ORDER PROHIBITING PUBLICATION OF THE NAMES OF THE APPELLANT AND THE RESPONDENT FOR 10 WORKING DAYS FROM DATE OF JUDGMENT OR FURTHER ORDER OF THIS COURT.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA155/2016
[2017] NZCA 249

	BETWEEN	JOINT ACTION FUNDING LIMITED Appellant
	AND	JOHN REVANS EICHELBAUM Respondent

Hearing:	14 March 2017
Court:	Brown, S France and J Williams JJ
Counsel:	A R Gilchrist and G Abdale-Weir for Appellant Respondent in person
Judgment:	14 June 2017 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B The award of costs in favour of the respondent in the High Court is set aside.

C The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

D Order prohibiting publication of the names of the appellant and the respondent for 10 working days from date of judgment or further order of this Court.

REASONS OF THE COURT

(Given by Brown J)

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Introduction

[1] Mr Eichelbaum is a practising barrister. He was successful in a claim, which he conducted in person, for an order under s 91 of the Companies Act 1993 rectifying the share register of the appellant, Joint Action Funding Limited (JAFL), to record a transfer to him of a 10 per cent shareholding in JAFL.[1] Thomas J awarded Mr Eichelbaum costs in the sum of $16,688 and disbursements of $2,630 and awarded JAFL indemnity costs in the sum of $1,375.50.[2] JAFL appeals against that costs judgment.

[2] Although a litigant in person in New Zealand is not entitled to recover costs except in exceptional cases,[3] there is a long recognised exception that a practising barrister and solicitor who brings or defends a proceeding in person[4] is entitled to the same costs as when acting on behalf of a client (the lawyer-litigant exception).

[3] JAFL invites this Court to reconsider that exception. Its appeal raises three issues, namely:

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1 *Eichelbaum v Joint Action Funding Limited* [2015] NZHC 2163.
2 *E v J* [2016] NZHC 419.
3 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24,500 at [162]; and *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA) at 441–442.
4 Or by a partner or employee of the firm.

(a) whether the lawyer-litigant exception should be maintained in New Zealand in view of the doubt expressed by the High Court of Australia in *Cachia v Hanes*;[5]

(b) whether the lawyer-litigant exception applies to a barrister appearing in court without an instructing solicitor; and

(c) as to quantum:

(i) whether the costs awarded to Mr Eichelbaum were excessive; and

(ii) whether the indemnity costs awarded to JAFL should be increased.

The origin of the lawyer-litigant exception

[4] The point of departure is the summary of this Court in *Brownie Wills v Shrimpton*:[6]

> The long-established rule is that, as an exception to the general rule denying costs to a litigant in person, a practising barrister and solicitor who brings or defends a proceeding in person or by a partner or employee of the firm is entitled to the same costs as when acting on behalf of a client. So the lawyer litigant may have the same costs as if another lawyer had been instructed but cannot, of course, charge for consulting, instructing, or attending upon him or herself: *London Scottish Benefit Society v Chorley* … . In New Zealand the exception is discussed or referred to in *Hanna v Ranger* … , *Lysnar v National Bank of New Zealand Ltd (No 2)* … and *Re Collier (A Bankrupt)* … .
>
> The High Court of Australia has cast some doubt on this exception (*Cachia v Haynes* …) but, not having been asked to reconsider the question, we do not depart from the practice of allowing costs to a solicitor/litigant.

[5] In *London Scottish Benefit Society v Chorley* a solicitor who successfully acted for himself in litigation was held to be entitled to the same costs as if he had employed a solicitor, except for items, such as obtaining instructions or attendances,

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5 *Cachia v Hanes* (1994) 179 CLR 403 at 412.

6 *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 (CA) at 327 (citations omitted).

that were unnecessary because he was his own client.[7] On appeal Brett MR contrasted the position of a solicitor with that of an ordinary litigant:[8]

> When an ordinary litigant appears in person, he is paid only for costs out of pocket. He cannot himself take every step, and very often employs a solicitor to assist him: the remuneration to the solicitor is money paid out of pocket. He has to pay the fees of the court, that is money paid out of pocket; but for loss of time the law will not indemnify him. When, however, we come to the case of a solicitor, the question must be viewed from a different aspect. There are things which a solicitor can do for himself, but also he can employ another solicitor to do them for him; and it would be unadvisable to lay down that he shall not be entitled to ordinary costs if he appears in person, because in that case he would always employ another solicitor.

[6] Bowen LJ analysed the matter by reference to measurement of expenditure. After noting that costs are the creature of statute and referring to passages in Coke's *Institutes*, he said:[9]

> 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; and it would be absurd to permit a solicitor to charge for the same work when it is done by another solicitor, and not to permit him to charge for it when it is done by his own clerk.

[7] Fry LJ perceived that the practice of allowing the lawyer-litigant exception had a public benefit:[10]

> I think that the conclusion at which we have arrived will be beneficial to the public, because if the rule were otherwise a solicitor who is party to an action would always employ another solicitor, and whenever he is successful he would recover full costs; whereas under the rule of practice laid down by us, a solicitor who sues or defends in person will be entitled, if he is successful, to full costs, subject to certain deductions, of which his unsuccessful opponent will get the benefit.

[8] Although the general principle and the exception are often referred to as a rule of practice, nevertheless, as Bowen LJ observed, costs are a creature of statute. Significantly in *Re Collier (A Bankrupt)* this Court remarked:[11]

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7 *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 (CA).
8 At 875.
9 At 877.
10 At 877–878.
11 *Re Collier (A Bankrupt)*, above n 3, at 441.

> The general question as to whether a litigant in person should be paid for his time and trouble raises many important considerations of both policy and practice, and as the High Court of Australia has observed, is not really a matter that can be solved by a Court.

