IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S4 of 2018

BETWEEN:

RONALD MICHAEL COSHOTT
Appellant

-and-

KEITH ROBERT SPENCER
First Respondent

DISTRICT COURT OF NEW SOUTH WALES (ABN 33 67 362 1537)
Second Respondent

CHRISTOPHER PHILLIP WALL
Third Respondent

COSTS ASSESSMENT MANAGER
Fourth Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I. Certification

1. The First Respondent certifies that these Submissions are in a form suitable for publication on the internet.

Part II. Statement of Issues

2. The Appellant contends that the Appeal raises the issue of whether the so called "*Chorley exception*" in relation to allowances on assessment for a self-represented solicitor's time in conducting his or her own litigation should continue to apply generally, or alternatively, whether in New South Wales that "exception" to the general rule relating to the costs of self-represented litigants has been abrogated by statute.

3. However, the First Respondent submits that in truth, the issues identified by the Appellant do not arise on the Appeal. The First Respondent submits that the Court of Appeal found (with respect, correctly) that he acted through an incorporated entity. He retained and entered into a costs agreement with that entity, which in turn entered into a costs agreement with counsel who appeared for him in the District Court (see [10(l)] below.

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4. He thus was not a self-represented litigant, with the result that the Court of Appeal should have dismissed the Appellant's application on the basis that his challenge to the *Chorley* exception was misplaced and the First Respondent was entitled to his costs in the normal way. This is what is contended by the First Respondent's Notice of Contention (for which leave to file out of time is sought) (see Part VII below). If it is upheld, the first issue above – whether the *Chorley exception* continues to exist – drops away as unnecessary for decision. Any comments made by the Court about *Chorley* would thus be dicta.

5. The Appellant also contends[1] that the Appeal presents the issue of "*whether a solicitor litigant acting through an incorporated entity is entitled to recover as costs for his or her time in conducting his or her own litigation*". This issue does not arise on this Appeal. It was not considered at any stage of the proceedings. The issue that was agitated in the Court of Appeal was limited to whether or not the First Respondent was a self-represented litigant.[2]

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

6. The First Respondent certifies that he has considered whether a Notice under s. 78B of the *Judiciary Act 1902* (**the Judiciary Act**) should be issued. The First Respondent considers that no such Notice should be issued.

7. However, and whilst no Constitutional issue is presented, if (as the Appellant contends) the Appeal presents the issue referred to in [5] above, then the First Respondent contends that notice of the Appeal should, nonetheless be given to the Attorneys General of the States in which incorporated legal practice is allowed, as well as to professional bodies representing solicitors in those states given the potential impact of any decision upon the regimes in place in those states for the conduct of legal practice through incorporated entities.

8. Further, given the potential significance of the decision on the affairs of companies registered under the *Corporations Act 2001* (Cth) (**the Corporations Act**) and for corporations law in general,[3] the First Respondent contends that notice should also be given to the Attorney General for the Commonwealth (see [51] below).

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[1] Appellant's Submissions [2(c)].

[2] See the Further Amended Summons (Judicial Review) at ground 9: CAB 50.10.

[3] See in particular the Appellant's Submissions at [45].

Part IV. Material Facts

9. There is no dispute that the First Respondent is a solicitor and the sole principal of an incorporated legal practice, Kejus (NSW) Pty Ltd t/as "Spencer & Co Legal" (**Kejus**).[4] However, beyond that, the Appellant's narrative statement of the material facts as set out in his Submissions filed on 2 February 2018 (**the Appellant's Submissions**) is disputed as set out below. Further, certain of the facts as they are stated in the Appellant's Chronology also filed on 2 February 2018 (**the Appellant's Chronology**) are also disputed as set out below.

10. The First Respondent says that the material facts are as follows:

    (a) Kejus, not the First Respondent,[5] was retained to act for the Appellant's sister-in-law, Mrs Ljiljana Coshott and his nephew, James Coshott (**the Coshotts**) as well as Schlotsky's Nominee Company Pty Ltd (**Schlotsky**) in relation to proceedings commenced against them in the Federal Court of Australia in connection with the bankruptcy of the Appellant's brother, Robert Coshott (**the Federal Court Proceedings**);[6]

    (b) Kejus, not the First Respondent,[7] provided legal services to the Coshotts and Schlotsky in connection with the Federal Court Proceedings;[8]

    (c) the costs relating to those services were the subject of a bill issued by Kejus, not by the First Respondent,[9] to the Coshotts and Schlotsky on 8 July 2013 (**the 2013 Bill**) and were paid in full;[10]

    (d) on 4 August 2014 the Appellant, the Coshotts and Schlotsky lodged an application with the Fourth Respondent for assessment of the costs the subject of the 2013 Bill, but naming the First Respondent as the "Costs Respondent" rather than Kejus;[11]

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[4] Appellant's Submissions [5].
[5] Cf. Appellant's Submissions [5] – [6].
[6] *Coshott v Coshott* [2013] FCA 907; CAB 7.15 – 8.30 (J/District Court [2] – [6]); RFM 74 – 75.
[7] Cf. Appellant's Submissions [5] – [6].
[8] CAB 7.15 – 8.30 (J/District Court [2] – [6]); RFM 74 – 75.
[9] Cf. Appellant's Submissions [5] – [6].
[10] CAB 7.15 – 8.30 (J/District Court [2] – [6]); RFM 74 – 75.
[11] RFM 72 – 75.

