15/10; [2010] VSC 133

SUPREME COURT OF VICTORIA

FOSTER JAMES PTY LTD v DALTON

Mukhtar AsJ

1 March, 15 April 2010

CIVIL PROCEEDINGS – LEGAL PRACTITIONERS — IMMUNITY FROM SUIT FOR CONDUCT OF LITIGATION IN COURT — CLAIM BY BARRISTER AGAINST INSTRUCTING SOLICITOR FOR UNPAID FEES FOR CONDUCT OF TRIAL — ALLEGATION OF INCOMPETENCE AND BREACH OF RETAINER — NO CLAIM BY CLIENT FOR LOSS — WHETHER IMMUNITY APPLIES – APPLICATION BY BARRISTER TO MAGISTRATE FOR SUMMARY JUDGMENT – APPLICATION GRANTED – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 2009, R10.08(1).

Section 10.08(1) of the *Magistrates' Court Civil Procedure Rules* 2009 provides:

> (1) Where the defendant has given a notice of defence, the plaintiff may at any time apply to the Court for an order against the defendant on the ground that the defendant has no defence to the whole or part of the claim, or no defence except as to the amount of the claim.

D. a barrister, sued FJP/L in the Magistrates' Court for the sum of $100,000 for payment of his professional fees for appearing for the plaintiffs in a substantial civil case in the Supreme Court. After FJP/L had given a notice of defence, D. applied to the Magistrates' Court for summary judgment. FJP/L resisted this application by asserting that D. did not act with expectable competence and diligence and as a result suffered a financial loss. The Magistrate, in granting the application, decided that D.'s services could not be said to be valueless and that the advocate's immunity prevented FJP/L from defending the claim. Upon appeal—

HELD: Appeal dismissed.

1. FJP/L's proposition was that the advocate's immunity was irrelevant because this case did not concern D.'s conduct in court, but involved an examination of whether D. was fit and well at the time he ran the case. Such an argument is specious. For summary judgment purposes, it was bound to fail.

2. FJP/L elevated the rationale or justification of the advocate's immunity into an applicable or decisive principle in itself, or a qualification to the immunity. But, the immunity is a substantive rule of the common law. It applies to any suit against an advocate concerning the conduct of a case in Court. If the rule applies on its terms then it applies; and it is no answer to say that it ought not apply or that it is irrelevant because the case will not involve a reopening of the trial (assuming that to be the case). The immunity means that a person is bound by the way the case was conducted in Court, so that negligence, actions without or contrary to instructions, not being a "team player", or errors of judgment at trial all fall within the purview of the immunity. The one possible and rare exception referred to by McHugh J in *D'Orta-Ekenaika* [2005] HCA 12; (2005) 223 CLR 1; (2005) 214 ALR 92; (2005) 79 ALJR 755; [2005] Aust Torts Reports 81-784 is the possibility of an intervention that an appellate Court may make in a case of "flagrant incompetence" of counsel which resulted in a miscarriage of justice. That consideration was not activated in the present case.

***D'Orta-Ekenaika v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1; (2005) 214 ALR 92; (2005) 79 ALJR 755; [2005] Aust Torts Reports 81-784, applied.**

***Francis v Bunnett* [2007] VSC 538, distinguished.**

3. It is not enough to assert simplistically that the client would not pay the solicitor because of the barrister's perceived physical and mental state, and therefore a loss has been sustained. The barrister has to be shown to be liable for a loss suffered by the solicitor. If D.'s personal condition and his conduct at trial caused the client to refuse to pay the appellant, then it must follow that D.'s performance during the trial of the principal proceeding would need to be assessed. That is, FJP/L had to establish that as a result of D.'s condition or incompetence or lack of diligence, the plaintiffs in the principal proceeding failed to be awarded a sum of damages that they would otherwise have been entitled to had they been represented by an advocate who was physically and mentally well. That necessarily involves revisiting the trial proceedings and collides with the immunity as well as its rationale. The source of the infliction of the alleged loss is the conduct of the case for which there is an immunity.

