

SUPREME COURT OF QUEENSLAND

CITATION: *Burmingham & Anor v Hynes & Ors* [2005] QCA 274

PARTIES: **DAVID GEORGE PETER BURMINGHAM**
(first plaintiff/applicant/appellant/cross-respondent)
WOOLLY BULL ENTERPRISES PTY LTD
ACN 050 235 311 (deregistered)
(second plaintiff)
v
**ROBERT MARK HYNES and BEAU TIMOTHY JOHN
HARTNETT trading as HYNES HARTNETT
LAWYERS**
(first defendants/first respondents)
ANDREW MUSGRAVE
(second defendant/second respondent/cross-appellant)

FILE NO/S: Appeal No 1934 of 2005
SC No 11290 of 2002

DIVISION: Court of Appeal

PROCEEDING: Application for Extension of Time
General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 5 August 2005

DELIVERED AT: Brisbane

HEARING DATE: 20 July 2005

JUDGES: de Jersey CJ, Jerrard and Keane JJA
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS:

1. **Applicant granted an extension of time in which to file the amended notice of appeal marked as exhibit "DGPB-13" to his affidavit sworn 2 June 2005**
2. **Appeal against order No 1 made on 8 February 2005 on application filed 10 August 2004 dismissed**
3. **Appeal against order No 2 made on 8 February 2005 on application filed 10 August 2004 allowed to the extent of adding "until 21 December 2004 but not thereafter"**
4. **Appeals against orders No 2, 4 and 5 made on 8 February 2005 on application filed 17 December 2004 dismissed**
5. **Appeal against dismissal of application to join other firms of solicitors as defendants dismissed**
6. **Cross-appeal dismissed with no order as to costs**

7. Appellant to pay one half of the first respondents' costs of the appeal assessed on the standard basis

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – CONTROL OVER PROCEEDINGS – REFUSAL OF ADJOURNMENT – first and second plaintiffs filed claim against first defendants for alleged negligence and other breaches arising out of first defendants' representation of second plaintiff company in Federal Court proceedings – first plaintiff sought various further orders including joining counsel who appeared for the second plaintiff in the Federal Court proceedings – first defendants sought to strike out the second plaintiff company's claim and statement of claim on the ground that it had been deregistered – applications heard together on 8 February 2005 – first plaintiff a self-represented litigant – first plaintiff complained of ill health but proceeded to make submissions on applications – first plaintiff did not actually ask for an adjournment – whether judge erred in not granting adjournment

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – OTHER MATTERS – COSTS – first plaintiff asserted at 8 February 2005 applications hearing that he had only been provided with authorities regarding the necessity of striking out the second plaintiff's claim on the morning of that hearing – first plaintiff made submissions on costs – judge ordered first plaintiff to pay first defendants' costs thrown away in prosecution of the claim in the name of the second plaintiff – whether first plaintiff would have continued proceedings if advised of their futility earlier – whether costs order should be amended to account for this possibility

Corporations Act 2001 (Cth), s 601AD

Supreme Court Act 1995 (Qld), s 253

Uniform Civil Procedure Rules 1999 (Qld), r 16, r 74(5)

D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12; (2005) 214 ALR 92, cited

Morton v Vouris (1996) 21 ACSR 497, cited

Pagnon v WorkCover Queensland [2000] QCA 421; [2001] 2 Qd R 492, cited

COUNSEL: The applicant/appellant appeared on his own behalf
D G Clothier for the first respondents
C D McIvor (sol) for the second respondent

SOLICITORS: The applicant/appellant appeared on his own behalf
Barry & Nilsson for the first respondents
Carter Newell for the second respondent

- [1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Jerrard JA. I agree with the orders proposed by His Honour, and with his reasons.
- [2] **JERRARD JA:** These appeals are against orders made in this Court on 8 February 2005. These were an order striking out the claim by the then second plaintiff in the proceedings, Woolly Bull Enterprises Pty Ltd (“the company”); an order that the first plaintiff David Birmingham pay the first defendants’ (Robert Hynes and Timothy Hartnett) costs thrown away by the prosecution of the claim in the name of the second plaintiff from 15 December 2000 until 8 February 2005; an order for the joinder of the second defendant Andrew Musgrave in the proceedings subject to a condition which was appealed against; an order that there be no order as to the costs of that order for joinder as between the first plaintiff and the first defendants; and an order that the costs of the application of the joinder of the second defendant be reserved. There are also other complaints made on the appeal about the orders of 8 February 2005. David Birmingham also sought an extension of time within which to appeal the strike-out order, the costs order against him, the conditions imposed on the joinder of the second defendant, and the reservation of the costs of his (successful) application to join the second defendant; Mr Musgrave cross-appealed the order joining him.

