12 pages.

ROYAL COURT
(Samedi Division) 149.

5th November, 1993.

Before: P.R. Le Cras, Esq., Lieutenant Bailiff,
Single Judge.

Between	T.A. Picot (C.I.) Limited.	First Plaintif
	Vekaplast Windows (C.I.)Limited.	Second Plaintif
And	Richard John Michel, Geoffrey George Crill, and Francis Charles Hamon, (exercising the professions of advocate and solicitor under the name and style of "Crills")	Defendant

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Applications by the Defendants:

(1) under Rule 6/13 (1) of the Royal Court Rules 1992, to strike out the Plaintiffs" Order of Justice; and

(2) If the above application is unsuccessful, for directions as to the conduct of the trial of the substantive action set down for hearing for the whole of March, 1994.

Advocate T.J. Le Cocq for the Defendants
Mr. T.A. Picot, a Director of the Plaintiff Companies,
on behalf of the First and Second Plaintiffs

JUDGMENT

THE LIEUTENANT BAILIFF: This is an application by the Defendants t strike out the Plaintiff's Order of Justice, or part thereof either under Rule 6/13 of the Royal Court Rules or pursuant to th Court's inherent jurisdiction. It has, added to it, effectivel what is a summons for directions.

The action of the Plaintiffs has a long history. Th litigation from which this action stems was commenced by an Orde of Justice, issued by Vekaplast Heinrich Laumann, K.G. (V.H.L.) o 8th June, 1984. Pleadings were exchanged, and the Action came o for hearing on 19th, 21st and 22nd May, 1986, after which it wa adjourned before coming on again on 19th and 21st August, 1986.

The Plaintiff's witnesses were heard, a Mr. T.A. Picot, the Managing Director of the present Plaintiffs, who were the then Defendants, had, by the record, at least, entered the witness box.

On 21st August, 1986, the Action was compromised, and the learned Deputy Bailiff gave a short judgement to deal with the situation.

The Defendants - that is, the Plaintiffs in the present action - were unhappy with the compromise, and sought leave to appeal against the Consent Order. Leave was refused by the Inferior Number, by a judgment dated 15th August, 1989. As a consequence, proceedings were issued against Advocate Michel, who had represented the Defendants in the original action.

The grounds on which actions may, in general, be struck out, are well enough known, see for example Arya -v- Minories (30th October, 1991) Jersey Unreported; they were put to the Court and there is no need to rehearse them here.

However, this is an unusual application, in that the main thrust of the submissions, on behalf of the Defendants, is a claim of immunity from suit by the advocate acting in the original action from a suit of negligence.

The second thrust is that this is an abuse of the process of the Court. There is, to some extent an overlap with the previous ground, whilst as a reserve, as it were, the defendants ask the Court to find that there is no reasonable cause of action.

The allegations of the Plaintiffs in the papers presented to the Court are numerous and to say the least they evidence considerable dissatisfaction, whether justified or not, with the competence and advice of Mr. Michel. However, it is not necessary to deal with them in detail, save to say that one ground - the change of name of the Plaintiff in the first Action - was abandoned, as it emerged during the submissions of Mr. Picot, for the Plaintiffs, that the grounds of complaint against Mr. Michel might be much more succinctly stated than they were in the amended Order of Justice and its supporting documents.

His, or to be more accurate, his companies' position in 1984 was this. Whatever the position of V.H.L. elsewhere, in Jersey, Mr. Picot, had a common law right to use the Veka name, as he had used it first, provided he had used it *bona fide*. V.H.L. he said, did not, at any rate when he started trading in Jersey. Vekaplast, the Guernsey Company, bought profiles from V.H.L., manufactured products and, *inter alia*, sold some on to the Jersey company, which had registered the trade names Veka and Vekaplast.

If his view were right, the case did not concern the obtention of registered trade marks, and would, he submitted, have turned on a *bona fide* first use of the Veka name in Jersey.

In these circumstances, the Guernsey company should have made an application to be discharged from the Jersey proceedings, and Mr. Michel should have sought, first, to strike out V.H.L.'s case as pleaded or, if that failed, to have pleaded and put Mr. Picot's, or rather as we say, his companies', case in the manner we have described.

The problem started at the very first meeting when Mr. Picot said that he made his views plain. Mr. Michel, he claimed, never bothered to understand from the beginning what the issue was, as Mr. Picot saw it; he just, said Mr. Picot, took charge and said he knew what to do. The result was that his case was not properly pleaded and never put to the Court. On what was before the Court, he conceded that the Judgment of August, 1986, was reasonable.

