GRENADA

IN THE COURT OF APPEAL

HCVAP 2010/001

JANIN CARIBBEAN CONSTRUCTION LIMITED

Appellant

and

[1] ERNEST CLARENCE WILKINSON
[2] WILKINSON, WILKINSON & WILKINSON

Respondents

Before:

The Hon. Mde. Janice M. Pereira (formerly George-Creque)	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal [Ag.]
The Hon. Mr. Frederick Bruce-Lyle	Justice of Appeal [Ag.]

Appearances:

Mr. Dwight Horsford with Ms Ayana Nelson for the Appellant
Mrs. Celia Edwards, QC with Ms. Sabritha Khan Ramdahni and
Ms. Karina Johnson for the Respondents

2010: November 24;
2011: November 7.

Civil appeal-definition of 'holding papers' - whether 'holding papers' creates a duty of care as between attorney and client-barrister's immunity from suit

The appellant brought a claim against the respondents for damages for negligence of the first respondent and vicariously against the second defendant, in the performance of his professional duties as an attorney-at-law asserting that the first respondent was acting for and on behalf of the appellant, Janin Caribbean in respect of a suit brought by one Francis against Janin in respect of two occasions when first respondent had been asked by Mr. Armand Williams QC, counsel on record, to hold papers for him at the trial on 17th January 1995. However, the first respondent failed to appear at the trial and ex parte judgment was entered against the appellant. Efforts were made to set aside the judgment but failed. Leave to appeal was then sought, but this was untimely. The appellant alleged that by holding papers the first respondent assumed a duty of care to the client. This was the appellant's contention despite the fact that the first respondent was never retained or instructed by the appellant and was merely extending a courtesy to Queen's Counsel.

The trial judge dismissed the appellant's claim and held that Mr. Williams QC, had at all material times retained conduct of the matter until his services were terminated by the appellant and that in any event

the first respondent enjoyed immunity from suit and further that failing to enjoy such immunity the appellant had failed to meet the test for establishing liability.

The appellant appealed contending that by 'holding papers' the first respondent assumed a duty of care toward them. They also contended that the trial judge erred in holding that the law relating to immunity of barristers and solicitors applicable in Grenada was as stated in the case of Rondel v Worsley and further argued that the law as it had developed in Hall v Simmons effectively removing the immunity, represented the law in Grenada.

Held: dismissing the appeal and awarding costs to the respondent being two-thirds of the prescribed costs awarded in the court below, that:

1. The expression 'holding papers' though devoid of legal definition, is commonplace among lawyers appearing before the court, at least in this jurisdiction. In practice, all concerned have a general appreciation of this expression as indicating that the lawyer 'holding papers' for his colleague conveys that he does not have conduct of the matter, has not been briefed or retained and is in essence, extending a courtesy to his fellow attorney who for one reason or another is unavailable to conduct the matter. The extent of the task to be performed is either to convey to the court the regrets of the attorney on record for being unable to attend and conduct the matter and to request a standing over of the matter or an adjournment of it.

2. While the categories of negligence are never closed, it would be a stretch to hold that where a lawyer, as a courtesy to the court, states that he is 'holding papers' on behalf of the attorney on record, he becomes fixed with a duty of care to the client in the Hedley Byrne sense. To hold otherwise would cut across very basic principles with respect to the underlying contractual basis on which a lawyer-client relationship is established and would deprive the profession and the court of a basic courtesy particularly having regard to the culture of practice in the jurisdiction and a court which is itinerant.

3. To merely 'hold papers' does not bring about that sufficiency of proximity in relationship as between the lawyer holding and the client from which a duty of care may be said to arise in the Hedley Byrne sense.

   Hedley Byrne and Co. Ltd. v Heller & Partners Ltd. [1963] 2 All ER 575; Rondel v Worsley [1967] 3 All ER 993 considered and distinguished.

4. The law as stated in Rondel v Worsley having not been changed by legislation represents the law applicable in Grenada with regard to a barrister's immunity.

