SUPREME COURT OF QUEENSLAND

CITATION:	*Smith v Jones Mitchell Lawyers (A Firm)* [2019] QSC 164
PARTIES:	**Robyn Gaye Smith** (plaintiff) **v** **Jones Mitchell Lawyers (A Firm)** (defendant)
FILE NO:	BS 9197 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	27 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2019
JUDGE:	Brown J
ORDER:	**The orders of the Court are:** **1. The application is dismissed.** **2. I will hear the parties as to costs.** **And the Court directs that:** **1. The parties liaise with the Associate to Justice Brown to fix a date for a hearing as to costs if the order cannot otherwise be agreed.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – DUTIES AND LIABILITIES – COUNSEL AND CLIENT – NEGLIGENCE – IMMUNITY FROM SUIT – where the defendant was retained by the plaintiff to assist her to obtain a binding and enforceable settlement with her former husband – where the plaintiff contends the defendant was negligent and breached the parties' contract in providing her with mediation advice and compromise advice as a result of which she entered an agreed property settlement with her former husband –

where after the settlement agreement was reached a registrar of the Federal Magistrates Court made consent orders at the request of the plaintiff and her former husband under s 79 of the *Family Law Act 1975* (Cth) giving effect to the agreement – where the defendant contends the making of the orders itself required the resolution of issues by the exercise of judicial power and any claim in respect of the work done leading to the settlement is therefore barred by advocate's immunity – whether advocate's immunity extends to negligent advice leading to a settlement even where the settlement is made effective by Court orders requiring the exercise of judicial power

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – where the defendant applies for summary judgment pursuant to r 293 of the *Uniform Civil Procedure Rules 1999* (Qld) – whether the defendant has a defence of advocate's immunity which is so strong and complete that the claim ought to be terminated on the basis it has no real prospects of success and the matter should not proceed to trial

Family Law Act 1975 (Cth), s 79, s 90C

Uniform Civil Procedure Rules 1999 (Qld) r, 293

Attwells v Jackson Lalic Lawyers Pty Ltd (2016) 259 CLR 1, considered

Bolton Properties Pty Ltd v JK Investments (Australia) Pty Ltd [2009] 2 Qd R 202, cited

D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1*,* cited

Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232, applied

Giannarelli v Wraith (1988) 165 CLR 543*,* cited

Goddard Elliott (a firm) v Fritsch [2012] VSC 87, considered

Harris v Caladine (1991) 172 CLR 84, considered

In the Marriage of Hickey (2003) 30 Fam LR 355, applied.

Kelley v Corston [1998] QB 686, cited

Kendirjian v Lepore (2017) 259 CLR 275, considered

Manny v David Lardner & Associates [2018] ACTSC 159, cited

MSP v Adams Maguire Sier Lawyers (Legal Practice) [2017] VCAT 658, considered

Palermo v National Australia Bank Ltd [2017] QCA 321, cited

Raging Thunder Pty Ltd & Anor v Bank of Western Australia Ltd

[2012] QSC 329, applied

Rogers v Roche (No 1) [2017] 2 Qd R 306, considered

Spralja v Bullards [2017] VSCA 32, cited

COUNSEL:	KA Barlow QC with S Minnery for the plaintiff RPS Jackson QC with AR Nicholas for the defendant
SOLICITORS:	Tucker & Cowen for the plaintiff Bartley Cohen for the defendant

The nature of the application

[1] Robyn Smith and her husband, Peter Smith, separated after approximately nine years. Ms Smith engaged Jones Mitchell Lawyers as her solicitors to advise and represent her in relation to the separation. In particular, she retained Jones Mitchell to assist her to obtain a binding and enforceable settlement with her husband. A mediation occurred and an Agreed Property Settlement was reached. Following the settlement being reached, in order to give effect to the Agreed Property Settlement, the Federal Magistrates Court made consent orders at the request of Robyn Smith and Peter Smith on 17 October 2007.

[2] Ms Smith contends that Jones Mitchell breached their contract with her and were negligent in providing her with mediation advice and compromise advice in respect of the Agreed Property Settlement. Ms Smith sues for the loss of opportunity to obtain a greater settlement said to have been caused by the mediation advice and compromise advice. Jones Mitchell contends that the claim is barred as a result of advocate's immunity and applies for summary judgment in respect of the claim in relation to the Agreed Property Settlement. A claim by Ms Smith in respect of a child support agreement is not the subject of this application.

[3] Ms Smith contends that advocate's immunity does not apply because the legal advice provided is outside the scope of the immunity.

[4] In particular, there is a dispute as to the effect of the High Court judgment in *Attwells v Jackson Lalic Lawyers Pty Ltd*[1] and whether the High Court carved out an exception to its decision whereby the immunity does not extend to negligent advice leading to a settlement even where the settlement is made effective by court orders requiring the exercise of judicial power.

[5] The question which falls to be determined by this Court is whether it can be satisfied to the high degree of certainty required that advocate's immunity applies and acts as complete bar to the claim by Ms Smith.

Legal principles: summary judgment

[6] The principles of summary judgment are well-established and uncontroversial.

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1 (2016) 259 CLR 1.

[7] For summary judgment to be granted, Jones Mitchell must satisfy the Court that the plaintiff has no real prospect of succeeding on all or part of the plaintiff's claim, that a trial is unnecessary and that it is better to end proceedings than proceed to a contest. The Court should not decide the issues raised in proceedings in a summary way except in the clearest of cases.

[8] In *Deputy Commissioner of Taxation v Salcedo,*[2] Williams JA (with whom McMurdo P and Atkinson J agreed) stated:

> "… ultimately the rules are there to facilitate the fair and just resolution of the matters in dispute. Summary judgment will not be obtained as a matter of course and the judge determining such an application is essentially called upon to determine whether the respondent to the application has established some real prospect of succeeding at trial; if that is established then the matter must go to trial."

[9] In the present case, Jones Mitchell contends that advocate's immunity bars the agreed property settlement claim, assuming the facts as pleaded on behalf of Ms Smith are established such that the question to be determined is one of law.[3]

[10] Ms Smith submits, however, that there are factual matters which have to be tried in order to determine the application of advocate's immunity in the present case, which she contends is uncertain.

