SUPREME COURT OF QUEENSLAND

CITATION:	*Rogers v Roche & Ors* [2017] QCA 145
PARTIES:	**ANDREW IAN ROGERS** (appellant) **v** **STEPHEN FRANCIS ROCHE** (first respondent) **SIMON MICHAEL MORRISON** (second respondent) **MARIA SKORDOU** (third respondent)
FILE NO:	Appeal No 10302 of 2015 SC No 2977 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Order
ORIGINATING COURT:	Supreme Court at Brisbane – [2015] QSC 272
DELIVERED ON:	Judgment delivered 16 December 2016 Further Order delivered 23 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Fraser and Gotterson JA and Burns J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The respondents should pay 60 per cent of the appellant's costs of the respondents' application in the Trial Division and the appellant's costs of the appeal, to be assessed on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where judgment in the appeal was given – where the parties were given leave to make submissions about costs – where the respondents' primary contention was that the costs in the Trial Division and in the appeal should be costs in the cause – where the appellant contended that he is entitled to costs orders that reflect his substantial success – where the appellant argued that he is entitled to recover costs for the time occupied in the litigation under the *Chorley* exception – whether, under a costs order against a party to a proceeding in favour of another party, who is an Australian lawyer entitled to practice in the court, the lawyer is entitled to recover professional costs referable to relevant items in the relevant

scale of costs – whether the regulatory scheme in Queensland is materially different in effect from the legislative provision considered in *Guss v Veenhuizen (No 2)*

Civil Proceedings Act 2011 (Qld), s 15
Legal Profession Act 2007 (Qld), s 300, s 301(4), s 319(1), s 326, s 328(4), s 345
Personal Injuries Proceedings Act 2002 (Qld)
Uniform Civil Procedure Rules 1999 (Qld), r 678(2), r 680, r 681, r 687, r 691(1), r 702(2), r 703(3), r 766(1)(d)

Bechara v Bates [2016] NSWCA 294, cited
Cachia v Hanes (1994) 179 CLR 403; [1994] HCA 14, followed
ChongHerr Investments Ltd v Titan Sandstone Pty Ltd [2007] QCA 278, followed
Guss v Veenhuizen (No 2) (1976) 136 CLR 47; [1976] HCA 57, followed
Hawthorn Cuppaidge & Badgery v Channell [1992] 2 Qd R 488, followed
London Scottish Benefit Society v Chorley, Crawford and Chester (1884) 13 QBD 872, considered
McIlraith v Ilkin [2008] NSWCA 11, cited
Rogers v Roche & Ors [2016] QCA 340, related
Wang v Farkas (2014) 85 NSWLR 390; [2014] NSWCA 29, cited
Wilkie v Brown [2016] NSWCA 128, cited

COUNSEL: No appearance by the appellant, the appellant's submissions were heard on the papers
No appearance by the respondents, the respondents' submissions were heard on the papers

SOLICITORS: No appearance for the appellant
No appearance for the respondents

[1] **FRASER JA:** When the Court gave judgment in this appeal, the parties were given leave to make submissions about costs.[1] The most significant question raised for decision by those submissions is whether, under a costs order made by a court under s 15 of the *Civil Proceedings Act* 2011 against a party to a proceeding in favour of another party, who is an Australian lawyer entitled to practice in the court, the lawyer is entitled to recover professional costs referable to relevant items in the relevant scale of costs.

[2] The appellant is a solicitor who resides in South Australia. He was injured in an accident at a resort in Queensland. He retained the first and second respondents as his solicitors to represent him in his attempt to recover compensation against the operator of the resort. The third respondent was the legal practitioner who had the day-to-day conduct of the appellant's matter during a relevant period. After unsuccessful negotiations and the commencement of litigation, the matter went to trial. The appellant succeeded in obtaining a judgment for damages but he was not satisfied

1 *Rogers v Roche & Ors* [2016] QCA 340.

with the amount allowed for economic loss. The appellant commenced proceedings against the respondents in the Trial Division. He alleged that his failure to recover the full amount of his economic loss was caused by negligence and breach of the solicitor's retainer, and various kinds of breaches of fiduciary duty by the respondents, during three distinct periods: in the course of the formation of the appellant's retainer of the first and second respondents as his solicitors; after the retainer was formed but before the commencement of the personal injuries litigation, during the conduct of the appellant's claim under the *Personal Injuries Proceedings Act* 2002 ("the PIPA stage"); and in the conduct of the appellant's claim after the commencement of that litigation ("the litigation stage").

