NT Pubco Pty Ltd & Anor v Strazdins & Ors; Strazdins & Anor v Cowell Clarke & Ors [2014] NTSC 8

PARTIES:	NT PUBCO PTY LTD (ACN: 109 250 982) AND DOWLING, Terence George v STRAZDINS, Andrejs Janis AND COOPER, Nicholas David AND COWELL CLARKE AND DART, Graham AND MACNAMARA QC, Phillip
AND BETWEEN:	STRAZDINS, Andrejs Janis AND COOPER, Nicholas David v COWELL CLARKE AND DOWLING, Terence George AND NT PUBCO PTY LTD (ACN: 109 250 982)

TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	95 of 2011 (21127140) and 35 of 2013 (21316264)
DELIVERED:	14 March 2014
HEARING DATES:	29 October 2013
JUDGMENT OF:	HILEY J

CATCHWORDS:

COURTS – Practice and Procedure – Application for summary judgment or strike out – Whether proceedings clearly untenable – *Supreme Court Rules 1987* (NT) r 23.01, 23.02 and 23.03

LEGAL PRACTITIONERS – Immunity from suit – Application of principle in *D'Orta-Ekenaike v Victoria Legal Aid* – Scope of advocate's immunity – Whether alleged conduct led to a decision affecting the conduct of the case in court

LEGAL PRACTITIONERS – Immunity from suit – Scope of advocate's immunity – Relevance of the need for finality

LEGAL PRACTITIONERS – Immunity from suit – Scope of advocate's immunity – Immunity of solicitor

LEGAL PRACTITIONERS – Immunity from suit – Scope of advocate's immunity – Extent to which immunity covers omissions such as failures to advise

LEGAL PRACTITIONERS – Immunity from suit – Scope of advocate's immunity – Importance of considering the conduct alleged – Application to other causes of action such as breach of fiduciary duties

Attard v James Legal Pty Ltd [2010] NSWCA 31; *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1; *Day v Rogers* [2011] NSWCA 124; *Donnellan v Woodland* [2012] NSWCA 433; *Giannarelli v Wraith* (1988) 165 CLR 543; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, applied

Bird v Ford [2013] NSWSC 264; *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209; *Coshott v Barry* [2009] NSWCA 34; *Francis v Bunnett* (2007) 18 VR 98; *Goddard Elliott v Fritsch* [2012] VSC 87; *Keefe v Marks* (1989) 16 NSWLR 713 at 718.; *MM & R Pty Ltd v Grills*[2007] VSC 528; Rees v Sinclair [1974] 1 NZLR 180; *Strazdins and others v Birch Carroll and Coyle Ltd* [2009] FCA 731; (2009) 178 FCR 300; *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169, considered

Agar v Hyde (2000) 210 CLR 552; Biggar v McLeod [1978] 2 NZLR 9; Bott v Carter [2012] NSWCA 89; Chamberlain v Ormsby t/as Ormsby Flower [2005] NSWCA 454; Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594; Dansar Pty v Pagotto [2008] NSWSC 112; Del Borrello v Friedman & Lurie [2001] WASCA 348; Donellan v Watson (1990) 21 NSWLR 335; Heydon v NRMA Ltd (2000) 51 NSWLR 1; Lai v Chamberlains [2007] 2 NZLR 7; Lewis v Hillhouse [2005] QCA 316; MacRae v Stevens [1996] Aust Torts Reports 81-405; Nibbs v Australian Broadcasting Corporation [2010] NTSC 52; Pritchard v Racecage Pty Ltd (1996) 64 FCR 96; 135 ALR 717; Pritchard v Racecage Pty Ltd (1997) 72 FCR 203; 142 FCR 527; Rich v CGU Insurance Ltd; Silbermann v CGU Insurance Ltd [2005] HCA 15; (2005) 79 ALJR 856; RTA Pty Ltd v Brinko Pty Ltd [2011] NTSC 103; Saif Ali v Sydney Mitchell & Co [1980] AC 198; Smits v Roach(2006) 227 CLR 423; Spencer v The Commonwealth (2010) 241 CLR 118; *Symonds v Vass [2009] NSWCA 139,* referred to

Alpine Holdings Pty Ltd v Feinauer [2008] WASCA 85, not followed

Corporations Act 2001 (Cth) ss 440C, 440D, 440D(1), 435C(2), 444, 444E, 444F

Law of Property Act 2000 (NT) ss 137, 138
Supreme Court Act 1979 (NT) s 94
Supreme Court Rules 1987 (NT) r 20.01, 20.02 and 20.03

REPRESENTATION:

95 of 2011

Counsel:

Plaintiffs:	M Livesey QC and W Roper
Third, Fourth & Fifth Defendants:	S J Doyle SC

Solicitors:

Plaintiffs:	Paul Maher
Third, Fourth & Fifth Defendants:	Hunt & Hunt

35 of 2013

Counsel:

Plaintiffs:	R Ross-Smith
First Defendant:	S J Doyle SC

Solicitors:

Plaintiffs:	Fox Tucker Lawyers
First Defendant:	Hunt & Hunt

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

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Nos. 95 of 2011 (21127140) and 35 of 2013 (21316264)

BETWEEN:

NT PUBCO PTY LTD (ACN: 109 250 982)

First Plaintiff

AND:

TERENCE GEORGE DOWLING

Second Plaintiff

AND:

ANDREJS JANIS STRAZDINS

First Defendant

AND:

NICHOLAS DAVID COOPER

Second Defendant

AND:

COWELL CLARKE

Third Defendant

AND:

GRAHAM DART

Fourth Defendant

AND:

PHILLIP MCNAMARA QC

Fifth Defendant

AND BETWEEN:

ANDREJS JANIS STRAZDINS

First Plaintiff

AND:

NICHOLAS DAVID COOPER

Second Plaintiff

AND:

COWELL CLARKE

First Defendant

AND:

TERRENCE GEORGE DOWLING

Second Defendant

AND:

NT PUBCO PTY LTD (ACN: 109 250 982)

Third Defendant

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 14 March 2014)

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Introduction

[1] These reasons relate to applications for summary judgment brought on behalf of the lawyers who are defendants in these proceedings (**the lawyer defendants**). The lawyer defendants contend that the claims against them are unsustainable by reason of their immunity from suit.

[2] The lawyer defendants, namely the third, fourth and fifth defendants in proceedings No. 95 of 2011 (**the 2011 proceedings**) and the first defendant in proceedings No. 35 of 2013 (**the 2013 proceedings**),[1] have been sued by the plaintiffs on account of their alleged negligence and other breaches including breach of contract and breach of fiduciary duties. Cowell Clarke, the third defendant in the 2011 proceedings and the first defendant in the 2013 proceedings, is a firm of solicitors. The fourth and fifth defendants in the 2011 proceedings are barristers.

[3] These proceedings follow proceedings brought in the Federal Court of Australia by Andrejs Janis Strazdins and Nicholas David Cooper (**the**

[1] These proceedings are in fact part of proceedings instituted by the Administrators and DNPW Pty Ltd in the Supreme Court of South Australia, matter No 858 of 2011. This part of those proceedings was transferred to this court pursuant to s 5(2)(b) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987*(Cth) by order made 4 March 2013.

Administrators) and DNPW Pty Ltd (subject to DOCA) (**DNPW**) (together **the FC Applicants**) against Birch Carroll and Coyle Ltd (**BCC**) (**the Federal Court proceedings**), which were heard and determined in 2009 by Lander J.[2] The FC Applicants were represented by the lawyer defendants in these proceedings, with Cowell Clarke (CC) as solicitors, Graham Dart (**Dart**) as junior counsel, and Phillip McNamara QC (**McNamara**) as senior counsel.

The Federal Court proceedings

[4] From 2003 DNPW Pty Ltd operated the business of a licensed hotel under the trading name "Ducks Nuts Bar and Grill" at premises leased from BCC (**the Lease**). By 16 April 2008 DNPW Pty Ltd was in arrears in respect of payment of rent. On 24 April 2008, by resolution of its directors DNPW Pty Ltd entered into voluntary administration resulting in the appointment of Messrs Strazdins and Cooper as joint and several voluntary administrators.

[5] On 12 June 2008 BCC sent a notice of termination of the Lease to DNPW Pty Ltd relying upon the fact that it had been placed into voluntary administration, that being an "Insolvency Event" in relation to the Lease. Because DNPW Pty Ltd was in administration, BCC was not entitled to take possession of the property or to apply to the

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2 *Strazdins and others v Birch Carroll and Coyle Ltd* [2009] FCA 731; (2009) 178 FCR 300 ("*Strazdins FC*")

Supreme Court of the Northern Territory for an order for possession, for example under s 137 of the *Law of Property Act 2000* (NT) (the **LPA**), unless it had the administrator's written consent or leave of the Federal Court.[3]

[6] On 26 August 2008, the creditors of DNPW Pty Ltd resolved at a creditors meeting that DNPW Pty Ltd execute a Deed of Company Arrangement (**the DOCA**) in the form proposed by Terrence George Dowling and NT Pubco Pty Ltd (**NT Pubco**). NT Pubco was a creditor of DNPW Pty Ltd, and Dowling was a director of NT Pubco. On 22 September 2008, the Administrators became joint and several Deed Administrators of DNPW. As a result of the DOCA being executed the administration ended.[4]

[7] The DOCA provided for obligations on the part of NT Pubco which, pursuant to clause 6.3.1, were conditional upon the Administrators obtaining an order for equitable relief or relief pursuant to s 444F of the *Corporations Act 2001* (Cth) (the **Corporations Act**) that the Lease be reinstated and that BCC's notice of termination of lease of 12 June 2008 be withdrawn, or that BCC grant a new lease to DNPW on terms acceptable to NT Pubco.

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3 Cf ss 440C & 440D *Corporations Act 2001* (Cth). See too *Strazdins FC* at [28] – [32].

4 Cf s 435C(2) *Corporations Act 2001* (Cth). See too *Strazdins FC* at [52] – [53] & [112].

[8] On 17 October 2008 the FC Applicants commenced their application in the Federal Court by filing an originating process (the **FC Application**) seeking orders including:

> "1. An order pursuant to s 444 of the *Corporations Act 2001* that the Respondent not take possession of the whole of the [Premises] or otherwise take action to recover such property.
>
> 2. In the alternative an order that [DNPW] be granted relief from forfeiture with respect to all and any breaches of the [Lease] … pursuant to the provisions of s 138 of the Law of Property Act (NT).
>
> 3. In the further alternative [DNPW] be granted relief from forfeiture in equity with respect to all and any breaches of the [Lease]."[5]

[9] On 24 November 2008 the FC Applicants filed Points of Claim in which they sought orders under s 444F of the *Corporations Act*. The Points of Claim also included:

> "22. In the alternative [DNPW] seeks relief from forfeiture pursuant to the provisions of s 138 of the Law of Property Act (NT)."

No relief of the kind claimed in paragraph 3 of the FC Application was included in the Points of Claim.

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5 *Strazdins FC* at [2].

[10] The FC Applicants abandoned the claim for statutory relief against forfeiture (ie relief pursuant to s 138 LPA) in their written submissions and at trial,[6] which occurred on 6 February 2009.

