JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	**:**	BEND-TECH GROUP (A FIRM) -v- BEEK [2015] WASC 491 (S)
CORAM	**:**	PRITCHARD J
HEARD	**:**	5 APRIL 2015
DELIVERED	**:**	11 APRIL 2016
FILE NO/S	**:**	CIV 2819 of 2015
BETWEEN	**:**	BEND-TECH GROUP (A FIRM) Plaintiff AND ANDREW DAVID BEEK Defendant

Catchwords:

Practice and procedure - Costs - Application for indemnity costs order - Application for special costs order - *Legal Profession Act 2008* (WA) s 280(2)(c) - Whether plaintiff's application for interlocutory injunction was hopeless - Whether plaintiff's conduct in seeking interlocutory injunction or rejecting offers of compromise was improper or unreasonable - Whether court must be satisfied that costs agreement complies with *Legal Profession Act 2008* (WA) pt 10 div 6 before it can make special costs order - Turns on own facts

Legislation:

Legal Profession Act 2008 (WA)

Result:

Indemnity costs order refused
Special costs order made

Category: B

Representation:

Counsel:

Plaintiff	:	Mr C J Graham
Defendant	:	Mr M D Cox

Solicitors:

Plaintiff	:	Borrello Graham Lawyers
Defendant	:	MDC Legal

Cases referred to in judgment:

Aristocrat Technologies Australia Pty Ltd v Allam [2016] HCA 3
Bend-Tech Group (A Firm) v Beek [2015] WASC 491
Buitendag v Ravensthorpe Nickel Operations Pty Ltd [2012] WASC 425 (S)
Civil Properties Pty Ltd v Miluc Pty Ltd [2011] WASCA 195
EDWF Holdings 1 Pty Ltd v EDWF Holdings 2 Pty Ltd [2008] WASC 275 (S)
Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Ltd (1988) 81 ALR 397
Frigger v Lean [2012] WASCA 66
Lane v Channel 7 Adelaide Pty Ltd [2004] SASC 47
Re Malley SM; Ex parte Gardner [2001] WASCA 83
Red Hill Iron Pty Ltd v API Management Pty Ltd [2012] WASC 323 (S)
Swansdale Pty Ltd v Whitcrest Pty Ltd [2010] WASCA 129(S)
Trafalgar West Investments Pty Ltd (as trustee for The Trafalgar West Investments Trust) v Superior Lawns Australia Pty Ltd [No 5] [2014] WASC 70
Wainwright v Barrick Gold of Australia Ltd [2014] WASCA 15 (S)

1 **PRITCHARD J**: On 22 December 2015, I dismissed Bend-Tech's application for an urgent interlocutory injunction (Injunction Application). These reasons should be read in conjunction with the reasons for decision I delivered on that occasion.[1] I also reserved the question of costs and granted Mr Beek liberty to apply for a special costs order.

2 By chambers summons dated 22 February 2016, Mr Beek now seeks the following orders:

1. The plaintiff pay the defendant's costs of the plaintiff's chamber summons dated 13 November 2015 [that is, the Injunction Application], those costs to be taxed on an indemnity basis and paid forthwith; and

2. Alternatively to order 1, the plaintiff pay the defendant's costs of the plaintiff's chamber summons dated 13 November 2015 forthwith, to be taxed if not agreed, without regard to the upper limits of the Supreme Court's Scale of Costs 2014 pursuant to s 280(2) of the *Legal Profession Act 2008* (WA).

3 For the reasons which follow, I am not persuaded that an order should be made that Bend-Tech pay Mr Beek's costs to be taxed on an indemnity basis. However, I am satisfied that a special costs order should be made pursuant to s 280(2)(c) of the *Legal Profession Act 2008* (WA) (the LP Act).

4 In support of his application for costs orders, Mr Beek relied on an affidavit of Mark David Cox sworn 22 February 2016, an affidavit of Vishan Kakara Atchamah affirmed 22 February 2016 and a further affidavit of Mr Vishan Kakara Atchamah affirmed 5 April 2016. By agreement of the parties, Mr Beek relied on copies of Mr Cox's affidavit, and of Mr Kakara Atchamah's first affidavit, from which certain paragraphs (or parts thereof) had been redacted.

