PARTIES:	ELDERS TRUSTEE AND EXECUTOR COMPANY LIMITED and RICHARD GILMORE HOWARD as Executors of the Estate of ALICE MARIE HOWARD AND THE ESTATES OF OSCAR SCHOMBURGK HERBERT AND EVAN SCHOMBURGK HERBERT
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN OF TERRITORY
JURISDICTION:	COURT OF APPEAL EXERCISING TERRITORY JURISDICTION
FILE NO:	AP21 of 1995
DELIVERED:	Darwin, 16 May 1996
HEARING DATES:	29 and 30 April 1996
JUDGMENT OF:	Gallop, Kearney and Thomas JJ

CATCHWORDS:

Legal Practitioners - Unqualified persons - Interstate practitioners not admitted to practise in the Territory may conduct litigation in the Territory by engaging local solicitors as agents -
TNT Bulkships Limited v Hopkins (1989) 65 NTR 1, not followed.

Legal Practitioners - Duties and liabilities - Solicitors on the record are responsible to the Court for actions or defaults of their interstate principal solicitors who are not admitted to practise in the Territory -
Re Booth, ex parte Wake (1833) 3 Deac & Ch 246, applied.
Porter v Kirtlan [1917] 2 IR 138, applied.

Costs - Taxation - Costs of Territory solicitors as agents are taxable as between the client and the client's interstate solicitors who are not admitted to practise in the Territory, and recoverable -
In Re Pomeroy & Tanner [1897] 1 Ch 284, applied.
Supreme Court Rules (NT), Order 63, discussed.
Legal Practitioners Act (NT), s136, discussed.

Costs - Taxation - Fees of counsel in Territory litigation conducted by interstate principal solicitors who are not admitted to practise in the Territory, are recoverable on taxation as the principal's disbursements -
In Re Pomeroy & Tanner [1897] 1 Ch 284, applied.

REPRESENTATION:

Counsel:

Applicant:	P. M. Biscoe QC
Respondent:	J. B. Waters

Solicitors:

Applicant:	Cridlands
Respondent:	Ward Keller

Judgment category classification:	A
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IN THE COURT OF APPEAL OF
THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

AP 21 of 1995

ON APPEAL from the judgment of Martin CJ in proceedings No. J118 and 119 of 1980 and 211 of 1985

BETWEEN

ELDERS TRUSTEE AND EXECUTOR COMPANY LIMITED and RICHARD GILMORE HOWARD as Executors of the Estate of ALICE MARIE HOWARD
Appellant

AND:

THE ESTATES OF OSCAR SCHOMBURGK HERBERT AND EVAN SCHOMBURGK HERBERT
Respondent

CORAM: GALLOP, KEARNEY and THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 16 May 1996)

GALLOP J:

This is an application for leave to appeal and the hearing of an appeal against the orders of Martin CJ made on 21 July 1995 in relation to the costs recoverable from

the Estates of Oscar Schomburgk Herbert and Evan Schomburgk Herbert on taxation of the bills of costs of the successful respondent in an action brought in this Court against the respondent and Koolpinyah Station Pty Limited, seeking to challenge the Wills of the deceased and certain inter vivos transactions entered into by them shortly prior to their deaths in 1972. The order of the Court was not sealed and issued until 21 August 1995.

On 21 July 1989 Nader J. found for the respondent and Koolpinyah Station Pty Limited in those proceedings. On appeal to the Court of Appeal of this Territory, the Court ordered on 28 August 1990 that the appeal be dismissed and that the Estates of the Herbert Brothers pay half of the costs of the applicant in the proceedings before Nader J., such costs to be assessed on an indemnity basis. On 12 November 1992 a summons for taxation and bill of costs were filed on behalf of the unsuccessful applicant before Nader J., namely Elders Trustee and Executor Company Limited and Richard Gilmour Howard as the executors of the Estate of Alice Marie Howard.

On 29 March 1993 a notice of objection to the bill of costs was filed on behalf of the Estates of the Herbert Brothers. After a number of interlocutory applications in relation to particulars, the filing of affidavits and other miscellaneous matters, the Master referred to a Judge the

determination of the preliminary objections taken by the Estates in the notice of objection.

In his reasons for judgment, the Chief Justice relevantly held:

1.(a) Morgans' charges for professional services made to their clients up to 26 October 1988 are not recoverable from the Plaintiff (sic Estates);

(b) Morgans' proper costs after 26 October 1988 are recoverable from the Plaintiff;

(c) Cridlands' proper costs are recoverable from the Plaintiff;

(d) Fees paid to Counsel who were admitted to practice in the Territory and held the appropriate practising certificates at the relevant time are recoverable from the Plaintiff.

Subsequently, by order made on 14 September 1995, Martin CJ ordered:

(1) that the title of the application for leave to appeal and the appeal be amended to substitute "the Estates of Oscar Schomburgk Herbert and Evan Schomburgk Herbert" for "Laurence Cheong Ah Toy" as the respondent to the appeal; and

(2) that in so far as it be necessary, the application for leave to appeal be heard concurrently with the hearing of the appeal.

Martin CJ made certain further orders which it is not necessary to repeat.

The present application for leave to appeal and the appeal are against order 1.(a) set out above. Leave to appeal is necessary pursuant to s.53 of the *Supreme Court Act* because the orders of Martin CJ are interlocutory.

