when effectively reinstating those stays.

Conclusion as to "sharp practice"

18. The applicant erroneously states (at ASA [14]) that the 'sole basis' that his Honour gave for ordering a stay was that the applicant's attempt to enforce its 'principal judgment' constituted sharp practice: [8] PJ. The primary judge in fact referred to the hearing on 12 September 2024 ([4] PJ]) and the prior judgment of *Atanaskovic Hartnell v Birketu Pty Ltd – Costs* [2020] NSWSC 779 in reiterating that "*all accounts*" between the parties "*should be brought to finality together*" ([7] PJ) as the basis for the stay.

19. In stating at [8] PJ, that the "*epithet 'sharp practice' comes to mind*", the primary judge was clearly cognisant of the clear warning made to the applicant on 12 September 2024 that to "*execute on those orders now would be not good*" (12/09/24 TT 12.25-6)[17] where the primary judge obviously referred to the 'principal judgment' in terms of "*those orders*". This is also in the context of the findings made against the applicant in the first judgment including that he was an *'unsatisfactory witness'*[18], and the conclusions of the Court of Appeal that the resiling from an undertaking given by the applicant to Birketu was dishonourable conduct by the applicant which warranted the exercise of the Court's supervisory jurisdiction to preclude the applicant from recovering its fees on the investigation invoice[19].

Alleged failure to advert to relevant principles

20. The principles concerning an application for a stay are well known and involve the resolution of the question of "*what the interests of justice require*", where the Court has a wide discretion whether to grant a stay: *Black Label Developments Pty Ltd v McMenemy* [2025] NSWCA 114 at [47]-[55]. The primary judge had previously stayed the orders for judgment made on 16 September 2019 and 3 July 2020 and was aware of the applicable principles. For reasons clearly elucidated to the parties in the costs judgment as well as the application for payment out of monies on 12 September 2024, the primary judge made clear that

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[17] White Folder, Tab O, p.63.
[18] First Judgment at [349].
[19] *Atanaskovic Hartnell v Birketu Pty Ltd* [2021] NSWCA 201, (2021) 105 NSWLR 542 at [139].

the interests of justice requires that "*all accounts*" between the parties "*should be brought to finality together*" ([7] PJ).

21. In *Black Label Developments Pty Ltd v McMenemy* [2025] NSWCA 114 the Court held, in the context of applications for a stay, that the weight to be given to any particular factor by a judge exercising the broad discretion to award a stay may vary substantially, depending on the nature or circumstances of the case: (at [53]). The Court continued (at [53]):

> "Generally speaking, and subject to the well-established principles by which discretionary decisions may be reviewed on appeal, the weight to be given to relevant factors is a matter for the judge exercising the discretion: *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66**;** [2008] HCA 42 at [138]."

22. Further, Counsel for the applicant was given an opportunity to address the primary judge on matters now raised in argument and chose not to: TT 3.8-15. It is not open to the applicant to now criticise the approach adopted by the primary judge in light of this choice.

B. Reasons why leave should not be granted: UCPR r 52.13(b)(ii)

23. The applicant must establish that the proposed appeal raises an issue of principle, a question of public importance or a clear injustice that is more than merely arguable: *Gorilla Rush Pty Ltd v Fraser* [2025] NSWCA 191 at [13]. No question of principle arises. The principles concerning stay applications are well known and recently reviewed by this Court in the context of s135 of the *Civil Procedure Act 2005* (NSW): *Black Label Developments Pty Ltd v McMenemy* [2025] NSWCA 114 at [47]-[55].

24. There is no question of public importance or a clear injustice that is more than merely arguable. Indeed, the parties are proceeding with the appeal process before the Review Panel and on 12 August 2025 Birketu paid the applicant its costs as awarded by the High Court of Australia[20]. There is no injustice to the

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[20] Affidavit of Craig Powell dated 25 August 2025 at [4]; Respondent's Supplementary Material p.56.

applicant in awaiting the outcome of an appeals process before the Review Panel that they themselves have initiated. Leave to appeal should not be granted.

C. Whether the opposing party consents to the application for leave being dealt with in the absence of the public and without the attendance of any person: UCPR r 52.13(b)(iii)

25. The respondent consents to the application for leave being dealt with in the absence of the public and without the attendance of any person.

D: Whether the application should be heard with the argument on the appeal, and why: UCPR r 52.13(b)(iv)

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

E. Any other relevant matters, including terms to which leave should be subject and contentions concerning costs: UCPR r 52.13(b)(v)

27. The respondent contends that costs should follow the event.

F. A list of relevant authorities and legislation: UCPR r 52.13(b)(vi)

Atanaskovic Hartnell v Birketu Pty Ltd [2021] NSWCA 201, (2021) 105 NSWLR 542

Black Label Developments Pty Ltd v McMenemy [2025] NSWCA 114

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