IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No S352 of 2018**

BETWEEN: **BELL LAWYERS PTY LTD**
Appellant

AND: **JANET PENTELOW**
First Respondent

AND: **DISTRICT COURT OF NEW SOUTH WALES**
Second Respondent

FIRST RESPONDENT'S REPLY NOTE ON BARRISTERS' CONDUCT RULES AND SOLICITORS' CONDUCT RULES

Filed on behalf of the First Respondent by
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PART I: CERTIFICATION

1. This document is in a form suitable for publication on the internet.

PART II: REPLY NOTE

2. This note replies to the note provided by the appellant on 16 May 2019 and is filed pursuant to the leave granted by the Court at Transcript line 233 (see *Bell Lawyers Pty Ltd v Pentelow* [2019] HCATrans 091).

3. In its note, the appellant "brings to the attention of the Court" a number of provisions of the *Barristers' Conduct Rules* dated 8 August 2011 and the *Law Society of New South Wales Professional Conduct and Practice Rules*.

4. However, the submissions of the appellant in support of which those rules are brought to the Court's attention are not clear.

5. If those rules are adduced for the purpose of founding a submission that some step taken by either the first respondent or the first respondent's two solicitors was in breach of professional conduct rules, the submission should not be entertained (and the materials not received). No such submission was made below (as the appellant's counsel accepted: Tr lines 212-215). It is a matter to which evidence could have been addressed – for example, as to the nature of the relationship between the first respondent and the first respondent's solicitors and the precise circumstances in which the first respondent came to do legal work. It is a matter on which the first respondent's solicitors may wish to be heard. It would be a serious allegation to make, and it is not one which can satisfactorily be raised by a note filed after oral hearing in the High Court.

6. If it is said to be relevant to the resolution of issues of principle in this appeal that the relevant lawyers did or did not comply with professional conduct rules, then the fact that no issue of compliance was raised in the proceedings below would suggest that this appeal is not an appropriate vehicle for the resolution of those issues.

7. If the professional conduct rules are adduced for the purpose of founding some submission as to legislative fact, a different issue arises: the appellant has not identified with any clarity the submission to which the rules are relevant. Is it suggested that the professional rules are contextual evidence as to the meaning of the

Civil Procedure Act 2005 (NSW)? If so, it is not explained how Barristers' Rules dated 8 August 2011 could affect the meaning of a statute enacted in 2005. Nor is it explained how or why subordinate instruments such as the professional conduct rules would (or could) affect the meaning of a statute, whether that meaning is assessed as at 2005 or at some time thereafter.

8. Nor still is it explained precisely what effect those professional conduct rules might have on the meaning of the *Civil Procedure Act 2005* (NSW). Is it suggested that, on the proper construction of the *Civil Procedure Act 2005* (NSW), costs are only recoverable by a self-represented lawyer who is acting in accordance with professional conduct rules as they are from time to time? That is not a submission that has ever been advanced. In any event, it takes one back to the problems addressed in paragraphs 5 and 6 above – because that submission would be relevant only if the first respondent and/or her solicitors were acting in breach of the professional conduct rules.

9. Alternatively, is it suggested that the professional conduct rules manifested an intention, throughout some unspecified time period, that barristers or solicitors not be entitled to represent themselves and/or not be entitled to accept an engagement to represent themselves and/or not be able to do any work on their own case? If that be the argument, it must confront the problem that the rules would then be being used to construe the Act. If it is submitted that the rules manifest an intention that a barrister or solicitor should be prohibited from representing themselves, that is a large submission to make (particularly without any argument on the issue) and is not one which the first respondent can adequately respond to without the point being fully and properly articulated by the appellant. The submission would be contrary (inter alia) to *Cachia v Haines* (1994) 179 CLR 403 at 415 (***Cachia***), which declared that "the right of a litigant to appear in person is fundamental".[1] If it is instead submitted that the rules manifest an intention that a barrister or solicitor should be prohibited from accepting an engagement to represent themselves, it also runs up against *Cachia* at 415 and sits uncomfortably with *Guss v Veenhuizen (No 2)* (1976) 136 CLR 47. Further, so far as such a submission would recognise that a barrister or solicitor *may*

