IN THE ROYAL COURT OF JERSEY

6th December, 1988.

Before: Commissioner F.C. Hamon
Jurat The Hon. J.A.G. Coutanche
Jurat D.E. Le Boutillier

BETWEEN	Juan Torrell and Rosa Torrell (née Clavero)	PLAINTIFFS
AND	Barry Keith Pickersgill and David Eldon Le Cornu, practising as Pickersgill and Le Cornu	DEFENDANTS
	(by original action)	
	AND	
BETWEEN	Barry Keith Pickersgill and David Eldon Le Cornu, practising as Pickersgill and Le Cornu	PLAINTIFFS
AND	Juan Torrell and Rosa Torrell (née Clavero)	DEFENDANTS
	(by counterclaim)	

Advocate W.J. Bailhache for Mr. and Mrs. Torrell
Advocate B.E. Troy for Pickersgill & Le Cornu

The Plaintiffs in this action Juan Torrell and Rosa Torrell (née Clavero) came to Jersey in 1961. They were both of Spanish descent. In 1962, they purchased a property Casa Altea, No. 16 Green Street, St Helier. On the 26th September, 1980, they borrowed £17,000 from the Jersey Savings and Loan Corporation Limited upon security of their home. There they lived with their two sons who, in 1984, were aged fourteen and eleven. Mrs Torrell worked at St Helier House as an auxillary nurse. She was described by her general practitioner, Dr J S Le Gresley, as "a very pleasant and hardworking lady". Although he had treated her in 1981 for minor stress at work, it is quite clear to the Court that, up to 1985, her general state of mind and health was entirely satisfactory.

Pellucidly clear is the fact that Mrs Torrell was the business head of the family; she used the six bedrooms [illegible] the property to full advantage. Through [illegible] Abbey Travel, a Dublin-based Comp[illegible] the house was occupied by five persons [illegible]

euphemistically known as "paying guests" by the Housing Department through the summer holiday season. This business produced an additional £4,760 a year for the family. As Mrs Torrell told us, these guests helped to pay the mortgage. Mrs Torrell was proud of her property and of her achievements in Jersey since 1961. One might have thought, in fact, viewing the scenario that in the words of Voltaire "Tout est pour le mieux dans le meilleur des mondes possibles."

As we have implied, Mrs Torrell was an ambitious lady. She was also beginning to find Casa Altea too large and burdensome. One day in January, 1984, she saw advertised in The Jersey Evening Post an invitation for applications for a husband and wife team to work at Noirmont Manor as housekeeper and chauffeur. With the employment went accommodation at the Gate House which comprised three bedrooms, two reception rooms and a bathroom. Mrs Torrell viewed the property and found that it was for her an ideal family arrangement. She thought the accommodation at the Gate House was beautiful. In her enthusiasm (and perhaps somewhat foolishly) she thought that she would be there for a considerable period or, as she put it to us "forever". It is important, in our view, to re-emphasize Mrs Torrell's state of health at this time. Dr Le Gresley told us that working, as she did, at the Old People's Home, she had come to him with the usual muscular complaints. They were what he described as "wear and tear symptoms". She had no worries of a severe nature and he had never treated her for serious depression. She had been his patient since 1980. It should also perhaps be pointed out that Mr Torrell received modest income as a tailor. It is presumed that by taking the employment as a handyman the family would have been generally better off. Be that as it may, the Plaintiffs applied for the position at Noirmont Manor and were successful in obtaining it.

They turned their attentions to Green Street.

Working with Mrs Torrell at [illegible] as [illegible]

Mrs Ann Barnes. Mrs Barnes and Mrs Torrell were on friendly terms. Mrs Barnes lived in rented accommodation in Hilgrove Street which was due to [illegible]

demolished. She had found for the family alternative accommodation in a property at Greve d'Azette and they were going to take that property for £105 per week. Mr Barnes was a builder and they intended to supplement their family income by taking in "sleepers".

It is now that we come to the first major conflict of evidence.

Mrs Barnes was adamant that Mrs Torrell approached her to say that she was selling Casa Altea in due course and that she and her husband could rent it for six years and then purchase it at the end of that time at its then market value. We were told that Mr and Mrs Barnes saw the property, liked the thought of a long, rather than a yearly lease, and were prepared to pay an ingoing of £6,000, which would include certain furnishings and carpets. Mrs Barnes had been left £6,000 by her mother. Mrs Barnes said that Mrs Torrell suggested the rent of £100 (£5 less per week than the property she had in mind) and that she was told that two other couples were after the property. As she put it to us, she was told "whoever gets it is the one with the most pennies".

It is for that reason, we were told, that she agreed to pay £6,000 for the ingoing rather than the £5,000 originally suggested by Mrs Torrell. We also saw a letter which she slipped late at night through the letter box of Casa Altea:

"Dear Rosa and John,

I just wanted to send you this small note to let you know our feelings.

Derek and I have both agreed there was something special that enveloped us when we visited your home. That lovely feeling as if you are at home.

Rosa and John, you can be sure, so very sure that we would love and look after your home as if it were our own. We can promise you peace of mind that you [illegible] how your home is being looked after [illegible] will love and look after it as you have. [illegible]

Best love to both for considering us.

Ann, Derek and Ria   XXXXX "

Agreement was finally made with the parties together at Casa Altea swearing eternal friendship and with Mr Torrell and Mr Barnes drinking one another's health.

The Plaintiffs' version of events is not the same. They were adamant that only a three year lease was agreed. In any event Mrs. Torrell's earnings at Noirmont Manor covered the mortgage repayments and she was in no hurry to let the property. She told us that Mrs Barnes had asked for a six year term but she would not agree to more than a three year term. There was a possibility of selling the property but it was no more than that. Mr Torrell remembered drinking the health of Mr and Mrs Barnes but he was certain that no six year term had been agreed. It was possible that the sale of the house was discussed. He could not recall.

The Defendants, and in particular Mr Barry Keith Pickersgill, an Ecrivain, had acted as homme d'affaires for the Plaintiffs for some four to five years. Mr Pickersgill had been in practice for fifteen years. He had, during his years of practice drafted many leases. He was an experienced Solicitor.

Mrs Torrell came to see him, as he put it "in a state of some elation" on the 8th February 1984. She described her new property as lovely - a nice new home. He asked her questions and wrote down her responses. That note was tendered in evidence. The note (and much reference was made to it throughout the trial) reads as follows:

8 February 1984

Mrs Torrell

You have agreed to let No 16 Green Street for three years at £100 per week and £6,000 lump sum for contents - Inventory coming.

To Derek and Ann Barnes - Form of Housing Application coming.

(Probably no-one acting - they may buy)

To start 1 March 1984

Lessees to pay Parish Rates (with Foncier and Occupier)

Services

Use only for domestic

Keep Garden

No animals without consent

No subletting etc. (charge ;them to pay fee (£108)

Lessors' Insurance

Pay Schedule A

Keep the property wind and watertight

Send you the lease to pass on

You will be living subsequently at Noirmont Manor 42661 - Gatehouse - Mr & Mrs Jagger as service tenants - warned of the lack of security of tenure."

