SUPREME COURT OF QUEENSLAND

CITATION:	*Equititrust Limited (Receivers and Managers Appointed) (In Liquidation) v Tucker & ors* [2019] QSC 308
PARTIES:	**EQUITITRUST LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ON ITS OWN ACCOUNT AND AS TRUSTEE OF THE EQUITITRUST PREMIUM FUND** **ACN 061 383 944** (plaintiff) **v** **DAVID ROBERT WALTER TUCKER** (first defendant) **TUCKERLOAN PTY LTD ON ITS OWN ACCOUNT AND AS TRUSTEE OF THE TUCKERLOAN TRUST** ACN 101 109 157 (second defendant) **DAVID ROBERT WALTER TUCKER AND RICHARD TERRICK COWEN, CARRYING ON THE PRACTICE AS PARTNERS UNDER THE NAME TUCKER & COWEN SOLICITORS (A FIRM)** (fifth defendants) **TCS SOLICITORS PTY LTD** ACN 601 321 509 (sixth defendant)
FILE NO:	BS No 7399 of 2018
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	4 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	4 December 2019
JUDGE:	Bradley J
ORDERS:	**1. Pursuant to rule 742(6)(b) of the *Uniform Civil Procedure Rules* 1999, paragraphs 3.1(a), 3.2(a) and 5 of the costs assessor's decision included in the Costs Assessment Certificate dated 17 October 2019 (the "Certificate") are set aside.** **2. Pursuant to rule 742(6)(b), paragraphs 3 and 6 of the costs assessor's decision included in the Certificate are**

varied by:

a. deleting references to the sum of $173,752.41; and

b. inserting in its place the sum of $86,747.52.

3. Pursuant to rule 742(6)(c), the Order of the Registrar made on 28 October 2019 is varied by deleting from paragraph 1 the sum of $173,752.41 and inserting the sum of $86,747.52.

4. Pursuant to rule 742(6)(d), the items in the costs statements relating to the fees claimed by the Second Defendant (if any) are to be referred back to the costs assessor for reconsideration.

5. Pursuant to rule 742(6)(d) and (e), the question of which party is entitled to be paid the costs of the assessment in paragraph 4 of the costs assessor's certificate dated 17 October 2019, and any further costs incurred since that date or to be incurred in respect of the costs assessment, including the costs of the provision of the reasons, are to be referred back to the costs assessor for reconsideration.

6. The first, second and first-named fifth defendants are to pay the plaintiff's costs of the application dated 21 November 2019.

The Court directs that:

7. The first defendant, the second defendant, and the first-named fifth defendant are to provide the costs assessor a copy of the reasons of Bradley J of 4 December 2019.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL MATTERS – NATURE OF COSTS: INDEMNITY DOCTRINE – APPLICATION TO PARTICULAR PERSON OR PARTY – LEGAL PRACTITIONER ACTING FOR SELF – where the plaintiff was ordered to pay the costs of several defendants in respect of two applications successfully brought against the plaintiff – where the costs assessor decided to include in the award of costs professional fees incurred by the first defendant, a solicitor, in acting for himself and the second defendant – where the plaintiff applies for review of that decision, on the basis that the costs assessor failed to appropriately apply the decision in *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, in which the High Court found that the *Chorley* exception is not part of the common law of Australia – where the first, second and first-named fifth defendants contend that the costs assessor was correct in finding that the decision in *Bell Lawyers* was not applicable

as costs were sought pursuant to a legislative regime, rather than the common law – whether the costs assessor erred in law

Civil Proceedings Act 2011 (Qld), s 15
Legal Profession Act 2007 (Qld), part 3.4
Uniform Civil Procedure Rules 1999 (Qld), r 742, r 691

Bell Lawyers Pty Ltd v Pentelow (2019) 93 ALJR 1007; [2019] HCA 29, applied

COUNSEL: P Somers for the plaintiff
P Hackett for the first, second and first-named fifth defendants

SOLICITORS: Russells for the plaintiff
D Tucker for the first, second and first-named fifth defendants

[1] The plaintiff Equititrust Limited (Receivers and Managers Appointed) (In Liquidation) (**Equititrust**) applied to review certain decisions of a costs assessor. There were five grounds of review. Each concerns the costs assessor's decision to include costs for the work of the first defendant (**Mr Tucker**), a solicitor, who appeared for himself and the second defendant (**Tuckerloan**).

