FEDERAL COURT OF AUSTRALIA

Sims v Chong [2015] FCAFC 80

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| Citation: | Sims v Chong [2015] FCAFC 80 |
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| Appeal from: | Sims v Chong [2014] FCA 1069 |
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| Parties: | **DOUGLAS ARTHUR SIMS v PATTI PENG SA CHONG** |
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| File number: | WAD 315 of 2014 |
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| Judge: | **MANSFIELD, SIOPIS AND RARES JJ** |
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| Date of judgment: | 5 June 2015 |
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| Catchwords: | **APPEAL** - legal practitioners – advocate’s immunity – the respondent legal practitioner represented the appellant in a Supreme Court of Western Australia proceeding – the appellant’s claim in the Supreme Court was struck out and dismissed – the appellant commenced a proceeding for damages in the Federal Court of Australia alleging the respondent had misrepresented her competence to conduct the Supreme Court proceeding – the appellant’s claim was summarily dismissed by the primary judge on grounds of advocate’s immunity – whether the doctrine of advocate’s immunity applied to statutory causes of action - whether it was arguable that the doctrine of advocate’s immunity did not apply to the claim made by the appellant – whether order for summary judgment ought to have been made.  |
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| Legislation: | *Federal Court Rules 2011* (Cth) *Federal Court of Australia Act 1976* (Cth)*Australian Consumer Law**Legal Profession Practice Act 1958* (Vic) *Trade Practices Act 1975* (Cth)*Fair Trading Act 1987* (NSW)  |
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| Cases cited: | *Sims v Chong* [2014] FCA 1069*Sims v Suda Ltd* [2014] WASC 3*Rippon v Chilcoton Pty Ltd* (2001) 53 NSWLR 198 *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1*Giannarelli v Wraith* (1988) 165 CLR 543 *NT Pubco Pty Ltd v Stradzins* [2014] NTSC 8 *Goddard Elliot (a firm) v Fritsch* [2012] VSC 87 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169*Spencer v Commonwealth* (2010) 241 CLR 118 *Bradken Ltd v Norcast S.ár.L* (2013) 219 FCR 101*Telstra Corporation Ltd v Minister for Broadband, Communications and the Digital Economy* (2008) 166 FCR 64*Commonwealth Bank of Australia v Walker* (2012) 289 ALR 674*Symonds v Vass* (2009) 257 ALR 689*Attard v James Legal Pty Ltd* [2010] NSWCA 311 *Donnellan v Woodland* [2012] NSWCA 433*Nikolaidis v Satouris* [2014] NSWCA 448*Nikolaidis* and *Alpine Holdings Pty Ltd v Feinaeur* [2008] WASCA 85 *Glendinning v Cuzens* [2009] WASC 21 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589*Boland v Yates Property Corporation* [1999] HCA 64; (1999) 167 ALR 575*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89*Bolt v Carter* [23012] NSWCA 89  |
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| Date of hearing: | 3 March 2015 |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Counsel for the Appellant: | MD Howard SC and N Ekanayake (Pro Bono) |
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| Counsel for the Respondent: | M Cuerden SC and S Popperwell |
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| Solicitor for the Respondent: | Denman Popperwell Lawyers |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 315 of 2014 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | DOUGLAS ARTHUR SIMSAppellant |
| AND: | PATTI PENG SA CHONGRespondent |

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| JUDGES: | MANSFIELD, SIOPIS AND RARES JJ |
| DATE OF ORDER: | 5 June 2015 |
| WHERE MADE: | PERTH |

THE COURT ORDERS THAT:

1. Leave to appeal from the Orders made on 3 October 2014 in Action WAD 116 of 2014 is granted.
2. The appeal is allowed and the Orders made on 3 October 2014 are set aside.
3. The application in Action WAD 116 of 2014 is remitted for further hearing and determination, including as to the costs of the application made on 20 June 2014 to strike out the claim.
4. Costs of the application and the appeal be reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | DOUGLAS ARTHUR SIMSAppellant |
| AND: | PATTI PENG SA CHONGRespondent |

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| --- | --- |
| JUDGES: | MANSFIELD, SIOPIS AND RARES JJ |
| DATE: | 5 june 2015 |
| PLACE: | PERTH |

**REASONS FOR JUDGMENT**

# THE COURT:

# INTRODUCTION

1. The primary judge summarily dismissed the claim made by Mr Sims (the appellant) against Ms Chong (the respondent) pursuant to r 16.21 of the *Federal Court Rules 2011* (Cth) (the Rules) and entered summary judgment for the respondent under s 31A of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act), with costs to be payable by the appellant: *Sims v Chong* [2014] FCA 1069 (the primary judgment). The appellant applied for leave to appeal. The appellant’s application for leave to appeal and the appeal were heard at the same time.
2. In very broad terms, the appellant’s claim in this Court concerned the quality of the professional legal services rendered by the respondent to the appellant in, and in relation to, conduct of proceedings by the appellant first in the District Court (the District Court claim) and then in the Supreme Court of Western Australia (the WA claim). The WA claim was ultimately struck out, following a series of orders striking out successive versions of the statement of claim, the last of which was made by a Registrar on 10 January 2014: *Sims v Suda Ltd* [2014] WASC 3. In the absence of a further properly pleaded statement of claim, the WA claim was then struck out on 21 February 2014.
3. The primary judge made the orders on two independent bases. The first was that the claim by the appellant against the respondent was an abuse of process. The second was that, in any event, the claim by the appellant against the respondent was doomed to failure, because the conduct on the part of the respondent of which he complained was protected by advocate’s immunity.
4. As to the first issue, after examining the proceedings in the WA claim, and in this Court, his Honour concluded that it should not be open to the appellant to “essentially re-litigate” the WA claim in this Court, and that to do so was an abuse of the process of the Court. His Honour referred to the decision in *Rippon v Chilcoton Pty Ltd* (2001) 53 NSWLR 198 (*Rippon*) as confirming a line of authorities that attempts to re-litigate issues in a proceeding already decided in other proceedings should not be permitted. His Honour had the view in this case that that was what the appellant was attempting to do.
5. As to the second issue, after referring to the decision of the High Court in *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 (*D’Orta-Ekenaike*), in particular to the plurality judgment at [84]-[86], his Honour concluded that the claim in this Court against the respondent was based upon conduct which was work done out of Court leading to a decision affecting the conduct of a case in the Court, and so within the immunity.
6. His Honour explained at [48]:

The drafting of the statement of claim in this case, by which the appellant is aggrieved, is plainly work done out of court which leads to a decision affecting the conduct of a case in court. It was that document that was found to be inadequate in court by Registrar Boyle.

