40/10; [2010] VSC 327

SUPREME COURT OF VICTORIA

FOSTER JAMES PTY LTD v DALTON

Ferguson J

31 May, 5 August 2010 — [2010] 28 VR 204

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 – MAGISTRATE NOT IN ERROR – APPEAL TO ASSOCIATE JUDGE DISMISSED – WHETHER ASSOCIATE JUDGE IN ERROR: *SUPREME COURT (GENERAL CIVIL PROCEDURE) RULES* 2005, R58.10(8)(b).

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 (Griffiths v Beerens). 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. An appeal to an Associate judge was dismissed (MC15/10; [2010] VSC 133). Upon appeal—

HELD: Appeal dismissed.

1. The key issue was whether the principle of the advocate's immunity from suit precluded FJP/L from relying on its defence.

2. In *D'Orta-Ekenaike* [2005] HCA 12; (2005) 223 CLR 1; (2005) 214 ALR 92; (2005) 79 ALJR 755; [2005] Aust Torts Reports 81-784 the majority of the High Court held that the immunity of advocates continues to apply in Australia. It applies whether the suit is for negligence or otherwise. Gleeson CJ, Gummow, Hayne and Heydon JJ stated that the central justification for the immunity is that controversies, once resolved, are not to be re-opened except in a few narrowly defined circumstances.

3. Whilst the High Court authorities concerned claims by clients against their lawyers – that is, as a 'shield' against suit, the justification for the immunity must apply equally where the lawyer's conduct is raised as a defence to a claim for fees. Both limbs of the defence of FJP/L's (breach of retainer and set-off) would inevitably lead to the re-litigation of at least part of the controversy in the Griffiths & Beerens proceeding.

4. In relation to the claim that the immunity does not apply where the party's position is merely defensive, one should look at the central justification for the immunity as expressed by the majority of the High Court in *D'Orta-Ekenaike*; that is, that controversies, once resolved, are not to be re-opened. That justification alone must also apply in circumstances where the client seeks to raise as a defence to a claim for fees, the conduct of counsel of the type alleged by Foster James against Mr Dalton. The same vice of collateral agitation of the substance of the matter will arise where there is subsequent litigation between persons involved in the original litigation although not parties to it.

5. FJP/L could not succeed simply by proving that Mr Dalton was ill. It would be necessary for FJP/L to establish that his ill health had led to a failure to provide the services of a competent barrister such that he was in breach of his retainer. Putting FJP/L's case at its highest, there would at least have to be evidence and argument about what Mr Dalton should have said and done in the Griffiths & Beerens proceeding if he had performed at the level he is alleged to have performed at in the past. That must lead to re-opening the matters that were in controversy in the Griffiths & Beerens proceeding.

6. Accordingly, the appeal from the Associate Judge's decision must be dismissed. FJP/L did not have an arguable case on appeal and it could not possibly succeed.

FERGUSON J:

History of the proceedings

1. Mr Dalton appeared as counsel for the plaintiffs in *Griffiths & Beerens Pty Ltd v Duggan*.[1] He was instructed by Foster James Pty Ltd. Some of Mr Dalton's fees were paid, but there is a balance outstanding. Mr Dalton sued Foster James for recovery of the unpaid fees in the Magistrates' Court[2] and he obtained summary judgment.

2. Foster James appealed to this Court. Mr Dalton was successful before an Associate Judge in having the appeal summarily dismissed under Rule 58.10(8)(b) of the *Supreme Court (General Civil Procedure) Rules* 2005 on the basis that Foster James did not have an arguable case on appeal.

3. Foster James appealed from the judgment of the Associate Judge. That appeal is by way of rehearing.[3] When the matter came before me, submissions were made as to the decisions of the Associate Judge and the Magistrate.

4. Both before the Magistrate and the Associate Judge, the key issue was whether the principle of the advocate's immunity from suit most recently expressed in *D'Orta-Ekenaike v Victoria Legal Aid*[4] precluded Foster James from relying on its defence.

Summary of decision

5. Foster James alleges that it does not have to pay Mr Dalton's fees because:

(a) he breached his retainer; and/or

(b) as a result of Mr Dalton's conduct, Foster James has been unable to recover its fees from its clients and it seeks to set off the amount of those fees against the claim made by Mr Dalton.

6. The central justification for the advocate's immunity is that once resolved, controversies are not to be re-opened.[5]

7. Foster James contends that:

(a) the immunity does not apply here because it is merely defending a claim brought by Mr Dalton rather than suing him; and

(b) even if the immunity applies to defence of a claim brought by a lawyer for payment of fees, it does not apply here because there would be no re-opening of the controversy in the original *Griffiths & Beerens* proceeding.

