IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S352 of 2018

BETWEEN

BELL LAWYERS PTY LTD ABN 96114514724

Appellant

and

JANET PENTELOW

First Respondent

DISTRICT COURT OF NEW SOUTH WALES

Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Issues

2 The appeal presents the following issues:

a. Whether, in respect to the general rule that a litigant in person does not recover costs for time spent in conducting his or her own litigation, there exists an exception in favour of a solicitor (the *Chorley Exception)*;

b. Whether, even if the Chorley Exception may have formerly existed, its operation is precluded by sec 98 of the *Civil Procedure Act* 2005 (NSW);

c. If the Chorley Exception exists and its operation is not precluded by sec 98, whether it applies to a barrister;

d. If the Chorley exception exists, is not precluded by sec 98 and applies to barristers, whether it applies to a barrister who is not self-represented.

Part III: Section 78B of the *Judiciary Act 1903*

3 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Citations

4 *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150

Filed on behalf of the Appellant
ADDRESS FOR SERVICE
Bell Lawyers
Level 1, 9 Tindale Street
Penrith NSW 2750

Tel (02) 4734 9333
Fax (02) 4734 9300
Ref Andrew Bell
Email dbell@bell-lawyers.com.au

Pentelow v Bell Lawyers Pty Ltd (ACN 114 524 724) trading as Bell Lawyers [2016] NSWDC 186

Part V: Facts

5 The appellant, an incorporated legal practice, retained the first respondent, a barrister, to appear for its client in proceedings in the Supreme Court of NSW under the *Family Provision Act 1982* (NSW): {AB 9 [2]}.

6 A dispute arose in relation to the first respondent's fees. She commenced proceedings in the Local Court of NSW for the balance of her unpaid fees but was unsuccessful. The first respondent then appealed to the Supreme Court and was successful. Judgment was entered in her favour for the balance of the fees she had claimed. An order for costs was made in her favour in respect of the Local Court and the Supreme Court proceedings {AB 65 [4]}.

7 In the Local Court the first respondent was represented by a solicitor and also undertook some work herself {AB 66 [5]}. In the Supreme Court the first respondent was represented by a solicitor and by senior counsel {AB 66 [5]}.

8 Following her success in the Supreme Court the first respondent forwarded a memorandum of fees to the appellant claiming costs pursuant to the costs orders made in those proceedings, claiming $144,425.45. That amount included claims for *"Costs incurred on her own behalf"* in the Local Court in the sum of $22,605.00 and for *"Provision of Legal Services Provided by herself"* in the Supreme Court in the sum of $22,275.00 {AB 66 [6]}.

9 The appellant made an application for assessment of costs pursuant to s.355 of the *Legal Profession Act* 2004 (NSW). The costs assessor rejected the claim by the first respondent for the legal work she personally undertook on the basis that she had legal representation in the Local Court and the Supreme Court proceedings and on the further basis that in NSW the *Chorley exception* did not apply to barristers {AB 66 [7]}.

10 The first respondent applied for a review of the assessment. The review panel determined that it was open to the costs assessor to find that the first respondent was not a self-represented lawyer. The review panel also determined that the *Chorley exception* applied only to solicitors and not to barristers {AB 66 [8]}.

11 On appeal to the District Court, the first respondent challenged those conclusions. Judge Gibson dismissed the appeal: *Pentelow v Bell Lawyers Pty Ltd* [2016] NSWDC 186 {AB 66 [9]}.

12 The first respondent sought judicial review of the District Court's decision in the NSW Court of Appeal: {AB 67 [10].

13 The application was heard on 13 July 2017 {AB 58}. With the consent of the parties judgment was then delayed pending the outcome of the grant of special leave to appeal from the decision in *Coshott v Spencer* [2017] NSWCA 118. Ultimately, the Court of Appeal delivered judgment on 13 July 2018, following the revocation of the grant of leave in *Coshott v Spencer* on 10 May 2018 {AB 98 [119]}.

Part VI: Argument

14 In the Court of Appeal the first respondent claimed she was entitled to costs for work she had personally undertaken, based on what she described as an extension of the *Chorley* exception {AB 65 [1]}.

