IN THE MAGISTRATES COURT OF VICTORIA

AT MELBOURNE

Case No. E12914870

AUSTRALIAN DEMOCRATS NATIONAL INC.	Plaintiff
V	
.AU DOMAIN ADMINISTRATION LTD	First Defendant
JOHN CHARLES BELL	Second Defendant

MAGISTRATE:	Magistrate R Maxted
WHERE HELD:	MELBOURNE
DATE OF HEARING:	1st – 4th February 2016
DATE OF PRINCIPAL DECISION:	4th February 2016 Ex tempore
	COSTS DECISION 11 MAY 2016

CASE MAY BE CITED AS:

REASONS FOR DECISION

APPEARANCES:	Counsel	Solicitors
For the Plaintiff		Mr Davey
For the 1st Defendant	Mr Hassan	
For the 2 nd Defendant	Ms Tadros	

JUDGEMENT IN RESPECT OF A PERSONAL COST ORDER AGAINST SOLICITOR JOHN DAVEY

This is a continuation of the return of an application by the First Defendant for a personal costs order against the Plaintiff's solicitor Mr John Davey. The Court having previously given judgement on 4 February 2016 for the First and Second named Defendants and where other costs orders were made in favour of the Defendants.

The hearing of this matter commenced on Monday 1st February, mid-morning and ran for 2nd February and 4th February 2016. Judgement was delivered on the afternoon of 4th February 2016.

In accordance with the judgement the Plaintiff's claim was dismissed. Costs were then ordered to be paid by the Plaintiff to both the First named and Second Defendant. In respect of the Second named defendants, cost orders, the quantum figure was agreed between the parties (without admission of any liability) and fixed in the sum of $24,464.05. In respect the First Defendant, the Court ordered the Plaintiff pay the First Defendants costs taxed on Scale G up till 1 May 2015 and after 1st May 2015 to be paid on a solicitor/client basis. In default of agreement as to the amount, to be taxed by the Cost Court.

The Personal Costs Order Application:

I refer to Mr Davey's written submissions of 11th March and 29th March 2016. In those submissions Mr Davey submitted that the Court was functus officio and was not permitted to make any further costs order since an appeal has been filed in the Supreme Court of Victoria. I reject this submission. On 5th February 2016 the personal costs application was adjourned; for provision of further time to being given to Mr Davey and for Mr Davey to prepare any written submissions he said he wished to make. He was to comply with and file such submissions by 4 March 2016. Mr Davey failed, refused or simply neglected to provide the

relevant submissions in the timeframe provided by the Court. This tardiness by the Plaintiff and or Mr Davey was prevalent throughout the entire proceeding. Mr Davey made no contact with the Court, prior to expiration of the timeframe, seeking leave to extend the order on notice or otherwise. I note that the appeal of 5th February decision of this Court to the Supreme Court, was initiated on his clients instructions within the appeal timeframe and such appeal was lodged by Mr Davey on 3rd March 2016. Yet the costs submissions that were due by him on the 4th March 2016 in respect of proposed costs orders to this Court were not made until 11 March. It would appear such submissions to have not being completed until substantial persistence by the First Defendants solicitor's.

This Court is in my view still clearly within power to deliver its decision on the adjourned costs issue. The relevant costs application was made before the appeal was lodged and before the Court concluded its orders. There is and was no stay or writ of prohibition on this courts function by virtue of the appeal. Further Mr Davey sought time until 4 March in order to respond to the application.

The initial costs application by the First Defendant was made orally and at the conclusion of the hearing. The application at the conclusion on 4th February 2016 was for the solicitor for the Plaintiff to be ordered to pay legal costs of the First Defendant personally. The application sought in particular for the solicitor for the Plaintiff to pay 50 % of the legal costs of the first defendant. It was founded on two bases, breach of the Civil Procedure Act 2010 and the common law doctrine of "wasted costs", as clarified in Victoria in the decision of Dura Constructions v Hue Boutique Living Pty Ltd 2014 Victorian Supreme Court cases at 400.

This particular application was not without previous notice to the Plaintiff . The First Defendant's solicitor had foreshadowed such an application, as far back as 9th April 2015 (see exhibit PBW1 to the affidavit of Paul Woods's solicitor). The exhibit set out fully the reasons

the defendant alleged why the claim should be discontinued against the Defendants. The Court notes particularly, paragraph 17 of that exhibited letter, and was one of the precise principle grounds for the Court in fact finding that the Plaintiff could not establish a case as claimed against the First Defendant.