JUDGMENT

[1] PEREIRA, JA[1]: This appeal raises a novel issue. That is whether an attorney-at-law who appears in court 'holding papers' for another attorney-at-law (who for the purposes of this judgment will be referred to as "the Attorney of Record") thereby comes under a duty of care to the client of the Attorney of Record. If the answer to this question is yes, then the next question

[1]Formerly "George Creque"

raised for consideration is that of a barrister's immunity from suit and whether such immunity is still the law in the State of Grenada. If the answer to this question is no, then the court must go on to consider whether on the facts of this case, the respondents are liable in the tort of negligence.

The Background

[2] The appellant ("Janin"), brought a claim against the respondents for damages for the alleged negligence of the first respondent ("Mr. Wilkinson") and vicariously, as against the second respondent, the law firm of Wilkinson, Wilkinson & Wilkinson (together called "Messrs. Wilkinson") in the performance of his professional duties as an attorney-at-law whilst acting for and on behalf of Janin in respect of a suit brought in Grenada by one Robert Francis against Janin in Suit No. 2 of 1994 ("the Francis Suit"). In its Statement of Claim Janin asserted, so far as is relevant, that Mr. Wilkinson:

(a) had advised Janin that it had a good defence to Mr. Francis' claim;

(b) failed to represent Janin at the trial of the Francis Suit on 17th January 1995, and this resulted in an ex-parte judgment being entered against Janin, which caused Janin loss and damage having had to satisfy the judgment in the Francis Suit.

In the Particulars of Negligence Janin further stated, in essence, that despite Messrs. Wilkinson being served with notice of the trial and having been reminded the previous day by counsel for the Claimant in the Francis Suit, and despite Messrs. Wilkinson being observed in the environs of the court on that morning and despite counsel for Mr. Francis having the matter stood down to later in the morning that they did not appear and this resulted in the court giving ex-parte judgment in favour of Mr. Francis in the Francis Suit:

(c) made application to have the ex-parte judgment set aside and this application was dismissed;

(d) made application on 3rd May 1995 for leave to appeal the decision made on 17th March 1995, after the time for seeking leave had expired, which application was dismissed on 8th December 1995.

[2] Messrs. Wilkinson in their Defence pleaded generally that on occasion they were requested by one Armand Williams, QC [the Attorney of Record] to 'hold papers' for him in respect of specific

applications before the court, and that on those occasions they '*exhibited a courtesy*' to Mr. Armand Williams, QC and that they were not *retained* by Janin. They went on further at paragraph 6 of their Amended Defence to state, in essence, and so far as is relevant, that:

(a) they were never retained by Janin;

(b) they had never advised Janin as alleged or at all;

(c) Janin was represented by Mr. Armand Williams QC;

(d) at the date of trial (17th January 1995) the Attorney of Record requested them (i.e. Messrs. Wilkinson) to *'*hold papers*'* on his behalf;

(e) they took all reasonable steps to ensure attendance but judgment was entered against Janin, as Janin or any representative on behalf of Janin had not attended trial;

(f) judgment having been entered, they took all reasonable steps to have the said judgment set aside, including seeking leave to appeal which were denied.

They further deny that they owed any duty of care to Janin, or, if they did, that they were negligent. Apart from this they pleaded a barrister's immunity in negligence.

[3] Mention must also be made of two other facts which are not in dispute:

(a) On 11th December 1995, Janin wrote to Mr. Williams terminating his services and notifying him of his intention to retain Mr. Anselm Clouden as his attorney.

(b) Janin, in 1996 in Suit No. 707 of 1996 commenced an action in negligence against Mr. Williams, ("the Williams Suit") in which Janin asserted that Mr. Williams had been retained to act for Janin in the Francis Suit but, as referred to by the trial judge at paragraph [12] of her judgment, just before securing a trial date, Mr. Croome, Janin's managing director, wrote to Mr. Clouden, attorney-at-law then acting for Janin, in the following terms:

> "...Although we initially retained Mr. Williams, we were aware that he had instructed Mr. Wilkinson to appear in court on our behalf, and we would assume that part of our fees paid to Williams would be disbursed to Wilkinson. Even though we had no direct relationship with Wilkinson, surely we are entitled to rely on the proper exercise of his professional conduct. Having made some enquiries with respect

> to the ability of Mr. Williams to satisfy a judgment of the magnitude of our claim, we would certainly feel more comfortable if the net were cast a little wider, even if it results in a postponement of the trial against Williams."

