IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY **NO S 161 OF 2015**

On Appeal From the Court of Appeal of the Supreme Court of New South Wales

BETWEEN: **GREGORY IAN ATTWELLS**
First Appellant

AND: **NOEL BRUCE ATTWELLS**
Second Appellant

JACKSON LALIC LAWYERS PTY LIMITED
Respondent

REPLY OF THE APPELLANTS

ANNOTATED

Filed on behalf of the appellants by:
L.C. Muriniti & Associates
Suite 15, 8-12 Pacific Parade, Dee Why NSW 2099
DX 9117 Dee Why

Date of this document: 26 October 2015

File ref: Leonardo Carlo Muriniti (as agent for Gary White, Whites Lawyers)
Telephone: 02 9972 3633
Facsimile: 02 9972 3919
Lawyer's E-mail: muriniti@tpg.com.au

A FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the Internet.

B APPLICATION OF THE EXISTING TEST

2. ***The Scope of the Test***: The respondent's submissions (RS) endorse the test in *Giannarelli* as approved in *D'Orta* but do not identify its limits: e.g., RS [10], fn 11; [21], [27]-[29]. The uncertain position of decisions by a client illustrates this. Contrary to RS[10], the appellants recognise that the decision on the facts in *D'Orta* involved a decision by the client. The appellants instead make two points. *First,* the plurality in *D'Orta* stated, at [86], that it was not departing from the test in *Giannarelli*, where this Court in turn adopted the test in *Rees v Sinclair* [1974] 1 NZLR 180. The preferred construction of the test in *Giannarelli* is that the relevant decision is a decision by an advocate. The test in *D'Orta*, at [86], should be construed in that way, conformably with *Giannarelli* and other authorities prior to *D'Orta.*[1] A question then arises as to whether *D'Orta* misapplied the *Giannarelli* test or can be explained in some other way. *Secondly,* on any view of *D'Orta* and *Giannarelli,* the core case of the immunity involves a decision by an advocate that affects the conduct of the case by governing the tactics to be adopted in court.[2] Whichever of the various tests is applied, the immunity does not apply to the circumstances of the present case. An expansion of the immunity far beyond the core case has led to the erroneous outcome identified at AS[64], in which any case involving a decision by a client, on advice, to settle is said to be in the strongest category of cases of the immunity. The plurality in *D'Orta* cannot be taken to have intended that outcome.

3. These matters ultimately bear upon whether this Court should re-open *D'Orta.* The plurality in *D'Orta* approved *Giannarelli* but applied it in a manner that produces three kinds of arguable disconformity. *First*, there may be disjuncture between the scope of *D'Orta* and *Rees*, as illustrated by the question of decisions of a client. *Secondly*, there may be disjuncture between the verbal formulations in *Giannarelli* and *D'Orta.* Intermediate courts have on occasion preferred the test in *Giannarelli* to that in *D'Orta*, notwithstanding that the plurality in *D'Orta* stressed the substantive identity of the two tests at [86] (see AS[60]). *Thirdly*, there is disjuncture between the test in *D'Orta* and the principles that sustain the immunity.[3] These matters provide a compelling reason to re-consider the immunity. It would be an odd result if the plurality in *D'Orta* had approved the immunity in *Giannarelli*, narrowed the principles that sustain it, but be taken to have expanded the scope of its application.

4. ***The Test and its Rationale***: RS[2], [12(a)] and [13]-[18] contend that the appellants illegitimately conflate the test for the immunity with one rationale advanced in its support. That is not so. Bathurst CJ observed at CA[40] (**AB 94**) that: "where it is uncertain that the advocates' immunity applies, consideration of that issue will be informed by its justification." This is not challenged. It may be accepted that the respondent acknowledges that the principle of finality does, in some way and in certain circumstances, guide the

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1 E.g., *Giannarelli* concerned an advocate's decision, *inter alia*, as to whether or not to raise s 6DD of the *Royal Commissions Act 1902* (Vic); *Rees* concerned an advocate's decision not to raise in evidence in court the unfounded allegations of the client against his wife; *Saif Ali* concerned a decision by the advocate not to add the driver of a vehicle as a defendant.

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

3 *Alpine Holdings Pty Ltd v Feinauer* [2008] WASCA 85 at [87]-[89]; *Attard v James Legal Pty Ltd* (2010) 80 ACSR 585; [2010] NSWCA 311 at [31] and [188]-[190]

application of the test. The remaining questions then are, how and when? Mason CJ in *Giannarelli*, at 560, observed that: "to take the immunity any further would entail a risk of taking the protection beyond the boundaries of the public policy considerations which sustain the immunity." McCarthy P in *Rees*, at 187, stressed that the "protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice."[4] See further *D'Orta* at [84] and [87]; AS[61], fn 29; AS[71]-[73].

