

Solicitor wins on advocate's immunity and statute of limitation

By PETER MORAN and ROLAND EVERINGHAM

Two recent Court of Appeal decisions strengthen solicitors' protections.

Advocate's immunity

The principle of advocate's immunity – as it applies to solicitors – has long been the subject of legal controversy. In the recent decision of *Donnellan v Woodland* [2012] NSWCA 433, the Court of Appeal held the immunity could extend to advice given by a solicitor to commence or settle litigation.

In *Donnellan*, the solicitor acted for a client in a dispute with a local council over the subdivision of land. As a condition of approval, the council required the provision of an on-site stormwater detention system. In an effort to circum-

vent the condition, the client sought a drainage easement over adjoining property owned by the council. When that was refused, proceedings were commenced in the Supreme Court seeking an easement under s.88K of the *Conveyancing Act 1919*.

During the course of the retainer, the solicitor provided advice on the prospects of success, potential costs consequences and whether settlement offers made by the council should be accepted. The tenor of the advice was that the client had good prospects and should recover his legal costs. The solicitor recommended counter offers be made.

As events turned out, there was no settlement and the case ran to trial. The council prevailed in the litigation. Hamilton J ordered the client to pay the council's costs, partly on an indemnity basis.

The client subsequently brought professional negligence proceedings against the solicitor and succeeded at first instance. Hume J held that the solicitor's advice in respect of liability and costs exposure – particularly in relation to the settlement offers – constituted a breach of the solicitor's duty of care. The trial judge ordered the solicitor to pay costs, including costs incurred by the council in the earlier proceedings. The solicitor appealed the judgment.

Appeal

The Court of Appeal held the solicitor had not breached his duty. However, the greatest significance of the decision lies in the court's consideration of the principle of advocate's immunity or perhaps, as it was more aptly described by Basten AJ, "practitioner's immunity".

In 2005, the High Court in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 confirmed that advocate's immunity extends to a solicitor acting in litigation if the solicitor's negligent conduct constitutes work done out of court that leads to a decision affecting the conduct of the case in court.

In *Donnellan*, the Court of Appeal considered the trial

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judge was (wrongly) of the view that advice to commence or continue the proceedings should not be protected by immunity because the advice did not bear on the "conduct of the case in court" or "on the way that case is to be conducted" (at [221]).

The issue, the Court of Appeal found, is not when the advice is given but whether the advice, or the failure to give advice, led to a decision to continue with the case, or meant that the case was continued because of that omission. In either circumstance the conduct leads to a decision affecting the conduct of the case in court, namely its continuance



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by way of full argument before a judge.

The decision in *Donnellan* applies the principles enunciated by the High Court in *Giannarelli v Wraith* [1988] HCA 52 and *D'Orta*. It is of significance to practitioners, and solicitors in particular, because it confirms that advice given on commencement or settlement of proceedings are matters which affect the conduct of litigation and therefore attract the immunity.

Statute of Limitation

In *D'Agostino v Anderson* [2012] NSWCA 443, 21 December 2012, the Court of Appeal clarified the issue of when time commences to run in "failing to explain" cases against solicitors where purchasers/clients contend they have entered into contracts based upon incomplete or negligent advice.

Kerrie and David Anderson exchanged contracts for the purchase of a chiropractic business, and the premises from which it operated, in September 2003. Completion of both contracts occurred in November 2003.

Eight months later, in July

2004, they received notification from the local council that development consent for the use of the property as a chiropractic clinic had lapsed in March 2003, that is, before exchange.

On becoming aware of the lapsed consent, they made a further application to council but withdrew it when conditions that would have been imposed by the council couldn't be achieved. The business was moved to another location and eventually failed. The property was later sold at a loss.

The Andersons commenced proceedings against the solicitor who acted for them on the purchase of the property and the business, the Statement of Claim issuing in November 2009 – more than six years after contracts had been exchanged, but less than six years after they became aware that they lacked the necessary development consent.

The solicitor pleaded, among other things, that the action against him was statute-barred, contending that the cause of action against him had arisen when contracts were exchanged in mid-September 2003.

At first instance, the District Court found in favour of the Andersons, holding that the cause of action arose when they became aware they lacked the necessary development consent; further, that the absence of development consent at the time of exchange was only a potential or prospective defect in use.

Appeal

The Court of Appeal overturned the first instance judgment and found in favour of the solicitor. The court found it was not correct to characterise the lack of development consent as creating merely a prospective or contingent loss that would accrue only if the lapsed consent was discovered (as the District Court judge had done).

One needs to look at what "package of rights" purchasers acquire on exchange and whether that is less than what they assumed they were acquiring. The appeal judges said (at [11]): "On purchase, the Andersons acquired a package of rights that was different to what they understood they were acquiring. The difference, the lack of development consent, was the difference between acquiring a premises and the business being lawfully run, and acquiring a premises and the business being unlawfully run."

Use of the property as a chiropractic clinic was prohibited from the time the development consent lapsed. As the appeal judges said, "like any other unlawful or prohibited conduct, it did not become unlawful only on discovery" ([14]). □



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