IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S170 of 2016

BETWEEN

DAVID KENDIRJIAN
Appellant

and

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EUGENE LEPORE
First Respondent

JIM CONOMOS
Second Respondent

APPELLANT'S REPLY

20 **Part I: Certification**

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

Part II: Reply

2 At page 1, paragraph 3 of his written submissions dated 19 August 2016 (**SRS**) the second respondent premises a submission that the immunity should apply on a distinction between the facts of *Attwell's Case* and this case. That submission fails to grapple with the functional connection requirement held by the High Court in *Attwells*. That is, the distinction to which the second respondent alludes does not absolve the facts of this case from the functional connection requirement annunciated in *Attwell's* at [5] namely, that for
30 the intimate connection required to attract the immunity there must be a functional connection between the impugned conduct and the judge's decision. Whilst the second respondent [page 3, paragraph 2 of SRS] acknowledges that the High Court in *Attwell's* held there must be a functional connection between the advocate's work and the judge's decision for the immunity to apply, the second respondent fails to reconcile that acknowledgment with his submission at page 1, paragraph 3 SRS.

3 The second respondent's submission at page 3, paragraph 5 of the SRS falls within the realms of what the majority said in *Attwell's* at [41]. On the appellant's case, the respondents did not communicate the Settlement Offer to him only that it was "too low"
40 and then they rejected the Settlement Offer absent any instructions from the appellant. The continuation of the proceedings was inevitable. The second respondent's submission that the advice that it was "too low" was integral to the conduct of the case in the sense used in *D'Orta* again fails to grapple with the functional connection requirement held by the High Court in *Attwells*. The extension of the immunity sought by the second respondent by his submission at page 3, paragraph 5 seeks "to decouple the immunity from the protection of the exercise of judicial power against collateral attack. Such an extension undermines the

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notion of equality before the law by enlarging the circumstances in which lawyers may be unaccountable to their client.": see *Attwells* at [41].

4 In response to SRS page 3, paragraphs 7 to 11, McHugh J in *D'Orta* at 52 [154] provides examples of work where courts have held was intimately connected with the conduct of a cause. The majority in *Attwell's* at [43] explains what McHugh J said in *D'Orta* at 51-52 [152-153]. At [153] McHugh J in D'Orta explains how a plea of guilty at committal is intimately connected with the hearing of the matter because the timing of the plea affects a judicial determination namely, the sentence imposed. The second respondent's submission [SRS page 3, paragraph 7] that what the majority said in *Attwell's* was obiter and inconsistent with the statements made by McHugh J in *D'Orta* at 52 [154] is misconceived.

5 It is simply anomalous for the second respondent to suggest [SRS page 4, paragraph 8] that concepts such as "conduct of the case in court" and "work in court" are "restrictive" and that all that is required to invoke advocates immunity is the justification for that rule, finality of litigation. Such suggestions overlook what the majority said in *Attwell's* at [5] where it was held:

> "As will be seen from a closer consideration of the reasoning in *D'Orta*, the public policy, protective of finality, which justifies the immunity at the same time limited its scope so that its protection can only be invoked where the advocate's work has contributed to the judicial determination of litigation."

6 The second respondent's submission [SRS page 5, paragraph 14] that the principle of finality is engaged is bedeviled by what the majority said in *Attwell's* at [48] – [49]. A mere historical connection between the failure to communicate the Settlement Offer on the basis that the offer was "too low" and the continuation of the proceedings which inevitably resulted in an outcome, in the sense that one event precedes another as a necessary condition of its occurrence, does not construct the required functional connection.

7 While the second respondent seeks [SRS page 5, paragraphs 15 - 16] to present the appellant's case as an unwarranted simplification, he does not factor in sub-paragraphs 20.1 (i) and (ii) of the Amended Statement of Claim which allege the second respondent did not provide him with advice as to the range of outcomes in the proceedings and more specifically, that a realistic range of outcomes would have been around $415,984 to $850,861. The second respondent's view of the appellant's case is flawed. As the majority said in *Attwell's* at [49]:

> "The central question would not be whether the court was right or wrong, but whether such advice was reasonable in all of the circumstances know to the advisor at the time the advice was given."

8 The appeal should be allowed with costs.

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