CA on appeal from QBD (Mr Ronald Walker QC) before Nourse LJ; Otton LJ; Chadwick LJ. 8th July 1998.

JUDGMENT : LORD JUSTICE CHADWICK:

1. This is an appeal, with the leave of the Judge, against the order made on 10 September 1997 by Mr Ronald Walker QC sitting as a Judge of the Queens Bench Division whereby he dismissed the defendants' appeal against the refusal of the Master to strike out the plaintiffs' claim pursuant to Order 18 rule 19 of the Rules of the Supreme Court 1965 on the grounds that it disclosed no cause of action, alternatively was an abuse of the process of the Court.

2. The appeal raises a question on which, as we were told, there has been no previous decision in this Court: namely, whether claims for negligence and breach of retainer can be brought by a party to pending proceedings against an expert whose evidence he proposes to call in those proceedings where the claims are said to arise out of the expert's conduct in preparing, in conjunction with the expert instructed by the other party to those proceedings, a joint statement indicating what parts of the evidence which, respectively, they were proposing to give at trial were or were not in issue. The preparation of such a joint statement is, of course, recognised in Order 38 rule 38 RSC.

3. The facts, as alleged in the statement of claim or as they appear from contemporary documents which are not in dispute, may be stated shortly. The plaintiffs, Mr Philip Stanton and his wife, were the owners of a dwelling house known as Espica Villa, Marsh Road, Shabbington, Aylesbury. In October 1981 the plaintiffs were concerned that their property had suffered subsidence damage. With the agreement of their insurers partial underpinning at the property was carried out in 1982. That work failed to stabilise the property. Further subsidence occurred. In November 1983 Mr Callaghan or his firm, Brian Callaghan & Associates, were engaged by the plaintiffs to make a report. In that report, which was dated 5 March 1984, Mr Callaghan advised that partial underpinning had been an inappropriate solution; but that, that work having been carried out, what was now required was total underpinning of the building.

4. On the basis of that report Mr Stanton made a claim against his insurers for the cost of total underpinning of the building. That claim was rejected. On 26 August 1986 Mr Stanton commenced proceedings against the insurers in the Oxford District Registry of the Queens' Bench Division under reference 1986 S 447. Mr Callaghan was retained to provide expert advice in support of that claim.

5. On 9 March 1997 the District Registrar gave directions in the proceedings 1986 S 447. Those included a direction that expert evidence be agreed if possible and failing agreement be limited to three expert witnesses on each side. There does not appear to have been an express direction, under Order 38 rule 37 RSC, for the reciprocal disclosure of written reports within any specified time; or any direction, under Order 38 rule 38 RSC for a meeting of experts "*without prejudice*". Nevertheless, it is clear from contemporary correspondence and from the pleadings, (i) that Mr Callaghan's report of 5 May 1984 had been provided to the insurers' solicitors, (ii) that the insurers' solicitors had themselves instructed an expert, Mr Russell, whose report, prepared in or about January 1987, had been provided to Mr Callaghan and (iii) that Mr Callaghan had set out his comments on Mr Russell's report in a letter dated 6 May 1987. In December 1987 Mr Callaghan prepared a contract specification in respect of the remedial works - that is to say, total underpinning of the building - which he then considered necessary. On the basis of that contract specification a quotation for the works was obtained in the sum of £64,812.

6. The trial of action 1986 S 447 was fixed to commence on 11 January 1990. On 17 July 1989 Mr Callaghan attended a conference with solicitors and counsel then acting for Mr Stanton. In the course of that conference he was asked to revisit the property and report on certain specific matters. He did so on or about 26 July 1989. He was subsequently asked to provide a full report.