Mr Pickersgill told us that the terms of the lease were based on his experience of drafting many such leases and he was suggesting a standard domestic lease. He remembers advising on the lack of security of tenure of the service tenancy but was only able to go on to say that "it was inconceivable" that he did not at the same time refer to the difficulty of getting Casa Altea back at the end of the lease.

Mrs Torrell remembered very little of the meeting of the 8th February. We see [illegible] everything [illegible] her lawyer's hands, fully trusting him. She did not recall being advised on any possible difficulty that the Plaintiffs might face in regaining possession of

their property at the end of the lease. When pressed on this point she said that she felt that he had not advised on that point at all. If he had said something she felt that she would have remembered.

Be that as it may, on the 13th February (five days after the first meeting), Mr Pickersgill sent a draft lease under cover of a letter. It is perhaps unfortunate that the golden opportunity to re-confirm the advice about lack of security of tenure at Noirmont Manor was not then taken. We have no doubt that the advice was given at the meeting of 8th February. It should be noted that Mr Pickersgill knew (he told us so) that he had in Mrs Torrell a forceful client who made her feelings plain at all times. He was aware that his client did not have English as her mother tongue but felt that he had no difficulty in making himself understood.

It must also be understood that Mr Pickersgill was perfectly frank in his evidence. He had no clear recollection of the note which stated: "warned of the lack of security of tenure". As a matter of practice he advised clients of the difficulty of obtaining a property back at the end of a lease. He could not say with certainty that he had advised in this case. In any event he did not feel that so to advise was any part of his duty.

Advocate Bailhache who appeared for the Plaintiff submitted that Mr Pickersgill should in the circumstances have drafted a furnished tenancy. He had the opportunity. It should have occurred to him. It did not.

The lease was sent to the Plaintiffs at Casa Altea but by then they had moved to Noirmont Manor. The Court was not shown the draft lease but only the executed lease. The letter of the 13th February 1988 contained these words:-

"Please let me know if anything requires to be changed, added or deleted [illegible] can [illegible] made ready for execution as soon as possible. In particular, you will see that I have made provision at Clause 4 for payment of [illegible]

a deposit. This can be excluded if you wish but, if the requirement is to remain in, I shall need to know what amount you require."

There is on the letter a note in Mr Pickersgill's handwriting dated 20th February 1984 ...

"No deposit - no mention in the lease but lessees get the first option if the place is to be sold."

The executed lease makes no mention of a deposit.

Mrs Torrell told us that she did not remember the "option" matter. She did not think that she ever had such a conversation with Mr Pickersgill. She does however remember reading the lease through at Noirmont Manor. Mr Torrell saw the letter but did not ever recall the question of the deposit.

The lease must have been passed on to Mr and Mrs Barnes. Mrs Barnes telephoned Mr Pickersgill. There is a note from a member of Mr Pickersgill's staff. It is undated and is on a printed form headed "while you were out". It reads:

"She (Mrs Barnes) wants to talk about her lease with Mr and Mrs Torrell. She doesn't understand it!" And underneath that note, with the brevity we have come to expect Mr Pickersgill had written "Explained"

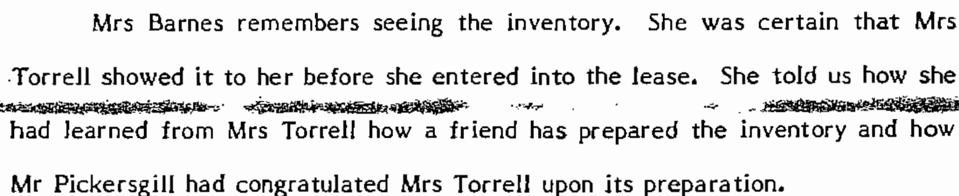
This is perfectly understandable. Mrs Barnes told us that her previous lease was a very simple affair. She had never seen anything like this lease before. Neither she nor her husband "understood a word of it". She said she was concerned that the lease was for three years and not for six years. Her husband somewhat cynically retorted in good humour that it "was another way to get a further lawyer's fee at the end of the term."

She was concerned about the failure of the lease to mention a term of renewal or indeed an option to purchase. She told us that Mr Pickersgill informed her that he knew his client. He had no instructions on an option. If Mrs Torrell had told her this she was a woman of her word; her word was her bond. Mrs Barnes pressed Mr Pickersgill. She asked him what would happen if Mrs Torrell (and we presume Mr Torrell, as the property was jointly owned) died in a car crash. He repeated (she said) that he knew the Torrell boys and in any event the Court would not hold with things like that. Somewhat prophetically in the circumstances Mrs Barnes told us that "very naively she just 'let things go'."

The lease makes mention of the sale of "furniture, furnishings and mobiliary effects" for £6,000 to be paid in two separate tranches of £3,000 each. The second to be paid on or before the expiration of three months after the execution of the lease by the parties. There is mention of an inventory "annexed to this present agreement".

Let us now consider the question of the inventory. Mrs Torrell remembered it as being prepared on the last Sunday in February - that is February 26th. The Plaintiffs were then living at the Manor and had left at Casa Altea all those things that they wanted to leave there. Friends came to visit them. A friend of long standing - a Mr Deacon - offered to help. He went through every room with Mr Torrell and made a list. He went away and typed it. He gave copies to Mrs Torrell. She kept one copy and took two copies to Mr Pickersgill. He made commendatory remarks. She told us that she did not check the inventory. She did not understand such matters.

Mrs Barnes remembers seeing the inventory. She was certain that Mrs Torrell showed it to her before she entered into the lease. She told us how she had learned from Mrs Torrell how a friend has prepared the inventory and how Mr Pickersgill had congratulated Mrs Torrell upon its preparation.



She had checked the inventory carefully and was not concerned by the fact that it contained fixtures as she felt that was consistent with the intention to purchase the house when she and her husband qualified under the Housing Regulations in 1990.

Mr Pickersgill did not examine the inventory. It never occurred to him to examine it. Had he done so he would have noticed some startling anomalies.

It will be recalled that the lease specified the sale of "furniture furnishing and mobiliary effects." The inventory contains such items as toilets, a wash hand basin, a water storage heater, a bath, bidet and a shower, plus a plethora of miscellaneous items reminiscent of the sale of a guest house. There was as Advocate Bailhache submitted, a clear conflict between the terms of the inventory and the terms of the lease: Advocate Troy for the Defendants dismissed the matter by saying that he did not consider that a Solicitor has a duty to inspect an inventory in any detail. Mr Pickersgill was presented with a fully detailed typed inventory. It was what the parties had agreed. Any errors in the inventory (if there were errors), were the responsibility of the Plaintiffs who had, in any event, delegated their responsibility to Mr Deacon. He said that in normal circumstances an inventory prepared by Estate Agents would carry no responsibility

It is unfortunate that the signed lease was not dated. The unsigned inventory was not dated. The Housing Exemption Form has attached to it this note "24.2.84. Original lodged (by Jeannette - hence no date) £3,000.00 paid to Mrs Torrell fee paid. Rental being dealt with by S.O. Counterpart lease returned to Mr and Mrs Barnes". The Housing Exemption Form shows the lease as commencing on the 1st March 1984. The lease contains this clause:

"2. That the Lease shall be for a period of three years to commence and be computed from the first day of the month in March in the year one thousand nine hundred and eighty four and to terminate on the [illegible] day of April in the year one thousand nine hundred and eighty seven."