Mr. Williams brought a third party claim against Mr. Wilkinson but this claim was struck out. Janin subsequently wholly discontinued or withdrew the Williams Suit.

The findings and conclusions of the trial judge

[4] After a full trial on the merits, the trial judge dismissed Janin's claim. In respect of the allegation of negligence regarding Mr. Wilkinson's failure to attend on the day of trial, she found that he enjoyed immunity from suit, but that even were no immunity enjoyed, given the failure of Janin and its witnesses to attend trial, which was not attributable to Messrs. Wilkinson, and given the prior history of defaults in the matter, it could not be said that the outcome would have been different had Mr. Wilkinson been present when the matter was called. On the allegation of negligence involving the failure to file leave to appeal within time, she found that Janin had failed to prove that Messrs. Wilkinson had conduct of the matter; and that Mr. Williams had conduct of the matter until Mr. Croome terminated his services on 11th December 1995.

The grounds of appeal

[5] Janin formulated some 11 grounds of appeal. In my view they can be conveniently considered under the following heads:

(a) Whether, in 'holding papers' for the Attorney of Record on 17th January 1995 when the Francis Suit was called on for trial, and in 'holding papers' for the Attorney of Record in the untimely application for leave to appeal, Messrs. Wilkinson thereby assumed a duty of care toward Janin;

(b) Whether the trial judge erred in holding that the law relating to immunity of barristers and solicitors applicable in the State of Grenada is as stated in the case of Rondel v Worsley[2];

and as ancillary issues to (a) and (b) depending on the answer to those questions:

[2][1967] 3 All ER 993; [1969] 1 AC 191.

(c) Whether the trial judge failed to evaluate the evidence of Mr. Wilkinson; and

(d) Whether the trial judge erred in holding that the absence of Messrs. Wilkinson was not determinative of the outcome of the trial in the Francis Suit.

Attorney-at-Law 'Holding Papers'

[6] The expression 'holding papers' is commonplace among lawyers appearing before the court, at least in this jurisdiction. In practice, all concerned have a general appreciation of this expression as indicating that the lawyer 'holding papers' for his colleague conveys that he does not have conduct of the matter, has not been briefed or retained and is ,in essence, extending a courtesy to his fellow attorney who for one reason or another is unavailable to conduct the matter. Usually, the extent of the task to be performed is either to convey to the court the regrets of the Attorney of Record for being unable to attend and conduct the matter and to request a standing over of the matter or an adjournment of it. To all intents and purposes, notwithstanding its frequent usage, this expression in reality appears to be a nebulous concept so far as legal definitions go.

[7] It does not appear that the question whether a particular legal connotation is to be ascribed to it, and if so, its scope, has ever been precisely addressed. I have searched for this expression in various codes which may throw some light on its meaning, but have uncovered nothing. The trial judge referred to it below without attempting a definition. Counsel for Janin has similarly, not attempted a definition.

[8] It is common ground that Janin never retained Messrs. Wilkinson in the sense that it never engaged their services or paid any fee for the performance by them of services. Accordingly, Janin does not rely on a contractual relationship which comes about where a client engages the services of a lawyer and pays a fee by way of retainer. Rather, counsel for Janin contends that this expression by an attorney-at-law, in appearing at the behest of the Attorney of Record, operates to bring about a duty of care to the client of the Attorney of Record in the tortious sense in reliance on the well-established principle in negligence based on the watershed case of Donoghue v Stevenson[3] of 'who is thy neighbour' Counsel relies on the celebrated case of Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.[4] and says that whatever the contractual relationship was as between Janin and Mr. Willaims, QC, that once Mr. Wilkinson undertook to

[3][1932] All ER 1; [1932] AC 562, HL.