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[1] See also *Judiciary Act 1903* (Cth) s 78, which confers a right on a party to appear personally in every court exercising federal jurisdiction. See also *Collins v R* (1975) CLR 120 at 122. The NSW Court of Appeal has similarly declared that litigants have a right to appear for themselves in NSW courts: see *Jeray v Blue Mountains Council (No 2)* [2010] NSWCA 367 at [7] ("More than a few litigants appear for themselves. Subject to any lawful procedure of a court, that is their right ...")

represent themselves, but cannot accept an engagement to do so, it raises questions as to whether on the facts of this case there was such an engagement, what its terms were and what (if any) of the first respondent's work was done pursuant to such an engagement. Those questions cannot adequately be answered at this stage of the litigation, when they have not been agitated below.

10. As to the specific *Barristers' Conduct Rules* referred to by the appellant:

(a) Rule 2(b) relates to the public obligation to act for any client in cases within a barrister's field of practice. The rule is irrelevant. (And, if it were relevant, it would support the right of a barrister to act for themselves within their field of practice).

(b) Paragraphs (b) and (d) of Rule 4 state that the objects of the rules are to ensure that all barristers "act independently" and "provide services of the highest standard unaffected by personal interest". Rule 5(e) refers to a "belief" in which the Rules are made, namely that barristers should give advice independently and for the proper administration of justice notwithstanding contrary desires of their client. The language of these rules is general, open-textured and aspirational. Consistently with *Cachia* at 415, it cannot be read as being intended to prohibit self-representation by a barrister or work by barristers on their own case. Further, the rules must be read as permitting some conduct, of a well-established kind, notwithstanding those objects – such as being engaged on a contingency basis and, in the first respondent's submission, acting for oneself.

(c) Rule 17 sets out a range of matters which a barrister must not do. Notably, the rule does not proscribe a barrister from acting for herself or himself. At most, it may be said that rule 17 may proscribe a barrister from doing some things but not others. And it is not alleged (and certainly not established on the facts of this case) that the first respondent did any of the things referred to in the rule.

(d) Rule 18 is an exception to rule 17. The rule is irrelevant.

(e) Rule 25 stipulates that a barrister has an overriding duty to the Court to act with independence in the interests of the administration of justice. For reasons already noted, the rule cannot be read as prohibiting self-representation. Further, lawyers may represent themselves and act with independence in the interests of the administration of justice.

(f) Rule 37 obliges a barrister to promote the client's best interests without regard to his or her own interests or to any consequences for the barrister. Further, so far as the rule gives weight to the interests of the litigant, it supports the right of barristers to appear for themselves.

(g) Rule 41 obliges a barrister not to act as a mere mouthpiece of the client and to exercise such forensic judgments as are called for during the case independently. For reasons already addressed, the rule cannot be read as prohibiting self-representation. Further, the rule says nothing about barristers who appear before a court on their own matter.

(h) Rule 95(g) obliges a barrister to refuse to accept or retain a brief to appear if the barrister has a material financial or property interest in the outcome of the case. The rule applies only to briefs to appear before a court and cannot be said to erect any more general prohibition. Further, for reasons already addressed, the rule cannot be read as prohibiting self-representation.

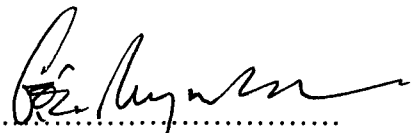
11. As for the *Law Society of New South Wales Professional Conduct and Practice Rules* referred to by the appellant.

(a) Rule 4 simply says that in-house company practitioners must abide by the *Legal Profession Act* and the Rules.

(b) Rule A16 obliges a practitioner to seek to advance and protect the client's interests uninfluenced by the practitioner's personal view of the client or the client's activities. The rule cannot be read as prohibiting self-representation. And a lawyer who represents themselves will obviously seek to advance and protect their own interests.

(c) Rule A17 relates to a practitioner's duty to assist the client to understand issues in a case and the client's possible rights and obligations. It is irrelevant to the present issues (and, if anything, supports the existence of a right to self-representation).

(d) Rule A18 largely corresponds with rule 41 of the *Barristers' Conduct Rules* which has already been addressed: see 10(g) above.



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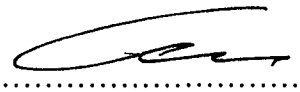

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