5. ***Causation***: RS[8]-[9] and [24] suggest that, contrary to AS[46]-[48], the impugned advice must have affected the conduct of the hearing; if it were otherwise, the appellants could not establish causation. It is further said that for *any* of the alleged negligence to be causative of the appellants' loss, it must be shown that the negligence caused the decision to consent to the orders. The submission in essence is that the test in *D'Orta* applies to all of the negligence alleged against Jackson Lalic. The appellants have both a narrow and a broad response to this.

6. The *narrow response* arises out of the various particulars of negligence referred to at AS[47] and [53].[5] The respondent does not address differences amongst these particulars. Nor did the Court of Appeal: AS[46]. Particular 13(d) (**AB 35**) concerns alleged negligent advice as to *the effect of* the Consent Order. Order 11 could only operate once Orders 1-9 had been entered and the stated condition had not been fulfilled: AS[17]. The loss suffered as a result of negligent advice concerning the effect of those orders could only crystallise once the proceedings had ended. After that time Gregory Attwells, in reliance on advice from Jackson Lalic, did not make payment of $1,750,000 on or before 19 November 2010. He thereby incurred a debt that prior to the proceedings he did not owe.

7. The *broad response* concerns whether any of the alleged negligent advice affected the conduct of the case in court. As noted in *Rees*, at 187, that involves "the tactics to be adopted in court". Here, the case was compromised between the parties out of court and effected by consent orders, absent a substantive hearing and judicial reasons. The conduct of the case in court was not affected. The principle of finality is not engaged. There is no final judicial determination on the merits to protect. While the Court approved the orders, in substance the agreement of the parties resolved the controversy. The clear distinction between a plea of guilty and a settlement by consent orders of this kind illustrates this: cf RS[44]. As Judge LJ observed in *Kelley v Corston* [1998] QB 686 at 697C-D: "The plea is not a compromise of private litigation which brings proceedings to an end. It is a public admission in court of criminal responsibility, and the case in court proceeds accordingly, and eventually to sentence."

8. ***Settlement and Finality***: RS[19] and [20]-[31] contend that finality would be undermined if settlement advice were placed outside the immunity. Two matters arise. *First*, there is no freestanding principle of law that the matters the subject of an earlier dispute cannot be examined in later proceedings between different parties. Further, parties may bring proceedings against each other arising out of the circumstances in which settlements are concluded.[6] *Secondly*, finality is not undermined if an advocate is exposed to a negligence suit for advice on settlement. The final consent order stands. In the rare situation in which an action against the advocate involves a re-agitation of an issue raised in earlier

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4 Approved in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 215 (Lord Wilberforce) and 224 (Lord Diplock)

5 The status of these particulars and attendant agreed facts may not be as clear as the respondent contends at RS[4]: *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359-360, [57].

6 *Abriel v Australian Guarantee Corporation Ltd* [2001] FCA 165; *Barry v City West Water Ltd* [2002] FCA 1214; *Pittorino v Meynert* [2002] WASC 76; *Abriel v Bennett* [2003] NSWCA 323; *National Australia Bank Ltd v Koller* [2011] VSC 228

proceedings in a manner that is unfair to a person who is not a party to the proceedings against the solicitor, the abuse of process doctrine may well be enlivened.[7]

9. ***Settlement and Skewing of Litigation***: Contrary to RS[23], no skewing would occur. The immunity, if any, of the judge and witnesses in a proceeding will not result in unfairness or injustice to an advocate sued for negligence in connection with a settlement. In such a case, the court would be entitled to consider the conduct of the judge and witnesses in assessing whether the advocate was negligent, notwithstanding that the judge or witnesses may themselves be immune from suit. Further, the practical difficulties suggested at RS[23] are largely imagined: witnesses who gave evidence in the earlier proceedings will generally be compellable to give evidence in, and produce documents for, subsequent negligence proceedings; judges and jurors are competent, and may be compellable, to give evidence in relation to previous proceedings, save as to jurors' reasons for decision or deliberations;[8] and evidence of settlement communications relevant to a subsequent negligence claim is likely to fall within an exception to any otherwise applicable privilege.[9]