10 15 By majority (Beazley ACJ and Macfarlan JA) the Court of Appeal held that the *Chorley* exception applies to barristers {AB 92 [95]} and that this conclusion involved *"an application of existing High Court authority"* {AB 93 [98]} and *"an application of the Chorley exception to the facts and is not an extension of it"* {AB 98 [116]}. Furthermore, in relation to the question of self-representation, Beazley ACJ considered that, *"[t]he question whether the applicant was a self-represented litigant was not in issue per se. Rather, the issue raised by grounds 3, 4 and 5 was whether the Chorley exception applied to her as a barrister in circumstances where she had retained lawyers but nonetheless did aspects of the legal work herself"* (at [112]).

16 Meagher JA, in dissent, assumed that the High Court's decision in *Guss v Veenhuizen (No 2)* (1976) 136 CLR 47 ("Guss") *"established that a costs power limited to costs that are "payable" authorises awards to solicitors appearing in person in respect of amounts that are not "payable" to anyone"* but did not assume that *"Guss resolved the difficulties inherent in that construction of such a power":* {AB 105 [137]}.

17 His Honour considered the application of the Chorley exception to barristers to be an extension of *Guss* which was not supported by that case, *"which referred exclusively to solicitors appearing in person"* {AB 105 [138]}.

18 His Honour further considered that the *Chorley* exception *"is not identified as an alternative, non-statutory source of the power to make such an order in the circumstances"* (at [127]) and that *"caution is required before construing s 98(1) according to a special rule derived from cases on other legislation"* (at [128]).

19 The appellant contends that Meagher JA's approach is to be preferred, both as a matter of statutory interpretation and, alternatively, in relation to the non-extension of the *Chorley* exception to the circumstances of this matter.

20 The appellant further contends that the Chorley exception has an unconvincing foundation in Australian law and that it should be abandoned by this Court.

21 Alternatively, the appellant contends that if the Court considers that the Chorley exception should be preserved as part of Australian case law it should be confined to the circumstances in which it was articulated in *Chorley*, that is, to solicitors who are self-represented.

The Chorley exception in NSW and Australian law

22 The *"general rule"* of costs – that a litigant in person is not entitled to claim costs for time spent in preparing his case – has *"never been doubted"* in Australian law. On the other hand, an exception to that rule – that in the case of a solicitor litigant who is self-represented the solicitor is entitled to claim professional costs under the order for costs in the solicitor's favour – has been the subject of doubt since it was first accepted as part of the law of New South Wales in 1883, the year before Chorley was decided.

23 Although the exception to the general rule takes its name from the case of *The London Scottish Benefit Society v. Chorley, Crawford and Chester* (1884) 13 QBD 872 , a Chorley-type exception was recognised but doubted in NSW in *Pennington v Russell (No 2)* [1883] NSWLawRp 47; (1883) 4 LR (NSW) Eq 41, prior to the decision in *Chorley*. In that case the defendant, who was a solicitor, had appeared and defended in person. The plaintiff was ordered to pay the defendant's costs. The Master in Equity had allowed such items of costs as would have been allowed if the defendant had appeared and defended by another solicitor. The plaintiff sought a reference back to the Master to review his decision. Faucett J observed that *"no reliable express authority on the question"* had been cited but that looking at the Acts which regulate the taxing of costs of solicitors and attorneys *"there could hardly be a question that these Acts contemplated only the case of solicitors or attorneys acting for other persons as their clients, and not the cases of solicitors or attorneys acting for themselves"* (42). His Honour posed the question, *"does the fact, then, of his being a solicitor or attorney alter the case, or entitle him to peculiar privileges?"* (at 43). Ultimately, his Honour found *"great difficulty"* in deciding the question on the authority of the cases but adopted statements laid down in certain books of practice as *"indicating the practice in England"*(at 46) and *"with very great doubt"* found in favour of the solicitor (at 46).

