Chorley abolished! High Court has final say


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Snapshot

- The High Court has abolished the so-called '*Chorley* exception', meaning self-represented legal practitioners can no longer recover costs for time spent on litigation. Disbursements remain recoverable however.
- Parties who are not legal practitioners can still claim the costs of employed solicitors.
- The position of incorporated legal practices remains unclear and may require clarification, ultimately by the High Court.

There is a general rule about the recoverability of legal costs in litigation. It is that a party who is self-represented cannot recover costs under an order for costs for time spent on the litigation. Disbursements are, however, recoverable. An exception to the general rule is known as the *Chorley* exception: it has provided that where the party is a solicitor, that party can recover costs for time spent. In some courts, but not in others, the *Chorley* exception was extended to barristers. On 4 September 2019 the High Court delivered judgment in *Bell Lawyers v Pentelow* (***'Bell Lawyers'***) [2019] HCA 29, and held that the *Chorley* exception is not part of the common law of Australia.

Practical ramifications

The practical ramification of the decision is that solicitors and barristers who are self-represented cannot claim for their own time spent on the litigation, where they are awarded costs by the court.

Bell Lawyers v Pentelow

In *Bell Lawyers* the respondent, a barrister, was retained by the solicitor and had issued invoices for her fees. The solicitor had paid part but not all of the fees. The barrister sued unsuccessfully in the Local Court for those fees but the result was reversed on appeal to the Supreme Court, and the costs of the Supreme Court and Local Court proceedings were awarded to the barrister. In the Local Court the barrister had retained a solicitor, who was on the record. In the Supreme Court, the barrister had retained a solicitor, who was on the record, and a barrister.

When the costs of the proceedings came to be assessed, the barrister claimed the costs of her legal representatives and also costs for work she had performed in the matters. The costs assessor did not allow the costs of the work the barrister had performed herself. The review panel agreed with the costs assessor. The barrister's subsequent appeal to the District Court was dismissed by Judge Gibson. The barrister sought judicial review. The Court of Appeal, by majority (Beazley P and Macfarlan JA; Meagher JA dissenting) upheld the review, holding that the *Chorley* exception was part of the law of NSW, that it extended to barristers and that the barrister was self-represented for the purpose of the rule.

A seven-member bench of the High Court allowed the appeal from the decision of the Court of Appeal. Four separate judgments were delivered: the plurality consisted of Kiefel CJ, Bell, Keane and Gordon JJ; Gageler, Nettle and Edelman JJ each delivered separate judgments. The judgments were unanimous in holding that the *Chorley* exception did not apply to barristers. All but Nettle J went further in finding that the *Chorley* exception was not part of the common law of Australia, meaning that the exception does not exist for the benefit of solicitors either.

The conclusion of the plurality was that 'the *Chorley* exception is not only anomalous, it is an affront to the fundamental value of equality of all persons before the law. It cannot be justified by the considerations of policy said to support it. Accordingly, it should not be recognised as part of the common law of Australia' (at [3]). The bases of that determination were that: (i) the reasoning in *Chorley* was 'not persuasive' (at [22]); (ii) it was contrary to the modern orthodoxy that solicitors should not act for themselves (at [19]); and (iii) this view was reflected in professional conduct rules across the various states of Australia (at [20]). Furthermore, the notion that private expenditure of labour by a layman cannot be measured is neither correct (at [24]), nor the basis for the general rule (at [22]). The acceptance by the High Court of the exception in *Guss v Veenhuizen [No 2]* (1976) 136 CLR 47 ***('Guss')*** was uncritical and the criticisms made of it in *Cachia v Hanes* (1994) 179 CLR 403 (***'Cachia'***) undermined the authority of *Chorley* (at [32]).

The plurality considered that the 'proper effect' of ss 3 and 98(1) of the *Civil Procedure Act 2005* (the definition of costs and the power to award costs, respectively) was that costs awarded by a court governed by the *Civil Procedure Act* do not include the costs of a self-represented legal practitioner.

A thread which ran throughout the plurality's decision was that the *Chorley* exception resulted in inequality before the law of self-represented parties who were not legal practitioners. That

proposition is difficult to argue with, whatever practical inconvenience may be caused to legal practitioners by the decision.