(e) on 8 December 2014 the Fourth Respondent declined to refer the application for assessment to a costs assessor on the grounds that it appeared to have been made out of time;[12]

(f) on 9 December 2014 the (then) solicitor for the Appellant, the Coshotts and Schlotzky wrote to the Fourth Respondent stating that the application on behalf of the Coshotts and Schlotzky was abandoned, but that the Appellant's application was pressed on the basis that he was a "third-party payer" (whilst the 2013 Bill had been sent to the Coshotts and Schlotzky, it was asserted that it had not been sent to the Appellant, nor had any request for payment been made of him);[13]

(g) on that basis, on 19 December 2014, the Fourth Respondent referred the Appellant's application to a costs assessor, Ms Dulhunty;[14]

(h) Ms Delhunty dismissed the Appellant's application for assessment on 29 June 2015 on the basis that he was not a third-party payer and had no standing to make the application, however in the course of doing so she amended the application for assessment, of her own motion, to (in substance) substitute Kejus for the First Respondent;[15]

(i) on 18 September 2015 the Appellant commenced proceedings in the District Court of New South Wales, which is the Second Respondent to the Appeal, by way of an appeal from Ms Dulhunty's decision, not from the decision of the Third Respondent,[16] under s. 384 of the *Legal Profession Act 2004* (as then in force) (**the District Court Proceedings**);[17]

(j) in spite of the amendment made by Ms Dulhunty (see sub-paragraph (h) above), and the terms of the Certificates that she issued and her reasons,[18] the

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[12] RFM 76 – 77.
[13] RFM 78.
[14] RFM 79.28.
[15] CAB 40.13 (J/District Court [130]); RFM 81 – 89.
[16] Cf. Appellant's Chronology – 18 September 2015.
[17] CAB 8.39 (J/District Court [7]); CAB 43.50 – 45.14 (J/District Court [101] – [106]).
[18] RFM 81 – 89.

Appellant "erroneously" commenced the District Court Proceedings against the First Respondent, rather than Kejus; [19]

(k) Kejus was the solicitor for the First Respondent in the District Court Proceedings,[20] though the First Respondent undertook the relevant work in connection with those proceedings on Kejus's behalf and, as its "principal";

(l) the First Respondent retained and entered into a costs agreement with Kejus and Kejus[21] engaged counsel to appear at the hearing of the District Court Proceedings on the First Respondent's behalf (Counsel's fee notes refer to a costs agreement between Kejus and Counsel dated 27 January 2016);[22]

(m) on 8 April 2016, Gibson DCJ dismissed the District Court Proceedings and ordered the Appellant to pay the First Respondent's costs of those proceedings;[23]

(n) Kejus prepared an application for assessment of the First Respondent's costs of the District Court Proceedings and lodged that application with the Fourth Respondent on 6 June 2016; [24]

(o) the Fourth Respondent referred the application for assessment of the First Respondent's costs to the Third Respondent on 15 June 2016 for assessment in accordance with Pt 7, Div. 2 and Div. 3 of the *Legal Profession Uniform Law Application Act 2015* (NSW) (**the Uniform Law Application Act**);[25]

(p) between 11 July 2016 and 18 September 2016, the Appellant commenced proceedings in the Court of Appeal for judicial review of her Honour, Judge Gibson's decision in the District Court Proceedings (**the Court of Appeal Proceedings**);[26]

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[19] CAB 7.15 (J/District Court [2]); CAB 8.39 (J/District Court [7]); CAB 43.50 – 45.14 (J/District Court [101] – [106]).
[20] CAB 6.36.
[21] AFM 11.30.
[22] RFM 90.15, 90.50; RFM 92.15, 93.12.
[23] CAB 45.20 and 46.
[24] AFM 5 – 17, in particular at 6.48 – 7.13 and 8.45.
[25] AFM 18 – 32; RFM 94.
[26] Appellant's Chronology – 11 July 2016 and 18 September 2016.