In the event of leave to appeal being granted, the Estates have cross-appealed against the orders of Martin CJ allowing Cridlands' costs prior to 26 October 1988 and counsel's fees incurred by Morgans or on their instructions prior to 26 October 1988.

The grounds upon which leave is sought are set out in the affidavit of the applicant's solicitor, Neville John Henwood, sworn 18 August 1995 in the following terms:

(i) the decision is contrary to general principles relating to the indemnity nature of a costs order;

(ii) the decision is inconsistent with the principles and reasoning of Kearney J. in TNT Bulkships Ltd -v- Hopkins (1989) 65 NTR 1;

(iii) by reason thereof, the correctness of the decision is attended with sufficient doubt to warrant it being reconsidered on appeal;

(iv) in any event, it is appropriate that the principles relied on in the decision and in the decision in TNT Bulkships be considered by the Court of Appeal;

(v) further, if the order were left to stand, the taxation will proceed on the basis directed by the decision;

(vi) substantial injustice would result to the Applicant if the order were left to stand as the Applicant would thereby be deprived of a large portion of its costs; and

(vii) further, substantial injustice may result if the order is left to stand if it be the case (as is contended by the Respondent) that Morgans' bill of costs is required to be redrafted in accordance with Order 63 of the Supreme Court Rules."

It was common ground at the hearing of the application for leave that prior to the taxation of the bill of costs the applicants had paid all the costs charged by Morgans, solicitors of Adelaide.

The main thrust of the applicants' case for leave was that the orders of Martin CJ punish the applicants for the failure of the Adelaide solicitors to get themselves admitted as legal practitioners in this Court prior to 26 October 1988, the orders have brought about an unjust result so far as the applicants are concerned; the reasons for judgment and the orders made are contrary to authority and legal principle; and the Rules of this Court themselves provide for the allowance of the costs of the Adelaide solicitors incurred prior to 26 October 1988.

Before examining the reasons for judgment of the learned primary Judge, it is necessary to refer to some of the evidence before him. By his affidavit sworn 12 July 1993, David Glyn Morgan, the solicitor and principal of the firm known as Morgans, deposed to having been a member of

the firm when the firm first took instructions in the matter. The firm acted as the South Australian solicitors for the relatives of the Herbert Brothers. They obtained initial instructions from the relatives and on behalf of the relatives collated and conveyed instructions to Messrs Cridland and Bauer (and subsequently Cridlands), in relation to the subject proceedings and performed such legal work as was appropriate to be performed in South Australia as a matter of practical necessity.

Pursuant to an agreement entered into between the relatives of the Herbert Brothers and their authorised executors, the parties were divided into such geographical groupings as were necessary as a matter of practical expediency, as the relatives resided variously in the United Kingdom, Western Australia, New South Wales, Victoria and South Australia. The South Australian relatives, as a term of that agreement, collated the instructions of the parties. Certain of the represented relatives used their own solicitors and five such relatives had other solicitors involved in giving advice or instructions. Pauline Elizabeth Payne, as executor of the Estate of Richard Henry Schomburgk (deceased), resided in Adelaide in the State of South Australia and was appointed the co-ordinator of all the relatives.

From May 1985 the only practitioners at Morgans who performed work in relation to the matter were one Brohier

and Morgan. They were both admitted to practice as legal practitioners in this Court on 26 October 1988 and obtained practising certificates pursuant to the *Legal Practitioners Act* of the Northern Territory on that date. He further deposed that all accounts rendered by his firm and Cridlands in respect of legal costs and disbursements in the proceeding had been paid in full by or on behalf of the relatives of the Herbert Brothers or their authorised executors.

By his affidavit sworn 12 December 1993, Neville John Henwood, a solicitor then in the employ of Cridlands, deposed that he had the conduct of the action and that Cridlands performed legal work and incurred professional fees as principal solicitors in the total sum of $109,275. All accounts rendered by Cridlands during and after the proceedings have been paid in full.

By his further affidavit of 1 February 1995 and his evidence before the primary Judge on 16 December 1994, Henwood related some of the litigious steps performed by Cridlands in the action and collation of material for the purpose thereof.

Reasons for judgment of the primary Judge

It is first necessary to refer to certain findings of fact made by the primary judge. Those findings of fact were made in the light of the evidence and his Honour's own

examination of hundreds of documents placed in evidence in the proceedings. He noted that there were no documents which comprise any formal contract or otherwise or that confirm the relationship between the relatives and the two firms of solicitors or between the two firms. He found, however, that the documents do clearly show that the relatives regarded Morgans as the solicitors acting on their behalf. They were advised by Morgans and the instructions of the relatives in relation to the proceedings were related by Morgans to Cridlands. It was Morgans who chose Cridlands to act in the Territory. The bulk of the direction regarding the gathering of evidence came from Morgans and it was the solicitors of that firm who took most of the statements of witnesses, many of them in Darwin. Morgans drafted many of the court documents, including affidavits.