5 Bend-Tech relied on an affidavit of Mr Darryl Siu Chuan Koh sworn 9 February 2016.

The application for indemnity costs

6 The principles in relation to the grant of an order for costs on an indemnity basis are well-established. They were set out by the Court of Appeal in ***Swansdale Pty Ltd v Whitcrest Pty Ltd***.[2] After pointing out

[1] ***Bend-Tech Group (A Firm) v Beek*** [2015] WASC 491.
[2] ***Swansdale Pty Ltd v Whitcrest Pty Ltd*** [2010] WASCA 129(S).

that an order for indemnity costs will only be made in exceptional circumstances,[3] the Court summarised the relevant principles as follows:[4]

> 1. [The Court] in its inherent jurisdiction, may make an indemnity costs order.
>
> 2. An indemnity costs order departs from the usual costs disposition order, whereby costs are awarded on a party/party basis.
>
> 3. The court's discretion as to the making of an indemnity costs order is a discretion that must be exercised judicially. In ***Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Ltd***, Woodward J said:
>
>> Courts in both the United Kingdom and Australia have long accepted that solicitor and client costs can properly be awarded in appropriate cases, where "there is *some special or unusual feature in the case* to justify the court exercising its discretion in that way". (emphasis added)
>
> 4. To obtain an indemnity costs order, it is not the case that the successful party needs to show a collateral purpose, or establish some species of fraud against the unsuccessful party. In ***J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA Branch) (No 2)***, French J by reference to the observations of Woodward J in ***Fountain Selected Meats***, said:
>
>> It is sufficient, in my opinion, to enliven the discretion to award such costs that, for whatever reason, a party persists in what should on proper consideration be seen to be a hopeless case.
>
> 5. Furthermore, in ***Tetijo Holdings Pty Ltd v Keeprite Australia Pty Ltd***, French J observed:
>
>> The categories in which the discretion may be exercised are not closed.
>
> 6. Competing principles need to be balanced in assessing the making of a potential award of indemnity costs. In ***Quancorp Pty Ltd v MacDonald***, Wheeler J observed:
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>> On the one hand, a party should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain. Uncertainty is inherent in many areas of law, and the law changes with changing circumstances. It is inappropriate that a case be

[3] ***Swansdale Pty Ltd v Whitcrest Pty Ltd*** [2010] WASCA 129(S) [7] referring to ***Re Malley SM; Ex parte Gardner*** [2001] WASCA 83.

[4] ***Swansdale Pty Ltd v Whitcrest Pty Ltd*** [2010] WASCA 129(S) [10] (citations omitted).

> too readily characterised as "hopeless" so as to justify an award of indemnity costs to the successful party. However, where a party has by its conduct unnecessarily increased the cost of litigation, it is appropriate that the party so acting should bear that increased cost. Persisting in a case which can only be characterised as "hopeless" is an example of the type of conduct which may lead the court to a view that the party whose conduct gave rise to the costs should bear them in full.

7. An indemnity costs order may be appropriate in situations which are shown to involve some element of improper, or at least unreasonable, conduct by a party or the party's legal advisers.

8. A properly crafted special costs order may obviate the need for an indemnity costs order, where components of cost scale items are allowed above the applicable scale ceiling.

9. An indemnity costs order may not be appropriate if the claimed costs would be likely to be recovered under the standard order for party and party costs, or under a special order raising or removing a scale ceiling allowance. In ***Unioil (No 2)***, Ipp J observed:

> However, counsel for the plaintiffs was unable to identify any costs so incurred that would not be covered by an order for party and party costs. An order for indemnity costs on this ground is therefore not warranted.

10. Nonetheless, an indemnity costs order will constitute an appropriate sanction marking the disapproval of improper or unreasonable conduct. In ***Flotilla***, Pullin J said:

> A solicitor should not, in my view, resort to an application for an indemnity costs order merely to secure the recovery which could be achieved by a properly formulated special costs order, unless the unsuccessful party's conduct is genuinely to be impugned by the successful party.

7 An order for costs on an indemnity basis may be made on the basis that an action was 'hopeless' in the sense that 'the action was commenced or continued in circumstances where the plaintiff, properly advised, should have known that the action had no prospect of success'.[5] An action which appears to have been commenced or continued in circumstances where the applicant, properly advised, should have known that he or she had no chance of success, may be presumed to have been commenced or continued for some ulterior motive or because of some wilful disregard of

[5] ***Civil Properties Pty Ltd v Miluc Pty Ltd*** [2011] WASCA 195 [84] (Newnes JA).

known facts or the clearly established law.[6] In assessing whether a party engaged in improper or unreasonable conduct, attention needs to be focused on what the party knew, or ought reasonably to have known, in the circumstances.[7] The fact that a case is weak or marginal, or unlikely to succeed, does not make it a 'hopeless case' which merits the sanction of an indemnity costs order.[8]

8 Mr Beek seeks that his costs of the Injunction Application be awarded on an indemnity basis for three reasons, namely:

(a) the Injunction Application was hopeless or misconceived;

(b) further or alternatively, Bend-Tech behaved improperly or unreasonably in the making and conduct of the Injunction Application; and

(c) further or alternatively, Bend-Tech unreasonably or imprudently rejected Mr Beek's genuine offers of compromise.

