IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
IN THE HIGH COURT OF JUSTICE
(CIVIL)

**GRENADA**
Claim Number: **GDAHCV2015/0496**
Between

**LIBERTY CLUB LTD**

**Claimant**

**AND**
**JAMES BRISTOL**
**HENRY, HENRY & BRISTOL, a firm**

**Defendants**

**Appearances:**
Anselm Clouden along with Olibisi Clouden for the claimant
Sydney Bennett Q.C along with Alban John, Shasa Courtney and Thandiwe Lyle for the defendants

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2016: February 3
: March 14

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## RULING ON APPLICATION FOR SUMMARY JUDGMENT

[1] **GLASGOW, M:** The Eastern Caribbean Court of Appeal in the case of **Janin Caribbean Construction Limited v Wilkinson et al**[1] made an express finding that "*the law as it stands in **Rondel v Worsley** having not been changed by legislative hand, represents the law applicable in Grenada with regards to barrister's immunity*". Notwithstanding this statement of the law for the purposes of this territory, the claimant herein (hereinafter the respondent) has filed this claim in which it asserts that it is entitled to remedies for the defendants' negligence and breach of contract as counsel in proceedings before the court. Unsurprisingly, the defendants (hereinafter the applicants) have applied to strike out the claim on the grounds that it has no realistic prospect of succeeding. The grounds for the application are equally predictable. The applicants are asking the court to find that the allegations made in the statement of claim "*relate to decisions made in the course and furtherance of the conduct and management of litigation in the Insurance Claim and the decision to amend the said pleadings was made in court or alternatively was a preliminary decision affecting the way in which the case was to be conducted at the hearing and, in the circumstances, the Defendants are immune from suit in respect thereof by virtue of section 25 of the Legal Professions Act No. 25 of the 2011 Laws of Grenada.*"[2]. Complaint was made about the claim being statute barred but this point of contention was not pursued strenuously by either side in oral arguments.

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[1] GDAHCVAP 2010/0001
[2] Paragraph 11 of the affidavit of James Bristol filed on December 22, 2015

[2] Before reciting the respondent's rejoinder, it may assist to set out the background to how the parties got to this point.

## BACKGROUND

[3] The first applicant is a partner in the second applicant firm of attorneys-at – law. The second applicant was retained to represent the respondent in claim no GDAHCV 2005/0409 which action was brought by the respondent against Beacon Insurance Company Limited (hereinafter referred to as "Beacon" and the "Beacon Proceedings"). In the Beacon proceedings, the respondent alleged that Beacon breached the terms of an insurance agreement between Beacon and the respondent. Beacon is said to have failed to honour obligations to pay the respondent for losses it incurred as a result of the passage of Hurricane Ivan in 2004. The respondent filed this claim against the applicants alleging that they (the applicants) breached their contractual obligations to properly represent the respondent in the Beacon proceedings. It is also pleaded that the applicant acted negligently in executing their duties owed to the respondent. The allegations concern the conduct of the trial of the Beacon proceedings. I will borrow the applicants' succinct description of the actions which form the basis of the respondent's complaint against the applicants –

> The respondent "*alleges that on the morning of the trial the first defendant James Bristol who with Leslie Haynes QC and Diana Forrester acted as counsel for Liberty Club Ltd in the action had applied to amend its Reply to Defence against Beacon without consulting it on the matter. It maintains that the Reply ought to have been amended within the 17 months prior to the hearing and the application for amendment was made contrary to Liberty Club's instructions that nothing should be done to delay trial of the action against Beacon.*"[3]

[4] For the respondent it is said that the applicants' actions at trial breached the specific terms of the retainer agreement with the respondent. Concomitantly, the applicants acted inconsistently with their implied duty to use reasonable skill and care in the conduct of the Beacon proceedings. The applicants, in their defence and affidavit in support of the application for summary judgment rejoin that their actions in the said proceedings were entirely appropriate and in any event they benefit from barristers' immunity for the manner in which they conducted the trial. The first applicant offers the following explanation of the events at the trial of the Beacon proceedings –

