COSHOTT v SPENCER & ORS (S4/2018)

Court appealed from: New South Wales Court of Appeal
[2017] NSWCA 118

Date of judgment: 31 May 2017

Special leave granted: 15 December 2017

Mr Keith Spencer is a solicitor who is the principal of the incorporated legal practice Kejus Pty Ltd, trading as Spencer & Co Legal ("Spencer Legal"). Spencer Legal provided legal services to Ms Ljiljana Coshott, Mr James Coshott and Schlotzsky Nominees Co Pty Ltd ("Mr Spencer's clients") in respect of certain proceedings in the Federal Court. The Appellant in this Court, Mr Ronald Coshott ("Mr Coshott"), was not a party to those proceedings.

On 4 August 2014 Mr Spencer's clients, along with Mr Coshott, brought an application for assessment of the costs claimed by Spencer Legal relating to the Federal Court proceedings. That application was then referred to a costs assessor. On 29 June 2015 the costs assessor dismissed Mr Coshott's application on the basis that he was not a "third party payer" within the meaning of the *Legal Profession Act* 2004 (NSW) ("the Act").

Mr Coshott unsuccessfully appealed to the District Court, with Judge Gibson also making a costs order in favour of Mr Spencer. Mr Spencer then made an application for the assessment of his costs in respect of the appeal proceedings. A second costs assessor subsequently allowed Mr Spencer's professional costs in acting as a legal representative for himself ("the second costs assessment").

Mr Coshott then commenced proceedings in the Court of Appeal, challenging both the District Court decision and the second costs assessment. Upon appeal the main issues were:

a) whether Judge Gibson had erred in law in holding that the costs assessor had jurisdiction to determine whether Mr Coshott was a "third party payer" within the meaning of s 302A of the Act; and

b) whether the "Chorley exception" to the rule that a self-represented litigant is not entitled to professional costs still applied in New South Wales.

On 31 May 2017 the Court of Appeal (Beazley ACJ, McColl & Simpson JJA) unanimously held that a costs assessor does have the jurisdiction to determine whether or not a party is a "third party payer". All Justices further noted that a self-represented litigant is not generally entitled to professional costs when acting for himself or herself in legal proceedings. An exception to that rule however exists (the Chorley exception) where a solicitor represents himself or herself. As section 98 of the *Civil Procedure Act* 2005 (NSW) did not, by its express terms, render the "Chorley exception" inapplicable, their Honours found that it continued to apply in New South Wales.

The grounds of appeal include:

- The Court erred in finding that there is an exception in the case of a solicitor litigant to the general rule that a litigant is not entitled to recover as costs for his or her time in conducting his or her own litigation.

- The Court erred in failing to find that pursuant to section 98 of the *Civil Procedure Act* 2005 (NSW) there is no exception in the case of a solicitor litigant to the general rule that a litigant is not entitled to recover as costs for his or her time in conducting his or her own litigation.

On 6 March 2018 Mr Spencer filed a summons, seeking leave to rely upon a proposed notice of contention filed out of time, the ground of which is:

- Having found (at J[108]) that Mr Spencer acted through a solicitor corporation, the Court erred in not also finding that Mr Spencer was not a self-represented litigant and that the "Chorley exception" had no application.