CA on appeal from QBD, Bath District Registry (Mr Justice Longmore) before Butler-Sloss LJ, Pill LJ, Judge LJ. 10th July 1997.

JUDGMENT : LORD JUSTICE JUDGE:

1. On 15th March 1996 Longmore J dismissed the plaintiff's appeal from the decision of District Judge Rutherford on 2nd January 1996 that the plaintiff's claim against the defendant should be struck out under Order 18 r.19 of the Rules of the Supreme Court. He granted leave to appeal.

2. The defendant is and at all material times was a barrister in practice from chambers in Bristol. Her areas of practice included family law.

3. In 1984 the plaintiff married Nicholas Davies. In 1991 she was granted a decree nisi of divorce which was made absolute in November. There were no living children of the family. Efforts were made to achieve a negotiated settlement of her claims for financial relief. A hearing was arranged for 18th December 1991 and a few days before the hearing the defendant received instructions "*to advise*" the plaintiff. It is however common ground that the instructions represented delivery of a brief to attend the hearing for ancillary relief and represent the plaintiff. A conference was arranged and took place on 17th December. On the next day, at court, when the plaintiff was represented by the defendant the proceedings were compromised, and an order by consent was made by Deputy District Judge Johnson.

4. The terms of the order *record "Upon hearing counsel for both parties and upon reading the affidavit sworn herein and upon the petitioner undertaking*

   (1) to use her best endeavours to secure the release of the Respondent from his covenants under the mortgage held with the Halifax Building Society secured on the property known as 3 Edgar Buildings, Bath and until that release is obtained to indemnify the Respondent for any liability arising under the said mortgage

   (2) to assign within 28 days of the date hereof to the Respondent her interest in the following policies:

   (6 policies were then set out)

   It is ordered that:

   1. *Upon petitioner securing the release of the Respondent from his obligations due under the said mortgage the Respondent shall transfer to the petitioner all his estate and interest in the said property*
   2. *The Respondent do pay the petitioner maintenance in the sum of £300 per month together with the repayments due under the said mortgage until the 31st March 1992*
   3. *The Respondent do pay the petitioner a lump sum of £2,500 on or before the 31st May 1992*
   4. *Upon the said payment and transfer set out above all capital and income claims that either party may have against the other shall be dismissed and neither party shall be entitled to make any application under section 23 and 24 of the Matrimonial Act 1979 and under the Married Women's Property Act 1882 (this provision is recorded in counsel's brief as "dismissal of claim under MCA 1973 and MWPA 1882")*
   5. *Pursuant to section 15 of the Inheritance (Provision for Family and Dependants) Act 1975 and the court considering it just so to do, neither the petitioner nor the Respondent shall be entitled on the death of the other to apply for an order under section 2 of the said Act*
   6. *It is declared for the purposes of Regulations 96 and 97 of the Civil Legal Aid (General Regulations) 1989 that the said property and lump sum payable by the Respondent be used as a home for the petitioner and her dependants."*

   Agreed provision was made for costs, and the attendance of counsel, and the order concluded "there be liberty to apply".

5. Two particular features of this order should be noted. First, the Judge had read the relevant affidavit evidence produced by each side and second, it was expressly recorded that the court considered it "just" to make an order relating to inheritance arrangements. The reference to the Matrimonial Act 1979 was plainly an error and was meant to be a reference to the Matrimonial Causes Act 1973. The legal effect of the order made by the District Judge was dependent not on the consent of the parties but on the making of the order by the court. (**De Lasala v De Lasala** [1980] AC 546 and **Livesey** (**formerly Jenkins) v Jenkins** [1985] 1 AC 424)

6. In **Thwaite v Thwaite** [1982] F1 the Court of Appeal adopted the principle applied in **De Lasala v De Lasala** that *"financial arrangement that are agreed upon between the parties for the purpose of receiving the approval and being made the subject of a consent order by the court, once they have been made the subject of the court order no*

longer depend upon the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order;....."

7. This principle was said to *"represent a significant departure from the general principle frequently stated in cases arising in other divisions of the High Court, that the force and effect of consent orders derives from the contract between the parties leading to, or evidenced by, or incorporated in, the consent order..... A distinction, therefore, has to be made between consent orders made in this and other types of litigation."*

8. The inclusion of section 33A of the Matrimonial Causes Act 1973 by section 7 of the Matrimonial & Family Proceedings Act 1984 confirms this principle.

9. Section 33A(1) provides *"Notwithstanding anything in the preceding provisions of this Part of this Act, on an application for a consent order for financial relief the court may, unless it has reason to think that there are other circumstances into which it ought to enquire, make the order in the terms agreed on the basis only of the prescribed information furnished with the application."*

10. Such a provision would not have been necessary if the court had not been under a duty fully to enquire into proposed settlements for financial relief. The effect of the section is that provided prescribed information is before it, the court is permitted to make an order without further enquiry but it is not required to do so, and if there is any reason to think that there are other relevant circumstances the order may not be made until proper enquiry has been made. In **Peacock v Peacock** [1991] FCR 121 Thorpe J considered a consent order which had been made in 1982. In the course of his judgment he summarised the principle which has been understood and applied for many years. *"All the issues between the parties related to the 1982 consent order, its implementation, and its possible variations..... It is beyond question that such orders are not made simply upon evidence of the applicant's consent. The court has an over-riding duty to survey the sufficiency of the proposed consideration and the overall fairness of the orders proposed."*

11. In July 1995 the plaintiff claimed damages for negligence against the defendant in *"negotiating and advising the plaintiff to accept a settlement of her claim for ancillary relief against her husband"*. The details of the earlier negotiations and the circumstances in which the eventual compromise were reached do not require amplification in this judgment. The critical allegation is that the overall effect of the settlement meant that the plaintiff was unable to finance the repayments of the mortgage on the former matrimonial home after it was transferred into her name. Having filed a defence which in addition to denying the allegations of negligence, alleged that the statement of claim did not disclose a reasonable cause of action *"in that each and every act or omission of the Defendant relied upon is covered by the immunity from suit of the Defendant as a barrister"*, the defendant sought to strike out the statement of claim on the basis that "*the whole of the plaintiff's claim is covered by the doctrine of immunity from suit which covers an advocate in relation to the conduct and management of a case in court, the conference and negotiated settlement being covered by the same doctrine*".

12. The grounds of appeal from the decision of Longmore J are that he was wrong in law and in fact in upholding the decision of the District Judge that the defendant's actions on 18th December 1991 *"in negotiating and advising the plaintiff to accept a settlement of her claim for ancillary relief against her former husband were so closely connected with the conduct of the case in court as to render the defendant immune from an action for negligence on the part of the plaintiff and (ii) that the advice given .....on.....17 December 1991 was part and parcel of and rolled up in the defendant's conduct on 18th December and therefore subject to the same immunity"*. These grounds of appeal, together with the pleaded defence and the application to strike out the statement of claim, raise the question whether the present defendant is immune from suit, and if so the circumstances, if any, in which any such immunity may arise. For the purposes of the present appeal Mr Peter Smith QC on behalf of the plaintiff accepted that events on 17th and 18th December were so interconnected that if the defendant is indeed immune from suit for the actions on 18th December, there is no prospect of a successful claim in respect of the advice she gave on the previous day.

13. Perhaps it should not be necessary to begin consideration of these issues by emphasising that the immunity of the advocate from liability is not founded on some special protection granted by the court to the legal profession to enable lawyers to avoid justified complaints by dissatisfied clients. The legal adviser may be held liable for negligent advice to his client in the same way as his medical practitioner or accountant. The immunity arises in very limited circumstances when the general public interest prevails against even a

meritorious claim. The trend has been increasingly to limit the circumstances in which immunity may be established and the concept of a blanket immunity is completely out of date. The present claim for immunity therefore requires analysis of the developing principles in this field.

14. Although some of their Lordships, and in particular Lord Morris, were considerably influenced by the phrase "*the conduct and management of the cause*" derived from the unanimous opinion of the court in **Swinfen v Lord Chelmsford** 5 H & N 890, in which the action against counsel was based on his alleged mishandling and settlement of litigation, references to statements of principle before **Rondel v Worsley** [1969] 1 AC 191 are unhelpful.

