No Special Treatment for Lawyers – Debt Recovery for 'Fools'

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By Chloe Howard, a Solicitor of Matthews Folbigg, in our Insolvency, Restructuring and Debt Recovery Group

They say a person who represents himself has a fool for a client. However if the person is lawyer, at least the 'fool' could recover his or her own professional costs in debt recovery proceedings. Or at least that was until a High Court's decision this week abolished this special treatment for lawyers.

Normally, it is not possible for a self-represented litigant to recover any costs of litigation, including debt recovery. Until recently, however, there was a benefit of lawyers keeping their own debt recovery in-house: The *Chorley* exception. This exception, adopted from the Court of Appeal of England and Wales case of *Scottish Benefit Society v Chorley* (1884) 13 QBD 872, meant that lawyers who represented themselves in litigation, including debt recovery for their own fees, were entitled to recover the costs associated with litigating that claim.

The *Chorley* exception was great for lawyers – it meant lawyers could keep their debt recovery in-house and recover the costs associated from litigating to recover the debt – a win, win. The justification for the exception was said to be that professional skill could be measured by the law, whereas private effort could not, and that it was "absurd to permit a solicitor to charge for the same work when it is done by another solicitor, and not to permit him to charge for it when it is done by his own clerk" (per Bowen LJ in *Chorley*)

However, on 4 September 2019, the High Court of Australia found this justification 'unpersuasive' and inconsistent with the general principle that costs in litigation were intended to partly recover monies actually incurred in the conduct of litigation. In the matter of *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, the High Court considered the question of whether the Chorley exception extended to work done by barristers (as distinct from lawyers) when recovering their own fees. The High Court nevertheless took the opportunity to consider whether Chorley exception was or should be part of the common law.

Although Justice Nettle did not find it necessary to decide this question to dismiss the barrister's appeal, the remaining judges of the High Court all held that the *Chorley* exception should not be recognised as part of Australian common law. In making the decision, it was stated by the plurality (Kiefel CJ, Bell J, Keane J, and Gordon J at [3]) that the Chorley exception was "*an affront to the fundamental value of equality of all persons before the law*".

What This Means for In-House Debt Recovery

So, what does this mean for in-house debt recovery for lawyers moving forward?

Ultimately, the decision in *Bell Lawyers Pty Ltd v Pentelow* means there is very little benefit for lawyers to keep their own debt recovery in-house, as the time spent in pursuing the debt will not be recoverable.

The High Court drew a distinction between in-house solicitors, however, and held that the entitlement of organisations engaging their own in-house lawyers to undertake litigation and debt recovery was not based upon the *Chorley* exception.

However, for lawyers and firms wishing to pursue recovery of unpaid fees, the time and cost effective approach will be to outsource the debt recovery to another firm who will be able to claim the costs associated with pursuing the debt on your behalf, thus reducing the cost burden for lawyers recovering these debts themselves.

Read the decision here [*Bell Lawyers Pty Ltd v Pentelow*].

Matthews Folbigg is a specialist in debt recovery. If you are a lawyer who is looking for a cost-effective debt recovery arrangement, please contact a Principal of the Matthews Folbigg Insolvency, Restructuring and Debt Recovery Group:

- Jeffrey Brown on (02) 9806 7446 or jeffreyb@matthewsfolbigg.com.au
- Stephen Mullette on (02) 9806 7459 or stephenm@matthewsfolbigg.com.au