REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2017-00857**

BETWEEN

JENNIFER MORALDO

Claimant

AND

KENNETH O'BRIEN

Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Thursday 21st June 2018

Appearances:

Mr. Brent Hallpike instructed by Ms. Kamini Persaud-Maraj for the Claimant

Mr. Gilbert Peterson SC instructed by Mr. Sterling John for the Defendant

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JUDGMENT

JENNIFER MORALDO'S NEGLIGENCE ACTION

1. This judgment addresses the important issue of the roles and responsibilities of attorneys in court ordered mediations and their immunity from actions in negligence when ongoing litigation is compromised as a result of their participation in the mediation process.

2. The Claimant, Mrs. Jennifer Moraldo, contends that her attorney-at-law, Dr. Kenneth O'Brien executed a mediation agreement and entered a consent order on her behalf compromising her ongoing litigation[1] without her instructions to do so. She has been

[1] CV2011-02229

unsuccessful in a separate action to set aside that consent order[2] principally on the basis that she had agreed to settle the proceedings and that her attorney had an implied and ostensible authority to settle those proceedings on her behalf. She now claims damages for negligence against her attorney for having submitted that mediation agreement and consent order to the Court without her instructions. However, a fundamental question raised by her attorney in this claim, before addressing any alleged breach of duty or loss, is whether "attorney immunity" as prescribed by statute and the common law affords this attorney a complete defence to Mrs. Moraldo's claim. In my view it does.

3. The Mediation Act Chapter 5:32 confers an immunity to both the mediator and the attorney from any claim arising out of any act done or omitted to be done in the course of the mediation process. Additionally, the Legal Profession Act Chapter 90:03 has codified the common law espoused in **Rondel v Worsley** [1967] 3 WLR 1666 and **Saif Ali And Another Respondents And Sidney Mitchell & Co. (A Firm) And Others Appellants** [1978] 3 WLR 849, in conferring an immunity on attorneys for the conduct of litigation which extends to any pre-trial work intimately connected with the manner in which the matter is conducted. The decision of an attorney to settle or compromise a pending claim falls within this immunity. Not only does it fall squarely within the four corners of the statute as an act done in the conduct of litigation but there are sound policy reasons for conferring such immunity on attorneys to protect such decisions made and advice given which result in a settlement or compromise of litigation arising out of court ordered mediation.

4. It must be understood at the outset that the Courts in this jurisdiction robustly encourage parties and their attorneys to utilise mediation as an effective method to resolve disputes. The Court's role in civil litigation is no longer seen as ushering cases towards a trial as though that is an inevitable event to resolve a claim. A trial is a last resort to the resolution of claims in our Courts. Rather, instead, the role of the case managing Judge under the Civil Proceeding Rules 1998 as amended (CPR) is to assist the parties to identify the issues in dispute and the suitable methods for their resolution whether by way of mediation, judicial settlement conferences (JSCs), expert determination, adjudication or other suitable means. There is no doubt that the settlement or compromise of actions are welcomed and facilitated

[2] **Jennifer Moraldo v Anthony Sandiford** CV2016-01946 (Jennifer Moraldo's setting aside action)

by the Courts as ultimately a solution driven by the parties themselves. Such solutions on most occasions are superior to one imposed by the Court after a judicial determination at a trial. To that extent the case managing Judge and the attorneys are active collaborators in assisting clients to arrive at such just resolutions. Indeed all parties are enjoined to assist the Court to give effect to the overriding objective of the CPR[3]. By extension, court annexed mediators are collaborators in this system of civil justice and the Mediation Act has set out extensive regulations to standardise and monitor such practices to ensure an acceptable level of quality which would not compromise the overall system of justice and the client's access to justice.

5. I emphasise this from the outset as, contrary to the submissions made by Counsel for the Claimant, attorneys do play an important role at court ordered mediations and it is not the expectation of our Courts that when a matter is referred to mediation by a Court that the attorney simply abandons the client. To the contrary, attorneys ought not to assume that their clients who attend court ordered mediation have dispensed with the need for legal services. In the preparation for court ordered mediation, the conduct of that mediation and the post mediation phases, attorneys must continue to discharge their duties to their client, the Court and to the wider society and to resolve any ethical dilemmas that may arise where these duties inevitably intersect with one another.

6. While there are as yet no codes of conduct for attorneys in this jurisdiction that specifically govern mediation either in the Legal Profession Act or the Mediation Act, the role of the attorney in mediation undoubtedly takes on a new dimension fashionably referred to as "the mediation advocate". Such an advocate discharges his traditional ethical obligations under the attorney's Code of Ethics but the approach, however, is not adversarial but collaborative. The skills and services of the attorney to zealously protect or pursue a client's cause are now engaged to assist the client in the mediation process in a problem-solving model to help obtain the best possible negotiated settlement. It is important for attorneys to acknowledge that new role that they assume in mediation.

7. As the Hon T F Bathurst quite rightly observed:

> "A key strength for the successful lawyer is the ability to switch hats and transform from

[3] Civil Proceeding Rules 1998 as amended (CPR)

adversarial court advocate one day, highlighting the strengths of a client's position, to dispute resolution advocate the following day, participating in collaborative problem-solving and encouraging a client to move away from a position, think creatively and accept compromise."[4]

8. Although an attorney, like a mediator, may be immune from actions, both are liable to be disciplined for breach of their ethical duties towards the parties or clients. In the case of the mediator, a breach of the mediator's Code of Ethics would result in sanctions by the Mediation Board of Trinidad and Tobago. In the case of the attorney, a breach of his ethical duties would result in disciplinary action by the Disciplinary Committee. As mediation grows in popularity in this jurisdiction, such liabilities demonstrate that the attorney at law must keep in step with his obligations and responsibilities to his client in the mediation room.

9. In this case, the attorney's alleged breach of duty was to enter into a mediation agreement without the express authority of his client. I have found on the facts in the case that while the client did enter into an oral agreement at the mediation session which was subsequently reduced into writing by the mediator and executed by the attorney, the client, Mrs. Moraldo was not informed of the entering of the consent order by her attorney. As a consequence, although the client had agreed to settle the claim on the terms of the mediation agreement, the consent order which was presented by Dr. Kenneth O' Brien was done without his client's specific knowledge.

10. An attorney no doubt has the authority to compromise proceedings on behalf of his client. The entering of a consent order in terms of a mediation agreement in court ordered mediation may be seen as a natural consequence of the client agreeing to terms to compromise a claim. Effective communication with the client is essential to avoid any allegations of acting without instructions which is tantamount to a failure to comply with the ethical duties and responsibilities expected of the reasonable professional. This judgment examines the extent to which the attorney immunity should protect such decisions by attorneys which brings a halt to the litigation and is not related to its continuing conduct and management. It is the difficulty in drawing artificial lines or examining the "jagged edge" of attorney immunity

[4] Off With The Wig: Issues That Arise For Advocates When Switching From The Courtroom To The Negotiating Table Australian Disputes Centre 30 March 2017

which has spurred some Commonwealth jurisdictions to abolish the immunity altogether, a matter which may yet engage the professional bodies of attorneys and mediators in this jurisdiction.

11. In dealing with this claim I examine three main questions:

    a) Whether Dr. O'Brien had the authority of Mrs. Moraldo to enter into the consent order;
    b) If not whether in doing so it was an act which is intimately connected with the conduct of the litigation or in reference to the mediation process and therefore he is immune from an action in negligence;
    c) If he is not immune whether he acted negligently and what is the extent of his client's loss.[5]

12. These questions arise from the following factual context.

Brief Facts

13. Mrs. Moraldo retained Dr. Kenneth O'Brien to act for her in various matters and he was also retained by her as the Defendant in High Court Action CV2011-02229[6] to protect her interests and to defend a claim by Mr Anthony Sandiford for the possession of property[7]. In those proceedings Mr. Anthony Sandiford had brought a claim against Mrs. Moraldo for possession of his property (The East Apartment) at No. 104 Capildeo Land, Cleaver Road, Arima. She counterclaimed that she was entitled to the East Apartment at No. 104 Capildeo Land, Cleaver Road, Arima. For both parties their entitlement to be in possession of the said premises was at stake and a negative outcome at a trial would have meant for either of them losing their property at No. 104 Capildeo Land, Cleaver Road, Arima to the other.

14. At the stage of the pre-trial review the parties were, by consent, referred to mediation by the Court. The mediation was conducted by Mr. Anthony Vieira on February 2013, a certified

[5] The Defendant did raise the issue that the claim was statute-barred but that defence upon the Court's enquiry was abandoned by Counsel for the Defendant before the judgment was delivered and quite rightly so. The Court will not approve of limitation defences in cases of negligence against attorneys at law.

[6] Anthony Sandiford v Occupants of the property known as the "East Apartment" of the property located at No. 104 Capildeo Lands, Cleaver Road, Arima, Jennifer Moraldo (Legal Personal Representative of the Estate of Elaine Sandiford) Sharmaine King (Proposed Legal Personal Representative of the Estate of Arnold Sandiford).

[7] He was retained in two related matters **Anthony Sandiford v Arnold Sandiford** CV2008-01690 and **Jennifer Moraldo v Anthony Sandiford** CV2009-04330

mediator under the Mediation Act. After the end of the mediation session the mediator drew up the agreement of the parties in his office and sent it to the attorneys at law for both parties. The attorneys executed it and sent it to the Court's Judicial Support Officer (JSO) under a joint letter indicating that the matter was settled in the terms of the mediation agreement and desiring to enter into a consent order in terms of the agreement. A consent order was subsequently drawn up by the Judge in Chambers without a further hearing and issued to the parties.

15. There is no dispute in this case that Mrs. Moraldo and her attorney Dr. O'Brien together with Mr. Sandiford and his attorney Ms. Turkessa Blades attended the mediation session and that the mediation agreement was subsequently drawn up and entered as a consent order. Mrs. Moraldo's case of negligence against Dr. O'Brien is not one of failing to give proper advice. It is not a case of failing to advise on the proposed settlement or to make proper representation to obtain a just result for Mrs. Moraldo. It is not a case of any failure of Dr. O'Brien as an attorney at law in representation or guidance in the mediation process at all. It is simply that Mrs. Moraldo contends that Dr. O'Brien entered into the consent order without her instructions to do so and by failing to represent Mrs. Moraldo's case to the Court during the proceedings. Mrs. Moraldo contends that he breached his fiduciary duties by:

    a) Acting without informing the Claimant or obtaining the Claimant's instructions;

    b) Deliberately concealing the true actions and the nature of the communication between himself and the Court in the said matter.

16. Importantly, there is no specific claim for damages for negligence, but she seeks several declaratory reliefs that Dr. O'Brien breached his duty towards her and seeks the repayment of fees she paid to him in the sum of $100,000.00. It was not part of her pleaded case that the measure of her loss arose is referable to the terms of the agreement.

17. Dr. O'Brien in his defence denies that Mrs. Moraldo instructed him of any change in her position with regard to the agreement during the mediation process or after it. The mediation agreement was executed by Dr. O'Brien and Counsel for Mr. Sandiford following the mediation session in the presence of Mrs. Moraldo and with her full knowledge and consent.

18. In 2015, Mrs. Moraldo, through her husband, indicated that she was unable to secure the money to satisfy the judgment and it was on that basis Mrs. Moraldo's husband requested Dr. O'Brien to set aside the consent order. Dr. O'Brien denies that he gave any undertaking to do same.

19. He contends that he was present at the hearings before the Court and due to the fact that mediation was ordered in the proceedings with a view of amicably settling the matter, there was no need for him to put forward any further defence on behalf of Mrs. Moraldo. He further denies that he received the sum of $100,000.00 and contends that he did not breach the fiduciary duty owed to Mrs. Moraldo.

20. By way of context, Mrs. Moraldo also brought a claim against Mr. Sandiford to set aside the consent order in **Jennifer Moraldo v Anthony Sandiford** CV2016-01946 (the setting aside action). In that case, this Court has already found that there was a clear agreement made by the parties at the mediation session which was subsequently drawn up by the mediator and the attorneys for Mrs. Moraldo and Mr. Sandiford. Dr. O'Brien had the ostensible and implied authority to enter that consent order and to bind his client in circumstances where Mr. Sandiford was unaware of any dispute between Dr. O'Brien and his client. Mr. Sandiford acted at all material times on the faith of the agreement and consent order that was entered between the parties. The consent order was not set aside.

21. Against this backdrop, I turn to the first issue for determination of the authority of Dr. O'Brien to act for Mrs. Moraldo in executing the mediation agreement and consent order.

I (i) The authority of Dr. O'Brien to execute the mediation agreement

22. The Mediation Act defines the mediation process as ending with the execution of a mediation agreement:

> "Mediation process" includes the mediation session together with all administrative processes and procedures leading to and necessary for the conduct of such mediation session and all processes and procedures after the completion of the mediation session ending with the signing of the mediation agreement or if there is no agreement, when the mediation session is otherwise terminated."

23. The mediation process therefore ends upon the execution of the mediation agreement or when the session is otherwise terminated. In this case, the mediation agreement was not executed by the parties at the mediation room but was subsequently drawn up by the mediator and executed by the attorneys. It is of course a matter of good practice for mediation agreements to be executed at the end of the mediation session. However, there would be many reasons why the execution of a mediation agreement may be postponed after the end of the mediation session. In this case the mediation ended late in the day and the mediator undertook to draft the agreement based on the notes of the agreement he recorded with the concurrence of the parties. To that extent, the mediation process is still extant. It is standard practice that the written memorandum of the agreement is immediately prepared and signed before the parties leave. However, the practice of mediation suggests that the facilitating of the drafting of the agreement at a later stage by the mediator may also occur. See **ADR Principles and Practice 3rd Edition** page 255.

24. The manner in which the mediation agreement was executed in this case does not excite the Court's suspicion, nor has Mrs. Moraldo proven on a balance of probabilities that it was executed without her knowledge nor consent.

25. In analysing the evidence in this case of whether there was an agreement, I dealt with the question of the admissibility of confidential information at the mediation session in the setting aside judgment. I adopt that reasoning in my analysis of the evidence in this case. See paragraphs 43-55 of **Jennifer Moraldo v Anthony Sandiford** CV2016-01946.

26. I make this main finding of fact based upon my analysis of the evidence in this case and the credibility of the witnesses who have testified on this issue namely, Mr. Keith Moraldo and Mrs. Moraldo for the Claimant, Dr. O'Brien for the Defendant and Mr. Vieira who responded to the summons issued by the Court to assist it in determining whether the agreement presented to this Court were the terms agreed to by the parties.

27. The well-known authorities of **Reid v Dowling Charles and Percival Bain** Privy Council Appeal No. 36 of 1987 and **The Attorney General of Trinidad and Tobago v Anino Garcia** Civil Appeal No. 86 of 2011 are pertinent guides in determining the credibility of witnesses where less emphasis is placed on demeanour and more emphasis is placed on a forensic analysis of the witness testimony.