15. In that case the plaintiff alleged negligence against his barrister in the conduct of his defence in criminal proceedings heard before a jury at the Old Bailey. The decision established, or perhaps more correctly, confirmed in modern form the principle that the barrister was immune from suit in the performance of his duties in court. Observations were also made on two connected subjects, first, the ambit of the undoubted immunity and, second, whether it extended to different and if so which aspects of a barrister's professional obligations to his client. In view of the decision in **Saif Ali v Sydney Mitchell & Co (a firm) [**1980] AC 198, that the immunity was not unlimited and that such immunity as existed extended to solicitors as well as barristers, further consideration of **Rondel v Worsley** can be limited to analysing the extent of immunity envisaged by those of their Lordships who accepted that the immunity was subject to some limitations rather than the blanket immunity which formed the basis for the conclusion reached by Lord Pearce, and subsequently rejected in **Saif Ali** . In the Court of Appeal Salmon LJ (who was to be one of the majority in the House of Lords in **Saif Ali)** was not prepared to extend the immunity to work of an advisory nature, *"quite separate from"* or *"unconnected with .... the conduct and management of a case in court"*. Within this categorisation at that time he included pleadings, advice on evidence and a notice of appeal. In the House of Lords Lord Reid applied the immunity to the *"conduct of litigation"* and being *"engaged in litigation"*. These phrases embodied the work covered in drawing pleadings or conducting subsequent stages in the case, and as if to emphasise the immunity would always extend to such cases, he added that it would also apply to some cases where litigation was "impending" but not to advisory work *"where that consideration did not apply"*. Lord Morris of Borth y Gest concluded that immunity extended to the "conduct and management of a case in court" by the advocate. He did not suggest that this phrase amounted to a gloss on "the conduct of the management of the cause" used in **Swinfen v Lord Chelmsford** but rather approached it as a statement made *"in reference to litigation"*. He accepted the correctness of the judgment of Salmon LJ in the Court of Appeal. Lord Upjohn concluded that immunity was essential "*in litigation*" and believed that immunity began before the advocate actually walked into court. He considered that it extended to pleadings, advice on evidence and advice on the "*prospects of success*" and suggested that the appropriate starting point would be the letter before action. Finally Lord Pearson referred to "*the conduct of litigation*" and later to the "conduct of a case" as within the scope of the immunity but concluded that "*pure paperwork*" on the other hand fell outside it. While acknowledging that these observations were unnecessary for the decision in **Rondel v Worsley** and strictly speaking were no more than obiter dicta, on this analysis it is in my judgment clear that if the House of Lords in **Rondel v Worsley** had been invited to answer the question whether immunity from suit extended to the settlement of civil actions at the door of the court when the case was listed for hearing, the undoubted conclusion would have been that it did.

16. One further feature of the decision in **Rondel v Worsley** needs emphasis. None of their Lordships doubted that in the public interest absolute privilege attached to everything said in court by the judge, jurors, advocates and witnesses and indeed media reporting of words actually spoken. All were equally protected. In **Watson v M'Ewan** [1905] AC 480 this protection was extended to cover statements made by a witness preparatory to trial. (see also **Marrinan v Vibart** [1963] 1 QB 528: **Evans v London Hospital Medical College (University of London)** [1981] 1 WLR 184: **Palmer v Durnford (a firm) [**1992] 1 QB 483: and the speech of Lord Browne-Wilkinson in **X (minors) v Bedfordshire County Council** [1995] 2 AC 633 at 755 agreeing with the observations of Drake J in **Evans** *"at least in relation to the investigation and preparation of evidence in criminal proceedings"*, and in this context, casting no doubt on the decision in **Palmer v Durnford Ford** [1992] QB 483.) The principle was underlined and adopted in **Saif Ali v Sydney Mitchell & Co** .

17. In **Saif Ali** the extent of the immunity from suit, and in particular whether it covered pre-trial acts or omissions in connection with civil proceedings, was considered by the House of Lords. To the extent that **Rondel v Worsley** decided that immunity extended to acts and omissions in the course of the hearings in court, **Rondel v Worsley** was (despite Lord Diplock's reservations) not reconsidered. Trenchant views were expressed by a minority. Lord Russell concluded that **Rondel v Worsley** had decided that the immunity of an advocate from negligence extended to *"areas which affect or may affect the course of the conduct of the litigation"* and decisions which *"shape or may shape the course of a trial, including advice on settlement"*. Lord Keith of Kinkell adopted the same approach. The immunity was *"applicable to all stages of a barrister's work in connection with litigation, whether pending or only in contemplation"*. However the majority concluded that the immunity did not extend or apply to every piece of work performed by an advocate in connection with litigation. Instead, on the basis of the second and alternative contention on behalf of the respondent they adopted, with different degrees of emphasis, the test propounded by McCarthy P in **Rees v Sinclair** [1974] 1 NZLR 180 and adopted by Bridge LJ in the Court of Appeal *"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 pre-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 text I have stated"*.

18. Lord Wilberforce accepted the language of McCarthy P involved a more restricted approach to immunity than the phrase *"conduct and management"*. He underlined that interlocutory and pre-trial proceedings could fall within the ambit of the immunity: in other words it was not limited to the substantive hearing alone. He regarded the *"intimate connection with the conduct of the case in court"* as providing a sound basis for analysing whether the immunity applied to the facts of any case. He added that the privilege which protected judge, counsel, witnesses, jurors and parties to proceedings in court could not be *"out flanked by basing a claim on statements made or agreed to be made out of court if these were clearly and directly made in relation to the proceedings in court"*.

19. Lord Diplock accepted the principle of immunity for the advocate for things said and done (or omitted) in court both on the basis of the decision in **Rondel v Worsley** in relation to court proceedings and by reference to two further grounds developed in his speech.

20. The principle of immunity extended to advocates as it formed part of the general immunity provided for all who participate in court proceedings: *"the courts have been vigilant to prevent this immunity from indirect as well as direct attack - for instance by suing witnesses for damages for giving perjured evidence or for conspiracy to give false evidence;* ***Marrinan v Vibart*** *[1963] 1 QB 528. In* ***Watson v M'Ewan*** *[1905] AC 480, this House held that in the case of witnesses the protection extended not only to the evidence that they give in court but to statements made by the witness to the client and to the solicitor in preparing the witness's proof for the trial; since, unless these statements were protected, the protection to which the witness would be entitled at the trial could be circumvented"*.

21. Lord Diplock also concluded that litigation about these issues would undermine the integrity of public justice, permitting the re-trial of issues already resolved, a consideration which he acknowledged would not apply when there had been no disputed hearing in court. In such cases, of course, the first ground for immunity would continue to apply. However he could find *"no sufficient reason for extending the immunity to anything that a barrister does out of court"* unless it fell within a situation analogous to that which arose in relation to the witness providing a statement pre-trial and out of court to a litigant or his solicitor. Accordingly he also accepted that "*intimate connection*" with the conduct of the case in court was an appropriate test. As an example, but without attempting any catalogue, he included pre-trial advice on evidence and pre-trial advice which was adopted at the hearing itself.

22. Lord Salmon rejected as without justification any proposition that the barrister enjoyed a blanket immunity for work done out of court. He modified his own observations in **Rondel v Worsley** that counsel's immunity extended to pleadings and advice on evidence: it would "*sometimes*" do so when, for example, the advice *"would be so closely connected with the conduct of the case in court that it should be covered by the same immunity. It would be absurd if counsel who is immune from an action in negligence for refusing in court to call a*

witness could be sued in negligence for advising out of court that the witness should not be called. If he could be sued for giving such advice it would make a travesty of the general immunity from suit for anything said or done in court and it is well settled that any device to circumvent this immunity cannot succeed".

23. From this analysis the first principle of immunity, and settled law, is that an advocate is immune from suit for negligence for what he (or she) says and does (or omits to say or do) during the course of a hearing in court. The clear division between the views expressed in the House of Lords in **Rondel v Worsley** and the majority view expressed in **Saif Ali** about the extent of the immunity from suit did not undermine the unequivocal conclusion that those who participate in court proceedings are normally held immune from suit from anything said or decided by them in court, an immunity which extends beyond the confines of the court to protect them from indirect as well as direct attack. Any forensic investigation which contravenes this principle is prohibited. Secondly, immunity is not confined to the conduct of proceedings within the physical confines of the court and in very limited circumstances it extends to events outside the court door, provided the claim concerns matters which are inextricably connected with the way in which the cause is or would be conducted in court. Both principles have been acknowledged in statute. Section 60 of the Courts & Legal Services Act 1990 underlined, without expressly identifying its full ambit, the existence of an advocate's *"immunity from liability for negligence".* The Supply of Services (Exclusion of Implied Terms) Order 1982 made under section 12(4) of the Supply of Goods & Services Act 1982 provided that section 13 should not apply to the services of an advocate in court or before any tribunal inquiry or arbitrator and in carrying out *"preliminary work directly affecting the conduct of the hearing".* The third principle, although not arising for immediate attention in the present appeal, is that proceedings which amount to a collateral attack on a final decision made by a court of competent jurisdiction should be regarded as an abuse of the process of the court. (**Hunter v Chief Constable of the West Midlands Police** [1982] AC 529)

24. Whatever the basis for the immunity of the advocate and whatever its ambit, the starting point remains that the immunity constitutes an exception to the fundamental principle that those who have suffered loss and damage as a result of the negligence of their professional advisers should normally be entitled to their remedy. Therefore the immunity should be confined as closely as possible to those circumstances where notwithstanding the possible merit of an individual claim the public interest requires that immunity should be recognised. The claim to immunity for the conduct of an advocate can only arise if the case falls squarely within one or more of these three principles, participation in court proceedings, intimate connection with the conduct of the case, or a collateral attack on a final decision. As Lord Salmon warned in **Saif Ali** , *"it can only be the rarest of cases that the law confers any immunity upon a barrister against a claim for negligence in respect of any work he has done out of court."*

25. There is no clear authority decisive of the problem which arises in the present appeal which in essence is whether immunity from suit outside the court includes or extends to litigation against an advocate for negligent advice which has culminated in a settlement. Mr Smith submitted that a settlement before the start of the hearing in court has no sufficient connection with the conduct of the case in court to attract immunity: in the context of advice on settlement such immunity would only attach after the hearing had started. Neither the temporal connection (the imminence of the hearing) nor the geographical connection (the door of the court) comes within the principles relating to immunity. The negligence arises from the lack of negotiating skills with the other party to the litigation and the negligent advice about what settlement should be accepted. These are not techniques of advocacy deployed in court. The submission by Mr Rupert Jackson QC, reinforced by the need for a clear workable rule, was that when the advocate arrived at court to conduct the substantive hearing his conduct fell within the acknowledged principles of immunity, whether he presented the case through to the eventual decision by the judge or settled the litigation. Attention was drawn to a number of authorities from which both counsel accepted that no entirely consistent pattern emerged.