[11] In Raging Thunder Pty Ltd & Anor v Bank of Western Australia Ltd, Applegarth J stated:[4]

> "[14] If that demanding criterion in the first limb of r 293(2) is satisfied, then in a matter in which the facts are not in contention, the second limb also may be satisfied. There may be no need for a trial because, even assuming in the plaintiff's favour that it will prove the facts pleaded by it, its claim will fail as a matter of law. If the claim is precluded as a matter of law, a trial may not be needed, and will be productive of unnecessary costs.
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> [15] In some cases, the extent and complexity of questions of law may warrant a trial of those issues. In other cases, where the facts are not in dispute and the rights of the parties turn upon questions of law, the Court may give summary judgment even where the point of law is difficult." (footnotes omitted)

The pleaded case

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2 [2005] 2 Qd R 232 at [17].

3 See, for example: *Ligon Sixty-Three v ClarkeKann* [2015] QSC 153 at [36], in which McMurdo J refused an application for joinder of the solicitors on the basis that the immunity would apply if the pleaded facts were established.

4 [2012] QSC 329 at [14]-[15].

[12] The following matters are pleaded in the Further Amended Statement of Claim which, for the purposes of this application for summary judgment, may be treated as uncontroversial.

[13] After separating from Mr Smith, Ms Smith engaged Jones Mitchell to provide legal advice and representation in respect of family law matters arising from her marital separation. In particular, she instructed Jones Mitchell to assist her to obtain:

(a) A binding and enforceable property settlement with Mr Smith on fair and reasonable terms;[5] and

(b) A binding and enforceable award for child support for the infant children on fair and reasonable terms.[6]

[14] Mr Smith was a wealthy individual. Ms Smith herself had no significant assets, income or resources prior to the marriage.[7]

[15] Jones Mitchell advised the solicitors for Mr Smith that Ms Smith was ready, willing and able to commence proceedings in the Family Court of Australia against Mr Smith for orders facilitating a fair and reasonable property settlement between them should she consider it necessary or appropriate to do so. Jones Mitchell retained Mr Grahame Richardson SC in or about June 2007 to advise and represent Ms Smith.

[16] For the purposes of the property settlement, Mr Smith provided a report by Robert Calabro and a spreadsheet prepared by Charles Mobrici, the Chief Financial Officer of the SCT Group, of which Mr Smith was the CEO and major shareholder.

[17] Jones Mitchell initially indicated to Habermann and Associates, the solicitors acting on behalf of Mr Smith, by correspondence in June and July 2007 that the parties needed to obtain an independent forensic accountant's report as to the size and value of the matrimonial asset pool.[8]

[18] In August 2007, Jones Mitchell advised Ms Smith that despite the contents of the correspondence to Habermann and Associates, it would be appropriate for her to:

(a) Participate in the mediation without obtaining a report from an independent forensic accountant as to the size and value of the matrimonial asset pool for the purposes of the mediation;[9]

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5 [6.1] of the FASOC.

6 [6.2] of the FASOC.

7 [7.1] and [7.2] of the FASOC.

8 [13.3] and [13.6.2] of the FASOC.

9 [14.1] of the FASOC.

(b) Participate in the mediation on the basis that the matrimonial asset pool for the purposes of the mediation would be agreed by her and Mr Smith to be in the range of $160 million to $200 million;[10] and

(c) With the assistance of Jones Mitchell, Mr Richardson SC and the mediator, negotiate a property settlement on fair and reasonable terms if Mr Smith was to agree for the purposes of mediation that the matrimonial asset pool fell within the agreed range of $160 million to $200 million.[11] ("**Mediation Advice**")

[19] Ms Smith acted on that advice.

[20] Ms Smith contends that at the time the mediation advice was provided, the matrimonial asset pool was in fact significantly more extensive than described and greater than the range of $160 million to $200 million, that the Calabro report was incomplete and out of date and the Mobrici spreadsheet was not objective, given its author's employment by Mr Smith.

[21] It is further alleged that letter from Mr Richardson SC as to the fact that the agreed range for the matrimonial asset pool may be an under-estimation of the actual asset pool, , was not shown to Ms Smith and should have been.[12]

[22] For the purposes of the mediation, Ms Smith and Mr Smith accepted the value of the matrimonial asset pool was $180 million and the matter was settled on the basis that Ms Smith would receive assets and resources with an agreed combined value of approximately $21.5 million. ("**Agreed Property Settlement**") Child support arrangements were ordered to be made separately.[13]

[23] At the conclusion of the mediation, Ms Smith and Mr Smith reached an agreement that, amongst other things:

(a) Ms Smith was to receive the benefit of the Agreed Property Settlement on certain terms;

(b) Mr and Ms Smith would request from the Federal Magistrates Court consent orders, declarations and notations to give effect to the Agreed Property Settlement.[14]

[24] Amended Particulars of that Agreed Property Settlement were provided on the day of the hearing of this application. It is said to have been in writing, comprising a document setting out its terms which was signed by each of the parties and their solicitors and dated 3 October 2007. The agreement was partly oral and partly to be implied from the heading and prefatory words of the Agreed Property Settlement.

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[10] [14.2] of the FASOC.

[11] [14.3] of the FASOC.

[12] [20A]-[20B] of the FASOC.

[13] [23A] of the FASOC.

[14] [23] of the FASOC.

[25] Mr Jones of Jones Mitchell is said to have advised Ms Smith that the offer was a good offer ("**Compromise Advice**"). He apparently did not advise her to counter offer or reject the offer.[15]

[26] Ms Smith claims that the mediation advice and compromise advice were given in breach of Jones Mitchell's duty and that it should have advised her that it was unwise to proceed to mediation on the basis she did and to commit to the Agreed Property Settlement on the basis of the information then known as to the size and value of the matrimonial asset pool. Ms Smith further claims Jones Mitchell should have advised her of the deficiencies in the information provided by Mr Smith and that it would be unwise for her to continue to participate in the mediation on the basis of that information and that she should have obtained an independent forensic accountant's report.

