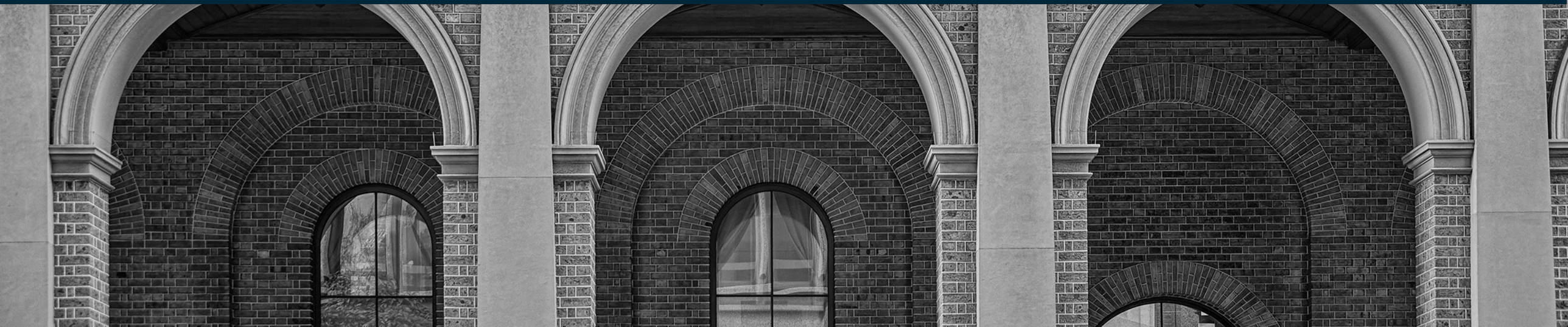


GREENWAY CHAMBERS

Biller Beware – Lessons in the Court's Inherent Supervisory Jurisdiction

Through the lens of *Hartnett v Bell* [2023] NSWCA 244



Statutory Sources

Supreme Court Act 1970 (NSW)

(23) The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.

Legal Profession Uniform Law (2014) (NSW)

264 Jurisdiction of Supreme Courts

(1) The inherent jurisdiction and powers of the Supreme Court with respect to the control and discipline of Australian lawyers are not affected by anything in this Chapter…



Traditional Uses of the Jurisdiction

- Preserving subject matter of proceedings
- Staying and referring proceedings to arbitration
- Ordering non-publication of proceedings
- Grant or refuse a right of appearance, including by way of intervener
- Strike out scandalous matters in court documents
- Prevent abuse of process
- Dismiss proceedings for want of prosecution
- Case management
- To make self-executing orders



Traditional Uses of the Jurisdiction

- Order summary judgment
- Costs, including personal costs orders and indemnity costs
- To set aside default or irregularly obtained judgments
- Amend judgments to correct errors
- Contempt
- Order stays pending appeal
- Avoid abuse of process
- Exercise protective jurisdiction, including children and incapable persons
- Jurisdiction over legal practitioners



Mason's Classic Statement

"The control over the conduct of proceedings extends, at least in the Supreme Court, to dealing with practitioners for professional misconduct, negligence or default in the conduct of cases in the Court. This jurisdiction is both punitive and compensatory in that the Court may strike off or suspend the legal practitioner, or order him to pay the costs of either his own client or the opposite party. Similarly, a court's inherent jurisdiction over its own officers extends to ordering them to deliver a bill of costs and tax it."



Atanaskovic Hartnell v Birketu [2020] NSWSC 573

[29] The Court has a well-established inherent supervisory jurisdiction, to which solicitors are amenable, ***which is designed to impose on them higher standards than the law applies generally***: *United Mining & Finance Corporation Limited v Becher* [1910] 2 KB 296 at 304; *Wade v Licardy* (1993) 33 NSWLR 1 at 6-9. A solicitor is expected to act honourably and ethically. A solicitor is expected to keep her or his word.

[30] This jurisdiction is disciplinary and compensatory. It is not exercised for the purposes of enforcing legal rights, ***but for the purpose of ensuring honourable conduct on the part of the Court's own officers***. It is distinct from any legal rights or remedies of the parties, it is unaffected by anything which affects the strict legal rights of the parties, and it is not limited to technical principles: *Re Gray* [1892] 2 QB 440 at 443 per Lord Esher MR; *R & T Thew Limited v Reeves (No 2)* [1982] 1 QB 1283 at 1285; *Countrywide Banking Corporation Limited v Kingston* [1990] 1 NZLR 629 at 637; *Australian Guarantee Corporation (NZ) Ltd v East Brewster Urquhart & Partners* [1990] 2 NZLR 167 at 173; *McIlriath v Ilkin* [2007] NSWSC 911 at [10].