Whether the Injunction Application can properly be characterised as one which was 'hopeless' or 'misconceived'

9 Counsel for Mr Beek submitted that the Injunction Application was hopeless because there was no evidence to establish a serious question to be tried.

10 In my Reasons for Decision, I concluded that Bend-Tech had not established a *prima facie* case that the restraint clause was valid and enforceable, for two reasons. The first was that the evidence did not clearly establish that the restraint clause remained a term of Mr Beek's employment after he ceased occupying the position of Production Manager and resumed working in the position of Bending Supervisor.[9] (The question whether the restraint clause was supported by consideration was a matter which I left for determination at trial.) I concluded that the evidence left me with 'a real doubt that the restraint clause continued to form part of the terms of Mr Beek's contract of employment even after he ceased in the position of Production Manager'.[10]

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[6] ***Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Ltd*** (1988) 81 ALR 397, 401.
[7] ***Trafalgar West Investments Pty Ltd (as trustee for The Trafalgar West Investments Trust) v Superior Lawns Australia Pty Ltd [No 5]*** [2014] WASC 70 [12] (Kenneth Martin J).
[8] ***Civil Properties Pty Ltd v Miluc Pty Ltd*** [2011] WASCA 195 [86] (Newnes JA, Murphy JA and Hall J agreeing).
[9] ***Bend-Tech Group (A Firm) v Beek*** [2015] WASC 491 [53].
[10] ***Bend-Tech Group (A Firm) v Beek*** [2015] WASC 491 [53].

11 Secondly, I concluded that the restraint clause was too widely drawn. The restraint clause included a non-solicitation clause, and I concluded that it was difficult to see how the non-solicitation clause could be considered necessary for the protection of Bend-Tech's interests, or how its operation could be said to preserve the fullest liberty for Mr Beek consistent with preserving Bend-Tech's interests, so that it could be characterised as a reasonable restraint. The restraint clause also included a non-competition clause. That clause effectively prohibited Mr Beek from acting as the director of the company he established to operate his metal-bending business, but also from using the skills he had accumulated over the course of virtually the whole of his working life to earn a living in the employ of any business similar to that operated by Bend-Tech. Counsel for Bend-Tech conceded that the non-competition clause was too widely drawn. Nevertheless, Bend-Tech sought an injunction in terms reflecting the operation of the restraint clause to its fullest extent. I concluded that on the basis of the evidence adduced at the hearing of the Injunction Application, I was left with 'a real doubt that [the restraint clause] can be said to be necessary for the adequate protection of Bend-Tech's interest, or reasonable in relation to its operation Mr Beek'.[11]

12 Counsel for Mr Beek submitted that Bend-Tech had been made aware, from as early as 30 January 2015, that the validity and enforceability of the restraint clause was disputed, and thus that the question of the enforceability of the restraint clause would be a threshold question in the Injunction Application, but that Bend-Tech had failed to adduce evidence to address that question. He submitted that Bend-Tech had failed to adduce evidence, at the hearing of the Injunction Application, that the restraint clause continued to form part of the terms of Mr Beek's contract of employment after he ceased working in the position of Production Manager, and that Bend-Tech had also failed to adduce any evidence that the inclusion of the restraint clause in Mr Beek's contract of employment had been supported by any consideration.

13 I am not persuaded that the Injunction Application should properly be viewed as 'hopeless' (so as to warrant an order for indemnity costs) on this basis. It cannot be said that Bend-Tech did not lead *any* evidence regarding the existence and operation of the restraint clause. Bend-Tech adduced evidence that while Mr Beek was working as Production Manager, his contract of employment, on its face, included the restraint clause. Furthermore, counsel for Mr Beek conceded that if the restraint clause was valid and enforceable, Mr Beek's conduct (as disclosed in the

[11] ***Bend-Tech Group (A Firm) v Beek*** [2015] WASC 491 [54].

affidavits filed by Bend-Tech) would have breached that restraint clause. However, having regard to the totality of the evidence, and to the submissions of counsel, I was not persuaded that the evidence was sufficient to establish that there was a serious question to be tried that Mr Beek had acted in breach of a valid and enforceable restraint clause.

14 The fact that one of the factors in that conclusion was the breadth of the restraint clause does not mean that the Injunction Application can properly be characterised as 'hopeless'. In cases of the present kind, arguments in relation to the permissible breadth of a restraint of trade clause are commonplace. Where the line should be drawn between a restraint clause which is valid and enforceable and one which is not can involve difficult questions over which reasonable minds may differ. Failure to succeed on this basis does not mean that the Injunction Application was 'hopeless'.