4. What FJP/L said he saw during the trial did not mean that D. did not conduct his case diligently and properly. The Magistrate was correct in finding that it was clear that the legal principle concerning the advocate's immunity precluded the defence of FJP/L.

MUKHTAR AsJ:

1. In Australia, it is a fundamental and pervading tenet of the judicial system that an advocate is immune from suit whether for negligence or otherwise in the conduct of a case in Court or in work out of court which is intimately connected with the conduct of a case in court.[1] The central justification for this immunity is the principle that controversies resolved by the judicial branch of government are not to be reopened except in a few narrowly defined circumstances. The desideratum of finality in legal proceedings is regarded as being not only a matter of particular interest to the disputants but also for society at large and the administration of justice.[2]

2. This truly is an extraordinary case. The respondent, a barrister, sued the appellant, his instructing solicitor, in the Magistrates' Court for payment of his fees for appearing for plaintiffs in a substantial civil case in this Court. In circumstances I shall expose later, the appellant sought to resist the claim by asserting that the respondent was exhibiting signs of stress and anxiety, and did not act with expectable competence and diligence. The appellant says that was in breach of the retainer and as a result, he — but not the client — has suffered a loss because the disappointed client would not pay the appellant's fees for work done on the case. Can that be reasonably argued to be a defence and set-off to the barrister's claim, or is it shut out by the advocate's immunity? That is the principal issue in this appeal.

3. In a contested application for summary judgment, the Magistrates' Court gave the respondent judgment on 6 November 2009 for $100,000 plus costs of $6,578.[3] In a written decision, the Magistrate decided that the respondent's services could not be said to be valueless, and that the advocate's immunity prevented the appellant from defending the claim.

4. A party to a civil proceeding in the Magistrates' Court may appeal to this Court on a question of law from a final order. The Notice of Appeal states this to be the question of law:

> Whether or not it is a defence to a claim for payment of barrister's fees that the fees rendered were rendered at a time when the barrister's physical and mental state was such that he was suffering from a stress and/or anxiety-related illness and he was physically and mentally unable to act with the normal competence and diligence which he would otherwise bring to his retainer.

5. Under rule 58.10(8), this Court may dismiss the appeal if satisfied that:

> (a) the notice of appeal does not identify sufficiently or at all a question of law;
>
> (b) the appellant does not have an arguable case on appeal or to refuse leave would impose no substantial injustice; or
>
> (c) the appeal is frivolous, vexatious or otherwise an abuse of the process of the Court.

The respondent urges that I should dismiss the appeal on all three grounds. He submits the appellant's case is a contrivance to avoid the advocate's immunity.

The facts

6. A good exposition of the facts is given in materials before the Court and in the respondent's written submissions. For present purposes, it is unnecessary to recite them copiously, and I shall confine myself to the salient facts and some contextual facts.

7. The respondent is a member of the Victorian Bar, having signed the Roll of Counsel in November 1998. He was retained by the appellant to appear on behalf of the plaintiffs at the trial of a Supreme Court proceeding of *Griffiths & Beerens Pty Ltd & Ors v Paul Duggan & Ors*. In essence, the plaintiffs purchased a 45% shareholding in companies for $6 million to give them 100% ownership. Under the relevant agreements, the defendant Duggan agreed to restraint of trade provisions. The plaintiffs alleged that Duggan actively assisted the other defendants (his children) to establish a rival business and induced employees, customers and suppliers to come his way. The case involved issues of breach of restraint of trade clause, breach of confidence, breach of

fiduciary duties and directors' duties, breach of employee's duty of fidelity, and an assessment of damages. The trial was heard and determined by Pagone J on various dates between March and May 2008. Judgment was given on 11 June 2008.

8. The respondent describes the case as long, difficult and strongly contested. An indication of the scale of the case is given in the early part of His Honour's judgment in this way:[4]

> The proceeding occupied 33 hearing days. The transcript of evidence spans 3368 pages. The court book is made up of over 21 arch-lever folders, and 270 separate exhibits were tendered. A combined narrative of facts of 65 pages was filed setting out agreed facts as well as others contended for, or disputed by, either party. The defendants' primary written submissions was 247 pages in length plus four shorter annexures. The plaintiffs' primary written submissions were 91 pages in length plus annexures and tables. Each handed up other written submissions, annexures and calculations during the course of argument.

