BELL LAWYERS PTY LTD v PENTELOW & ANOR (S352/2018)

Court appealed from: Supreme Court of New South Wales, Court of Appeal [2018] NSWCA 150

Date of judgment: 13 July 2018

Special leave granted: 14 December 2018

In July 2010 Ms Janet Pentelow, a barrister, sued Bell Lawyers Pty Ltd ("Bell Lawyers") in the Local Court for unpaid fees for work she had performed for a client of that firm. After being unsuccessful in the Local Court proceedings, Ms Pentelow succeeded on appeal to the Supreme Court. The Supreme Court made an order for costs in Ms Pentelow's favour, for the proceedings in both courts.

In the Local Court proceedings Ms Pentelow had been represented by a solicitor and in the Supreme Court proceedings she had been represented by solicitors and senior counsel. In both proceedings she had also undertaken legal work herself. Based on the costs order made by the Supreme Court, Ms Pentelow sent a bill to Bell Lawyers claiming the payment of her legal costs of both proceedings. The bill included amounts for the legal work which Ms Pentelow had carried out herself (which amounted to approximately $45,000 of a total bill of approximately $144,000). Bell Lawyers had the bill assessed by a costs assessor, who disallowed all of the costs claimed by Ms Pentelow for the work which she had undertaken personally. This was on two bases: (1) Ms Pentelow had not been self-represented; and (2) the exception to the rule that a self-represented party is not entitled to his or her costs of pursuing legal proceedings personally, known as "the *Chorley* exception" (which applies to solicitors), did not apply to barristers. Upon a review of the costs assessment, a Review Panel determined that the *Chorley* exception indeed did not apply to barristers in New South Wales and that it had been open to the costs assessor to conclude that Ms Pentelow had not been self-represented in the Local Court and Supreme Court proceedings.

An appeal by Ms Pentelow to the District Court was dismissed on 25 August 2016 by Judge Gibson, who essentially held that the Review Panel had not erred.

Ms Pentelow then applied to the Court of Appeal for judicial review of Judge Gibson's decision. The Court of Appeal allowed Ms Pentelow's application in part (Beazley ACJ and Macfarlan JA; Meagher JA dissenting) and remitted the matter to the District Court (for remittal by that court to the Review Panel and for potential further remittal by the Review Panel to a costs assessor).

The majority of the Court of Appeal approached the matter as an application of the *Chorley* exception to Ms Pentelow's circumstances, namely, a barrister who was represented but who undertook some of the legal work herself. The rationale of the *Chorley* exception was based on the ability to quantify the type of legal work generally undertaken by solicitors. The majority found that barristers now also undertook such legal work and their fees were subject to the

process of costs assessment. The majority held that the *Chorley* exception ought to apply to barristers in Ms Pentelow's circumstances.

Meagher JA however would have dismissed Ms Pentelow's application. His Honour held that the "costs" to be considered for partial indemnification by costs orders were those actually incurred and payable. That was due to the statutory source of the power to award costs, which was s 98(1) of the *Civil Procedure Act 2005* (NSW), read with the definition of "costs" in s 3(1) of that Act. The fees claimed by Ms Pentelow were not the subject of accounts rendered to her solicitors. Meagher JA found that Ms Pentelow's position was similar to that of a lay litigant who sought to claim for the value of his or her time.

The grounds of appeal are:

- The Court of Appeal erred in finding that Ms Pentelow was entitled to recover costs of the time spent by her in the conduct of the Local Court and Supreme Court proceedings.

- The Court of Appeal erred in determining that the *Chorley* exception applied to Ms Pentelow in circumstances where she retained solicitors in the Local Court and Supreme Court and, in addition, counsel in the Supreme Court.

- The Court of Appeal erred in determining that s 98 of the *Civil Procedure Act 2005* (NSW) permitted the application of the *Chorley* exception to Ms Pentelow.