[4][1963] 2 All ER 575; This case made negligent misstatements in certain circumstances actionable.

represent Janin in the matter on the morning of 17th January 1995, Messrs. Wilkinson assumed a duty of care to Janin. The key question though is did he undertake to represent Janin?

[9] I do not consider that Hedley Byrne is directly on point since it deals with negligent misstatements, whereas, what is complained of here are the acts (or failures to act) of Messrs. Wilkinson, save to the extent it expounds on the duty of care which is said to be created by a relationship of sufficient proximity. As Lord Reid said in Hedley Byrne[5], *"... the law must treat negligent words differently from negligent acts".* That aside, I agree that the matter must be considered on the basis of tortious liability in negligence as expounded in Donoghue v Stevenson and more so in Hedley Bryne based on a relationship of sufficient or close proximity.

[10] The learned trial judge accepted the evidence led at trial with respect to when Mr. Wilkinson first had any knowledge of the Francis Suit, the circumstances in which he acquired that knowledge and as to the events transpiring on the day of the trial. From this she concluded that Mr. Wilkinson did not have conduct of the matter and was merely *'*holding papers*'* for the Attorney of Record. Further, she found that the extent of the request made of Mr. Wilkinson by the Attorney of Record was that he seeks an adjournment of the trial.[6]

[11] Whilst whether Mr. Wilkinson inadvertently went to the wrong court, or that on the morning of the trial he had matters of his own and had asked for an indulgence in having the matter stood down was disputed, what is not in dispute is the extent of the request made of him by the Attorney of Record. Furthermore, Mr. Croome [on behalf of Janin] could not speak as to the extent of what Mr. Wilkinson was asked to do. He said he did not know. It is reasonable to infer at the very least that Mr. Croome had not given instructions of any kind whatsoever to Mr. Wilkinson in respect of the matter. In such circumstances can it be said that the mere *'*holding of papers*'* on behalf of the Attorney of Record whose duty and responsibility it was to appear and conduct the trial on behalf of his client Janin, thereby brought Mr Wilkinson himself under a duty of care to Janin?

[12] At this juncture, I think it useful to recite one of the rules from the OECS Bar Code of Ethics which was adopted in June 1991. Rule 28 which falls under the general heading governing an attorney-at-law's conduct in relation to clients, states as follows:

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[5]Supra at page 580 (G).
[6]See judgment of Henry J at paras.15, 16 and 19.

> "Where an attorney-at-law determines that the interest of his client requires At (sic), he may with the specific or general consent of the client refer his business or part of it to another attorney-at-law whether or not a member of his own firm." (my emphasis)

Clearly then, there is nothing wrong with an Attorney of Record referring his client's business or matter to another attorney-at-law, but critical to this is the specific or general consent of the client. This is for good reason. It recognises that the foundation of a relationship between a lawyer and his client is one based on contract. One lawyer cannot foist unto another lawyer his client's matter without the agreement of the client. Both the client and the attorney-at-law to whom the matter is referred must be in agreement – the lawyer to having conduct of the matter, and the client agreeing that he should do so. This brings about its own independent retainer arrangement as between them. There is no evidence here of there being such an arrangement as between the Attorney of Record and Janin or Mr. Wilkinson and Janin. The most that is said by Mr. Croome in his letter referred to at paragraph [3] above, is that 'we were aware that he had instructed Mr. Wilkinson to appear in court on our behalf, and we would assume that part of our fees paid to Williams would be disbursed to Wilkinson.' Furthermore it is common ground that Janin and its witnesses did not attend for the trial on 17th January 1995.