[2] The application was heard on 4 December 2019 in the applications list. These reasons comprise the revised *ex tempore* reasons for the decision provided at the conclusion of the hearing, augmented by the inclusion of extracts of referenced documents, some defined terms and foot-noted references. One matter dealt with after the judgment in exchanges with counsel – about a contractual liability in a costs agreement – has been also included in the reasons.

Background

[3] Earlier this year, Mr Tucker and Tuckerloan (the **Tucker defendants**) and other defendants were successful, to some extent, in a challenge to the statement of claim filed by Equititrust. The Tucker defendants were wholly successful in an application for Equititrust to provide security for their costs.[1]

[4] On 18 March 2019, Equititrust was ordered to pay 80% of the Tucker defendants' costs of the challenge to the statement of claim and all their costs of the application for security.

[5] The process for the assessment of those costs proceeded.[2] On 17 October 2019, the costs assessor delivered a certificate of assessment (**Certificate**).

"**COSTS ASSESSOR'S CERTIFICATE**

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1 Both applications were heard on 14 February 2019 before Justice Bowskill. Her Honour's orders and reasons were published in *Equititrust Limited v Tucker & Ors* [2019] QSC 51.

2 The Tucker parties served a costs statement. Equititrust served a notice of objection. The registrar appointed a costs assessor. The costs assessor issued a number of directions to the parties. The parties made submissions to the costs assessor.

I, *Edward Thomas Skuse*, of Skuse and Co. Solicitors and Costs Assessors, 20 Robert Street, Mudgeeraba in the State of Queensland 4213 certify that –

1. I am an approved costs assessor appointed under the Uniform Civil Procedure Rules 1999.
2. I was appointed to assess the costs in this matter pursuant to the Order of the Registrar dated *11 June 2019*.
3. I have assessed the costs payable by the Plaintiff to the abovenamed Defendants in the amount of *one hundred and seventy-three thousand, seven hundred and fifty-two dollars and forty-one cents ($173,752.41)* comprising:
   - 3.1 Costs Statement dated 30 April 2019:
     - a. Fees allowed on above Costs Statement $59,923.01
     - b. Disbursements allowed on said Costs Statement $82,922.52
   - 3.2 Additional Costs Claim dated 5 September 2019 replaced on 26/09/19:
     - a. Fees allowed on Additional Costs Claim $ 6,843.88
     - b. Disbursements allowed on Additional Costs Claim $ 3,825.00
4. Assessor's fees total for assessing three Costs Statements/Claims $20,238.00
5. The party entitled to be paid the costs of the assessments are the Defendants.
6. The total amount payable by the abovenamed Plaintiff is: $173,752.41

Signed: [signature]

Edward Thomas Skuse, Costs Assessor

Dated: the 17 day of October 2019"

[6] On 21 October 2019, Equititrust sought reasons from the costs assessor for the decision to allow the Tucker defendants professional fees of $66,766.89.[3] On 8 November 2019, the costs assessor delivered written reasons.

The application for review

[7] The review application was made under rule 742 of the *Uniform Civil Procedure Rules* 1999 (**UCPR**). The court will interfere in a costs assessor's decision where a discretion has not been exercised or where it has been exercised in a manner that is manifestly wrong.[4]

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3 This figure is the total of the two amounts allowed in paragraphs 3.1(a) and 3.2(a) of the Certificate.

