Post-*Pentelow*

Australian legal practices' battle to recover employed solicitors' costs

Following *Pentelow*, concerns arose regarding whether recovery of professional costs was prohibited for all types of legal practice. This includes sole practitioners,[4] law firms,[5] community legal services, incorporated legal practices,[6] and unincorporated legal practices (ULPs),[7] as defined in s6 of the *Legal Profession Uniform Law*.

The High Court acknowledged that the inapplicability of the *Chorley* exception did not affect the 'well-established understanding'[8] that government agencies and corporations could recover costs of in-house solicitors acting in litigation because in-house solicitors are solicitors on record when successfully acting in litigation on behalf of their employer. However, *Pentelow* left the door open on the issue of whether self-represented legal practices are entitled to recover professional costs incurred by their employed solicitors.[9] The decision suggested that the final determination on this issue 'may require close consideration of the legislation which provides for incorporation of solicitors' practices and the intersection of that legislation with the provisions of the *Civil Procedure Act* in light of the general rule'.[10]

Australia does not have an employed lawyer rule, as New Zealand does, which allows self-represented legal practices to recover employed lawyers' costs of litigation.

Case law: Various legal practices

Law firms

The Court of Appeal of the Supreme Court of Victoria (VSCA) clarified by way of unanimous decision in *United Petroleum Australia Pty Ltd v Freehills*[11] (*United Petroleum)* that law firms could not rely on the *Chorley* exception to recover costs for employed solicitors' work.[12] The VSCA held that the solicitors employed by law firms are not analogous to the in-house counsel of corporations and government agencies because the employer law

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Before 2019, Australian self-represented legal practitioners and law practices relied on the UK case *London Scottish Benefit Society v Chorley*[1] to recover their professional costs from the losing party, known as the '*Chorley* exception' to the general rule that a self-represented litigant cannot be recompensed for their time spent in litigation.[2] However, the High Court's decision in *Bell Lawyers Pty Ltd v Pentelow*[3] (*Pentelow*) on 4 September 2019 clarified that the *Chorley* exception is *not* part of Australian common law, preventing self-represented barristers and solicitors from recovering professional costs. This article delves into the implications of this decision, focusing on the capacity of various legal practices to recover costs of employed solicitors.

firm is both the party and the solicitor on the record, making it self-represented. In contrast, for corporations and government agencies, the employer is the party, and the in-house counsel is the solicitor on the record.[13] Additionally, a partner of the law firm has 'oversight and control of the litigation'[14] whereas the director of the corporation/government agency does not (save for providing instructions in the capacity of a client of the in-house lawyer).

Incorporated legal practices (ILPs)

In *Guneser v Aitken Partners*[15] (*Guneser*) the Victorian Supreme Court ruled that an ILP cannot use the *Chorley* exception to recover its or its employed solicitors' professional costs. Justice Macaulay highlighted that ILPs have corporate characteristics that differentiate them from law partnerships yet rejected the analogy between an ILP's employees and in-house counsel.[16] Instead Macaulay J highlighted several reasons why ILPs are more analogous to law firms when considering whether the costs should be recoverable. These reasons include that there is no practical or functional separation between the party to the litigation and the solicitor on the record, the ultimate supervision and control of the *legal* work of its employees being at the hands of directors of the ILP.[17]

Nonetheless, the Supreme Court of NSW in *Spencer v Coshott*[18] (*Spencer*) took the opposite stance, allowing recovery of costs by a solicitor represented by an ILP, in which they were the principal and sole director and shareholder, because of the separate legal personality of an ILP.

Unincorporated legal practices (ULPs)

In *Atanaskovic v Birketu Pty Ltd*[19] (*Atanaskovic*), the majority held that the High Court's rejection of the *Chorley* exception did not exclude partners of an ULP

from recovering costs for work done by employed solicitors. The decision hinged on the statutory construction of the word 'remuneration' used in the definition of 'costs' in s3(1) of the *Civil Procedure Act 2005* (NSW). The Court also applied common law principles from the judgment in *Pentelow*, concluding that unincorporated law firms should benefit from the employed lawyer rule, which upholds the general indemnity principle.[20]

This case originated from a debt recovery proceeding where Atanaskovic and other partners of an ULP successfully litigated against its former clients and obtained a costs order. The costs assessment claim included work performed by employed solicitors, not the partners. The clients have sought to appeal this decision in the High Court, indicating the ongoing complexity and debate surrounding the recovery of professional costs by self-represented legal practices.[21]