[11] The Court was reconvened on 25 May 2009 and Lander J raised a number of matters, one of which was the fact that there was no pleading seeking relief from forfeiture. His Honour invited the FC Applicants to provide the Court and the respondent (BCC) with a copy of any proposed amended points of claim and written submissions in support of any application to amend the Points of Claim.[7]

[12] The application to amend was heard on 5 June 2009. His Honour dismissed that application and provided detailed reasons for doing so in his Reasons for Decision of 9 July 2009.[8]

[13] The FC Applicants succeeded in obtaining the primary relief which they had sought, namely the order under s 444F preventing BCC from taking possession or otherwise recovering certain property under the Lease during the operation of the order. However, the orders did not include orders whereby the Lease was to be reinstated and the notice of termination be withdrawn. In the course of his reasons, Lander J stated

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6 *Strazdins FC* at [12], [176] & [185]
7 *Strazdins FC* at [177]
8 *Strazdins FC* at [175] – [224]

that while the practical effect of an order under s 444F may be similar to relief against forfeiture, it did not operate to reinstate the Lease.[9]

[14] Consequently the plaintiffs in these two matters contend that the condition in clause 6.3.1 was not fulfilled, the DOCA failed (or its objects could not be achieved) and they thereby suffered losses. They are suing the lawyer defendants for those losses which they say resulted from the breaches of duty on the part of the lawyers in failing to achieve reinstatement of the Lease.[10]

Summary judgment / strike out

[15] The lawyer defendants each applied by Summons for orders that judgment be entered for them against the plaintiffs, alternatively that the statements of claim be struck out as against them. They rely upon Rules 23.01 or 23.03 of the *Supreme Court Rules 1987* (NT) in relation to the former and Rule 23.02 in relation to striking out the statements of claim or parts thereof.[11] Rule 23.02 enables the Court to order that

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9 *Strazdins FC* at [174]

10 The statements of claim do not complain about the failure to seek and obtain an order requiring the Notice of Termination to be withdrawn. Their focus is upon the failure to seek orders to the effect that the Lease was to be "preserved" or "reinstated", apparently by seeking relief against forfeiture.

11 At the hearing, leave was given for the plaintiffs in the 2013 proceedings to amend their statement of claim and for the lawyer defendants to amend their summonses so as to refer to the latest versions of the respective statements of claim, namely the Further Amended Statement of Claim filed 24 June 2013 in the 2011 proceedings (the **2011 S/C**) and the Amended Statement of Claim filed 21 June 2013 in the 2013 proceedings (the **2013 S/C**).

the whole or part of the pleading be struck out or amended.

[16] Courts have been reluctant to allow summary determinations; rather, a party is ordinarily entitled to have its case placed before the court in the 'ordinary way'.[12] The power under Order 23 is one that should be exercised by a court with great caution; with the applicant bearing a heavy burden.[13] It has been held in this jurisdiction that Rule 23.03 will only be enlivened in circumstances where the plaintiff's case is so clearly untenable that it could not possibly succeed.[14]

[17] The lawyer defendants accept that in order to succeed under these provisions for summary relief they must establish that the claims against them are plainly unsustainable, in the sense described in Northern Territory authorities such as *Nibbs v Australian Broadcasting Corporation,*[15] and *RTA Pty Ltd v Brinko Pty Ltd.*[16] These authorities are based upon the principles well established in and following *Dey v Victorian Railways Commissioners*[17] and *General Steel Industries Inc v Commissioner for Railways (NSW),* where Barwick CJ said, at [10]:

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12 *Agar v Hyde* (2000) 201 CLR 552, 575–576 [57], Gaudron, McHugh, Gummow and Hayne JJ, cited in *Rich v CGU Insurance Ltd; Silbermann v CGU Insurance Ltd* (2005) 79 ALJR 856; [2005] HCA 16, [18]: "*issues raised in proceedings are to be determined in a summary way only in the clearest of cases*"

13 *Wilson v Union Insurance Company* [1992] NTSC 107; (1992) 112 FLR 166

14 *Outback Civil Pty Ltd v Francis* [2011] NTCA 3, at [10]; *House v Diamond Leisure Pty Ltd* [1987] NTSC 6 at [10]; following the example of the High Court in *Spencer v The Commonwealth* (2010) 241 CLR 118.

15 *Nibbs v Australian Broadcasting Corporation* [2010] NTSC 52.

16 *RTA Pty Ltd v Brinko Pty Ltd* [2011] NTSC 103.

17 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91.

> "…in my opinion great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal. On the other hand, I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed." [18]

[18] In *Spencer v The Commonwealth* Hayne, Crennan, Kiefel and Bell JJ, after considering *General Steel* and the test applied in other summary determination cases, said:

> "…the test to be applied was expressed in many ways, but in the end amounted to different ways of saying 'that the case of the plaintiff is so clearly untenable that it cannot possibly succeed.' As the formulation shows, the test to be applied was one of demonstrated certainty of outcome."[19]

[19] Consistent with the authorities, for the purpose of these applications, the Court proceeds on the assumption that the allegations in the statements of claim will be made out in favour of the plaintiffs.

[20] In relation to applications such as this, where a defendant seeks summary relief on the basis of advocate's immunity, the application would usually focus on the assumption that by reason of the advocate's immunity the claim does not disclose a cause of action or is an abuse

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18 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125(*"General Steel"*) at [10].

19 *Spencer v The Commonwealth* (2010) 241 CLR 118 at[55].

of the process of the Court.[20] This follows from the principle that "advocates do not owe an *actionable* duty of care in respect of their conduct in court …".[21]

[21] While courts are often reluctant to determine claims summarily, there is recognition in the authorities of the appropriateness, indeed desirability, of entertaining such applications in the context of claims defended upon the basis of immunity from suit. The rationale for this is that a reluctance to entertain such applications would risk undermining the very foundation for the existence of the immunity, namely the need to avoid jeopardising the finality of judicial determinations by permitting the re-agitation of the same issues in subsequent proceedings.[22]

[22] However there have been cases where that has not been thought appropriate, for example where the issues may not be sufficiently clear on the pleadings to permit such an approach. In some such cases the

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20 With regard to the latter, see for example the discussion by Bell J in *Goddard Elliott v Fritsch* [2012] VSC 87 at [774] – [789] ("*Goddard Elliott v Fritsch*"). .

21 Cf McHugh J in *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1 at [95] *("D'Orta-Ekenaike").*

22 See for example comments in *Donnellan v Woodland* [2012] NSWCA 433 ("*Donnellan v Woodland"*) by Basten JA at [259] – [263] and Barrett JA at [276] – [282] with whom Sackville AJA agreed at [285]. See too *Bott v Carter* [2012] NSWCA 89 *("Bott v Carter").*

matter has proceeded to trial but a determination made on the immunity issue prior to the making of a determination on the main issues.[23]

Claims against the lawyers

[23] Clause 4 of the DOCA imposed a number of obligations upon NT Pubco (described in the DOCA as the Proposer) including the payment of all legal fees in respect of proceedings seeking relief pursuant to s 444F of the *Corporations Act,* contribution of cash upon the satisfaction of conditions in clause 6 being satisfied or waived by the Proposer, entering into a management agreement for the operation of the business, and offering continuing employment to some of DNPW's employees.

[24] Clause 6 set out a number of conditions. Clause 6.3 provided that:

> "The obligations of the Proposer in clause 4 hereof are conditional on the following:
>
> 6.3.1 the Administrators applying to court and obtaining an *order* for equitable relief or relief pursuant to Section 444F of the Act *that the Lease be reinstated* and that the Notice of Termination of Lease dated the 12th day of June 2008 issued by Birch Carroll Coyle be withdrawn; or, alternatively that Birch Carroll Coyle grant a new lease to [DNPW] on terms acceptable to the Proposer;
>
> …" (emphasis added by me)

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[23] See for example *Alpine Holdings Pty Ltd v Feinauer* [2008] WASCA 85 *("Alpine Holdings"), Chamberlain v Ormsby t/as Ormsby Flower* [2005] NSWCA 454 and *Symonds v Vass* [2009] NSWCA 139.

[25] On 10 July 2009 the Federal Court ordered that:

> "So long as [DNPW] complies with all of the terms and conditions of … [the lease], as if the Lease had not been terminated including giving [BCC] … an unconditional and irrevocable undertaking in favour of [BCC] by ANZ Bank Ltd to pay the sum of $79,980 upon demand, [BCC] be restrained from taking possession or otherwise recovering the whole of the land … until such time as [BCC] would have been entitled to recover possession or otherwise recover the property if the Lease had not been terminated."[24]

[26] As already noted at [13] above the Federal Court's orders did not include those emphasised by me in [24] above, namely that the Lease be reinstated.

The retainers and main factual allegations

[27] In the statement of claim in the 2011 proceedings the plaintiffs (NT Pubco and Dowling) allege that:

(a) On or soon after 22 September 2008, NT Pubco retained Cowell Clarke (**CC**) to act on its behalf and on behalf of DNPW "with the authority and approval of" the Administrators "in relation to,

(i) the completion of the Deed as to ensure that NT Pubco acquired on completion, either:

(1) the shares in [DNPW] with the Lease in place; or

[24] Affidavit of Paul Maher sworn 9 September 2013 Ex PGM 27 p 317.

(2) the business assets of [DNPW] including the Lease

(hereinafter "the objects of the Deed");

(ii) the preservation or reinstatement of the Lease; and

(iii) the provision of advice in respect of each of the foregoing.

(hereinafter collectively referred to as the "Retainer")"[25]

(b) "In or about October / November 2008 CC retained McNamara and Dart as senior and junior counsel respectively to:

(i) advise on achieving the objects of the Deed; as well as to

(ii) act in and advise on the preservation or reinstatement of the Lease and the Lease Proceedings."[26]

[28] They also allege that:

(a) On 9 April 2008 Dowling and NT Pubco retained CC to "act on and advise on a dispute between the directors and shareholders of [DNPW Pty Ltd] and a potential administration of [DNPW Pty Ltd].[27]

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25 2011 S/C [8].
26 2011 S/C [9A].
27 2011 S/C [1A].

(b) CC drafted the Deed of Company Arrangement on or about 30 July 2008.[28]

(c) On or about 17 October 2008 CC issued the "Lease Proceedings" in the Federal Court seeking the orders set out in [8] above.[29]

(d) On or about 20 November 2008 CC provided a draft points of claim document to Dart with a request that Dart "run this by McNamara".[30]

(e) The draft points of claim included a plea, in the alternative, for relief from forfeiture of the Lease in equity.[31]

(f) On 24 November 2008 Dart sent to CC a version of the points of claim settled by Dart and or McNamara.[32]

(g) Those points of claim did not include any express claim for relief from forfeiture of the Lease in equity, and did not seek the preservation and or reinstatement of the Lease, but merely sought relief under s 444 of the *Corporations Act* seeking to prevent BCC from taking possession of the premises.[33]

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28 2011 S/C [4].
29 2011 S/C [9].
30 2011 S/C [9C].
31 2011 S/C [9D].
32 2011 S/C [9F].
33 2011 S/C [9G].

(h) On 24 November 2008 CC sought advice from Dart as to why the claim for relief from forfeiture of the Lease in equity had been omitted from the points of claim, and Dart provided oral advice to the effect that the points of claim were adequate to effect the preservation or reinstatement of the Lease and that only the statutory claims under s 444F of the *Corporations Act* and s 138 of the *LPA* were necessary so as to ensure the preservation or reinstatement of the Lease.[34]

(i) The points of claim were filed in that form on about 24 November 2008.[35]

(j) The claim for relief under s 138 was subsequently abandoned on the advice of Dart and McNamara.[36]

[29] In the statement of claim in the 2013 proceedings the plaintiffs (Strazdins and Cooper) allege that in or about September 2008:

(a) Dowling and NT Pubco retained CC to:

(i) "advise on achieving the objects of the DOCA; and

34 2011 S/C [9H].
35 2011 S/C [9I].
36 2011 S/C [9J].

(ii) act for DNPW and Strazdins and Cooper for the purpose of reinstating the Lease by an application in the Federal Court against BCC;"[37]

(b) "Strazdins & Cooper agreed to the Federal Court Application being maintained in their names and Cowell Clarke acting for them therein for the purpose and on the agreement that Cowell Clarke would report to Strazdins & Cooper throughout the conduct of the Federal Court Application;"[38] and

(c) "Cowell Clarke accepted instructions to act and did act on those terms."[39]

[30] They also refer to the matters referred to in paragraphs [28](c), [28](g) and [28](i) above,[40] and also allege that:

(a) At a mention on 11 December 2008 Justice Lander "alerted counsel for the applicants (who was retained by Cowell Clarke) that" an order under s 444F of the Act:

(i) would not operate to give equitable relief from forfeiture; and

(ii) would prevent BCC from taking possession, but it would not allow an assignment of the Lease .[41]

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37 2013 S/C [26.1].
38 2013 S/C [26.2].
39 2013 S/C [26.3].
40 2013 S/C [28], [30], [32] & [33].

