

Matter No S182 of 2017

COSHOTT

v

SPENCER & ORS

Matter No S4 of 2018

COSHOTT

v

SPENCER & ORS

JUDGMENT

KEANE J

Matter No S182 of 2017

COSHOTT

v

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Matter No S4 of 2018

COSHOTT

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1. In Matter No S182 of 2017 in this Court, Mr Coshott was the applicant for special leave to appeal from a judgment of the Court of Appeal of the Supreme Court of New South Wales. In consequence of the grant of special leave on 15 December 2017, he became the appellant in Matter No S4 of 2018 in this Court. On 10 May 2018, the Full Court ordered that special leave be revoked with costs against Mr Coshott.

2. In conformity with the order of the Full Court, the costs claimed by the first respondent in each of these matters, Mr Spencer, were assessed under Pt 57 of the *High Court Rules 2004* (Cth) ("the Rules"). After a full taxation and a reconsideration

under r 57.03 of the Rules, the Taxing Officer certified that Mr Spencer's costs had been assessed and allowed at \$35,222.26 as against Mr Coshott in respect of the application for special leave to appeal in Matter No S182 of 2017, and at \$106,995.50 in respect of Matter No S4 of 2018.

3. Mr Spencer is a solicitor of the Supreme Court of New South Wales. He is a shareholder in, and a director of, Kejus Pty Ltd ("Kejus"), trading as Spencer & Co Legal, an incorporated legal practice of which Mr Spencer is the principal under the provisions of the *Legal Profession Uniform Law* (NSW) ("the Uniform Law"). These provisions allow for the formation, and operation, of a corporation in association with a solicitor.

The issues

4. Mr Coshott now applies pursuant to r 57.05 of the Rules for an order to review the taxation in respect of certain items in each of the bills of costs allowed by the Taxing Officer. These items relate to professional work as a solicitor performed by Mr Spencer in the proceedings brought against him by Mr Coshott. The principal basis for Mr Coshott's challenge to these items is that Mr Spencer is under no liability, as a client and respondent to the proceedings instituted against him, to pay for work in fact performed by him but provided to him by Kejus as the solicitor on the record because

Mr Spencer had not engaged Kejus to act on his behalf in the proceedings.

5. A second submission was advanced, albeit tentatively, to the effect that if the solicitor on the record was not Mr Spencer but Kejus, then because Kejus was not entitled to render a bill of costs in respect of its representation of Mr Spencer in the proceedings, Mr Spencer is not liable to Kejus for such costs, and so is not entitled to an indemnity from Mr Coshott.

Background

6. In the Court of Appeal of New South Wales, the focus of attention was upon Mr Coshott's argument that, as a general rule, a litigant who represents himself or herself is not entitled to recover his or her professional costs and upon Mr Spencer's response that there is an exception to the general rule. This exception, known as "the *Chorley* exception", is named after a decision of the Court of Appeal of England and Wales in which it was held that a self-represented litigant who happens to be a solicitor may recover his or her professional costs of acting for himself or herself¹.

1 *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 877.

7. In the Court of Appeal of New South Wales, Mr Coshott argued that the *Chorley* exception should not be recognised as part of the common law of Australia. His argument was rejected by the Court of Appeal². Whether the *Chorley* exception is part of the common law in Australia was the basis for the grant of special leave to appeal to this Court. On the hearing of the appeal in this Court, however, it emerged that there was a threshold issue as to whether Mr Spencer was working for himself rather than for Kejus, it being the solicitor on the record in the proceedings brought against Mr Spencer by Mr Coshott.
8. In this regard, the Chief Justice, giving the reasons of the Court for revoking special leave, said³:

"This case presents a question at the threshold about whether the respondent was in fact acting for himself in the District Court proceedings. Although there is apparently only slender evidence of there being a costs agreement between the respondent and Kejus Pty Ltd trading as Spencer & Co Legal, an incorporated legal practice of which the respondent is the authorised principal, the proceedings below have been conducted on that basis and there was no challenge from the appellant to that asserted fact.

