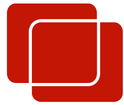


LEGAL BITES UPDATE 15 MARCH 2007

1. ORDER UNDER S. 345 LPA FOR SOLICITOR TO PAY COSTS

Firth v Latham, [2007] NSWCA 40

New South Wales Court of Appeal
09 March 2007
Santow JA, McClellan CJ at CL, Hoeben J

CATCHWORDS:

Legal Practitioners - s345 of Legal Profession Act - whether "reasonable prospects of success" when trial commenced - exercise of discretion by trial judge under s348(1)(a) of the Legal Profession Act - solicitor ordered to pay costs awarded against plaintiff - effect of s43A Civil Liability Act on plaintiff's claim.

LEGISLATION CITED:

Civil Liability Act 2002

Legal Profession Act 2004

CASES CITED:

Altamura v Victorian Railways Commissioners (1974) VR 33 at 35

Bullock v London General Omnibus Co (1907) 1 KB 264

Degiorgio v Dunn (No 2) [2005] 62 NSWLR 284

Fennell v Supervision & Engineering Services Holdings Pty Ltd (1988) 47 SASR 6 at 7-8

Gould v Vaggelas (1984) 157 CLR 215 at 247

House v R (1936) 55 CLR 499 at 504

Johnsons Tyne Foundry Pty Ltd v Maffra Corporation (1948) 77 CLR 544 at 556

Lackersteen v Jones (No 2) (1988) 93 FLR 442 at 449

Latham v Fergusson [2006] NSWCA 288

Lemoto v Able Technical Pty Limited & Ors [2005] 63 NSWLR 300

Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA Pty Ltd (1984) 157 CLR 149 at 163

Roads and Traffic Authority of New South Wales & Ors v Palmer (No 2) [2005] NSWCA 140 at [30]

Steppke v National Capital Development Commission (1978) ACTR 23 at 30-31

Sved v Council of the Municipality of Woollahra (1998) NSW Con R 55-852 at 55,605

Judgment below

28 In reaching his decision in relation to the solicitor his Honour correctly identified the relevant sections of the *Legal Profession Act* 2004 and had regard to the leading decision on the interpretation of those sections *Lemoto v Able Technical Pty Limited & Ors* [2005] 63 NSWLR 300.

29 Applying those sections as explained in *Lemoto*, his Honour concluded that there was sufficient material available to the solicitor for him to have a reasonable belief that "provable facts" and the law justified commencing proceedings against the Council. His Honour referred to the fact that the pedestrian crossing as constructed had not conformed with the Council's own plans and to those parts of the first report of Mr Keramidas which indicated that this variation from the plans contributed to the accident, ie the lack of visibility of the plaintiff behind the chevron sign. The first Keramidas report identified alternatives to having the chevron sign at the commencement of the pedestrian crossing, which if implemented may have avoided the accident.

30 His Honour accepted that at the time when proceedings were commenced against the Council more evidence needed to be gathered and there remained defences under the *Civil Liability Act* 2002 which needed to be met. Nevertheless at that point in time his Honour concluded that there was an arguable case against the Council.

31 His Honour noted that the obligation imposed by s345 of the *Legal Profession Act* was a continuing obligation. He drew a distinction between the situation which existed when proceedings were commenced against the Council and that which prevailed at the time when a trial was about to commence. Material which might indicate an arguable case against a party so as to justify the commencement of proceedings might not be sufficient at the point of trial to demonstrate the continuing existence of such an arguable case.

32 Following the approach in *Lemoto* his Honour interpreted the phrase "without reasonable prospects of success" as used in the Act to mean "so lacking in merit or substance as not to be fairly arguable". His Honour found that whereas the plaintiff's case against the Council was not hopeless or without foundation at the time when proceedings were issued against the Council, that situation had changed by the time the trial commenced. At that point in time his Honour found that due to lack of evidence the plaintiff's case against the Council was "without reasonable prospects of success".

