

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
Legal representative reference	JLA 6167
Contact name and telephone	Torey Politis, (02) 9777 7000
Contact email	tsp@ah.com.au

CERTIFICATION

This and the following 10 pages are the Applicant's Reply Submissions, which document is suitable for publication pursuant to paragraph 27 of Practice Note SC CA 01.

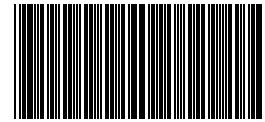


Torey Politis

Solicitor for the Applicant



Filed: 26 September 2025 3:09 PM



D00028E4YJ

Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00197791

TITLE OF PROCEEDINGS

First Applicant	John Atanaskovic
First Respondent	BIRKETU PTY. LTD. ACN 003831392
Second Respondent	WIN CORPORATION PTY LTD
Number of Respondents	7

FILING DETAILS

Filed for	John Atanaskovic, Applicant 1
Legal representative	JOHN LJUBOMIR ATANASKOVIC
Legal representative reference	
Telephone	02 9777 7000
Your reference	6167

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (260925 - AH Reply Submissions.pdf)

[attach.]

Antanaskovic v Birketu Pty Ltd & Ors

NSW Court of Appeal

Applicant's reply submissions

26 September 2025

Primary judge's misapprehension as to orders made

1. In the brief judgment the subject of this application to appeal, the primary judge repeatedly referred to the effect of his orders below on that date as imposing a stay of "orders for costs" (at [1]), "costs orders" and "judgment for costs" (each at [9]).
2. There does not appear to be any dispute that the effect of his Honour's orders was to impose stays over the principal judgments in the applicant's favour, not any "orders for costs" as that phrase is usually understood in the context of civil litigation.
3. Nevertheless, Birketu denies that the primary judge was under a misapprehension as to the effect of his orders. Birketu's arguments, and the applicant's responses to them, are set out below.

"Costs orders" does not refer to judgments in debt for unpaid legal fees

4. First, Birketu appears to contend that his Honour's statement that he was imposing a stay of the operation of "orders for costs" should be understood as encompassing the principal judgments in favour of the applicant: see RWS[14](a).
5. Orders 1 and 2 of the Court's orders of 16 September 2019 were (White Folder tab I):
 - 1 Judgment for the plaintiff against the first defendant in respect of the invoices numbered B10580, B10559, B10528, B10561 and B10582 (save for the matters in respect of invoice number B10582 remaining to be determined, the investigation invoice issue) in the amount of \$858,966.92 inclusive of \$40,094.73 interest to 9 August 2019.
 - 2 Judgment for the plaintiff against the second defendant in respect of the invoices numbered B10557 and B10579 in the amount of \$115,692.97 inclusive of \$5,583.97 interest to 9 August 2019.

The judgment relating to those orders was *John Ljubomir Atanaskovic and the persons named in Schedule A trading as Atanaskovic Hartnell v Birketu Pty*

Ltd [2019] NSWSC 1006.

6. Order 2 of the Court's orders of 3 July 2020 was (White Folder tab J):

2. Judgment for the plaintiffs against the first defendant for \$16,142.76 (inclusive of pre-judgment interest to 3 July 2020 of \$1,212.62).

The judgment relating to those orders was *John Ljubomir Atanaskovic and the persons named in Schedule A trading as Atanaskovic Hartnell v Birketu Pty Ltd – Supervisory Jurisdiction* [2020] NSWSC 573.

7. The applicant's underlying claims were for unpaid legal fees and disbursements. The principal judgments made in the applicant's favour therefore reflected the applicant's entitlement to unpaid legal fees. Birketu appears to contend that on that basis his Honour did not err by describing the orders above as "orders for costs".

8. That submission should be rejected. There is a distinction between:

- (a) a final judgment for a sum of money, where the underlying claim was a contractual claim for unpaid legal fees due under various written retainer agreements; and
- (b) an "order for costs" or a "costs order" or a "judgment for costs". The natural meaning of those phrases, in the context of civil litigation in the Supreme Court of NSW, is an order under s 98 of the *Civil Procedure Act 2005*. That provision relevantly provides that "costs are in the discretion of the court", which "has full power to determine by whom, to whom and to what extent costs are to be paid".