Arguments for consistency

Several arguments support the appeal, suggesting that the High Court should conclusively rule that no self-represented legal practice can recover fees incurred for work undertaken by employed solicitors and other staff. These arguments include:

- Practical inconsistency.[22]
- While the term 'costs' in NSW is defined as 'costs payable in or in relation to the proceedings', and includes 'remuneration',[23] it is arguable that salaries paid to employed solicitors do not fall under this definition because salaries are due irrespective of any proceeding. Notably, equivalent provisions do not exist in Victorian legislation.[24]
- In *Guneser*, Wood AsJ found that s33 of the *Legal Profession Uniform Law* disallows the use of a corporate vehicle in avoidance of the professional ethical considerations underpinning *Pentelow*.
- Partners of an unincorporated legal practice effectively acting for themselves as work done by their employed solicitors is considered the firm's work, with the solicitor on record being one of the applicants in the proceedings.[25]
- Employed solicitors of an ULP lack sufficient professional detachment due to their subordination to partners who have a personal interest in the litigation's outcome and costs.[26] This arguably applies to employed solicitors of all legal practices.
- The court must be satisfied on the evidence that the legal practice has established payment or a liability to pay its employed lawyers, typically by production of a binding costs agreement and all invoices rendered.[27]
- *Spencer* was decided without an examination of the relevant legislation,[28] which the High Court confirmed is essential for determining the ILP question, and concerned an ILP which had entered into a binding costs agreement with its principal.

The only scenario where sympathy might be extended to solicitors is when a solicitor is represented in a personal proceeding by a legal practice of which they are the director. However, cases have found no distinction between a solicitor and their entity, considering the solicitor as self-representing.[29]

Conclusion

The High Court's decision in *Pentelow* has created a complex legal landscape for Australian legal practices regarding the recovery of costs for employed solicitors. With the *Chorley* exception no longer applicable, the legal community is closely watching the ongoing appeal in *Atanaskovic*, hoping it will provide much-needed clarity on the employed lawyer rule and its implications for cost recovery by self-represented legal practices.

Notes: **1** (1884) 13 QBD 872. **2** *Cachia v Hanes* (1994) 179 CLR 403 (*Cachia*). **3** [2019] HCA 29 (*Pentelow*). **4** An Australian legal practitioner who engages in legal practice on his or her own account. **5** A partnership comprising only Australian legal practitioners or a combination of Australian legal practitioners and Australian-registered foreign lawyers. **6** A corporation, either a company under the *Corporations Act 2001* (Cth) or a corporation approved by the Legal Services Council, that has notified its intent to practice law in Australia, offers legal services beyond in-house or non-legally required services, and is not excluded by the Uniform Rules or classified as a community legal service. **7** A partnership or an approved unincorporated body, approved by the Legal Services Council, that has notified its intent to practice law in Australia, offers legal services beyond in-house or non-legally required services, and is not classified as a law firm, community legal service, or incorporated legal practice. **8** *Pentelow*, above note 3, [50]. **9** Ibid, [75]. **10** Ibid, [52]. **11** [2020] VSCA 15. **12** Ibid, [95]. **13** Ibid, [97] and [102]. **14** Ibid, [99]. **15** [2020] VSC 329. **16** Ibid, [69]. **17** Ibid, [66]. **18** (2021) 106 NSWLR 84 (*Spencer*). **19** [2023] NSWCA 312 (*Atanaskovic*). **20** Ibid, [188], [213] and [308]–[309]. **21** See Appellants' submissions filed in the High Court of Australia on 24 May 2024. **22** *McGuire v Secretary for Justice* [2018] NZSC 116, [85], [93]. **23** *Civil Procedure Act 2005* (NSW) s3. Also see s98. **24** That is, the *Legal Profession Uniform Law* (Vic) in Schedule 1 to the *Legal Profession Uniform Law Application Act 2014* (Vic); *Civil Procedure Act 2010* (Vic). **25** *Atanaskovic*, above note 20, [157] (Ward P, dissenting). **26** Ibid, [158]. **27** *DA Starke Pty Ltd v Yard (No 2)* [2020] SASC 81. **28** *Spencer*, above note 19, [99]. **29** *McIlraith v Ilkin & Anor (Costs)* [2007] NSWSC 1052, [11].

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