33 By way of illustration his Honour referred to the absence of any opinion from an appropriately qualified expert in support of the plaintiff's claim against the Council. His Honour noted that the contents of the second Keramidas report did not fill the evidentiary gap in the plaintiff's case and that much of it was inadmissible in any event. His Honour inferred from the way in which the matter had been conducted that at the commencement of the trial the solicitor had no intention of adducing any evidence against the Council and intended to rely upon evidence which might emerge in the driver's case (ie from Mr Keramidas) to enable a case against the Council to be made out.

40 The relevant provisions of the *Legal Profession Act* are as follows:-

"345 (1) A law practice must not provide legal services on a claim or defence of a claim for damages unless a legal practitioner associate responsible for the provision of the services concerned reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.

(2) A fact is provable only if the associate reasonably believes that the material then available to him or her provides a proper basis for alleging that fact.

(3) This Division applies despite any obligation that a law practice or a legal practitioner associate of the practice may have to act in accordance with the instructions or wishes of the client.

(4) A claim has reasonable prospects of success if there are reasonable prospects of damages being recovered on the claim. A defence has reasonable prospects of success if there are reasonable prospects of the defence defeating the claim or leading to a reduction in the damages recovered on the claim.

(5) Provision of legal services in contravention of this section constitutes for the purposes of this Division the provision of legal services without reasonable prospects of success.

347 (1) The provision of legal services by a law practice without reasonable prospects of success does not constitute an offence but is capable of being unsatisfactory professional conduct or professional misconduct by a legal practitioner associate of the practice who is responsible for the provision of the service or by a principal of the practice.

(2) A law practice cannot file court documentation on a claim or defence of a claim for damages unless a principal of the practice, or a legal practitioner associate responsible for the provision of the legal service concerned, certifies that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.

...

348 (1) If it appears to a court in which proceedings are taken on a claim for damages that a law practice has provided legal services to a party without reasonable prospects of success, the court may of its own motion or on the application of any party to the proceedings make either or both of the following orders in respect of the practice or of a legal practitioner associate of the practice responsible for providing the services:

(a) an order directing the practice or associate to repay to the party to whom the services were provided the whole or any part of the costs that the party has been ordered to pay to any other party,

(b) an order directing the practice or associate to indemnify any party other than the party to whom the services were provided against the whole or any part of the costs payable by the party indemnified.

..."

41 The meaning of those provisions was comprehensively analysed by McColl JA in *Lemoto v Able Technical Pty Limited & Ors* at [116] -- [138]. By way of a general overview, her Honour said:

"123 The grave consequences to which Div 5C exposes a legal practitioner and his or her client indicates that "[t]he construction of the section and the application of the jurisdiction should ... be no wider than is clearly required by the statute": cf *Medcalf* (at 143 [56]) per Lord Hobhouse of Woodborough.

124 There are some general observations which can be made. First, Div 5C represents a departure from the historical basis upon which legal practitioners could be exposed to personal costs orders. A legal practitioner is now required to ensure that a claim, or a defence to a claim, for damages has "reasonable prospects of success" and, to that extent, to become a judge of the client's cause. The legislature has endorsed the proposition that it is not in the public interest, nor a function of the due administration of justice, for legal practitioners to provide legal services in circumstances which involve representing clients who wish to pursue or defend claims for damages which have no reasonable prospects of success.

125 Secondly, Div 5C requires the legal practitioner to evaluate the client's case with an eye to his or her potential exposure to a personal costs order as well as the disciplinary consequences which may flow from a finding that he or she has contravened s 198J: see s 198L. The potential for a conflict of interest is manifest as, too, is the deterrent effect on legal practitioners. Division 5C is capable of visiting severe consequences both against the legal practitioner and the client potentially deprived of legal representation to pursue his or her claim for damages.