After a significant period of reflection of the matters the subject of this application, the Court has come to the conclusion that this is one of those rare cases where the Court is indeed obliged to order costs to be paid personally by the solicitor. I find that such an order is warranted either pursuant to the "wasted costs" jurisdiction (see Dura) and/or pursuant to the wider provisions now provided to the Courts pursuant to various Sections of the Civil Procedure Act 2010.

I provide my reasons below for coming to such a conclusion.

ORDER

That Mr John Davey be personally responsible for the payment of one third of the First Defendant's costs, the subject of the earlier costs order made on 5th February 2016, namely that the Plaintiff pay the First Defendant's costs taxed on Scale G up until 1 May 2015 and after 1st May 2015 to be paid on a solicitor/client basis in default of agreement to be taxed by the Cost Court.

REASONS FOR ORDER

After reading submissions for the Plaintiff filed 11th March 2016, the First Defendants submissions of 18th March 2016 and the affidavit of Mr Paul Woods of 2nd February 2016 and 4th February 2016 as well as the further written submissions dealing with both Dura Constructions and Section 29 of the Civil Procedure Act in reply by the Plaintiff on 29th March 2016, I come to the following conclusions;

1. The power to award costs under the Civil Procedure Act becomes relevant when there is a breach of any one or more of the various overarching obligations. The leading decision in respect of this wasted costs jurisdiction has become known as Dura Constructions v Hue Boutique Living Pty Ltd 2014 Victorian Supreme Court cases 400 per Dixon J. The law that is distilled from the Dura Construction case pertaining to such personal costs applications is very succinctly stated and summarised by counsel Mr Hassan in his submissions for First Defendant namely

    i) any contravention of the overarching obligations may be taken into account (see Dura at paragraph 93)

    ii) the jurisdiction to award such costs is approached with considerable caution as to be exercised only in clear cases (see Dura at paragraph 97)

    iii) an application under Section 29 of the Act should not be a back door means of recovering costs not otherwise recoverable against an impoverished litigant (see Dura at paragraph 100)

    iv) the Act was intended to affect cultural change and judicial officers actively hold parties to account (see Dura at paragraph 101)

    v) the Briginshaw Standard is to apply (see Dura at paragraph 108)

I refer to the submission referred at paragraph 10.5 of the First Defendant's submissions, namely the issue of proofs and the Briginshaw Principle, particularly, the much earlier common law principle , that a legal practitioner must have the benefit of the doubt when they are unable to inform the Court of all the full facts and when privilege is not waived .However when "privilege" has not been waived by the lay client, the common law position which had been earlier construed as per above ,when there was any conflict between the practitioners instructions and their duty to the Court. However the practitioner's obligations are now

restated as one always being a duty to the Court; see Section 13 sub-section 2 and 3 of the Civil Procedure Act. I adopt and accept that the Civil Procedure Act has had that affect, making the duty to the Court the paramount principle and in effect where the two conflicts the duty to the Court prevails.

Thus the client's instructions themselves which may indeed have shown or indicated that the legal practitioner was directly instructed to bring the proceedings or also to continue to do so, therefore bringing in question whether there has been a breach of the obligation by the legal practitioner, provides in effect no real effective answer to the issue. Therefore it is my view where the client has not waived privilege , this does not absolve the practitioner from divulging reasons as to why certain decisions were made and why for example a claim was made with or without a proper basis for example, or why tactical decisions were made in the litigation to pursue a particular course of action.

The legal practitioner bears the burden of proving that there was such privileged communications that permits the benefit of the doubt being given to him or her (see McDonald J Re Manilo No 2 2016 and Gibb v Gibb 2015 VSC 35) . The mere referral as Mr Davey did to "significant and important political dimensions to this case…which prevents disclosure" being made does not deal properly with the strategic and forensic decisions being made by the solicitor by the Plaintiff as to the filing of proceedings, amendments, certifications of overarching obligations, tendering of material in proceedings and reliance on particular claims and affidavits. There is and was a total dearth of any sort of explanation by the Plaintiff's solicitor as to any such decisions being made.