9. His Honour upheld the plaintiffs' claims against all defendants, but ultimately found it not possible to disentangle the plaintiffs' claim and a set off for an amount admitted to be due to the defendants. Accordingly, His Honour ordered that on the claim and counterclaim the defendants were to pay the plaintiffs $145,385.82. That was less than an offer of compromise from the defendants. The outcome was not a financial success for the plaintiffs.

10. The trial had commenced on 3 March 2008. Some facts antecedent to the trial are significant. The client could not afford senior counsel. The instructing solicitor, Mr Alan Foster, said preparation costs had to be minimised and that he, Foster, would do most of the trial preparation. The client faced a winding up application in this Court, said to have been instigated at the behest of the trial defendant, Duggan, to thwart the pending trial. The client was not wound up but was ordered to pay the creditor's debt into Court. The respondent apprehended that the client could not pay the costs of a major trial from cash flow or working capital. He asked Foster to ensure that there was money in trust for fees.

11. At trial, the defendants were represented by senior counsel and 2 junior barristers. Mr Foster briefed a junior barrister to appear with the respondent. According to the respondent, in the first 2 weeks of trial, Mr Foster was instructing only on a few occasions but made himself available after Court hours.

12. During the early stages of the trial, the respondent asked Mr Foster whether he had obtained money in trust for counsel's fee, otherwise he would not act. A barrister is entitled to refuse to act unless the solicitor obtains funds on trust: *Dimos v Hanos*.[5] Mr Foster told him he was negotiating with a bank to obtain release of $300,000 to fund the proceeding. Later, he was told a bank had approved the payment of $300,000 and he had received the money in trust.

13. On 10 April 2008, the respondent received $78,375 for pre-trial preparation and for appearances and preparation from 3 to 18 March 2008. He did not receive any further payment, nor did he make any demand for payment, believing Mr Foster had funds in trust. He rendered his last bill for trial work on 21 May 2008. For preparation work and appearances during the trial, he issued invoices to the appellant for a total of $172,025 of which $105,950 remains unpaid.

14. In June 2008, Mr Foster said there was no more money in trust, that the clients were in the process of selling some industrial property and were also expected to succeed in some other litigation to be heard in August 2008. He said that once that sale went through or the litigation was settled or determined, there would be money to pay the barristers. Subsequently, he asked the respondent to appear for the client in the other litigation but the respondent would not do so unless his fees were paid.

15. In an affidavit filed in the Magistrates' Court for the summary judgment application, the respondent deposed to these facts after judgment was given by Pagone J:

> We discussed the *Griffiths & Beerens* proceeding. Foster told me that he and I had done the best job that we could for Beerens during the trial. He told me and I believed that he had recently had a conversation with Beerens in his office during which Beerens had said to him words to the effect that the result of the trial would have been better if it had not been for Foster's negligence. Foster told me and I believe that he had responded by telling Beerens to leave his office.

16. The respondent pressed for payment. Various communications took place in June 2008 between the respondent and Mr Foster to which I will not refer, but only say there was no suggestion of unwillingness to pay the respondent's fees or any complaint or question about his performance as counsel. In a letter from Mr Foster to the respondent on 27 June 2008, he had this to say:

> The total fees on page 1 of your letter claimed by yourself and Renee [that is, Renee Sion, the other junior barrister appearing with the respondent] total $273,125, and leave no funds for any other parties, including third parties such as Litsupport and the transcript provider, working on the file.
>
> The unpaid professional costs of Foster Harris exceed $85,000, in addition to disbursements paid out of the Foster Harris general bank account of over $6,000.
>
> As soon as we are able to discuss payment arrangements with the client] upon his return from China early next week, we will do so, and inform you of all proposals.