126 The legislature clearly intended Div 5C to have this chilling effect. It is timely, however, to recall the tensions to which the Court of Appeal referred in *Ridehalgh* (at 226). While the Div 5C jurisdiction should not be emasculated, the due administration of justice should not be impaired by a too liberal exercise of the new powers.

127 Turning to the construction of Div 5C, it is apparent that the question whether legal services have been provided "without reasonable prospects of success" turns, in the first instance, on the legal practitioner's "reasonable" belief as to the "provable facts" and his or her view of the law: s 198J(1). Section 198J(2) explains the circumstances in which a fact will be regarded as "provable", again turning on the question of the legal practitioner's "reasonable" belief that the material then available provides a proper basis for alleging that fact. There is no express requirement that this material be admissible. However s 198J imposes a continuing obligation. There may be a stage in a claim for damages where the fact a legal practitioner could not then reasonably believe that the evidence available would be admissible to enable the claim to be proved or defended, may lead to a prima facie case of a contravention of s 198J: cf *Cahill v Ekstein* (Smart J, 5 June 1998, unreported).

128 Section 198J (4) describes the circumstances in which a claim or a defence will be regarded as having "reasonable prospects of success". The combined effect of s 198J(1) and (4) is that a claim will have "reasonable prospects of success" if the legal practitioner reasonably believes there are "provable facts" and a "reasonably arguable view of the law" to establish that "there are reasonable prospects of damages being recovered on [a] claim ...[or] ... there are reasonable prospects of [a] defence defeating the claim or leading to a reduction in the damages recovered on the claim".

129 Section 198J (5) conflates the product of s 198J(1) and (4) to provide that provision of legal services in contravention of s 198J constitutes the provision of legal services "without reasonable prospects of success" for the purposes of the Division. The remaining sections in Div 5C use the conflated expression. It is important not to lose sight of its constituent components.

130 The question whether a s 198M order should be made is discretionary. The court "may" make either a repayment order or an indemnity order: s 198M(1). The discretion operates even if the court concludes that the legal practitioner provided legal services to a party without reasonable prospects of success."

42 In determining what the expression "without reasonable prospects of success" meant, her Honour accepted the analysis of Barrett J in *Degiorgio v Dunn (No 2)* [2005] 62 NSWLR 284 where his Honour said:

"28 The several factors to which I have referred ... cause me to adopt the construction of "without reasonable prospects of success" that equates its meaning with "so lacking in merit or substance as to be not fairly arguable". The concept is one that falls appreciably short of "likely to succeed."

43 On that issue her Honour concluded:

"132 Barrett J's construction of the expression "without reasonable prospects of success" appears to me to accommodate both the purpose of Div 5C and to reflect the language of s 198J. The test, whether a claim or a defence was "so lacking in merit or substance as to be not fairly arguable", must be applied, however, in the context of the constituent components of s 198J. In that context the question becomes whether the solicitor or barrister held a reasonable belief that the provable facts and a reasonably arguable view of the law meant that the prospects of recovering damages or defeating a claim or obtaining a reduction in the damages claimed were "fairly arguable". These are matters about which reasonable minds might differ. The question will be whether the solicitor or barrister's belief that they had material which objectively justified proceeding with the claim or the defence "unquestionably fell outside the range of views which could reasonably be entertained": *Medcalf* (at [40]) per Lord Steyn.

...

138 When considering whether to make a s 198M order the court should, in my view, consider the nature of the contravention of Div 5C which has been established, the possibly serious implications of making the costs order and determine whether it is just, in all the circumstances, that a repayment and/or indemnity order should be made and whether it should be as to the whole or part of the costs." (*Lemoto* McColl JA [132] and [138])

44 It is against that background that the submissions of the solicitor need to be considered.

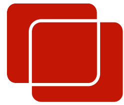
45 His Honour's order under s348(1)(a) of the *Legal Profession Act* 2004 involved an exercise of his discretion. For this Court to intervene the solicitor has to establish error of the kind identified in *House v R* (1936) 55 CLR 499 at 504, ie that his Honour acted upon a wrong principle or allowed extraneous or irrelevant matters to guide or affect him or if he made a mistake as to the facts or if he did not take into account some material consideration. Here the error which the solicitor seeks to establish is in his Honour's process of reasoning.

