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9 April 2013

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BY HAND

RECEIVED
09 APR 2013
BY:----------

Mr Frank O'Donnell
Director
O'Donnell Salzano
Level 4
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Dear Mr O'Donnell

Clayton Utz ats Dale
Supreme Court Proceeding Number SCI 2011 4655

We refer to previous correspondence.

We enclose, by way of service, Notice of Appeal filed today.

Yours faithfully
MINTER ELLISON

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Our reference: RDM GJC 30-7033661

enclosure

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COURT OF APPEAL

No.

BETWEEN

CLAYTON UTZ (A FIRM)

Appellant

and

CHRISTOPHER ANTONY DALE

Respondent

NOTICE OF APPEAL

Date of document: 9 April 2013
Filed on behalf of: the Appellant
Prepared by:

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TO: The Respondent

c/- his solicitors, O'Donnell Salzano, Level 4, 170 Queens Street, Melbourne, Vic 3000.

TAKE NOTICE that the Appellant appeals to the Court of Appeal of this Court against the judgment and orders of the Honourable Justice Hollingworth given on 26 March 2013.

The Appellant appeals from the whole of the judgment and orders.

The grounds upon which the Appellant relies are as follows:

1. The trial judge erred in finding that the Appellant's letter to Respondent via his solicitors dated 31 October 2006 (referred to in the judgment as the "Fagan letter")

(a) did not ask the Respondent whether he was the source of the leak of confidential information belonging to the Appellant and/or its former client to The Sunday Age or any other third party; and

(b) was a "cute lawyer's letter".

2. The trial judge erred in holding that the approach taken by the Respondent in his letter of reply to the Fagan letter dated 3 November 2006 (referred to in the judgment as the "3 November letter") was "understandable" in the context in which it was written.

3. The trial judge ought to have found that:

(a) in the Fagan letter, the Appellant clearly and unambiguously asked the Respondent to confirm whether or not he was responsible for disclosing the relevant information to The Sunday Age or any other third party;

(b) in his 3 November letter in reply, the Respondent denied that he was responsible for disclosing the relevant information to The Sunday Age or any other third party **(Respondent's denial)**; and

(c) the Respondent's denial was false because he had in fact disclosed the relevant information to The Sunday Age, Peter Gordon of Slater and Gordon and Jack Rush QC in September 2006.

4. The trial judge erred in holding that the Respondent had not knowingly and recklessly made a false representation when under an obligation to tell the truth for the purposes of section 103(2)(a) of the *Evidence Act 2008* (Vic) **(Act)** and that the 3 November letter did not give cause to doubt the Respondent's credibility in relation to his evidence concerning his dealings with Mr Myers QC.

5. The trial judge ought to have found that the Respondent's denial in the 3 November letter was a false representation made knowingly and/or recklessly when under an obligation to tell the truth and is a matter which substantially affects the assessment of the credibility of his evidence concerning his dealings with Mr Myers QC pursuant to section 103 of the Act.

6. The trial judge erred in:

   (a) finding that the Respondent's evidence as to an alleged meeting with Mr Myers QC on or about 23 August 2004 (referred to in the judgment as the "August 2004 meeting") and an alleged telephone call with Mr Myers QC in 2005 (referred to in the judgment as the "2005 phone call") is not *directly* contradicted by Mr Myers QC; and/or

   (b) failing to find that the Respondent's evidence as to the August 2004 meeting and the 2005 phone call is contradicted by and/or is inconsistent with the evidence of Mr Myers QC.

7. The trial judge erred in finding that Mr Myers QC's evidence about his "universal practice" only goes to his belief as to the basis upon which the Respondent would have spoken with him, if at all.

8. The trial judge ought to have found that the Respondent's evidence as to the August 2004 meeting and the 2005 phone call is contradicted by and/or is inconsistent with the evidence of Mr Myers QC in circumstances where:

   (a) Mr Myers QC's evidence is that:

      (i) he has no recollection of any meeting with the Respondent on or about 23 August 2004;

      (ii) he has no recollection of ever discussing with the Respondent the matters which the Respondent says were discussed at the August 2004 meeting;

      (iii) he has no recollection of ever discussing with the Respondent any issues between the Respondent and the Appellant whether relating to Mr and Mrs Ebner or otherwise;

      (iv) he appeared on three occasions in November 2011, December 2011 and March 2012 for the Appellant resisting an application by Mr and Mrs Ebner to extend the time for service of proceedings against Clayton Utz and at no stage in the course of those appearances or in preparation for them was any recollection triggered of any dealings between Clayton Utz

and the Ebners and Mr Myers QC believes that some recollection is very likely to have been triggered if he had previously had the discussion described by the Respondent; and