(q) the Third Respondent issued certificates of determination and his reasons on 28 July 2016, [27] which were sent to the parties on 2 August 2016[28] in which he allowed an amount of $10,494.00 for "fees" being professional fees for the First Respondent's time spent in the conduct of the District Court Proceedings;[29]

(r) on 28 September 2016, the Appellant filled a "Further Amended Summons (Judicial Review)" in the Court of Appeal Proceedings, by which he sought judicial review of the Third Respondent's determination and relief in that regard under s. 69 of the *Supreme Court Act 1970* (**the Supreme Court Act**);[30]

(s) the Court of Appeal dismissed the Appellant's Further Amended Summons with costs on 31 May 2017;[31] and

(t) on 15 December 2017 the Appellant was granted special leave to appeal to this Court from that part of the Court of Appeal's decision in relation to the Third Respondent's determination.[32]

Part V. Applicable Constitutional Provisions, Statutes and Regulations

11. With the exception of the references to the provisions of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) (**the Solicitors' Conduct Rules**),[33] the First Respondent accepts that the statutory provisions and regulations referred to in the Appellant's Statement of Applicable Constitutional Provisions, Statutes and Regulations are relevant to the consideration of the issues presented by the Appeal. However, the First Respondent says that the Appellant's statement is incomplete. The First Respondent submits that the statutory provisions and regulations referred to in the Appendix to these Submissions (**the Appendix**) are relevant to the determination of the issues presented by the Appeal.

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[27] AFM 18 – 32.
[28] AFM 18.
[29] AFM 27.20.
[30] CAB 47 – 52.
[31] CAB 98 – 9.
[32] CAB 101.
[33] Appellant's Submissions, Appendix at [6].

12. The First Respondent submits that the provisions of the Solicitors' Conduct Rules to which the Appellant has referred have no bearing upon the Court's consideration of the issues presented by the Appeal. It has not been suggested that the First Respondent has, at any stage, acted contrary to the Solicitors' Conduct Rules. He gave no evidence in the District Court Proceedings and he did not appear as an advocate at the hearings in either the District Court Proceedings or the Court of Appeal Proceedings.

Part VI. Argument

The decision of the Court of Appeal

13. The relevant part of the judgment in the Court of Appeal is set out in the reasons of Beazley ACJ at J[63] – [109],[34] with whom McColl and Simpson JJA relevantly agreed.[35] Her Honour rejected the Appellant's submission that the effect of ss. 3 and 98 of the *Civil Procedure Act 2005* (NSW) (**the Civil Procedure Act**) was to deprive the District Court of the power to award costs to a party other than costs that were "payable" by that party to someone else, such as its lawyers: in other words, her Honour rejected the submission that the effect of those provisions was to override the *Chorley* exception.[36]

14. Her Honour considered that the decision of this Court in *Guss v Veenhuizen*[37] was binding authority to the effect that the exception referred to in *London Scottish Benefit Society v Chorley*,[38] applied in Australia.[39] In that regard, the Court of Appeal maintained the position that it had taken in *Atlas Corporation v Kalyk*.[40] Her Honour therefore considered it unnecessary to resolve issues relating to the application of the exception to solicitors that conduct legal practice through an incorporated entity.[41]

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[34] CAB 73.19 – 84.60.
[35] At J[111] and J[112] respectively: CAB 85.10 and 85.13.
[36] At [107]: CAB 84.33.
[37] (1976) 136 CLR 47.
[38] (1884) 13 QBD 87.
[39] At [107]: CAB 84.33.
[40] [2001] NSWCA 10 at [9].
[41] At J[108]: CAB 84.52.

The jurisdiction and power to award costs

15. While prior to the advent of the judicature system, Courts exercising jurisdiction in Equity had always claimed a discretionary jurisdiction and power to deal with costs, "*Costs in Courts of Common Law were not by Common Law at all, they were entirely and absolutely creatures of statute*".[42]

16. The First Respondent submits that the approach adopted at [19] – [34] of the Appellant's Submissions, in asking the Court to simply "abandon the exception" on the basis that it is "anomalous" or that "times have moved on" and Courts are now able to value the time of a wide range of professionals, suffers from the fundamental defect that it fails to appreciate the Court's role in connection with this Appeal. The Court here is engaged in a process of statutory interpretation. The policy considerations that are relevant to that task are those mandated by the statue in question. The issues presented by the Appeal are not ones to be determined "at large" or in isolation from that task.

17. As Kirby J stated in *Re JJT; Ex Parte Victoria Legal Aid* (and though dissenting in the result, the First Respondent submits that his Honour's statement of relevant principles could not be considered controversial):[43]

> Before considering each of these suggested sources of the power, a few general propositions may be accepted:
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> 1. There was no power to order costs at common law. The source of the power must therefore be found in legislation. Accordingly, the primary task before the Court in this part of the case, is to examine the provisions of the Act relied upon and to consider whether those provisions, or any of them, sustain the order.
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> 2. Statutory powers providing for costs appear in a multitude of forms. Although the word "costs" may import notions of a general kind from the forms of orders which have been made in courts of law for centuries, such preconceptions must not distract the Court from the task of construction which each statutory provision for costs invokes. As with any other legislative measure, the law in question must be construed to achieve its identified purposes. A section empowering orders for costs will be construed in the context of any peculiarities of the legislation in which it appears. ...

