IN THE HIGH COURT OF AUSTRALIA No. S4 of 2018

SYDNEY REGISTRY

BETWEEN:

RONALD MICHAEL COSHOTT

Appellant

and

KEITH ROBERT SPENCER

First Respondent

DISTRICT COURT OF NEW SOUTH WALES

Second Respondent

CHRISTOPHER PHILLIP WALL

Third Respondent

COSTS ASSESSMENT MANAGER

Fourth Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. The appeal presents the following issues:

   a. whether there is an exception in the case of a solicitor litigant to the general rule that a litigant is not entitled to recover as costs for his or her time in conducting his or her own litigation ("the *Chorley* exception");

   b. whether the effect of section 98 of the *Civil Procedure Act* 2005 (NSW) was to remove in New South Wales any exception in the case of a solicitor

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litigant to the general rule that a litigant is not entitled to recover as costs for his or her time in conducting his or her own litigation;

c. whether a solicitor litigant acting through an incorporated entity is entitled to recover as costs for his or her time in conducting his or her own litigation.

Part III: s.78B Notice

3. The appellant certifies that it has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act* 1903 and considers that it is unnecessary to do so.

Part IV: Decision below

4. *Coshott v Spencer* [2017] NSWCA 118.

Part V: Facts

5. The First Respondent is a solicitor and the principal of an incorporated legal practice, Kejus Pty Ltd, trading as Spencer & Co Legal. He provided legal services to Ljiljana and James Coshott and Schlotzsky Nominees Co Pty Ltd in respect of proceedings in the Federal Court. The Appellant was not a party to those proceedings.

6. On 4 August 2014, the Appellant applied for assessment of the costs claimed by Spencer & Co relating to the Federal Court proceedings. On 29 June 2015, the costs assessor dismissed the Appellant's application on the basis that he was not a "*third party payer*" within the meaning of the *Legal Profession Act* 2004 (NSW).

7. The Appellant appealed to the New South Wales District Court. On 8 April 2016 Gibson DCJ dismissed the appeal and made a costs order in favour of the First Respondent (*Coshott v Spencer* (2016) 22 DCLR (NSW) 115; [2016] NSWDC 43).

8. On 6 June 2016 the First Respondent applied for assessment of those costs, which included claims in respect of solicitor's work performed by him and for disbursements. On 28 July 2016 the Third Respondent issued a Certificate of Determination of Costs with reasons. Costs were allowed for the claimed solicitor's work performed by the First Respondent (at the claimed rate of $450 per hour) on the basis that although the work was "*that of [the First Respondent] in his capacity as a*

litigant in person...he is a legal practitioner [and] subject of an exception to the normal rule that a litigant cannot recover costs for that litigant's own time". He was thus "*entitled to be compensated for [his] time in doing legal work*".[1]

9. The Appellant commenced proceedings in the New South Wales Court of Appeal, seeking judicial review of the decision of Gibson DCJ relating to him not being a third party payer and of the Third Respondent's costs assessment. On 31 May 2017 the Court of Appeal dismissed the application with costs.

10. By this appeal, the Appellant challenges the decision of the Court of Appeal in respect of the Third Respondent's costs assessment.

10 **Part VI: Argument**

11. The Court of Appeal held that it was bound by *Guss v Veenhuizen (No 2)* (1976) 136 CLR 47 to apply the *Chorley* exception[2] so that the First Respondent was entitled to his professional and profit costs of acting for himself; that section 98 of the *Civil Procedure Act* 2005 (NSW) did not have the effect of rendering the *Chorley* exception inapplicable; and that it was "*unnecessary to consider the position where the solicitor litigant acts through an incorporated entity, as was the case here*".[3]

(a) The *Chorley* exception

12. Contrary to the Court of Appeal's finding, the Appellant contends that there is no exception in the case of a solicitor litigant to the general rule that a litigant is not
20 entitled to recover as costs for his or her time in conducting his or her own litigation ("the *Chorley* exception").

13. This Court has never been called upon to determine whether the *Chorley* exception applies (or should be adopted) in Australia.

