FEDERAL COURT OF AUSTRALIA

CPJ17 v Minister for Immigration and Border Protection [2018] FCA 1241

Appeal from:	*CPJ17 v Minister for Immigration & Anor* [2017] FCCA 3176
File number:	NSD 15 of 2018
Judge:	**CHARLESWORTH J**
Date of judgment:	21 August 2018
Catchwords:	**PRACTICE AND PROCEDURE** – party appointing a barrister without an intermediary instructing solicitor – whether barrister engaged on a direct access brief is a lawyer appointed by a party to represent the party in the proceedings – whether barrister required to file a notice of acting in accordance with r 4.03 of the *Federal Court Rules 2011* (Cth) – whether inconsistency between r 4.03 and provisions of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) – whether a direct access barrister who prepares a document for filing in court must be identified in accordance with r 2.16 of the *Federal Court Rules 2011* (Cth)
Legislation:	*Federal Court of Australia Act 1976* (Cth) ss 4, 37M *Judiciary Act 1903* (Cth) ss 55B, 78B *Migration Act 1958* (Cth) ss 486E, 486F, 486I, Pt 8B *Federal Court Rules 2011* (Cth) rr 1.34, 1.52, 2.16, 4.01, 4.02, 4.03, 4.04, 4.05, 4.11, 4.12, 5.02, 8.01, 8.04, 11.01, 36.01, 39.05, 40.07, Div 4.2 *Legal Profession Act 1987* (NSW) s 57A *Legal Profession Uniform Law* (NSW) s 419 *Legal Profession Uniform Law Application Act 2014* (NSW) s 4 *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) r 13 *New South Wales Barristers' Rules* r 75
Cases cited:	*ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1 *ARN17 v Minister for Immigration and Border Protection* [2018] FCA 974 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389

	CPJ17 v Minister for Immigration & Anor [2017] FCCA 3176 *Momcilovic v The Queen* (2011) 245 CLR 1 *R v Licensing Court of Brisbane; Ex parte Daniell* (1920) 28 CLR 23 *SZSFS v Minister for Immigration and Border Protection* (2015) 232 FCR 262 *VAUX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588 *Western Australia v Commonwealth* (1995) 183 CLR 373
Date of hearing:	21 June 2018
Date of last submissions:	17 July 2018
Registry:	New South Wales
Division:	General Division
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Category:	Catchwords
Number of paragraphs:	102
Counsel for the Appellant:	Name withheld
Counsel for the First Respondent:	Mr H Bevan
Solicitor for the First Respondent:	Minter Ellison
Counsel for the Second Respondent:	The Second Respondent filed a Submitting Notice
Counsel for the Intervener:	Mr A Stewart SC with Ms Chordia

ORDERS

NSD 15 of 2018

BETWEEN:	**CPJ17** Appellant
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** First Respondent
	IMMIGRATION ASSESSMENT AUTHORITY Second Respondent
	NEW SOUTH WALES BAR ASSOCIATION Intervener
JUDGE:	**CHARLESWORTH J**
DATE OF ORDER:	**21 AUGUST 2018**

THE COURT ORDERS THAT:

1. The following orders be revoked:

   (a) the orders of 18 May 2018; and

   (b) paragraph 1 of the orders of 31 May 2018.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

CHARLESWORTH J:

1 This appeal remains part heard.

2 The present question is whether a barrister appointed by the appellant on what is known as a "direct access" brief is obliged to file a notice of acting in accordance with r 4.03 of the *Federal Court Rules 2011* (Cth) (the Court Rules). It provides:

> **4.03 Appointment of a lawyer—notice of acting**
>
> If a party is unrepresented when a proceeding starts and later appoints a lawyer to represent the party in the proceeding, the lawyer must file a notice of acting, in accordance with Form 4.
>
> Note: File is defined in the Dictionary as meaning file and serve.

3 The application of r 4.03 was first raised by the Court of its own initiative soon after the commencement of the hearing in the legal and factual context described below. It has culminated in the filing of an interlocutory application dated 1 July 2018 by which the appellant seeks substantive relief in the following terms:

> 1. Declaration that the Appellant's barrister is not required by Federal Court Rule 4.03 to file a Form 4, alternatively that she be excused from such a requirement under Federal Court Rule 1.34.

4 These reasons are to be understood as limited to a case in which a barrister is engaged directly by a party. They do not concern any long-established practices by which an independent barrister appears in this Court pursuant to a retainer entered into between the barrister and a party's solicitor, the solicitor having a general authority to act. In the latter more traditional arrangement, the party's solicitor is identified as the party's legal representative on the Court's record. There is no suggestion that a barrister engaged in that entirely conventional way should file a notice of acting.

5 The originating documents filed by the appellant suggest that the appellant was not represented by a lawyer in any capacity at the time the appeal was commenced. No notice of acting has been filed since that time. The circumstance that the Court remained unaware that the appellant had appointed a lawyer in any capacity after the commencement of the hearing is disruptive and unsatisfactory in a number of respects especially pertinent in the migration practice area.