Gageler J, in a separate judgment, agreed with the plurality and additionally observed that although costs are 'entirely and absolutely creatures of statute' the principles according to which the discretion to award costs has been exercised 'have been left to exposition and development by the courts themselves' (at [59]). His Honour explained the contrast between the acceptance of *Chorley* into Australian law in *Guss* and its criticism in *Cachia* as reflective of the 'cessation of the institutionalised deference on the part of Australian courts to decisions of the English Court of Appeal' brought about by the termination of appeals to the Privy Council in 1986.

Another matter considered by Gageler J was the continued ability of parties who employ lawyers (such as banks and government departments) to claim costs under an order for costs. This is discussed in further detail below.

Nettle J agreed with the plurality in relation to the application of the *Chorley* exception to barristers but did not consider it necessary to decide that it should be abolished generally. His Honour gave an eloquent and detailed exposition of the factors that counted against abolishing the exception for solicitors. These included that the rule is of long standing (at [72]) and 'has been widely acted upon by the courts, the legal profession, governments and government departments, business and various legislatures and rules committees throughout Australasia' (at [72]), that the Court had not heard argument from interested bodies (at [72]) and that 'the potential regulatory and fiscal consequences of abrogating the exception appear to me to be of a nature and extent that only Parliament is competent to measure and balance' (at [73]).

The judgment of Edelman J illuminated a number of aspects which his Honour considered arose in the course of determining the matter. His Honour described the history of the recognition of the exception, the difference between costs in Chancery and at common law, the wide discretion which existed within the power to award costs, principles of statutory interpretation and the meaning of the word 'practice' in the present context. His Honour also touched on possible legislative reform and the meaning of 'self-representation'.

What does self-represented mean in this context?

Despite its thorough treatment of the subject, the High Court did not examine this question in detail because the Court of Appeal had held that the question of whether a party is self-represented was a question of fact, not amenable to judicial review. The authors suggest that the question of self-representation is apt to mislead. Edelman J illuminated this point in saying, 'Although an unrepresented solicitor who is party to an action is often described as "self-represented", the solicitor, like any other unrepresented litigant, does not "represent herself or himself". The solicitor's role as an agent for another is absent' (at [92]). In other words, the act of representing somebody requires that there be another 'body' to represent. What is really being spoken of is 'doing work for oneself'. In this sense, a party can be both represented by other lawyers, as Ms Pentelow was, but be 'self-represented' for the purpose of the *Chorley* exception where the lawyer does work on the matter. The result of *Bell Lawyers* suggests that it is claims for time expended in working on one's own case that will be caught, howsoever the lawyer structures the representation.

What about parties who charge for in-house or employed solicitors?

Even since before the *Chorley* exception was recognised, the courts allowed the 'recovery of costs by a party using an employed solicitor' (at [68] per Gageler J). The plurality took the view that in abolishing the *Chorley* exception such arrangements would not be disturbed because 'the recovery of the professional costs of inhouse solicitors enures by way of indemnity to the employer, as is confirmed by the inclusion of "remuneration" in the definition of "costs" in the *Civil Procedure Act*' (at [47]). Gageler J was of the opinion that '[t]he better view… is that recovery of costs by a party using an employed solicitor is an application of the general principle rather than an exception to it', because the costs of using an employed solicitor are awarded by way of indemnity, albeit that they are incurred in the form of an overhead, and are not reflected in a severable liability (at [68]).

What about incorporated legal practices?

The position of incorporated legal practices ('**ILP**') who are parties and are awarded costs is less clear and *Bell Lawyers* did not raise this for determination. One of the difficulties for the courts will be that an ILP can exist in many guises, from the sole shareholder and sole director company, which is essentially a sole practitioner clothed in a corporate entity, to a large, multi-state law firm consisting of hundreds of 'partner' shareholders. The plurality, after affirming the continued ability of parties who employed lawyers to recover costs, said, '[w]hether the same view should be taken in relation to a solicitor employed by an incorporated legal practice of which he or she is the sole director and shareholder stands in a different position' (at [51]) and that the 'the resolution of this question may be left for another day' (at [52]). They concluded that the question 'is ultimately a matter for the legislature' (at [53]).

Conclusion

Much uncertainty has surrounded this area of the law, and much ink has been spilt, including by the authors, on the existence of the *Chorley* exception. In large measure, the High Court's judgment has quelled the uncertainty. There remains for future determination the question of whether incorporated legal practices are entitled to recover fees where 'self-represented' and awarded costs. On 11 September 2019, Keane J delivered judgment in *Coshott v Spencer*, in relation to a review of taxation. The application of Bell Lawyers to incorporated legal practices was referred to but not determined (at [15]-[19]) **LSJ**