18. It must follow that the issues for determination in this Appeal involve first and foremost, the question of the proper construction of the statutory provision pursuant to

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[42] *Garnett v Bradley* (1878) 3 App Cas 994 at 962; see also: *Booker v Gill* (1899) 15 WN (NSW) 158; *Service v Flatau* (1900) 16 WN (NSW) 248 at 249.

[43] (1998) 195 CLR 184 at 200 (footnotes omitted). The above passage is cited in Dal Pont op cit. at [6.4].

which the costs order was made in the District Court Proceedings: s. 98 of the Civil Procedure Act.

19. Such was the approach taken by the New Zealand Court of Appeal in *Joint Action Funding Ltd v Eichelbaum* when asked to reconsider the application of *Chorley* in New Zealand.[44]

20. So far as the relevant question of construction is concerned, Kirby J went on to make the following further points in *Re JJT; Ex Parte Victoria Legal Aid* (which the First Respondent submits are also uncontroversial):[45]

> 3. A grant of power to a court to make orders as to costs will not, in the absence of a legislative indication to the contrary, be construed narrowly. This is because it is implied from the character of the donee of the power that the power will be exercised judicially and in accordance with established legal principles. ...
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> 4. It is legitimate, in construing a power appearing in legislation, to have regard to the course of any amendments which help to explain the legislative purpose that lies behind the present provision. ...

Chorley – what are "costs"?

21. In *Harold v Smith*,[46] Bramwell B stated what has since become known as the "costs indemnity rule", in terms similar to those which were used many years later by the majority in this Court in *Cachia v Haynes*,[47] when he described costs as an "indemnity", the amount of the indemnity being determined by reference to the "*damnification*", that is to say the loss or injury suffered as a result of having been required to conduct proceedings before the Court.

22. Whilst he accepts that the focus of the majority in *Cachia* was on injury or loss in the nature of an "out-of-pocket" expense,[48] the First Respondent submits that the ordinary concept of a indemnity against injury or loss is not (unless expressly or by implication subjected to some words of limitation in relation to the nature of the injury or loss suffered) confined to responding only to that species of loss, even if in the "usual case" the relevant indemnity will apply to loss or injury of that kind.

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[44] [2017] NZCA 249 at [8].
[45] (1998) 195 CLR 184 at 201 (footnotes omitted).
[46] (1860) 5 H&N 381 at 385; 157 ER 1229 at 1231.
[47] (1994) 179 CLR 403 at 410 – 411.
[48] At 410 – 411.

23. After referring to *Harold v Smith*, Denman J (with whom Manisty and Watkin Williams JJ agreed) in the Divisional Court in *Chorley*[49] applied the indemnity principle to the time spent by a firm of solicitors in conducting their own case as follows:[50]

> … treating the costs as being in a reasonable sense of the word equivalent to an indemnity, I am not aware of any principle which ought to prevent a successful party who is a solicitor, and who does solicitor's work, from being indemnified not merely for the time he must necessarily expend as a witness in his own case, but also for the pains, trouble, and skill which he has to incur and to exercise in order to bring it to a successful conclusion. There is nothing to prevent "costs" thus incurred from falling within the fair meaning of an "indemnity," though not actually money out of pocket such as he would have had to pay if his action or his defence had been intrusted by him to another solicitor. …

24. The Court of Appeal agreed (unanimously) with the approach of the Divisional Court.[51] While the Court of Appeal acknowledged that in the case of an ordinary litigant in person, recovery of costs would be limited to out-of-pocket expenses, the Court was at pains to stress that there was no question of a solicitor being placed in a "privileged" position. Rather the "general rule" limiting the recovery of a litigant in person to recovery of out of-pocket expenses was the result of the "imperfect nature of the indemnity", the difficulty in determining the value of the litigant's time and, more particularly the difficulty in assessing the reasonableness of the time spent by a lay litigant in the conduct of his or her own case.[52] A similar point, in relation to the reasonableness of the time likely to be spent by a lay litigant on the conduct of his or her own case was made by the majority in *Cachia* (at 415).

25. The First Respondent submits that the true basis for both the general rule and the exception should be seen, consistently with the authorities referred to above, as being derived not from a narrow interpretation of the term "costs" when used in the relevant statutes, but in the discretionary nature of the power which those statues confer. Such a power, as has been observed on many occasions, must be exercised judicially, "*in accordance with established legal principles*".

