



Michaelmas Term

[2016] UKPC 26

Privy Council Appeal No 0111 of 2014

JUDGMENT

**Janin Caribbean Construction Limited (Appellant) v Wilkinson and another (as
executors of the estate of Ernest Clarence Wilkinson) and another (Respondents)
(Grenada)**

From the Court of Appeal of Grenada

before

Lord Clarke

Lord Wilson

Lord Sumption

Lord Hodge

Sir John Gillen

JUDGMENT GIVEN ON

11 October 2016

Heard on 28 June 2016

Appellant
Jonathan Crystal

(Instructed by Sebastians Solicitors)

Respondents
Celia Edwards QC
Shireen Wilkinson

(Instructed by Blake Morgan LLP)

LORD CLARKE:

Introduction and issues

1.

This appeal arises out of a claim made by Janin Caribbean Construction Limited (“Janin”) against Ernest Clarence Wilkinson (“Mr Wilkinson”) for damages for breach of a duty of care said to have been owed to Janin for failure to exercise reasonable care and skill in acting for Janin in defence of a personal injuries action brought against Janin by Robert Francis arising out of injuries sustained by him while working for Janin as long ago as 15 May 1993. The principal case against Mr Wilkinson was

that he failed to turn up at the trial of the action on 17 January 1995. He was at that time said to have been simply holding papers on behalf of the Attorney of Record, Mr Armand Williams QC.

2.

The claim was dismissed by Henry J (“the judge”) with costs on 21 December 2009. Janin appealed to the Court of Appeal in Grenada, which heard the appeal on 24 November 2010 but did not give judgment until nearly a year later on 7 November 2011. The Court of Appeal, which comprised Pereira JA, Gordon JA (Ag) and Bruce-Lyle JA (Ag), dismissed the appeal. The Court of Appeal (Pereira JA, Thom JA and Stollmeyer JA (Ag) subsequently granted Janin’s application for final leave to appeal to the Board on 13 October 2014.

3.

The issues in this appeal, as set out with slight amendments and in what seems to the Board to be the most logical order, are these. (1) Who, if anyone, was Mr Wilkinson representing when he held papers on behalf of Mr Williams, the Attorney of Record? (2) Did Mr Wilkinson owe a duty of care to Janin? (3) Was Mr Wilkinson immune from suit in Grenada? (4) If he owed a duty of care was he in breach of duty? (5) If so, should the Board determine issues of causation or remit them to the courts below? (6) If such issues are not remitted, was any breach of duty causative of loss and, if so, what is the measure of damages? As appears below, the Board has decided that it is not necessary, or appropriate, to determine all those questions.

4.

At the relevant time Mr Wilkinson was a solicitor and a barrister but not a QC. Later he became a QC and gave evidence in this action but subsequently died. The first respondents are therefore the executors of Mr Wilkinson’s estate. The second respondents are the firm of Wilkinson, Wilkinson and Wilkinson (“the firm”), which (as the Board understands it) it is agreed is vicariously responsible for any breach of duty on the part of Mr Wilkinson, who was the head of chambers and a solicitor with the firm.

The factual background

5.

On 15 May 1993 Robert Francis was injured while he was working for Janin at Grand Anse in Grenada. He was working as a welder-mechanic on a crane when the crane’s boom collapsed and fell on him. In October 1993 Janin received a letter written on behalf of Mr Francis claiming a total of \$82,920 against Janin on the basis that it was responsible for the accident. Janin notified its insurers and on 19 October 1993 Mr Williams wrote to Janin saying the he would be “handling the matter on behalf of the other parties concerned.” On 4 January 1994 a writ and statement of claim was served on Janin naming Mr Francis as the claimant. On 10 January 1994 Mr Williams entered an appearance on behalf of Janin. However it appears that no defence was served because on 22 February 1994 judgment in default of defence was entered against Janin for damages and costs to be assessed. On 5 April 1994 Mr Alban John filed a summons on behalf of Mr Francis for the entering of judgment for the special damages claimed in the writ and for general damages to be assessed. The hearing was set down for 29 April 1994. It appears that Janin was not represented at that hearing because on that date the court made an order in default of defence that Janin was to pay to Mr Francis the principal sum of \$110,653.20 together with interest at 6% per annum. The order was served on Janin by delivery to Mr Williams on 13 May 1994.