(i) Guss and Cachia v Hanes

14. In *Guss*, the existence of the general rule and the *Chorley* exception were assumed without argument and the issue was whether a solicitor litigant could claim the

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1 Reasons of the Third Respondent at [8.1] – [8.9].

2 Established in *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872.

3 Court of Appeal judgment at [107] – [108].

benefit of the assumed *Chorley* exception when, his name having inadvertently not been entered in the Register of Practitioners, he was not entitled to practise in the High Court. The Court divided 3-2 on that issue in the solicitor's favour.

15. In order to determine whether the assumed exception should extend to the practitioner, it was necessary for the majority in *Guss* to identify its rationale. In so doing, the majority described the *Chorley* exception as a "*well-established rule of practice*" and, on the basis of *Chorley* and one other English authority, held:[4]

> Those authorities establish that the litigant in person does not recover such costs in such circumstances in the capacity of a solicitor, but because, he happening to be a solicitor, his costs are able to be quantified by the Court and its officers.

16. After citing from each of the three judgments in *Chorley*, the majority in *Guss* identified that the "*true basis of the rule*" was "*not one of privilege to a solicitor...but is that work done by a solicitor can be quantified on a taxation of costs*".[5]

17. In *Cachia v Hanes* (1994) 179 CLR 403, this Court (by 5-2 with a differently constituted majority) refused a non-solicitor party compensation for time spent in conducting his case. In so doing, the majority applied the general rule, whilst observing that both the general principle and the exception had been accepted in *Guss*.[6] The Court in *Cachia* did not need to (and did not) consider and determine the *Chorley* exception since the case did not involve a solicitor litigant. Indeed the majority described the *Chorley* exception as "*somewhat anomalous*" and being supported by a justification that was "*somewhat dubious*".[7] Further, by that time, as the Court recognised in *Cachia*, the general rule (and therefore the need for any exception to that rule) had been abolished in England and Wales by statute so that in

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4 *Guss* at 51.

5 *Guss* at 52 and see the three judgments in *Chorley*, each of which stressed that this was not a question of a privilege for solicitors (*Chorley* at 875 (per Brett MR) and 877 (per Bowen and Fry LJJ)).

6 *Cachia* at 412.

7 *Cachia* at 411.

that jurisdiction all litigants are now entitled to seek compensation for their own time where they conduct their own litigation.[8]

18. As the majority said in *Cachia* at 412 – 413 in respect of the position in Australia:

> If the explanations for allowing the costs of a solicitor acting for himself are unconvincing, the logical answer may be to abandon the exception in favour of the general principle rather than the other way round...However, it is not necessary to go so far for the purposes of the present case. It suffices to say that the existence of a limited and questionable exception provides no proper basis for overturning a general principle which has, as we have said, never been doubted and which has been affirmed in recent times.

(ii) The Chorley exception should not be applied

19. The Appellant contends that this Court should now either abandon the exception or (given that there has been no decision considering and adopting it) confirm that it does not form part of the law of Australia.

20. First, whatever may have been the case at the time of *Guss (*and indeed *Chorley*), the Courts are now well able and indeed well used to quantifying the professional costs of non-solicitors:[9] for instance barristers, liquidators, receivers and managers, trustees, experts in legal proceedings, executors and administrators. The rationale expressed in *Chorley* that it is only the costs of a solicitor that can be readily quantified does not hold good.

21. Indeed the comments in *Chorley* as to the varying nature of the time spent by non-solicitor litigants due to varying anxiety[10] or zeal, assiduity and nervousness[11] could be said to apply to each of those other categories and indeed to solicitors (both generally and when acting as litigants). Ultimately the work done is the same, irrespective of who has performed it, namely the conducting of legal proceedings; and a costs assessor ought therefore to be able to "*determine what is a fair and*

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[8] The *Litigants in Person (Costs and Expenses) Act* 1975 (UK), permitting all litigants in person to recover for work done in representing themselves with limits prescribed then pursuant to Rules of the *Supreme Court* 1965 (UK) Order 62 rule 18; and see *Cachia* at 416 – 417.

