

# Reasonable prospects of success and costs orders against solicitors

By Phillipa Alexander

While the courts have long had statutory power to make personal costs orders against legal practitioners,<sup>1</sup> in NSW the bar was raised in 2002 with the introduction of division 5C part 11 (now division 10, part 3.2) of the *Legal Profession Act*.<sup>2</sup>

**T**he previous reluctance of courts to exercise their jurisdiction to make a costs order against a practitioner acting in even a 'hopeless' case<sup>3</sup> is being challenged by these provisions, with the Court of Appeal recently making costs orders against two practitioners.<sup>4</sup> By virtue of the definitions of 'solicitor' and 'barrister' in the *Legal Profession Act* 2004, these provisions will also apply to inter-state practitioners who appear in NSW proceedings.

Section 345<sup>5</sup> stipulates that a law practice must not act unless there are reasonable prospects of success for a claim or defence of a claim for damages (with preliminary work being exempted under s346). Providing legal services without reasonable prospects of success could be deemed unsatisfactory professional conduct or professional misconduct under s347. In such proceedings, s348 empowers a court on its own motion or on the application of any party to the proceedings to make personal costs orders (including indemnifying orders) against a law practice or a legal practitioner associate of the practice.

In *Degiorgio v Dunn (No. 2)*,<sup>6</sup> Barrett J notes that general costs orders against a party's lawyer turn upon the lawyer's duty to the court, whereas the more demanding standard of the *Legal Profession Act* subjects the lawyer to a statutory duty reflective of the interests of the community.

## CLAIM FOR DAMAGES?

The threshold issue of what constitutes 'a claim for damages' was considered in *Degiorgio*. His Honour held that 'a claim for damages' includes every case in which the originating process claims what are designated as 'damages', whether or not the nature of the damages is specified. He further found that while 'the *Civil Liability Act* is concerned overwhelmingly with claims in negligence for personal injuries, the parliamentary materials make it clear that the *Legal Profession Act* aspects are not so confined'.<sup>7</sup> His Honour left open for further consideration whether claims for compensation or reimbursement that are not labelled 'damages', but which may fall within one of the 'loose sense' concepts of damages, were subject to the provisions.

The Court of Appeal has also confirmed that 'a court in

which proceedings are taken on a claim for damages' referred to in s348 covers an application in the Court of Appeal for leave to appeal against an award of damages.<sup>8</sup>

## REASONABLE PROSPECTS – ELEMENTS OF THE BELIEF

Five elements underlying a belief in reasonable prospects of success were first identified in *Momibo Pty Ltd v Adam*<sup>9</sup> and were confirmed and amplified in *Degiorgio*<sup>10</sup> as being:

1. An overriding element that the practitioner subjectively held a reasonable belief about the prospects of success, based on propositions that are logically arguable in an objective sense.
2. The reasonable belief must have its objective foundation in material available to the practitioner. The material needs to be credible, but not necessarily strictly admissible.
3. The identified material must provide a proper basis for alleging each relevant fact.
4. The claim must proceed according to a reasonably arguable view of the law. Arguably, available extensions and innovations of the law may be encompassed.
5. When acting for a claimant, there must be reasonable prospects of some damages, however nominal or token, being recovered on some aspect of the claim.

## ORDERS REFUSED

Orders were refused in *Momibo*<sup>11</sup> on the basis that the solicitors had material (albeit not in admissible form) upon which a reasonable belief could be based, that there was an 'arguable view of the law' and, for part of the claim at least, there were reasonable prospects of damages being recovered. In *Sorridimi v Moros & Anor*,<sup>12</sup> the Court of Appeal set aside the order of Herron ADCJ dismissing Sorridimi's application for a s198M order. The matter was remitted back to the District Court where an order was again refused on the basis that such an order should be made only in claims that are spurious or without merit, reflecting the references in the Premier's second reading speech to 'unmeritorious claims' and 'spurious defences'.<sup>13</sup>