The issue of a proper explanation is even greater in my view where there is tenuous but not irrelevant connection between the legal practitioner and the party the subject of the proceeding. This was the position for the Plaintiff. I refer in particular to exhibit JML1 to the affidavit of Joanna Marie Lim sworn 30th November 2015 at paragraph 20, referring to Mr

Davey's then association with the Plaintiff itself. According to correspondence in these exhibits it would appear the Mr Davey was an officeholder of the Plaintiff from time to time, and during the very relevant and early periods of this dispute in 2013.

This fact alone is not a reason for incapacity to act, or prevention of any professional detachment. However coupled without a full and proper explanation as to why certain litigation steps were taken within the litigation and preparation to and continuing in it, it raises matters of enquiry which without proper explanation causes doubt, and concern as to the proper independent decision making of any lawyer.

Further and importantly Mr Davey I note at no time referred in his written submissions on the costs issues of approaching Independent Counsel in the usual course, and of receiving written advice or counsel's opinion as to proofs or the claims merit, surprising when such a valuable resource for the solicitor's branch of the profession is readily and easily accessible .

The allegations agitated before me permitting a personal costs order related to alleged breaches of Section 20, 23 and 24 of the Civil Procedure Act.

In respect of Section 20 allegations, this is obligation to cooperate in the conduct of civil proceedings:

Upon reviewing all the material filed in the Court, and the conduct proceedings before me there were various failures on the part of Mr Davey to ensure compliance with Court orders. The first serious failure was that of Mr Davey in his firms repeated failure pertaining to complying with a costs order of the Court relating to payment of costs sum prior to the case being permitted to recommence and proceed in early 2015. On 25th May 2015 the Chief Magistrate found and ruled the proceeding could be reinstated upon a proper affidavit having been filed in the first place. The Court finding that this affidavit may have avoided any

particular hearing in the Court. The Court further made comment that the Plaintiff's solicitor should have been far more diligent and criticised the proper presentation of the Plaintiff's legal work.

Further on 1st June 2015 the First Defendant, requested Mr Davey consent to an order pursuant to the Civil Procedure Act to permit an unmarked version of the second amended complaint and second amended defence, which had already been filed and to be treated as a substantive pleadings. Mr Davey failed even to respond to that request. On 23rd July 2015,a further letter by the 1st defendant was sent regarding the running of the hearing in order to seek consent to have one of the First Defendant witnesses interposed and a timetable for discovery and inspection of documents in dealing with concerns regarding the manifest defect in the pleading of the pleadings was dispatched to Mr Davey. On 3rd August 2015 a response was received refusing the interposing request. As a result an application was set down before a Magistrate on 11th August 2015 to rule on this issue inter alia. The Plaintiff did not even appear to this application, despite the Plaintiff indeed requiring such a formal application to be made . This was despite opposing the course , in writing and then requiring the application to be made on summons in Court.

By order of the Court on 11th August 2015 the parties were to exchange affidavits of documents before 28th August 2015. Both Defendants complied. The Plaintiff did not.

Further the order of the Court 11th August 2015 required the parties to exchange a list of witnesses by 22nd September 2015. The Plaintiff did not yet again comply, until 26th October 2015. The list contained the name of the actual solicitor for the Second Defendant. It is to be noted that despite this, no subpoena had ever been issued at the hearing for Ms McColl the actual solicitor to appear as a witness as contained in that list.

On 28th October the Plaintiff issued to the Australian Electoral Commissioner a subpoena to produce documents relating to the decision to deregister the Australian Democrats political

party. A copy of the subpoena was served on the First Defendant on 12th November 2015. A letter was sent to the Plaintiff's solicitor by the First Defendant solicitor requesting the relevance of these documents given that it was a contractual claim made by the Plaintiff.

On 26th October 2015 the Deputy Chief Magistrate made orders requiring parties to file and serve any affidavit material upon which the parties intended to rely by no later than 30th November 2015. The Plaintiff did not file any such material. It sought to rely on a notice to admit facts which dealt in principle with a number of issues not relevant to the pleadings. Both Defendants sought clarification as to what exact material the Plaintiff would be relying upon by way of affidavit in proving its case and in its own proceeding. Various letters were sent to Mr Davey the solicitor for the Plaintiff. No reply was yet again forthcoming on the point.