[27] On 17 October 2007, the Federal Magistrates Court of Australia at Brisbane made the consent orders at the request of Mr and Ms Smith, thereby giving effect to the Agreed Property Settlement.[16]

[28] The material which was filed in support of the application for orders under s 79(2) of the *Family Law Act 1975* (Cth) referred to the agreed pool of $160 million to $200 million for the purposes of mediation,[17] as well as making reference to the report of Calabro Consulting, the schedules prepared by Mr Mobrici and other documents.[18] The Calabro report and the spreadsheets of Mr Mobrici were annexed as A1 and A2.[19] Ms Scott's affidavit also annexes the orders that were made by the Federal Magistrates Court.

[29] No proceedings had been issued prior to the parties applying for the orders under s 79(2) of the *Family Law Act* from the Federal Magistrates Court. An application for consent orders was then made[20] by Ms and Mrs Smith. The orders were made by a registrar of the Federal Magistrates Court and record that they are by consent.

[30] Ms Smith alleges that had she received the advice she should have been given, she would have followed the advice, obtained better evidence and therefore obtained a better outcome at any mediation or a trial.[21] This is on the basis the pool would have been greater and she would have obtained a greater proportion of the pool.[22]

[31] She claims that she has lost the chance to obtain better evidence and negotiate a better settlement or to commence proceedings and achieve a better outcome.

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15 [27] of the FASOC.

16 [32] of the FASOC.

17 Affidavit of R Scott, Exhibit 1, p 32.

18 Affidavit of R Scott, Exhibit 1, p 31.

19 Affidavit of R Scott, Exhibit 1, p 31.

20 Affidavit of R Scott, Exhibit 1, p 7.

21 [17A] of the FASOC.

22 [26] and [26A] of the FASOC.

Contentions

[32] Jones Mitchell contends that the simple question that arises for determination is whether the consent orders made reflect a voluntary agreement reached between the parties or whether the making of the orders itself required the resolution of issues by the exercise of judicial power. Jones Mitchell contends it is the latter case and the defence of advocate's immunity is a complete bar to the claim of Ms Smith in respect of the Agreed Property Settlement.

[33] Jones Mitchell contends that central to the determination of this application is the plaintiff's pleading of allegations that:

(a) She retained Jones Mitchell to assist her to obtain a binding and enforceable property settlement with Mr Smith; and

(b) Following the mediation, the Federal Magistrates Court made the consent orders at the request of the parties, thereby giving effect to the Agreed Property Settlement.

[34] It contends that while the Federal Magistrates Court made consent orders, it only did so after considering whether the proposed orders were "just and equitable" as required by s 79(2) of the *Family Law Act* and being satisfied that was the case. The orders were necessary to make the agreement binding and give effect to the settlement. According to Jones Mitchell, absent those orders, no binding or enforceable agreement would have existed. Given the Court is required to exercise a discretion to give approval to the settlement and make a determination as to whether the orders are "just and equitable", Jones Mitchell submits that there was personal participation by the registrar in assessing the merits of the orders and that they represent a final determination of the proceeding for the purposes of the application of advocate's immunity.

[35] It is uncontentious that the registrar, who is an officer of the Court, was obliged to consider the matters under s 79(2) of the *Family Law Act* in order to determine whether it was just and equitable to give effect to the minutes of the consent orders signed by the parties.[23]

[36] Jones Mitchell contends that there was a functional connection between the orders made and the impugned work of Jones Mitchell. It contends the orders were necessary to make the agreement reached in principle at the mediation binding and give effect to the settlement.

[37] Ms Smith contends that all the acts or omissions that Ms Smith pleads constitute negligence and breach of retainer by Jones Mitchell occurred prior to the filing of the application for the consent orders ultimately made by the Federal Magistrates Court. She contends that advocate's immunity does not extend to negligent advice which leads to settlement of a claim in civil proceedings. The work of Jones Mitchell was, she contends, completed for the most part between February 2007 and 3 October 2007 when an agreement was reached. The mediation advice and compromise advice did not have the required intimate connection with the orders made by the Federal Magistrates Court to attract advocate's immunity. She submits that her claim impugns the agreement reached

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[23] *Family Law Act 1975* (Cth), s 38N(1)(b).

on 3 October based on negligent advice and does not seek to impugn the order of the Court.

[38] In particular, Ms Smith's counsel emphasised that:

(a) The mediation advice was given some three months before the Court order;

(b) At the time of the mediation any agreement reached was not necessarily an agreement that needed to be or could be approved by the Court under the *Family Law Act*;[24]

(c) The application for consent orders, which recorded the agreement reached and the basis of the agreement, was filed and the orders were made on the same day without any need for appearances. There was no quelling of a controversy by the registrar in making the orders given they were with the parties' consent;[25]

(d) Ms Smith does not seek to argue that the Federal Magistrates Court ought not to have made the orders sought but rather that the settlement was reached based on mediation advice and compromise advice said to be negligent. Therefore the claim does not involve a collateral attack on judicial conduct. Ms Smith does not contend that the orders should not have been made on the basis that was jointly put to the Court officer by the parties;

(e) The orders made by consent pursuant to s 79 of the *Family Law Act* fall within the category of case that the High Court in *Attwells*[26] declined to decide, such that it cannot be said that the plaintiff's case is doomed to fail or has no prospects of success;

(f) The advice that the offer was a good offer was akin to advice to cease litigating which does not attract the immunity as it does not affect the judicial determination of the case;[27]

(g) The Court would need to take into account the facts and circumstances in which the impugned conduct occurred in order to determine whether the immunity was attracted.[28]

Order under s 79 *Family Law Act*

[39] Section 79 of the *Family Law Act* relevantly provides:

"**79 Alteration of property interests**

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[24] It could have been done by the parties under s 90C of the *Family Law Act 1975* (Cth).

[25] *Harris v Caladine* (1991) 172 CLR 84 at 101 per Brennan J.

[26] At [60]-[61].

[27] *Attwells* at [50].