(b) Those observations were not conveyed by CC to Strazdins and Cooper and no instructions were sought about them.[42]

(c) At the hearing of the application on 6 February 2009 "Justice Lander repeated to counsel for the applicants that s 444F of the Act was less than relief from forfeiture".[43]

(d) Those observations were not conveyed by CC to Strazdins and Cooper and no instructions were sought about them.[44]

(e) At a further mention on 25 May 2009 Justice Lander referred again to the absence of a pleading seeking equitable relief from forfeiture and suggested that application be made to amend the pleadings in order to plead such a claim.[45]

(f) Without the knowledge of Strazdins and Cooper, CC then made an application to amend the claim to include a claim for equitable relief against forfeiture.[46]

(g) Justice Lander heard the application to amend on 5 June 2009 and sought an explanation of why the equitable relief from forfeiture had not been pleaded.[47]

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41 2013 S/C [35].
42 2013 S/C [36].
43 2013 S/C [41].
44 2013 S/C [42].
45 2013 S/C [45].
46 2013 S/C [49].

(h) CC did not inform Strazdins and Cooper of the events at the hearing on 5 June 2009.[48]

(i) On or about 13 October 2009, CC wrote to Strazdins and Cooper informing them of what had happened in relation to the failure to make a claim for relief from forfeiture in equity and recommended they obtain independent legal advice.[49]

Causes of action

[31] In the 2011 proceedings the plaintiffs allege that:

(a) CC and the barristers owed NT Pubco duties to take reasonable care:

(i) in the performance of their respective retainers;

(ii) "to advise on achieving the objects of the Deed";

(iii) in the prosecution of the Lease Proceedings; and

(iv) in the provision of advice to the Administrators and NT Pubco, and by the barristers to CC, "with respect to the carriage of the same."[50]

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47 2013 S/C [50].
48 2013 S/C [51].
49 2013 S/C [54].
50 2011 S/C [11] & [11A].

(b) CC breached the terms of its retainer and its duty of care in several respects including:

(i) failing to advise the Administrators and NT Pubco "properly or at all:

(1) as to achieving the objects of the Deed;

(2) as to the consequences of not seeking relief from forfeiture of the Lease in equity;

(3) that the relief available under s 444F of the *Corporations Act* could not result in the preservation or reinstatement of the Lease; and

(4) that the objects of the Deed could not therefore be achieved."[51]

(ii) failing to properly draft and/or settle the FC Application so as to seek relief from forfeiture of the Lease in equity and orders preserving or reinstating the Lease;[52]

(iii) failing to properly brief or instruct the barristers that the only purpose of the Lease Proceedings was to secure the

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51 2011 S/C [12(aa)].
52 2011 S/C [12(ab)].

preservation or reinstatement of the Lease in accordance with the Deed;[53]

(iv) failing to incorporate in or to instruct the barristers to incorporate the Points of Claim a claim for equitable relief against forfeiture;[54]

(v) failing to "turn its mind to" the effect of the omissions referred to in subparagraphs (ii) and (iii) above;[55]

(vi) failing to provide any or any proper advice to the Administrators or NT Pubco as to the effect of the omissions referred to in subparagraphs (ii) and (iii) above;[56]

(vii) failing to make any claim at all for the preservation or reinstatement of the Lease.[57]

(c) The barristers breached their duties of care in several respects including:

(i) failing to advise CC, the Administrators and NT Pubco, properly or at all, of the matters set out in subparagraph (b)(i) above;[58]

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53 2011 S/C [12(ac)].
54 2011 S/C [12(a)].
55 2011 S/C [12(b)(i)].
56 2011 S/C [12(b)(ii)].
57 2011 S/C [12(c)].

(ii) failing to properly draft or settle the FC Application so as to seek relief from forfeiture of the Lease in equity and orders preserving or reinstating the Lease;[59]

(iii) failing to incorporate any claim for equitable relief against forfeiture in the Points of Claim;[60]

(iv) when settling the draft Points of Claim, removing any and all reference to relief from forfeiture in equity "with the effect that it was not litigated";[61]

(v) failing to "turn their respective minds to" the effect of the matters referred to in subparagraphs (i) to (iv) above;[62]

(vi) failing to provide any or any proper advice to CC, the Administrators or NT Pubco as to the effect of the matters referred to in subparagraphs (i) to (iv) above;[63]

(vii) failing to advise the CC, the Administrators or NT Pubco "as to the necessity to seek the preservation or reinstatement of

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58 2011 S/C [12A(a)].
59 2011 S/C [12A(b)].
60 2011 S/C [12A(c)].
61 2011 S/C [12A(d)].
62 2011 S/C [12A(e)(i)].
63 2011 S/C [12A(e)(ii)].

the Lease or to otherwise make a claim for equitable relief against forfeiture of the Lease."[64]

(d) CC and the barristers owed the plaintiffs fiduciary duties:

(i) to advise the plaintiffs "to seek independent legal advice immediately their interests came into conflict (whether actually or potentially) with those of, or their duties owed to, [the plaintiffs] ('conflict between interest and duty')"; and

(ii) to stop acting in the event of a conflict between interest and duty, unless they obtain the informed consent of [the plaintiffs].[65]

(e) CC and the barristers breached their fiduciary duties by:

(i) not advising the plaintiffs to seek independent legal advice at any time from 11 December 2008 until 13 October 2009;

(ii) continuing to act in the Lease Proceedings, without the informed consent of the plaintiffs.[66]

[32] In the 2013 proceedings the plaintiffs allege that:

(a) CC owed them duties of care and fiduciary duties to:

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64 2011 S/C [12A(f)].
65 2011 S/C [12B].
66 2011 S/C [12E].

(i) "act according to the usual professional standards of care skill and diligence of solicitors";[67]

(ii) "not act in their own interests in conflict with" the interests of Strazdins and Cooper and DNPW".[68]

(b) CC breached their duty of care to the Administrators, Strazdins and Cooper, in several respects including:

(i) failing to "plead equitable relief against forfeiture for reinstatement of the Lease in the points of claim";[69]

(ii) failing to "procure or communicate to Strazdins & Cooper advice that not pleading equitable relief against forfeiture for reinstatement of the Lease from the points of claim risked, or was likely to risk:

(1) the failure of the FC Application to achieve an order for equitable relief against forfeiture or reinstatement of the Lease;

(2) the DOCA not being capable of being completed;

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67 2013 S/C [27.11].
68 2013 S/C [27.12] – [27.13].
69 2013 S/C [55.1].

(3) the value of the Ducks business being reduced due to lack of tenure and the inability to realise it by sale as a going concern;

(4) ongoing costs, losses and liabilities incurred by Strazdins & Cooper while the DOCA was unable to be completed and steps in mitigation investigated."[70]

(iii) failing to "procure or communicate a recommendation to Strazdins & Cooper to plead the order for equitable relief against forfeiture";[71]

(iv) failing to "obtain from Strazdins & Cooper their consent (reasonably informed or otherwise) or instructions not to plead the order for equitable relief against forfeiture";[72]

(v) failing to notify Strazdins & Cooper of various remarks made by Lander J on 11 December 2008, 6 February 2009, 25 May 2009 and 5 June 2009;[73]

(vi) failing to "advise about or recommend that Strazdins & Cooper file affidavit evidence in support of the application to

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70 2013 S/C [55.2].
71 2013 S/C [55.3].
72 2013 S/C [55.4].
73 2013 S/C [55.5], [55.6], [55.7] & [55.9].

amend the pleading, following the 25 May 2009 and 5 June 2009 hearings".[74]

(c) CC breached their fiduciary duties "by acting in their own interests in conflict with the interests of DNPW and Strazdins & Cooper during the Federal Court Application" in that they failed to advise Strazdins &Cooper that:

(i) equitable relief from forfeiture had not been pleaded;

(ii) Justice Lander had, on 11 December 2008, 6 February 2009 and 25 May 2009, alerted counsel for Strazdins & Cooper and DNPW that equitable relief from forfeiture was the relief the applicants should seek;

(iii) CC should file evidence which explained why equitable relief from forfeiture was not pleaded; and

(iv) evidence was required as to why equitable relief from forfeiture had not been pleaded so as to amend the points of claim.[75]

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74 2013 S/C [55.8].
75 2013 S/C [57.1] & [58].

Summary of the respective contentions

[33] In paragraphs 25 and 26 of their Outline of Argument the lawyer defendants submitted that:

> "The essence of the common law and fiduciary cases against the lawyer defendants is that they acted in breach of their duty in their conduct of the Federal Court proceedings:
>
> 1. In the case of the common law breaches the essence of the allegations is that they failed to properly plead or pursue a claim for equitable relief against forfeiture.
>
> 2. In the case of the fiduciary breaches, the essence of the allegations is that by reason of their conduct (ie the common law breaches) they were in a position of conflict and yet continued to act.
>
> As the allegations relate to the conduct of court proceedings, they fall squarely within the scope of lawyer defendants' immunity from suit. Indeed, in light of recent authority … the immunity extends not only to breaches of duty in the conduct of court proceedings, but indeed all breaches in connection with work leading to a decision affecting the conduct of a case in court. And the immunity is an immunity from all such claims, regardless of whether they are pleaded as common law or fiduciary breaches."

[34] They contend that there is a strong analogy with the case against the lawyer defendant in *Keefe v Marks*,[76] which concerned the failure of counsel to claim interest when pleading an action for damages for personal injuries, and other cases involving overarching complaints of failures to advise, plead or raise particular arguments or issues. They

[76] *Keefe v Marks* (1989) 16 NSWLR 713 at 718 (*"Keefe v Marks"*).

contend that in both *Keefe v Marks* and the present case the essence of the complaint was a failure to plead or otherwise pursue a particular kind of relief, and that in both cases the failures were continuous throughout the relevant retainers and impacted upon the decisions made in the conduct of the proceedings. They contend that the immunity is not governed by temporal or geographical considerations and so may apply to conduct prior to the commencement of proceedings.

[35] They also submit that the immunity extends equally to breaches of fiduciary duties, at least where those breaches relate to the same or similar conduct as that which is said to constitute the common law breaches of duty. In this context they point out that the immunity cannot be circumvented simply by reformulating what is in substance a complaint of negligence as a breach of duty couched in different terms.

[36] The plaintiffs in both matters stress the need for caution in summary judgment applications and the fact that a party is ordinarily entitled to have its case placed before the court in the 'ordinary way'.[77]

[37] The plaintiffs in the 2011 proceedings, NT Pubco and Dowling, contend that the lawyer defendants first need to establish that the conduct complained of would involve "a re-litigation of any issues in

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[77] See for example *Agar v Hyde* (2000) 210 CLR 552 at 575-576 [57] and *Rich v CGU Insurance Ltd; Silbermann v CGU Insurance Ltd* [2005] HCA 15; (2005) 79 ALJR 856 at [18].

the past proceedings and or the impugning of a final or intermediate determination or a collateral attack thereon." They rely upon a number of authorities, including the decision of the Court of Appeal (WA) in *Alpine Holdings*, all of which predate the decision of the New South Wales Court of Appeal in *Donnellan v Woodland*. They contend that only after "the necessary potential for a challenge to finality" is shown to exist is it necessary to "consider the nexus between the conduct complained of and the conduct of the case in court so as to determine if the immunity found to subsist extends to that conduct."[78]

[38] They contend that their claim does not involve a challenge to finality capable of grounding the immunity. They say that they are not contending that the conduct of the lawyer defendants led to any error in the decision of Lander J. Rather, they contend that the case that should have been before the Federal Court was never in fact before it. Further, they point out that relief from forfeiture could have been sought in a further action. However, the constraints of time and costs associated with the DOCA were such that the application for relief against forfeiture should have been included in the same proceedings.

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[78] They base these contentions on their construction of the High Court's decision in *D'Orta-Ekenaike*.

[39] NT Pubco and Dowling also contend that the conduct complained of was not sufficiently connected with the conduct of the case in court. In relation to their claim against CC they contend that:

(a) CC's obligation to advise pleaded in paragraphs 8(b) and 12(aa) of their Statement of Claim extended beyond the Federal Court proceedings;

(b) CC's failure to plead and/or maintain a claim for relief against forfeiture and for orders preserving or reinstating the Lease, as alleged in paragraphs 12(ab), 12(a) & 12(c) of their Statement of Claim, was too remote from the conduct of the proceedings in court to attract any subsisting immunity;

(c) CC's negligence in the briefing of counsel, as alleged in paragraphs 12(ac) & 12(a) of their Statement of Claim, does not relate to the conduct of the case in court.