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[49] (1884) 12 QBD 452.
[50] At 455 – 456.
[51] (1884) 13 QBD 872 at 875 – 877.
[52] (1884) 13 QBD 872 at 875; see more recently *Malkinson v Trim* [2003] 1 WLR 463 at 468E-F.

26. That the approach taken in *Chorley* was also mandated by s. 26 of the Judiciary Act and O. 71 r. 19(1) of the *High Court Rules 1952* (as then in force) was confirmed by this Court in *Guss v Veenhuizen.*[53] However, while the rationale for and policy behind the exception may have been questioned by the majority in *Cachia,*[54] the application of both the general rule and the exception were acknowledged[55] and the case turned not upon any consideration of the rationale or merit of either, but upon the proper construction of the rules then applicable in the Supreme Court of New South Wales in relation to the taxation of costs, which were held to have been consistent with the general rule (at the very least) and (at least arguably) the exception.[56]

Reform of the law?

27. However the general rule and the exception may be characterised, they are rules relating to questions of practice and procedure applicable in the various Courts of the States and the Commonwealth. They are rules that have been recognised in England since at least 1884, and have been held by this Court in 1976 and 1994 to apply in Australia in relation to the statutes then governing this Court and the Supreme Court of New South Wales. A similar conclusion was reached by the New South Wales Court of Appeal in 2001[57] and 2004 [58] in relation to legislation governing civil procedure in that State.

28. They are rules in respect of which the Parliament of each State and the Commonwealth has the right to legislate and of which the Parliament of each State and the Commonwealth must be taken to have been aware when enacting legislation dealing with maters of practice and procedure in the Courts of their respective jurisdictions.

29. They are rules of which the Parliament of New South Wales must be taken to have been aware upon the enactment of the Civil Procedure Act, but as Beazley ACJ held at

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[53] (1976) 136 CLR 47 at 51 – 53.
[54] (1994) 179 CLR 403 at 412 – 414.
[55] At 412.
[56] At 414 – 415.
[57] *Atlas Corporation v Kalyk* [2001] NSWCA 10.
[58] *Lawrence v MD Nickolaidis & Co* (2003) 57 NSWLR 355.

J[107][59] (the First Respondent says correctly) they are not rules that the Parliament of New South Wales chose to alter or "render inapplicable".

30. In contrast to the position in the United Kingdom, the Parliaments of the States and the Commonwealth have not, by legislation framed in express terms, sought to alter either the general rule or the exception. The First Respondent submits that it is not appropriate for the Appellant to ask this Court to reconsider and abandon the exception, in isolation from and without any reconsideration of the general rule (as has been the case in United Kingdom) and that revision of both the general rule and the exception is most appropriately left to legislation.

31. After extensively considering the merits or otherwise of the general rule and the exception, the majority made the point succinctly in *Cachia*:[60]

> We mention these matters not to express any view, but merely to indicate that there are considerations which must be weighed before any reasoned conclusion can be reached. A court engaged in litigation between parties, even if it were not constrained by the legislation and rules, is plainly an inappropriate body to carry out that exercise or to act upon any conclusion by laying down the precise nature of any change required.

The Appellant's primary contention – the significance of the word "payable"

32. The Appellant's primary contention (and the First Respondent submits it is his only viable contention) is that, because of the inclusion of the word "payable" in the definition of costs in s. 3 of the Civil Procedure Act (which word was not used in the definition of costs applicable in the Supreme Court immediately prior to the enactment of the Civil Procedure Act and which word was, and is, not used in s. 26 of the Judiciary Act – but was used in the rules then in force governing the taxation of costs in this Court), a change was effected in the law of New South Wales such that, whatever the previous position may have been, costs may no longer include any allowance for a solicitor's time spent in the conduct of his or her own litigation.[61]

33. However, in the First Respondents submission, the use of the word "payable" in s. 3 begs the question: payable by whom and to whom? Was the reference to costs being "payable" intended to be a reference to costs payable by a client to his or her solicitor

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[59] CAB 84.33.

[60] (1994) 179 CLR 403 at 416; see also *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA) at 441.

[61] Appellant's Submissions [35] – [43].

pursuant to a retainer or costs agreement, or was it intended to be a reference to costs payable pursuant to an order of the Court by one party to the litigation to another, or by a non-party to a party or by a party to a non-party?

34. The First Respondent submits that the inclusion of the word payable in the definition of costs does not betray in any meaningful way, any legislative intention to effect a change in the law or to otherwise render the *Chorley* "rule" or "exception" inapplicable in New South Wales. No such intention can be discerned from the Act or from the extrinsic materials that may be called upon as an aid to its interpretation.[62]

The jurisdiction and power of the District Court to award costs prior to August 2005

35. The power of the District Court to award costs in civil cases has always been defined by reference to costs that are "payable". As it was initially enacted, s. 116 of the *District Court Act 1973* (NSW) (**the District Court Act**) provided that the Court had power to make orders in relation to costs "payable between party and party".

