CITATION:	*Kiranou v Black* [2020] NTSC 60
PARTIES:	GEORGE KIRANOU
	v
	CECIL BLACK
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2019 – 03050 – SC
DELIVERED:	8 September 2020
HEARING DATE:	20 August 2020
JUDGMENT OF:	Luppino AsJ

CATCHWORDS:

COURTS – Practice and Procedure – Application for summary judgment and strike out – Difference between a strike out application and a summary judgment application – Embarrassing pleadings – When a pleading is embarrassing – Requirements of pleadings.

LEGAL PRACTITIONERS – Advocate's immunity from suit – Scope of advocate's immunity – Test to determine the application of the immunity – Whether pleaded case is subject to the immunity.

Supreme Court Rules, rr 4.07(a), 13.02(1)(a), 22.01, 23.01, 23.02.

LKAJ Two Pty Ltd v Squire Patton Boggs (AU) & Anor [2020] NTSC 45.
Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd [2011] QCA 252.
Environinvest Ltd v Prescott; Environinvest Ltd v Blackburne Pty Ltd [2011] VSC 325.

Trade Practices Commission v George Weston Foods Pty Ltd (1979) 39 FLR 182.
Meckiff v Simpson [1968] VR 62.
Trade Practices Commission v David Jones (Australia) Pty Ltd (1985) 7 FCR 109.
Northern Territory of Australia v John Holland Pty Ltd & Ors [2008] NTSC 4.
Giannarelli & Ors v Wraith & Ors (1988) 81 ALR 417.
D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1.
Attwells & Ors v Jackson Lalic Lawyers Pty Ltd [2016] HCA 16.
NT Pubco Pty Ltd & Anor v Strazdins & Ors [2014] NTSC 8.
Rees v Sinclair [1974] 1 NZLR 180.
Keefe v Marks (1989) 16 NSWLR 713.
Biggar v McLeod [1978] 2 NZLR 9.
Alpine Holdings Pty Ltd v Feinauer [2008] WASCA 85.
Coshott v Barry [2009] NSWCA 34.
Goddard Elliott v Fritsch [2012] VSC 87.
Donnellan v Woodland [2012] NSWCA 433.
Attard v James Legal Pty Ltd [2010] NSWCA 31.
Day v Rogers [2011] NSWCA 124.
Yates Property Corporation Pty Ltd v Boland (1997) 145 ALR 169.
Saif Ali v Sydney Mitchell & Co [1980] AC 198.
McRae v Stevens [1996] Aust Torts reports 81-405.
Trade Practices Commission v David Jones (Australia) Pty Ltd (1985) 7 FCR 109.

REPRESENTATION:

Counsel:

Plaintiff:	In Person
Defendant:	T Liveris

Solicitors:

Plaintiff:	Self Represented
Defendant:	Gilchrist Connell

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Kiranou v Black [2020] NTSC 60

No. 2019 – 03050 – SC

BETWEEN:

GEORGE KIRANOU
Plaintiff

AND:

CECIL BLACK
Defendant

CORAM: Luppino AsJ

REASONS

(Delivered 8 September 2020)

[1] By summons filed 21 July 2020 the Defendant sought summary judgment and alternatively, a strike out of the Plaintiff's Second Amended Statement of Claim. The application is made pursuant to rules 22.01, 23.01 and 23.02 of the *Supreme Court Rules* ("*SCR*"). The Plaintiff has been unrepresented throughout the proceedings.

[2] Those rules provide as follows:-

22.01 Summary judgment

(1) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:

(a) the first party is prosecuting the proceeding or that part of the

proceeding; and

(b) the Court is satisfied that the other party has no reasonable prospect of successfully defending the proceeding or that part of the proceeding.

(2) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:

(a) the first party is defending the proceeding or that part of the proceeding; and

(b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.

(3) For this rule, a defence of a proceeding or part of a proceeding need not be hopeless or bound to fail for it to have no reasonable prospect of success.

(4) The powers under this rule may be exercised at any stage in a proceeding.

(5) This rule does not limit any powers that the Court has apart from this rule.

23.01 Stay or judgment in proceeding

(1) Where a proceeding generally or a claim in a proceeding:

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the Court;

the Court may stay the proceeding generally or in relation to a claim or give judgment in the proceeding generally or in relation to a claim.

