**IN THE HIGH COURT OF AUSTRALIA**
**SYDNEY REGISTRY** **No S352 of 2018**

**BETWEEN:** **BELL LAWYERS PTY LTD**
Appellant

**AND:** **JANET PENTELOW**
First Respondent

**AND:** **DISTRICT COURT OF NEW SOUTH WALES**
Second Respondent



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# FIRST RESPONDENT'S SUBMISSIONS

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Filed on behalf of the First Respondent by
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**Part I: Internet certification**

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

**Part II: Statement of issues**

2. At present the *Chorley* principle[1] is good law in this Court and in every superior court in Australia, and in the UK, New Zealand, Canada and Hong Kong.

3. The primary issue on the appeal is whether that principle still applies in the NSW Supreme Court.

4. More particular issues which arise include the following:

   (i) Should the principle be abrogated despite having stood for over 130 years?

   (ii) Should *Guss v Veenhuizen [No 2]* (1976) 136 CLR 47 (which accepted the correctness of the principle) be overruled?

   (iii) Has the *Chorley* principle been adopted (or ousted) by s.98 of the *Civil Procedure Act 2005* (NSW)?

   (iv) Should the abrogation (or alteration) of this rule of practice be a matter for the courts (rather than the legislatures and Rule Committees)?

   (v) Should the status of this rule of practice in the NSW Supreme Court be a matter for that court (and its Rule Committee)?

   (vi) Does the *Chorley* principle apply to barristers (in addition to solicitors)?

   (vii) Does the *Chorley* principle apply when the lawyer litigant has retained counsel or a solicitor (or both)?

**Part III: Section 78B certification**

5. There are no constitutional issues in this case.

**Part IV: Contested material facts**

6. The facts stated in the appellant's submissions ("AS") require some supplementation.

7. The first respondent (Ms Pentelow) is a barrister. She was retained by the appellant (Bell Lawyers) to act as counsel in the NSW Supreme Court in a matter under the *Family Provision Act* 1982 (NSW). After the case concluded, Ms Pentelow rendered a bill to Bell Lawyers. Bell Lawyers paid only a portion of that bill.

8. Ms Pentelow then brought proceedings in the Local Court for the balance of her unpaid fees. She was represented in those Local Court proceedings by a solicitor, Mr Muggleton. Mr Muggleton did not retain counsel. At the request of Mr Muggleton (Gibson DCJ at [59]), Ms Pentelow did some work in relation to her matter, including

[1] See *London Scottish Benefit Society v Chorley* (1884) 12 QBD 452 (Div Ct); *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 (CA).

compiling written submissions, compiling a memorandum on strike-out principles, drafting her own affidavit, drawing the plaintiff's submissions at trial, attending as a witness, compiling various submissions and compiling submissions on costs.

9. Bell Lawyers brought a preliminary application in the Local Court seeking a strike out or stay of the proceedings. This was dismissed: *Pentelow v Bell Lawyers Pty Ltd* (unreported, Atkinson SM, 29.11.10). An order was made that Bell Lawyers pay Ms Pentelow's costs of that motion.

10. Ultimately, Magistrate Atkinson rejected the claim by Ms Pentelow for unpaid fees and ordered her to pay Bell Lawyers' costs: *Pentelow v Bell Lawyers Pty Ltd* (unreported, 17.6.11).

11. Ms Pentelow then filed an appeal against the decision of the Magistrate in the Supreme Court pursuant to s. 39(1) of the *Local Court Act 2007* (NSW). Ms Pentelow retained Auslegal Solicitors who briefed Mr Brabazon SC on her behalf. No junior counsel was retained. Ms Castle of counsel appeared for Bell Lawyers instructed by Bell Lawyers. The appeal was heard on 13 December 2012 by Schmidt J who allowed Ms Pentelow's appeal and determined that she was entitled to judgment on her claim for her unpaid fees: *Pentelow v Bell Lawyers Pty Ltd t/as Bell Lawyers* [2012] NSWSC 111. After some submissions on the papers, Schmidt J made further orders on 4 April 2013. Those orders included an order that the judgment of the Local Court be set aside and in lieu thereof, the following orders be made:

    (i) judgment for the plaintiff against the defendant in the sum of $23,760 for claim and $4,343.16 for interest to 22 February 2013, a total of $28,103.16, plus interest of $3.28 per day from 22 February 2013 to the date of judgment;

    (ii) order that the defendant pay the plaintiff's costs.

12. Bell Lawyers were also ordered to pay Ms Pentelow's costs of and incidental to the appeal to the Supreme Court.

13. At the request of Auslegal Solicitors (Gibson DCJ at [59]), Ms Pentelow had done a substantial amount of work for her appeal to the Supreme Court. That work included summarising written summaries of the three judgments below, a written advice on recent NSW case law, conferences with Mr Brabazon, research on legal issues, reviews of and summaries of evidence, conferences with the solicitor (Mr Relf), drawing up an appeal brief for Mr Brabazon, identifying evidence, engrossing a summons, appearing before Registrar Bradford on the first return date, obtaining transcripts, drawing her own affidavit, dealing with items of correspondence, reviewing the Local Court transcript, research on recent case law, amendments to the plaintiff's affidavit, a further directions hearing before Registrar Bradford, reviewing a written outline of submissions for the plaintiff and reviewing submissions in reply.

14. There was no further appeal by Bell Lawyers. The primary remaining issue was compliance with the costs order made in respect of the Local Court and Supreme Court proceedings in Ms Pentelow's favour. Ms Pentelow rendered a bill for $22,605 for her Local Court work and a separate bill of $28,258.90 for her work on the Supreme Court appeal (both items including GST).

15. Bell Lawyers refused to pay any of Ms Pentelow's fees for the work she had done herself. They also disputed the recoverability of the fees of Ms Pentelow's solicitors and Mr Brabazon SC.

16. Bell Lawyers then filed an application under s 353 of the *Legal Profession Act* 2004 (NSW) (now repealed) for an assessment of party/party costs both in relation to the Supreme Court order for costs and the Local Court order for costs.

17. The costs assessor (Mr M.J. Dyson) assessed a fair and reasonable amount of costs in the amount of $55,761.52. The costs assessor allowed an amount of "nil" for the costs payable to Ms Pentelow personally. In his statement of reasons, the assessor denied her claim on the basis that she had legal representation in both the Local Court and Supreme Court proceedings, and also on the basis that in New South Wales the *Chorley* principle did not apply to barristers: CA [7]. That assessment took place pursuant to s. 367A of the *Legal Profession Act* 2004 (NSW).