46 In that regard I accept that the solicitor had to assume that both reports of Mr Keramidas would be admitted. I accept, as his Honour did, that the solicitor's investigations revealed that the Council had constructed the pedestrian crossing and that the chevron signs on the approaches to the pedestrian crossing did not comply with the Council's original design.

47 I accept that the effect of the first report of Mr Keramidas was that the accident involving the driver and the plaintiff could have taken place without there necessarily being negligence on the part of the driver.

48 Where I have difficulty with the submissions of the solicitor is in relation to the proposition that the combination of the two reports of Mr Keramidas provided a case in negligence against the Council which was fairly arguable. There was no issue that the Council in constructing the pedestrian crossing owed a duty of care to pedestrians such as the plaintiff. There was material in the Keramidas reports to establish a causal link between the construction of the chevron sign and the accident. I cannot, however, discern anything in those reports which would establish breach of duty on the part of the Council.

49 Insofar as the Council was concerned, the material in the second Keramidas report is replete with hindsight reasoning. This is best illustrated by the comment at p11 of that report "Had any other treatment been applied other than this type of chevron guidance marker board, it is likely that the extent of view obstruction would have been significantly reduced." That of course was not and never could be the appropriate inquiry. The issue which needed to be addressed was whether in the circumstances the construction of the pedestrian crossing with a chevron sign of this type was an adequate response to a risk of injury which was reasonably foreseeable. To the extent that the Keramidas reports addressed that question, their conclusion was fatal to the plaintiff's claim, ie "In general, the author does not consider the pedestrian facility ... to fall outside what is often observed in similar facilities within the State of New South Wales. As indicated above, the facility itself does not technically comply with the Technical Direction recommended by the RTA, but as a whole it is not unreasonable in its layout and construction." (See [18] hereof.)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50 The balance of that quotation could never prove the matters necessary to mount an arguable case against the Council since it involved no more than speculation based upon unestablished facts.

51 The rationale behind the joinder of the Council is clear. The solicitor believed that the plaintiff had a strong case against the driver. After receipt of the first Keramidas report, he was justifiably concerned that if the matters raised therein as to the lack of visibility of the plaintiff behind the chevron sign were established, there was a complete explanation for the accident which did not involve negligence on the part of the driver. He therefore sought to deal with that possible eventuality by making inquiries to see whether a cause of action existed against the Council. His motive was to protect the plaintiff in what he clearly regarded as the unlikely circumstance where she might fail against the driver for the reasons raised in the first report of Mr Keramidas.

52 Although the solicitor did not say so in his affidavit, it can be reasonably inferred that because of what he regarded as the strength of the plaintiff's case against the driver he did not wish her to needlessly expend costs in preparing a case against the Council where its joinder had been made as a defensive tactic to deal with what he regarded as an unlikely contingency. In acting as he did the solicitor clearly had the best interests of the plaintiff in mind.

53 It was submitted that the solicitor was entitled to assume that if the second report of Mr Keramidas was admitted, the Council would tender the report of Mr Stuart-Smith and that both those experts would give evidence. There would then be ample scope through the cross-examination of those experts for a case against the Council to be established.

54 In my opinion that was a high risk tactic. As indicated, the reports of Mr Keramidas could not provide "provable facts" to establish breach of duty on the part of the Council. The difficulty became even greater when it emerged that the plaintiff intended to object to the tender of both the Keramidas reports. This was no doubt intended to strengthen the case against the driver. Finally, there was nothing in the reports of Mr Keramidas and Mr Stuart-Smith which would support a reasonable belief that cross-examination of either or both of them would cause a case against the Council to emerge where the basis for such a case was not already set out in the reports.