26. **Rees v Sinclair** was first followed in **Biggar v McLeod** [1977] 1 NZLR 321, decided after **Saif Ali** had been heard in the Court of Appeal but before the decision in the House of Lords. The allegation in this case arose from alleged negligence in the settlement of matrimonial proceedings after the hearing had begun. The Court of Appeal in New Zealand applied the principle in Rees followed by Bridge LJ in the Court of

Appeal and subsequently approved by the majority in the House of Lords. Woodhouse J concluded that work which *"was associated with the ending of an action by a settlement"* fell within the principle in **Rees v Sinclair** or *"the conduct of litigation"*. He said *"the simple question is whether the step of ending current proceedings by a compromise rather than by obtaining the judgment in due course should properly be regarded as part and parcel of the work of counsel in carrying forward the proceedings to a conclusion. I am in no doubt that this must be so"*.

27. Without expressing reservations about this broad statement of principle Richardson J confined his observations to advice leading to a settlement during the "*course of the trial*". He continued *".....the settling of the terms of a compromise must attract immunity. It is intimately and immediately connected with, and involves the termination of the litigation.....The giving of advice as the compromise of proceedings, involving as it does the question of their continuation or termination, is an inherent feature of the conduct of the cause by counsel. .... Advice on settlement of a cause, during trial, is as much an incident of the conduct of the trial as advice on and decisions as to the calling of witnesses and other matters, which, although not necessarily given and made in the courtroom, cannot in a practical way be severed from and dissociated from the conduct of the cause by the barrister in the presence of the judge"*.

28. Quilliam J agreed with both judgments. The observations of Woodhouse J with which Quilliam J agreed were obiter dicta. **Biggar v McLeod** was cited in argument in the House of Lords in **Saif Ali** without attracting any comment, presumably on the basis that the decision was consistent with **Rees.** Holland J was later to consider the observations by Richardson J in **Landall v Dennis Faulkner and Alsop and Others** [1994] 5 Med LR 268, and to apply them or to treat them as if they applied to advice resulting in a settlement at the door of the court before the start of the hearing, which they did not.

29. The principles in **Saif Ali** have been considered by the Court of Appeal in actions for alleged negligence arising in the conduct both of civil and criminal proceedings. In **Somasundaram v M Julius Melchior & Co [**1988] 1 WLR 1394 complaint was directed at the advice given to the plaintiff in relation to his plea to a charge of malicious wounding. The claim against the barrister was struck out both as an abuse of process in which a collateral attack was being made of the decision of another court (see **Hunter v Chief Constable of the West Midlands Police** [1982] AC 529) and as falling within the principle of *"intimate connection*", advice about the plea in a criminal case amounting to *"a preliminary decision affecting the way that the case is to be conducted when it comes to a hearing..... indeed it is difficult to think of any decision more closely so connected"*. Nothing which follows in this judgment is to be taken as a gloss on the principle established in **Somasundaram** in relation to criminal proceedings, which in any event is binding authority, but the similarity between the plea of guilty under consideration in **Somasundaram** and the settlement in a civil action is only superficial. The plea is not a compromise of private litigation which brings proceedings to an end. It is a public admission in court of criminal responsibility, and the case in court proceeds accordingly, and eventually to sentence. In **Somasundaram** the court also accepted as a matter of principle that although the advice on the plea was immune from suit because of its connection with subsequent advocacy in court, immunity did not extend to the plaintiff's solicitor who enjoyed no advocate's role.

30. In **Bateman v Owen White** [1996] PNLR 1 the plaintiff alleged negligence in the form of wrongful advice or a wrongful judgment exercised by counsel in a criminal case over the question whether particular witnesses should be required to attend the trial. It was held that this fell within the scope of immunity based on the "intimate connection" principle and that it was also in the public interest to avoid "*re-hearings*" of matters already heard and decided in another court of competent jurisdiction. (see also **Smith v Linskills (a firm)** [1996] 1 WLR 763)

31. In **Walpole v Partridge & Wilson** [1994] QB 106 the argument on behalf of the defendant's solicitors was that the plaintiff's claim for their negligent failure to lodge an appeal against a criminal conviction contrary to advice from counsel should be struck out. It was held that the principle of abuse of process did not apply to such negligence. In passing the Court of Appeal doubted the correctness of part of the decision in **Palmer v Durnford Ford** [1992] QB 483.

32. In **Palmer** part way through the trial, when the expert had completed his evidence, the plaintiffs on advice, abandoned their claims. Accordingly judgment was entered by consent for the defendants. Ignoring for present purposes the subsequent claim by the plaintiffs against their expert witness, they in addition

sought damages against their former solicitors on the basis that they had instructed an inadequate expert and failed to appreciate and advise about the extent of the weaknesses in the plaintiff's case before the start of the hearing. This part of the claim was struck out as an abuse of process on the basis that the consent judgment constituted a final decision on the claim. No argument was addressed about the principle of immunity based on "*intimate connection*" and it is unclear whether the solicitors appeared as advocates in the County Court. In Walpole Ralph Gibson LJ expressed his concern about this decision when, after acknowledging that *"if a plaintiff is advised, and agrees, to submit to judgment because, on the available evidence, there is no basis of claim against a party, as in* ***Palmer v Durnford Ford*** *[1992] QB 483 against the repairers, the mere assertion that that judgment against him was brought about by the breach of duty of the solicitors may be insufficient to justify the maintenance of proceedings which depend upon showing that there would have been no such judgment, but a judgment in favour of the plaintiff, if the solicitors had performed their contractual duty. Such a plaintiff may reasonably be required to show that credible evidence which would have supported a judgment in favour of the plaintiff against the repairers would have been available if the solicitors had performed their duty, and would be available in the proceedings against the solicitors.....If I have correctly understood the facts of that case....., I consider that the claim against the solicitors in* ***Palmer****'s case should not have been struck out."*

33. This decision, which involved alleged negligence in relation to a criminal appeal, therefore provides a measure of support for the proposition that submission to judgment by a litigant in civil proceedings after the start of the hearing does not necessarily preclude him from claiming damages against his legal advisors for their negligent conduct of litigation.

34. Three decisions at first instance need attention. In **McFarlane v Wilkinson** [1996] LL.LR 486 Rix J held that a claim for damages based on alleged negligent advice not to amend particulars after the decision at first instance and before the hearing in the Court of Appeal fell within the immunity principle. As the issue under consideration was, so far as relevant, based on alleged negligence after the conclusion of proceedings at first instance, it is unnecessary to consider the decision further, save to note that it is unlikely to be axiomatic that liability for negligent advice can never arise merely because there has been a concluded hearing and decision at first instance. However in **Landall v Dennis Faulkner & Alsop** Holland J concluded that a practising barrister who relied on a report from a medical expert was entitled to "*immunity*" in relation to advice given to the plaintiff supporting a settlement at the court door. He also struck out a claim against solicitors as "*frivolous vexatious and an abuse of process"* because he was not prepared to accept there was any distinction between the solicitors and the barrister. The immunity of the solicitors was based on what would have amounted to "*blatant outflanking"* of the barrister's immunity, an argument not apparently advanced and inconsistent with the principle applied by the Court of Appeal in **Somasundaram.** However more significant is his general conclusion that advising settlement at the court door is an activity which is *"intimately connected with court proceedings"*. Adopting Richardson J's observations in **Biggar** about a settlement during the course of the hearing, he summarised the critical considerations: *"It is at that stage that the practitioner is able to make his or her advice specific to the tribunal, to the available evidence and to the nature and quality of the opposition. It is common for such advice to be interspersed with sessions in court and to amount to immediate reflection upon the course of proceedings. The settlement may be total or may leave issues (typically as to costs) to be resolved by the court - in either event it manifestly affects "the way that cause is to be conducted when it comes to a hearing". Two aspects of public policy are pertinent. First, any litigation as to a court door settlement necessarily requires a court to balance that settlement with what might have been obtained by litigation before a known (and not a notional) court of comparable jurisdiction - the risk of bringing the administration of justice into disrepute is obvious. Given that the reasonably skilled and careful practitioner must take into account the likely result of litigation before a particular judge, how can the identity of the latter be other than relevant?"*

35. He continued, inconsistently with Lord Diplock's observations in **Saif Ali** that reference to counsel's duty to the court was *"no more than a pretentious way of saying that ..... a barrister..... must observe the rules*", "Second, in his conduct at the court door, the barrister has a duty not just to his client but also to the court."