7. Mr Callaghan prepared a draft report, dated 11 December 1989, under his new firm name of Brian Callaghan & Partners. The draft was described as *"a full report on the structural stability of Espica Villa"*. It contained advice as to the original cause of the subsidence to the property and the suitability of the partial underpinning scheme that had been carried out; and set out the firm's recommendations as to the works needed to achieve future stability of the property and an estimate of the cost of those works. In summary, the conclusions, as they appeared in the draft, were (i) that the original problem had been caused by dehydration of the clay sub-soil attributable to the proximity of willow trees, (ii) that the correct remedial works to solve that problem

would have been to remove the trees and repair the property following rehydration of the ground over time, (iii) that the course actually adopted in 1982 - partial underpinning - was *"totally the wrong procedure"*, because it gave rise to differential movement on rehydration due to the stiffness created by underpinning at only one section of the building and (iv) that, in order to overcome that problem, the underpinning should now be continued over the full length and area of the property so as to place the property on similar foundations throughout.

8. On 14 December 1989, before a report in the form of the draft had been sent to Mr Stanton or his solicitors, Mr Callaghan attended a meeting at the property with Mr Kelsey, the expert then instructed on behalf of the insurers. He did so on instructions contained in a letter dated 7 December 1989 from Mr Stanton's solicitors:

9. The Insurance Company's Solicitors are pressing for us to exchange reports with them and have suggested that a meeting of experts take place before the Christmas break at Shabbington with a view to agreeing as much as possible and making a list of those areas where a dispute really does exist.

10. Following that meeting on 14 December 1989 Mr Kelsey prepared a joint statement which he and Mr Callaghan each signed. That joint statement recorded that the solution adopted before 1982 - partial underpinning - did entail a considerable risk of future damage; and that some further damage had indeed occurred, probably due to slight foundation movement. The joint statement contained the following paragraphs which are material:

3. Risk of differential settlement : *The experts agreed that there is a risk of differential foundation movement however slight with the present system which incorporates foundations with considerable difference in formation levels.*

4. Agreed Remedy : *The experts agreed that a solution to the problem stated in item 3 above would be to disconnect the piers from the underpinning beams and form a gap between the underside of the beam and the top of the pier. This gap to be 150 mm deep and to be infilled with low density polystyrene.*

11. Mr Callaghan has deposed, in an affidavit sworn on 16 February 1998 which was admitted on this appeal without objection, that that joint statement was sent to Mr Stanton's solicitors by fax on 15 December 1989. In the light of the matters which he had agreed with Mr Kelsey, Mr Callaghan revised his draft report. He included under section 7 (recommendations) a further paragraph;

7.03. An alternative to this procedure [total underpinning] would be to remove the influence of the partially underpinned section of the property by cutting a gap between the beam and the piers. The beam would appear to have been constructed directly onto the ground and therefore the beam will act similarly to a strip footing which is similar to the original design of the foundations. This would alleviate the hard spot of the underpinning and remove the differential settlement aspect of the property and would alleviate the cracking to other parts of the property where the stiff section has undoubtedly caused cracking through the roof.

12. In paragraph 7.07 of the draft report Mr Callaghan had estimated the cost of works for the full underpinning of the property at £77,339 - that reflecting an indexed uplift from the quotation obtained following the December 1987 specification. On revision he added the following sentence :

7.07. . . . Should the alternative [mentioned in 7.03] be accepted, thereby removing the influence of the underpinning carried out in 1982 and returning the foundations of the property to that that existed in 1981, the effective repairs would remove clauses 2.04 to 2.11 and 2.15 from our specification [of December 1987] which would effectively reduce the cost of the works to approximately £21,130 excluding VAT.

13. He concluded with the following recommendation:

7.08. It is our recommendation that either of the above schemes would return the property to stability and full market value. The former being the only recommendation if the original underpinning was stated to be remaining.

14. Mr Callaghan completed the final version of his report and sent it to Mr Stanton on or about 18 December 1989 - although (in error) that final version continued to bear the date of the original draft, 11 December 1989. Between 18 December 1989 and 8 January 1990 Mr Callaghan was overseas. He returned shortly before the day fixed for the commencement of the trial of action 1986 S 447. It is not clear whether (and if so when) Mr Callaghan's final report was sent to the insurers or their solicitors; but it is common ground that it is likely that experts' reports were exchanged shortly before the trial was due to commence. In any event, the insurers' solicitors had received a copy of the joint statement from Mr Kelsey and were aware of the agreed solution.