18. Ms Pentelow then filed an application for a review of the determination of the costs assessor on various grounds, but principally on the ground that the assessor had allowed nothing in relation to her costs. That application for review was made pursuant to s. 373 of the *Legal Profession Act* 2004 (NSW).

19. The review panel (Mr McIntyre and Mr Plummer) rejected Ms Pentelow's application for review in relation to her own costs. The review panel's reasons for rejecting Ms Pentelow's claim were encapsulated at [20] of their reasons.

20. Ms Pentelow then brought an appeal against the review panel's decision to the District Court under s.384 of the *Legal Profession Act 2004* (NSW). Gibson DCJ rejected her appeal. In particular, her Honour held that the principle in *Chorley* did not extend to barristers (at [71]-[72]) and also held that the review panel was correct to determine that the principles in *Chorley* did not apply where solicitors and/or counsel were retained (at [76]-[91]). Gibson DCJ rejected all Ms Pentelow's grounds of appeal: [92]. Gibson DCJ also dealt with a notice of contention at [104]-[112].

21. Ms Pentelow filed a summons for judicial review in the NSW Court of Appeal pursuant to s.69 of the *Supreme Court Act*. A majority of the Court of Appeal allowed the appeal. The majority's reasons adopted the principle in *Chorley* and applied it to a barrister litigant. The majority also did not embrace the proposition that *Chorley* could not apply where the lawyer litigant had retained solicitors and counsel.

22. It is important to note that at no stage in the costs assessment process did Bell Lawyers assert that the *Chorley* principle was not good law in relation to *solicitors*. At every step along the way, Bell Lawyers had acted for themselves and instructed counsel. Nor did Bell Lawyers indicate at any time that they would not seek the costs of acting for themselves were they to be successful.

23. On 14 December 2018 the High Court granted special leave to appeal.

**Part V: Ms Pentelow's argument**

24. It is convenient to consider Ms Pentelow's argument under a number of headings.

## (i) Background

25. The history of the *Chorley* principle goes back more than 130 years. Prior to the passing of the *Judicature Acts* in the 1870s the practice had been adopted in the common law courts and was referred to in the practice books. Reference is made to a number of these works in *Chorley* at pp.458, 458 (Div Ct); pp.873, 874 (CA) and in *Pennington v Russell [No 2]* (1883) 4 NSWR 41 at 43, 46[2]: *Archbold's Practice* (13th ed) p.82; *Dixon's Lush's Practice* (3rd ed) p.896; *Chitty's Archbold's Practice* (12th ed) p.80; *Pulling's Law of Attornies* (3rd ed) p.267; *Archbold's Practice* (2nd ed) p.65; *Archbold's Practice* (all editions from 1st to 1883).

26. It was also the "uniform practice" in the Court of Chancery: see *Chorley* at 457; *In Re West* 14 Jur 997.

27. As a result of the *Judicature Acts*, the various Chancery practices in relation to costs were adopted. This legislation "marked the prevalence of equity practice and procedure with respect to costs over the brutal simplicities which had attended such matters in the courts of common law": *Oshlack v Richmond River Council* (1998) 193 CLR 72, at [34]-[35]. The *Judicature Act* provisions were the ultimate source of the statutory provision now found in s.98 of the *Civil Procedure Act* 2005 (NSW) which superseded s.76 of the *Supreme Court Act* 1970 (NSW). Section 98(1)[3] provides as follows:

> Subject to rules of court and to this or any other Act:
> (a) costs are in the discretion of the court, and
> (b) the court has full power to determine by whom, to whom and to what extent costs are to be paid, and
> (c) the court may order that costs are to be awarded on the ordinary basis or an indemnity basis.

28. "Costs" are defined ("[i]n this Act") in s.3(1) as follows:

> "costs", in relation to proceedings, means costs payable in or in relation to the proceedings, and includes fees, disbursements, expenses and remuneration.

## (ii) *London Scottish Benefit Society v Chorley* and the position in the UK

29. The correctness of the established practice came before a Divisional Court (Denman, Manisty and Williams JJ) in 1884 in *London Scottish Benefit Society v Chorley* (1884) 12 QBD 452. That court affirmed the practice. The Court of Appeal (Brett MR, Bowen LJ, Fry LJ) dismissed the appeal: *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872. The decision by the Master (referred to at p.454) was affirmed. Thus the principle was endorsed by seven judicial officers.

30. The facts were that an action was brought by the LSBS against three persons: Chorley, Crawford and Chester. The action was for money had and received as solicitors. The three defendants seem to have been the partners of a firm of solicitors.

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[2] In NSW, see also A. G. Saddington, *Taxation of Costs between Parties* (1919) pp.12-14; R. T. Oram and R. J. D. Legg *The Law and Practice of the District Court of NSW* (1968) at p.171.

[3] Similar provisions exist in each of the Australian superior courts: see [39] below.

Two of the defendants (Crawford and Chester) conducted their own defence and also relied upon the services of a clerk of the firm. It is not clear who represented Chorley. At the trial before Denman J the defendants succeeded and an order for costs was made in their favour. On the taxation of these costs the plaintiff objected "that the defendants, being solicitors, and having appeared throughout the whole of the action as defendants in person, ought not to be allowed any costs other than costs out of pocket, or such costs as they would be entitled to if they were non-professional men" (p.452). The Master (p.452) "overruled the objection saying that, in his experience, of forty years, it had always been the practice to allow to solicitors who sued or defended in person and who obtained a judgment in their favour, the usual party and party costs, except certain charges for instructions". Accordingly, the Master permitted the solicitors the usual party and party costs, which included remuneration for their own work and (probably) that of a clerk of the firm.

31. Various observations by the Divisional Court and the Court of Appeal are noteworthy. Both courts affirmed the position taken in the common law and chancery practice books and textbooks (456, 877). The costs were to be paid because there had been an expenditure of professional skill and labour (460, 877) and professional skill and labour are recognised and could be measured (877). The practice was beneficial to the public (877, 875) and advantageous to the other party because less costs would thus be paid by that other party (457). For example, taking instructions from the client (and matters of a like nature) would not be chargeable (454). The interests of justice supported the rule for various reasons (457). If it were otherwise, a solicitor would simply employ another solicitor (875, 877) which would be more expensive. The notion of "costs should be held fairly to include a reasonable remuneration for that work which, if he did not do it himself, would have had to be done by another solicitor and paid for by his unsuccessful opponent" (455): "[i]f a solicitor does by his clerk that which might be done by another solicitor, it is a loss of money, and not simply a loss of time, because it is work done by a person who is paid for doing it" (875). Further, "it would be absurd to permit a solicitor to charge for the same work when it is done by another solicitor, and not to permit him to charge for it when it was done by his own clerk" (877). It is significant that the costs were said to be a "remuneration" (455). Likewise, it is stated that "such legal costs are to be treated as expenses" (877).

