HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

GREGORY IAN ATTWELLS & ANOR APPELLANTS

AND

JACKSON LALIC LAWYERS PTY LIMITED RESPONDENT

Attwells v Jackson Lalic Lawyers Pty Limited
[2016] HCA 16
4 May 2016
S161/2015

ORDER

1. *Appeal allowed.*

2. *Set aside orders 3, 4 and 5 of the Court of Appeal of the Supreme Court of New South Wales made on 1 October 2014 and in their place order that:*

   (a) *the appeal be allowed;*

   (b) *the orders of Harrison J made on 17 October 2013 be set aside, and in their place order that the separate question of whether the plaintiffs' claim is defeated entirely, because the defendant is immune from suit, be answered: "No".*

3. *Set aside the orders of the Supreme Court of New South Wales made on 28 October 2014.*

4. *The respondent pay the appellants' costs of the proceedings on the separate question in the courts below and of the appeal to this Court.*

5. *The Law Society of New South Wales pay the costs of the appellants and the respondent occasioned by its intervention in the proceedings.*

On appeal from the Supreme Court of New South Wales

Representation

G O'L Reynolds SC with R C A Higgins, R A Yezerski and D W Robertson for the appellants (instructed by L C Muriniti & Associates)

A S Bell SC with P D Herzfeld for the respondent (instructed by Sparke Helmore Lawyers)

R P L Lancaster SC with N J Owens for the Law Society of New South Wales, intervening (instructed by Allens)

CATCHWORDS

Attwells v Jackson Lalic Lawyers Pty Limited

Legal practitioners – Negligence – Advocate's immunity from suit – Advice given out of court – Where advice given by advocate led to agreed settlement of proceedings – Where terms of settlement reflected in consent orders made by court and court's noting of agreement – Where negligence proceedings issued in respect of advice – Whether advocate immune from suit.

High Court – Stare decisis – Whether *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 and *Giannarelli v Wraith* (1988) 165 CLR 543 should be reconsidered.

Words and phrases – "advocate's immunity", "collateral attack", "consent orders", "finality", "intimately connected", "judicial determination", "judicial power", "statement of agreed facts".

Civil Procedure Act 2005 (NSW), ss 90, 133(1).
Uniform Civil Procedure Rules 2005 (NSW), Pt 36.

1 FRENCH CJ, KIEFEL, BELL, GAGELER AND KEANE JJ. In these proceedings, the appellants claim that earlier litigation to enforce a guarantee was settled on terms unfavourable to the first appellant as a result of the negligent advice of the respondent, his solicitor at the time. The respondent has raised the advocate's immunity from suit as a complete answer to the appellants' claim. The respondent contends that the advocate's immunity extends not only to negligent advice which leads to a final judicial determination, but also to negligent advice which leads to an agreed settlement.

The advocate's immunity

2 In *D'Orta-Ekenaike v Victoria Legal Aid*[1], this Court held that the advocate's immunity from suit under the common law of Australia in respect of his or her participation in the judicial process extends to protect a solicitor involved in the conduct of litigation in court. In reaching that conclusion, the Court declined to reconsider its earlier decision in *Giannarelli v Wraith*[2], in which it was held that the advocate's immunity extends to "work done out of court which leads to a decision affecting the conduct of the case in court."[3] That extension of the scope of the immunity was justified by the view that, as Mason CJ said[4]: "it would be artificial in the extreme to draw the line at the courtroom door." But the immunity was not extended to all work in any way connected to litigation. Mason CJ explained[5]:

> "Preparation of a case out of court cannot be divorced from presentation in court. The two are inextricably interwoven so that the immunity must extend to work done out of court which leads to a decision affecting the conduct of the case in court. But to take the immunity any further would entail a risk of taking the protection beyond the boundaries of the public

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1 (2005) 223 CLR 1; [2005] HCA 12.

2 (1988) 165 CLR 543; [1988] HCA 52.

3 (1988) 165 CLR 543 at 560.

4 (1988) 165 CLR 543 at 559.

5 (1988) 165 CLR 543 at 559-560.

policy considerations which sustain the immunity. I would agree with McCarthy P in *Rees v Sinclair*[6] where his Honour said:

> '… the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing.'"

3 This statement of the scope of the immunity by Mason CJ was confirmed in *D'Orta*, in which Gleeson CJ, Gummow, Hayne and Heydon JJ said of the boundary of the immunity[7]:

> "there is no reason to depart from the test described in *Giannarelli* as work done in court or 'work done out of court which leads to a decision affecting the conduct of the case in court'[8] or … 'work intimately connected with' work in a court. (We do not consider the two statements of the test differ in any significant way.)"

The issue

4 The present case raises the question whether the immunity extends to negligent advice which leads to the settlement of a case by agreement between the parties. The appellants contend that *D'Orta* does not support that extension. In the alternative, they argue that the immunity should be abolished.

5 The abolition of the immunity would require this Court to overrule its decisions in *D'Orta* and *Giannarelli*. For the reasons which follow, the appellants' argument in this regard should be rejected. On the other hand, the appellants' argument as to the scope of the immunity should be accepted. The authoritative test for the application of the immunity stated in *D'Orta* and *Giannarelli* is not satisfied where the work of the advocate leads to an agreement between parties to litigation to settle their dispute. No doubt an advice to cease litigating which leads to a settlement is connected in a general sense to the litigation which is compromised by the agreement. But the intimate connection required to attract the immunity is a functional connection between the advocate's

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6 [1974] 1 NZLR 180 at 187.

7 (2005) 223 CLR 1 at 31 [86].

8 (1988) 165 CLR 543 at 560.

work and the judge's decision. As Mason CJ said in *Giannarelli*, the required connection is between the work in question and the manner in which the case is conducted in court. Both *D'Orta* and *Giannarelli* were concerned with claims which impugned a judicial determination to which the allegedly negligent work of the advocate contributed. As will be seen from a closer consideration of the reasoning in *D'Orta*, the public policy, protective of finality, which justifies the immunity at the same time limits its scope so that its protection can only be invoked where the advocate's work has contributed to the judicial determination of the litigation.

6 In short, in order to attract the immunity, advice given out of court must affect the conduct of the case in court and the resolution of the case by that court. The immunity does not extend to preclude the possibility of a successful claim against a lawyer in respect of negligent advice which contributes to the making of a voluntary agreement between the parties merely because litigation is on foot at the time the agreement is made. That conclusion is not altered by the circumstance that, in the present case, the parties' agreement was embodied in consent orders.

The guarantee proceedings

7 The first appellant and Ms Barbara Jane Lord ("the guarantors") guaranteed payment of the liabilities of a company to a bank. Ms Lord is not a party to the present litigation. The second appellant is a party to the current proceedings by virtue of an assignment to him by the first appellant's trustee in bankruptcy of the first appellant's rights against the respondent[9].

8 The company defaulted on its obligations to the bank, and the bank commenced proceedings against the company and the guarantors ("the guarantee proceedings"). In April 2010, the guarantors and the company retained the respondent to advise and act for them in relation to the guarantee proceedings.

9 The action came on for trial before Rein J in the Supreme Court of New South Wales. The amount of the company's indebtedness to the bank was almost

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9 The proceedings were in federal jurisdiction as the cause of action assigned to the second appellant had vested in the first appellant's trustee in bankruptcy by operation of s 58(1) of the *Bankruptcy Act* 1966 (Cth). No party adverted to the federal character of the jurisdiction and it was not suggested that it would have made any difference in this case.

$3.4 million. That debt was secured by various securities given by the company in favour of the bank. The guarantors' liability under the guarantee was limited to $1.5 million. On the opening day of the trial, the bank certified that the total amount owing under the guarantee, including interest and enforcement costs, was $1,856,122[10].

10 Later that day, counsel for the guarantors informed the Court that the proceedings had been settled on terms to the effect that judgment would be entered against the guarantors and the company for the full amount of the company's indebtedness to the bank, being $3.4 million, and the bank would not seek to enforce the order for payment of that amount if the guarantors paid to the bank the sum of $1.75 million on or before 19 November 2010, a date approximately five months after the settlement. Those terms were reflected in a consent order for judgment in the amount of $3.4 million made by the Court and the Court's noting of the conditional non-enforcement agreement between the parties, which was not itself embodied or reflected in an order of the Court.

11 In the event, the guarantors failed to meet their initial payment obligation. A subsequent attempt to set aside the settlement as an unenforceable penalty was dismissed[11].

12 The appellants then issued proceedings in the Supreme Court of New South Wales against the respondent alleging that it was negligent in advising the guarantors to consent to judgment being entered against them in the terms of the consent orders, and in failing to advise them as to the effect of the consent orders ("the negligence proceedings").

The current proceedings

13 Upon the application of the respondent pursuant to r 28.2 of the Uniform Civil Procedure Rules 2005 (NSW), and with the consent of the first appellant, Schmidt J ordered that the question whether the respondent is immune from suit by virtue of the advocate's immunity be determined separately from the other issues in the negligence proceedings[12]. The parties agreed to a document, described as "Proposed Agreed Facts" but treated as a statement of agreed facts

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10 *Jackson Lalic Lawyers Pty Ltd v Attwells* [2014] NSWCA 335 at [5].

11 *Attwells v Marsden* (2011) 16 BPR 30,831.

12 *Attwells v Jackson Lalic Lawyers Pty Ltd* [2013] NSWSC 925.

by the parties and the courts below, as the basis on which the determination of the question should proceed.