> *In or about June 2008 whilst I was preparing the said pre-trial memorandum in conjunction with Leslie Haynes Q.C, it became evident to us that the Defendant may have waived strict compliance with a condition of the insurance policy, the subject matter of the Insurance claim.*
> *It was decided that no immediate application ought to be made to the Court to amend the Claimant's Reply in the Insurance Claim due to the restriction on so doing as a result of the interpretation placed by the Court on CPR Part 20.1(3) as it was then worded.*
> *On the 17th November 2009 whilst preparing for trial of the Insurance Claim together with Leslie Haynes Q.C, I formed the view that the restriction on amendments imposed by CPR Part 20.1(3) may be unconstitutional in that it denied the Claimant therein the right to a fair*

[3] Paragraph 1.3 of the defendants' submissions filed on February 2, 2016

*hearing as guaranteed by Section 8(8) of the Constitution. The issue was discussed with Leslie Haynes Q.C and it was decided that an application to amend the Reply ought to be made and which was made the next morning immediately before the trial commenced."*[4]

[5] The applicants argue that the claim ought to be dismissed and a summary judgment entered in their favour. The respondent strongly opposes this view. The respondent's rejoinder is that the claim exposes issues which ought to be resolved at trial and not by summary disposal. Chief among the reasons for this submission is the posture that section 25 of the Legal Professions Act (hereinafter the Act) relied on by the defendants does not apply to this case *"since at the material time when the negligence arose, the Act was not then in force and the Act is not retroactive in nature."*[5] In respect of the immunity of barristers, the respondent's reply is that the "*old rule of **Rondell v Worsely** does not apply. The House of Lords has since the case of **Hall v Simons** departed from the English Law doctrine of barristerial immunity from suit for professional negligence... It is doubtful whether that doctrine was imported into Grenada."*[6] The response continues that even if the doctrine did apply to the territory, the conduct "*of which complaint was made does not fall within the category of negligent conduct covered by this immunity... insofar as such conduct does not fall within such category or that the question whether it does fall unto that category, is a mixed question of law and fact which cannot be disposed of in a summary fashion."*[7] For the position that the court ought not to grant a summary judgment in these circumstances, the respondent relies on the cases of **CITGO Global Custody NV v Y2K Finance Inc**[8], **Alfa Telecom Turkey Limited v Cukurova Finance International Limited and Cukurova Holdings AS**[9], **Saint Lucia Motors & General Insurance Co. Ltd v Modeste**[10] and **SGL Holdings Inc. v Shammas**[11].

## SUBMISSIONS

[6] Much of the argument in this case was focused on the question of the applicability of the barristers' immunity from suit for negligence. More aptly, the applicability of what may be shortly described as the **Rondel v Worsley** principle and the line of cases following that decision. Counsel for the applicants insisted that **Rondel v Worsley** is still good law in Grenada and urged the court to consider the New Zealand case of **Rees v Sinclair**[12] for the proposition that the **Rondel v Worsley** principle is extended to jurisdictions such as Grenada where there is what is called a "fused" legal profession. The applicants also urge the court to dismiss the assertion that the Act is inapplicable to this case having been promulgated at a time after the cause of action arose. The argument here is that the Act intends to affect the instituting of suits against counsel for negligence from the date of its promulgation and does not reflect any intention of retroactive effect. For this latter proposition, the applicants rely on the Court of Appeal decision in **Browne v the Attorney General and others**[13].

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[4] Paragraph 10 of the defendants' affidavit in support of the application filed on December 22, 2015
[5] Paragraph 8 of the claimant's affidavit in reply filed on February 2, 2016
[6] Ibid at paragraph 9
[7] Ibid at paragraph 10
[8] BVIHCVAP 2008/022
[9] BVIHCVAP2009/0001
[10] SLUHCAP 2009/0008
[11] GDAHVCAP 2010/0002
[12] [1974] 1 NZLR 180
[13] [2014] 5 LRC 348

[7] For its part, the respondent relies on the cases of **Saif Ali v Sydney Mitchell & Co (a firm) and others, P (Third Party)**[14] and **Arthur J.S. Hall & Co (a firm) v Simons et al** [15] for the argument that the barristers' immunity no longer exists in England and has not been imported into Grenada.

