IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S352 of 2018

BETWEEN

BELL LAWYERS PTY LTD ABN 96114514724

Appellant

And

JANET PENTELOW

First Respondent

DISTRICT COURT OF NEW SOUTH WALES

Second Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I: Certification

This outline is in a form suitable for publication on the internet.

Part II: Outline of propositions the appellant intends to advance in oral argument

1. The statutory costs power is the ultimate source of the answer to the question whether the first respondent may claim costs by way of fees as if she was her own client. See [10] and [11] below. The history of the *Chorley* exception does not support its existence in face of the legislation, or at all.

2. The majority below wrongly saw the outcome as an application but not an extension of the *Chorley* exception: CAB 65[1], [98], [116]. They treated the first respondent's claim that she was entitled to costs for work she had undertaken herself - which the first respondent "described as an extension of the *Chorley* exception" (CAB 65[1]) - as not involving an extension of the *Chorley* exception: AS [14]-[15]. Meagher JA correctly sought to resist extending an undesirable anomaly beyond what was covered by authority, that is, correctly understood the case presented as a claim for so-called costs by a barrister who was at all times represented by solicitors (and by a barrister for one hearing). Hitherto, the *Chorley* exception was surely understood to be available for a solicitor acting for himself or herself, ie, as a self-represented litigant.

3. Acceptance by the majority of the *Chorley* exception in *Guss v Veenhuizen (No 2)* is not the result of "a principle carefully worked out in a succession of cases": AS [69] – [75];

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4. The majority in *Guss* applied the *Chorley* exception in the absence of argument against it: AS [27] – [31].

5. Australian courts have been frank, even since before *Chorley* was decided, about their unease with the application of an exception to the general rule: AS [22]-[26]. The general rule, for present purposes, has its focus in the central notion of an indemnity (albeit partial) for costs actually incurred.

6. The criticism of *Chorley* in *Cachia* has not been quelled by the passing of time: its application continues to engender litigious controversy, as evidenced by the cases cited in the appellant's and first respondent's submissions: see, eg, AS [22] – [62]; RS [36]-
10 [37].

7. The rationale advanced for the existence of the *Chorley* exception is that the work done by a solicitor is capable of quantification on taxation: AS [29], [77]. That reasoning is not a proper basis for the continuation of rule, given the courts' ability and willingness to quantify the value of many kinds of services in the context of quantum meruit claims: AS [77]. Applied without regard to the professional calling of the litigant, it would logically lead to the abrogation of the general rule, not to the justification of the exception.

8. The further rationale advanced is equally as unconvincing: that the paying party will benefit because costs are less: AS [78]. Also possible is that the recoverability of
20 such "costs" would swell them were self-representation to produce, as commonly experienced, a lack of professional detachment.

9. The recovery of something in the nature of an "opportunity cost" (cf AS [38]) is not a sound basis for the *Chorley* exception (AS [38]). A self-represented lawyer is not required to prove that he or she had other (equally remunerative) work he or she could have done instead of working on his or her own case; the lost opportunity is assumed at full value. If unproven lost opportunity were a proper basis for the rule, the proper measure of it would be loss of a chance, rather than a full indemnity. This approach illegitimately introduces compensation for lawyers, but not for non-lawyers, for attention to their own personal cases.

30 10. In any event, and as a starting point in reasoning to the dismissal of the appeal to the Court of Appeal, the requisite statutory jurisdiction does not permit ordering payment by a losing party of these non-indemnity "costs", for compensation for time spent by the winning party on its own case.

11. Section 3 of the *Civil Procedure Act 2005* introduced the word "payable" into the definition of costs. It conveys the basal notion of a liability incurred. Accordingly, the power in sec 98 is to award "costs payable in or in relation to the proceedings". Where a solicitor litigant acts for himself or herself there would be no "costs payable" by the solicitor as litigant to the solicitor (who is still relevantly the litigant): AS [63] – [68]. It could not be favorably different for the first respondent as a barrister.

In answer to the first respondent's submissions

12. The *Chorley* exception is not fairly captured by describing it as a rule relating to "recovery for loss of earnings": ASR [17]. On any view, it entrenches on the general rule against compensation of litigants for time spent as such in connection with the litigation. The High Court did not misunderstand its exceptional nature in *Guss* and *Cachia*: ASR [18].

13. The decision and reasoning of the Supreme Court of New Zealand in *McGuire* does not provide persuasive assistance. The New Zealand approach to the "employed lawyer rule" as an exception entailed in the *Chorley* exception itself is not Australian law. Where statute permits, the so-called rule ordinarily arises in the context of lawyers employed by corporations. There is a real cost to the corporation of employing that lawyer. The corporation is the named party who is awarded costs; typically, the lawyers who did the work are employed by it and are paid by it as employees. As the party is the corporation and the solicitor the lawyer, the question of self-representation does not arise. The express inclusion of "remuneration" in s.3 of the Civil Procedure Act's definition of costs addresses this situation.

9th May, 2019.

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