(2)-(3) Omitted

23.02 Striking out pleading

Where an endorsement of claim on a writ or originating motion or a pleading or a part of an endorsement of claim or pleading:

(a) does not disclose a cause of action or defence;

(b) is scandalous, frivolous or vexatious;

(c) may prejudice, embarrass or delay the fair trial of the proceeding; or

(d) is otherwise an abuse of the process of the Court,

the Court may order that the whole or part of the endorsement or pleading be struck out or amended.

[3] In *LKAJ Two Pty Ltd v Squire Patton Boggs (AU) & Anor*[1] (*LKAJ*), I pointed out the difference between an application for summary judgment and a strike out application. I noted that the former operates as a summary determination of the proceeding on the basis that the claim, or defence, is bad in law, whereas a strike out application assumes a valid claim, or defence, in law but the claim is insufficiently expressed in the pleading.

[4] The major difference between the two is the effect of a successful application on the proceedings. A successful application for summary judgment necessarily brings the proceedings to an end. In contrast, the strike out of a pleading does not automatically determine the proceedings as leave can be sought to file an amended pleading. Only when that leave is not sought or not granted or, where there is a failure to re-plead after leave is granted, can the proceedings be dismissed, and then by further order, as an indirect consequence of the strike out.

[5] Relevant to the strike out application is the question of when a pleading is embarrassing. I also discussed this in *LKAJ*. I said that the term derives from the phrase "*may prejudice, embarrass or delay the fair trial of the proceeding*" in rule 23.02(c) of the *SCR*. In broad terms, a pleading will be found to be embarrassing if it does not state allegations sufficiently clearly so that the other party knows clearly what is alleged against it. That follows

1 [2020] NTSC 45.

from the core function of pleadings, which is to clearly and unambiguously inform the other parties of the case that must be met.

[6] More specifically, and relevant to the current proceedings, an unintelligible or ambiguous pleading, or a confusing pleading, or a pleading which is vague or too general, or which pleads irrelevancies, or which pleads conclusions, or which fails to comply with the pleading rules, have all been held to be embarrassing.[2]

[7] The background to the substantive proceedings is that the Plaintiff retained the Defendant as his lawyer to represent him "… *for his property settlement against his ex-partner*".[3] No other basis of engagement or retainer has been pleaded. In general terms, the Plaintiff alleges that the Defendant was negligent in the handling of those proceedings resulting in the loss by the Plaintiff of a number of properties.

[8] The proceedings were commenced by Originating Motion. That was inappropriate given the nature of the dispute. An order was made that the matter proceed as if commenced by Writ for that reason. No order was made for the affidavit in support of the Originating Motion to stand as a pleading[4] and the Plaintiff was ordered to file a Statement of Claim within six weeks. The allowed time was substantially more than the norm but that no doubt

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2 See *LKAJ* for a fuller discussion; see also *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd* [2011] QCA 252, *Environinvest Ltd v Prescott; Environinvest Ltd v Blackburne Pty Ltd* [2011] VSC 325, *Trade Practices Commission v George Weston Foods Pty Ltd* (1979) 39 FLR 182, *Meckiff v Simpson* [1968] VR 62, *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1985) 7 FCR 109 and *Northern Territory of Australia v John Holland Pty Ltd* [2008] NTSC 4.

3 Second Amended Statement of Claim, paragraph 7.

4 Rule 4.07(a) of the *SCR*.

reflected the complex nature of the required pleading and the concessions usually made for unrepresented parties.

[9] Although the Plaintiff put a lot of effort into the Statement of Claim, nonetheless the pleading which was filed was inadequate. I do not criticise the Plaintiff for that, given the complexity of the pleading principles generally and specifically the issues in this case. Although Courts usually make concessions and allowances for unrepresented parties, at a bare minimum however the pleadings must at least be intelligible and clear enough to enable the Defendant to know the case which must be met. Further, in context of a summary judgment application, no concessions can be made in favour of an unrepresented litigant which would permit a claim which is bad in law, to be maintained.

[10] The Defendant indicated at an early stage that it considered the Statement of Claim to be deficient and that particulars would first be sought. Given that, at my suggestion, the Defendant agreed to first serve a request for particulars and a summary of the defects in the Statement of Claim. The intention was that that would provide some guidance to the Plaintiff in the preparation of an amended pleading. Leave was given to the Plaintiff to file and serve a further version of the pleading within 4 weeks of service of the Defendant's request for particulars.