[40] In relation to their claim against the barristers, NT Pubco and Dowling:

(a) make the same points as those above in relation to the claim against CC; and

(b) contend that, in respect of the breaches alleged in:

(i) paragraph 12A(d), namely that they removed "any and all reference to relief from forfeiture in equity with the effect that it was not litigated"; and

(ii) paragraph 12A(f), namely that they failed to advise CC and their clients "as to the necessity to seek the preservation or reinstatement of the Lease or to otherwise make a claim for equitable relief against forfeiture of the Lease with the result that the issue was never litigated",

they "would appear to be beyond the scope of any subsisting immunity."

[41] The plaintiffs in the 2013 proceedings, the Administrators, emphasise the fact that CC was engaged to advise on and to set about achieving the objects of the DOCA, relevantly clause 6.3.1. They:

(a) point out that clause 6.3.1 provided two options, only one of which was the bringing of the Federal Court proceedings, the other being the negotiation of a fresh lease with BCC;

(b) contend that the court proceedings should have aimed at having BCC's termination of the Lease overcome by obtaining relief against forfeiture;[79]

(c) contend that because CC failed to tell them of the concerns expressed by Lander J about the likely inadequacy of the relief that would be granted, particularly without a claim for relief against forfeiture, they lost the opportunity to pursue the commercial (non-litigious) option of negotiating a fresh lease with BCC before it was too late;[80]

(d) contend that CC's failures to tell them of these concerns constituted breaches of their fiduciary obligations.[81]

Relevant legal principles regarding the immunity from suit

D'Orta-Ekenaike v Victorian Legal Aid

[42] The existence and scope of the immunity was confirmed by the High Court in *D'Orta-Ekenaike*, upholding its earlier decision in *Giannarelli v Wraith*.[82]

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79 They refer to this as "the lease claim".
80 They refer to this as "the DOCA claim".
81 They refer to this as "the fiduciary claim".
82 *Giannarelli v Wraith* (1988) 165 CLR 543 ('*Giannarelli*').

[43] Much of the discussion concerned the basis for the immunity from suit. The Court held that the rationale for the existence of the immunity was the public policy in favour of the finality of judicial decisions[83] – referred to by the plurality (Gleeson CJ, Gummow, Hayne and Heydon JJ) as "finality in the quelling of disputes by the exercise of judicial power"[84] and "the general principle that controversies, once quelled, may not be reopened".[85] The plurality concluded their discussion about whether or not the immunity should remain by saying: "But underpinning the judicial system is the need for certainty and finality of decision. The immunity of advocates is a necessary consequence of that need."[86]

[44] The plurality then considered whether the scope of the immunity as set out in *Giannarelli* should be altered, and concluded that it should not. At [87] they said:

> "The criterion adopted in *Giannarelli* accords with the purpose of the immunity. It describes the acts or omissions to which immunity attaches by reference to the conduct of the case. And it is the conduct of the case that generates the result which should not be impugned."

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83 The plurality (Gleeson CJ, Gummow, Hayne and Heydon JJ) at [25], [30], [34], [43], [45]; McHugh J at [95], [97], [143], [144], [162], [164]. Callinan J supported the retention of the immunity on broader grounds than simply the public interest in finality. Kirby J dissented, rejecting the existence of the immunity at least in respect of out of court work.

84 The plurality at [25].

85 The plurality at [35].

86 The plurality at [84].

[45] At [25] their Honours had set out the Court's conclusion in *Giannarelli* that:

> "… at common law, an advocate cannot be sued by his or her client for negligence in the conduct of a case, or in work out of court which is intimately connected with the conduct of a case in court."

[46] At [86] their Honours said that:

> "there is no reason to depart from the test 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'[87] or as the latter class of case was described in the Explanatory Memorandum for the Bill that became the Practice Act, 'work intimately connected with' work in any court. (We do not consider the two statements of the test differ in any significant way.)"

[47] Their Honours proceeded to apply the *Giannarelli* test to the facts in that case, and said (at [91]):

> "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."

[48] McHugh J also agreed that the Court should not overturn the decision in *Giannarelli* "where the Court held that what has been called the advocate's immunity from suit prevents the bringing of a civil action

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87 Quoting Mason CJ at p 560 of *Giannarelli*.

for conduct occurring during, or intimately connected with, the trial of a civil or criminal cause."[88]

[49] At [95] McHugh J said:

> "… advocates do not owe an *actionable* duty of care in respect of their conduct in court. Similarly, they owe no actionable duty of care in respect of out-of-court conduct that is intimately connected with in-court conduct. They do, however, owe actionable duties of care in respect of conduct that is not intimately connected with in-court advocacy."

[50] At [151] McHugh J referred to the acceptance by the majority in *Giannarelli* of what McCarthy P said in *Rees v Sinclair*:[89]

> "… 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."

[51] At [154] McHugh J identified a number of examples of work that has been held to be intimately connected with the conduct of a case, and hence protected by the immunity:

(a) failing to raise a matter pertinent to the opposition of a maintenance application (*Rees v Sinclair*);[90]

(b) failing to plead or claim interest in an action for damages (*Keefe v Marks*);

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88 Supra at [102]. See too [103] – [104].

89 *Rees v Sinclair* [1974] 1 NZLR 180 at 187. The immunity has subsequently been abolished in New Zealand – see *Lai v Chamberlains* [2007] 2 NZLR 7.

90 *Rees v Sinclair* [1974] 1 NZLR 180.

(c) failing to plead a statutory prohibition on the admissibility of certain crucial evidence (*Giannarelli*);

(d) negligently advising a settlement (*Biggar v McLeod*).[91]

[52] His Honour also referred to Gleeson CJ's references in *Keefe v Marks* to other examples of out of court work that would be intimately connected with the conduct of the cause:

> "interviewing the plaintiff and any other potential witnesses, giving advice and making decisions about what witnesses to call and not to call, working up any necessary legal arguments, giving consideration to the adequacy of the pleadings and, if appropriate, causing any necessary steps to be undertaken to have the pleadings amended."

[53] At [156] McHugh J referred to some examples of conduct that have been held not to fall within the immunity, namely:

(a) failing to advise as to the availability of possible actions against third parties (*Saif Ali v Sydney Mitchell & Co*);[92]

(b) failing to advise commencing proceedings in a particular jurisdiction (*MacRae v Stevens*);[93]

(c) negligent compromise of appeal proceedings leading to the loss of

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91 *Biggar v McLeod* [1978] 2 NZLR 9.
92 *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 216, 224, 232.
93 *MacRae v Stevens* [1996] Aust Torts Reports 81-405.

benefits gained at first instance (*Donellan v Watson*);[94] and

(d) the giving of advice not for the purpose of litigation (*Heydon v NRMA Ltd*).[95]

[54] At [166] his Honour said that:

> "So, it is possible to sue a practitioner for the negligent settlement of proceedings or for the negligent loss or abandonment of a cause of action. Such claims lead to the litigation of a primary claim even if that claim can no longer be pursued. These results flow even though there is a public interest in the finality achieved through the statutes of limitations in the promotion of out-of-court dispute settlement."

[55] At [157] McHugh J stressed the need to have regard to the conduct, rather than the form of the negligence.

> "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."

[56] At [167] McHugh J pointed to the need to look at the particular decision which is said to have affected the conduct of the case in court, not at the way in which the particular allegations are framed. He said:

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94 *Donellan v Watson* (1990) 21 NSWLR 335.
95 *Heydon v NRMA Ltd* (2000) 51 NSWLR 1.

> "If a decision affects the conduct of a case in court, it can be viewed both as a course of conduct lasting from the decision until and including the last opportunity to change the course during the hearing, and as a potential, although unprovable, causative factor in a result. The context in which the decision is made, either physical or temporal, is thus of no relevance. The notion of the 'calm of chambers' serves only to identify one factor supporting the restriction of the immunity, in respect of conduct taking place during court proceedings. It does not follow that a decision, made out of court, and maintained in court, is outside the rationales for the immunity."

[57] And at [168]:

> "Accordingly, the immunity should extend to any work, which, if the subject of a claim of negligence, would require the impugning of a final decision of a court or the re-litigation of matters already finally determined by a court."

Other relevant decisions

[58] Counsel identified and referred to a number of decisions that have addressed the scope of the immunity in the light of *D'Orta-Ekenaike*. Some of those decisions were decisions of the New South Wales Court of Appeal, parts of which have been overtaken by the more recent decision of that Court comprising a bench of five judges in *Donnellan v Woodland*. I propose now to discuss some of the decisions which were referred to by counsel in this matter.

<u>*Keefe v Marks* – 1989 NSWCA</u>

[59] Although this decision preceded the High Court's decision in *D'Orta-Ekenaike* it had regard to the principles established in *Giannarelli*. The

lawyer defendants rely upon it in support of the contention that advocate's immunity also applies to the failure to seek particular relief in a pleading. In that case, the client (Mr Tehfe) brought proceedings against his former solicitor for failing to claim interest under the *Supreme Court Act 1970* (NSW) in common law proceedings for damages for personal injury which the client had sustained, as a result of which he did not receive interest on his damages award. The solicitor (Mr Keefe) then sought contribution from the respondent (Mr Marks), a barrister who he had briefed "to advise and appear" in the matter.

[60] The barrister did not settle the form of statement of claim that was used to commence Mr Tehfe's personal injuries proceedings. Although the statement of claim in the professional negligence action against the barrister alleged that the solicitor briefed the barrister "as counsel to advise and appear for Tehfe in the preparation and conduct of the common law proceedings", Gleeson CJ clarified that the allegation was that the barrister was briefed to advise about the preparation and conduct of the proceedings.[96] His Honour noted that at no stage was the barrister asked to consider or advise about the statement of claim but that it was undoubtedly part of his duty as counsel "to address his

[96] See further extracts and discussion at [103] below about the need to identify the conduct alleged rather than the particular way in which the claim is formulated.

mind to the adequacy of the pleadings as a vehicle for propounding a claim for whatever his client's rights might be."[97]

[61] His Honour said:

> "In short, the 'brief to advise and appear' was not materially different from what is sometimes called a 'brief on hearing', and the references in … the statement of claim to advising upon the common law proceedings and the conduct of pre-trial work, whilst no doubt included in an attempt to overcome the immunity earlier referred to, are to be understood as references to the matters of pre-trial consideration and preparation which would normally be expected to be undertaken by a barrister who has been briefed to appear for a plaintiff on the hearing of an action for damages for personal injuries. That would include such matters as interviewing the plaintiff and any other potential witnesses, giving advice and making decisions about what witnesses to call and not to call, working up any necessary legal arguments, *giving consideration to the adequacy of the pleadings and, if appropriate, causing any necessary steps to be undertaken to have the pleadings amended*. Matters of that kind would ordinarily be under active consideration, as required, not only prior to the commencement of the hearing, but, also throughout the hearing and right up until the time of the conclusion of the proceedings."[98]
>
> (emphasis added by me)

[62] Specifically, in relation to claiming interest Gleeson CJ said:

> "The rules of Court require claims for interest to be made, in a general way, in the relevant originating process: *Supreme Court Rules* 1970, Pt 7, r 1(5); Pt 16, r 1A. Nevertheless, … if for some reason no claim for interest were pleaded, an application at the hearing to amend the pleading by including a claim for interest would ordinarily be virtually irresistible, unless there

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97 *Keefe v Marks* at p 718D.
98 *Keefe v Marks* at p 718D-F.

> existed some special circumstances giving rise to a discretionary consideration."[99]

[63] His Honour carefully considered what Mason CJ had said in *Giannarelli* at p 614 in relation to work done out of court which is "unconnected with work done in court" on the one hand and work done out of court "which led to a decision affecting the conduct of the case in court" on the other. His Honour concluded that the barrister's failure to advise the client or to ensure that interest was sought fell within the latter category and therefore fell within the scope of the immunity.