4 The court's approach to a review was identified by the Tucker parties in their written submissions, citing: *Redfern v Mineral Engineers Pty Ltd* [1987] VR 518 at 523 (Tadgell J); *Hannover International Ltd v Robson* [2012] QSC 47 at [17]-[18], [47] (Ann Lyons J); *Australian Coal and Shale Employees'*

[8] In this application, the court's consideration was confined to the five grounds set out in the application.

The first ground: the Bell Lawyers decision

[9] The first ground concerns the effect of the recent decision of the High Court in *Bell Lawyers Pty Ltd v Pentelow*.[5] In that decision, the court dealt with the so-called "*Chorley* exception." By a majority, the court held that the exception was not part of the common law of Australia.

[10] The exception, and its title, derive from a decision of Lord Brett MR in *London Scottish Benefit Society v Chorley*.[6] There, the Master of the Rolls said:

> "When, however, we come to the case of a solicitor, the question must be viewed from a different aspect. There are things which a solicitor can do for himself, but also he can employ another solicitor to do them for him; and it would be unadvisable to lay down that he shall not be entitled to ordinary costs if he appears in person, because in that case he would always employ another solicitor."[7]

[11] The *Chorley* exception, as its name betrays, was an exception to the common law rule: that where a party appears for himself or herself, the party is not indemnified for the loss of time incurred in doing so.

[12] It was common ground between Equititrust and the Tucker defendants that the rationale for the decision in *Bell Lawyers* was that an award of costs in litigation is to partially indemnify a successful party for the costs incurred in conducting the litigation and the general position is a person acting for themselves is not entitled to an award of costs. As the Tucker defendants identified, costs are a creature of statute. They submitted the High Court had found: that the *Chorley* exemption "had been displaced" by the *Civil Procedure Act* 2005 (NSW).[8] That submission, which reflects "one view" considered by the plurality,[9] does not accord with their Honours' conclusions.[10] The Tucker defendants correctly identified the High Court's observations that "the privilege of Chorley is inconsistent with the equality of all persons before the court" and that the relevant costs "are costs rendered under a contract of service."

[13] Mr Tucker is a solicitor. He appeared for the Tucker defendants at the hearing of the applications. The professional fees claimed by the Tucker defendants (and allowed by the costs assessor) were for attendances and work by Mr Tucker. The Tucker defendants submitted that the decision in *Bell Lawyers* had no relevant operation here, because they "did not rely upon the previous Chorley common law position to recover solicitors' costs". Instead, it was submitted, they relied upon:

Federation v The Commonwealth (1953) 94 CLR 621 at 627-628 (Kitto J); and *Farrar v Julian-Armitage & Anor* [2015] QCA 289 at [15] (Henry J, McMurdo P and Morrison JA agreeing). For Equititrust the same position was adopted, relying on *Australian Coal and Shale Employees Federation v The Commonwealth* (op cit) at 627 and *Nashvying Pty Ltd & Ors v Giacomi* [2009] QSC 31 at [4] (Jones J).

5 [2019] HCA 29.

6 (1884) 13 QBD 872.

7 at 875.

8 In their submissions, the Tucker defendants described this as "the NSW equivalent of the *UCPR*".

9 Kiefel CJ, Bell, Keane and Gordon JJ at [15].

10 See: [33], [44] and [57].

> "the statutory regime for costs in s 15 of the *Civil Proceedings Act* 2011, the recovery of solicitors' costs pursuant to Part 3.4 of the *Legal Profession Act* 2007 (costs agreements) and rule 691 of the *UCPR*."