17. On 30 July 2008, Mr Foster paid another $20,000 towards the respondent's fee. Then, on 17 September 2008, after the respondent had engaged solicitors to collect the debt, Mr Foster sent a letter to the respondent's solicitors saying, amongst other things:

> We are placed in a difficult position as GB Pty Ltd and the other GB entities . . . have directed us not to pay any fees of Mr Dalton by reason of his inability to properly represent them during the trial. Notwithstanding this, we have endeavoured to have the clients pay such of Mr Dalton's fees as are presently not outstanding, and whilst reserving our rights to object to payment as directed by our client, we will continue to do so should the judgment debt ($145,000) and the costs orders become available

18. Then, on 1 October 2008, the respondent received an e-mail from the client which commences by saying "It is extremely unfortunate that I have to write this letter. It is, because of your insistence in taking legal action to recover payment for your services, which I now feel obliged to finally tell you how I feel about your performance during our trial." There followed some disobliging remarks, including an accusation that the respondent wanted to see the plaintiffs' case fail. The Court is not to be seen as protecting a litigant, but I do think it illuminating to repeat other opinions, not facts, in that communication from the client.

19. By letter dated 17 September 2008, Foster wrote to the respondent's solicitors stating: "Like Mr Dalton, we are out of pocket for over $100,000, largely as a consequence of the low damages award obtained in the proceedings." The letter stated that after the damages award was determined, the client's bankers reviewed their position and on 10 September 2008 appointed receivers and managers to the company, and the Australian Taxation Office had a court-appointed liquidator to wind up the company. The letter went on to say: "We are placed in a difficult position as GB Pty Ltd and the other GB plaintiffs . . . have directed us not to pay any fees to Mr Dalton by reason of his inability to properly represent them during the trial."

20. Thus, the respondent sued the appellant for his fees. In the Magistrates' Court the appellant filed a defence which, in essence, said three things. First, that the barrister "purported to provide the potential services of a competent barrister . . . at a time when he was not competent to do so by reason of illness or the effect of drugs." Secondly, that he failed to act on and carry out the directions and instructions of his instructing solicitor and made uninstructed concessions against the client's interests. Thirdly, that by reason of that conduct, the solicitor has been unable to recover his own fees in excess of $100,000 from the clients.

21. I take leave to say that the sensational and allusive statement in the filed defence that the barrister was "under the effect of drugs" should not have been made unless it was sustainable. It would lead any reader to think that reference is being made to the use of illicit or narcotic drugs. A statement like that is memorable, and could be highly injurious especially to a professional person. It is just as well, but no consolation, that in his affidavit in opposition to final judgment, Mr Foster adjusted this to refer to drugs being taken for an illness. He stated:

> 5. In the period July 2005 to February 2008, the Plaintiff presented as, and conducted himself as a highly-competent barrister.
>
> 6. However, some time shortly before the commencement of the trial on 3 March 2008, I became

> concerned that the Plaintiff presented as being highly anxious, constantly scratching what appeared to be itches, and had sores on his scalp around which the hair had been removed.
> 7. At or about the commencement of the trial, his facial colour was often bright red and after court his hands would shake and he had started smoking cigarettes. His personality was less patient and much more aggressive than I had experienced over the previous three years. I have formed the view that he was either quite ill or suffering side effects of drugs dealing with an illness. Discovery will be sought form [sic] the Plaintiff in relation to these issues.
> ...
>
> 12. In view of my 27 years post-admission experience, principally in civil litigation, I have developed a teaming role with counsel, where the client has the right to provide instructions to me and counsel, as to the manner in which a case is to be conducted, provided the client is made fully aware of the implications of those instructions. In my opinion, subject to the paramount duty to the Court it is the client who dictates the objectives of representation and a properly instructed barrister is required to proceed with that particular course of action.
>
> 13. In relation to this matter, the Plaintiff did not see the role of client/instructing solicitor/barrister in this way . . .
>
> 14. This refusal to act on instructions; the evidence and examples and consequences of it, lie at the heart of the defence in this matter. There were various times in the trial when the Plaintiff performed well and was told he had done so. However, the Plaintiff was also aware that I had formally briefed three other barristers (in addition to Sion) to assist in submissions and earlier had sought out three silks to assist in the representation of the matter. The Plaintiff refused my requests that he "team" with senior counsel and from this I formed the view that retaining senior counsel would not be beneficial without the Plaintiff's co-operation.