[28] Drawing upon the discussion of Fraser JA in *Rogers v Roche (No 1)* [2017] 2 Qd R 306 at [27] and further the decision in *Manny v David Lardner & Associates* [2018] ACTSC 159, where McWilliam AsJ stated at [32] that the question of whether or not advocate's immunity applied may be a question of fact and degree.

(1) In property settlement proceedings, the court may make such order as it considers appropriate…

(2) The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

(4) in considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account:

(a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and

(b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and

(c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent; and

(d) the effect of any proposed order upon the earning capacity of either party to the marriage; and

(e) the matters referred to in subsection 75(2) so far as they are relevant; and

(f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and

(g) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage."

[40] The Family Court of Australia considered the requirement that an order be "just and equitable" in *In the Marriage of Hickey.*[29] The Court in that case identified that the preferred approach was to follow four steps:[30]

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[29] (2003) 30 Fam LR 355.

[30] (2003) 30 Fam LR 355 at [39].

> "The case law reveals that there is a preferred approach to the determination of an application brought pursuant to the provisions of s 79. That approach involves four inter-related steps. First, the court should make findings as to the identity and value of the property, liabilities and financial resources of the parties at the date of the hearing. Second, the court should identify and assess the contributions of the parties within the meaning of s 79(4)(a), (b) and (c) and determine the contribution based entitlements of the parties expressed as a percentage of the net value of the property of the parties. Third, the court should identify and assess the relevant matters referred to in s 79(4)(d), (e), (f) and (g), (the other factors) including, because of s 79(4)(e), the matters referred to in s 75(2) so far as they are relevant and determine the adjustment (if any) that should be made to the contribution based entitlements of the parties established at step two. Fourth, the court should consider the effect of those findings and determination and resolve what order is just and equitable in all the circumstances of the case." (internal references omitted)

[41] Counsel for Ms Smith accepted that the making of an order under s 79 of the *Family Law Act* by a registrar is an exercise of judicial power.[31]

Advocate's immunity

[42] The High Court has recently considered the application of advocate's immunity to out of court work, particularly in relation to advice leading to settlements in *Attwells v Jackson Lalic Lawyers Pty Ltd,*[32] and advice not to settle in the case of *Kendirjian v Lepore*.[33]

[43] In *Rogers v Roche (No 1),*[34] Fraser JA stated that the test established by *Attwells* for advocate's immunity in relation to out of court work is "whether that work was intimately connected with in court work, in the functional sense that the work affected both the conduct of the case in court and the resolution of the case by that court".[35] His Honour noted that while the test was expressed in terms which are unambiguous and quite specific, its application may be debateable in certain cases and it is necessary to take into account the underlying rationale for the advocate's immunity in such cases.[36] In that regard, he stated that *Attwells* is authority for the propositions:[37]

> "…that advocate's immunity is attracted by the advocate's participation as an officer of the court in the quelling of controversies by the exercise of judicial power and that the immunity is grounded in the high value which the law attributes to certainty and finality of judicial decisions and the consequential

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[32] (2016) 259 CLR 1.

[33] (2017) 259 CLR 275.

[34] [2017] 2 Qd R 306.

[35] At [26].

[36] At [27].

[37] At [27].

> undesirability of allowing collateral attacks on those judicial decisions."
> (footnotes omitted)

[44] In *Attwells*,[38] the High Court refused to reconsider the advocate's immunity from suit, which had been confirmed to be part of the common law of Australia in *Giannarelli v Wraith*[39] and in *D'Orta-Ekenaike v Victoria Legal Aid*.[40] In *D'Orta-Ekenaike*, the High Court extended advocate's immunity to protect a solicitor involved in the conduct of litigation. This further extended the immunity from that decided in *Giannarelli*, which held that advocate's immunity extends to work done out of the Court which leads to a decision affecting the conduct of the case in Court.[41]

[45] In *Attwells*, the majority[42] considered that the immunity was justified by "the specific concern that once a controversy has been finally resolved by the exercise of the judicial power of the State, the controversy should not be reopened by a collateral attack which seeks to demonstrate that that judicial determination was wrong".[43]

[46] The majority considered that the public policy protecting finality which justifies the immunity also limits the scope of the immunity, such that its protection can only be invoked where the advocate's work has contributed to the judicial determination of the litigation.[44]

[47] At [6], the majority stated that:

> "In short, in order to attract the immunity, advice given out of court must affect the conduct of the case in court and the resolution of the case by that court. The immunity does not extend to preclude the possibility of a successful claim against a lawyer in respect of negligent advice which contributes to the making of a voluntary agreement between the parties merely because litigation is on foot at the time the agreement is made. That conclusion is not altered by the circumstance that, in the present case, the parties' agreement was embodied in consent orders."

[48] In *Attwells*, the majority of the High Court determined that the immunity did not extend to negligent advice of solicitors which led to the settlement of a claim in civil proceedings. In that regard, the majority stated that while advice to settle or not settle is connected with the case insofar as the advice leads to the end of a case or its continuation, the connection is a mere historical connection. Neither piece of advice affects the judicial determination

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38 (2016) 259 CLR 1.

39 (1988) 165 CLR 543.

40 (2005) 223 CLR 1.

41 (1988) 165 CLR 543 at 560, per Mason CJ.