24 The appellant denies the continued existence of the foundation upon which the majority reasoning in *Guss* was based.

25 In 1895, in *Wright v Trenchard* [1895] 1 ALR 22 (at 23) Madden CJ of the Victorian Supreme Court determined that the exception was available in circumstances where a non-

practising solicitor was a party and had a solicitor acting for him but did most of the work himself.

26 In 1904 the Full Court of the Supreme Court of Victoria decided *Ogier v Norton* (1904) 29 VR 536. The plaintiff, who appeared for himself, was described as a "barrister and solicitor" who had never held himself out or practised as a solicitor but who was a member of an association of counsel and practised as a barrister. The appellant was awarded costs. On taxation, the taxing officer disallowed certain costs. The plaintiff appealed. Hood J allowed the appeal and remitted the matter to the taxing officer. The defendant appealed. The Full Court (Madden CJ, A'Beckett and Hodges JJ) dismissed the appeal. Madden CJ observed that *"[t]he point involved in this appeal is not free from doubt, and it is not easy even now to find the full explanation of the established principle of this point"* (at 538).

27 In *Guss v Veenhuizen (No 2)* (1976) 136 CLR 47 the appellant, a solicitor, was successful in an appeal to the High Court. In that appeal he acted for himself as solicitor and was represented by counsel at the hearing of the appeal. When costs came to be taxed the appellant learnt for the first time that through inadvertence or error his name had not been entered on the Register of Practitioners. As a result, under sec 55B(3) of the *Judiciary Act 1903,* the appellant was not entitled to practice in the High Court.

28 The majority (Gibbs ACJ, Jacobs and Aickin JJ) held that sec 55B did not create a statutory bar to the allowance of professional costs *"in respect of work done in a capacity which by force of the statute he was not entitled to exercise"* (at 52) but whether in the *"special circumstances"* of the case he was entitled to the benefit of the *Chorley* exception (at 52).

29 The majority held that as the true basis of the exception was not the privilege of the solicitor but that work done by the solicitor was capable of quantification on taxation, the solicitor was entitled to claims costs for the work done by him.

30 In relation to O 71, r 19, which referred to *"bill of costs and fees which...are payable to barristers or solicitors entitled or admitted to practise in the Court in respect of business transacted by them in the Court"*, the majority held that the rule did not affect the *"long established rule of practice"* and therefore provided no obstacle *"to the extension of that rule of practice to the very special circumstances of this case"* (at 53).

31 Accordingly, the reliance on *Chorley* in *Guss* went beyond a straightforward application on the rule to a self-represented solicitor who was otherwise entitled to *practice* and recover costs in the Court that made the costs order. This Court's decision in *Guss*

represented an extension of the Chorley exception but in circumstances where the existence of the exception appears not to have been the subject of argument.

32 In *Cachia v Hanes* (1994) 179 CLR 403 ("Cachia") the appellant was a self-employed consultant engineer who appeared for himself in litigation in the Supreme Court of New South Wales. He was successful and was awarded costs. On taxation, the taxing master disallowed many items claimed by the appellant in his bill of costs for work he had done himself in the matter. The Court of Appeal agreed with the taxing master's decision and held that *"costs"* within the meaning of the Rules *"are reimbursement for work done or expenses incurred by a practitioner or practitioner's employee. Compensation for the loss of time of a litigant in person cannot be said to constitute costs within the meaning of the Rules"* (at 410).

33 A majority of this Court referred to the exception to the general rule as *"somewhat anomalous"* and *"limited and questionable"* (at 413). It further held that the assertions made in *Chorley* that in would be *"unadvisable"* or *"absurd"* to refuse to let a solicitor who acts for himself to charge for work done for himself *"ignores 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"* (at 412).

The application of Chorley in State and Federal Courts

34 The *Chorley* exception has been the subject of numerous judgments in State and Federal Courts.

New South Wales Authority

35 The Chorley exception has been applied consistently by the New South Wales Court of Appeal.

36 In *Atlas Corporation Pty Ltd v Kalyk* [2001] NSWCA 10 the respondent solicitor had acted for himself and his partners in proceedings to recover fees. The appellant submitted that the Court should apply the *"general principle established in Cachia v Hanes"* (at [4]).