It should have been stated, of course, that the lease would terminate on 28th February 1987.

At this stage, with the storm clouds not yet looming on the horizon, we can consider the question of the lease and the ancillary questions surrounding the lease. We shall return to the lease and the inventory later in this judgement.

Advocate Bailhache asks to consider three acts of alleged negligence. He asks the Court to consider these questions:

1. Was the Defendant negligent in not advising on the provisions of the Loi (1946) concernant l'expulsion des locataires refractaires?

2. Was the Defendant negligent in his failure to draw the lease correctly? Should he have at least advised on a furnished tenancy?

   Should he have made the tenant liable for foncier rates? Was the incorrect termination date the act of a negligent draftsman?

3. Was he negligent in not checking the inventory? Was the discrepancy between the fixtures specified in the inventory (the detailed contents of which Mr Pickersgill was unaware) and were the "furniture, furnishings and mobiliary effects" mentioned in the lease important?.

In Blacklock and Another -v- Perrier and Labesse (1980) JJ 197 at Page 207 the learned Bailiff recites a passage from Cordery 6th Edition on Solicitors at Page 187:

"Actionable negligence may be said to possess three essential ingredients: the complex concept of duty, breach of the duty, and damage suffered by the person to whom the duty was owing. In the case of a solicitor and his client such negligence involves:

a) A legal duty towards the client to exercise care or skill or both;

b) A breach of that duty by the solicitor i.e. a failure to attain the standard of care or skill prescribed by law; and

c) Actual loss to the client as the direct result of such breach."

The learned Bailiff went on to say that the English cases show that the standard of care is that of a reasonably prudent solicitor.

We agree but we would also add two helpful passages cited to us by Advocate Troy from Dugdale and Stanton "Professional Negligence" Paragraph 25.06 and 25.08.

"25.06:

A professional person's role will commonly be to apply his expertise and skill for the benefit of his client. A standard consequence of this is an obligation to identify problems and to warn the client of them so that he may act on the advice."

"25.08:

Legal practice may well entail a similar obligation to identify problems and to bring their effect to the attention of the client, particularly since the legal difficulties in a situation may well not be apparent to a lay client."

This latter stricture is well explained in an unreported case : Carradine Properties Limited -v- D J Freeman & Co - The Times 19 February 1982. It was stated that a solicitor's duty was to exercise all reasonable care and skill in and about his clients' business in which he was engaged but the scope of that duty depended upon the extent to which his client appeared to need advice. [illegible] inexperienced client required more advice than an experienced one. [illegible]

The Blacklock case is distinguishable from this case on its facts. One factor in that case (there were of course other factors) was a Proposition of the States to widen Dumaresq Street which would lead to the acquisition of properties in the vicinity including that of the Plaintiffs. This had been lodged as a public documenet well before the Plaintiffs were introduced as clients to the Defendants. The Defendants failed to discover the danger and allowed the Plaintiffs to purchase the property. The negligence was further compounded by the fact that the defendants in that case failed to tell the Plaintiffs (or one of them) that he had no qualifications under the Housing Laws to live in Jersey. The Court had to sift through conflicting evidence to reach its decision. Having satisfied itself on the facts the conclusion was inevitable.

Here, the problems are more finely drawn.

Mr Pickersgill freely admits that he did not read through the inventory in any detail. He freely admits his mistake on the termination date in the lease; he agrees that the inventory contains fixtures and the lease purports to sell only furniture, furnishings and mobiliary effects; he agrees that the lease is not dated and that the inventory is not signed.

At the end of his examination in chief, Advocate Bailhache asked Mrs Torrell an important question:

"If Mr Pickersgill had told you - if he had told you - in March 1984 or February 1984, that at the end of the lease you might not get immediate possession of your house back, would that have prevented you from granting the lease?"

To this question Mrs Torrell replied: "Of course it would. If I could have known then what I know now, obviously I wouldn't have done it. Probably I would have let the house making better arrangements or knowing more about the law or knowing - I don't know - I would have done things and I would not get myself in a mess like that if I knew."

We feel that Mr Torrell came closer to the truth of the matter when he said that he could not say what they would have done if they had known. The Court, has had the opportunity of listening to the witnesses and assessing the way that they gave their evidence. We have no doubt in our mind that had Mr Pickersgill spelled out to the Plaintiffs the possible dangers of a three year unfurnished lease, it is more than likely that the Plaintiffs would have acted just as they did.

In Stannard -v- Ullithorne (1834) 10 Bing 985 at Page 990 Tindal CJ said:-

"It may be assumed as a general principle, that an attorney, by reason of the emolument he derives from the business in which he is employed, undertakes and is bound to take care, that his client does not enter into any covenant or stipulation that may expose him to a greater degree of responsibility than is ordinarily attached to the business in hand, or at all events, that he does not do so till the consequences have been explained to him."

It is clear that a client may well have high expectations of his solicitor, particularly when, as in Jersey, he is an "homme d'affaires." When things go wrong the "emolument he derives from the business in which he is employed" may well be a recipe for misunderstanding, disappointment and claims. Indeed if a solicitor causes physical injury shock or economic loss then the solicitor may be held liable in tort as well as in contract.

We must in this context look at Sykes -v- Midland Bank Executor Co (1970) QB 113. In that case a solicitor advising on underleases did not draw the attention of his clients to the fact that there was an absolute right in the freeholder to refuse his consent to a change of user. Having found the Solicitor negligent (although only by a little) the Court of Appeal went on to consider the question of damages. At page [illegible] Salmon [illegible]

[illegible]

"It was for the Plaintiffs to show that it was probable that, if they had received proper advice, they would not have entered into the underleases, at any rate not at the rents reserved. In my opinion, they completely failed to prove anything of the kind."

It may be useful to examine the situation as it stands at this point. I have determined the existence of a duty of care situation - as shown in Blacklock -v- Perrier and Labesse - as well as the standard of care and scope of duty by which to decide carelessness. There is evidence to suggest that failure to show the requisite care might reasonably be inferred.