28. In **The Attorney General v Anino Garcia** CA Civ. 86/2011 Bereaux JA placed emphasis on the assessment of the credibility of witnesses as against the pleaded case, contemporaneous documents and the inherent probabilities of the rivalling contentions. He adopted the guidance of the Privy Council in **Reid v Dowling Charles and Percival Bain** Privy Council Appeal No. 36 of 1987 at page 6 where the Court noted:

> "Where the wrong impression can be gained by the most experienced of judges if he relies solely on the demeanour of witnesses, it is important for him to check that impression against contemporary documents, where they exist, against the pleaded case and against the inherent probability or improbability of the rival contentions, in the light in particular of facts and matters which are common ground or unchallenged, or disputed only as an afterthought or otherwise in a very unsatisfactory manner. Unless this approach is adopted, there is a real risk that the evidence will not be properly evaluated and the trial judge will in the result have failed to take proper advantage of having seen and heard the witnesses. "

29. In **Mahabir Industries Limited v Winston Moore**, Mohammed J opined at paragraphs 31-33:

> "[31] Before arriving at a conclusion, the court ought to "weigh in the balance matters of substantive evidence which bear on the question of whether a particular witness was or was not telling the truth": **Ramsaran v Hoodan** (unreported) Privy Council App. No 5 of 1997 (the Privy Council noting with approval the words of de la Bastide CJ in the Court of Appeal judgment of that case). It is well-established that in doing so, a first instance trial judge can take into consideration observations in respect of the non-verbal communication that accessorizes a witness' oral testimony while the witness is being examined or cross-examined. Where the version of facts proffered by each side is diametrically opposed the court ought to consider the credibility and reliability of the witnesses in determining what is more likely to be the truth.
>
> [32] Throughout, however, as cautioned by the Privy Council in **Attorney General and anor. v. Kalicklal Bhooplal Samlal** (1987) 36 WIR 382 it must be borne in mind that the trial judge must balance the demeanor of the witnesses against the rest of the evidence. The trial judge must, when weighing the credibility of a witness, put correctly

into the scales the important contemporaneous documents and inherent improbabilities. This principle was concisely put in the headnote of the Privy Council's judgment in **Kalicklal** (supra), per curiam, as follows: "Before a trial judge forms a view based on the demeanour of a witness on a matter on which there is a conflict of evidence, he must check his impression on the subject of demeanour by a critical examination of the whole of the evidence (in this case, the contemporaneous documents and the inherent improbability...)."

[33] The court's final determination on the issue of fact should: (i) be based on the facts as properly deduced from the matter; (ii) have much support in the evidence; and (iii) be a decision which a reasonable judge could have reached: deduced from **Attorney General of Trinidad and Tobago and Anino Garcia** CA No. 86 of 2011. Of course, a court should always have due regard to the particular circumstances of a matter when determining an issue of fact: **Attorney General for the Isle of Man v Moore** (1938 3 All ER 263 (Privy Council)."

30. I was very impressed with Mr. Vieira's evidence. He gave his evidence in a candid and open manner. Where there were any inconsistences he quickly owned up to them and gave credible explanations for any discrepancies in his evidence. His evidence, of course, was given against the backdrop of having conducted the mediation some five (5) years ago. Nevertheless, the clarity with which he answered his questions and the willingness with which he responded to the Court's invitation are to be commended. A mediator is in fact not compellable as a witness, however, Mr. Vieira himself was quick to point out to the Court, when he first presented himself, of the exceptions to the confidentiality rules and his obligation to assist the Court to determine whether an agreement was arrived at between the parties. I also took note of the fact that there was no motive nor interest of Mr. Vieira to be served in supporting either party. His deportment and answers to questions confirmed his status as a true neutral in this dispute[8]. Indeed I took careful note of both Mr. and Mrs. Moraldo's reticence under cross examination in accusing Mr. Vieira of lying and when confronted with the fact that their testimony irreconcilably conflicts with Mr. Vieira

[8] Code of Ethics in the Mediation Act

suggesting that Mr. Vieira has lied, their answers were non-committal and drew short of making any negative inferences of Mr. Vieira.

31. Ultimately his evidence was consistent, clear, without any hint of prevarication nor of any interest to serve save for assisting this Court in determining whether the parties agreed to the terms set out in the agreement. It is fitting to analyse Mr. Vieira's evidence first as it serves in many respects as a compass in guiding this Court in the determination of the credibility of the parties on this aspect of the case.

32. In his evidence in chief he contended that he recalled conducting a mediation session in 2013. He was assured at the start of the mediation that all persons who were needed in order to give a binding agreement were present and that their lawyers had authority to act and speak on their behalf. The mediation lasted for several hours and it seemed doubtful as to whether an agreement would be arrived at but eventually they did arrive at an agreement. He contended that the consent dated 13th March, 2013 represented his understanding of what was agreed. He stated that at the end of the mediation session, the agreement was written out in manuscript and the parties initialled the hand-written agreement.

33. In cross examination by Counsel for the Claimant, Mr. Vieira admitted that the matter was very contentious and that he did not think the parties would have arrived at an agreement. He contended that the attorneys for both parties were there throughout the mediation. He stated that "the mediator tries to encourage the parties to be the ones to participate and to speak and to do the agreement and the attorneys are there for ostensibly to give advice to make sure legal points arise but often times the attorneys engage with the parties in the discussions."

34. He contended that when they arrived at the mediation agreement, he read out the terms, the lawyers on each side kept notes and then the agreement was typed up in keeping with those notes. He stated:

> *"What happened as I said is, at the end of the session I read over the terms what I understood the agreement to be, I said I would have it typed up so it can be put as a court order as annexed to the court. I took my manuscript, I had it typed and I sent it to the two (2) lawyers for them to see if it properly represented what was agreed at the mediation session. There were some delay as you say here for probably waiting for receipts and other documentation, but eventually the two (2) lawyers got back to me. They said it was*

fine, this represented what was agreed in the session. I signed off on it and I gave it to them to put in."

35. In the setting aside action I held that his testimony established the following facts:

    (a) The parties and their attorneys at law attended the mediation session.

    (b) There was a pre-mediation and a main mediation session.

    (c) It was a difficult mediation.

    (d) He employed the process of caucusing to break the deadlocks between the parties and to keep the negotiations continuing.

    (e) Mrs. Moraldo was represented by her attorney Dr. O'Brien and Mr. Sandiford represented by Ms. Blades. All present had full authority to settle the claim.

    (f) All parties present were allowed to speak and to participate in the negotiations.

    (g) The mediator recorded the terms of settlement. This was read over to the parties at the end of the session and all agreed to the terms.

    (h) The mediator was unsure as to whether the parties had themselves initialled his draft of the agreement however he took his notes back to his office and as agreed by them he later typed up the agreement, signed it and sent it to the respective attorneys.

    (i) Both attorneys eventually executed the agreement.

36. It was not suggested to Mr. Vieira in cross examination that the agreement which he typed up was not the terms that were discussed in the mediation room nor was it suggested to him that the parties did not agree to any terms at the end of the mediation session. When questioned by Counsel for the Claimant if he heard Mrs. Moraldo in cross examination say she did not agree nor did she sign an agreement, he indicated that he did. He was then questioned by Counsel that at that point there was probably a draft proposed agreement and not an actual agreement but he maintained that there was an agreement. Mr. Vieira's consistent answer in cross examination of what transpired at the end of the mediation session was that he read the terms of the agreement, the parties agreed, he later drafted it out and sent it back to the attorneys for Mrs. Moraldo and Mr. Sandiford to confirm that it represented what they

discussed and agreed. The attorneys eventually responded that they did and that it was going to be entered into as a consent order. The mediation agreement was in the following terms:

"*This Agreement dated and effective this day of February 2013 is made between (1) Jennifer Moraldo; and (2) Anthony Sandiford.*

It is Agreed:

1. *Matter settled for Nine Hundred Thousand Dollars (TT$900,000.00) and a congruent transfer of property, specifically:*
    a) *Jennifer Moraldo will pay Anthony Sandiford the agreed sum of TT$900,000.00 on or before 31 December 2013; and*
    b) *Anthony Sandiford will convey the property in Arima known as 104 Capildeo Land, Cleaver Road in Arima to Jennifer Moraldo (preferably by Deed of Gift but if that's not feasible then otherwise by Deed of Conveyance; the costs and charges associated with the transfer to be borne by Jennifer Moraldo). The Deed of Gift/Transfer shall be prepared and signed forthwith and in any event before 31 December 2013, but will be held in escrow until the agreed sum has been paid. If Jennifer Moraldo needs more time to pay the agreed sum Anthony Sandiford will be entitled to statutory interest (12%) from 31 December 2013 to the date of final payment inclusive.*
2. *All further proceedings (including HCA CV2008-01690 and HCA CV2010-5045) stayed upon the terms set out above.*
3. *The parties acknowledge that the above terms represent their complete agreement relating in property and finance and it constitutes full and final satisfaction of all and any claims either may have against the other.*
4. *Each party acknowledges and agrees that upon complete compliance by each other with the terms of this Agreement and with any Order made embodying or reflecting it, these proceedings and all other proceedings (including HCA CV2008-01890 and HCA CV2010-5045) do stand dismissed and neither party will have any further claims upon the other including any claims upon her or his respective estates.*

5. *Each party will bear their own costs with respect to this Agreement and there shall be no order as to costs in these and the other proceedings.*
6. ***This Agreement shall be filed and made an Order of the Court.***
7. *There shall be liberty to both parties to apply as to carrying the agreed terms into effect.*

Concurrence of the Mediator

The general provisions contained in the foregoing Agreement were reached by the parties in mediation conducted by the undersigned mediator. Legal advice and services required for vetting and approving this agreement were provided by the independent advisory attorneys whose signature appear above."

37. As the parties agreed to this mediation agreement being made an order of the Court the consent order that was drafted was in similar terms. It stated:

a) *"That the matter is settled for Nine Hundred Thousand Dollars (TT$900,000.00) and a congruent transfer of property specifically:*

Jennifer Moraldo will pay Anthony Sandiford the agreed sum of Nine Hundred Thousand Dollars (TT$900,000.00) on or before 31st day of December 2013 and; Anthony Sandiford will convey the property in Arima at 104 Capildeo Lane, Cleaver Road in Arima to Jennifer Moraldo (preferably by Deed of Gift but if that is not feasible then otherwise by deed of conveyance; the cost and charges associated with the transfer to be borne by Jennifer Moraldo. The Deed of Gift/Transfer shall be prepared and signed forthwith and in any event before 31st December 2013, but will be held in escrow until the agreed sum had been paid. If Jennifer Moraldo needs more time to pay the agreed sum Anthony Sandiford will be entitled to statutory interest of twelve perfect (12%) from 31st day of December, 2013 to the date of final payment inclusive;

b) *All further proceedings (including HCA CV2008-01690 and HCA CV2010-05045) are stayed upon the terms set out above;*

c) *The parties acknowledging that the above terms represent their complete agreement relating to property and finance and it constitutes full and final satisfaction of all and any claims that either may have against the other;*

d) *Each party acknowledges and agrees that upon compliance by each other with the terms of this agreement and with any Order made embodying or reflecting it, these proceedings and all other proceedings (including HCA CV2008-01690 and HCA CV2010-05045) do stand dismissed and neither party will have any further claims upon the other including any claims upon her and his respective estates;*

e) *Each party will bear their own costs with respect to this Agreement and there shall be no order as to costs in these and the other proceedings;*

f) *Liberty to apply; and*

g) *The parties shall bear their own costs.*

38. Turning to the parties' evidence, Dr. O'Brien's testimony was more consistent with that of Mr. Vieira than Mr. and Mrs. Moraldo. Further, there were many inconsistencies in Mr. and Mrs. Moraldo's evidence which makes it improbable that they were unaware of the terms of the mediation agreement or that they did not authorise Dr. O'Brien to enter into that mediation agreement.

39. First, Mrs. Moraldo asserts that she did not agree to the terms of settlement proposed by Mr. Sandiford and she expressly instructed Dr. O'Brien of same. She also went home and discussed the proposal with her husband and children and confirmed her reasoning that she could not accept the settlement. If she had there and then in the mediation room indicated to Dr. O'Brien that she was not accepting the proposal there was no need for her to revert to her family. She stated that she never issued any instructions to Dr. O'Brien for the settlement of the matter. This is in stark contrast to the evidence of the mediator and of Dr. O'Brien that the session ended with more than just a proposal by Mr. Sandiford but with an agreement and acceptance by Mrs. Moraldo of that proposal.

40. Second, in cross examination Mrs. Moraldo's evidence contradicted her main testimony in material aspects. She said that after the mediation Dr. O'Brien said they would go back to his office and he would relist the matter before the Court. This would suggest either that there

was no agreement or that there was an agreement and the agreement would be entered as an order of the Court. This is entirely consistent with Dr. O'Brien's indication that the next step would be to have the consent order entered before the Court at a next court hearing.

41. It is true that at the mediation nothing was executed between the parties. She appeared not to understand the purpose of the mediation at all and her attempt to characterise the mediation as a means to deal with a figure of $313,000.00 is misleading. Her exchange in cross examination demonstrates either her inability to recollect the details of the mediation or her mischaracterisation of the mediation process:

    "Q: Ok, well when you'll were assembled in that meeting room that morning tell me what happened tell us.

    A: We went into the mediation and Mr. Vieira said that we are here to try to come to an agreement with the matter that was before him $313,000.00 agreed for a property.

    Q: So the only figure you were dealing with at that mediation according to you was $313,000.00.

    A: Yes because that is what we went into the mediation to settle.

    Q: And did you agree to the $313,000.00?

    A: No, we didn't and that is why we went to mediation.

    Q: At the mediation did you agree to $313,000.00?

    A: We did not agree to anything or any figure.

    Q: What was your proposal?

    A: I didn't give any because the $313,000.00 is what we had gone there to get resolve.

    Q: That was the only figure being discussed at mediation?

    A: That figure wasn't discussed at all.

    Q: No figure was discussed?

    A: No"

42. Third, she was adamant that no proposal was exchanged at the mediation, however, later in her cross examination she admitted that Mr. Sandiford wanted and did propose $900,000.00.

43. Fourth, she indicated that a week after the mediation had ended she went to Dr. O'Brien's office and he indicated that he would obtain another letter from Mr. Glenn Parmassar. However, according to her own evidence in chief, that took place in 2015 and not in 2013.

44. Fifth, she gives the impression that after the mediation was over her next step was to "go to Dr. O'Brien and let him know that I did not agree". This gives rise to the inference that either she said nothing at the mediation with respect to the proposal or that she did not tell Dr. O'Brien at the conclusion of the mediation session that she did not agree with the proposal. Her evidence on this respect is quite confusing:

    "*Q: And after you consider those proposal what was the arrangement for you to communicate your decision on that?*

    A: To go to Mr. O'Brien and let him know that I did not agree

    Q: When were you to do that?