[3] The respondents applied in the Trial Division to strike out the appellant's Claim and his pleading ("Fresh Statement of Claim") on the grounds that his claims were not maintainable by reason of advocate's immunity and they also involved an abuse of process by the re-litigation of issues determined in the personal injuries judgment. The primary judge accepted the respondents' arguments and made orders striking out so much of the appellant's Claim and Fresh Statement of Claim as concerned the alleged breaches of retainer, negligence, and breach of fiduciary duty. The primary judge made consequential orders, including an order removing the third respondent from the proceeding and giving judgment in her favour.

[4] The appellant was partially successful in the Trial Division. The primary judge did not strike out so much of the Fresh Statement of Claim and the Claim as concerned only claims for a declaration that the first and second respondents were not entitled to payment of fees they had charged in the personal injuries litigation and for consequential orders for repayment of those fees. That may be put to one side for present purposes. The respondents did not seek judgment upon those claims, they were not in issue in the appeal,[2] and no party submitted that this circumstance was relevant in the determination of the appropriate costs orders. No party sought different costs orders as between the third respondent and the other respondents.

[5] The appellant's appeal was allowed. The Court held that no part of the appellant's Claim and Fresh Statement of Claim involved an abuse of process and that advocate's immunity precluded the litigation only of so much of the appellant's claim as relied upon allegations of wrongful conduct during the litigation stage.[3] The orders striking out paragraphs of the Fresh Statement of Claim concerning the other matters, and the order striking out claims in the appellant's Claim, were set aside. In addition, some struck out paragraphs concerning the claim about costs were restored and the order removing the third respondent as a party was set aside.[4]

[6] The respondents' primary contention is that the costs in the Trial Division and in the appeal should be costs in the cause, for the following reasons: there has been mixed success because significant parts of the Fresh Statement of Claim have been struck out as a result of the respondents' application and the appellant's partial success on appeal; the Fresh Statement of Claim requires amendment in any event; and whether the further amended pleading will reveal a cause of action with real prospects of success is best determined at a trial. The respondents contend in the alternative that it is inappropriate for the respondents to bear the whole of costs in the Trial Division and of the appeal.

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2 [2016] QCA 340 at [3].
3 [2016] QCA 340 at [65].
4 [2016] QCA 340 at [66]-[67].

[7] The appellant contends that he is entitled to costs orders that reflect his substantial success: the respondents sought to strike out his Claim for damages and other orders and to have the third respondent removed, but all that has been struck out after the appeal is the claim concerning "the litigation stage". He also argued that the respondents could have waited until the evidence was adduced at trial before arguing that the appellant's claims were not maintainable and they could have made concessions about his appeal rather than arguing each point. The latter arguments should not be accepted. The respondents' contentions were ultimately rejected but it could hardly be said that those arguments or their application were unreasonable. The issue turns primarily upon an assessment of the parties' relative degrees of success in the application and appeal.

[8] As the appellant acknowledged during the hearing of his appeal, his pleading in any event requires some amendment,[5] but that was not the basis upon which the primary judge made the orders set aside on appeal. It is not a significant factor in the present context. Furthermore, the respondents' primary contention attributes insufficient weight to the factor that they were ultimately unsuccessful in their application to strike out the appellant's claims in his Claim for breaches of fiduciary duty, negligence, and breaches of the retainer. They were the most significant claims and the application to strike out those claims was the most significant order sought by the respondents. The application to strike out those parts of the Claim very substantially elevated the significance of the interlocutory hearing in the Trial Division and the appeal. In addition, the appellant ultimately succeeded in staving off the respondents' attempt to strike out the main pleaded bases of his claims for negligence, breach of retainer and breach of fiduciary duty in relation to two of the three distinct topics in the Fresh Statement of Claim. Looking at the matter broadly, the overall result was very much more favourable to the appellant than it was to the respondents.