36. Section 116 was repealed in 1985 and a new definition was provided for in what became s. 148A. However, costs continued to be defined as being costs payable between "party and party" until 1994 when, by the *Legal Profession Reform Act 1993* (NSW), s. 148A was amended so as to define costs as being "costs payable by a party in or in relation to proceedings". At the same time s. 148B was amended so as to make provision for a power to award costs on an indemnity basis.

37. Costs for the purposes of the District Court Act continued to be defined in that manner until August 2005 when s. 148A was repealed (together with s. 148B) upon the Civil Procedure Act coming into force.

38. Though it was not the subject of argument, in *Lawrence v MD Nickolaidis & Co*[63] the Court of Appeal approached the question of whether a self-represented solicitor litigant was entitled to recover costs for his own time spent in the conduct of his litigation under the regime then applicable in the Local Court (which was in materially the same terms as that applying in the District Court) on the basis that the *Chorley* exception applied.

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[62] In that regard the First Respondent relies on s. 34 of the *Interpretation Act 1987* (NSW).

[63] (2003) 57 NSWLR 355, per Hodgson JA at [19], [25] – [28] and [52]. At the relevant time s. 33 of the *Local Courts (Civil Claims) Act 1970* (NSW) defined "costs" to mean "costs payable by a party in or in relation to proceedings ...".

39. The Parliament of New South Wales can be taken to have been aware of all of the above upon the enactment of the Civil Procedure Act.

The position under the Civil Procedure Act

40. Immediately prior to the enactment of the Civil Procedure Act, s. 19 the Supreme Court Act defined costs to "*include*":

> ... fees, charges, disbursements, expenses and remuneration. ...

41. Immediately prior to the enactment of the Civil Procedure Act, s. 148A(1) of the District Court Act defined costs to "*mean*":

> ... the costs payable by a party in or in relation to proceedings, including disbursements. ...

42. The Civil Procedure Act, at s. 3, now defines costs to "*mean*":

> ... costs payable in or in relation to the proceedings, and includes fees, disbursements, expenses and remuneration. ...

43. The First respondent submits that there is no clear textual reason to interpret the word "payable", either when used in the District Court Act prior to 2005, or when used in the Civil Procedure Act since that time, as limiting the nature of the "costs indemnity" for which the relevant provisions provide, to out-of-pocket expenses. As stated above (at [33]), there is at the very least a textual ambiguity present.

44. The First Respondent submits further that the Civil Procedure Act definition is plainly a composite of the definitions previously applicable in different Courts. That is not surprising when one considers that the purpose of the Act as stated in the report of the NSW Attorney General's Department "*An Introduction to the Civil Procedure Bill 2005 and the Uniform Civil Procedure Rules 2005*"[64], which was tabled by the Attorney General at the commencement of the second reading debate,[65] was to consolidate the law relating to civil procedure in New South Wales:

> The Working Party's aim was to consolidate provisions about civil procedure into a single Bill and to develop a common set of rules, simplified where possible, but without radical changes in substance or in form.

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[64] RFM 12 – 71 at 18.46.

[65] *Hansard*, Legislative Assembly, Wednesday 6 April 2005 p.15115 (RFM at 6.40).

45. In his second reading speech the Attorney-General stated: [66]

> ... The bill and rules largely reflect existing provisions and continue to use phrases that have a settled legal meaning. Where there is change, much of it can be attributed to the fact that drafting styles have changed over the past 30 years. ...

46. Indeed, in relation to cl. 98 (and cl. 9) of the Bill (which became ss. 98 and 99 of the Act respectively) he stated:[67]

> Part 7 of the bill deals with judgments and orders. It incorporates provisions from the Supreme Court Act, the District Court Act and the Local Courts (Civil Claims) Act and the Supreme Court Rules. Clauses 98 and 99 carry over provisions dealing with the court's power as to costs and its power to make costs orders against legal practitioners. ...

47. Neither the report nor the Attorney's second reading speech make any reference to the definition of "costs" or any intention to change the law regarding the nature of the costs that may be recovered pursuant to a costs order.

48. In the First Respondent's submission there is simply no textual or contextual support for the narrow interpretation of the definition of costs in s. 3 of the Civil Procedure Act for which the Appellant contends.

Part VII. Notice of Contention

49. If the Court grants leave to the First Respondent to file the Notice of Contention the subject of his application filed on 7 March 2018, the First Respondent makes the submissions set out below.

