SUPREME COURT OF QUEENSLAND

CITATION:	*Murphy v Legal Services Commissioner (No. 2)* [2013] QSC 253
PARTIES:	**JOHN PAUL MURPHY** (applicant) **v** **LEGAL SERVICES COMMISSIONER** (respondent)
FILE NO:	7724 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	19 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	3 September 2013
JUDGE:	Daubney J
ORDERS:	**1. The applicant's further application is dismissed**.
CATCHWORDS:	PROCEDURE – COSTS – RECOVERY OF COSTS – where the applicant seeks costs – where the applicant is a self-represented barrister – where the applicant submits that an anomalous exception relating to self-represented solicitors – may be extended to allow self-represented barristers to claim their professional costs in litigation – where the applicant seeks an order that the costs be paid on an indemnity basis – whether the application should be allowed. *Litigants in Person (Costs and Expenses) Act* 1975 (UK) *Cachia v Hanes* (1994) 179 CLR 403, cited. *Farkas v Northcity Financial Services Pty Ltd* [2006] NSWSC 1036, considered. *Guss v Vanhuizen (No. 2)* (1976) 136 CLR 47, considered. *Hartford Holdings Pty Ltd v CP (Adelaide) Pty Ltd & Ors* [2004] SASC 161, cited. *Khera v Jones* [2006] NSWCA 85, considered. *London Scottish Benefit Society v Chorley, Crawford and Chester* (1884) 13 QBD 872, cited. *Murphy v Legal Services Commissioner* [2013] QSC 70, cited. *Worchild v Petersen* [2008] QCA 26, considered.

COUNSEL:	J P Murphy appeared in person
	M S Trim for the respondent
SOLICITORS:	J P Murphy appeared in person
	Crown Law for the respondent

Background

[1] This is a costs judgment arising from my judgment in *Murphy v Legal Services Commissioner* [2013] QSC 70.[1] The applicant, who represented himself in the proceeding, is a barrister. He held, and is the current holder of, a practising certificate.[2]

[2] In the principal judgment, I made the following order for costs:

> "[3] The respondent shall pay the applicant's costs of and incidental to this application."

[3] On 26 March 2013, the applicant delivered a letter to the Crown Solicitor attaching a fee note for his professional costs and disbursements of and incidental to the application.[3] The Crown Solicitor disputed liability to pay the applicant's "professional costs". The applicant now seeks a declaration that the word "costs … includes the applicant's professional costs", an order that the costs be paid on the indemnity basis, and costs of the present application.

General principles

[4] It is well established that litigants in person are not entitled to be compensated for the value of their time. The basis for this rule was articulated by the House of Lords in *London Scottish Benefit Society v Chorley*, *Crawford and Chester ("Chorley's case")*:[4]

> "… only legal costs which the Court can measure are to be allowed, and that such legal costs are to be treated as expenses necessarily arising from the litigation and necessary caused by the course which it takes. Professional skill and labour are recognised and can be measured by the law; private expenditure of labour and trouble by a layman cannot be measured. It depends on the zeal, the assiduity, or the nervousness of the individual. Professional skill, when it is bestowed, is accordingly allowed for in taxing a bill of costs…"[5]

[5] In *Guss v Vanhuizen*, a self-represented solicitor sought taxation of costs on the basis that he fell within the rule of practice that a solicitor should be entitled to costs in those circumstances. It was held, *inter alia*, that the solicitor was entitled to his professional costs.

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1 *Murphy v Legal Services Commissioner* [2013] QSC 70.
2 Affidavit Murphy paragraphs 2 & 3; Ex JPM-1.
3 Affidavit Murphy paragraphs 8 & 9; Ex JPM-3.
4 (1884) 13 QBD 872.
5 (1884) 13 QBD 872, 876 – 877.

[6] The High Court, applying *Chorley's Case,* described the basis of the rule in the following terms:[6]

> "… the litigant in person does not recover such costs in such circumstances in the capacity of a solicitor, but because he happening to be a solicitor, his costs are able to be quantified by the Court and its officers."[7]

[7] Subsequently, in *Cachia v Hanes,*[8] the High Court questioned the principle that a self-represented solicitor may be entitled to costs, without finding it necessary to overrule the principle for the purpose of deciding the case. Mason CJ, Brennan, Deane, Dawson and McHugh JJ stated:

> "It suffices to say that the existence of a **limited and questionable exception** provides no proper basis for overturning a general principle that had never been doubted and which had been affirmed in recent times". (emphasis added)

[8] Thus, there appears to be an anomalous exception to the general rule regarding self-represented litigants to the effect that solicitors may be compensated for time spent acting as a litigant in person.[9] The applicant submitted that costs should be awarded in his favour, on the basis that the anomalous exception should be extended to self-represented barristers. The applicant sought to advance this argument on the basis that: "an award of costs will include costs for the application of professional legal skills where the value of the professional time can be quantified on an assessment of costs".[10] The applicant relied on the self-represented barrister's exercise of professional legal skill as the basis for his claim for costs.