37 The Court (Handley JA, with whom Sheller and Meagher JJA agreed) considered that *"In the end, despite the decision of the Western Australian Full Court in Dobree & Ors v Hoffman... the duty of this Court is as described in Garcia v National Australia Bank Ltd"* (at [10]).

38 Handley JA observed that there was *"still scope for the indemnity principle"* (at [9]) in the context of solicitors acting for themselves because *"[s]uch solicitors will have spent time and trouble representing themselves and, to that extent, they will have lost the opportunity of using that time doing professional work for other clients and being remunerated accordingly" (at [9])*. The indemnity in the case of solicitor litigants is,

therefore, against the opportunity cost rather than the direct cost of their professional time spent on their own case" (at [9]). Cf Tracey J in *Bashour v Australia and New Zealand Banking Group Limited* [2017] FCA 163 at [72] – [74].

39 In *Khera v Jones* [2006] NSWCA 85 the Court refused leave to appeal to an applicant who sought leave to challenge a costs assessment in which a solicitor who was self-represented and was awarded costs recovered costs for time spent. At the time, the solicitor held a practicing certificate but was not working (at [4]). The Court observed that if the matter *"were uncluttered by authority"* it would have preferred the approach taken in *Dobree v Hoffman* (1986) WAR 36 and commented further that, *"If the "rule of practice" deserves continuing application, the present case is a most undeserving applicant for inclusion. Indeed, it casts further doubt on the sustainability of the Chorley rule"* (at [3]).

40 In *Wang v Farkas* [2014] NSWCA 29 the respondent, a barrister, was awarded costs under the *Criminal Procedure Act 1986* (NSW). He had appeared for himself. The Local Court Magistrate determined his costs in the amount of $278,993, which included claims for time spent doing work in the matter, or professional costs of $256,678.

41 Following the introduction of the *Civil Procedure Act 2005*, which introduced a differently worded general power in relation to costs (sec 98), the Court had occasion to consider the application of the *Chorley* exception in a number of cases, including *Wilkie v Brown* [2016] NSWCA 128; *Bechara v Bates* [2016] NSWCA 294; and *Coshott v Spencer* [2017] NSWCA 118. In *Wilkie v Brown* and *Bechara v Bates* the Court applied the *Chorley* exception without finally determining its application.

42 In *Coshott v Spencer* Beazley P, with whom Simpson and McColl JJA agreed, noted that rule 19 of Order 71 of the *High Court Rules* considered in *Guss "referred to "costs and fees ... payable"* (at [106]) and concluded that *" s 98, by reference to the definition of "costs" in s 3 does not, by its express terms, render the Chorley exception inapplicable. Rather, I consider that this Court is bound by the decision in Guss v Veenhuizen (No 2)"* (at [107]).

43 The *Chorley* exception has also been the subject of numerous decisions at first instance in the Supreme Court of NSW and has been consistently applied: *Coshott v Barry & Board* [2017] NSWSC 1435; *Ada Evans Chambers P/L v Santisi* [2014] NSWSC 538 (in relation to a barrister); *Farkas v Northcity Financial Services Pty Ltd* [2006] NSWSC 1036 (also in relation to a barrister).

44 It has been held not to apply to solicitors who do not hold a practising certificate: *Lloyd v Hill* [2004] NSWSC 652.

45 In some cases, the exception has drawn criticism. In *McIlraith v Ilkin & anor (Costs)* [2007] NSWSC 1952, a solicitor was the defendant and was successful. It was argued by the plaintiff that the defendant is, or ought not, be entitled to the costs of acting for himself. Brereton J noted that *"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"* (at [11]). His Honour considered that the rationale of the *Chorley* exception involved two propositions (at [16]):

(a) that a solicitor litigant's costs could be allowed because they were measurable by the court, whereas the costs of other litigants in person were not measurable by the court; and

(b) that as a solicitor could always employ another solicitor to act and recover costs, there was no reason why the solicitor should not be entitled to recover costs of instead acting for himself or herself, which were likely to be less.