The decision of the primary judge

14 Before the primary judge (Harrison J), the appellants argued that they did not seek to impugn the consent orders. On the contrary, it was said that the consent orders were relied upon to calculate the amount of their loss, being the difference between the undisputed amount for which the guarantors were liable under the guarantee and the amount of the judgment, in the form of the consent orders, entered against them[13]. The appellants argued that, in these circumstances, the finality of the judgment in the guarantee proceedings was not impugned and, accordingly, their claim was beyond the scope of the immunity[14].

15 The primary judge rejected that argument, holding that the appellants did, in truth, seek to assert that "the judgment that was entered against [the guarantors was] not an accurate reflection or measure of their liability to the bank."[15] The primary judge said[16]:

> "[T]he plaintiffs in [the negligence proceedings] will be asserting that the judgment in [the guarantee proceedings] is wrong and does not represent [the guarantors'] genuine liability to the bank, whereas the defendants will be asserting that the judgment in [the guarantee proceedings] is correct and by force of that judgment unquestionably establishes [the guarantors'] actual legal liability to the bank."

16 Nevertheless, his Honour declined to answer the separate question[17]. His Honour was concerned that, without further evidence in relation to the

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13 *Attwells v Jackson Lalic Lawyers Pty Ltd* [2013] NSWSC 1510 at [16], [22].

14 *Attwells v Jackson Lalic Lawyers Pty Ltd* [2013] NSWSC 1510 at [23].

15 *Attwells v Jackson Lalic Lawyers Pty Ltd* [2013] NSWSC 1510 at [28].

16 *Attwells v Jackson Lalic Lawyers Pty Ltd* [2013] NSWSC 1510 at [28].

17 *Attwells v Jackson Lalic Lawyers Pty Ltd* [2013] NSWSC 1510 at [38].

respondent's alleged negligence, he could only form a view about the application of the advocate's immunity on a hypothetical basis[18].

The decision of the Court of Appeal

17 The Court of Appeal (Bathurst CJ, Meagher and Ward JJA) granted leave to appeal, and held that the primary judge erred in declining to answer the separate question[19]. Their Honours then proceeded to answer that question adversely to the appellants.

18 The Court of Appeal held that the respondent's advice was within the immunity recognised in *Giannarelli*[20] as "work done in court or work done out of court which leads to a decision affecting the conduct of the case in court."[21] Bathurst CJ, with whom Meagher and Ward JJA agreed, said[22]:

> "In the present case, in my opinion, the work fell within categories of work done out of court affecting the conduct of the case in court. The alleged breach occurred in advising on settlement of the guarantee proceedings …
>
> The advice … led to the case being settled. Put another way it was intimately connected with the conduct of the guarantee proceedings."

19 The Court of Appeal concluded that the negligence proceedings would necessarily involve a re-agitation of the issues determined in the guarantee proceedings; and a reconsideration of those issues in order to determine whether the respondent had been negligent would offend the principle of finality[23].

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18 *Attwells v Jackson Lalic Lawyers Pty Ltd* [2013] NSWSC 1510 at [37].

19 *Jackson Lalic Lawyers Pty Ltd v Attwells* [2014] NSWCA 335 at [30]-[32].

20 (1988) 165 CLR 543 at 560.

21 *Jackson Lalic Lawyers Pty Ltd v Attwells* [2014] NSWCA 335 at [36].

22 *Jackson Lalic Lawyers Pty Ltd v Attwells* [2014] NSWCA 335 at [37]-[38].

23 *Jackson Lalic Lawyers Pty Ltd v Attwells* [2014] NSWCA 335 at [41].

Accordingly, the respondent was immune from suit[24], and judgment was entered for the respondent in the proceedings[25].

20 The appellants appealed to this Court pursuant to a grant of special leave[26]. In this Court, the Law Society of New South Wales ("the Law Society") sought leave to intervene. That leave was granted on the condition that the Law Society pay the costs of the parties occasioned by the intervention[27].

The agreed facts

21 As already noted, the hearing before the primary judge proceeded on the basis of a statement of agreed facts. These reflected the allegations of fact, including the negligence of the respondent, set out in the statement of claim. It appears clear that they were "agreed" in the sense that the separate question was to be determined on the assumption, made only for the purposes of that determination, that they were established. If the procedure for determination of a separate question is to be useful, it is necessary for those managing the case at the stage when a question is posed for separate determination to ensure that the facts on which the question is to proceed are "the facts … which the [plaintiff] will seek to establish at trial."[28] If the parties are unable to state facts which, if found, will lead to a judgment in the plaintiff's favour, doubts as to the utility of the determination of the proposed separate question may lead a court to decline an application to determine that question separately.

22 In the present case, as appeared from the terms of the statement of agreed facts upon which the separate question was posed for resolution, it must be said, as the appellants' Senior Counsel acknowledged in argument in this Court, that "there is a measure of opacity … on the issues of negligence and causation" in the appellants' claim.

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24 *Jackson Lalic Lawyers Pty Ltd v Attwells* [2014] NSWCA 335 at [47].

25 *Jackson Lalic Lawyers Pty Ltd v Attwells* [2014] NSWCA 335 at [48].

26 Bell, Gageler and Gordon JJ, 7 August 2015.

27 *Levy v Victoria* (1997) 189 CLR 579 at 603, 615, 628; [1997] HCA 31; *Roadshow Films Pty Ltd v iiNet Ltd [No 1]* (2011) 248 CLR 37 at 39 [3]; [2011] HCA 54.

28 *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135 at 155 [34]; [2013] HCA 30.

23 The agreed facts stated that the respondent advised the guarantors to sign the consent order containing the terms of settlement "because, if they defaulted in payment of the sum of $1,750,000 by 19 November 2010, it would not make any difference if the judgment in favour of the bank was for $3,399,347.67 or any other sum ('the advice')." The statement of agreed facts then asserted, among other things, that the respondent was negligent:

(i) in giving the advice when the guarantors did not have a liability to the bank for $3,399,347 or anything like that sum;

(ii) in failing to advise the guarantors that if they defaulted in payment of the sum of $1,750,000 by 19 November 2010, there would be a judgment against them for $1,543,225 more than the guaranteed amount of $1,856,122; and

(iii) in failing to advise the guarantors that no legally binding settlement came into existence unless the terms of settlement were signed, and that there were alternatives that they could pursue, including making a counteroffer reflecting the guaranteed sum of $1,856,122 in lieu of $3,399,347 and, failing acceptance of that offer by the bank, resuming the hearing.

24 There is a tension between the appellants' contention that the respondent was negligent in failing to advise the guarantors that they did not have a liability to the bank for $3,399,347 and the advice which, it is an agreed fact, was given. The statement of agreed facts asserted that the fact of a liability to the bank under the settlement for $3,399,347 was expressly adverted to before the guarantors signed the consent order. The terms of the advice which is alleged to have been given to the guarantors clearly assumed the disparity between the larger liability which would arise in the event of default in payment on 19 November 2010, and the guarantors' liability under the guarantee.

25 It also appears to be the case that the advice was not advice to the guarantors as to their liability under their guarantee. The consent orders and associated agreement appear, on their face, to have created a new charter of rights between the parties. The liability which the guarantors assumed under that new charter was distinctly not their liability under the guarantee. If the guarantors met their liability under the guarantee within the extended time for which the settlement agreement provided, they would be released from all liability to the bank. In return for extra time to pay their true debt, the guarantors agreed to consent to a judgment for the total indebtedness of the company with a collateral agreement that the judgment would not be enforced should the amount they owed under the guarantee be paid within that extended time.

26 That having been said, the appeal to this Court is concerned solely with whether the advocate's immunity is, as the respondent contends, a separate and complete answer to the appellants' claim. This Court has not been invited to hold that the weakness of the appellants' claim on the issues of negligence and causation of loss is so clear that there is no utility in deciding the issue presented for determination. The decision of the Court of Appeal, while it stands, precludes any investigation of the strengths and weaknesses of the appellants' claim. The issue as to the effect of the immunity was raised by the respondent, and, the issue having been decided by the Court of Appeal in the respondent's favour as a complete answer to the appellants' claim, should be decided by this Court.

Reconsidering *Giannarelli* and *D'Orta*

27 The appellants submitted that this Court should exercise its undoubted authority[29] to reconsider its previous decisions in *Giannarelli* and *D'Orta*. The appellants argued that the decisions in *Giannarelli* and *D'Orta* do not rest upon a principle carefully worked out from the authorities. The appellants also argued that the judgments in *D'Orta* left the scope of the immunity unclear, and that there is such a degree of inconsistency between the immunity and its rationale that this Court should follow other common law systems and abolish the immunity.

28 The decision whether to reconsider *Giannarelli* and *D'Orta* must be made in light of the "grave danger of a want of continuity in the interpretation of the law."[30] The decision must be informed by "a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law"[31]. To overturn *Giannarelli* and *D'Orta* would generate a legitimate sense of injustice in those who have not pursued claims or have compromised or lost cases by reference to the state of the law as settled by these authorities during the years

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29 *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599, 602, 620; [1977] HCA 60; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-440, 450-453; [1989] HCA 5; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 350 [65], 352-353 [70], 357-359 [82]-[86]; [2009] HCA 2; *Beckett v New South Wales* (2013) 248 CLR 432 at 454 [52]; [2013] HCA 17.

30 *The Tramways Case [No 1]* (1914) 18 CLR 54 at 58; [1914] HCA 15.

31 *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352 [70].

when they have stood as authoritative statements of the law. An alteration of the law of this kind is best left to the legislature.