[11] That resulted in the filing of an Amended Statement of Claim. It was only marginally better than the pleading it replaced and it was also inadequate. I

had little doubt that the complexity of the issues involved meant that it was unlikely that the Plaintiff would be able to file and serve a sufficient pleading if he did not have the benefit of legal assistance. I stressed this to the Plaintiff at an early stage. Further time (6 weeks) was then allowed to the Plaintiff to again amend the pleading. I agreed to that because the Plaintiff assured me that he would be able to obtain legal assistance as the cost was his only obstacle and his children would assist with the cost.

[12] However, as it transpired the Plaintiff's children were not able to financially assist him and therefore the Plaintiff filed a Second Amended Statement of Claim on 23 June 2020, which again was prepared without legal assistance. In the intervening period, on or about 22 June 2020, the Defendant served another request for particulars in respect of the Amended Statement of Claim. Although the Plaintiff may not have received that letter until shortly before he completed the Second Amended Statement of Claim, it is clear that none of the matters in that letter were addressed in the last version filed.

[13] That pleading is again marginally better than the preceding version but it is also inadequate. It does not remedy the numerous existing defects. By the time the matter came before the Court for the hearing of the Defendant's application, a period of nearly 2 months had elapsed from the time that the Defendant sent the letter of 22 June 2020, yet the Plaintiff chose not to respond to that letter until the eve of the hearing. At that time, he gave

notice that he was seeking an extension of the time to file a further Amended Statement of Claim.

[14] At the commencement of the hearing before me the Plaintiff sought that leave, indicating a willingness to address the matters raised in the Defendant’s last letter, and sought an adjournment of the Defendant's application for that purpose. The Plaintiff explained that he had not responded to that letter as he was attempting to secure legal assistance. I doubted that explanation given that the first task was securing financial assistance from his children. That was all he had to do in the end as the Plaintiff’s children could not provide assistance so the Plaintiff had ample time to respond to the Defendant’s letter.

[15] Although I was unhappy with the two month delay and the last minute request, my main concern was that, without legal assistance, allowing the Plaintiff a further opportunity to amend the pleading was not likely to result in a better or sufficient pleading. Hence, I refused the Plaintiff’s request. However, I did make one concession namely, that I would proceed to hear the Defendant's application based on the current pleading, but if the Plaintiff provided a proposed Third Amended Statement of Claim before my decision was completed, (and I agreed to allow at least 14 days) then, provided that the proposed pleading contained sufficient and proper pleadings, I would deal with the Defendant's application on the basis of that proposed further pleading. The Plaintiff did not submit a proposed Third Amended Statement

of Claim within that time frame and therefore these reasons are based on the Second Amended Statement of Claim.

[16] With that background, I first make some general comments about the Second Amended Statement of Claim. It pleads mostly irrelevant facts or evidence. The latter is especially evident from the 78 annexures, which clearly are the evidence by which the Plaintiff's case is intended to be proved. That is an obvious breach of the rule 13.02(1)(a) of the *SCR* requiring material facts, as opposed to the mode of proof of the material facts, to be pleaded. Overall the document reads more like an affidavit than a pleading. I would be prepared to overlook the non-compliance with rule 13.02(1)(a) by an unrepresented party where the pleading otherwise satisfied the core function of the pleadings. However, the current pleading does not achieve that minimum requirement and it does not sufficiently articulate the basis of the Plaintiff's claim. The precise allegations are not clear, nor are there sufficient particulars. The deficiency is particularly evident in respect of the proper pleading of loss and the total absence of material facts in respect of causation, the latter being a critical failure.

[17] The Defendant's application for summary judgment is primarily based on advocate's immunity. The alternative order sought is for strike out of the current Statement of Claim. That the alternative order sought will be made, if summary judgment is not ordered, appears to be inevitable, for the reasons discussed below, as the current pleading is inadequate. At the very least the

pleading is embarrassing and, crucially, it fails to plead all the material facts and particulars required to properly found the intended cause of action.[5]

[18] The principle of advocate's immunity is a common law concept which has been the subject of a number of High Court decisions in recent times.[6] The principle was most recently dealt with in this Court in *NT Pubco Pty Ltd & Anor v Strazdins & Ors*[7] (*NT Pubco*). The following is a summary of the principles of advocate's immunity derived from the various authorities.[8]

1. A lawyer is immune from civil action in respect of the conduct of a case in court, or work intimately connected with the conduct of the case in court.

2. The immunity is based on the public policy of ensuring the finality of judicial decisions and to prevent re-litigation of a controversy.

3. The immunity is an immunity from civil suit and therefore it is irrespective of the specific cause of action on which the suit is based.

