ADDISONS

Recovery of professional costs by self-represented practitioners – High Court in *Bell v Pentelow*

Authors: Justine Munsie, Alexander Latu and Ellen Anderson

In *Bell Lawyers Pty Ltd v Pentelow* ("***Bell***")[1] the High Court of Australia has determined that solicitors and barristers who represent themselves in court are not able to recover their own professional costs for that work.

This ruling is in keeping with the general rule that self-represented litigants cannot recover the costs of their time in litigation. However, under the long-standing '*Chorley* exception' to the general rule, solicitors had previously been treated as entitled to those costs. In issue before the High Court was whether the *Chorley* exception should be extended to cover barristers, on which there was mixed authority. The High Court not only declined to recognise the *Chorley* exception as applicable to barristers, but determined that the *Chorley* exception is an affront to equality before the law and is not part of the common law of Australia.

The precise practical ramifications of this decision, particularly in relation to 'one person' incorporated legal practices is yet to be determined, and it remains to be seen whether legislative clarification will be forthcoming. As canvassed by their Honours, courts and legislatures in various common law jurisdictions have taken different approaches to balancing the various interests arising from the general rule and the *Chorley* exception,[2] illustrating the potential range of policy options in this area.

The Court has also emphasised that costs are awarded as an indemnity for professional legal services, and made observations about the professional conduct expected of its officers – providing impartial and independent advice, and a measure of objectivity. The more that any in-house/employed solicitor can demonstrate that their professional services bear these hallmarks – for example documentary practices demonstrating the independence of advice from commercial concerns – the more likely it would appear that such costs would be recoverable.

Background[3]

The appellant in *Bell* was an incorporated legal practice that had retained the respondent, a barrister, for professional legal services. A dispute regarding the respondent barrister's fees arose, and only a portion was paid. The respondent brought proceedings seeking payment of the balance of her fees (the **Fees Proceedings**), and was ultimately successful. As a result, the appellant was ordered to pay the respondent's costs of the Fees Proceedings.

In the Fees Proceedings, the respondent barrister was legally represented but had undertaken preparatory work herself, including preparing/reviewing written submissions and advising her senior counsel. She had also attended court on occasion. These costs were included in her memorandum of costs claimed against the appellant.

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[1] *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29 (***Bell***).
[2] See for example *Bell* at [37], [89]-[90].
[3] *Bell* at [4]. The background summarised in this section is set out in the judgment of the plurality (Kiefel CJ, Bell, Keane and Gordon JJ) at [4]-[12].

The appellant refused to pay costs claimed for the work the respondent herself had undertaken in the Fees Proceedings, and applied for the respondent's claimed costs to be assessed. The costs assessor rejected the respondent's claim for the costs of her own work, including on the basis that in New South Wales the *Chorley* exception did not extend to barristers. The assessor's decision was affirmed by a Review Panel.

The respondent unsuccessfully appealed the Review Panel's decision to the New South Wales District Court, and then sought judicial review of the District Court decision in the Court of Appeal.

The Court of Appeal noted the District Court's finding (not amenable to review) that the respondent was a "self-represented" litigant, and focused on the question of whether the *Chorley* exception applied to the respondent, as a barrister, in circumstances where she had undertaken legal work in litigation in which she was represented.[4] The applicability of the *Chorley* exception to barristers had not been determined by the High Court or an intermediate appellate Court.[5] The Court of Appeal held by majority that the respondent could rely on the *Chorley* exception "for the same reason as a solicitor is so entitled, namely, that her costs were quantifiable by the same processes as solicitors' costs".[6]

It was on this basis that the appellant appealed to the High Court.