Cridlands' role in the main in regard to documents was to engross and file them, and in the case of affidavits of deponents living in the top end of the Territory, to have them sworn. Morgans drafted many of the pleadings and where required had them settled by counsel briefed by Morgans. Cridlands were simply instructed to file and serve them. Counsel were chosen by Morgans, although sometimes at the suggestion of Cridlands, and Morgans played a primary and major role in briefing counsel, attending at conferences and at trials. Morgans did

everything in relation to the complex arrangements for collecting funds on account of costs and paying them, including counsel's fees. Cridlands sent accounts for their work to Morgans. Cridlands, on Morgans' instructions, prepared court documents and briefed counsel in relation to some interlocutory matters. Their name appears as the solicitors for the defendants (the present appellants) on the court files (once as "agents for" Morgans). Morgans dealt directly with the Public Trustee and the Public Trustee's solicitor in all major matters concerning the involvement of the Public Trustee in the proceedings.

His Honour found that in the terminology employed between the solicitors and by others in reference to them, Morgans were the ones "acting for" the relatives and Cridlands were "the agents". Morgans consistently referred to Cridlands as "the agents". Cridlands sometimes referred to Morgans as "our instructing solicitors" or the like, and when writing to Morgans, spoke of the relatives as "your clients". They were important findings of fact.

His Honour further concluded that every indicia as to which of the two firms was acting for the relatives and which was acting on the instructions of the other pointed to Morgans and Cridlands respectively. His Honour then went on to observe that in the circumstances it was understandable that Morgans were in the position of being

the solicitors to whom the relatives looked for advice and to whom they gave instructions. It was abundantly clear, his Honour said, that in doing so the relatives were not using Morgans as a conduit to relay instructions to Cridlands. Morgans were not simply the agents of the relatives for the purposes of instructing Cridlands. They were heavily involved in the conduct of the litigation and had control of the relatives' side of it. None of that suggested to his Honour that there was anything improper, in the legal ethical sense, in the arrangements come to.

The trial in the Territory commenced on 26 October 1988. On the same day, the South Australian solicitors from Morgans were admitted to practice and obtained practising certificates. There was no significant alteration in the relationship of the clients after that date to that which prevailed before. Finally, his Honour observed "if Cridlands were part of the team … there is no doubting that Morgans were the captain".

His Honour correctly stated the principles of law applicable to orders for costs. He said:

> "'An order for costs indemnifies the successful party in litigious proceedings in respect of liability for professional fees and out-of-pocket expenses reasonably incurred in connection with litigation' *Kelly v Noumenon Pty Ltd* (1988) 47 SASR 182 at 184; per McHugh J. in *Latoudis v Casey* (1990) 170 CLR 534 at 566. His Honour continued:

> 'The rationale of the order is that it is just and reasonable that the party who has caused the other party to incur the costs of litigation should reimburse that party for the liability incurred."

As costs between party and party are awarded as an indemnity, a person not in a position to claim to be indemnified is not entitled to party and party costs.

If, by reason of some statutory prohibition, a successful party is not liable to pay any costs to the solicitor for the party, the party cannot recover costs from the opposite party, *Irving v Gagliardi; ex parte Gagliardi (No 2)* (1895) 6 QLJ 200. Sir Samuel Griffith said:

> 'There is no doubt that, as a general rule, costs are given by way of indemnity. For instance, it has been held that if, by reason of the operation of some statutory prohibition, the successful party is not liable to pay his own solicitor any costs, he cannot recover any costs from the opposite party.'

I would add to the statement of principles a reference to *Cachia v Hanes & Anor* (1993-94) 179 CLR 403 where the High Court considered the question whether an unrepresented litigant was entitled, on taxation of his bill of costs, to compensation for the loss of his time spent in the preparation and conduct of his case and for out of pocket expenses being his travelling expenses. The majority (Mason CJ, Brennan, Deane, Dawson and McHugh JJ) observed at p.410-11:

> "It has not been doubted since 1278, when the *Statute of Gloucester* 1278 (UK) 6 Edw. I c.1

> introduced the notion of costs to the common law, that costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation. They were never intended to be comprehensive compensation for any loss suffered by a litigant. As Coke observed of the *Statute of Gloucester*, the costs which might be awarded to a litigant extended to the legal costs of the suit, 'but not to the costs and expences of his travell and losse of time' (Coke, *Second part of the Institutes of the Laws of England* (1797), p.288. See also *Howes v Barber* (1852) QB 588, at p.592 [118 ER 222, at p.224]; *Dowdell v Australian Royal Mail Steam Navigation Co.* (1854), 3 El & Bl 902, at p.906 [118 ER 1379, at p.1381]."

Later their Honours said (at p.414):

> "Even less do the Rules provide for the substitution of an antithetical basis for the accepted basis upon which a taxation of party and party costs is conducted. We speak of antithesis because, as we have said, the accepted basis for an award of costs is that they are by way of indemnity. They are intended to reimburse a litigant for costs actually incurred; they are not intended to compensate for some other disadvantage or inconvenience suffered by the litigant."

The Meaning of Costs

In its primary sense, the word "costs" means the remuneration of a solicitor for professional services rendered to a client and such payments made in connection with those services as are sanctioned as professional payments by the general and established custom and practice of the profession. But where a judgment or order provides for the payment of costs by the party to another party <u>out of a fund</u>, the word is used in a different sense; such

costs do not belong to the solicitor; they are the property of the client and are given to him as an indemnity or partial indemnity against the costs he has incurred in the proceedings (Oliver, *Law of Costs*).

Returning to Martin CJ's approach, his Honour held that it is only solicitors as defined who are recognised for the purposes of the Court's costs rules. That lawyers from other parts of Australia might be easily enough admitted to practice here and obtain a practising certificate is not to the point. He held that the law is that competence must be recognised by local authority and that the practitioner be subject to the discipline of the courts and the Society in the manner prescribed.