36. By contrast **in B v Miller & Co** [1996] 2 FR 23, McKinnon J dismissed an application to strike out a claim on the basis that it amounted to a collateral attack on a final decision taken by a court of competent jurisdiction. The negligence was said to arise from a consent order made in proceedings for ancillary relief,

which was subject to statutory obligations imposed on the court *"to approve the order"* in accordance with section 25(1) of the Matrimonial Causes Act 1973. McKinnon J distinguished between a decision following a contested hearing and *was "prepared to hold that the consent order .....is not to be distinguished for present purposes from a consent order in other Divisions of the High Court. There cannot have been, in this case, any meaningful approval of the agreed terms whereby provision was made for the plaintiff, any more than a judge in the Queen's Bench Division would have enquired into and approved the settlement of a negligence action between parties who are sui juris and not under disability. Thus, there is here, in my judgment, no impediment to the plaintiff's action on the grounds that it amounts to a collateral attack upon the court's decision. There has been no real opportunity for the plaintiff to present her true case. She was deprived of that opportunity, as she was entitled to contend and maintain, by the negligence of the defendants."*

37. In effect therefore McKinnon J held that the action against the plaintiff's former solicitors could proceed notwithstanding that the claim for alleged negligence arose from a consent order in matrimonial proceedings which, as already noticed, took effect with the approval of the court "as an order of the court", whereas Holland J concluded that immunity from suit applied to a consent order made following a settlement at the door of the court of a claim for personal injuries which would have been enforceable on the basis of an accord and satisfaction. These decisions are not reconcilable.

38. In reaching his conclusion in the present case Longmore J was faced with the argument, repeated and amplified by Mr Smith before us, that a settlement at any time before the case was started in court could not attract immunity because by definition the policy considerations developed in **Saif Ali** had no application to a settlement. He concluded that the present case was indistinguishable in the principles applied from **Landall** with which he expressed his agreement, concluding that it was difficult *"to conceive of an activity more closely connected with litigation in court than settling at the court door".*

39. After this analysis of the relevant authorities I can now consider the question whether the advocate is entitled to immunity from suit when settling civil litigation at the door of the court. Settlements of litigation are to be encouraged, and as early as possible. Many settlements are advised before litigation is started, and many more cases are settled long before the date of the substantive hearing. Some cases settle a day or two before the hearing, some at the door of the court, and some indeed after the substantive hearing has begun. Yet others settle on appeal. The advice on which settlements are based will reflect many different considerations. For example in one case the advice to settle may arise from the non-availability of a witness in circumstances where the costs of an adjournment would be disproportionate to the value of a claim. In another the settlement of a claim for personal injuries may be woefully inadequate simply because inexperienced counsel has grossly underestimated the value of the claim. In another case, for reasons of his own the client may insist that the case should be settled on the best available terms because there are no circumstances in which he wishes the case to be heard in court. The circumstances are infinite. One specific feature relating to all settlements needs attention. Every lawyer in practice and every judge knows that there is no such thing as the case which is bound to succeed. Experience shows that cases with the brightest prospects of success somehow fail and it is difficult to underestimate the value of the certainty provided by a settlement as opposed to the continuing risks of litigation through to judgment. This factor alone should militate against successful proceedings based on criticism of advice leading to a settlement.

40. It is of course obvious that any settlement is closely connected with the litigation in the sense that it ends it and creates a binding agreement between the parties. Although an imminent hearing, and presence in the court building, often provide the occasion for the advice resulting in the settlement, and in that sense the advice is closely connected with the court hearing, the advocate at court is not conducting the hearing before the tribunal when he is giving his client advice on the settlement. In the ultimate analysis his advice concerns a proposed new contractual arrangement which will bring the litigation to an end and replace the uncertain prospects of success or failure in that litigation with an enforceable accord and satisfaction.

41. No doubt the advocate at court is in the words of Holland J making his advice "specific to the tribunal.... and the nature and quality of the opposition" but that means no more than that he is taking into account all the relevant features of the case at the time he is deciding what advice to give his client. The advice to settle will take account of the advocate's assessment of the judge before whom the case is listed, including his experience (or lack of it) and the perception of the likely impact on the judge of the particular

circumstances of the case. Assuming that the identity of the trial judge genuinely plays a significant part in the advocate's assessment of his client's prospects which the advocate then seeks to deploy to defend himself from an allegation of professional negligence, notwithstanding the possible embarrassment which would follow I remain un-persuaded that it is in the public interest for that fact to provide an insuperable bar to the plaintiff's claim, nor that its possible deployment in isolated cases justifies an absolute prohibition against further inquiry into the allegation of negligence. As an incorrect decision by any judge is in any event susceptible to appeal, and criticism, the advocate should not advise his client to accept a wholly inadequate settlement remote from the true merits of the case because of the identity of the tribunal. Equally, if counsel's duty to the court has impelled him to give advice which leads to an apparent discrepancy between a fair and reasonable settlement and a grotesquely inadequate one, I cannot see why the advocate should not rely on the performance of his duty to the court to defend himself against the allegation of negligence. It follows that I respectfully disagree with the observations by Holland J in **Landall.**

42. In my judgment the settlement of litigation is not normally encompassed within the principles on which the immunity of the advocate is based. None of the relevant authorities requires and there are no public policy considerations which justify a blanket immunity from suit for negligent advice to a client which results in a settlement of his claim, whether the advice is given by counsel or a solicitor (whether advocate or not) and whether the settlement is reached before the hearing or at the door of the court.

43. I can now consider two areas of exception. First, after the hearing has begun in the sense that the judge begins to consider the plaintiff's claim, it is self-evident that any settlement is intimately connected with the conduct of the case in the presence of the judge and it may indeed involve the judge, and any comments or interventions from him. Accordingly such settlements fall within both the first and the second principles of immunity. It is unnecessary for me to repeat the language of Richardson J in **Biggar** with which I respectfully agree.

44. The second area of exception concerns settlements which are subject to or require the approval of the court. One example is the settlement of a claim by a person under disability: another is settlement of matrimonial proceedings, such as the settlement in the present case. Such settlements involve the direct participation of the judge who is invited to indicate his approval, and who is not bound to give it. This responsibility is clearly imposed on the judge who must make whatever enquiries seem appropriate to him before making his decision. In granting his approval he will of course have in mind the immense value of a settlement outlined earlier in this judgment. Nevertheless if he concludes that the settlement arrangements are inappropriate he cannot his ignore his responsibilities. Litigation which raises the question whether the advocate was negligent in the advice leading to any settlement requiring the approval of the judge is liable to circumvent the principle that the judge may not be asked to explain what he has said or done in court. If such litigation were permitted it is difficult to see how it would be fair to prevent the defendant advocate from seeking to call the judge to demonstrate that the settlement was reasonable. In any event the discussion of the settlement before the judge and response to any enquiries from him as well as the provision of the relevant material for his consideration all form part of the advocate's function in court. In my judgment this form of settlement is therefore immune from suit on the basis of the first two principles justifying immunity. It also follows that I disagree with the decision in **B v Miller** .

45. For the avoidance of doubt these exceptions do not include settlements which do not require the approval of the court but which are settled and followed by an order made by consent. In such circumstances the judge may be invited to or may offer on his own initiative to assist with the wording of the order but he has no contribution to make to the agreed terms. He simply makes suggestions to assist the parties to find the right words in which to express their agreement. The judge does not participate by approving it. Therefore these considerations do not make such a settlement immune from possible liability. If of course, as a result of something said in court by the judge, the terms of the agreement are varied in a significant respect, or the parties settle their litigation in accordance with their perception of some comment or observation made by the judge before the substantive hearing actually begins, then it would be arguable that the settlement of the action followed a hearing in court, and immunity may arise to protect the advocate.

46. In my judgment the present case falls within the immunity principle. After negotiations had been carried out between the parties the settlement was placed before the judge for his approval, which he gave. The settlement cannot now be impugned by litigation against either advocate.

47. Accordingly I should dismiss the appeal.

LORD JUSTICE PILL:

48. The essential facts, and the order by consent made by the Deputy District Judge, have been set out in the judgment of Judge LJ. Mr Jackson QC has sought to uphold the decision of Longmore J on the basis that "the defendant's actions at court on 18 December 1991 in negotiating and advising the plaintiff to accept a settlement of her claim for ancillary relief fell within the scope of advocate's immunity". However, a further question has arisen and it is the resolution of that question which has been decisive in the judgment of Judge LJ: if the respondent fails in her submission, is she nevertheless immune from the suit because of the form of the settlement in this particular case? The defendant's argument at the hearing of the appeal essentially was that the advocate's immunity from suit for negligence is respect of her conduct of litigation covered the settlement in this case, that is, a settlement made at the door of the court on the day of the hearing but before the hearing has begun.

49. The scope of a barrister's immunity was considered in The House of Lords in **Saif Ali v Sydney Mitchell & Co [**1980] AC 198. Lord Wilberforce stated at p 210H: *"in **Rondel v Worsley** [1969] 1 AC 191, this House decided that a barrister was immune for any action for professional negligence in respect of acts or omissions during the trial of criminal proceedings against his lay client. Now in this case it is necessary to decide whether the barrister's immunity covers pre-trial acts or omissions in connection with civil proceedings brought by his lay client."*

50. At p 214H, Lord Wilberforce stated that the immunity from an action depended upon public policy and that in fixing its boundary account must be taken of the counter policy that a wrong ought not to be without a remedy: *"Furthermore, if the principle is invoked that it is against public policy to allow issues previously tried (between the client and his adversary) to be relitigated between client and barrister, it may be relevant to ask why this principle should extend to a case in which by the barrister's (assumed) fault, the case never came to trial at all. Those two considerations show that the area of immunity must be cautiously defined.*

*How can this be done? 'Conduct and management' is the expression which has emerged and no doubt this is not a sharp definition. I think that something more precise is required if immunity in respect of acts out of court is to be properly related to the immunity for acts in court. A helpful expansion of the phrase was suggested by McCarthy P in the New Zealand Court of Appeal in **Rees v Sinclair** [1974] 1 NZLR 180. I quote his words, at p 187:*

> *'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 charge. The protection should not be given an 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.'*

I do not understand this formulation as suggesting an entirely new test, ie, a double test requiring (a) intimate connection with the conduct of the cause in court and (b) necessity in the interests of the administration of justice. The latter words state the justification for the test but the test lies in the former words. If these words involve a narrowing of the test as compared with the more general words 'conduct and management' I think that this is right and for that reason I suggest that the passage, if sensibly, and not pedantically, construed, provides a sound foundation for individual decisions by the courts, whether immunity exists in any given case."