46 Brereton J indicated that *"[w]ere the question untrammelled by authority"* he may have taken the approach adopted in *Dobree v Hoffman* (see [59] below) but that he was bound by both the High Court in *Guss* and the NSW Court of Appeal in *Atlas Corporation Pty Ltd v Kalyk* [2001] NSWCA 10 and *Khera v Jones* [2006] NSWCA 85.

47 In the course of his reasons Brereton J questioned 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. Indeed, where the court concludes that a solicitor is not in a position to give impartial and independent advice to a party, because of the solicitor's own interest in the outcome, the court has restrained the solicitor from continuing to act [see, for example, Kallinicos v Hunt [2005] NSWSC 1181; (2006) 64 NSWLR 561]. 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":* (at [25]).

The position of Chorley in other States

Victoria

48 In Victoria, the Chorley principle has been consistently applied in relation to solicitors: *Brott v. Almatrah* [1998] 2 VR 83; *Batrouney v Forster (No 2)* [2015] VSC 541; *United Petroleum Australia Pty Ltd v Herbert Smith Freehills (No 2)* [2018] VSC 501.

49 In relation to barristers the application of Chorley has been less consistent. In *Ogier v Norton* (1904) 29 VLR 536, discussed above, the Court held that a barrister was entitled to the benefit of the principle.

50 In *Winn v Garland Hawthorn Brahe (a firm)* [2007] VSC 360 Kaye J refused to award costs in favour of the appellant, who was a legal practitioner litigant who had practised as a barrister and solicitor in Victoria for part of the proceedings but who had then been appointed to the Queensland Bar and was practising as a barrister in Queensland when judgment was handed down. The appellant claimed three categories of costs. The respondent objected to two categories, being *"costs which would ordinary be claimed by a party engaging a solicitor"* and *"costs for counsel's fees"* (at [2]).

51 Kaye J refused costs in the first category on the basis that *"s.2.4.35 of the Legal Profession Act 2006 precludes her from practising as a solicitor in an unrestricted capacity in the State of Victoria, as she is only an interstate legal practitioner and does not hold a practising certificate in this State"* (at [8]).

52 In relation to the second category Kaye J held that *"the exception stated in Guss' case does not apply to counsel who appears on his or her own behalf"* (at [10]): firstly because the High Court in *Cachia v. Hanes*, *"emphasised that the exception to the rule should not be expanded at all, particularly because of its anomalous nature"* and secondly because counsels' fees *"are different, of their very nature, to costs and fees charged by a solicitor... counsel fees are a disbursement to the client and not a profit cost"* (at [10]).

53 Recently, in *Lake v Municipal Association of Victoria (No 2)* [2018] VSC 660, Ginnane J observed, *"there is debate over whether the Chorley exception is limited to solicitors, or extends to barristers as well"* (at [6]). After noting the decision of Kaye J in *Winn*, Ginnane J distinguished *Winn* and awarded costs to the plaintiff, who was a practising barrister, who had appeared for himself in proceedings against the Municipal Association of Victoria. The award of costs was, however, confined to *"fees as a barrister for appearances and for barrister's work associated with those appearances on a standard basis together with disbursements reasonably incurred in connection with this proceeding, but such order does not include costs for any work that would ordinarily be performed by a solicitor"* (at [13]).

Queensland

54 The *Chorley* exception has been applied in Queensland in relation to solicitors: *Tolteca Pty Ltd v Lillas & Loel Lawyers Pty Ltd* [2015] QSC 148; *Hydrofibre Pty Ltd v Australian Prime Fibre Pty Ltd and Anor (No 4)* [2013] QSC 247; but refused in the case of a

solicitor who did not at the relevant time hold a practising certificate: *Worchild v. Petersen* [2008] QCA 26.

55 In *Murphy v Legal Services Commissioner (No. 2)* [2013] QSC 253 Daubney J declined to extend the exception to a self-represented barrister. His Honour stated, *"There is no authority which supports the proposition that the "anomalous" and "somewhat dubious" exception in favour of a self-represented solicitor extends to a self-represented barrister. In the absence of clear authority, I am not prepared to extend the ambit of an exception which is itself of such questionable application:* at [16].