Morgans did not subject themselves to the scrutiny of the admission process or the regulation and discipline flowing through the Law Society. They conducted legal practice in the Territory without lawful authority to do so. That their clients may have been liable to pay for the services which they rendered and the fact that they have paid for those services does not mean that the clients can obtain an indemnity for those outgoings for professional charges. Otherwise schemes of local regulation of the members of the legal profession common to all parts of Australia would be set at nought. That conclusion was disputed by the applicants.

The solicitors of Morgans failed to bring themselves within the law of the jurisdiction until they wished to take their place in the body of the Court as instructing solicitors for the purpose of the hearing. Significantly his Honour held that they were not "solicitors" within the meaning of the Territory costs rules prior to then and their charges for professional services made to their clients up to that time were not such as to attract the benefit of the costs order. That conclusion was also disputed by the applicants.

His Honour further held that if, on the other hand, Cridlands, who were solicitors admitted in the Territory, had been the principals and Morgans their agents, the fees payable to Morgans would have been recoverable. Likewise that conclusion was disputed by the applicants.

For the purpose of deciding whether Morgans' fees were recoverable on the taxation, it is not strictly necessary, in my opinion, to categorise them as the principals or as Cridlands' agents. In so far as it is necessary to do so, however, it is perfectly plain on the whole of the evidence that they were in fact the principals and that Cridlands were their agents. Morgans took instructions from the clients pursuant to their retainer. Because they were not admitted to practice in the Northern Territory they engaged Cridlands as their Darwin agents. Whatever Cridlands did in the conduct of the litigation was

as the Darwin agents of Morgans. Such an arrangement is absolutely common place, not only in the Northern Territory but in other parts of the Australian judicial system where it is necessary to engage local practitioners having the right to practise in the particular jurisdiction and an address for service which will be within the geographical limits prescribed by the particular rules of court. Contrary to the conclusion of Martin CJ, I am firmly of the opinion that this was such a case.

The matter has been succinctly stated in relation to the comparable situation in England in *Cordery on Solicitors*, 8th Edition, at p.279 where it is stated that in relation to the opposite side and to third parties, the London agent whose name is on the record is treated as the solicitor in the action and as such he is liable for costs occasioned by misconduct on the part of the country solicitor *Re Booth, ex p Wake* (1833) 3 Deac & Ch 246; *Porter v Kirtlan* [1917] 2 IR 138. The agent has power to waive irregularities (*Griffiths v Williams* (1787) 1 Term Rep 710), grant indulgence (*Wallace v Willington* (1737) Barnes 256), give consent (*Withers v Parker* (1860) 5 H & N 725), or compromise, and otherwise bind the client in the ordinary course, and documents are generally produced at the agent's office (*Prestney v Colchester Corpn* (1883) 24 Ch D 376). But the agent's authority is limited by the authority of and in accordance with the directions of his

immediate principal, the country solicitor, and he cannot go beyond them, nor take any steps in a cause after his authority is revoked (*Freeman v Fairlie* (1838) 8 LJ Ch 44; *Malins v Greenway* (1847) 10 Beav 564). A country solicitor on the record in a district registry as agent for a London solicitor has a general authority to compromise an action on behalf of the client provided that he acts bona fide and reasonably, and not in defiance of his direct and positive instructions (*Re Newen, Carruthers v Newen* [1903] 1 Ch 812, 72 LJ Ch 356). The onus of proof of authority, as against the clients, is on the solicitor and similarly is on the agent as against his principal (*Maries v Maries* (1853) 2 Eq Rep 361).

Submissions on behalf of the applicants

The first submission was that the applicants are entitled to recover Morgans' fees because they had paid them. In support of that submission counsel for the applicants relied upon ancient authorities as well as more recent decisions of this Court.

The first authority was *TNT Bulkships Limited v Hopkins* (1989) 65 NTR 1. In that case Kearney J. considered a review of the taxation of a plaintiff's bill of costs. The taxing master upheld submissions by the defendant liable to pay those costs and disallowed all the items in the bill. The objections were on the basis of the carrying on of legal work, including the briefing of

counsel, by an unqualified person. The litigation was conducted by a Sydney firm of solicitors who engaged Darwin solicitors for the purpose. In other words, the arrangement was the common place type of arrangement to which I have referred earlier. The Sydney law firm (Dawsons) conducted the litigation by two partners, neither of whom had practising certificates in the Northern Territory. One partner (Davis) was admitted to practice as a legal practitioner in the Northern Territory. The other (Conley) was neither admitted nor had a practising certificate. There was an admission by the plaintiff seeking a review of the taxation that Dawsons had "carried out the bulk of the (legal) work" and had the "carriage of the action, including the briefing of counsel".

Kearney J. held that:

(1) a successful plaintiff cannot recover the costs of his uncertificated solicitor from the defendant except as to moneys he has already paid to that solicitor on account of his costs in the action;

(2) no costs were recoverable by the plaintiff on taxation for professional work done by Conley as he was not a legal practitioner in the Territory;

(3) no costs were recoverable by the plaintiff on taxation for professional work done by the uncertificated practitioner Davis, with the practical rider that any moneys paid by the plaintiff to Davis prior to taxation on account of Dawsons' costs and disbursements in getting up the case (including counsel's fees and the Darwin agents' costs) were recoverable if taxed and allowed;

(4) s.22(4) of the *Legal Practitioners Act* (NT) is directed specifically at a person who is a legal practitioner but who lacks a practising certificate; and

(5) as it had been admitted that Dawsons were the principal solicitors for the plaintiff and had the carriage of the matter, with the Darwin firm acting as their Territory agent, the admitted reality could not be brushed aside so as to reverse the roles played by their respective firms.