[9] See also the discussion on this point in *Dobree v Hoffman* (1996) 18 WAR 36 at 42.

[10] Per Brett MR at 875.

[11] Per Bowen LJ at 877.

reasonable amount of costs for the work concerned",[12] irrespective of whether it was done by a solicitor or a non-solicitor.

22. It is therefore difficult to see the exception as being other than a privilege for solicitors, which was a position and rationale expressly rejected in *Chorley*;[13] and which should not adopted by this Court.

23. Secondly, even if the rationale of the exception was still valid, namely that only the costs of solicitors can be quantified, that does not lead to a conclusion that there should be an exception. It might be different if the rationale of the general rule were that costs of litigants in person cannot be quantified, but (as will be discussed below) that is not the case. The fact that costs of a solicitor can be quantified provides no principled justification as to why only a solicitor should be compensated for the time spent as a litigant – it is simply giving the solicitor an unjustified privilege. Indeed, the majority in *Cachia* described compensating a litigant for his or her time as "antithetical" to the accepted basis upon which costs are assessed.[14]

24. Thirdly, given that costs are intended to be compensatory for the expense to which a successful litigant has been put rather than by way of punishment to the unsuccessful party or profit for the successful party,[15] it is difficult to see the justification for a successful litigant (but only one who is a solicitor) not only receiving the fruits of any verdict but also profiting from the conduct of litigation.[16] As the majority recognised in *Cachia* at [12]:

> Those assertions that it would be "unadvisable" or "absurd" to refuse to allow a solicitor who acts for himself "to charge" for the work done by himself or his clerk ignore the questionable nature of a situation in which a successful litigant not only receives the amount of the verdict but actually profits from the conduct of the litigation.

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[12] *Legal Profession Uniform Law Application Act* 2014 (NSW), section 76.

[13] *Chorley* at 875 (per Brett MR) and 877 (per Bowen and Fry LJJ).

[14] *Cachia* at 414.

[15] Eg *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534 per Mason CJ at 543 and McHugh J at 567 and *Oshlack v Richmond River Council* (1998) 193 CLR 72.

[16] See also the discussion on this point in *Dobree v Hoffman* (1996) 18 WAR 36 at 42.

25. Fourthly, the majority in *Cachia* noted the problems that can arise from litigants conducting their own cases.[17] On a similar basis, the practice of solicitors acting for themselves in litigation is not one to be encouraged since it removes the independence, impartiality and objectivity that the Courts expect from legal representatives. As Brereton J observed in *McIlraith v Ikin (costs)* [2007] NSWSC 1052 at [25]:

> Were the question untrammelled by authority, I might well have taken the same course as the Supreme Court of Western Australia in *Dobree*. In particular, I would question the proposition, which underlies the *Chorley* exception, that as a solicitor can employ another solicitor to do the work he or she should be entitled to recover the costs of doing the work him or herself. To the contrary, there seems to me a substantial reason to do so. Where a solicitor represents a litigant, the court is entitled to expect the litigant to be impartially and independently advised by an officer of the court...Where a solicitor acts for himself or herself there cannot be independent and impartial advice, and this is in principle a strong reason for holding that a solicitor litigant should not be entitled to costs of acting for him or herself.

and to similar effect see also per McMurdo P, Thomas JA and Mullins J in *Adamson v Williams* [2001] QCA 38 at [26].

26. As Parker J (with whom Steytler and Rowland JJ agreed) put the matter in *Dobree v Hoffman* (1996) 18 WAR 36 at 42:

> To the extent that the court was concerned that, in the absence of an exception to the general rule, solicitors would in effect be encouraged to retain other solicitors to act for them which would add to the costs to be met by an unsuccessful opponent, it is to be observed that any such saving in costs would not usually be significant as it affects only such matters as taking instructions and attendances. It should further be noticed that for solicitors to act in their own litigation carries with it the disadvantage that the solicitor litigant is without impartial advice as to whether a particular line of effort in the litigation is warranted or merely a reflection of undue nervousness or zeal encouraged by the personal interest of the solicitor litigant. Indeed the exception may well have the effect, in some cases, of encouraging ill-considered or unnecessary litigation because in the case of a solicitor litigant, the exception has the effect of diminishing the disadvantages of entering into litigation.