The result was that quite a different case was heard, and compromised. He does not therefore seek to attach the Judgment, but to pursue Advocate Michel for damages for failing to put his case as it should have been put, so that he was effectively shut out from the litigation as if the case had been conceded on the negligent advice of Counsel, without his ever going to Court, because the issue, as he saw it, was not debated.

Whether, of course, this complaint is justified is not before the Court, as Mr. Michel has not had the chance to be heard before this Court. We must, however, for the purposes of this Summons, treat it as it is. Having said that, several issues fall immediately into place. First, the various complaints into which the complaints have been grouped fall into one heading, which is, that from the beginning Mr. Michel negligently failed to grasp the essence of the case, as described above, and that, consequently, the pleadings and other procedural steps *en route* to Court were thereby inevitably flawed, as was the conduct of the case in Court, the advice to settle, and the settlement itself.

Second, and resulting from this, it is quite clear and conceded by Mr. Le Cocq, that he had not appreciated precisely what it was that concerned Mr. Picot. For his part, Mr. Picot conceded that his pleading did not set out his case in that concise fashion.

Third, it was obvious that any submissions by Mr. Le Cocq, on the third part of his Summons, viz. that there was no reasonable cause of action disclosed on the pleadings, had been made under a misapprehension of the claim Mr. Picot wished to bring.

Subject therefore, of course, to the ruling and the orders made on the first two grounds, that is whether Mr. Michel is immune from suit, and whether this action is an abuse of the process of the Court, the Court orders that the third part of the Summons be stood over to come on again, if thought fit, after the Plaintiffs have repleaded their case.

We turn first to the question of the immunity of Counsel from suit. Mr. Picot's allegations now make it quite clear where and how he felt Mr. Michel failed him. That is, right from the outset, when he failed to grasp his instructions and as a result, every step along the path led to the inevitable end.

The question of the immunity of Counsel was decided in Torrell -v- Pickersgill (1987-88) J.L.R.702. In that case, it was held not only that there was an immunity granted to Counsel in Court (p.718/33) but also in respect of pre-trial work (p.719/7). The extent to which immunity extended to pre-trial work was discussed at page 716. The findings in Saif Ali -v- Sydney Mitchell and Company, (1977) 3 All ER 1033, were adopted, and it is right to set out the passage which a majority of their Lordships accepted, as limiting the immunity, for example in Lord Wilberforce's Judgment at p.1039:

> ***"But I cannot narrow the protection to what is done in Court: it must be wider than that and include some pre-trial work. Each piece of before-trial work should, however, be tested against the one rule: that the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice, and that is why I would not be prepared to include anything which does not come within the test I have stated."***

From this, it would appear, that every case of this nature, must, within the principle, be decided on its own circumstances. From a perusal of Saif Ali and the other authorities put to the Court, there appears to be no clear line. Inevitably, in an application such as this, there was considerable discussion as to where the line fell. Mr. Picot's submissions fell into several categories.

First, the categories of negligence are widening. See for example Lord Salmon in Saif Ali at p.1050 B-E and Lord Diplock at p.1041J, and that in any case, where there is doubt, the Court should widen rather narrow.

Second, as in Saif Ali where (e.g. Lord Keith at p.1055) Counsel had prevented the Action from coming to Court, so here Mr. Picot was effectively prevented from bringing his case forward, as of course, on his account, Mr. Michel had misunderstood it from the beginning. In those circumstances, it must fall into the category of negligence outside the immunity. In essence, Mr. Michel had conceded the case long before the case came to Court.

Third, this was a case of a Solicitor in a combined profession who elected to go to Court. He referred the Court to the passage in Rondel -v- Worsley (1967) 3 All ER 993, at p.1035:

> ***"The first question is as to the liability of a solicitor for acts of negligence during the conduct of his client's case, in an inferior Court when acting as an advocate. I see no reason why a solicitor acting as an advocate should not claim the same immunity as can counsel, in my opinion, for acts of negligence in his conduct of the case. But this principle, I have no doubt, must be rigorously contained for it is only while performing the acts which counsel would have performed had he been employed that the solicitor can claim that immunity."***

This, submitted Mr. Picot, is precisely the case here. It was as a solicitor that Mr. Michel negligently instructed himself and hence falls under Leslie -v- Ball outside the line of the immunity. It was his negligence as a solicitor which denied Mr. Picot his right to a hearing. Mr. Michel never bothered, or alternatively, negligently failed to instruct himself as Counsel.