One consequence of this state of affairs is that the Court of Appeal has not dealt with this question and this Court does not have the benefit of its reasons. Another is that, in any event, the appellant has little prospects of establishing that the respondent acted for himself. It is

2 *Coshott v Spencer* [2017] NSWCA 118 at [106]-[107].

3 *Coshott v Spencer* [2018] HCATrans 81.

therefore unlikely that the issue regarding the *Chorley* exception will be reached.

In reality, the appellant's argument is addressed to a situation not envisaged by the *Chorley* exception, but it was that exception and its maintenance which was the basis for the grant of special leave. The appellant's argument is for a different general rule in relation to the orders which may be made for costs. Again, this was not an issue addressed by the Court of Appeal. For these reasons, special leave is revoked."

Mr Coshott's arguments

9. Mr Coshott, in his written submissions in the present applications, sought to raise a preliminary issue as to the standing of Kejus. It was said that Kejus is not on this Court's Register of Practitioners, and so Kejus was not entitled to practise, by reason of s 55B(3) of the *Judiciary Act 1903* (Cth), as a solicitor in this Court. On that footing, it was suggested that Kejus is not entitled to recover its costs of representing Mr Spencer.
10. In the course of oral argument in these applications, this preliminary point was not pressed. That is not surprising because, in truth, no issue as to the standing of Kejus has arisen or, indeed, could arise. Mr Coshott joined Mr Spencer, not Kejus, as respondent to the proceedings that he initiated in this Court, just as he had joined Mr Spencer as the respondent in the proceedings he brought in the Court of Appeal. Indeed, Mr Coshott brings these applications for an order for review against Mr Spencer, not Kejus.

11. The principal question sought to be raised on these applications is whether the Taxing Officer was correct in allowing claims for the items relating to the work performed by Mr Spencer in the absence of evidence that Mr Spencer had retained Kejus to act on his behalf under a costs agreement between them. Mr Coshott points to the absence from the record of any evidence of Mr Spencer's liability to Kejus for the costs it incurred in representing him in this Court.
12. Mr Spencer contends that the work was performed by him on behalf of Kejus, he having retained Kejus to represent him in the proceedings instituted by Mr Coshott and having agreed to pay Kejus' costs of doing so. Mr Spencer argued that he performed the work the subject of challenge in his capacity as the principal of Kejus.
13. It may be said that it is quite artificial that an individual may render services for a corporation, of which he or she is a sole shareholder and director, at the same time as the corporation provides those services for the same individual as a client of the corporation. It may fairly be said that this "metaphysical bifurcation", as it was described by Bray CJ in *R v Goodall*⁴, is as unattractive as it is unnatural. But as Bray CJ also recognised, it is

4 (1975) 11 SASR 94 at 99-100.

"the logical consequence of *Salomon's Case*"⁵, in which the House of Lords affirmed that the legal personality of a corporation is separate from that of the individual who controls the corporation. And so an individual who is the sole director and shareholder of a corporation may contract with that corporation for the provision of services by it so as to give rise to an obligation to pay for those services⁶.

14. It has been noted that this Court accepted, albeit on the basis of "only slender evidence", that there was a costs agreement between Kejus and Mr Spencer as the client in the proceedings. It was not open to the Taxing Officer to proceed on a contrary basis. That the evidence before the Full Court was "slender" may be explicable by reason of the circumstance that Mr Coshott had not previously sought to raise an issue about the retainer of Kejus by Mr Spencer. However that may be, the basis on which the Full Court of this Court ordered the revocation of the grant of special leave is distinctly inconsistent with the propositions that Mr Spencer had not retained Kejus to represent him under a costs agreement and was not liable to pay costs to Kejus thereunder. It would be inconsistent with the position established by the decision of the Court of Appeal, and with the reasons of this Court for the revocation of the grant of

⁵ (1975) 11 SASR 94 at 101 citing *Salomon v Salomon & Co Ltd* [1897] AC 22.

⁶ Compare *Lee v Lee's Air Farming Ltd* [1961] AC 12 at 26; *Hamilton v Whitehead* (1988) 166 CLR 121 at 128.

special leave, to hold on a taxation of costs, or a review of that process, that Mr Spencer was not liable to Kejus for the services rendered by it pursuant to the costs agreement between him and Kejus.

