IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S170 of 2016

BETWEEN

DAVID KENDIRJIAN

Appellant

and

EUGENE LEPORE

First Respondent

JIM CONOMOS

Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2 Two issues arise. Firstly, does the advocate's immunity principle as stated in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 apply to circumstances in which a legal practitioner fails to communicate the contents of a settlement offer to his/her client who then decides to continue the proceedings without any instructions from his/her client? Secondly, did the Court of Appeal misapply the advocate's immunity principle as stated in *D'Orta-Ekenaike* when it found that the mere commencement or continuation of proceedings fell within that principle?

3 Since the Court of Appeal delivered its judgment, the High Court delivered judgment in *Attwells v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16 with the consequence that those two issues must be resolved in favour of the appellant.

Part III: Section 78B of the *Judiciary Act 1903*

4 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Citations

5 The judgment of the Court of Appeal is not reported. Its medium neutral citation is *Kendirjian v Lepore* [2015] NSWCA 132.

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Part V: Facts

6 The proceedings at first instance and on appeal were conducted on the assumed basis that if the proceedings went to trial, the appellant (**"Kendirjian"**) would be able to prove the facts upon which he relied in his Amended Statement of Claim.

7 On **21 November 1999** Kendirjian was involved in a motor vehicle accident with another vehicle driven by Ms Cheree Ayoub (**"Ayoub"**) and suffered personal injury.

8 In **2004** the first respondent (**"Lepore"**) commenced proceedings on behalf of Kendirjian against Ayoub in the District Court of NSW at the Parramatta Registry for damages (**"Earlier Proceedings"**). In the Earlier Proceedings Ayoub admitted liability leaving only quantum in dispute.

9 Lepore briefed the second respondent (**"Conomos"**) to appear for Kendirjian at the hearing in the Earlier Proceedings which were set down for five days commencing 30 August 2006 before Delaney DCJ.

10 On the first day of the trial of the Earlier Proceedings, some settlement negotiations took place between Lepore and Conomos on the one hand and Ayoub's lawyers on the other. In those negotiations, Ayoub's lawyers communicated to Lepore and Conomos an offer to settle the Earlier Proceedings for $600,000 plus costs (**"Settlement Offer"**).

11 Lepore and Conomos did not advise Kendirjian of the amount of the Settlement Offer but merely of the fact that an offer had been made.

12 The Settlement Offer was rejected by Lepore and Conomos absent any instructions from Kendirjian on the basis that it was "too low". The consequence of that rejection was that Lepore and Conomos decided to continue Kendirjian's cause of action absent any instructions from Kendirjian.

13 On **13 October 2006** Delaney DCJ delivered judgment awarding Kendirjian $308,432.75 in damages.

14 Upon Lepore's advice Kendirjian instituted an appeal to the Court of Appeal against the award by Delaney DCJ. On 14 August 2008 that appeal was dismissed (see *Kendirjian v Ayoub* [2008] NSWCA 194) with an order that Kendirjian pay the costs of the appeal other than the first day which were payable by Lepore and Conomos personally (see *Kendirjian v Ayoub (No 2)* [2008] NSWCA 255).

15 In **around January 2009** Kendirjian discovered the substance of the Settlement Offer when Ayoub's lawyer informed Kendirjian that Ayoub had offered to settle the Earlier Proceedings for $600,000 plus costs.

16 On **9 October 2012** Kendirjian commenced proceedings against Lepore and Conomos in the District Court of NSW Sydney Registry (**"the District Court Proceedings"**). The Amended Statement of Claim was filed in court on 15 March 2013.

17 On **29 and 31 July 2013** Lepore and Conomos respectively filed Notices of Motion to dismiss the District Court Proceedings pursuant to Uniform Civil Procedure Rules 13.4(1) on the basis that they were protected by the advocate's immunity.

18 On **18 October 2013** Kendirjian filed a Notice of Motion seeking leave to file and serve a Further Amended Statement of Claim.

19 The Motions filed by Lepore, Conomos and Kendirjian were all listed for hearing by Taylor SC DCJ on 11 and 12 December 2013.

20 On **16 May 2014** Taylor SC DCJ found that, in accordance with *Donnellan v Woodland* [2012] NSWCA 433, Kendirjian's case must fail and dismissed the District Court Proceedings pursuant to UCPR 13.4(1).