His other conclusions are not relevant for the purposes of the first submission.

In reaching his conclusions, Kearney J. referred to s.22(4) of the *Legal Practitioners Act*, which is in the following terms:

"A legal practitioner is not entitled to recover any costs or disbursements in respect of any work of a professional nature done by him as a legal practitioner if, at the time at which the work was done, he was not the holder of a current unrestricted practising certificate or restricted certificate class 2."

A "legal practitioner" is defined as (s.6):

"(a) except in Parts VII, VIII, IX and X, means a person whose name is on the Roll of Legal Practitioners;

(b) in Parts VII, VIII, IX and X, means a person whose name is on the Roll of Legal Practitioners and who holds an unrestricted practising certificate, save that -

(i) it does not in any of those Parts include a local Counsel or visiting Counsel; and

(ii) it does not in Part VII, VIII or IX include the Solicitor-General of the Northern Territory, the Director of Public Prosecutions, a person acting in the name of the Solicitor for the Northern Territory, the holder for the time being of the office of Director of the Australian Legal Aid Office, Northern Territory, Commonwealth Attorney-General's Department, or the Director of Legal Aid within the meaning of the *Legal Aid Act*;

(c) includes a person whose name is not on the Roll of Legal Practitioners but who has notified the local registration authority under section 19(1) of the *Mutual Recognition Act* 1992 of the Commonwealth and whose application under that Act has not been determined."

Kearney J. reached the view that s.22(4) in terms prevents a legal practitioner as defined in the Act from suing his client for his professional fees and expenses if he did not hold a practising certificate when he carried out the legal work in question; in those circumstances the uncertificated practitioner has no remedy against his client for the debts owed him by his client, ie his costs.

I agree with that conclusion, but for present purposes it is not relevant to the question whether Morgans' fees are recoverable on the taxation of the successful applicants' bill of costs. It is common ground for the purposes of the first submission that neither Brohier nor Morgan was a legal practitioner as defined in the Act and accordingly s.22(4) would not apply to either of them.

Nevertheless, in the course of considering whether the operation of s.22(4) should be limited to prohibiting only the uncertificated solicitor from recovering his costs from his own client, and does not have the consequence that the (successful) client is thereby prohibited from recovering those costs against the unsuccessful party, Kearney J. reviewed the ancient cases on the subject and concluded that neither Davis nor Conley was entitled to recover costs and disbursements from their client and it followed that if they were not, neither was Dawsons. He cited *Fullalove v Parker* (1862) 31 LJCP 239; *In re Jones*

(1869) LR 9 Eq 63; *Re Hope* (1872) 7 Ch App 766; *Fowler v Monmouthshire Railway and Canal Company* (1879) 4 QBD 335; and *In Re Sweeting* [1898] 1 Ch 268.

He also held, however, that s.22(4) of the Act did not prohibit the successful plaintiff from recovering from the unsuccessful defendant on taxation advances it had already paid to Dawsons on account of their proper costs and disbursements in the litigation.

I do not agree otherwise with the conclusions reached by Kearney J. about the operation of s.22(4) in relation to recovery of costs on a party and party taxation, but, in my opinion, he was correct, whatever the operation of s.22(4), in deciding that costs and disbursements already paid by the client are recoverable. All the old cases support that proposition.

In *Young v Territory Insurance Office* (unreported decision of Kearney J., 14 December 1993), his Honour returned to the operation of s.22(4) in a review of a successful plaintiff's taxation of her bill of costs. His Honour repeated what he had said in *TNT Bulkships* to the effect that normally the solicitors on the record are the principal solicitors, in that sense. He expanded what he meant in the following passage:

> "It is the solicitors on the record to whom the Court looks for the fulfilment of professional responsibilities; for that purpose, they are the only solicitors recognized by the Court as acting

> in the case. Interstate solicitors not admitted to practice in the Territory cannot conduct litigation in this Court. If in fact they are responsible for the carriage of an action in this Court - and therefore 'principal solicitors' in that sense - as Dawsons admittedly were in *TNT Bulkships* (supra), s22(4) of the Legal Practitioners Act prevents them from recovering their costs or disbursements in the action from their client, as far as the law of the Territory goes. In turn, if the client succeeds in obtaining an order for costs in its Territory action, it cannot seek to recover those costs from the other party unless it has already paid them to its (interstate) solicitor. This is because costs are an indemnity and a party cannot recover a sum in excess of its liability to its own solicitor."

As I stated earlier, I do not agree with his conclusion that interstate solicitors not admitted to practice in the Territory cannot conduct litigation in this Court and that if they are responsible for the carriage of an action in this Court, and therefore principal solicitors in that sense, s.22(4) prevents them from recovering their costs or disbursements in the action from their client. But, I do agree that if the client succeeds in obtaining an order for costs in its Territory action, and has paid the costs of the interstate solicitor, the client can recover those costs from the other party.

It is common ground in this case that Morgans' costs and disbursements have been paid by the present applicants. That is an end of the matter and should result in the appeal being allowed.