[14] This submission was explained in the following way:

> "12. Section 15 of the [*Civil Proceedings Act*] provides: "*A court may award costs in all proceedings unless otherwise provided*."
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> 13. Costs are in the discretion of the Court: r 681 *UCPR*. That means that the Court has full power to determine by whom, to whom and to what extent costs are to be paid (in similar terms to the NSW *Civil Procedure Act* considered in *Bell Lawyers v Pentelow* at [13]). In this case the Court made costs orders in favour of the Tucker defendants.
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> 14. Rule 691 *UCPR* provides that an Australian lawyer is entitled to charge and be allowed the costs under the scales of costs for work done for or in a proceeding in the court. Mr Tucker is an Australian lawyer (see r 679 *UCPR*, which definition adopts the (*sic*) s 5 of the [*Legal Profession Act*]). It means a person who is admitted to the legal profession under the [*Legal Profession Act*].
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> 15. A written Costs Agreement exists. The Costs Agreement is between David Tucker Solicitor as trustee of the Tucker Practice Trust (the Solicitor) and David Robert Walter Tucker and Tuckerloan Pty Ltd (the Clients).
>
> 16. Mr Tucker has been admitted as a solicitor in Queensland since 1991, and holds a practicing certificate.
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> 17. There is nothing in either the *UCPR*, the [*Civil Proceedings Act*] or the [*Legal Profession Act*] that states that a solicitor acting for themselves cannot recover costs. If that was the intention of the legislature, it would have expressly provided so. To have done so would offend the equality principle the High Court espoused in *Bell Lawyers v Pentelow*."

[15] These matters were the subject of a number of iterations of written submissions put to the costs assessor by the parties. In the reasons, the costs assessor summarised the submissions put by the Tucker defendants and then reached this conclusion about *Bell Lawyers*:

> "The High Court simply abolished a common law rule, being the *Chorley* exception. The High Court did not deal with the Queensland legislation, which does not disentitle a duly admitted practitioner from the right to recover legal costs."[11]

[16] The costs assessor made an error of law in reaching that conclusion.

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[11] The assessor's decision on this point may be found at pages 288 to 289 of exhibit TPR-1 to the affidavit of Timothy Patrick Russell sworn on 20 November 2019.

[17] It may be accepted that the power of the court to award costs by the order of 18 March 2019 was not subject to any relevant legislative restriction. There was no issue about the court's exercise of its discretion. Indeed, no challenge has been made to the costs order.

[18] It may also be accepted that Mr Tucker may charge for his work as a solicitor. The rights of Mr Tucker (as a solicitor) and those of his clients in respect of the recovery of such costs by Mr Tucker from his clients are regulated by the *Legal Profession Act.* There is no challenge here to the written costs agreement Mr Tucker (as a solicitor) executed with himself and the second defendant, Tuckerloan Pty Ltd (**Tuckerloan**), (as his clients) in compliance with those statutory provisions.

[19] These uncontroversial points do not govern the right of Mr Tucker and Tuckerloan to recover from Equititrust for costs charged for or attributed to Mr Tucker's attendances on behalf of himself and Tuckerloan.

[20] Under the common law, the general principle is that a party acting for himself or herself cannot recover the costs of their own time attending to their participation in the proceeding. The statutory provisions in the *Civil Proceedings Act* and in the *Legal Profession Act* and, indeed in the rules, do not operate to alter that common law position. They deal only with what is to occur in respect of costs. In each of those legislative instruments, "costs" means costs as understood by the common law.[12]

[21] Costs can only be awarded where a statute permits it. There are statutes, noted above, that permit the awarding of costs. But the extension of the right to recover costs to a solicitor acting for himself or herself was effected by the common law *Chorley* exception and not by any of the relevant statutory provisions. No enactment was required to remove the *Chorley* exception in Queensland.

[22] The High Court has decided the *Chorley* exception is not part of the common law of Australia. It follows that the exception – which might have entitled a solicitor acting for himself or herself to recover costs of their own attendances – is not part of the law. The interpretation of the relevant statutory provisions and rules proceeds without any such exception. This puts Mr Tucker in the same position as any other self-represented litigant. The decision did not affect the making of costs orders, but did affect the assessment of costs the subject of such orders.[13]

[23] Although the precise extent cannot be gauged from the Certificate, this error significantly affected the costs assessor's decision. The decision should be set aside insofar as it is recorded in paragraphs 3.1(a) and 3.2(a) of the Certificate. Given the likely significant effect of this error, it is also appropriate to set aside the decision recorded in paragraph 5 of the Certificate.