21 Kendirjian appealed that decision to the New South Wales Court of Appeal and on **21 May 2015** the Court of Appeal dismissed his appeal: see *Kendirjian v Lepore* [2015] NSWCA 132.

Part VI: Argument

22 There are two facts pleaded in the Amended Statement of Claim which the appellant says are critical for the purposes of this argument. The first fact is that the respondents did not advise the appellant of the amount of the Settlement Offer (vide paragraph 8.2 of the Amended Statement of Claim). The second fact is that the respondents rejected the Settlement Offer absent any instructions from the appellant (vide paragraph 8.3 of the Amended Statement of Claim). The appellant says that the profound consequence of those two critical facts taken together was that the litigation continued to a final hearing. Put another way, the respondents unilaterally assumed exclusive control of the appellant's prerogative right as the *dominus litus*[1] when they decided to reject the Settlement Offer and continued with the prosecution of the appellant's District Court Proceedings absent the appellant's instructions to do so. That is the context of the factual matrix on which the question of whether the principle of the advocate's immunity applies presents itself. In light of that factual matrix, it must be noted what Beazley JA said in *Donnellan* at [198]:

[1] *Fray v Voules* (1859) 120 E.R. 1125 at 1128– the client is the dominus litis who is to be the judge of what is beneficial to his interests; and at 1129 the client and not the attorney is the dominis litis and the client has the right to decide whether or not there shall be a compromise.

The question is not when the advice was given, but whether the advice given led to a decision affecting the conduct of the case in court. As McHugh J stated, the giving of advice is an integral part of an advocate's role. If the giving of advice, or the omission to give advice, led to a decision to continue with the case, or meant that the case was continued because of that omission, such conduct would lead to a decision affecting the conduct of the case in court, namely, its continuance by way of full argument before a judge.

23 Beazley JA was referring to what McHugh J said in *D'Orta-Ekenaike* 223 CLR 1 at [157] where his Honour said:

> "The issue is whether the relevant connection with the conduct of the litigation exists, not the form of the negligence. An integral part of the advocate's role is the giving of advice on the basis of which the client will give instructions that direct the course of proceedings. The advice is critical to and often determinative of the client's decision. There is no relevant distinction between instructions given on negligent advice and the negligent carrying out of instructions if both are intimately connected with the conduct of litigation."

24 At [41] to [46] MacFarlan JA (with whom Leeming JA and Bergin CJ in Equity agreed), after considering the formulation in *Giannarelli* of the test as applying where work affects "the way" a case is conducted, went on to find at [47] that it was not adopted by the plurality in *D'Orta-Ekenaike*. His Honour also noted at [47] the effect of the High Court's then most recent pronouncement in *D'Orta-Ekenaike* was that the immunity applies to 'work done out of court which leads to a decision affecting the conduct of the case in court' and to 'work intimately connected with' work in court. That said, his Honour reasoned erroneously that both formulations sufficiently cover cases such as the present where the alleged negligence was a failure to advise properly in relation to acceptance of a settlement which led to a plaintiff continuing with court proceedings. His Honour went on to find that *Donnellan v Woodland* confirms that primacy is not to be given to McCarthy P's reference to "the way" in which a court proceeding is conducted. The appellant says MacFarlane JA's reasoning is erroneous for two reasons. Firstly, it wrongly assumes that it was Kendirjian who decided to continue with the court proceedings. Secondly, it fails to identify or demonstrate a "functional connection" between the respondents' failure to communicate the Settlement Offer to the appellant and the way the respondents conducted the case in court or the judicial determination of it by Delany DCJ.

25 In *Attwells*, the Court considered the scope of the advocate's immunity in light of its earlier decisions in *Giannarelli v Wraith (1988) 165 CLR 543* and *D'Orta-Ekenaike*. The majority in *Attwells* said at [5]:

> "..... the intimate connection required to attract the immunity is a ***functional connection*** between the advocate's 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."
>
> (emphasis added)

and then at [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."

26 At [31] to [37] the majority in *Attwells*, after considering the rationale and justifications for the immunity, held that they 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.