51. Lord Diplock emphasised two reasons for the immunity. The first is that the barrister's immunity for what he says and does in court is: *"part of the general immunity from civil liability which attaches to all persons in respect of their participation in proceedings before a court of justice; judges, court officials, witnesses, parties, counsel and solicitors alike. The immunity is based on public policy, designed, as was said by Lord Morris of Borth-y-Gest (in **Rondel)** to ensure that trials are conducted without avoidable stress and tensions of alarm and fear in those who have a part to play in them. As was pointed out by Starke J in **Cabassi v Vila** (1940) 64 CLR 130, 141, a case in the High Court of Australia, 'The law protects witnesses and others, not for their benefit, but for a higher interest, namely, the*

advancement of public justice.' The courts have been vigilant to prevent this immunity from indirect as well as direct attack ¾ for instance by suing witnesses for damages for giving perjured evidence or for conspiracy to give false evidence; ***Marrinan v Vibart*** *[1963] 1 QB 528. In* ***Watson v M'Ewan*** *[1905] AC 480, this House held that in the case of witnesses the protection extended not only to the evidence that they give in court but to statements made by the witness to the client and to the solicitor in preparing the witness's proof for the trial; since, unless these statements were protected, the protection to which the witness would be entitled at the trial could be circumvented."*

52. The second reason is also based upon the need to maintain the integrity of public justice. There should not be collateral attacks on the correctness of a subsisting judgment of a court of trial upon a contested issue by retrial of the same issue *"a retrial of any issue decided against a barristers client in favour of an adverse party in the action in respect of which allegations of negligent conduct by the barrister are made would be an indirect consequence of entertaining such an action"* (p 222G). Lord Diplock added (p 223E): *"A similar objection, it may be mentioned, would not apply in cases where an action has been dismissed or judgment entered without a contested hearing and there is no possibility of restoring the action and proceeding to a trial. If the dismissal or the entry of judgment was a consequence of the negligence of the legal advisers of a party to the action, a claim in negligence against the legal advisers at fault does not involve any allegation that the order of the court which dismissed the action or entered judgment was wrong".*

(I interpose that I agree with Longmore J that in using those words Lord Diplock was not determining whether immunity should be granted in such a case but only whether the particular reason for immunity applied.)

53. Having stated that these two grounds of public policy do not apply *"to what a barrister does outside court in advising about litigation or settling documents for use in litigation",* Lord Diplock continued: *"Without the support of those additional grounds of public interest, as I have already indicated, I can find no sufficient reason for extending the immunity to anything that a barrister does out of court; save for a limited exception analogous to the extension of a witness's protection in respect of evidence which he gives in court to statements made by him to the client and his solicitor for the purpose of preparing the witness's proof for trial. The extend of this exception was in my view well expressed by McCarthy P. in the Court of Appeal of New Zealand (where the profession is a fused one) in* ***Rees v Sinclair [****1974] 1 NZLR 80, 187:*

> *Each piece of before-trial word should ¼ 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 ¼ .'*

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

It would not be wise to attempt a catalogue of before-trial work which would fall within this limited extension of the immunity of an advocate from liability for the way in which he conducts a case in court."

54. Lord Salmon, at p 231E stated*: "In my opinion, however, it can only be in the rarest of cases that the law confers any immunity upon a barrister against a claim for negligence in respect of any work he has done out of court ¼ I should have said that the immunity might sometimes extend to drafting pleadings and advising on evidence."*

55. Mr Smith QC, for the plaintiff, submits that a door of court settlement has only a temporal connection with the trial. Unlike an advice on evidence, it has nothing to do with the trial. Because the effect of a settlement is that there is no trial, the settlement can have no intimate connection with a trial. Mr Smith accepted that the situation was different after the trial had begun. Further, if, as a matter of fact, the court had an impact upon the settlement, the immunity arises. If, for example, the judge gives an indication about the case, or about its possible outcome, be has had an impact on any subsequent settlement and the immunity is present.

56. It is submitted that approval by the court of an infant's claim, though required by Rules of Court, does not have the required impact even if, for technical reasons, some change in the form of Order results. In

matrimonial proceedings, dealing with financial arrangements, it would be a question of fact whether any interventions by the judge before the settlement was made had the necessary impact. A line had to be drawn and the point at which to draw it was when the judge can be said to have had an impact upon the settlement.

57. Mr Jackson QC, for the defendant, submits that settling a case is one aspect of conducting the case. Advocacy includes negotiating skills as well as presentation of the case in court. A settlement just before a civil trial begins is intimately connected with the conduct of the trial. The process of arguing points in court and resolving them by negotiation at the door of the court cannot sensibly be disentangled. Mr Jackson relied on the decision of Holland J in **Landall v Dennis Faulkner & Alsop** [1994] 5 Med LR 268; also cited and relied upon by Longmore J: *"It is difficult to conceive of an activity that is so intimately connected with court proceedings as advising at the court door. (Longmore J relied expressly on that statement). It is at that stage that the practitioner is able to make his or her advice specific to the tribunal, to the available evidence and the nature and quality of the opposition. It is common for such advice to be interspersed with sessions in court and to amount to immediate reflection upon the course of proceedings. The settlement may be total or it may leave issues (typically as to costs) to be resolved by the court - in either event it manifestly affects 'the way that cause is to be conducted when it comes to a hearing.' Two aspects of public policy are pertinent. First, any litigation as to a court door settlement necessarily requires a court to balance that settlement with what might have been obtained by litigation before a known (and not a notional) court of comparable jurisdiction - the risk of bringing the administration of justice into disrepute is obvious. Given that the reasonably skilled and careful practitioner must take into account the likely result of litigation before a particular judge, how can the identity of the latter be other than relevant? Second, in his conduct at the court door, the barrister has a duty not just to his client but also to the Court."*

58. Holland J cited the dictum Richardson J in **Biggar v McLeod** [1978] 2 NZLR 9 at 13*: "The giving of advice as to the compromise of proceedings, involving as it does the question of their continuation or termination, is an inherent feature of the conduct of the cause by counsel."*

59. It is common ground that appearance of the parties and their advisers at court on the day of the hearing and in the knowledge that the dispute is about to be resolved one way or the other does, as counsel put it, focus the minds of the parties. This illustrates the intimate connection of the door of court settlement with the trial, Mr Jackson submits. He also submits that door of court settlements are in the public interest. Mr Smith counters that earlier settlements are even more in the public interest and the advocate at the door of the court should be in no better position than the lawyer who advised settlement much earlier.

60. The difficulty about applying the Rees test in the present situation is that, as expressed, the test is concerned essentially with situations in which the case has come to a hearing. The pre-trial work is to be assessed by reference to its impact on a hearing but there is no hearing when there is a door of court settlement. It is not suggested that an advice on evidence is any the less covered because a case does not come to a hearing. The impact upon the present situation of words used to cover a situation of a different type must be considered.

61. In **Biggar v McLeod** , Woodhouse J giving the leading judgment in the New Zealand Court of Appeal, appears to have understood the ***Rees*** principle to cover a door of court settlement. Woodhouse J referred to the opinion of Lord Reid in **Rondel v Worsley** , at p 231, that it was in the public interest to retain the immunity of barristers "at least as far as it relates to their work in conducting litigation". Having referred to the passage in the judgment of McCarthy P adopted in **Saif Ali** , Woodhouse J stated, at p 11,: *"As I read the reference to the court the learned judge was not concerned so much to point to the actual activity of counsel inside the court room. The phrase as I understand it is intended to qualify the type of legal work which would attract the immunity and, of course, he was concerned in the passage to which reference had been made with the question of pre-trial work in particular, since no question had arisen in the case concerning the importance of what Lord Reid had described as the conduct of litigation. In any event it seems clear to me that McCarthy P tended in no way to limit the breadth of what had been said by Lord Reid concerning the policy reasons underlying the existence of the immunity or the circumstances which would give rise to it".*

62. Determination of the door of court question will not be necessary if the present case is resolved in the defendant's favour upon an application of the judicial impact test advocated by the plaintiff.

63. I accept that there are situations in which the intervention of the court is sufficient in itself to give rise to the immunity. A settlement in the course of the hearing, as in **Biggar**, may be an example. The intimate connection is established. Further, where a settlement, by the law or by rules of court, requires the approval of the court as to its merits and receives that approval, the advocates who have reached the settlement are in my judgment covered by immunity from suit.

64. Thus under O 80 r 10*: "Where in any proceedings money is claimed by or on behalf of a person under disability, no settlement, compromise or payment and no acceptance of money paid into court, whenever entered into or made, shall so far as it relates to that person's claim be valid without the approval of the court"*. O 80 r 11 provides a procedure for obtaining the court's approval for a settlement made before proceedings in which the claim for money is made by or on behalf of a person under disability are begun. The procedure protects minors and patients from any lack of skill of their legal advisers and also provides the means by which a defendant may obtain a valid discharge from a minor's or a patient's claim.