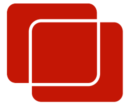
55 It was submitted that his Honour erred in his approach to whether or not there were reasonable prospects of success in the solicitor allowing the matter to proceed to trial against the Council. It was submitted that his Honour's reasoning assumed that the only way in which this could be done was if positive evidence to that effect was adduced in the plaintiff's case. If his Honour had reasoned in that way, this could amount to error. It is trite law that matters can be proved through witnesses called in another interest. Nevertheless one would have to have a strong basis for expecting that such witnesses would be called and would give evidence to that effect if the matter to be proved was an important part of the case.

56 In my opinion his Honour did not err in the way submitted. His Honour correctly appreciated that the reports of Mr Keramidas could not of themselves provide a case against the Council and that additional evidence had to be adduced on behalf of the plaintiff to supplement those reports. For the reasons already indicated, his Honour's conclusion in that regard was correct.

57 I appreciate that considerable care must be taken in judging the conduct of a lawyer for a party in litigation where the arguability of that party's case depends upon a question of fact. Having said that I am unable to find in the reports of Mr Keramidas a basis whereby breach of duty on the part of the Council could be established. Accordingly it was open to his Honour to find that by going to trial with only that evidence on the issue of breach the plaintiff's claim was without reasonable prospects of success.

58 There is another consideration which leads to the same result. It arises from the submissions made by the Council in respect of s43A *Civil Liability Act* 2002.

59 That section provides: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"43A(1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a public or other authority's exercise of, or failure to exercise, a special statutory power conferred on the authority.

(2) A "special statutory power" is a power:

(a) that is conferred by or under a statute, and

(b) that is of a kind that persons generally are not authorised to exercise without specific statutory authority.

(3) For the purposes of any such proceedings, any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.

(4) In the case of a special statutory power of a public or other authority to prohibit or regulate an activity this section applies in addition to section 44."

60 In the Court below and in submissions before this Court it was accepted by the Council that s43A provided a defence to the Council provided it could establish that the liability alleged against it was based on its exercise of a special statutory power. It was common ground that the construction of a pedestrian crossing did involve such an exercise. Although his Honour did not base his decision on it, the Council submitted that because of s43A, the plaintiff had no reasonable prospects of success against the Council at the time the trial commenced.

61 The Council put its submission in this way: Section 43A in essence provided a defence by requiring the plaintiff to establish that no local council having special statutory powers relating to the erection of traffic control devices could properly consider the act or omission to be a reasonable exercise or failure to exercise that power.

62 That being so, it was submitted that there was never any evidence marshalled by the plaintiff which could have related to this issue and that there could never have been success against the Council without some evidence that it had departed from what Councils normally did in similar areas of responsibility. To the extent that there was evidence available on that issue it was against the plaintiff, eg the evidence of the police officer that the presence of chevrons as shown on this crossing was a regular feature within Sydney and the evidence of Mr Keramidas (see [18] hereof) that the pedestrian facility did not fall outside what is often observed in similar facilities within the State of NSW and the evidence of Mr Stuart-Smith to similar effect (see [16] hereof).

63 These submissions by the Council are clearly correct. It follows that even if error had been identified in his Honour's judgment and this Court were to re-exercise the discretion, it would still find that when the trial commenced the plaintiff's case against the Council was so lacking in merit or substance as to not be fairly arguable.

64 In the course of argument, it was suggested from the bench that the matters raised by s43A were not matters of defence but rather matters which a plaintiff has to prove as a precondition to establishing liability on the part of a public or other authority for its exercise of a special statutory power. Since the matter was not argued in that way before his Honour and since the matter was not fully argued before this Court, it is not necessary to reach a concluded view.