That distinction is fundamental. For example, there is an appeal as of right to this Court in respect of the former (assuming the \$100,000 threshold is met), but leave is required in respect of the latter under s 101(2)(e).

9. At AWS[14], Birketu seeks to draw support from the fact that, at J[6], the primary judge referred to the applicant seeking to enforce his "full claim". However, there is no reason to conclude that the primary judge was there referring to the applicant's "full claim" under the principal judgments referred to in paragraphs 5-6 above, as opposed to the applicant's "full claim" under the costs assessment in his favour. On the contrary, each previous reference in the judgment to the applicant's entitlement was to his entitlement under the costs order in his favour: see e.g. J[2]

and J[5]. The primary judge seems to have simply misunderstood that the amount which the applicant had sought to enforce was the outstanding component of the principal judgment debts in his favour, rather than his entitlement under the costs order in his favour.

10. If there were any ambiguity at all, the catchwords to the judgment (which are in some respects more explanatory than the judgment itself) describe the decision as determining 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”.
11. For the reasons set out above, this Court should reject Birketu’s submission that the primary judge’s references to “costs orders” should be read as references to the principal judgments made in the applicant’s favour.

Birketu’s reliance upon 12 September 2024 hearing is misplaced

12. Second, Birketu submits that this Court should not find that the primary judge was under a misapprehension as to the effect of his orders on 28 April 2025 because he had understood the issues in dispute when the matter had been previously before him on 12 September 2024: RWS[14](b)-(e). This Court should not accept that argument.
13. As a general proposition, the Court should not draw an inference as to the primary judge’s understanding as expressed in the judgment in respect of which leave to appeal is sought, by examining the primary judge’s understanding as expressed in his comments on transcript during a hearing some seven months earlier.
14. As Birketu notes at RWS[12] and [14](c), in his 28 April 2025 judgment at J[4] the primary judge did refer to the transcript of the hearing on 12 September 2024. His Honour there summarised his previous comments in that hearing as that there should not be “enforcement by either party of any costs orders” (emphasis added). However, as Birketu appears to accept at RWS[12], the primary judge there was incorrect as to the effect of his comments as recorded in that transcript.
15. The discussion during the 12 September 2024 hearing concerned the applicant’s attempt to obtain money owed under the principal judgments referred to in paragraphs 5-6 above, not an attempt to enforce any costs orders: see e.g. White Book Tab O, T10.4-5: “all of this is a judgment debt owed to us by reason of the initial unpaid fees”. Birketu argued (entirely correctly) in the 12 September 2024

hearing that the effect of s 86(1) of the *Legal Profession Uniform Law Application Act 2014* was that the applicant could not enforce the costs assessment under the costs order in his favour given that Birketu had an extant application to a review panel to review that costs assessment: White Book Tab O, T3.9-10. Accordingly, there was simply no discussion during the 12 September 2024 hearing as to whether it would be appropriate to seek to enforce any costs orders.

16. It follows that the reference in the judgment at J[4] to the 12 September 2024 transcript only serves to reinforce that the primary judge misunderstood the issues before him as at 28 April 2025.
17. In any event, the actual events of the 12 September 2024 hearing (rather than the primary judge's inaccurate summary of them) still support the applicant's position.
18. The proceedings were re-listed for the 12 September 2024 hearing on the application of the applicant. Birketu's position prior to the hearing was that the application for payment out of funds from Court was "hopelessly premature", on the basis that any payment could only occur after Birketu's High Court appeal was determined, the costs review panel had determined the review application, and the parties had exhausted any rights of appeal from the costs review panel's determination: White Folder Tab M at [4], [7].
19. The primary judge did not accept those submissions. At White Book Tab O, T4.11-39, the primary judge was taken to his previous comments in his 2020 costs judgment (*Atanaskovic Hartnell v Birketu Pty Ltd – Costs* [2020] NSWSC 779; White Book Tab K) to the effect that:
 - (a) the stay over the principal judgments should remain in place until costs assessment had occurred: at [20];
 - (b) the moneys held in court should not be paid out until there was a finalisation of all accounts between the parties: at [24].
20. The primary judge noted the extraordinary delay in having the costs orders assessed, at e.g. White Book Tab O, T5.5, 5.9: "It's taken four years to get the assessment done... What causes this to get delayed like that?"
21. The primary judge expressed the view that "some professional fees are going to be payable out of this money in court to [the applicant], some amount, and the balance is going to be paid to [Birketu]": White Book Tab O, T8.5-7. That is, the