22. It is noteworthy, I think, that Mr Foster's affidavit said that "discovery will be sought from the plaintiff in relation to these issues." Thus, as I apprehend it, the issue which the solicitor contended ought be investigated (and thus summary judgment refused) was the barrister's physical and mental state at the time of the trial and whether it rendered him physically and mentally unable to act with competence and diligence. Yet the only basis for Mr Foster's opinion was his lay observation about anxiety, rubicund complexion, and shaking in the hands. I can only suppose that he had in mind probing for discovery into private and personal matters such as medical documents to reveal whether the respondent had any physical illness or "health issues" as they are called nowadays, or records of consultations with doctors, pharmaceutical prescriptions or some such documents.

23. The respondent filed a substantial, and in my assessment, a measured and dispassionate affidavit in the Magistrates' Court in support of summary judgment. He rejected as scandalous and vexatious any suggestion that he was ill or under the effect of drugs. He also said:

> 71. Foster instructed me on most days during the trial and I conferred with him by telephone or in person on every day of the trial. I also conferred with him in person or by telephone on most weekends and public holidays during the trial. He and I also communicated by email on an almost daily basis before and after Court. At no time did he ever say anything to me to indicate that he was dissatisfied with my performance or to indicate that he thought I was ill or under the effect of drugs. At no time did he say to me anything to suggest that Beerens was dissatisfied with my performance or thought that I was ill or under the influence of drugs. On a number of occasions Foster told me that he thought the trial was going well.
>
> 72. At no time during any of the discussions that I had with Foster after the trial did he raise any issue about my performance during the trial.
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> 73. At no time during or after the trial did Foster tell me that I had failed to carry out directions or instructions given to me by him. From time to time during the course of the trial he and I had discussions about points to make to the Court or topics on which to cross examine witnesses. In accordance with my ethical obligations as counsel, I adopted the suggestions of Foster with which I agreed and did not adopt those with which I disagreed.
>
> 74. I did not make any uninstructed or unnecessary concessions to the Court. At no time during or after the trial did Foster tell me that I had. To the best of my recollection, Foster and I have never discussed any concessions that I made to the Court.
>
> 75. Foster did discuss with me the appointment of senior counsel to act on behalf of the GB plaintiffs.

> To the best of my recollection he raised it with me after Court on 20 March 2008 which was Easter Thursday. I had closed the GB plaintiff's case that afternoon. Foster told me that he was thinking of engaging senior counsel, particularly in relation to the damages issue. Justice Pagone had expressed concern about the GB plaintiff's damages case.
>
> 76. Foster told me that he would only appoint a senior counsel if I approved. I told him that it was always a matter for him and the client as to whether senior counsel was appointed. He told me that he knew that but that he did not want to do it unless I approved. I told him that appointing senior counsel half way through a trial was not ideal. I told him that it would take senior counsel a long time to become familiar with the issues and it is likely that I would have to spend a lot of time helping whomever was appointed getting up to speed . . . I told him that it was a decision for him.

24. An affidavit was also filed in the Magistrates' Court by the respondent's co-counsel Renee Sion saying, in essence that: (i) there was no foundation for saying the respondent was affected by illness or drugs, and that he was at all times in command of an extremely complex case involving many witnesses; (ii) Dalton and Foster worked well together and Foster told her that Dalton had done a sensational job; and (iii) Foster told her in mid March 2008 that he had received $300,000 on trust from the client of which counsel's fees were the top priority, but in mid May told her that the money was gone.

25. On 19 October 2009, the Magistrate published a written decision in which he gave the respondent summary judgment. Rule 10.08(1) of the *Magistrates' Court Rules* permits a plaintiff to apply for summary judgment on the ground that the defendant has no defence to the whole or part of the claim. Rule 10.13(1) permits the Court to make an order in favour of the plaintiff unless the defendant satisfies the Court that "a question ought to be heard and determined at a hearing or that there ought for some other reason be a hearing of that claim or part." The tests are, by and large, the same as would be applied for summary judgment in this Court.