The Legal Practitioners Act and Rules of Court

However, there are other reasons why the applicants are entitled to recover Morgans' costs, even if the applicants had not paid them prior to taxation. The authority for allowing those costs on taxation is contained within the *Supreme Court Rules* themselves. Order 63 provides for the taxation of bills of costs. By definition, "costs" includes disbursements (O.63.01). "An order for costs in the proceeding" has the effect that the party in whose favour an order for costs is made in a proceeding is entitled to costs of the proceeding (O.63.02). Where the Court makes an order for the payment of costs, the costs may be taxed without an order for taxation (O.63.10).

Costs in a proceeding which are to be taxed are taxed on the standard basis or the indemnity basis (O.63.25). On a taxation of costs on the indemnity basis all costs shall be allowed except to the extent that they are of an unreasonable amount or have been unreasonably incurred (O.63.27). A disbursement may be included in a bill notwithstanding that it has not been paid if the bill states that fact and on the taxation the disbursement may be allowed if it is paid before the taxation and that disbursement takes place (O.63.41).

Where a bill includes a charge for work done by a lawyer practising in a place out of the Territory, (a) the charge shall be shown as a disbursement, and (b) so far as

practicable the charge shall, if allowed, be allowed at an amount appropriate to the place where the lawyer practises (O.63.42(1)). Where O.63.42(1) applies, a bill in taxable form of that lawyer's fees shall be attached to the bill of the party claiming the disbursement.

Where a solicitor acts as agent for a lawyer practising in a place out of the Territory, the professional fees of that lawyer shall not constitute a disbursement of the solicitor for the purpose of rule 63.41 so as to require payment of those fees before the commencement of the taxation (O.63.68).

Those rules were referred to by Martin CJ and he observed that they envisaged a solicitor who is a legal practitioner in the Northern Territory, taxing a bill in which he is an agent for a lawyer who is not a legal practitioner in the Territory and practising in a place out of the Territory, with the professional fees of that lawyer constituting disbursements of a solicitor. He held that this was not such a case. I have already said that in my opinion it was.

Those are express provisions in the Rules of Court relating to the fees payable to solicitors acting as agents for lawyers practising in a place out of the Territory. They have direct application to the taxation in the present matter. Martin CJ held that O.63.68 applies only where the fees of a lawyer out of the Territory are "charges properly

paid by the Territory solicitors". In my respectful opinion, his Honour was wrong about that. There is no statutory prohibition on the recovery of such fees.

Section 131 of the *Legal Practitioners Act* prohibits a person other than a legal practitioner from holding himself out to be, or to be qualified to perform many of the functions of, a legal practitioner. Section 132 prohibits such a person from drawing wills or other instruments creating or regulating rights between persons or relating to real or personal property for reward. Section 133 prohibits such a person from taking instructions for the preparation of papers to be used in respect of an application for a grant of probate or letters of administration.

An important provision is s.136 which provides, in sub-s.(1) that a legal practitioner shall not share the receipts from his practice with a person other than a legal practitioner. Sub-section (2) provides that sub-s.(1) does not apply to a legal practitioner to the extent that he shares the receipts from his practice with, inter alia, a person who carries on practice in a State or another Territory and for whom the legal practitioner, in the course of his practice, performs work of a professional nature as the agent of that person. Thus the Act which regulates the legal profession in the Territory

specifically provides for the situation that prevails in this case.

In concluding that the applicants were not entitled to recover Morgans' fees on the taxation, his Honour referred to the intention of Parliament to be derived from the *Legal Practitioners Act*, as reinforced by the Rules made by the Judges of this Court. I would not depart to the slightest degree from his Honour's observation that the intention of Parliament is to ensure that the interests of the public are served by protecting it against people professing to be qualified to practise law in the Territory but who are not, and that the public may be reasonably assured that those who are recognised by the Supreme Court as fit to practise in its jurisdiction and who have a licence by way of a certificate from the Law Society to conduct legal practice, generally are persons upon whom they might rely to competently see to their legal affairs, contentious or otherwise, within the Territory.

The two solicitors from Morgans did not profess to be qualified to practise law in the Territory and did not offend against that intention of Parliament. They engaged Cridlands to conduct the litigation in the Territory for the very reason that they were not qualified to practise in the Territory. It is true that they did not subject themselves to the scrutiny of the admission process or the regulation and discipline flowing through the Law Society.

Unless they were admitted to practice in the Territory they were not amenable to the regulation and discipline of the Society.

Cridlands as the Darwin agents were the solicitors on the record and were treated as the solicitors in the action. In so far as it is relevant to inquire, as Martin CJ did, as to who had the carriage or conduct of the matter, Morgans had the conduct of the matter and Cridlands as the solicitors on the record were responsible to the Court for the actions or defaults of Morgans.

Martin CJ's refusal to allow the applicants to recover Morgans fees prior to their admission on the grounds that he thought to do so would negate schemes of local regulation of the members of the legal profession was, in my opinion, an error. It did not follow established practices and authorities except *TNT Bulkships* which in my opinion was wrongly decided except on the point I have mentioned. The refusal to allow Morgans' fees was contrary to express provisions in the *Legal Practitioners Act* and the Rules of this Court, and it unjustly penalised the applicants who are out of pocket for Morgans' fees.