15 Counsel for Mr Beek also submitted that the Injunction Application was hopeless because Bend-Tech did not establish that the balance of convenience warranted the grant of an interlocutory injunction. He pointed to my finding that there had been considerable and unexplained delay by Bend-Tech in bringing the Injunction Application. That was one of the factors on which I relied in concluding that the balance of convenience did not warrant the grant of an interlocutory injunction. I am not persuaded that that delay suggests that Bend-Tech had pursued its application when it should have known that the action had no prospect of success. There may be many reasons why a party does not rush to commence litigation, not the least of which are the costs and inconvenience involved in doing so. That is all the more so in cases of this kind where the financial impact of the breach of a restraint of trade clause may be incremental. Furthermore, notwithstanding Bend-Tech's delay in bringing the Injunction Application, when it finally did so, over three months of the total restraint period still remained. If the restraint clause was valid and enforceable, then clearly Bend-Tech was entitled to seek to enforce that clause for the balance of the restraint period.

16 Counsel for Mr Beek also pointed to my finding that there was no evidence to suggest that Mr Beek's conduct, even if in breach of his obligations under the restraint clause, had had any adverse impact on Bend-Tech's business. This was not a case where Bend-Tech failed to produce any evidence as to the balance of convenience. Rather, the position was that I was not satisfied, having regard to the evidence as a whole, that the balance of convenience favoured the grant of injunctive relief. There was some evidence that some of Bend-Tech's customers had

been approached by Mr Beek, but no evidence that any of them had taken their business to Mr Beek's company. And although Bend-Tech had relied on evidence of a downturn in its revenue, I was not persuaded that that was necessarily explicable by Mr Beek's conduct (as opposed to a downturn in business attributable to the current economic climate).

17 Finally, it should be noted that my conclusion as to the balance of convenience resulted from weighing up the factors discussed above, together with the likely impact of the grant of an interlocutory injunction on Mr Beek. In considering whether Bend-Tech's case was 'hopeless', it is not appropriate to focus on deficiencies in particular aspects of its case, and to lose sight of its case overall.

18 While there were some aspects of Bend-Tech's case which it should properly have regarded as weak, I am not persuaded that Bend-Tech should have viewed its case as a whole as 'hopeless'. As the authorities to which I have referred make clear, the fact that a case is 'weak' or 'marginal' does not make it 'hopeless', so as to warrant an order for costs on an indemnity basis.

Whether Bend-Tech's conduct in bringing the injunction application was improper or unreasonable so as to warrant an order for costs on an indemnity basis

19 Counsel for Mr Beek submitted that, properly advised, Bend-Tech should have known that it had no chance of success because:

- it knew that only four months remained of the restraint period at the time of the Injunction Application;
- it knew or ought to have known that, at law, the restraint clause was at least arguably unenforceable; and
- it knew or ought to have known that it did not have sufficient evidence to establish that an interlocutory injunction should be granted.

20 Counsel for Mr Beek submitted that by bringing the Injunction Application in those circumstances, Bend-Tech engaged in unreasonable conduct which unnecessarily increased the costs to the parties of the litigation, and that Bend-Tech should bear those increased costs.[12] Furthermore, counsel for Mr Beek submitted that because Bend-Tech

[12] Defendant's Outline of Submissions on Costs [30].

should have known it had no chance of success, it could be presumed that the Injunction Application was commenced or continued for some ulterior motive or because of some wilful disregard of known facts or the clearly established law. For the reasons discussed above, I am not persuaded that the inference can or should be drawn that the Injunction Application must have been commenced or continued for some ulterior purpose or motive or in wilful disregard of the facts or of the law.

21 Counsel for Mr Beek also submitted that there was 'some element of improper or unreasonable conduct' at least in the sense that Bend-Tech was 'seriously remiss'[13] in that the affidavits it filed in support of the Injunction Application did not include all of the correspondence passing between Mr Beek and Bend-Tech, or their representatives, in relation to the dispute over whether the restraint clause was valid and enforceable. Counsel for Mr Beek refrained from going so far as to suggest that the selective inclusion of correspondence may have misled the Court. However, he submitted that 'it was suggested [by Bend-Tech] that Mr Beek had acted in disregard of warnings and communications to him ... when, in fact, Mr Beek and his representatives had responded at some length to dispute the restraint'.[14]

22 The allegation that an incomplete picture was presented in the affidavits filed by Bend-Tech in support of the Injunction Application, because not all of the relevant correspondence was included in those affidavits, would have been a particular concern if the Injunction Application had been made on an *ex parte* basis.[15] However, the Injunction Application was made on notice to Mr Beek, and it was clearly anticipated from the outset that the hearing of that application would be *inter partes*.