26. The Magistrate found first, that there was no evidence to challenge that the plaintiff's fees were fair and reasonable. Secondly, His Honour found that the advocate's immunity from civil suit encompasses actions in tort and contract, and the impugned actions of the plaintiff attracted the immunity. The Magistrate found that to allow the defendant to resist the claim would defeat the central justification of the advocate's immunity. Thirdly, His Honour held that it could not be legitimately asserted that the plaintiff's work was useless or valueless.

27. There are two elements of the argument sought to be put on appeal. First, the appellant submits that the advocate's immunity is an immunity from suit by the client. It is put that the client is not claiming a loss by reason of the barrister's conduct of the case. The appellant contends it can raise the breach of retainer as a plain defence and then make the transition to create a set off (which is a monetary countervailing claim based upon a legal liability) by contending the barrister did not provide the services of a properly-functioning barrister and, as a result, the appellant has not been able to recover its fees from the client in an amount in excess of $100,000. Thus, Mr Foster is saying that he, not the client, has suffered the loss and he seeks to set off that loss against the barrister's claim for fees.

28. Secondly, the appellant says if the only question is the barrister's physical and mental fitness to act, then no part of its case will involve reopening the conduct of the case conducted before Pagone J and disturbing the finality of that decision. Therefore, it was said, there is no invasion of the foundation on which the High Court in *D'Orta-Ekenaika* decided the advocate's immunity should rest.

29. At the very least, the appellant says their points are arguable or not hopeless, and on the conventional tests applicable to a summary judgment application, the Magistrate erred in not giving leave to defend.

30. The appellant's case was said to have the support of a decision of Lasry J in *Francis v Bunnett*.[6] In that case, a client sued her solicitor for breach of retainer and negligence claiming that due to the inattention paid to her case by the solicitor, she terminated his retainer. But despite that, she alleged the solicitor consented to settle the proceedings without her instructions to do so. The solicitor contended that his actions were so intimately connected with the conduct of a case in court that it fell within the immunity.

31. Lasry J held, on a summary judgment application, that where an advocate settles proceedings before trial, and there is no quelling of the controversy by the exercise of judicial power involving the determination of the issues in the case, it is arguable that such activities and the work connected with them may fall outside the advocate's immunity.[7] His Honour seemed to accept as not untenable a submission that suing a lawyer for settling a client's case on disadvantageous terms does not involve a collateral attack on a Court decision or involve the conduct of an advocate in Court; it only involves a consideration of the conduct of a legal practitioner and the advice provided. But in my view it is very important to see this case as not in any way involving conduct of a case in court. It concerns the boundaries of the immunity. That is not the present case.

32. The appellant also called in aid a decision of Cavanough J in *MM&R Pty Ltd v Grills*.[8] In that case, the conduct in question was the alleged negligent failure to take certain steps in time to have an appeal dismissed under the *Administrative Appeals Tribunal Act* (Cth). His Honour decided it was arguable that *D'Orta-Ekenaika* leaves room for solicitors and barristers to be found liable in negligence for conduct which, at least, can be properly characterised as sheer delay or mere inaction, where action is required. But this case did not involve conduct in court or preparation for court. Like *Francis v Bunnett*, this case is an example of a court considering the boundaries of the immunity.

33. Reference was also made to a decision of Byrne J in *Maurice Blackburn Pty Ltd v Birmingham*.[9] That is a lengthy case which need not be examined here, but His Honour organised the various allegations of negligence under separate headings. One of the headings was "General Competence and the Retainer of Counsel"; another was "Preparation of the Case for Trial". His Honour in that case did not purport to give anything more than a "brief survey" of the list of complaints and decided that for the most part in that case the complaints fell within the advocate's immunity.