6.

The evidence of Mr Geoff Croome of Janin was that shortly after receiving that order, he spoke to Mr. Williams, who assured him that he would be able to get the order set aside. Mr Williams advised him that he intended to hand over the file to Mr Wilkinson because he himself did not do much court work any more. Mr Williams assured Mr Croome that Mr Wilkinson and his firm were competent and experienced in matters of this nature. He said that he would arrange for Mr Croome to meet with Mr Wilkinson. However, Mr Willams sent him his bill for services to date, which was paid, and thereafter, except for a telephone call asking him to attend on Mr Wilkinson, he had no correspondence from Mr Williams and dealt exclusively with Mr Wilkinson.

7.

On 6 June 1994 an application for examination of Janin as judgment debtor on 1 July 1994 was made and granted. According to Mr Alban John, who appeared for Mr Francis, Mr Wilkinson had until then had no connection with the case and did not have the conduct of the proceedings on Janin's behalf. On 28 June 1994 Mr Williams filed a summons requesting a hearing of an application to set aside the judgment and seeking an order that Janin be permitted to defend the action. For some reason that application was heard on 1 July instead of the application on behalf of Mr Francis. According to Mr John, Ms Margaret Wilkinson of the firm held papers for Mr Williams and argued in support of the application. Against what Mr John described as his strong opposition, the judgment was set aside and Janin was given 14 days to enter a defence. The defence signed by Mr Williams was served on 11 July 1994. It alleged that the injuries to Mr Francis had been caused by Mr Francis himself.

8.

On 9 December 1994 a notice fixing the date for trial as 17 January 1995 was sent to Mr Williams and, subsequently to Mr John. Janin was not informed of the hearing date. At some stage Mr Williams asked Mr Wilkinson to hold the papers for him in relation to the hearing on 17 January. Mr Wilkinson's evidence in this regard before the judge in these proceedings included the following:

"Q: You appeared at the hearing to set aside judgment?"

A. Yes.

Q. So you were doing a courtesy or favour again?

A. Yes I was. Mr Williams had asked me to make the application and I did.

Q. And you appeared again as Counsel at the hearing of the application for leave?

A. Yes.

Q. And for an extension of time to file an appeal?

A. That is quite correct.

Q. ... So on all these occasions that I just mentioned you agree that you appeared, you were doing a favour?

A. If Mr Williams asked me to appear in court for him ...

Q. Right. So it was a courtesy?

A. Yes.

Q. And in your view when you appeared on these occasions would you agree that you were appearing as counsel for the defendants?

A. As I said I was doing Mr Williams a favour. Mr Williams asked me to hold papers for him.

Q. But would you agree that you were appearing as Counsel for the defendant?

A. No. I was appearing as Counsel instructed by Mr Williams who was for the defendant. I was not for the defendant.

Q. So you are saying that Queen's Counsel -

A. Mr Williams gave me instructions.

Q. So then you had conduct of the matter?

A. I wouldn't put it as high as that. What I did know [was] that Mr Williams asked me to hold the papers for him and to seek an adjournment in the matter. He asked me to seek an adjournment of the matter."

9.

In the light of those exchanges, it appears to have been Mr Wilkinson's case that he was doing a courtesy or favour for Mr Williams but not appearing for Janin. The Francis trial was listed in Court No 1 on 17 January 1995 but Mr Wilkinson had a matter in Court No 2 which he attended. When he attended Court No 1 he found out that "the trial had taken place in my absence judgment delivered". The judgment had been delivered in the absence of Janin or any attorney appearing on its behalf. It appears that no-one at Janin had been informed of the trial date, either by Mr Williams or anyone else. It may be noted that in para 10 of his witness statement of 27 October 2003 Mr Wilkinson admitted that in these circumstances it was "inevitable that judgment would be entered against Janin".

10.

Mr Wilkinson further said in evidence:

"Well my recollection that I had to seek an adjournment because I was going to the No 2 Court which was this court and I advised the bailiff that I'll be back to attend to the matter. When I got back there the matter was already heard in this courtroom."

A little later there was this further exchange:

"Q. So would you not dispute that you did not appear?