In our view the retention or otherwise of the exception to the general principle is not truly a matter of practice but turns on the proper construction of the rules relating to costs as set out in the High Court Rules.

[9] However, reflecting the fact that the appellant's invitation to reconsider the exception was sparked by the dicta in *Cachia v Hanes*, the submissions of both parties focussed primarily on the several decisions in Australia and England delivered since *Brownie Wills*. In those circumstances, before turning to consider the interpretation of the current costs rules, we briefly review developments in Australia and England which reveal significantly different positions prevail.

The Australian position

[10] Both the general principle of denying costs to litigants in person and the lawyer-litigant exception were adopted by the High Court of Australia in *Guss v Veenhuizen [No 2]*.[12] The majority, citing *Chorley*,[13] said of a solicitor who acts for himself:[14]

> Those authorities establish that 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.

The Court went on to refer with approval to the passages from the judgments of Brett MR and Bowen LJ in *Chorley.*[15]

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12 *Guss v Veenhuizen [No 2]* (1976) 136 CLR 47.

13 And *H Tolputt & Co Ltd v Mole* [1911] 1 KB 836.

14 *Guss v Veenhuizen [No 2]*, above n 12, at 51. Although Mr Guss was a solicitor, his name was not entered on the court's register. Nevertheless he was allowed his professional costs, the majority making it clear that that was wholly because the absence of his name from the register was due to an error on the part of an officer of the court when Mr Guss had attempted to enrol himself.

15 Set out at [5]–[6] above.

[11] Less than two decades later in *Cachia v Hanes* the lawyer-litigant exception was described in the majority judgment as a somewhat anomalous exception.[16] The justification for the privileged position of a solicitor acting for himself was viewed as somewhat dubious. However, Mr Cachia was not a lawyer but a self-employed consulting engineer; hence, the Court's observations on the integrity of the lawyer-litigant exception were obiter dicta.

[12] The Court was not minded to revisit the general principle, stating:[17]

> If the explanations for allowing the costs of a solicitor acting for himself are unconvincing, the logical answer may be to abandon the exception in favour of the general principle rather than the other way round … . However, it is not necessary to go so far for the purposes of the present case. It suffices to say that the existence of a limited and questionable exception provides no proper basis for overturning a general principle which has, as we have said, never been doubted and which has been affirmed in recent times.

[13] A succession of decisions followed in which state courts recognised the validity of the reservations expressed in *Cachia v Hanes* but were constrained to follow *Guss v Veenhuizen [No 2]*. A notable exception was the decision of the Supreme Court of Western Australia in *Dobree v Hoffman*,[18] which considered that the exception should be abolished. Concurring with the primary judgment of Parker J at first instance, Rowland J stated:[19]

> I agree with his Honour's conclusion that the so-called *Chorley* exception (*London Scottish Benefit Society v Chorley* …) should not be adopted as the practice to be followed in this Court. I have reached this conclusion with some hesitation because, as his Honour has pointed out, the *Chorley* exception has been followed in other Australian States. However, in the event, I agree that the exception is difficult to justify, either as a matter of fairness or under the laws of this State. Where it has been followed in other States, it has been generally followed without argument. There is dicta in the recent decision of the High Court in *Cachia v Hanes* … which would justify this Court, having heard full and helpful argument on the matter, to resolve the matter at least for this State.

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16 *Cachia v Hanes,* above n 5, at 411.
17 At 412–413.
18 *Dobree v Hoffman* (1996) 18 WAR 36 (SC).
19 At 38 (citations omitted).

[14] However the orthodox position was maintained in New South Wales by the Court of Appeal in *Atlas Corporation Pty Ltd v Kalyk.*[20] The Court reasoned that the majority in *Cachia v Hanes* did not overrule *Guss v Veenhuizen [No 2]* and their statements about the position in the case of solicitors acting for themselves in litigation were only dicta.[21] Handley JA, giving judgment for the Court, went on to note:[22]

> In the end, despite the decision of the Western Australian Full Court in *Dobree & Ors v Hoffman* .., I am of the view that the duty of this Court is as described in *Garcia v National Australia Bank Ltd* … where at 403 the majority said:

"It should be emphasised it is for this Court alone to determine whether one of its previous decisions is to be departed from or overruled". Subsequently in *Soia v Bennett* the Court of Appeal of Western Australia accepted that *Dobree v Hoffman* had been wrongly decided.[23]

[15] The prevailing mood in Australia appears to be well summarised in *Law of Costs*:[24]

> The issue therefore awaits definitive High Court authority, but obiter remarks in *Cachia v Hanes*, coupled with the tenor of judicial statements to date, suggest that the *Chorley* exception is likely to have a limited lifespan.

The English position

[16] The general rule applied in England until the mid 1970s, albeit without enthusiasm as the observation of Sir Gordon Willmer LJ in *Buckland v Watts* demonstrated:[25]

> It is because there has been an exercise of professional legal skill that a solicitor conducting his own case successfully is treated differently from any other successful litigant in person conducting his own case. We are not

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20 *Atlas Corporation Pty Ltd v Kalyk* [2001] NSWCA 10. The orthodox position has also been maintained in the Federal Court of Australia: see *Waller v Freehills* [2009] FCAFC 89, (2009) 177 FCR 507; in Victoria: see *Winn v Garland Hawthorn Brahe (A Firm)* [2007] VSC 360; and in Queensland: see *Worchild v Peterson* [2008] QCA 26.

21 At [9]. This reasoning was followed in *Khera v Jones* [2006] NSWCA 85.

22 At [10] (citations omitted).

23 *Soia v Bennett* [2014] WASCA 27, (2014) 46 WAR 301 at [79].

24 G E Dal Pont *Law of Costs* (3rd ed, LexisNexis Butterworths, Chatswood (NSW), 2013) at [7.40].

25 *Buckland v Watts* [1970] 1 QB 27 (CA) at 37–38.