- primary judge accepted that the significant delay in the costs assessment process had changed the position since the 2020 costs judgment, so that his views expressed at [20] and [24] of that judgment that there should be no payments out of the money in court to discharge the principal judgments were no longer apposite.
22. Counsel for Birketu agreed with that position, so long as his client was “fully protected”: White Book Tab O, T8.9-T8.17.
 23. There was lengthy discussion as to the likely consequence of Birketu’s success in its High Court appeal on the likely net costs position, once the costs assessments were resolved: White Book Tab O, T6.1-5, T7.1-25, T9.1-T10.30. The basis for that discussion was to work out, if money was paid out of Court to the applicant in respect of the principal judgments, what would be necessary to “fully protect” Birketu against possibility that it would succeed in its High Court appeal and then subsequently have to recover some amount from the applicant (see e.g. T9.9-10: “I think that would be full protection”).
 24. His Honour’s intention was that, after the payments out of Court “you all go home”... “then you can fight it out between you” ... “then the moneys out of Court and then you don’t have to come back here ever”: White Book Tab O, T10.30-40. As his Honour further observed at T13.13-15: “I understand the antagonism and the desire to keep the plaintiff out of any money at all. But I’m thinking at the end of the day, that’s that”.
 25. Consistently with that view, his Honour then accepted that the existing stays over the principal judgments should be vacated: White Book Tab O, T11.44-12.30. In the orders which his Honour made following the hearing, his Honour did vacate those stays and ordered payment of the balance of the money held in Court (approximately \$310,000) to the applicant: White Book tab P, orders 1 and 3. Again, his Honour’s orders are only explicable on the basis that his Honour accepted that his views expressed at [20] and [24] of his 2020 costs judgment were no longer apposite.
 26. Birketu places reliance upon the primary judge’s comments at White Book Tab O, T12.25-26 that, for the applicant to try to “execute on those orders now would be not good”. That position is explained by his Honour’s observation at T12.16-17 that the money paid out was “representative, or supposed to have been representative, of the possible outcome on costs”, and observation at T12.21 that

“you’ve [i.e. Birketu has] an appeal”. The appeal to which his Honour referred there was the High Court appeal. The potential consequences of that appeal on the likely net costs position had dominated the discussion at the hearing. His Honour was observing that an attempt to enforce the outstanding principal judgment amounts while the High Court appeal was still undetermined would be “not good”. That is because to do so would be inconsistent with the basis upon his Honour had divided the amount held in Court between the parties, and would leave Birketu exposed in the event that it was successful in its High Court appeal, causing a significant shift in the likely net costs position.

Birketu’s reliance upon 2020 costs judgment is misplaced

27. Third, Birketu submits that the Court should not find that the primary judge was under a misapprehension as to the effect of his orders on 28 April 2025 because those orders are said to be consistent with the comments which his Honour made in his costs judgment of 19 June 2020 (*Atanaskovic Hartnell v Birketu Pty Ltd – Costs* [2020] NSWSC 779; White Book Tab K): RWS[14](f).
28. However, as noted in paragraphs 21 and 25 above, his Honour accepted during the 12 September 2024 hearing, and in his subsequent orders, that the position that the applicant should still be prevented from receiving payment in respect of the principal judgments in his favour was no longer sustainable in light of the significant passage of time.