Background matters

- [3] Mr Birmingham has represented himself at all relevant stages of the proceedings in this Court. He has filed extensive written submissions and the Court had the benefit of a very comprehensive record. The proceedings in this Court are ones in which Mr Birmingham originally sued only the first defendants, who were solicitors acting for the company in proceedings concerning a trade mark in the Federal Court. In this Court he has claimed damages from the first defendants on a number of grounds for injury he has suffered. The grounds include alleged negligence, breaches of an agreement or agreements, and of the *Trade Practices Act 1974* (Cth).¹ Despite those claims an affidavit sworn in this Court by Mr Birmingham on 30 April 2004² annexes to it a copy of a decision in the Southport Magistrates Court given on 24 March 2003, in which the learned Magistrate dismissed a claim by the first defendants against the first plaintiff for professional fees incurred in the trade mark litigation in the Federal Court. The judgment records the Magistrate’s finding that he accepted Mr Birmingham’s contention in that court that Hynes Hartnett Lawyers were instructed to act only for the company in the litigation, and that Mr Birmingham represented himself in it, giving instructions directly to Mr Musgrave on his own behalf. The finding that Mr Birmingham acted for himself in the proceedings, and that the solicitors were instructed to act only for the company, was the reason the Magistrate gave for dismissing the claim by the solicitors against Mr Birmingham for fees.³
- [4] Mr Birmingham alleges the second defendant was engaged by the first defendants as counsel in those Federal Court proceedings, on behalf of the company, of which Mr Birmingham pleads he was a director and the sole beneficial shareholder. That company was the first applicant in the Federal Court proceedings, and Mr Birmingham the second, in proceedings in which those applicants appealed a decision of the registrar’s delegate under s 101 of the *Trade Marks Act 1995* (Cth)

¹ A copy of the pleadings against the first defendants appears at AR 714-750

² Reproduced at AR 323

³ The reasons are reproduced at AR 341-344

to remove the first applicant company's trade mark from the register. That mark had been registered as from 15 July 1992, and the respondent in the Federal Court proceedings had applied under s 92 of the *Trade Marks Act* for removal of the mark on the grounds of non-use during the three year period from 17 August 1995 to 17 August 1998. In a judgment dated 15 March 2001 Drummond J dismissed the appeal and upheld the finding that there had not been any use of the mark in that three year period, and that circumstances which did not have a trade character but which affected a mark owner only in his personal character, such as recurrences of a chronic fatigue syndrome suffered by Mr Birmingham in that three year period, could not provide an answer to an application for removal of the mark for non-use.⁴

- [5] A draft amended claim and statement of claim, describing the proceedings to be launched against Mr Musgrave if added as a second defendant, was annexed to an affidavit Mr Birmingham filed in this Court on 3 February 2005.⁵ On 22 April 2005 a judge ordered that Mr Birmingham was not required to deliver any statement of claim against Mr Musgrave prior to the determination of Mr Musgrave's appeal against the order joining him as a party; the draft pleadings Mr Birmingham exhibited add claims for breach of fiduciary obligations and for breaches of the *Fair Trading Act* 1989 (Qld) to the claim filed against the first defendants, and the pleadings appear somewhat prolix.
- [6] Mr Birmingham filed his claim and statement of claim against the first defendants in the Brisbane Registry of this Court on 10 December 2002. They had traded as Hynes Hartnett Lawyers at the time they represented him, although that partnership was dissolved on 3 September 2001. The company was named as the second plaintiff; it was deregistered on 15 December 2002 and by reason of s 601AD of the *Corporations Act* 2001 (Cth) ceased to exist on that day. Further, all its property then vested in the ASIC.⁶ Since the company had no legal existence from that date, proceedings in its name were bound to be struck out.⁷ Despite that, the claim was renewed on 4 May 2004 by the registrar for 12 months from 30 December 2003, and it was served on the first defendants in July 2004. They filed a conditional notice of intention to defend on 28 July 2004, and on 10 August 2004 filed an application pursuant to r 16 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("*UCPR*") to set aside the second plaintiff's proceedings.⁸