> concerned with the exercise of other professional skills. Other professional people, who become involved in litigation and conduct their own cases, may recover something in respect of their own professional skill in so far as they qualify as witnesses and are called as such. Nobody else, however, except a solicitor, has ever been held entitled to make any charge, as I understand it, in respect of the exercise of professional legal skill and it is this which the appellant has sought to do in the present case. I have much sympathy for him … , as indeed had Donaldson J, but I can find no ground, either in principle or on authority, for allowing him anything by way of remuneration for the exercise of a professional skill which he has not got.

[17] Reflecting the point acknowledged in *Re Collier (A Bankrupt)* that any change was the role of the legislature,[26] the general rule was revised by the Litigants in Person (Costs and Expenses) Act 1975 (UK) which provided:

> **1 Costs or expense recoverable**
>
> (1) Where, in any proceedings to which this subsection applies, any costs of a litigant in person are ordered to be paid by any other party to the proceedings or in any other way, there may, subject to rules of court, be allowed on the taxation or other determination of those costs sums in respect of any work done, and any expenses and losses incurred, by the litigant in or in connection with the proceedings to which the order relates.

This was further revised by the Civil Procedure Rules 1998 (UK), which provided that the costs so allowed to a litigant in person (other than for disbursements) were limited to two-thirds of the amount that would have been allowed had the litigant been legally represented.[27] Rule 48.6 also stated:

> (6) For the purpose of this rule, a litigant in person includes—
>
> …
>
> (b) a barrister, solicitor, solicitor's employee or other authorised litigator … who is acting for himself.

[18] While this appeared to have removed the *Chorley* exception, treating lay-litigants and lawyer-litigants alike, the rule was then modified by a Practice Direction to exclude from r 48.6(6)(b) solicitors represented in proceedings by their firm or representing themselves but under their firm name. In 2003 that exception was extended by the English Court of Appeal in *Malkinson v Trim* to a situation

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[26] *Re Collier (A Bankrupt)*, above n 3, at 441.
[27] Civil Procedure Rules 1998 (UK), r 48.6(2).

where the work was done by the partner of the lawyer-litigant.[28] Chadwick LJ explained:[29]

> To adopt and adapt the observation of Bowen LJ which I have just set out, I would think it absurd to permit a solicitor to charge for work in the litigation when done (a) by another solicitor (or a solicitor in another firm) or (b) by his clerk (or an employed solicitor in his own sole practice) or (c) by himself, but not to permit him to charge for the same work when done (d) by employees of the firm of which he is a partner or (e) by one or more of his partners. The reasoning which led this court to the conclusion which it reached in [*Chorley*] must lead to the same conclusion in a case where the solicitor litigant carries on his practice as a solicitor in partnership. The successful litigant is entitled to an indemnity; there is no difficulty in measuring the cost of legal professional time and skill; and there is likely to be some saving of costs if the work is done within his own firm rather than if he is encouraged, in practice, to instruct another firm.

[19] *Malkinson* clarified the implications of the curious distinction drawn between a solicitor "acting for himself" and a solicitor who was represented in proceedings by his firm, the history of which was summarised by Mitchell J in *Khan v Lord Chancellor*.[30] The distinction was explained in *Malkinson* in this way:[31]

> One effect of [the Civil Procedure Rules 1998 (UK)] r 48.6(6)(b), read in conjunction with section 52.5 of the Practice Direction, is that there is now more clearly recognised a distinction between the solicitor litigant who provides, in connection with his own litigation, professional skill and knowledge in the course of his practice as a solicitor — that is to say, who "is represented … by himself in his firm name" — and the solicitor litigant who provides skill and knowledge in what might be described as "his own time" — that is to say, outside the course of his practice as a solicitor and (typically) outside the office. The latter is treated as a litigant in person for the purposes of … r 48.6; and so is subject to the restrictions imposed by that rule, including the two-thirds restriction imposed in paragraph (2). The former is not.

The position in New Zealand

[20] Against that backdrop, we turn to consider the position in New Zealand where the High Court Rules governing costs have changed since *Brownie Wills*. The appellant's written submission focussed primarily on the second and third issues,[32] and the respondent's submissions likewise engaged primarily with those contentions.

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28 *Malkinson v Trim* [2002] EWCA Civ 1273, [2003] 1 WLR 463.
29 At [14].
30 *Khan v Lord Chancellor* [2003] EWHC 12, [2003] 1 WLR 2385 (QB) at 2391.
31 *Malkinson v Trim*, above n 28, at [22].
32 Set out at [3] above.

Neither side's submissions explored in any depth the current costs rules and their implications for the first issue. Consequently, in order to address the purpose of the costs rules it has been necessary to undertake our own research on the travaux préparatoires in the form of the Rules Committee minutes.

The former costs rules

[21] The general provisions relating to costs in force when *Brownie Wills* was decided were, as set out in the High Court Rules:

> **46 Court's overriding discretion**
>
> (1) Except as expressly provided in any Act, all matters relating to the costs of or incidental to any proceeding or any step therein shall be in the discretion of the Court.
>
> (2) Without limiting the generality of subclause (1) the Court may—
>
> (a) Refuse costs to a successful party, or order a successful party to pay costs to an unsuccessful party:
>
> (b) Direct by whom the costs of a successful defendant shall be paid as between the plaintiff and an unsuccessful defendant:
>
> (c) Fix a sum as costs notwithstanding that the sum is greater or less than the sum named in Schedule 2 to these rules.
>
> (3) Rules 46A to 53 shall apply subject to the discretion conferred by subclause (1).
>
> **47 Costs to follow event**
>
> If the Court makes an order as to the costs of any proceeding or of any issue therein or of any interlocutory application, the Court shall order that the costs shall follow the event of the proceeding, issue, or interlocutory application except where it appears to the Court that some other order should be made as to the whole or any part of the costs.