**Discussions and ruling**

[8] I have hopefully recited the legal positions of both sides with deference to the eminence of legal counsel engaged in this case. However, the reason for the controversy on the application is not readily apparent to me. I say this because it would seem to me that the entire issue of the law on the barristers' immunity in Grenada was fulsomely addressed in the case of **Janin Caribbean v Wilkinson et al**. In this context it would be useful to quote fully from what was said by her Ladyship, Pereira C.J in this regard –

> *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 recognized 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 the 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 of Lords said no such thing. They merely decided to take a different approach as appropriate to the changed times and circumstances then prevailing in England…*
>
> *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 **Campbell v Hall**[16] 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 they are not of binding effect in Grenada.*
>
> *… 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 regards to a barrister's immunity."*[17]

[9] The foregoing excerpt ought to dispose of any argument as to whether counsel in Grenada continues to enjoy the immunity enunciated in **Rondel v Worsley** in respect of conducting litigation. Counsel for the respondent sought to distinguish the facts of this case from the facts in **Janin**. The claimant in **Janin** filed suit against counsel who was holding papers in other proceedings in which the claimant was the defendant. The allegation was that counsel failed to

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[14] [1978] 3 ALL ER 1033
[15] [2000] 3 All ER 674
[16] [1558-1774]ALL ER 252
[17] [1967] 1 AC 191

appear at the trial of a claim and as a result an exparte judgment was entered against the claimant. The Court of Appeal agreed with the High Court that counsel holding papers did not appear as counsel for the claimant but rather appeared as a courtesy to his colleague who was on record for the claimant. The court further held that counsel enjoyed immunity from suit in the **Rondel v Worsley** sense since the law as stated in that case had not been changed by legislation and as such the decision represents the law applicable in Grenada with regards to a barrister's immunity from claim for his conduct of litigation. While I agree with counsel that the facts in this case may be more glaring if they can be said to amount to negligence, I cannot agree that such a finding permits me to deviate from the Court of Appeal's definitive statement not only in respect of the applicability of the law to the facts before it in **Janin** but its further declaration of the law on this issue for the state of Grenada.

[10] I would venture to find that even if one did not consider the immunity from suit for the conduct of litigation, it is difficult to see how the facts of this case amount to negligence or breach of contract. The facts tell the story.

[11] Prior to its amendment in 2011 CPR 20.1 (1) to (3) read as follows –

> *"20.1(1) A party may change a statement of case at any time before the case management conference without the court's permission unless the change is one to which –*
>
> *(a) Rule 19.4 (special provisions about changing parties after the end of a relevant limitation period); or*
> *(b) Rule 20.2(changes to statements of case after the end of a relevant limitation period) applies.*
>
> *(2) An application for permission to change a statement of case may be made at the case management conference.*
>
> *(3) The court may not give permission to change a statement of case after the first case management conference unless the party wishing to make the change can satisfy the court that the change is necessary because of some change in the circumstances which became known after the date of that case management conference.*

[12] The amendments to CPR 20.1 (1) to (3) in 2011 read the following –

> *20.1 – (1) A statement of case may be amended once, without the court's permission, at any time prior to the date fixed by the court for the first case management conference.*
> *(2) The court may give permission to amend a statement of case at a case management conference or at any time on an application to the court.*
> *(3) A statement of case may not be amended without permission under this Rule if the change is one to which any of the following applies –*
> *(a) Rule 19.4 (special provisions about adding or substituting parties at the end of the relevant limitation period); and*
> *(b) rule 20.2 (changes to statement of case after the end of a relevant limitation period).*

[13] Evidently, the applicants were governed by the state of the rules as they stood when they were engaged in preparing for trial in the Beacon proceedings between the years 2008 to 2009. The affidavit evidence indicates that the information to amend the claim came to light after the case management conference but before the filing of the pre-trial memorandum. The prevailing state of CPR 20.1(3) dictated that counsel would have had to satisfy the court that the proposed amendment fell within the terms of the rule as it was then stated. I would assume that counsel, like all astute lawyers, would continue to assess the claim until the trial is completed. Counsel explains that it was not until the eve of trial that continued preparation suggested that a legal argument about the constitutionality of the then prevailing state of CPR 20.1(3) became apparent and was contemplated. One would not be incorrect to conjecture that it would have been much tidier and expedient if this illumination on a possible legal argument had been visited on counsel much earlier than on the cusp of a trial. But I cannot see how this fact alone turns what transpired into negligent conduct. As Lord Upjohn puts it in **Rondel v Worsley**[18]