Error in conclusion as to “sharp practice”

29. At RWS[18]-[19], Birketu contends that the primary judge’s finding as to “sharp practice” was based on the primary judge’s summary of the 12 September 2024 hearing and his 19 June 2020 costs judgment. However, as noted above:
 - (a) as noted in paragraphs 14-16 above, the primary judge’s summary in his judgment of the 12 September 2024 hearing was incorrect (erroneously referring to enforcement of costs orders);
 - (b) as noted in paragraphs 21 and 25 above, the primary judge’s comments during the 12 September 2024 hearing, and the orders made as a result, involved an acceptance that his obiter dicta observations in his 19 June 2020 costs judgment were no longer apposite.
30. Accordingly, the applicant’s issuance of a garnishee order to seek to enforce the

outstanding principal judgment debts did not constitute sharp practice – it was not an attempt to enforce a costs judgment (where that would have been impermissible); and was consistent with the primary judge’s position in the previous hearing, in which he discharged the stays over the principal judgments and released funds referable to those judgments to the applicant.

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

31. At RWS[22], Birketu submits that the applicant was given the opportunity to raise matters in argument and chose not to, citing his Honour’s comment at White Book tab F, T3.14-15: “Do you want to be heard further on this?” However, prior to that comment, his Honour had said:

- (a) at T1.35-36: “You and I can debate this ... I’m not going to allow this to stand.”
- (b) at 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.”
- (c) At T3.8-14 (immediately prior to the invitation to make further submissions upon which Birketu relies): “I won’t give a judgment unless you want me to give reasons, Mr Birch, but I don’t propose to permit this. I’m going to stay all those judgments in accordance with the proffered orders that have been given. I just don’t think this is appropriate for this to have occurred and lest there be any doubt about it, I’m not proposing to sanction it in any way.”

32. Accordingly, his Honour had made it abundantly clear from the opening of the short hearing that, whatever submissions were made to him, he was proposing to set aside the garnishee orders and reimpose the stays. In those circumstances the applicant cannot be criticised for not referring the primary judge to the principles to which his Honour otherwise failed to have regard.

Reasons why leave should be granted

33. Birketu submits at RWS[24] that “there is no injustice to the applicant in awaiting the outcome of an appeals process before the Review Panel that they themselves have initiated”. This submission repeats the primary judge’s error in confusing enforcement of the principal judgment debts in the applicant’s favour with

enforcement of the costs judgment in the applicant's favour. It is also factually inaccurate: there were two costs review applications before the costs review panel: the first made by Birketu on 5 September 2024, and the second made by the applicant on 13 September 2024. It is the costs review application by Birketu which prevents the applicant from enforcing the costs assessment in his favour.

34. The injustice to the applicant arises from the prejudice in being prevented from enforcing the outstanding principal judgment debts in his favour of nearly \$500,000, more than 6 years after judgment, where there has never been any appeal against those judgments. The primary judge appears to have reverted to the position (contrary to his position at the 12 September 2024 hearing) that any enforcement of the principal judgments must wait until the costs assessments are resolved. That position is unjust in light of the extreme delays in having the costs assessed (principally a result of Birketu's proceedings culminating in its unsuccessful High Court appeal). As the primary judge observed during the 12 September 2024 hearing, fairness now dictates that the applicant be permitted to enforce its principal judgment debts, so long as Birketu remains protected against the possibility of success in its costs review application: White Book Tab O, T8.5-11.
35. As at the date of these submissions, the costs review panel has indicated that it has completed the two reviews and forwarded the relevant certificates and reasons for determination to the Manager, Costs Assessment. However, the parties are yet to receive those documents.
36. However, even after the costs review panel's decisions, Birketu has an appeal as of right to the District Court or Supreme Court under s 89(1) of the *Legal Profession Uniform Law Application Act 2014*. There are then further avenues to the Court of Appeal (whether by way of judicial review or application for leave to appeal).
37. If the judgment below is not set aside and Birketu exercises its rights of appeal against the costs review panel's decisions under s 89(1) of the LPULAA, the applicant will still be unable to enforce the primary judgments in his favour for a considerable period of time. As his Honour observed in argument during the 12 September 2024 hearing, Birketu has to date been motivated by antagonism and a desire to keep the applicant out of any money at all: T13.13-14.

Conclusion

38. For the reasons set out above and in the applicant's summary of argument, this Court should grant leave to appeal and uphold the appeal.

A handwritten signature in black ink, appearing to be 'DB' followed by a stylized flourish.

David Birch
8228 7124
7 Wentworth Selborne Chambers
davidbirch@7thfloor.com.au

26 September 2025