In my opinion the common place situation of Darwin solicitors conducting litigation as solicitors on the record for solicitors throughout Australia or elsewhere who have not been admitted to practice in the Territory is not to be impeded in any way by the spectre of substantial

litigation being conducted in the Territory pursuant to such an arrangement, and the un-admitted solicitor being at risk about proper recovery on behalf of the client of that solicitor's fees. Provided the fees are properly incurred and reasonable, they are always recoverable on taxation pursuant to an order for costs in the proceedings.

The common place practice is exemplified in the English context in *In Re Pommeroy & Tanner* [1897] 1 Ch 284 at p.287 where Stirling J. said:

> "Let us look at it as a matter of principle. It is well settled that between the client and the London agent of the country solicitor there is no privity. The relationship of solicitor and client does not exist between the client and the London agent. What is done by the London agent is part of the work done by the country solicitor for the client. The country solicitor does or may do part of the work personally. He does or may do part of his work through clerks whom he employs in the country. Or, if necessary - and the necessity occured in this case - he may do part of his work through a London agent. But as between the country solicitor and the client the whole of the work is done by the country solicitor. It follows, therefore, that the items which make up the London agent's bill are not mere disbursements, but are items taxable in the strictest sense as between the client and the country solicitor, just as much as items in respect of work done by the country solicitor personally, or by the clerk whom he employs in the country. That is the view which I take of the question as a matter of law."

Accordingly, I would grant leave to appeal and allow the appeal with a direction to the Master to the effect that Morgans' professional fees are recoverable by

the applicants from the Estates in respect of work done prior to 26 October 1988.

I turn to the cross-appeal by which the respondent seeks to appeal from that part of the judgment of Martin CJ which directed that the applicants could recover, after taxation, from the respondent: (a) costs charged by Cridlands prior to 26 October 1988; and (b) counsel's fees incurred by Morgans prior to 26 October 1988.

Martin CJ, in concluding that Cridlands' professional fees were recoverable, noted that Cridlands were at all times admitted and certificated. He said that so far as the costs order is concerned, they stood in no different position "to that than if the instructions they received had come direct from the defendants". Their proper costs were therefore within the costs order. He further said that in so far as Kearney J. ruled otherwise in *TNT Bulkships* (see p.9 of the judgment) he disagreed.

The submission by the respondent was that the costs paid by the applicants to Morgans, who then paid the costs to Cridlands, were not recoverable as against the respondent because Cridlands were clearly doing work for a non-legal practitioner which could not have been legally recovered from the applicants in any event.

That premise is fundamentally wrong. Cridland's costs were legally recoverable from the applicants by Morgans by reason of their retainer from the applicants,

and as a matter of course and in the ordinary way, Cridlands would look to Morgans for the payment from Morgans, not relying upon any privity of contract between Cridlands and the applicants. Again, this is a common place situation. Martin CJ was correct to order that they were proper costs within the costs order.

It was further submitted that Cridlands' fees were not recoverable by the applicants because there was no privity of contract between Cridlands and the applicants. It is correct that the relationship of solicitor and client does not exist between the client and the Darwin agents. Adapting the language in *In re Pommeroy & Tanner* above, what is done by the Darwin agents is part of the work done by the Adelaide solicitors for the clients. The Adelaide solicitors did part of the work personally or if necessary - and the necessity occured in this case - the Adelaide solicitors did part of their work through Darwin agents. But as between the Adelaide solicitors and the clients, the whole of the work was done by the Adelaide solicitors.

It follows that the items which make up the Darwin agents' bill are not mere disbursements but are items taxable in the strictest sense between the clients and the Adelaide solicitors, just as much as items in respect of work done by the Adelaide solicitors personally or by their office in Adelaide.

For the same reason, counsel's fees are Morgans proper disbursements for acting for the applicants. Morgans had every right and duty to incur those disbursements on behalf of the applicants and were honour bound to pay counsel. As proper disbursements in the action they were recoverable on taxation as the principal's disbursements. Again, this is a common place situation.

In any event, counsel for the respondent failed to address the fact that the payment of Cridlands' fees and counsel's fees had been made and, within the accepted principles stated above, that is the end of the matter. That the payment is conclusive seems to have been recognised by Martin CJ and in that he was correct.

The cross-appeal should be dismissed.

I would further order the respondent to pay the costs of the reference to Martin CJ and the costs of the application for leave and of the appeal and cross-appeal.

In summary, the orders I would make are:

(1) that leave to appeal be granted;

(2) that the appeal be allowed with a direction to the Master to the effect that Morgans' professional fees are recoverable by the applicants from the Estates in respect of work done prior to 26 October 1988.

(3) that the cross-appeal be dismissed; and

(4) that the respondent pay the costs of the reference to Martin CJ and the costs of the application for leave and of the appeal and cross-appeal.

KEARNEY J

I respectfully concur in the opinion of Gallop J as to the disposition of the appeal and cross-appeal. His Honour has set out the background to this appeal.

Counsel analysed in depth the implications of my decision in *TNT Bulkships Ltd v Hopkins* (1989) 65 NTR 1. In that case it was expressly stated that Territory litigation had been conducted for the successful plaintiff by two partners of a firm of Sydney solicitors, D. Neither of those solicitors held a Territory practising certificate; only one of them had been admitted to practise law in the Territory. D had engaged a Territory firm of solicitors, WK, as their agent; WK were the solicitors on the record in the proceeding, but it was conceded that they did not in fact conduct the Territory litigation. I said in *TNT Bulkships* at p3:

> "This was a vital admission by TNT; it determines the outcome."