Each piece of pre-trial work had to be considered. Here, the damage which resulted in his case going unheard took place at so early a stage that it had to be while Mr. Michel was acting as a solicitor.

Mr. Le Cocq's submission on these points was short.

The pleading, of which Mr. Picot makes considerable complaint, and other pre-trial work, for example, a failure alleged by Mr. Picot to strike out the V.H.L. case, were drafted by Mr. Michel, and the decision not to seek to strike out were taken by him, as Counsel, and were intimately connected with the conduct of the case in Court, as indeed, were all his other decisions.

In the present case it is quite impossible to distinguish the work done as a Barrister from that done as a Solicitor. If, as must be the case, on the authorities, Mr. Michel has immunity for what was done or not done in Court, there must here be an immunity so that he cannot be sued by, as it were, the back door, for decisions taken earlier which entirely affected the way he handled the case in Court.

It does appear that the problem here is that, *per* Mr. Picot, the conduct of the case in Court was governed by, and as a consequence of, the initial view which Mr. Michel took. If he cannot be sued for the conduct of his case in Court, or on account of questions he did or did not ask, it is difficult to see how the immunity can be lifted from actions or non-actions which led directly, and indeed, inevitably to the result which occurred in Court.

In these circumstances, the immunity must here extend from the start when Mr. Michel was first instructed. It appears that every action which he took was sufficiently intimately connected to the conduct of the case in Court that the immunity must extend to them. The allegations in the Order of Justice have been

extensively canvassed before the Court by both parties. All of them, in the view of the Court, relate back to the real allegation of negligence, that is, that Mr. Michel did not understand the case, and the amended Order of Justice must be struck out on this ground.

There are, however, the further questions which arise as a result of the compromise, and these also fall to be dealt with under the Summons.

Mr. Le Cocq put the case in this part of the summons for striking out the pleadings of the Plaintiff, on two grounds. The first is that Counsel in effecting or agreeing a settlement is immune from suit. The second is that the original action, having been settled, it would be an abuse of the process of the Court to permit the present Action to proceed.

The circumstances of the settlement were clearly put to us by Mr. Picot. While he was giving his evidence in chief, Mr. Michel requested an adjournment. There was a meeting outside the Court, Mr. Picot was persuaded, much against his wishes, to agree a settlement. He did so, and was in Court when it was announced.

In fairness to Mr. Picot, it should be noted that he was quite clear that he did not wish to re-adjudicate, as against V.H.L. what was agreed in 1986. He also, very properly, conceded that it was an agreement as against a mere non-objection: see Judgement of 15th August, 1989 at p.278/20.

On the first point Mr. Le Cocq relied on two precedents. The first was the passage in Jackson and Powell on Professional Negligence (1993) (3rd Ed'n) at p.433:

> ***"Public policy. The view that the public interest required Counsel to be immune emerged during the nineteenth century. In Swinfen -v- Lord Chelmsford a claim against a barrister for compromising an action contrary to the client's instructions failed. Pollock C.B., delivering the judgment of the Court of the Exchequer, said that if Counsel were liable for negligence, they "would perform their duties under the peril of an action by every disappointed and angry client". The court explained that Counsel owed a duty not only to their clients but also to the Court and the public at large. It was held that no action would lie against Counsel "for any act honestly done in the conduct or management of the cause". A similar justification for the immunity of an advocate in Scotland was put forward in Batchelor -v- Pattison and Mackersy. The Lord President pointed out that an advocate owed duties to his client, the Court, his profession and the public; and furthermore, that he was bound to act for any litigant who sought his services."***

And a further passage at p.439:

"If a barrister's client is convicted, the client may not be able to sue him on the grounds of abuse of process, on the reasoning of the Court of Appeal in Somasundaram -v- M. Julius Melchior & Co..The Court of Appeal also considered that the objection could be taken when the original case under attack was a civil one."

He further referred the Court to the long passage at p. 1007(f) in Rondel -v- Worsley where what is described as the remarkable case of Swinfen -v- Lord Chelmsford was discussed. From this, it is quite clear that the Plaintiff had succeeded in setting aside the case settled by her Counsel on the grounds it had been made without her authority. Even in these circumstances, Counsel was immune from suit.