6 The New South Wales Bar **Association** was granted leave to intervene in the proceedings for the purpose of making submissions in support of the interlocutory application. The oral and written submissions made on behalf of the Association were adopted and supplemented by Counsel for the appellant.

7 The Association's primary submission is that a barrister engaged to appear on a direct access brief has no legal obligation to file a notice of acting pursuant to r 4.03, properly construed. In the alternative, it is submitted that the Court should dispense with the requirement of r 4.03 in the exercise of its discretion under r 1.34.

CONTEXT

8 The appellant is a non-English speaking citizen of Sri Lanka. After his unauthorised arrival in Australia, he made an application for a protection visa under the ***Migration Act 1958*** (Cth). The visa application was refused by a delegate of the now-named **Minister** for Home Affairs and the delegate's decision was affirmed on review by the Immigration Assessment **Authority**.

9 The primary judge dismissed an application for judicial review of the Authority's decision: *CPJ17 v Minister for Immigration & Anor* [2017] FCCA 3176. A notice of appeal from that judgment was filed in this Court on 10 January 2018. It is in accordance with Form 121: see r 36.01(1)(a). It contains a single ground of appeal to the effect that the primary judge erred by rejecting the single ground of judicial review argued in the proceedings below.

10 The notice of appeal appears to have been signed by the appellant personally. Where the form makes provision for the disclosure of the person who prepared the document, the word "Appellant" appears. The address for service, telephone and email contact details are not stated to be those of a legal practitioner.

11 The appellant did not personally draft the notice of appeal. In oral evidence he said that he did not know the identity of the person who had drafted it.

12 Part 8B of the Migration Act imposes certain obligations on persons involved in migration litigation. Among them is the obligation under s 486I. It provides:

> **486I Lawyer's certification**
>
> (1) A lawyer must not file a document commencing migration litigation, unless the lawyer certifies in writing that there are reasonable grounds for believing that the migration litigation has a reasonable prospect of success.

> (2) A court must refuse to accept a document commencing migration litigation if it is a document that, under subsection (1), must be certified and it has not been.

13 This Court's compliance with its obligation under s 486I(2) is facilitated by r 8.04 of the Court Rules. It provides:

> **8.04 Application starting migration litigation to include certificate**
>
> (1) For section 486I of the *Migration Act 1958*, a lawyer may file an originating application starting migration litigation only if the application includes a certificate in accordance with the certificate contained in Form 15, signed by the lawyer.
>
> Note 1: See section 486I of the *Migration Act 1958*.
>
> Note 2: The Court will refuse to accept an originating application unless a certificate is provided in accordance with this subrule.
>
> (2) In this rule:
>
> ***lawyer*** has the meaning given by section 5 of the *Migration Act 1958*.
>
> Note: ***Migration litigation*** is defined in the Dictionary.

14 The certificate referred to in that rule appears on the Form 121 utilised by the appellant in this case. It states:

> **Certificate under section 486I of the Migration Act 1958**
>
> For the purposes of section 486I of the *Migration Act 1958*, I [name of lawyer] certify that there are reasonable grounds for believing that this migration litigation (within the meaning of section 486K of that Act) has a reasonable prospect of success.

15 The certificate on the notice of appeal is not signed by any person, and no lawyer's name is inserted in the certificate itself, thus indicating that the originating application was not "filed by" a lawyer within the meaning of s 486I of the Migration Act.

16 On 6 February 2018 a Registrar made orders for the case management of this proceeding, including as to the preparation, filing and service of an appeal book. The order in [4(a)] required that the appeal book be "prepared, filed and served by the lawyer for the appellant or by the Minister for Immigration and Border Protection ('the Minister') if the appellant is not represented by a lawyer".

17 The orders in [5] and [6] respectively required that the appellant's written submissions be filed and served no later than ten business days before the hearing date and that the Minister's submissions be filed and served no later than five business days before the hearing date. Accordingly, on the setting down of the appeal for hearing, the appellant's written submissions

were to be filed no later than 2 May 2018 and the Minister's submissions were to be filed no later than 9 May 2018.

18 No written submissions were filed by or on behalf of the appellant within the ordered time. Written submissions were filed on behalf of the Minister on 9 May 2018. The Minister's submissions deal with the merits of the single ground of appeal.

19 The Court arranged an accredited interpreter to attend at the hearing of the appeal. It is the practice of the Court to arrange an interpreter if the originating process indicates that the appellant is unrepresented and no notice of acting has since been filed to indicate that status has changed. The costs of an interpreter is absorbed by the Court itself. Unsurprisingly, it is not the practice of the Court to arrange an interpreter in a case where a lawyer has been appointed to represent a party at a hearing.

20 On 11 May 2018, the appellant filed a list of authorities and an outline of submissions. The submissions are dated 9 May 2018. They are stated to have been prepared by Counsel, who is named at the end of the document. Counsel is a legal practitioner admitted to practice as a barrister in the Supreme Court of New South Wales and so entitled to appear as a barrister in this Court: s 55B of the ***Judiciary Act 1903*** (Cth).