    A: Anytime was convenient to both of us. There was no specific date and time

    Q: But I thought after the mediation the next thing you were to do is to get a date to go back to court

    A: Well, that is what Mr. O'Brien was to do, he said, he will call me when he would relist the matter to the judge, so I will have to wait on Mr. O'Brien to give me, the judge say this is the date and we will prepare to come to court."

45. Importantly, there is no absolute denial from Mrs. Moraldo that Mr. Vieira read out the terms of agreement at the mediation meeting. This is passing strange for a client whose case is based on the fact that there was no agreement arrived at the mediation. She simply said she could not recall. She also cannot recall whether the request for receipts was in fact to verify the settlement figure of $900,000.00.

46. Sixth, importantly, later in her cross examination she clarifies for the first time that she was not in agreement with the $900,000.00 when they left the mediation. If indeed she did not agree with paying $900,000.00, then why would Mrs. Moraldo through Dr. O'Brien request

receipts with respect to the $900,000.00 and indeed the contemporaneous documents reveal the request for receipts for the said $900,000.00.

47. Importantly, seventh, for the first time in her cross examination she reveals that the matter of the dismissal of other Court actions were in fact part of her agreement and were discussed. Then when pressed by Counsel about details of the discontinuance she conveniently fell into a lapse of memory saying that she could not recall.

48. And lastly, she contends that she paid Dr. O'Brien $100,000.00 in remuneration for his services yet was unable to produce any receipt save for $18,000.00.

49. Mr. Keith Moraldo in his examination in chief[9] contends that, after the mediation session ended, Mrs. Moraldo, in his presence, informed Dr. O'Brien that she could not accept the settlement proposed by Mr. Sandiford in the mediation session. To his understanding, the matter had to be given a date before this Court.

50. In cross examination, Mr. Moraldo was more aggressive and also proved to be an unreliable witness. First, very early in his cross examination he made a Freudian slip indicating that he expected after the mediation that he would get a return date to set aside the agreement. This in fact is entirely plausible and consistent with the Moraldos change in heart that they changed their minds with respect to the agreement and not that an agreement was not made at the mediation.

51. Second, Mr. Moraldo immediately answered by way of retreating his concession which was equally confusing:

> *"Q: I want the error, what you said before?*
>
> *A: To say there was no agreement because I said that before, when you asked me a question I said there was no agreement it's a slip of my tongue when I said agreement ok.*
>
> *Q: You kept asking Mr. O'Brien what?*
>
> *A: When are we going to come to whatever transpired the suggestions that transpired at the mediation, it wasn't agreement? When are we going to get back*

[9] Witness Statement of Keith Moraldo filed 27th November, 2017

to this place of the suggestions that he mentioned, not me, not my wife in the mediation.

Q: What did he mention in the mediation?

A: Actually he said nothing.

Q: He said nothing and the questions after when would we get back to what he said in the mediation that is what you just told us again. You realize you said that.

A: Go ahead I'm listening.

Q: No, no I just want confirmation that you said that otherwise I could ask his Lordship to repeat. Yes or no.

A: I said that, repeat what you said.

Q: No, you repeat what Mr. O'Brien was to get back to you'll about.

A: He was to get back to my wife with respect to the suggestions that he made.

Q: So you realize when you told me he said nothing at the mediation and you now say he tell your wife don't speak he made the suggestions those two things cannot coexists.

A: That is what existed.

Q: But you realize just to repeat it and listen to it both things can't be true."

52. Third, another area where Mr. Moraldo's recollection of the events of the mediation appeared unreliable is when he appeared confused as to who and when the $900,000.00 offer was made:

"Q: What figure did Mr. O' Brien proposed, the figure for settlement in the mediation?

A: Mr. O'Brien said that, ok $900,000.00

Q: That came from Dr. O'Brien?

A: Yes it did.

Q: And that's the first time you where hearing that figure in the mediation?

A: Yes sir.

Q: It was not suggested by Mr. Sandiford?

A: Yes it was suggested by Mr. Sandiford.

Q: After Dr. O'Brien suggested it or before?

A: Before Mr. O'Brien suggested it.

Q: But you just told me the first time you heard that figure was in the mediation from Dr. O'Brien.

A: I could make a mistake I can't remember everything. What I'm telling you but I could remember $900,000.00 being mentioned.

Q: By?

A: Mr. Sandiford and then Mr. O'Brien told that they are asking for that."

53. Fourth, Mr. Moraldo certainly confirms that nothing in the mediation room suggested that they did not accept the $900,000.00:

"Q: There is evidence that your wife had to consider the proposal and get back to Mr. O'Brien.

A: The proposal is that she have to talk to her children because of what age.

Q: Depending on what the children say what will she do with the answer?

A: She had already made up her mind.

Q: After she discussed with the children what was she to do with the answer?

A: She probably was to get back to Mr. O' Brien.

Q: Not probably she was to get back to Mr. O'Brien with it and that was what the $900,000.00.

A: She never accepted that.

Q: No Mr. Moraldo I know what you want to say but you have to answer the question she had to get back to Mr. O'Brien about the $900,000.00?

A: With what transpired not the $900,000.00 alone but what transpired.

Q: No why the alone, so at least with the $900,000.00 she was to get back to him.

A: Yes yes.

Q: Because she had to talk to the children and discuss it, isn't that so?

A: And it wasn't in her mind to accept it, she said I not accepting this.

Q: She didn't say that in the mediation to Mr. Vieira?

A: She said that.

Q: To Mr. Vieira?

A: Not to Mr. Vieira.

Q: She said it after you'll left the mediation?

A: She said it to Mr. O Brien, while walking out.

Q: So she never told Mr. O'Brien that in Mr. Vieira proceedings that she not agreeing to the $900,000.00 is yes or no.

A: Mr. O'Brien told her not to say anything and not to sign anything she was just following instructions from the lawyer."

54. Importantly, he admitted that Dr. O'Brien had the authority to act on his wife's behalf and he indicated that his wife was told by Dr. O'Brien that she was not to do any talking. Not only is this implausible in a normal mediation, it directly contradicts the clear and consistent evidence of Mr. Vieira and Dr. O'Brien.

55. Fifth, he directly contradicts his wife's evidence with regard to the receipts:

"A: That was prior to the mediation.

Q: Do recall about 15 minutes ago telling his Lordship under oath that the first time you hear this figure of $900,000.00 was from Mr. O' Brien's mouth at the mediation.

A: It was $313,000.00, you complicating things.

The question is twofold, when did you learn about the receipts and in support of the $900,000.00 so this question is about the receipts.

Q: I went step by step you told us that you learn Ms. Blades was to supply receipts to Mr. O'Brien to support $900,000.00.

A: No totaling $313,000.00.

Q: You don't know that Ms. Blades was to send receipts with respect to the $900,000.00 at all.

A: No.

Q: And Mr. O'Brien was to do that after the mediation? When?

A: That was to be done before the mediation. When the matter came up he was supposed to submit receipts before the judge with respect the $313,000.00 the he alleged that he spent, the receipts was never submitted.

Q: And you don't know that Mr. O'Brien was to get receipts from Ms. Blades after the mediation for $900,000.00?

A: No is $313,000.00

Q: First time you hearing that is now?

A: First time."

56. At the end of the mediation, Mr. Moraldo indicates that Mr. Vieira said that the lawyers would get together. This is entirely consistent with an agreement being arrived at as Mr. Vieira testified about the lawyers preparing the formalities of the agreement:

"Q: And at the end before you'll had the tea and so on Mr. Vieira did a recap as to what happened for the day?

A: No he did not.

Q: He said that you'll will just go back to the judge now.

A: He said the lawyers will get together I guess I can't remember what he say because all of us.

Q: The lawyers will what.

A: Get together.

Q: And sign off on the typed up order.

A: Typed up it had no typed up order.

Q: No, what did he say you heard when Mr. Vieira said?

A: They say they will get together the lawyers I can't remember anything else and we left."

57. Dr. O'Brien's evidence on the client's agreement to terms at the mediation was clear and consistent. Dr. O'Brien in his evidence[10] contends that the mediation session took place on 18th January, 2013. The mediator, Mr. Anthony Vieira, held both individual and group sessions with the parties. He contends that Mr. Sandiford's attorney, Ms. Turkessa Blades contacted a valuator for an estimate value of the property and the figure given was in excess of one million ($1,000,000.00) dollars.

58. He stated that Mr. Sandiford proposed the sum of $900,000.00 as full and final settlement of his claim which Mrs. Moraldo agreed. The mediator in the presence of the parties reviewed the terms of the agreement and Mrs. Moraldo indicated her agreement to the terms. He contends that she accepted to pay the sum of $900,000.00 and that at no time during the mediation or subsequent to it did she indicate her disagreement with the outcome of the mediation.

59. He stated the mediation agreement was reduced to writing and it was understood that the attorneys would sign on the parties' behalf. The mediator also went over the terms of the mediation agreement with the parties and the parties agreed and accepted the terms before they left the mediation. The agreement was then sent to the attorneys who executed same and the mediator subsequently signed the agreement and placed his certificate.

60. Unlike the Moraldos, Dr. O'Brien's evidence was consistent with his pleaded case and consistent with the evidence of Mr. Vieira, the mediator. He confessed that it was his first and only mediation which he attended as an attorney. There were three (3) sessions as far as he could recall. This is consistent with the contemporaneous record that there was a pre-mediation session and then two (2) mediation sessions thereafter. He confirmed that the verbal agreement at the mediation was for the payment to Mr. Sandiford of $900,000.00.

[10] Witness Statement of Kenneth O'Brien filed 8th December, 2017

61. Counsel for Mrs. Moraldo spent a considerable amount of time pointing out that it was Mrs. Moraldo's belief that they were going to the mediation to agree to pay Mr. Sandiford $313,000.00 or less. Not only is that inconsistent with the pleaded case nor does it form part of the Claimant's case in negligence, it is entirely irrelevant to the fact whether the client at the end of the mediation session would have agreed to pay the sum of $313,000.00. It is the essence of any negotiation in any contract that parties may have their own "bottom lines" or expectations but the key requirement for enforceability in this case is not what the parties had originally expected to accomplish at a negotiation or mediation but what was actually agreed at the negotiation or mediation. Indeed when Dr. O'Brien was asked "she was going to the mediation to try and encourage Mr. Sandiford to reduce that figure" Dr. O'Brien candidly and correctly responded *"She agreed to negotiate. She was going to try to negotiate a settlement."*

62. Insofar as Counsel suggested in cross examination that a settlement of $900,000.00 was acceptable, Dr. O'Brien's response was stoically "once the parties agree". Indeed, although considerable time was spent by Counsel on this aspect of the reasonableness of the settlement, it formed no part of Mrs. Moraldo's case that the settlement was unreasonable or ill-advised.

63. As Counsel continued with his cross examination it revealed that either he was unfamiliar with the pleaded case or had a poor understanding of the nature of negotiations in a mediation. The following exchange with Dr. O'Brien reveals an unfair exchange with Dr. O'Brien regarding the fairness of the final agreement without putting on the record the entire context of the negotiations:

> *"A: My rule is to try to get through the process to advise the client to the best of my ability and to listen to the other side.*
>
> *Q: And to advise the client to the best interest to them isn't it so.*
>
> *A: Try always to do that sir.*
>
> *Q: So you advise your client you take instructions from your client correct.*
>
> *A: Yes.*

Q: So you would advise your client that hear what Sandiford wants $313,000.00 take $900,000.00 that's a good settlement, you would advise that.

A: I am not sure what in this context.

Q: In this context.

A: Sir with the greatest of respect I am not sure that in this particular context and in this court room today several things happened in that mediation."

64. Senior Counsel for the Defendant objected to the line of questioning and I had expressed my own reservation to Counsel for Mrs. Moraldo of this line of questioning. I left it for the parties to make their submissions on this aspect of the evidence. Having reviewed the pleaded case, any such insinuation or allegation that the agreement was ill-advised or that Dr. O'Brien failed in his duty in not providing effective and proper legal advice on the settlement is simply misplaced and falls outside the four corners of Mrs. Moraldo's case which is premised firmly on the fact that she did not give Dr. O'Brien any instructions to settle this claim.

65. In any event any, attempt to discredit the settlement in terms of examining the parties' monetary claim as identified in the litigation is irrelevant to the negotiating process in mediation. Such a focus unfairly puts undue emphasis on the party's position that is "I do not want to pay more than $313,000.00" rather than focusing on underlying interests. In mediation practice a position is a demand or claim a party makes. It is a "wish list" or "wants" of the client. Interests on the other hand are factors which underlie the parties' positional claims, those things which are actually motivating the parties in the negotiations. Interests can also be referred to as motivations or needs". Positions and interests in these senses are often closely connected. However a positional claim may disguise the party's real interest…One way of turning a position to an interest is to ask the question why is the position important for you?" See **Mediator Skills and Tehcniques: Triangle of Influence** by Boulle and Nesic page 78. The context of the negotiation is therefore very relevant to understand the reasons why Mrs. Moraldo would agree to $900,000.00 and it simply cannot be answered in black and white lines of examining the claim on the pleadings without a fuller appreciation of both parties underlying interests at the mediation session.

66. On that material aspect of the case Dr. O'Brien's cross examination confirms the following. That there were no instructions in writing from Mrs. Moraldo to settle the claim. That her instructions to settle the claim was made orally at the end of the mediation session. He did not tell Mrs. Moraldo that she was not allowed to speak and that she did participate in the mediation session. The actual written agreement was executed by the attorneys some days after the mediation session. Those terms were the terms which were read over by the mediator in the mediation room.

67. From the assessment of the evidence I am of the view that there was an agreement at the mediation room by Mrs. Moraldo on the terms of settlement which were subsequently reduced into writing by Mr. Vieira.

68. It is implausible that Mr Vieira would have typed up that agreement without reference to his notes of the agreement of the parties. It was never suggested to him that he manufactured this agreement and that it was something which he created without reference to the clients. The more difficult issue, however, for Dr. O'Brien is the authority to enter into the consent order. It is in this area that the evidence of Dr. O'Brien is found wanting and is an area in which the mediator can be of no assistance as his participation ended with the execution of the mediation agreement.

I (ii)The authority of Dr. O'Brien to enter into the consent order

69. According to Mr. and Mrs. Moraldo, on February 2013, Mrs. Moraldo's husband, Mr. Keith Moraldo, visited Dr. O'Brien's office to follow up on the matter and he informed her that the matter would be listed for hearing before this Court. In November 2014, her husband visited Dr. O'Brien's office again and thereafter informed her that unknown to her that a consent order dated 13th March 2013 was entered in the matter.

70. Upon discovering this, she visited Dr. O'Brien's office and again informed him that she could not fulfil the terms of the order. She informed him that Mr. Sandiford was a beneficiary of a property obtained by fraud. He undertook to have the consent order set aside.