In this particular case, while the *Trade Practices Act* and the *Australian Consumer Law* are each referred to and in some cases might raise the question whether the immunity from suit doctrine necessarily applies in respect of a statutory cause of action where Parliament has made it clear that a party can sue a legal practitioner (including an advocate) for work done of the type currently covered by the advocate’s immunity, that is not the true nature of the claims made. On any proper view of the pleading, confirmed by what the appellant has said in Court on the hearing of this interlocutory application, his complaint is fairly and squarely about the inadequacy of the pleading. His claims of incompetence are based on the outcome of the work done by the practitioner culminating in the Registrar striking out a pleading, despite five attempts having been made to perfect it. The same point relates to all other apparent causes of action.

1. His Honour also referred to authority to support the proposition that advocate’s immunity applies to any claim against a legal practitioner however framed, that is, whether it is framed in negligence or for breach of contract (the retainer) or for contravention of the *Australian Consumer Law* (*ACL*). Consequently, he said, even if any of the claims made by the appellant relied upon a statutory, rather than a general law, cause of action, he would conclude that the advocate’s immunity from suit applied in the case so that it had no reasonable prospect of succeeding.
2. To understand the issues on this appeal, it is desirable to consider in more detail how the claim against the respondent was made in the District Court, in the WA claim, and then how the appellant’s claim was expressed in this Court.
3. Before doing so, we indicate that, for reasons which follow, in our view the appeal should be allowed and the orders made by the primary judge on 3 October 2014 set aside. That will mean that the matter will be remitted to the primary judge for further hearing. That is not to say that the matter should necessarily be allowed to proceed to hearing on the basis of the existing pleadings, or on the basis of the claims as the appellant has expressed them, or indeed at all. It is simply to say that, on the material before the primary judge, we respectfully disagree with his conclusions that the case as expressed was not reasonably arguable and should have been summarily dismissed.

# THE WA CLAIM

1. The respondent is a legal practitioner. She acted for the appellant in a claim against Suda Ltd (at the time called Earthland Medical Symptoms Ltd) (Suda). It was first instituted in the District Court of Western Australia. Because the claim of $3.8 million exceeded the jurisdictional limit of that Court, the claim was transferred to the Supreme Court of Western Australian in March 2012. It is alleged that costs were therefore unnecessarily incurred in the District Court claim.
2. The claim against Suda was described in the Registrar’s judgment at [14]-[15] as arising in relation to “five entities” (as described by the Registrar), namely:
3. a Clip-On device which the appellant pleaded that he invented in the period from January to May 2006, and for which he applied for a provisional patent in May 2006 and a standard patent in May 2007;
4. a trademark ArTiMist which he claims to have devised in February 2007;
5. a claim on a trademark NiCoSorb which he also claims to have devised in February 2007;
6. a strategy called Star which he claims to have devised in about 8 February 2007; and
7. a strategy called the BPAG strategy which he also claims to have devised in February 2007, and said to relate to the manufacturing rights for the device associated with the ArTiMist trademark.
8. The Registrar said the five entities comprised a patent, two trademarks and two strategies.
9. There was no assertion in any version of the statement of claim in the WA claim that any of (1)-(3) were invented or devised by the appellant at the request of Suda. Nor was there any assertion that the Star strategy was devised at the request of Suda, although the pleading said that its implementation was “undertaken by the plaintiff at the request of the defendant”. It was alleged that the appellant devised the Star strategy and owned the manufacturing rights associated with the ArTiMist trademark, but it was not pleaded that the device associated with the ArTiMist trademark was itself invented by the appellant.
10. Collectively, with respect to the five entities, the appellant claimed that he had an agreement with Suda which was entered into between February and November 2007 (a plea which the Registrar in the reasons at [26] called “embarrassing” because of its imprecision), and he further pleaded that:
11. in about February 2007 an officer of Suda made certain “representations” to the appellant to the effect firstly that the appellant “… should be rewarded by” Suda for developing the two pleaded strategies, and for selling to Suda the two trademarks and the provisional patent, and secondly that Suda could not then afford to pay the appellant, but that the appellant was (in effect) to transfer his rights in the trademarks and the patent to Suda and the reward for his doing so “would be fixed by mutual agreement at a later date”. The appellant asserts that he verbally agreed to those terms.
12. on about 8 October 2007 it is alleged that the appellant wrote to Suda with a proposal about his reward, and by letter of 12 December 2007 Suda agreed to the proposal: as described by the Registrar, it is said that the proposal required the appellant variously be paid a sum of money and be allowed to purchase at specified prices either shares or options in Suda or in another company called BPAG (the proposal).
13. As the Registrar noted, the conduct of February 2007 could not itself have led to any concluded contract as the consideration payable to the appellant was not fixed. Later in the statement of claim, the appellant alleged that by virtue of the two sets of communications referred to above, there was an agreement that Suda would pay to the appellant a reward, or confer on him a benefit, in accordance with the proposal, although (as the Registrar noted) earlier parts of the pleading asserted that the appellant took certain steps pursuant to the “agreement” made by virtue of the February 2007 communications only. The appellant was said to face the problem that he had performed by 8 October 2007 what he said he was to have done by the communications in February 2007, but until October 2007 (on his own pleading) there was no agreement about the consideration for him doing so, and he had not pleaded that what he had done in the period between February and October 2007 was at the request of Suda.
14. Consequently, the Registrar struck out what was then the fifth statement of claim. The Registrar noted at [34] of his reasons that that ruling did not necessarily leave the appellant without any remedy, as he might seek compensation quantum meruit, in the nature of a restitutionary claim, made on the basis that it would be unjust for Suda to retain the benefit of what the appellant had provided to it without compensating the appellant. The Registrar noted that there was no such claim in the appellant’s pleading.
15. The Registrar noted later in his reasons at [44]-[46]:

The next question is whether the plaintiff ought to have leave to re-plead. As I have mentioned already, there have now been five attempts at the statement of claim. That would normally be more than enough. But it does seem to me that, if the story is as the plaintiff tells it were made good by the evidence, then the defendant would have the benefit (if any) of having come into control or ownership of the various entities without having in any way compensated the plaintiff.

There may be an arguable claim that the plaintiff can articulate: the present pleading does not do it. The appropriate order is for the plaintiff to bring in a further minute of proposed substituted statement of claim within a time to be limited. The balance of the application is to stand adjourned until that minute can be considered. If it still presents no arguable case, the action will be dismissed.

The plaintiff should not read the grant of one last chance to re-plead his case as a suggestion that he has a “good” case. It is not: it is only that it is not quite possible yet to exclude any chance that he has a case worthy of taking to trial. First he must overcome the problems of contract formation and consideration by a new pleading. For the purposes of this application I have been able to deal with the fiduciary question quite shortly as a pleading point. However, as a matter of evidence, it would be a formidable obstacle for the plaintiff at trial.