21 Paragraphs 2 and 3 of the submissions state:

> **LEAVE TO APPEAL**
>
> 2. The Appellant seeks leave to rely on Ground One, the same ground of review pressed in the lower court. However, the Appellant seeks to rely on two additional limbs to Ground One, not pressed at first instance. In summary, it is submitted the additional limbs have merit and no prejudice to the Respondent is evident.
>
> 3. In these circumstances it is submitted leave can be granted consistently with the principles developed in ***SZSFS v Minister for Immigration and Border Protection*** **[2015] FCA 534**.

22 In ***SZSFS*** *v Minister for Immigration and Border Protection* (2015) 232 FCR 262 Logan J discussed, among other things, the leniency that may at times be extended by this Court to applicants or appellants in migration matters who are self-represented at the time that their arguments are initially framed and who subsequently apply for leave to amend documents or to raise arguments on appeal that have not previously been raised. See also *VAUX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588. By invoking *SZSFS*, the written submissions effectively asserted that the appellant did not have the assistance of a lawyer when the proceeding commenced and that circumstance, together with

his status as a person who claims to be a refugee, were sufficient to warrant the grant of leave to raise the new arguments, albeit at such a late stage.

23 Nothing is said in the submissions as to whether the appellant was represented in the proceedings before the primary judge, nor is anything said as to when the appellant first obtained advice and assistance in relation to his appeal, or otherwise to explain why the application was made at the commencement of the hearing and not an earlier time.

24 Annexed to the written submissions is a draft Amended Notice of Appeal. That document appears to have been signed personally by the appellant on 10 May 2018. The word "APPELLANT" appears at the foot of the document where provision is made to name the person who prepared it. Clearly, the appellant did not prepare that document.

25 As at the commencement of the hearing, the appellant had filed no application for an extension of time in which to file written submissions, no application for leave to file an amended notice of appeal and no application for leave to introduce grounds not argued before the primary judge. No affidavit was filed explaining the delay in the provision of written submissions, nor to explain the reason why the newly proposed grounds were not included on the notice of appeal as originally filed. Neither the appellant nor the appellant's Counsel notified the Court that a lawyer would present oral argument on the appellant's behalf at the hearing of the appeal. The Court was not otherwise notified that an interpreter would not be required at the hearing.

26 The hearing commenced at the scheduled time of 10.15 am on 16 May 2018. At the public's expense, an accredited interpreter was in attendance, in accordance with the prior arrangements of the Court.

27 After announcing her appearance for the appellant, Counsel acknowledged that it was necessary for the appellant to apply for an extension of time in which to file and serve written submissions, and to apply for leave to amend the originating application so as to agitate grounds for judicial review of the Authority's decision that had not been raised in the proceedings before the primary judge.

28 The question of when Counsel was first engaged was relevant to both applications.

29 In an initial exchange with Counsel the Court expressed the view that Counsel was a lawyer who had been appointed by a party within the meaning of r 4.03 of the Court Rules (extracted at [2] above) and so should file a notice of acting.

30 Counsel initially stated that she "came into the matter" on 9 May 2018. In the absence of a notice of acting, I intimated to Counsel that for the purpose of finding facts relevant to the applications before me, I would not act on assertions of fact made from the bar table as to when the appellant first engaged a lawyer. Counsel was given, and accepted, an opportunity to adduce oral evidence from the appellant.

31 The appellant gave oral evidence about the attempts he had made at various stages of his legal proceedings to obtain professional advice and assistance. Relevantly, he stated that he had retained Counsel with the assistance of an intermediary in the community (a non-lawyer) who may be referred to as "N". He said that he had not discussed his matter with Counsel and that he had signed the costs agreement that morning prior to the commencement of the hearing. The general effect of his evidence was that he had relied entirely upon N to engage a barrister to represent him in the proceedings. There was no evidence that N had conveyed the substance of any legal advice to the appellant in relation to the appeal, or in relation to the applications now made on the appellant's behalf.

32 In light of that evidence, the matter was stood down so as to provide Counsel with an opportunity to give advice and obtain instructions. When the matter resumed, Counsel informed the Court that the application to amend the notice of appeal was abandoned.

33 The time for the appellant to file and serve written submissions was extended to 11 May 2018 *nunc pro tunc* and the hearing then resumed.

34 Orders were subsequently made in Chambers to the effect that any application by the appellant's lawyer for an order dispensing with the requirement of r 4.03 of the Court Rules be filed and served on or before 1 June 2018. Counsel was informed that the Association would be permitted to intervene on any such application. That was done because Counsel had earlier intimated that any obligation to file a notice of acting might be inconsistent with certain rules of conduct governing the practice of a barrister in New South Wales and counterpart rules operating in other States and Territories.

35 That is the background against which the present interlocutory application was filed.

CONSTITUTIONAL ISSUE

36 Prior to the hearing of the interlocutory application, the Association gave the Attorneys-General of the Commonwealth and the States notice of a Constitutional issue pursuant to s 78B of the Judiciary Act. The notice states:

> The proceeding raises as issue as to whether there is any inconsistency, within the meaning of s 109 of the Constitution, between r 4.03 of the *Federal Court Rules 2011* (Cth) and the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW).

