IN THE HIGH COURT OF AUSTRALIA No.S352 of 2018

SYDNEY REGISTRY

BETWEEN

BELL LAWYERS PTY LTD ABN 96114514724

Appellant

AND

JANET PENTELOW

First Respondent

DISTRICT COURT OF NEW SOUTH WALES

Second Respondent

APPELLANT'S REPLY

Part I:

1. The reply is in a form suitable for publication on the internet.

Part II:

2. In this Reply the appellant uses the same abbreviations as in its primary submissions.

3. The appellant's reply to the respondent's argument can be summarized in three points:

(a) The respondent incorrectly identifies Australian courts' application of the Chorley principle as agreement and acceptance of it. Since 1976 those Courts have, as they are required to do, applied the High Court's decision in *Guss*, in which it accepted the Chorley Exception as part of Australian law: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89

(b) The suggestion that the principle in Chorley is not an exception to the general rule is incorrect. It arises as a result of misstatement of the general rule by introducing the phrase *"loss of earnings"* into the statement of the general rule: at [59];

(c) In *Guss*, the majority of the High Court adopted without question the justification for the Chorley Exception in the reasoning of the English Court of Appeal in Chorley. More telling in terms of the search for a proper basis upon which to rest the principle is Faucett J's judgment in *Pennington v Russell (No 2)* [1883] NSWLawRp 47; (1883) 4 LR (NSW) Eq 41, where

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his Honour accepted the apparent practice as revealed by books of practice *"with great difficulty"*. More than 100 years later, in *Cachia* the High Court had not resolved that difficulty. The continued application of a doctrine which does not withstand the studied scrutiny of this Court (and numerous other courts in the judicial hierarchy) should not be maintained.

Material facts

4. The first respondent's statement of facts at [15] RS requires clarification. The appellant challenged the first respondent's entitlement to any of the claims for costs for work she had done herself but challenged only the quantum, and not the entitlement, of the first respondent to recover the costs of her solicitors and Mr Brabazon.

The long-standing recognition of a Chorley-type rule

5. The first respondent relies on the longstanding recognition of a Chorley-type rule as a reason it should remain. In the appellant's submission, more telling than the long-standing recognition is that no Court since Chorley has advanced a reason other than that advanced in Chorley for the rule. On the contrary, the High Court in Cachia, rather than support the continued existence of the rule, questioned the explanations given for it (at 412). Other Courts have echoed the criticism. In many cases the application of the Exception is preceded by an acknowledgment of the criticism, and there are numerous instances of the Court limiting or distinguishing its application.

Statutory construction of s.98 of the Civil Procedure Act

6. The appellant acknowledges that the *Judicature Acts* were the ultimate source of sec 76 of the *Supreme Court Act 1970*. However, the introduction of the definition of *"costs"* in sec 3(1) of the *Civil Procedure Act 2005* (NSW) does not find its origin in the *Judicature Acts*. Section 3 introduced the word *"payable"* into the definition, which was a departure from the definition of *"costs"* in the *Supreme Court Act 1970*. The word *"payable"* implies a legal obligation to pay.

7. The possible effect of the word *"payable"* in this context was first remarked upon by Basten JA in *Wang v Farkas*, in obiter comment. As a matter of statutory interpretation, the words must be given primacy and *"[t]he legislative history cannot overcome the plain words of the provision"*: *Grajewski v Director of Public Prosecutions (NSW)* [2019] HCA 8 at [19].

8. Contrary to RS [49], no assumption should be made that the word *"'costs' is used in s. 98 by the NSW legislature with its established technical legal meaning"* in circumstances where a new definition of *"costs"* has been introduced.

That the Chorley Exception leads to lower legal costs

9. Contrary to RS [68], the appellant does contest the proposition that *"Chorley results in a considerable costs saving to the losing party"*. It does not contest the factual position that under the Chorley Exception a solicitor cannot charge for certain attendances. But that is a long way from establishing that *Chorley* leads to lower legal costs and the countervailing factors of lack of objectivity and self-interest are capable of increasing legal costs.

Chorley followed in the UK

10. That Chorley is followed in the UK is not of itself a persuasive reason for the High Court to continue to follow it.

11. Furthermore, the continued acceptance of Chorley in the UK must be seen in the context of the *Litigants in Person (Costs and Expenses) Act 1975*, which effectively reversed the general rule in relation to litigants in person, including legal practitioners, in matters to which it applies. Chorley now finds application only 'around the edges', such as in criminal trials and in legal disciplinary proceedings and so in effect represents an exception to a very limited general rule as to costs.