[9] The applicant pointed to *Farkas v Northcity Financial Services Pty Ltd*[11] as authority for the proposition that a self-represented barrister is entitled to costs. In *Farkas*, the applicant applied for an order pursuant to s 101(4) of the *Civil Procedure Act 2005* (NSW) that a defendant to that proceeding pay interest on the amount of costs awarded to the plaintiff. The case did not concern the question of whether a self-represented barrister is entitled to an award of costs but held only that there was no entitlement to interest in circumstances where there had been no challenge to a costs assessor having allowed those costs. This case does not provide any authoritative basis for the position advanced by the present applicant.

[10] The applicant also sought to rely on several English authorities, such as *Buckland v Watts,*[12] which, it was submitted, are authority for the proposition that quantifiable, legal work may be liable to be compensated with an award for costs.[13] Those cases are distinguishable from the present case, not least because the relevant UK legislation contains express provisions concerning the recovery of costs by litigants in person generally. Under the *Litigants in Person (Costs and Expenses)*

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6 (1976) 136 CLR 47.
7 *(No. 2)* (1976) 136 CLR 47 at 51 – 52.
8 (1994) 179 CLR 403.
9 See, for example, *Guss v Veenhuizen* (1976) 136 CLR 47 at 51-52, *Hawthorne Cuppaidge & Badgery v Channell* [1992] 2 Qd R 488 at 488, 490 and 491, *Cachia* (1994) 179 CLR 403 at 411, 413 and 414.
10 Applicant's outline of submissions, para 13.
11 [2006] NSWSC 1036.
12 [1970] 1 QB 27.
13 See also *London Scottish Benefit Society v Chorley, Crawford and Chester* (1884) 13 QBD 872.

Act 1975 (UK), litigants are entitled to recover loss of earning incurred during the course of preparing and presenting a case.[14] The plurality in *Cachia* referred to these provisions as a significant point of distinction between the English and Australian authorities: [15]

> "Clearly, that is merely an indirect way of recompensing a litigant for time spent in the preparation or conduct of his case which, if it is not contemplated by the relevant legislation or rules, is not permissible. Of course, a litigant who qualifies as a witness is entitled to the ordinary witness's fees."

[11] The UK authorities do not assist the applicant's present argument.

[12] In *Worchild v Petersen,*[16] Mackenzie AJA, with whom McMurdo P and Holmes JA agreed, articulated the general rule and the exception under Australian law in the following terms:[17]

> "… the principle said to be derived from *Guss v Vanhuizen* … [is] that a solicitor who appears in person is entitled to costs for his professional time, not because he is a solicitor in the formal sense, but because, being a solicitor, his costs can be quantified …"

[13] Mackenzie AJA continued:

> "**[9]** The principle referred to as never being doubted is that a person who is not within that limited exception defined in *Guss* cannot recover costs in respect of time lost by him in preparing and conducting his case. More recent judicial discussion on the subject shows a trend toward the view that *Guss* should be regarded as representing the law until overruled by binding authority (eg *McIlraith v Ilkin* [2007] NSWSC 1052 — applying *Atlas Corporation Pty Ltd v Kalyk* [2001] NSWCA 10; *Winn v Garland Hawthorn Brahe (a firm) (Ruling No 1)* [2007] VSC 360; *A & D Douglas Pty Ltd v Lawyers Private Mortgages Pty Ltd* [2006] FCA 690), notwithstanding the contrary view in Western Australia (*Dobree v Hoffman* (1996) 18 WAR 36). It is clear from this that any review of the law is unlikely to provide a better outcome for the applicant."

[14] In *Khera v Jones,*[18] the New South Wales Court of Appeal affirmed the limited scope of the rule allowing solicitors in litigation to claim professional costs. That case concerned an application for leave to appeal in a dispute between two self-represented solicitors. In dismissing the appeal, the Court said:

> "[2] In *Cachia*, the *Chorley* rule was described (at 411) as 'somewhat anomalous' and resting upon a 'somewhat dubious' justification. Indeed, the majority hinted (at 412-413) that the exception ought perhaps to be abandoned. The Full Court of the Supreme Court of Western Australia took this step in *Dobree v Hoffman* (1996) WAR 36 …"

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14 *Hartford Holdings Pty Ltd v CP (Adelaide) Pty Ltd & Ors* [2004] SASC 161.
15 *Cachia v Hanes* (1994) 179 CLR 403 at 13.
16 [2008] QCA 26.
17 [2008] QCA 26, 4.
18 [2006] NSWCA 85.

[15] Mason P and Ipp J continued:[19]

> "… Were the matter uncluttered by authority we would favour the approach in *Dobree.* But there is little reason to think that this Court would depart from its firm and comparatively recent decision in *Atlas.* Nor are the prospects of engrafting an exception on the *Chorley* exception, related to 'unemployed' solicitors, of sufficient weight to merit a grant of leave that would add a further costly chapter to this litigation. These matters could only be addressed by the High Court."

[16] There is no authority which supports the proposition that the "anomalous" and "somewhat dubious" exception in favour of a self-represented solicitor extends to a self-represented barrister. In the absence of clear authority, I am not prepared to extend the ambit of an exception which is itself of such questionable application.

The application for indemnity for costs

[17] Having determined that the applicant is not entitled to costs as a self-represented barrister, it is unnecessary for me to consider the question of indemnity costs.

Conclusion

[18] It will be ordered that the applicant's further application be dismissed.

[19] [2006] NSWCA 85, 6.