In *Lemoto v Able Technical Pty Ltd*,<sup>14</sup> the Court of Appeal

overturned a costs order made by Phegan DCJ against a solicitor on the basis that there was no *prima facie* case that the solicitor had provided legal services without reasonable prospects of success. The Court confirmed that such a costs order was discretionary, not mandatory, and involved 'either an exercise of disciplinary power or the exercise of a power ancillary to a disciplinary power, rather than merely the exercise of the court's costs jurisdiction'. The Court noted that 'the purpose of division 5C is plainly to deter the legal practitioner – at the peril of a personal costs order, and possibly disciplinary proceedings – from representing a client where the solicitor believes that there are no reasonable prospects of success. There is no entitlement to legal representation in such cases. It is a matter for the client to determine whether to pursue the claim or defence without such services'.<sup>15</sup>

Orders were also refused by Barrett J in *Degorgio*,<sup>16</sup> on the basis that 'without reasonable prospects of success' equates to 'so lacking in merit or substance as to not be fairly arguable'. Nor did Barrett J consider that 'lawyers practising in NSW courts must boycott every claimant with a weak case'. Barrett J was satisfied that the solicitor had a genuine subjective opinion that the claim was not so 'devoid of merit or substance as to be not fairly arguable' and that, objectively, there were reasonable grounds for holding that opinion.

**ORDERS MADE**

Costs orders were, however, made by the Court of Appeal against both a solicitor and a barrister in *Eurobodalla Shire Council v Wells & 2 Ors*.<sup>17</sup> At trial, the Council was found not to have been negligent in relation to the collapse of a park bench, nor had the claimant established that the severity of her non-economic loss was at least 15% of the most extreme case.<sup>18</sup> The claimant was unsuccessful on her application for leave to appeal and was ordered to pay the Council's costs of the leave application on an indemnity basis. The Council sought an order under s198M (now s348) that the claimant's legal representatives indemnify the claimant for the costs payable by the claimant to the Council. The Court of Appeal did 'not think there was any prospect as to damages' nor 'any real case for liability' and the case below was characterised as 'hopeless'.<sup>19</sup>

As the evidence before the trial court did not ground a belief that the claim had reasonable prospects of success, the Court of Appeal upheld the presumption in s198N (now s349)<sup>20</sup> that legal services were provided on the claim without reasonable prospects of success. It therefore exercised its discretion to order the claimant's practitioners to indemnify the claimant in respect of the costs payable to the Council.

In exercising its discretion, the Court of Appeal considered the nature of the contravention of division 5C, and the possibly serious implications of making the costs order; whether it was just, in all the circumstances, and whether the order should be as to the whole or part of the costs. The Court noted that the case had 'no redeeming feature' and 'no question of difficult law', and the prospect of the claimant paying the costs of application for leave to appeal was zero.

**OTHER LEGISLATION**

A lengthy analysis of the meaning of a 'reasonable prospect of succeeding' was recently given by the Western Australian Court of Appeal.<sup>21</sup> The Court was required to consider the requirement introduced by the *Criminal Appeals Act 2004* that leave to appeal on a ground of appeal is not to be granted unless the court is satisfied the ground has a 'reasonable prospect of succeeding'.<sup>22</sup>

The Court considered that there was practical utility in asking whether the arguments in support of a ground are such as to call for a reply from the respondent. If not, it is unlikely to have a reasonable prospect of succeeding. 'On the other hand, what is "reasonable" takes its colour from the circumstances. Thus, where a ground is on a point on which the law is unclear and is in a state of development, and where the ground might succeed were the point to be accepted, the ground would be unlikely to be held to have no reasonable prospect of succeeding'.<sup>23</sup>

Certification that the proceedings have reasonable prospects of success is also required in relation to patent infringement proceedings under the *Therapeutic Goods Act 1989* (Cth). A penalty of up to \$10,000,000 applies where the certificate is false or misleading in a material particular.<sup>24</sup>

The Federal Court is empowered under the *Workplace Relations Act 1996* to impose a penalty of \$10,000 against body corporate advisers, and \$2,000 against other advisers, where an adviser has encouraged an employee to make or >>

**PROFESSIONAL MEDICAL NEGLIGENCE REPORTS**

**Susan Welling & Associates**



*acting as independent intermediary between specialist doctors and solicitors.*

We have a wide range of specialists available to provide expert medical negligence reports.