Widespread acceptance of Chorley in Australian Courts

12. The first respondent's reliance on the widespread acceptance of Chorley in Australian courts (RS [34]-[39]) as a reason for it to remain is misplaced. Once the High Court accepted the general status of the Chorley principle in *Guss*, Australian Courts were limited in their ability not to apply it, even where the rules of that court were different to the High Court Rules considered in *Guss*. This point has repeatedly been made[1].

13. This impermissibility of refusing to follow *Guss*, if it applied, explains why the appellant's arguments on costs assessment, costs review, in the District Court and in the Court of Appeal, did not include an invitation to decline to apply *Guss*, if it applied. At each instance, however, the appellant contended that the Chorley Exception did not apply to barristers or to any lawyer who was legally represented. It is only in this Court that the appellant can seek the overturn of *Guss*.

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[1] See, eg, *Atlas v Kalyk* [2001] NSWCA 10 at [10]; *McIlraith v Ilkin and anor (Costs)* [2007] NSWSC 1052 at [25] – [26]); *Soia v Bennett* (2014) 46 WAR 301 at 321.

Appeal to fairness in support of the Chorley Exception

14. The first respondent contends that *"if legal work is done by qualified legal practitioners, it is only fair that it should be reasonably remunerated"*. On the contrary, charging and recovery of fees for legal work is seen, other than in the Chorley Exception, as an exchange for professional services rendered in representing the interests of a client. Self-interest is the antithesis of the exchange of fee for service in the law. There is nothing unfair about not being able to recover fees for work in one's self-interest.

15. On the other hand, a question which arises for the Court is whether it is fair that solicitors enjoy a privilege not afforded to others? Does the Exception represent the Court's imprimatur of the position that lawyers are to be treated differently because of the privilege of being a lawyer? Whatever the answer to that question may be, does the rule result in an outcome where although all litigants in person are equal before the law, lawyer litigants in person are 'more equal'?

Abrogation into the future

16. Although often referred to as a rule of practice, the Chorley Exception is more than that. It is a principle of general application in the law of party/party costs. Accordingly, cases in relation to rules which are solely rules of practice are not applicable.

Incorrect statement of the general rule

17. The first respondent contends that Chorley is not an exception to the general rule *"that litigants in person do not recover as part of their costs compensation for loss of earnings resulting from running a case"* (RS at [59]), or the *"rule of no recovery for loss of earnings"* (RS at [59]). Both are incorrect statements of the general rule. Neither the general rule nor the exception are rules about recovery of loss of earnings. That would result in a damages-type inquiry. That is not the purpose of costs: *Cachia* at 410-411. Rather, outside the Chorley Exception, *"costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation"*: *Cachia* at 410.

18. Any statement of the general rule must accommodate the cardinal principle represented by that statement. The general rule was correctly expressed by Beazley ACJ, with whom Macfarlan JA agreed in the instant case, as being that *"a self-represented litigant is not entitled to professional costs for acting for herself or himself in legal proceedings"*: Judgment at [19]. When the general rule is correctly stated, it is clear that the Chorley rule is an exception. Furthermore, the High Court considered it an exception

in *Cachia* and the majority used the word *"exception"* seven times in that context: at 411, 412, 413 and 414.

19. In summary answer to RS [47] the appellant says:

(i) longevity is no reason for a principle which has been little analysed to remain;

(ii) the appellant

(iii) the minority was constituted by Mason and Murphy JJ. Mason CJ was in the majority in *Cachia* which criticised Chorley. Murphy J was no longer on the Court;

(iv) the appellant agrees but observes that the majority in *Guss* was of three justices whereas the majority in *Cachia* was constituted by five justices;

(v) other than the High Court itself, Australian courts are required to apply *Guss* until such time as it is overturned. That has created the *"stream of authority"*;

(vi) the principle has been adopted in all principal common law jurisdictions but none have provided an answer to the criticism of this Court in *Cachia*;

(vii) there is inconvenience in the uncertainty which has arisen from the High Court's criticism of the Exception and the current state of uncertainty is undesirable;

(viii) if *Guss* applied only the High Court Rules in relation to costs and other courts were free to construe their rules free of the shadow of Chorley, the submissions could be accepted. That is not the case for the reasons mentioned above;

(xi), (xiv) the Court is well-equipped to understand the cases in which Australia courts have applied Chorley;

(ix), (x), (xii) the NSW parliament must also be taken to be aware that the High Court may review the Chorley exception and be aware of the desirability of the High Court determining the issue so that it applies to all Courts in the integrated federal legal system so that, for example, a claim arising under federal law litigated in a NSW Court does not result in the application of a different rule than if the claim is litigated in a federal court;

(xiii) The principle is established through lower courts obligations to apply it, not through repeated and thorough argument;

(iv) Given the narrow compass of the exception, this is unlikely;

(xv) The question properly arises for determination before this Court in this case.

Dated: 22 March, 2019.

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