65. Consent orders following settlements which do not require the approval of the court in my view fall into a different category. It may be that some or most Judges do take an interest in the terms of a settlement referred to them and express views if they see fit. However there is no obligation upon them to do so. Immunity from suit (if not otherwise present) should not in my judgment depend upon the degree of conscientiousness of the judge who makes the consent order. If he is not under an obligation to consider the merits of the order, the existence of the immunity should not depend upon the degree of interest he shows in the settlement. Dependence of the immunity upon comments made by the judge when the settlement is brought before him would be haphazard in operation and would also involve calling evidence of the degree of interest shown and the care taken by the judge to investigate the merits and fairness of the settlement.

66. A further difficulty with a test by way of judicial impact, though not one which affects the outcome of the present case, is that in some situations the judicial involvement is, at least in part, for reasons other than concern for the interests of the parties. Before granting injunctions by consent (or upon *ex parte* applications), for example, the judge may investigate the circumstances of the dispute. His concern will not however be primarily for the interests of the parties and their protection from incompetent lawyers but with whether the jurisdiction of the court is properly invoked. The same will apply when prerogative orders are granted by consent. To define the limits of an immunity by reference to judicial intervention would be to give an apparent but illusory protection to the litigant in the exercise of some areas of the courts jurisdiction. The judicial impact test will provide situations in which the immunity exists but I do not regard it as a satisfactory test of the limits of the immunity.

67. The settlement in the present case led to a consent order under the Matrimonial Causes Act 1973 and the question arises whether it did or did require the approval of the court. A consent order under the 1973 Act was considered by McKinnon J in **B v Miller & Co** [1996] 2 FLR 23. The plaintiff sought to sue her solicitors on the ground that she agreed to the consent order because of their negligent advice. Though it is not expressly stated in the report, the settlement does not appear to have been a door of court settlement. The defendants sought to strike out paragraphs of the statement of claim on the basis that the consent order was a final order of the court in ancillary relief proceedings made pursuant to the court's examination of the parties' respective financial means as jointly disclosed by them in Form 76A. (The amount of information required by the present form *"M 1 - Statement of Prescribed Information"* is similar.) It was submitted that the action constituted a collateral attack on a final decision taken by a court of competent jurisdiction.

68. The judge referred to s 33A(1) of the Act which provides that *"on an application for a consent order for financial relief the court may, unless it has reason to think that there are other circumstances into which it ought to enquire, make an order in the terms agreed on the basis only of the prescribed information supplied with the application"*. (Supplied in the present case as in B.) However, the judge based his conclusion upon s 25 which provides that "it shall be the duty of the court in deciding whether to exercise its powers under s 23, 24 or 24A above (orders for ancillary relief) and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen".

69. McKinnon J stated at p 31G: *"The court was required under s 25 to look at all the circumstances of the case. One of those circumstances was that the parties had reached agreement. I do not see that what happens in the approval of an agreement, with no more information than is before the court than is required by Form 76A, or was provided to the court in this case, begins to equate the true status of a consent order with that of an order made following a contested hearing. It seems to me that the consent order in this case is much closer to the category of case referred to by Lord Diplock in the* ***Saif Ali*** *case, at 223E, which I have already cited ¾ much closer to that category of case than any of the other orders or decisions referred to in any of the cases cited to me. I would be prepared to hold that the consent order in this case is not to be distinguished for present purposes from the consent order in other Divisions of the High Court. There cannot have been in this case any meaningful approval of the agreed terms whereby the decision was made for the plaintiff, any more than a judge in the Queen's Bench Division would have inquired into and approved the settlement of a negligence action between parties who were sui juris and not under disability. Thus, there is here, in my judgment, no impediment to the plaintiffs action on the grounds that it mounts a collateral attack upon the court's decision."*

70. The action was allowed to proceed but it appears that the collateral attack issue was the only one raised by the defendants. They did not seek to strike out on the basis of the advocate's immunity for work intimately connected with the conduct of the cause in court, the point taken by the defendant in the present case.

71. **Jenkins v Livesey** [1985] AC 424 was mainly concerned with the disclosure of information by the parties upon an application for an order for financial provision and property adjustment. Lord Brandon stated at p 440B that the principle of full and frank disclosure of all material facts depended on "the statutory requirement imposed by section 25(1), that the court must exercise its discretion to make orders under sections 23 and 24 in accordance with the criteria prescribed by that sub-section, and that, unless the parties make full and frank disclosure of all material matters, the court cannot lawfully or properly exercise such discretion."

72. While the court has a discretion as to whether to make an order, it has a duty before exercising it to have regard to certain matters. These are relevant to the merits of the claim. In effect, a consent order under s 25 requires the court's approval based upon criteria specified in the statute. Referring to the then new section 33A and rules of court made under it, Lord Brandon stated at p 444C: *"The procedure so laid down includes the lodging of a statement containing the kind of information which the court needs to have before making an order in accordance with ¼ section 25."*

73. In **Peacock v Peacock** [1991] FLR 121 Thorpe J considered an application to vary a consent order made under the 1973 Act to conclude financial proceedings between divorced spouses. He stated at p 125: *"All the issues between the parties related to the 1982 consent order, its implementation, and its possible variation ¼ . It is beyond question that such orders are not made simply upon evidence of the applicant's consent. The court has an overriding duty to survey the sufficiency of the proposed consideration and the overall fairness of the orders proposed".*

Peacock does not appear to have been cited to McKinnon J in **B v Miller and Co .**

74. Section 33A deals expressly with consent orders for financial relief. It was enacted to enable courts to deal with consent applications upon a consideration of the papers. However it does not in my judgment remove the duty of the court to consider the merits of the settlement. The parties have a duty of full and frank disclosure. The must disclose the information prescribed by rules of court. The court then has a duty, in the context of the statute, to consider whether there are other circumstances into which it ought to inquire. It follows from the existence of that duty, which will no doubt lead to the making of further enquiries in some cases, that, if a consent order is made, it is made with the approval by the court of its contents. The court having assumed a responsibility for the merits of the order, the advocate is immune from suit for his part in the settlement.

75. In my judgment **B v Miller and Co** was wrongly decided in so far as it is based on the proposition that no immunity arose out of the approval of the agreed terms. In the case of an order under s 33A of the 1973 Act, the immunity arises from the duty of the court to approve the terms of the settlement. It does not depend upon a further investigation of the manner, if at all, in which the duty has been performed by the court.

76. That finding does not in my view conclude the present appeal in the defendant's favour. Until the point was raised by the court itself during the hearing of the appeal, it had not been taken by the defendant either in the pleadings or in argument. Paragraph 1 of the defence does assert that *"each and every act or omission of the defendant relied upon is covered by the immunity from suit of the defendant as barrister*". The affidavit sworn on behalf of the defendant in support of the summons to strike out claims that *"the completed and negotiated settlement [were] covered by the said doctrine [of immunity from suit]".* It is not suggested in either document that the act of the judge in approving the settlement has created an immunity otherwise absent. It is clear from the judgment of Longmore J that the point was not taken before him. Subject to a claim of immunity, the statement of claim discloses a reasonable cause of action. Upon a striking our application it appears to me that an immunity based on judicial intervention ought to have been pleaded and argued if the defendant sought to rely on it. Moreover, public policy does not normally require or entitle the court to take a point on immunity not taken by the defendant.

77. For that reason, I am unable to decide the appeal on the basis that an immunity, which would not otherwise exist, is created by judicial intervention by way of approval of the settlement in this case. I would not dismiss the appeal on the ground which has found favour with Judge LJ and am driven to consider the question whether the defendant succeeds on the basis alleged on her behalf and mentioned at the beginning of this judgment.

78. It is common ground that the existence of the barrister's immunity, however defined, may result in a wrong to the litigant. The law requires toleration of a possible wrong because of the public interest in immunity. Immunity during the trial exists as much for an elementary error in failing to call a witness as for a difficult decision as to whether to ask a question in cross-examination. An unsatisfactory settlement at the door of the court may result from an elementary misapprehension of the law or the facts or only a misapprehension of the likely attitude of the particular judge to the particular facts. Because the reason for the immunity is in public policy, no attempt has been made to define it by reference to the enormity or triviality of the error involved.

79. In **X (Minors) v Bedfordshire County Council** [1995] 2 AC 633, Lord Browne-Wilkinson, agreeing with Sir Thomas Bingham MR in the Court of Appeal in the same case, stated, at p 749G, that *"the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied and that very potent counter considerations are required to override that policy".* The question is whether there are in this case, as there were held to be in **X (Minors** *)*, such considerations.

80. In **Somasundaram v Julius Melchoir & Co** [1988] 1 WLR 1394 it was held that advice as to plea in a criminal trial is *"something which is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that the cause is to be conducted when it comes to a hearing, within the test propounded by McCarthy P in* ***Rees v Sinclair*** *and approved by the House of Lords in* ***Saif Ali v Sydney Mitchell & Co****. Indeed it is difficult to think on any decision more closely so connected"* (per May LJ, giving the judgment of the court at, p 1403). May LJ also stated that *"it is difficult in principle to draw any distinction between the decision in a criminal court and that of a civil court".*

81. I recognise the public interest, for the protection of litigants in general, in keeping the immunity as narrow as possible. However it does in my judgment cover the defendant's conduct in the present case in making a settlement at the door of the court when the trial of the merits was about to begin. The conduct at the door of the court, while precluding the conduct of the cause in court, is nevertheless intimately connected with it. Negotiations in such circumstances, and settlements which result from them, are an integral part of the conduct of the cause having the necessary intimate connection with its conduct in court within the meaning of that expression adopted in **Saif Ali .** They cannot sensibly be distinguished from the advocate's conduct of the cause once the trial has begun. I can see no sensible distinction between a settlement in course of trial, which may be reached for reasons connected with or unconnected with the events of the trial so far, and a door of court settlement before the trial begins. The immunity cannot in my judgment be so narrowly defined as to exclude conduct which involves predicting the likely outcome of a case at the door of the court and settling it before the hearing has begun.