Proceedings in this Court

- [7] It was set for hearing on 20 December 2004, and on 17 December 2004 Mr Birmingham filed his own application for various orders, including for leave to amend his claim and statement of claim by the "addition and/or deletion of all necessary parties". His application was set down for hearing on 8 February 2005; when the first defendants' application to set aside the second plaintiff's claim and statement of claim came on for hearing on 20 December 2004, it too was ultimately adjourned for hearing to 8 February 2005. Mr Birmingham had appeared by telephone on 20 December 2004 and it transpired that he had only received the first

⁴ The decision in *Woolly Bull Enterprises Pty Ltd v Reynolds* [2001] FCA 261 is reproduced at AR 18-41

⁵ They appear at AR 463-541

⁶ See s 601AD(2)

⁷ See *Morton v Vouris* (1996) 21 ACSR 497 at 514-515, and *Pagnon v WorkCover Queensland* [2001] 2 Qd R 492 at 497 per McPherson JA

⁸ The application is reproduced at AR 754

defendants' outline of argument that morning. He asked for an adjournment for that reason. The first defendants' counsel accepted that Mr Birmingham had not been given warning of the nature of the arguments that would be made against him, and the matter was adjourned.

- [8] On 8 February 2005 proceedings began much as they had on 20 December 2004, in that Mr Birmingham informed the learned trial judge that he had only been served that morning with the first defendants' now amended outline of argument. He had likewise just received copies of three cases on which they relied, one of which was 30 pages long. He complained that exactly the same had happened on 20 December 2004, which had led to the hearing being adjourned. That submission resulted in the learned judge examining and comparing the written outlines prepared for 20 December 2004 and 8 February 2005, and in the course of that comparison it became clear that the point the first defendants were taking was that the second plaintiff had been de-registered more than two years earlier and could not remain a party. Mr Birmingham did not dispute that proposition, but contended that had he been supplied earlier than 8 February 2005 with a copy of the decision in *Re Morton* – as he now had been – he may well have conceded a long time ago that the company's proceedings should be struck out.⁹
- [9] The learned judge then heard Mr Birmingham's applications, of which the most significant was that Mr Musgrave be joined. His submissions included the complaint, which appeared in his statement of claim, that the first defendants and Mr Musgrave had badgered him, immediately prior to the start of the proceedings in the Federal Court, into letting Mr Musgrave represent Mr Birmingham as well as the company. The judge also heard an application by Mr Birmingham for leave to add as defendants other firms in which either Mr Hartnett or Mr Hynes had been partners, formed since 3 September 2001. Mr Birmingham also sought information about those other firms. The learned judge explained that Mr Birmingham needed to demonstrate some ground for joining other firms with other partners against whom there were no allegations made, and to that extent refused the application for joinder.¹⁰ The judge held that the proposed amended pleading did not disclose any adequate justification for a joinder of any new firms, because the claims in their proposed amended form – as in their original – would only be agitated against the existing first defendants, and not against any other solicitors.
- [10] Dismissal of that application resulted in Mr Birmingham still pressing for information as to other firms, and an undertaking was given by the first defendants to supply him with a letter containing relevant details. His supplementary indexed paginated bundle of documents – at A242 and A243 – reveal that he was given that information, actually quite unnecessary for his litigation, by letters dated 7 and 15 March 2005.
- [11] The learned judge then dealt with the application to join Mr Musgrave, and held that sufficient was pleaded to reveal an arguable case, remarking that it appeared inevitable that there would be further skirmishes concerning those pleadings and more interlocutory disputes. The court then adjourned for lunch and the matter was called on again at 2.50 pm. Soon after it resumed Mr Birmingham informed the judge that the events of the day had taken quite a toll on his health, and that he had

⁹ That concession appears at AR 57 in the applicant's indexed paginated bundle of documents