Not until 21st January 2016 did the Plaintiff serve a summons, returnable in the Practice Court which had been much earlier issued as far back as 17th December 2015 at the registry of the Court. This was not served on any of the parties for some one month. That delay was never explained to the Court or the parties .

The Plaintiff sought orders in that application that both Defendants defences be struck out and the Second Defendant be removed from the proceeding. This was despite the Plaintiff's clear earlier consent to join the Second Defendant. The summons was returnable only three days before the trial commencement date.

On 27th January 2016 the Plaintiff wrote to the First Defendant's solicitor and to Mr Hassan (Counsel for the First Defendant) making further allegations, inter alia, that Counsel may have been intending to mislead the Court; and then threatened in writing an oral application to the Court pertaining to breaches of the overarching obligations of the Civil Procedure Act by the defendants. The Deputy Chief Magistrate refused all orders sought on that application by the Plaintiff and awarded costs in favour of the Defendants.

On Friday 29th January 2016 at 6.44pm on the last working day before commencement of the trial the Plaintiff's solicitor Mr Davey sent correspondence attaching copies of affidavits of Mr Horrex and Mr Pulling that it would rely upon. This was clearly in breach of the earlier orders of the Court in late 2015.

During the trial of the matter Mr Davey a solicitor, conducted the Plaintiff's case at trial. Mr Davey in many instances relied predominantly on the evidence (the affidavits) of the two Defendants filed in court . Mr Davey filed an affidavit of a Mr Pulling and Mr Horrex , pertaining to quite short and confined material .In respect of an affidavit of Mr Horrex, this affidavit had to ultimately be withdrawn by the Plaintiff's solicitor during the actual running of the trial and after opening . This was because the affidavit itself, and its exhibit to the affidavit as sworn, failed to actually depose to the facts as alleged in the affidavit itself by Mr Horrex. The Plaintiff was then left with only one very brief affidavit sworn by Mr Michael Pulling to run its entire case. The plaintiff attempted to adopt material from the various Affidavits filed by the defendants.

There was a further attempt by Mr Davey to rely upon a certificate of a NSW Department of Fair Trading that had not been discovered to the parties until shortly prior to the morning of commencement of the trial. This entire conduct was in my view clearly in breach of an earlier order of the Court with respect to the conduct of the trial. A Certificate of Incorporation of the Plaintiff was sought to be relied upon by the Plaintiff to assert that the Plaintiff (as named) had in fact been incorporated on the dates as alleged and in the format and the style as per the process of incorporation as alleged pursuant to the NSW Incorporations Act, was also in breach of the earlier order .

It was in my view (despite the complex and prolix pleadings of the Plaintiff) always a matter in serious contention between the Plaintiff and the two Defendants as the proper incorporation of the Plaintiff. The Plaintiff was on notice that this was of crucial foundation

for the Plaintiff to commence its case by virtue of the various pieces of correspondence. Mr Davey in my view was at all material times aware of this but failed to rely and tender a proper and accurate certificate in the Court. He instead chose to rely on the 2014 Certificate. This in my view (taking into account the entire approach to the litigation), was a tactical decision to overcome the known issues of the Plaintiff's internal structural management problems relating to the commencement of the Plaintiff's named personality. Once the 2014 Certificate was identified by the Court itself in the running as flawed, due to the correspondence from the Director of NSW Department of Fair Trading, Mr Davey then only sought to withdraw the certificate and then rely on an earlier certificate which it appeared had not been discovered. A withdrawal of the certificate by the Director of Fair Trading was advised to Mr Horrex's solicitor Mr Davey by a letter of the Department. I find it difficult to accept that this tender of the exhibit was inadvertent or purely an error.

I've already in my judgement dealt with the inability of the Plaintiff to prove its many and various claims as alleged. The allegations in the statement of claim, that it had any contractual relationship between it and the First Defendant or Second Defendant cannot be seen on the material filed nor on any other material that the Plaintiff relied upon at trial . I cannot find that it ever had a bonafide case based in contract against the Defendants. I invited the Plaintiff to amend its claim during the early part of the opening of its proceedings but it chose not to do so.