The *Chorley* exception

As noted above, the general rule is that self-represented litigants cannot recover costs for the value of their time spent in litigation.[7] The basis for this rule is that "costs are awarded by way of…partial indemnity…for professional legal costs actually incurred in the conduct of litigation … [they are not] … comprehensive compensation for any loss suffered by a litigant."[8] Nor are they a reward for successful litigation. This principle had long underpinned the interpretation of statutory provisions empowering the award of costs.[9]

The Court of Appeal of England and Wales in *London Scottish Benefit Society v Chorley* had authoritatively established, as an exception to the general rule, that solicitors could recover the costs of their own time.[10] The apparent bases for this exception included the view that solicitors should not be encouraged to employ another solicitor to do legal work they could themselves do (and that it would be absurd for costs to be recoverable in the former situation but not the latter); as well as the idea that the value of solicitors' time was capable of being measured in a way that the value of a lay-person's time could not be.[11]

The High Court's reasoning

While the High Court was unanimous in allowing the appeal, four sets of reasons were given: in the plurality judgment of Kiefel CJ, Bell, Keane and Gordon JJ; and separate judgments of Gageler J, Nettle J, and Edelman J. While Gageler J and Edelman J stated their agreement that the *Chorley* exception should be "abandoned" or "is not part of Australian law",[12] Nettle J agreed with the orders "for the reason only that the

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[4] Ibid at [10] referring to *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 (***Bell* NSWCA**) at [15], [112], [116].
[5] *Bell* NSWCA at [22], [117].
[6] *Bell* at [11], referring to *Bell* NSWCA at [90]-[96], [121].
[7] *Bell* at [1].
[8] *Cachia v Hanes* (1994) 179 CLR 403 at 410-411 (***Cachia***); see discussion in *Bell* at [22], [33].
[9] *Bell* at [33].
[10] *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 (***Chorley***), see discussion in *Bell* at [1] and [17]-[25].
[11] *Bell* at [17] and [21], discussing *Chorley*.
[12] *Bell* at [63] per Gageler J and [99] per Edelman J.

Chorley exception should not be extended to barristers".[13] This paper focusses on the majority reasoning of the joint judgment.

The joint judgment expressed some reservation as to whether the *Chorley* exception had ever properly been laid down as a legal rule in Australia.[14] Although the *Chorley* exception had been accepted as applicable in Australia in two previous High Court decisions – *Guss*[15] and *Cachia*[16] – *Guss* had simply uncritically accepted the *Chorley* exception, and the majority in *Cachia* had been very critical of the exception as recognised in *Guss*.[17] The joint judgment considered that the issue of whether the *Chorley* exception should be recognised as part of the common law of Australia had not previously been before the High Court.[18] However, the appeal had been conducted on the basis that abandoning the *Chorley* exception would require departure from *Guss*. The joint judgment's conclusion accordingly proceeded by considering whether that was appropriate – and concluded that it was.[19]

The joint judgment considered the rationales for the exception expressed in *Chorley* to be unconvincing, and the exception to be an anomalous, non-useful departure from principle. Being an anomaly, the exception was not to be extended to benefit barristers.[20]

More fundamentally, the joint judgment considered it unacceptable in principle for the *Chorley* exception to allow a solicitor to profit from their own litigation, rather than simply be rewarded for their exercise of professional skill.[21] The judgment had earlier observed that it was not obviously beneficial to encourage solicitors to act for themselves, as they would lack the impartial and independent advice that the court expects its officers to provide, and might lack also objectivity due to self-interest. In turn, that could lead to inflated costs.[22]

The joint judgment also expressed concern that the *Chorley* exception resulted in inequality before the law by privileging solicitors over laypersons.[23] It had earlier criticised reliance on the ability to quantify the value of litigants' time in order to justify either the general rule or the exception. For one, this focus on 'measurability' is irrelevant to the true, indemnity, basis of the general rule as explained in *Cachia*, and is accordingly irrelevant to any exception.[24] For another, contrary to *Chorley*, the joint judgment considered that in principle it *is* in fact possible to measure the reasonable value of any person's time in this context, although practical difficulties may arise for non-practitioners. In those circumstances, acting on a principle that evidence of the value of non-solicitors' time should just be ignored would be to "exalt the position of solicitors … to an extent that is an affront to equality before the law". Generally, the *Chorley* exception was characterised as an "affront to the fundamental value of equality of all persons before the law".[25]