34. His Honour determined that under the rubric of preparation of the case for trial, that sort of work fell within the boundaries of the immunity.[10] That must surely be so; preparation of work for trial is referable only to the conduct of a case for trial and therefore must be regarded as being intimately connected with the conduct of a case at trial. But the appellant apprehended that his Honour might be construed as going further and holding that complaints about general competence of counsel also fall within the immunity. If so, the appellant submitted his Honour was wrong. I do not concern myself with that submission. There is no doubt in the present case that the respondent's fees rendered were for trial preparation as well as appearance. For that reason, the decision of Byrne J was relied upon by the respondent.

35. To repeat: the appellant's proposition is that the immunity is irrelevant because this case does not concern the respondent's conduct in court, but "simply involves an examination of whether the respondent was fit and well at the time he ran the case." I think that argument is specious. For summary judgment purposes, I think it is bound to fail, for the following reasons.

36. First, I think the appellant is elevating the rationale or justification of the advocate's immunity into an applicable or decisive principle in itself, or a qualification to the immunity. But, the immunity is a substantive rule of the common law. It applies to any suit against an advocate concerning the conduct of a case in Court. If the rule applies on its terms then it applies; and it is no answer to say that it ought not apply or that it is irrelevant because the case will not involve a reopening of the trial (assuming that to be the case). The immunity means that a person is bound by the way the case was conducted in Court, so that negligence, actions without or contrary to instructions, not being a "team player", or errors of judgment at trial all fall within the purview of the immunity. The one possible and rare exception referred to by McHugh J in *D'Orta-Ekenaika* is the possibility of an intervention that an appellate Court may make in a case of "flagrant incompetence" of counsel which resulted in a miscarriage of justice.[11] That consideration is not activated here.

37. The decision in *Francis v Bunnett* is of interest but is not authority in support of the appellant's argument. The basis of that decision was obviously the fact that the conduct in question was not conduct in Court. All of the fees for which the respondent obtained judgment in the present case were for his conduct of the case in court and preparatory work for that conduct, both of which fall squarely within the boundaries of the immunity.

38. Secondly, I think it is illusory to say, as the appellant does, that the confines of its defence and set off will not involve a revisiting of the trial and the conduct of the case at trial. I agree with the respondent's principal submission that demonstration of loss caused by the barrister's alleged incompetence is critical to the erection of the defence and set off. In my view, it is not enough to assert simplistically that the client would not pay the solicitor because of the barrister's perceived physical and mental state, and therefore a loss has been sustained. The barrister has to be shown to be liable for a loss suffered by the solicitor. If the respondent's personal condition and his conduct at trial caused the client to refuse to pay the appellant, then it must follow that the respondent's performance during the trial of the principal proceeding will need to be assessed. That is, the appellant must establish that as a result of the barrister's condition or incompetence or lack of diligence, the plaintiffs in the principal proceeding failed to be awarded a sum of damages that they would otherwise have been entitled had they been represented by an advocate who was physically and mentally well. That necessarily involves revisiting the trial proceedings and collides with the immunity as well as its rationale. The source of the infliction of the alleged loss is the conduct of the case for which there is an immunity.

39. Thirdly, I think the respondent's alternative submission on causation is correct. That is, even assuming for the sake of argument that the immunity is not applicable, the appellant had to establish that its loss was caused by the barrister's alleged conduct. The appellant's loss was the unwillingness of the client to pay its own fees. It must show by evidence that the cause of the client to not pay the solicitor's fees was the lower than expected damages award. There was no evidence of that causal link. The refusal to pay the solicitors fees might be attributable to other reasons than the barrister's conduct of the case.

40. Finally, it was submitted that in a summary judgment application, the Court is not required to accept every statement in an opposing affidavit and conclude there is a factual controversy or a case to be investigated, especially if they are mere assertions, or are unsubstantiated or implausible. I accept that. But, it depends on the assertions, who is making them, if they are informed, and the degree to which they have, or lack conviction or the "ring of possible truth" making them worthy of investigation. Or, a Court at first instance may be moved to give leave to defend conditionally on the claimed sum being paid into Court.

