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 OUTLINE OF ORAL ARGUMENT

Filed on behalf of the First Respondent by
Maurice Castagnet
Castagnet Lawyers
84 Alcorn Street
SUFFOLK PARK NSW 2481

Dated: 9 May 2019
Tel: (02) 6685 9848
Fax: (02) 6685 3681
Mobile: (0418) 280 586
Email: law@castagnetlaw.com.au

Part I: Certification

1. This document is suitable for publication on the internet.

Part II: Outline of argument

(1) *Cachia v Hanes* (1994) 179 CLR 403 (*Cachia*): RS [54]-[59]

2. The observations made by the majority in *Cachia* about *Chorley* and *Guss* are highly qualified (e.g. "questionable") and were made without argument on the correctness of *Chorley* and *Guss*. On analysis, those provisional statements do not assist BL on this appeal.

(2) The meaning of "costs" in s.98: RS [29]-[53]

3. BL's argument must confront a substantial number of difficulties: it is contrary to *Guss*; it is contrary to the position in all other common law jurisdictions;[1] it is contrary to the long and well-established position; it is contrary to the uniform practice in Chancery (on which s.98 is based); it is contrary to the clear case law (*Cachia* at 414.3 and 415.3); it is contrary to the well-established meaning of a legal term ("costs");[2] it is contrary to the position in all Australian jurisdictions; it is contrary to the position that has obtained in NSW for well over 100 years; and it does not comport with the requirement that costs provisions are read broadly. There is a convincing rationale for *Guss* and it advances the public policy of reducing costs.

4. Further, any change is a matter for the legislature or rule committee: *Cachia* at 415, 416 (a view also taken by the NZSC).

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1 Further, *Chorley* "has been approved by South African courts": *Texas Co v CTM* [1926] SALR 467 at 488 (citing *Lewin v Muller* (1914) EDL 467; *Du Plessis v Wilsnach* (1915) CPD 539; *Webb v Union Government* (1917) TPD 195).

2 *Attorney-General (NSW) v Brewery* (1908) 6 CLR 469 at 531: "Where words have been used which have acquired a legal meaning it will be taken, *prima facie*, that the legislature has intended to use them with that meaning unless a contrary intention clearly appears from the context. To use the words of Denman J in *R v Slator* (1881) 8 QBD 267 at 272: 'but it always requires the strong compulsion of other words in an Act to induce the Court to alter the ordinary meaning of a well known legal term'."

5. BL has shown no basis for overruling *Guss*.

(3) BL's arguments re "costs": RS [60]-[75]

6. Apart from relying on some provisional observations in *Cachia*, BL says (AS [78]) that Ms Pentelow's reduction of costs point is unconvincing because if lawyers do legal work on their own case, they do not receive impartial and independent advice. This is problematical: RS [67]-[68].

10 7. Further, at AS [77] BL says that the value of the litigation work of non-lawyers is as easy to measure as that of a lawyer. This too is problematical: RS [65]-[66].

8. BL's submissions are unpersuasive and do not establish a basis for overruling *Guss*.

(4) BL's arguments re "payable": RS [61]-[62]

9. In the alternative, BL submits that, even if "costs" would otherwise include *Chorley* costs, "payable" in s 3(1) of the *Civil Procedure Act 2005* (NSW) displaces *Chorley*. BL's construction of "payable" suffers from a range of difficulties. In particular,
20 "payable" cannot amount to a clear displacement of the established meaning of "costs".

10. The word "payable" simply means "to be paid".

11. In any event, the extension to "remuneration" picks up *Chorley* costs.

(5) Barristers in NSW: RS [81]-[84]

12. In the alternative, BL submits that even if s.98 covers *Chorley* costs for solicitors, it
30 does not include NSW barristers (as the NSWCA held). Case law in Australia and elsewhere is against that proposition. The rationales of *Chorley* apply as much to barristers as solicitors. BL can point to no relevant distinction between NSW barristers and solicitors which would support its argument. Nor is there any reason or principle which would justify drawing a distinction between barristers and solicitors in this respect. Nor is there any relevant difference in the litigation work done by

NSW barristers and solicitors. And in New South Wales their fees are both subject to the same process of assessment. *Chorley* costs for a solicitor are not payable to a solicitor qua solicitor. Further, such a distinction would be arbitrary and necessarily based on captious distinctions which would involve a risk of creating anomalous differences between the various Australian jurisdictions.

13. The two arguments put by BL based on two Australian cases have no substance: RS [79]-[80].

(6) *Chorley* costs when other lawyers are acting: RS [81]-[84]

14. This argument has difficulties. It was rejected in *Hawthorn*, it is inconsistent with many cases, it is supported by no authority, it is inconsistent with the rationales for the rule in *Chorley*, it has "no rational justification" (*Hawthorn* p.492 line 4) and would lead to absurd results.

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G. O'L. Reynolds

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D. P. Hume

Dated: 9 May 2019