71. Dr. O'Brien requested that she obtain a forensic examination report from Mr. Glenn Parmassar. Dr. O'Brien wrote to Mr. Parmassar by letter dated 22nd January 2015 requesting a forensic examination of the Deed of Conveyance No. 4637 of 1977. The report was

prepared on 31st July 2015 and delivered to Dr. O'Brien who then informed Mrs. Moraldo that he received the report and that he would inform her when the matter was re-listed for hearing.

72. She contends that Dr. O'Brien failed to bring to the Court's attention the nature of the first forensic report or indicate to the Court the issue of the matter in relation to fraud. She further contends that the consent order does not have her signature of consent to it and that Dr. O'Brien signed it as her representative without her authority.

73. Between March-November 2014, he visited Dr. O'Brien's office since he had non-contentious work with him. He enquired about Mrs. Moraldo's matter to which Dr. O'Brien responded that "he threw it out the window" which left him dumbfounded.

74. He contends that the consent order which was entered was done outside the confines of a Court hearing via email. He further contends that Mrs. Moraldo never agreed or consented to it. He stated at no time during February 2013 to November 2014 when he was following up with Dr. O'Brien was he made aware of the consent order.

75. Dr. O'Brien contends that following the execution of the agreement and the entering of the consent order, his retainer with Mrs. Moraldo came to an end but he continued to act for her husband in several other matters unrelated to the matter resolved at the mediation.

76. In the early part of 2016, he was informed by Mr. Moraldo that Mrs. Moraldo was yet to pay for the property. He contends that Mrs. Moraldo never indicated to him prior to the mediation or during it that she was unable to secure the money required to satisfy the agreement. He also did not undertake to set aside the consent order.

77. He contends that the services of Mr. Parmasar was done at the behest of Mrs. Moraldo's husband in order to obtain forensic analysis of the purported amendments made to the parent deed by which Mr. Sandiford obtained title. He stated that the allegation of fraud was not brought to the knowledge of the Court because there was no conclusive evidence of fraud and the matter was settled following the mediation.

78. He contends that he conducted himself in keeping with the rules and ethics of the legal profession and he acted in accordance with his client's instructions and in her interest as her advocate in the course of her litigation.

79. He considered that his retainer with Mrs. Moraldo ended when the consent order was entered. Although it was suggested that this was inconsistent with him still being on record for Mrs. Moraldo and writing to Mr. Parmassar in January 2015 for Mrs. Moraldo to obtain a forensic report on the deed which was the subject of the same action.

80. Dr. O'Brien explained that the request for the forensic report was in relation to the estate of the deceased which had to be settled and there could be no handing over of the property until the estate grant was obtained. However, in a pointed exchange in his cross examination, Dr. O'Brien said that the issue of fraud although pleaded in the defence was not pursued "until it was clear that Mrs. Moraldo did not intend to try to keep with the settlement that was agreed upon". This is consistent with Mrs. Moraldo telling Dr. O'Brien that either she was not in agreement with the consent order that was entered or that she was unable to comply with its terms. In any event this work would not have been commissioned by Dr. O'Brien if in fact he had obtained his client's instructions that the order had to be set aside.

81. Despite the fact that Dr. O'Brien contends that Mrs. Moraldo was informed that the consent order was entered, there is absolutely no written record of this neither are there any details provided by him of any oral conversation or meeting where this was formally communicated to Mrs. Moraldo either before the consent order was entered or after. I am not satisfied that Dr. O'Brien did enter the consent order with the client's express knowledge. It is more probable that after executing the mediation agreement he simply sent it to the Court without further reference to his client and without confirming with his client on the steps he will take to make the agreement an order of the Court as discussed in the mediation session. However, it is important to note that the mediation agreement itself provided for it to be sent to the Court:

> "This Agreement shall be filed and made an Order of the Court."

82. Dr. O'Brien had the authority to enter the mediation agreement but acted without his client's specific knowledge when the consent order was forwarded to the Court and entered as the Court's order. He did not act to set aside the order when requested by Mr. and Mrs. Moraldo although this is not a pleaded aspect of Mrs. Moraldo's claim of negligence. In any event, any such attempt would have been met with the problem of the parties arriving at an

agreement at the mediation session. I turn to the second question whether these acts by Dr. O'Brien falls within the protection of advocate/attorney immunity.

II(i)Advocate Immunity

83. Having found that there was an agreement to settle the claim and that it also included the entering of the agreement as a consent order, the only complaint Mrs. Moraldo would have is a failure of the attorney to effectively communicate with her when he was embarking on these steps and in failing to take steps to set aside the consent order. Of course the latter aspect was not part of the pleaded case of negligence. However, a major obstacle in the path of Mrs. Moraldo in any event is the question whether Dr. O'Brien is immune from any action in negligence for any acts done in the mediation process and in the conduct of the litigation resulting in the entering of the consent order allegedly without any instructions to do so. Counsel for Mrs. Moraldo argued that these actions are not protected by the immunity while Senior Counsel for Dr. O'Brien has posited that they fall within the well-known principles of attorney immunity under the common law and statute and by extension mediation immunity.

84. There are two aspects of this immunity to be examined. The first, the traditional attorney immunity conferred by section 22(1) of the Legal Profession Act and the second, "mediation immunity", the immunity conferred on the attorney for his acts or omissions in relation to a mediation. Before examining the statutory immunity, I would examine briefly the common law on advocate immunity and its development in various jurisdictions.

II(ii) Advocate immunity –Common law

85. It is trite law that in our common law with respect to the conduct and management of a case in Court public policy requires that an attorney remain immune from suit. See **Rondel v Worsley** [1967] 3 WLR 1666. This immunity extends to pre-trial work so intimately connected with the conduct of the case in Court so that it can fairly be said to be a preliminary decision affecting the way the case is to be conducted at the hearing. See **Saif Ali And Another Respondents And Sidney Mitchell & Co. (A Firm) And Others Appellants** [1978] 3 WLR 849. **The Legal Profession in the English Speaking Caribbean** by Karen Nunez-Tesheira Chapter 11.

86. In **Rondel v Worsley** the Law lords made the following pertinent observations in discussing

the "jagged edge" of attorney immunity where the attorney's public duty conflicts with his clients:

> "The main reasons on which I have based my opinion relate to the position of counsel while engaged in litigation, when his public duty and his duty to his client may conflict. But there are many kinds of work undertaken by counsel where no such conflict would emerge, and there I see little reason why the liability of counsel should be different from that of members of any other profession who give their professional advice and services to their clients. The members of every profession are bound to act honourably and in accordance with the recognised standards of their profession; but that does not, in my view, give rise to any such conflict of duties as can confront counsel while engaged in litigation.
>
> It was argued that, if counsel were to have immunity with regard to one part of their work but not with regard to other parts, there would be great difficulty in distinguishing between one case and another or determining where the immunity is to stop. I do not think so. The same public duty applies when drawing pleadings or conducting subsequent stages in a case as applies to counsel's conduct during the trial; and there will be cases where the same will apply at a stage when litigation is impending. But there are extensive fields of advisory work or work in drafting or revising documents where that does not apply."[11]

87. **Rondel v Worsley** established that "a barrister was immune from an action for negligence at the suit of a client in respect of his conduct and management of a cause in court and the preliminary work connected therewith such as the drawing of pleadings. That immunity was not based on the absence of contract between barrister and client but on public policy and long usage in that (a) the administration of justice required that a barrister should be able to carry out his duty to the court fearlessly and independently; (b) actions for negligence against barristers would make the retrying of the original actions inevitable and so prolong litigation, contrary to the public interest; and (c) a barrister was obliged to accept any client, however difficult, who sought his services."[12] Later in **Saif Ali** the Law Lords examined the extent of

[11] **Rondel v Worsley** [1967] 3 WLR 1666 at 1677
[12] **Rondel v Worsley** [1967] 3 WLR 1666 at 1677

pre-trial work that would attract the immunity.

88. In **Saif Ali** the Law Lords observed:

> "The general principle that barristers are entitled to some immunity was established, or re-established, by unanimous decision of all their Lordships. It was argued that barristers should enjoy no greater immunity than other professional men. But that argument was rejected: barristers, it was firmly held, have a special status, just as a trial has a special character: some immunity is necessary in the public interest, even if, in some rare cases, an individual may suffer loss. Now I would accept that the existence of a duty of care, and correspondingly of liability in negligence for failure to exercise that duty, continues in the natural course of legal evolution to expand as new situations come before the courts. But I do not think that this natural process which bears upon the existence of a duty of care should lead us to sweep away after so short a time an immunity from suit on special grounds of principle, which after many centuries of existence has been restated by this House. No ground was suggested why we should reopen the decision in *Rondel v. Worsley* [1969] 1 A.C. 191 and I do not think we should do so. What is required of us is a decision on the limits of an immunity held by this House to exist -- a fringe decision rather than a new pattern. I will now consider the opinions……
>
> First, I think that the formulation takes proper account, as it should, of the fact that many trials, civil and criminal, take place only after interlocutory or pre-trial proceedings. At these proceedings decisions may often fall to be made of the same nature as decisions at the trial itself: it would be illogical and unfair if they were protected in the one case but not in the other. Secondly, a decision that a barrister's liability extends so far as I have suggested necessarily involves that it does not extend beyond that point. In principle, those who undertake to give skilled advice are under a duty to use reasonable care and skill. The immunity as regards litigation is an exception from this and applies only in the area to which it extends. Outside that area, the normal rule must apply. Thirdly, I would hold that the same immunity attaches to a solicitor acting as an advocate in court as attaches to a barrister. Fourthly, it is necessary to repeat that the rule of immunity is quite distinct from the question what defences may be available to a barrister when he is sued. It by no means follows that if an error takes place outside this immunity area, a liability

in negligence arises.

Finally, as to the present case. The question is whether the third party claim should be allowed to go to trial, or whether it should be held that it falls within the area of immunity so as to justify striking out at this stage. In the Court of Appeal Lord Denning M.R. and Lawton L.J. held that the acts and omissions complained of came within the general words "conduct and management of litigation." Bridge L.J. held that they came within the narrower test of *Rees v. Sinclair."*

…….

An oversight, or failure to consider the consequences of not adding Mrs. Sugden as a defendant before the limitation period expired, if such took place, may have been defensible, but fell outside the immunity area."[13]

89. Lord Diplock famously noted:

"The fact that application of the rules that a barrister must observe may in particular cases call for the exercise of finely balanced judgments upon matters about which different members of the profession might take different views, does not in my view provide sufficient reason for granting absolute immunity from liability at common law. No matter what profession it may be, the common law does not impose on those who practise it any liability for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made. So too the common law makes allowance for the difficulties in the circumstances in which professional judgments have to be made and acted upon. The salvor and the surgeon, like the barrister, may be called upon to make immediate decisions which, if in the result they turn out to have been wrong, may have disastrous consequences. Yet neither salvors nor surgeons are immune from liability for negligent conduct of a salvage or surgical operation; nor does it seem that the absence of absolute immunity from negligence has disabled members of professions other than the law from giving their best services to those to whom they are rendered."

My Lords, the argument founded upon the barrister's competing duties to court and client,

[13] **Saif Ali And Another Respondents And Sidney Mitchell & Co. (A Firm) And Others Appellants** [1978] 3 WLR 849 at 854, 856, 857

upon which this House so strongly relied in *Rondel v. Worsley* [1969] 1 A.C. 191, loses much of its cogency when the scene of the exercise of the barrister's judgment as to where the balance lies between these duties is shifted from the hurly-burly of the trial to the relative tranquillity of the barrister's chambers. The kind of judgment which a barrister has to exercise in advising a client as to who should be made defendant to a proposed action and how the claim against him should be pleaded, if made with opportunity for reflection, does not seem to me to differ in any relevant respect from the kind of judgment which has to be made in other fields of human activity, in which prognosis by professional advisers plays a part. If subsequently a barrister is sued by his own client for negligence on what he advised or did in the particular case, he has the protection that the judge before whom the action for negligence against him will be tried is well qualified, without any need of expert evidence, to make allowance for the circumstances in which the impugned decision fell to be made and to differentiate between an error that was so blatant as to amount to negligence and an exercise of judgment which, though in the event it turned out to have been mistaken, was not outside the range of possible courses of action that in the circumstances reasonably competent members of the profession might have chosen to take……..

……

The first is that the barrister's immunity from liability for what he says and does in court is part of the general immunity from civil liability which attaches to all persons in respect of their participation in proceedings before a court of justice; judges, court officials, witnesses, parties, counsel and solicitors alike. The immunity is based on public policy, designed, as was said by Lord Morris of Borth-y-Gest (p. 25 1), to ensure that trials are conducted without avoidable stress and tensions of alarm and fear in those who have a part to play in them. As was pointed out by Starke J. in *Cabassi v. Vila* (1940) 64 C.L.R. 130, 141, a case in the High Court of Australia, "The law protects witnesses and others, not for their benefit, but for a higher interest, namely, the advancement of public justice." The courts have been vigilant to prevent this immunity from indirect as well as direct attack -- for instance by suing witnesses for damages for giving perjured evidence or for conspiracy to give false evidence; *Marrinan v. Vibart* [1963] 1 Q.B.

In *Watson v. M'Ewan* [1905] A.C. 480, this House held that in the case of witnesses the protection extended not only to the evidence that they give in court but to statements made by the witness to the client and to the solicitor in preparing the witness's proof for the trial; since, unless these statements were protected, the protection to which the witness would be entitled at the trial could be circumvented.

The second reason is also based upon the need to maintain the integrity of public justice. An action for negligence against a barrister for the way in which he has conducted a case in court is founded upon the supposition that his lack of skill or care has resulted in the court having reached a decision that was not merely adverse to his client as to liability or quantum of damages but was wrong in being adverse and in consequence was unjust, for otherwise no damage could be shown to have resulted from the barrister's act or omission of which complaint is made. The client cannot be heard to complain that the barrister's lack of skill or care prevented him from obtaining a wrong decision in his favour from a court of justice. So he must prove that if the action had been conducted competently by his counsel he would have succeeded instead of failed…….

…….

In *Rees v. Sinclair* [1974] 1 N.Z.L.R. 180, 187:

> "Each piece of before-trial work should ... 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 he given any wider application than is absolutely necessary in the interests of the administration of justice ..."

So for instance in the English system of a divided profession where the practice is for the barrister to advise on evidence at some stage before the trial his protection from liability for negligence in the conduct of the case at trial is not to be circumvented by charging him with negligence in having previously advised the course of conduct at the hearing that was subsequently carried out.

It would not be wise to attempt a catalogue of before-trial work which would fall within

this limited extension of the immunity of an advocate from liability for the way in which he conducts a case in court.

The work which the barrister in the instant case is charged with having done negligently, viz. in advising as to who was to be a party to an action and settling pleadings in accordance with that advice, was all done out of court. In my view, it manifestly falls outside the limited extension of the immunity which I have just referred to.