29 It must also be said that the questions agitated here as to the rationale for the immunity and its scope were fully argued in *Giannarelli* and *D'Orta*. No argument of principle or public policy was advanced by the appellants which had not been addressed in *Giannarelli* and *D'Orta*. It is true that, since the decision in *Giannarelli*, courts in other legal systems have come to a different view as to how competing considerations of principle and policy should be resolved[32], but those decisions do not reveal an insight into any issue of principle or policy that was not appreciated in *Giannarelli* and *D'Orta*.

30 More importantly, the decision in *D'Orta* states a rule which is consistent with, and limited by, a rationale which reflects the strong value attached to the certainty and finality of the resolution of disputes by the judicial organ of the State. To explain why that is so, it is necessary to consider more closely the reasons given by the plurality for their decision in *D'Orta*.

The decision in *D'Orta*

31 In *D'Orta*[33], the plurality noted that the immunity as stated in *Giannarelli* was consistent with the decisions of the House of Lords in *Rondel v Worsley*[34] and *Saif Ali v Sydney Mitchell & Co*[35] and with the reasons said in those decisions to underpin the immunity. The plurality noted[36] that the House of Lords had reconsidered its earlier decisions in *Arthur J S Hall & Co v Simons*[37] and observed that this alteration of the common law might be understood in the light of the "then imminent coming into operation of the *Human Rights Act 1998*

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32 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615; *Lai v Chamberlains* [2007] 2 NZLR 7.

33 (2005) 223 CLR 1 at 14-16 [25]-[29].

34 [1969] 1 AC 191.

35 [1980] AC 198.

36 (2005) 223 CLR 1 at 23-24 [56].

37 [2002] 1 AC 615 at 678, 684, 688, 709-710, 728, 736-737, 752-753.

(UK)"[38]. The plurality also discussed the state of the law in other common law jurisdictions[39].

32 The plurality, in considering the reasons advanced to support the immunity, referred to the "chilling" effect of the threat of legal action upon advocates and the consequent prolongation of trials[40]. The prospect of such a chilling effect was not thought to "provide support in principle for [the] existence" of the immunity[41]. In their Honours' view, in the search for the true rationale of the immunity, "[c]hief attention must be given to the nature of the judicial process and the role that the advocate plays in it."[42] Their Honours referred to the various reasons for the immunity discussed in *Giannarelli*[43], and said[44]:

> "Of the various factors advanced to justify the immunity, 'the adverse consequences *for the administration of justice* which would flow from the re-litigation in collateral proceedings for negligence of issues determined in the principal proceedings' (emphasis added)[45] was held to be determinative[46]."

33 The plurality in *D'Orta* accepted that the rationale of the immunity was rooted in the role of the advocate engaged, as an officer of the court, in the exercise by the court of judicial power to quell a controversy, and went on to

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38 (2005) 223 CLR 1 at 23-24 [56].

39 (2005) 223 CLR 1 at 25-26 [61]-[64].

40 (2005) 223 CLR 1 at 15-16 [29].

41 (2005) 223 CLR 1 at 16 [29].

42 (2005) 223 CLR 1 at 16 [30].

43 (1988) 165 CLR 543 at 554-555.

44 (2005) 223 CLR 1 at 16 [31].

45 (1988) 165 CLR 543 at 555.

46 See also (1988) 165 CLR 543 at 574 per Wilson J, 579 per Brennan J, 595-596 per Dawson J.

emphasise the binding nature of judicial decision-making as an aspect of the government of society. Their Honours said[47]:

> "[T]he central concern of the exercise of judicial power is the quelling of controversies. Judicial power is exercised as an element of the government of society and its aims are wider than, and more important than, the concerns of the particular parties to the controversy in question … No doubt the immediate parties to a controversy are very interested in the way in which it is resolved. But the community at large has a vital interest in the final quelling of that controversy. And that is why reference to the 'judicial branch of government' is more than a mere collocation of words designed to instil respect for the judiciary. It reflects a fundamental observation about the way in which this society is governed."

34 To speak of the exercise of judicial power to quell controversies as an aspect of government is to make it clear that the immunity is not justified by a general concern that disputes should be brought to an end, but by the specific concern that once a controversy has been finally resolved by the exercise of the judicial power of the State, the controversy should not be reopened by a collateral attack which seeks to demonstrate that that judicial determination was wrong. Their Honours said[48]:

> "[T]he central justification for the advocate's immunity is the principle that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances. This is a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society."

35 Their Honours explained[49] that, where a final order has been made resolving litigation, a claim that "but for the advocate's conduct, there would have been a different result" is objectionable as a matter of public policy. That is because the consequences of the decision about which the claimant wishes to complain are "consequences flowing from … a *lawful* result … *lawfully* reached."[50] The advocate's immunity is, therefore, justified as an aspect of the

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47 (2005) 223 CLR 1 at 16 [32].

48 (2005) 223 CLR 1 at 20-21 [45].

49 (2005) 223 CLR 1 at 27 [70].

50 (2005) 223 CLR 1 at 27 [70] (emphasis in original).

protection of the public interest in the finality and certainty of judicial decisions by precluding a contention that the decisions were not reached lawfully[51].

36 This review of the reasons of the plurality in *D'Orta* is sufficient to demonstrate that, contrary to the appellants' argument for abolition, there is a clear basis in principle for the existence of the immunity. As to the soundness of the decision in point of authority, the statement of the common law immunity in *D'Orta* (and *Giannarelli*) reflects what had been established as the law in the United Kingdom before the change wrought by the decision of the House of Lords in *Arthur J S Hall v Simons*. The common law of Australia, as expounded in *D'Orta* and *Giannarelli*, reflects the priority accorded by this Court to the values of certainty and finality in the administration of justice as it affects the public life of the community[52].

37 The foregoing is a sufficient basis to reject the appellants' invitation to reconsider the decisions in *D'Orta* and *Giannarelli*. At the same time, however, this review of the reasons of the plurality in *D'Orta*, and the identification of the public policy on which the immunity is based, serve to show that the scope of the immunity for which *D'Orta* and *Giannarelli* stand is confined to conduct of the advocate which contributes to a judicial determination.

Extending the immunity to compromises

38 It is apparent from the passages set out above from *D'Orta* that it is the participation of the advocate as an officer of the court in the quelling of controversies by the exercise of judicial power which attracts the immunity. Because that is so, the immunity does not extend to acts or advice of the advocate which do not move litigation towards a determination by a court. In particular, the immunity does not extend to advice that leads to a settlement agreed between the parties. As McHugh J said in *D'Orta*[53]:

> "[I]t is possible to sue a practitioner for the negligent settlement of proceedings or for the negligent loss or abandonment of a cause of action … even though there is a public interest in the finality achieved through

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51 (2005) 223 CLR 1 at 30-31 [84].

52 Recently discussed in *Achurch v The Queen* (2014) 253 CLR 141 at 152-154 [14]-[18]; [2014] HCA 10.

53 (2005) 223 CLR 1 at 56 [166].

> the statutes of limitations and the promotion of out-of-court dispute settlement. But where a trial has taken place, as the judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ demonstrates, public confidence in the administration of justice is likely to be impaired by the re-litigation in a negligence action of issues already judicially determined."

39 While the plurality in *D'Orta* did not state explicitly that advice leading to an out of court settlement was outside the scope of the immunity, it is apparent on a fair reading of their Honours' reasons that the rationale of the immunity does not extend to advice which does not move the case in court toward a judicial determination[54].

40 The respondent relied upon the decision of the Court of Appeal of New Zealand in *Biggar v McLeod*[55] to support the contention that the immunity does extend to an agreed settlement of proceedings after a hearing has commenced. In that case, it was said[56] that:

> "The giving of advice as to the compromise of proceedings, involving as it does the question of their continuation or termination, is an inherent feature of the conduct of the cause by counsel."

41 But to say that is not to identify conduct by counsel which affects the judicial determination of the case. This expansive view of the scope of the immunity was expressed by a court in New Zealand before the immunity was abolished in that country by the decision of the Supreme Court of New Zealand in *Lai v Chamberlains*[57]. It may be observed, with the greatest respect, that by allowing an expansive view of the scope of the immunity so that its operation was wider than was "absolutely necessary in the interests of the administration of justice"[58], the decision in *Biggar v McLeod* effectively strengthened the case for the abolition of the immunity in New Zealand. To accept that the immunity

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54 (2005) 223 CLR 1 at 16 [32].

55 [1978] 2 NZLR 9.

56 [1978] 2 NZLR 9 at 14.

57 [2007] 2 NZLR 7.

58 *Rees v Sinclair* [1974] 1 NZLR 180 at 187.

extends to advice which leads to a settlement of litigation is to decouple the immunity from the protection of the exercise of judicial power against collateral attack. Such an extension undermines the notion of equality before the law by enlarging the circumstances in which lawyers may be unaccountable to their clients.

42 The appellants argued that the immunity is confined to those decisions which a lawyer may make in the conduct of a case without the specific instructions of the client. In response to that argument, the respondent drew attention to the conclusion by the plurality in *D'Orta*[59]:

> "Because the immunity now in question is rooted in the considerations described earlier, where a legal practitioner (whether acting as advocate, or as solicitor instructing an advocate) gives advice which leads to a decision (here the client's decision to enter a guilty plea at committal) which affects the conduct of a case in court, the practitioner cannot be sued for negligence on that account."

43 The respondent sought to argue that this statement shows that advice by a lawyer which leads to a decision by a client is within the scope of the immunity. So much may be accepted, to the extent that such advice affects the judicial determination of the proceedings. But negligent advice to plead guilty, as had been allegedly given in *D'Orta*, when accepted by the client, *does* affect the determination of the case by the court. The court cannot proceed to conclude its function until a conviction is recorded. In *D'Orta*, McHugh J explained[60]:

> "A decision about a plea of guilty cannot be described other than as intimately connected with the conduct of a criminal cause. It is a decision made preliminary to the hearing of a charge which affects the conduct of the accused's matter before the court. …
>
> The connection of a plea of guilty at committal with the conduct of a criminal matter is intimately connected with the hearing of that matter

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59 (2005) 223 CLR 1 at 32 [91].