[13] Whilst it is appreciated that the categories of negligence are never closed, it would be, to my mind, taking matters quite a stretch to hold that where a lawyer, as a courtesy to another or, as a courtesy to the court, as is often the case, states that he *'holds papers'* on behalf of the Attorney of Record, he thereby becomes fixed with a duty of care to the client in the Hedley Byrne sense. To hold otherwise would be, firstly, to cut across very basic principles with respect to the underlying contractual basis on which a lawyer-client relationship is established. At the core of it must be the lawyer's acceptance of the matter and the client's consent to act, whether or not a specific retainer fee has been agreed. There are many instances where a client may not agree for a particular lawyer to handle his matter even though that lawyer may be a member of the firm, to whom he has given instructions. Even in legal aid cases where a lawyer has been assigned, the client still retains the right to accept or reject counsel so assigned. Of course, if he rejects, then unless he can retain counsel of his choice, he may be required to conduct the matter on his own. The point however, is that, the choice is his. Indeed, this choice is of such fundamental importance that it finds expression in most Commonwealth Caribbean constitutions. To merely 'hold papers' *does* not bring about that sufficiency of proximity in relationship as between that lawyer and the client from which a duty of care may be said to arise in the Hedley Byrne sense. Secondly, such a conclusion, would

deprive the profession and the court of a basic courtesy particularly having regard to our own culture of practice, and a court which is itinerant.

[14] It would be quite a different thing where Mr. Wilkinson having turned up in time to request the adjournment and the adjournment having been refused, then proceeded (with Janin's consent) to conduct the trial of the matter on behalf of Janin. This act, which would be outside the scope of the request of the Attorney of Record, would have then placed him in a direct relationship with Janin and accordingly under a duty of care. It is in those circumstances that the second issue of immunity would come into play. This is not the case here. As learned Queen's Counsel for Messrs. Wilkinson points out, Mr. Wilkinson was asked by Mr. Williams QC to attend at court specifically to seek an adjournment and so there was no duty at all to Janin in respect of the conduct of the case. In my view, Mr. Wilkinson was under no duty to Janin to attend at court at all on 17th January 1995.He had not so arranged with Janin. He was not on record. In this regard the Judge's notes of evidence of the proceedings of 17th January are illuminating, and a portion warrants setting out:

> "Mr. Alban John for Plaintiff.
> Writ filed on 4th January, 1994, endorsed with Statement of Claim
> Appearance entered on 10th January, 1994, by Mr. A. Williams QC
> Defence entered on 11th July, 1994 by Mr. A .Williams QC
> All pleadings for the Defence entered by the said A. Williams
> ...
> Motion of today's hearing served on A. Williams on 12th December, 1994.
> The Defendant has not appeared. Mr. A. Williams has not appeared.
> Mr. John ask that judgment be entered for this Plaintiff in the terms of the Statement of Claim.
> ..."

There is no mention whatsoever of Messrs. Wilkinson appearing or being on record or having conduct of the matter.

The Application for leave to appeal

[15] The learned trial judge at paragraph 20 of her judgment said this:

> "After the application to set aside the default judgment [the ex-parte judgment] was dismissed there is no evidence before the court of a change of counsel in the matter. While Mr. Wilkinson 'held papers' when the matter came up in court, Mr. Armand Williams QC continued to represent Janin until Mr. Croome's letter to Mr. Williams on 11th December 1995."

Having reviewed the record this finding was one open to the trial judge on the evidence before her. No basis has been shown which warrants disturbing this finding. Having concluded what the expression 'holding papers' signifies in practice and given the lack of a specific legal definition, this complaint which urges the finding of a duty of care, fails for the same reasons I have given in respect of the 'holding of papers' on the trial date.

[16] Having concluded that the 'holding of papers' does not give rise without more to a duty of care, this is sufficient to dispose of this appeal. However, I think it useful to consider the question whether attorneys-at-law, as advocates, in the state of Grenada enjoy immunity from suit for the tort of negligence based on the law as confirmed in the seminal case of Rondel v Worsley or whether the law which is applicable, is as set out in Arthur JS Hall & Co. (a firm) v Simmons[7] on which Mr. Horsford, counsel for Janin relies. This will be considered on the assumption that Messrs. Wilkinson was liable in negligence in respect of the conduct of the matters complained of.

Barrister's immunity

[17] The learned trial judge, beginning at paragraph [23] of her judgment considered the law relating to this question starting with the provisions of the West Indies Associated States Supreme Court (Grenada) Act[8] [sections 78 and 79] dealing with admissions to practice and enrolment as a barrister and solicitor. She then noted [Para. 24] that in Grenada, the legal profession is fused, in that a person admitted as a barrister is entitled to practice as a solicitor.