1. To that point, the appellant had been represented by the respondent, and on the material before the primary judge it appears that the respondent had from time to time engaged counsel to draft and settle the statement of claim to reflect the instructions the respondent had received from the appellant, and to appear before the Registrar.
2. The appellant had terminated the retainer of the respondent and handled the matter himself, apparently from 29 November 2013. The Registrar’s decision was given on 10 January 2014, after an argument which took place on 19 July 2013. Consequently, the termination of the retainer of the respondent occurred whilst that decision was reserved.
3. On the material before the primary judge in this Court, the appellant personally then prepared and submitted a new minute of proposed statement of claim as invited by the Registrar, but this was objected to and the Registrar following a further hearing on 21 February 2014, did not allow the proposed amendment and struck out the action.
4. It also appears, as the primary judge noted, that an appeal by the appellant to a Master of the Supreme Court of Western Australia against the Registrar’s strike-out decision was subsequently dismissed. The material before the primary judge or on this appeal does not suggest that the Registrar provided any reasons for his decision on 21 February 2014, or whether the Master subsequently did so. Nor does it contain the version of a further proposed statement of claim as apparently drawn by the appellant in person and as presented to the Registrar on 21 February 2014.

# PROCEEDINGS IN THE FEDERAL COURT

1. Instead of appealing from the decision of the Master, on 9 May 2014 the appellant commenced the proceeding in this Court against the respondent arising from the summary dismissal of the WA claim.
2. As described by the primary judge in his reasons at [9], the statement of claim in this Court pleaded that the action against Suda in the WA claim involved aspects of the law of contract, patent law, inventor’s rights for reward for their inventions, fraud by appropriation of property and unjust enrichment. The cause of action against Suda, as described by the Registrar, was based only upon breach of contract, and possibly negligence. Apparently the WA claim was maintained on that basis, even when the proposed sixth version of the statement of claim was submitted by the appellant (then acting in person) to the Registrar on 21 February 2014.
3. The allegations of material facts in the statement of claim (SOC) are:
4. Suda agreed “in a written contractual promise to reward” the applicant for his inventions, but then resolved not to do so “despite having partly performed the promise and its acceptance by [Suda]”: SOC [2];
5. the respondent was requested to take action against Suda “to enforce payment of the written contractual promise to pay him the implied terms of that promise (sic)” and “after examining [the applicant’s] brief” advised that she was competent to act, and was engaged in January 2011;
6. the appellant’s claim involved aspects of contract; patent law “in relation to patents and trademarks”; inventor’s rights; fraud for appropriation of property; and Suda “unjustly profiting” from the appellant’s inventions: SOC [4];
7. the respondent was not competent to act: the particulars assert the erroneous commencement of proceedings in the WA District Court, and in the WA claim filing five statements of claim which were rejected as inadequate and which resulted in the WA claim being struck out. It is significant that the particulars include the allegation that “None of the Statements of Claim addressed all the issues raised by the Applicant”: SOC [7(d)];
8. the respondent was negligent: the particulars, apart from referring to commencing proceedings erroneously in the WA District Court, and to the preparation of five statements of claim [by inference or by reference to SOC [7(d)] with their asserted deficits, assert that the respondent:

[failed] to address all aspects of my claim in her Statement of Claim, in particular the right of an inventor to be rewarded and the fraud by appropriation when “Suda decided not to honour its promise to pay”: SOC [8(a)(iii)].

1. the respondent acted in an unconscionable manner: the particulars are that it was unconscionable to assert that she was competent to act for the appellant, and later on 6 April 2011 asserted she was providing “...quality legal advice ...”: SOC [9];
2. the respondent misled and deceived the appellant: the particulars refer to the assertion of competence and to the fact that the statements of claim had been struck out: SOC [10];
3. the respondent “breached her contractual and fiduciary duty” to the appellant: the particulars refer to the engagement, and then that “resulted in the [respondent] having a fiduciary duty to act” by progressing the appellant’s action “to have his claims heard and adjudicated upon” and that she failed to do so: SOC [11];
4. the appellant therefore dispensed with the respondent’s services, and (unsuccessfully) appeared in person when the WA claim was dismissed so that his “rights to recover the contractual promise to pay have been severely jeopardised”: SOC [12];
5. the appellant suffered loss as a consequence of the respondent’s “incompetence and negligence”: particulars are given, including stress, the payment of legal fees to the respondent of $134,145 without benefit, the loss of the “value of the unpaid promise” valued at $3.8M, liability for costs the appellant has been or may be ordered to pay in the WA claim, and the loss of resources to pay for legal advice now: SOC [13];
6. the relief sought includes a refund of the fees paid to the respondent, and the cancellation from liability for any outstanding fees and disbursements; and reimbursement of the costs paid or payable to Suda as a result of the WA claim being struck out. It also includes damages for the loss of the claim against Suda of “$3,800,000 being the value of the Intellectual Property Reward [Suda] had contractually promised to pay, or such amount as may be assessed by the Court for losses Applicant has incurred in (sic) arising from the [WA Claim] being struck out”. It also claims damages for the respondent’s conduct as referred to above: SOC [15]. It is not expressly stated, but there is no reason to exclude from those claims the wasted cost of the District Court claim being made in the wrong Court, having regard to (4) above.
7. The statement of claim is a little repetitive. It repeats the allegations and breaches of duty by the respondent: failing to represent him competently in the WA claim (said to be a breach of both the contractual duty and the fiduciary duty and to be negligent); and acting unconscionably, and engaging in misleading and deceptive conduct by asserting a competence to act for him when she was not competent to do so: SOC [14].
8. The respondent’s contention before the primary judge on the abuse of process allegation was that, by the resolution of the WA claim, it had been determined that the appellant does not have a claim in contract against Suda, because he could not establish that he had provided good consideration for what he had provided to Suda, and (it was argued) it was an abuse of process to raise the same argument that had been rejected in the WA claim in support of his fresh claim against the respondent.
9. At first instance, the appellant appeared in person. It is apparent, as the primary judge recorded, that the appellant had difficulty in identifying and focusing on the material facts arising in relation to his claim in this Court, and the principles applicable to it. After endeavouring to synthesise the appellant’s claims in the WA Claim, and in this action, the primary judge noted that it was apparent that the respondent had engaged barristers to draft an appropriate statement of claim “that would pass muster”, reflecting the instructions she had received from the appellant about his dealings with Suda. The appellant, in that context, had difficulty in identifying his cause of action in terms which, as the primary judge said at [30], “would have got around the defects” the Registrar identified. The primary judge recorded the appellant’s response that he was the author or inventor of the five entities or inventions, that there was no doubt that they had been provided to Suda, and that he somehow was entitled to be recompensed for them. His Honour noted that the appellant complained that the respondent did not have expertise in litigation relating to intellectual property, and that the appellant asserted that his claim had failed because the respondent held out to him that she had the expertise to conduct such a claim, and that she did not in fact have that expertise.
10. The primary judge characterised the appellant as asserting that it should have been, and was, possible to devise an appropriate statement of claim reflecting his instructions, capable of being sustained in the WA claim, and that the failure to do so demonstrated professional incompetence. The assumption, therefore, that an appropriate maintainable statement of claim could have been prepared was the critical assertion. It appeared to the primary judge that it was an abuse of process to re-litigate the claim against Suda that the appellant had a claim against Suda in contract, in effect by making the same claim against the respondent in this Court. His Honour regarded it as concluded by the WA claim that there was no enforceable promise made by Suda to the appellant upon which he could succeed. His Honour, having regard to the significance of finality in litigation, considered it was therefore an abuse of process to re-litigate “the contract argument in this proceeding”: at [36].
11. As to the issue of advocate’s immunity, the primary judge accepted the submission of the respondent that “the sting” in the appellant’s complaints is the failure of the respondent to present in the WA claim a statement of claim immune from challenge: at [38]-[39]. His Honour said that allegation underpins all the allegations made against the respondent.
12. That led the primary judge to consider whether that done by or on behalf of the respondent as a legal practitioner was subject to immunity from suit. His Honour referred to *D’Orta-Ekenaike*, in particular at [85]-[87] where the plurality (Gleeson CJ, Gummow, Hayne and Heydon JJ) referring to *Giannarelli v Wraith* (1988) 165 CLR 543 (*Giannarelli*) said:

*Redrawing the line*

[85] No sufficient reason is proffered for reconsidering the Court’s decision, in *Giannarelli*, that an advocate is immune from suit whether for negligence or otherwise in the conduct of a case in court. Should the boundary of the operation of the immunity be redrawn?

[86] Again, we consider that no sufficient reason is proffered for doing so. In particular, there is no reason to depart from the test described in *Giannarelli* as work done in court or “work done out of court which leads to a decision affecting the conduct of the case in court” (142) 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 a court. (We do not consider the two statements of the test differ in any significant way.)

[87] As Mason CJ demonstrated in *Giannarelli* (125), “it would be artificial in the extreme to draw the line at the courtroom door”. And no other geographical line can be drawn that would not encounter the same difficulties. 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.

1. Applying that reasoning, the primary judge said firstly that the drafting of the statement of claim in the WA claim was plainly work done out of Court which led to a decision affecting the conduct of the case in Court. Secondly, and appropriately, his Honour considered whether the advocate’s immunity should apply where there was a statutory (as distinct from common law) cause of action relied upon. That is apparently a reference to ss 18, 20 and 21 of the *ACL*, proscribing respectively misleading or deceptive conduct and unconscionable conduct and s 236 which provides a remedy for their contravention. As to that, his Honour said at [48]:

On any proper view of the pleading, confirmed by what the applicant has said in Court on the hearing of this interlocutory application, his complaint is fairly and squarely about the inadequacy of the pleading. His claims of incompetence are based on the outcome of the work done by the practitioner culminating in the Registrar striking out a pleading, despite five attempts having been made to perfect it. The same point relates to all the other apparent causes of action.

He reinforced the conclusion by reference to authority which he considered supported the proposition that advocate’s immunity applies to any claim against a legal practitioner however framed, whether or not, for example, it involves a claim for contravention of the *ACL: NT Pubco Pty Ltd v Stradzins* [2014] NTSC 8 where Hiley J came to that view at [108]-[109] and [114] following *Goddard Elliot (a firm) v Fritsch* [2012] VSC 87 and *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169.

1. Consequently, his Honour concluded that, even if it were possible to construe any of the claims of the appellant as relying on a statutory cause of action, those authorities would lead him to conclude that advocate’s immunity from suit applied so that the claim in the Court had no reasonable prospect of succeeding.

# THE GROUNDS OF APPEAL

1. The appellant, to succeed on this appeal, necessarily had to have both the reasons of the primary judge set aside.
2. As to the first reason, the substituted grounds of appeal assert that the primary judge erred in deciding that the appellant’s claim depended on him establishing an enforceable contract between the appellant and Suda, and focused on the submission that his claims extended beyond that matter. It was said that he had claims under s 18 of the *ACL* for misleading or deceptive conduct against the respondent for:
	1. representing that she was competent to act for him in his claim against Suda; and
	2. failing to advise him to pursue a claim against Suda “in unjust enrichment, quantum merit”, or for the breach of s 18 of the *ACL*.

It is clear that ground (b) was inelegantly expressed, but its intention is clear.

1. As to the second reason, the ground of appeal was that it was erroneous summarily to dismiss the claim under s 31A of the FCA Act based on advocate’s immunity, firstly because not all the appellant’s claims clearly fell within the shadow of the immunity or alternatively, because the existing state of the authorities was not so clear as to justify the exercise of the power under s 31A of the FCA Act in any event to his claim.
2. *Spencer v Commonwealth* (2010) 241 CLR 118 explained the nature of the judgment to be made when deciding whether summarily to dismiss a claim under s 31A of the FCA Act: see per French CJ and Gummow J at [25] and per Hayne, Crennan, Kiefel and Bell JJ at [51]-[60], especially at [58]-[60]. There was no dispute about those principles. It is necessary to give proper effect to the expression in s 31A that the Court must be satisfied that the appellant had no reasonable prospect of successfully prosecuting the claim.