32. *Chorley* has been consistently followed, applied and noted with approval in the UK: *Bidder v Bridges* [1887] WN 208; *H. Tolputt & Co Ltd v Mole* [1911] 1 KB 836 esp. at 839; *Reed v Gray* [1952] Ch 337 esp. at 350-351; *Buckland v Watts* [1970] 1 QB 27 esp. at 35G, 37-38; *R v Boswell* [1987] 1 WLR 705 esp. at 710-711; *Stubblefield v Kemp* [2001] 1 Costs LR 30; *Malkinson v Trim* [2003] 1 WLR 463; *Boyd & Hutchinson v Joseph* [2003] 3 Costs LR 358; *R (Bar Standards Board) v Disciplinary Tribunal* [2015] 1 WLR 2778; *R (Bar Standards Board) v Disciplinary Tribunal* [2016] 1 WLR 4506; *Shackleton & Associates Limited v Shamsi* [2017] 2 Costs LO 169; *Robinson v EMW Law* [2018] 4 Costs LO 477; *EMW Law v Halborg* [2018] 1 WLR 52.

33. In these cases (and in others noted at [36]-[37], [40]-[41] and [83] below) the principle has been extended beyond the circumstances in *Chorley* to many other situations.'

### (iii) The *Chorley* principle in Australia

34. Even before *Chorley* was decided, Faucett J in the NSW Supreme Court had adopted the rule of practice in *Pennington v Russell [No 2]* (1883) 4 NSWR 41.

35. In *Guss v Veenhuizen [No 2]* (1976) 136 CLR 47, Gibbs ACJ, Jacobs J and Aickin J followed the *Chorley* principle referring to it repeatedly as a "rule of practice" (pp.51-53) and as "well established" (p.51) and "long established" (p.53). These justices interpreted "costs" in accordance with that established rule of practice. Mason and Murphy JJ dissented (on another issue) and did not address the rule of practice in any respect. Neither the Federal Parliament nor the High Court (despite a recent revision of the Rules) has seen fit to alter the effect of this decision.

36. In NSW *Chorley* has been accepted as correct (and "costs" construed conformably) by the CA: *Cachia v Hanes* (1991) 23 NSWLR 304 (CA); *Atlas v Kalyk* [2001] NSWCA 10; *Khera v Jones* [2006] NSWCA 85; *McIlraith v Ilkin* [2008] NSWCA 11; *Bechara v Bates* [2016] NSWCA 294; *Coshott v Spencer* [2017] NSWCA 118. It has also been adopted at first instance: *Pennington v Russell [No 2]* (1883) 4 NSWR 41; *Martin v Armstrong* (1916) 33 WN (NSW) 50; *McIlraith v Ilkin* [2007] NSWSC 1052; *Ada Evans v Santisi* [2014] NSWSC 538; *McMahon v John Fairfax (No 8)* [2014] NSWSC 673. Again, these cases involve a variety of different circumstances.

37. *Chorley* has also been accepted as correct (and "costs" construed conformably) in all of the other Supreme Courts within Australia (except the Northern Territory where no case has fully addressed the issue) and in the Federal Court and Family Court. In Victoria see the Full Court in *Ogier v Norton* (1904) 29 VLR 536 (Full Ct) and *Wright v Trenchard* (1895) 1 ALR 22; *Brott v Almatrah* [1998] 2 VR 83; *Lake v Municipal Association of Victoria* [2018] VSC 660; *United Petroleum v Herbert Smith Freehills* [2018] VSC 501. In Western Australia see the Full Court in *Soia v Bennett* [2014] 46 WAR 301 (FC). In Queensland see the CA in *Rogers v Roche* [2017] QCA 145; *Hawthorne Cuppaidge & Badgery v Channell* [1992] 2 Qd R 488; *Hydrofibre Pty Ltd v Australian Prime Fibre [No 4]* [2013] QSC 247; *Tolteca Pty Ltd v Lillas & Loel* [2015] QSC 148. In Tasmania see *Burnett v Fitzgerald* [2017] Tas SC 35. In the ACT see *Islam v Director-General* [2018] ACTCA 41; *GBT v Scott* (1994) 116 FLR 266; *DP v Law Society of the ACT* [2006] ACTSC 61 (Full Ct). In South Australia see *Strachan Thomas v Clough* [1999] SASC 298; *Steicke v Connolly* [2017] SASC 99; *Legalese Pty Ltd v Gregory* [2018] SASC 58. The Full Federal Court has also followed suit: see *Waller v Freehills* (2009) 177 FCR 507; *Secretary Department of Foreign Affairs v Boswell* (1992) 39 FCR 2881. See also *Cashman & Partners v Human Services* (1995) 61 FCR 301; *A&D Douglas Pty Ltd v LPMPL* [2006] FCA 690; *Re New Tel* [2008] FCA 1084; *University of WA v Gray* [2009] 180 FCR 483; *Bashour v ANZ* [2017] FCA 163. In the Full Court of the Family Court and the Family Court, see *Stewart & Stewart* [2017] FamCAFC 67; *Redmond & Redmond* [2014] FamCAFC 55; *Masters (Deceased) & Parsons* [2017] FamCA 391. Again, these cases cover many different circumstances.

38. It is clear that in Australia the *Chorley* principle (and the cognate meaning of "costs") is well-established, well-known and accepted in the superior courts. It is referred to in all the practice books. It has been the practice in NSW since at least 1883 and in Victoria since 1895. And although reform and review of costs regimes have been frequently considered by the various Law Reform Commissions, legislatures and Rule Committees, no legislature within Australia or any Rule Committee for any superior

court has seen fit to abrogate the rule, despite having power to do so[4] (because it is a "rule of practice": *Guss* pp.51-53 and relates to "costs").[5]

39. Further, in each jurisdiction, the current costs provision for each superior court was enacted or promulgated after *Chorley* and, in a number of cases, after *Guss*: see *Judiciary Act* 1903 (Cth) s 26 (enacted in 1903); *Federal Court of Australia Act* 1976 (Cth) s 43 (enacted on 9 December 1976, judgment in *Guss* having been delivered on 15 November 1976); *Family Law Act* 1975 (Cth) s 117(2) (enacted in 1975); *Civil Procedure Act* 2005 (NSW) s 98; *Supreme Court Act* 1986 (Vic) s 24 (enacted in 1986); *Civil Proceedings Act* 2011 (Qld) s 15; *Supreme Court Act* 1935 (SA) s 40 (enacted in 1935); *Supreme Court Civil Procedure Act* 1932 (Tas) s 12 (enacted in 1932); *Supreme Court Act* 1935 (WA) s 37 (enacted in 1935); *Court Procedures Rules* 2006 (ACT) r 1721(1); *Supreme Court Rules* 1987 (NT) r 63.03(1) (inserted in 1988).