Those provisions were not substantially different from the costs discretion conferred by the former Code of Civil Procedure, the predecessor to the High Court Rules.

The current costs rules

[22] On 1 January 2000 a new costs regime was introduced, described by one commentator as a "costs revolution".[33] The new costs rules introduced by cl 2 of the High Court Amendment Rules 1999 were of the same tenor as the current costs rules set out in subpt 1 of pt 14 of the High Court Rules. These rules are now deemed to be part of the Senior Courts Act 2016.[34]

[23] As earlier noted,[35] we consider that whether the exception to the general rule currently applies turns not on a ruling as to practice by the courts but on the proper construction of the present costs rules. The meaning of the costs rules is to be ascertained from their text and in the light of their purpose.[36] As the Supreme Court observed in *Commerce Commission v Fonterra Co-operative Group Ltd*, in determining purpose the Court must have regard to both the immediate and the general legislative context.[37] The social, commercial or other objective of the enactment may also be relevant.

Text

[24] The relevant costs rules as set out in the High Court Rules provide:

> **14.1 Costs at discretion of court**
>
> (1) All matters are at the discretion of the court if they relate to costs—
>
> (a) of a proceeding; or
>
> (b) incidental to a proceeding; or
>
> (c) of a step in a proceeding.
>
> (2) Rules 14.2 to 14.10 are subject to subclause (1).
>
> (3) The provisions of any Act override subclauses (1) and (2).
>
> **14.2 Principles applying to determination of costs**
>
> The following general principles apply to the determination of costs:

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33 Andrew Beck "The costs discretion" [2001] NZLJ 425 at 425.
34 Senior Courts Act 2016, s 147(1).
35 At [8] above.
36 Interpretation Act 1999, s 5(1).
37 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

(a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:

(b) an award of costs should reflect the complexity and significance of the proceeding:

(c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:

(d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:

(e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:

(f) an award of costs should not exceed the costs incurred by the party claiming costs:

(g) so far as possible the determination of costs should be predictable and expeditious.

[25] Thus, while the overriding discretion concerning costs is preserved in r 14.1(2), seven "general principles" are stated. The principle in the former r 47, that costs should normally follow the event, is retained as the first general principle. The last item is not so much a principle of direct application as a signal of the overall objective, namely the predictable and expeditious determination of costs. It is reiterated in the rules relating to increased costs,[38] indemnity costs[39] and refusal or reduction of costs.[40]

[26] The principles in paras (b) to (e) reflect the substantial change in approach taken in respect of sch 3, which differs from its predecessor in three significant respects:

(a) the earlier reliance on scale costs as a percentage of the sums at stake is entirely removed;

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38 High Court Rules, r 14.6(3)(d).
39 Rule 14.6(4)(f).
40 Rule 14.7(g).

(b) litigation is divided into more detailed steps; and

(c) a time allocation (measured in days or part days) rather than a monetary allocation is accorded to each step.

The total costs award is now converted into a monetary sum by applying the appropriate daily rate found in sch 2.

[27] The principle set out in r 14.2(f) is significant for the issue to be determined on this appeal. It places a cap on a permissible award of costs by reference to "the costs incurred by the party claiming costs". It reflects the long-standing principle that the function of an award of costs is partial indemnity, not reward or (except in unusual circumstances) punishment.[41]

[28] An instance of the application of the principle is *Taunoa v Attorney-General,*[42] where it was recognised that the award of costs would need to be reduced if the calculation of costs under the costs rules exceeded the payment by the Legal Services Board.

[29] Part 14 of the High Court Rules then addresses the categorisation of proceedings (r 14.3), appropriate daily recovery rates (r 14.4) and the determination of "reasonable time" (r 14.5). Provision is made for increased and indemnity costs (r 14.6) and for the refusal of, or reduction in, costs (r 14.7).

[30] The word "costs" is not defined. It is used in two senses in the High Court Rules, and indeed in r 14.2(f) itself. In most instances, "costs" means the monetary amount of an award which is made, either by the application of the formulae comprised in schs 2 and 3 of the High Court Rules or as adjusted pursuant to the overriding discretion in r 14.1.

[31] However in three instances the word is used in conjunction with the word "incurred" to describe the successful party's expenditure or outgoings (a phrase we

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41 *Harold v Smith* (1860) 5 H&N 381 (Exch) at 385.
42 *Taunoa v Attorney-General* (2004) 8 HRNZ 53 (HC) at [43].

adopt as a neutral description) in fact accrued in connection with representation by a qualified lawyer. Sequentially the three different phrases are:

(a) the costs actually incurred by the party claiming costs: r 14.2(e);

(b) the costs incurred by the party claiming costs: r 14.2(f);

(c) the actual costs, disbursements and witness expenses necessarily incurred by a party: r 14.6(1)(b).

[32] "Disbursement" is defined in r 14.12(1):

> **disbursement**, in relation to a proceeding,—
>
> (a) means an expense paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from legal professional services in a solicitor's bill of costs; and
>
> (b) includes—
>
> (i) fees of court for the proceeding:
>
> (ii) expenses of serving documents for the purposes of the proceeding:
>
> (iii) expenses of photocopying documents required by these rules or by a direction of the court:
>
> (iv) expenses of conducting a conference by telephone or video link; but
>
> (c) does not include counsel's fee.

[33] We draw two preliminary conclusions from the above. First, the reference to "costs" in r 14.2(f) means actual costs. We do not consider that the absence of the word "actually" in r 14.2(f) suggests that a different meaning is intended from the phrase in r 14.2(e). Rather we consider that, as r 14.2(f) follows r 14.2(e), the same meaning is intended in both. There is support for that interpretation in the explanatory note to the High Court Amendment Rules 1999 which stated that the principles applying to the determination of costs included that "[c]osts should not exceed the actual costs incurred by the party seeking costs".

