Vale the *Chorley* Exception

Benjamin Goodyear reports on *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29

If a party had a choice between losing a case against a represented party or losing a case against a self-represented litigant, it is suggested that the latter might be preferred (even if counsel might think otherwise). Against the former, the losing party may be ordered to pay the costs that the represented party has spent on lawyers. Against the latter, the general rule is that the self-represented litigant would not be entitled to compensation for the value of his or her time spent in litigation.

The *Chorley* exception

There has, however, thought to have been an exception to the general rule. If the self-represented successful litigant happened to be a solicitor, the litigant was able to recover his or her professional costs of acting in the litigation. Having been established in *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872, the exception was known as the '*Chorley* exception'.

On 4 September 2019, the High Court of Australia delivered judgment in *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29 and unanimously held that the *Chorley* exception should not be extended for the benefit of a self-represented litigant who was a barrister. A majority of the Court went further to hold that the *Chorley* exception is not part of the common law of Australia.

The facts

Solicitors retained a barrister to appear in the Supreme Court of New South Wales. A dispute arose concerning the barrister's fees. The barrister sued the solicitors for unpaid fees (the 'Recovery Proceedings') and won. The solicitors were ordered to pay the barrister's costs of the Recovery Proceedings.

During the Recovery Proceedings, the barrister had been represented. But she had also done some work herself. The solicitors refused to pay any costs claimed in respect of that personal work ('Personal Work Costs'). Five levels of review ensued. First, a costs assessor rejected the barrister's claim for Personal Work Costs. That decision was based on, amongst other things, a view that the *Chorley* exception did not extend to barristers. Second, the Review Panel affirmed the decision. Third, the District Court dismissed the barrister's appeal. Fourth, the Court of Appeal reversed the trend and

found in favour of the barrister. That Court reasoned that the barrister could rely on the *Chorley* exception notwithstanding she was a barrister not a solicitor. Fifth, the solicitors obtained special leave and appealed to the High Court.

The reasons of the majority of the High Court

The reasons of the majority, comprised of Kiefel CJ, Bell, Keane and Gordon JJ, stated that the *Chorley* exception was 'not only anomalous', but that it was also 'an affront to the fundamental value of equality of all persons before the law': at [3].

The majority considered that 'the view that it is somehow a benefit to the other party that a solicitor acts for himself or herself, because the expense to be borne by the losing party can be expected to be less than if an independent solicitor were engaged, is not self-evidently true': at [18]. The majority considered that a 'self-representing solicitor, lacking impartial and independent advice that the Court expects its officers to provide to the litigants they represent, may also lack objectivity due to self-interest. That may, in turn, result in higher legal costs to be passed on to the other party in the event that the self-representing solicitor obtains an order for his or her costs': at [18]. The majority reasoned that 'it is undesirable, as a matter of professional ethics, for a solicitor to act for himself or herself in litigation': at [19].

Accordingly, the majority considered that the *Chorley* exception 'cannot be justified by the considerations of policy said to support it' and for that reason it 'should not be recognised as part of the common law of Australia': at [3]. It was not the case that the exception could only be abolished by the legislature. Although 'costs are a creature of statute' (at [33]), the *Chorley* exception itself was the result of a judicial decision, and thus the Court was not prevented from determining the exception was not part of the common law of Australia: at [53]-[54].

Finally, the majority stated that its decision 'would not disturb the well-established understanding in relation to in-house lawyers employed by governments and others, that where such a solicitor appears in proceedings to represent his or her employer the employer is entitled to recover costs in circumstances where an ordinary party would be so entitled by way of indemnity': at [50].

The other judges

Justices Gageler, Nettle and Edelman each delivered separate sets of reasons.

Justices Gageler and Edelman each agreed that the *Chorley* exception should be abandoned: at [63] and [99] respectively. Justice Nettle agreed that the *Chorley* exception did not extend to barristers, but considered there was no need or justification to decide, as part of the matter before the Court, that the *Chorley* exception should be abolished: at [70].

A closing observation

The majority rejected the suggestion that a change to the *Chorley* exception should operate only prospectively: at [55]. As Edelman J articulated, the consequence is that the 'legal rule which this Court determines to apply … is one that should have applied, and does now apply, at all relevant times': at [98]. This is interesting. Those who have previously paid costs to solicitors, under the mistaken belief that the *Chorley* exception was part of the common law of Australia, may well consider *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38 and the corresponding pocket of cases concerning monies paid under a mistake of law. BN