[64] Meagher JA agreed with Gleeson CJ, including his understanding and application of what Mason CJ had said in *Giannarelli.* His Honour concluded by saying that "[e]ach allegation of negligence in the present case is an allegation of negligence in the conduct of a case or in work which is ancillary to the conduct of a case."[100] His Honour had also made an observation about the failure to claim interest, namely that:

> "a mere failure to include a prayer for interest in a statement of claim does not prevent one from asking for interest at the hearing, whether with or without an amendment, and any such application is automatically granted. It follows that no damages – the necessary ingredient in action of negligence – flow from a mere pleading deficiency of this type."

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99 *Keefe v Marks* at p 718C-D.
100 *Keefe v Marks* at p 729C.

[65] The third judge in that matter, Priestley JA, took a narrower view of what the majority had said in *Giannarelli* about the application of the immunity to out-of-court work, and considered that it is "arguable that the rule does not apply to a simple out-of-court omission to consider whether a claim for interest was available in the proceedings".[101] He also considered it arguable "that a decision concerning an interest claim under the *Supreme Court Act*, s 94, does not have such a significant bearing upon the way in which a claim for damages for personal injury will be conducted as to warrant being categorised as intimately connected with conduct of the proceedings."[102] His Honour also pointed to causation difficulties likely to exist in that case because all of the damage sustained by the client could well have been caused by in-court breaches which were covered by the immunity.[103] Accordingly, applying the *General Steel* principles, his Honour considered that the statement of claim should not have been struck out.

Alpine Holdings Pty Ltd v Feinauer - 2008 WASCA

[66] The plaintiffs had successfully brought a claim and were awarded damages for misleading and deceptive conduct. On appeal, the amount of the damages that had been awarded by the trial judge was substantially reduced. The plaintiffs then brought proceedings against

101 *Keefe v Marks* at p 725C.
102 *Keefe v Marks* at p 725D.
103 *Keefe v Marks* at p 726B-E.

their solicitor alleging negligence in respect of advice given as to the likely quantum of damages and in relation to an offer of settlement made between trial and appeal.

[67] The solicitor sought and was successful in having the claim struck out on the basis that he was protected by the immunity. The Court of Appeal (WA) allowed the appeal by the plaintiffs, holding that it was arguable that the immunity did not apply to cover the conduct complained of.

[68] The Court, comprising Steytler P and Newnes AJA, examined a number of previous decisions with particular regard to whether advice in relation to settlement before trial falls within the immunity.

[69] Their Honours then said (at [83] – [87]):

> "83. In a very recent case, *Francis v Bunnett* [2007] VSC 527, it was held, albeit on a pleading summons, that whether or not the immunity applied to a settlement of proceedings was arguable. There the plaintiff alleged that the defendant solicitor had consented to settle the proceedings without her instructions, for an amount that was far less than she was entitled to. The defendant applied for the action to be summarily stayed or dismissed on the ground that advocate's immunity applied. Lasry J held that in light of the conclusion of the majority of the High Court in *D'Orta-Ekenaike* that the central justification for the immunity was to prevent the re-litigation of disputes previously resolved, it was arguable that where advocates resolve proceedings before trial and there is no quelling of the controversy by the exercise of judicial power involving the determination of the issues in the case, such activities and the work connected with them fall outside the immunity.

84. Having regard to the present state of the authorities, we do not consider it can be said with confidence where the line is to be drawn as to the application of the immunity in relation to advice given in connection with the settlement of legal proceedings. …

85. Turning then to the specific issues that arise on this appeal, it is clear that a case is not to be summarily dismissed unless there is a high degree of certainty that it would fail if it were allowed to go to trial in the ordinary way: *Agar v Hyde* (2000) 201 CLR 552, 576. We do not consider there is that degree of certainty in this case.

86. As matters stand, it is, in our view, arguable that the second claim does not fall within the immunity. In the first place, the advice in relation to the settlement was arguably not connected with '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 court'. That is, it did not affect the *conduct* of the appeal in court, nor was it connected, with any work that would or might be done in court, except in the general sense that it determined whether or not there was ultimately any litigation to proceed to court. In that sense, however, it might be thought not to differ in principle to advice on the prospects of success before action on which a decision is based as to whether or not to commence proceedings. We do not think it could be suggested in light of the modern authorities that advice of the latter kind would attract the immunity.

87. It is also arguable, having regard to the justification for the immunity as described by the majority in *D'Orta-Ekenaike*, that there is no occasion for the application of the immunity in the present case as the claim does not involve any derogation from, or undermining of, the principle of finality of court decision by requiring the re-opening of earlier litigation. It is not alleged that the decision of the Court of Appeal was wrong or that the negligence of the defendant brought about a decision of the court that would have otherwise have been different. The claim does not require reconsideration of the correctness of the decision of the Court of Appeal. The decision is simply the basis upon which the claim is founded."

Coshott v Barry - 2009 NSWCA[104]

[70] This appeal concerned seven claims that had been brought by the appellants against the respondent, a solicitor, alleging negligence on the part of the solicitor in a number of matters in which he had acted for the appellants against third parties. In respect of one of those matters (referred to as the Citibank claim) the appellants claimed that the solicitor had been negligent in failing to advise them that the relief which they had claimed against Citibank Ltd should have been more limited than it was, as a result of which they settled the claim on a basis which required them to pay Citibank's costs.

[71] At first instance, the trial judge rejected the appellants' claim against the solicitor "by reason of advocate's immunity". His Honour said that "[d]etermining what claims for relief should be included in the pleading was work done out of court which led to a decision effecting the conduct of the case in court."[105]

[72] On appeal, the Court of Appeal (Ipp JA, Beazley and Campbell JJA agreeing) held that the trial judge had erred. At [62] Ipp JA said:

> "In my opinion, this finding by his Honour went too far. Mr Coshott's case was that Mr Barry breached his duty to advise virtually from the inception of the retainer. *Such an alleged failure would be too far removed from the actual conduct of the*

104 *Coshott v Barry* [2009] NSWCA 34 *("Coshott v Barry").*
105 *Coshott v Barry* at [61].

> *trial to be covered by the doctrine of advocate's immunity*. I do not think that, when the retainer commenced, the failure to advise as alleged could be regarded, properly, as leading to a decision affecting the conduct of the case in court (*Giannarelli* …at 560 per Mason CJ). The period from the time the retainer commenced to the trial itself was too long for the requisite connection to the conduct of the case in court to be established."
>
> (emphasis added by me)

Goddard Elliott v Fritsch – 2012 VSC[106]

[73] I mention this case because, although at single judge level, it contains a detailed and very useful analysis of the relevant principles, including discussion about whether the immunity covers breaches of fiduciary duty.[107] The decision however was delivered prior to the decision of the New South Wales Court of Appeal in *Donnellan v Woodland*.

[74] The plaintiff, a firm of solicitors, sued its client, Mr Fritsch, for fees. Fritsch cross claimed against his solicitors, barristers and accountant and settled his claim against the barristers and accountant. However his claim against the solicitors went to trial. He had engaged them to act for him in property settlement proceedings in the Family Court, in circumstances where the solicitors knew the proceedings raised complex commercial and taxation issues and that Fritsch was mentally ill. Despite two years of preparation, and without any fault on the part

106 *Goddard Elliott v Fritsch* [2012] VSC 87.
107 I refer to this later from [106] below.

of Fritsch, his case was not ready to proceed at the commencement of the trial, and was adjourned for three days. The proceedings then settled at the door of the court on terms which were overly generous to the wife. The settlement sum became the subject of a consent court order, and the trial judge held that the settlement sum was just and equitable.

[75] Fritsch alleged that the settlement resulted from breaches of the solicitors' contractual and tortious duties of care and from misleading conduct and fiduciary breaches, particularly by failing to prepare the evidence necessary for trial (the "preparation negligence") and also in taking and acting on instructions in relation to the settlement which Fritsch did not have the mental capacity to give (the "capacity negligence"). Following a lengthy and complex hearing Bell J found that the solicitors had been negligent both in their preparation and also in relation to the capacity issue. He valued Mr Fritsch's loss and damage at $900,000. However he held that advocates' immunity applied, as a result of which the solicitors were not liable to pay such damages but Fritsch was liable to pay the solicitors its fees.[108]

[76] His Honour referred to the extensive references in both *Giannarelli* and *D'Orta-Ekenaike* to importance of the public interest in the finality of

[108] At [1145] his Honour pointed out that his conclusion was driven by the binding authorities and is one that he found "deeply troubling".

judicial determinations[109]. His Honour also referred to a number of cases involving negligent omissions where the immunity was held to apply, including *Keefe v Marks*, *Yates Property Corporation Pty Ltd v Boland*,[110] *Attard v James Legal Pty Ltd*[111] and *Day v Rogers*.[112] He also pointed out that in *MM & R Pty Ltd v Grills*[113] "Cavanough J doubted that the immunity applied to 'sheer delay or mere inaction' (where action is required), but his Honour was speaking of allowing a critical date to pass."[114]

[77] The negligent omissions in that case involved failures to prepare evidence which was needed for the conduct of the case in court by Mr Fritsch's barristers. His Honour held that such negligence fell within the scope of the immunity because it was "work done out of court leading to a decision about, or intimately connected with, the conduct of the case in court."[115] This was so notwithstanding that such negligence involved preparation that was or should have been done long before the commencement of the hearing of the matter in court, and notwithstanding a contention that it was work to be done by the solicitors, not as advocates, which was functionally remote from the

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109 *Goddard Elliott v Fritsch* at [772], [774] – [789] & [791] – [792].
110 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169.
111 *Attard v James Legal Pty Ltd* [2010] NSWCA 31.
112 *Day v Rogers* [2011] NSWCA 124.
113 *MM & R Pty Ltd v Grills* [2007] VSC 528 at [56].
114 *Goddard Elliott v Fritsch* at [793].
115 *Goddard Elliott v Fritsch* at [794] – [796].

proceeding. His Honour repeated that the "test depends on the nature of the work and its connection with the case in court".[116]

[78] Bell J referred to *Alpine Holdings* when discussing whether the immunity applied to settled cases. His Honour said that in New Zealand it is established that the immunity does apply to such matters, but that in Australia the issue was not settled. At [800], referring to *Francis v Bunnett*[117] and *Alpine Holdings*, he said that:

> "… there are decisions that a claim based on negligent settlement advice should not be summarily dismissed. These decisions are based on the argument that the immunity does not apply where it was a settlement and not a final order of a court following a trial which quelled the controversy. To the contrary are the obiter observations in *Chamberlain v Ormsby* that the immunity does apply to negligent settlement advice because of its connection with the conduct of a case in court."

However, this question has now been examined further by the NSW Court of Appeal in *Donnellan v Woodland*.

<u>*Donnellan v Woodland* – 2012 NSWCA</u>

[79] In that matter the defendant solicitor had advised his plaintiff client that it was "quite likely" that the Supreme Court would grant a drainage easement over property owned by the Manly Municipal Council and that he had a "strong case", following which the client

116 *Goddard Elliott v Fritsch* at [795] – [797].
117 *Francis v Bunnett* [2007] VSC 527; (2007) 18 VR 98.

commenced proceedings in December 1999. The client was not told otherwise during the proceedings. In December 2001, shortly before the proceedings were heard, the defendant solicitor gave the client advice about potential costs consequences and certain offers that had been made by the Council. After the application failed the client had to pay costs to the Council. The client sued the defendant solicitor in negligence for having given negligent advice in and after December 2001 about the prospects of success and costs and for not advising him to accept the Council's offer.[118] He succeeded at first instance, the trial judge finding that the defendant solicitor was negligent and was not immune from suit.

[80] The Court of Appeal allowed the appeal of the defendant solicitor and ordered judgment for the defendant. Although the appeal was allowed on the basis that the defendant solicitor had not in fact been negligent, their Honours would also have dismissed the plaintiff's claim on the basis of the application of the immunity.[119]

[81] At [163] Beazley JA, with whose reasons Barrett, Hoeben JJA and Sackville AJA agreed, referred to *D'Orta-Ekenaike* and the emphasis upon the fact that "the judicial function in quelling disputes, that is, the principal of finality, centrally underlies the immunity."