15. It was in those circumstances that, shortly before the trial, the insurers increased the amount which they had paid into court from £5,000 to £16,000. In the light of the evidence which Mr Callaghan was proposing to give - as set out in his final report and the agreed joint statement - Mr Stanton, no doubt with the benefit of legal advice, took the view that there was no choice but to accept the monies in Court. He did so, with costs down to 31 December 1989, immediately before the trial would otherwise have commenced on 11 January 1990.

16. Mr Stanton did not use the £16,000 recovered in action 1986 S 447 for the purposes of repairing the property, Espica Villa. After payment of the unrecovered costs of the action (£11,300) there was little left out of that sum. In due course the plaintiffs sold their property for £50,000. It is said that that was, in effect, its site value. It is alleged that, had the property been repaired by total underpinning, it would have been worth £105,000.

17. The current proceedings, which are brought by Mr Stanton and his wife as former co-owners of Espica Villa against Mr Callaghan, Brian Callaghan & Associates and Brian Callaghan & Partners, were commenced on 13 July 1995. In paragraph 11 of the statement of claim it is alleged that the alternative solution proposed in paragraph 7.03 of Mr Callaghan's final report and in paragraph 4 of the agreed joint statement (for convenience referred to as "the gap solution") was not feasible and would not have been effective to return the property to stability. It is also alleged in paragraph 11 of the statement of claim that, in advising that the gap solution was feasible and would be effective to return the property to stability and its full market value, Mr Callaghan acted negligently and in breach of implied terms in his contract of retainer. A defence to that statement of claim was served on 31 January 1996.

18. By summons issued on 21 March 1997 the defendants applied to strike out the plaintiffs' claim pursuant to Order 18 rule 19 RSC on the grounds that it disclosed no reasonable cause of action; that it was scandalous, frivolous or vexatious; or that it was otherwise an abuse of the process of the Court. The basis of the application is set out, conveniently, in paragraph 24A of a proposed amended defence; leave to serve which was sought under an alternate head in the summons of 21 March 1997:

    24A. In the yet further alternative, the defendants will contend that, in respect of each and/or all of the individual reports and/or the meeting of experts on 14 December 1989 and/or the conference at Court on 11 January 1990, the first defendant was acting in his capacity as expert adviser retained by the plaintiffs in support of their claim against the Sun Alliance. In the premises, the defendants are entitled to and claim immunity from suit in respect of each/or all of the individual reports and/or the meeting of experts on 14 December 1989 and/or the conference at Court on 11 January 1990.

19. The defendants' summons came before Master Murray on 11 July 1997. He refused the application to strike out, gave the plaintiffs general leave to amend their statement of claim and gave the defendants leave to amend the defence. The defendants appealed to the Judge. On 21 August 1997 the plaintiffs amended the statement of claim to allege (at paragraph 7) that it was an implied term of Mr Callaghan's retainer that he would act in accordance with the plaintiffs' lawful instructions and within the limits of his authority. On the basis of that implied term the amended statement of claim introduced, under the particulars of negligence and breach of contract set out in paragraph 11, a new allegation:

    (A) At a meeting between experts on the 14 December 1989 he [Mr Callaghan] wrongfully agreed facts and an opinion with Mr Kelsey, the expert for the Sun Alliance, and wrongfully conceded that the damage to the plaintiffs' property could be repaired without the need for full underpinning without first consulting the plaintiffs or their legal advisers and without their actual authority or consent. In the premises Mr Callaghan exceeded his authority and without the plaintiffs' agreement he wrongly conceded the major issue in the action.