10. ***Settlement and the Administration of Justice***: RS[19] and [32]-[35] contend that the exclusion of settlement from the immunity would be detrimental to the administration of justice, due to the nature of the arguments that may need to be put. We note three matters. *First*, experience overseas in jurisdictions where the immunity has been abolished does not suggest that this difficulty will materialise. Nor does authority in Australia: *Kolavo v Pitsikas* [2003] NSWCA 59.[10] *Secondly*, it cannot be denied that material that is potentially uncomfortable for participants in the administration of justice may be introduced into evidence, subject to any suppression order. However, evidence and submissions concerning such persons are unexceptional in our legal system. The credibility and reliability of lay and expert witnesses are commonly put in issue. Each application that requests that a judge recuse himself or herself ventilates matters about the judge, and typically before that judge. On appeal, counsel frequently criticise judges. *Thirdly*, there will usually be sound forensic reasons not to attack the judge in the earlier case, when defending a negligence suit on behalf of an advocate. Indeed, such evidence is likely to be most relevant in negligence cases based on alleged deficient forensic decision-making. Such claims are the least likely to be initiated, due to the grave difficulties of establishing negligence and causation that would arise.

11. ***Settlement and Incoherence***: RS[19] and [36]-[39] argue that the exclusion of settlement from the immunity would be productive of incoherence, in essence, by translating primary claims not concerning loss of a chance into negligence claims concerning loss of a chance. This is not a reason to retain the immunity. Indeed, properly understood, the argument from incoherence exposes an infirmity in the respondent's arguments from finality. *First*, such an action for loss of a chance is orthodox: the loss of a right or chose in action by a client, as a result of tortious conduct or breach of contract by the solicitor, may ground a suit against the solicitor. In seeking to make good such a case, the client must be restored to the position he or she would have been in had the negligence not occurred.[11] There is

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7 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 707B (Lord Hoffmann); *Lewis v Hillhouse* [2005] QCA 316

8 E.g., *Uniform Evidence Acts*, ss 16, 129; *Jury Act 1977* (NSW), s 68B.

9 E.g., *Uniform Evidence Acts*, s 131(2)(c), (e), and (g).

10 See further, *Studer v Boettcher* [1998] NSWSC 524; BC9807363; on appeal [2000] NSWCA 263; special leave refused, 14 December 2001, S5298/2000, [2001] HCATrans 663

11 *Moss v Eaglestone* (2011) 83 NSWLR 476 at 483-485, [20]-[26]; *Kitchen v Royal Airforce Association* [1958] 1 WLR 563 at 575; *Johnson v Perez* (1988) 166 CLR 351 at 367; *Nickolaou v Papasavas, Phillips & Co* (1989) 166 CLR 394 at 402–403; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 119; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 354

nothing incoherent about the law valuing an opportunity differently at different times, depending upon the amount of information available to the Court in making that assessment. *Secondly*, as properly accepted at RS[38], "to some extent this incoherence already exists in relation to cases outside the immunity." The respondent's objection concerns a question of degree and not kind. That such cases are currently run tells against arguments from finality and the administration of justice. A related submission, RS[67], observes that the doctrines of *res judicata* etc., "will rarely be an impediment on a client suing his lawyer." This too undermines any argument from finality. If these doctrines are not engaged, the case falls within the categories of cases in which re-litigation has never been found to be offensive.

12. ***Previous Authorities***: RS[7] and [40]-[45] contend that authority supports the submission that settlement should fall within the immunity. However, the state of authority in this respect is unsettled, and includes cases beyond those cited at RS[7], fn 8. The decision of the Court of Appeal in *Arthur JS Hall & Co*[12] involved four separate cases: *Arthur JS Hall & Co v Simons* [49]-[64]; *Barratt v Woolfseddon* [65]-[76]; *Cockbone v Atkinson Dacre & Slack* [77]-[101]; *Harris v Scholfield Roberts & Hill* [102]-[110]. In each of these cases, the Court of Appeal held that on the *Rees* test the immunity did not apply to the negligent settlement advice.[13] In *Hodgins v Cantrill* (1997) 26 MVR 481, Grove J rejected the immunity in respect of negligent settlement advice. See further: *D'Orta* at [166] (McHugh J, obiter); *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 237A (Lord Keith, obiter) and 234C (Lord Russell, obiter); *Donellan v Watson* (1990) 21 NSWLR 335 337F-338B and 340–341; *Landell v Dennis Faulkner* [1994] 5 Med LR 268; *B v Miller & Co* [1996] 2 FLR 23 at 31-32; *Woodland v Donnellan* [2011] NSWSC 777 (Hulme J). Further, various courts have held that a claim based on negligent settlement advice should not be summarily dismissed: *Francis v Bunnett* (2007) 18 VR 98 at [36] and [50]; *Alpine Holdings* at [21]-[29], [86]-[87]; *Naylor v Oakley Thompson & Co Pty Ltd* [2008] VCAT 1724 at [88]. This unsatisfactory situation supports a full consideration of the issue by this Court.