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118 *Donnellan v Woodland* at [64], [256] & [267] – [268].
119 *Donnellan v Woodland* at [233], [275], [283] – [285].

[82] At [172] her Honour said:

> "The plurality's reasons in *D'Orta-Ekenaike* make it clear that the immunity is not confined to negligence on the part of a legal practitioner, whether barrister or solicitor, who acts in a case as an advocate. It extends to a solicitor who acts in the litigation qua solicitor provided that, on the facts, the negligent conduct falls within the reach of the immunity, namely, work done out of court that leads to a decision affecting the conduct of the case in court. This was expressly acknowledged by the plurality, at [90] – [91]."

[83] Her Honour then referred to some of the observations of the other justices in *D'Orta-Ekenaike* particularly those of McHugh J concerning the importance of the finality of litigation and the passage which I quoted above at paragraph [57].

[84] Beazley JA then considered a number of other recent decisions of the New South Wales Court of Appeal including *Attard v James Legal Pty Ltd*,[120] *Day v Rogers*[121] and *Symonds v Vass*.[122] In both *Attard v James Legal Pty Ltd* and *Day v Rogers* Giles JA (with whom the other two members of each bench agreed) concluded that the rationale for the immunity as explained by the plurality in *D'Orta-Ekenaike* does not require that in any particular case there would be a challenge to finality at all.[123] In *Attard v James Legal Pty Ltd* Giles JA also described the paradigm case as providing "a very wide notion of offence to

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120 *Attard v James Legal Pty Ltd* [2010] NSWCA 31.
121 *Day v Rogers* [2011] NSWCA 124.
122 *Symonds v Vass* [2009] NSWCA 139.
123 See *Attard v James Legal Pty Ltd* [2010] NSWCA 31 at [28] – [30] and *Day v Rogers* [2011] NSWCA 124 at [132].

finality."[124] Her Honour also referred to the judgment of Ipp JA in *Symonds v Vass* including where his Honour stated, at [116], that "a paradigm case to which advocate's immunity applies is where the client asserts that, 'if the case had been prepared and presented properly, a different … result would have been reached'", citing *D'Orta-Ekenaike* [70].[125]

[85] At [193] Beazley JA referred to an argument put by the respondent client which emphasised the temporality of the alleged negligent conduct. At [198] her Honour said:

> "The question is not when the advice was given, but whether the advice given led to a decision affecting the conduct of a 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."

[86] At [194] Beazley JA referred to another argument put by the respondent client which concerned the relevance and application of the principle of finality. The respondent contended that "for work done out of court to have the necessary link with work done in court so as to attract the immunity, the negligence must have resulted in a different

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124 *Attard v James Legal Pty Ltd* [2010] NSWCA 31 at [29].

125 *Symonds v Vass* [2009] NSWCA 139 at [116], cited in *Donnellan v Woodland* at [188] – [189].

order being made by the court than would have been made absent the negligent conduct." He submitted that "the question whether advocate's immunity applied in a particular case turned upon the question 'whether the claim against the advocate could or might involve a direct or indirect challenge to the outcome of the litigation'."

[87] Her Honour proceeded to dismiss these contentions, referring first to the two decisions upon which the respondent relied, namely the decision of the Court of Appeal (WA) in *Alpine Holdings* and the decision of Harrison J in *Dansar Pty v Pagotto*.[126]

[88] In relation to *Alpine Holdings* her Honour observed, at [201], that "in dealing with the advice given in respect of the offer of settlement the Court (Steytler P and Newnes AJA) considered that it was not certain where the line was appropriately drawn as to the application of the immunity."

[89] After quoting paragraphs [86] and [87] her Honour said, at [202]:

> "In the result, the Court held that the trial judge had erred in striking out the statement of claim as it was arguable that the plaintiff's claim was not defeated by advocate's immunity. As is apparent from the manner in which the Court expressed their opinion in these paragraphs, the Court, at the most, raised questions as to the reach of the immunity. Their Honours did not engage in any analysis of, nor was it necessary to determine whether advocates immunity applied. For that reason and with

126 *Dansar Pty v Pagotto* [2008] NSWSC 112.

> respect to their Honours no assistance is to be gained from that case in the determination of this case."

[90] Her Honour then considered and disagreed with the views expressed at [94] of *Dansar Pty v Pagotto* to the effect that the immunity would not apply where "the principle of finality and the judicial system as part of the government structure do not arise".[127]

[91] Her Honour proceeded to consider and discuss a number of other decisions concerning advocate's immunity, including *Coshott v Barry* and *Keefe v Marks.*

[92] At paragraphs [213] and [214] her Honour referred to *Coshott v Barry* and in particular to the sentence emphasised by me in the passage quoted at [72] above and said:

> "In his Honour's opinion, the failure to advise as alleged at the commencement of the retainer could not properly be regarded as leading to a decision affecting the conduct of the case in court.
>
> Although I agreed in the outcome in that case, it could be argued that the court's decision is contestable, given the approach to the application of the immunity which I have discussed in this case."

[93] Her Honour then referred to the (1989) decision in *Keefe v Marks* as "an example of the application of the immunity where the outcome was different from that in *Coshott v Barry*." At [215] she said:

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127 *Donnellan v Woodland* at [208].

> "Whilst acknowledging that the immunity does not extend to work done out of court which is unconnected with work done in court, Gleeson CJ, at 719, considered that the failure to claim interest in the statement of claim was connected with work done in court. As his Honour explained:
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> > '… In so far as complaint is made of action or inaction prior to the commencement of the hearing it concerns a matter which was intimately connected with the work ultimately done in Court, that is to say the presentation of [the client's] claim for damages in any consequential relief to which he was also entitled.'
>
> His Honour continued at 720:
>
> > 'The substance of the allegation against [the barrister] is that he was negligent in the way in which he conducted [the client's] action, and the principle of immunity which applies in such a case cannot be circumvented by drawing fine distinctions between the preparation and the conduct of the case or between [the barrister's] failure to advert to the matter of interest while he was in his Chambers and his failure to do so while he was in court.'"

[94] At [219] her Honour concluded that the immunity applied in the case at hand. She said that:

> "However, whether the immunity applies involves an examination of the found negligence and the determination of the question whether that conduct led to a decision affecting the conduct of the case in court."

[95] The trial judge (in *Donnellan v Woodland*) had noted that the client's claim did not involve challenging the correctness of the first judge's decision. This appears to have been his main reason for deciding that

the immunity did not apply.[128] He also considered that the advice given to the client was not advice "affecting the conduct of the case in court" or work "intimately connected with work in a court" in any meaningful way.[129]

[96] At [224] her Honour said that although the plurality in *D'Orta-Ekenaike* did say that the test they had enunciated was not significantly different to the language of "intimately connected with" the conduct of the case in court,

> "the combination of the two statements is apt to mislead as each tends to focus attention on different things. The language of the plurality, at [1], that a practitioner:
>
> > '… cannot be sued … 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'
>
> focuses, in its second limb, attention upon conduct that leads to a decision which has the stated effect."

[97] Her Honour said (at [225]) that the question that should have been applied by the trial judge was "whether the negligence he found was 'conduct that led to a decision affecting the conduct of the matter in court' in circumstances where costs were wasted by continuing the litigation."

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128 *Donnellan v Woodland* at [220] – [222].
129 *Donnellan v Woodland* at [223].

[98] Her Honour held (at [229]) that the solicitor's omission to give appropriate advice on the offer made by the Council shortly before the hearing led to the client continuing the proceedings, with the consequent waste of costs. The "effect of deciding to continue with proceedings is to make a decision that affects the conduct of the case in court."

[99] Accordingly, her Honour (with whose reasons three of the other four judges expressly agreed) concluded that the immunity applied to the solicitor's conduct in that matter.[130]

[100] In adopting what Beazley JA said, particularly about the role and relevance of the finality principle, their Honours have placed less importance upon that aspect than had emerged from some of the earlier cases including *Alpine Holdings*.

[101] Accordingly, following the decisions in *Donnellan v Woodland* (and *Attard v James Legal Pty Ltd* and *Day v Rogers*), I agree that whilst considerations of finality and possible re-agitation of the proceedings are relevant, the necessary enquiry is whether the test in *Giannarelli* as explained in *D'Orta-Ekenaike* is satisfied, namely whether the conduct led to a decision affecting the conduct of the case in court.

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130 *Donnellan v Woodland* at [233].

Characterisation of the conduct

[102] In my opinion in order for a court to decide whether the immunity applies in a particular case, the necessary starting point must be to identify the particular conduct which is alleged to give rise to the cause or causes of action against the lawyer – that is, the conduct that is said to have "led to a decision affecting the conduct of the case in court". This approach is important for several reasons:

(a) it helps one to identify and focus on the particular decision or decisions which are said to have affected the conduct of the case in court, rather than the way in which the particular allegations are formulated;[131]

(b) it focuses attention upon the conduct alleged in the pleadings, rather than on the evidence that has been or might be adduced at trial;

(c) it leads to the conclusion that the immunity is not confined to any particular cause of action.

[103] The first two of the points made in [102] above are well illustrated in the following observations of Gleeson CJ (with whom Meagher JA agreed) in *Keefe v Marks* at 717-720:

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[131] See paragraphs [46] to [56] above particularly the passages quoted from McHugh J in *D'Orta-Ekenaike* at [157] and [167].

"The statement of claim is expressed in terms which evidence an understanding of the difficulties which might confront the claimant by reason of this immunity, and that no doubt accounts for the pleader's understandable attempt to focus attention upon 'the conduct of pre-trial work'.[132]

…

The substance of the complaint that was made against the barrister is, in my view, simple and clear. It is that, having been briefed to act as counsel for Mr Tehfe in his action for damages for personal injuries, he did not at any relevant time, either prior to the commencement of the hearing, or during the hearing, direct his mind to the desirability of making on his client's behalf a claim for interest or take the steps necessary to propound such a claim and that his neglect in that regard produced the result that Master Greenwood failed to award interest and the Court of Appeal declined to intervene. As a consequence, it is alleged, Mr Tehfe did not recover his full entitlement... The question is whether a claim of that nature is within the area of immunity to which reference has earlier been made. Whatever may be the answer to that question, it does not appear to me that it could depend upon the detail of the evidence adduced at a hearing of the District Court action. Indeed, the relevant principle of immunity would be capricious in its operation if its application in a case such as the present were made to depend upon the precise history or circumstances of the communications and dealings between the barrister and his solicitor and lay client. A rule of law which is said to be based upon considerations of public policy should not depend for its practical operation upon chance. Furthermore, *it does not seem to me that a plaintiff can circumvent the immunity, simply by constructing allegations of damage in a manner which attempts to relate the harm suffered as a consequence of the barrister's alleged negligence to that aspect of his conduct furthest removed from physically standing up and speaking in Court.* The statement of claim is to be read as a whole, and there is no doubt about what it is the barrister is said to have done that was wrong, or what form of harm befell his client. *The barrister's alleged negligence involved a continuing course of conduct, or inaction, which extended up until the conclusion*

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132 *Keefe v Marks* at p 717F.

> *of the hearing before Master Greenwood and manifested itself in a failure to make a claim for interest, and to apply for any necessary amendment to the pleadings in order to enable that claim to be pursued.*[133]
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> …
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> The substance of the allegation against the opponent is that he was negligent in the way in which he conducted Mr Tehfe's action, and the principle of immunity which applies in such a case cannot be circumvented by drawing fine distinctions between the preparation and the conduct of the case, or between the opponent's failure to advert to the matter of interest while he was in his Chambers and his failure to do so while he was in Court."[134]
>
> (emphasis added by me)

[104] At [167] of his reasons in *D'Orta-Ekenaike*, immediately before the passage quoted in paragraph [56] above, McHugh J said, quoting from *Keefe v Marks*:

> "The preservation of finality is a compelling reason why it is not appropriate to construct 'allegations of damage in a manner which attempts to relate the harm suffered as a consequence of a barrister's alleged negligence to that aspect of his conduct furthest removed from physically standing up and speaking in Court'."