23 In addition, having reviewed the submissions made on Bend-Tech's behalf, in light of the affidavits it filed, it seems to me that the point being made was that Mr Beek established a company which operated a metal bending business knowing full well that Bend-Tech considered that that conduct was in breach of the restraint clause. While Mr Beek disputed that that clause was valid and enforceable (as other correspondence, which he annexed to his affidavit, demonstrated), that did not detract from the point made against him, which was that if the clause was valid and

[13] Defendant's Outline of Submissions on Costs [35].
[14] Defendant's Outline of Submissions on Costs [35].
[15] See ***Aristocrat Technologies Australia Pty Ltd v Allam*** [2016] HCA 3, [15] - [16] and ***Lane v Channel 7 Adelaide Pty Ltd*** [2004] SASC 47 [9].

enforceable, Mr Beek had acted in the knowledge of its existence and with notice that Bend-Tech regarded his conduct as a breach of the clause.

24 Counsel for Mr Beek also submitted that because Bend-Tech did not include, in the affidavits filed in support of the Injunction Application, the entirety of the parties' correspondence in respect of the validity and enforceability of the restraint clause, it was necessary for Mr Beek's solicitors to ensure that other correspondence was included in Mr Beek's affidavit and to ensure that all material which was relevant to his case was before the Court. It is difficult to see how less care in preparation would have been required of Mr Beek's solicitors, irrespective of the content of Bend-Tech's affidavits. I am not persuaded that Bend-Tech's conduct was improper or unreasonable so as to warrant an indemnity costs order on this basis.

Whether Bend-Tech unreasonably rejected Mr Beek's settlement offers

25 Counsel for Mr Beek also submitted that Bend-Tech's conduct was unreasonable because it rejected various offers made by Mr Beek, on a without prejudice basis, to settle the proceedings and that this justified the award of costs on an indemnity basis.

26 It was not in dispute that offers of compromise were made by Mr Beek, through his solicitors, to Bend-Tech, through its solicitors, on 7 December 2015, 15 December 2015, and 19 January 2016, and that an offer was made orally, through Mr Beek's counsel, in the course of a break in the hearing of the Injunction Application on 8 December 2015. There appears to be a dispute about the nature and content of the latter offer, and as a result of the redaction of the affidavits to which I earlier referred, no details are available in respect of that offer. It can be put to one side for present purposes.

27 I am not persuaded that Bend-Tech's failure to accept those offers of compromise can be considered so unreasonable that costs should be awarded against it on an indemnity basis, for the following reasons.

28 First, the only offer of compromise made prior to the hearing of the Injunction Application was that made on 7 December 2015. The annexures to Mr Koh's affidavit indicate that that offer was made in a letter sent by email late in the day prior to the hearing, so that the offer was open for approximately 16 hours only, of which less than two hours fell within business hours. I am not persuaded that that afforded Bend-Tech a reasonable period to consider the offer. That is so notwithstanding that the time frame required to permit reasonable

consideration of such an offer must necessarily have been truncated in view of the urgency of the Injunction Application. Notice of the Injunction Application and the basis for it had been given to Mr Beek and his solicitors well in advance of the hearing, and Mr Beek's affidavit material and submissions had been filed and served on 4 December 2015. It is not apparent why an offer of compromise could not have been made prior to 7 December 2015 in those circumstances.

29 Secondly, the offer made on 7 December 2015 required Bend-Tech to pay Mr Beek's costs up to and including the filing of Mr Beek's submissions, those costs to be taxed if not agreed. No information appears to have been provided in respect of the likely quantum of those costs. In my view, it would not be reasonable to expect Bend-Tech to accept such an offer without being informed as to the approximate quantum of those costs and given the opportunity to obtain advice in respect of the offer to compromise in light of that information.

30 Thirdly, refusal of the offers made on 7 December 2015 and 15 December 2015 was said to be unreasonable or improper conduct because it should have been apparent to Bend-Tech at each stage that the Injunction Application was hopeless and doomed to fail. For the reasons outlined above, that argument cannot be accepted.

31 Fourthly, in so far as the offer dated 15 December 2015 is concerned, by that date the hearing of the Injunction Application had taken place. Settling at that stage (rather than waiting for the delivery of judgment) was likely to result in only minimal costs-savings.

32 Finally, rejection of the offer made on 19 January 2016 provides little support for an order for costs on an indemnity basis in respect of the Injunction Application, given that that offer was made after my Reasons for Decision had been delivered on the application by which time virtually all of the costs associated with that application had been incurred.

Conclusion in relation to the application for costs on an indemnity basis

33 None of the matters raised by counsel for Mr Beek, whether considered individually (as above), or collectively, warrant the conclusion that Bend-Tech should be required to pay Mr Beek's costs of the Injunction Application on an indemnity basis.