The second ground: failure to consider Equititrust's submissions

[24] The second ground of review is that the costs assessor failed to consider Equititrust's submissions relating to *Bell Lawyers*. Those submissions were dated 23 September 2019. Given the view I have taken of the first ground, it is not necessary to determine the second. I merely note that the costs assessor made no express reference to

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12 *cf* the term "legal costs" used in division 8 of the *Legal Profession Act* 2007 (Qld) and defined in s 346.

13 See, e.g., *Davey v Desso Pty Ltd* [2019] FCA 1735.

submissions of that date, but did refer to Equititrust's later submissions, which referred to and – to some extent – repeated the submissions made in the unreferenced submissions.

Third ground: limiting recovery to 5% of costs of Mr Tucker's attendances

[25] The third ground of review is a complaint that, insofar as Tuckerloan may be entitled to recover costs for Mr Tucker's attendances in acting as a solicitor for that company, the costs assessor failed to find that those costs were no more than five per cent of the total professional fees claimed.

[26] This ground is based upon a submission, put to the costs assessor by the Tucker defendants, that the "costs in relation to the Tuckerloan Pty Ltd Application are incidental" and "would consist of, at best, 5% of the total costs" incurred by the Tucker defendants.[14] By reference to the challenged paragraphs of Equititrust's pleading, the Tucker defendants explained:

> "You will note that the allegations in the statement of claim that relate to Tuckerloan are in paragraphs 117 and 118 and they barely cover one page of a 113 page statement of claim. The relief sought against Tuckerloan is in paragraphs 29-31 of the prayer for relief, being three paragraphs of 41."

[27] This ground of review was pressed "further or in the alternative", so that Equititrust persisted with it notwithstanding its success on the first ground.

[28] Equititrust submitted that, if Tuckerloan is entitled to recover costs for Mr Tucker's attendances, then the quantum of those costs should be assessed at five per cent of the total costs claimed for Mr Tucker's attendances. This was put as a factual conclusion to be drawn from the "admission" quoted above.

[29] I am not satisfied that such a conclusion can be drawn. The question of whether, and to what extent, Tuckerloan was entitled to recover costs for Mr Tucker's attendances in acting for that company is not a simple one. The costs assessor did not consider whether, if at all, Tuckerloan (by itself) had incurred costs that might be recoverable pursuant to the order. I do not consider it appropriate for this court to embark upon that examination on the basis of the evidence before it. That is a task more apt to be undertaken by a costs assessor.

[30] Given the error made by the costs assessor as to the effect of the decision in *Bell Lawyers*, if any costs are claimed by Tuckerloan, it would be appropriate for them to be assessed by a costs assessor on the basis of a corrected understanding of the application of that decision.

[31] In response to the court indicating this conclusion on the third ground, the Tucker defendants made a further oral submission based upon the costs agreement. They put that Tuckerloan could recover from Equititrust the whole of the costs charged by Mr Tucker for his attendances – whether acting for Tuckerloan or for himself or for both of them. This submission relied on a term in the costs agreement between Mr Tucker and the Tucker defendants that made each defendant jointly and severally liable to Mr

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[14] The submission was put by the Tucker defendants in response to an earlier Equititrust submission that Tuckerloan was entitled to claim 50% of the costs incurred by the Tucker defendants.

Tucker for any cost Mr Tucker could recover from either defendant under the costs agreement.