[9] The complication of separate assessments of costs according to the results of different issues or applications for different orders should be avoided by taking into account, necessarily in an imprecise way, the effect of setting-off what otherwise would be the amounts of costs recoverable by each party against the other under notional costs orders in their favour. It is therefore relevant that, even if the appellant is entitled to recover costs for his time, the amount of his costs may be expected to be much less than the amount of costs incurred by the respondents. That is so because the appellant retained solicitors and counsel only in the Trial Division, whereas the respondents were represented both in the Trial Division and on appeal by counsel and solicitors, and those solicitors presumably charged for some costs (for example, the costs of attending upon and obtaining instructions from their clients) which the appellant could not have incurred.

[10] Taking all of these circumstances into account, and adopting the broad approach already mentioned, if the appellant is entitled to recover costs for his time the appropriate order is that the respondents pay 60 per cent of the appellant's costs of the proceedings in the Trial Division and in the appeal.

[11] The appellant sought an order fixing costs in a gross sum of at least $150,000. That amount was explained by statements in the appellant's written submissions that the respondents had told him that their party costs in the application in the Trial Division were assessed at $98,000 and they anticipated that their costs of the appeal

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5 See [2016] QCA 340 at [34], [64].

would not be significantly less. Upon those assumptions the appellant's claim for at least $150,000 was about 75 per cent of what he contended should be regarded as his total, reasonable costs of the proceedings in the Trial Division and on appeal. The appellant referred to various amounts he stated he had paid, including payments to counsel, a local solicitor, a town agent in Brisbane, and for filing fees and transcript fees in the appeal. More significantly for present purposes, the appellant's submissions also referred to the hourly rate the appellant stated he charges for his work as a solicitor and to the stated approximate cost of his flights to Brisbane to attend the hearing of the appeal.

[12] A very substantial part of the amount claimed by the appellant must be compensation for the time he spent in preparing for, travelling to, and appearing at the hearings in the Trial Division and on appeal. The appellant argued that he is entitled to recover costs for the time occupied in the litigation under the exception ("the *Chorley* exception") in the rule of practice established by *London Scottish Benefit Society v Chorley, Crawford and Chester*.[6]

[13] The rule of practice stated in *Chorley* is that a litigant who appears in person is entitled to recover the legal costs of the suit paid by the litigant but is not entitled to any payment for his or her time occupied in the litigation, except that a solicitor who acts for himself or herself in litigation is entitled to the same costs as if the litigant had employed a solicitor. (There is a qualification that some items, such as obtaining instructions and attendances, by their nature are not recoverable.) The rationales expressed by the judges in *Chorley* for the exception is that the costs of a litigant who is a solicitor are measurable by the Court, but the costs of unqualified litigants acting for themselves are not so measurable, and the solicitor should not be precluded from recovering costs because the solicitor might instead employ another solicitor, whose costs are likely to be greater.

[14] The *Chorley* exception was accepted by the High Court in *Guss v Veenhuizen (No 2)*.[7] In *Cachia v Hanes*,[8] Mason CJ, Brennan, Deane, Dawson and McHugh JJ described the exception as "somewhat anomalous" and "limited and questionable",[9] but their honours stopped short of concluding that *Guss v Veenhuizen (No 2)* was wrongly decided. The *Chorley* exception has been applied in Queensland.[10] In *McIlraith v Ilkin*,[11] Brereton J referred to decisions throughout Australia upon the topic, including decisions in South Australia and Western Australia holding that the *Chorley* exception should no longer be applied in those States (or in particular jurisdictions in those States), and held that it was not open to his Honour to discard the exception. On appeal, the New South Wales Court of Appeal (Basten and Bell JJA) held that, despite the different approach taken in other jurisdictions, it was not open to that Court to depart from the High Court's conclusion in *Guss v Veenhuizen (No 2)*.[12] The same conclusion was reached in *Wang v Farkas*.[13] In that case it was also held that *Guss v Veenhuizen (No 2)* would not bind a court in respect of a statutory provision that was materially different from the provision considered in the High Court's decision. Those conclusions were endorsed by the New South