20. When the matter came before the Judge on 10 September 1997 it became clear that counsel for the plaintiffs wished to advance their case on a rather wider front than that pleaded; and, in particular, wished to allege that there were to be implied as terms of the defendants' retainer, in addition to those already pleaded, (i) that, if Mr Callaghan changed his opinion as to the merits of the claim being advanced by the plaintiffs (or otherwise so as to affect radically their claim), he would first communicate that change of view to the plaintiffs and obtain their express authority before disclosing it to the defendant and (ii) that his advice to the plaintiffs and any report prepared for the purposes of disclosure to the insurers would be his own independent product uninfluenced by the exigencies of litigation or any improper or extraneous considerations. The second of those implied terms is the foundation for allegations of breach of duty now

made in sub-paragraphs (B) and (C) in the particulars under paragraph 11 of a re-amended statement of claim served on 14 October 1997:

(B) He [Mr Callaghan] was influenced in changing his opinion and agreeing the remedy by an improper and/or extraneous consideration namely a statement by the said Mr Kelsey that the insurers would not agree to pay for a scheme of full underpinning because it would represent a degree of betterment falling outside the terms of the insurance cover.

(C) He failed to inform the plaintiffs alternatively the first plaintiff or their legal advisers of the statement of Mr Kelsey referred to at (B) above which the plaintiffs alternatively the first plaintiff avers was or was one of the facts, reasons or assumptions upon which his radical change of opinion was based.

21. Although the new allegations which subsequently found their way into the re-amended statement of claim had not been formally pleaded when the matter was before the Judge it is plain from his judgment that he approached the issues before him on the basis that those allegations were to be made. It has been agreed between counsel that the proper course for this Court to adopt in those circumstances is to regard the plaintiffs' case as that which is now pleaded in the re-amended statement of claim. On that basis the plaintiffs' allegations of breach of duty may fairly be summarised as follows:

(1) That Mr Callaghan's advice that the gap solution would resolve the subsidence problem and restore the property to its full market value was wrong (sub-paragraph (a) in the particulars under paragraph 11) and was the result of negligence in a number of respects particularised in sub-paragraphs (b) - (h).

(2) If (contrary to the plaintiffs' primary case) the gap solution was a viable solution, the defendant was negligent in failing to point that out at any time before delivery of his final report on or about 18 December 1989 (sub-paragraphs (i) and (j) in the particulars under paragraph 11). Further he failed to provide any accurate or adequate costing of the works needed to effect the gap solution (sub-paragraph (l) in those particulars).

(3) If, as Mr Callaghan asserts - see paragraph 10 of his affidavit sworn on 11 February 1998 - and the plaintiffs now accept, the gap solution first occurred to him in the course of his meeting with Mr Kelsey on 14 December 1989, then (i) he was wrong to allow himself to be influenced by a statement, said to have been made by Mr Kelsey at that meeting, that the insurers would not agree to pay for a scheme of full underpinning because it would represent a degree of betterment falling outside the terms of the insurance cover and (ii) he was in breach of duty in failing to inform the plaintiffs or their solicitors of that statement before taking it into account (sub-paragraphs (B) and (C) in the particulars under paragraph 11).

(4) On the basis that, in the course of the meeting on 14 December 1989, Mr Callaghan did, properly and on material which he was entitled to take into account, form the view that the gap solution was viable he was in breach of duty in communicating that view to Mr Kelsey without having first obtained the plaintiffs' express authority or consent (sub-paragraph (A) in the particulars under paragraph 11).

(5) Mr Callaghan was in breach of duty in going abroad on 18 December 1989 without informing the plaintiffs' solicitors or leaving a contact number with them - thereby (so it is alleged) making himself unavailable to explain his ideas in respect of the gap solution until the day of the trial (sub-paragraph (k) in the particulars under paragraph 11).

22. The Judge held that there was an essential distinction between alleged negligence on the part of the expert acting *qua* expert witness and alleged negligence on the part of the expert acting *qua* adviser to the party instructing him. In the first category of case there will be immunity from suit on the grounds of public policy; in the latter there will not. He accepted that Mr Callaghan was acting in both capacities. He went on to say this (transcript, pages 8E-9A).

23. When entering into the agreement of 14th December he [Mr Callaghan] was acting as the plaintiffs' expert witness. Prima facie, whatever agreement he entered into in the course of that meeting was effected in that capacity, and he would be immune from suit in respect of alleged negligence in agreeing the terms that he did.