The question was whether in those exceptional circumstances the successful plaintiff could recover on taxation the

costs and disbursements it had incurred in the litigation in the Territory carried out by the members of the firm D.

Section 22(4) of the Legal Practitioners Act prohibits a "legal practitioner" as defined in s6 from recovering his professional legal costs from his client, unless he holds a current Territory practising certificate. It was held in *TNT Bulkships* that s22(4) prohibited the uncertificated Sydney solicitor, a Territory legal practitioner, from recovering his costs of conducting the Territory litigation from his client, the successful plaintiff. As a consequence, since costs are in their nature an indemnity, it was held that the successful plaintiff could not recover from the defendant the professional costs of that solicitor, except to the extent of monies it had already paid him on account of his costs. The exception was warranted on the basis that he was entitled to retain monies paid to him for his work and, since the purpose of an award of costs is to indemnify the successful litigant, the plaintiff could properly seek to recover those monies on taxation. Rule 63.26 of the Supreme Court Rules allows a successful party to recover "a reasonable amount in respect of *all* costs reasonably incurred", and that is not limited to the professional costs of a certificated Territory legal practitioner. It was also held that the plaintiff could not recover on taxation the costs of the professional work carried out by

the other Sydney solicitor in his admitted conduct of the Territory litigation, because he had not been admitted to practise in the Territory.

TNT Bulkships Ltd is distinguishable from the present case by the admission in that case that the Territory litigation was conducted by the Sydney solicitors. No such admission was made in this case. To the contrary; Cridlands are the solicitors on the record and the bill of costs shows that they carried out directly a substantial part of the litigious work. In that situation I consider it is not open on taxation to enquire into whether in fact the solicitors on the record had the conduct of the litigation. As far as other parties to the litigation are concerned, absent express admission to the contrary, it is to be taken on taxation that the solicitors on the record had the conduct of the litigation.

Cridlands are to be treated as the appellant's solicitors in the litigation; monies payable to them for their proper professional costs are recoverable on taxation. Only fees payable to the certificated legal practitioners, Cridlands, can be recovered as costs for getting up the Territory case for trial; see *Minister for Works v Australian Dredging and General Works Pty Ltd* [1986] WAR 235. The proper charges and disbursements in that process of the interstate solicitors, Morgans, are taxable and recoverable under r63.42(1) as disbursements

in the litigation. This approach is similar to that taken by Diplock J on a review of taxation of costs in *McCullie v Butler* [1962] 2 QB 309 at 313, a similar case; it is sufficient to dispose of this appeal and cross-appeal.

I add that I consider it is crucial that a relationship of agency in the technical sense used in litigation of "principal solicitor and [town] agent" can only exist as between solicitors both entitled to practise in the jurisdiction. In r63.68 the word "agent" is not, in my view, used in that sense, but in the broader sense of agency. When a Territory solicitor acts for a party to litigation in Territory courts under instructions from that party's interstate solicitors, who are not entitled to practise in the Territory, he is not acting in that litigation as the interstate solicitor's agent in the sense that they are the "principal solicitors" and he is their "town agent". In these circumstances the Territory solicitor on the record is the solicitor responsible for the Territory litigation, as a professional legal agent for the interstate client. In such a case there is a contractual relationship between the client and the Territory solicitor, the instructions being transmitted by the interstate solicitors (not entitled to practise in the Territory) as the client's agent for that purpose. The position is akin to English solicitors acting on instructions of Irish solicitors or Scottish law agents as

exemplified in *Hyndman v Ward* (1899) 15 TLR 182 and *Murray v Honey* (1900) 44 Sol. Jo. 469. That position will obtain, while the profession and the right to practise are organised and controlled on a State and Territory basis, and not an Australia-wide, basis .

The observation in *TNT Bulkships v Hopkins* (supra) at p18:

> "The court looks only to the solicitor on the record, as far as responsibility for the conduct of the litigation is concerned; that does not affect the reality of the situation, when it comes to a matter of taxing costs"

should be read in the context of that case, where "the reality of the situation" was that the litigation admittedly had been conducted by lawyers neither of whom were certificated Territory legal practitioners. Absent such an admission, for taxation purposes the other party cannot go behind the solicitor on the record as the solicitor responsible for getting up the case for trial.

There is nothing in the decision in *Young v Territory Insurance Office* (unreported, Supreme Court (NT) (Kearney J), 14 December 1993) which is inconsistent with this analysis. In that case preliminary objections to taxation of the plaintiff's Bill of Costs were taken by the unsuccessful defendant on various grounds, including *TNT Bulkships* - type grounds. It applied to have those grounds heard and determined before taxation. The Master granted

the application and ordered that the plaintiff provide answers to defendant's questions probing the *TNT Bulkships* - type issue. An appeal was allowed and the order quashed, on the basis that any objections could best be dealt with at taxation. The point that *TNT Bulkships* - type objections could only be raised if it was conceded that foreign lawyers had the conduct of Territory litigation, was not agitated.

For these reasons, I concur in the orders proposed by Gallop J as to the disposition of the appeal and cross-appeal.

THOMAS J

I have read the draft reasons for judgment of Gallop J. I agree with his reasons and with the orders he proposes.