The application for a special costs order

34 Ordinarily, the taxation of bills of costs charged by a legal practice is regulated by costs determinations made by the Legal Costs Committee

established under the LP Act.[16] However, the applicable limits under the scale of costs set out in such costs determinations are able to be raised or removed by the Court pursuant to the power in s 280(2) of the Act, which provides:

> (2) ... if a court or judicial officer is of the opinion that the amount of costs allowable in respect of a matter under a costs determination is inadequate because of the unusual difficulty, complexity or importance of the matter, the court or officer may do all or any of the following -
>
> (a) order the payment of costs above those fixed by the determination;
>
> (b) fix higher limits of costs than those fixed in the determination;
>
> (c) remove limits on costs fixed in the determination;
>
> (d) make any order or give any direction for the purposes of enabling costs above those in the determination to be ordered or assessed.

35 The principles concerning special costs orders under s 280(2) of the Act are now well-established. They were set out by the Court of Appeal in ***Wainwright v Barrick Gold of Australia Ltd***.[17] In ***Crawley Investments Pty Ltd v Elman***, those principles were summarised by Edelman J[18] as follows:

> The principles concerning special costs orders under s 280 of the Legal Profession Act were recently set out by the Court of Appeal in ***Wainwright v Barrick Gold of Australia Ltd***.[19] They can be summarised, from that decision unless otherwise indicated, as follows:
>
> (i) The court must form an opinion which has two components. First, the court must determine that the amount of costs allowable in respect of a matter under a legal costs determination is inadequate. Second, the court must conclude that the inadequacy arises because of the "unusual difficulty, complexity or importance of the matter".
>
> (ii) Having heard the matter and being familiar with the way in which the case was conducted and the issues which were litigated, the court is in a position to form the opinions required under the section as matters of impression rather than "detailed evaluation", "precision", "science" or "mathematics".

[16] *Legal Profession Act 2008* (WA) s 280(1).
[17] ***Wainwright v Barrick Gold of Australia Ltd*** [2014] WASCA 15 (S) [7] - [9] (the Court).
[18] ***Crawley Investments Pty Ltd v Elman*** [2014] WASC 233 (S) [5].
[19] ***Wainwright v Barrick Gold of Australia Ltd*** [2014] WASCA 15 (S) [7] - [9] (the Court).

(iii) As to the first question (inadequacy) the court must form the view that the maximum amount allowable under the relevant scale item is inadequate in the sense that there is a fairly arguable case that the bill to be presented to the taxing officer may properly tax at an amount which is greater than the limit which would be imposed by the relevant costs determination. Until that threshold is crossed, the power will not ordinarily be exercised.

(iv) A conclusion that it is fairly arguable that the taxing officer might properly allow costs at an amount greater than the amount allowable under the Scale does not always require evidence of the costs actually incurred.[20]

(v) As to the second question (the cause of the inadequacy being unusual difficulty, complexity or importance), the word 'unusual' qualifies only the 'difficulty' of the matter and not its complexity or importance. The word 'unusual' in this context means unusual having regard to what one might describe as the usual run of civil cases determined in the Supreme and District Courts. That essentially involves the making of a value judgment by the court, having regard to the court's experience of the particular case when compared with the usual run of cases. And the word 'importance' in s 280(2) encompasses importance to the parties; it does not require broader importance to the public or a sector of the public.[21]

(vi) Although replacing the amount of the Scale item with a different ceiling may be appropriate where sufficient information exists to make that assessment, it is not uncommon for an order to be made removing the limit for the Scale item without replacing that limit with a different ceiling.[22]

(vii) One of the principles that should guide a court in addressing an issue under s 280(2) is that the court should not usurp the role of the taxing officer.[23]

The applicable determination

36 In his Chamber Summons of 22 February 2016, Mr Beek sought an order that the costs be taxed without regard to the upper limits of 'the Supreme Court's Scale of Costs 2014' pursuant to s 280(2) of the Act. It was not in dispute that the *Legal Profession (Supreme Court) (Contentious Business) Determination 2014* (the Determination) applies to the costs incurred by Mr Beek in this matter. Item 10 of the Scale of Costs set out in Table B of cl 9 of the Determination (the Scale) pertains

[20] ***Frigger v Lean*** [2012] WASCA 66 [81] (Allanson J, Newnes & Murphy JJA agreeing).
[21] ***Red Hill Iron Pty Ltd v API Management Pty Ltd*** [2012] WASC 323 (S) [7] (Beech J).
[22] ***EDWF Holdings 1 Pty Ltd v EDWF Holdings 2 Pty Ltd*** [2008] WASC 275 (S) [8] - [9], [13] (Martin CJ); ***Red Hill Iron Pty Ltd v API Management Pty Ltd*** [2012] WASC 323 (S) [5] (Beech J).
[23] ***Red Hill Iron Pty Ltd v API Management Pty Ltd*** [2012] WASC 323 (S) [6] (Beech J).

to proceedings in chambers other than proceedings to which Item 11 of the Scale applies (which are not presently relevant).