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[13] *Bell* at [79].
[14] *Bell* at [28]. Compare Gageler J at [62]-[63], Nettle J at [72] and Edelman J at [93].
[15] *Guss v Veenhuizen* (No 2) (1976) 136 CLR 47 (***Guss***).
[16] Above n 8.
[17] *Bell* at [30] and [31]-[38].
[18] *Bell* at [26].
[19] *Bell* at [28], [29]-[39], [57].
[20] *Bell* at [3].
[21] *Bell* at [32]
[22] *Bell* at [18]-[19], see also Edelman J at [92] discussing other characteristics of solicitor 'self-representation'.
[23] *Bell* at [38]-[39], [25].
[24] *Bell* at [22].
[25] *Bell* at [24], [3].

The joint judgment thus considered that in the absence of a compelling reason to the contrary, the *Chorley* exception should be held not to be part of Australia's common law. No such reason was found.

No compelling reason for *Chorley*

The respondent's argument that the inclusion of "remuneration" in the *Civil Procedure Act 2005*'s definition of "costs" demonstrated a legislative intention to maintain the *Chorley* exception was rejected. "Remuneration" was considered "simply not a word which is apt to include the notion of payment to a person by himself or herself for work done by himself or herself."[26]

Nor did the joint judgment consider that rejecting *Chorley* would cause unacceptable inconvenience to in-house solicitors employed by governments and corporations, including incorporated legal practices, by preventing them from recovering costs for professional legal services rendered by employed solicitors.

The joint judgment noted that in-house lawyers are treated as being outside the general rule because the recovery of in-house costs enures by way of indemnity to the employer, as confirmed by the inclusion of "remuneration" in the definition of "costs". Further, the costs of employed solicitors have been dealt with by permitting the award of costs on a basis comparable to what would have been incurred and allowed on taxation by an independent solicitor, in order not to infringe the indemnity principle.[27] This well-established understanding in relation to in-house lawyers would not be disturbed by non-recognition of the *Chorley* exception.[28]

However, it was less clear to their Honours whether the same would apply to a solicitor employed by an incorporated legal practice of which (s)he is the sole director and shareholder. It could be queried whether such a person would have "sufficient professional detachment to be characterised as acting in a professional legal capacity when doing work for the … practice", as well as whether such costs would fall within the authorities on the meaning of indemnity. This question was not, however, resolved.[29]

Finally, the joint judgment rejected the submission that the legislature (or the rules committee of a superior court) was the more appropriate body to determine whether the *Chorley* exception should be recognised in Australia – "[t]he *Chorley* exception is the result of judicial decision and it is for this Court to determine whether it is to be recognised in Australia".[30]

Chorley the exception was OK in the past, then?

The respondent also submitted that any alteration or abrogation of the *Chorley* exception by the Court should only operate prospectively from the date of that decision - thus entitling the respondent to her costs based on the New South Wales Court of Appeal decision.[31] This submission appears to have been based on the premise that the *Chorley* exception was a rule of practice susceptible to prospective change.[32] The joint judgment, having found that the *Chorley* exception was not part of Australia's common law, rejected that submission – it followed from that finding that there was no basis in the law for the *Chorley* exception in

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[26] *Bell* at [41]-[44].
[27] *Bell* at [46]-[47].
[28] *Bell* at [50].
[29] *Bell* at [51]-[53].
[30] *Bell* at [54].
[31] *Bell* at [55].
[32] Transcript of Proceedings, *Bell Lawyers Pty Ltd v Pentelow* [2019] HCATrans 091 (9 May 2019) at 2762-2828.

previous decisions, consistently with the remarks on the nature of prospective overruling being inconsistent with the judicial power made in *Ha v New South Wales*.[33]

[33] (1997) 189 CLR 465, Bell at [54], see also Edelman J at [94]-[98].

Level 12, 60 Carrington Street
Sydney NSW 2000 Australia

ABN 55 365 334 124
Telephone +61 2 8915 1000

mail@addisons.com
www.addisons.com