[34] Secondly we consider that costs are distinct from disbursements and witness expenses.

[35] What then does the phrase "costs actually incurred" mean? Is the phrase confined to legal fees rendered to and paid by a party (in other words, a solicitor's bill of costs or counsel's fee referred to the definition of disbursement)? Or does it include a monetary amount assessed as reflecting the time and effort expended by a lawyer litigant in self-representation? Or does it extend to the opportunity cost of time lost, as described in *Kalyk*:[43]

> It might be said, with respect, that although solicitors representing themselves in litigation have no need of any indemnity against professional costs paid or payable to another practitioner, there is still scope for the indemnity principle. Such solicitors will have spent time and trouble representing themselves and, to that extent, they will have lost the opportunity of using that time doing professional work for other clients and being remunerated accordingly. The indemnity in the case of solicitor litigants is, therefore, against the opportunity cost rather than the direct cost of their professional time spent on their own case.

[36] While there are many reported cases which have considered the meaning of costs, expenses or debts incurred or accrued, they invariably turn on their particular context. The wording of the particular costs provision will frequently be significant.

[37] For example s 19(1) of the Supreme Court Act 1970 (NSW) which applied in *Cachia v Hanes* provided a definition of costs as including fees, charges, disbursements, expenses and remuneration. A revised definition was included in s 3 of the Civil Procedure Act 2005 (NSW) which inserted the phrase "costs payable in or in relation to the proceedings". In *Wang v Farkas* it was suggested that the introduction of the word "payable" might require reconsideration of the application of *Chorley* in civil proceedings in New South Wales.[44]

[38] In declining to determine the application of the lawyer-litigant issue in circumstances where the relevant costs provisions were materially different from

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43 *Atlas Corporation Pty Limited v Kalyk*, above n 20, at [9].

44 *Wang v Farkas* [2014] NSWCA 29, (2014) 85 NSWLR 390 at [28].

those applied in *Guss v Veenhuizen [No 2]*, the New South Wales Court of Appeal recently remarked in *Wilkie v Brown*:[45]

> The costs regime under the Application Act and the Uniform Law is labyrinthine and, at this stage, largely unexplored in the case law. The relevance of cases dealing with previous statutory schemes may be questionable.

The Court did express the preliminary view that the language of the costs provision at issue did not appear to be apt to extend to the professional costs of a solicitor acting in person.[46]

[39] Hence our focus is on the particular provisions in the High Court Rules. However of interest with reference to the material phrase in the New Zealand costs rules is the following observation in *Cachia v Hanes*:[47]

> Taxation on a party and party basis is required to be in accordance with the relevant table in Sch. G and that makes no provision for the reimbursement of a litigant for time lost in the preparation or presentation of his case. *It does provide for solicitors' costs which have been incurred. That affords some basis (although insufficient in our respectful view) for an award of costs in favour of a solicitor acting for himself* and so performing professional duties, but it affords no basis whatsoever for an award by way of recompense to a litigant for time lost in the preparation or presentation of his case.

[40] While we share that view as to the insufficiency in respect of the phrase "costs … incurred", we consider that the argument is significantly stronger in respect of the composite phrase "costs actually incurred". We recognise the point made in *Stroud's Judicial Dictionary of Words and Phrases* that the word "actual" does not usually advance the meaning.[48] However in colloquial use, as an ordinary adverb modifying verbs, "actually" means in fact or in reality.[49] It is in that sense that the adverb and the adjective appear to be used in rr 14.2(e) and 14.6(1)(6) respectively.[50]

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45 *Wilkie v Brown* [2016] NSWCA 128 at [49].

46 At [43].

47 *Cachia v Hanes*, above n 5, at 414 (emphasis added).

48 D Greenberg *Stroud's Judicial Dictionary of Words and Phrases* (9th ed, Sweet & Maxwell, London, 2016) at 45. It is noted that "speaking generally a thing is not more itself because it is spoken of as "actual", nor is an act more done or enjoined because it is said, or required, to be "actually" done."

49 J Butterfield *Fowler's Dictionary of Modern England Usage* (4th ed, Oxford University Press, Oxford, 2015) at 17.

50 At [31] above.

[41] We therefore consider that the natural meaning of the phrase "costs actually incurred", and thus "cost incurred", envisages invoices rendered for legal services provided by a legal practitioner to a litigant. We do not think that the phrase is apt to include a period of time spent in connection with litigation upon which some notional numerical value is placed but which is not the subject of a bill of costs.

[42] We consider that that interpretation gains support from the context of the costs rules, in particular the fifth general principle in r 14.2(e), which distinguishes between "the time actually spent by the solicitor or counsel involved" and "the costs actually incurred by the party claiming costs". The former phrase would be apt to describe the second and third possible meanings in [35] above.

[43] Consequently it is our conclusion that in the context of the current costs rules the proper meaning of the composite phrase "costs actually incurred" is confined to legal costs billed by a lawyer retained by a party litigant for legal services provided by the lawyer to that litigant.

[44] Because a lawyer-litigant who has no separate legal representation will not have a liability for such costs actually incurred, the effect of the sixth general principle in r 14.2(f) will be that no award of costs should be made in favour of such a party. In mathematical terms, a lawyer-litigant's "costs incurred" will be zero and hence no award of costs can be made.