It follows that in my view the third party proceedings ought not to have been struck out upon the grounds stated in the judgments in the Court of Appeal. Whatever other grounds there might have been for doing so have not been relied upon by the respondents. So, the consequence must be that the order of the Court of Appeal should be reversed, and the appeal allowed……."[14]

90. Lord Salmon went on to comment at 870:

"There are several excellent reasons to which I have already referred and each of which is cogently set out by this House in *Rondel v. Worsley* [1969] 1 A.C. 191 explaining why public policy demands that a barrister, in common with a judge, juryman, or witness, shall be immune against being sued in respect of anything he does or says in court. I entirely agree with that immunity for the reasons I gave *when Rondel v. Worsley* [1967] 1 Q.B. 443 was before the Court of Appeal, and I shall not repeat any of them. I cannot, however, understand how any aspect of public policy could possibly confer immunity on a barrister in a case such as the present should he negligently fail to join the correct persons or to advise that they should be joined as defendants; or for that matter should he negligently advise that the action must be discontinued. It seems plain to me that there could be no possibility of a conflict between his duty to advise his client with reasonable care and skill and his duty to the public and to the courts. I do not see how public policy can come into this picture. This is certainly not a case where it could possibly be regarded as oppressive to join Mrs. Sugden as a defendant. After all, she had pleaded guilty to driving without due care and attention at the material time. Nor do I understand how any aspect of public policy could have required counsel to advise that the action against Mr.

[14] **Saif Ali And Another Respondents And Sidney Mitchell & Co. (A Firm) And Others Appellants** [1978] 3 WLR 849 at 861-865

Sugden should be discontinued. Once it is clear that the circumstances are such that no question of public policy is involved, the prospects of immunity for a barrister against being sued for negligently advising his client vanish into thin air, together with the ghosts of all the excuses for such immunity which were thought to exist in the past."

English common law- Hall v Simons

91. In the United Kingdom (UK) advocate immunity was abolished by the House of Lords in **Hall v Simons** [2000] 3 WLR 543 upon their review of the **Rondel v Worsley** and **Saif Ali** principles. The principal reasons for abolishing the immunity were as follows:

    - In the light of changes in the law of negligence, the functioning of the legal profession, the administration of justice and public perceptions reconsideration of the issue of advocates' immunity from suit was appropriate; that none of the reasons said to justify the immunity, viz. the "cab rank" rule (which provides that barristers may not pick and choose their clients), the analogy with the immunities of witnesses and others involved in legal proceedings, the duty of the advocate to the court and the public policy against relitigating a decision of a court of competent jurisdiction, had sufficient weight to sustain the immunity in relation to civil proceedings;
    - That the principles of res judicata, issue estoppel and abuse of process were sufficient to prevent any action being maintained which would be unfair or bring the administration of justice into disrepute;
    - That the obstacle of proving that a better standard of advocacy would have produced a different outcome and the ability of the court to strike out unsustainable claims under C.P.R., r. 24.2 would restrict the ability of clients to bring unmeritorious and vexatious claims against advocates should the immunity be removed; and
    - That, accordingly, the public interest in the administration of justice no longer required that advocates enjoy immunity from suit for alleged negligence in the conduct of civil proceedings.[15]

92. According to the House of Lords in **Hall v Simons**, the public interest in the administration of justice no longer required that an advocate enjoy immunity from suit for alleged negligence in the conduct of civil proceedings. Lord Steyn opined that **Rondel v Worsley** no

[15] **Hall v Simons** [2000] 3 WLR 543 at 544

longer reflects public policy and the basis for the immunity of barristers has gone. Indeed, the arguments in **Hall v Simons** in a world with increasing demands on the accountability of officials and those who hold fiduciary duties, the argument that no special immunity ought to be conferred is irresistible. In the 21st century with an increasing demanding public to ensure the probity of actions of their representatives and the high standards to which the judiciary and the legal system is adjudged, there is a compelling case for removing any sacred cows in our legal system in which any special immunity would be misplaced.

93. As a result of the abolishing of the immunity in the UK as a result of **Hall v Simons,** Lord Jackson in his Handbook in ADR[16] set out the areas of exposure by an attorney in mediation and ADR:

> "4.38 A lawyer has no immunity from an action for professional negligence in relation to a case. A lawyer may be liable for negligence in relation to ADR if he or she:
>
> a) Advises a client to accept too low a sum;
> b) Fails to investigate facts properly; so that the client recovers less that should have been recovered;
> c) Fails to pass important information to a client;
> d) Fails to make the client aware of the implications of unusual terms in an agreement;
> e) Undertakes responsibilities in relation to an agreement, but is responsible for a breach of what was undertaken."

94. While no such action in negligence can arise in this jurisdiction, they still serve as useful guides for attorneys when discharging their ethical duties to their clients.

95. This development in the UK has not been embraced uniformly by other Commonwealth jurisdictions although advocate immunity is under considerable scrutiny and pressure to remain as a justifiable immunity in the face of obvious injustices to clients.

New Zealand

96. **Rees v. Sinclair** [1974] 1 N.Z.L.R. 180 in fact first enunciated the test to determine the scope of advocate immunity which was relied on in **Rondel v Worsley**. However, the tide took an

[16] The Jackson ADR Handbook 1st Edition paragraph 4.38

about turn against advocate immunity in that jurisdiction in **Lai v Chamberlains** [2007] 4 LRC 79. New Zealand which previously followed the **Rondel v Worsely** and **Saif Ali** principles effectively abolished attorney immunity for the following reasons:

a) The test of 'intimate connection' (which had as its touchstone the in-court conduct of litigation) was uncertain.

b) The former principal justifications for the immunity were no longer persuasive. The ends of finality in litigation were adequately addressed by res judicata and issue estoppel, the pleas of autrefois acquit/convict, and the power of the court to strike out proceedings which were an abuse of process in application of the **Henderson v Henderson** principle. Immunity for advocates was not, therefore, required to meet the public interest in finality of proceedings or the integrity of the judicial process.

c) No compelling public policy required retention of an anomalous immunity for one occupational group.

d) The danger of allowing potential exceptions was that room was left for argument about whether a particular case was exceptional, and to some extent the purpose of the rule would be undermined. In the interests of certainty and simplicity there should be an absolute rule. In the civil arena, there should be a general prohibitory rule from which exceptions would be appropriate. The onus should be on the plaintiff in the second proceedings to demonstrate (a) that the bringing of those proceedings was not unfair to any party in the first proceedings; (b) that the consequences of success in the second proceedings would not cause an undesirable clash of determinations; and (c) that the bringing of the second proceedings would not otherwise bring the administration of justice into disrepute.

e) There is no information to suggest that the removal of the immunity would overset expectations to such an extent that it should apply on a prospective basis only.

Australia

97. Australia recognises an advocates' immunity against claims in negligence arising from their conduct of a case in court, or in work out of court intimately connected with that conduct. In **Giannarelli v Wraith** 1988] HCA 52 the High Court of Australia recognised and applied

Rondel v Worsley. The existence of the immunity was reaffirmed by the High Court in **D'Orta-Ekenaike v Victoria Legal Aid** [2005] HCA 12 in spite of **Hall v Simons**.

98. One of the concerns of the High Court in **D'Orta-Ekenaike** was that for a client to demonstrate negligence on the part of an advocate in the conduct of litigation, re-litigation of the concluded issues would be an inevitable step. However, it was essential to the public confidence in the finality of proceedings that litigation should not be re-opened except in a few narrowly defined circumstances: "the finality principle".

99. In **D'Orta-Ekenaike,** McHugh J said that "the immunity should extend to any work, which, if the subject of a claim of negligence, would require the impugning of a final decision of a court or the relitigation of matters already finally determined by a court." McHugh J also gave examples of the types of work determined to be "intimately connected" to the relevant extent, and therefore protected, were: Failing to plead or claim interest in an action for damages; Issuing a notice to admit and making admissions; Failing to plead a statutory prohibition on the admissibility of crucial evidence; **Negligently advising a settlement**; Giving advice and making decision about what witnesses to call and not to call; Giving consideration to the adequacy of the pleadings and, if appropriate, causing any necessary steps to be undertaken to have the pleadings amended.

100. There followed, however, in that jurisdiction a concern of "*lack of fit between the rationale for the immunity (the finality principle) and the formula specifying its scope*". A settlement at the door of the Court attracted the immunity in **Kelley v Corston** [1998] 3 WLR 246 on the basis that such conduct involved predicting the likely outcome of a case at the door of the Court and settling before it has begun, and therefore had the requisite degree of intimate connection with the case's conduct in Court.

101. In two recent cases in Australia it appears that for policy reasons the tide had turned against advocate immunity in that jurisdiction.

102. In **Gregory Ian Attwells & Anor v Jackson Lalick Lawyers PTY Limited** [2016] HCA 16, Jackson Lalick Lawyers had acted for Atwells in a bank recovery claim where the bank was owed $3.4 million. Atwell's liability to the bank was limited to $1.5 million but Jackson Lalick Lawyers advised the guarantors to enter into a settlement agreement to pay

the bank $1.75 million by a specified date and also to accept liability for the $3.4 million because it would not make a difference to them if they defaulted for the $3.4 million. Atwells did not make the payment within the specified time and the bank commenced proceedings against them. Atwells thereafter commenced legal proceedings against Jackson Lalick Lawyers alleging that they were negligently advised on the settlement agreement. The High Court allowed the appeal and held that the respondent's conduct was not work that was intimately connected with the judicial determination of the case to attract the advocate's immunity from suit and further that the advocate's immunity did not extend to negligent advice given to a client that lead to the settlement of a case by agreement between parties, even where the settlement agreement is embodied in a consent order. The Court noted:

> "46. Once it is appreciated that the basis of the immunity is the protection of the finality and certainty of judicial determinations, it can be more clearly understood that the "intimate connection" between the advocate's work and "the conduct of the case in court" must be such that the work affects the way the case is to be conducted so as to affect its outcome by judicial decision. The notion of an "intimate connection" between the work the subject of the claim by the disappointed client and the conduct of the case does not encompass any plausible historical connection between the advocate's work and the client's loss; rather, it is concerned only with work by the advocate that bears upon the judge's determination of the case……
>
> 52. As to the argument advanced by the Law Society, the immunity is not attracted simply because its existence might encourage lawyers to advise their clients to settle their claims. While it is no doubt true that there is a public interest in the resolution of disputes, the public policy which justifies the immunity is not concerned with the desirability or otherwise of settlements, but with the finality and certainty of judicial decisions. Decisions by the courts, as the judicial organ of the State, are necessary precisely because the parties cannot achieve a compromise of their disputes. The advocate's immunity is grounded in the necessity of ensuring that the certainty and finality of judicial decisions, values at the heart of the rule of law, are not undermined by subsequent collateral attack. The operation of the immunity may incidentally result in lawyers enjoying a degree of privilege in terms of their accountability for the performance of their professional obligations. But this incidental operation is a

consequence of, and not the reason for, the immunity. Because this incidental operation of the immunity comes at the expense of equality before the law, the inroad of the immunity upon this important aspect of the rule of law is not to be expanded simply because some social purpose, other than ensuring the certainty and finality of decisions, might arguably be advanced thereby."

103. **Kendirjian v Lepore** [2017] HCA 13 further strengthened the position in **Attwells**. In this case, Mr. Kendirjian who was injured in a car accident was offered a settlement of $600,000.00. This offer was rejected by Mr. Kendirjian's representatives who informed him that an offer was made but omitted to inform him of the amount. Mr. Kendirjian was eventually awarded $308,432.75 plus cost at the District Court. However, when he was informed of the original settlement, he commenced proceedings against his representatives alleging that they were negligent in not advising him of the settlement offer when it was made. The District Court held that the legal representative's conduct was covered by advocate's immunity. This was upheld in the Court of Appeal. However, the High Court overturned that decision and allowed the appeal of Mr. Kendirjian and did not distinguish **Attwells**. Edelman J stated at paragraphs 31 and 32:

"31. The joint reasons of the majority in *Attwells* explained the rationale for the immunity when declining to extend it to compromises. Since the immunity attaches by the "participation of the advocate as an officer of the court in the quelling of controversies by the exercise of judicial power", it followed that the immunity did not extend to advice that leads to a settlement between the parties. Advice leading to a compromise of a dispute cannot lead to the possibility of collateral attack upon a non-existent exercise of judicial power to quell disputes. For this reason, the expression of the test concerning work done out of court which "leads to a decision affecting the conduct of the case in court", or which is "intimately connected with" work in court, is not engaged merely by "any plausible historical connection" between an advocate's work and a client's loss. The test requires that the work bear upon the court's determination of the case. There must be a "functional connection" between the work of the advocate and the determination of the case.

32. In *Attwells*, the respondent submitted that an anomaly would arise if the immunity did not extend to negligent advice which leads to a compromise of the proceeding, but did

extend to negligent advice not to compromise a proceeding which leads to a judicial decision. The joint reasons of the majority explained that the assumption underlying the respondent's submission was that the immunity would extend to negligent advice not to compromise a proceeding because that advice was intimately connected with the ensuing judicial determination. The joint reasons rejected this assumption on the basis that negligent advice not to compromise a proceeding gives rise only to an historical connection between the advice and the continuation of the litigation. As the joint judgment concluded, the giving of advice either to cease or to continue litigating does not itself affect the judicial determination of a case."

104. In that jurisdiction advocate immunity does not extend to a compromise of an action.

Canada

105. The doctrine of advocate immunity is not part of the Canadian jurisprudence for the negligence of attorneys in the conduct of litigation. This was reiterated in **Amato v Welsh** [2013] ONCA 258. The case concerned a lawyer's right to invoke absolute privilege and the client's right to bring a claim against the lawyer and her law firm for alleged breaches of fiduciary duty and the duty of loyalty based on statements made and omitted to be made by the lawyer while representing different clients in quasi-judicial proceeding. The Court noted that "the doctrine of absolute privilege has never been treated as a rationale for protecting lawyers from negligence suits by their own clients. In Ontario, lawyers can be sued by their clients for their negligent conduct of both civil and criminal litigation". In commenting on advocate's immunity from its position in England to that of New Zealand, E.A Cronk J.A stated at paragraph 49, 51 and 52:

"49 The positions in England and New Zealand on advocates' immunity from professional negligence suits are now aligned with the pre-existing law in Ontario. In this province, the courts have never recognized immunity from client negligence claims in respect of an advocate's conduct of litigation. The seminal authority in this jurisdiction remains *Demarco*, which was cited with approval by this court in *Wong v. Thomson, Rogers* [1994 CarswellOnt 2925 (Ont. C.A.)], 1994 CanLII 841 and in *Wernikowski v. Kirkland, Murphy & Ain* (1999), 50 O.R. (3d) 124 (Ont. C.A.)…….

51 In *Demarco*, Krever J. posed the central question on the motion in these terms, at para. 2: "[t]he question is whether a lawyer, in the conduct of a trial, or other proceeding in Court, is, alone among all other professional persons, incapable of being sued by the client for negligence."