24. Nevertheless, he declined to strike out the statement of claim. He held that it was arguable that, before entering into the agreement with Mr Kelsey on 14 December 1989, Mr Callaghan *qua* adviser ought to have

notified the plaintiffs that he was proposing to agree something that was "radically inconsistent" with the case thus far advanced. He held, also, that it was arguable that the immunity afforded to witnesses might not extend to negligence which consisted in taking into account extraneous matters, not within the province of the expert. In effect, therefore, the Judge was satisfied that the plaintiffs had an arguable case under the heads which I have identified as (3) and (4) above; although, as he pointed out, he was not invited to (and did not) undertake the exercise of distinguishing between the various pleaded allegations with a view to striking out some and not others.

25. In relation to the heads of claim which the Judge held to be arguable - which I have identified as (3) and (4) above and which have emerged as sub-paragraphs (A), (B) and (C) in paragraph 11 of the re-amended statement of claim - the allegations, as pleaded, are that Mr Callaghan acted in breach of the instructions to be implied in his retainer. The allegations, properly understood, are not allegations of negligence; they are allegations that Mr Callaghan went beyond, or acted inconsistently with, what he had been instructed to do. Accordingly, as it seems to me, the first question to consider in relation to these heads of claim is whether the allegations of breach of duty are capable of being made out. Unless there is a *prima facie* case that (absent negligence) Mr Callaghan was in breach of his instructions in agreeing, at the meeting on 14 December 1989, that the gap solution was viable, the question of immunity does not arise in relation to these heads of claim. They fail on the basis that no breach of duty can be made out.

26. In this context it is essential to identify what were Mr Callaghan's instructions; both generally in relation to action 1986 S 447 and, in particular, in relation to the meeting on 14 December 1989. The allegation, in paragraph 7 of the re-amended statement of claim, is that Mr Callaghan agreed "to provide technical and expert advice in support of the plaintiffs' claim". The claim in action 1986 S 447 - as it appeared from the statement of claim endorsed on the writ in that action - may be summarised as follows: (i) that, in or about 1980, the plaintiffs' property had suffered subsidence damage caused by trees growing on the neighbouring land, (ii) that the works of partial underpinning which had been carried out in 1982 had failed to remedy that damage and (iii) that further works (identified in Mr Callaghan's report of 5 March 1984) were required. The issues in relation to which Mr Callaghan could provide expert advice were (i) whether there was a continuing liability to subsidence at the plaintiffs' property, if so (ii) what was the cause and (iii) what further remedial works were required. Those were the matters on which he was to give evidence at the trial which was to commence on 11 January 1990. The instructions in the letter of 7 December 1989 from Mr Stanton's solicitors - to which I have already referred - were to meet Mr Kelsey *"with a view to agreeing as much as possible and making a list of items agreed and those areas where a dispute really does exist"* . There was nothing in those instructions which required Mr Callaghan to seek further authority from the solicitors before reaching agreement with Mr Kelsey as to the matters on which there would be no evidential dispute between them. The purpose of the meeting, as Mr Callaghan had been told, was to narrow the issues at trial on which he and Mr Kelsey would be in dispute. That was to be done by agreeing as much as possible. The outcome of the meeting was to be recorded in writing, in a form to which they could both assent.

27. The agreed joint statement which the two experts signed following their meeting on 14 December 1989 addressed the issues in relation to which expert evidence was to be given at the trial. It records that Mr Callaghan and Mr Kelsey were in agreement (i) that there was some continuing foundation movement and (ii) that the probable cause was the differential arising from partial underpinning. It also records agreement as to a remedy: the gap solution would avoid the problem associated with the differential arising from partial underpinning. It seems to me that (absent negligence) Mr Callaghan, in agreeing the joint statement, was doing just what he had been instructed to do. I can see no basis upon which he can be said to have acted in breach of his retainer if, in order to give effect to instructions to agree as much as possible, he sought a solution which took into account the fact that, as stated by Mr Kelsey, the insurers would not agree to pay for a scheme of full underpinning because it would represent a degree of betterment. It was obviously sensible, in those circumstances, to consider whether there was some other, equally viable, scheme which the insurers would accept. If there was, and if that was a scheme on which he and Mr Kelsey could agree, it was appropriate - indeed necessary - to say so.