**(iv) Other Common Law Jurisdictions**

40. In New Zealand the Supreme Court adopted *Chorley* in *McGuire v Secretary for Justice* [2018] NZSC 116 and held at [88] that any reform of the principle was a matter for the legislature or Rules Committee. Chorley had earlier been adopted in other NZ cases: see, for example *Hanna v Ranger* [1912] NZLR 159; *Brownie Willis v Shrimpton* [1998] 2 NZLR 320 at 327 (CA).

41. In Canada, *Chorley* has been accepted as good law. See *Johnston v Ryckman* (1903) 7 OLR 511; *Lalancette v Walford* [1927] 4 DLR 642; *Endicott v Halliday* (1982) 28 CPC 114; *Wright and McTaggart v Soapak Industries* (1990) 75 OR (2d) 394; *Jaffe v Dearing* (1992) 7 CPC (3d) 225; *Fellowes, McNeil v Kansa General* (1997) 37 OR (3d) 464; *Gunning Estate v Abrams* [1997] OJ No 4364; *Jouppi v Guy* [1997] OJ No 2170; *Dechant v Law Society of Alberta* (2001) 203 DLR (4th) 157 (Alberta CA)[6]; *Fong v Chan* (1999) 181 DLR (4th) 614 (Ontario CA).[7]

42. In *Hong Kong* the principle in *Chorley* has been applied in *Lee Chan Cheng Solicitors v Yung Mei Chun* [2004] HKCFI 349. In Singapore a rule of court (O 59 r 18A) provides that all litigants in person may be awarded costs.

**(v) The case for *Chorley*, *Guss* and the current interpretation of "costs"**

43. The case for maintaining the principle in *Chorley* (and the cognate interpretation of "costs") is strong.

44. The *Chorley* principle has existed for over 130 years. And references to the principle in the practice books go back well beyond 1884.

45. The principle has been adopted in every Australian jurisdiction (except the Northern Territory): the superior courts have interpreted "costs" in legislation as incorporating the principle. And it is also good law in Canada, NZ and the UK.

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[4] In NSW, see *Civil Procedure Act* s.9(2) and Schedule 3 clauses 1 (procedure and practice) and 18 (matters relating to costs).

[5] In NSW the rule was expressly referred to in the rules from 1972 to 1993: *Cachia* p.412 footnote 38.

[6] Leave to appeal to Supreme Court of Canada refused on October 4, 2001.

[7] However, it should be noted that in Canada all common law jurisdictions now permit all successful self-represented litigants to be awarded similar costs: see *Hope v Pylypow* (2015) 384 DLR (4th) 255 at [62].

46. When the issue came before this Court in *Guss*, the principle was unequivocally endorsed by Gibbs ACJ, Jacobs and Aickin JJ (without criticism by Mason and Murphy JJ).

47. Multiple factors suggest that the correctness of the decision in *Guss* should not be reopened (let alone overruled):

(i) it has stood for over 40 years: *Geelong Harbour Trust v Gibbs* (1970) 122 CLR 504 at 518 (McTiernan and Menzies JJ), 518 (Kitto J);

(ii) it cannot be suggested (and the appellant does not suggest) that *Guss* is "clearly wrong" or "manifestly wrong": *AG (NSW) v Perpetual Trustee* (1952) 85 CLR 237, 266; *Queensland v Commonwealth* (1977) 139 CLR 585 at 624; *Australian Agricultural Co v FEFAA* (1913) 17 CLR 261, 278-279; *The Tramways Case [No 1]* (1914) 18 CLR 54, at 58 ("only when the decision is manifestly wrong");

(iii) there was no dissenting judgment in *Guss* on this question: the judgment of Mason and Murphy JJ goes off on another issue and does not discuss the *Chorley* principle;

(iv) there was no difference of opinion among the justices in *Guss* who adopted the principle: *John v FCT* (1989) 166 CLR 417, 438-439; *Imbree v McNeilly* (2008) 236 CLR 510, 526 [45];

(v) *Guss* is part of a "stream of authority" in Australia and elsewhere which has endorsed the principle: *Victoria v Commonwealth* (1957) 99 CLR 575 at 615-616 (Dixon J); *Queensland v Commonwealth* (1977) 139 CLR 585, at 630; *A-G v Perpetual Trustee* (1952) 85 CLR 237, at 244;

(vi) the *Chorley* principle adopted in *Guss* has been adopted in many (indeed all the principal) common law jurisdictions: *Ross Smith v Ross Smith* [1963] AC 280, 307, 321;

(vii) the adoption of the *Chorley* principle in *Guss* has not led to any inconvenience and certainly not considerable inconvenience: *Imbree v McNeilly* at [45], *John v FCT* at 438-439; nor does the appellant point to any inconvenience;

(viii) *Guss* involved the construction of a word ("costs") in a statutory provision: the construction of a statute of doubtful meaning laid down and accepted for a long period of time should not be altered unless the Court can say positively that it is wrong and productive of inconvenience: *Hanau v Ehrlich* [1912] AC 39, at 41; *Bourne v Keane* [1919] AC 815, at 874;

(ix) *Guss* has been accepted by legislatures and Rule Committees throughout the Commonwealth who have not altered the principle despite knowing of its existence and having the power to do so: *Geelong* 122 CLR at 518, 518-519; *C (A Minor) v DPP* [1996] AC 1, at 28C;

(x) any change in the law is a matter which is better left to the legislatures and Rule Committees in the various jurisdictions: *Cachia v Hanes* at 415;

*McGuire v Secretary for Justice* [2018] NZSC 116 at [88]; *Re Collier* [1996] 2 NZLR 438, at 441; *Joint Action v Eichelbaum* [2018] 2 NZLR 70, at [8]; *McGuire* [2018] 3 NZLR 71, at [70];

(xi) in determining whether to overrule *Guss* this Court would need to consider all of the situations where the rule is applied: the Court is both ill-equipped to do so and unable to deal with all of these situations in its judgment: *Osmond* [1984] 3 NSWLR 447, at 474; *Cachia* at 415; *Jones* [1972] AC 944, at 1025;

(xii) the NSW Parliament has not seen fit to change *Guss* by legislation despite passing legislation on the issue after this Court's decision: *Geelong* at 518 per Kitto J;

(xiii) the decision does not conflict with "well established principle" (*AG v Perpetual Trustee* (1952) 85 CLR 237, at 243-244; *Queensland v Commonwealth* at 620, 630) but applies a "well established" principle (*Guss* at p.51);

(xiv) review of the principle has (or may have) consequences beyond the precise question decided which are difficult to foresee: *Steadman v Steadman* [1976] AC 536, at 542C;

(xv) if any change in the relevant principles is to be made it would be better that that change be made as part of a review of the whole field (viz costs for litigants in person and associated matters): *Myers v DPP* [1965] AC 1001 at 1021-1022.