[45] It follows that, in our view, the effect of r 14.2(f) is that the lawyer-litigant exception should no longer be available in New Zealand. We turn to consider the cross-check against purpose directed by the Supreme Court in *Fonterra*.[51]

The purpose of the costs rules

[46] The new regime was the product of what, writing extra-judicially, Fisher J[52] described as the Rules Committee's longest running project.[53] A central aim of the new regime was to deliver to the successful party approximately two-thirds of those

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51 *Commerce Commission v Fonterra Co-operative Group Ltd*, above n 43, at [22].
52 A member of the Rules Committee during the costs review project.
53 Robert Fisher "The new High Court costs regime" (1999) 532 LawTalk 7.

costs which would be reasonably payable as between solicitor and client. Fisher J explained:[54]

> Of special importance is the emphasis the rules place upon the objectivity of the exercise. The sole focus lies upon the proceeding itself. Only the nature of the proceedings can indicate what was, or will be, reasonably required to conduct those proceedings. The identity of the practitioner actually involved, the time actually spent and the costs actually paid, are irrelevant [r 14(2)(b), (c) and (e) and r 14.3].

[47] The point was underscored by Chambers J[55] in *Nomoi Holdings Ltd v Elders Pastoral Holdings Ltd*:[56]

> [33] [Counsel for Elders] submitted that "the starting point" under the new costs regime "remains that party and party costs are a reasonable contribution, in all the circumstances, to the party's costs actually and reasonably incurred". In support of that submission, he cited *Morton v Douglas Homes Ltd (No 2)*. That submission reveals a misunderstanding of the new costs regime. The Court is not interested in a party's actual costs. Far from a party's costs "*actually* and reasonably incurred" being the starting point, they are not relevant save in one respect. It would, of course, be improper for a party or its solicitor to claim an award of costs exceeding the costs in fact incurred by that party: see [r 14.2(f)].
>
> [34] I fully understand that, particularly in the last years of the old costs regime when the old scale had become increasingly out of date and parsimonious, it was reasonably common for the winning party, when seeking costs, to inform the Court of the actual costs it had incurred. But it is no longer necessary, indeed it is inappropriate, for counsel to continue giving what is now irrelevant information on a costs application. To take into account a party's actual costs would be contrary not only to the principle enunciated in r [14.2(e)] but also to the principle in r [14.2(g)] which emphasises the importance of predictability and expedition in determining costs.

[48] The Rules Committee is a statutory body established by s 51B of the Judicature Act 1908 and continued by s 155 of the Senior Courts Act 2016. Its minutes are now published on the Courts of New Zealand website. The minutes of the Rules Committee for the 12 meetings from 28 November 1996 to 25 November 1999 document the progress of the costs review project at considerable length.

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54 At 8 (footnotes omitted).

55 Also a member of the Rules Committee during the costs review project.

56 *Nomoi Holdings Ltd v Elders Pastoral Holdings Ltd* (2001) 15 PRNZ 155 (HC).

[49] Although there are numerous references to particular aspects of the proposed rules, the minutes do not provide any specific guidance concerning the status for the future of the lawyer-litigant exception. The most that can be said is that that material is not inconsistent with the meaning we have attributed to the text of the rules. We turn to consider the exception in the light of what was referred to in *Fonterra* as the objective of the enactment.

The objective of the costs rules: the exception contrasted

[50] The objective in the last general principle in r 14.2(g) is that so far as possible the determination of costs should be predictable and expeditious. As Andrew Beck explained:[57]

> From the way in which the rules have been structured, it becomes apparent that every costs exercise requires a systematic process to be followed. The Court has to:
>
> - ascertain who won;
> - classify the proceeding;
> - allocate a time band to each step;
> - ascertain whether any additional items are permissible;
> - consider whether there is a case for increased or decreased costs.
>
> The idea of this formulaic approach is that any person with a reasonable knowledge of the proceeding should be able to work out what the costs will be. Not only should this eliminate most costs arguments, it should also enable a legal adviser to inform a client in advance what the likely costs consequences of success or failure will be.

[51] Where a lawyer-litigant claims costs, the efficiency and possibly also the predictability of the regime will be reduced because a lawyer-litigant should not be entitled to the totality of the time allocations in sch 3 of the High Court Rules. As Bowen LJ acknowledged in *Chorley*:[58]

> It is true, however, to say that the costs of a solicitor appearing in person must be taxed differently from those of an ordinary litigant appearing by a solicitor. The unsuccessful adversary of a solicitor appearing in person cannot be charged for what does not exist, he cannot be charged for the

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57 Andrew Beck, above n 33, at 425.

58 *London Scottish Benefit Society v Chorley*, above n 7 at 875–876.

> solicitor consulting himself, or instructing himself, or attending upon himself. The true rule seems to be that when a solicitor brings or defends an action in person, he is entitled to the same costs as an ordinary litigant appearing by a solicitor, subject to this restriction, that no costs which are really unnecessary can be recovered. Of this kind are the costs of instructions and attendances.

[52] It will be recalled that it was because an unsuccessful opponent would get the benefit of such deductions that Fry LJ considered that the exception recognised in *Chorley* was beneficial to the public.[59]

[53] However the difficulty of applying that approach to scale costs was noted by Edwards J in *Hanna v Ranger*,[60] the first reported decision in New Zealand to follow *Chorley*. The Judge considered that:[61]

> … it would be impossible in a case such as the present to apportion the amount allowed by the scale between the work in respect of which, according to the English authorities, the solicitor litigant can recover costs and that in respect of which he cannot.

[54] Mr Hanna was awarded scale costs. Similarly in *Brownie Wills* the appellant law firm, which was represented by an associate of the firm, was awarded $5,000 costs on the appeal and scale costs in the High Court.[62] Hence the reported cases suggest that the application of the lawyer-litigant exception in New Zealand has not consistently observed the *Chorley* qualification.