52 Justice Krever concluded that to deprive clients of recourse for the negligent conduct of a civil case is inconsistent with the public interest. As later explained by Doherty J.A. of this court in *Wernikowski*, at para. 39, Krever J. regarded the following policy concerns as mandating that a client has the right to sue his or her lawyer for the negligent conduct of the client's civil case in court:

• *accountability*: lawyers should be as accountable as anyone else for their misdeeds;

• *fairness*: those who suffer loss as a result of a lawyer's negligence should be entitled to compensation through the tort system;

• *the maintenance of minimum standards of competence*: the potential exposure to negligence claims serves as a deterrent against incompetent representation; and

• *the integrity of the justice system*: lawyers should not appear to be given favoured treatment which is not extended to other professionals who have, arguably, at least as good a claim to immunity from negligence claims as do lawyers."

106. He further explained at paragraph 87:

"…the jurisprudence on advocates' immunity described above instructs that immunity from suit must be based on public policy considerations. For example, in *Saif Ali*, Lord Wilberforce explained, at p. 214: "[i]n fixing [the boundary of immunity from suit], account must be taken of the counter policy that a wrong ought not to be without a remedy." Similarly, the Court of Appeal of New Zealand said in *Rees*, at p. 187: "[t]he protection [afforded by the principle of immunity] should not be given any wider application than is absolutely necessary in the interests of the administration of justice."

II(ii) The Statutory Immunity- The Legal Profession Act

107. In light of these developments in the Commonwealth, the survival of advocate immunity which remains part of the common law in any jurisdiction faces serious challenge. This should give rise to some introspection by the Law Association of Trinidad and Tobago

(LATT) in this jurisdiction and the question of the amendment to the Legal Profession Act. I had considered inviting the LATT to make submissions on this issue in this case, however, it would be more prudent if a more expansive exercise of consultation be engaged by the legal profession itself as the question of attorney immunity is also culturally sensitive to the nature of our society and the public that seeks access to justice.

108. Despite these developments in the common law, in the Commonwealth the decision of **Rondel v Worsley** and **Saif Ali** have been codified in section 22(1) of the Legal Profession Act. It provides as follows:

> "22. (1) Subject to subsection (2) an Attorney-at-law shall enjoy no special immunity from action for any loss or damage caused by his negligence or lack of skill in the performance of his function.
>
> (2) An Attorney-at-law is immune from suit in negligence in respect of his conduct of litigation only.
>
> (3) The immunity referred to in subsection (2) is not confined to proceedings in Court but extends to such pre-trial work as is so intimately connected with the conduct of the cause in Court that it could fairly be said to be a preliminary decision affecting the way the cause 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."

109. Attorney immunity therefore is now much a matter of statutory construction where the attorney is liable to actions in negligence save for his conduct of litigation which includes proceedings in Court and to pre-trial work intimately connected with the conduct of the case in Court. It creates a statutory embargo on actions in negligence for any actions which includes the manner in which the attorney conducts the litigation. There is no restriction that the immunity does not protect such actions which may lead to the compromise of litigation.

110. **Janin Caribbean Construction Ltd v Wilkinson and Others** [2016] UKPC 26 provides a perfect recent example of the distinction between the developing jurisprudence on advocate immunity in other Commonwealth countries and the policy reason behind the

retention of advocate immunity in the Caribbean for those that have implemented this statutory provision. In the case of **Janin** the appellant appealed the decision of the Court of Appeal to dismiss a claim made by the appellant against Mr. Wilkinson for damages for failing to exercise reasonable care and skill in acting for Janin in defence of a personal injuries claim wherein Mr. Wilkinson failed to attend at the trial of the action. Mr Wilkinson's position was that he was holding papers on behalf of the Attorney on Record out of courtesy and was not appearing for Janin. In dismissing the appeal, the Privy Council held that Mr. Wilkinson was immune from suit. Lord Clarke commented:

"**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 s 25 of the **Legal Profession** Act 2011, which provides as follows:

> "25(1) Subject to sub-s (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 sub-s (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 sub-s (2) and (3) of s 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 s 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 s 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."

111. In **Somasundaram v M. Julius Mechiour and Co.** [1988] 1 WLR 1394, the plaintiff who was charged with maliciously wounding his wife, instructed the Defendants to conduct his defence on the basis that he had no recollection of picking up the knife and the he intended to plead guilty. He then instructed the defendants that he remembered getting the knife and hitting his wife on the head with it. The defendants advised him that he had no defence and he plead guilty. He was sentenced to two (2) years imprisonment. He brought an action for damages against the defendants stating that they had been negligent in the conduct of his defence and that they had pressurised him to plead guilty. The appeal was dismissed for it was considered an abuse of process of the Court for the plaintiff to bring this action which necessarily involves an attack on the conviction and sentence imposed by the Crown Court and upheld in the Court of Appeal (Criminal Division) subject to the reduction in sentence. However, May LJ commented that that they were not persuaded that the action should be struck out on the grounds of immunity from suit. She stated:

"The remaining ground upon which counsel for the defendants submits that the action should be struck out is that the defendants are immune from suit in respect of the

allegations in the statement of claim and the action is therefore bound to fail. This submission was supported by Mr. Pulman. Both counsel submit, rightly in our judgment, that advice as to a plea is something which 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 the cause is to be conducted when it comes to a hearing, within the test proposed by McCarthy P. in *Rees v. Sinclair* [1974] 1 N.Z.L.R. 180 and approved by the House of Lords in *Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198. Indeed it is difficult to think of any decision more closely so connected. Counsel submitted that such immunity must therefore extend to solicitors and he relied upon passages in the speeches of their Lordships in *Rondel v. Worsley* [1969] 1 A.C. 191 to this effect. But to our minds it is clear that in extending the immunity to solicitors, their Lordships limited it to the occasions when they were acting as advocates, as of course they frequently do in the magistrates' courts and county courts and occasionally in those Crown Courts where they have rights of audience. Lord Reid said, at p. 232:

> "There are differences between the position of barristers and solicitors; not all the arguments which I have adduced apply to solicitors. But the case for immunity of counsel appears to me to be so strong that I would find it difficult to regard those differences as sufficient to justify a different rule for solicitors. I have already shown that solicitors have the same absolute privilege as counsel when conducting a case. So my present view is that the public interest does require that a solicitor should not be liable to be sued for negligence in carrying out work in litigation which would have been carried out by counsel if counsel had been engaged in the case:"

see also *per* Lord Pearce, at p. 267, and *per* Lord Upjohn at p. 284.

Mr. Pulman submitted that in a case where there was both solicitor and barrister, it would be anomalous if the immunity in relation to advising on plea extended to the barrister, but not to the solicitor. That may be so; but we would not be willing to extend the immunity that protects barristers and solicitors qua advocates any further than is necessary in the interests of justice and public policy. Thus we are not persuaded in this case that the

action should be struck out on the grounds of immunity from suit, in so far as this is a separate heading from the first ground."

112. In **Mohanlal Ramcharan v Carlyle Ambrose Serrano** CV2011-02646, the Defendant sought an order, inter alia, that the action be dismissed or stayed on the ground that it disclosed no cause of action and an abuse of process The Claimant contended that the Defendant acted without authority in pursuing an appeal to the Privy Council. Justice Jones in considering whether "want of authority" is a cause of action stated:

"21. Although not canvassed by the Defendant the real question seems to me to be whether "want of authority" is in itself a cause of action. In other words is the absence of the authority to sue on the Claimant's behalf "a statement of alleged facts which if true give rise as a matter of law to an obligation" or whether as pleaded it is merely a stepping stone from which a court may come to a conclusion of professional negligence. If it is the latter then in my opinion the statement of case discloses no cause of action since professional misconduct is not a cause of action and by section 22 of the Act an attorney is immune from suit in negligence with respect to litigation…….

……..

27. By making an Attorney at Law immune from suit with respect to negligence in the conduct of litigation a finding of professional negligence is one which is beyond the power of the Court to grant. Similarly, absent an appeal from a finding of the Disciplinary Committee under the Act, a Court has no jurisdiction in professional misconduct. In the case of **Cox v Green** a dispute over whether the plaintiff's conduct was contrary to the British Medical Association's ethical rules was held to be non-justiciable. In that case the plaintiff had brought an action seeking in effect a declaration that he had not been acting contrary to the ethics of his profession as set out in the Association's rules. The action was struck out.

28. It would seem to me that in a similar vein this action is merely for the purpose of establishing a finding of fact for use in the disciplinary proceedings and for an order ensuring the availability to the Claimant of the sum claimed in those disciplinary proceedings. To my mind therefore the action before the court is merely to facilitate the Claimant's remedies before the Disciplinary Committee. In my opinion this is an improper use of the Court's process and amounts to an abuse of the process of the Court."

113. Mention should be made as well to **Joash Morris v Curtis Johnson** CV2007-00987 in which Jones J similarly held that notwithstanding the fact that a consent order which the attorney entered without the client's instructions could not have been set aside, the client was left to such remedies available against the attorney before the Disciplinary Committee.

114. The statutory provisions clearly prohibit actions in negligence against attorneys in the conduct of litigation. In this case, Dr. O'Brien was charged by his client with the management and conduct of the litigation. The parties were ordered to attend mediation. Both parties with their attorneys attended. They assisted the mediator in arriving at a settlement. The terms of the agreement were drafted and submitted to the Court for its consideration to arrive at a suitable outcome for the dispute over the contested property. The Court would, of course, had to consider matters such as whether the order fell within its jurisdiction to make and any other suggestions with regard to its mechanics before it was entered. Ultimately, proceedings to set those consent orders aside necessarily involve a reflection on the merits of the case as indeed Mrs. Moraldo has sought to do in this case.

115. However, in addition to attorney immunity, Mrs. Moraldo's case faces the additional challenge of the statutory immunity for actions in negligence against attorneys and mediators in the course of the mediation session.

Statutory Immunity- Mediation Immunity

116. With the survival of attorney immunity in the jurisdiction it is not surprising that the Mediation Act confers an immunity on those participating in the mediation process. For good reasons the ambit of the immunity is wider than other jurisdictions which recognises immunity for the mediator from civil action. Section 12 of the Mediation Act provides:

> "12. (1) No legal proceeding may be commenced against a **certified mediator or any person or official involved in the mediation process** for any act done or omitted to be done in the course of the performance of his functions, **in reference to such mediation process**.
>
> (2) Notwithstanding subsection (1), if a person suffers loss or damage as a result of the wrongful disclosure of confidential information by a certified mediator or by any person

who in the course of his employment or training gained access to such confidential information, that person shall be entitled to bring suit for damages.

(3) Subject to subsection 11(2), the certified mediator or any other person involved in the mediation process is not compellable as a witness, to give evidence of any matter which occurred during the mediation session or any confidential information which came to his knowledge during the mediation process."

117. In relation to this section, I had asked the parties to address me on three (3) questions: First whether "any person" referred to in section 12(1) of the Mediation Act refers to an attorney at law who participates in the mediation process. Second, if so, what is the rationale for conferring such an immunity on an attorney at law? Third, does it extend to the presentation of consent orders to the Court after the mediation session is concluded?

118. Both parties recognise that mediation is a party driven process, that is, it is a process focused on direct communication and facilitated negotiation between the parties in the dispute. Mediation is described as a process in which a mediator facilitates and encourages communication and negotiation between the mediation parties and seeks to assist the mediation parties in arriving at a voluntary agreement[17].

119. However in a startling and troubling submission, Counsel for Mrs. Moraldo argued that "any person"[18] cannot refer to an attorney at law as an attorney plays no role in the mediation process. There was no need for an attorney and the attorney ought not to speak at the mediation except to offer advice to his client. This submission which neuters attorneys in a mediation process is not only worrying in principle and policy but is out of step with the present standards for court annexed mediations.

120. A fundamental philosophy of mediations is that it is seen as another means for the party to access justice. In doing so, the client seeks the aid of a certified mediator. That mediator as the neutral will collaborate with the parties to establish their ground rules for discussions inclusive of the roles to be played by attorneys at law. Recognising, however, that a fundamental principle of mediation is self-determination and informed consent[19], a party

[17] See section 2 of the Mediation Act 2004 Chapter 5:32
[18] Section 12(1) of the Mediation Act 2004 Chapter 5:32
[19] See Code of Ethics Mediation Act.

cannot and ought not to be deprived of his attorney of choice in the mediation room. The level of participation of the attorney at the mediation is a matter to be established by the mediator and the parties. An attorney can be the silent adviser or can be an active negotiator so long as it comports with a problem solving and not adversarial style.

121. As a system of justice, all efforts must be made to ensure that the client is well advised of their options in settlement and are encouraged to think openly, candidly and creatively in arriving at durable solutions at the mediation. It is a matter which I brought to the attention of both Counsels that there have been cases where parties have been ordered to attend mediation and their attorneys refused to attend. The mediation progressed and when the mediated agreement was tendered to the Court the attorneys objected on the basis that the clients did not receive proper and independent legal advice. This not only amounted to a waste of the mediator's and parties' time but completely derailed the purpose of any meaningful negotiations. Recognising that mediation is yet evolving in this jurisdiction and that counsel's submission may represent a certain view of the lack of participation of the attorney in mediation, I would seek later in this judgment to address the role of the attorney in mediation as the mediation advocate.

122. In my view "any person" must include an attorney at law. To this extent, I agree with the submission of Senior Counsel for Dr. O'Brien. First, the plain meaning of the words "any person" carries no words of limitation nor restriction[20].

123. Second, the Mediation Act recognises that whereas the parties to the dispute are the principal participants, a "Non-party participant" means "a person, other than a mediation party or mediator, who is present at a mediation session or otherwise participates in a mediation process." This clearly leaves room for the participation of the attorney from a limited or passive to extensive or active role at the mediation. As Senior Counsel for Dr. O'Brien quite rightly submitted, the attorney in the mediation adopts a different role, he is not an adversarial advocate but he has a "seat at the table." In mediation practice many non-party participant may attend the mediation: friends, witnesses, secondary parties, attorneys, therapists, counsellors and other resource persons. See **The Mediation Process,**

[20] See Words and Phrases Legally Defined 4th Edition Volume 1 page 143 which stated "The words "any person" are perfectly general and unless restricted in some way must include an unascertained or an unborn person." **Re Turners Wills Trusts, Bridgeman v Turner** [1959] 2 All ER 689 at 692, per Danckwerts J.