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6 (1884) 13 QBD 872.
7 (1976) 136 CLR 47 (Gibbs ACJ, Jacobs and Aickin JJ, Mason and Murphy JJ contra.).
8 (1994) 179 CLR 403.
9 (1994) 179 CLR 403 at 411, 413.
10 See, for example, *Hawthorn Cuppaidge & Badgery v Channell* [1992] 2 Qd R 488.
11 [2007] NSWSC 1052.
12 *McIlraith v Ilkin* [2008] NSWCA 11 at [17].
13 (2014) 85 NSWLR 390 at [29] (Basten JA, Bathurst CJ and Beazley P agreeing).

Wales Court of Appeal in *Wilkie v Brown.*[14] This Court should adopt the same view.

[15] The appellant argued that his claim is consistent with the discretionary power of the Court to order costs under the *Uniform Civil Procedure Rules* 1999 ("*UCPR*") r 681, the Court's power to fix the amount of costs under *UCPR* r 687 instead of the costs being assessed, and the Court of Appeal's general power under r 766(1)(d) to "make the order as to the whole or part of the costs of an appeal it considers appropriate". The respondents opposed the appellant's application for the Court to fix the amount of the costs recoverable by the appellant. They argued that the *Chorley* exception is inconsistent with provisions in the *UCPR* and the *Legal Profession Act* 2007.

[16] Rule 687 of *UCPR* provides:

> "(1) If, under these rules or an order of the court, a party is entitled to costs, the costs are to be assessed costs.
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> (2) However, instead of assessed costs, the court may order a party to pay to another party –
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> (a) a specified part or percentage of assessed costs; or
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> (b) assessed costs to or from a specified stage of the proceeding; or
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> (c) an amount for costs fixed by the court; or
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> (d) an amount for costs to be decided in the way the court directs."

[17] Rule 687(2)(c) empowers the Court to make an order of the kind the appellant seeks. It is not necessary for the party seeking such an order to supply material of a kind that is required in an assessment of costs, but the power to fix costs ordinarily should be exercised only where the supporting material gives the Court sufficient confidence that the costs claimed were reasonably incurred and are reasonable in amount.[15] It is not necessary in this case to be more precise about the nature of the material required because the appellant has not supplied any material, in the form of an affidavit or otherwise, in support of the facts and figures contended for in his written submission or otherwise verifying that it was reasonable to incur the relevant items of cost or as to the reasonableness of the individual amounts of each item or the gross amount of all items. For these reasons, if the *Chorley* exception remains part of the applicable law in Queensland it is inappropriate for the Court to fix costs in this matter, but if the *Chorley* exception is not applicable in Queensland, the only costs claimed by the appellant that are recoverable appear to be filing fees and other court costs;[16] if so, the Court could and should assess those costs.

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14 [2016] NSWCA 128 at [26]-[28].

15 *ChongHerr Investments Ltd v Titan Sandstone Pty Ltd* [2007] QCA 278 at [6]. See also *Wilkie v Brown* [2016] NSWCA 128 at [51] (Beazley P, McColl and Gleeson JJA agreeing), approving Beazley P's reasons in *Hamod v New South Wales* [2011] NSWCA 375 at [813]-[820].

16 See *Cachia v Hanes* (1994) 179 CLR 403 at 415-416, *Worchild v Petersen* [2008] QCA 26 at [4]-[9], and *Merrin v Commissioner of Police* [2012] QCA 181 at [24], [29], [33], [39]. See also Henry J's conclusion in *Freitag & Anor v Bruderle & Anor* [2012] QSC 207 at p 9 (It is not necessary to consider other aspects of his Honour's reasons.).

[18] The applicable statutory provision in *Guss v Veenhuizen (No 2)* was s 26 of the *Judiciary Act* 1903 (Cth). That section conferred upon the High Court and every justice of the Court sitting in chambers "jurisdiction to award costs in all matters brought before the Court". The term "costs" was not defined. In Queensland, the power of the courts to order costs is conferred by s 15 of the *Civil Proceedings Act* 2011. It provides that "a court may award costs in all proceedings unless otherwise provided".[17] Again, the term "costs" is undefined. Section 15 does not differ from s 26 of the *Judiciary Act* in a way which is material for the application of the High Court's decision in *Guss v Veenhuizen (No 2)*. The appellant is therefore entitled to succeed upon the present issue unless it is "otherwise provided" for the purposes of s 15 of the *Civil Proceedings Act* 2011. For the following reasons none of the provisions upon which the respondents relied do provide otherwise in a way which is relevant to this issue.