37 In the course of the hearing, counsel for Mr Beek confirmed that the application was made in reliance on s 280(2)(c) of the LP Act, and that Mr Beek sought that the Court remove the limits contained in Item 10 of the Scale.

38 The allowance under Item 10 of the Scale is calculated by reference to two days of preparation and one day of hearing and sets a rate for counsel of $385 per hour or $3,850 per day to a total allowance of $11,550. In addition, Item 10 permits some other modest allowances for matters such as attending on a reserved judgment in chambers.

The evidence relied on by Mr Beek in support of his application for a special costs order

39 Mr Beek relied on the affidavits affirmed by Mr Kakara Atchamah on 22 February 2016 and 5 April 2016 in support of his application for a special costs order. Annexed to Mr Kakara Atchamah's affidavit of 22 February 2016 was a copy of a tax invoice issued to Mr Beek by his solicitors, MDC Legal, dated 11 January 2016, together with a detailed itemisation of various items of legal work undertaken in respect of these proceedings, the time spent and the amount charged for those items of work, and a table setting out the hourly rates charged by the staff of MDC Legal. Mr Kakara Atchamah's first affidavit also annexed an edited itemisation of Mr Beek's tax invoice, which appears to include only those matters which it was considered might reasonably be claimed on a taxation. Mr Kakara Atchamah deposed that the tax invoice, invoice itemisation and edited invoice itemisation annexed to his affidavit would form the basis of a bill to be presented at taxation. He deposed that the allowable costs under the Scale would cover approximately 38% of the actual costs incurred in the performance of the work itemised in those annexures.

Determination of the application for a special costs order

40 I turn to the matters requiring consideration under s 280(2) of the LP Act.

41 Having regard to the tax invoice, invoice itemisation and edited invoice itemisation annexed to Mr Kakara Atchamah's affidavit of 22 February 2016, I am satisfied that there is a fairly arguable case that the bill to be presented to the taxing officer may tax at an amount greater

than the limit that would be imposed under Item 10 of the Scale, and that the amount of costs allowable under Item 10 will therefore be inadequate. I hasten to add that in reaching this conclusion, I express no opinion as to the size of the bill for Mr Beek's legal costs. The amount ultimately permitted on a taxation is a matter entirely for the taxing officer and it is not for the Court to usurp the role of the taxing officer.

42 Counsel for Bend-Tech submitted that the Injunction Application was not a matter involving any unusual difficulty, complexity or importance. I am unable to accept that submission. I am satisfied that the inadequacy of the costs allowed under Item 10 of the Scale arises in this case because of the complexity of the issues raised by the Injunction Application. That complexity arose from the terms of the restraint clause (which as I have observed was extremely broad in its scope), from the legal and factual issues raised as to whether the restraint clause applied to Mr Beek's employment (at all, or at the time when he engaged in the conduct complained of), and from other factual disputes arising from the evidence, including as to the nature of the business which Mr Beek had commenced and the nature of Bend-Tech's business.

43 The complexity of those issues was reflected in the fact that Bend-Tech relied on two affidavits, one of which was relatively lengthy, and Mr Beek filed a detailed and lengthy affidavit in response. There were extensive written and oral submissions by counsel as to the facts and the law, and the hearing of the Injunction Application took an entire day.

44 I am also satisfied that the inadequacy of the costs allowed under Item 10 of the Scale arises because of the importance of the Injunction Application or, more precisely, the successful defence of that application, to Mr Beek. As I have already explained, the grant of an interlocutory injunction in the terms sought by Bend-Tech in the Injunction Application would have left Mr Beek in the position where he was unable to act as the director of the company he had established, or to seek employment for any employer engaged in a business similar to that of Bend-Tech, in circumstances where he had no realistic option of alternative employment. The possibility of that outcome represented a significant financial risk for Mr Beek. Faced with the risk of an order of that kind being made, it was to be expected that Mr Beek would vigorously defend the Injunction Application, with detailed attention both to the facts and to the law.

45 Counsel for Bend-Tech pointed to the existence of the undertaking as to damages given by his client as undermining the claim that the Injunction Application was a matter of some importance to Mr Beek. I do

not accept that that is so. If the interlocutory injunction were to have been granted, Mr Beek would been denied the opportunity to work for the company he had established, or for any other employer performing work similar to the metal bending work engaged in by Bend-Tech, without any real alternative employment, for a three-month period. Yet if that injunction were subsequently found to have been wrongly granted, any financial recompense pursuant to the undertaking would be likely to take some time to obtain. In my view, the existence of the undertaking did not in any way detract from the importance of the Injunction Application to Mr Beek.