---

- Accident & Emergency Physician • Anaesthetist
- Breast & General Surgeon • Cardiologist
- Cardiovascular and Thoracic Surgeon • Chiropractor & Osteopath
- Colorectal Surgeon • Dentist • Dermatologist • Endodontist
- Ear, Nose & Throat Surgeon • Gastroenterologist
- General Physician • General Practitioner • General Surgeon
- Geneticist • Haematologist • Hand, Plastic & Reconstructive Surgeon
- Infectious Diseases Physician • Intensivist
- Maxillofacial & Oral Surgeon • Neonatal Physician • Neurologist
- Neurosurgeon • Obstetrician/Gynaecologist • Oncologist
- Ophthalmologist • Orthodontist • Orthopaedic Surgeon
- Paediatrician • Paediatric Anaesthetist • Paediatric Cardiologist
- Paediatric Infectious Diseases Physician • Paediatric Neurologist
- Paediatric Orthopaedic Surgeon • Paediatric Surgeon
- Paediatric Radiologist • Paediatric Thoracic Physician
- Pathologist • Pharmacologist • Psychiatrist
- Renal Physician • Radiologist • Rheumatologist
- Thoracic/Respiratory Surgeon • Upper GI Surgeon
- Urologist • Vascular Surgeon

PO Box 672, Elsternwick, VIC 3185  
 Tel: 03 9576 7491 Fax: 03 9576 7493  
 Email: [susanw@smartchat.net.au](mailto:susanw@smartchat.net.au)

pursue an unfair termination application where they should have been aware that there was no reasonable prospect of success in respect of the application.<sup>25</sup>

The *Migration Act 1958* now provides for costs orders against persons, including lawyers, who encourage another person to commence or continue litigation where it has no reasonable prospect of success, and the person does not give proper consideration to the success of the litigation or achieving some ancillary purpose.<sup>26</sup> In raising the standard of conduct to a new level, the Act also specifies that migration litigation need not be hopeless or bound to fail for it to have 'no reasonable prospect of success'.