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[17] *Cachia* at 415.

27. This approach gains support from the *Australian Solicitors' Conduct Rules* 2015, which were developed by the Law Council of Australia (in 2011 and subsequently updated). They have been adopted in New South Wales,[18] Victoria, Queensland, South Australia and the ACT.

28. The objective of the Rules "*is to assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and these Rules*".[19] Rule 17 is headed *Independence – avoidance of personal bias* and Rule 17.1 provides:

> A solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client or of the instructing solicitor (if any) and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's instructions where applicable.

29. Further, Rule 27.1 provides:

> In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court, the solicitor may not appear as advocate for the client in the hearing.

30. These provisions seek to ensure the independence, impartiality and objectivity of a solicitor, which, as Brereton J observed in *McIlraith v Ikin*, the Court is entitled to expect. Those objectives cannot, however, be achieved where the solicitor acts in his or her own case. This Court should then not encourage that practice, let alone permit the solicitor to be compensated and indeed to profit where he or she chooses to do so.

(iii) This Court should intervene

31. As the majority noted in *Cachia*, the general rule has been in place at least since 1278 and has not been doubted since that time.[20] Any attempt in this Court to challenge that general rule would then be resisted (and left to the legislature) on the basis that its rationale has been fully argued in this Court and is well settled.[21] This is

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[18] As the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules* 2015 (NSW) under the *Legal Profession Uniform Law (NSW)*.

[19] Preliminary Rule 3.1.

[20] *Cachia* at 410 and 413.

[21] See for instance *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1 at [27] – [30].

not the case with the *Chorley* exception, however, and this Court should not be reluctant or hesitant to abandon it (or confirm that it does not form part of the law of Australia).

32. In that regard:

a. the general rule has been in place since at least 1278 in England and Wales and has not been doubted since that time. Further, it has been applied by the Courts in this country without question or criticism;

b. by contrast, the *Chorley* exception was introduced in England and Wales in 1884, at which time there was no consistent practice in that regard.[22]

10 It is also of note that although the rule in *Chorley* was expressed by reference to a solicitor appearing for himself, the rationale was expressed by reference to the solicitor appearing by himself but doing the work by his own clerk who is paid for doing it;[23]

c. the *Chorley* exception was assumed to apply in Australia by the majority of this Court (in a 3-2 decision) in 1976 in *Guss*, but without argument or consideration;

d. in 1994, the majority of this Court in *Cachia* (in a 5-2 decision) observed that the general rule and the exception had been "*accepted*" in *Guss*. The exception did not need to be (and was not) determined, but it was described
20 as "*somewhat anomalous*" and with a rationale that was "*somewhat dubious*", "*questionable*" and "*unconvincing*";

e. the *Chorley* exception has not been fully argued in this Court and indeed has not been determined by this Court;

f. the *Chorley* exception has been applied by first instance and appellate Courts in Australia on the basis that *Guss* and *Cachia* established a binding precedent in this regard but without embracing any rationale for the rule and

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[22] See *Chorley* at 876 per Brett MR.

[23] See *Chorley* at 875 (per Brett MR) and 877 (per Bowen LJ).

indeed often acknowledging (without dissent) the criticisms of the exception in *Cachia*;[24]

g. there has been much judicial criticism of the rule;[25]

h. attempts to expand the scope of the exception have been unsuccessful (eg in respect of professional arrest charges;[26] to a paralegal;[27] to a barrister without a practising certificate;[28] to a solicitor who had not renewed his practising certificate;[29] to an Australian lawyer admitted to practice but not yet holding a practising certificate;[30] to a barrister;[31] and to a legal practitioner in respect of work as a barrister[32]) in circumstances where the rationale for the *Chorley* exception would appear to have been equally applicable and it is difficult to see any principled basis for not applying the