42 French CJ, Kiefel, Bell, Gageler and Keane JJ.

43 At [34].

44 At [5].

of a case and therefore both fail to satisfy the functional nature of the intimate connection required by the public policy which sustains the immunity.[45]

[49] The majority in *Attwells* rejected the argument that the position was different because the Court had made consent orders following agreement being reached between the parties. The majority did not accept, on the facts of *Attwells*, that a compromise, which was encapsulated by the parties in a consent order, was no less effective to quell controversy than if it had followed a contested hearing. Notwithstanding that the consent order had been made, the majority found that the primary judge made no finding of fact or law which resolved the controversy between the parties. This was supported by the fact that the compromise did not lead to the resolution of any issues in the proceedings, but rather a new charter of rights between the parties.[46] The majority therefore determined that the consent order did not involve an exercise of judicial power, being an agreement of the parties that settled its terms.[47]

[50] At [60] to [61] of the reasons, the majority in *Attwells* stated:

> "[60] The respondent also argued that cases involving settlements may involve a collateral challenge to judicial conduct because, in some cases where a case is resolved by settlement, the judge is required to be satisfied that the orders should be made.
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> [61] It may be acknowledged that there are many cases where, although the parties have agreed upon the terms of the order which a court is asked to make, the making of the order itself requires the resolution of issues by the exercise of judicial power. Examples include where representative proceedings are settled, or where proceedings on behalf of a person under a legal incapacity are to be compromised, or where agreements are made in relation to proceedings under ss 86F, 87 and 87A of the *Native Title Act 1993* (Cth). Other examples include the exercise of the judicial discretion to allow an agreement to amend a patent granted under the *Patents Act 1900* (Cth), and the compromise of certain debts under s 477(2A) and (2B) of the *Corporations Act 2001* (Cth). It is not necessary to consider such cases here." (internal references omitted)

[51] Both Jones Mitchell and Ms Smith rely on the acknowledgment of the High Court at [61] in support of their contentions. Jones Mitchell contends that [61] identifies a category of cases where advocate's immunity would apply. The examples given by the majority

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[45] At [49].

[46] At [55].

[47] At [62].

included court orders following representative proceedings which are settled or where the sanction of the Court is required.[48]

[52] Jones Mitchell contends that an order made under s 79 of the *Family Law Act* is of a similar nature to those outlined by the High Court at [61], requiring the Court to be satisfied that the order is "just and equitable" before making the order. Counsel for Jones Mitchell contends that given the guidance of the majority of the High Court in its reasons and its explanation as to the rationale underlying the immunity, there is no doubt that the High Court at [61] was stating that orders of the kind made under s 79 of the *Family Law Act* were an exception carved out in relation to out of court work which led to a settlement and consent orders being made. If work done leading to an order by consent required the exercise of judicial power, it would be a case where advocate's immunity would apply to the work done. Ms Smith accepts orders made under s 79 of the *Family Law Act* are within the category of cases referred to by the majority in [61]. She, however, contends that the majority left the law in respect of that category of cases undecided and such a case remains open to be considered.

[53] Jones Mitchell relied upon a decision of Hampel J in *MSP v Adams Maguire Sier Lawyers (Legal Practice)*[49] as supporting its contention. In *MSP*, her Honour regarded [61] of *Attwells* as carving out an exception of orders made by consent to which advocate's immunity could apply. In that case, her Honour had to determine whether consent orders which had been agreed between the parties required the resolution of issues by the exercise of judicial power and advocate's immunity barred the claim. The plaintiff had sought to raise a claim against the solicitors based on negligent advice given, which was said to have resulted in a settlement that was unfavourable to him and incorrect advice that the Family Court had jurisdiction. The solicitors sought to raise advocate's immunity as a bar to the claim in respect of the advice allegedly given negligently.

[54] Her Honour held that the case fell squarely within the exception identified by the majority in [61] of the reasons for judgment in *Attwells*. Her Honour found that on the evidence, the registrar was considering the matters required under s 90SM(4) of the *Family Law Act* in order to determine whether it was just and equitable to make orders in terms of the minutes of consent orders signed by the parties.[50] Her Honour summarily dismissed the claim in negligence against the solicitors on the basis that advocate's immunity provided a complete bar to MSP's claim.

[55] Counsel for Ms Smith contends that Hampel J misconstrued [61] of *Attwells* in finding that it positively carved out an exception, noting that her Honour had omitted the final sentence of [61] when referring to *Attwells*, namely "[i]t is not necessary to consider such cases here*".* They also note that her Honour had referred to the active participation by the

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[48] *Federal Court of Australia Act* 1976 (Cth), s 33V, which requires the approval of the Court, a sanction of a settlement of a person who is under legal incapacity or approval of a compromise of certain debts under s 477(2A) and (2B) of the *Corporations Act 2001* (Cth).

[49] [2017] VCAT 658.

[50] At [31]; s 90SM(4) is in similar terms to s 79 in respect of de factos.

registrar with the applicant to make sure he was satisfied with the agreement before making the orders, as being a distinguishing feature from the present case.[51]

[56] Jones Mitchell also referred to a decision of Bell J in *Goddard Elliott (a firm) v Fritsch* in support of its position.[52] That case was decided prior to *Attwells.* Caution must therefore be exercised before relying on such a case. However, Jones Mitchell submits that the reasoning of Bell J in that case was consistent with that of *Attwells.*

[57] Bell J in *Goddard Elliott* held that a claim for negligence against solicitors arising out of work leading to a decision which resulted in a settlement, with the making of orders under s 79 of the *Family Law Act* by consent, was barred by advocate's immunity. His Honour found that the work was intimately connected with the conduct of the family law proceedings which resulted in the Court determining whether the proposed orders were just and equitable. Short reasons were given by the Court in approving the orders under s 79 of the Act, which again was pointed to by counsel for Ms Smith as a distinguishing feature from the present case.[53] Bell J stated that there was personal participation by the Judge in the merits of the orders and that they represented a final determination of the proceeding for the purposes of the application of the immunity.[54]

[58] His Honour however rejected the argument that it was appropriate to examine "the reality of the deliberation which was given to the proposed orders by the trial judge",[55] stating that for the purposes of immunity, "the final character of the court's determination results from the exercise of the judicial responsibility of the court to approve or otherwise consider the merits of the proposed orders, not from the quality or extent of the approval or consideration which was given in fact".[56] His Honour stated that on the current state of the law it was not appropriate to go into any of those matters.[57]

[59] Bell J concluded that the trial judge had exercised his judicial responsibility to make the consent orders only after finding them just and equitable. For the purposes of the immunity, that is a final judicial determination of the proceeding, and the immunity would apply.

[60] *Goddard Elliott* was referred to by the Victorian Court of Appeal in *Spralja v Bullards*.[58] It was, however, only referred to in the context of having been relied upon by the primary Judge. In that case, the Victorian Court of Appeal set aside summary judgment given on the basis that advocate's immunity barred the claim, stating that the conclusion that the

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51 At [31]-[32]

52 [2012] VSC 87.