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5 *Northern Territory of Australia v John Holland Pty Ltd & Ors* [2008] NTSC 4.

6 *Giannarelli & Ors v Wraith & Ors* (1988) 81 ALR 417; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; *Attwells & Ors v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16.

7 [2014] NTSC 8.

8 *Giannarelli & Ors v Wraith & Ors* (1988) 81 ALR 417; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; *Attwells & Ors v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16; *Rees v Sinclair* [1974] 1 NZLR 180; *Keefe v Marks* (1989) 16 NSWLR 713; *Biggar v McLeod* [1978] 2 NZLR 9; *Alpine Holdings Pty Ltd v Feinauer* [2008] WASCA 85; *Coshott v Barry* [2009] NSWCA 34; *Goddard Elliott v Fritsch* [2012] VSC 87; *Donnellan v Woodland* [2012] NSWCA 433; *Attard v James Legal Pty Ltd* [2010] NSWCA 31; *Day v Rogers* [2011] NSWCA 124; *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169; *Saif Ali v Sydney Mitchell & Co* [1980] AC 198; *McRae v Stevens* [1996] Aust Torts reports 81-405.

4. Work is intimately connected with the conduct of a case in court for the application of the immunity if the work leads to a decision affecting the conduct of the case in court.

5. The question is not when the conduct complained of occurred but whether that lead to a decision affecting the conduct of a case in court, but the conduct cannot be too far removed from the actual conduct of the trial.

6. The immunity does not depend on whether the claim against the lawyer could, or might, involve a direct or indirect challenge to the outcome of the litigation.

7. The immunity is conduct based and applies equally to acts or omissions.

8. Negligent conduct in relation to a resolution before trial can be, but is not necessarily, in connection with the conduct of the case in court.

9. The immunity extends to any work which would otherwise require the impugning of a final decision of the court or the re-litigation of a matter already finally determined by a court.

[19] In *NT Pubco,*[9] Hiley J discussed a number of cases which demonstrated the application of the principle. Dealing first with examples of instances which have been held to fall within the immunity, these were:-

1. Failing to claim interest on damages;[10]

2. Failing to obtain and prepare and evidence for trial;[11]

3. Failing to raise a matter pertinent to an application;[12]

4. Failing to plead a statutory prohibition on the admissibility of evidence;[13]

5. Negligently advising a settlement;[14]

6. Giving advice about, and making decisions about, which witnesses to call, preparing legal arguments and considering the adequacy of pleadings.[15]

[20] Examples of instances which have been held not to fall within the immunity are:-

1. Failing to advise as to the availability of possible actions against third parties;[16]

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9 [2014] NTSC 8.
10 *Keefe v Marks* (1989) 16 NSWLR 713.
11 *Goddard Elliott v Fritsch* [2012] VSC 87; *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169.
12 *Rees v Sinclair* [1974] 1 NZLR 180.
13 *Giannarelli & Ors v Wraith & Ors* (1988) 81 ALR 417.
14 *Biggar v McLeod* [1978] 2 NZLR 9.
15 *Keefe v Marks* (1989) 16 NSWLR 713.

2. Failing to advise to commence proceedings in a particular jurisdiction;

3. The negligent compromise of appeal proceedings;[17]

4. For negligent pre-action advice concerning available relief.[18]

[21] The starting point where advocate's immunity is raised is the identification, by analysis of the allegations in the pleadings, of the conduct complained of to determine if it is connected with the conduct of the case in court.[19] Unless some part of the claim falls outside the scope of the immunity, clearly the claim will not be maintainable and an order for summary judgment is appropriate.

[22] Now follows my summary of, and comments on, the allegations pleaded in the Second Amended Statement of Claim in the context of the current application.

[23] As noted above, paragraph 7 recites that the Defendant represented the plaintiff "*for his property settlement against his ex-partner*" between 17 August 2012 and 16 June 2015. Although no other basis of retainer is pleaded, other parts of the pleading (see discussion below in respect of paragraphs 8(i)(a) and 8(i)(d) of the pleading) refer to Plaintiff instructing the Defendant in what appears to be two other separate matters. That is a

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16 *Saif Ali v Sydney Mitchell & Co* [1980] AC 198.
17 *Donnellan v Watson* (1990) 21 NSWLR 335.
18 *Coshott v Barry* [2009] NSWCA 34.
19 *NT Pubco Pty Ltd & Anor v Strazdins & Ors* [2014] NTSC 8.

defect which is enough to render the pleading embarrassing, but that is a technical defect which I am prepared to overlook in the case of an unrepresented plaintiff as that can be rectified if necessary.

