By Dipal Prasad

COSTS RECOVERY for self-represented litigants

When the court makes an order that a party in litigation (Party A) is liable to pay the costs of another party (Party B), Party B can recover from Party A a significant portion of the reasonable professional costs and disbursements associated with having a solicitor act in their matter. Complications arise when Party B does not have a solicitor and is self-represented. Further complications arise when Party B is a solicitor, barrister, law firm or an incorporated legal practice.

The general rule that a self-represented litigant cannot be recompensed for his/her time spent in litigation is undisputed in Australia.[1]

Prior to September 2019, self-represented solicitors and law practices relied on the UK case of *London Scottish Benefit Society v Chorley*[2] to recover their professional costs from the losing party. This was known as the '*Chorley* exception' to the general rule.

However, on 4 September 2019, the High Court delivered judgment in the matter of *Bell Lawyers Pty Ltd v Pentelow*[3] (*Pentelow*) clarifying that the *Chorley* exception is *not* part of the common law of Australia. Accordingly, self-represented barristers and solicitors cannot recover their professional costs from the party liable to pay costs in a proceeding.

The High Court acknowledged that the inapplicability of the *Chorley* exception did not alter the 'well-established understanding'[4] that government agencies and corporations are entitled to recover costs of their in-house solicitors when successfully acting in litigation on behalf of their employer.

SELF-REPRESENTED LAW FIRMS

Pentelow left the door open on the issue of whether self-represented law firms are entitled to recover professional costs incurred by their employed solicitors.[5]

On 13 February 2020, the Court of Appeal of the Supreme Court of Victoria (VSCA) clarified this issue in its unanimous decision in *United Petroleum Australia Pty Ltd v Freehills*[6] (*United Petroleum*).

In the Supreme Court of Victoria (VSC), the law firm Freehills was successful in two sets of proceedings against its former client United Petroleum – one proceeding commenced by Freehills to recover outstanding legal fees, and the second commenced by United Petroleum for negligence during the provision of legal services. Freehills obtained judgment in both proceedings for its fees and special costs orders in its favour.

United Petroleum applied to the VSCA for leave to appeal the decisions in both proceedings. Interestingly, the hearing of the application commenced on the same day that the High Court provided judgment in *Pentelow*.

Relying on reasoning in *Pentelow*, the VSCA confirmed that Freehills could not rely on the *Chorley* exception for the purpose of recovering costs of the work of its employed solicitors and other staff, as that exception had been retrospectively abolished by the High Court.[7] Freehills conceded that it could not recover costs in respect of work undertaken by partners of the firm.[8] The only available avenue was determining that the role of employed solicitors of law firms was analogous to that of in-house counsel/

solicitors in government agencies and corporations, whose costs are recoverable on an *inter partes* basis and to whom the general rule does not apply.

Justices Whelan, McLeish and Niall held that employed solicitors of law firms are not analogous to in-house counsel because the employer law firm is both the party and the solicitor on the record (that is, it is self-represented). In contrast, an employer corporation/government agency is the party and the in-house counsel is the solicitor on the record.[9] Additionally, a partner of the law firm has 'oversight and control of the litigation'[10] 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).

As a result, Freehills was not entitled to recover the fees incurred for work undertaken by its employed solicitors and other staff.

SELF-REPRESENTED INCORPORATED LEGAL PRACTICES

While *United Petroleum* dealt with the rights of law firms (a partnership of legal practitioners, including incorporated law practices),[11] on 5 June 2020 the VSC delivered judgment in *Guneser v Aitken Partners*[12] (*Guneser*) clarifying the position on the rights of an incorporated legal practice (ILP) to recover its employees' costs of acting on its behalf.

Aitken Partners Pty Ltd, an ILP, was successful on three matters: a taxation of costs initiated by its former client Mr Guneser; a review of that taxation by a costs judge; and an appeal from that costs judge's decision to the trial division.

With respect to the costs aspects of each decision, while the costs registrar awarded Aitken Partners full professional costs and disbursements for acting for itself on the taxation, the costs judge, on review, set aside that decision and allowed Aitken Partners to recover only disbursements incurred during taxation. The costs judge made a further order for recovery of disbursements incurred for acting for itself in the review.

The question before the trial division on cross-appeal was whether the costs judge's decision on costs was correct.

In *Pentelow*, their Honours' comments were confined to a particular form of ILP – one where the employed solicitor is the sole director and shareholder.[13] Yet no determination was made about the entitlement of an ILP to recover professional costs when acting for itself in litigation, whether by its principal or employed solicitors.

As in *United Petroleum*, Macaulay J clarified that Aitken Partners could not rely on the *Chorley* exception to recover its professional costs after the position espoused by the High Court in *Pentelow*. The only option open to Aitken Partners was to demonstrate that their professional fees were recoverable on the same basis as in-house lawyers under the 'well-established understanding'.[14]

Justice Macaulay noted that 'an incorporated legal practice has the various incidents of being a corporation whereas [a] law partnership [firm] does not'.[15] Despite this, Macaulay J rejected Aitken Partners' argument that employees of an ILP should be seen as analogous to an in-house lawyer. Instead he highlighted several reasons demonstrating ILPs being more analogous to law firms when considering whether the costs should be recoverable. These included no practical or functional separation between the party to the litigation and the solicitor on the record, and the ultimate supervision and control of the *legal* work of its employees being at the hands of directors of the ILP.[16]

Accordingly, the decision of the costs judge was upheld.

CONCLUSION

In Australia, self-represented solicitors, barristers, law firms and incorporated legal practices, just like all other self-represented litigants, cannot recover costs for successfully acting for themselves. This ensures the fundamental notion of equality before the law is upheld.

All self-represented litigants are, however, entitled to recover their disbursements, including counsels' fees.

The general rule[17] does not apply to government agencies and corporations as these entities are rarely, if ever, 'self-represented'. Instead they are represented by their in-house solicitors.

The High Court decision of *Pentelow*, extended by the Supreme Court of Victoria decisions *United Petroleum* and *Guneser*, is likely to motivate solicitor and law practice litigants to outsource work to independent solicitors or barristers, whose costs can be recovered. ■

Notes: **1** *Cachia v Hanes* (1994) 179 CLR 403 (*Cachia*). **2** (1884) 13 QBD 872. **3** [2019] 93 ALJR 1007; [2019] HCA 29 (*Pentelow*). **4** Ibid, [50]. **5** Ibid, [75]. **6** [2020] VSCA 15. **7** Ibid, [95]. **8** Ibid, [49] and [59]. **9** Ibid, [97] and [102]. **10** Ibid, [99]. **11** *Legal Profession Uniform Law Application Act 2014* (Vic), s9A substituting a different definition of 'law firm' from that which appears in s6 of the *Legal Profession Uniform Law*. **12** [2020] VSC 329. **13** *Pentelow*, above note 3, [51]–[53]. **14** [2020] VSC 329, [62]. **15** Ibid, [69]. **16** Ibid, [66]. **17** Affirmed in *Cachia*, above note 1.

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