53 At [361].

54 At [813].

55 At [814].

56 At [815].

57 Relying on *Kelley v Cortson* [1998] QB 686, per Pill LJ.

58 [2017] VSCA 32.

claim had no reasonable prospects of success could not be sustained in light of the decision in *Attwells*. According to the Victorian Court of Appeal, the majority in *Attwells* recognised that the foundation of the immunity relates to the exercise of judicial power and that:[59]

> "The protection afforded by the immunity arises out of the connection between a lawyer's work and the judicial determination of a controversy for which a court is responsible. It does not extend to the compromise or settlement of a proceeding, even where that settlement is recorded in consent orders by a court, because the substantive resolution of the dispute does not involve the exercise of judicial power by a court."

[61] The Court did not, however, determine whether advocate's immunity applied and in particular considered that it was not appropriate for it to determine the issue as there were factual matters that had to be resolved as to the circumstances in which the order was made. It commented that the question of the status of the original judgment and whether it reflected the consent of the parties or involved a judicial determination on the merits was not properly agitated below.[60] The Victorian Court of Appeal considered that it would not be appropriate for it to seek to apply *Attwells* to the circumstances of the case when those factual issues remained unresolved.[61]

[62] Subsequent to *Attwells,* the High Court in *Kendirjian v Lepore*[62] considered the application of advocate's immunity to advice given not to compromise a proceeding. In that case, Edelman J delivered the decision of the Court. His Honour rejected an argument that advocate's immunity applied to advice given not to compromise a proceeding. In that case, in the course of his reasoning, his Honour found that a negligence action against the solicitor would not give rise to the possibility of challenging findings of the District Court as to the plaintiff's credibility and stated at [34] that:

> "From the perspective of the second respondent, issues concerning the reasonableness of advice given will be assessed at the time the advice was given, not at the time of the District Court judgment. The assessment of reasonableness will not involve any consideration of whether the decision of the District Court, affirmed by the Court of Appeal, was right or wrong whether in relation to credibility or otherwise."

[63] Ms Smith's counsel submits that Ms Smith would be the same position in the present case, where the mediation advice was given some months prior to the Agreed Property Settlement and Court orders and the compromise advice was given prior to the entry into the Agreed Property Settlement, such that there would be no challenge to the orders themselves. The reasonableness of the advice given would be assessed at the time it was given and as such, she contends there is no intimate connection between the advice given and the conduct of the case in court to establish the functional connection required for advocate's immunity.

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[59] At [46].

[60] At [53].

[61] At [53].

[62] (2017) 259 CLR 275.

Consideration

[64] The question in this application is whether I can be satisfied, to a high degree of certainty, that the conduct of Jones Mitchell said to give rise to negligence and/or breach of contract is so intimately connected with the conduct of the case in obtaining the orders pursuant to s 79 of the *Family Law Act* that Jones Mitchell has a defence so strong and complete that the agreed property settlement claim ought to be terminated, on the basis it has no real prospects of success and the matter should not proceed to trial.

[65] There is no real factual dispute between the parties requiring resolution, since counsel for Jones Mitchell contend that advocate's immunity applies to bar the Agreed Property Settlement claim on the basis of the facts pleaded by Ms Smith. Ms Smith's counsel, however, contends this matter requires a trial to examine the factual context in which the impugned conduct occurred. They contend that the mediation advice and compromise advice was not work done that bears upon the judge's determination of the case[63] because it was remote in time and there were no proceedings on foot at the time the advice was given. The advice given was akin to advice to cease litigating, which the majority in *Attwells* stated did not affect the judicial determination of the case.[64]

[66] For the following reasons, I do not regard the defence of advocate's immunity as being so strong and complete that summary judgment should be granted, The present case may potentially be an exception to the majority's decision in *Attwell's*, which Fraser JA in *Rogers v Roche (No 1)* described as follows:[65]

> "The majority observed of their conclusion that advocate's immunity is not attracted to negligent advice which contributes to the making of settlement during litigation that the conclusion was "not altered by the circumstance that, in the present case, the parties' agreement was embodied in consent orders". That was a rejection of an argument that a consent judgment which embodied the compromise quelled the controversy as effectively as a judgment after a contested hearing, an argument which was based upon propositions that the parties' antecedent rights merged in the consent judgment and that the claim was a collateral challenge to the judgment. In relation to the first proposition the majority observed that "[t]he public policy which sustains the immunity is not offended by recognising the indisputable fact that the terms of the settlement agreement, by reason of which the appellants claim to have been damaged, were not, in any way, the result of the exercise of judicial power". The majority rejected the second proposition upon the ground that the terms of the consent order were settled by the parties' agreement without any exercise of judicial power." (footnotes omitted)

[67] However, there is uncertainty in a case such as this, where there has been some exercise of judicial power in the making of consent orders, as to whether that is sufficient to result

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63 *Attwells* at [46].

64 At [50].

65 [2017] 2 Qd R 306 at [25].

in advice which led to a settlement which otherwise would not be regarded as moving litigation to court, having the functional connection required to attract advocate's immunity. I consider that the High Court in *Attwells* at [61] sought to identify that its reasoning in that case did not necessarily apply to cases where negligent advice led to a settlement in relation to which orders from the Court were sought which required the exercise of judicial power, albeit which were consented to by the parties. That would, as submitted by Jones Mitchell, be consistent with part of the rationale for advocate's immunity identified by the High Court, namely to avoid collateral attacks on judicial decisions.

[68] However, the breadth of any such exception was not resolved by the High Court in *Attwells*.