¹⁰ The learned judge's reasons appear A 113 of the applicant's indexed paginated bundle of documents

nearly blacked out just before lunch. He did not ask for an adjournment, and instead responded to an invitation to make submissions as to why he should not be ordered to pay the first defendants' costs incurred in the proceedings to strike out the second plaintiff's claim. His submission actually began with the provision of the above information about his health, and continued with an explanation of how he had really only learnt that day of the legal effect of deregistration. He submitted that had he been provided with the respondents' material earlier, he would have just said "yes", to the application to set aside the company's proceedings, and that he should not be prejudiced by a costs order because of action that the defendants' solicitors could have taken to mitigate the expense of Mr Birmingham's own errors.

- [12] The learned judge then advised that an order would be made that Mr Birmingham pay the first defendants' costs thrown away by the prosecution of the claim in the name of the second plaintiff from 15 December 2002. Mr Birmingham then advised the judge that he was trying to avoid collapsing and having to go to hospital. In response, the judge invited him to "Do your best, relax, collect your thoughts"; and there was still no request for any adjournment. The judge accordingly proceeded to the next application. In substance, that was an invitation to make submissions on the form of the order sought by the first defendants with respect to the costs of what had become a strike out application, and while Mr Birmingham began his submissions by stating that his head was spinning and he could not think coherently, he referred to correspondence sent in August 2004 to the first defendants advising of his waiving any requirement for them to file a defence until he had attended to all amendments to his own statement of claim, and to adding and *deleting* parties as required. Those submissions, which once again did not include any application for any adjournment, were developed by Mr Birmingham, and they led to the judge reminding him that his obligation pursuant to the *UCPR* to proceed in an expeditious way did not mean that the litigation could proceed simply as it suited him. The learned judge then made the costs orders in terms already disclosed to Mr Birmingham.
- [13] Mr Birmingham was then invited to make submissions about the form of the order joining Mr Musgrave suggested by the counsel for Mr Musgrave, which included a proposed order under *UCPR* r 74(5) that would have the effect that for the purpose of any limitation period, the proceedings against Mr Musgrave were taken to have commenced as at 8 February 2005. Mr Birmingham advised that his head was spinning, and the learned judge suggested that he be seated and that he let the judge know when he was ready to proceed. He was allowed to remain seated, and he then made responsive submissions, in which he complained of the conduct of the first defendants. The submission included that he should not be prejudiced by any such *UCPR* r 74(5) order, and that Mr Musgrave would have been put on notice as early as April 2001 that Mr Birmingham regarded Mr Musgrave's representation as negligent. That submission accords with Mr Birmingham's written outline of argument in the appeal, at paragraph 65, where he submitted that Mr Musgrave ought always to have been aware that Mr Birmingham thought his conduct was negligent, because Mr Birmingham had said so at the time.
- [14] The learned judge then formally ordered the addition of Mr Musgrave as a second defendant, and gave brief reasons, including reasons for making an order pursuant to *UCPR* r 74(5). Those were that the judge considered Mr Birmingham ought to be in no better position so far as defeating any limitation defence raised by Mr Musgrave than he would be if separate proceedings had been issued only that day,

because the judge considered there was no justification for defeating any possible limitation defence by making an order for joinder without that condition.