56 In *Adamson v Williams* [2001] QCA 38 the Queensland Court of Appeal acknowledged the existence of the exception but declined to make an order for costs in favour of a solicitor litigant who had been self-represented in the Magistrate's Court and before the Court of Appeal but who had retained counsel in an unsuccessful appeal to the District Court. The Court declined to award costs on the basis that the solicitor had chosen to appear for himself in circumstances where he also gave contested evidence. The Court stated, *"There is of course nothing improper in a solicitor choosing to act as a litigant in person in legal proceedings, even where such controversy may arise. However if a solicitor does so, we do not think that a court should grant him the benefit of wearing his solicitor's hat as well. The ethical rule against continuing to act as solicitor on the record in such cases has a sound basis and is designed to retain trust between the court and its officers. The potential for a conflict between interest and duty is obvious when the solicitor on the record is a witness on a controversial issue. The solicitor here did not choose to observe that rule. He could have retained other solicitors had he chosen, but did not do so, apart from the occasional use of a town agent. In these circumstances, although he has succeeded in obtaining a retrial, he should not be in any better position than an ordinary litigant in person"*: at [26].

South Australia

57 In South Australia, the *Chorley* exception has been applied to solicitors: *Steicke v Connolly & Co* [2017] SASC 99; *Legalese Pty Ltd v Gregory* [2018] SASC 58; *Trachan Thomas* v *Clough* [1999] SASC 298.

58 In *Hartford Holdings Pty Ltd v CP (Adelaide) Pty Ltd* (2004) 234 LSJS 66; [2004] SASC 161 the Full Court of the Supreme Court dismissed an appeal by a legal practitioner who had a solicitor on the record for him as one of several plaintiffs but undertook considerable work himself in preparation of the matter and appeared for himself at the trial. The judge at first instance awarded him costs for doing the work of a solicitor but not for

appearing as counsel. Doyle CJ, with whom Gray and Besanko JJ agreed, considered that the decision of the primary judge was *"required of him, in light of... Cachia"* (at [125]).

Western Australia

59 In *Dobree v Hoffman* (1996) 18 WAR 36, the Full Court of the Supreme Court of Western Australia refused to apply the *Chorley* exception in favour of a solicitor litigant and considered that the decision of this Court in *Guss* did not bind it, on the basis that the application of the *Chorley* exception was not directly in issue and that *Guss* did not determine the application of the exception to the *Supreme Court Act 1935* (WA) and the relevant Rules.

60 In *Soia v Bennett* (2014) 46 WAR 301, the Western Australian Court of Appeal overruled *Dobree v Hoffman*. Pullin JA, with whom Newnes and Murphy JJA agreed, held that the Full Court was wrong not to apply *Guss* because it was either binding or *"seriously considered obiter"* (at 321).

The application of Chorley in Federal courts

61 In the Federal Court, at first instance and in the Full Court, the *Chorley* exception has been applied in favour of legal practitioner claimants: *Freehills, in the matter of New Tel Limited (in liq) ACN 009 068 955 (No 4)* [2008] FCA 1085 at [9]; *Waller v Freehills* [2009] FCAFC 89 at [89]; *Boase v Sullivan Commercial Interiors Pty Ltd trading as McGees Property (No 4)* [2013] FCA 195; *Bashour v Australia and New Zealand Banking Group Limited* [2017] FCA 163 at [61]-[82]. On occasions, it has been criticised: *Hudson v Sigalla (No 2)* [2017] FCA 339; *Beling v Sixty International S.A.* [2015] FCA 250 at [56]; *Bechara v Bates* [2018] FCA 460 at [5], [6].