Christopher Moore. Boulle and Nesic in **Mediator Skills and Techniques: Triangle of Influence** describes these persons as support persons: "The flexibility of the process allows for the involvement and participation of a wide range of support persons in mediation. It is in the intake process that the mediator identifies the participant which includes the parties, any legal advisers and any other adviser or supporter and who has the authority to settle the matter." Non-party participants are also described by Boule and Nesic as instructing attorneys. In the **Mediation Process by Christopher W. Moore 4th Edition** the learned author noted:

> "Lawyers are a special category of resource persons. They provide numerous types of services of disputants (Bronstein, 1982; Riskin, 1982). They maybe legal advisers offering information about possible settlement ranges or potential judicial decisions should the dispute be brought to court; or strategists, general advisers, or surrogate negotiators for disputants who are disinclined or unable to represent themselves.
>
> If lawyers are to be present in negotiations, the mediator, parties, and their legal counsel need to be clear about the role they will pay. If they are to be coaches or strategists, the mediator may request that lawyers remain silent in joint session and confine their activities to consultation with their clients in caucuses or private meetings. Alternatively, lawyers may participate fully as either co-negotiators or as direct advocates for parties, with the latter retaining only final decision-making authority. The degree of lawyer involvement depends on the case, the will of the parties, and the mediator's style and preferences.
>
> It should always be remembered that mediators and lawyers are not adversaries. Lawyers provide clients with advocacy skills they may not have and be needed to reach fair and balanced settlements. They can also provide parties and mediators with legal information that is important to consider when reaching agreements. It is generally in both parties' and mediator's interests to reach agreements that respect, or at a minimum do not contradict or are not at odds with, common accepted legal parameters and standards.
>
> Finally, it should be noted that both mediators and lawyers can help each other work with difficult parties. Mediators can help lawyers by providing effective third-party procedures that promote greater understanding and agreement making. Lawyers can help mediators by providing reality testing with parties, and raising questions about their

client's Best Alternative (s) to a Negotiation (BATNAs) if talks fail to result in an agreement."

124. Thirdly, for sound policy reasons, the immunity conferred on the mediator should also extend to the attorney at law. As Senior Counsel submitted, where the immunity exists for an advocate in litigation the immunity similarly exists for advocates in mediation.

125. The immunity of the mediator and its participants is an important feature of the mediation process and the framers of the Mediation Act considered it necessary to import the principle of immunity available to attorneys in the judicial process to mediation. Without the immunity, mediators may be exposed to such actions for beach of contract, negligence, discrimination, breach of fiduciary obligations. The mediator and other participants would be exposed similarly to such actions as defamation, misleading or deceptive conduct, fraud, breach of condolence. In the absence of statutory immunity, mediators and their participants would have had to make a case for common law judicial immunity. Interestingly in **Wagshal v Foster** 28 F.3d 1249 (D.C. Cir. 1994) a Court of Appeal in United States in holding that Court appointed mediators have common law judicial immunity, based its decision on three factors:

(a) that the function of a mediator are comparable to those of a judge describing the general process of encouraging settlement as a natural almost concomitant of adjudication;

(b) the nature of the controversy is intense enough that future harassment or intimidation by litigants is a realistic prospect; and

(c) the system contains safeguards which are adequate to justify dispensing with private damage suits to control unconstitutional conduct.

126. Although that case misplaced the neutral facilitative roles of the mediator with a more adjudicative function, it usefully places court ordered mediation in the heart of the judicial process of resolution of disputes. The immunity being extended to attorneys at law for policy reasons ensures that there is a finality of agreements precluding the re-opening of matter settled in mediation.

127. There are benefits which an attorney will bring to the mediation process either as the mediation advocate or the passive adviser. Any complaint by a party as to the role played by

the attorney at law can be adequately dealt with by the Disciplinary Committee under a complaint that the attorney has breached his code of ethics. In any event, the standard of care expected in mediation is regulated by the Mediation Board which has oversight over the conduct of certified mediators in the mediation process and the establishment of standards for the process.

128. However, the mediation immunity protects all such actions ending with the execution of the mediation agreement. In this case this took place after the parties left the mediation room. Nevertheless, as defined by the Mediation Act the mediation session does not come to an end until the agreement is executed or the parties agree to end the discussions. According to the evidence of Dr. O'Brien and Mr. Vieira, the mediation in this case continued after the meeting and ended with the signing of the agreement in the circumstances described earlier in this judgment. Dr. O'Brien is protected by mediation immunity for the reasons set out above for any act leading up to the execution of that agreement.

129. I also agree with Senior Counsel that mediation immunity can extend to the presentation of the consent order to the Court. This of course is a fact specific question. So long as the presentation of the consent order was an act done by the attorney in the course of the performance of his functions in reference to the mediation process, it falls within the mediation immunity as defined in section 12(1) of the Mediation Act. Notably the definition of the mediation process in the Mediation Act is inclusive and not restrictive. Especially in the court annexed mediations, the submission to the Court of both a mediation agreement and a draft consent order would amount to such acts in reference to and intimately connected with the concluded mediation proceedings.

130. In any event, if the presentation of the consent order does not fall within the scope of mediation immunity, it falls within the recognised attorney immunity protecting the attorney from actions in negligence in relation to such acts in the conduct of litigation including its settlement.

Attorney immunity and Pre-trial work resulting in the settlement of cases

131. There is very little case law in this jurisdiction and none was brought to the Court's attention, which dealt with the advocate immunity where the pre-trial work resulted in the settlement of the action. The common law of Australia suggests an evolving view that such

work was connected with the conduct of litigation. This view prevailed until recently when the tide turned against extending attorney immunity in that jurisdiction and considered such acts of settlement as not an act which progressed the matter to a judicial determination and therefore fell outside the "jagged edge" of immunity. Mrs. Moraldo's complaint throws up for re-consideration whether an attorney's actions at and after a mediation leading to the entering of a consent order based upon a mediation agreement falls within the traditional immunity. In basic terms, do the acts of the attorney in relation to effecting a settlement of the claim referable to the "conduct of litigation" or "intimately connected with the conduct of the cause in Court"?

132. It can be said that having regard to the shrinking world of immunity recognised in **Hall v Simons**, there will be a reluctance to extend section 22 of the Legal Profession Act to cover the acts or omissions of the attorney at law in relation to a mediation or settlement of claim. Indeed, in most of the Commonwealth, the common law has evolved to effectively abolish the immunity and in Australia as was seen in the case above of **Gregory Ian Attwells & Anor v Jackson Lalick Lawyers PTY Limited** effectively restricted it.

133. Section 22 of the Legal Profession Act, however, was designed to deal with the attorney's overall conduct of the litigation or cause in Court. This was the traditional view as espoused in **Saif Ali** and **Rondell v Worsley**. Settlement discussions can have an impact on the manner in which the claim is conducted and there could be no difference between advice to settle at the doorstep of the trial, during a break in a trial or in a court ordered mediation. To draw artificial lines of liability would lead to an absurdity and a limitation of the immunity not contemplated in our statutory provisions.

134. Although mediation is the antithesis of litigation there may be circumstances where the mediation and settlement agreement would be intimately connected with the conduct of the claim in Court. This was the view held in **Stillman v Rusbourne [**2015] NSWCA 410. The Court of Appeal held:

> "52.It can be accepted that there are similarities and also one difference between the present facts and the circumstances in *Jackson Lalic Lawyers Pty Ltd v Attwells* [2014] NSWCA 335 (**Jackson Lalic**) at [37] (Bathurst CJ; Meagher and Ward JJA agreeing), where this Court accepted that advice concerning settlement given in the course of a final

hearing falls within the scope of the advocates' immunity. The difference is that in *Jackson Lalic* there was a temporal connection between the work involved in advising on a settlement and the actual trial itself. The advice was given during the luncheon adjournment on the first day of the hearing and on the evening of that day.

53 Nonetheless and importantly, in *Jackson Lalic* the final hearing did not proceed to its ultimate conclusion. The proceedings were terminated by the terms of a consent order which provided for a verdict and judgment for a specified amount and an agreement to not to enforce that judgment if a lesser sum was paid by a specified date.

54 While the temporal connection in *Jackson Lalic* between that work and the actual trial itself served to highlight the intimate connection between the two, the statements of Mason CJ and Brennan J in *Giannarelli v Wraith* [1988] HCA 52; 165 CLR 543 at 560 (Mason CJ) and 579 (Brennan J) make clear that the advocates' immunity does not depend upon demonstrating such a temporal connection.

55 Negligently advising a settlement of proceedings is a recognised category of work involving a preliminary decision affecting the way in which the case is to be conducted when it comes to a hearing: *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; 233 CLR 1 at [154] (McHugh J), citing *Biggar v McLeod* [1978] 2 NZLR 9. This is because it involves the question of the continuation or termination of the litigation: *Biggar v McLeod* at 14 (Richardson J).

56 That *Biggar v McLeod*, like *Jackson Lalic*, differs from the present case because it also involved negligently advising a settlement during the conduct of the hearing is not, of itself, a sufficient distinction. In both of those cases, like the present, the fresh proceedings against the legal practitioner involved a re-agitation of the issues raised in the earlier litigation. Thus it was fundamental to the claim that the consent judgment entered following the settlement was wrong and the incorrect result due to the negligence of the legal practitioner. As Bathurst CJ said in *Jackson Lalic* (at [41]) "[t]his necessarily involves consideration of the issues raised in the earlier litigation to determine whether in fact the applicant's advice was negligent".

57 I do not regard *Donellan v Watson* (1990) 21 NSWLR 335 as requiring a different result and I respectfully disagree with the contrary view expressed by Basten JA.

58 *Donellan v Watson* was an unusual case. A settlement of appeal proceedings had deprived the clients of benefits obtained at first instance. The settlement was contrary to the clients' instructions. It was not contended that the order made was wrong. Mahoney JA (with whom Waddell AJA agreed) held (at 337) that there was no collateral attack on the order and that the rationale of the reasons for the advocates' immunity did not apply. His Honour accepted (at 338) that ordinarily, a compromise, even if consensus is reached out of court, is within the advocates' immunity. However the case before him involved negligence in failing to carry an authorised compromise into effect.

59 As Bathurst CJ observed in *Jackson Lalic* (at [46]), the settlement in that case, unlike *Donellan v Watson*, was within the authority of the applicant. Accordingly, the fresh proceedings against the legal practitioner involved a re-agitation of the issues raised in the earlier litigation, unlike the position in *Donellan v Watson*. It was in that sense that the proceedings in *Jackson Lalic* offended against the principle of finality of litigation: *Jackson Lalic* at [41]. They involved a collateral attack on the judgment which had been entered by consent. That falls squarely within the rationale of the advocates' immunity as presently stated by the High Court.

60 In the present case, the work by the respondent lawyers fell within the recognised categories of work done out of court affecting the conduct of the case in court. The alleged breach occurred in advising on a settlement of proceedings at mediation. The settlement terms were recorded in a deed which provided for payment of a sum ($1 million) by instalments and, in the event of default, the entry of a consent judgment for a larger sum. This is what ultimately occurred. The advice led to the case being settled. That was a sufficient connection between the work out of court and the conduct of the case in court to attract the advocates' immunity."

135. Whereas that case lies in contrast to **Kendirjian**, it certainly represents the legitimate view under the **Rondel v Worsley** and **Saif Ali** line of cases and indeed the statutory immunity which firmly implants attorney immunity in this jurisdiction. The recent Australian hostility to immunity to actions leading to the settlement of cases can be distinguished from this case.

136. Firstly, in this jurisdiction, attorney immunity and mediation immunity are matters prescribed by statute and not evolving under the common law. Second, the rationale of those decisions squarely restricted intimate connection between the attorneys work and the judicial determination of the case.

137. Third, in this jurisdiction work of the attorney in facilitating a settlement is engaged in an active exercise to assist the Court in giving effect to the overidding objective and thus the conduct of the litigation leading to a determination of the matter.

138. The case managing judge is an active collaborator with the parties and the attorney in finding a just resolution not necessarily by trial. Indeed, quite usefully, the JEI's handbook on "Exploring the Role of the CPR Judge"[21] sets out the distinguishing and revolutionary features of our case management jurisprudence which places dispute resolution firmly in the core activity of the judicial process and not adjudication. In section 6 "The New Role of the CPR Judge" it is stated:

> "The CPR clearly brought about changes in how civil litigation in Trinidad and Tobago is to be conducted. The breadth of these changes has not always been fully appreciated. As stated in **Her Worship Magistrate Marcia Ayers-Caesar and the Attorney General of Trinidad and Tobago v BS**:
>
> *30. While it is accepted that in adversarial litigation judges must be cautious to always preserve the core judicial values of independence and impartiality, it is equally clear that the role of the judge under the Civil Proceeding Rules, 1998 is significantly different from what previously obtained. This is apparent from the overriding objective and the provisions of the CPR itself….*
>
> *32. The CPR, 1998 have brought about a seismic shift in the roles, responsibilities and powers of the Court to manage and shape litigation, and to control its unfolding in terms of issues and timing.*
>
> There was thus "a fundamental ideological shift: from a "lawyer-driven court" to a "judge-controlled court."

[21] Justice Peter Jamadar JA and Kamla Jo Braithwaite

This means that the CPR Judges have more power over the control and shape of litigation and greater consequential freedom to exercise their discretionary powers and functions. As a result of this increased freedom, and to ensure that the value of impartiality is maintained, CPR Judges need to be ever more mindful of the principles of judicial conduct discussed in this exploration of the role of the CPR Judge."

139. In Section 4 "Alternative Dispute Resolution", the learned authors noted:

"In so far as the just resolution of civil disputes includes the disposition by consensual means, including by Alternative Dispute Resolution (ADR) (whether within or outside the formal court process), the idea of dealing justly with cases has to be expanded to include this aspect of the civil legal process.

This aspect is explained in the Foreword to the CPR in the following ways:

a) 'The CPR are founded on a system of caseflow management with active judicial case management: [Parts 25 and 26]. This new procedural code is buttressed by a plethora of rules which create several in-built mechanisms to foster settlement at the earliest and every stage of the proceedings: [Part 25.1(c), (d) and (e)];
b) 'The concept of early court intervention reflects the court's objectives to resolve matters as early in the process as is reasonable by negotiated settlement and to reduce costs in litigation'; and
c) 'The CPR brings with them a new litigation culture- a paradigm shift in the administration of civil justice… This new approach propagates the expectation that a large percentage of cases would now be settled very early in the process which would otherwise have gone to full trial.'

In fact, the CPR aspires to the goal that 'litigation should be a last resort.'

……..

The CPR are premised on the philosophical and policy determination that 'justice on merits'- substantive justice determined at a trial- is not the singular aim of the civil justice system in Trinidad and Tobago. Indeed, that is not even the most desirable aim. What is sought is the just disposition of all matters brought before the civil

courts. This includes an emphasis, aim and expectation of early resolution by settlement of a 'large percentage of cases.'

It is therefore imperative that CPR judges actively encourage and assist parties to settle their cases, and to do so in the most timely and economic ways possible, and on terms that are fair and just to all."

140. Indeed, the failure to participate in mediation and the unreasonable refusal to mediate a dispute is a factor which attracts adverse costs sanctions and may include wasted costs against the attorney at law. See also Rule 66.6 CPR and **Lord Jackson's ADR Handbook** at Chapter 11.