- [15] There were then submissions made by both parties about the proper orders for costs, and by Mr Birmingham about his address for service. The submissions on costs included whether jurisdiction existed to make orders for costs in favour of a self representing litigant, and a discussion of *Cachia v Hanes* (1994) 179 CLR 403. Mr Birmingham made what reads as responsive and coherent arguments on costs, including as to the number of separate applications on which each party had succeeded and failed, in their respective cases. The learned judge then made costs orders, and then, at the conclusion of the proceedings, Mr Birmingham remarked that he had been driven into the ground, he had nearly collapsed, and that the matter “should have been adjourned a long time ago.” That statement¹¹ was the only time Mr Birmingham suggested that day that proceedings should have been adjourned.
- [16] His original notice of appeal filed 8 March 2005 did not appeal the order that the second plaintiff’s claim be struck out. Mr Birmingham now seeks an extension of time in which to do that, principally because he now grasps that he cannot appeal the costs orders unless he succeeds in overturning the order to which it is attached. He was refused leave to appeal the costs order under s 253 of the *Supreme Court Act* 1995 (Qld) on 19 May 2005, and has not explicitly sought leave to appeal that order of refusal.
- [17] The chief argument he advanced in his carefully prepared, but repetitious, written submissions is that the learned judge ought to have adjourned all applications on 8 February 2005. That was because of Mr Birmingham’s ill health and consequent inability to represent himself adequately. His brief oral argument included the submission that he had applied for an adjournment, which suggestion also appeared in the written argument. In fact, as described, no such request was ever made and Mr Birmingham did make responsive and competent submissions throughout the day. Mr Birmingham’s pleadings describe him as a chartered accountant with substantial experience in providing specialist advice in all areas of intellectual property, taxation, trade practices and corporate law, and other general laws. He also pleaded that the solicitor employed by the first defendants, and who had had the carriage of the proceedings in the Federal Court on behalf of the second defendant company, had informed Mr Birmingham that that solicitor had never previously been presented with such a complete and well organised brief from any client; and also that if all clients could produce briefs and instructions of that quality, then the first defendants would be “out of business”.¹² Mr Birmingham’s pleadings thus demonstrate grounds for respecting and accepting his capacity to prepare properly and thoroughly for a hearing. The pleadings further allege that the solicitor employed by the first defendant told Mr Birmingham at the conclusion of the (unsuccessful) trial before Drummond J that the solicitor admitted that he should have followed the advice and instructions specifically provided by Mr Birmingham, and that “we would have done things differently with the benefit of hindsight”.¹³
- [18] Mr Birmingham did describe being stressed and unwell on 8 February 2005 but the material he put before the learned judge revealed that this was a chronic condition, and that despite it he could make all appropriate preparations for a contested

¹¹ At AR 111 of the applicant’s indexed paginated bundle of documents

¹² Those pleadings are at AR 171 and 722 respectively

¹³ This appears at AR 738

hearing. The proceedings under appeal show that Mr Birmingham was entirely capable of asking for an adjournment if he considered he needed one; he expressly asked for an adjournment at the start of the hearing on 20 December 2004. As it happened, it was the same judge who heard the subsequent proceedings on 8 February 2005, and that judge therefore had proper grounds for accepting both that Mr Birmingham could protect his own interests by any appropriate application, and that Mr Birmingham would be prepared.

- [19] Mr Birmingham's written material and arguments demonstrated careful study of the *UCPR* and of the legislation and grounds relevant to his claims against the defendants. The transcript does reveal that Mr Birmingham described himself as struggling to meet the applications and draft orders sought by his opponents on 8 February 2005, but that difficulty is entirely explicable, and only to be expected, simply because of the strength of those applications, and not because of his ill health or his being ambushed. There was no basis in which he could resist the strike out application, and he put all possible arguments on the costs application against him. Likewise he succeeded in joining a barrister as a defendant, but could not point to any reason for excluding a limitation defence, solely because there was no reason.
- [20] It is true that Mr Birmingham referred a number of times to feeling unwell and to difficulties he was having, but the learned judge responded with sympathy to those statements, and indeed warned counsel for the first defendants against making any unnecessary applications which might distress Mr Birmingham. The learned judge was not dealing solely with that matter that day, but devoted a good deal of time to ensuring that Mr Birmingham was not taken by surprise on any application, and that he had the opportunity to make submissions on matters the import of which were carefully explained on each occasion by the judge. Mr Birmingham's principal complaint, that the applications should not have been heard, should be dismissed.
- [21] There is no merit in most of his other challenges to the orders. Accepting that the judge was correct in joining Mr Musgrave, the condition imposed was entirely justified, particularly because Mr Birmingham's own submissions made it clear that he had at all times been critical of Mr Musgrave's representation. That being so, it was Mr Birmingham's choice not to make Mr Musgrave a party to the original proceedings, and to wait until nearly four years had passed before taking proceedings against him. There was no appeal from the orders of Drummond J in the Federal Court, and Mr Birmingham proposes to re-litigate that matter in this Court.
- [22] No basis has been shown for overturning the order striking out the second plaintiff's claim. That order was inevitable, and Mr Birmingham actually agreed to it being made. He then relied on that agreement as a basis for challenging the costs order against him. Regarding that costs order, leave is needed to appeal it. The hearing in which he was refused leave to appeal, conducted on 19 May, took place in Mr Birmingham's absence. That appeared to have been as a result of his misunderstanding a direction the judge gave him when Mr Birmingham appeared by telephone that morning, and explained that (yet again) he had not yet received his opponent's outline of argument. After a good deal of discussion, in which the judge suggested that Mr Birmingham make his way to Brisbane from the Gold Coast so that he could read the document in person, the judge had suggested that Mr