The Jurats find that Mr Pickersgill, at this stage, did not fai to exercise reasonable care and skill. We do not believe that, in the circumstances, the failure to consider the inventory was of any moment. The error in the termination clause of the lease was such a patent ambiguity that its correction under normal circumstances would cause no difficulty. We feel that the Plaintiff might, as a counsel of perfection, have spelled out the provisions of the Loi (1946) concernant l'expulsion des locataires refractaires. We do not think that failure to do so (bearing in mind that we are satisfied that Mr Pickersgill did advise on the question of security of tenure at Noirmont Manor) was a material factor. In fact the Court is satisfied that Mr Pickersgill acted as a reasonable solicitor in March 1984. Many things, however, were yet to happen.

In 1985 Mrs Torrell developed a Whitlow on her finger. She wore rubber gloves when washing dishes and at other times but this did not seem to help the problem. Her employer was not unnaturally concerned. The hitherto friendly relationship between employer and employee became tense. This was an infectious complaint. Her employer did not wish her to work preparing food. Mrs Torrell became frustrated ; her employer became increasingly unhappy. This lady described by her general practitioner as a "most helpful, charming soul", saw her dream world collapsing about her. Dr Le Gresley signed [illegible] work. Her complaint improved slightly. She returned to work. Dr Le Gresley [illegible]

advised her that water and cooking were anathema to her complaint. The family stayed on for a few weeks at Noirmont Manor but her employer deducted £100 from her wages. The family had £40 per week to live on. Her employer pressed her to give up her accommodation. Eventually in June 1985 Mrs Torrell handed in her notice.

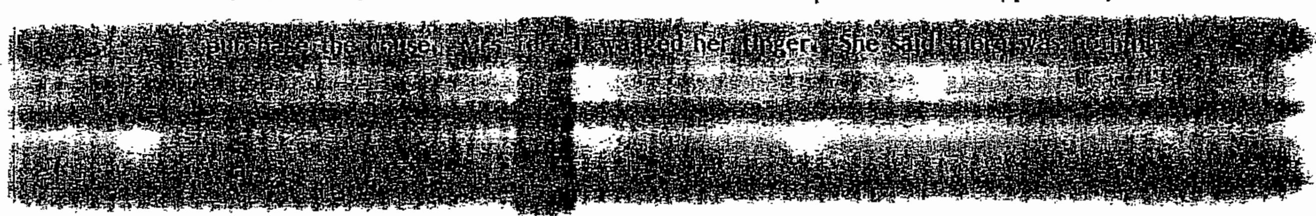
The storm clouds had broken.......

Mrs Barnes was expecting a baby. Mrs Torrell waited a "decent time" until the last Saturday in July to contact her. Mrs Barnes had given birth to a daughter a few days previously. The lease of course still had nearly two years to run.

Mrs Torrell had by then found her family temporary, unsatisfactory accommodation. She wanted to appraise Mr and Mrs Barnes of her predicament. Mr Torrell and the two boys were living in one room; Mrs Torrell was living in the other.

Again, we have a conflict of evidence. Mrs Torrell said that she merely wished to tell Mr and Mrs Barnes that she wanted the property back at the end of the lease. A remark was made about the furniture. Mrs Torrell told us that she offered to buy the furniture back if the Barnes' would in fact leave immediately. Mrs Barnes seemed keen but Mr Barnes said that they had the protection of the lease. The parties parted in that unsatisfactory state; but with Mrs Torrell saying that she was convinced that she would get the property back at the end of the lease.

Mrs Barnes told us that when Mrs Torrell came to see her in July when she was still weak after the birth of her daughter, Mrs Torrell demanded the property back there and then. There were tears. Mrs Barnes felt that their situations were similar. She said she had been promised the opportunity to purchase the house. Mrs Torrell wagged her finger. She said [illegible]



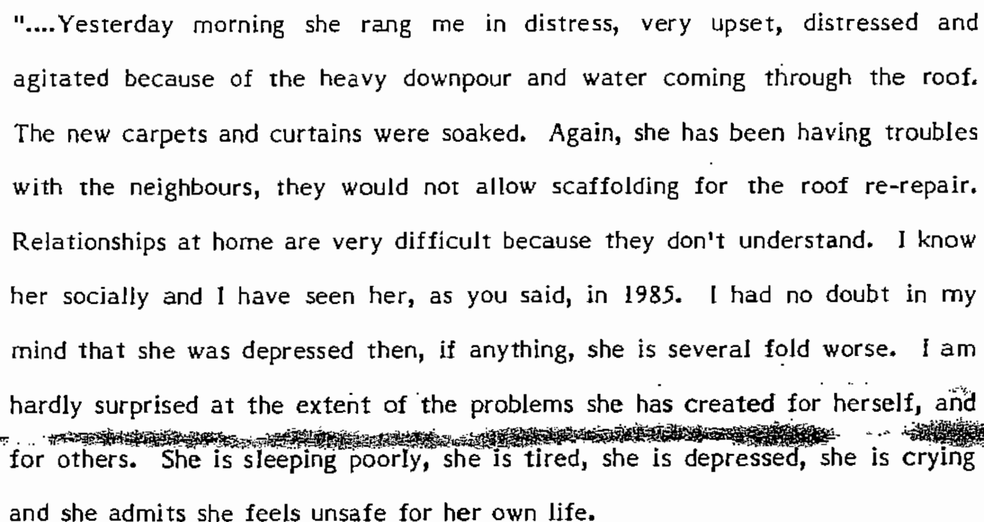
in writing. Mr Barnes reminded her of the payment of £6,000. Mrs Torrell said that if they left by the end of the week she would pay half that sum. Mr Barnes asked her to leave. In acrimony, she left.

The parties thereafter left matters to the professionals. Mr and Mrs Torrell instructed Mr Pickersgill; Mr and Mrs Barnes instructed Advocate Bertram of Le Masurier Giffard & Poch.

The effect of subsequent events on Mrs Torrell's health can only be described as cataclysmic. She suffered depression and became extremely upset. Visits to the doctor for depression became frequent. She was prescribed Prothiaden - an anti-depressant. She eventually had to receive psychiatric help and there were eviction proceedings (which will be discussed at length) after which she behaved irrationally; she began a programme of harassment against Mr and Mrs Barnes which led to Court action; cheques were returned; the Income Tax Department threatened proceedings for arrears of Income Tax and an increased mortgage had to be taken out on Casa Altea.

By the end of September 1988, Dr Faiz the Consultant Psychiatrist of the Jersey Group of Hospitals was writing of this lady:

"....Yesterday morning she rang me in distress, very upset, distressed and agitated because of the heavy downpour and water coming through the roof. The new carpets and curtains were soaked. Again, she has been having troubles with the neighbours, they would not allow scaffolding for the roof re-repair. Relationships at home are very difficult because they don't understand. I know her socially and I have seen her, as you said, in 1985. I had no doubt in my mind that she was depressed then, if anything, she is several fold worse. I am hardly surprised at the extent of the problems she has created for herself, and for others. She is sleeping poorly, she is tired, she is depressed, she is crying and she admits she feels unsafe for her own life.