# CONSIDERATION

1. It is not necessary to say a great deal about the first ground of appeal.
2. That is because the respondent accepts, in the light of the written submissions made by the appellant, that the primary judge should not have dismissed the claim on that ground.
3. It is, of course, incumbent upon the Court to be satisfied that arguable error is demonstrated on the part of the primary judge: *Bradken Ltd v Norcast S.ár.L* (2013) 219 FCR 101; [2013] FCAFC 123; *Telstra Corporation Ltd v Minister for Broadband, Communications and the Digital Economy* (2008) 166 FCR 64; *Commonwealth Bank of Australia v Walker* (2012) 289 ALR 674. In our view, it is arguable that the primary judge erred in striking out the claim as an abuse of process, as acknowledged by the respondent through counsel. The short point is that the statement of claim in this Court extended beyond the claim pleaded in the WA claim against Suda solely in contract, namely to include pleas based upon restitution or unjust enrichment. It also included the claims concerning the conduct leading to, and maintaining, the retainer. It is fair to say that those claims were not well expressed, and to acknowledge (as does the respondent) that the full understanding of the scope of the appellant’s claims in his statement of claim is assisted by counsel now appearing for the appellant. They have given a much clearer focus to his statement of claim than, it appears, the appellant was able to do at first instance. It is not necessary for this purpose to refer in detail to the statement of claim. It is further considered when considering the second ground of appeal.
4. We observe that, as the primary judge said, the pleading against Suda in the WA claim was solely a contractual one. However, we consider (as the respondent accepts) that it was arguably erroneous to categorise all the appellant’s claims against the respondent as depending on him establishing in the proceeding in this Court that there was an enforceable promise made by Suda to the appellant. The statement of claim in the proceeding in this Court arguably accommodates the assertion that his claim against the respondent is because there was no advice given about, and were no claims made in, the WA claim for unjust enrichment or for restitution or for a form of quantum merit. It also appears to make the statutory claim under s 18 of the *ACL* that the respondent, at the time of her engagement, misrepresented her professional capacity to take proper instructions and to conduct appropriately the claim then proposed against Suda, including giving proper advice about the alternative bases on which such a claim might be pursued.
5. Accordingly, the focus of submissions on the appeal was directed to whether it was correct for the primary judge to have summarily dismissed the claim based upon advocate’s immunity. That exposed three issues:
6. whether the doctrine of advocate’s immunity applies to enable a claim such as that of the appellant to be dismissed summarily, where there had been no trial and so no final determination after a hearing on the merits of the claim against Suda;
7. whether it is erroneous in any event to apply the doctrine of advocate’s immunity to the present claim as expressed in the statement of claim so as to lead to the summary dismissal of the claim; and
8. whether the doctrine of advocate’s immunity applies to protect the advocate from statutory causes of action, relevantly for contravention of s 18 and potentially ss 20 and 21 of the *ACL*.
9. In each instance, the appellant contended that the law is not sufficiently settled to have justified the summary dismissal of the claim, and in the case of issue (2) it was argued that it was not sufficiently clear in the light of the allegations in the statement of claim that the claim should have been summarily dismissed.
10. It is helpful first to review the two leading High Court cases.
11. The first in time is *Giannarelli*.
12. *Giannarelli* decided that, at common law, an advocate cannot be sued for negligence in the conduct of a case in court, in the absence of any contrary statutory prescription. That case alleged negligence on the part of several barristers in failing to advise that evidence given to a Royal Commission was not admissible on a charge of perjury, and in not objecting to that evidence. It is not necessary to refer to the views of the Court on the collateral or related issues as to the effect of s 10(2) of the *Legal Profession Practice Act 1958* (Vic) nor as to the immunity extending to a solicitor when acting as an advocate.
13. The recognition of advocate’s immunity was accepted by Mason CJ, Wilson, Brennan and Dawson JJ, each in separate judgments. The minority view of Deane, Toohey and Gaudron JJ was that the legislation had removed the immunity.
14. Mason CJ at 555-559 explained the public policy underlying advocate’s immunity, as it extends to those engaged in the administration of justice. His Honour at 559 then discussed where the dividing line is to be drawn between providing immunity for “in-court negligence” and “work done out of court”, as the public policy considerations underlying the immunity have no relevance to negligent advice in relation to out-of-court matters. He said:

Is the immunity to end at the courtroom door so that the protection does not extend to preparatory activities such as the drawing and settling of pleadings and the giving of advice on evidence? To limit the immunity in this way would be to confine it to conduct and management of the case in the courtroom, thereby protecting the advocate in respect of his tactical handling of the proceedings. However, it would be artificial in the extreme to draw the line at the courtroom door. Preparation of a case out of court cannot be divorced from presentation in court. The two are inextricably interwoven so that the immunity must extend to work done out of court which leads to a decision affecting the conduct of the case in court. But to take the immunity any further would entail a risk of taking the protection beyond the boundaries of the public policy considerations which sustain the immunity. I would agree with McCarthy P in *Rees v Sinclair* (41) where his Honour said:

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

This persuasive statement of the limits of the immunity was indorsed by four members of the House of Lords in *Saif Ali* (42). The statement is all the more important in that it acknowledges the existence and the limits of the immunity in a country where the legal profession is fused.

That approach was then applied to the particular facts. Mason CJ at 558 said that the public policy in not allowing Court decisions to become the subject of collateral attack by actions against counsel for in-court negligence was one of the two significant aspects of public policy.

1. Wilson J at 576-576 addressed the public policy supporting the common law rule of advocate’s immunity. It is fair to observe that his Honour’s focus on the public interest in the due administration of justice identified five distinct grounds to support the immunity, including difficulties associated with re-litigation where the claim has “a view to proving that the original decision was wrong by reason of counsel’s negligence” (at 573). In the view of Wilson J, public confidence in the administration of justice by preserving finality of litigation was most at risk in the circumstances of that case. It supported the dismissal of the appeal.
2. Brennan J generally agreed with the judgment of Mason CJ (see at 579). His Honour there said the immunity extended to “the making of preliminary decisions affecting the way in which the case is to be conducted when it comes to a hearing”. That, in the circumstances, meant the appeal was to be dismissed.
3. Dawson J at 594-596 reached views generally consistent with those already referred to. The question of where to draw the line was not specifically adverted to, clearly because in his Honour’s view clearly the circumstances fell within the immunity. At 594-595, his Honour (as did Wilson J) placed considerable emphasis on avoiding the decision of a court being subject to collateral attack by a client seeking to blame the advocate for the loss of the case.
4. The more recent is *D’Orta-Ekenaike*.
5. That case concerned a claim against Victoria Legal Aid, but in substance against a solicitor and against a barrister, for negligence in relation to a charge of rape. The appellant in that case first pleaded guilty, on legal advice, and having changed his plea was eventually acquitted. It was claimed that the first plea of guilty was induced by inappropriate pressure and included advice about the likely sentence if he then pleaded guilty, and alternatively if he pleaded not guilty but was convicted. The occasion when the relevant advice was given was immediately before the commencement of the committal hearing, at which the plea of guilty was made. The immediately relevant passage in the plurality judgment is set out at [30] above. The allegedly wrongful advice did not ultimately affect the outcome, as the appellant was acquitted. He complained of the adverse intermediate consequences.
6. The plurality in *D’Orta-Ekenaike* at [88] concluded, in a short passage, that the circumstances in that case fell within the aegis of advocate’s immunity. The advice complained of was given at the point of an administrative function (the committal hearing) as part of the controversy which the trial ultimately determined. It was work which an advocate did out of court but was work which led to a decision which affected the conduct of the case at the subsequent trial.
7. In *D’Orta-Ekenaike*, the plurality judgment focused on the public interest in the finality of court-resolved controversies. Their Honours said at [45] that the central justification for the advocate’s immunity is the principle that “controversies, once resolved, are not to be re-opened except in a few narrowly defined circumstances”.
8. Consequently, there is analysis at [66]-[70] of the nature of the client’s complaint, and the point is reached that – whether in a civil or criminal case – it is said at [80] that:

... no remedy is to be provided if its provision depends upon demonstrating that a different *final* (emphasis in original) result should have been reached in the earlier litigation.