A. I did appear. Yes I did appear. I can[not] dispute that. I did appear. When I appeared the matter was disposed of."

It is not easy to follow that evidence, but the position appears to be that Mr Wilkinson did not accept that he appeared for Janin at the hearing because he was simply holding papers for Mr Williams and not representing Mr Williams' client. When he arrived, he did appear in a physical sense but by that time judgment had been given in the absence from anyone from Janin.

11.

An affidavit sworn by Mr Wilkinson on 19 January 1995 in the proceedings brought by Mr Francis included the following:

"1. I am a Solicitor with the firm of Wilkinson, Wilkinson & Wilkinson acting on behalf of the Solicitor for the defendant and have had the conduct of these proceedings on behalf of the defendant.

2. That on the 17 day of January 1995 ... [Lyle St Paul J] ... entered judgment for the plaintiff in the above matter in the absence of the defendant and its solicitor.

3. That I was in the No 2 High Court where I was engaged in another matter.

4. That through inadvertence I believed that the matter was fixed for the no 2 Court.

5. That whilst I was in the No 2 Court I learnt that the above matter was heard ex parte and that judgment was entered against the defendant.

6. In view of the foregoing I hereby request that the judgment entered be set aside and that a new trial be ordered on such terms as the court seems fit."

12.

In his witness statement in this action Mr Wilkinson said that he first learned of the matter when in or about June 1994 Mr Williams asked him to hold papers on the hearing of an application to have judgment in default set aside. He had not filed the defence in time and judgment had been entered against Janin. As stated above, Margaret Wilkinson attended and the judgment was set aside and leave given to Janin to defend. When the matter was set down for trial on 17 January 1995 Mr Williams asked him to hold papers for him. However he was engaged in a matter in the No 2 Court. So on his way to court he asked the Bailiff to inform Mr John that he had gone to the No 2 Court and that he would return to No 1 Court as soon as possible. When he returned to No 1 Court default judgment had been entered as stated above. He then said in para 10 (as noted above) that it was "inevitable that judgment would be entered against Janin."

13.

Mr Wilkinson then described in his statement his unsuccessful attempts to have the judgment set aside and to obtain leave to appeal. He added that Mr Williams had done nothing. He denied any negligence on 17 January 1995 and asserted that he did everything that he reasonably could thereafter. Further he said in para 18 of his statement that the case against Janin was strong because the equipment was defective and there was no feasible way in which Janin could win.

14.

On 11 December 1995 Janin wrote to Mr Williams terminating his services as attorney. Janin subsequently instituted proceedings alleging negligence against Mr Williams, who brought a third party claim against Mr Wilkinson. That third party claim was struck out and Janin discontinued its claim against Mr Williams, apparently for commercial reasons. In the event it was only the present proceedings which were pursued by Janin against Mr Wilkinson's executors and the firm. The claim can only succeed if Janin establishes an actionable breach of duty on the part of Mr Wilkinson.

The judgment of the judge

15.

The judge's findings of fact may be summarised thus. From the outset Mr Williams QC was retained to represent Janin. He continued to do so until Mr Croome wrote to him on 11 December 1995 terminating his services. The pleadings including the defence were filed by Mr Williams. The events up until 17 January were substantially as set out above. The first that Mr Wilkinson knew about the matter was in June 1994 when Mr Williams asked him to hold the papers for him on the application to

have the judgment in default of defence set aside. As indicated above, Ms Wilkinson succeeded in having the judgment set aside and in obtaining leave for Janin to file a defence. The date for trial was fixed for 17 January 1995 and notice of the hearing was sent to Mr Williams.

16.

The judge described the events of 17 December in paras 17 and 18 as follows:

“17. In regard to the trial of the matter. Mr Wilkinson’s evidence at trial is that when the matter was set for trial he was again asked to hold papers for Mr Williams; that he received the papers in his chambers the very morning of the trial and that he was requested to seek an adjournment of the matter. The veracity of this evidence is supported by the affidavit of Mr Alban John sworn on 30 January, 1995 where he states that on the day prior to the trial about 4:00 pm, knowing that Mr Wilkinson had previously held for Mr Williams, he telephoned the chambers of Mr Wilkinson and spoke to Margaret Wilkinson informing her of the trial next day and that she indicated that she knew nothing about it. Mr Croome’s evidence at trial was that he did not know the extent of Mr Wilkinson’s instructions. I am satisfied from the evidence that Mr Wilkinson did not have conduct of the matter and that he had been asked to hold papers for Mr Williams, for the purpose of obtaining an adjournment, which he consented to do. Janin’s contention to the contrary is therefore rejected.