Hartnett v Bell [2023] NSWCA 244

- Bell was executor and sole beneficiary of his mother's (**Mabel**) will
- Mabel passed away in 2013 – left real property in Ballina
- Property had mortgage of $30,000 to Gwendoline Deakin-Bell pursuant to former family law property settlement
- Bell failed to obtain grant of probate – Gwendoline sued for the mortgaged sum and possession
- Hartnett acted for Gwendoline
- Proceedings not defended – orders made by consent by Davies J in April 2016
- Property sold in October 2016



Hartnett v Bell [2023] NSWCA 244

- Costs order made by Davies J in *Deakin-Bell v NSW Trustee and Guardian* [2016] NSWSC 540 (the **Possession Proceedings**):

5. After the Property has been sold, the plaintiff be entitled to apply the proceeds of sale towards payment of:

> 5.1 the principal sum of $30,000 owing under the registered mortgage dated 11 November 1994 (the Mortgage);
>
> 5.2 pursuant to the terms of the Mortgage, and on an indemnity basis, the costs and expenses she has incurred in relation to the Mortgage and these proceedings to date, and any such costs that she incurs in the future; and
>
> 5.3 pre-judgement interest on the principal sum of $30,000.00 pursuant to section 100 of the Civil Procedure Act 2005 (NSW) for the period September 2013 to 29 April 2016.



Hartnett v Bell [2023] NSWCA 244

- Hartnett indicated to NSW Trustee & Guardian that fees, including for uplift and care and consideration, would be $302,000 to $330,000
- Bell retained new solicitors – began agitating on question of costs
- 14 November 2016 Hartnett issues invoices
- 17 November 2016 – Gwendoline signed a “Specific Trust Account Authority” authorising:
  - $39,089.57 to Gwendoline
  - $288,601.03 to himself
  - $33,834.45 to the Supreme Court of New South Wales



Hartnett v Bell [2023] NSWCA 244

- Bell obtained grant of probate
- Bell attempted to obtain information regarding Hartnett's invoices
- Costs assessment in February 2018:
  - Labelled party/party but done in accordance with terms of Davies J's orders
  - Not participated in by Hartnett or Gwendoline, though noted that he was charging for reading material
  - Costs assessed at $40,000 in absence of material less the cost of the assessment
- Proceedings commenced in September 2020



Procedural History

1. Summons seeking declarations
2. Application to set aside for improper service – Slattery J reopened Possession Proceedings to run alongside Equity Proceedings
3. Slattery J made orders that proceedings continue in absence of representative of Gwendoline's estate
4. Extensive procedural directions and judgment given on 12 October 2021 – raised inherent supervisory jurisdiction
5. Ordered Amended pleadings
6. Ordered Points of Claim identifying how inherent supervisory jurisdiction is engaged



Primary Judgment

1. Costs assessment was binding as between Gwendoline and Bell
2. Exorbitant overcharging is a recognised basis for the Court to exercise its inherent supervisory jurisdiction overs solicitors
3. That Bell was not a client of Hartnett was no impediment to exercising the jurisdiction (relying on Hammerschlag J)
4. In light of the exorbitant overcharging, it was an appropriate case to exercise the Court's inherent supervisory jurisdiction
5. "As Mr Bell was only obliged to pay $37,345.50 towards Gwendoline's legal costs pursuant to Justice Davies' order, I consider the inherent jurisdiction is engaged to do justice between the parties and Mr Hartnett must pay the sum he was paid over and above that sum from the proceeds of sale to Mr Bell." at [129]



Hartnett v Bell [2023] NSWCA 244

1. Grounds 1 and 2 of the appeal were that [114] – [115]:
    a) It was inappropriate to "extend" the jurisdiction to the circumstances to include payment to a mortgagor
    b) Even if it was appropriate, the Primary Judge's discretion miscarried because, *inter alia*:
        - Mortgagee was not a party to proceedings below
        - Respondent did not send costs for assessment
        - Costs assessment was not binding on Hartnett
        - The Primary Judge inappropriately quantified the costs



Hartnett v Bell [2023] NSWCA 244

1. The gravamen of Hartnett's argument was that the invocation of the inherent supervisory jurisdiction was not necessary to do justice as there were alternate remedies, namely:
   a. Third party costs assessment
   b. Mortgagee accounting/tracing
2. Relied on *McGuirk v University of New South Wales* [2010] NSWCA 104 at [187]



Hartnett v Bell [2023] NSWCA 244

Court dismissed that argument, finding at [127] – [128]:

[127] It is important to bear in mind that Sackville AJA commenced [187] of his judgment in *McGuirk* with the observation that "[t]here is authority for the proposition that the court's inherent jurisdiction is not displaced by rules of court, provided the exercise of the inherent jurisdiction does not contravene the requirements of the rules of court: *Landsal* at 476, and recognised the tension between that authority and what his Honour went on to say. What was said in *Landsal* has been noted at [123(4)] above. *Landsal* is also consistent with *Woolf* where Dixon J identified three sources of power justifying a particular course. One of those sources was the Court's general supervisory jurisdiction over solicitors which is a recognised aspect of a superior court's inherent jurisdiction.