41. Mr Foster is an experienced lawyer who has seen fit to say, on his oath, what he has said. And he has persevered with it, and must be taken to believe it. He does not say that what he saw affected the case from beginning to end. Indeed, he has made part payments of fees. I cannot dismiss his observations and conclude, as I was asked, as a value judgment that this case is a "try on" to intimidate the respondent into giving up or demoralising him to compromise his claim for payment.

42. What this Court can say is that the objective facts, as I have recited them, lack any consistency with the assertions now being made about the respondent's performance. Mr Foster has made the allegations only when sued. At a trial, it would be his and his client's opinion against the statement of the respondent. Does Mr Foster have in mind calling evidence from others observing the respondent at trial? To counteract that, will the respondent be forced to call others to say his performance was unquestionable, or even better? Would the presiding Judge be called? All of these questions I pose show that in truth this case is all about the advocate's immunity because the real difficulties with these questions is what underlies the rationale of the immunity in the first place.

43. Here, I am bound to say that litigation, civil and criminal, particularly but not exclusively in higher courts, is notoriously stressful for advocates, solicitors, witnesses and judges. Trial is hard. Long cases in particular are exhausting, sometimes oppressive. They have their ebbs and flows. Anxiety and nervousness are normal; indeed they can increase motivation. This is especially so for those "on their feet" and dealing with the heat in the crucible of trial. The heat of the battle sometimes brings out impatience and aggression. Performances in Court fluctuate depending on the shifting fortunes of a case, the dynamics of trial, professional interactions, client expectations, the quality of instructions, and the diligence and competence of instructing solicitors. There are a diversity of factors at play and great care or discretion must be taken in reaching conclusions about individual performances, certainly if one ventures, as Mr Foster has done, to give a quasi-medical opinion. If the respondent was not a "team player" maybe that was

attributable to a disposition of independence as counsel, in the interests of the client. If he made concessions, maybe that was because he regarded it as bad advocacy to argue an unsustainable point and infect the attraction of more persuasive points.

44. When it comes to applications for summary judgment the High Court in *Agar v Hyde*[12] said (omitting footnotes) –

> The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.

45. And the Court is bound to assess the case even if it may involve having to consider a substantial question of law.[13]

46. I cannot say the appeal is an abuse of process or is vexatious. The most I am willing to conclude is that the appellant's accusations are very weak and reflect on the merits of the case in general. What Mr Foster says he saw does not therefore mean Mr Dalton did not conduct the case diligently and properly. I prefer to dismiss this appeal under Rule 58.10 (8)(b) on the ground that, as the Magistrate found, it is clear that the legal principle concerning the immunity precludes the appellant's defence.

47. I order that the appeal commenced by notice of appeal filed 4 December 2009 and the summons for directions filed 11 December 2009 be dismissed with costs.

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[1] *D'Orta-Ekenaika v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1 at [45], [84]; (2005) 214 ALR 92; (2005) 79 ALJR 755; [2005] Aust Torts Reports 81-784.
[2] *D'Orta-Ekenaika* at [31] ff.
[3] The barrister abandoned the excess of his claim for $105,950 so as to come within the Magistrates' Court jurisdictional limit of $100,000.
[4] See 66 ACSR 472; [2008] VSC 201.
[5] [2001] VSC 173 at [86]-[87] (Gillard J).
[6] [2007] VSC 538.
[7] [2007) VSC 538 at [36].
[8] [2007] VSC 528 at [29] and [55].
[9] (2009) VSC 20
[10] At [155]
[11] *D'Orta-Ekenaika* at [196].
[12][2000] HCA 41; (2000) 201 CLR 552 at 575; (2000) 173 ALR 665; (2000) 74 ALJR 1219; [2000] Aust Torts Reports 81-569 per Gaudron, McHugh, Gummow and Hayne JJ.
[13] See discussion and authorities in Williams, *Civil Procedure Victoria*, Vol 1 at [22.06.25].

APPEARANCES: For the appellant Foster James Pty Ltd: Mr J O'Bryan, counsel. Foster Nicholson Legal, solicitors. For the respondent Dalton: Ms M Loughnan SC with Mr D Farrands, counsel. Hoyle Da Silva Lawyers.