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[24] Eg. *Croker v Commissioner of Taxation* [2002] FCA 1432; 124 FCR 286 at [8] per Madgwick J; *Tyne v UBS AG (No 2)* [2014] FCA 1228 at [32] per Greenwood J; *Programmed Total Marine Services Pty Ltd v Ships Hako Endeavour, Hako Excel and Hako Esteem* [2014] FCAFC 134; 315 ALR 66 at [183] per Besanko J with whom Allsop CJ and Rares J agreed; *Atlas v Kalyk* [2001] NSWCA 10 at [9] to [12] per Handley JA, with whom Meagher and Sheller JJA agreed; *Winn v Garland Hawthorn Brahe (a firm)* [2007] VSC 360 at [6] to [15] per Kaye J; *Soia v Bennett* [2014] WASCA 27 at [82]-[84] per Pullin JA, with whom Newness and Murphy JJA agreed; *Bashour v Australian and New Zealand Banking Group Ltd* [2017] FCA 163; and *Rogers v Roche* [2017] QCA 145.

[25] Eg. *Cashman and Partners v Secretary Department of Human Services and Health* (1995) 61 FCR 301; [1995] FCA 1730 at [57] per Beazley J; *Freehills, in the matter of New Tel Limited (in liq) (No 4)* [2008] FCA 1085 at [9] per McKerracher J; *Beling v Sixty International SA* [2015] FCA 250 at [56] per Mortimer J; *Khera v Jones* [2006] NSWCA 85 at [1] to [6] per Mason P and Ipp JA; *McIlraith v Ilkin (Costs)* [2007] NSWSC 1052 at [25] to [26] per Brereton J; *McMahon v John Fairfax Publications Pty Ltd (No 8)* [2014] NSWSC 673 at [63] to [68] per McCallum J; *Murphy v Legal Services Commissioner (No. 2)* [2013] QSC 253 at [8] and [16] per Daubney J; *Ogier v Norton* (1904) 10 Argus LR 76 at 78; (1904) 29 VLR 536 at 539 per Madden CJ and at 541 per Hodges J; *Hartford Holdings Pty Ltd v CP (Adelaide) Pty Ltd* [2004] SASC 161 at [122] to [132] per Doyle CJ, with whom Gray and Besanko JJ agreed; *Dobree v Hoffman* (1996) 18 WAR 36 at 42 per Parker J with whom Steytler and Rowland JJ agreed.

[26] *Programmed Total Marine Services Pty Ltd v Ships Hako Endeavour, Hako Excel and Hako Esteem* [2014] FCAFC 134; 315 ALR 66.

[27] *Croker v Commissioner of Taxation* [2002] FCA 1432; 124 FCR 286.

[28] *Tyne v UBS AG (No 2)* [2014] FCA 1228.

[29] *Worchild v Petersen* [2008] QCA 2, *Batrouney v Forster (No 2)* [2015] VSC 541 and *Piscioneri v Whitaker* [2017] ACTSC 174.

[30] *QRS v Legal Profession Board of Tasmania (No2)* [2017] TASFC 13.

[31] *Murphy v Legal Services Commissioner (No. 2)* [2013] QSC 253, *Winn v Garland Hawthorn Brahe (a firm)* [2007] VSC 360 and *Hudson v Sigalla (No 2)* [2017] FCA 339 (although this issue was left open in *Bechara v Bates* [2016] NSWCA 294).

[32] *Hartford Holdings Pty Ltd v CP (Adelaide) Pty Ltd* [2004] SASC 161.

Chorley exception other than that it is an unattractive (but binding) exception that should not be extended;

i. the exception has not been applied where the Court has considered itself not bound to do so,[33] including at appellate level.[34]

33. The current position was summarised in *Joint Action Funding Ltd v Eichelbaum* [2017] NZCA 249 at [15]:

> The prevailing mood in Australia appears to be well summarised in *Law of Costs* (GE Dal Pont *Law of Costs* (3rd ed, LexisNexis Butterworths, Chatswood (NSW), 2013) at [7.40]):
>
> > The issue therefore awaits definitive High Court authority, but obiter remarks in *Cachia v Hanes*, coupled with the tenor of judicial statements to date, suggest that the *Chorley* exception is likely to have a limited lifespan.