27 At [38] the majority in *Attwells* held that as 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, the immunity does not extend to acts or advice of the advocate which do not move litigation towards a determination by a court and in particular, it does not extend to advice that leads to settlement agreed between the parties for the reasons quoted from McHugh J in *D'Orta* at 223 CLR 1 at 56.

28 The respondent in *Attwells* as recorded at [40] had argued that the immunity extends to an agreed settlement of proceedings after a hearing has commenced relying on *Biggar v McLeod* [1978] 2 NZLR 9 where it was held "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". The majority in *Attwells* rejected that argument saying at [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 a decision of the Supreme Court of New Zealand in *Lai v Chamberlains*. 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" [citing *Rees v Sinclair* [1974] 1 NZLR 180 at 187], the decision in *Biggar v McLeod* effectively strengthened the case for the abolition of the immunity in New Zealand. To accept that the immunity extends to advice which leads to settlement of litigation is to decouple the immunity from the protection of the exercise of the 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 the clients."
> (emphasis added)

29 In the courts below, it was argued by the respondents and accepted by Taylor SC DCJ in the District Court Proceedings and the Court of Appeal in *Kendirjian* that any decision not to discuss the Settlement Offer with the appellant or properly advise him was necessarily a decision affecting the conduct of the case in court, namely, "deciding to continue with the proceedings" citing *Donnellan v Woodland* [2012] NSWCA 433 at [229] in support.

30 The analysis and approach taken in *Donnellan* as to the interpretation of the immunity and its scope and which was followed by Taylor SC DCJ and the Court of Appeal in *Kendirjian* is inconsistent with what the majority held in *Attwells* at [41], [48] and [49].

31 Further, it was argued by the respondents in the courts below and accepted that the respondents' failure to communicate the Settlement Offer to the appellant on the basis that it was "too low" was advice leading to the case not being settled which in turn fell within the immunity. The same issue was considered in *Attwells* where it was argued by the respondent at [47] that it would anomalous to hold 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 the rejected offer of compromise. That argument was rejected by the majority where French CJ, Kiefel, Bell, Gageler and Keane JJ said at [48] to [49]:

"[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."

(emphasis added)

32 The courts below failed to identify how the failure by the respondents to communicate the Settlement Offer to the appellant affected the judicial determination by Delany DCJ in the Earlier Proceedings or had any functional connection with the determination by Delany DCJ. The courts below failed to make such an identification simply because one cannot be made. Put another way, if one were to assume that the respondents had communicated the content of the Settlement Offer to the appellant and he did not accept it, how would that have affected the way in which the respondents conducted his case in court ? Moreover, how would that have affected the judicial determination by Delaney DCJ in the Earlier Proceedings ? It would not have affected it in any way whatsoever. The respondents were presumably always going to conduct the case in court in the way that they ultimately did irrespective of whether or not the Settlement Offer had been made by Ayoub in the Earlier Proceedings. It of course goes without saying that Delaney DCJ was always going to make his judicial determination in

the Earlier Proceedings in the way that he did irrespective of whether or not the Settlement Offer had been made by Ayoub in the Earlier Proceedings.

33 As a result of *Attwells*, in order that a proper application of the subsisting law decides this case, the appeal should be allowed.

Part VII: Legislation

Not Applicable

Part VIII: Orders sought

34 The appellant seeks the following orders:

a. the appeal be allowed.

b. the orders made by the Supreme Court of New South Wales, Court of Appeal below on 21 May 2015 and 1 June 2015 be set aside.

c. in lieu of the orders made in the Supreme Court of New South Wales, Court of Appeal, order that the appeal to the Supreme Court of New South Wales, Court of Appeal be allowed and the orders made by Taylor SC DCJ on 16 May 2014 be set side and in lieu thereof order that:

(i.) the Notices of Motion filed by the first and second respondents on 29 July 2013 and 31 July 2013 respectively in the District Court of New South Wales below be dismissed;

(ii.) the respondents pay the appellant's costs of and incidental to the Notices of Motion filed in the District Court of New South Wales below by the first respondent and the second respondent on 29 July 2013 and 31 July 2013 respectively.

d. the respondents pay the appellant's costs of the proceedings in the Supreme Court of New South Wales, Court of Appeal below.

e. the respondents pay the appellant's costs of the appeal.

Part IX: Time estimate

35 The appellant would seek no more than 2 hours for the presentation of the appellant's oral argument.

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