48. Turning to s.98 of the *Civil Procedure Act 2005* (NSW) (set out at [27]) above, the NSW Parliament must be taken to have been aware in 2005 of the *Chorley* principle, the decision in *Guss*, the many cases in NSW (and elsewhere) which have adopted *Chorley* (and *Guss*) and the references to those principles in the local (and other) practice books and textbooks. The NSW Parliament must also have been aware that s.76 of the *Supreme Court Act* 1970 (NSW) (the predecessor of s.98) had been interpreted as incorporating the *Chorley* principle. And yet, in enacting s.98, the NSW Parliament did not abrogate the principle in *Chorley*. The NSW Attorney-General in his Second Reading Speech for the *Civil Procedure Act* said that the clause which became s.98 simply carried over the earlier provision (s.76) in relation to costs. Nor has the Rule Committee abrogated the principle despite clearly having the authority to do so: *Civil Procedure Act* s.9(2) and Schedule 3 clauses 1 and 18.

49. Further, it should be assumed that the word "costs" in s. 98 is used by the NSW legislature with its established technical legal meaning (thus incorporating the principle in *Chorley*).

50. Moreover, in s.3 of the *Civil Procedure Act* the NSW legislature expanded the definition of "costs" so that it "includes" not only costs in the established signification of that word, but also "fees, disbursements, expenses and remuneration". The cases on the *Chorley* principle make it clear that these words encompass costs within that principle: *Chorley* p.455 ("reasonable professional remuneration for that work"), p.877 ("legal costs which the Court can measure are to be allowed, and ... such legal costs are to be treated as expenses necessarily arising from the litigation"; "the costs claimed ... ought to be allowed, because there is an expenditure of professional skill

and labour"); *Cachia v Hanes* (HCA) at 410 ("reimbursement for work done ... by a practitioner or practitioner's employee") at 413 (costs are "intended to cover remuneration for the exercise of professional legal skill" citing Sir Gordon Willmer), 409 (costs "in the conventional sense" are "remuneration for work performed by a solicitor or a solicitor's clerk"); *Cachia* (1991) 23 NSWLR 304, at p.317 ("[i]n this definition fees, charges and remuneration refer to remuneration for the exercise of professional legal skill"). See also *Buckland v Watts* [1970] 1 QB 27, at 35G ("remunerated for his professional services"), 37G ("costs" is a word "intended to cover remuneration for the exercise of professional legal skill"), 38B ("remuneration for the exercise of a professional legal skill"). It may be reasonably assumed that the NSW legislature and the Rule Committee were aware of this case law. Moreover, if the legal work is done by qualified practitioners, it is only fair that it should be reasonably remunerated.

51. The *Chorley* principle also advances the public policy of reducing legal costs. As a number of cases note, the costs payable to a lawyer litigant are confined to "necessary" costs and would not include various costs which would be payable if another lawyer were retained (e.g. the costs of conferring with the client). Thus, the principle reduces the costs which the losing party would otherwise pay, which is in the public interest.

52. Finally, as this court has noted in a very similar context (*Cachia* at 415), any change in the *Chorley* principle would be more appropriately dealt with by the NSW Supreme Court Rule Committee (or the Parliament) which could "inform itself adequately of the reasons for and against such a change and no doubt it would be able to do so in a way in which a judge or court cannot" (ibid). That is the view which has been adopted by the NZ Supreme Court in 2018: *McGuire* at [88]. Those observations have even greater force when one recalls that the principle in *Chorley* operates in a large number of different factual situations, each of which would need to be considered and dealt with if any alteration were proposed. Similarly, the NSW Supreme Court is in a better position than this Court to determine whether its rules of practice should be altered or abrogated: this court does not know the reasons for the various NSW costs rules or how they are related to each other.

53. In the alternative, it is submitted that if the "rule of practice" (as it is eight times described in *Guss* at pp.51-53) in *Chorley* is to be altered or abrogated that change should only operate prospectively. In *McKinney v R* (1991) 171 CLR 468, this Court created a new rule of practice "which will operate for the future" (476) that is "in future cases" (478). Similarly in *Connelly v DPP* [1964] AC 1254 Lords Reid, Devlin and Pearce dismissed an appeal in a case where the existing practice had been followed but stated that the existing practice was flawed and should be replaced by another practice for the future: see pp.1296, 1360-1361, 1368. Lord Devlin (with whom Lords Reid and Pearce agreed) noted that a rule of practice was different from a rule of law: "[w]hen declared by a court of competent jurisdiction, the rule [of practice] must be followed until that court or a higher court declares it to be obsolete or bad or until it is altered by statute" (p.1361).[8]

[8] Compare also the approach adopted in *Bropho v Western Australia* (1990) 171 CLR 1.

**(vi)** ***Cachia v Hanes***

54. Before dealing with the appellant's arguments it is convenient to make some observations about *Cachia v Hanes* (1994) 179 CLR 403. In that case, the issue was whether a non-lawyer litigant in person entitled to "costs" could recover as part of those costs compensation because he "had lost money from his consulting practice in defending the case" (p. 408). Mr Cachia asserted that he was entitled to "compensation for the loss of his time spent in the preparation and conduct of his case and for out of pocket expenses, being travelling expenses, associated with the preparation and conduct of his case" (p.408).

55. This was a very difficult argument for Mr Cachia. It had been clear since the time of Sir Edward Coke that costs extended "to all the legal costs of the suit but not to the costs and expenses of his travell and losse of time": *Second Part of the Institutes of the Laws of England* (1797) p.288 (cited in *Chorley* at 876-877, *Cachia* at 411). The established meaning of "costs" in the case law did not include for *any* litigant (including lawyers) compensation for money they would have earned if they had not been engaged in defending or prosecuting the case.