62 In *Bechara v Bates,* the barrister, Mr Bates, was granted to leave to appear as a self-represented litigant, notwithstanding that he had retained solicitors. He claimed his costs for doing so but then withdrew the claim. Perry J observed, *"I have serious doubts regarding the proposition that a self-represented litigant, who is also a practising barrister, can appear as counsel in effect instructing his solicitors to instruct him and is thereby entitled recover his costs as counsel. These doubts include concerns as to how the duties owed by a barrister to those instructing her or him and to the "client" might sit with such a proposition: see also the doubts expressed by Katzmann J in Hudson v Sigalla (No 2) [2017] FCA 339 at [50]-[53] notwithstanding her Honour's consideration of authorities on which Mr Bates relied"*: at [6].

Whether the Chorley exception is precluded by sec 98 of the *Civil Procedure Act 2005* (NSW)

63 In 2005 the *Civil Procedure Act 2005* (NSW) was enacted. Section 98 relevantly provides:

98 Courts powers as to costs

(cf Act No 52 1970, section 76; SCR Part 52A, rules 5, 6, 7 and 8; Act No 9 1973, section 148B; Act No 11 1970, section 34)

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

(a) costs are in the discretion of the court, and

(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.

64 The word *"costs"* is defined in sec 3 as *"**costs**, in relation to proceedings, means costs payable in or in relation to the proceedings, and includes fees, disbursements, expenses and remuneration"*.

65 Sec 98 may be contrasted with sec 76 of the *Supreme Court Act 1970*, which it effectively replaced. Sec 76 provided:

76 Costs

(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.

66 Sec 19 contained a definition of *"costs"*, being *"**"costs"** includes fees, charges, disbursements, expenses and remuneration"*.

67 In *Wang v Farkas*, Basten JA foreshadowed a reconsideration of the application of *Chorley* in civil proceedings in New South Wales following the introduction of the word *"payable"* into the definition of "costs", stating *"*[t]*he introduction of the emphasised word "payable" may at some stage require reconsideration of the application of Chorley in civil proceedings in this State. It is not necessary for present purposes to resolve that question"* (at [28]).

68 A consideration of the relation between the *Chorley* exception and sec 98 subsequently occurred in a number of cases. In *Wilkie v Brown* [2016] NSWCA 128, the Court considered that it was *"not appropriate to finally determine the questions of principle raised" (at [49]).* In *Bechara trading as Bechara and Company v Bates* [2016] NSWCA 294 the Court considered that it was *"not appropriate to finally determine the important questions of construction raised in this case"*: at [66].

Reconsideration of its earlier decisions by this Court

69 The abandonment of the *Chorley* exception would involve the Court in departing from its decision in *Guss.* It is submitted that this is an appropriate case in which to do so.

10 70 This Court has taken the view that it can, and if appropriate will, reconsider its earlier decisions: *R v Commonwealth Court of Conciliation & Arbitration* (1914) 18 CLR 54 at 58 per Griffith CJ; *Attorney*-General *(NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 243-244 per Dixon J.

71 A primary consideration which will justify departure from an earlier decision is where the earlier decision or decisions *"do not rest upon a principle that has been carefully worked out in a succession of cases"*: *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 56 per Gibbs CJ, with whom Stephen J (at 59) and Aicken J at 66) agreed; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417; *Imbree v McNeilly; McNeilly v Imbree* (2008) 236 CLR 510 at 526.

20 72 The acceptance of the *Chorley* exception by the High Court in *Guss* is the only occasion on which the principle has been part of the ratio decidendi of a judgment. In *Cachia* the exception was the subject of consideration but only in obiter dicta.

73 In *Guss,* by a majority of 3-2 the Court accepted that it was a *"rule of practice"* that could be relied on in the *"special circumstances"* of the case which, the Court found, involved inadvertence or error by the Principal Registrar of the High Court (cf *Kenna v Connolly* (1943) 17 ALJ 32). As the full High Court observed in *Cachia, "no general submission was advanced in Guss v. Veenhuizen (No.2) to the effect that a successful solicitor litigant who acts for himself is never entitled to recover "costs" in respect of his own time and services. The argument in the case was about whether the solicitor litigant was precluded*
30 *from recovering "costs" in respect of his own time and services in relation to an appeal to this Court by reason of the fact that he was not on this Court's Register of Practitioners"* (at 412).

