[2015] QCA 222

COURT OF APPEAL

FRASER JA

Appeal No 10302 of 2015
SC No 2977 of 2014

ANDREW IAN ROGERS	**Appellant**
v	
STEPHEN FRANCIS ROCHE	**First Respondent**
SIMON MICHAEL MORRISON	**Second Respondent**
MARIA SKORDOU	**Third Respondent**

BRISBANE

MONDAY, 9 NOVEMBER 2015

JUDGMENT

FRASER JA: The appellant has appealed against the orders made in the trial division striking out part of the appellant's statement of claim; giving judgment for the respondents in respect of the appellant's most substantial claim, the claim for damages for breach of retainer, negligence and breach of fiduciary duty; making costs orders in favour of the respondents; removing the third respondent from the proceeding; and making procedural directions. In what follows, I will refer to that substantial claim for damages as "the claim".

The appellant has applied for orders which include a stay of the orders made by the primary judge pending appeal. The respondents have applied for security for their costs of the appeal.

In relation to the respondents' application for security, the appellant has not contradicted the respondent's evidence that a reasonable estimate of the legal costs they will occur in resisting the appeal is $31,500, of which the respondents would recover approximately $20,000 on the standard basis of assessment if the appeal is dismissed with costs. Upon the appellant's evidence, he owns no real property. His debts exceed his assets by hundreds of thousands of dollars. A credit card debt exceeds his cash reserves and he is unemployable as a result of a disability. The appellant's evidence suggests that this state of affairs resulted from injuries he unfortunately sustained in an accident in 2001. That the respondents might defeat the appeal but not obtain satisfaction of a consequential costs order favours an order for security.

On the other hand, the evidence suggests that the appellant could not secure any substantial amount as security for the respondent's costs of the appeal. An order for security therefore might stifle his appeal. That favours refusal of the application for security. The respondents argue that the prospects of the appeal are poor and that this favours ordering security. The appellant argues that he has good prospects and that this favours refusal of security. It is therefore necessary to consider the appellant's prospects of success, although I can do this only upon a provisional basis and with reference to the necessarily abbreviated arguments upon this interlocutory application.

I will briefly set out the facts. The appellant retained the first and second respondents to act as his solicitors in a claim for damages for the injuries he sustained in his accident. After a trial, the appellant was given judgment for about $600,000. The part of the appellant's claim which the primary judge struck out included allegations that in breach of the retainer, and without the appellant's knowledge, the first and second respondents substantially delegated the performance of their retainer to Murshine Pty Ltd. That company was not entitled to practice law and it employed solicitors, including the third respondent, to attend to the day-to-day conduct of the appellant's claim.

The appellant contended that if the first and second respondents had properly performed their retainer, or if the respondents had exercised reasonable care and skill or discharged their alleged

fiduciary obligations, then the appellant would have obtained damages upon his claim for economic loss by settlement before the commencement of proceedings, or by judgment after a trial, of about $1.6 million.

The appellant allowed a setoff of $480,000, the amount assessed by the trial judge for the appellant's economic loss, leaving a claim for damages of about $1 million plus interest.

In the trial division, the respondents advanced three main reasons why the appellant's claim could not succeed. First, the appellant's pleading did not articulate or sufficiently articulate the causal link between the alleged negligence, breach of retainer or breach of fiduciary duty and the claimed damages. The primary judge did not strike out the appellant's claim on that ground, so it may be put to one side for present purposes. Secondly, the claim was doomed to failure because it amounted to a collateral attack upon the trial judge's assessment of damages. If the appellant succeeded in the present claim against the respondents, the judgement in this matter would conflict with the judgment in the personal injuries case, thereby bringing the administration of justice into disrepute. Thirdly, the appellant's claim inevitably infringed upon the immunity from suit conferred upon advocates. The primary judge accepted the second and third reasons for concluding that the appellant's claim could not succeed.

As the appellant argues, the test which must be satisfied to justify the summary termination of a claim is demanding. The claim must be so clearly untenable that it could not possibly succeed: *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, at [8]. So much was accepted in the respondents' submissions at first instance. They argued that the claims were manifestly untenable. The primary judge proceeded on that basis, finding that the claim was "doomed to failure": [2015] QSC 272 at [15].

The primary judge noted that the High Court granted special leave to appeal from the decision in *Jackson Lalic Lawyers Pty Limited v Attwells* [2014] NSWCA 335, a case which concerns advocate's immunity in relation to negligently advised settlements of litigation. The mere fact that it is presently unknown whether the High Court will consider in that appeal the general question whether advocate's immunity should be maintained is not a good reason for doubting

that the endorsement of *Giannarelli v Wraith* (1988) 165 CLR 543 in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 settled the law which I must apply.