37 The following provisions of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) (the Barristers Rules) are said to potentially give rise to the inconsistency:

> 13. A barrister must not ...
>
> ...
>
> (d) act as a person's only representative in dealings with any court, otherwise than when actually appearing as an advocate;
>
> (e) be the address for service of any document or accept service of any document;
>
> (f) commence proceedings or file (other than file in court) or serve any process of any court; ...

38 The Barristers Rules are delegated legislation made on 26 May 2015 by the Legal Services Council pursuant to s 419 of the *Legal Profession Uniform Law* (NSW) (the LPUL). The LPUL is applied as a law of the State of New South Wales by s 4 of the *Legal Profession Uniform Law Application Act 2014* (NSW). As their full name suggests, the Barristers Rules form a part of a legislative arrangement intended to ensure uniformity in the regulation of legal practice across Australia.

39 Whether there exists an inconsistency between Commonwealth and State laws depends on the text and operation of the respective laws: *Western Australia v Commonwealth* (1995) 183 CLR 373 at 465 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). Section 109 of the Constitution operates to invalidate the State law to the extent of any such inconsistency. The same principles apply to delegated legislation as they do to principal enactments: *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 398.

40 There will be an inconsistency between the Barristers Rules (as delegated legislation of a State) and the Court Rules (as delegated legislation of the Commonwealth) if the Commonwealth law compels the doing of an act which is prohibited by the State law: *R v Licensing Court of Brisbane; Ex parte Daniell* (1920) 28 CLR 23 at 29; *Momcilovic v The Queen* (2011) 245 CLR 1 at [631]. For the purposes of that enquiry, it is sufficient to focus attention on r 13(f) of the Barristers Rules. It expressly prohibits a barrister from filing (other than "filing in court") or serving any process of a court. The phrase "process of a court" is defined to include a "notice", but does not include submissions or lists of authorities. A notice of acting is a "process of a court" within the meaning of the Barristers Rules. The prohibition in r 13(f) would be

inconsistent with the Court Rules to the extent that the Court Rules imposed an obligation upon the barrister personally to file and serve such a notice, other than filing it in court. As the Association properly acknowledged, the Constitution would resolve such an inconsistency by invalidating the State law to the extent of the inconsistency.

SUMMARY OF CONCLUSIONS

41 Whether inconsistency arises in the present case depends upon whether r 4.03, properly construed, imposes upon the appellant's Counsel an obligation to file and serve a notice of acting in the form of Form 4. Having now had the benefit of the Association's submissions, I have concluded that r 4.03, construed in its proper context does not impose that obligation.

42 That is not to say that a direct access barrister could not or should not be required by an order of the Court to disclose the fact of his or her engagement by other means. Nor does it mean that other rules of the Court ought not to be construed so as to impose obligations directly upon the barrister appearing on such a retainer. Whether the imposition of obligations upon a barrister by other provisions of the Court Rules, or by court order, would give rise to an inconsistency within the meaning of s 109 of the Constitution has not been the subject of argument.

RULE 4.03

The existing "legal landscape"

43 For the Association it was submitted that the Court Rules are to be construed having regard to the "legal landscape" that may be presumed to have been known by their makers at the time they were promulgated.

44 The Association submitted, and I accept, that prohibitions to the same effect as those presently contained in r 13 of the Barristers Rules were in force at the time that the Court Rules were made in 2011: see r 75 of the *New South Wales Barristers' Rules* made under s 57A of the *Legal Profession Act 1987* (NSW) as in force in June 2008. From there, the Association submitted that the limitations on the practice of barristers formed a part of the legal landscape at the time that the Court Rules were made, and that r 4.03 should accordingly be construed as intended to exclude direct access barristers from its reach.

45 It may be assumed that the makers of r 4.03 fairly had in their contemplation the traditional division between the work of barristers and the work of solicitors who engage them. However, the present application does not concern that well-recognised division of work. On its terms,

r 4.03 clearly does not impose any obligation upon a barrister who is appointed by a solicitor in the historically traditional way, simply because such a barrister is not appointed *by a party*.

46 A direct access barrister is a lawyer appointed by a party, not by a solicitor. Whilst the Barristers Rules may persist in their long-standing limitations of "barristers work" and at the same time make provision for a barrister to be engaged under a "direct access" brief, they contain no provision identifying the person who must perform the tasks ordinarily performed by an instructing solicitor, including the necessary tasks of filing and serving documents, accepting service, dealing directly with the Court at times other than the hearing date and the like. The Barristers Rules appear to contemplate, at least by omission, that these tasks will be performed personally by the party, being the barrister's client, if not by some other person on the client's behalf.

47 I am not prepared to infer that the business model recognised by the "direct access" provisions within the Barristers Rules was so familiar a part of the "legal landscape" that the makers of the Court Rules should be presumed to have had the model within their contemplation at all when making the Court Rules in August 2011. I am still less inclined to draw such an inference in the context of migration litigation, a practice area in which a significant proportion of moving parties are non-English speaking unsuccessful asylum seekers who are wholly unfamiliar with the Australian legal system, let alone the Court's own processes.