Mr. Picot's answer was to assert that the advice given as to settlement and any negotiations which occurred, took place outside the Court. Although he sought ratification of the agreement with Mr. Picot's instructions, Counsel induced agreement to the contract outside the Court. In those circumstances, Mr. Picot urges that the immunity cannot apply.

This is, in the view of the Court, a fundamental misconception. A settlement in the circumstances in which it took place is an integral part of the conduct and management of the case. On this ground also the Court orders that the Order of Justice be struck out.

This then, leaves the final ground, that is the compromise, having been put before the Court and ratified, and a subsequent appeal refused, the Court will not now, permit the case to be re-opened.

Mr. Le Cocq cited the case of Somasundaram -v- Melchior (1988) 1 WLR 1394, where the Plaintiff had been "overpersuaded" by his legal advisers, to plead guilty and had been sentenced on a guilty plea to prison. His leave to appeal against conviction was dismissed and he sued his solicitors for negligence. Mr. Le Cocq relied on a very long passage commencing at p.132:

"The abuse of process which the instant case exemplifies is the initiation of proceedings in a Court of Justice for the purpose of mounting a collateral attack on a final decision against the intending plaintiff which has been made by another Court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the Court by which it was made. The proper method of attacking the decision by Bridge J in the murder trial that Hunter was not assaulted by the police before his oral confession was obtained would have been to make the contention that the judge's ruling that the confession was admissible had been erroneous a ground of his appeal against his conviction to the Criminal Division of the Court of Appeal. This Hunter did not do. Had he or any of his fellow murderers done so, application could have been

made on that appeal to tender to the Court as "fresh evidence" all material on which Hunter would now seek to rely in his civil action against the police for damages for assault, if it were allowed to continue. But since, quite apart from the tenuous character of such evidence, it is not now seriously disputed that it was available to the defendants at the time of the murder trial itself and could have been adduced then had those who were acting for him or any of the other Birmingham bombers at the trial thought that to do so would help their case, any application for its admission on the appeal to the Court of Appeal, Criminal Division, would have been doomed to failure...My Lords, collateral attack on a final decision of a Court of competent jurisdiction may take a variety of forms. It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the instant case. But the principle applicable is, in my view, simply and clearly stated in those passages from the judgement of A.L. Smith LJ in Stephenson -v- Garnett (1898) 1 QB 677 and the speech of Lord Halsbury LC in Reichel -v- Magrath (1889) 14 App Cas 665 which are cited by Goff LJ in his judgment in the instant case. I need only repeat an extract from the passage which he cited from the judgment of A.L. Smith LJ in Stephenson -v- Garnett (1898) 1 QB 677 at 680-681: "...the Court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent Court". The passage from Lord Halsbury LC's speech in Reichel -v- Magrath 14 App Cas 665 at 668 deserves repetition here in full: "...I think it would be a scandal to the administration of justice if the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again".

On the face of it that statement of the law appears to be directly in point. But Counsel as amicus curae submits that it is inconsistent with the law as laid down in the House of Lords in Saif Ali -v- Sydney Mitchell & Co (a firm) (1978) 3 All ER 1033, (1980) AC 198. In that case it was held that the barrister's immunity from suit for negligence was not total, but only extended so far as was absolutely necessary in the interests of the administration of justice. It was not confined to what was done in Court but extended to pre-trial work -

> *"where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing".*

The quotation is from the judgment of McCarthy P in Rees -v- Sinclair (1974) 1 NZLR 180 at 187 and was approved by the majority of their Lordships' House.

In some cases where the barrister gives advice that is not immune from suit under this principle there may be a judgment of a competent Court against the plaintiff who wishes to sue the negligent barrister. Counsel as amicus curiae submits that the House of Lords cannot have intended in Hunter's case to say that such claims were an abuse of the process of the Court. He therefore invites this Court to deal with the matter solely on the basis of immunity, so that the reconciliation of these difficulties can be left for resolution to the House of Lords. But in our judgment the two decisions are not unreconcilable. In Saif Ali's case the alleged negligence was failure to sue the correct defendant before the claim was statute-barred. The claims against the allegedly negligent drivers were never considered on their merits. The situation is akin to that which all too commonly occurs where through negligence a writ is not issued in time or proceedings are struck out for want of prosecution. In such cases there is no question of there being a direct or indirect attack on the decision of a court of competent jurisdiction.

It is perfectly possible to reconcile the two decisions on the basis that even if a barrister is not immune from suit, where there has in fact been a decision on the merits by a court of competent jurisdiction public policy requires that that decision should not be impugned either directly or indirectly.