I would have admitted her but there was no bed and she thought that she could manage for another week. Therefore, I have prescribed Prothiaden 75 mg at night, to be reviewed in one week's time...."

We must for a moment examine one matter germane to this action.

Mrs Torrell was prepared to wait until the lease terminated to get her property back. Correspondence began to flow.

Mr Pickersgill wondering perhaps at the back of his mind if his clients had been hoist with their own petard fired a broadside before he took further instructions. He wrote on the 14th March:

"If the agreement which your clients allege with regard to a second term was ever made, which I consider to be most unlikely, not only was it neither disclosed to me, nor ever mentioned by my client, but it is remarkable that no reference to it was made in the agreement of lease.

I shall take instructions in order, as I anticipate, to be able definitively to deny that any such option to renew was ever agreed."

In seeking instructions by letter of the same day, Mr Pickersgill wrote:

"It seems clear that you are going to have continuing difficulties with Mr and Mrs Barnes and you might be wise to give further consideration to their offer to sell you back the lease, although not at the price which they paid for it."

On the 17th March 1986, Mr Pickersgill wrote one of his notoriously brief diary sheets. It reads:

"No option was ever offered or agreed.

If they go at once and leave the contents as they were you will pay £2,000."

Mrs Torrell remembered discussing the reduction to £2,000 with Mr Pickersgill but only had the vaguest recollection of that discussion.

The offer was put. It was rejected. The option was mentioned again.

On 8th May Mr Pickersgill wrote to his clients advising eviction proceedings if Mr and Mrs Barnes should fail to vacate and giving a caveat that "although the Court will make an eviction order, it will grant a delay in the execution of it for a period which I cannot at present attempt to estimate."

Mrs Torrell was quite frank when asked by her counsel to consider this letter. She began by saying that at the time she did not really know what an eviction was. She did not know what would happen. She thought it obvious that the matter would finish up in court. She believed that she would get her house back. She knew that the Court had authority to do anything that was just. If the Court was told the truth, she would get the property straight away. She was however prepared for three months delay.

Mrs Torrell did not sit idly by. She began her attack on Mr and Mrs Barnes by trying to find clear breaches of the lease. She was certain that Mr and Mrs Barnes were taking too many lodgers. She went to the police station to check on the Police Register. She went to Tourism; she went to Housing. They advised her (for reasons that we do not understand) to contact a Mr David Watkins, a private investigator. She told us that she was ill and frightened. She felt that Mr Pickersgill was not working in her best interest. She wanted to visit her property. She asked Mr Pickersgill to accompany her. Mr Pickersgill suggested Mr Watkins so that he could be left to conduct the case dispassionately. It took some seven weeks before a visit to the property could be arranged. [illegible]

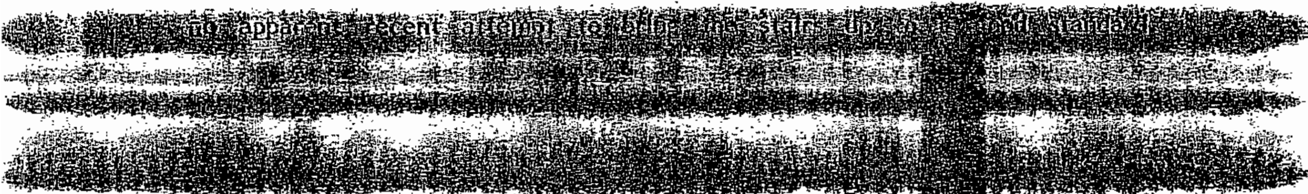
28th November Mr Watkins presented a written report. Mrs Torrell did not think it was comprehensive. On Mr Pickersgill's advice the report was rewritten on 17th December. It reads:

"I refer to our meeting at 9.30 a.m. on Tuesday, 11th November 1986, at the above property which you own and lease to Mr and Mrs Barnes with a view to inspecting the building to see if there has been any neglect or evidence of disrepair.

We were met by Mrs Barnes who was quite obviously upset by our visit but managed to contain herself and was reasonably civil during the visit. We were shown to the top of the building where in one of the bedrooms I found an electric wire running across the floor immediately inside the door which was covered with insulating tape and which was obviously dangerous. This was pointed out to Mrs Barnes and she immediately removed it.

The trapdoor in the ceiling had deteriorated quite badly and obviously the flat roof needed attention because it had caused deterioration in that area and also the twin room adjacent to it had dampness along the whole length of the wall.

In the bathroom the walls suffered from condensation and there were dark mildew patches present because of it. At one stage it was obvious that the toilet must have been broken and water had come through the floor. The toilet had not been replaced and the porcelain had been put back together in a very rough and ready fashion. When I inspected the room below again it was found that the ceiling had been damaged as a result of the water coming through from the toilet into the kitchen. Attempts had been made to patch the ceiling but the finish was very unsatisfactory and again can only be termed as being "rough and ready". The hardwood staircase which leads to various rooms required attention with regard to its general exterior appearance and there was no apparent recent attempt to [illegible] the stairs up to [illegible] standard



It is my view that in particular the dampness and the damage to the ceiling and replacement of the toilet should have been brought to your attention in order that you could satisfy yourself as to the standard of the repair and replacement......"

It is to the Court's mind somewhat surprising that a private investigator was recommended by Mr Pickersgill to inspect the property. The recommendation must, however, be taken in its context. Mrs Torrell was introduced to Mr Watkins initially by the Housing Department. When Mrs Torrell came to see Mr Pickersgill on 29th September she, at first, wanted him to accompany her. He felt that suggestion inappropriate. He did not wish to be called as a witness in any subsequent Court proceeding. He suggested one of her sons. She did not agree. He then suggested Mr Watkins. We can see nothing approaching a lack of a duty of care at that point. Mr Watkin's amended report is factual and useful as a pointer to the state and condition of the property. We say that even though Mr Pickersgill told us candidly that a surveyor might have been better and he now sees the "Watkins episode" as a "bit of a waste of time".

In the following correspondence it becomes very clear that Advocate Bertram is stonewalling. We do not criticise him for that. Eventually it became clear to Mr Pickersgill that all attempts at compromise had failed. He issued a summons for expulsion in the usual form.

His letter to the Viscount is dated the 2nd March 1987.

On the 10th March Mr Pickersgill wrote this letter to his clients:

"I am afraid that the Viscount has been unable to summon Mr and Mrs Barnes for tomorrow so the action for their expulsion will come to Court on March 18th. Unfortunately, I shall be out of the Island on that day and I have therefore had to adjourn the action until March 25th, although I have agreed that the order finally made will date from the 11th. As I have already told [illegible]

you there is inevitably going to be a stay of execution granted so you suffer no prejudice as a result of this. In the meantime, may I remind you that following our meeting of 2nd March you had agreed to let me have written details of your financial position for presentation to the Court and a written resume of the various hardships which you are suffering by being kept out of your property, and I still wait to receive this."