48 I would in any event avoid a process of construction by which the makers of the Court Rules are imputed with anxiety about the potential for conflict with the Barristers Rules insofar as they provide for such a thing as a direct access brief.

49 It was further submitted that construing r 4.03 so as to apply to a direct access barrister would have the consequence that a barrister could not accept a direct access brief at all from a disadvantaged party to migration litigation who would otherwise be unrepresented in the proceedings. It is not clear why that should be so. If there be inconsistency between obligations under the Court Rules and obligations under the Barristers Rules, the Barristers Rules would be invalidated to the extent of the inconsistency and so there would not, in law, be a conflict between obligations rendering a direct access brief impossible. Moreover, there is no evidence before me to support the assertion that a person in the appellant's position would be rendered unrepresented as a consequence of r 4.03 operating on his Counsel.

50 The above contextual considerations raised by the Association should not influence the construction of r 4.03 of the Court Rules. The rule is to be construed having regard to its text, context and purpose, and in a manner that complies with s 37M of the *Federal Court of Australia Act 1976* (Cth) (FCA Act), to which I now turn.

Section 37M of the FCA Act

51 Rule 4.03 is a "civil practice and procedure provision" within the meaning of s 37M(4) of the FCA Act. The overarching purpose of the civil practice and procedure provisions is identified in s 37M(1) and (2) as follows:

> **37M The overarching purpose of civil practice and procedure provisions**
>
> (1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:
>
> (a) according to law; and
>
> (b) as quickly, inexpensively and efficiently as possible.
>
> (2) Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:
>
> (a) the just determination of all proceedings before the Court;
>
> (b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
>
> (c) the efficient disposal of the Court's overall caseload;
>
> (d) the disposal of all proceedings in a timely manner;
>
> (e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

52 The Court must interpret and apply the Court Rules in a way that best promotes the overarching purpose: s 37M(3) of the FCA Act. In the absence of a contradictor on the appellant's interlocutory application, it is appropriate to summarise certain issues the Court identifies as potentially bearing upon the interpretive task.

53 The first issue arises from the order of the Registrar made on 6 February 2018 requiring that the appeal book be filed by the Minister if, at the time for compliance, "the appellant is not represented by a lawyer". The Court's interest in ensuring compliance with that order would appear to be frustrated if the Court is unable to identify, by reference to its own record, whether the responsibility for compliance rests with the appellant or the respondent.

54 The second issue is that in the absence of a notice of acting filed by a lawyer appointed to represent a party in the proceedings (or in the absence of such a person being named on the

originating process) the Court is unable to confirm the identity of those persons who are authorised to bind the party in his or her dealings with the Court, including by way of correspondence directed to the chambers of the presiding judge.

55 The third issue is the expense incurred by the Court (and therefore the public) in arranging the services of an accredited interpreter for a proceeding in which it appears, from the Court's record, that a non-English speaking litigant will appear self-represented at a hearing. If the Court is not advised with reasonable notice before a hearing that the party will be represented by a lawyer, the financial and administrative resources of the Court are wasted.

56 The fourth issue arises from a perception that appears to be held by Counsel for the appellant in the present case concerning the disclosure of the identity of any person who has prepared a document on a party's behalf (quite apart from the identity of the person who files the document). As has been mentioned, Counsel in this matter prepared a draft amended notice of appeal. That document contained a representation that it had been prepared by the appellant himself. Whilst this issue bears only peripherally on the construction and operation of r 4.03, it will be dealt with in these reasons so as to leave no room for doubt as to the obligations of a lawyer briefed in whatever capacity to disclose his or her identity as the person responsible for preparing a document that is subsequently filed in a proceeding.

57 Relatedly, s 486F of the Migration Act contains provisions that, among other things, empower this Court to make a costs order against a person who acts in contravention of s 486E. Section 486E provides:

> **486E Obligation where there is no reasonable prospect of success**
>
> (1) A person must not encourage another person (the ***litigant***) to commence or continue migration litigation in a court if:
>
> (a) the migration litigation has no reasonable prospect of success; and
>
> (b) either:
>
> (i) the person does not give proper consideration to the prospects of success of the migration litigation; or
>
> (ii) a purpose in commencing or continuing the migration litigation is unrelated to the objectives which the court process is designed to achieve.
>
> (2) For the purposes of this section, migration litigation need not be:
>
> (a) hopeless; or
>
> (b) bound to fail;

> for it to have no reasonable prospect of success.
>
> (3) This section applies despite any obligation that the person may have to act in accordance with the instructions or wishes of the litigant.

58 In cases where the Court, at the time of giving judgment, finds that migration litigation had no reasonable prospects of success, the Court *must* of its own accord consider whether an order for costs (including against a lawyer personally) should be made: s 486F(2). In discharging that obligation, the Court has an interest in knowing, by reference to its own record, the identity of any person (whether a lawyer or not) who has encouraged the commencement or continuation of the litigation, including by formulating and drafting grounds or arguments appearing on documents filed in Court.