60 (2005) 223 CLR 1 at 51-52 [152]-[153].

because the timing of the plea affects the sentence imposed, in particular, whether the plea was entered at the first reasonable opportunity[61]."

44 In addition, the judicial function is squarely engaged in determining whether to accept a plea of guilty. A court may not accept the plea of guilty unless it is satisfied that it is freely made by the accused[62].

45 For present purposes, however, it is not necessary to determine whether the immunity attaches only to the kinds of decision which a lawyer charged with the conduct of a case in court may make without instructions from the client. It is sufficient to conclude that the immunity does not extend to negligent advice which leads to the settlement of a claim in civil proceedings.

46 Once it is appreciated that the basis of the immunity is the protection of the finality and certainty of judicial determinations, it can be more clearly understood that the "intimate connection" between the advocate's work and "the conduct of the case in court" must be such that the work affects the way the case is to be conducted so as to affect its outcome by judicial decision. The notion of an "intimate connection" between the work the subject of the claim by the disappointed client and the conduct of the case does not encompass any plausible historical connection between the advocate's work and the client's loss; rather, it is concerned only with work by the advocate that bears upon the judge's determination of the case.

An anomaly?

47 The respondent argued that it would be anomalous to hold that the immunity does not extend to advice which leads to a disadvantageous compromise but does extend to negligent advice not to compromise which leads to a judicial decision less beneficial to the client than a rejected offer of compromise. It was argued that in each case the advice is intimately connected with the proceedings. Further, it was said that to differentiate between these cases may discourage lawyers from giving frank advice in favour of settlement because settlement itself would put them outside the zone of immunity. The Law

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61 *Cameron v The Queen* (2002) 209 CLR 339 at 345-346 [19]-[25] per Gaudron, Gummow and Callinan JJ; [2002] HCA 6.

62 *Meissner v The Queen* (1995) 184 CLR 132 at 141-142; [1995] HCA 41; *GAS v The Queen* (2004) 217 CLR 198 at 210-211 [29]; [2004] HCA 22.

Society supported this argument, emphasising that public policy favours the settlement of litigation.

48 The assumption on which the respondent's argument depends, that is, that negligent advice not to settle is "intimately connected" with the ensuing judicial decision of the court so as to attract the immunity, is not sound. The respondent cited no authority in support of this assumption. That is not surprising, given that it is difficult to envisage how advice not to settle a case could ever have any bearing on how the case would thereafter be conducted in court, much less how such advice could shape the judicial determination of the case.

49 The respondent's assumption depends on the view that a merely historical connection between the advice and the outcome of the case, in the sense that one event precedes another as a necessary condition of its occurrence, is the intimate connection on which *Giannarelli* and *D'Orta* insist. As has been said, it is a functional connection between the work of the advocate and the determination of the case by the court which is necessary to engage the immunity. Just as it is true to say that advice to settle is "connected" to the case in the sense that the advice will, if accepted, lead to the end of the case, so it is true to say that advice not to settle a case is "connected" to the case in the sense that the advice will, if accepted, lead to the continuation of the case. But to say either of these things is to speak of a merely historical connection between events. That is to fail to observe the functional nature of the intimate connection required by the public policy which sustains the immunity.

50 The insufficiency of a mere historical connection between an advocate's work and a litigious event may be illustrated by reference to negligent advice to commence proceedings which are doomed to fail. No one suggests that the immunity is available in such a case. Likewise, advice to cease litigating or to continue litigating does not itself affect the judicial determination of a case.

51 The respondent argued that where a client has accepted advice not to settle a claim and the matter proceeds to a judgment which is less advantageous for the client than the rejected offer it could be expected that the legal adviser when sued would be disposed to defend himself or herself by arguing that the judgment was wrong and his or her advice was right. That submission is not accepted. It is difficult to conceive of any circumstance in which the correctness of the court's decision would be put in issue. The central question would not be whether the court was right or wrong, but whether the advice was reasonable in all the circumstances known to the adviser at the time the advice was given. Secondly, if the judgment were erroneous, one would expect that this would be demonstrated on appeal; and if the error cannot be demonstrated on appeal from

the record of proceedings in court in the earlier case, that would tend to confirm that the negligent advice had nothing to do with the judgment reached by the court.

52 As to the argument advanced by the Law Society, the immunity is not attracted simply because its existence might encourage lawyers to advise their clients to settle their claims. While it is no doubt true that there is a public interest in the resolution of disputes[63], the public policy which justifies the immunity is not concerned with the desirability or otherwise of settlements, but with the finality and certainty of judicial decisions. Decisions by the courts, as the judicial organ of the State, are necessary precisely because the parties cannot achieve a compromise of their disputes. The advocate's immunity is grounded in the necessity of ensuring that the certainty and finality of judicial decisions, values at the heart of the rule of law, are not undermined by subsequent collateral attack. The operation of the immunity may incidentally result in lawyers enjoying a degree of privilege in terms of their accountability for the performance of their professional obligations. But this incidental operation is a consequence of, and not the reason for, the immunity. Because this incidental operation of the immunity comes at the expense of equality before the law, the inroad of the immunity upon this important aspect of the rule of law is not to be expanded simply because some social purpose, other than ensuring the certainty and finality of decisions, might arguably be advanced thereby.

53 Accordingly, it should be accepted that in the present case there was no occasion for the operation of the immunity in relation to advice which led to the settlement of the guarantee proceedings on terms disadvantageous to the guarantors. That said, the question which now must be addressed is whether the circumstance that the settlement was embodied in consent orders was sufficient to attract the operation of the immunity.

The consent order

54 The respondent argued that a judgment that reflects a compromise reached by consent is no less effective to quell a controversy than if it followed a

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63 As reflected in the maxim "interest reipublicae ut finis sit litium" (it is in the public interest that there be an end to suits).

contested hearing. It was said to be important in this regard to recognise that the parties' antecedent rights merged in the consent judgment[64].

55 In *Newcrest Mining Ltd v Thornton*[65], French CJ said that although a consent order may, by the rules of the court, be given the same legal effect as an order made after a hearing in the court, "[t]hat does not impute any finding to the court." Here, the primary judge made no finding of fact or law which resolved the controversy between the parties. And the circumstance that the appellants' claim against the respondent relates, not to the resolution of the issues which arose in the guarantee proceedings, but to the terms of a new charter of rights between the parties to those proceedings, also tends to confirm that this is so.

56 For the respondent, reliance was placed on the decision of this Court in *Chamberlain v Deputy Commissioner of Taxation*[66] in support of an argument that the negligence proceedings involved an impermissible attack on a judgment of a court because the settlement agreement had merged in the consent order so that the appellants' claim impugned a subsisting decision of a court.

57 In *Chamberlain*, the settlement in question was, in terms[67]:

> "By Consent … Judgment for the Plaintiff in the sum of $25,557.92 together with costs to be assessed and agreed at $115.00. … The settlement monies to be paid by the Defendant to the Plaintiff forthwith."

58 The judgment which was entered in that case recited that the terms of settlement had been filed and "adjudged" accordingly that "the Plaintiff recover against the Defendant the sum of $25,557.92 for debt and $115.00 for costs." When the plaintiff discovered that the amount for which judgment had been entered was less than the amount actually due, and brought an action to recover the balance, this Court held that the action was not maintainable on the footing that the cause of action upon which the plaintiff relied had merged in the

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64 *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 508; [1988] HCA 21.

65 (2012) 248 CLR 555 at 564 [17]; [2012] HCA 60.

66 (1988) 164 CLR 502.

67 (1988) 164 CLR 502 at 505.

judgment of the court "thereby destroying its independent existence so long as that judgment stood."[68]

59 The decision in *Chamberlain* does not assist the respondent. The present case is not concerned with whether the bank's original cause of action had merged in the judgment of the court, or even with whether the bank's rights under the settlement agreement had merged in the consent order of the court. Whether or not the settlement agreement has a legal existence independent of the consent order, such as for the purposes of its enforcement, has nothing to do with the substantive content of the rights and obligations established by it. The substantive content of those rights and obligations was determined by the parties without any determination by the court. The public policy which sustains the immunity is not offended by recognising the indisputable fact that the terms of the settlement agreement, by reason of which the appellants claim to have been damaged, were not, in any way, the result of the exercise of judicial power.

60 The respondent also argued that cases involving settlements may involve a collateral challenge to judicial conduct because, in some cases where a case is resolved by settlement, the judge is required to be satisfied that the orders should be made.

61 It may be acknowledged that there are many cases where, although the parties have agreed upon the terms of the order which a court is asked to make, the making of the order itself requires the resolution of issues by the exercise of judicial power. Examples include where representative proceedings are settled[69], or where proceedings on behalf of a person under a legal incapacity are to be compromised[70], or where agreements are made in relation to proceedings under ss 86F, 87 and 87A of the *Native Title Act* 1993 (Cth). Other examples include the exercise of the judicial discretion to allow an agreement to amend a patent granted under the *Patents Act* 1900 (Cth)[71], and the compromise of certain debts under ss 477(2A) and 477(2B) of the *Corporations Act* 2001 (Cth). It is not necessary to consider such cases here.

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68 (1988) 164 CLR 502 at 510.