The alleged negligent failure of the respondents to obtain and adduce certain evidence, which is at the heart of so much of the appellant's claim as concerns the respondents' in-court conduct of his personal injuries claim, plainly attracts advocate's immunity as it was explained in *Giannarelli v Wraith* and *D'Orta-Ekenaike v Victoria Legal Aid* (see in particular at [87]).

The appellant argues that advocate's immunity is inapplicable because the first and second respondents did not perform their retainer, but impermissibly delegated it to an unqualified company which engaged a stranger to the retainer to perform it – relevantly here the third respondent, but also another lawyer. The appellant also argues that there is no inconsistency between the appellant's claim and the judgment of the trial judge, because the appellant's claim involves no criticism of the trial judge. His claim did not suggest that the trial judge made a wrong assessment upon the evidence, but rather that the evidence which should and could have been admitted for the appellant at the trial was not obtained by the respondents.

It is difficult to accept the premise of the first argument, that the retainer obliged the respondents to perform their obligations personally. The retainer in terms refers to the use of "teams" and "Department Personnel" performing the work, as well as to outlays which may be incurred in the performance of the work, including barrister's fees. Whether or not the appellant was charged appropriately is a different question. That may be relevant to the part of the appellant's claim which was not struck out, but it is not relevant here. It is clear that the first and second respondents did not undertake to perform the legal work personally. Whether they did the work personally, by employees or by independent contractors is of no apparent moment in relation to their claimed immunity, at least in relation to in-court work, because the appellant's claim necessarily involves the proposition that the respondents, as solicitors who were responsible for the conduct of his personal injuries litigation, should have conducted it or caused it to be conducted in such a way as to secure a better result.

The appellant also argues, however, that there is no breach of advocate's immunity in relation to his allegation that during the processes under the *Personal Injuries Proceedings Act* 2002 (Qld) ("PIPA"), the respondents did not properly present his claim and should have obtained for him a settlement which was much more favourable than the judgment obtained at trial. Some of those processes allegedly occurred before the personal injury claim was commenced, and all allegedly occurred before that claim was served. The primary judge found that this basis of claim against the respondents infringed advocate's immunity because those processes were closely interrelated with the trial and because there would still be "conflicting judgments on the question of the proper award of damages that [the appellant] should have received": [2015] QSC 272, at [17]. There is support in some cases, including decisions of intermediate appeal courts, for the way in which the primary judge framed the test. See, for example, *Sims v Chong* (2015) 230 FCR 346, at [62]-[63] and the cases there cited. Furthermore, the way in which the primary judge expressed the conclusion accords with Justice McHugh's statement in *D'Orta-Ekenaike v Victoria Legal Aid* at [168] that:

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

However, whilst the plurality judgment of the High Court in the same case explains advocate's immunity as mainly grounded in the character of the judicial system as an arm of government and the "central and pervading tenet of the judicial system … that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances" ((2005) 223 CLR 1, at [34]), the judgment does not express those grounds in the tests for deciding whether the immunity is attracted; rather, the judgment (at [85]-[86]) endorsed the tests which had been approved in *Giannarelli v Wraith*:

> "an advocate is immune from suit, whether for negligence or otherwise in the conduct of a case in court … and for work done out of court that leads to a decision affecting the conduct of the case in court."

Furthermore, the appellant's pleading extends beyond criticism of the respondents' preparation and presentation of the claim before and after the commencement of litigation. It includes claims for damages relating directly to the formation of the appellant's retainer with the first

and second respondents. For example, the appellant alleges that the respondents breached an alleged fiduciary duty by acting in their own interests in "securing his retainer on the basis that it would be performed by a team of solicitors with specialist public liability expertise when it was always intended by them, and as happened, that the plaintiff's claim would be conducted by persons without the necessary experience or qualification": Statement of claim, at [50].

That and similar allegations are arguably analogous to the alleged pre-retainer misrepresentations of expertise by a solicitor which in *Sims v Chong* the Full Court of the Federal Court held did not so clearly attract the immunity as to justify summary dismissal: see at [89]-[96]. The respondents argue that the fiduciary duty claim is inadequately pleaded and might not succeed for other reasons. As I have mentioned, that was not the basis upon which the primary judge struck out the claim.