The meeting on the 2nd March is recorded on a diary sheet (with that economy of language that we have now come to expect from Mr Pickersgill in such documents) as "discussing your eviction proceedings - one hour". Mrs Torrell's memory of that meeting was confused. She told us that she did not remember much of it and that she did not take much notice. She remembers telling Mr Pickersgill many times about the unsatisfactory alternative accommodation. She says that Mr Pickersgill explained nothing of what would happen in Court. She implied that he was trying to dissuade her from going to Court. "If you go to Court" he said "I will put you in the witness box." She said that Mr Pickersgill knew her problems both financial and medical. She gave him letters for use in Court.

It must be recorded that when Mr Pickersgill wrote on the 16th December 1985 in a diary sheet that Mrs Torrell was proposing to sell "Casa Altea" as soon as the lease finished - a statement that he repeated to the Jersey Savings & Loan Corporation in a letter dated the 17th December - this statement is not agreed by Mrs Torrell.

Be that as it may. Both parties began to draw their battle lines. We shall examine in a moment what "heavy guns" were available to Mr Pickersgill and how he deployed his troops.

First a preliminary skirmish.

On the [illegible] March the case was called in the Petty Debts Court ([illegible] been adjourned from March 18th). Notice of the preliminary point had clearly [illegible]

been given to Mr Pickersgill (or whoever stood in for him as he was out of the Island on the 18th). Advocate Bertram opened with these words:

"Sir, you may recall some two weeks ago this case came up originally before the Court and in effect a preliminary point has been taken as to the interpretation of the lease entered into by the parties in 1984."

Even if his clients were not aware of the fact that a preliminary point was to be taken it does seem to the Court that Mr Pickersgill seemed woefully unprepared to argue the point of law. The matter finally petered out with Mr Pickersgill making a somewhat tentative suggestion to the Judge of the point he was so certain of on the 10th March 1987:

"....I have agreed that the order finally made will date from the 11th."

In any event Mrs Torrell was not duly concerned about the first hearing. She waited with some anxiety for the 1st April.

Witnesses available to Mr Pickersgill at this stage were:

1. The Plaintiffs
2. Dr Le Gresley
3. Mr Watkins or the building contractor, Mr. R.C. Green.

He also had a large number of important letters that Mrs Torrell had gathered for him. He should obviously have agreed with his opponent that these letters could, if necessary, have been put in without the necessity of calling their authors. Procedure in the Petty Debts Courts is not as formalised as that in the Royal Court. It is not entirely without its formalities. It is still governed by Rules. Rule 16 of the Petty Debts Court (Jersey) (Rules) 1977, states:

"Evidence

Any fact required to be proved at the hearing of any suit by the evidence of witnesses shall be proved by the examination of witnesses orally and in open Court; provided that the Court may order that any particular facts may be proved by affidavit, by production of documents or by such other means as the Court may direct."

What letters did Mr Pickersgill hold?

1. A letter from the Income Tax Department dated 23 February 1987.

2. A letter concerning accommodation and financial problems from Mrs M N Beddoe dated 6th March 1987.

3. A letter from the Plaintiff's landlord dated 30th March 1987.

4. A letter from the Headmaster of De la Salle College dated 5 March 1987.

5. Various letters from the National Westminster Bank indicating financial hardship.

6. A builders estimate dated 16 December 1986.

7. Mr Watkins' Report dated 28th November 1986.

8. Dr Le Gresley's letter dated 20th November 1986.

One might consider that a formidable array.

At one stage of the hearing Advocate Bertram passed a letter to the Judge. It was the letter of 4th March 1986. Mr Pickersgill made no objection. That is in itself surprising. That letter was not marked "without prejudice" but was a reply to a letter from Le Masurier Giffard & Poch marked "Without Prejudice". Those letters were clearly written in an attempt to settle the

dispute. If Mr Bertram was going to raise the veil then he could not have objected to the letter of 18th February 1986 being put in. That letter contains the sentence: "I say that they would be prepared to provide almost immediate vacant possession to your clients, but Mr and Mrs Barnes would obviously require a week or two in which to find alternative accommodation."

This might well have proved useful to the Plaintiffs' arguments.

For a moment, however, let us try to establish what Mr Pickersgill had done by way of pre-trial work.

He had seen Mrs Torrell for about an hour. He had not seen Mr Torrell. He had no proof of evidence from Mrs Torrell but as he told us he never took proofs of evidence for eviction proceedings. He felt that he must have made notes of the meeting on 2nd March. He thought those notes must have been lost. In any event he had all the facts at his fingertips. He had an excellent memory. He knew that the Plaintiffs were suffering hardship. He did not take his files to Court. He felt that Dr Le Gresley's letter was with him in Court - he would have extracted that letter with others from his file. There was of course also the question of whether or not Mr and Mrs Barnes were supplementing their income by taking in more "paying guests" than they were entitled to by law. He had those facts "in his head".

At about 9 o'clock in the morning of 1st April, Mrs Torrell came to see Mr Pickersgill. She saw his secretary. She was told that there could be at least a six months delay but that the question of the date of termination of the lease was no longer to be argued. Mr and Mrs Torrell were told to meet Mr Pickersgill at Court at 10 o'clock.

At this point let us make a comment. It was implied that procedures at the Petty Debts Court are fairly informal. Mr Pickersgill was to open his case. That seems to us to be a perfectly reasonable way to start. We feel that [illegible] Mr Pickersgill safely established in the driving seat, he should have opened his [illegible]

case, called his witnesses, examined them, allowed them to be cross-examined and re-examined them if necessary. Advocate Bertram would then have opened his case and adopted the same procedure with his witnesses. Mr Pickersgill would then have summed up his case; Advocate Bertram would have summed up his case. Mr Pickersgill would have had the last word.

It must be remembered that we are dealing with a highly experienced solicitor, well versed in the procedures of the Petty Debts Court.

The Court finds the way that matters progressed was extremely confusing.

Mr Pickersgill opened: a very brief opening, interrupted constantly by the Judge seeking better information.

After a matter of minutes he sat down. Advocate Bertram opened. He moved into the driving seat. He even discussed which witnesses would be called:

Judge Short: Well, if we call them, we are bound to call Mrs Torrell aren't we, because she won't agree I don't think with what your clients are going to say? And whom do you wish to call? Both your clients, Mr and Mrs Barnes?

Adv Bertram: Certainly Mrs Barnes, Sir.

Judge Short: Certainly Mrs Barnes.

Adv Bertram: And Mr Barnes as well.

Judge Short: Wishes to be heard and probably Mr and Mrs Torrell or at least Mrs Torrell wants to be heard. Yes, I think it might be helpful to hear them on that point. We'll decide in a moment.

Adv Bertram: Yes, Sir.

There was an interval while another case was heard. The discussion continued briefly. Mr and Mrs Barnes and Mrs Torrell were sworn in. Mr Pickersgill did not say a word.