15. The second argument advanced on behalf of Mr Coshott in support of the proposition that Mr Spencer is under no liability to Kejus for costs is that Kejus was not entitled to render a bill of costs, either because Kejus was not on this Court's Register of Practitioners, or because Kejus had not, in truth, performed such services because it was not the solicitor on the record for Mr Spencer.
16. In relation to the latter aspect of this second argument, I was invited by counsel for Mr Coshott to "interrogate the Court's files" with a view to resolving the issue. A review of the Court's files shows that Spencer & Co Legal, that is to say, Kejus under its business name, appeared for Mr Spencer in the proceedings in this Court. Mr Coshott has shown no reason to doubt that, insofar as Mr Spencer performed work in the proceedings, he did so on behalf of Kejus as the entity representing him as a party. This aspect of Mr Coshott's argument is, therefore, rejected.
17. As to the former aspect of this second argument, Mr Spencer's response is that the work for which costs are claimed from Mr Coshott was performed by Mr Spencer and there is no

doubt as to his entitlement to practise as a solicitor. On one view, it might be said that the position of an incorporated legal practice and its principal solicitor under the Uniform Law should be no different from that of an ordinary corporation and an employed in-house solicitor. It is well settled that, in a case where the solicitor acts in proceedings on behalf of his or her employer, the employer is entitled to recover its costs quantified by a taxation of the costs of the services performed by the employed solicitor. In such a case, the employer is entitled to recover costs incurred on its behalf by its employee just as it would be entitled to an indemnity for costs payable to an external solicitor⁷. On the other hand, it might be said that "no significance" should be attributed to the circumstance that, pursuant to the Uniform Law, an incorporated legal practice is interposed between the individual who is the client in litigation and the same individual who renders legal services⁸.

18. These applications are not the occasion on which to resolve these competing views. This issue was not addressed by the Court of Appeal where it was said to be "unnecessary to consider the position" where the solicitor has acted through a corporate entity as in the present case⁹. It is sufficient to say that every step of the

⁷ *Commonwealth Bank of Australia v Hattersley* (2001) 51 NSWLR 333 at 337 [11]; *Ly v Jenkins* (2001) 114 FCR 237 at 280 [160].

⁸ *McIlraith v Ilkin (Costs)* [2007] NSWSC 1052 at [11].

⁹ *Coshott v Spencer* [2017] NSWCA 118 at [108].

proceedings in the courts below, and in this Court, has proceeded on the footing that Mr Coshott's liability for costs was to be determined on the basis that the professional services in question were actually performed by Mr Spencer. The quantification of the value of those services must proceed on that footing.

19. It was also said on Mr Coshott's behalf that the resolution of these applications should await the determination of the case of *Bell Lawyers Pty Ltd v Pentelow*¹⁰ then pending in this Court. This was said to be so because of the possibility that the Court's decision in that case might resolve, or at least give guidance in relation to the resolution of, the issue whether a solicitor may claim costs in respect of the professional work performed by him or her for an incorporated legal practice under the Uniform Law. As it happens, that issue was not resolved by, or explored in, this Court's decision in *Bell Lawyers Pty Ltd v Pentelow*¹¹. Indeed, this Court declined to enter upon any consideration apt to resolve or suggest the resolution of this issue.

Conclusion and orders

20. Both applications for an order to review should be dismissed. Mr Coshott must pay Mr Spencer's costs of each application.

¹⁰ [2019] HCA 29.

¹¹ [2019] HCA 29 at [51]-[52].

This page and the preceding ten pages comprise my reasons for judgment in Matter No S182 of 2017, *Coshott v Spencer & Ors*; Matter No S4 of 2018, *Coshott v Spencer & Ors*.

IN THE HIGH COURT OF AUSTRALIA

Matter No. S182/2017 & S4/2018

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REASONS FOR JUDGMENT

Judgment delivered and published in Canberra
on Wednesday, 11 September 2019