69 *Federal Court of Australia Act* 1976 (Cth), s 33V; *Civil Procedure Act* 2005 (NSW), s 173; *Supreme Court Act* 1986 (Vic), s 33V.

70 *Somerset v Ley* [1964] 1 WLR 640 at 643; [1964] 2 All ER 326 at 328.

71 *Novartis AG v Bausch & Lomb (Australia) Pty Ltd* (2004) 62 IPR 71 at 75 [14].

62 In the present case, the consent order and associated notation by the Court reflected an agreement of the parties for the payment of money in circumstances where no exercise of judicial power determined the terms of the agreement or gave it effect as resolving the dispute. The consent order may have facilitated the enforcement of the compromise, but it was the agreement of the parties that settled its terms.

Orders

63 The following orders should be made.

1. Appeal allowed.

2. Set aside orders 3, 4 and 5 of the Court of Appeal of the Supreme Court of New South Wales made on 1 October 2014 and in their place order that:

   (a) the appeal be allowed;

   (b) the orders of Harrison J made on 17 October 2013 be set aside, and in their place order that the separate question of whether the plaintiffs' claim is defeated entirely, because the defendant is immune from suit, be answered: "No".

3. Set aside the orders of the Supreme Court of New South Wales made on 28 October 2014.

4. The respondent pay the appellants' costs of the proceedings on the separate question in the courts below and of the appeal to this Court.

5. The Law Society of New South Wales pay the costs of the appellants and the respondent occasioned by its intervention in the proceedings.

64 NETTLE J. I have had the advantage of reading the reasons for judgment of Gordon J and I agree with her Honour for the reasons she gives that the appeal should be dismissed. I wish to add something concerning the reasoning of the majority.

65 As the majority observe, on a fair reading of *D'Orta-Ekenaike v Victoria Legal Aid*[72], it may be said that the rationale of an advocate's immunity from suit does not extend to advice unless it is advice which "move[s] the case in court toward a judicial determination". Contrary to the majority's reasoning, however, it does not follow that the immunity may not apply to advice to settle a proceeding or to advice not to settle a proceeding.

66 The purpose of the advocate's immunity is to avoid the re-litigation in collateral proceedings for negligence, or other civil cause of action, of issues determined in the principal proceedings. As Gordon J explains, it is based in policy that a controversy should not be re-opened by a collateral attack which seeks to demonstrate that a judicial determination was wrong. Where, therefore, a final order has been made resolving litigation, a claim that, but for an advocate's conduct, there would have been a different result is necessarily objectionable.

67 When a matter is settled wholly out of court, the settlement does not move the litigation toward a determination by the court. Consequently, advice to enter into such a settlement does not attract the immunity. But where a matter is settled out of court on terms providing for the court to make an order by consent that determines the rights and liabilities of the parties, the settlement plainly does move the litigation toward a determination by the court.

68 It is true that, in the latter class of case, the determination will largely be the result of agreement as opposed to a working out by the court of the parties' rights and liabilities. But even where the parties are agreed on the orders which should be made for the determination of their rights and liabilities, it remains for the court to be satisfied that it is appropriate so to order[73]. Thus, for one party later to contend that it was negligent of an advocate to advise in favour of such a settlement will involve calling into question the rectitude of the court's order.

69 To take a simple case for example, suppose that a plaintiff's claim is for $200,000 and that the proceeding is settled on terms that the defendant pay the plaintiff $150,000 and that the parties consent to an order that the plaintiff's claim

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72 (2005) 223 CLR 1; [2005] HCA 12.

73 *The Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 90 ALJR 113 at 127-128 [57] per French CJ, Kiefel, Bell, Nettle and Gordon JJ; 326 ALR 476 at 491; [2015] HCA 46.

be struck out or dismissed without an adjudication upon the merits[74]. In such a case, the order to strike out or dismiss the proceeding without any adjudication on the merits would not, in any sense, determine the rights and liabilities of the parties. Hence, a claim that an advocate was negligent in advising the defendant to settle on those terms would not involve any attack on the order. The attack would be confined to the defendant's contractual obligation under the terms of settlement to pay the plaintiff $150,000. In those circumstances the immunity would not apply.

70 By contrast, if the plaintiff's claim were settled on terms that the parties consent to an order that the defendant pay the plaintiff $150,000, and such an order were made, the order would determine the rights and liabilities of the parties. It would determine that the extent of the defendant's liability to the plaintiff was $150,000. And, in such a case, a claim that the advocate was negligent in advising the defendant to consent to the order would involve a collateral attack on the order. It would require the defendant to establish that, but for the advocate's negligence in advising the defendant to consent to the order, the court would have determined that the defendant's liability to the plaintiff was less than $150,000, and thus that the order that the defendant pay the plaintiff $150,000 was, in that sense, wrong.

71 It would be similar if the plaintiff's claim were settled on terms that the defendant pay the plaintiff $150,000, the proceeding be struck out and, in default of timeous payment, the defendant consent to judgment for $200,000; and if, following default by the defendant, the plaintiff successfully moved for judgment for $200,000 on the terms of settlement[75]. The court's order that the defendant pay the plaintiff $200,000 would determine the rights and liabilities of the parties, namely, that the defendant was liable to the plaintiff for $200,000. In those circumstances, a claim that the defendant's advocate was negligent in advising the defendant to enter into the terms of settlement would also involve a collateral attack on the order. It would require the defendant to establish that, but for the advocate's negligence in advising the defendant to enter into the terms of settlement, the court would have determined that the defendant's liability to the plaintiff was less than $200,000, and thus that the order that the defendant pay the plaintiff $200,000 was, in that sense, wrong.

72 By further contrast, however, advice to reject an offer of settlement will, if accepted, invariably affect the conduct of the case in court. To persist with the example of the claim for $200,000, if an advocate advised the defendant against

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74 See, eg, Uniform Civil Procedure Rules 2005 (NSW), rr 12.1(1), 12.3.

75 See *Roberts v Gippsland Agricultural and Earth Moving Contracting Co Pty Ltd* [1956] VLR 555.

accepting an offer to settle for $150,000 and at the conclusion of the trial the court gave judgment for the plaintiff for $190,000, a subsequent claim by the defendant that the advocate was negligent in advising against settlement would call into question whether the advocate had a reasonable basis for so advising. As the majority observe, in principle that might not necessitate establishing that the judgment was wrong. But it would necessitate re-litigation of issues determined at trial, including: the strength of the plaintiff's case; probably, the appropriate weight to be given to the evidence, taking into account considerations of credibility and reliability of witnesses; and the correct application of legal principle and authority. That is the kind of exercise which *D'Orta* was calculated to avoid and, in my view, it is not one which should now be sanctioned.

Conclusion

73 In this case, the determination of the appellants' claim would necessitate re-opening the controversy between the first appellant and Australia and New Zealand Banking Group Limited ("the Bank") and receivers appointed by the Bank by way of a collateral attack which seeks to demonstrate that, in the circumstances of this case, the judicial determination comprised of the consent order that there be judgment for approximately $3.4 million was not a just determination of the first appellant's liability to the Bank. That being so, I consider that the Court of Appeal of the Supreme Court of New South Wales was right to hold that the immunity applied. I would dismiss the appeal.

GORDON J.

Introduction

74 The first appellant, Mr Gregory Ian Attwells ("Mr Attwells"), was a defendant in proceedings commenced by Australia and New Zealand Banking Group Limited ("the ANZ Bank"), and receivers appointed by the ANZ Bank, in the Supreme Court of New South Wales ("the Recovery Proceedings").

75 The Recovery Proceedings were settled. A "Judgment/Order" was entered on 16 June 2010 ("the Order"), pursuant to r 36.11 of the Uniform Civil Procedure Rules 2005 (NSW) ("the UCPR"). It was in the terms of a "Consent Order" signed by the parties ("the Consent Order").

76 The Order comprised two sections. The first section, headed "BY CONSENT, THE COURT ORDERS THAT", contained nine orders. Order 1 of the Order was verdict and judgment for the ANZ Bank against Mr Attwells and others in the sum of $3,399,347.67. Orders 2 to 7 of the Order provided, amongst other things, that Mr Attwells and Ms Barbara Lord ("Ms Lord") give possession of certain land, water rights and goods to the ANZ Bank and the receivers. Order 8 of the Order was verdict and judgment for the cross-defendants on the Amended Cross-Claim and order 9 of the Order dismissed the Amended Cross-Claim.

77 In the second section of the Order, "THE COURT NOTES … THE AGREEMENT BETWEEN" the ANZ Bank and the receivers and Mr Attwells, Ms Lord and another defendant that, amongst other things:

(a) the ANZ Bank and the receivers would not *enforce* orders 1 to 9 of the Order if Mr Attwells, Ms Lord and another defendant paid the ANZ Bank $1,750,000 on or before 19 November 2010; and

(b) in the event that Mr Attwells, Ms Lord and another defendant failed to comply with particular obligations (including paying the ANZ Bank $1,750,000 on or before 19 November 2010), the ANZ Bank and the receivers would be "at liberty to *enforce* [orders 1 to 9] forthwith" (emphasis added).

78 Under r 36.1A of the UCPR, the court may "give judgment, or order that judgment be entered, in the terms of an agreement between parties in relation to proceedings between them".

79 Jackson Lalic Lawyers Pty Limited, a company carrying on legal practice under the name "Jackson Lalic Lawyers", had advised Mr Attwells and Ms Lord to sign the Consent Order and to consent to judgment in the terms recorded in that Consent Order. A verdict and judgment was made or given, and entered, in the sum of $3,399,347.67 by the Supreme Court of New South Wales.