82. One consideration, though not one which applies in this case, is that the door of court settlement may well be made in reliance upon the door of court statement of a prospective expert witness as to what he would

say in court upon certain eventualities. Lord Diplock drew an analogy between the position of the advocate and that of the witness. It would be curious if the expert witness's door of court conduct was covered by immunity (as would appear to follow from Lord Diplock's analysis) but the advocate's was not (see also **Palmer v Dunford Ford** [1992] QB 483 and Lord Browne-Wilkinson in **X (Minors)** stating, at p 755F, that nothing he has said cast any doubt upon that decision). The protection of the witness illustrates the intimate connection between advice at the door of the court and the conduct of the cause in court.

83. The intimate connection is also illustrated by the investigation as to the advisability of the settlement which would be necessary in the absence of an immunity. Consideration of what would have happened at the avoided hearing and what the particular judge is likely to have decided would be necessary and though, as Lord Diplock stated, it would not be a collateral attack on the correctness of a subsisting judgment of the court, it would be a collateral investigation into the likely conduct of the case by the judge. Moreover, I find it difficult to see how advice as how to plead in a criminal case (as in **Somasundaram)**, which may be based upon a misunderstanding of the law or the evidence, is covered by the immunity but advice at the door of the court as to whether to settle a civil claim is not. While I accept that the plea of guilty has a public impact not always present in civil litigation, the potential wrong to the litigant may be as great in one situation as the other and the role of the person giving the advice is the same. In some situations, such as assaults in their various forms, proceedings may, on the same facts be either criminal or civil or both. The door of court settlement in the civil case has the more intimate connection with the hearing about to begin. In my judgment the reasons for which the law, for better or worse, recognises the advocate's immunity for what he says and does in court apply also to a door of court settlement such as that in the present case. The difficulty of deciding where the line is to be drawn should not deter from such a conclusion.

84. The position of a solicitor who is advising a client along with a barrister instructed by him does not arise for decision in this case. I say only that I do have difficulty with any general application of the distinction drawn in **Somasundaram** as to their relative positions.

85. I would dismiss this appeal.

LORD JUSTICE BUTLER-SLOSS:

86. I have had an opportunity of reading the judgment of Judge LJ in draft and gratefully adopt his recital of the facts. I have also had an opportunity of reading the judgment of Pill LJ in draft and agree with his conclusions.

87. The submissions of counsel before this court and before Longmore J were directed to the principles applicable to civil litigation generally and the extent of the immunity from liability granted to the legal profession. Before turning to consider whether that immunity covers settlements generally "at the door of the court" it is important to consider the facts of this appeal.

88. The present appeal does not arise out of the settlement of civil proceedings in the Queens Bench Division, but from the conclusion of ancillary relief proceedings after a decree absolute of divorce in the family jurisdiction of the county court. The order with which we are concerned was made by Deputy District Judge Johnson. It recites:- *"Upon hearing counsel for both parties and upon reading the affidavit sworn herein and upon the petitioner undertaking....."*

89. Although we are told that the proceedings in court took 10 minutes, the court heard both counsel and read the affidavit and accepted undertakings made to the court. The order included the dismissal of any further claims by the parties and under para 5:- *"Pursuant to section 15 of the Inheritance (Provision for Family and Dependants) Act 1975 and the court considering it just so to do, neither the petitioner nor the respondent shall be entitled on the death of the other to apply for an order under section 2 of the said Act".*

90. An ancillary relief application may be launched in accordance with the provisions of the Matrimonial Causes Act 1973, (the 1973 Act) as amended by the Matrimonial Proceedings Amendment Act 1984, (the 1984 Act), and the relevant regulations, now the Family Proceedings Rules 1991.

91. Although it is possible for parties, after dissolution of their marriage, to agree a settlement without recourse to the courts, it is a widespread practice to embody the agreement in a court order with the advantages of court enforcement of the provisions of the order if not complied with, (see **De Lasala v De Lasala** [1980] AC 546 . In **Thwaite v Thwaite** [1982] FD 1 Ormrod LJ applied the principle in **De Lasala** that the legal

effect of a consent order derives from the order and not from the terms of the agreement, to ancillary relief applications made under the provisions of the 1973 Act. He said at page 8:- *"We respectfully adopt [the principle] and believe that it removes much of the confusion about consent orders which has prevailed in this jurisdiction. It does, however, represent a significant departure from the general principle frequently stated in cases arising in other divisions of the High Court, that the force and effect of consent orders derives from the contract between the parties leading to or evidenced by, or incorporated in, the consent order: ..... A distinction, therefore, has to be made between consent orders made in this and other types of litigation."*

92. The present practice in respect of consent orders for ancillary relief is to be found in section 33A of the 1973 Act as amended by section 7 of the 1984 Act. It reads:-

"-(1) Notwithstanding anything in the preceding provisions of this Part of this Act, on an application for a consent order for financial relief the court may, unless it has reason to think that there are other circumstances into which it ought to inquire, make the order in the terms agreed on the basis only of the prescribed information furnished with the application.

(2) Subsection (1) above applies to an application for a consent order varying or discharging an order for financial relief as it applies to an application for an order for financial relief.

(3) In this section-

"consent order", in relation to an application for an order, means an order in the terms applied for to which the respondent agrees;

"order for financial relief" means an order under any of sections 23, 24, 24A or 27 above; and

"prescribed" means prescribed by the rules of court."

93. Rule 2.61 of the 1991 Rules sets out the prescribed information to be provided in a consent application. The prescribed information includes the duration of the marriage, the age of each party and of the children, an estimate of the capital resources and net income of the parties, the arrangements for the accommodation of the parties and the children, remarriage or proposals for remarriage or cohabitation, and ´any other especially significant matters´. The statement of prescribed information was formerly Form 76A but since the 1991 Rules is now identified as D81 or M1. The order may be made with or without an oral hearing.

94. In **Livesey (formerly Jenkins) v Jenkins** [1985] 1 AC 424 the principle of full and frank disclosure by each party of all material facts to the other party and to the court in consent orders was clearly stated by the House of Lords. The (new) section 33A was referred to in the speech of Lord Brandon at page 444. He set out in his speech that the decision of the Court of Appeal in the Livesey appeal had been the reason for the introduction of the amendment, (see also the Report of the Special Standing Committee on the Matrimonial and Family Proceedings Bill, 10th and 15th May 1984, Solicitor-General Hansard pages 684 and 690). It was clearly not the intention of Parliament to affect the powers and duties of the court in ancillary relief consent orders but to restore the status quo before the Court of Appeal decision.

95. In my judgment, therefore, the jurisdiction of the court to deal with consent orders, provided by the 1973 Act and amended for procedural purposes by section 33A, remains unchanged. Thorpe J in **Peacock v Peacock** [1991] FCR 121 set out at page 125 the duty of the court with regard to a consent order:- *"It is beyond question that such orders are not made simply upon evidence of the applicant´s consent. The court has an overriding duty to survey the sufficiency of the proposed consideration and the overall fairness of the orders proposed."* see also Bush J in **Dean v Dean** [1978] 3 All E R 758 at page 762 et seq).

96. The court retains the duty laid upon it under section 25 in respect of consent orders as well as contested proceedings. It has to scrutinise the draft order and to check, within the limited information made available, whether there are other matters which require the court to make inquiries. The court has the power to refuse to make the order although the parties have agreed it. The fact of the agreement will, of course, be likely to be an important consideration but would not necessarily be determinative. The court is not a rubber stamp. In cases where a direction under section 15 of the Inheritance Act is to be part of the order, (as in the present appeal), the court must also be satisfied that it is just to make the direction. This duty of the court is in marked contrast to the approach of the High Court and county courts to settlements in civil litigation other than those which specifically require the approval of the court such as child settlements. It follows therefore that there is in relation to consent orders made under the 1973 Act such an intimate connection with the conduct of the cause in court that those consent orders come, in my judgment,

clearly within the test propounded by McCarthy P in **Rees v Sinclair** [1974] 1 NZLR 180 and approved by Lord Diplock in his speech in **Saif Ali v Sydney Mitchell & Co** [1980] AC 198 at page 224.