[24] Paragraph 8 then contains a number of bare allegations specifically, that the Defendant owed the Plaintiff a duty of care, that the Defendant failed to discharge his duty and was negligent. This pleading is defective. Had the Plaintiff properly responded to the Defendant's request for particulars, this deficiency may have been rectified. For now however, the pleading is defective as it lacks allegations and particulars of the nature and scope of the alleged duty. That is required to enable assessment of whether the subsequent conduct alleged amounts to a breach of the alleged duty. Again, in appropriate circumstances, that defect is curable.

[25] The bare allegations in the pleading amount to a pleading of conclusions. *Northern Territory of Australia v John Holland Pty Ltd & Ors*[20] is authority for the proposition that a Plaintiff must plead all the material facts necessary to establish the cause of action relied on, including loss and causation, and that a conclusory pleading of the allegations, without supporting material facts, does not satisfy that requirement. Further, particulars cannot fill in any gaps in the pleading of material facts.[21] This only relates to the strike out part of the application so again, in appropriate circumstances, that defect is curable.

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20 [2008] NTSC 4.

21 *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1985) 7 FCR 109.

[26] The particulars to paragraph 8(i)(a) refer to proceedings for the prosecution of a related body corporate. The particulars allege that the related company was prosecuted "*because the defendant failed to defend the plaintiff*" and further alleges that the Defendant "*breached in (sic) his duty of care as a result the plaintiff suffered a loss*."

[27] Causation and loss must be pleaded in the normal course as facts relative to that are essential parts of pleadings in a claim such as in the current proceedings. As the related company referred to is not a party to the proceedings, the pleading must therefore demonstrate how the Defendant's actions caused a loss for the Plaintiff, as opposed to the related company. Further, how "*the defendant failed to defend*" is not apparent on the wording of the pleading. Relying on the annexures for this purpose, it appears that the Plaintiff alleges that the Defendant failed to attend a hearing of a prosecution of that related company for failure to pay tax. The annexures also show that the company intended to plead guilty at that hearing and that the fine actually imposed on that company in default of appearance was less than anticipated in any case. If that is correct then it may be that the Defendant's failure to attend, instead of causing a loss, may have saved legal fees.

[28] Notwithstanding that, the pleading does not plead facts to demonstrate the loss occasioned by the Plaintiff, nor causation. As things stand, I cannot see how anyone but the related company could maintain that claim. Clearly though, the Plaintiff has no reasonable prospect of success on this part of

the proceeding, even disregarding issues relating to advocate's immunity. The Defendant is entitled to an order for summary judgment in respect of this part of the proceeding on that basis.

[29] In any case, failing an order for summary judgment, this part of the pleading is clearly embarrassing and would be struck out in the alternative.

[30] The next two allegations (paragraphs 8(i)(b) and 8(i)(c) of the pleading) can be conveniently dealt with together. These allegations are that the Defendant failed to prepare a "*Financial Statement*" in default of court orders. I consider that to be conduct protected by advocate's immunity. It is directly on point with the authorities which have held that a claim based on the failure to present evidence falls within the immunity. Although the relevant paragraphs of the pleading allege an omission, as opposed to a positive act, that distinction is irrelevant to the determination as to whether the conduct in question falls within the immunity.

[31] In any case, the pleading is also insufficient as it is vague and unclear and lacks necessary particulars. Most importantly, there is inadequate pleading of facts to establish loss and causation is, at best, left to inference. Hence, these allegations would likewise be struck out in the alternative.

[32] Paragraph 8(i)(d) alleges that the Defendant failed to prepare a "*counter claim to BDO*". Having regard to the annexures, I think the failure is more correctly described as a failure to submit a defence to that claim, but nothing turns on that. With this allegation there is at least some pleading of

loss. In paragraph 22, although containing a bare statement that the Defendant's negligence caused the Plaintiff to suffer the loss of his properties, the particulars state that the Plaintiff paid the outstanding amounts to BDO "*to avoid bankruptcy*". However, clearly that is still inadequate.