34. The *Chorley* exception then provides not only an exception to the general rule that litigants who conduct their own litigation may not recover for their time in so doing but also an exception to the rationale for that rule, namely that costs serve as an indemnity for costs paid rather than as compensation (let alone profit). As such, the result of that exception is "*unfairness and a privileged position*" for solicitors,[35] for which there is no logical rationale and which should not be permitted.

(b) Costs under the *Civil Liability Act* 2005 (NSW)

35. In *Guss*, the Court drew a distinction between the power to order costs on the one hand and the method and manner of quantifying awarded costs on the other.[36] Up until 2005, the provisions in New South Wales in respect of the power to order costs were not materially different to any of the other jurisdictions in Australia. The power to order costs is now set out in section 98 of the *Civil Procedure Act 2005* (NSW), but such costs are now defined in section 3 as follows:

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

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[33] *Adamson v Williams* [2001] QCA 38.

[34] *Dobree v Hoffman* (1996) 18 WAR 36 and *Wang v Farkas* (2014) 85 NSWLR 390.

[35] *Dobree* at 41E.

[36] *Guss* at 53.

36. This definition then altered the previous position and distinguished it from the other jurisdictions in Australia.

37. The power of Gibson DCJ to order costs was confined to costs as defined in section 3, which restricted costs to those that are "*payable*" and thus excluded compensation for a solicitor's time in acting as a self-represented litigant.

38. The potential significance of the inclusion of the word "*payable*" was recognised, albeit without deciding the issue, in *Wang v Farkas* (2014) 85 NSWLR 390 at [28] to [37], *Wilkie v Brown* [2016] NSWCA 128 at [34] to [49], *Coshott v Barry* [2016] NSWCA 358 at [19] to [26] and *Bechara v Bates* [2016] NSWCA 294 at [36] to [40] and [56] to [67].

39. In the instant case, Beazley ACJ (with whom McColl and Simpson JJA agreed on this issue) at [106] relied upon the inclusion of the word "*payable*" in the relevant rules considered by this Court in *Guss*. Order 71 rule 19 of the *High Court Rules* 1952, which were the relevant rules in force at the time of *Guss*. Rule 19 provided that "*bills of costs and fees which...are payable...shall be taxed*" and held that this did not affect the application of the *Chorley* exception. In *Guss*, however, the majority observed at [53]:

> Rule 19 provides for the method and manner of quantifying awarded costs in the ordinary case. It does not affect the long established rule of practice which gives certain professional costs to a litigant in person who is a solicitor. It therefore provides no obstacle to the extension of that rule of practice to the very special circumstances of this case.

40. The inclusion of the word "*payable*" in Order 71 rule 19 related to the taxation of costs and was therefore irrelevant to considering the power to order costs.

41. In the instant case, the word "*payable*" in section 3 for the purposes of section 98 confines the power to order costs; whereas the power to order costs relevant in *Guss* was (and is) contained in section 26 of the *Judiciary Act 1903* (Cth) and simply provides that the Court "*shall have jurisdiction to award costs in all matters*". In other words, contrary to the position here, there was no restriction upon the power of the Court to order costs in *Guss*; and the rule relating to the "*method and manner of quantifying awarded costs*" could not affect the scope of those awarded costs.

42. Thus, Gibson DCJ's power to order costs was confined by sections 98 and 3 to the costs that were payable, thus excluding compensation for the solicitor's time in conducting his own case.

43. Such an interpretation is consistent with the general principal that "*costs are awarded by way of indemnity...for professional legal costs actually incurred in the conduct of litigation*";[37] and the same arguments made above in relation to why the *Chorley* exception should not apply support that interpretation.

(c) Vehicle through which legal practice operates

44. No principled distinction ought to be drawn where the solicitor litigant carries out the work on his own case but does so, as here, in the name of his own firm or through a corporate entity. A corporate entity, such as Kejus Pty Ltd, is not capable of performing legal work. It is simply a means by which a law practice may be structured for business efficacy or other reasons.

45. The relevant question is who performed the work and not who is ultimately the beneficiary of monies paid on a bill of costs in respect of that work.