The appellants sued Jackson Lalic Lawyers in negligence. For the purposes of determining whether Jackson Lalic Lawyers was entitled to the benefit of the advocate's immunity in respect of that advice, the parties agreed that the advice was given and that it was negligent. Argument in this Court has proceeded on the assumption that the full extent of the liability of Mr Attwells and Ms Lord to the ANZ Bank was only $1,856,122.28.

80 Was Jackson Lalic Lawyers able to be sued in damages in a civil action for that advice? In the circumstances of this appeal, the answer is "No", because the giving of the advice is covered by the advocate's immunity.

Facts

81 The appeal in this Court and the decisions below proceeded upon "Proposed Agreed Facts". They are as follows.

82 Mr Attwells and Ms Lord were guarantors of certain advances made by the ANZ Bank to a company, Wilbidgee Beef Pty Limited ("the Company"). The Company defaulted and the ANZ Bank commenced the Recovery Proceedings against Mr Attwells and Ms Lord on the guarantee. The second appellant, Mr Noel Bruce Attwells, is the assignee of the rights of Mr Attwells against Jackson Lalic Lawyers.

83 In about April 2010, Mr Attwells, Ms Lord and the Company retained Jackson Lalic Lawyers to act for and advise them in relation to their dealings with the ANZ Bank and Mr Attwells and Ms Lord retained Jackson Lalic Lawyers to conduct their defence of the Recovery Proceedings.

84 On 15 June 2010, counsel for the ANZ Bank and the receivers opened the trial of the Recovery Proceedings before Rein J in the Supreme Court and acknowledged in open court that:

(a) the claim by the ANZ Bank against Mr Attwells and Ms Lord on the guarantee was limited;

(b) the ANZ Bank accepted that the debt due by Mr Attwells and Ms Lord on the guarantee was $1.5 million plus interest plus enforcement costs ("the guaranteed debt"); and

(c) the amount of the guaranteed debt, as at 15 June 2010, as certified by the ANZ Bank, was $1,856,122.28.

85 On 15 June 2010, senior counsel briefed by Jackson Lalic Lawyers to appear for Mr Attwells and Ms Lord negotiated a settlement of the Recovery Proceedings on terms that there would be judgment for the ANZ Bank for $1,750,000, inclusive of costs, and Mr Attwells and Ms Lord would have until the end of November 2010 to pay that amount.

86 Shortly after the luncheon adjournment on 15 June 2010, senior counsel approached Mr Attwells, Ms Lord and Mr Faris Shehabi of Jackson Lalic Lawyers and said words to the effect, "I have got you $1,750,000 and November to pay. Is that OK?" Mr Attwells and Ms Lord gave instructions to settle the proceedings on that basis. At about 2.30 pm on that day, the Court was informed that the Recovery Proceedings had been settled, subject to terms. The hearing of the Recovery Proceedings was adjourned by the Court to permit terms of settlement to be prepared and subsequently handed up the next day.

87 During the afternoon of 15 June 2010, draft terms of settlement, in the form of the Consent Order, were prepared by the solicitors for the ANZ Bank and forwarded to Mr Shehabi of Jackson Lalic Lawyers.

88 At or about 7.30 pm on 15 June 2010, during a conference at the offices of Jackson Lalic Lawyers, Mr Shehabi on behalf of Jackson Lalic Lawyers advised Mr Attwells and Ms Lord that they should sign the Consent Order and consent to judgment against themselves, in favour of the ANZ Bank, in the sum of $3,399,347.67 because, if they defaulted in payment of the sum of $1,750,000 by 19 November 2010, it would not make any difference if the judgment in favour of the ANZ Bank was for $3,399,347.67 or any other sum. Mr Attwells and Ms Lord signed the Consent Order. The Consent Order was submitted to the Court on 16 June 2010.

The Order

89 The Order was entered by the Court on 16 June 2010. The Order comprised two sections – orders of the Court and the recording of an agreement between the parties. Relevantly, it was in the following terms:

> "BY CONSENT, THE COURT ORDERS THAT:
>
> 1. *Verdict and judgment for [the ANZ Bank] against [Mr Attwells, Ms Lord and the Company] in the sum of $3,399,347.67.*
>
> 2. [Mr Attwells and Ms Lord] give to [the ANZ Bank and the receivers] possession of [identified] land …
>
> …
>
> 4. [Mr Attwells and Ms Lord] give to [the ANZ Bank and the receivers] possession of the water rights …
>
> 5. [The ANZ Bank and the receivers] have leave to issue writs of possession forthwith.
>
> 6. [Mr Attwells, Ms Lord and the Company] deliver up to [the ANZ Bank and the receivers], or as [the ANZ Bank and the receivers]

direct, the items detailed in Annexure 'A' to these Consent Orders ('the Goods').

7. [The ANZ Bank and the receivers] have leave to issue a writ for the delivery of goods in respect of the Goods forthwith.

8. *Verdict and Judgment* for the cross-defendants on the Amended Cross-Claim.

9. The Amended Cross-Claim is dismissed.

THE COURT NOTES THAT THE THIRD DEFENDANT IS IN LIQUIDATION AND THE AGREEMENT BETWEEN [THE ANZ BANK AND THE RECEIVERS] AND [MR ATTWELLS, MS LORD AND THE COMPANY] THAT:

10. …

11. [The ANZ Bank and the receivers] shall not *enforce* orders 1 to 9 above ('the Orders') provided that:

    (a) [Mr Attwells, Ms Lord and the Company] pay to [the ANZ Bank] the sum of $1,750,000 on or before 19th November 2010 …

12. In the event that [Mr Attwells, Ms Lord and the Company] fail to comply with any of their obligations under *paragraph* 11 above, [the ANZ Bank and the receivers] shall be at liberty to enforce the Orders forthwith.

…

16. *The parties to these Consent Orders acknowledge and agree that:*

    (a) these Consent Orders embody the entire agreement between the parties; …

17. …" (emphasis added)

90 The $1,750,000 was not paid to the ANZ Bank on or before 19 November 2010, thereby allowing the ANZ Bank to enforce the orders in accordance with the parties' agreement as recorded in pars 11(a) and 12. By reason of order 1 of the Order, Mr Attwells was indebted to the ANZ Bank in the sum of $3,399,347.67.

91 An attempt by Mr Attwells, Ms Lord and the Company to set aside the settlement as a penalty was dismissed by Pembroke J on 11 February 2011[76]. That order was not the subject of challenge in this appeal.

Previous decisions

92 Mr Attwells and the second appellant sued Jackson Lalic Lawyers for negligence in the Supreme Court of New South Wales. On 10 July 2013, Schmidt J ordered that the question of whether that claim was defeated entirely because Jackson Lalic Lawyers was immune from suit should be decided separately[77].

93 The primary judge (Harrison J) declined to answer the separate question[78], although his Honour's preliminary conclusion was that the losses claimed by Mr Attwells and the second appellant were within the scope of the advocate's immunity.

94 Jackson Lalic Lawyers sought leave to appeal to the Court of Appeal of the Supreme Court of New South Wales. The application for leave to appeal was heard concurrently with the proposed appeal. The first two issues considered by the Court of Appeal were procedural – whether leave to appeal should be granted and whether the primary judge should have answered the separate question. They may be put to one side. The third issue was whether the claim against Jackson Lalic Lawyers fell within the scope of the advocate's immunity.

95 Bathurst CJ (Meagher and Ward JJA agreeing) held that Jackson Lalic Lawyers was immune from suit in respect of the claim of Mr Attwells and the second appellant[79]. His Honour concluded that[80]:

> "[T]he work fell within categories of work done out of court affecting the conduct of the case in court. The alleged breach occurred in advising on settlement of the guarantee proceedings during the luncheon adjournment on the first day of the hearing and more importantly on the evening of that day. The Agreed Facts also state that the consent order [Mr Attwells] and

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76 *Attwells v Marsden* (2011) 16 BPR 30,831.

77 *Attwells v Jackson Lalic Lawyers Pty Ltd* [2013] NSWSC 925.

78 *Attwells v Jackson Lalic Lawyers Pty Ltd* [2013] NSWSC 1510.

79 *Jackson Lalic Lawyers Pty Ltd v Attwells* [2014] NSWCA 335.

80 *Jackson Lalic Lawyers Pty Ltd v Attwells* [2014] NSWCA 335 at [37]-[41].

Ms Lord were advised to sign were signed on that evening and submitted to the Court on the following day.

The advice thus led to the case being settled. Put another way it was intimately connected with the conduct of the guarantee proceedings.

…

[T]he current proceedings do involve a re-agitation of the issues raised in the earlier litigation. It is fundamental to the claim that the judgment entered was wrong and the incorrect result was due to the negligence of [Jackson Lalic Lawyers]. This necessarily involves consideration of the issues raised in the earlier litigation to determine whether in fact [Jackson Lalic Lawyers'] advice was negligent. In that sense it offends against the principle of finality of litigation."

96 The Court of Appeal therefore answered the separate question as follows: "The advocate's immunity from suit is a complete answer to the claim made by [Mr Attwells and the second appellant]"[81].

Issues on appeal to this Court

97 Three issues were raised on the appeal to this Court: first, whether the Court of Appeal applied the wrong test for the application of the advocate's immunity or, in the alternative, misapplied the correct test; second, whether the Court of Appeal made an error in holding that the immunity applied to a negligently advised or effected settlement where the claim did not involve any collateral challenge to a judicial determination on the merits; and third, whether this Court should reconsider its decisions in *Giannarelli v Wraith*[82] and *D'Orta-Ekenaike v Victoria Legal Aid*[83].