[105] The fact that the starting point must be the conduct complained of also leads to the conclusion that there is no reason why the immunity should

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133 *Keefe v Marks* at p 718G-719D.
134 *Keefe v Marks* at p 720A-B.

be confined to particular causes of action, such negligence or breach of a contractual duty of care.

[106] As Bell J said in *Goddard Elliott v Fritsch* at [544]: "The application of the immunity depends on the substance of the wrong which was done."

[107] Much of the discussion about the immunity is couched in the language of negligence and the existence of a duty of care. However it is clear that the immunity at least extends to claims based upon a contractual duty of care. This must be the effect of the decision in *D'Orta-Ekenaike* given the plurality's express reference to the claim in that case being one founded upon a contractual and/or tortious duty of care.

[108] However, given that the immunity is generally described as an immunity from suit, it is apparent that the immunity is a general common law immunity. As such, it provides protection, where it operates, against other common, or general, law claims (such as an equitable claim for breach of fiduciary duty) or statutory claims.

[109] If it were otherwise, the plaintiff might be able to circumvent the immunity by pleading a different cause of action, albeit relying upon

the same facts, for example misleading or deceptive conduct or unconscionable conduct under the Australian Consumer Law.[135]

[110] In *Yates Property Corporation Pty Ltd v Boland*,[136] Branson J found that the immunity applied to a claim for statutory compensation for misleading conduct under s 42 of the *Fair Trading Act* 1987 (NSW). In so holding, her Honour applied the principle of statutory construction that legislation is presumed not to interfere with fundamental common law rights or principles unless the intention to do so is manifest.

[111] That case ultimately went to the High Court.[137] (It was not necessary for that Court to consider the application of the immunity to causes of action other than negligence. However, Callinan J observed (at [364]-[365]):

> "The respondent's case against the lawyers purported to be not only in negligence but also in deceptive conduct and breach of the *Fair Trading Act*. Subsequently a further claim for breach of fiduciary duty was somewhat unconvincingly articulated. All were rejected by Branson J. The last three as I have earlier suggested probably owed their assertion in this case to a perception that the immunity might only apply to a claim in negligence. Such a perception is not well founded."

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135 *Competition and Consumer Act 2010* (Cth) sch 2. See for example *Pritchard v Racecage Pty Ltd* (1996) 135 ALR 717; *Pritchard v Racecage Pty Ltd* (1996-7) 142 FCR 527; *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594.

136 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169.

137 *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209.

[112] In *Goddard Elliott v Fritsch* the plaintiff's allegations included a breach of fiduciary duty by the solicitor defendant in bringing improper pressure to bear upon him in relation to the settlement of the property dispute in the Family Court. Bell J considered that regardless of whether this conduct might be characterised as involving a fiduciary breach, the immunity applied. He said (at [544]):

> "It is tempting to think the answer to that question might be influenced by characterising the wrong as something more than a breach of duty of care, ie a breach of fiduciary duty. Admitting the considerations pointing in the other direction, I have come to the view the application of the immunity does not turn on whether the wrong which was done here was a breach of the duty of care or a breach of fiduciary duty. The application of the immunity depends on the substance of the wrong which was done. The substance of the wrong which was done here was that the lawyers breached their duty of care towards [Mr Fritsch] by taking and acting on instructions to settle the case when they should have known he lacked the mental capacity to give instructions. That was negligence in respect of something which would be foundational to [Mr Fritsch's] participation in the proceeding – his mental capacity as a client and a party. But I would not give a different answer to the question whether the immunity applies by characterising that negligence as a breach of fiduciary duty."

[113] In the same case, Bell J also held that claims for misleading conduct would also be protected by the immunity.[138]

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138 In this context, Bell J explained (at [835]) that while the language of 'negligence' was often used in connection with the immunity, properly understood it was a general immunity from suit. He referred to the statement by the plurality in *D'Orta-Ekenaike* at [85] that "an advocate was immune from suit whether for negligence or otherwise in the conduct of a case in court", holding that this breadth of the immunity was consistent with its public policy rationale of finality – which applies equally to negligence and other causes of action.

[114] I too am of the view that the immunity may apply to relevant conduct whether it be negligent, in breach of a contractual duty of care or in breach of a relevant fiduciary duty.

Immunity includes solicitors

[115] There is no longer any doubt that the advocate's immunity extends to protect solicitors as well as barristers. Further, the immunity is not confined to negligence on the part of a legal practitioner, whether barrister or solicitor, who acts in a matter as an advocate. It extends to a solicitor who acts in the litigation qua solicitor provided that, on the facts, the conduct falls within the reach of the immunity.

[116] In *D'Orta-Ekenaike* the solicitor was alleged to have given the client the same advice at the same time and for the same purpose as the advice given by counsel. At paragraphs [90] and [91] the plurality said:

> "90. No relevant distinction could be drawn between the junior of two counsel retained to appear for an accused tendering advice of the kind of which the applicant complains and the instructing solicitor tendering that advice. Neither junior counsel nor the instructing solicitor may have addressed the

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Having referred to Branson J's reasons in *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169, and the interpretative principle relied upon by her Honour, Bell J accepted (at [838]) that the advocates' immunity called for an application of this principle, such that it could not be taken away without statutory language which was unmistakable and unambiguous. He held that the relevant provisions of the *Fair Trading Act* were enacted into Victoria's general system of law, which included the immunity. His Honour concluded that that legislation "does not exhibit a manifest intention to abrogate the immunity and it does not have that effect".

> court in any subsequent court appearance. The duties which each owes the client are identical. The content of the advice is identical. It cannot be said that the advice of one is more closely related to the court proceedings than the other, let alone one being intrinsically superior to or more effective than the other (if such a distinction were possible or relevant). What this example reveals is that the considerations of finality which require maintenance of the advocate's immunity require that the immunity extend to the advice allegedly given by [the solicitor].
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> 91. 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, practitioner cannot be sued for negligence on that account."

[117] At [172] in *Donnellan v Woodland* Beazley JA quoted [91] in *D'Orta-Ekenaike* and said:

> "The plurality's reasons in *D'Orta-Ekenaike* make it clear that the immunity is not confined to negligence on the part of a legal practitioner, whether barrister or solicitor, who acts in a case as an advocate. It extends to a solicitor who acts in the litigation qua solicitor provided that, on the facts, the negligent conduct falls within the reach of the immunity, namely, work done out of court that leads to a decision affecting the conduct of the case in court."

[118] In *Goddard Elliott v Fritsch* Bell J held that the immunity applied to the solicitor in relation to the preparation of the necessary evidence for the trial, for the reason that it was sufficiently connected with the conduct of the case in court.[139]

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139 *Goddard Elliott v Fritsch* at [797].

Acts or omissions

[119] In principle, there is no distinction between positive acts on the one hand and omissions on the other hand, for the purposes of determining the application of the immunity. Both are invariably part of the lawyer's conduct of a case.[140] However, whilst it may not be difficult to conclude that a positive act has led to a result, including a decision ("affecting the conduct of a case") the same cannot so readily be said of an act or omission. It may be that the "intimately connected" test is appropriate for omissions to do things which should have been done.

[120] As the lawyer defendants accept, it may be that omissions which merely affect whether proceedings are commenced or settled do not fall within the immunity on the basis that they only affect the existence of proceedings rather than the conduct of, or decisions in, the proceedings. However if the failures or omissions had an impact upon decisions made that affect the conduct of the proceedings it is likely that they will be covered by the immunity in the same way as would positive acts having a similar impact, even if the failures or omissions occurred early in the retainer and prior to the commencement of proceedings.

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140 *Smits v Roach* (2006) 227 CLR 423 at [48].

[121] In *Goddard Elliott v Fritsch* (part of which concerned the failure by the solicitor to prepare asset valuation, taxation and other evidence which was needed for the conduct of the case in court by the client's barristers) Bell J referred to and followed a "strong body of authority … that the immunity applies to acts of negligent omission in the preparation of a case for court." His Honour referred to:

(a) *Keefe v Marks* - where the barrister had failed to include a claim for interest in a personal injuries pleading and to give advice about that matter;

(b) *Yates Property Corporation Pty Ltd v Boland*[141] - where the lawyers failed to have a valuer's report prepared for a trial;

(c) *D'Orta-Ekenaike* - where the immunity was held to apply to "acts or omissions" involved in "the conduct of the case";

(d) *Attard v James Legal Pty Ltd*[142] - where the lawyers failed to advise that claims for and against a company (of which the plaintiffs were shareholders and directors) were stayed by reason of the operation of ss 440D(1) and 444E(1) of the *Corporations Act* (as a result of which they necessarily incurred costs which could not be recovered in the primary proceedings);

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141 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169.

142 *Attard v James Legal Pty Ltd* [2010] NSWCA 31.

(e) *Day v Rogers*[143] - where the defendant barrister had negligently failed to request and obtain asset valuation evidence, as a result of which the plaintiff's case had been dismissed for lack of evidence.

[122] To these examples I would add the recent decision of *Bird v Ford*,[144] where it was held that even if the lawyer had been negligent in failing to advise the client that it should not pursue an application which the client has instructed the lawyer to bring, the immunity would have applied. However the circumstances there were that the lawyer had already been retained to act for the client in bringing the application, and the lawyer and senior counsel did give advice about the difficulties with proceeding with the application, and about work that would be required to be done including the drafting of the statement of claim. In other words the alleged failure to give the particular advice was in reality part of a broader complaint about the advice that was actually given concerning the conduct of the application, and would normally fall within the scope of other advices, such as advices on prospects and advices on evidence, to which the immunity would normally apply.

143 *Day v Rogers* [2011] NSWCA 124.
144 *Bird v Ford* [2013] NSWSC 264.

Consideration

[123] At the outset, it must be borne in mind that the views which I express are based upon the assumption that all of the facts pleaded in the statements of claim are accurate. My views for the purpose of these applications are not intended to include final conclusions about questions that would be involved in a trial of these matters such as findings as to the precise scope of the retainers, the content and accuracy of advices, whether or not the Federal Court or some other court could order "that the Lease be reinstated and that the Notice of Termination of Lease … be withdrawn" even if relief against forfeiture was sought and granted, causation and so on.

[124] As to causation, there may be real questions at trial about the causal connection between conduct which is not within the scope of the immunity and losses suffered by the plaintiffs, where such losses could also be said to have flowed from conduct which is covered by the immunity.[145]

[125] As the test for the immunity requires one to consider whether the conduct complained of was conduct or work "which leads to a decision affecting the conduct of the case in court" or which is "intimately connected with" work in court, it is appropriate to state the obvious at

[145] See for example the observations by Priestley JA in *Keefe v Marks* noted at [63] above.

this stage, that is that "the case in court" in the present matter is the Federal Court proceedings.

[126] Contrary to the submissions made on behalf of the plaintiffs in the 2011 proceedings referred to in [37] above, I do not consider that the lawyer defendants first need to establish that the conduct complained of would involve a re-litigation of issues in the Federal Court proceedings "and or of the impugning of a final or intermediate determination or a collateral attack thereon." It is not a necessary precondition to the operation of the immunity that the public policy of finality will be infringed in a particular case.[146]

[127] Accordingly, rather embark on questions of finality, I propose to consider each of the breaches alleged and whether or not they rely on conduct that meets the tests in *D'Orta-Ekenaike* as further explained in *Donnellan v Woodland*.[147]

[128] In relation to the claims against CC, I start with the observation that the retainer was very broad, much broader than the prosecution of the Federal Court proceedings.[148]

[129] For the most part the alleged breaches fall into one of two categories: i) failures to give any or proper advice to the client, and ii) failures to

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146 See my discussion above at [83] - [101].
147 Cf *Donnellan v Woodland* at [225] – [229].
148 See 2011 S/C [1A] & [8] and 2013 S/C [26]. See too [27](a), [28](a), [29], [31] and [32] above.

take certain steps in the litigation itself such as briefing counsel and drawing and amending pleadings.