[33] The annexures relevant to this allegation show that the Defendant advised the Plaintiff that he did not have a defence to the claim. On that basis, any claim against the Defendant would fall within advocate's immunity as that is sufficiently connected with the conduct of the case in court. That would lead to summary judgment for the Defendant in respect of this allegation. In any case, if the advice of the Defendant complained of was found to be correct then the Plaintiff could not possibly establish loss. Causation is yet again, not addressed in the pleading. To sufficiently plead loss and causation the pleading would require allegations to the effect that the debt could not otherwise have been recovered by the claimant and that the necessity of the Plaintiff to pay that debt occurred as a result of a failure by the Defendant. To deal with advocate's immunity, pleadings which demonstrated that the specified failure was conduct falling outside the scope of advocate's immunity would be required. Therefore, in the alternative, failing an order for summary judgment, the allegations are liable to strike out on pleadings principles.

[34] Paragraph 9 alleges negligence on the part of the Defendant in failing to adequately explain certain provisions of the Family Law Act to the Plaintiff.

The particulars refer to orders made in court but how that is connected to the alleged negligence is not clear. The annexures do not shed any further light on the nature of the allegation. Again there is inadequate pleading of material facts to demonstrate loss and no pleading is to show causation.

[35] In respect of the summary judgment application, there is enough in the pleading to satisfy me that the conduct upon which the allegation is founded is conduct which attracts advocate's immunity. Accordingly, this part of the claim is not maintainable. Again, if I were to decline an order for summary judgment, the defective nature of the pleading would necessarily result in the strike out of that allegation.

[36] Paragraphs 10, 11, 12 and 16 can be conveniently dealt with together as they are all based on an alleged failure by the Defendant to engage an interpreter. There is an allegation that the Defendant was specifically instructed to do so. The pleading nonetheless refers to the interpreter being required to translate documents to be sworn or signed or for the purposes of a court hearing. I am satisfied therefore on the pleading that the conduct complained of sufficiently falls within the conduct that attracts advocate's immunity. Again, there it is insufficient pleading with respect to loss, and no pleadings to establish causation meaning that, in any case, those paragraphs are liable to strike out if summary judgment is not ordered.

[37] Paragraph 13 is an allegation that the Defendant was negligent because he failed to follow instructions. Although this seems to relate more to a cause

of action for breach of retainer than negligence, which has not been pleaded, that makes no difference to the application as advocate's immunity applies to the civil suit, not the specific cause of action.

[38] Having said that, notwithstanding that the pleading lacks allegations and particulars regarding the alleged failure to follow instructions, the particulars sufficiently demonstrate that the instructions relied on relate to the conduct of the case in court. More importantly, what it is not pleaded is what loss flows from that or how the alleged failure is causative of loss. Two of the allegations are analogous to complaints of a failure to provide evidence to the court. Specifically, a failure to appoint a forensic accountant as well as a failure to issue subpoenas. This conduct clearly triggers the immunity and is on point with the cases of *Yates Property Corporation Pty Ltd v Boland*[22] *(Yates)* and *Goddard Elliott v Fritsch*[23] (*Fritsch).*

[39] The same applies in respect of paragraphs 14, 15, 17 and 18. All of these paragraphs, in different ways, allege that the Defendant failed to submit documents to the court. Similarly, and also on authority of *Yates*[24] and *Fritch*,[25] advocate's immunity would apply. Likewise, again these allegations would be liable to strike out based on the inadequate pleading of loss and the absence of pleadings concerning causation in any case.

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22 (1997) 145 ALR 169.
23 [2012] VSC 87.
24 (1997) 145 ALR 169.
25 [2012] VSC 87.

[40] Paragraph 19 contains an allegation that the Defendant was negligent for failing to explain costs orders. The allegation is not clear as it refers to orders made by Judge Harland, Justice Dawe and Justice Strickland. This is embarrassing at least as the involvement of Justice Strickland came after the end of the Defendant's retainer. The specific complaint seems to be that the Plaintiff was not told that he had to meet costs orders, (presumably the orders of Judge Harland and/or Justice Dawe), before he could pursue his appeal before Justice Strickland. If that is the correct allegation, then no loss can possibly follow. Again, there are no pleadings to establish causation in respect of the otherwise inadequately pleaded loss.

[41] In any case, and subject to the Plaintiff demonstrating that the conduct occurred within the period of the Defendant's retainer, given the nature of the allegation, the conduct complained of would be conduct to which the immunity applies.