8. These contentions fail. Whilst the High Court authorities concerned claims by clients against their lawyers – that is, as a 'shield' against suit, the justification for the immunity must apply equally where the lawyer's conduct is raised as a defence to a claim for fees. Both limbs of the defence of Foster James (breach of retainer and set-off) would inevitably lead to the re-litigation of at least part of the controversy in the Griffiths & Beerens proceeding.

9. The appeal from the decision of the Associate Judge is dismissed as I am satisfied that Foster James does not have an arguable case on appeal.

10. My detailed reasons are set out below.

The defence of Foster James

11. Foster James' notice of defence states that:

(a) Mr Dalton purported to provide the potential services of a competent barrister to the plaintiffs in the *Griffiths & Beerens* proceeding at a time that he was not competent to do so by reason of illness or the effect of drugs;
(b) Mr Dalton failed to discharge his duty to his instructing solicitors to act on and carry out their directions and he made uninstructed concessions;
(c) by his conduct, Mr Dalton breached his retainer in such a manner as to disentitle him from charging for the work done;
(d) because of Mr Dalton's conduct, Foster James was unable to recover its fees from the client and it sought to set off this loss against Mr Dalton's claim.

Evidence as to competency

12. In opposition to the Magistrates' Court application for summary judgment, Mr Foster swore an affidavit. An excerpt is as follows:

> Competence
> 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 on which the hairs 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.

13. In relation to the issue of competency, Foster James also relied on an email from Mr Beerens, which was sent to Mr Dalton some time after judgment had been delivered in the Griffiths & Beerens case. Whilst Griffiths and Beerens succeeded in that proceeding, the amount of damages awarded was significantly less than that claimed. Mr Beerens' email is to the effect that this outcome was due to Mr Dalton's physical condition and state of mind.

14. Mr Dalton denied that he was ill or under the effect of drugs. This evidence was supported by an affidavit by his co-counsel who said that the allegation against Mr Dalton was without foundation.

Evidence as to failure to carry out instructions and making concessions

15. In his affidavit opposing summary judgment, Mr Foster gave what he said were two examples of Mr Dalton's alleged failure to follow instructions – an email that he sent to Mr Dalton and his co-counsel and draft submissions prepared by Mr Foster which were not included in the written submissions that were provided to the Court. Mr Foster also deposed that Mr Dalton made a concession without instructions in the written submissions provided to the Court in respect of some of the expert evidence. Mr Foster said that he only became aware of the concession on the morning when the submissions were handed up to the Court.

16. Mr Dalton denied that he had made any uninstructed or unnecessary concessions. He also said that during the trial, he and Mr Foster had discussions about points to make and topics for cross-examination, and he adopted the suggestions of Mr Foster with which he agreed, but not those with which he disagreed.

The Magistrate's decision

17. The Magistrate decided that the advocate's immunity from suit prevented Foster James from denying Mr Dalton's claim based on the issues raised by it. His Honour stated:

> Since the impugned actions of the plaintiff clearly attract the immunity (*D'Orta-Ekenaike 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), how then do the defendants [Foster James and Mr Foster] raise negligence or breach of an implied term in defence of the claim? They cannot raise it as a cross-claim, whether as a set-off or counterclaim. They cannot raise it as a pure defence because it asserts more than merely a denial of part or all of the claims. They cannot raise those matters unless in contradiction of the immunity.[6]

The Appeal

18. Foster James appealed from the decision of the Magistrate. The Notice of Appeal identified the question of law on which the appeal is brought as

> [w]hether or not it is a defence to a claim for payment of barristers 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.

19. The Notice of Appeal set out the grounds of appeal as follows:

> That the learned Magistrate erred by finding that, the principles enunciated in *D'Orta-Ekenaike 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 prevented the first defendant [Foster James] from defending [Mr Dalton's] claim for recovery of professional fees on the grounds that the barristers 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.

20. The Associate Judge dismissed Foster James' appeal under Rule 58.10(8)(b).

Test for Rule 58.10(8)(b) application

21. So far as relevant in this case, Rule 58.10(8)(b) provides that an Associate Judge may dismiss an appeal from the Magistrates' Court if the appellant does not have an arguable case on appeal.

22. There must be a high degree of certainty that there is not an arguable case before an Associate Judge should dismiss an appeal under the Rule.[7]

Does immunity preclude the defence?

23. One of the principal issues that the High Court considered in *D'Orta-Ekenaike* was whether the Court should reconsider its decision in *Giannarelli v Wraith*[8]. It was held in *Giannarelli* that at common law an advocate cannot be sued by his or her client for negligence in the conduct of a case in court, or in work out of court which leads to a decision affecting the conduct of the case in court.