56. In order to attempt to surmount these difficulties, counsel for Mr Cachia seems to have relied on *Chorley* as an example of a litigant recovering compensation for loss of his time. He then submitted that there was no reason to distinguish between a lawyer and a non-lawyer as litigants in person and that the same rule should apply to both. Counsel for the respondent does not seem to have disputed Mr Cachia's characterisation of *Chorley* as an exception to the general rule that litigants in person do not recover compensation for loss of their time, but did submit that there was "no easy standard for the determination of the loss of earnings of a lay litigant, because the loss of earnings of a farmer, an investor and an unemployed person are different" (p. 406).

57. In rejecting Mr Cachia's argument the majority justices referred to the principle that "costs" "were never intended to be comprehensive compensation for any loss suffered by a litigant" (410-411). They referred to the *Chorley* principle as an exception which was "somewhat dubious" but which "serves to emphasize the general rule" (p. 411).

58. Subsequent critics of the rule in *Chorley* have seized on these comments as potentially undermining *Chorley* asserting that it has been said to be a "questionable" exception to a general rule that litigants cannot recover as part of their costs compensation for loss of earnings resulting from running a case.

59. However, *Chorley* is not an exception to the rule that litigants in person do not recover as part of their costs compensation for loss of earnings resulting from running a case. If that was the basis of *Chorley*, the lawyer's costs would be assessed by evidence valuing the loss of opportunity by reference to the work which the lawyer would have done if the case had not proceeded. A lawyer who recovers "*Chorley* costs" does not get compensation based on a lost opportunity to engage in other legal work (which may require extensive evidence). Rather, remuneration is recovered (according to well known standards) for the exercise of professional skill: see *Guss* pp.51-53 ("professional costs", "professional skill and labour"); *Buckland* p.35G ("remunerated for his professional services"), 37G-H ("costs" intended "to cover remuneration for the exercise of professional legal skill"). This is not loss of opportunity damages but reasonable remuneration for work done on the case.

Conversely, a non-lawyer litigant in person cannot recover "remuneration for the exercise of a professional skill which he has not got": *Buckland* p.38B. And if it is not truly an exception to the rule of no recovery for loss of earnings there is no basis for describing the *Chorley* principle as an exception which is "somewhat dubious" (411) or "questionable" (412). In short, the law does not permit *any* litigant to recover as "costs" compensation for loss of earnings caused by the litigation. But a lawyer litigant can recover reasonable remuneration for legal work done on his or her own case, although an unqualified non-lawyer litigant cannot.

**(vii) Responses to the Appellant's Arguments**

60. The appellant's submissions ("AS") raise five principal arguments in favour of abrogating the *Chorley* principle.

61. First, at AS [75](c) the appellant seems to suggest that the word "payable" in the definition of "costs" in s.3 (set out at [27] above) has the effect of ousting the well-established principle in *Chorley*. There is no elaboration of this argument.

62. This suggestion has substantial difficulties. The appellant points to no case which has held that this is correct (although sometimes judges have briefly noted the argument). And it would seem unlikely that a principle as well-established as *Chorley* would be implicitly ousted by one general word in a definition clause, without any reference to the change in the second reading speech. Indeed, the second reading speech suggests that the meaning of "costs" in s.76 of the *Supreme Court Act* is simply carried over into the new provision. Consideration of the text of ss.98 and 3 (set out at [27] above) reveals further problems with the argument. Section 98(1)(b) refers to the Court's power to "determine by whom, to whom and to what extent costs *are to be paid* to the party entitled to receive them": the italicised words can only mean payable by the party ordered to pay costs. In light of those words "costs payable" in section 3 will naturally refer to the costs payable by the party ordered to pay costs to the party entitled to receive them. That makes it difficult to construe "costs payable" to mean "costs which a party is obliged to pay to that party's solicitor", which seems to be the construction hinted at by the appellant. Moreover, in some cases a party will not have a solicitor. Further, on the appellant's approach, the notion of "payability" would have to operate in two different ways in s.98: (i) payable by the party ordered to pay costs to the party entitled to receive them; (ii) payable by the [winning] party to his/her solicitor. In *Guss* the relevant rule of court (Order 71 r 19) expressly referred to "bills of costs and fees which ... are payable to barristers and solicitors" and the Court held that the rule "does not affect the long established rule of practice" in *Chorley*: at 53. Similarly, the NZ Supreme Court in *McGuire* held that the NZ costs rule which referred to "the costs incurred by the party claiming costs" could not have been intended to abrogate the *Chorley* principle because "[i]f this had been the purpose more explicit language would have been used": [66]. Further still, the expanded definition of "costs" in s.3 ("includes") makes it clear that "*Chorley* costs" are included: see [50] above.

63. Secondly, at AS [75](b) the appellant suggests that one of the aspects of the rule in *Chorley* which "call[s] for careful consideration" is the status "to be accorded to 'rules of practice' in the context of the primacy of statute".

64. As noted at [49] above, "costs" is a legal term which has a well-established meaning which includes the principle in *Chorley* and unless the statutory context suggests

otherwise, the word will be assumed to have that meaning. That well-established meaning has been adopted not only by this Court but by every other common law jurisdiction. The NSW Parliament has used "costs" in s.98 of the CPA without manifesting any intention to diverge from the established meaning.[9]

65. Thirdly, at AS [77] the appellant submits that the "main rationale" for the *Chorley* "exception" is that "a solicitor's costs are able to be measured". The appellant then submits that this basis provides weak support for this "exception" because the value of the labour or services of non-lawyers (the subject of the alleged general rule) is just as easily valued (as in quantum meruit cases).

66. This argument assumes that there is a general rule that litigants in person cannot recover compensation for the loss of an opportunity to do their usual work caused by involvement in a case, but that there is an exception in favour of lawyers (who may recover such compensation based on the work they would have done if the litigation had not occurred). As noted at [59] above, this is not correct. No litigant (lawyer or otherwise) may claim as part of their "costs" compensation for such a loss of opportunity, which can only be pursued (if at all) as part of a damages case. In truth, recovery by a lawyer for work on their own case is simply "remuneration" for that legal work done by a qualified legal professional: see [50] above. There are well-established processes for calculating that amount which have been applied in millions of cases. There is no basis for valuing the work of an unqualified non-lawyer in attempting to perform litigation work, just as there is no appropriate fee for a blacksmith to attempt to repair a watch. An unqualified person simply cannot recover "remuneration for the exercise of a professional skill which he has not got": *Buckland v Watts* [1970] 1 QB 27, at 38B.