[130] Whilst conduct of the latter kind would readily appear to be "connected with" work in the court, the question as to whether the giving of advice is sufficiently connected to the case in court will depend upon the nature and purpose of the advice. For example, an advice on evidence given during the course of a proceeding would normally be very much a part of a barrister's retainer and would be likely to be subject of the immunity because of its obvious connection with the conduct of the proceeding.[149]

[131] Further, as I have already said, I would think that a failure to give particular advice would be less likely to fall within the immunity, than would be the positive act of giving advice which is wrong, misleading or inaccurate. Whilst the latter may well lead to a decision that affects the conduct of the case in court, the necessary link between conduct of the former kind and the conduct of the case in court may not be so easy to identify and establish.

[132] Putting the Federal Court proceedings aside for a moment, the allegations of breaches by CC include allegations involving the failure to advise their clients and to keep them advised as to the achievement

[149] Recall observations by Gleeson CJ in *Keefe v Marks* quoted in [61] above.

or otherwise of the objectives under clause 6.3.1, including the pursuit of the second option of attempting to renegotiate a new lease with BCC.[150] I do not consider that this work was sufficiently connected with the conduct of the Federal Court proceedings as to attract the immunity. If the immunity were to apply so broadly, a solicitor would be immune from liability for a wide range of conduct from the time of the initial retainer just because part of the retainer might lead to the solicitor instituting court proceedings.

[133] Similarly, I do not consider that the alleged failures of CC to "turn its mind to" and advise its clients about the effect of omissions to draft the FC Application so as to seek relief from forfeiture or other orders preserving or reinstating the Lease would fall within the immunity, even if they were otherwise actionable breaches.[151] I do not consider that these omissions were conduct that led to a decision (affecting the conduct of the case in court) or that was intimately connected with the Federal Court proceedings in the relevant sense.

[134] In relation to the Federal Court proceedings there are several aspects that I propose to consider separately, namely CC's:

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150 See 2011 S/C [12(aa)] and 2013 S/C [55.2]. See too [31](b)(i) and [32](b)(ii) above.

151 See 2011 S/C [12(b)] and 2013 S/C [55.1] – [55.4]. See too [31](b)(v)-(vi) and [32](b)(i)-(iv) above.

(a) briefing and instruction of counsel;[152]

(b) pleading of claims for relief against forfeiture, whether in equity or under s 137 of the LPA, and the failure to seek orders preserving or reinstating the Lease;[153]

(c) alleged failures to advise its clients:

(i) to seek independent legal advice, and continuing to act in the Federal Court proceedings without the informed consent of the clients;[154]

(ii) about the risks of not pleading equitable relief against forfeiture and failing to recommend that such relief be pleaded or to seek informed consent that it not be pleaded;[155]

(iii) of the various remarks made by Lander J.;[156]

(iv) or to make recommendations to the clients about filing affidavit evidence in support of the application to amend the pleading.[157]

[135] In relation to briefing counsel:

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152 See 2011 S/C [12(ac)] & [12(a)] and [31](b)(iii) above.
153 See 2011 S/C [12(ab)], [12(a)] & [12(c)] and 2013 S/C [55.1]. See too [31](b)(ii), (iv) & (vii) and [32](b)(i) above.
154 See 2011 S/C [12E] and 2013 S/C [57.1] & [58]. See too [31](e) and [32](c) above.
155 See 2013 S/C [55.2]-[55.4].
156 See 2013 S/C [55.5]-[55.7], [55.9], [57.1] & [58]. See too [32](b)(v) and [32](c) above.
157 See 2013 S/C [55.8], [57.1] & [58]. See too [32](b)(vi) and [32](c)(iii)-(iv) above.

(a) I consider that the immunity would apply in respect of that part of CC's instructions to counsel as specifically related to the Federal Court proceedings (which had already been commenced). This would include CC's failure to properly brief or instruct the barristers that "the only purpose of the Lease proceedings was to secure the preservation or reinstatement of the Lease in accordance with the Deed"[158] and that they should incorporate in the final points of claim a claim for equitable relief against forfeiture.[159] Such conduct was work intimately connected with the Federal Court proceedings.

(b) However the immunity could not apply to that part of the brief that related to "advising on achieving the objects of the Deed" except to the extent that such advice was part of their conduct of the Federal Court proceedings.[160]

[136] In relation to CC's alleged breaches based on the failure to include pleadings seeking relief against forfeiture and orders preserving or reinstating the Lease:

(a) I proceed on the assumption, it not having been suggested otherwise by counsel during submissions, that an order granting

158 Cf 2011 S/C [12(ac)]
159 Cf 2011 S/C [12(a)]
160 Cf 2011 S/C [9A(a)]

relief against forfeiture of the Lease would preserve or reinstate the Lease, and would therefore be "an order … that the Lease be reinstated" as contemplated in clause 6.3.1 of the DOCA.

(b) Unlike the situations in *Coshott v Barry* and *Keefe v Marks*, the FC Application did seek relief against forfeiture, but those claims were removed apparently on the advice of counsel. It is not uncommon for pleadings to be amended from time to time, for any number of reasons including forensic reasons.

(c) I consider that the immunity does apply to this conduct (regarding the removal and failures to include these claims and orders) from the time when CC originally drafted the FC Application extending throughout the proceedings. Such conduct was intimately connected with the conduct of the case itself. It is the very kind of conduct in which lawyers engage in the course of defining and refining a claim that is being prosecuted.

(d) Moreover, I consider that any litigation that would be brought based on those alleged breaches would necessarily involve, to some extent at least, reconsideration of the reasons why the original claims for relief against forfeiture were removed or abandoned, why leave to insert the claims was not sought earlier, whether if it was sought earlier the Federal Court would have

allowed the amendments and whether that would have resulted in different relief being ultimately obtained in the Federal Court proceedings, in particular relief of the kind contemplated in clause 6.3.1 of the DOCA. I consider that this would offend against the principle of finality.

[137] In relation to the alleged failures of CC to advise its clients and make recommendations:

(a) I consider it unlikely that the immunity applies. Whilst such conduct did indeed concern the proceedings, I doubt that it was "work intimately connected with" the proceedings in the sense used in *D'Orta-Ekenaike*.

(b) This is particularly so in light of the assertions that the passing on of some of that information was important to the clients because they would have explored the alternative option of negotiating a fresh lease with BCC. As to whether this would have achieved any different outcome, and if so what, may involve difficult questions at trial, but that is not a reason for concluding that the immunity applies.

(c) Further, the pursuit of this part of the plaintiffs' claim would not necessarily involve any re-agitation of Lander J's decision. The

advice may well have been, and led the client, to pursue more vigorously the alternative option of negotiating a fresh lease.

(d) As I have already noted CC's retainer was somewhat broader than carrying out work directed at prosecuting the court proceedings. Its retainer, like that of most solicitors, but unlike that of a barrister (or a solicitor instructing the barrister in court) whose primary focus must be upon the conduct of the case in court, extended to dealing with the client and keeping the client advised of the progress of the litigation.

(e) This is quite different to the situation of the instructing solicitor described at [90] of *D'Orta-Ekenaike*. In the present matter (in relation to failing to give particular advice to the client) the duty owed to the client was quite different to that of counsel.

[138] I do not consider that characterising some of the lawyers' conduct as involving conflicts of interests and or breaches of fiduciary duties makes any real difference when considering the immunity, at least in the present matter.

[139] In their written submissions the Administrators referred to authority to the effect that advocates' immunity would not be available to an

advocate who has acted in bad faith or dishonestly,[161] and contended that CC, "by breaching their fiduciary duties by preferring their own interests over the interests of the plaintiffs, have at least arguably acted in bad faith." Even if such a serious allegation was pleaded, as it should have been but was not as far as I can tell, I do not have to consider that further, in light of my conclusion that the immunity does not apply to any failure on the part of CC to keep its clients properly informed about the proceedings.

[140] In relation to the claims against the barristers, I note that their retainers too are alleged to have concerned matters additional to the prosecution of the Federal Court proceedings.[162] Without knowing more about the precise terms of their retainers it is difficult to obtain a clear picture of to the extent to which some of their work may have been connected with the Federal Court proceedings.

[141] However, and consistent with what I have already said in relation to the briefing of counsel by CC I consider that the immunity applies in respect of that part of counsels' work as was specifically related to the Federal Court proceedings, which had already been commenced by the time they were briefed. This includes the removal or abandonment of the pleas for relief against forfeiture and the failures to seek leave to

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161 *Del Borrello v Friedman & Lurie* [2001] WASCA 348 at [122] - [123] referring to *Swinfen v Lord Chelmsford* (1860) 5 H&N 890; 157 ER 1436.

162 See 2011 S/C [9A] and [27](b), [28](d) – (j) and[31] above.

include them, or to seek other orders directed at achieving reinstatement of the Lease.[163]

[142] I doubt that the immunity would apply to those parts of their briefs that related to "advising on achieving the objects of the Deed"[164] except to the extent that such advice was part of their conduct of the Federal Court proceedings. Whether and to what extent this conduct, and the other failures to advise alleged in paragraphs [12A(a)] and [12A(f)] of the 2011 S/C, was sufficiently connected with the conduct of the Federal Court proceedings to fall within the immunity or whether it was referable to more general advice as to how to achieve the objects of the Deed is a matter that can only be clarified at trial after the precise scope of the barristers' retainers have been identified. The situation is not sufficiently clear for me to resolve in the course of these applications for summary judgment and strike out.

[143] In relation to the alleged failures of the barristers to advise the plaintiffs to seek independent legal advice and their continuing to act in the proceedings without the informed consent of the plaintiffs,[165] I have reached a different conclusion than that which I reached in relation to CC.

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163 Cf 2011 S/C [12A(b)], [12A(c)], [12A(d)] and [12A(e)] to the extent that those failures concerned the matters alleged in [12A(b)], [12A(c)] & [12A(d)].

164 Cf 2011 S/C [12A(a)] & [12A(f)] and [12A(e)] to the extent that those failures concerned the matters alleged in [12A(a)] & [12A(f)].

165 Cf 2011 S/C [12E].

(a) Notwithstanding that there may well be ethical obligations in relation to the matters complained of, I consider that the barristers were entitled to continue to use their best endeavours in prosecuting the case without having to stop, inform and consult their clients every time they made a particular decision that may turn out to be wrong or every time something was said in court that was not favourable to the client's case.

(b) Unlike CC whose retainer required it to keep its clients fully advised, the barristers' work in proceeding with the court case as they thought appropriate was work intimately connected with the court case.

Conclusions

[144] Because I have concluded, on these summary applications, that some of the causes of action may not fall within the scope of advocate's immunity, I am not able to conclude, and do not conclude, that either proceeding does not disclose a cause of action or is an abuse of the process of the Court within the scope of Rule 23.01 or 23.02. Nor can I conclude that any of the lawyer defendants have a good defence on the merits such as to warrant summary relief under Rule 23.03.

[145] Accordingly I dismiss the applications for relief under Rules 23.01 and 23.03.

[146] However, I propose to strike out, under Rule 23.02, those parts of the statements of claim that relate only to the conduct which I have held to be subject of advocate's immunity, for the reason that those parts disclose no cause of action. They are:

(a) those parts of the statement of claim in the 2011 proceedings that relate to the breaches alleged in:

(i) paragraphs 12(ab), 12(ac), 12(a), 12(c), 12A(b), 12A(c) and 12A(d);

(ii) paragraph 12A(e) to the extent that it relates to the breaches alleged in paragraphs 12A(b), 12A(c) and 12A(d); and

(iii) paragraph 12E in so far as it relates to the barristers; and

(b) those parts of the statement of claim in the 2013 proceedings that relate to the breaches alleged in paragraph 55.1.

[147] I propose that the parties identify and attempt to agree upon what parts of the statements of claim should be struck out or amended having regard to my reasons. Subject to any agreement that is reached in the meantime, I direct the Applicants in both of these applications, namely the lawyer defendants, to file and serve within 21 days a document indicating what parts of the statements of claim should be struck out or amended, and each of the Respondents, namely the respective plaintiffs

in each proceeding, to file and serve a proposed amended statement of claim and any document responding to any disputed parts of the Applicant's document, within the 14 days of receiving the Applicant's document.

[148] To the extent that agreement cannot be reached, arrangements will be made for determining any areas of dispute in relation to what parts of the statements of claim should be struck out and what other amendments if any should be made to them.

[149] Until then there will be liberty to apply, including in relation to costs.