[32] The term may have contractual force as between Mr Tucker and Tuckerloan. It has no relevance to the costs that Tuckerloan can recover from Equititrust pursuant to the order of 18 March 2019. The order did not entitle Tuckerloan to an indemnity (partial or complete) in respect of costs incurred by another party. The agreement to be contractually bound to pay Mr Tucker for Mr Tucker's own costs, did not extend the scope of the costs the court awarded in Tuckerloan's favour to include Mr Tucker's costs.

[33] The entitlement of Tuckerloan to recover for Mr Tucker's attendances may also be affected by the fourth ground, also pressed "further or in the alternative".

Fourth ground: need for a principal's practising certificate

[34] The fourth ground was that Mr Tucker could not appear on behalf of Tuckerloan before 18 January 2019 when he obtained a principal's practicing certificate. It followed, according to Equititrust, Mr Tucker could not charge Tuckerloan (or himself) for his earlier attendances and any such charges should not have been assessed as part of the Tucker defendants' costs in the Certificate.

[35] This ground was said to flow from a consideration of the decision in *Worchild v Petersen*.[15] In that decision, the Court of Appeal dealt with an application for leave to appeal from a discretionary decision of a Magistrate not to award costs to a solicitor who held no practicing certificate during most of the period in which he acted for himself in Magistrates Court proceedings.

[36] Having carefully considered the reasons in that case,[16] I am unable to accept as correct the submission that the Court of Appeal decided a solicitor must have a practicing certificate, entitling him or her to engage in practice as a principal of a law practice, in order to recover his own costs.[17] Therefore, I am unable to reason by inference from the Court of Appeal's decision that, at any relevant time, Mr Tucker was not entitled to appear on behalf of Tuckerloan[18] in this proceeding.

[37] As noted above, it is not known whether Tuckerloan incurred legal costs in respect of which it is entitled to a partial indemnity, pursuant to the costs order. So it is not known whether those costs include costs paid or liable to be paid to Mr Tucker for his work acting as the solicitor for Tuckerloan. Without evidence of any such costs, I am not persuaded that Tuckerloan's position would be affected by the more restricted nature of Mr Tucker's practicing certificate prior to 18 January 2019, just as it is not known how they might be affected by the recognition that the *Chorley* exception is not part of the common law of Australia.

Fifth ground: liability for the costs of the costs assessment process

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15 [2008] QCA 26.

16 The reasons are set out by MacKenzie AJA, with McMurdo P and Holmes JA agreeing.

17 The decision was made at a time when the *Chorley* exception was thought to be part of the common law of Australia.

18 Or indeed, as seemed to have been put, on his own behalf.

[38] The final ground for review concerns the payment of the costs of the assessment process.

[39] A decision on that topic cannot be made until the correct total amount of any costs that should be allowed is determined through the costs assessment process. The costs assessor undertaking that task is the appropriate person, in the first instance, to make such a determination. Having set aside paragraph 5 of the Certificate, as well as paragraphs 3.1(a) and 3.2(a), the appropriate course is to refer the matters the subject of all these paragraphs for assessment by a costs assessor in accordance with the Rules.

Costs of the application for review

[40] The Tucker defendants submitted that the costs of the application should be apportioned between them and Equititrust on the basis of Equititrust's "partial success".

[41] Equititrust has succeeded on the major point of contention raised by the first ground. This was the matter of most significance in the dispute about the Certificate. Equititrust has not succeeded on the second ground, but in a way that appears to have no effect on the overall outcome.

[42] The court has made directions to refer the relevant items back to the costs assessor for reconsideration, which might be considered a partial success for Equititrust in respect of the third ground.

[43] Equititrust has failed on the fourth ground. The outcome of the fifth ground, of course, is a matter that should properly be determined by the costs assessor, but the decision, as recorded in the Certificate, will be set aside.

[44] In the circumstances, Equititrust has had substantial success in the application for review. I do not propose to apportion the costs of this application. I will order that the Tucker defendants pay Equititrust's costs of the application to review the costs assessor's decisions.

[45] I will also make a direction to assist any reconsideration of the Tucker defendants' costs claim.