The advocate's immunity

98 In *D'Orta*, the plurality said that "at common law an advocate cannot be sued by his or her client for negligence in the conduct of a case in court, or in work out of court which leads to a decision affecting the conduct of a case in court"[84]. The second class of work was also described as "'work intimately

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81 *Jackson Lalic Lawyers Pty Ltd v Attwells* [2014] NSWCA 335 at [48].

82 (1988) 165 CLR 543; [1988] HCA 52.

83 (2005) 223 CLR 1; [2005] HCA 12.

84 (2005) 223 CLR 1 at 9 [1] summarising the holding in *Giannarelli* (1998) 165 CLR 543. See also at 14 [25].

connected with' work in a court'"[85]. The plurality in *D'Orta* did not consider that the two statements of the test differed in any significant way[86].

99 The phrase "intimately connected" had been used by McCarthy P in *Rees v Sinclair*[87] in limiting the extent of the protection afforded by the immunity to "only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing".

100 The plurality in *D'Orta* grounded the retention of the immunity in two matters of principle – "the place of the judicial system as a part of the governmental structure" and "the place that an immunity from suit has in a series of rules all of which are designed to achieve finality in the quelling of disputes by the exercise of judicial power"[88]. After considering those two matters of principle in some detail, the plurality said[89]:

> "[T]he central justification for the advocate's immunity is the principle that controversies, once resolved, are *not to be reopened except in a few narrowly defined circumstances*. This is a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society." (emphasis added)

101 Of course, the law does not assume the processes or outcomes of judicial determination are perfect. That is not the reason the immunity attempts to protect judicial determinations. Rather, it does so because there must be finality in the resolution of disputes. As the plurality in *D'Orta* stated[90]:

> "Of course, there is always a risk that the determination of a legal controversy is imperfect. And it may be imperfect because of what a party's advocate does or does not do. The law aims at providing the best and safest system of determination that is compatible with human fallibility. But underpinning the system is the need for certainty and

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85 *D'Orta* (2005) 223 CLR 1 at 31 [86]. See also at 33-34 [93]-[95].

86 (2005) 223 CLR 1 at 31 [86]. See also at 33-34 [93]-[95].

87 [1974] 1 NZLR 180 at 187.

88 (2005) 223 CLR 1 at 15 [25]. See also at 20-21 [45], 30-31 [84].

89 *D'Orta* (2005) 223 CLR 1 at 20-21 [45]. See also at 30 [84].

90 (2005) 223 CLR 1 at 31 [84].

finality of decision. The immunity of advocates is a necessary consequence of that need." (footnote omitted)

102 It was for that reason that the plurality in *D'Orta* explained why the re-litigation of disputes already judicially quelled is a threat to finality wherever a client alleges that, but for their lawyer's negligence, a judicial determination would have been different[91]:

> "In every case the complaint must be that a consequence has befallen the client *which has not been, and cannot be, sufficiently corrected within the litigation in which the client was engaged*. That consequence may take a number of forms. For the moment, it will suffice to identify what may appear to be the three chief consequences: (a) a wrong final result; (b) a wrong intermediate result; and (c) wasted costs.
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> …
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> What unites these different kinds of consequence is that none of them has been, or could be, wholly remedied within the original litigation. The final order has not been, and cannot be, overturned on appeal. The intermediate consequence cannot be repaired or expunged on appeal. The costs order cannot be set aside; the costs incurred cannot be recovered from an opposite party. And in every one of these cases, the client would say that, but for the advocate's conduct, there would have been a different result." (emphasis added)

Does the advocate's immunity apply here?

103 For the purposes of this appeal, Jackson Lalic Lawyers accepts that it was negligent in advising Mr Attwells and Ms Lord to sign the Consent Order and consent to a judgment against them in the sum of $3,399,347.67 and that a verdict and judgment was made or given, and entered, for the ANZ Bank against Mr Attwells, Ms Lord and the Company for $3,399,347.67, when the full extent of their liability to the ANZ Bank was only ever the lesser sum of $1,856,122.28.

104 Did the advocate's immunity extend to that negligent advice? The issue is resolved by understanding that there was a final quelling of the controversy between the parties by the Order.

105 There are two points of chief importance which together dictate that the advocate's immunity extended to that negligent advice.

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91 (2005) 223 CLR 1 at 26-27 [66]-[70].

106 First, as *D'Orta* demonstrates, the immunity revolves around finality – the final quelling of a controversy by the exercise of judicial power[92]. A legal practitioner is not liable for "work done in court or 'work done out of court which leads to a decision affecting the conduct of the case in court' or … 'work intimately connected with' work in a court"[93]. Work that contributes to the final quelling of a controversy by the exercise of judicial power is "work intimately connected with" work in a court. That conclusion is fortified by the fact that the "test" for whether the immunity applies must be considered in light of the principles which underpin it.

107 A challenge to finality is not permitted, except in a few narrowly defined circumstances. It is not permitted for the reasons addressed in *D'Orta*, to which reference has already been made[94]. It was for those reasons that the plurality said in *D'Orta*[95]:

> "[W]here a legal practitioner (whether acting as advocate, or as solicitor instructing an advocate) gives advice which leads to a decision (here the client's decision to enter a guilty plea at committal) which affects the conduct of a case in court, the practitioner cannot be sued for negligence on that account."

108 Here, there was a similar final outcome to that in *D'Orta* – "Verdict and judgment for [the ANZ Bank] against [Mr Attwells, Ms Lord and the Company] in the sum of $3,399,347.67"[96]. That final outcome was entered by consent. It is no different, in effect, from the core complaint made in *D'Orta*. The applicant in *D'Orta* complained that he had been advised to plead guilty – that is, to admit the allegations made against him. In this appeal, Mr Attwells' complaint is that he agreed to verdict and judgment being entered against him for $3,399,347.67. Both admissions were given legal effect by authority of the court; in one case by entry of conviction, in the other by entry of verdict and judgment. Entry of verdict and judgment by admission or consent is as much the exercise of judicial

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92 (2005) 223 CLR 1 at 16 [32].

93 *D'Orta* (2005) 223 CLR 1 at 31 [86] (footnote omitted).

94 See [100]-[102] above.

95 (2005) 223 CLR 1 at 32 [91].

96 Order 1 of the Order; cf *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 508; [1988] HCA 21.

power as entry of judgment after trial[97]. In both, there is a final outcome – the final quelling of a controversy by the exercise of judicial power.

109 Judicial power is difficult to define exhaustively[98]; however, "[a]n exercise of judicial power, it has been held, involves 'as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons'"[99]. The quelling of the controversy between the parties and the creation of a new charter of rights – by an exercise of judicial power – is recorded in a conclusive, binding and enforceable judgment or order of the court.

110 A judgment or order "quells" the controversy between persons. Both in *D'Orta* and in the Recovery Proceedings, the pre-existing rights and liabilities of the parties were determined and the controversy was quelled, as it was, not only because the advocate advised the client to consent to the controversy being resolved in that manner but because the controversy was quelled by an exercise of judicial power by the court, which made a conclusive, binding and enforceable judgment or order – conviction and sentence[100] in *D'Orta*, verdict and judgment entered in the Recovery Proceedings. The conviction and sentence, and the verdict and judgment, were both final. Indeed, as the Court recently observed in *Tomlinson v Ramsey Food Processing Pty Ltd*, "[t]he rights and obligations in controversy, as between those persons, cease to have an independent existence:

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97 *The Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 90 ALJR 113 at 127-128 [57]; 326 ALR 476 at 491; [2015] HCA 46. See also *Newcrest Mining Ltd v Thornton* (2012) 248 CLR 555 at 575 [48]; [2012] HCA 60.

98 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189; [1991] HCA 58; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 267; [1995] HCA 10; *Luton v Lessels* (2002) 210 CLR 333 at 373 [124]; [2002] HCA 13; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 577 [93]-[94], 592 [151]; [2008] HCA 2.

99 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 89 ALJR 750 at 756 [20]; 323 ALR 1 at 6; [2015] HCA 28 quoting *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374; [1970] HCA 8. See also *Duncan v New South Wales* (2015) 89 ALJR 462 at 471-472 [41]-[42]; 318 ALR 375 at 386-387; [2015] HCA 13.

100 See *Crump v New South Wales* (2012) 247 CLR 1 at 26 [58]; [2012] HCA 20; *Pollentine v Bleijie* (2014) 253 CLR 629 at 656 [71]; [2014] HCA 30.

they 'merge' in that final judgment [and that] merger has long been treated in Australia as equating to 'res judicata' in the strict sense"[101].

111 Second, Mr Attwells says, in effect, that, although he cannot set aside the liability incurred by that verdict and judgment, he wants to moderate its effect, or affect the result, by challenging the bases on which the judgment was entered. Attempts to set the judgment aside have failed. It stands unimpeached. Yet central to the claim against Jackson Lalic Lawyers is the contention that Mr Attwells was not indebted to the ANZ Bank in the amount recorded in that judgment. That is, the claim necessarily disputes the judgment that has been entered in respect of the dispute commenced by the ANZ Bank – the Recovery Proceedings. That is a direct challenge to finality. It is impermissible.

112 The conclusion that the claim against Jackson Lalic Lawyers is an impermissible challenge to finality is fortified by understanding the structure of the Order, the reasons why the Order was structured in the manner it was and the significant consequences of the Order being entered.

113 As seen earlier, the Order, which was entered by the Court, comprised two sections – one containing orders made by the Court and the other "noting" an agreement between the parties. The distinction between the orders (orders 1 to 9) and the agreement between the parties noted in the Order (pars 10 to 17) is important. Most importantly, order 1 provided that there was verdict and judgment for the ANZ Bank against Mr Attwells, Ms Lord and the Company in the sum of $3,399,347.67.