46 Counsel for Bend-Tech also submitted that there was nothing in the material before the Court on which the Court could be satisfied that the inadequacy of the Scale allowance was actually attributable to the unusual difficulty, complexity or importance of this matter. He submitted that it was necessary that the affidavit material make clear the link between the legal work undertaken, the taxed costs of which would likely exceed the amount permitted under the Scale, and the complexity or difficulty or importance of the matter. That submission must also be rejected. As the principles set out at [35] make clear, the Court forms the opinion required under s 280(2) of the LP Act as a matter of impression, rather than as a result of a detailed evaluation, or some precise mathematical or scientific assessment. Having heard the Injunction Application, and having carefully considered the evidence and the submissions of the parties on that application, I am satisfied that the likely inadequacy of the costs allowed under the Scale is attributable to the complexity and to the importance of the Injunction Application.

47 Bend-Tech also opposed the special costs order sought in this case on a further basis. Counsel for Bend-Tech submitted that a precondition to the making of a special costs order is that the Court must be satisfied that there was in place between the applicant for the special costs order and his or her solicitors a costs agreement made in accordance with div 6 of pt 10 of the LP Act, and that there was no such evidence before the Court in this case. He submitted that it was necessary for the Court to be positively satisfied that any agreement as to costs which existed was one which met the requirements for a costs agreement under div 6 of pt 10 of the Act, including the matters set out in s 282(3) and (4) of the LP Act. He submitted that it was not sufficient for the Court to rely upon affidavit evidence of a legal practitioner that there was in existence a written retainer with a client, which constituted a costs agreement under the LP Act.

48 This submission should be rejected for three reasons. First, the evidence before the Court establishes that Mr Beek and MDC Legal had a costs agreement of the kind contemplated by div 6 of pt 10 of the Act. The tax invoice annexed to Mr Kakara Atchamah's affidavit of 22 February 2016 indicated that if Mr Beek was dissatisfied with the invoice, he would be entitled to apply to 'set aside our costs agreement'. In addition, in his affidavit of 5 April 2016, Mr Kakara Atchamah deposed that he was aware 'that MDC Legal has a written retainer agreement with Mr Beek, pursuant to which Mr Beek is liable to pay legal costs on agreed terms to MDC Legal at the hourly rate listed' in the annexure to Mr Kakara Atchamah's affidavit of 22 February 2016.[24] Further, Mr Kakara Atchamah annexed a copy of an email passing between MDC Legal and Bend-Tech's solicitors in which the latter acknowledged advice from MDC Legal that the firm did have a costs agreement with Mr Beek.

49 Secondly, nothing in s 280(2) supports the contention that the Court must be satisfied that a costs agreement exists between the client and his or her solicitors which meets the requirements of div 6 of pt 10 of the LP Act. The terms of s 280(2) of the Act clearly set out the matters about which the Court is required to form an opinion for the purpose of determining whether a special costs order should be made. Those matters do not include the existence of a costs agreement which meets the requirements of div 6 of pt 10 of the LP Act.

50 Thirdly, the submission is contrary to authority. In ***Walter v Buckeridge [No 5]***, Le Miere J said:[25]

> Section 280 of the *Legal Profession Act 2008* applies to costs between legal practitioners and their own clients, and costs between party and party. Section 280(2) empowers the court, if it is of the requisite opinion, to order the payment of costs above those fixed by the determination or to make one of the other orders specified. The power to make such a "special costs order" is not conditioned upon there being a costs agreement between the legal practitioner and his client. To put it another way, if the court is of the requisite opinion it may order the payment of costs above those fixed by the determination in relation to solicitor and own client costs and in relation to party and party costs. In neither case is it a condition of the power to order the payment of costs above those fixed by the determination that there be a costs agreement made in accordance with Div 6 under which the legal practitioner is entitled to charge costs above those fixed by the determination.

[24] Affidavit of Vishan Kakara Atchamah, affirmed 5 April 2016 [4].
[25] ***Walter v Buckeridge [No 5]*** [2012] WASC 495 [56].

51 His Honour expressed the same view in ***Buitendag v Ravensthorpe Nickel Operations Pty Ltd***.[26]

Conclusion

52 There will be an order that Bend-Tech pay Mr Beek's costs of Bend-Tech's chambers summons dated 13 November 2015 forthwith, to be taxed if not agreed, without regard to the upper limits of Item 10 of the *Legal Profession (Supreme Court) (Contentious Business) Determination 2014*.

53 Counsel should confer in respect of the costs of the present application with a view to submitting a minute of consent orders. In the absence of consent, I will hear from the parties.

[26] ***Buitendag v Ravensthorpe Nickel Operations Pty Ltd*** [2012] WASC 425 (S) [5].