> *... I am not, of course, suggesting for one moment that the fact that counsel does or does not call a witness, or does or does not ask a question or does or does not ask to amend his pleadings could by itself be a cause of negligence, even if "jobbing backwards" on mature reflection it had been better if counsel had pursued an opposite course. The most that can be said is that he committed an error of judgment.*

[14] In all the circumstances I find that the conduct sought to be challenged relates to the conduct of litigation or in preparation for litigation and cannot be challenged on the present state of the law in Grenada as stated by the Court of Appeal in **Janin**. I find further find that the conduct in itself does not disclose a case with the reasonable prospect of success that counsel acted without reasonable skill and care in conducting the litigation on behalf of his client or in breach of contract.

[15] Something must be said about section 25 of the Act since it came into force on November 15, 2011 and thus, it may be argued that the provisions thereof may have changed the state of the law in Grenada from what was previously declared in **Janin.** The section reads –

> *25. Liability for negligence and lack of skill*
> *(1) Subject to subsection (2), an attorney-at-law shall not enjoy immunity from action for any loss or damage caused by his own negligence or lack of skill in the performance of his functions.*
> *(2) An attorney-at-law shall be immune from suit of negligence in respect of his conduct of litigation only.*
> *(3) The immunity referred to in subsection (2), shall not be confined to proceedings in court, but shall extend to such pre-trial work as is so intimately connected with the verdict of the case in court, that it could be said to be a preliminary decision, affecting the way in which the case is to be conducted at the hearing.*
> *(4) In this section, "function" means a function undertaken by an attorney-at-law in relation to the conduct or management of litigation, or prospective litigation, whether performed in or out of court, or before, during or after any court proceedings.*

[18] [1967] 1 AC 191 at page 283, paragraphs E-F

[16] It is immediately apparent that the section has not changed the **Janin** exposition of the law in Grenada but rather the section encapsulates the common law position with respect to a barrister's immunity for the conduct of litigation. More appropriately, it can be said that the learning in **Rees v Sinclair** that applies the **Rondel v Worsley** principle to jurisdictions where there is a fused profession has been clearly articulated by this section. In addition, a further reading of the express wording of the provision does not support the argument of counsel for the respondent that the applicants are trying to apply the section retroactively. Indeed counsel for the respondent is quite correct that the Act came into force in November 2011. It is also true that the conduct in question in this case occurred previously in November 2009. But what is said in section 25 very plainly instructs that from the date it became the law, counsel is to enjoy immunity from suit for negligence in respect of his conduct of litigation. Legislation is always interpreted as being prospective in its effect except where it can be shown that Parliament explicitly or impliedly intended the same to have retrospective effect[19]. With respect to the arguments of counsel for the respondent, the question of retrospectivity does not arise on this discourse. In my view all the section is saying is that from the time the Act became the law, counsel is protected from suit regarding allegations of negligence in respect of the conduct of litigation. The section does not say anything about when the alleged negligent conduct would have been performed or more properly when the litigation work in question would have been undertaken. The section relates solely to the instituting of claims against counsel for allegations for negligently conducting litigation as defined therein whenever that conduct arose and clearly prohibits such suits from the date the law took effect. There is nothing in the section to suggest that the conduct sought to be impugned ought to have performed after the Act came into force. The conduct in question herein, being captured by the terms of the section, cannot form the subject of a claim in negliegence.

[17] For all the foregoing reasons it is quite difficult to see how the respondent could sustain its action against the applicants. Accordingly, the applicants have demonstrated that the respondent's claim does not have a reasonable prospect of succeeding and the same must be dismissed. The application is therefore granted and the claim against the applicants is dismissed with prescribed costs of $23,628.61.

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**RAULSTON GLASGOW**
**MASTER**

[19] See Baptise J.A in Browne V Attorney General and others [2014] 5LRC 348 at paragraphs 55 and 56