In these circumstances, whilst I am far from expressing even a provisional view that the appellant has good prospects of success in his appeal, I am persuaded that it is arguable in the Court of Appeal that the primary judge applied the wrong test in deciding that the respondents were immune from suit in relation to their presentation of the appellant's claim during the PIPA processes. Similarly, I am persuaded that it is arguable that not all claims made by the appellant against the respondents inevitably attract immunity from suit such as to justify summary striking out.

It is necessary then to consider whether or not it is arguable in the Court of Appeal that the primary judge erred in summarily deciding that the appellant's claim, particularly so much of it as concerned alleged negligence before the commencement of litigation, is an abuse of process on the ground that it involves the re-litigation of an issue finally decided by the trial judge. In so concluding, the primary judge applied the decision in *Lewis v Hillhouse* [2005] QCA 316.

The appellant argued that a right-thinking member of the community would not have his or her confidence in the administration of justice undermined by the appellant's success in proving that, whilst the trial judge's assessment of damages was not inappropriate upon the evidence

before that judge, but for the negligence of the respondents, there would have been better evidence and a correspondingly larger award of damages. That is not an obviously unreasonable proposition, although it must be borne in mind that the High Court has given much more emphasis to the principle that final judgments must be treated by each party as being incontrovertibly correct: see *Rogers v The Queen* [1994] HCA 42, at 255-257, 273-274; *Giannarelli* at 558, 579; and the passages already cited from *D'Orta-Ekenaike*.

Lewis v Hillhouse involved an attempt to re-litigate in civil proceedings precisely the same issue which had been decided in an earlier criminal trial. That the principle may be applied in the attempted re-litigation in civil claims of decisions in earlier civil proceedings is evident from the seminal decision in *Reichel v McGrath* [1889] 14 App Cas 665, which was followed in *Walton v Gardiner* (1993) 177 CLR 378 and *Rogers v The Queen* (1994) 181 CLR 251. Furthermore, in *Giannarelli*, Chief Justice Mason, with whose reasons in this respect Justice Brennan agreed, held that a claim that "but for the negligence of counsel – [the client] would have obtained a more favourable outcome in the initial litigation" would undermine the status of the initial decision: (1988) 165 CLR 543, at [18]. Justice Wilson (at 573-574) and Justice Dawson (at 594-595) made similar observations. However, so far as I am aware the High Court has not held that the mere fact that a claim involves the litigation by a plaintiff of a claim adversely determined against the plaintiff in an earlier claim against an unrelated defendant inevitably involves an abuse of process regardless of the strength of the competing public policy arguments.

Although my provisional conclusion is that the appellant does not have good prospects of success in this respect, I am not prepared to conclude in this interlocutory matter that his prospects of success are so limited as to justify the likely prospect that his appeal will be stifled by an order for security for costs.

In these circumstances, I refuse the application for security for costs.

In relation to the appellant's application, I refuse paragraphs 1, 3 and 4 of the application for the reasons articulated during the hearing of that application. That leaves the application in

paragraph 2 that all of the orders made by the primary judge be stayed. For the reasons articulated at the hearing, the only orders which arguably should be stayed pending the appeal are the orders concerning future steps to be taken in proceedings and the orders for costs. Having regard to my views about prospects of success in the appeal, I am not prepared to stay the procedural directions made by the primary judge, although the parties may decide between themselves that there is little point in pursuing those procedural directions pending the appeal. However, I am prepared to stay the enforcement of the costs order made by the primary judge until judgment in the appeal or further order.

In the result, the orders are that the respondents' application for security for costs be refused and that the application made by the appellant be refused, save that the costs orders made by the primary judge are stayed.

Costs, Mr Holyoak?

MR HOLYOAK: Your Honour, there's been mixed success. Costs in the appeal?

FRASER JA: Yes. Mr Rogers, Mr Holyoak suggests that the appropriate order in each application is that the costs be costs in the appeal, by which he means that if his side wins the appeal, they will get the costs; if you win the appeal, you would get an order for costs in your favour. Whether or not you would recover anything on that, I don't know, but that's what he's proposing. Do you want to say anything about costs?

MR ROGERS: No, I have no view about it. I'm in your Honour's hands.

FRASER JA: I order that the costs of each application be costs in the appeal. Anything else? Do you have any other application to make, Mr Rogers?

MR ROGERS: No, thank you, your Honour.

FRASER JA: Mr Holyoak?

MR HOLYOAK: No, your Honour.

FRASER JA: Yes. Adjourn the Court.