[55] This was one of the reasons why the majority in *Cachia v Hanes* viewed the *Chorley* exception as somewhat dubious, observing with reference to the observations of Brett MR and Bowen LJ:[63]

> Those assertions that it would be "unadvisable" or "absurd" to refuse to allow a solicitor who acts for himself "to charge" for the work done by himself or his clerk ignore the questionable nature of a situation in which a successful litigant not only receives the amount of the verdict but actually profits from the conduct of the litigation.

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59 See the passage set out at [7] above.
60 *Hanna v Ranger* (1912) 31 NZLR 159 (SC).
61 At 160.
62 *Brownie Wills v Shrimpton*, above n 6.
63 *Cachia v Hanes*, above n 5, at 412.

[56] However if the *Chorley* rationale is to be observed and the perceived public benefit secured, then to some extent the advantages of the new regime will be lost for this reason. In each case involving a lawyer-litigant an inquiry would need to be undertaken either as to the extent of the litigation conduct for which the lawyer should be compensated or in the assessment of the time expended as a measure of the lawyer's opportunity cost. In the decision under appeal, deductions on this account were made to the scale time allocations for commencement of proceedings, preparation of briefs and preparation for hearing,[64] but these deductions were necessarily somewhat arbitrary in nature.

[57] The fact that such an exercise must be undertaken dilutes the predictability and expedition in the costs determination and hence tends to undermine the objective in r 14.2(g). We therefore consider that such a consequence tells against the retention of the lawyer-litigant exception in the new costs regime.

Conclusion

[58] We consider that the lawyer-litigant exception is inconsistent with the text of pt 14 of the High Court Rules and its retention would undermine the objectives of the current costs rules to a significant degree. We cannot discern anything in the purpose of the costs rules which counters that view. Consequently we conclude that the lawyer-litigant exception should no longer apply in New Zealand.

Does the exception apply to a self-represented barrister sole?

[59] In the event that our conclusion on the first issue is found not to be correct, we turn to address JAFL's second contention. In support of the proposition that a self-represented barrister sole should not be entitled to an award of costs, Mr Gilchrist for JAFL relied on a line of Australian authority declining to extend the ambit of an exception viewed as being of questionable application.[65]

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64 *E v J*, above n 2, at [26]–[30].

65 *Winn v Garland Hawthorn Brahe (A Firm)*, above n 20; and *Murphy v Legal Services Commissioner (No 2)* [2013] QSC 253.

[60] The refusal to extend the exception was not confined to states where there was a formal division between solicitors and barristers. The Supreme Court of South Australia in *Hartford Holdings Pty Ltd v CP (Adelaide) Pty Ltd* stated:[66]

> Although, in South Australia, practitioners are admitted as solicitors and barristers, and can practice in both capacities, or in one only, a distinction remains as a matter of law and practice between the role of solicitor and that of counsel, and between the position of solicitor and that of counsel. Different professional duties attach to each capacity, although there is a considerable overlap.
>
> I recognise that it might be said, as a matter of logic, that at least in a state in which practitioners are admitted as solicitors and barristers, and can practice as such, the so-called "anomalous exception" should be extended to a case like this. But I consider that the decision in *Cachia* requires a decision to the contrary. If it does not, I consider that it is in any event more consistent with principle to restrict the exception to its present limits. The role of counsel is one that requires a degree of independence between counsel and client, and the recognition and performance of duties to the court of a substantial nature. As the Judge observed, there are good reasons why a person with a direct interest in litigation should not be permitted to act as counsel. There are solid arguments against extending the exception, because that may encourage a practitioner to appear in person.

[61] There are however a number of more recent decisions in Australia where barristers sole have recovered costs.[67]

[62] Mr Gilchrist submitted that the intervention rule still applies in New Zealand in respect of barristers with limited exceptions, none of which apply in this appeal.[68] The rule that barristers may not sue for their fees is well-established.[69] A barrister's fee may be recovered only by his or her instructing solicitor as a disbursement incurred by the instructing solicitor and a barrister may not sue the instructing solicitor for payment of a fee note.[70] Payment of a barrister's fee is a matter of professional obligation rather than legal obligation.

[63] In those circumstances, Mr Gilchrist submitted that it was anomalous for a barrister acting for himself but without an instructing solicitor to be awarded costs

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66 *Hartford Holdings Pty Ltd v CP (Adelaide) Pty Ltd* [2004] SASC 161 at [131]–[132].

67 *Ada Evans Chambers Pty Ltd v Santisi* [2014] NSWSC 538; *Wilkie v Brown*, above n 45; and *Bechara (trading as Bechara and Company) v Bates* [2016] NSWCA 294.

68 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 14.4.

69 *Atkinson v Pengelly* [1995] 3 NZLR 104 (HC).

70 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, r 10.7.2.

when, had he been acting for a party without an instructing solicitor, he would have been:

(a) breaching his professional obligations in so acting;

(b) not able to claim costs, as any claim for a fee would be a breach of his professional obligations; and

(c) as a barrister, unable to enter into an enforceable contract for fees with a client and thus cannot have "incurred" costs, there being no obligation to pay them even if the client had volunteered to pay those costs.

[64] Further, observing that *Brownie Wills* referred to "a practising barrister and solicitor",[71] Mr Gilchrist contended that that decision is not authority for the proposition that costs may be awarded to a barrister sole acting in person. We note however that the commentary in *McGechan on Procedure* assumes that the exception applies to either a practising barrister or solicitor.[72]

[65] While we share the views expressed in *Hartford Holdings* as to the importance of the role of counsel,[73] we do not consider that there is a sound rationale in New Zealand in the context of self-representation for distinguishing a practitioner who is both a barrister and solicitor from one who is a barrister sole. On this issue we note the observations of Cooke J in *Henderson Borough Council v Auckland Regional Authority*:[74]

> As to costs, there is first the question of principle, whether any award to the Regional Authority should be refused in the light of the fact that the Authority was represented by an employee both as solicitor and counsel. Much of the work was counsel's work. In England an employed barrister cannot appear as counsel for his employer in the superior Courts: see general *3 Halsbury's Laws of England* (4th ed) para 1202; Final Report of the Royal Commission on Legal Services 1979, Cmnd 7648, vol 1, chapter

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71 *Brownie Wills v Shrimpton*, above n 6, at 327.