24. In *D'Orta-Ekenaike* the applicant sued the barrister and solicitor who had represented him in a criminal matter. He alleged that the lawyers had breached the duties owed to him (either contractually or at law) and that, as a result, he had suffered loss. The primary judge ordered that the proceeding be stayed because the immunity defence principle applied. The majority of the High Court held that the immunity of advocates continues to apply in Australia. It applies whether the suit is for negligence or otherwise.[9] Gleeson CJ, Gummow, Hayne and Heydon JJ stated that the central justification for the immunity is that controversies, once resolved, are not to be re-opened except in a few narrowly defined circumstances.[10] Their Honours stated:

> This is a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society. If an exception to that tenet were to be created by abolishing that immunity, a peculiar type of re-litigation would arise. There would be re-litigation of a controversy (already determined) as the result of what had happened during, or in preparation for, the hearing that had been designed to quell that controversy. Moreover, it would be re-litigation of a skewed and limited kind. No argument was advanced to this Court urging the abolition of judicial or witness immunity. If those immunities remain, it follows that the re-litigation could not and would not examine the contribution of judge or witness to the events complained of, only the contribution of the advocate. An exception to the rule against the re-opening of controversies would exist, but one of an inefficient and anomalous kind.[11]

25. Counsel for Foster James also relied upon the following sentence from the judgment of McHugh J:

> Accordingly, the immunity should extend to any work, which, if the subject of a claim in negligence, would require the impugning of a final decision of a court or the re-litigation of matters already finally determined by a court.[12]

26. That sentence should be read in the context of the whole of his Honour's judgment, and the particular matters that his Honour was considering when making that statement. In that part of his judgment, his Honour was considering whether the immunity could apply to decisions made out of court and whether a distinction should be drawn between the role of a solicitor and a barrister when advising a client regarding the entering of a plea. Read in that context, I do not regard his Honour as having purported to relevantly restrict the boundary of the immunity. Further, as counsel accepted, the joint judgment in *D'Orta-Ekenaike* does not go that far.

27. Counsel also referred to *Francis v Bunnett*.[13] In that case, a client sued her solicitor for breach of retainer in negligence in respect of a claim that had been settled prior to trial. Lasry J refused to strike out the claim because it was arguable that where advocates resolve 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, such activities and the work connected with them may fall outside the immunity articulated in *D'Orta-Ekenaike*.[14]

28. That case is distinguishable from the present. There had been a settlement before trial and there was no determination by the Court of the dispute on the merits.

29. *Francis v Bunnett* was referred to by the Court of Appeal of the Supreme Court of Western Australia in *Alpine Holdings Pty Ltd v Feinauer*.[15] The court there held that it was arguable that certain claims against an advocate would not fall within the immunity. Those claims related to advice about a settlement offer and advice to plead and pursue a cause of action or head of damage which, as a matter of law, was doomed to and did fail. The court held that the claim should not be struck out at an interlocutory stage.

30. Counsel for Foster James also cited *MM & R Pty Ltd v Grills*[16] as authority for the proposition that there are circumstances in relation to the conduct of a case in court where the immunity would not apply. Cavanough J held that it was at least arguable that lawyers could be found liable for conduct amounting to sheer delay or mere inaction. His Honour was there concerned with allegations of delay in the conduct of litigation and failure to comply with directions for steps in the proceeding. That is something quite different from the issues raised by Foster James in this proceeding.

31. In *Maurice Blackburn v Burmingham*,[17] Maurice Blackburn sued Mr Burmingham for legal fees under a costs agreement. Mr Burmingham represented himself.

32. Byrne J listed Mr Burmingham's allegations against the solicitors under a series of headings including 'general competence and the retainer of counsel' and 'preparation of the case for trial'. After referring to the immunity of advocates, his Honour stated:

> A brief survey of Mr Burmingham's list of complaints shows that, for the most part they fall within this principle. Accordingly, no defence may be raised based upon them.

His Honour continued:

> More particularly, however, none of the allegations, except one, has been made out.