1. The plurality in *D’Orta-Ekenaike* said at [34]:

A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. That tenet finds reflection in the restriction upon the reopening of final orders after entry (63) and in the rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud (64). The tenet also finds reflection in the doctrines of res judicata and issue estoppel. Those doctrines prevent a party to a proceeding raising, in a new proceeding, against a party to the original proceeding, a cause of action or issue that was finally decided in the original proceeding (65). It is a tenet that underpins the extension of principles of preclusion to some circumstances where the issues raised in the later proceeding could have been raised in an earlier proceeding (66).

1. Those rules based on the need for finality of judicial determination justify creating a range of immunities from suit, beyond the parties to the primary proceeding, including judges, witnesses and advocates: at [36]-[42]. The role of the judicial branch of government in “the quelling of controversies” precludes the re-litigation of that controversy, because its re-litigation would be:

... an inevitable and essential step in demonstrating that an advocate’s negligence in the conduct of litigation had caused damage to the client” [at 44].

1. The next section of the reasons of the plurality examines (and rejects) the reasons why advocate’s immunity as found in *Giannarelli* should be found no longer to exist, and explains why, on the particular facts in both *Giannarelli* and in *D’Orta-Ekenaike*, the advocate’s immunity meant that the claim against the advocate could not be maintained because, to do so, it would have been necessary to demonstrate that the judicially quelled controversy should have been resolved differently.
2. Then, at [85] and [86], in the passage quoted in [30] above, the plurality said firstly that no sufficient reason had been shown to review the conclusion in *Giannarelli*, and secondly that it would not re-draw the line (as expressed by Mason CJ in *Giannarelli*) between the advocate’s conduct or omissions which have the aegis of the immunity and those which do not.
3. The consequence is that, whilst the primary public policy considerations supporting the immunity have been refined and further explained, the plurality reasons in *D’Orta-Ekenaike* evince a clear intention to continue to recognise the immunity as recognised in *Giannarelli* and to maintain the line between where immunity comes into existence and where it does not exist as explained in *Giannarelli*. The reasons of the majority in *Giannarelli*, in particular of Mason CJ referred to above, indicate that the line is to be drawn where the work is advocate’s work (whether provided by a barrister or a solicitor) and is in relation to work done in court or work done out of court which leads to a decision affecting the conduct of the case in court.
4. In that regard, the observations of McHugh J in *D’Orta-Ekenaike* in agreeing with the plurality are also apposite. His Honour said at [166] and [168]:

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

...

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.

1. This appeal concerns the drawing of the line. There is, as Giles JA said in *Symonds v Vass* (2009) 257 ALR 689 at 698, some difficulty in drawing that line where the relevant advocate’s work or advice was done or given (or not done or given) prior to the commencement of the proceeding. There are similar observations by Giles JA and by Tobias JA in *Attard v James Legal Pty Ltd* [2010] NSWCA 311 at [31] and [188]-[190] respectively (*Attard*). In that case, one issue concerned whether an appellant could recover costs wasted by having to defend (successfully) a claim when there was a readily available defence not pleaded and which was likely to have led to the claim against that appellant not proceeding at a much earlier stage. There was no attempt to impugn the final decision, or to relitigate matters already decided, to use the phraseology of McHugh J in *D’Orta-Ekenaike* at [168].
2. Moreover, there appears to be a more robust application of the finality principle in some cases than in others. It is evident that the line is to be drawn at least where the proposed claim might cause an inquiry (and outcome) with a result which might differ from the judicially quelled controversy. In addition, a number of subsequent decisions support the conclusion that the line should be drawn in favour of immunity where the inquiry that would be prompted by the proposed claim might lead to a decision that the outcome of the judicially quelled controversy – even though it is accepted as being correct as it was presented – might be found to have produced a different result if the case had been conducted in a different way: see eg *Donnellan v Woodland* [2012] NSWCA 433 and *Nikolaidis v Satouris* [2014] NSWCA 448 (*Nikolaidis*), and the cases referred to by Barrett JA (with whom Beazley P and Ward JA agreed) at [28] and [43]: cf *Nikolaidis* and *Alpine Holdings Pty Ltd v Feinaeur* [2008] WASCA 85 (*Alpine Holdings*).
3. *Alpine Holdings* involved two claims against the legal adviser. The claim for damages for misleading and deceptive conduct against a landlord was successful at trial, but the amount of the damages awarded was substantially reduced on appeal. The claims against the legal adviser were first that, prior to the trial, the legal adviser had engaged in misleading and deceptive conduct about the amount of damages that *Alpine Holdings* would be entitled to, and secondly that, after the judgment and prior to the hearing of the appeal the legal adviser was negligent and engaged in misleading and deceptive conduct in the advice given in relation to an offer of settlement by the landlord. Those claims were struck out by a Master, on the basis that they were not arguable by reason of advocate’s immunity.
4. The Court of Appeal regarded both claims as arguable. In relation to the second matter, it did not affect the conduct of the appeal. It was like advice on the prospects of success before action on which a decision is based whether or not to commence a claim. Nor did it involve any derogation from, or undermining of, the principle of the finality of Court decisions by requiring the re-opening of earlier litigation, as it was not alleged that the decision on the appeal reducing the damages was wrong or that the allegedly negligent conduct brought about a different result on that appeal. The claim did not require reconsideration of the correctness of that decision: see at [86]-[87].
5. In relation to the first matter, the Court of Appeal also considered that the claim did not plainly fall within the immunity. It was said that there will be cases where the manner of pleading would affect the way the case was conducted in Court, so that an allegation that the case should have been pleaded differently would involve re-opening the earlier decision in an endeavour to prove the result would have been different, but where the allegation is that the advocate advised the client to pursue a claim, and pleaded a cause of action when it was doomed to failure, it is not so obvious that it is necessary to re-open the original controversy: at [91]-[92].
6. In the light of those observations, we turn to the three issues on this ground of appeal.

## Final determination

1. The Registrar’s decision in this matter decided only that the pleadings as presented did not disclose an arguable cause of action against Suda in contract and that, accordingly the action be struck out. Such a decision is interlocutory. That is because, as McHugh ACJ, Gummow and Heydon JJ said in *Re Luck* (2003) 203 ALR 1 at 2 [4] the usual test for determining whether an order is final or interlocutory is whether the order, as made, finally determines the rights of the parties in a principal cause between them. They concluded (at [9]):

An order is an interlocutory order, therefore, when it stays or dismisses an action or refuses leave to commence or proceed with an action because the action is frivolous, vexatious, an abuse of the process of the court or does not disclose a reasonable cause of action.