18. As to the events of the morning of the trial, there is nothing to contradict the evidence of Mr Wilkinson that on that morning he had matters of his own in Courtroom No 2 and that he first went there to appear in his matters and that when he finished his matters and got to Courtroom No 1 where the Janin trial was scheduled to take place, he found that judgment had been entered in his absence. He says however that before going to deal with his matters he stopped off at No 1 Courtroom and spoke to the Bailiff requesting him to inform Mr John of the situation and that he would return to No 1 Courtroom as soon as possible. However, Mr Wilkinson, in his affidavit to set aside the default judgment sworn on the 19 January 1995, gave another reason for his failure to appear prior to the entry of judgment, that is, that he inadvertently thought the Janin matter was to be heard in Court No 2. In this affidavit he made no mention of having gone to Court No 1 before going to attend to his matters in Court No 2. The court is therefore asked to reject the explanation given at trial as of recent vintage. Mr Wilkinson explains this difference by stating that the affidavit sworn on 19 January 1995 was prepared by Mr Williams’ office and the statement referred to is not accurate. I accept the explanation.”

17.

The judge then concluded at para 19 that Janin had failed to prove that the defendants filed and served the application to set aside the judgment. Notwithstanding the fact that an affidavit signed by Mr Wilkinson accompanied the application to set aside the default judgment, the application was made by Mr Williams as counsel for Janin, as indicated by his signature on the application. The judge held that it was Mr Williams who still had conduct of the matter. She further held, at para 20, that after the application to set aside the default judgment was dismissed, there was no evidence before the court of a change of counsel. While Mr Wilkinson held papers when the matter came up in court, Mr Williams continued to represent Janin until Mr Croome’s letter to Mr Williams on 11 December 1995.

18.

Before the judge the issues were limited to two: first, whether the defendants were liable in negligence for the entry of the default judgment and for the subsequent untimely filing of the application for leave to appeal; and secondly, if so, the extent of the damages suffered.

19.

In paras 21 to 39, under the heading “Preliminary Submission” the judge considered whether Mr Wilkinson was immune from suit under the principle in *Rondel v Worsley* [1969] 1 AC 191. The judge held that he was and dismissed the claim. She further noted in para 39 that, even if immunity from suit was not established, Janin would have to prove both a breach of a duty and that it had suffered loss as a result of the breach. The judge concluded that, given the failure of Janin and its witnesses to attend the trial, a failure not attributable to negligence on the part of Mr Wilkinson or the firm, it could not be said that the outcome would have been any different had Mr Wilkinson been present when the matter was called.

20.

The judge further held in para 40, albeit without any analysis, that Mr Williams had conduct of the matter, that Mr Wilkinson (and his firm) merely held papers for him on specific occasions and that Janin had failed to prove that they had conduct of the matter or that they were responsible for the timely filing of the relevant application.

The Court of Appeal

21.

In para 4 of her judgment in the Court of Appeal, Pereira JA, with whom the other members of the court agreed, summarised the conclusions of the judge as the Board has done in paras 20 and 21 above. Under the heading “Attorney-at-Law Holding Papers” she considered the liability of Mr Wilkinson at paras 6 to 15, where she held that the holding of papers without more does not give rise without to a duty of care. She held that it followed that Janin’s appeal to the Court of Appeal must fail. However, between paras 17 and 21 she held that the immunity derived from *Rondel v Worsley* continues to apply in Grenada and that it was not necessary to consider any of the other issues which might arise.

This appeal

Immunity from suit

22.

It is convenient first to consider the third issue identified in para 3 above, namely whether Mr Wilkinson is or was immune from suit in Grenada. For this purpose it is convenient to assume that Mr Wilkinson owed a duty to Janin, that he was in breach of that duty by failing to attend the hearing on 17 January 1995 and that Janin suffered loss as a result.

23.