67. Fourthly, at AS [78] the appellant dismisses as "unconvincing" the rationale that the costs recoverable by a lawyer under the *Chorley* principle are considerably less than those which would be payable by the losing party in respect of the costs of an alternative lawyer. Although the appellant does not dispute that *Chorley* leads to reduced costs, the appellant then states that if a lawyer is self-represented they will not receive "impartial and independent advice".

68. This argument does not contest (and is not responsive to) the important point that *Chorley* results in a considerable costs saving to the losing party. Nor does the argument point to any deficiency in the *Chorley* principle. Rather, it suggests that there is a downside to self-representation, *viz*, the absence of any independent legal advice. That is a criticism of self-representation. It is not a criticism of the *Chorley* principle. Moreover, in many (perhaps most) cases where *Chorley* costs have been ordered, the lawyer litigant has retained other lawyers who could give independent advice. *Guss* is an example: Mr Hulme QC and Mr Merkel were instructed by Mr Guss (136 CLR at 36). So is the present case: Ms Pentelow retained solicitors and senior counsel. Moreover, even in the unusual situation where a lone sole practitioner acts without the direct involvement of any other lawyer, that lawyer has the benefit of their own legal knowledge and experience and can easily obtain independent legal advice if and when required. Besides, many of these cases are basic debt recovery cases. The appellant's argument amounts to little more than this: the availability of *Chorley* costs *might* make it more likely that a legal practitioner will act alone and (if this occurs) there is a risk that that practitioner *may* not seek independent legal advice.

[9] It is noteworthy that in *In Re West* 14 The Jurist 997 Knight Bruce VC noted that "[i]f it shall appear that there is any such practice, I cannot act in contradiction to it": *cursus curiae est curiae lex.*

That is a very long way from being a powerful argument against the *Chorley* principle.

69. Fifthly, at AS [80] the appellant suggests that *Chorley* amounts to differential (or special) treatment of lawyers.

70. However, *Chorley* does not amount to differential or special treatment of lawyers. The costs rules are the same for both lawyer and non-lawyer litigants. Most relevantly, if either a lawyer or non-lawyer litigant is awarded costs that party's legal fees will be paid for (as assessed) by the losing party. The only way the appellant could argue that there is a differential would be if *Chorley* costs were compensation to the lawyer for the lost opportunity of recovering fees for other work. That would create a differential with an ordinary litigant who cannot recover such compensation (see *Cachia v Hanes*). However, that is not how the *Chorley* principle operates: see [59] above. The *Chorley* principle operates on the basis of reasonable remuneration for the exercise of professional legal skill. But a non-lawyer litigant is not entitled to "remuneration for the exercise of a professional skill which he has not got": *Buckland* p.38B. Although the principles relating to costs operate in theory in exactly the same way for all litigants, it is possible that in a particular case the costs regime will give one of the parties some side-wind gain from the litigation. That is inevitable no matter what regime is in place and does not amount to differential treatment. For example, travel, accommodation, couriers, photocopying and victualling are all (or may be) accepted costs but there is no unfairness in a party making a profit from assisting (in their own litigation) with such matters.[10] Similarly, one party may recover costs for being a witness (or complying with a notice to produce or similar) which may be quite lucrative when the other party does not. But this is mere happenchance operating (like *Chorley*) in unusual circumstances. The important thing is that the rules are the same for all.

71. In addition to these five arguments, the appellant raises three matters said to be relevant to reopening/overruling this Court's decision in *Guss*:

    (i) *Guss* does not rest upon a principle that has been carefully worked out in a succession of cases: AS [71], [75];

    (ii) in *Guss* the existence of the *Chorley* principle "appears not to have been the subject of argument": AS [31];

    (iii) overruling *Guss* would have "no foreseeable adverse consequences to the administration of justice": AS [79].

72. On the issue of re-opening and overruling, Ms Pentelow relies on the various matters noted at [47] above, but responds to the appellant's three arguments as follows.

73. As to (i): although there is only one decision of this Court adopting *Chorley* the principle in *Chorley* has been the subject of consideration in scores of cases in all common law jurisdictions and is accepted as good law in all of them. It is part of a long stream of authority and is a well-established principle which has existed for a very long time: see [25], [32], [34]-[37] and [40]-[42] above.

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[10] Thus a case brought by (or against) Qantas, Hilton Hotels, Federal Express, Law-in-Order or McDonalds may well result in a profit component to the party for providing relevant goods and services which become recoverable as costs.

74. As to (ii): no argument is recorded in the Commonwealth Law Reports for *Guss v Veenhuizen [No 2]* so that it is difficult to know whether counsel raised any argument against the adoption of *Chorley*. That stated, the majority reasoning amounts to an unequivocal acceptance of this principle as both well-established and long established. Nor was there any dissent from the minority on this question.

75. As to (iii): the *Chorley* principle is deeply embedded in the statutory and regulatory costs regimes of every superior court in Australia and (most relevantly) in those of the NSW Supreme Court. All of those regimes have been enacted with full knowledge of *Chorley* or *Guss* (or both) and no Australian legislature or Rule Committee has chosen to alter the well-established *Chorley* principle. These regimes are all predicated on the operation of *Chorley* and many aspects of those regimes are interdependent and related. If *Guss* were overruled, the intentions of the various legislatures and Rule Committees are likely to be subverted and the regulatory regimes may be thrown out of kilter. Moreover, it is often the case that overruling a decision/principle may have consequences beyond the precise issue determined which are difficult to foresee: see [47](xiv) above. And the appellant points to no "foreseeable adverse consequences to the administration of justice" from maintaining the current law operating in all Australian jurisdictions and all over the common law world.

**(viii) Does *Chorley* apply to barristers?**

76. The second issue which arises on the appeal is, assuming the *Chorley* principle is good law, does it apply to barristers (as the NSWCA held)? See the notice of appeal at [4]. It arises because Ms Pentelow was (and continues to be) a barrister. This issue is noted at AS [2](c) but no submissions are contained in AS in support of this ground (although some reference is made to cases which touch on this issue).

77. Australian case law supports Ms Pentelow (and the NSWCA) on this issue: see for example, *Bechara v Bates* [2016] NSWCA 294; *Farkas v North City Financial Services* [2006] NSWSC 1036; *Ada Evans Chambers v Santisi* [2014] NSWSC 538; *Ogier v Norton* (1904) 29 VLR 536 (Full Court): as noted in AS [26]; *Lake v Municipal Association of Victoria [No 2]* [2018] VSC 660. Similarly, Mr Guss had been admitted as a barrister and solicitor of the Supreme Court of Victoria: *Guss* at 48.