72 Andrew Beck and ors *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HRPt14.12(2)(a)].

73 *Hartford Holdings Pty Ltd v CP (Adelaide) Pty Ltd*, above n 66, at [131].

74 *Henderson Borough Council v Auckland Regional Authority* [1984] 1 NZLR 16 (CA) at 23.

> 20; Rules for Employed Barristers approved by the Bar Counsel on 31 March 1980.
>
> In New Zealand the two branches of the profession are not strictly fused, but a duly qualified practitioner may act in both capacities. In New Zealand I do not think it can be said to be improper for an employed barrister to represent his employer. Nor did counsel for the appellant so argue. A fortiori an employed solicitor duly enrolled and with a current practising certificate may properly act as solicitor for his employer. Against that background it appears to me that the fact that an employed practitioner has acted for the successful party is not a sufficient reason for denying that party an award of party and party costs: after all, the time of a salaried employee has been occupied.

[66] While those observations were focused on the employed nature of the lawyer, we consider that they support the view that there should not be a distinction between solicitors and barristers sole in the context of recovery of costs associated with self-representation. Consequently, the answer to the second issue, whether the lawyer-litigant exception applies to a barrister sole appearing without an instructing solicitor, is in the affirmative.

Quantum

[67] In view of our decision on the primary issue that the *Chorley* exception no longer applies in New Zealand, it is unnecessary to consider the first quantum issue, namely whether the costs awarded to the respondent were excessive.

[68] As to the second quantum issue, Thomas J awarded JAFL indemnity costs on account of the manner in which the proceedings were conducted at the hearing on 8 June 2015. In a minute dated 8 June 2015 Thomas J noted various failures on the part of Mr Eichelbaum concerning the filing of his synopsis and the provision of updated evidence, together with his failure to plead to affirmative defences raised by JAFL. It was necessary for the hearing to be adjourned part-heard. A timetable was made for steps to be taken in preparation for a new hearing date on 24 August 2015.

[69] In the judgment under appeal, Thomas J observed that the proceedings on 8 June 2015 were conducted in an unacceptable way, completely wasting court and counsel time:[75]

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[75] *E v J*, above n 2, at [32].

> By my Minute of 8 June 2015, I recorded my thoughts in respect of costs relating to the part-heard hearing. I rejected then, as I do now, the applicant's submission that the respondent needed to take some responsibility for not having raised the fact that the applicant did not respond to the affirmative defences and that he was late in filing his synopsis. It was up to the applicant to present his case properly and in accordance with the [High Court] Rules. He may have been a litigant in person but he is also a lawyer.

[70] JAFL argued that the indemnity costs awarded in its favour should be increased for the following reasons:

(a) Mr Eichelbaum adduced no evidence to establish that he in fact incurred any costs which he could claim;

(b) the Judge did not take into account the errors in and the poor quality of the respondent's pleadings when assessing the quantum of an award of costs;

(c) the respondent made scurrilous, inappropriate, prejudicial and inadmissible statements in his evidence; and

(d) the Judge did not consider the waste of time and effort expended by counsel in preparation for the wasted hearing on 8 June 2015. It submits that the actual time expended by counsel for JAFL for the hearing on that day was $7,144.38 (GST inclusive).

[71] So far as the fourth ground is concerned, Mr Eichelbaum pointed out that the amount of the indemnity costs awarded was equal to the amount of the item in the fee note of JAFL's then-counsel in respect of the appearance on 8 June 2015. The amount sought on appeal covered the entirety of the fee note which included submissions and preparation for the hearing of an earlier failed adjournment application.

[72] While costs decisions are discretionary, the discretion must be exercised judicially.[76] However, provided the discretion has been exercised in the proper

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[76] *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [7].

manner, an appellate court has no power to substitute a different award of costs. We do not discern any error of principle in the Judge's consideration of JAFL's claim for indemnity costs.

[73] With reference to the submission made by Mr Gilchrist that Mr Eichelbaum had made scurrilous, inappropriate and prejudicial suggestions about a non-party in evidence, the Judge observed that there were issues on both sides in that regard and put that submission to one side.[77]

[74] Furthermore, Thomas J's view that the claim should have been concluded in a shorter time, that there was legitimacy in the criticism of Mr Eichelbaum's synopsis and of his failure to admit evidence were all reflected in the reduction made to Mr Eichelbaum's costs award.

[75] In our view there was no error of the nature which would justify this Court entering upon the exercise of the discretion afresh. The appeal against the quantum of the indemnity costs order is dismissed.

Result

[76] The appeal is allowed in part.

[77] The award of costs in favour of the respondent in the High Court is set aside.

[78] The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

[79] It is not apparent why the names of the parties are anonymised in the judgment under appeal. The parties were named in the judgment on the substantive claim.[78] If the parties wish a suppression order to be made or continued, then they are to file a joint memorandum within 10 working days explaining why a suppression order is warranted in light of the decisions of this Court in *Y v*

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77 *E v J*, above n 2, at [36].
78 *Eichelbaum v Joint Action Funding Limited*, above n 1.

Attorney-General[79] and the Supreme Court in *Erceg v Erceg*.[80] To protect the position of the parties until such time, we make an order prohibiting publication of the names of the appellant and respondent for 10 working days from the date of this judgment or further order of this Court.

Solicitors:
Buddle Findlay, Auckland for Appellant.

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79 *Y v Attorney-General* [2016] NZCA 474, [2016] NZAR 1512.
80 *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310.