Further the Plaintiff despite alleging a claim of estoppel in the pleadings and advanced in the hearing and on oral submissions, there was no proper or adequate case ever made out by material nor any evidence called or material filed that remotely came even close to proving or alleging a genuine case of an equitable estoppel or an estoppel by conduct.

In my view the fact that the Plaintiff was unable to advance any proper case of breach of contract or estoppel goes to the very heart of whether the Plaintiff's solicitor who signed the

proper basis certificate and ran a case with no relevant material has breached its overarching obligation. In my view this was a breach of Section 23 of the Civil Procedure Act.

Finally Mr Davey after the case was in fact closed, and within minutes prior to the courts delivering a judgement on the case in the Court on 4th February 2016, sought to reopen his case. It is to be noted on the evening of 3rd February 2016 Mr Davey wrote by email to both Defendants solicitors asserting the material of the First Defendant namely, the affidavit of Joanna Marie Lim and exhibits were not fully supplied to him in accordance with the affidavit. He alleged that as a result of this alleged failure, that the Court would be led into "jurisdictional error". This submission out of hours required the solicitor for the First Defendant to urgently reply by way of affidavit explaining the circumstances of the format of the exhibit. In any event this issue was never adequately or purposefully pursued by Mr Davey in a material way before me in regards to the contention or findings of the matters between the parties. It also would not have affected the decision of the Court as the point was made on matters not material to the findings. Ultimately the Plaintiff's solicitors despite making this application and again on the morning of 4th February, after the court stood the matter down to permit it the plaintiff to pursue the iisue or make any further applications in respect of those allegations did not do so .

This sort of advocacy by Mr Davey was seen throughout the proceeding and was not conduct in my view that a solicitor advocate, acting reasonably, and responsibly, should have engaged in. This also went to the issue in my view of Mr Davey breaching his obligation to ensure costs were reasonable and appropriate (see Section 24 of the Civil Procedure Act).

Given all the factors detailed above and given the steps taken by Mr Davey which were either unnecessary or failed to be proceeded with , or were made by repeated applications as to earlier concluded matters which were the subject of earlier Court orders, led evidence which was inadmissible and sought to agitate matters with no relevant or admissible material

I find that taking all of these various matters into account, as a scenario of events, that the Court is satisfied on the Briginshaw Principle Standard that there have been breaches of the overarching obligations warranting a costs order as indicated above.

Therefore the cost jurisdiction under Section 21 is now enlivened. I recognise that Mr Davey was a solicitor advocate. However in his written submissions on costs he significantly asserted that he was an experienced legal practitioner and an experienced litigation advocate. Therefore his conduct cannot be excused as through want of experience. I am satisfied on the above material that Mr Davey therefore breached his obligations pursuant to Section 20, 23 and 24 of the Act.

It is clear in my view that each case must be determined individually and any order tailored to fit the precise finding. Taking all the material into account I am satisfied that this case goes beyond a mere prima facie case of requiring just investigation and referral to a disciplinary agency . I have already ruled that a prima facie case exists for an inquiry. After reviewing Mr Davey's responses to the investigation, I am satisfied to the requisite standard that an order is now required to express the courts disapproval of the actions of the solicitor for the various breaches of the Civil Procedure Act. Such is clear that the court has such power See the cases of Gibb v Gibb 2015 VSC 35 and Stagliano v Scerri 8 April 2016 Mc Donald J .

I therefore make a practitioner costs order, in favour of the First Defendant. In accordance with the decisions of Chen and Ors v Chan and Ors 2009 VSCA at 233, Ritter v Godfrey 1998 193 CLR 72 and Oshlac v Richmond River Council 1998 193 CLR and the summation of the law as stated by Dixon J in Durac Homes I have concluded that not all the costs should be visited upon the solicitor. The applicant in this case seeks 50% of the costs by paid by Mr Davey.

When a Court determines costs in these matters, it does so primarily as a matter of "impression and evaluation" (see the cases cited above, see Chen's case) rather than with any arithmetical precision. Having considered the importance of the matters upon which the First Defendant has argued successfully, I find the responsibility of these breaches relevant to the solicitor involved and his conduct were responsible for 30% of the wasted costs in the Court. Therefore the costs order should be reflective that Mr Davey will now also be responsible for 30% only of the First Defendant's costs already made in its favour.

Magistrate RG Maxted

Dated 11 May 2016