1. The Registrar’s order striking the WA claim out was an order dismissing an action because it did not disclose a reasonable cause of action. That order did have any final effect. In particular, it did not of itself, preclude the appellant from bringing and pursuing to final judgment a fresh proceeding based on a subsequent, properly pleaded cause of action arising out of his controversy with Suda.
2. There was no judicially quelled controversy, in the sense that after a hearing and upon evidence and submissions, the WA claim was determined. Indeed, the careful use of the expression “conduct of the case in court” might support that analysis. As the plurality said in *D’Orta-Ekenaike* at [87]:

It describes the acts or omissions to which immunity attaches by reference to the conduct of the case.

McHugh J in that case used the expression “judicially determined”.

1. There has been no decision which determines that that expression incorporates circumstances such as the present where, on the pleading, summary judgment is entered. The appellant accepted that the Registrar correctly struck out the statement of claim and then dismissed the WA claim (and the Master correctly dismissed the appeal from that decision). So, at least in that respect, namely the potential for inconsistent decisions on a judicially resolved controversy, the public interest would not obviously enliven the immunity.
2. The respondent accepted that the order dismissing the WA claim may arguably be characterised as interlocutory rather than final: see *Glendinning v Cuzens* [2009] WASC 21 at [24]. It is also correct on the other hand, as counsel for the respondent said, that the appellant would be confronted with the obstacle of *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 if the appellant now attempted to institute fresh proceedings against Suda based upon his causes of action other than for breach of contract. That type of obstacle was referred to by the plurality in *D’Orta-Ekenaike* at [34] and [35].
3. The decision in the WA claim was that the pleaded case, an action in contract against Suda, was not maintainable. The statement of claim, whilst it may have elements of maintaining the contractual assertion, at least includes the claim that, prior to instituting, or during the conduct of, the WA Claim the respondent should have advised the appellant of a potential claim against Suda to account for its use of the five entities, for misappropriating his intellectual property in the five entities, or for quantum merit. And, additionally, the liability of the respondent is said to arise from the respondent representing a competence which she did not have.
4. The maintaining of those assertions does not involve a collateral attack on the decision on the pleadings in the WA claim. If successful, it would not suggest that the decision in the WA claim was erroneous. It would not clearly, in the manner described in *Giannarelli*, provoke any lack of confidence in the administration of justice. If the approach of the Court of Appeal in *Alpine Construction* were adopted, at least arguably the claim in this matter would not have been summarily dismissed. It must be accepted that, on the issue of damages, if the cause of action were made out on the facts, the claim would then require an assessment of the loss suffered by the appellant, quantified by the loss of opportunity to pursue a claim against Suda on a proper basis (excluding a contract claim). The loss of that opportunity would have been averted (on the assumption that the claim is made out) if the respondent had given different advice: either that she was not competent or appropriately experienced in advising on or conducting such a claim as the appellant wished her to advise and act in. We shall return to that aspect later in these reasons.
5. Whilst it may be the case that a final judgment, when entered by consent, may reflect a judicial quelling of a controversy between the two parties (as the cases such as *Donnellan* and *Symonds* demonstrate), an interlocutory order striking out an action is not final: *Re Luck*.
6. Having regard to the reasons for judgment of Mason CJ in *Giannarelli* and of McHugh J in *D’Orte-Ekenaike* referred to above, we consider that the position is clear and that the primary judge, who was not referred to in *Re Luck*, erred in orderingthe summary dismissal of the appellant’s claim against the respondent.
7. In addition, in any event, we do not consider that the primary judge should in the circumstances, have exercised the summary dismissal power under s 31A of the FCA Act. The proper application of s 31A was explained by the High Court in *Spencer v The Commonwealth*, in particular per French CJ and Gummow J at [25]-[26] and per Hayne, Crenna, Kiefel and Bell JJ at [60]. It is, at the least, not sufficiently clear that the interlocutory order disposing of the WA claim has the character of final judicial quelling of the present controversy either as it was described by the primary judge or, as – in our view – it is pleaded as to warrant its summary dismissal.

## (2) Statutory liability and immunity

1. It is also, in our view, not sufficiently clear that the statutory causes of action relied on by the appellant, if established, would all fall within the protection of the immunity.
2. The High Court has not decided that question. In the context of s 18 of the *ACL* (relevantly, in that case, s 42 of the *Fair Trading Act 1987* (NSW), in *Boland v Yates Property Corporation* [1999] HCA 64; (1999) 167 ALR 575, Callinan J at [364]-[366] clearly was of the view that advocate’s immunity would protect from an alleged breach of s 52 of the *Trade Practices Act 1975* (Cth) or its analogue in the *Fair Trading Act 1987* (NSW).
3. *Nikolaidis* primarily concerned the question whether advocate’s immunity from suit provided a shield against a statutory cause of action for misleading and deceptive conduct (in that case s 68 of the *Fair Trading Act 1987* (NSW) as it was prior to the enactment of the ACC).
4. The claim arose from the client alleging that, through the negligence or misleading and deceptive conduct of the advocate, it was necessary to settle a claim against the client by consenting to judgment for a significant sum and costs. The claim was summarily dismissed on the pleadings, as being covered by advocate’s immunity.
5. Only the applicability of the immunity to the statutory cause of action was the subject of the appeal: see per Barrett JA at [10]. There was no issue that the immunity did not apply where there had been a consent judgment rather than a judicial determination after a trial: see at [12]. It also noteworthy that there was no contention that, if the claim was only in negligence, the immunity would have covered the conduct of the advocate: at [47]. It was decided that the advocate’s immunity from suit does apply to proceedings framed as a statutory cause of action.
6. The Court noted that, if leave to appeal had been given, the client wished to preserve the argument that, despite the immunity, it remained available to claim wasted costs from the advocate because that did not (where there had been no hearing) involve any reconsideration of the consent order. It was accepted that the earlier decisions in *Symonds*, *Attard* and *Donnellan* precluded that argument succeeding.
7. It is clear, as the primary judge observed, that the weight of authority, concluding with the decision in *Nikolaidis,* supports the conclusion that any potential liability of an advocate for negligent conduct, if it is covered by the shield of advocate’s immunity, is also covered by that shield where there is otherwise a liability for contravention of s 18 of the *ACL* or its equivalents. This Court should follow those decisions: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135].
8. However, even from that basis, we do not consider that it was appropriate in this case to summarily dismiss the claim. The statutory liability invoked included unconscionable conduct, including presumably contrary to ss 20 and 21 of the *ACL* (although the statutory basis is not expressly identified). It is not so clear that the same conclusion about the scope of advocate’s immunity would be reached in relation to such contraventions. There may be different public policy considerations in such circumstances: see eg *D’Orta-Ekenaike* in the plurality reasons at [34]. The factual elements to be established to make out such a claim may substantially overlap with those required to make out negligence or breach of contract or contravention of s 18 of the *ACL*, but they will necessarily involve qualitative differences and perhaps required additional factual elements. The statement of claim does not identify which of ss 20 or 21 (as explained in s 22) of the *ACL* is relied upon, or whether the reference to “unconscionable” has some other context. Clearly, the pleading is inadequate, and is vulnerable to being struck out if not adequately pleaded or amended or particularised. That is not the present issue. Clearly, too, it might be that a proper pleading on that topic cannot be sustained. That, too, is not the present issue.
9. The same observations may be made about the assertion of a breach of fiduciary duty. In relation to that, it may additionally be observed that – at least on the factual allegations in the statement of claim – it is difficult to show that the appellant is in fact asserting conduct by the respondent in breach of the conventional fiduciary duties owed by a lawyer to the client.
10. To adopt and adapt the words of Steydler P in *Alpine Holdings* at [98], the application of the immunity to what would otherwise be the (assumed) liability of the respondent to the appellant for contravention of those provisions of the *ACL* is not a matter to be determined routinely on a “pleading summons”. They involve complex questions of law that are properly left to be determined at a trial. It is also likely to be important that their consideration should arise on facts as found, and so should be determined in the light of findings as to the precise nature of any offending conduct.
11. As we have remarked, those conclusions are not to be taken as indicating that the present statement of claim is in a proper form, or that it will necessarily survive amendment if made on proper instructions and with a proper foundation.

