

ACTING FOR YOURSELF MAY NOT PAY OFF

Self-represented law firms cannot recover costs in respect of work performed by partners, employed solicitors or other employed staff.

There are many reasons why it is not a good idea to act for yourself in litigation, the recent outcome in *Bell Lawyers Pty Ltd v Pentelow*¹ illustrates one of them.

Bell Lawyers Pty Ltd v Pentelow

*Bell v Pentelow*² involved a barrister who sued solicitors for unpaid fees for appearing in a family provision dispute. The barrister represented herself in a successful fee recovery proceeding and sought legal costs in acting for herself. The case ended up in the High Court.

The High Court majority held that the old English exception, allowing self-represented solicitors to recover their legal fees when other self-represented litigants could not, was not part of the common law in Australia. This exception was commonly known as the *Chorley* exception after the 1884 case of *London Scottish Benefit Society v Chorley* where a self-represented solicitor was permitted to recover his costs.

The majority rejected one of the arguments used to justify the *Chorley* exception, namely, that it was too difficult to value the time of non-lawyers spent in the course of the litigation. They said this argument serves to “exalt the position of solicitors in the administration of justice to an extent that is an affront to equality before the law”.³ They concluded the privilege given solicitors in this exception is “inconsistent with the equality of all persons before the law”.⁴

They noted costs are awarded by way of indemnity (or partial indemnity) for professional legal costs actually incurred in the conduct of litigation, not as a comprehensive compensation for loss suffered by a litigant.⁵

They confirmed that in-house lawyers in government and corporations could still recover costs when representing their employers because they were outside the general rule that self-represented litigants could not recover their costs.

Importantly, the plurality expressed the view that self-represented solicitors lacking the impartial and independent advice the court expects its officers to give litigants may also lack objectivity given their self-interest as named parties.⁶ They went on to comment that modern orthodoxy finds as a matter of professional ethics that it is undesirable for solicitors to act for themselves.⁷

The case has recently been given additional clarity by the Victorian Court of Appeal and applied to prevent a self-represented law firm recovering legal costs in respect of work done by employed solicitors within the firm.⁸

The Court of Appeal said to permit recovery of costs for work done by employee solicitors would undermine the unequal treatment that *Bell v Pentelow* sought to eradicate.⁹ However, the firm could recover costs in respect of disbursements incurred by it in the course of the litigation or insofar as it had incurred legal costs with external lawyers who were retained by the firm and assumed carriage of the case part-way through the proceeding.

Lessons

The lesson from these cases is clear – if you or your firm are self-represented in litigation, you will not be entitled to seek legal costs for your own time or that of your partners or employees in running the claim.

Firms wanting to represent themselves in litigation should think carefully about the consequences of doing so – it raises the risk of a lack of objectivity in the way the matter is handled, including decisions as to whether the case should be settled.

Courts are also concerned to ensure solicitors are not seen to be profiting from conducting their own litigation and potentially bringing the administration of justice into disrepute.

While instructing external lawyers in actions for unpaid legal fees means incurring out of pocket costs, it will ensure you receive the benefit of independent and dispassionate legal advice at a time when your emotions may be running higher than usual. This is especially important if a claim for unpaid fees prompts threats of a counterclaim for professional negligence. ■

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1. *Bell Lawyers Pty Ltd v Pentelow* [2919] HCA 29.
2. Kiefel CJ, Bell, Keane and Gordon JJ, with Gageler and Edelman JJ each providing separate judgments. Nettle J dissenting on this point.
3. Note 2 above, at [24].
4. Note 2 above, at [25].
5. Note 2 above, at [44].
6. Note 2 above, at [18].
7. Note 2 above, at [19].
8. *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15.
9. Note 8 above, at [108].

TIPS

- *Bell Lawyers Pty Ltd v Pentelow* found the *Chorley* exception is not part of Australian common law.
- Self-represented firms are not entitled to a costs order for the work done by partners or employees of the firm.
- Retain external lawyers to act in proceedings for unpaid fees to ensure you get the benefit of objective and dispassionate legal advice at all stages.

