IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN:

No. S4 of 2018

RONALD MICHAEL COSHOTT

Appellant

KEITH ROBERT SPENCER

First Respondent

AND OTHERS

APPELLANT'S OUTLINE OF ORAL ARGUMENT

10 **Part I: Certification**

1. The Appellant certifies that this outline is in a form suitable for publication on the internet.

Part II: Outline

2. Since the role of this Court is to correct error, the starting point is the decision of the Court of Appeal.

3. The Court of Appeal determined that the *Chorley* exception applied; that section 3 of the *Civil Procedure Act* 2005 (NSW) did not affect that position; and that it was therefore unnecessary to consider the relevance (if any) of the First Respondent having acted through an incorporated entity. The Appellant's argument therefore follows that
20 structure.

4. In any event, the status of the *Chorley* exception and its ratio needs to be considered in order to determine whether a solicitor's corporate status takes the position outside of the exception.

5. Although the power to order costs is a creature of statute, the *Chorley* exception cannot be derived from statutory interpretation.

6. The *Chorley* exception could never have been derived from a process of statutory interpretation; and the Court in *Chorley* did not purport to do so.

7. The *Chorley* exception, where applied, is described as a "rule of practice".

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8. This Court then has to consider whether it is a rule of practice that has become part of the law of Australia; and, if so, whether it should remain as such.

9. This Court has never determined whether the *Chorley* exception forms part of the law of Australia: in *Guss*, the existence of the *Chorley* exception was assumed; and in *Cachia*, the issue was whether the general rule should be applied.

10. The *Chorley* exception has never been embraced by Courts in Australia: it has been the subject of much criticism (including in *Cachia* itself); attempts to expand its scope have been unsuccessful; and it has not been followed where Courts have felt able to distinguish it.

10 11. The rationale for the exception, as expressed in *Chorley*, is that a solicitor's time can be quantified.

12. Whatever may have been the position in 1884 at the time of the judgment in *Chorley*, Courts are now well able and indeed often called upon to quantify the professional costs of non-solicitors, such as barristers, liquidators, receivers and managers, trustees, experts in legal proceedings, executors and administrators.

13. The rationale of the *Chorley* exception no longer holds good (if indeed it ever did).

14. Even if the rationale held good and only the costs of solicitors could be quantified, that does not lead as a matter of logic to a conclusion that only solicitors should be entitled to recover costs (still less to a conclusion that they should be entitled to profit from
20 conducting their own litigation).

15. The *Chorley* exception gives solicitors a privilege (which the Court in *Chorley* rejected as any justification for the exception) that cannot be justified on any principled basis.

16. The Court in *Chorley* made comments about the varying anxiety, zeal, assiduity or nervousness of litigants. Those comments could be equally applied to solicitor litigants.

17. Fry LJ in *Chorley* expressed the opinion that if there were not an exception for solicitors, then they would be likely to instruct separate solicitors. If the result of there being no exception is that solicitor litigants employ third party solicitors, then the resultant independence, impartiality and objectivity is to be encouraged.

18. Where a solicitor acts for himself (with the benefit of the *Chorley* exception) rather than through an independent solicitor, there is no advantage to the opposing party. The only person who benefits from such an arrangement is the solicitor litigant, who then makes a profit out of acting for himself.

19. There should be no privilege for solicitor litigants.

20. This Court should not be hesitant in so holding given the doubtful status and the lack of judicial support for the *Chorley* exception.

21. Up until 2005, the power to order costs in the Supreme Court of New South Wales was defined by reference to "costs". A limitation on the power to award costs was introduced by section 3 of the *Civil Procedure Act* 2005 (NSW) by defining costs by reference to "costs payable".

22. The power to award costs is to be distinguished from the method and manner of quantifying those costs.

23. Even if the District Court had defined costs in those terms prior to 2005, this differential had not been previously appreciated; and the various cases considered by the appellate Courts were under the broader definition in the Supreme Court provisions.

24. Section 3 then removed the ability for solicitors to claim the benefit of the *Chorley* exception in acting for themselves.

25. The same rationale as to why this Court should not *Chorley* exception supports a conclusion that a solicitor acting through a corporate entity should not be able to circumvent the ordinary rule that litigants are not entitled to recover compensation (let alone profit) for the time spent in conducting their own litigation.

26. The issue is not to be addressed by reference to a label of whether the solicitor was "self represented". Whatever the contracting entity, as a matter of substance there has to be an individual solicitor who is on the record and performs the relevant work. Here, it was the First Respondent. As a matter of substance, the position is the same: the individual solicitor was carrying out work on his own case: he is not entitled to compensation for (let alone to profit from) so doing.

Dated: 10 May 2018.

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