[18] The argument run by counsel for Janin which is, in essence, a re-run of the argument made below is that a barrister's immunity is a principle coined by the English common law as mirrored in the House of Lord's decision in Rondel v Worsley; that in 2000 the House of Lords in Hall removed a barrister's immunity and that this then being a further or most recent development of the common law, it must be taken to be the law applicable in Grenada since the immunity does not rest on a statutory foundation. Counsel indeed goes so far as to say that the House of Lords, in declaring the doctrine to no longer exist as the House stated in Hall, did so retrospectively so that, says he, it was always the law that it never applied to Grenada.

[19] With respect to counsel, there are two flaws in his argument:

[7][2000] 3 All ER 673.
[8]Cap. 336, Laws of Grenada1990.

(i) Firstly, he has misapprehended the ruling in Hall. As the learned trial judge pointed out from paragraphs 29 to 32 of her judgment, the Hall decision did not overrule Rondel v Worsley. Rather, the House of Lords in Hall (in 2000) concluded that the public policy considerations which merited the principle as recognised and applied in Rondel v Worsley (decided in 1964) did not still hold, given the changed circumstances in England. It was because of the changed circumstances in England that House of Lords considered that the principle could no longer be justified on public policy grounds. This does not equate to saying that Rondel v Worsley was overruled by Hall. The House said no such thing. They merely decided to take a different approach as appropriate to the changed times and circumstances then prevailing in England. Therefore there could be no retrospective application of Hall as counsel seeks to do.

(ii) Counsel assumes the continued or ongoing importation of the common law into the State of Grenada. This is not the case as is made plain in the case of Campell v Hall[9] which settled this question in respect of Grenada. There is no continuing reception of the common law as it may be coined from time to time by the House of Lords in England, into Grenada. Accordingly, the case of Hall does not automatically become applicable in Grenada. Decisions of the House of Lords in England are not binding on this Court, and thus are not of binding effect in Grenada.

[20] It is only left to be added that, save for the statement at para. 28, to the effect that the Eastern Caribbean Court of Appeal in the case of Parry Husbands v Warefact Limited[10] treated with the question of a barrister's immunity, I consider that the learned trial judge ably and clearly set out the law applicable to Grenada on this question. Accordingly, I would hold that the law as it stands in Rondel v Worsley, having not been changed by legislative hand, represents the law applicable in Grenada with regard to a barrister's immunity.

[9][1558-1774] All ER 252.
[10]1998 ECLR 341. The case of Rondel v Worsley was cited in support of the inability of Queen's Counsel (a Barrister) to sue for his fees.

[21] I do not consider it necessary having concluded as I have above (that no duty of care arises) to embark upon the test required to prove negligence or indeed to set about on a qualitative analysis of the evidence which would have been relevant to this issue.

Conclusion

[22] For the reasons given above, I would dismiss this appeal.

Costs

[23] The learned trial judge ordered prescribed costs in the absence of agreement. Learned counsel for Janin did not address costs in his skeletal argument nor at the hearing of this appeal. His grounds of appeal did not touch on the costs order made by the trial judge save to the extent that if the trial judge's decision was reversed then the costs order would suffer a similar fate. Counsel for Messrs. Wilkinson addressed costs at paragraphs 25 and 26 of her submissions on the prescribed costs basis. CPR 65.5(2)(b) says, in essence, that in determining such costs, in the case of a defendant, the amount claimed by the claimant in the claim form is the value of the claim. Janin claimed damages in the sum of EC$246,185.23 as well as interest compounded at the rate of 11.5% per annum from 11th December 2000 to the date of judgment. Taking the value of the claim as the sum of $246,185.23 stated in the claim form, costs on the prescribed basis in the court below in accordance with Appendix B, would amount to $45,927.78. I would award two-thirds of that sum on appeal in accordance with CPR 65.13(b).

Janice M. Pereira (formerly George-Creque)
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]

I concur.

Frederick Bruce-Lyle
Justice of Appeal [Ag.]