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*Practice Group(s):*

*Labour, Employment  
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## Non-Party Employer Made to Pay Costs in Restraint Litigation

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On 1 May 2013, the Supreme Court of New South Wales handed down judgment in *HRX Pty Ltd v Scott* [2013] NSWSC 451 (*HRX v Scott*). In doing so, the Court sent a clear message to employers about the risks associated with "poaching" employees from competitors. The Court imposed an order for costs against the new employer which had initially funded the employee's defence. The claim was brought by the employee's previous employer against its former employee due to an alleged breach of the employee's restraint of trade obligations.

### The Facts

HRX Pty Ltd (HRX), the former employer, and Talent2 Pty Ltd (Talent2), the new employer, are both providers of human resources consultancy services in direct competition with each other. Mr Scott, the defendant, was employed by HRX until 31 January 2012, when he resigned and began working for Talent2.

Mr Scott's contract of employment with HRX contained a post-employment restraint provision which prevented him from soliciting HRX's clients or working for a competitor for a specified period upon ceasing employment with HRX. Prior to litigating the matter, HRX requested that Mr Scott and Talent2 provide undertakings to the effect that both would stop soliciting HRX's clients and that Mr Scott would cease working for Talent2.

When these undertakings were not provided, HRX commenced proceedings against Mr Scott who defended the claim with the financial assistance of Talent2. The proceedings progressed for a period, however on 22 August 2012, Talent2 advised Mr Scott that they would no longer fund his defence and, if he did not resign from his position at Talent2 his employment would be terminated.

In light of this, Mr Scott resigned from Talent2 and submitted to most of the orders sought by HRX. HRX then proceeded to seek an order that Talent2 pay its costs of the proceedings in accordance with s 98 of the *Civil Procedure Act 2005* (CPA).

### The Decision

The Chief Justice in Equity, Justice Bergin, ordered that Talent2 pay HRX's costs even though Talent2 was not a party to the original proceedings. The Court determined that its powers to award costs under s 98 of the CPA extended to non-parties due to its "full power" to determine by whom, to whom and to what extent costs are to be paid.

In handing down her decision Justice Bergin stated that:

"When a new employer "stands up to" and funds litigation brought by the former employer against its new employee in circumstances where there are breaches of obligations owed to the former employer, the new employer may be at risk of an order being made against it under s 98 of the Act. Of course it will depend upon the circumstances of each case."

The Court determined that without the funding from Talent2, the litigation would not have proceeded and Talent2 was in a position where it would have benefited from the employee's successful litigation as it would have retained an experienced employee in a competitive market.

## Implications for Corporations

The decision in *HRX v Scott* provides an important lesson for corporations aiming to recruit the employees of its competitors. Justice Bergin stated that:

"It is incumbent upon employers who effectively poach their competitors' employees to ensure that those employees are not acting in breach of their obligations to their former employers, particularly where the consequence of such breach is a benefit to the new employer."

By ignoring a new employee's obligations to their previous employer, a corporation puts itself at significant risk even in circumstances where litigation isn't commenced directly against it.

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