The examination of Mrs Barnes centered around the option for a further three years and the payment of £6,000. The possibility to purchase was mentioned. Mr Barnes gave evidence. He mentioned the offer of Mrs Torrell "If you move in a week, I'll give you your money back."

The exchange is interesting:

Judge Short: But you said "No we can't?"

Witness: Well, what was I supposed to do with two children in a week, you know.

Judge Short: Absolutely.

It will be recalled that in his "without prejudice" letter of the 18th February, the Barnes were able to provide "almost immediate vacant possession".

Mrs Barnes, having given her evidence, was allowed back into the witness box. Mr Pickersgill, caught on the horns of a dilemma, surmised that he might withdraw and give evidence. He did not press the point. The Court heard more evidence on the offer to sell.

By the time that Mrs Torrell had entered the witness box the tides of war had turned against her. The learned Judge clearly did not entirely sympathise with her predicament. He had elicited two important facts:

1. That Mrs Torrell had received legal advice on the lease from Mr Pickersgill and Mr and Mrs Barnes had received no legal advice.

2. That there had been a "concealed consideration" of £6,000; what Judge Short described as "a lot of stuff which is valueless or worth very little and cost the Barnes a lot of money."

Mrs Torrell did her best - she mentioned the letting of the rooms, the damage done to her property, the offer of £2,000 - the unsatisfactory accommodation. It must be said that she dealt with all that without much assistance from Mr Pickersgill. She did deal with it.

There then followed what can best be described as a discussion between both Counsel and the Judge. The letter of 4th March was put in. A discussion ensued about the £2,000. Mr Pickersgill said:

"All right, I haven't got the filed papers with me, but I believe what Mrs Torrell is saying is correct. There was an offer of £2,000 made but I'm not sure where it came in the sequence of events. It may well have preceded that letter."

Later, on the question of the £6,000, Mr Pickersgill volunteered a statement:- "And it may be a device to avoid payment of Income Tax, but I wouldn't like to develop that too far." He mentioned a large number of letters that he had on hardship - he did not produce them - and also mentioned the financial and other difficulties that his clients faced. What we would call "the broad sweep approach".

The Judge adjourned for one week. He returned on 8th April. There was this exchange:-

Judge Short: Was the ... could you help me please? Was the delay going to date from the 1st March or the 11th March? Can you just clear that little point up?

Adv Bertram: It must have been the eleventh, Sir.

Judge Short: Very well, thank you - that helps me. Fine. That's the 11th, yes. In that case, I have come to a very firm decision as to where the hardship lies and I have decided that there should be an order with effect from 11th April 1988. That's my decision, Mr Bertram and Mr Pickersgill. Thank you very much.

There was much ingenuous argument by both Counsel as to why the 11th April was chosen. Advocate Bailhache urged upon us the fact that the learned Judge had been influenced by the error in drafting and had split the extra months. We think that the explanation may be more simple than that.

We think that the learned Judge may well have said "April" when he meant "March". It is unfortunate that nobody questioned him at the time.

We now must look at the law.

We will need to examine two leading cases in the House of Lords: Saif Ali -v- Sydney Mitchell & Co (a firm) and others, P (third party) (1978) 3 All ER page 1033 and the earlier case of Rondel -v- Worsley (1967) 3 All ER page 993. The earlier case decided that a barrister is not liable for negligence in the conduct of litigation or in advising in connection with it. This immunity also extends to solicitors in respect of advocacy work. But with regard to counsel's pre-trial work (this is the Saif Ali case) only such matters which are so intimately connected with the conduct of litigation that they may fairly be described as preliminary decisions affecting its conduct were held to be immune.

For some two hundred years, many litigants, particularly perhaps in the Criminal Courts, must have felt that they would have succeeded if their Counsel had not made serious errors. The argument was always put forward, however, that there was no contract of employment between counsel and client - because of the "honorarium" which prevented a barrister suing for his fees, [illegible] nature of the relationship made action by either party impossible.

[illegible]

However, in Hedley Byrne & Co Limited -v- Heller and Partners Ltd (1964) AC465 it was held that if a person took on himself the responsibility to do an act that gave rise to the duty of care he could be held liable for his negligence even if there was no contractural relationship. This opened the whole matter of counsel's immunity which came to be decided in Rondel -v- Worsley. Neither Advocate Bailhache nor Advocate Troy could find any Jersey authority that would help this Court in the matter.

Advocate Bailhache asked us to distinguish the English cases - and particularly Rondel -v- Worsley. He says that this is the first time that the matter has come before the Royal Court. He says that it is unjust for a litigant if he loses his case because his advocate or solicitor is negligent. Everywhere modern society is moving towards accountability, even when a surgeon is carrying out complicated surgery. What can be different to protect a lawyer? He further reminded us that this Court has in the past followed dissenting judgements of the House of Lords.

He did not give us any authority that might have been persuasive upon us other than taking us through the erudite and constructive passages of the two House of Lords judgements. To fly against these judgements may perhaps be likened to a request to clean out the stables on Augeas without the help of Hercules. In deference to Advocate Bailhache's careful and attractive argument, we will attempt the task.

Counsel has a duty to justice. In the context of this case the duties of an advocate and those of a solicitor (or ecrivain) are identical. Furthermore, it matters not that the eviction proceedings took place in the Petty Debts Court. The duty to justice, in our view, should apply equally in any Court, whether superior or inferior.

Establishing the rules of the duty to justice may, in the words of Lord Diplock in Saif Ali, in borderline cases, call for a degree of sophistry. In Rondel and Saif Ali the rules of the duty to justice were described as "transcending in

certain cases" (Lord Denning M R in Saif Ali) and "overriding" (Lord Diplock in Saif Ali).

The obvious importance of the duty to justice is shown by Lord Diplock in Saif Ali at page 1042:

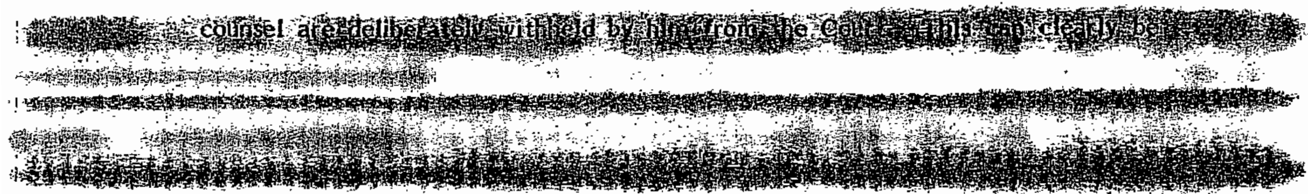
"... to say of a barrister that he owes a duty to the Court or to justice as an abstraction, to act in a particular way in particular circumstances may seem to be no more than a pretentious way of saying that when a barrister is taking part in litigation he must observe the rules; and this is true of all who practice any profession."