The immunity relied upon is that identified by the House of Lords in *Rondel v Worsley*, which was decided in 1967. It was concerned with the position of a barrister. The House held that a barrister was immune from a claim for negligence in respect of his conduct of litigation. In *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, which was decided in 1978, the House held by a majority that a barrister’s immunity from suit extended only to those matters of pre-trial work which were so intimately connected with the conduct of the case in court that they could fairly be said to be preliminary decisions affecting the way the case was conducted when it came to a hearing. However, the House of Lords subsequently held in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 that the public policy upon which the immunity in those cases was based was no longer applicable in England. Accordingly, if this case were heard in England, Mr Wilkinson would not be immune from suit under

the principles developed in *Rondel v Worsley* and *Saif Ali*. The question is whether those principles apply to the facts of this case in Grenada.

24.

It is common ground that the decision in *Rondel v Worsley* and the principles upon which it was based were accepted in Grenada at one time: see eg the decision of the Eastern Caribbean Court of Appeal in *Husbands v Warefact Ltd* 1998 ECLR 341, where Byron CJ (Ag), with whom Singh and Redhead JJA agreed, said that the rule was authoritatively expressed in Halsbury's Laws of England 4th ed, vol 3 at para 1198 in this way:

"In the language of an earlier age, the remuneration of a barrister was classed as honorarium, rather than merces, payment becomes a matter of honour and not a legal obligation. There is no contractual relationship between a barrister and either the instructing solicitor or the client upon which he can sue, and conversely the client has no contractual remedy against a barrister for non-attendance or negligence in the conduct of a case."

25.

There has been no decision of the courts of Grenada departing from the principles in *Rondel v Worsley*. In particular there has been no decision following the decision of the House of Lords in *Hall v Simons*. On the contrary the only development of this area of the law in Grenada in recent years has been the enactment of section 25 of the Legal Profession Act 2011, which provides as follows:

"25(1) Subject to subsection (2), an attorney-at-law shall not enjoy immunity from action for any loss or damage caused by his own negligence or lack of skill in the performance of his functions;

(2) An attorney-at-law shall be immune from suit of negligence in respect of his conduct of litigation only.

(3) The immunity referred to in subsection (2), shall not be confined to proceedings in court, but shall extend to such pre-trial work as is so intimately connected with the verdict of the case in court; that it could be said to be a preliminary decision, affecting the way in which the case is to be conducted at the hearing.

(4) In this section, 'function' means, a function undertaken by an attorney-at-law in relation to the conduct or management of litigation, or prospective litigation, whether performed in or out of court, or before, during or after any court proceedings."

26.

It was common ground between the parties at the hearing of this appeal that subsections (2) and (3) of section 25 reflected the English decisions in *Rondel v Worsley* and *Saif Ali* respectively. Those subsections therefore provide no support for the view that in the period with which this dispute is concerned the law of Grenada reflected the approach now adopted in England since the decision in *Hall v Simons*. On the contrary it appears to the Board that the fact that section 25 was enacted in the terms in which it was points strongly to the fact that the law of Grenada reflected the decisions in *Rondel v Worsley* and *Saif Ali* throughout.

27.

As the Board sees it, the position is that *Rondel v Worsley* and *Saif Ali* have always reflected the law of Grenada and still do, essentially for these reasons. First, the decision in *Hall v Simons* essentially decided that the traditional reasons for the immunity (duty to the court, cab rank rule, objections to secondary litigation and the like) were points of policy which were no longer as weighty in England

and Wales as they had once been. Secondly, the weight to be attached to these factors is very much a matter of local policy, which may differ in Grenada from that of England and Wales. Thirdly, the subsequent enactment of section 25 of the Legal Profession Act 2011 in Grenada enables the Board to see that the policy considerations have not changed in Grenada. It would be absurd for the Board to say that the policy changed when *Hall v Simons* was decided in England and Wales and then returned to square one when Parliament intervened in Grenada.

28.

The question then arises whether, on the assumed facts, the application of the principles in *Rondel v Worsley* and *Saif Ali* leads to the conclusion that Mr Wilkinson is or was immune from suit. The answer to that question depends upon the nature and limits of that immunity. It was submitted on behalf of Janin that Mr Wilkinson was not immune because his negligent failure to attend the hearing on 17 January 1995 was not sufficiently intimately connected with the trial process.

29.