114 The effect of the agreement between the parties noted in pars 10 to 17 was, amongst other things, merely to record that *enforcement* of that verdict and judgment would be delayed. The fact that a judge notes an agreement between the parties, and that note is entered in the court's record, neither adds to nor detracts from the nature of the agreement. It is an agreement between the parties, not an order of the court[102].

115 As Campbell JA correctly explained in *Beck v Weinstock*[103]:

> "A characteristic of judgments and orders of a court that belong in the mandatory part of the court order is that they take effect through the authority of the court. A court order produces legal consequences through

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101 (2015) 89 ALJR 750 at 756 [20]; 323 ALR 1 at 6-7.

102 cf directions as to enforcement, by order, given under s 135 of the *Civil Procedure Act* 2005 (NSW).

103 [2012] NSWCA 289 at [61]-[63] (McColl and Meagher JJA agreeing).

> the very fact that it is made by the court. … It happens when the court gives a judgment that A pay $X to B, where the judgment itself is a source of the liability to pay the $X. A court order that commands that some act be done is itself a source of an obligation to perform that act. Special enforcement procedures appropriate to judgments and orders can be invoked to achieve the effect that the judgment or order is obeyed. By contrast, an agreement *inter partes* that the court has noted creates obligations that are merely contractual ones, not obligations based in any way on the authority of the court. The enforcement mechanisms available concerning it are the same as would have been available if the agreement had been made, but not noted by the court.
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> …
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> An agreement that is noted by a court, but does not result in a court order being made that gives the court's authority to the agreement does not result in a *res judicata*."

116 Here, order 1 of the Order was "Verdict and judgment for [the ANZ Bank] against [Mr Attwells, Ms Lord and the Company] in the sum of $3,399,347.67". This was an order of the Court that took effect through the authority of the Court. That order was made or given, and entered, consistent with the *Civil Procedure Act* 2005 (NSW) ("the CPA") and the UCPR. It is worth considering each in greater detail.

The CPA

117 Section 90 of the CPA, entitled "Judgments generally", provides that[104]:

> "(1) The court *is, at or after trial or otherwise as the nature of the case requires, to give such judgment or make such order as the nature of the case requires*.
>
> (2) If there is a claim by a plaintiff and a cross-claim by a defendant, the court:
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> (a) may give judgment for the balance only of the sums of money awarded on the respective claims, or
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> (b) may give judgment in respect of each claim,
>
> and may give judgment similarly where several claims arise between plaintiffs, defendants and other parties." (emphasis added)

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104 See also s 91 of the *Supreme Court Act* 1970 (NSW).

118 Section 133(1) of the CPA provides that a judgment or order of the court may not be *enforced* until it has been entered in accordance with the UCPR. Here, the judgment was entered. Enforcement was delayed.

The UCPR

119 Part 36 of the UCPR deals with "Judgments and orders". It comprises four divisions. The general rules are in Div 1. Rule 36.1, entitled "General relief", provides that "[a]t any stage of proceedings, the court may give such judgment, or make such order, as the nature of the case requires, whether or not a claim for relief extending to that judgment or order is included in any originating process or notice of motion". Unsurprisingly, it is in similar terms to s 90 of the CPA.

120 Consent orders are dealt with in r 36.1A of the UCPR. Rule 36.1A(1) provides that "[t]he court *may* give judgment, or order that judgment be entered, in the terms of an agreement between parties in relation to proceedings between them" (emphasis added). The Consent Order was filed under r 36.1A. There is no question that the Court could refuse to make a consent order under r 36.1A[105]. Rule 36.1A, and the discretion its terms provide, recognises that there is a distinction between agreements that a court will, if asked, give effect to by pronouncing an order (here, orders 1 to 9 of the Order) and agreements that a court is willing to note, but not include in an order (here, pars 10 to 17 of the Order). That is what occurred here. Paragraphs 10 to 17 of the Order "can properly be described as an order which expresses an agreement in a more formal way than usual"[106]. Paragraphs 10 to 17 record an agreement between the parties – they are not orders of the Court which "impute any finding to the court"[107].

121 However, orders 1 to 9 of the Order record a verdict and judgment that was made or given, and entered on 16 June 2010. That judgment or order took effect as of the date on which it was given or made[108].

122 Setting aside or varying judgments and orders is dealt with in Div 4 of Pt 36 of the UCPR[109]. A power exists to set aside a judgment or order "if the

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105 See, eg, *Ryde City Council v Petch* [2012] NSWSC 1246 at [5]-[11].

106 cf *Newcrest Mining* (2012) 248 CLR 555 at 564 [17].

107 cf *Newcrest Mining* (2012) 248 CLR 555 at 564 [17].

108 r 36.4(1)(a) of the UCPR.

109 Subject to s 14 of the CPA, which permits the court to dispense with the UCPR in certain circumstances.

judgment was given or entered, or the order was made, irregularly, illegally or against good faith"[110] or if the parties to the proceedings consent[111]. It is not suggested here that the Order was obtained by fraud, or otherwise improperly.

123 Rule 36.16 contains further limited powers to set aside or vary a judgment or order. Under r 36.16(1), the court may set aside or vary a judgment or order if the notice of motion for the setting aside or variation is filed *before* entry of the judgment or order. The circumstances in which a court may set aside or vary a judgment or order *after* it has been entered are limited to where it is a default judgment, the judgment or order was given or made in the absence of a party, or in proceedings for possession of land, where the judgment or order was given or made in the absence of a person whom the court had ordered to be added as a defendant[112]. The court may also "set aside or vary any judgment or order except so far as it"[113]:

> "(a) determines any claim for relief, or determines any question (whether of fact or law or both) arising on any claim for relief, or
>
> (b) dismisses proceedings, or dismisses proceedings so far as concerns the whole or any part of any claim for relief."

124 Any application to set aside or vary a judgment or order must be filed within 14 days after the judgment or order is entered[114]. The court may not extend that time limit[115]. Nothing in r 36.16 affects any other power of the court to set aside or vary a judgment or order[116].

125 These restrictions in the UCPR upon reopening of orders after they have been formally given or made, and entered, reflect the general principle of finality

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110 r 36.15(1) of the UCPR.

111 r 36.15(2) of the UCPR.

112 r 36.16(2) of the UCPR.

113 r 36.16(3) of the UCPR.

114 r 36.16(3A) of the UCPR. See also r 36.16(3B).

115 r 36.16(3C) of the UCPR.

116 r 36.16(4) of the UCPR. Correction of a judgment or order under the "slip rule" is provided for in r 36.17.

of litigation which underpins the immunity as explained in *D'Orta*[117]. They also have a related point – that the principle of finality "serves as the sharpest spur to all participants in the judicial process, judges, parties and lawyers alike, to get it right the first time"[118].

Mr Attwells' verdict and judgment

126 The verdict and judgment made or given and entered against Mr Attwells on 16 June 2010 was final. Orders 1 to 9 of the Order (as distinct from the agreement noted in pars 10 to 17) recorded the final quelling of a controversy by the exercise of judicial power. To observe that the judgment was entered by admission or consent of Mr Attwells in no way denies that the controversy between the parties was finally quelled by verdict and judgment. And the rights of the parties merged in that "final" judgment[119].

127 The work done by Jackson Lalic Lawyers, which is now the subject of challenge, was done directly for the final quelling of the Recovery Proceedings, by the exercise of judicial power. It was "work intimately connected with" work in a court. The case ended when the verdict and judgment, recorded in order 1 of the Order, was made or given and entered by the Court.

128 The conclusion reached in this case is consistent with the view that the advocate's immunity (and the principles which underpin it) does not extend to negligent advice to commence proceedings which are doomed to fail. Advice of that kind is not work done for the final quelling of a controversy by the exercise of judicial power. Advice of that kind starts a controversy.

129 By contrast, advice not to settle a proceeding which proceeds to judgment on the merits is covered by the immunity. In a case of that kind, there will have been a contested hearing in which the judge makes factual findings and applies the law to those facts. Adapting the language of the plurality in *D'Orta*[120], the complaint of the client must be that "a consequence has befallen the client which has not been, and cannot be, sufficiently corrected within the litigation in

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117 See *Burrell v The Queen* (2008) 238 CLR 218 at 223 [15]; [2008] HCA 34; *Achurch v The Queen* (2014) 253 CLR 141 at 152-154 [14]-[18]; [2014] HCA 10.

118 *Burrell* (2008) 238 CLR 218 at 223 [15]-[16]. See also *Achurch* (2014) 253 CLR 141 at 153 [15].

119 *Chamberlain* (1988) 164 CLR 502 at 508; *Tomlinson* (2015) 89 ALJR 750 at 756 [20]; 323 ALR 1 at 6-7.

120 (2005) 223 CLR 1 at 26 [66]. See also at 27 [70].

which the client was engaged". There has been a final quelling of the controversy. That challenge to finality cannot be permitted.

130 For these reasons, the Court of Appeal applied the right test and answered the separate question correctly.

Reconsidering *Giannarelli* and *D'Orta*

131 I agree with the reasons of French CJ, Kiefel, Bell, Gageler and Keane JJ that this Court should not reconsider its previous decisions in *Giannarelli*[121] and *D'Orta*[122].

Orders

132 The appeal should be dismissed. The appellants should pay the respondent's costs of the appeal to this Court. The intervener should pay the costs of the parties occasioned by the intervention.

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121 (1988) 165 CLR 543.

122 (2005) 223 CLR 1.