33. Counsel for Foster James relied upon earlier passages in the judgment. In those passages, his Honour stated that Mr Burmingham's defence contained allegations that he had suffered loss and damage, although his Honour did not see the pleading as a counterclaim. His Honour tried to assist the parties by identifying the allegations in the defence. They included questions as to whether items of work in the solicitors' bill were authorised or whether they were performed competently or otherwise in breach of contract as Mr Burmingham had alleged.[18] Counsel submitted that having regard to the nature of the matters raised by Mr Burmingham, what his Honour was saying in the passage above was that if the complaints were raised properly, they would amount to a claim against the solicitors in relation to work performed in court and the immunity would apply. It was submitted that otherwise the case is not consistent with *Giannarelli* and *D'Orta-Ekenaike*. It was contended that if the case is authority for the proposition that a party cannot raise a defence in relation to conduct that is otherwise covered by the immunity, then it is wrong. It was submitted that at the very least his Honour's observations must be understood to apply only to circumstances where the raising of the defence would involve a re-opening of the controversy in which the barrister acted in order to be consistent with *D'Orta-Ekenaike*. I do not interpret his Honour's reasoning in the limited fashion suggested by Foster James' counsel. It seems to me that his Honour did hold that the immunity applies in circumstances where a client is sued by his lawyers for fees and the client seeks to raise a defence based on allegations of negligence or breach of duty in performance of work to which the fees relate.

Foster James' case

34. As it was argued before me, Foster James' defence to the claim has two aspects. The first

is that Foster James should not have to pay because the retainer was not fulfilled. The second (which is in addition or alternative to the first) is a defence by way of set-off.

Defence 1 – The retainer was not fulfilled

Only a defensive position so immunity does not apply

35. It was submitted by Foster James that the immunity only prevents a lawyer from being sued for loss in relation to the conduct of the case. The contention is that it cannot apply in this case because Foster James' position is merely defensive – it does not seek to sue Mr Dalton.

36. The High Court authorities do concern claims by clients against their lawyers. The judgments talk in terms of lawyers not being liable to be sued in damages by their clients and reference is made in some of the judgments to the influence that the potential for being sued for negligence may have on counsel.[19] However, one should look at the central justification for the immunity as expressed by the majority of the High Court in *D'Orta-Ekenaike*; that is, that controversies, once resolved, are not to be re-opened. That justification alone must also apply in circumstances where the client seeks to raise as a defence to a claim for fees, the conduct of counsel of the type alleged by Foster James against Mr Dalton. The same vice of collateral agitation of the substance of the matter will arise where there is subsequent litigation between persons involved in the original litigation although not parties to it.

Immunity does not apply if there is no re-opening or re-litigation of the proceeding

37. It was submitted by Foster James that even if the immunity otherwise applies to the defence of a claim brought by a lawyer for payment of fees, it does not apply in this case. The reason for this, it was argued, is because the scope of the immunity can now be confined to circumstances where there would be a re-opening of the controversy in the original case. It was put that the issue on Foster James' defence, is whether Mr Dalton discharged his retainer. This, it was submitted, turned on whether Mr Dalton was fit and well at the time he ran the Griffiths & Beerens case. As such, it was contended that the defence would not involve the impugning of the Griffiths & Beerens judgment or any re-opening or re-litigation of that dispute. Counsel relied upon the passage of McHugh J's decision in *D'Orta-Ekenaike* set out at [25] above.

38. This contention was developed before me. It was put that the defence is that Mr Dalton was not performing in the way that he performed in the past and he was briefed on the basis of his past performance. It was submitted that this did not offend the immunity principle because the Magistrates' Court would simply be looking at the physical attributes of Mr Dalton and what he did in court, but Foster James would not contend that as a result of Mr Dalton's performance there would have been a different result in the Griffiths & Beerens proceeding. Foster James conceded that it would not make any claims against Mr Dalton and would not make any claim that Mr Dalton caused Foster James any loss. Therefore, it was argued, there would be no question of going behind the judgment or bringing the judgment into question.

39. Counsel for Foster James accepted however that it would be necessary to do more than simply establish that Mr Dalton was ill; counsel accepted that the consequences of that condition would depend upon the extent of it. Counsel submitted the case would presumably involve evidence of a number of things like what Mr Foster's observations of Mr Dalton were physically, his interactions with him and how and what he did in Court and how he behaved in Court.

40. There are a number of flaws in Foster James' contentions.

41. In essence, what Foster James asked the Court to do was to take a theoretical approach by looking at the legal issue of advocate's immunity in a vacuum leaving consideration of how the case would be formulated and run to the Magistrates' Court. However, in considering whether the defence would lead to a re-opening or re-litigation of the controversy in the Griffiths & Beerens proceeding, it is necessary to consider how the defence would be structured and how it would be argued and proved.

42. I do not accept that it is arguable that there would be no re-litigation of the controversy in the Griffiths & Beerens proceeding. As counsel accepted, Foster James could not succeed simply by proving that Mr Dalton was ill. It would be necessary for Foster James to establish that his ill health had led to a failure to provide the services of a competent barrister such that he was

in breach of his retainer. Putting Foster James' case at its highest, there would at least have to be evidence and argument about what Mr Dalton should have said and done in the Griffiths & Beerens proceeding if he had performed at the level he is alleged to have performed at in the past. That must lead to re-opening the matters that were in controversy in the Griffiths & Beerens proceeding.