59 The fifth issue concerns the potential for disruption to the Court's processes by the late and sudden termination by a direct access barrister of his or her retainer. In that regard, both Counsel for the appellant and the Association submit that there is no legal obligation on a direct access barrister to serve a notice of intention of ceasing to act in accordance with r 4.05(1)(a) and no obligation to file a notice of ceasing to act in accordance with r 4.05(1)(b) (extracted at [80] below).

60 A sixth issue relates to the Court's interest in ascertaining, for a substantive purpose, whether a litigant was represented by a lawyer at the time that his or her grounds are formulated and the action is commenced. The present case is illustrative. The appellant was unable to say in his evidence who had drafted the notice of appeal. The ground may well have been drafted by a direct access barrister not being the same barrister presently briefed to appear. The Court simply does not know. For the Association it is submitted that there is no obligation for a barrister retained on a direct access brief to be identified as a person's lawyer on the face of an originating document such as a notice of appeal. Considerable store is placed on that submission because of its importance to the construction of r 4.03 in the context of the Court Rules as a whole.

61 In my view, all of these matters inform the task of construing r 4.03 of the Court Rules in accordance with s 37M(3) of the FCA Act.

62 In *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1, French CJ, Crennan, Kiefel and Keane JJ said at [28]:

> ... The appropriate inquiry in the construction of delegated legislation is directed to the text, context and purpose of the regulation, the discernment of relevant constructional choices, if they exist, and the determination of the construction that,

according to established rules of interpretation, best serves the statutory purpose.

63 The effect of s 37M(3) is that where a constructional choice exists the Court is to favour the construction that best promotes the overarching purpose.

64 The antecedent question is whether there exists a constructional choice at all. That question should be answered having regard to the text of r 4.03 and to its contextual setting within the Court Rules as a whole.

Text

65 The Dictionary in Sch 1 to the Rules defines "party" to mean a party to a proceeding.

66 The word "lawyer" has the meaning given by s 4 of the FCA Act, namely, a person enrolled as a legal practitioner of a Federal Court or the Supreme Court of a State or Territory. On its terms, that definition captures a person admitted to practice as a barrister (and only as a barrister) in the Supreme Court of a State.

67 The word "lawyer" is used elsewhere in the Court Rules in contexts which make it plain that the word includes a barrister. See, for example, r 40.07, which empowers the Court to make certain orders in circumstances where a party has reasonable cause to believe that costs have been incurred because of his or her lawyer's misconduct. The term "lawyer" expressly includes a barrister.

68 To some extent the obligation imposed by the rule is to be discerned by the requirements of the Court form to which it refers. Form 4 is a form approved by the Chief Justice for the purposes of the rule: see r 1.52. The form makes provision for the name of a "lawyer" and a "firm" appointed to "represent" the party "in the proceeding" and for the insertion of the party's address for service.

69 The Association submitted that the form itself contemplated that r 4.03 was restricted in its operation to "lawyers who have firms". The submission should be rejected. It may reasonably be assumed that the legal profession in Australia includes sole practitioner lawyers (in large number) who are entitled to practice in the Supreme Court of a State. It is clearly open to a lawyer to name no firm on the notice of acting in Form 4 if that field is inapplicable.

70 The words "appoint" and "represent" are not defined.

71 Construed in accordance with its ordinary meaning, a lawyer will be "appointed" by a party if the lawyer owes direct and enforceable obligations to the party, whether by reason of a voluntary undertaking or, as in the present case, by the terms of a written costs agreement.

72 The ordinary meaning of the word "represent" incorporates notions of agency, of a lawyer doing an act or thing on behalf of his or her client and so binding the client to his or her act. It is well established that a party is bound by the oral and written submissions made on his or her behalf by a lawyer of any kind, whether a barrister or solicitor. The preparation of written submissions and the presentation of oral submissions fall within ordinary notions of representation. Construed in isolation, the words of r 4.03 tend toward a construction that captures a barrister appointed by a party on a direct access brief.

73 These words are not to be construed in isolation. On its terms, r 4.03 provides that a lawyer must file a notice of acting if "a party is unrepresented when a proceeding starts and later appoints" the lawyer "to represent the party in the proceeding". These compound phrases must be construed having regard to the purpose of the rule, discerned from its wider context.

Context

74 The contextual starting point is r 4.01(1). It provides that "a person may be represented in Court by a lawyer or may be unrepresented". The words "represented" and "unrepresented" are not defined in that rule. Importantly, r 4.01(1) contemplates that a party will have one status or the other.

75 Rule 4.02 provides that a party's lawyer may do an act or thing that the party is required or permitted to do unless the context or subject matter indicate otherwise. That is a permissive rule. On its terms, it does not prevent a party from personally filing a document, even if he or she has appointed a lawyer. Nor does it appear to mandate the doing of an act by a lawyer if the act would be outside of the scope of the lawyer's authority. The costs agreement between Counsel and the appellant in this case neither authorises or obliges Counsel to file a document in the proceeding, save, implicitly, for written submissions and a list of authorities.