[128] *Woolf* is inconsistent with any contention that the Court's supervisory jurisdiction may not be exercised where alternative statutory avenues may provide a remedy…



Hartnett v Bell [2023] NSWCA 244

1. Accepted that the gateway to the exercise of the jurisdiction is dishonourable conduct – see [131] – [137] in particular
2. Earlier “threatening and evasive” conduct would have also justified the use of the jurisdiction
3. Having regard to all circumstances, it was appropriate to exercise the jurisdiction



Difference between ISJ and Statute

- Court of Appeal summarised at [123], including:

Statutory provisions dealing with the issue of lawyers' costs are complementary to this inherent jurisdiction, and do not oust it: *Woolf* at [678]; *Pryles & Defteros (a firm) v Green* [1999] 20 WAR 541; [1999] WASC 34 at [24] (*Pryles*); see also *Re Jabe; Kennedy v Schwarcz* [2021] VSC 106 at [46] (*Re Jabe*) and s 264 of the Legal Profession Uniform Law 2014 (NSW). The two jurisdictions are enlivened by different acts and must be analysed separately: *Whyked Pty Limited v Yahoo!7 Pty Limited* [2008] NSWSC 477at [18]



Difference between ISJ and Statute

- Contrast with section 99 *Civil Procedure Act 2005* (NSW)

(1) This section applies if it appears to the court that costs have been incurred - -

  (a) by the serious neglect, serious incompetence or serious misconduct of a legal practitioner, or

  (b) improperly, or without reasonable cause, in circumstances for which a legal practitioner is possible.



Mortgage Costs

The Court can intervene in private contractual arrangements.

Clause 5 in the Memorandum of Mortgage Q860000 provided:

"In addition to all costs and expenses which the mortgagor may be liable at law or in equity to pay in respect of this security, or otherwise in relation thereto, the mortgagor will upon demand pay all costs and expenses, including costs as between solicitor and client, incurred by the mortgagee in consequence or as between solicitor and client, incurred by the mortgagee in consequence or on account of any default on the part of the mortgagor hereunder or incurred by the mortgagee for the preservation of or in any manner in reference to this security, all of which costs and expenses shall from the time of payment or expenditure thereof respectively until repaid to the mortgagee by the mortgagor be deemed principal moneys covered by this security, and mortgagor be deemed principal moneys covered by this security…"



Conflict between Solicitor and Client Interests

- Abundant caution is necessary when there are competing interests between solicitor's fees and client's interests
- *Malouf v Constantinou* [2017] NSWSC 923



Calling Witnesses

"… a judge making use of such material as she had in order to undertake a quantification exercise in circumstances where the one party with peculiar and personal knowledge, and the ability, to explain the charges declined to take the few short steps to the witness box in order to do so. It is trite that such a circumstance provides a ready basis for the drawing of a negative inference against that party: Cullen v Welsbach Light Co of Australasia Ltd (1907) 4 CLR 990 at [1002]; [1907] HCA 3; Ellor v Selfridge and Co (1930) 46 TLR 236. As Rich J put it in Insurance Commissioner v Joyce (1948) 77 CLR 39 at [49]; [1948] HCA 17:

> "[W]hen circumstances are proved indicating a conclusion and the only party who can give direct evidence of the matter prefers the well of the court to the witness box a court is entitled to be bold."



Time Limit to Bring Application

- Rule 36.16 *Uniform Civil Procedure Rules*:

(3) In addition to its powers under subrules (1) and (2), the court may set aside or vary any judgment or order except so far as it - -

> (a) determines any claim for relief, or determines any question (whether of fact or law or both) arising on any claim for relief, or
>
> (b) dismisses proceedings, or dismisses proceedings so far as concerns the whole or any part of any claim for relief.

(3A) If notice of motion for the setting aside or variation of a judgment or order is filed within 14 days after the judgment or order is entered, the court may determine the matter, and (if appropriate) set aside or vary the judgment or order under subrule (1), as if the judgment or order had not been entered.



Time Limit to Bring an Application

- On the proper construction of rule 36.16, an order for fixed costs, so long as there has been no order that costs be paid "as agreed or assessed" is a *further* order and not an application to vary an earlier order
- Section 98(4) *Civil Procedure Act 2005* (NSW) enables a court to specify costs in a gross sum any time before the costs assessment process has been undertaken