74 The *Chorley* exception was the subject of an appeal in *Coshott v Spencer & Ors* [2018] HCATrans 81 but was not ultimately the subject of judgment, given the revocation of the grant of special leave.

75 Accordingly, the acceptance by this Court of the *Chorley exception* is not the result of *"a principle carefully worked out in a succession of cases"* (*Imbree v McNeilly; McNeilly v Imbree* (2008) 236 CLR 510 at 526). Aspects of the rule which call for careful consideration in the context of the present case include whether:

(a) the rationale articulated in *Chorley* has continued validity;

(b) what status ought to be accorded to *"rules of practice"* in the context of the primacy of statute;

(c) whether the *Chorley* exception is precluded by sec 98 of the *Civil Procedure Act 2005* (NSW) specifically, or by costs powers which are defined in terms of *"costs payable"* generally;

(d) whether policy considerations militate in favour or against the continued existence of the exception, including whether the abandonment of the exception would have any foreseeably adverse consequences in relation to the administration of justice.

Policy considerations

76 The rationale advanced for the *Chorley* exception in *Chorley*, and adopted by the High Court in *Guss*, is unconvincing. The High Court identified this in *Cachia v Haines* and this criticism has been oft-repeated.

77 The main rationale advanced was that a solicitor's costs are able to be measured. However, the Courts have not had difficulty in valuing the provision of labour or services in the context of quantum meruit claims in other contexts and would have no difficulty today in accepting evidence, expert of otherwise, of the value of labour or services of non-lawyers. Accordingly, this basis provides weak support for the exception.

78 A further rationale advanced in support of the exception is that it is to the benefit of the paying party because the costs will be less than they would be if the solicitor litigant retained another practitioner to act for him or her. This too is unconvincing: when a legal practitioner is self-represented, the practitioner is not receiving the impartial and independent advice that the Court is entitled to expect its officers to provide to the litigants they represent.

79 Were the Court to abandon the *Chorley* exception, there would be no foreseeable adverse consequences to the administration of justice. It would not change the rule in relation to the recoverability of costs where solicitors are employed by a corporation, as the proper basis for that rule is not the *Chorley* exception but, rather, that the corporation is incurring the cost of salaries and, that in NSW at least, the definition of "costs" includes "remuneration" (sec 3 of the *Civil Procesure Act 2005;* sec 19 of the *Supreme Court Act 1970).* Cf *McGuire v Secretary for Justice* [2018] NZSC 116.

80 In summary, there are powerful policy reasons to resist the continuation or extension of the differential treatment of lawyers in relation to the costs of proceedings in which they represent themselves. In some areas of the law, such as in advocates' immunity, there are powerful and justified systemic reasons for the special treatment of lawyers. Those reasons support and enhance the better administration of justice. In the case of the *Chorley* exception, such arguments are unconvincing and the argument which militate against the maintenance of the exception are likely to better serve the administration of justice.

Part VII: Legislation

81 The following provisions are relevant to the argument in this case. The versionsreferred to are the versions which were current in the cases in which they are cited.

Sec 3 and 98 of the *Civil Procedure Act 2005* (NSW)

Sec 76 of the *Supreme Court Act 1970*

Sec 55B of the *Judiciary Act 1903* (Cth)

Order 71, r 19 of the *High Court Rules*

Part VIII: Orders sought

81 The appellant seeks the following orders:

1. Appeal allowed.
2. Set aside orders 1 to 4 of the Court of Appeal of the Supreme Court of New South Wales made 13 July 2018 and in their place order that:
   (i) The Summons be dismissed;
   (ii) Costs.

Part IX: Time estimate

82 The appellant would seek no more than 2 hours for the presentation of the appellant's oral argument.

1st February 2019

	Bret Walker		Michelle Castle
Phone	(02) 8257 2527	Phone	(02) 9335 3035
Fax	(02) 9221 7974	Fax	(02) 9335 3099
Email	maggie.dalton@stjames.net.au	Email	michelle.castle@stjames.net.au

Counsel for the appellant