Burmingham either appear by telephone at 12.30 pm, or in person at 3.30 pm. (It appeared that by 12.30 pm Mr Burmingham would have received the outline by email, and would have had time to comprehend it.) Mr Burmingham suggested he be allowed to appear by telephone at 3.30 pm and the judge then adjourned the matter to 12.30, advising Mr Burmingham to be present then by phone. Mr Burmingham's affidavit material asserts, and the fact that he did appear in person at 3.30 confirms, that he misunderstood the learned judge, and thought he still had the option of appearing in person at 3.30.

- [23] What had happened was that the matter was called before 1.00 pm, and as Mr Burmingham had not telephoned or attempted to, it was heard on its merits in his absence at 2.34 pm. Mr Burmingham's contention in his written material before the trial judge, supporting his application to the judge for leave to appeal the costs order the judge had made two and a half months earlier, was that he was denied the opportunity on 8 February 2005 to make submissions about that costs order; but that argument was contradicted by the number of pages of transcript (reproduced at A86-A89 of the applicant's indexed paginated bundle of documents) in which Mr Burmingham actually made submissions about those costs. The learned judge considered that the affidavit material filed by Mr Burmingham in support of his application for leave, and the relevant grounds in the notice of appeal, when considered together, really relied on health problems and an inability to properly attend to matters on 8 February. The learned judge held, and the appeal record shows, that the transcript did not support Mr Burmingham's assertion that he could not attend properly to matters that day, and also that he had made submissions about the costs orders. Accordingly, the judge held, there was no chance that Mr Burmingham could persuade this Court that he was not heard in relation to those orders, a conclusion which is correct. The judge therefore refused leave.¹⁴
- [24] Mr Burmingham asks for an extension of time within which to file his amended notice of appeal. That amended notice does not in terms appeal the refusal to grant leave to appeal the costs order on the strike out application, but Mr Burmingham's extensive written material complains of the hearing being conducted in his absence, occasioned by his failing to grasp that the learned trial judge had restricted the options available to Mr Burmingham. The record shows that he did appear by 3.30 pm that day in person, and was then advised by the learned judge that that matter had been heard and determined, and to contact the lawyers for the opposing parties. The learned judge was entitled and obliged to control the proceedings brought by Mr Burmingham, and to set a time for hearing those, but Mr Burmingham clearly enough misunderstood the judge's instructions to him. In those circumstances, and solely because of his own lack of comprehension, he lost the opportunity to participate in proceedings heard on their merits. Understandably he complains about that, and because of the importance of justice being seen to be done and a party having the opportunity to be heard in person if possible, he should have a grant of leave to appeal against that refusal.
- [25] Once the matter is considered on its merits, including Mr Burmingham's extensive written arguments, it is patent that Mr Burmingham cannot resist an order against him for the costs of the first defendants thrown away in their prosecution of their application to strike out the second plaintiff. Mr Burmingham was the person in

¹⁴ The transcript of the argument and the learned judge's ruling appear in the first respondent's indexed paginated bundle of documents; the learned judge's reasons appear at page 66-71 thereof

control of the proceedings for both plaintiffs. His written material, including the pleadings, makes that clear. He let proceedings continue in the name of a non-existent party after having notice of an application to set those aside. The second defendants were obliged to continue that application to a hearing.