## (3) The general scope of the immunity

1. Finally, we turn to the more general issue as to whether it is clearly enough the case that the allegations in the statement of claim, if made out, would only expose conduct or omissions on the part of the respondent from which all would be protected by advocate’s immunity.
2. In our view, the narrow characterisation of the appellant’s claims against the respondent as being confined to the process of the pleading and the inadequacy of the pleading in the WA claim does not fully reflect the statement of claim. That certainly underlies the appellant’s claim against the respondent. But, in our view the statement of claim exposes the potential need for an inquiry beyond the quality of the pleading about the existence of the asserted contract between the appellant and Suda. It asserted that the respondent mislead the appellant by claiming she had the capacity to conduct a claim of the general character presented or (to use the appellant’s words) in the “brief” provided to her. It asserted that the “brief” exposed claims or potential claims that Suda was “unjustly profiting” from his inventions. It is fair to say that the material may have required the respondent to consider a claim other than one based on contract. The allegation is then specifically made that none of the statements of claim in the WA claim addressed all the issues the appellant raised with the respondent.
3. In our view, the statement of claim arguably asserts conduct on the part of the respondent (however it is characterised) which arguably falls outside the scope of advocate’s immunity as explained by the High Court in *D’Orta-Ekenaike*. Indeed, some of the conduct alleged against the respondent, concerning her representations as to her competence to be retained by the appellant to plead and then commence the WA claim, occurred before any litigation was filed. Again, because the allegations in the statement of claim give rise to alleged conduct which is arguably outside that covered by the immunity, the application of the immunity should be determined in the light of findings as to the precise nature of the conduct on the part of the respondent which might expose her to liability to the appellant.
4. That is sufficient to dispose of the appeal.
5. This appeal highlights the matter upon which some judges have expressed difficulty in “drawing the line” following the decision in *D’Orta-Ekenaike*, particularly by reason of the allegation in the statement of claim that the conduct of the respondent for which the respondent should be liable to him for the circumstances in which the retainer was agreed upon. That is, by reason of the representation at the time of competence to conduct a claim of the general character in the “brief”.
6. The position has been taken that, wherever a claim against an advocate might involve a reconsideration of a matter which has been the subject of a judicial determination (including by a consent judgment: see eg *Donnellan*, advocate’s immunity protects the advocate from any liability. That has been applied, too, where the result of the judicial determination has not been sought to be altered, but it is said the failure to take a point has resulted in additional unnecessary costs. It has been said to apply wherever the proposed claim against the advocate might require damage to be assessed for the loss of an opportunity to have had the claim presented in a different way, with a potentially different result, even where it is accepted that the conduct of the “advocate” was clearly delictual.
7. It is not clear that the reach of advocate’s immunity extends to circumstances where the “advocate” has misrepresented the skill and experience possessed, even though (if the cause of action against the “advocate” on that basis is made out) the damages relate to the loss of the opportunity to be properly advised. By way of example, if a lawyer fails to institute a proceeding within a prescribed time limit, a claim for damages for the loss of the opportunity to bring the claim could be made. If the lawyer, through negligence/ignorance of the time limit, instituted the claim but it was summarily dismissed because the defence raised the fact that the claim was out of time, why should the immunity protect the lawyer from liability exist? If the proceedings were instituted out of time, but with the entitlement to seek an extension of time in certain circumstances, and were summarily dismissed on the application of the respondent because the lawyer for the applicant did not know that entitlement existed, it is hard to see why the lawyer should be protected by the immunity, whereas the lawyer who did not institute proceedings because of ignorance first of the time limit and then of the entitlement to seek an extension of time would clearly be liable to the client, at least for the loss of the opportunity to seek an extension of time and to succeed in the action.
8. This was not an appropriate case to enter summary judgment on the pleadings. There will no doubt be cases where it is appropriate to do so: see eg the observations of Barrett JA in *Donnellan* at [260]-[263] and applied in *Bolt v Carter* [23012] NSWCA 89. The pleadings in that case readily identified the scope of the impugned conduct.

# CONCLUSION

1. We therefore grant the appellant leave to appeal and allow the appeal and set aside the orders made on 3 October 2014. The matter should be remitted to the primary judge for further hearing. Hopefully, having regard to the difficulties which the primary judge had in addressing and identifying the appellant’s points, and the benefits apparent from the assistance of counsel in this matter, he will be legally represented as the matter proceeds. As we have also remarked, the statement of claim clearly requires amendment and better particularisation. It, or parts of it, may not survive a further application to be struck out because it (or parts of it) when refined may clearly assert conduct or omissions which is or are within the immunity or for other proper reasons. That is a matter for the primary judge.
2. The respondent should pay to the appellant his costs of the application for leave to appeal and the appeal. We do not deal with the costs of the interlocutory application before the primary

judge, as in our view, they ought to be decided in conjunction with any application to amend the statement of claim.

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| I certify that the preceding ninety‑eight (98) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Mansfield, Siopis and Rares. |

Associate:

Dated: 5 June 2015