In order to resolve this question, it is helpful to consider the approach of the courts in the decided cases. In *Saif Ali* the majority (Lord Wilberforce, Lord Diplock and Lord Salmon) held that the principle in *Rondel v Worsley* was not limited to barristers but extended to solicitor advocates. Moreover, although the principle arose out of the fact that there was no contract between a barrister and his or her client, so that a barrister could not sue for his or her fees, it followed that he or she could not be sued for breach of contract. It was also held that he or she could not be sued in tort for breach of a duty to exercise reasonable care and skill. He or she could thus not be sued in negligence. None of that is in dispute between the parties in the instant case. The question is whether a breach of duty by a barrister or solicitor advocate is properly actionable on the facts of this case, where the breach of duty was not, say, a failure to call a witness or to cross-examine a witness competently, but a negligent failure to turn up to apply for an adjournment.

30.

In *Rondel v Worsley* their Lordships used differing expressions to describe the scope of the immunity: see the discussion by Lord Wilberforce in *Saif Ali* at pp 213-214. However, as Lord Wilberforce put it at p 215B, the expression 'conduct and management' (that is of the litigation) had emerged but "no doubt this was not a sharp definition". All three members of the majority relied upon the approach of McCarthy P in *Rees v Sinclair* [1974] 1 NZLR 180, 187:

"But I cannot narrow the protection to what is done in court: it must be wider than that and include some pre-trial work. Each piece of before-trial work should, however, be tested against the one rule; that 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. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice, and that is why I would not be prepared to include anything which does not come within the test I have stated." (the Board's italics)

Lord Wilberforce added in *Saif Ali* (at p 215D):

"I do not understand this formulation as suggesting an entirely new test, ie a double test requiring (a) intimate connection with the conduct of the cause in court and (b) necessity in the interests of the administration of justice. The latter words state the justification for the test but the test lies in the former words. If these words involve a narrowing of the test as compared with the more general words 'conduct and management' I think that this is right and for that reason I suggest that the

passage, if sensibly, and not pedantically, construed, provides a sound foundation for individual decisions by the courts, whether immunity exists in any given case.”

See also per Lord Wilberforce at p 215F-H, Lord Diplock at p 224 and Lord Salmon at p 232 E-G.

31.

The Board notes that the passage italicised above is reflected in section 25(3) of the Legal Profession Act 2011.

32.

None of those statements focuses on the particular problem in this case, namely whether the negligent failure to turn up to apply for an adjournment of the trial falls within the immunity. However the Board concludes that the judge and the Court of Appeal were entitled to hold that the case falls within the immunity on its facts. There is some support for this conclusion in the older cases.

33.

Some assistance is to be found in an Irish case decided in 1880, namely *Robertson v Macdonogh* (1880) 6 LR lr 433 which was decided on demurrer and cited with approval by Lord Morris of Borth-y-Gest in *Rondel v Worsley* at p 239G. The assumed facts in *Robertson* were that in breach of an agreement an Irish QC declined to appear for the plaintiff on the second day of his trial without reasonable cause for his refusal. As May CJ put it, delivering the judgment of the court, at pp 436-437, the plaintiff’s counsel admitted that in an ordinary case arising between client and counsel the counsel could not maintain an action against his client for remuneration for his service as an advocate. Nor on the other hand could a client sue his counsel for the non-performance of his duties of advocate or for negligence in the performance of such duties. It was submitted that this was a special case not falling within the general rule of law because of the nature of the contract, which involved an agreement to pay a special fee in lieu of an ordinary honorarium or fee, and that the defendant had agreed to attend throughout the trial without unreasonable absence.

34.

May CJ made extensive reference to the English case of *Kennedy v Broun* (1863) 13 CB(NS) 677 and held that the true principle was that an advocate and his client were mutually incapable of entering into contracts of hiring with respect to advocacy in litigation and that this incapacity was reciprocal. May CJ said at p 438:

“Whether the advocate sues the client, as in *Kennedy v Broun*, for non-payment of the promised fee or the client sues the advocate for the non-performance of the promised advocacy, the same principle applies, and neither can succeed.”

That was an example of a case where the immunity extended to a refusal to perform the advocacy. Here the alleged negligence was negligent failure to attend the trial in order to perform advocacy, namely to make an application for an adjournment.”