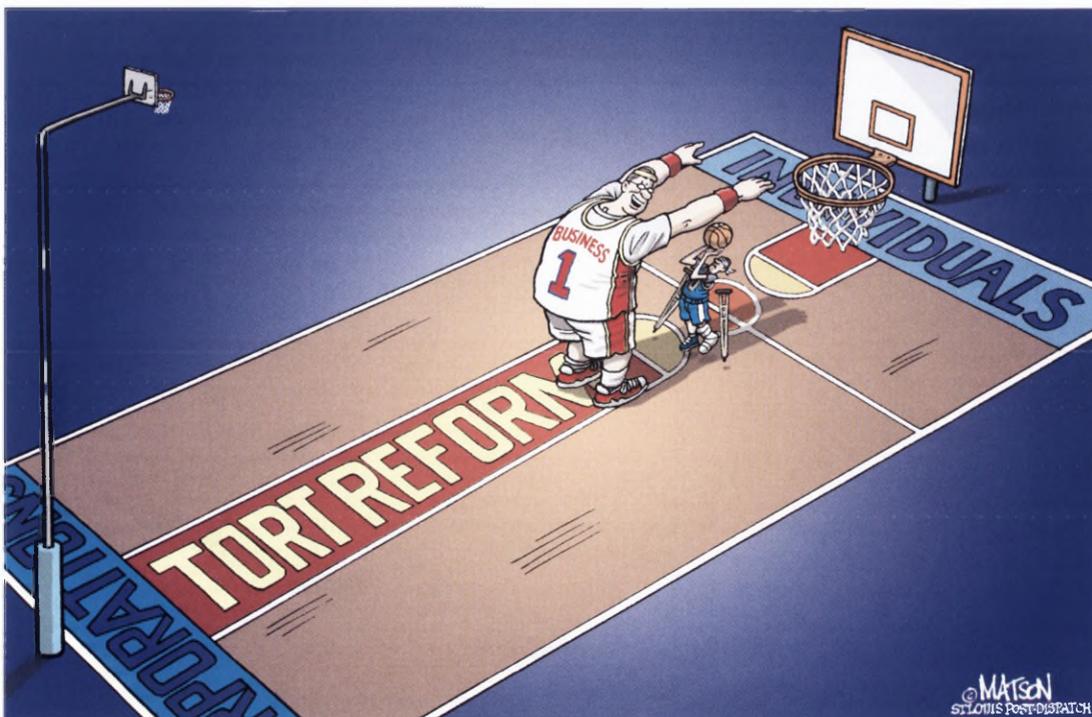
**SUMMARY**

While the above cases provide some guidance for practitioners as to the meaning of without 'reasonable prospects of success' and the circumstances in which a court may exercise its discretion to make a s348 costs order under the NSW legislation, it remains difficult to ascertain what meaning the courts are ascribing to the word 'reasonable'. To date, the legislation has been narrowly interpreted, such that it appears an order will be made only where legal services have been provided in proceedings with 'no' prospects of success. This is propitious, noting the point made by Barrett J that 'the legislation is not meant to be an instrument of intimidation, as far as lawyers are concerned'.<sup>27</sup> ■

**Notes:** **1** Currently under s99 *Civil Procedure Act 2005* (NSW) and in a supervisory jurisdiction pursuant to Rule 42.3(2)(g) *Uniform Civil Procedure Rules 2005* (NSW). **2** Section 198M *Legal Profession Act 1987* (NSW); s348 *Legal Profession Act 2004* (NSW). **3** *Steindl Nominees Pty Ltd v Lghaifair* [2003] QCA 157; *Levick v Commission of Taxation*

[2000] FCA 674; *Harley v McDonald* [2001] UKPC 18. **4** *Eurobodalla Shire Council v Wells & 2 Ors* [2006] NSWCA 5 (21 February 2006). **5** *Legal Profession Act 2004* (NSW). **6** *Degiorgio v Dunn (No. 2)* [2005] NSWSC 3 (1 February 2005) at [26]. **7** *Degiorgio v Dunn (No. 2)* [2005] NSWSC 3 (1 February 2005) at [15]. **8** *Eurobodalla Shire Council v Wells & 2 Ors* [2006] NSWCA 5 at [13]. **9** *Momibo Pty Ltd v Adam* (2004) 1 DCLR (NSW) 316. **10** See note 6. **11** See note 9. **12** *Sorridimi v Moros & Anor* [2004] NSWCA 168. **13** *Hansard*, Legislative Assembly, 28 May 2002, p2085. **14** *Lemoto v Able Technical Pty Ltd* [2005] NSWCA 153 (9 May 2005) at [121]. **15** *Lemoto v Able Technical Pty Ltd* [2005] NSWCA 153 at [142]. **16** See note 6. **17** See note 4. **18** As required by s16 of the *Civil Liability Act 2002* (NSW). **19** *Eurobodalla Shire Council v Wells & 2 Ors* [2006] NSWCA 5 (21 February 2006) at [3]. **20** As an aside, it is noted that failure to provide certification under s198L(2) (now s347(2)) will not invalidate or render proceedings a nullity such that they will be liable to be struck out solely on that ground. However, the proceedings may be struck out if the default continues after it has been brought to the attention of the defaulter. **21** *Samuels v The State of Western Australia* [2005] WASCA 193 (7 October 2005). **22** See ss 9, 18 and 27(1) *Criminal Appeals Act 2004* (WA). **23** *Samuels v The State of Western Australia* [2005] WASCA 193 (7 October 2005) at [59]. **24** Section 26C *Therapeutic Goods Act 1989* (Cth). **25** Sections 676 and 679 *Workplace Relations Act 1996* (Cth). **26** Section 486E to 486K *Migration Act 1958* (Cth). **27** *Degiorgio v Dunn (No. 2)* [2005] NSWSC 3 (1 February 2005) at [28].

**Phillipa Alexander** specialises in legal costs and is a director of Costs Partners. PHONE (02) 9006 1033  
EMAIL [phillipa@costspartners.com.au](mailto:phillipa@costspartners.com.au)



"NOW THIS IS WHAT I CALL A FAIR COURT SYSTEM!"