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 REPLY

Part I: Certification

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

Part II: Reply

The arguments to be determined

2. The Court of Appeal in the instant case determined (following the structure of how the case was argued) that it was bound to apply the *Chorley* exception; that the introduction of the word "payable" in section 3 of the *Civil Procedure Act* 2005 (NSW) did not demand a different result; and that it was therefore unnecessary to consider whether it made a difference that the First Respondent was acting through a corporate entity.

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3. In approaching its task of assessing whether the Court of Appeal was in error, this Court needs to consider those issues, but:

    a. if this Court agrees with the Court of Appeal in relation to the first two issues, then the third issue does not arise;

    b. if this Court disagrees on the first issue and does not apply the *Chorley* exception, then the second issue of the impact of the *Civil Procedure Act* 2005 (NSW) upon that exception does not arise, but the third issue needs to be considered.

4. Further, if the *Chorley* exception is not applied, then the rationale for not applying it in the context of the general rule will inform the question of whether the fact that the First Respondent was acting through a corporate entity takes this case outside of the general rule. Thus the third issue requires consideration of the rationale for the general rule and the *Chorley* exception.

5. The First Respondent's submission that the *Chorley* exception does not arise is therefore misplaced. Indeed the status of the *Chorley* exception is the starting point and in that regard it is noteworthy that the First Respondent has not sought to justify the *Chorley* exception or engage with the Appellant's arguments as to why it should not be applied.

Statutory interpretation

6. The First Respondent criticises the Appellant for asking this Court to abandon the *Chorley* exception on the basis that to do so is not consistent with a process of statutory interpretation.[1]

7. This submission, however, fails to acknowledge that the Appellant's position is that 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. Further, this Court has never been called upon to determine whether the *Chorley* exception forms part of the law of Australia, so that any observations in that regard would be obiter. There is therefore no binding precedent on this issue. Contrary to the First Respondent's

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[1] First Respondent's Submissions at para 16.

submission,[2] the New South Wales has not adopted the *Chorley* exception, but has applied it only on the basis that it has been obliged to do so by reason of this Court's decisions in *Guss* and *Cachia*.

8. If the issue is approached purely as one of statutory interpretation, there is nothing in the statutes before this Court (or indeed any other Court previously) that would justify a distinction being drawn between an ordinary litigant not being entitled to recover for his or her time in conducting his or her own litigation (the general rule) and the position of a solicitor litigant (the exception). Thus, an approach based upon statutory interpretation does not support the adoption or retention of the *Chorley* exception.

9. In *Chorley*, the judgments proceeded without any analysis of the relevant statutes and the exception was described as a "*rule of practice*",[3] which description was also adopted in *Guss*.[4] A rule of practice cannot be elevated to a rule of statutory interpretation, still less to the level of a statutory provision.

10. Further, the First Respondent himself propounds the "*true nature*" of both the general rule and the *Chorley* exception as deriving from "*the discretionary nature of the power which those statutes confer*".[5] Such a submission of itself demonstrates that the exercise in which this Court is required to engage is not one of pure statutory interpretation.

11. There is thus no impediment to this Court holding that:

    a. the *Chorley* exception has never formed part of the law of Australia and should not be adopted; or

    b. if the *Chorley* exception has been adopted in this country, it should not be retained.

12. Even if this Court holds that the *Chorley* has been adopted in this country, this Court is entitled to revisit that issue, even as a matter of pure statutory interpretation (see for example *Telstra Corp Ltd v Treloar* (2000) 102 FCR 595 at 603). In the present circumstances, it should not be hesitant to do so given that any adoption of the

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[2] First Respondent's Submissions at para 27.
[3] (1884) 13 QBD 872 at 877
[4] (1976) 136 CLR at 53
[5] First Respondent's Submissions at para 25.

Chorley exception was only done indirectly and without full argument and consideration; its rationale has never been embraced; and for the reasons set out in the Appellant's primary submissions.

Civil Procedure Act 2005 (NSW)

13. The introduction of the word "*payable*" in section 3 of the *Civil Procedure Act* 2005 (NSW) did represent a change in the power of the Supreme Court to award costs when compared with the previous definition in section 19 of the *Supreme Court Act* 1970 (NSW); and that remains the case even if the District Court's power had previously been defined so as to include that term.

14. In any event, the power to award costs considered in *Guss* and *Cachia* were both defined without reference to costs payable; in *Guss* the Court drew a distinction between the power to order costs and the method and manner of quantifying awarded costs and thus ignored any impact of the use of the word payable in Order 71 rule 19 which governed the quantifying of awarded costs;[6] and the relevant power in *Cachia* was the *Supreme Court Act* 1970 (NSW).

15. This Court has therefore never considered the issue of whether the limitation to "*costs payable*" in the power to order costs excludes the effect of the *Chorley* exception. For the reasons set out in the Appellant's primary submissions, this Court should hold that in view of the definition in section 3 of the *Civil Procedure Act* 2005 (NSW), the *Chorley* exception does not apply, at least in New South Wales. This is consistent with the decision of the New Zealand Court of Appeal in *Joint Funding Limited v Eichelbaum* [2017] NZCA 249 where the power to order costs was defined by reference to "*costs actually incurred*".

Corporate entity

16. The First Respondent contends that the general rule (as confirmed in *Cachia*) did not apply on the basis that he was not "*a self-represented litigant*" since he acted through an incorporated entity.

17. The question of whether a party comes within the general rule or indeed the *Chorley* exception cannot depend upon the label to be attached to that party. Rather it should depend upon an analysis of the rationale for the existence (or indeed otherwise) of

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[6] (1976) 136 CLR 47 at 53.

the rule and the exception and the substance of the party's position. This is an issue that has not been considered by this Court before.

18. The general rule operates irrespective of the corporate structures involved and treats all litigants conducting their own case equally.[7] In the same way as the *Chorley* exception granted solicitors a privilege that cannot be justified and maintained, to permit solicitors to avoid the effect of the general rule by acting through a corporate entity would in effect be to reintroduce that same privilege for solicitors. For the reasons set out in the Appellant's submissions for not applying the *Chorley* exception, avoiding the effect of the general rule by acting through a corporate vehicle should not be permitted by this Court.

19. Although Kejus Pty Ltd was an incorporated law practice, it could only provide a vehicle through which Australian Legal Practitioners could operate. The First Respondent was its principal[8] and the reality here was that he was a solicitor litigant acting through an incorporated entity.[9]

20. The position might be distinguishable where work is done by another solicitor, but the position here is that, as noted by the costs assessor, the First Respondent carried out the work himself and the costs claimed were for his time.[10]

21. The position then is that no litigant should be permitted to recover as costs for his or her own time in conducting his or her own litigation.

Dated: 6 April 2018.

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[7] As indeed was noted in *Cachia* (1994) 179 CLR 403 at 414.
[8] See Core Appeal Book at page 59 line 49 per Beazley P.
[9] See Core Appeal Book at page 84 line 108-109 per Beazley P.
[10] See Appellant's Further Materials at page 26 lines 8 to 23.