(v) he believes that he first heard that the Respondent had been dismissed from Clayton Utz in or about October 2006, when he was engaged for British American Tobacco Australia Services Pty Ltd in relation to the publication of confidential documents provided by the Respondent to a journalist for The Sunday Age newspaper. The Respondent became a defendant to the proceeding and at no stage in the course of those proceedings was any recollection triggered of the circumstances of the Respondent's dismissal and Mr Myers QC believes that some recollection is very likely to have been triggered if he had previously had the discussion described by the Respondent,

(b) the matters which the Respondent says were discussed at the August 2004 meeting and the 2005 phone call are matters which would, or would likely, have left an indelible impression on Mr Myers QC's memory had they been discussed;

(c) Mr Myers QC's evidence is that his "universal practice" is to insist upon the provision of a brief at least comprised of a backsheet if someone seeks his advice as Counsel, even if the advice is sought by a colleague in a personal capacity and the backsheet is marked "fee declined", yet no brief or backsheet was provided in respect of the August 2004 meeting or 2005 phone call and, according to the Respondent's evidence to the trial judge, Mr Myers QC did not insist upon the provision of a brief or backsheet at or following the August 2004 meeting or 2005 phone call; and

(d) Mr Myers QC's evidence was not challenged by the Respondent.

9. The trial judge erred in finding that the Respondent's evidence as to the August 2004 meeting and the 2005 phone call should be largely accepted and that during the August 2004 meeting the Respondent spoke frankly and confidentially to Mr Myers QC about his current legal predicament and sought advice about what he should do to best

protect himself and Mr Myers QC gave the Respondent legal advice which led to the Respondent agreeing to repay certain monies to the Appellant on a particular basis.

10. The trial judge ought to have found that the Respondent's evidence as to the August 2004 meeting and the 2005 phone call cannot be accepted having regard to all of the facts and circumstances of the case, including the matters in paragraphs 3, 5 and 8 above.

11. The trial judge erred in finding that a professional relationship of lawyer and client was created between the Respondent and Mr Myers QC during, and for the purposes of, the August 2004 meeting.

12. The trial judge ought to have found that:

    (a) as the Respondent's evidence as to the matters discussed at the August 2004 meeting cannot be accepted, there was no evidence to support a lawyer and client relationship between the Respondent and Mr Myers QC during, and for the purposes of, the August 2004 meeting; or

    (b) alternatively, the evidence adduced before the trial judge as to the August 2004 is insufficient to objectively infer the existence of a lawyer and client relationship between the Respondent and Mr Myers QC during, and for the purposes of, the August 2004 meeting.

13. The trial judge erred in having regard to whether the Respondent's specificity of description of the confidential information is greater than that which was identified and protected in *Sent v John Fairfax Publication Pty Ltd* (***Sent***) [2002] VSC 429.

14. The trial judge ought to have found that the degree of particularity of the confidential information depends upon the circumstances of each case and that the circumstances in *Sent* are distinguishable from those before the trial judge in the primary proceeding, including by reason of the matters in paragraph 8 and 12 above and in particular the fact that, unlike the position in *Sent*, it is the evidence of Mr Myers QC that he never acted for the Respondent at all.

15. The trial judge erred in finding that at the August 2004 meeting the Respondent communicated confidential information to Mr Myers QC in circumstances which imposed an obligation of confidentiality on Mr Myers QC.

16. The trial judge ought to have found that:

    (a) as the Respondent's evidence as to the matters discussed at the August 2004 meeting cannot be accepted, there was no evidence of any confidential information communicated to Mr Myers QC; or

    (b) alternatively, the Respondent's evidence as to the matters discussed at the August 2004 meeting fails to identify any confidential information communicated to Mr Myers QC with sufficient particularity.

17. The trial judge erred in holding that Mr Myers QC had a relevant memory capable of being refreshed and that if that memory were to return, there is a real possibility that he might be a witness at the trial or that he might have an unfair advantage in his cross-examination of the Respondent at trial.

18. The trial judge erred in finding that an injunction should be granted in order to ensure the due administration of justice and to protect the integrity of the judicial process and in order that justice not only be done, but be seen to be done and that a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that the Appellant be prevented from retaining Mr Myers QC in the primary proceeding.

In place of the judgment and orders from which the appeal is brought the Appellant seeks orders that:

1. The appeal be allowed.

2. The orders of the Honourable Justice Hollingworth made on 26 March 2013 be set aside and the following orders be made in lieu thereof:

    (a) the Plaintiff's summons dated 14 February 2012 be dismissed; and

    (b) the Plaintiff pay the Defendant's costs of the summons, including reserved costs.

3. The Respondent pay the Appellant's costs of this appeal.

4. Such further orders or other relief as this Court deems appropriate.

DATED: 9 April 2013

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MINTER ELLISON
Solicitors for the Appellant