76 A person who wants to commence a proceeding in the Court's original jurisdiction must file an originating application in accordance with Form 15: r 8.01(1). The originating application must include the applicant's name and address and the applicant's address for service:

r 8.01(2)(a) and (b). Similarly, r 5.02 provides that a respondent who has been served with an originating application must file a notice of address for service in accordance with Form 10.

77 If a party terminates a lawyer's retainer and a new lawyer is appointed to represent the party, the new lawyer must file a notice of acting in accordance with Form 5: r 4.04(1). A lawyer whose retainer has been terminated may otherwise file a notice of ceasing to act in accordance with Form 8: r 4.04(3).

78 A person who wants to appeal to the Court must file a notice of appeal: r 36.01. The notice of appeal must be in accordance with the applicable form identified in r 36.01(1). Rule 2.16 specifies the details that must be included at the foot of the front page of the notice of appeal (and indeed, upon any document filed in the Court). They are:

> **2.16 Details at foot of each document**
>
> (1) A document filed in a proceeding must contain the following information under a horizontal line at the foot of the front page of the document:
>
> (a) the name and role of the party on whose behalf the document is filed;
>
> (b) the name of the person or lawyer responsible for preparation of the document;
>
> (c) if the party is represented by a lawyer—the telephone number, fax number and email address of the lawyer;
>
> (d) if the party is not represented by a lawyer—the telephone number, fax number and email address, if any, of the party;
>
> (e) the address for service of the party.
>
> ...

79 On its terms, r 2.16 contemplates that a lawyer responsible for the preparation of a document may not be the same person who has been engaged to represent a party in any capacity in the proceeding.

80 Reference should also be made to r 4.05. It provides:

> **4.05 Termination of retainer by lawyer**
>
> (1) If a party's lawyer terminates the retainer, the lawyer must:
>
> (a) serve on the party a notice of intention of ceasing to act, in accordance with Form 7; and
>
> (b) at least 7 days after serving the notice—file a notice of ceasing to act, in accordance with Form 8.

(2) A party whose lawyer has filed a notice under paragraph (1)(b) must file a notice of address for service within 5 days after the notice is filed.

...

81 The applicable court forms make provision for the party to state his or her address *and* his or her address for service. Rule 11.01 is titled "Address for service – general". It provides:

11.01 Address for service—general

(1) An address for service for a party must include the address of a place within Australia at which a document in the proceeding may, during ordinary business hours, be left for the party and to which a document in the proceeding may be posted to the party.

(2) If a party is represented by a lawyer who has general authority to act for that party, the address for service for the party must be the address of the lawyer.

(3) The address for service must contain the information mentioned in rule 2.16.

(4) If the party is represented by a lawyer, the party agrees for the party's lawyer to receive documents at the lawyer's email address.

(5) If the party is not represented by a lawyer but provides an email address, the party agrees to receive documents at the email address.

Note: The parties may agree on how service is to be effected. For example, the parties may agree that service be at a fax number.

82 The Association also referred the Court to Div 4.2 of the Court Rules. It makes provision for the Court to refer a party to a lawyer "for legal assistance", a phrase defined in r 4.11 as follows:

legal assistance means any one of the following:

(a) advice in relation to the proceeding;

(b) representation at a directions, interlocutory or final hearing or mediation;

(c) drafting or settling documents to be used in the proceeding;

(d) representation generally in the conduct of the proceeding.

83 It was submitted, and I accept, that this rule recognises that a lawyer may participate in a proceeding other than pursuant to a general authority to act. It is also accepted that limitations on a lawyer's role may be agreed as between the lawyer and the client and is not unique to those cases in which the Court refers a party for limited "legal assistance" as defined.

Purpose

84 Having regard to this structural context, the Association argued that the purpose of r 4.03 was to inform the Court and other parties of a change in the party's status, after the commencement of a proceeding, from that of a person who is not represented by a lawyer *with general authority to act*, to that of a person who is so represented.

85 Accordingly, it was submitted, the Court Rules regulating the content of a notice of appeal or originating application impose no obligation upon a party to identify that he or she is represented by a lawyer, unless the party is "represented by a lawyer who has general authority to act for that party" within the meaning of r 11.01(2), in which case the party's address for service must be that of the lawyer.

86 It follows, the Association submits, that the Court Rules make no provision for the filing of a notice of acting by a lawyer appointed by a party after the proceeding has commenced if that lawyer does not have a general authority to act.

87 These submissions should be accepted, notwithstanding the disruptive case management issues identified earlier in these reasons.

88 An obvious purpose of the Court Rules to which I have referred is to identify the address for service of a party. The rules relating to the provision of an address for service are clearly intended to assist the Court's task as a finder of fact when the validity of service of a document is in issue. Whether or not a person has been validly served informs the exercise of significant powers contained elsewhere in the Court Rules.