[42] Paragraphs 20 and 21 are meaningless. The complaint seems to be that the Defendant sent emails to the Plaintiff, which he did not understand, and that impacted on his health. How that could be is not stated, nor is that apparent. It is difficult to see how this could be a breach of the duty based on the pleading in paragraph 7. However, this allegation must inevitably relate to work intimately connected with the conduct of the case in court thereby triggering advocate's immunity considerations again. Summary judgment in respect of that is therefore appropriate. Otherwise strike out is inevitable as

the pleading is vague and the pleaded loss could not possibly flow from the conduct complained of. Further, facts to establish causation are not pleaded.

[43] Paragraph 26 alleges a breach by the Defendant of professional conduct rules. It is not clear if this is intended to be a particular of the duty of care but that is irrelevant to the question of advocate's immunity. The entire paragraph however is a jumble of allegations, proposed evidence, opinion or commentary by the Plaintiff.

[44] This pleading is supported by 11 subparagraphs of particulars. Subparagraph 1 of the particulars complains that the Defendant took so long to issue proceedings that the Plaintiff's ex-partner commenced proceedings first. The Plaintiff was apparently unhappy about that as he wished to be the applicant, not the respondent. It is inconceivable that any loss could flow from that, and yet again causation is not demonstrated and therefore summary judgment is appropriate on that basis in any case, even disregarding advocate's immunity.

[45] Subparagraph 2 of the particulars contains a complaint that the Defendant decided to argue the Plaintiff's case as a business dispute and not as a domestic relationship property settlement dispute. If so, I think that is clearly intimately connected with the conduct of the case in court which triggers advocate's immunity.

[46] Subparagraph 3 is unclear. It is brief so I will set it out in full. It provides:- "*When the defendant hired [name of counsel] to support the plaintiff's case,*

the defendant asked him to pull out because we will be lost (sic)." It is apparent from the annexures that the person named in the particular acted as counsel for the Plaintiff. However, I do not know what these particulars are intended to mean. It is impossible to tell precisely what the conduct complained of is, other than the fact that it involves counsel and could therefore mean that it related to the conduct of the case in court, in which case advocate's immunity might apply. In case it is intended to be a complaint of the conduct of counsel, that is not maintainable without joinder of the named counsel in any case. However, on the state of this pleading, a determinative answer is not possible. Needless to say however, the subparagraph is embarrassing and is liable to strike out.

[47] The particulars in subparagraph 4 amount to little more than the Plaintiff being unhappy with the Defendant's advice. The Plaintiff seems to allege that the Defendant merely informed the Plaintiff about what the other side wanted rather than advancing the Plaintiff's case. I do not know what this means nor what loss flows. Clearly this is insufficient as a particular of breach of duty as it is too general. Particulars are meant to supplement the generality of pleadings. This is more a representative or indicative type pleading and the Defendant cannot possibly know precisely what case it has to meet from such a pleading. Although there is some attempt at pleading loss, and possibly causation, it is far from sufficient. The subparagraph seems to suggest that the conduct of the Defendant complained of caused the Plaintiff anxiety resulting in the loss of two properties and control of the

Plaintiff's business. That is a bare statement. As a pleading of loss and/or causation, it is not adequate. Overall, again on the state of this pleading, a determinative answer as to whether advocate's immunity can apply is not possible but again, the subparagraph is embarrassing and is liable to strike out in any event.

[48] Subparagraph 5 refers to what the Plaintiff describes as a catastrophic situation. These particulars are very unclear. Implicit is the allegation that the Defendant somehow did not follow instructions although even that is not clear. The Plaintiff's complaint is that somehow properties were given to his ex-partner and although rents were received in respect of those properties that income was not applied to servicing loans, presumably by the ex-partner, but even that is not clear. A bare allegation is pleaded that "*the defendant did not do anything to stop this*." The object of the pleading is to inform the other party of the case that has to be met. A pleading like this in the negative does not achieve that. Instead, the subparagraph should precisely specify, and in conjunction with setting out precisely what was the scope of the Defendant's duty, what it is that the Defendant should have done. There is insufficient particularisation to precisely determine the nature of the conduct complained of for the purposes of determining whether advocate's immunity applies. The conduct complained of would appear to generally involve the conduct of the Plaintiff's claim but the extent to which it related to work in court cannot be conclusively determined from the pleading.

[49] What is clear however is that the subparagraph is so vague as to be meaningless. Further, what loss flows is not apparent and that has not been alleged in the pleading. As commonly occurs in the Plaintiff's pleading, in this instance there is also no pleading of causation. It is obviously embarrassing and strike out is inevitable.

