



# Young Lawyers Case Notes

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## **Sims v Chong [2015] FCAFC 80**

*Appeal - Summary dismissal by primary judge of claim against legal practitioner because of advocate's immunity - Dismissal overturned on appeal - Respondent represented appellant in Supreme Court proceedings - Appellant commenced Federal Court proceedings alleging misleading and deceptive conduct by respondent - Whether alleged conduct protected by advocate's immunity.*

In *Sims v Chong* [2015] FCAFC 80, the Full Federal Court (Mansfield, Siopis and Rares JJ) allowed an appeal from the summary dismissal of the appellant's claim against his former solicitor. The appellant essentially alleged that the respondent was negligent in acting for him in a contract claim in the Supreme Court of Western Australia, which was struck out on the pleadings [2]. The solicitor's conduct was also said to involve unconscionable conduct, breaches of statutory and fiduciary duties, and misleading and deceptive conduct [25]. The primary judge dismissed the claim on two grounds.

The first ground was that the claim was an abuse of process. On appeal, the parties agreed, and the court accepted, that the primary judge erred in dismissing the claim on this ground [38]. The appellant was not simply re-litigating the Supreme Court action, because the Federal Court claim extended further: it also pleaded an unjust enrichment claim, and alleged that the appellant retained the solicitor due to misleading and deceptive conduct [39].

The second ground was that the Federal Court proceedings were 'doomed to failure' because the solicitor enjoyed advocate's immunity [3]. The Full Court concluded that the conduct asserted on the part of the respondent "arguably falls outside the scope of the advocate's immunity" [91]. The court endorsed the view of McHugh J in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 233 CLR 1: the immunity protects the interest in finality of litigation, and extends to

"any work, which, if the subject of a claim of negligence, would require the ... re-litigation of matters already finally determined by a court" [61]. The Supreme Court action was struck out on the pleadings — an interlocutory decision, not a final determination of the parties' rights [68]. The Federal Court action was not a collateral attack on that decision [74], even though the Supreme Court proceedings created an *Anshun* estoppel foreclosing the cause of action the appellant said the practitioner should have pleaded [72].

The House of Lords abolished advocate's immunity in *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, and the High Court has observed that the immunity, as it is understood in Australia, does not exist in Canada, New Zealand or the United States: *D'Orta-Ekenaike* [61]. Yet the High Court has declined to follow the House of Lords. The Full Court's decision, which turns on the technical distinction between *res judicata* and *Anshun* estoppel, revives the question answered negatively by the House of Lords in 2000: is the advocate's immunity a necessary and appropriate way to promote the administration of justice and the finality of litigation in the 21<sup>st</sup> century?

Scott Young

## **MZACX v Minister for Immigration & Anor [2015] FCCA 681**

*Review - Refugee Review Tribunal - eligibility for a protection visa - 'relocation test' - whether risk of persecution a relevant consideration - whether personal circumstances a relevant consideration.*

In *MZACX v Minister for Immigration & Anor* [2015] FCCA 681 the Federal Circuit Court of Australia (the Court) considered the 'relocation' test when assessing whether an asylum seeker is eligible to be granted a Protection visa. An applicant may not be eligible for a Protection visa if it is reasonable for them to relocate to a different region in their home country where there is no real risk of persecution. This is the 'relocation' test.

The applicant sought judicial review of a decision of the Refugee Review Tribunal (RRT) which effectively affirmed a decision of the Minister's delegate to refuse to grant him a Protection visa. The applicant argued two grounds of appeal: first, that the RRT failed to consider the risk of him suffering harm in a different region of Pakistan; and second, that the RRT failed to consider his personal circumstances when assessing whether it was reasonable or practicable for him to relocate to a different area of Pakistan.

The Court held that, when assessing whether an applicant can reasonably relocate to a different region in their home country, the decision maker must consider both the risk of persecution in any other region and the practicability of the applicant relocating to a different region. This assessment should always take into account the personal circumstances of the applicant. The decision maker may also consider independent country information.

The Court found that the RRT had correctly applied the 'relocation' test as the RRT had considered the applicant's language skills, education and work experience, in addition to country information, in deciding that he was reasonably able to relocate to a different region in Pakistan. Upon this basis, the appeal was dismissed.

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## **Kidd v The State of Western Australia [2015] WASCA 62 (S)**

*Appeal - costs - protracted disputes as to costs be discouraged - case management principles - O 66 r 2(d) RSC - assessment and taxation of costs following relevant costs determinations.*

In *Kidd v The State of Western Australia* [2014] WASC 99 (S) (Beech J), the Court made costs orders in the defendants' favour following the plaintiffs' failed attempt to restrain Burswood Nominees Ltd (the third defendant) from all