As Le Gros so aptly put it:

"...Au barreau la conviction est l'object supreme de l'orateur. La tache de l'avocat est de convaincre ses juges que la these qu'il soutient est juste. S'il veut suivre les traditions qui ont embelli les annales du barreau, il doit etre verse dans la loi et la jurisprudence et n'employer ses talents qu'a soutenir le droit et l'equite. Il ne doit controuver aucuns faits "si vos Clients ne vous les ont affirmes pour vrais." Il ne doit pas croire qu'apres avoir quitte la faculte de droit il peut descendre dans l'arene et soutenir avec une assurance ferme une question de droit ou de procedure qui presente quelque difficulte."

There are many cases when Counsel's failure to act properly can give rise to immediate criticism. His fault is apparent. Take, for example, the case of a defendant in a damages claim. He had been a chief inspector of police but demoted to station sergeant after disciplinary proceedings.

His offence involved deception of a court of law. All this is known to Counsel for the defence. The police sergeant dresses in civilian clothes. He is a friend of counsel. He is addressed as "Mr" by counsel. The facts known to


counsel are deliberately withheld by him from the Court. This can clearly be

seen as a failure to act properly according to the requirements of the judicial process. If that had happened in Jersey, it might well have led to disciplinary proceedings.

But that is the duty to justice.

As Lord Reid said in Rondel -v- Worsley at page 998:-

"Every counsel has a duty to his client fearlessly to raise every issue, advance every argument and ask every question, however distasteful, which he thinks will help his client's case. As an officer of the court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may, and often does, lead to a conflict with his client's wishes, or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession. He must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. By so acting, he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him.

Is it in the public interest that barristers and advocates should be protected against such actions? Like so many questions which raise the public interest, a decision one way will cause hardships to individuals while a decision the other way will involve disadvantage to the public interest. On the one hand, if the existing rule of immunity continues there will be cases, rare though they may be, where a client who has suffered loss through the negligence of his counsel will be deprived of a remedy."

Lord Reid went on to say that the onus of proving professional negligence over and above error of judgement is a heavy one.

Jersey has a fused profession. Whether counsel is an Advocate or a Solicitor, in questions of his engagement in litigation, there is no doubt in our minds that we must adopt the findings of the House of Lords in both Rondel -v- Worsley and Saif Ali. When Counsel's public duty to justice and his duty to his client might conflict then duty to justice must prevail. If it is to prevail at all it can only do so if Counsel, be he advocate or solicitor, is untrammeled by any consequences of his actions once the trial is ended. The immunity - like the immunity of witnesses - is absolute.

Lord Norris said in Rondel -v- Worsley at Page 1013:

"It must be recognised that there must, in the past, have been instances where a lack of due care and skill has resulted in the loss of a case. Such instances may unhappily occur in the future."

Or as Lord Wilberforce said in Saif Ali at Page 1037:

"... Some immunity is necessary in the public interest, even if, in some rare cases, an individual may suffer loss."

We need to examine the allegation by the Plaintiffs that Mr Pickersgill failed to prepare adequately for trial. Lord Wilberforce at page 1039 put the duty this way. "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."

We can see no reason why we should not extend the immunity of counsel to pre-trial work. We say this after a very careful consideration of Saif Ali. Also, of course, to the Australian and Canadian cases cited therein. We do not need to go into great detail on this point. We do not consider that Mr Pickersgill's pre-trial work was negligent. It may have been slip-shod [illegible] was nothing in the pre-trial work carried out by Mr Pickersgill which leads us

[illegible]

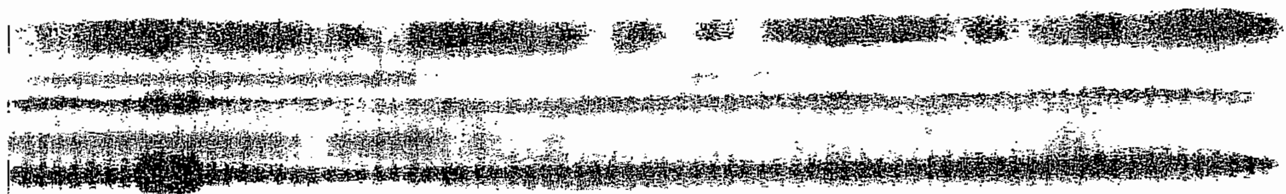
inevitably to find him negligent. We feel that Mr Pickersgill had sufficient facts to put up a strong case for his clients when he walked through the doors of the Court on 1st April.

We believe, however, that Mr Pickersgill's performance in Court fell far short of the standard we would have expected from a solicitor of his experience. Had he opened his case properly with medical evidence and with the many letters that he held the delay might well have been less; he should either have stopped Advocate Bertram, from putting in the "without prejudice" letter of the 4th March or, if it was to come before the Judge, insisted on putting in the letter of the 18th February. If he did not have it with him, he should have asked for an adjournment. He was perhaps insensitive to his client's plight. It does seem to us indicative of his feelings that on the 23rd April he had Mrs Torrell on the telephone for 11/2 hours and could only write on his diary:-

"...at considerable length and to no purpose."

Lord Reid in his judgment in Rondel v Worsley pointed out (at page 1000) that "successful claims against solicitors for negligence in doing the kind of work which a barrister would do if instructed in the case appear to be very few in number. As regards reported cases, there was a case in 1855 - Stokes v Trumper (1855) 2 K & J 232 - but the researches of counsel have only discovered one recent reported case - Scuddel v Prothero & Prothero. I find this case not easy to understand; it may have been wrongly decided. There have also been one or two Scottish cases where a solicitor has been held negligent in carrying out work in court which should have been done by an advocate if counsel had been instructed. There were also put before your Lordships, by agreement of claims against solicitors which had been or were in course of being settled by an insurance company. If these notes can be treated as a random sample, they show that among some three hundred claims only about eight are in respect of negligence by a solicitor in carrying out work which would have been within the province of a barrister conducting litigation, a proportion of less than three per cent."

Neither Counsel in this case has been able to discover a single Jersey authority where an advocate or a solicitor had been actioned in negligence for work carried out in Court. Negligence in Court must be virtually impossible to prove in a case such as this without having a complete re-trial. We cannot in the circumstance find that the Defendants were negligent. Because of that finding we must find for the Defendants on their counter-claim. In view of our strictures we must leave it to the common sense of the Defendants, as professional men, as to how much of that claim they wish to enforce now that the order is granted to them.



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DW Moore & Co Ltd and others -v- Ferrier and others All ER 400.
* Dugdale and Stanton "Professional Negligence" Paragraphs 25.06 - 25.10, 4.20, 2.24, 2.25.
* Sykes and Others -v- Midland Bank Executor & Trustee Co Limited and others [1970] All ER 471.
Jersey Judgments 1974 - 1979 Page 65 York Street Pharmacy Limited -v- Rault and Jeffrey.
Sykes and Others -v- Midland Bank Executor & Trustee Co Limited and others [1970] All ER 471.

* denotes authority referred to in judgment.