[69] While her Honour in *MSP* regarded the High Court as having carved out an exception, her Honour did not refer to the last sentence of [61] of *Attwells* in her judgment,[66] nor did her Honour determine the question of whether the test for advocate's immunity was satisfied by reference to the underlying rationale as suggested by Fraser JA in *Roche*.[67]

[70] The statement by the majority in [61] was a not a broad statement of principle. The acknowledgment of the majority in *Attwells* at [61] was in response to the respondent's argument that cases involving settlements may involve collateral challenge to judicial conduct because in some cases the judge is required to be satisfied that the orders should be made.[68] While one would anticipate that, consistent with the rationale for advocate's immunity, [61] identifies cases where the making of an order which arose out of a settlement and involved an exercise of judicial power may attract advocate's immunity, the majority left the question of the breadth of any such exception open. As such I do not find her Honour's judgment that [61] of *Attwells* is settled law persuasive.

[71] While Bell J in *Goddard Elliott* found there was advocate's immunity arising out of work found to be intimately connected with orders made under s 79 of the *Family Law Act* following a settlement being reached, that matter had been the subject of contested proceedings beforehand and the case was decided before *Attwells.* While his Honour in his reasons anticipated in some respects the distinction ultimately made by the High Court in *Attwells*, he stated:[69]

> "However, I do not see anything in the several judgments in *Giannarelli* and *D'Orta-Ekenaike* (including the judgment of McHugh J) permitting me to distinguish between various kinds of binding court orders."[70]

[72] His Honour did not consider the question of any distinction mattered because there was deliberation on the merits by the Judge when the making the order under consideration.

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66 At [10] and [31].

67 At [27].

68 At [60].

69 At [811].

70 See for example [813].

[73] While I consider Bell J's reasoning *Goddard Elliott* persuasive, given it was decided before *Attwells* I do not consider that it is determinative of the present case.

[74] I do agree, however, with Hampel J in *MSP* that orders made under s 90SM of the *Family Law Act* for a settlement of property reached by consent between the relevant parties which the registrar determined was "just and equitable" are orders of the kind identified by the majority of the High Court in *Attwells,* and that would be similarly the case in relation to orders under s 79 of the *Family Law Act.* That was a matter agreed upon by the parties in the present application.

[75] Counsel for Ms Smith sought to contend that while an order made under s 79 of the *Family Law Act* was an exercise of judicial power it was not different from the consent orders the subject of the decision in *Attwells.* That is inconsistent with *Attwells* itself, and with the fact that the Court must determine whether a property settlement is "just and equitable" prior to making orders even if they have been agreed by the parties. That was acknowledged by Brennan J[71] and Dawson J[72] in *Harris v Caladine.* While Brennan J did, as identified by Ms Smith's counsel, state that a consent order was always regarded as a judicial determination of those issues even if they are made in accordance with a contract between the parties, his Honour's comments were made in the context of a consent order made under s 80(1)(j) involving s 79 orders, where the Court still had to be satisfied that the order was "just and equitable".[73]

[76] In my view cases such as this, where advice has been given in respect of a settlement which would, on the basis of the decisions of *Attwells* and *Kendirjian,* not be regarded as having the relevant functional connection and satisfying the test for advocate's immunity, but which involve a subsequent exercise of judicial power, need to be the subject of careful examination to determine whether the test is satisfied.

[77] While Bell J in *Goddard Elliott* stated that the current state of the law was such that it was not appropriate to go into matters relating to the reality of the deliberation, which in my view has much to support it, that may not be the case post *Attwells,* at least to a limited extent.[74] The High Court in *Attwells* examined the consent order at least to the extent required to determine it involved no judicial determination. It may also be considered in determining whether the making of the order quelled a controversy between the parties.

[78] Where an order is made on the papers as occurred here and one infers that there has been a judicial determination, given the requirement for the Court to be satisfied that the orders are "just and equitable". There is however no evidence of personal participation in the merits of the orders by the registrar as was the case in *MSP* and *Gordon Elliott* other than the making of the orders themselves. The making of the orders may well be sufficient to

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71 At 104.

72 At 124.

73 At 101 and 103, per Brennan J; see also 133, per Toohey J.

74 See the discussion in *Kelley v Corston* [1998] QB 686 particularly at 700 and 718-719, in relation to a settlement reached on or just prior to the commencement of the trial upon which the advocate gave advice and the Court then made orders reflecting the settlement.

attract advocate's immunity as it requires some exercise of judicial power, notwithstanding that the orders have been made with the consent of the parties. However, any exercise of judicial power must be seen in the context of the fact that there were no proceedings on foot at the time the orders were applied for and an agreed settlement had been reached. In my view that raises a real issue as to whether advocate's immunity would apply in the present case, particularly having regard to the underlying rationale of advocate's immunity. Contrary to the submission of Jones Mitchell, I consider on the facts of the present case its application is not so clear that I can conclude the defence is established.

[79] Even accepting that orders made under s 79 of the *Family Law Act* are orders of the kind identified in [61], and negligent advice giving rise to settlements leading to such orders may be outside the decision of *Attwells*, I consider that a determination of this case and whether advocate's immunity bars the suit by Ms Smith in respect of the Agreed Property Settlement requires an examination of the factual context of the advice given and the orders made. This would require a trial to examine the relevant factual matrix surrounding the advice given and the sequence of events relevant to the making of the order, beyond the material facts pleaded, having regard to the underlying rationale of advocate's immunity.[75]

[80] While the Further Amended Statement of Claim does plead the scope of the retainer, the advice given within the scope of that retainer and the resulting orders being obtained in accordance with that retainer, the question of whether the work done out of court affects the conduct and resolution of the case in court is potentially affected by the fact that no proceedings were on foot prior to the settlement being reached. While Jones Mitchell submits that the fact that there was no need for any controversy between the parties to be quelled in making the orders given the exercise of judicial power, the present case unlike that considered in *MSP* and *Goddard Elliott*, had no proceedings on foot prior to the settlement being reached. There was no appearance by the parties, although attachments were provided for the purpose of obtaining the orders. While the agreed matrimonial asset pool was provided in the application for orders,and had been the subject of advice and was relevant to the Court's consideration under s 79(2), no specific order was made as to the matrimonial asset pool. That raises the question of whether the work done by Jones Mitchell was relevant to the conduct of the case in court and the extent to which it can be said to have involved them participating in the quelling of any controversy between the parties by the making of those orders,[76] given that no proceedings had been issued prior to applying for the orders and the matrimonial asset pool had been agreed prior to the parties partaking in a mediation.