C REOPENING AND RECONSIDERATION

13. ***Argument and Application:*** RS[53]-[59] contend that given *Giannarelli* and *D'Orta* were fully argued and have been regularly applied those decisions accordingly should not be disturbed. Against this, the appellants put various arguments, including: (a) both cases were decided at a time when there was a relative paucity of case law concerning the precise boundaries of the immunity; (b) while based on principle, the cases did not form part of a stream of High Court authority; (c) there are three separate majority judgments in *D'Orta* and significant differences between the reasoning of the plurality and the reasons of McHugh J (particularly on settlement at [154]-[168]) and Callinan J; (d) in *D'Orta* the Court did not consider argument directed to whether the immunity was supportable by reference *only* to the twin rationales identified in *D'Orta*; (e) the confusion and concern that have been expressed by intermediate appellate courts as to how to apply the verbal formulae in *Giannarelli* and *D'Orta;* (f) inconsistency in approach to the immunity between different intermediate courts; (g) the possibility of inconsistent and capricious results that could be productive of injustice; (h) the immunity has created an anomalous exception to the general liability of professionals for negligence and is incompatible with the ongoing development of the law of negligence; (i) the development of a body of precedent in comparable common law systems as to the effect, on the administration of justice, of abolishing the immunity provides real world comparators to assess the likely effect of

12 [2002] 1 AC 615 at 646 [47] (Lord Bingham of Cornhill CJ, Morritt and Walker LJJ)
13 *Ibid* 645 [43]

abolishing the immunity and demonstrates that perceived difficulties in running such cases are slight or non-existent; (j) the abolition of witness immunity in the United Kingdom supports a re-evaluation of the immunity; (k) the immunity is part of public policy which changes from time to time and merits revisiting; (l) the appellants are advancing arguments not previously put, including that there may be disconformity between the tests in *Giannarelli* and *D'Orta* and between the test in *D'Orta* and its supporting principles, and that focus on the primary rationale of re-litigation indicates that the immunity cannot be supported on this ground alone.

14. RS[57]-[59] suggest that the Court ought not re-open *D'Orta* due to the disruption it would cause and the great sense of injustice it will generate in those who have never commenced, compromised or run cases by reference to *Giannarelli* and *D'Orta*. That is a risk that attends any departure by this Court from one of its previous decisions. Moreover, any sense of injustice would be offset by the consideration that there is currently a grave injustice to clients who are unable to sue negligent advocates, no matter how extreme the negligence, how gross the misconduct and how great the loss: cf *Giannarelli* at 588 (Deane J).

15. ***Legislative Abstention***: Contrary to RS[60]-[63] the absence of legislative intervention since *D'Orta* does not militate against reconsideration. That is for three reasons. *First*, there is no way of knowing the reasons for such legislative inaction, which may indicate no more than that the legislatures are leaving the matter to this Court. *Secondly*, advocates' immunity is a matter properly left to the judicial branch of government. As noted in the Options Paper referred to at RS[63], at [28]: "the significant developments in relation to advocates' immunity have been developments of the common law." Further, as Lord Hobhouse observed in *Arthur JS Hall & Co*, at 737B: "in the present appeals the relevant area is the system of justice and the administration of justice in the courts. In this area the judges have a legitimate competence to declare where the public interest in the achievement of justice lies and what is likely to be the impact of one rule or another upon the administration of justice." See the cognate observations at: *Arthur JS Hall & Co* at 683E-F (Lord Steyn) and 704H-705A (Lord Hoffmann); *Lai v Chamberlains* [2007] 2 NZLR 7 at [92]-[94] (Elias CJ), [127]-[128] (Tipping J). *Thirdly*, legislation is not suited to this task in Australia. The common law must be kept unified, which is best achieved by decisions of this Court. Piecemeal intervention would be undesirable. Uniform legislation could only be passed once all state and territories had agreed a common approach. This would be very difficult to achieve with 9 different legislatures.

16. ***No Relevant Changes***: RS[64]-[68] contend that there has been no relevant change of circumstance. For the reasons identified at AS[79]-[84] and at [12] herein, that is not so.

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Guy O'L Reynolds SC
Sixth Floor Chambers
Ph: 9232 5016
E: guyreynolds@sixthfloor.com.au

Ruth C A Higgins
Banco Chambers
Ph: 9376 0602
F: 9335 3542
E: ruth.higgins@banco.net.au

Robert A Yezerski
Banco Chambers
Ph: 9376 0660
F: 9210 0521
E:robert.yezerski@banco.net.au

David W Robertson
New Chambers
Ph: 9151 2055
F: 9233 1850
E: Robertson@newchambers.com.au