78. In the UK the *Chorley* principle has been applied in cases involving barristers: see, for example, *R v Boswell* [1987] 1 WLR 705; *Khan v Lord Chancellor* [2003] 1 WLR 2385; *R (Bar Standards Board) v Disciplinary Tribunal* [2015] 1 WLR 2778; *R (Bar Standards Board) v Disciplinary Tribunal of the Council of the Inns of Court* [2016] 1 WLR 4506.[11] In New Zealand, the Court of Appeal in *Joint Action v Eichelbaum* [2018] 2 NZLR 70 held that the principle applied to barristers: [59]-[66]; see also *Brownie Willis v Shrimpton* [1998] 2 NZLR 320 (CA) where it is noted that the principle applies to "a practising barrister and solicitor" (p.327).

79. Occasionally, lower courts in Australia have refused to apply the principle to barristers on the basis that if the High Court in *Cachia* has stated that the "exception" as it relates to solicitors is "questionable" that is a sufficient basis for not "extending"

[11] In Canada, all litigants in person may now recover remuneration for running their cases.

the exception to counsel. This reasoning depends on the characterisation of the *Chorley* principle as an "exception" which is problematical: see [59] above. Moreover, it is submitted that this form of reasoning (although it may be legitimate in lower courts) would not be adopted by this Court in the present case. If this Court holds that *Guss* and *Chorley* are good law in relation to solicitors, the principle will not be "questionable"; if they are held to be bad law then the issue of whether the principle applies to barristers does not arise.

80. The principal difficulty for the appellant is that there is now no relevant distinction which can be drawn between barristers and solicitors in NSW. It was accepted by all of the judges in the NSWCA that statutory reform has removed any relevant distinction: [91]-[95], [121], [138]. Nowadays, all practitioners are admitted as a "lawyer" of the Supreme Court of NSW. As Adamson J pointed out in *Ada Evans* at [29], "[t]he distinction between solicitors and barristers has become less important in circumstances where all legal practitioners are admitted as such". And NSW barristers may act without an instructing solicitor, enter into fee contracts and bring actions to recover fees. Absent a well-reasoned basis for distinguishing between barristers and solicitors in NSW on this question the argument must fail. No such argument is to be found in AS. There is simply no basis in principle for drawing a relevant distinction in NSW between barristers and solicitors. Moreover, in a world where modes of practice are changing very quickly (e.g. in-house counsel, special counsel, incorporated practices, limited liability partnerships) the creation of such a strict distinction would be captious and potentially productive of injustice.[12]

**(ix) Does Chorley apply when other lawyers are retained?**

81. The third and final issue is: assuming the *Chorley* principle is correct, does it apply where the lawyer litigant has also retained a solicitor or another barrister? See the notice of appeal at [3]. This issue arises in the present case because in the Local Court proceedings Ms Pentelow retained a solicitor and in the Supreme Court proceedings she retained both a solicitor and Senior Counsel. This argument is not developed in AS.

82. If this argument were to succeed, *Guss* would have to be overruled. In that case Mr Guss had instructed Mr Hulme QC (leading Mr Merkel) and Evans, Guss & Co were Mr Guss' solicitors (136 CLR at 46). This Court held that the principle was applicable. No attempt is made by the appellant to challenge *Guss* on this question.

83. Moreover, there are many cases other than *Guss* where the *Chorley* principle has been held applicable where other lawyers or legal entities have also been acting. See, for example: *Bechara v Bates* [2016] NSWCA 294; *Coshott v Spencer* [2017] NSWCA 118; *Martin v Armstrong* (1916) 33 WN (NSW) 50; *McIlraith v Ilkin* [2007] NSWSC 1052; *McMahon v John Fairfax [No 8]* [2014] NSWSC 673; *Wright v Trenchard* (1895) 1 ALR 22; *Ogier v Norton* (1904) 29 VLR 536; *GBT Corporation Pty Ltd v Scott* (1994) 116 FLR 266; *Soia v Bennett* (2014) 46 WAR 301; *Hawthorn Cuppaidge & Badgery v Channell* [1992] 2 Qd R 488; *Steicke v Connolly & Co* [2017] SASC 99; *H. Tolbutt & Co Ltd v Mole* [1911] 1 KB 836; *Malkinson v Trim* [2003] 1 WLR 463;

[12] More generally, "when matters of principle are invoked to confine the making of orders by a superior court, pursuant to a power given to it by statute, it is preferable to regard those matters as regulating the exercise of the power, than to regard them as going to the existence of jurisdiction to make the orders": *Jackson v Sterling* (1987) 162 CLR 612, 616 (Mason CJ).

*Khan v Lord Chancellor* [2003] 1 WLR 2385 at [38]; *Endicott v Halliday* (1982) 28 CPC 114.

84. It cannot be suggested that all of these cases are wrongly decided. The appellant gives no reason for not applying *Chorley* (assuming it to be good law) in these various situations. Nor does the appellant point to any case in any jurisdiction where this argument has succeeded. Moreover, in *Hawthorne Cuppaidge & Badgery v Channell* [1992] 2 Qd R 488 this point was raised and decisively rejected by Ambrose J who pointed out (p. 491) that no authority supported it. Nor is there any argument of principle by the appellant for asserting that *Chorley* is inapplicable if other lawyers are acting.

**(x) Conclusion**

85. The case for overruling *Guss* is unconvincing: the appellant's arguments needed to be powerful and they are underwhelming. And so is the argument for construing "costs" in s.98 so as not to cover Ms Pentelow's remuneration. The few criticisms made of *Chorley* by the appellant are not persuasive. The *Chorley* principle has stood for well over 130 years. It is good law in all common law jurisdictions and in every superior court in Australia. Moreover, any change in the position is best left to the Rule Committees and legislatures, who must be taken to have adopted the established meaning of "costs" in their use of that word in rules and legislation. Any perceived unfairness in individual cases can be mollified by the exercise of the discretion to disallow or limit the costs to be paid.[13] As a fallback, any change in the practice should be prospective only. And, if the principle is good law, there are grave difficulties in asserting that it does not cover barristers, or lawyers who have retained a solicitor or counsel (or both) to assist them with the legal work.

**Part VI: Time estimate**

86. The respondent estimates between 1.5 and 2 hours for her argument, but emphasises that the length of argument in this case is difficult to forecast.

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Dated: 4 March 2019

[13] "There is no absolute rule with respect to the exercise of the power to award costs": *Bodrodazza v MIMA* (2007) 228 CLR 651, at [77] (per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) citing *Oshlack* at [40], [143]