89 A party commencing proceedings in the Court must identify an address for service on the originating application or notice of appeal as the case may be. That obligation arises whether or not the party is represented by a lawyer. If the party is represented by a lawyer who has general authority to act, the address for service must be the address of that lawyer: r 11.01(2). If the party is not represented by a lawyer who has a general authority to act then the address for service may be that of the appellant personally, or any other address satisfying the requirements of the Court Rules.

90 However, neither r 8.01 (in its application to original jurisdiction matters) nor r 36.01 (in its application to appeals) impose an obligation to disclose on the originating process the fact that a lawyer has been engaged by a party to represent him or her for a limited purpose, that is, other than pursuant to a general authority to act.

91 Whilst it is true that the name of a lawyer who has prepared a document must be disclosed, the disclosure of that information does not, of itself, inform the Court whether the lawyer so named has been engaged to represent the party in the proceedings in any capacity.

92 In my view, if the Court Rules were intended to oblige a party to disclose that they have directly appointed a lawyer with other than a general authority to act, the rules and forms would have made express provision both for the identification of such a practitioner and for the nature and scope of the limitation on the practitioner's retainer to be notified to the Court. The rules and forms to which I have referred make no such provision.

93 It follows that a barrister directly appointed by a party for the purpose of making oral and written submissions on the party's behalf at a hearing need not be identified on the process by which proceedings are commenced. It must follow that r 4.05 ought not to be construed so as to require the filing of a notice of ceasing to act by a person retained from the outset as a barrister on a limited direct access brief.

94 Rule 4.03 must be construed so as to operate harmoniously with the foregoing scheme. There being no obligation on a party to disclose the appointment of a direct access barrister at the commencement of a proceeding, r 4.03 should not be construed to impose an obligation upon a direct access barrister to file a notice of acting if he or she is appointed after the proceedings are commenced.

95 The rules are premised on an assumption that a party will either be unrepresented, or represented by a lawyer with general authority to act. The appellant is neither. In my view, no provision is made to accommodate what appears to be an increasing trend in the migration practice area whereby litigants, perhaps with the assistance of paid or unpaid community intermediaries, directly appoint a barrister for limited (albeit critical) tasks without the intermediary of an instructing solicitor and without notifying the Court. If the non-disclosure of the retainer is potentially disruptive of the Court's processes, the disruption is to be avoided firstly by the observance by the barrister of the usual standards and courtesies ordinarily expected of a legal practitioner in his or her dealings with a court and, failing that, by the exercise of the express and implied powers of the Court to manage its own proceedings.

RELATED MATTERS

96 Before concluding it is appropriate to emphasise again the obligation under r 2.16 of the Court Rules.

97 As discussed earlier in these reasons, the obligation to identify a barrister as the lawyer who has prepared a document arises whether or not the barrister is directly appointed to represent a party generally in a proceeding. The obligation arises under r 2.16 of the Court Rules and not under r 4.03. The obligation is expressed in absolute terms and I do not propose to dispense with its requirement in the present case.

98 To the extent that Counsel maintains the view that her identity as the drawer of a document filed in the Court need not be disclosed, a separate application for relief will be necessary, should the occasion arise.

99 As will be recalled, the issue arose only obliquely in the present case in respect of the draft amended notice of appeal. The application to amend the notice of appeal was abandoned and so that document was not filed. Accordingly, no occasion directly arises to determine whether there was a failure on the appellant's part (albeit through Counsel) to comply with r 2.16 of the Court Rules.

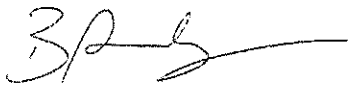
100 I have otherwise construed r 2.16 to the extent necessary to explain the context in which r 4.03 appears. To be clear, where a document is prepared by a lawyer (including by the formulation of the grounds of appeal), the lawyer's name must be identified in the footer of the document, irrespective of the capacity in which the lawyer is engaged. This Court has previously expressed the view that to represent such a document as having been prepared by a self-represented litigant would be apt to mislead the Court: *ARN17 v Minister for Immigration and Border Protection* [2018] FCA 974 at [43]. The appellant's submissions on this application do not dissuade me from that view.

DISPOSITION OF THE INTERLOCUTORY APPLICATION

101 The question of whether r 4.03 applied to Counsel was raised by the Court of its own initiative in the circumstances described earlier in these reasons. Neither the Association nor the parties to the appeal submitted that the Court as presently constituted should not determine the question arising on the interlocutory application, notwithstanding that the previous orders of the Court were premised on an assumption that r 4.03 applied in the circumstances of the case. The interlocutory application ultimately filed sought relief principally on the basis that the rule, properly construed, had no application. That argument having been accepted, it is appropriate that the procedural order of 18 May 2018 and order 1 of the orders of 31 May 2018 be revoked on the basis that those interlocutory orders were premised on an incorrect construction of r 4.03: see r 39.05(c) of the Court Rules.

102 Orders will now be made for the resumption of the hearing of the appeal.

I certify that the preceding one hundred and two (102) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Charlesworth.



Associate:

Dated: 21 August 2018