[19] The first rule in Pt 1 of Ch 17A of *UCPR* is rule 678. Rule 678(1) provides that Ch 17A "applies to costs payable or to be assessed under an Act, these rules or an order of the court." Rule 678(2) identify parts of the chapter which apply or do not apply to certain costs:

> "(2) However—
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> (a) part 2 applies to costs payable or to be assessed under the *Legal Profession Act 2007* only if section 319(1)(b) of that Act applies to the costs; and
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> (b) part 3 does not apply to costs payable or to be assessed under the *Legal Profession Act 2007*; and
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> (c) part 4 applies only to costs payable or to be assessed under the *Legal Profession Act 2007*."

[20] The respondents argued that the word "payable" in r 678(2)(a) connoted an antecedent obligation to make payment of money or amount which is liable or due to be paid by one person or entity to another. This is so but it does not advance the respondents' case. If a costs order is made in the appellant's favour, the recoverable costs will be "payable" by the respondent to the appellant "under…an order of the court". The use of the word "payable" in r 678(1) of *UCPR* does not imply that the relevant costs are limited to costs which were paid or payable to a solicitor. The meaning of "payable" in that provision is unaffected by r 678(2)(a). That provision renders part 2 of Ch 17A applicable in an assessment of costs, if the assessment is made under an applicable scale of costs,[18] as between a solicitor (or, more accurately, a "law practice") and either the client or another person (a "third party payer") who is legally obliged to pay either the law practice or (in the case of a "non-associated third party payer") the client of the law practice or another person, for legal services provided to the client.[19] But by the express terms of r 678(2)(a) it has that effect only if the costs are "payable or to be assessed under the *Legal Profession Act* 2007". Where, as in a case of this kind, a court makes a costs order in favour of a party to litigation, the costs will instead be payable to that party under

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17 Before the commencement of that section the power of the Supreme Court to order costs was conferred in materially indistinguishable terms by s 221 of the *Supreme Court Act* 1995: the Court "shall have power to award costs in all cases brought before it and not provided for otherwise than by this section."

18 *Legal Profession Act* 2007, s 319(1)(b).

19 *Legal Profession Act* 2007, s 301.

the court's order and (if any assessment is required) assessed under the relevant provisions of *UCPR*.

[21] Section 319(1) of the *Legal Profession Act* 2007 provides that "legal costs" are recoverable under a costs agreement, or, if that is inapplicable, under the applicable scale of costs,[20] or, if neither is applicable, according to the fair and reasonable value of the legal services provided. The expression "legal costs" is defined in s 346, but only for the purposes of div 8 of pt 3.4 of that Act, which provides a maximum payment for a law practice's conduct of a speculative personal injuries claim.[21] In that context it is unsurprising that the definition is confined to "amounts that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services…". The circumstance that this definition comprehends only amounts charged by or payable to a law practice is not an indication that the term "costs" in s 15 of the *Civil Proceedings Act* 2011 is similarly limited.

[22] Rule 680 of the *UCPR* provides: "A party to a proceeding can not recover any costs of the proceeding from another party other than under these rules or an order of the court." If an order for costs is made in favour of the appellant, the appellant will be entitled to recover those costs from the respondents under that order. This rule does not "otherwise provide" in terms of s 15 of the *Civil Proceedings Act* 2011.

[23] The meaning of "the standard basis" of assessment is explained in r 691, in Pt 2 of Ch 17A. Rule 691(1) provides:

> "For assessing costs on the standard basis, an Australian lawyer is entitled to charge and be allowed the costs under the scales of costs for work done for or in a proceeding in the court."