- [26] Nevertheless, there is apparent merit in Mr Birmingham's claim that had the first defendants supplied him in December 2004 with the outline of argument and authorities supplied in February 2005, a hearing on the latter date would have been unnecessary. He readily accepted on 8 February 2005 that the proceedings by the second plaintiff could not continue, once referred to the appropriate law. His complaint now is that he had not realised on 8 February 2005 that conceding that point would have costs implications against him. He is obviously intelligent, and this Court should accept his proposition that if the first defendants had provided him in December 2004 with the fuller outline provided on the day on 8 February 2005, it would have been unnecessary for them to argue on 8 February 2005 for setting aside the second plaintiff's proceedings; Mr Birmingham would have conceded that point before the hearing. Accordingly, I would modify the order of the learned judge, that "The First Plaintiff pay the Defendants' costs thrown away by the prosecution of the claim in the name of the Second Plaintiff from 15 December 2002", by the addition of the words "up to 21 December 2004 but not thereafter".
- [27] No grounds have been shown for disturbing the order entitling Mr Musgrave to rely on a limitation defence, if any, and no grounds have been shown for the joinder of any other legal practitioners who have become partners of either Mr Hynes or Mr Hartnett since the dissolution of the partnership of Hynes Hartnett Lawyers on 3 September 2001; there are no grounds shown for any action or orders against any such other partners. Likewise no grounds have been shown for any order requiring the provision of information about any other partnerships to Mr Birmingham.
- [28] Mr Birmingham should be allowed an extension of time within which to file his amended notice of appeal; the proceedings in this Court were conducted on the assumption that it was considering that amended notice. Many of the grounds are repetitious and this judgment deals with those of any substance. Arguments without substance include the complaint that the *UCPR* were applied in a manner that was discriminatory against Mr Birmingham and in violation of his general rights; he received a sympathetic enough hearing from the learned judge, and the difficulties he faced derived from the strength of the applications he had to meet, and not from any discrimination or unfairness.
- [29] Mr Musgrave has cross-appealed against the order joining him. This judgment says nothing about the merits of the pleaded case which Mr Birmingham proposes to file and serve, or whether it can survive the decision in *D'Orta-Ekenaike v Victoria Legal Aid*.¹⁵ It is possible that Mr Birmingham's amended statement of claim will plead negligence by Mr Musgrave other than in the conduct of the case or in work out of court intimately connected with the conduct of the case in court, and will plead proper grounds for reopening the controversy between the parties in the Federal Court. It would be inappropriate to uphold Mr Musgrave's appeal based on pleadings on which Mr Birmingham may no longer rely, he having already been given leave to deliver amended pleadings only after the outcome of this appeal is known. The argument on the appeal did not establish with clarity that there were

¹⁵ (2005) 214 ALR 92

absolutely no grounds in the proposed amended pleadings which could sustain a claim against Mr Musgrave; that judgment should be made after the amended pleadings are delivered, and delivery should be expeditious. Mr Musgrave's cross-appeal should therefore be dismissed.

[30] No basis has been shown for disturbing any of the other costs orders made by the learned judge, even had the judge given leave to appeal all of those. It was appropriate that the order joining Mr Musgrave reserve the costs of that application, and appropriate that there be no order as to the costs of that application as between Mr Birmingham and the first defendants. Since Mr Musgrave and Mr Birmingham each failed in their challenges to the order joining Mr Musgrave, there should be no costs ordered in the appeal or cross-appeal respecting the second defendant. There should be a limited costs order in the first defendants' appeal.

[31] I would order:

- Mr Birmingham be given an extension of time within which to file the amended notice of appeal marked as exhibit "DGPB-13" to his affidavit sworn 2 June 2005;
- That his appeal against order No 1 made on 8 February 2005 on the application filed 10 August 2004 be dismissed;
- That his appeal against order No 2 made on 8 February 2005 on the application filed 10 August 2004 be allowed, and that order varied to the extent of adding the words and figures "until 21 December 2004 but not thereafter";
- That his appeals against the orders No 2, 4, and 5 made on 8 February 2005 on the application filed 17 December 2004 be dismissed;
- His appeal against dismissal of an application to join other firms of solicitors as defendants be dismissed;
- The cross-appeal be dismissed with no order as to costs;
- The appellant pay one half of the first respondents' costs of the appeal assessed on the standard basis.

[32] **KEANE JA:** I agree with the reasons of Jerrard JA and with the orders proposed by his Honour.