35.

In *Rondel v Worsley* itself, Lord Upjohn considered, albeit obiter, when the immunity of a barrister started. He did so after considering the position of a solicitor which he regarded as different at that time because a solicitor could be in breach of contract, whereas a barrister could not. He said this with regard to a barrister at p 285F:

“... I should, however tentatively, suggest where I think the immunity of counsel engaged in litigation should start. Clearly it must start before counsel enters the doors of the court to conduct the case. He

will have had to give fearlessly to his client advice on the prospects of success; he will have settled the pleadings; and on discovery and in his advice on evidence and on many other matters he may have had to refuse to adopt his client's wishes. As a practical matter, I do no more than suggest that the immunity of counsel in relation to litigation should start at that letter before action where, if my recollection is correct, taxation of party and party costs starts.

What, then, of the immunity of counsel before that stage or when acting in matters which could not possibly be described as pertaining to litigation but rather as pure paper work such as drafting of wills, settlements, conveyances, real property contracts, commercial contracts, charterparties or giving advice generally which are not done with a view to litigation but rather with a view to defining the rights of the parties and, in many cases, to avoid litigation. In this class I think must be included that large class where settlements are entered into with a view to the avoidance of some fiscal liability probably at a later stage, though it may be recognised that such settlements may well be challenged by the Board of Inland Revenue at the appropriate time. I think this is a most difficult matter; I find it very difficult to see upon what principle the immunity which all of your Lordships are agreed must, as a matter of public policy, be granted to counsel while acting in litigious matters should extend to matters which are not litigious."

36.

That approach supports the conclusion that the immunity is likely to arise before the trial begins. However, as the discussion in Saif Ali shows, it may not always be easy to draw the line. If the passage italicised in para 30 above is applied here, the question becomes whether the negligent failure to appear at the trial was "so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary [decision] [or omission] affecting the way that cause [was] to be conducted when it [came] to a hearing." Put another way, in the expression used in section 25(3) of the 2011 Act, that negligent failure was "intimately connected with the verdict of the case in court", that is the order of the court at the trial. In this context the "verdict of the case in court" was the order of the court at the trial on 17 January 1995.

37.

In all these circumstances the Board concludes that the principles in *Rondel v Worsley* and *Saif Ali* represent the law applied in Grenada and that Mr Wilkinson was immune from suit in accordance with the principles discussed above. In the light of the decision of the majority of the House of Lords in *Saif Ali* that the principle in *Rondel v Worsley* extended to solicitor advocates, it appears to the Board that the immunity in Grenada must extend to solicitor advocates and, on the facts, includes Mr Wilkinson.

38.

It follows that this is thus an example of a case in which the common law in other jurisdictions has developed differently from its development in England and Wales. It is an example of the principle identified by the Board in *Isaacs v Robertson* (1984) 43 WIR 125 at 130; [1984] 3 All ER 140, 143, where the Board held that matters of practice and procedure

"are best left to be developed by the courts of the country concerned, with whose decisions as to the operation of the rule this Board would be reluctant to interfere."

Conclusion

39.

It follows from the above that the appeal against the holding that Mr Wilkinson was immune from suit must be dismissed because question (3) posed in para 3 above, namely whether Mr Wilkinson was immune from suit in Grenada, must be answered in the affirmative.

40.

It also follows that it is not necessary for the Board to answer any of the other questions posed in para 3. In these circumstances, the Board has concluded that there is no good reason to focus on any of those questions. In particular, the Board is reluctant to consider the true meaning and effect of the process known as holding papers, which is not a process with which it is familiar. On the face of it there is force in the point that when a person who is holding the papers makes an application to the court he must do so as advocate for the client, since he does so in his interests and on his behalf, albeit at the behest of the principal attorney-at-law. But, before the Board considered the point in detail, it would wish to be more fully instructed in the process, which appears to have existed in Grenada, and perhaps elsewhere, for a long time.

41.

For these reasons, the Board will humbly advise Her Majesty that the appeal be dismissed. The Board will resolve any issues of costs on the basis of written submissions. It directs the respondents to make written submissions on costs and serve them on the appellant within 21 days of the promulgation of this judgment and the appellant to make written submissions and serve them on the respondents within 14 days thereafter.