[24] The respondents did not submit that anything in the relevant scale of costs for the Supreme Court in schedule 1 militated against the application of the *Chorley* exception, although recovery under items quantifying some items of costs, such as the costs of obtaining instructions and attendances by the solicitor upon the client, necessarily would be unavailable to the appellant. The respondents did not submit that at any material time the appellant was not "an Australian lawyer" or not entitled to practise as a solicitor in the Supreme Court of Queensland.[22] The respondents' argument in relation to r 691(1) was that the word "charge" in the phrase "charge and be allowed" is consistent with a requirement for an antecedent obligation of payment from one person to another, such as between a solicitor and client. That is so, but it does not necessarily follow that it is not also consistent with a party to proceedings who is a solicitor charging and being allowed costs to enforce another party's liability to the solicitor created by a court order. Furthermore, an assessment of costs is not necessarily required to quantify costs payable under a court order made in either division of the Supreme Court: *UCPR*, rules 687 and 771. In that context, a provision in a rule concerning only the assessment of costs seems an unlikely place to find the destruction of the entitlement of a litigant who is a lawyer to recover professional costs.

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20 This provision is in paragraph (b), which is mentioned in rule 678(2)(b).

21 *Legal Profession Act* 2007, s 345.

22 Compare *Worchild v Petersen* [2008] QCA 26.

[25] As rule 678 requires, rule 691 is designed to apply in two different cases. The rule applies the scales of costs in an assessment of costs as between parties to litigation in accordance with pts 2 and 3 of Ch 17A (referred to in rr 678(1) and 678(2)(b)), where the liability to pay costs is created by other rules or a court order. That the liability in this case arises under the rules or a court order is also made clear by rule 680. In the second case, rule 691 applies the scales of cost in an assessment of costs under Ch 3, Div 7 of the *Legal Profession Act* in accordance with pts 2 and 4 of Ch 17A. This case comprehends two categories of liabilities. The first category is a client's liability to the solicitor, which arises under or with reference to the retainer, including by a costs agreement or various provisions of the Act.[23] The second category comprehends the liability of a person who is not a client but is legally liable to pay the costs. That liability, which is referred to in [20] of these reasons, may be created "by or under contract or legislation or otherwise".[24] The reference in r 691(1) to an Australian lawyer being "entitled to charge and be allowed the costs under the scale of costs" is apt to comprehend both cases. In the first case (of which this case is an example) a party is entitled to charge and be allowed costs against the other party by virtue of that other party's liability created by the court order or rule.

[26] The permissive and general language of rule 691 is, in any event, not apt to achieve the result for which the respondent contended; the rule describes an entitlement of an Australian lawyer, rather than a qualification upon the entitlement of a litigant who is both an Australian lawyer and the beneficiary of a costs order made under the general terms of s 15 of the *Civil Proceedings Act*.

[27] Division 2 of Pt 2 of Ch 17A specifies two bases of assessment of costs of a party in a proceeding. Rule 702(1) refers to "costs on the standard basis", which applies unless the rules or an order of the court provides otherwise. Rule 702(2) provides that in an assessment of costs on the standard basis "a costs assessor must allow all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed". That is consistent with the application of the *Chorley* exception. Rule 703 empowers the court to order costs to be assessed on the "indemnity basis" (formerly known as "solicitor and client costs"). Rule 703(3) provides that in such an assessment, "a costs assessor must allow all costs reasonably incurred and of a reasonable amount, having regard to…the scale of fees prescribed for the court…and…any costs agreement between the party to whom the costs are payable and the party's solicitor…and…charges ordinarily payable by a client to a solicitor for the work." The words "any" and "ordinarily payable" suggest that professional charges may be included in the assessment of the costs of a litigant who is a solicitor on the indemnity basis, whether or not the litigant retained a solicitor. This rule is also consistent with the application of the *Chorley* exception.

[28] Subject to consideration of the authorities upon which the respondents relied, the result of this analysis is that the statutory provisions and rules upon which the respondents relied do not justify a conclusion that the regulatory scheme in Queensland is materially different in effect from the legislative provision considered

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23 *Legal Profession Act* 2007, ss 319(1), 326, 328(4).