Defence 2 – Set-off

43. The second defence raised by Foster James is one of set-off. It is put that Mr Dalton did not provide the services of a properly functioning barrister in his retainer and as a result, Foster James has not been able to recover its fees in an amount in excess of $100,000. It seeks to set-off its loss against the claims of Mr Dalton.

44. Foster James contends that the set-off does not offend the immunity principle because it does not involve the re-opening of the controversy in the Griffiths & Beerens proceeding. It is said by Foster James that it simply requires the examination of the conduct of Mr Dalton to see if it justifies the failure of the client in the Griffiths & Beerens proceeding in refusing to pay.

45. It was submitted on behalf of Mr Dalton that the Notice of Appeal did not include as one of its grounds the arguments put forward on behalf of Foster James on the set-off. However, the set-off is raised by way of defence and is pleaded as such in the Notice of Defence. In my view, the Notice of Appeal is wide enough to cover the set-off argument.

46. It was also submitted that the argument that Foster James (rather than its clients) suffered loss because it could not recover its fees, was a matter that was not agitated before the Magistrate and ought not to be permitted to be advanced as a defence available to Foster James on the appeal. Counsel relied on *Mond v Lipshut*[20] as authority for that proposition. However, that case concerned a new question of law that had not been argued in the Magistrates' Court. Here, the set-off argument relates to the same question of law that was in issue before the Magistrate and was involved in his decision. Foster James is entitled to raise the argument it did.[21]

47. Again, if it is to be established that Mr Dalton did not provide the services of a properly functioning barrister, it will be necessary to re-open the controversy in the Griffiths & Beerens proceeding or, in effect, re-litigate it for the reasons given in relation to the first limb of the Foster James' defence.

Conclusion

48. The appeal from the Associate Judge's decision must be dismissed. I am satisfied that Foster James does not have an arguable case on appeal and that it could not possibly succeed. The appeal should be dismissed under Rule 58.10.

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[1] [2008] VSC 201; (2008) 66 ACSR 472 (*'Griffiths & Beerens'*).
[2] He also sued Mr Alan Foster, but that was not relevant to the matter before me.
[3] RSC 77.06(7).
[4] [2005] HCA 12; (2005) 223 CLR 1; (2005) 214 ALR 92; (2005) 79 ALJR 755; [2005] Aust Torts Reports 81-784 (*'D'Orta-Ekenaike'*).
[5] *D'Orta-Ekenaike* [2005] HCA 12; (2005) 223 CLR 1 per Gleeson CJ, Gummow, Hayne and Heydon JJ at 20-21. See also McHugh J at 63 and Callinan J at 120; (2005) 214 ALR 92; (2005) 79 ALJR 755; [2005] Aust Torts Reports 81-784.
[6] At p9.
[7] *Cohen v Accounts Control Management Services Pty Ltd* [2009] VSC 618.
[8] [1988] HCA 52; (1988) 165 CLR 543 (1988) 81 ALR 417; [1988] Aust Torts Reports 80-217; [1988] ANZ Conv R 541; (1988) 35 A Crim R 1; (1988) 62 ALJR 611 (*'Giannarelli'*).
[9] *D'Orta-Ekenaike* [2005] HCA 12; (2005) 223 CLR 1 at 20-21; (2005) 214 ALR 92; (2005) 79 ALJR 755; [2005] Aust Torts Reports 81-784.
[10] Ibid. The exceptions as to the principle were not relevant in this case.
[11] Ibid. See also McHugh J at 63 and Callinan J at 120.
[12] Ibid at 56.
[13] [2007] VSC 527; (2007) 18 VR 98.
[14] Ibid.
[15] [2008] WASCA 85.
[16] [2007] VSC 528.
[17] [2009] VSC 20.

[18] At [37], [40] and [41].
[19] For example, Mason CJ in *Giannarelli* [1988] HCA 52; (1988) 165 CLR 543 at 557; (1988) 81 ALR 417; [1988] Aust Torts Reports 80-217; [1988] ANZ Conv R 541; (1988) 35 A Crim R 1; (1988) 62 ALJR 611; McHugh J in *D'Orta-Ekenaike* [2005] HCA 12; (2005) 223 CLR 1 at 63; (2005) 214 ALR 92; (2005) 79 ALJR 755; [2005] Aust Torts Reports 81-784.
[20] [1999] VSC 103; [1999] 2 VR 342.
[21] Ibid at [46].

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