50. The *Legal Profession Uniform Law* (NSW) (**the Uniform Law**) (as relevant legislation has done for many years) entitles solicitors to practice through a range of "business structures" including through an incorporated legal practice. The Uniform Law (s. 6) specifically envisages that such a practice may be a company registered under *Corporations Act 2001* (Cth) (**the Corporations Act**). By allowing solicitors to practice in such a manner, Parliament can be taken to have specifically authorised the most significant consequence of incorporation: an incorporated legal practice is a separate person, not "mere machinery".[68] There is no warrant at all for ignoring this

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[66] Ibid at 15116 (RFM at 7.21).

[67] Ibid at 15118 (RFM at 9.50).

[68] *Salomon v Salomon & Co Ltd* [1897] AC 22; *Gas Lighting Improvement Co Ltd v Inland Revenue Commissioners* [1923] AC 723 at 740 – 741; *Hobart Bridge Co Ltd v Federal Commissioner of Taxation* (1951) 82 CLR 372 at 385.

central fact in the case as the Appellant would have the Court do.[69] Indeed, the submission made at [54] of the Appellant's Submissions ignores over 100 years of case law on the doctrine of separate legal identity.

51. As the Court of Appeal found, the First Respondent conducted legal practice through Kejus. Kejus was his legal representative during the course of the District Court Proceedings. It was (and is) a company registered for the purposes of the Corporations Act, and in that respect a separate legal entity. It was (and is) an "incorporated legal practice" for the purposes of the Legal Profession Uniform Law and a "solicitor corporation" for the purposes of r. 7.31 of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**).

52. Both s. 36 of the Uniform Law and UCPR r. 7.31 acknowledge the reality that like any corporation an incorporated legal practice can only act through the agency of a natural person. In the case of an incorporated legal practice, its obligations as a solicitor may be discharged by a "legal practitioner associate" (including a "principal") of the practice. For the purposes of the UCPR, such a solicitor corporation can perform an act on its client's behalf through the agency of a solicitor who is also one of its directors, officers or employees. In the circumstances of this case, Kejus undertook work for and discharged its obligations to the First Respondent through the First Respondent in his capacity as its principal.

53. The Divisional Court in *Chorley* recognised that a "solicitor's time has value".[70] But as the Court of Appeal for England & Wales recognised in *Malkinson v Trim*[71] the solicitor in question is not necessarily the only or even one of the persons entitled to exploit that value. In that case the Court considered the application of the *Chorley* principle to a partner in a firm of solicitors represented by his or her own firm or who represented his or her self "in his firm's name". The Court observed that one partner's time had value to the others, as did the time of their employed solicitors.[72]

54. However, in the case of an incorporated legal practice that represents one of its principals, there can be no question of the principal having some form of joint interest in the value of his own time; the inevitable result of the doctrine of separate identity is

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[69] Appellant's Submissions [44] – [47].
[70] (1884) 12 QBD 452 at 455.
[71] [2003] 1 WLR 463.
[72] At 469G.

that the person who is entitled to exploit the value of the principal's time must be the practice, not the principal. What's more the costs disclosure and assessment regime provided for under the Uniform Law Application Act and the Uniform Law is founded upon the assumption, in the case of an incorporated practice, that the practice has the right to charge for the value of its principal's time including in cases where the practice has failed to comply with its obligations to make disclosure in relation to costs.[73]

55. In the First Respondent's submission, in the case of an incorporated legal practice that represents one of its principals (or its only principal), absent some contract or agreement to the contrary [74] (and there is no suggestion by anyone that was the case here) or some other circumstances that when viewed objectively indicate that services were provided gratuitously, the practice will have the right to charge costs to the principal, including where the relevant legal services are provided on its behalf by the principal him or herself. That will be so either on the basis that there is a contract in place between the principal and the practice, or alternatively on a *quantum meruit* basis.[75]

56. The First Respondent submits that in such circumstances there is, as there is in this case, no room for the "general rule" to operate.

Part VIII. Estimate for Presentation of Oral Argument

57. The First Respondent estimates that two to two and a half hours will be required for presentation of his oral argument.

Date: 16 March 2018

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[73] Uniform Law, s. 178(1).

[74] *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635 at [45] – [55] and [111] – [126].

[75] *Brenner v First Artists Management Pty Ltd* [1993] 2 VR 221 at 256; *Pavey & Matthews v Paul* (1987) 162 CLR 221 at 255 – 257; *Horton v Jones (No. 1)* (1934) 34 SR (NSW) 359 at 367.

APPENDIX

A. *District Court Act 1973* (NSW), as in force between 1 July 1973 and 1 July 1985[76]:

Pt III – The Civil Jurisdiction of the Court

Div. 6 – Costs

119 Interpretation: Pt III Div. 6

In this Division, "costs" means costs payable between party and party, and includes disbursements.