24 *Legal Profession Act* 2007, ss 300 and 301(4). Despite the generality of the word "otherwise", the provisions of Ch 17A, particularly rules 678, 680, and Pt 3 of Ch 17A, are consistent only with the view that the word "otherwise" does not comprehend the liability of a party to proceedings to pay another party's costs pursuant to a court order.

in *Guss v Veenhuizen (No 2)*. Certainly the regulatory scheme is more detailed and complex, but nothing in it detracts in a material way from the generality of the power conferred upon courts by s 15 of the *Civil Proceedings Act* 2011 to order a party to proceedings to pay another party's costs.

[29] In *Bechara v Bates*[25] the New South Wales Court of Appeal endorsed Basten J's remark in *Wang v Farkas* [26] that the word "payable" in the definition of "costs" in s 3 of the *Civil Procedure Act* 2005 (NSW) "may be a significant distinguishing feature from the provision the subject of the decision in *Guss*".[27] Section 98 of that Act relevantly made "costs" in the discretion of the Court. Section 3 of the same Act defines "costs", in relation to proceedings, in an exhaustive way: the term "means costs payable in or in relation to the proceedings, and includes fees, disbursements, expenses and remuneration." Significantly, the same section defines the "ordinary basis" of assessment as meaning, "in relation to the assessment of legal costs that a court has ordered to be paid, means the basis of assessing costs in accordance with" the New South Wales *Legal Profession Uniform Law Application Act* 2014. Those provisions require a costs assessor to determine a fair and reasonable amount of costs for the work concerned. In making a determination the costs assessor might have regard to factors in provisions of the *Legal Profession Uniform Law (NSW)* 2014. In that Act, the phrase "legal costs" is defined to mean "amounts that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services…or…without limitation, amounts that a person has been or may be charged, or is or may become liable to pay, as a third party payer in respect of the provision of legal services by a law practice to another person – including disbursements but not including interest…". The New South Wales Court of Appeal referred to Beazley P's conclusion in *Wilkie* (which concerned a very similar regulatory scheme) that "on a preliminary view, the language does not appear to be apt to extend to the professional costs of a solicitor acting in person",[28] and concluded that the statutory language was arguably inconsistent with the judicial rationale for *Chorley* prior to 2005.

[30] It will be apparent that, although the New South Wales and Queensland regulatory schemes share much in common, there are differences between them which are significant for present purposes. Whereas in Queensland, a party's entitlement to costs is created by a court order made pursuant to the general power in s 15 of the *Civil Proceedings Act* 2011, in which the expression "costs" is undefined, in New South Wales the Act which creates the power of the court to order costs, the *Civil Procedures Act* 2005, both confines the meaning of "costs" to "costs payable" [29] and defines the usual basis of assessment in a way that requires reference to the limitation in the definition of "legal costs" in the *Legal Profession Uniform Law Application Act* (NSW) that it comprehends only amounts charged by a law practice for the provision of legal services to a different person.

[31] The New South Wales cases did not hold that the *Chorley* exception was inapplicable in that State. In light of the differences between the two States' regulatory schemes, the reasoning in those cases does not support the respondents' argument that the *Chorley* exception does not apply in Queensland. *Guss v*

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25 [2016] NSWCA 294 at [40].
26 (2014) 85 NSWLR 390 at [28].
27 [2016] NSWCA 294 at [40].
28 *Wilkie v Brown* [2016] NSWCA 128 at [43].
29 See *Bechara v Bates* [2016] NSWCA 294 at [51]-[64].

Veenhuizen (No 2) is not distinguishable. Unless and until the High Court decides to the contrary or the regulatory scheme is reformed in a material way, where a costs order is made by a court under s 15 of the *Civil Proceedings Act* 2011 against a party to a proceeding in favour of another party who is an Australian lawyer entitled to practice in the court, the lawyer is entitled to recover costs described in applicable items in the relevant scale of costs.

[32] It follows that there should be an assessment of the costs recoverable by the appellant under the Court's order.

Order

[33] The respondents should pay 60 per cent of the appellant's costs of the respondents' application in the Trial Division and the appellant's costs of the appeal, to be assessed on the standard basis.

[34] **GOTTERSON JA:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.

[35] **BURNS J:** I agree with Fraser JA.