[81] The loss Ms Smith seeks to claim as a result of the alleged negligence and breach of contract includes a loss of opportunity to obtain a property settlement greater than the Agreed Property Settlement which was the subject of the orders.[77] Jones Mitchell contends that necessarily shows that what Ms Smith is seeking to do is conduct a collateral

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[75] As identified by Fraser JA in *Roche.*

[76] See *Rogers v Roche (No 1)* [2017] 2 Qd R 306 at [25]; *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1 at [38]; *Kendirjian v Lepore* (2017) 259 CLR 275 at [31].

[77] Particulars of Loss and Damage, FASOC.

attack on the exercise of the judicial power in making the orders, which advocate's immunity seeks to prevent. There is much to be said for that contention, however, the attachments to the orders state that the agreed matrimonial pool was agreed for the purpose of mediation. It was relevant to the making of the order but not the subject of any specific finding or order. In the context of a claim based on negligent advice to proceed on the basis of the agreed matrimonial pool, the reasonableness of which is determined at the time the advice is given, it is not beyond argument that there is no collateral attack on the Court's order nor on the exercise of the discretion, as is contended on behalf of Ms Smith.

[82] The above matters raise clear issues as to whether the application of advocate's immunity in the present case is clear having regard to [61] of *Attwells* and the underlying rationale. However, the question of whether advocate's immunity applies is whether the connection between the lawyer's work and the judicial determination is sufficient to satisfy the relevant test.

[83] That brings me to a further issue which suggests that the defence of advocate's immunity is not necessarily so strong and complete as to warrant the granting of summary judgment. The mediation advice was given some time before the mediation, whereas the compromise advice was given at the mediation. The mediation advice is pleaded to have resulted in Ms Smith participating in the mediation, accepting for the purposes of the mediation that the value of the matrimonial asset pool was within the agreed range and not taking any further steps to determine the size of the asset pool.[78] While the Agreed Property Settlement was agreed by reference to that agreed matrimonial asset pool, which was ultimately presented to the registrar in support of the orders, the reasonableness of any such advice is assessed at the time the mediation advice was given.[79] The test concerning work done out of court which leads to a decision affecting the conduct of the case in court is not engaged merely by "any plausible historical connection".[80] It must be "intimately connected". It is at least arguable that the mediation advice to proceed to the mediation on a particular basis and not obtain independent reports or engage in further steps to ascertain the actual size of the asset pool has no more than such a historical connection.[81] It was given well before the mediation and before any proceedings were instituted and orders made. In *Roche*, Fraser JA stated that "whether the claimed loss is the lost chance of a settlement or an adverse judgment, advocate's immunity is ordinarily not attracted to conduct occurring before the commencement of litigation".[82] The fact that

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[78] See [17] and [17A] of the FASOC.

[79] *Kendirjian v Lepore* (2017) 259 CLR 275 at [34].

[80] *Kendirjian v Lepore* (2017) 259 CLR 275 at [31], referring to *Attwells* at [46].

[81] Although factually different from the present case, Ms Smith's counsel suggested that the mediation advice at least was more analogous to the PIPA preparation considered by the Court of Appeal in *Roche* at [60]. That is not an inarguable position. Notably, the loss claimed in that case was the difference between what was awarded at trial and what should have been awarded had the evidence been gathered: [54].

[82] At [56].

the parties may have entered a binding arrangement under s 90C of the *Family Law Act*[83] also has some relevance to the question of the degree of the connection. The pleaded retainer,[84] upon which Jones Mitchell placed reliance, did not necessarily require orders to be made under s 79 of the *Family Law Act*.[85] The work done by Jones Mitchell if a settlement was reached would not necessarily have resulted in court orders being made under s 79 of the *Family Law Act* in order for the settlement to be binding.

[84] The case with respect to advocate's immunity is more compelling in relation to the compromise advice. Given that the financial agreement[86] entered into which encapsulated the Agreed Property Settlement was not to take effect until final orders were made by the Federal Magistrates Court in accordance with the minutes of the orders, there is a closer connection between the compromise advice and the Federal Magistrates Court orders. However, as the FASOC pleads reliance[87] by Ms Smith and loss and damage on the basis of both the mediation and compromise advice constituting the breach of the retainer,[88] I would have to be satisfied that advocate's immunity extended to both the mediation advice and the compromise advice in order to grant summary judgment which, as set out above, I am not.

[85] The present case relies on the High Court's identification of a possible exception to its decision that advocate's immunity does not apply to negligent advice leading to a settlement, if encompassed in consent orders, because the orders involve the exercise of judicial power. The application of the test for determining whether advocate's immunity would apply in such a case does, as was submitted by Jones Mitchell, have to be considered having regard to the underlying rationale. While the defence is strongly arguable, given the Court's hesitancy to enlarge the circumstances in which lawyers may be unaccountable to their clients through advocate's immunity, careful consideration is required of all the facts relevant to the giving of the mediation advice and compromise advice and the orders obtained, having regard to the underlying rationale of the immunity, before a Court could conclude that advocate's immunity applied. The timing of events in relation to the advice given, the issuing of the proceedings and the orders made may well impact upon whether the relevant functional connection exists. While the present case does not decouple the immunity from the protection of the exercise of judicial power from collateral attack in the same way as the circumstance considered by the High Court in *Attwells*, the connection is not as strong as a case where proceedings have been instituted prior to the settlement being reached and orders made, with the exercise of some judicial power.

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83 Provided it satisfied s 90G of the *Family Law Act*.

84 [6] of the FASOC.

85 Cf Applicant's Submissions, [47].

86 Affidavit of RG Smith, Exh RGS-2.

87 [31] of the FASOC.

88 [33] of the FASOC.

[86] In the circumstances, Ms Smith's case could not be regarded as having no real prospects of success and not requiring a trial such that the case warrants the grant of summary judgment.

[87] In the circumstances, the application will be dismissed.

Orders to be made

[88] The application is dismissed.

[89] I will hear the parties as to costs.