IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S4 of 2018

BETWEEN: RONALD COSHOTT
Appellant

AND: KEITH ROBERT SPENCER
First Respondent

FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: The first respondent certifies that this outline is in a form suitable for publication on the internet.

Part II: Outline of propositions the respondent intends to advance in oral argument

1 Three fallacies underpin the appellant's submissions:

1.1 The respondent was a self-represented litigant.

1.2 This appeal raises issues about the *Chorley* exception to the general rule that a self-represented litigant is not entitled to costs.

1.3 (If and only if this appeal is thought to raises issues about the *Chorley* exception) This Court has never determined that the *Chorley* exception forms part of Australian law and there is therefore no binding precedent on this issue.

The first fallacy: The respondent was a self-represented litigant

2 The respondent as defendant in the District Court was represented by an incorporated legal practice in the name of Kejus Pty Ltd, trading as Spencer & Co Legal. (That also was the case in the Court of Appeal and is the case in this Court.)

3 Kejus, as required, gave Mr Spencer a costs disclosure. It entered into a costs agreement with him. Kejus also entered into a costs agreement with counsel, pursuant to which counsel appeared for Mr Spencer in the District Court.

4 When Gibson DCJ ordered the appellant to pay the respondent's costs in the District Court, Kejus prepared and lodged with the fourth respondent an application for assessment of the respondent's costs.

5 In the judgment under appeal, at J[108] Beazley P held that the respondent acted through an incorporated entity. The appellant accepts this finding: Ground of Appeal No. 4, CAB 103.3.

6 It is common ground that the respondent, a solicitor, carried out the legal work reflected in the application for assessment of costs.

7 The appellant relies on a simple but invalid syllogism to reach the conclusion that the respondent was a self-represented litigant:

Premise 1: The respondent was defendant in the District Court proceedings.

Premise 2: The respondent performed all the legal work of the solicitor for the defendant in those proceedings.

Conclusion: The respondent was a self-represented solicitor litigant.

8 The conclusion does not follow from the premises, because Kejus is a company. The consequence of incorporation is "*that one person may function in dual capacities*", with the result that "*one act by one man ... is in law both the act of the company and the separate act of himself as an individual*": *Hamilton v Whitehead* (1988) 166 CLR 121 at 128.

9 In performing legal services for the defendant in the District Court, the respondent was "*acting as the company*" that represented the defendant. It follows that the defendant was not self-represented.

10 The appellant submits that "*the First Respondent carried out the work himself and the costs claimed were for his time*": Reply [20]. This ignores (i) in carrying out the work, the respondent acted as Kejus; and (ii) the costs claimed were for work performed by Kejus, for which Kejus was entitled to charge the respondent: *Adams v London Improved Motor Coach Builders Ltd* [1921] 1 KB 495 at 501, 503; *Dyktynski v BHP Titanium Minerals Pty Ltd* (2004) 60 NSWLR 203 at [4]–[5].

Second fallacy: This appeal raises issues about the Chorley exception

11 *Chorley* is an exception in favor of solicitors to the general rule that a self-represented litigant is not entitled to costs representing his or her own time spent in the conduct of his or her case.

12 The respondent was not a self-represented litigant and therefore is not caught by the general rule. Given that, he does not need the benefit of the *Chorley* exception.

13 What the appellant seeks in this appeal is that the Court expand the ***general*** rule so that it provides that a solicitor who is not self-represented but who appears

by a solicitor corporation of which he/she is principal and, where he/she does the legal work involved in the appearance (but not otherwise), is to be treated as self-represented, despite not being self-represented.

14 In effect, the appellant seeks a declaration in these terms. That is made clear by paragraph 18 of the Reply, which claims that "*[t]he general rule operates irrespective of the corporate structures involved*". Whatever the merits of this claim may be, it does not involve a consideration of *Chorley*.

15 The relief sought would modify the costs rules of every Australian jurisdiction and accordingly notice should have been given to the Attorneys-General, as noted in the respondent's submissions.

Third fallacy: This Court has never determined that the Chorley exception forms part of Australian law and there is therefore no binding precedent on this issue.

16 The existence of the *Chorley* exception as part of Australian law forms part of the *ratio decidendi* of the majority judgment in *Guss*. The dissenting justices in *Guss* not only *sub silencio* adopted *Chorley* but, based on *Chorley*, would have partially allowed Mr Guss' appeal.

17 The majority judgment in *Cachia* recognises that *Guss* adopted *Chorley.* The dissenting judgment in *Cachia* also recognises this.

18 The statement in the majority judgment in *Cachia* that, in *Guss*, "*no general submission was advanced ...that a successful solicitor litigant who acts for himself is never entitled to recover costs in respect of his own time and services*" appears with respect to be without basis. That is because the arguments in *Guss* were not reported. For the same reason, the appellant's submission that "*in Guss, the existence of the general rule and the Chorley exception were assumed without argument*" is without basis.

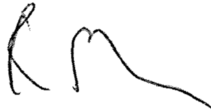
19 Taking *Guss* and *Cachia* together, eleven justices of this Court have recognised *Chorley* to be part of Australian law: Mason J/CJ and Gibbs ACJ and Jacobs, Murphy, Aickin, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

Conclusions

20 For the reasons in the first respondent's written submissions, this Court, even if it considers (contrary to these submissions) that the appeal does raise issues about *Chorley*, should not embark on a reconsideration of either the general rule

or the *Chorley* exception to it. The issues the Court would be required to consider on such a reconsideration are manifestly ones that should be left to the Parliaments of the States and the Commonwealth.

21 Special leave to appeal should be revoked because an appeal would not involve a consideration of *Chorley*. Alternatively, the appeal should be dismissed with costs.

R.S. Angyal 

R.P.V. Carey

Counsel for the first respondent

10 May 2018