2. LASTEST ON BULLOCK ORDERS

Firth v Latham, [2007] NSWCA 40

New South Wales Court of Appeal
09 March 2007
Santow JA, McClellan CJ at CL, Hoeben J

Bullock order

37 Despite not being raised in the Summons for Leave to Appeal and the draft grounds of appeal, a significant part of the solicitor's summary of argument challenged his Honour's refusal to make a Bullock order in favour of the plaintiff against the driver (paras [49] -- [62]). Those submissions have been largely overtaken by events in that his Honour's judgment in favour of the plaintiff has been set aside and judgment has been entered in favour of the driver. In those circumstances where there has been no unsuccessful defendant, it would be rare (but not of course impossible) for a Bullock order to be made in favour of a plaintiff who has been entirely unsuccessful.

38 In *Roads and Traffic Authority of New South Wales & Ors v Palmer (No 2)* [2005] NSWCA 140 at [30] Giles JA summarised the current position in relation to Bullock orders as follows:

"30 By a Bullock order, from *Bullock v London General Omnibus Co* (1907) 1 KB 264, a plaintiff who has brought proceedings against two defendants, and has succeeded against one but failed against the other, may obtain an order that the unsuccessful defendant pay the costs the plaintiff has been ordered to pay to the successful defendant. Many forms of words have been used to explain when the order will be appropriate. In *Sved v Council of the Municipality of Woollahra* (1998) NSW Con R 55-852 at 55,605 I said -

"It is not sufficient for the making of a Bullock order that it was reasonable for the plaintiff to bring the proceedings against both defendants, although sometimes the condition for making a Bullock order is stated in that way (eg *Johnsons Tyne Foundry Pty Ltd v Maffra Corporation* (1948) 77 CLR 544 at 556; *Altamura v Victorian Railways Commissioners* (1974) VR 33 at 35). One statement of principle is that the order may be made where the costs have been reasonably and properly incurred by the plaintiff as between it and the unsuccessful defendant (eg *Johnsons Tyne Foundry Pty Ltd v Maffra Corporation* at 572-3; *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA Pty Ltd* (1984) 157 CLR 149 at 163; *Gould v Vaggelas* (1984) 157 CLR 215 at 247, 229); it has also been said that the conduct of the unsuccessful defendant must have been such as to make it fair to impose some liability on it for the costs of the successful defendant, or that the conduct of the unsuccessful defendant must show that the joinder of the successful defendant was reasonable and proper to ensure recovery of the damages sought (*Steppke v National Capital Development Commission* (1978) ACTR 23 at 30-31; *Gould v Vaggelas* at 229; *Fennell v Supervision & Engineering Services Holdings Pty Ltd* (1988) 47 SASR 6 at 7-8, 15; *Lackersteen v Jones (No 2)* (1988) 93 FLR 442 at 449). The difference in formulations is probably more apparent than real, as reasonableness as between the plaintiff and the unsuccessful defendant will normally be demonstrated by some conduct of the unsuccessful defendant which made it proper that the successful defendant be joined or that the unsuccessful defendant should bear the costs of the successful defendant. Such conduct was found in *Lackersteen v Jones (No 2)* in the unsuccessful defendant denying the authority of its agent whereby the plaintiff joined the agent who became the successful defendant, and more widely has been found in the unsuccessful defendant telling that the plaintiff in one way or another that it should look to the successful defendant for its remedy (*Altamura v Victorian Railways Commissioners*; *Gould v Vaggelas*; *Fennell v Supervision & Engineering Services Holdings Pty Ltd*).""

39 Applying those principles his Honour was correct to conclude that the service of the first report of Mr Keramidas on the plaintiff by the driver was not the sort of conduct which would justify the making

of a Bullock order. The decision to bring proceedings against the Council was based primarily upon the solicitor's investigations which revealed that the pedestrian crossing as constructed did not comply with the Council's plans. There was no conduct identified on the part of the driver which could properly be characterised as encouraging the plaintiff to bring proceedings against the Council. No error in his Honour's approach has been identified. Any challenge by the solicitor to his Honour's refusal to grant a Bullock order in favour of the plaintiff against the driver must fail.