97. There is a decision contrary to the view I have expressed above. In **B v Miller & Co** [1996] 2 FLR 23, McKinnon J dismissed a summons by a firm of solicitors to strike out a claim by a divorced wife that they had given her negligent advice in the settlement of her ancillary relief applications. The consent order had provided for a ´clean break´ and had dismissed all ancillary relief claims by either party. The information provided to the court was in accordance with section 33A and contained the prescribed information on Form 76A (the prescribed form in 1988). There was also a direction under section 15 of the Inheritance (Provision for Family and Dependants) Act 1975. At page 31 McKinnon J recognised that consent orders in ancillary relief proceedings were unlike consent orders in other proceedings outside the jurisdiction of the Family Division and referred to **Thwaite v Thwaite** . He said:- *"In my judgment, there is a difference between an order in ancillary relief proceedings following a contested hearing and a consent order made following an application for it, accompanied by the information required to be set out in Form 76A. I accept Mr Spon-Smith´s argument. I do not believe that this court can close its eyes to the reality of the situation. Very little information was provided to the court in Form 76A in this case - certainly, insufficient to enable the court to assess the sufficiency or propriety of the agreement made between the parties, at least insofar as it made provision for the plaintiff*

....I would be prepared to hold that the consent order in this case is not to be distinguished for present purposes from a consent order in other Divisions of the High Court."

98. In my view, McKinnon J came to the wrong conclusion about consent orders in ancillary relief proceedings. **Peacock v Peacock** was not, however, cited to him. He failed to take into account the duty of the court under section 25 towards the consent order and the scope of section 33A including the power of the court not to accept the draft order presented to it, a situation entirely different from the jurisdiction in the other Divisions of the High Court or civil litigation in the county court. A problem would arise, in this specialist type of litigation, if **B v Miller & Co** was correctly decided, as to the degree of involvement of the judge and the extent to which he has, or has not had, a ´hands on´ approach to the draft order presented to him. In the more inquisitorial atmosphere of family proceedings it might well be difficult to establish, in the absence of evidence from the judge himself, the extent to which he made some ´input´ to the order finally made. It is clear that judges would not give evidence as to how they dealt with the individual case, (see **Warren v Warren** [1996] 2 FLR 777 per Lord Woolf MR at page 785), and there might well not be agreement among the advocates, about what happened, even if they had the relevant knowledge. Since I am satisfied that the judge has a duty to consider the order, it would be inappropriate to look at individual cases to see how far he carried out that task. It falls within the wider considerations of public policy to which I shall turn in a moment.

99. I have looked first at ancillary relief proceedings, since those are the proceedings before us on appeal. In my judgment, the judge was right to dismiss the appeal from the District Judge and to hold that the appellant´s case disclosed no reasonable cause of action on the grounds which I have set out above. The defendant´s case before Longmore J was not, however, pleaded nor argued on the basis of the special position of ancillary relief proceedings, nor was it so argued before us. The judge´s decision was not based upon the special position of ancillary relief proceedings. The question of the duty upon the court in consent ancillary relief orders was raised for the first time by this Court during argument. Although it would be possible to limit this judgment to the particular facts of this appeal, not only would the pleadings present an obstacle to the defendant succeeding on appeal, but my judgment would not represent my conclusions on the arguments actually presented to this Court and to the judge. With some hesitation and recognising that my views may be said to be strictly obiter, I feel I cannot refuse to express an opinion on the wider issues raised by the arguments of counsel and decided by the judge.

100. The special categories of civil cases where the approval of the court is required for a settlement are in my view indistinguishable from consent orders in ancillary relief applications. The problem arises as to the extent of the immunity from civil action afforded to advocates in ´door of court´ settlements in all other cases. As Judge LJ has pointed out in his judgment, the immunity of the advocate from liability for negligence is not for the special protection of the legal profession. The purpose of the immunity is based upon public policy where the public interest in the good administration of justice must prevail over the

claims, however well-based, of the individual litigant. Lord Wilberforce in **Saif Ali** said at page 213:- *"Some immunity is necessary in the public interest, even if, in some rare cases, an individual may suffer."*

101. It is not limited to counsel. Lord Reid in **Rondel v Worsley** [1969]1 AC 191 said at page 229:- *"It has long been established that judge, witnesses and barristers alike have absolute privilege with regard to what is said by them in court: and for reasons similar to those which apply to proceedings in Parliament."*

102. This immunity from liability for negligence of the advocate has been recognised in the Courts and Legal Services Act 1990, section 62, which provides:-

"(1) A person-

(a) who is not a barrister; but

(b) who lawfully provides any legal services in relation to any proceedings,

shall have the same immunity from liability for negligence in respect of his acts or omissions as he would have if he were a barrister lawfully providing those services."

103. The immunity of the advocate is limited. He/she may be held liable for negligent advice in the same way as any other professional adviser. Lord Wilberforce in **Saif Ali** said at page 215:- *"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."*

104. The limits of the immunity are not yet clear but I agree with Judge LJ that the trend is to limit the circumstances in which it will be recognised and to scrutinise carefully claims by those seeking its protection.

105. The starting point has to be whether it is in the public interest that ´door of the court ´settlements should be given this protection. That in turn may depend upon ambit of the test in **Rees v Sinclair** . McCarthy P said at page 187:- *"..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 interest 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."*

106. The majority of the House in the **Saif Ali** decision approved the test propounded by McCarthy P. In my view, the policy considerations developed in **Saif Ali** are equally capable of being applicable to a settlement by the parties before the case started in court, if it can be said to be closely connected with the litigation which is about to start. Longmore J, in the present case, followed the decision of Holland J in **Landall v Dennis Faulkner & Alsop** [1994] 5 Med LR 268. Holland J held that a barrister who relied upon a report from a medical expert was immune from liability with respect to the advice he gave *´at the door of the court´* on a settlement of the action. In coming to that conclusion Holland J said at page 274:- *"It is difficult to conceive of an activity that is so intimately connected with court proceedings as advising at the court door. It is at that stage that the practitioner is able to make his or her advice specific to the tribunal, to the available evidence and to the nature and quality of the opposition. It is common for such advice to be interspersed with sessions in court and to amount to immediate reflection upon the course of proceedings. The settlement may be total or it may leave issues (typically as to costs) to be resolved by the court - in either event it manifestly affects " the way that cause is to be conducted when it comes to a hearing". Two aspects of public policy are pertinent. First, any litigation as to a court door settlement necessarily requires a court to balance that settlement with what might have been obtained by litigation before a known (and not a notional) court of comparable jurisdiction - the risk of bringing the administration of justice into disrepute is obvious. Given that the reasonably skilled and careful practitioner must take into account the likely result of litigation before a particular judge, how can the identity of the latter be other than relevant? Second, in his conduct at the court door, the barrister has a duty not just to his client but also to the Court."*

107. Holland J relied upon a passage from the judgment of Richardson J in **Biggar v McLeod** [1978] 2 NZLR 9 at page 13:- *"The giving of advice as to the compromise of proceedings, involving as it does the question of their continuation or termination, is an inherent feature of the conduct of the cause by counsel."*

108. Although Richardson J was dealing with a settlement during the trial and not before it started, for the reasons given by Holland J, with which I respectfully agree, the observations of Richardson J are equally applicable to the door of the court settlement.

109. The problem is where to draw the line? It is important not to extend the protection of the advocate beyond that which is genuinely needed to maintain the integrity of public justice. It is also important to have a clear workable rule which would be well understood that the advocate was or was not covered by immunity from suit at the door of the court. There may be an illogicality in protecting the advocate in giving his advice on the day of the hearing and not protecting him in giving the same advice in chambers or the office on the day before. But the reasons advanced by Holland J in **Landall** seem to me to be most persuasive.

110. There is, in my view, a real public interest in not allowing litigation to develop over consent orders which come before the court. The alternative - ligation over the door of the court settlement might raise not only the considerations affecting the minds of the advocates in advising a settlement, but might well require a case by case investigation of whether the court had or had not in the particular case some input. Take an example, a case has not started but the judge has called the parties and advocates into the county court to obtain a realistic time estimate and in discussion with the advocates he has expressed a preliminary opinion. If the observations of the judge have an effect on the settlement, no doubt that would come within the **Rees v Sinclair** test. But there would be a real possibility of the need to investigate in each case whether in court or waiting outside court, the settlement had been affected by the court. A conclusion as to the relevance of these considerations to the settlement arrived at may be very difficult to prove either way, may become expensive for the parties, time-consuming for the courts and may be an added drain upon the public purse. In my view, there is no real distinction between coming to an agreement while waiting to start a case or, after the case has started, asking the judge for time to discuss a settlement at any time during the hearing. A major advantage of door of court immunity is the avoidance of investigation of the effect of or exact role played by the judge or district judge.

111. In the difficult and sensitive balance between the right of a litigant to seek redress for the negligent advice of his lawyers and the need to maintain protection of the administration of justice, we should be exceedingly cautious about encouraging any opportunity to investigate in subsequent litigation what actually happened in court when the settlement was presented to the judge.

112. The compromise of proceedings immediately before or during the trial is an important and valuable part of the litigation process and ought to be encouraged. For my part, I do not believe it is in the interests of the administration of justice that any distinction should be drawn between the point at which the advocates attend court and thereafter for immunity against suit to apply. It would also be a clear workable rule which was easy to apply.

113 I would dismiss the appeal.

Order: Appeal dismissed; order made under Section 18 of the Legal Aid Act 1988 for the payment of the defendant's costs (plaintiff/nil liability); legal aid taxation of the plaintiff's costs; application for leave to appeal to the House of Lords refused; order for payment of sum in court plus accrued interest to the defendant.

MR PETER SMITH QC & MR GOSLAND (Instructed by Longrigg Harris, Bath, BA1 2NT) appeared on behalf of the Appellant
MR RUPERT JACKSON QC & MISS SUSAN SOLOMON (Instructed by Veale Wasbrough, Bristol, BS1 5DS) appeared on behalf of the Respondent