141. It stands to reason that such an emphasis on resolution in our court process and the proactive role expected of attorneys in this process give more reasons to protect the actions of the attorney as a facilitator and collaborator in this court connected process. To a great degree the Court is now a gateway to ADR. The Chief Justice of Victoria in Australia in promoting the concept of the multi door courthouse saw the court as "offering a range of dispute resolution portals, determination by a judge being only one door and not the central door."[22] Our Chief Justice also noted that mediation is a central feature of the resolution of cases[23].

142. Further, the **Janin** and **Joash Morris** line of cases certainly demonstrates that in this jurisdiction there could be no question of restricting the immunity nor revisiting the policy considerations which have been considered by Parliament which underpins the immunity. The attorney immunity and mediation immunity were set by Parliament and it is a matter for them and not this Court to revisit it.

143. The work of Dr. O'Brien can be considered to be intimately connected with the manner in which the claim was to be conducted by settling in terms of the consent order. His acts or omission arising out of the mediation session is also immune from legal inquiry.

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[22] Should Judges be mediators? The Hon Marilyn Warren AC

[23] "Since the inception of the Court Annexed Mediation Pilot Project in 2011, and having reviewed the reports on that project with a settlement rate of 60 per cent, and a customer satisfaction rating of 95 per cent, the question in my mind has been, not whether mediation should form part of our judicial system, but rather and quite simply, why was it not done a long time ago." The Honourable Chief Justice Mr. Ivor Archie, O.R.T.T at the launch of the ADR Pilot Project, 2013.

144. For these reasons the work of Dr. O'Brien falls within the work contemplated by section 22 of the Legal Profession Act and section 12 of the Mediation Act and he is immune from suit. However, it would be remiss of this Court not to say a few words about the obligations of attorneys and their ethical duties and obligations to the client in mediation under the Code of Ethics recognising this as a growing area of "mediation jurisprudence".

Attorney's obligation in mediation

145. In an interesting exchange in cross examination with Dr. O'Brien it was suggested by Counsel for Mrs. Moraldo and accepted by Dr. O'Brien that as an attorney "you have nothing to do really with the mediation except you sit down let the parties thrash it out and then you advise your party whether it is that this is a sound agreement to enter if they reach to that point". This is but one view of the role of the attorney at mediation and may be the role which may be adopted in some mediations. But this is not the only role as suggested by Counsel for Mrs. Moraldo.

146. The attorney's role primarily is to ensure that the client is advised throughout the process and with respect to any proposed agreement. It is an important feature of the pillar of informed consent and self-determination which underpins all mediations. However, there is a growing field of mediation advocate where the attorneys can play a more pro-active and engaging role in the mediation session to assist the mediation parties in helping them to arrive at a settlement. It was not the role adopted by Dr. O'Brien in this case but equally it is a role which attorneys will do well to become familiar and to step out of their traditional adversarial roles and transform their ethical duties to their client in a problem solving model.

147. It was observed by Patricia Hughes in **Ethics in Mediation: Which Rules? Whose Rules? 50 U.N.B. L.J. 251**

> "Of course, lawyers have always been involved in representing their clients in settlement contexts, particularly negotiation or court-sponsored settlement conferences. Until relatively recently, however, most lawyers viewed the basic approach they should adopt in these situations as little different from that which they take in the courtroom. This remains perhaps more true of negotiation than of mediation which is premised on very different principles. The realization of mediation's potential as a distinct form of dispute resolution requires a "mind-set" in lawyers which differs from that which they are

accustomed to exercising in the courtroom. Thus in mediation lawyers are expected to take a co-operative rather than adversarial stance and a mutual problem-solving approach rather than one focussing more completely on their own client's position. Nevertheless, mediation is very much part of the lawyer's advocacy function on behalf of a particular client or clients. Indeed, rules of professional conduct for lawyers may now go beyond the traditional general admonition to encourage settlement in the same breath as avoiding frivolous or otherwise inappropriate litigation, to requiring lawyers to consider and, where appropriate, propose to their clients various forms of "ADR." There is probably no disagreement that advocates representing individual clients in mediation, ought to be subject to the codes of conduct governing lawyers. The issue is whether, given the different approach mediation anticipates, they ought to be subject to different ethical expectations or at least to a clearer statement of how the existing rules apply to the mediation context. I suggest that we need to think more carefully about how the current rules apply to this different way of "doing law."

148. Lord Jackson usefully sets out the elements of the role of lawyer in ADR and mediation[24]:

"The main elements of the role of a lawyer are potentially:

- As part of giving advice at key stages as litigation progresses, ensuring that the client is sufficiently aware of ADR alternatives to litigation;
- Providing objective information on relevant ADR options, including potential benefits and drawbacks, or giving a client sufficient guidance on where/how to get information;
- Advising the client on pre-action obligations relating to consideration of ADR;
- Advising clients on obligations under the overriding objective in relation to ADR;
- Ensuring that the client is aware of penalties that may result from an unreasonable refusal to use ADR;
- Giving appropriate advice on funding and costs in relation to ADR;

[24] The Jackson ADR Handbook, 1st Edition, paragraph 4.03

- If ADR is selected, getting clear instructions on the form of ADR to be used, objectives to be achieved etc;
- If ADR is not selected, ensuring that objective reasons are identified and sufficient evidence of them retained;
- If appropriate, assisting in the selection of an independent third party to conduct an ADR process;
- Advising on strengths and weaknesses of a case as part of assessing a case for the use of non-adjudicative ADR;
- Considering and advising on offers in relation to non-adjudicative ADR;
- Advising on and drafting terms of settlement."

The mediation advocate

149. One of the most important principles that should govern the lawyer's approach to mediation is the principle of client self-determination. The lawyer must be prepared to surrender the central role in the definition and presentation of the client's case. It is vital that clients tell their own stories. It is through the telling of those stories that clients may achieve some emotional closure or release, and may lay the groundwork for a resolution. The lawyer retains an important function, but should focus energy on the preparation and counselling stages, and act as a support person for the client during the mediation.

150. There is a growing field of mediation advocates who will not only prepare the client for the mediation but ensure that her interests are advocated in a problem solving model. There are some core functions of the mediation advocate which are important features of the attorney's representation of his client.[25]

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[25] **Mediator skills and Techniques: Triangle of Influence** by Laurence Boulle and Miryana Nesic:
"**Lawyers' functions and notes for lawyers/advisers**

(1) General overview

Before the mediation meeting

- To educate their clients about the nature of mediation and its procedures.
- To prepare their clients for participating in the mediation process.
- To prepare necessary documents, reports and other materials necessary for successful mediation.
- To give clients realistic and clear estimates about expenses and likely cost recoveries of other dispute resolution processes, including litigation, and to refer to both best-and worst-case outcomes.

151. **Harold I. Abramson** in his instructive text **Mediation Representation-Advocating as a Problem-Solver** recognised that very little attention has been placed on training attorneys to be problem solvers. His text has spawn a new generation of training for attorneys as a mediation representation advocates: "You need a different representation approach for this burgeoning and increasingly preferred forum for resolving disputes. Instead of advocating as a zealous adversary you should advocate as a zealous problem solver a strategy that has been shown in various studies to be more effective."

152. He also goes on to explain at page 5 that: "As a problem solver who is creative, you do more than try to settle the dispute. You try to locate the best possible resolution for your client. You search for solutions that go beyond the traditional ones based on rights, obligation and precedent. Rather than pressing for win-lose outcomes you search for solutions that might benefit both sides and therefore might be acceptable for settlement. You develop a

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- To advise their clients on relevant legal issues, including the Agreement to Mediate (Appendix 3).

During the mediation meeting

- To allow the mediator to conduct the process and to provide support to the mediator where appropriate.
- To permit and encourage their clients to participate fully and directly in the process.
- To assist client to focus on their real personal and commercial interests as opposed to their legal rights.
- To assist clients to communicate accurately and comprehensively and to negotiate constructively and productively.
- To provide to their client, legal information and advice, where appropriate, on their rights and duties.
- To give ongoing unrealistic predictions about likely outcomes in court or other non-mediation processes and their relative advantages or disadvantages.
- To assisting in the drafting of agreements and the formalisation of the mediation inappropriate ways.

After the mediation meeting

- To undertake any activities required for the formalisation of ratification of the mediated agreement and to liaise with other lawyers where necessary.
- To reassure clients who have second thoughts and to inform them about the options of dealing with problems in the implementation of the agreement, including through return to mediation.
- To maintain the confidentiality of the mediation meeting.

For exercise in forums other than mediation

- Acting as the adversarial advocate of their clients' legal rights.
- Cross-examining the other client or clients.
- Raising technical procedural points or insisting on formality.
- Engaging in other adversarial or combative strategies.

collaborative relationship with the other side and the mediator and participant throughout the process in a way that may produce solutions that are inventive as well as enduring…"

153. Similarly at the Hugh Wooding Law school emphasis is being placed on mediation advocacy:

> "Your bag of tools in this evolving world – where space is being unveiled for a new type of advocate – requires you to build on your skills to become the mediation representation advocate. This mediation representation advocate still has a sharp probing mind; however, this mediation representation advocate probes to build collaboration with the other side, rather than slay them as under trial cross-examination. This mediation representation advocate understands the power of paraphrasing and effectively communicating (by words and body language), The approach will no longer be that mediation is just something for the attorney to run with 'on the fly'. In this emergent Caribbean context, our attorneys will be attentive, fully focused on using mediation effectively and be problem-solvers, all while still advancing their clients' interests. Attorneys will now be seen as the promoters of, rather than the hindrances to, the progress of mediation. Attorneys will give mediation its due respect as a meaningful process with impactful outcomes. So, where do you stand with your toolbag today? Start nailing your readiness for the mediation ignition, within or without a court-mandated process, by arming yourself with your toolbag of mediation representation skills. This can only augur well for positive conflict transformation and a more sophisticated practice of the law."[26]

<u>The role of the mediation advocate</u>

154. Preparation is important and therefore the mediation advocate should:

(a) Assess the risks of the mediation.

(b) Ensure the client understands who will be present at the mediation and how the process will work?

(c) Know what are the costs to date and what are the projected future costs.

[26] The Resolution, Issue II , April 2018, G. Yearwood

(d) Spend some time talking to the mediator before the mediation day to find out more about the mediator's approach and the style he or she likes to adopt.

(e) Consider having a pre-mediation meeting with the mediator before the day of the mediation.

(f) Bring any documents they think they may need to the mediation.

(g) Arrive early enough at the mediation to allow the client to acclimatise themselves before the mediation starts.

(h) Make sure that there are arrangements in place for refreshments, including contingency plans if the mediation goes into 'overtime.'

(i) Be aware of any time constraints that may apply to anyone present.

(j) Become an active listener and understand what that really means.

(k) Not be afraid to sit around the same table as the other parties.

(l) Not be afraid to let your clients talk, whether to the mediator or to each other.

(m) Always be prepared to let the parties meet with the mediator without their lawyers present.

(n) Find an opportunity either before the mediation or at an early stage during the mediation to discuss with the other side's lawyers what the broad shape of a possible agreement might look like.

(o) Never underestimate the enormous power of an apology or an expression of regret.

(p) Encourage lateral thinking and creative solutions.

(q) Make a proposal for settlement if they have it and make it early.

(r) Try to keep their client focussed throughout the whole process on the future and on finding a way to resolve the current situation.

(s) Find inventive ways to attract the opposite party to the negotiation table.

(t) Pay special attention to the careful crafting of the settlement agreements.

(u) Determine when and how to use appropriately worded Tomlin orders.

Attorney's ethical obligations

155. How does this all fit with the attorney's duty of care and fiduciary duties to his client? As the attorney's actions fall within the ambit of the immunity discussed above the attorney is clearly not liable in negligence. However, potentially, the attorney is exposed to liability in disciplinary proceedings for breach of his ethical obligations.

156. Although there are no particular codes in the Code of Ethics in the Legal Profession Act which governs mediations the following key ethical obligations provide a key for the discharge of the attorney's duties to his client in mediations.

157. Sections 16, 21 and 22 of the Code of Ethics Part A provide:

"**16.** An Attorney-at-law shall not by his actions, stir up strife or litigation by seeking out defects in titles, claims for personal injury or other causes of action for the purpose of securing a retainer to prosecute a claim therefor; or pay or reward any person directly or indirectly for the purpose of procuring him to be retained in his professional capacity, and where it is in the interest of his client he shall seek to obtain reasonable settlements of disputes.

21. (1) An Attorney-at-law shall always act in the best interests of his client, represent him honestly, competently and zealously and endeavour by all fair and honourable means to obtain for him the benefit of any and every remedy and defence which is authorised by law, steadfastly bearing in mind that the duties and responsibilities of the Attorney-at-law are to be carried out within and not without the bounds of the law. (2) The interests of his client and the exigencies of the administration of justice should always be the first concern of an Attorney-at-law and rank before his right to compensation for his services.

22. (1) Before advising on a client's cause an Attorney-at-law should obtain full knowledge thereof and give a candid opinion of the merits or demerits and probable results of pending or contemplated litigation.

(2) An Attorney-at-law should beware of proffering bold and confident assurances to his client (especially where employment may depend on such assurances) always bearing in

mind that seldom are all the law and facts on the side of his client and that "audi alteram partem" is the safest rule to follow.

(3) Whenever the controversy admits of fair adjustment an Attorney-at-law should inform his client accordingly and advise to avoid or settle litigation."

158. Lord Jackson's admonishment and guidance to attorneys at law as to the reasonable standard expected of the attorney deserves commendation. It would be a question for the Disciplinary Committee to establish its own standards expected of the attorney within the existing code of ethics until specific codes are designed to deal with attorneys obligations at the mediation.

159. I turn finally to examine very briefly the loss if any to the client as a result of the actions of the attorney.

The loss to the client

160. Having found that an agreement was arrived at the mediation session a client who recants does so with considerable risk. A first option would be to return to mediation. If the other party however argues that there was an oral agreement at the mediation as in this case, the client would face a difficulty in continuing with his present proceedings and indeed the pleading can be amended to include the agreement arrived at or a fresh action brought to assert that such an agreement was made. In short, it is doubtful in these circumstances to see what the immediate loss would have been to the client and it is not guaranteed that the measure of her loss would be the payment of the sums to which she agreed.

Conclusion

161. For the reasons set out above Dr. O'Brien had complied with his client's instructions in executing the mediation agreement. He did not confer or communicate with her before entering it as a consent order nor did he comply with her instructions to set it aside. However, the attorney is immune from actions in negligence in relation to the conduct of litigation and for any acts done in the mediation process. Insofar as Dr. O'Brien actions would face possible disciplinary sanctions that is a matter for the Disciplinary Committee and not for this Court. As a matter of procedural fairness and recognising the complaint made by Mrs.

Moraldo I will refer the matter to the Registrar to bring it to the attention of the Disciplinary Committee to take such steps it considers appropriate.

162. I would also urge the Law Association of Trinidad and Tobago to engage in the education of its members of the role of attorneys in mediations and revisit its Code of Ethics in relation to the rights, duties and obligations of attorneys at mediations.

Vasheist Kokaram

Judge