Moreover we find it impossible to accept that Lord Diplock overlooked the implications of the decision in Saif Ali. Not only was the case cited in argument in Hunter's case but a passage from the speech of Lord Diplock was cited by Goff LJ in the Court of Appeal (see Mcilkenny -v- Chief Constable of West Midlands Police Force (1980) 2 All ER 227 at 250, (1980) QB 283 at 337) on the abuse of the powers of the court. Goff LJ's judgment was approved in the House of Lords (see (1981) 3 All ER 727 at 736, (1982) AC 529 at 545 per Lord Diplock). The passage cited by Goff LJ was as follows (1978) 3 All ER 1033 at 1045, (1980) AC 198 at 222-223):

> *"Under the English system of administration of justice, the appropriate method of correcting a wrong decision of a court of justice reached after a contested hearing is by appeal against a judgment to a superior court. This is not based solely on technical doctrines of res judicata but on principles of public policy, which also discourage collateral attack on the correctness of a subsisting judgment of a court of trial on a contested issue by retrial of the*

> ***same issue, either directly or indirectly in a court of co-ordinate jurisdiction...My Lords, it seems to me that to require a court of co-ordinate jurisdiction to try the question whether another court reached a wrong decision and, if so, to enquire into the causes of its doing so is calculated to bring the administration of justice into disrepute".***
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> ***Counsel as amicus curiae submitted that it would be an anomaly amounting to an absurdity if a barrister or solicitor could be sued for work in respect of which he is not immune under the principle of Saif Ali, where no decision of a court on the merits was involved, but could not where there was such a decision and the claim involved reopening that decision. But this is no more than saying that the rule involves hardship on the plaintiff in the latter case who cannot sue in respect of the negligence. All decisions that a suit, which would otherwise lie, cannot be brought on the grounds of public policy, involve hardship."***

His submission here was that the case, as brought by V.H.L. had come to Court, had been part heard and compromised, following which the Court had issued a short judgment and subsequently refused leave to appeal.

In Somasundaram -v- Melchior & Co there had been no trial as to whether the accused was guilty or not, so that in that case, the case was not heard out but settled on the guilty plea.

Here the question had come to Court, had been disposed of and could not now be re-opened. To do so would merely permit the Plaintiffs to relitigate, in a manner doubtless more convenient to themselves, an action which had been disposed of with an Order of the Court of the Inferior Number. Hard though it might be on the Plaintiffs, the Court should not allow the action to be re-opened, albeit between different parties.

Mr. Picot submits that he is not seeking to re-adjudicate the 1986 case, but seeking redress for the loss of property right. The full issues of the 1986 action do not require to be relitigated, and indeed, the questions which arise will be different from those which were then litigated, which brings the Court back, of course, to the basis of Mr. Picot's complaint. This is particularly so as the compromise did not settle what was, and should have been, in his view, a true dispute between the parties. Furthermore, there is no attack on the Judgment of the Court in 1986, as the Court did not, and indeed, in the circumstances, could not, make a judgment on the issues he now wishes to bring forward. Put another way, the trial of the present issues would cause no conflict with the 1986 judgment.

Once again, the Court finds against the Plaintiffs. In the view of the Court, Mr. Le Cocq's arguments are correct. This is a collateral attack, albeit by trying an issue which was not then

leaded, against a different party which indirectly attacks the correctness of the 1986 judgment. The case Mr. Picot now seeks to make could have been put forward then, even if the case was settled without the present arguments being put forward. It is, in the view of the Court, too late and an abuse of the process of the Court to raise them now. The ground of Public Policy must override any claim by the Plaintiffs.

On this ground also, therefore, the Order of Justice is struck out.

AUTHORITIES

Royal Court Rules, 1992: Rule 6/13.

R.S.C. (1993 Ed'n) 18/19/2,3,4,7,8,12 (ii) (Advocates Immunity), 17,18.

Jackson & Powell on Professional Negligence (1993: 3rd Ed'n): para 5-06, 07, 10-13, 16-21.

Torrell -v- Pickersgill & Le Cornu (1987-88) J.L.R. 702.

Somasundaram -v- M. Julius Melchior & Company (a firm) (1988) 1 WLR 1394.

Arya Holdings, Limited -v- Minories Finance, Limited (31st October, 1991) Jersey Unreported.

Rondel -v- Worsley (1967) 3 All ER 993.

Saif Ali -v- Sydney Mitchell and Company (1977) 3 All ER 1033.