B. *District Court Act 1973* (NSW), as in force between 1 July 1985[77] and 1 November 1991[78]:

Pt 3 – The Civil Jurisdiction of the Court

Div. 9A—Costs in proceedings

148A Interpretation

In this Division, a reference to costs is a reference to costs payable between party and party, including disbursements.

C. *District Court Act 1973* (NSW), as in force between 1 November 1991 and 1 July 1994[79]:

Pt 3 – The Civil Jurisdiction of the Court

Div. 9A—Costs in proceedings

148A Interpretation

In this Division (except section 148E[80]), a reference to costs is a reference to costs payable between party and party, including disbursements.

D. *District Court Act 1973* (NSW), as in force between 1 July 1994[81] and 15 August 2005[82]

Pt 3 – The Civil Jurisdiction of the Court

Div. 9A—Costs in proceedings

148A Definition of "costs"

In this Division (except section 148E), a reference to costs is a reference to the costs payable by a party in or in relation to proceedings, including disbursements.

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[76] Pt 3, Div. 6 was repealed on 1 July 1985 by the *District Court (Procedure) Amendment Act 1985*, s. 5, Sch. 3(54).

[77] Pt 3, Div. 9A was inserted on 1 July 1985 by the *District Court (Procedure) Amendment Act 1985*, s. 5, Sch. 3(59).

[78] s. 148A was amended on 1 November 1991 by of the *Courts Legislation (Civil Procedure) Act 1991*, s. 3 and Sch. 2(7).

[79] s. 148A and 148B were amended on 1 July 1994 by the *Legal Profession Reform Act 1993*, s. 4 and Sch. 6(6) and (7).

[80] s. 148E was inserted into the Act on 1 November 1991 by the *Courts Legislation (Civil Procedure) Act 1991*, s. 3 and Sch. 2(8), and provided for the Court to make costs orders against solicitors.

[81] s. 148A was amended on 1 July 1994 by the *Legal Profession Reform Act 1993*, s. 4 and Sch. 6(6) and (7).

[82] Pt 3, Div. 9A was repealed on 15 August 2005 by the *Civil Procedure Act 2005*, s. 6(2) and Sch. 5.12(25).

E. *Legal Profession Uniform Law* (NSW), as presently in force and as in force at all material times:

6 Definitions

(1) In this Law--

"**associate**" of a law practice means a person who is one or more of the following:

(a) a principal of the law practice;

(b) a partner, director, officer, employee or agent of the law practice;

(c) an Australian legal practitioner who is a consultant to the law practice;

"**incorporated legal practice**" means a corporation that satisfies the following criteria:

(a) it is:

(i) a company within the meaning of the Corporations Act; or

(ii) a corporation, or a corporation of a kind, approved by the Council under section 114 or specified in the Uniform Rules for the purposes of this definition;

"**law practice**" means: ...

(d) an incorporated legal practice; or ...

"**principal**" of a law practice is an Australian legal practitioner who: ...

(d) in the case of an incorporated legal practice ...

(i) holds an Australian practising certificate authorising the holder to engage in legal practice as a principal of a law practice; and

(ii) is:

(A) if the law practice is a company within the meaning of the Corporations Act--a validly appointed director of the company; ...

32 Business Structures

Legal services may be provided under any business structure, subject to the provisions of this Law and the Uniform Rules.

33 Obligations not affected by nature of business structures

(1) An Australian legal practitioner must comply with this Law, the Uniform Rules and his or her other professional obligations, regardless of the business structure in which or in connection with which the practitioner provides legal services.

(2) A law practice must comply with this Law, the Uniform Rules and its other professional obligations, regardless of the business structure in which or in connection with which the law practice provides legal services. ...

36 Discharge by legal practitioner associate of obligations of law practice

(1) A legal practitioner associate of a law practice may, on behalf of the law practice, discharge any obligations of the law practice under this Law or the Uniform Rules.

178 Non-compliance with disclosure obligations

(1) If a law practice contravenes the disclosure obligations of this Part—

(a) the costs agreement concerned (if any) is void; and

(b) the client or an associated third party payer is not required to pay the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority; and

(c) the law practice must not commence or maintain proceedings for the recovery of any or all of the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority or under jurisdictional legislation; and

(d) the contravention is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention.

F. *Uniform Civil Procedure Rules 2005* (NSW), as presently in force and as in force at all material times:

7.31 Actions by a solicitor corporation (cf SCR Part 66, rule 10)

Where, by or under the *Civil Procedure Act 2005* or these rules or otherwise by law:

(a) any act, matter or thing is authorised or required to be done by a solicitor for a person, and

(b) the solicitor is a solicitor corporation, and

(c) the act, matter or thing can, in the circumstances of the case, only be done by a natural person,

the act, matter or thing may be done by a solicitor who is a director, officer or employee of the corporation.