46. As Brereton J put the matter in *McIlraith v Ilkin (Costs)* [2007] NSWSC 1052 at [11]:[38]

> Strictly speaking, Mr Ilkin did not act for himself; a solicitor corporation of which he is the director was the solicitor. However, I have attributed no significance to this distinction, and proceed on the basis that Mr Ilkin is to be regarded as having acted as his own solicitor.

47. To hold otherwise would be inconsistent with the reasoning (set out above) as to why the *Chorley* exception should not be applied and would permit solicitors to restore an unjustifiable privileged position for themselves.

Part VII: Legislative provisions

48. The applicable legislative provisions as they existed at the relevant time are set out in the annexure to these submissions. Save where indicated otherwise, those provisions are still in force, in that form, at the date of making these submissions.

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[37] See *Cachia* at 410.

[38] See also *Wagdy Hanna and Associates Pty Ltd v Gavagna (No 2)* (2017) 316 FLR 215 at [31] – [36] and the Third Respondent's reasons at [8.1] – [8.7].

Part VIII: Orders sought

49. The Appellant seeks the following orders:

    a. Appeal allowed.

    b. Set aside the order of the Court of Appeal of New South Wales made on 31 May 2017 dismissing the Summons with costs and in its place:

        i. An order quashing the costs assessment of the Third Respondent 2016/13015, including the Certificate of Determination of Costs and the Certificate of Determination of Costs of Costs Assessment.

        ii. An order remitting the costs assessment 2016/173015 for determination according to law.

        iii. An order that the Summons otherwise be dismissed.

        iv. No order as to costs.

    c. The First Respondent pay the Appellant's costs of the appeal to this Court.

Part IX: Oral argument

The Appellant estimates that two to two and a half hours will be required for the presentation of his oral argument, including reply.

Dated: 2 February 2018.

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APPENDIX

1. *Judiciary Act* 1903 (Cth)

Section 26 Costs

The High Court and every Justice thereof sitting in Chambers shall have jurisdiction to award costs in all matters brought before the Court, including matters dismissed for want of jurisdiction.

2. *High Court Rules* 1952

Order 71 rule 19(1)

Unless the Court or a Justice in a particular case otherwise directs, bills of costs and fees which — (a) are payable to barristers and solicitors entitled to be admitted to practise in the Court in respect of business transacted by them in the Court or its offices; and (b) have been directed by a judgment or order to be taxed, shall be taxed, allowed and certified by a Registrar who, in these Rules, is referred to as 'the taxing officer'.

3. *Supreme Court Act* 1970 (NSW)

Section 76 Costs [repealed]

(1) Subject to this Act and the rules and subject to any other Act –

(a) costs shall be in the discretion of the Court;

(b) the Court shall have full power to determine by whom and to what extent costs are to be paid; and

(c) the Court may order costs to be assessed on the basis set out in Division 6 of Part 11 of the Legal Profession Act 1987 or on an indemnity basis.

Section 19 Definitions

In this Act and in the rules, except in so far as the context or subject matter otherwise indicates or requires:

costs includes fees, charges, disbursements, expenses and remuneration

4. *Civil Procedure Act* 2005 (NSW)

Section 98 Courts powers as to costs

(1): Subject to the rules of court and to this or any other Act:

(a) costs are in the discretion of the court;

(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 on an indemnity basis.

Section 3: Definitions

In this Act:

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

5. *Legal Profession Uniform Law Application Act* 2014 (NSW)

Section 76 Criteria of costs assessment of ordered costs

(1) In conducting an assessment of ordered costs, the costs assessor must determine what is a fair and reasonable amount of costs for the work concerned.

6. *Legal Profession Uniform Law Australian Solicitors' Conduct Rules* 2015 (NSW)

Preliminary Rule 3 Objective

The objective of these Rules is to assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and these Rules.

Rule 17 Independence – avoidance of personal bias

17.1 A solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client or of the instructing solicitor (if any) and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's instructions where applicable.

Rule 27 Solicitor as material witness in client's case

27.1 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court, the solicitor may not appear as advocate for the client in the hearing.