[50] The sixth subparagraph is grammatically unclear and the best that I can determine is that the Plaintiff complains that the Defendant, being aware of some anomalies in a partnership tax return, did not point out those anomalies to the court. To the extent that the complaint is of conduct that the Defendant failed to put something before the court, that amounts to conduct which is subject to the protection of advocate's immunity in accordance with *Yates*[26] and *Fritsch*.[27] Again, the vagueness and uncertainty of the subparagraph makes it embarrassing and liable to strike out. Again the pleading of loss is only general and therefore inadequate and nothing is pleaded to show that whatever loss exists was caused by the alleged default of the Defendant.

[51] The particulars in subparagraphs 7 and 11 have common features. Both are predicated on the basis of a failure by the Defendant to put some matter before the court, in the case of the seventh subparagraph, in respect of a mortgage over a property, and in the case of the other, relating to some expenditure from the Plaintiff's business credit facility. In each case the

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26 (1997) 145 ALR 169.
27 [2012] VSC 87.

Defendant is said to have advised the Defendant that nothing could be done because it was "*too late*". Again the particulars are insufficient and unclear but I consider there is enough to categorise this conduct as advice from the Defendant in respect of evidence to be put before the court. Therefore, again on authority of *Yates*[28] and *Fritsch*,[29] that is the subject of protection by advocate's immunity. Again the pleading of loss is only general and therefore inadequate and nothing is pleaded to show that if there was loss, it was caused by the alleged default of the Defendant.

[52] In subparagraph 8 the Plaintiff claims (implicitly, as it is not clear), that he instructed the Defendant to put material before the court in respect of an allegation that (although this is also unclear), the Plaintiff had not deposited a payment made to his business into the bank account of that business. The Plaintiff's complaint is that the Defendant failed to mention this to the court which quite obviously puts that into the category of conduct related to the conduct of the case in court. Again the pleading of loss is only general and therefore inadequate and nothing is pleaded to show that whatever loss resulted was caused by the default of the Defendant.

[53] Subparagraphs 9 and 10 relate to some tax documents. The Plaintiff complains the Defendant did not put the documents before the court. This is an obvious *Yates*[30] and *Fritsch*[31] situation and is clearly the subject of advocate's immunity. Again the pleading of loss is only general and

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28 (1997) 145 ALR 169.
29 [2012] VSC 87.
30 (1997) 145 ALR 169.
31 [2012] VSC 87.

therefore inadequate and nothing is pleaded to show that the loss was caused by the alleged default of the Defendant.

[54] Looking at the Second Amended Statement of claim overall, apart from some instances where the vagueness of the pleading makes it impossible to categorise the conduct complained of for the purposes of determining whether advocate's immunity applies,[32] I find that the Plaintiff's claim is otherwise sufficiently connected with the conduct of the Plaintiff's case in court such that the claim is not maintainable in law based on advocate's immunity. On that basis, the Plaintiff's case has no prospects of success and summary judgment in favour of the Defendant is appropriate.

[55] Where the application of advocate's immunity is not clear by reason of the insufficiency of the pleadings, strike out is inevitable for reasons already stated. Leave to re-plead could be granted if appropriate. Given the extensive parts of the pleading that are the subject of summary judgment in favour of the Defendant as aforesaid, leave would be required in respect of the whole pleading as a piecemeal re-pleading of only the struck out portions would be ineffective.

[56] The Plaintiff has now had three attempts to provide a Statement of Claim. Despite that, so far the versions produced have not satisfied basic and minimum requirements. As I had pointed out to the Plaintiff at a very early stage, it is clear to me that the Plaintiff will not be able to provide an

[32] Subparagraphs 1, 3, 4 and 5 of paragraph 26 of the Second Amended Statement of Claim.

appropriate pleading without legal assistance. I am satisfied from what the Plaintiff has told me that he has no prospect of securing legal assistance. I am not satisfied that an adequate pleading will result if leave is granted. Further, having had the advantage of considering much of the evidence the Plaintiff intends to adduce, in any case it is difficult to see that the Plaintiff would be able to plead a case based on allegations of conduct which would not be the subject of advocate's immunity meaning the granting of leave would be futile. Leave to amend is therefore refused.

[57] I therefore enter judgment for the Defendant against the Plaintiff in respect of all bar subparagraphs 3, 4 and 5 of paragraph 26 of the Second Amended Statement of Claim and I will order strike out of the balance of that pleading. An order for the costs of the application and of the proceedings in favour of the Defendant is also appropriate.

[58] I will hear the parties as to consequential orders.