28. For these reasons I am satisfied that the Judge was wrong to hold that the heads of claim pleaded under sub-paragraphs (A), (B) and (C) in the particulars under paragraph 11 of the re-amended statement of claim -

identified as (3) and (4) above -were arguable. In my view (absent negligence) those allegations of breach of duty cannot be sustained. In reaching that conclusion I do not find it necessary to rely on any immunity from suit which might arise from the position of Mr Callaghan as a potential witness. I prefer to express no view on the question whether any such immunity would extend to a claim based on the failure of an expert to act within the confines of his instructions. In my view, that question does not arise on the facts in the present case.

29. At the hearing of the appeal counsel for respondents (the plaintiffs in the action) made it clear that the allegations pleaded under sub-paragraphs (i), (j) and (l) in the particulars under paragraph 11 of the re-amended statement of claim would not be pursued. It is unnecessary, therefore, to consider further the head of claim which I have identified as (2) above.

30. I can deal shortly with the allegation pleaded under sub-paragraph (k) in the particulars under paragraph 11 of the re-amended statement of claim - identified as (5) above. It is said that Mr Callaghan was in breach of duty in going on holiday after submitting his report on 18 December 1989 without informing the plaintiffs' solicitors or leaving a contact number with them - thereby (so it is alleged) depriving the plaintiffs of the opportunity to change their expert before trial. In my view the allegation is misconceived. The report delivered on 18 December 1989 made it clear what Mr Callaghan's evidence would be if he were called as a witness at trial. It is not alleged that he could have been persuaded to alter the evidence which he proposed to give by representations made on behalf of the plaintiffs or their solicitors. In any event the plaintiffs would have been ill-advised to call Mr Callaghan to give evidence which differed from that contained in the agreed joint statement, even if he were persuaded that the views recorded in that joint statement could no longer be supported. In practice, therefore, once they knew of the views recorded in the joint statement and in Mr Callaghan's final report, the plaintiffs were faced with the choice of accepting his advice or instructing another expert. There is no suggestion that they considered instructing another expert; but, if they had been minded to do so, they were not prevented from taking that course by the fact that Mr Callaghan was on holiday. The claim based on the allegation in sub-paragraph (k) of the particulars under paragraph 11 in the re-amended statement of claim is not capable of being sustained.

31. I have indicated that the plaintiffs would have been ill-advised to call Mr Callaghan to give evidence which differed from that in the agreed joint statement, even if he were persuaded by representations made to him between 14 December 1989 and 11 January 1990 that the views recorded in that joint statement could no longer be supported. That reflects my view that, if he were called as a witness, the agreed joint statement could have been put to him. We were referred in argument to the decisions of His Honour Judge Fox-Andrews QC in **Murray Pipework Limited v UIE Scotland Limited** (1990) 6 Constr LJ 56 and His Honour Judge Newey QC in **Richard Roberts Holdings Limited v Douglas Smith Stimson Partnership** (1990) 6 Constr LJ 70. This is not the occasion to consider what the status of the agreed joint statement would have been if the action had proceeded to a trial at which Mr Callaghan were not called as a witness. It is not necessary to decide whether or not, in those circumstances, the agreed statement could have been relied upon by the insurers. What is beyond doubt, in my view, is that the statement could have been put to Mr Callaghan or to Mr Kelsey if either had sought to depart from the views recorded in it. To hold otherwise would be to deprive a joint statement agreed between experts of the purpose which it was obviously intended to serve.

32. I turn, therefore, to the plaintiffs' primary claim: that Mr Callaghan's advice that the gap solution would resolve the subsidence problem and restore the property to its full market value was wrong, as pleaded in sub-paragraph (a) in the particulars under paragraph 11 in the statement of claim. On this application to strike out the court must assume that that is an allegation which could be established at trial. In fairness to Mr Callaghan, however, it is appropriate to observe (i) that the gap solution has not been attempted and so cannot be shown to have failed in practice and (ii) that the allegation that the gap solution was not viable is strenuously denied. Further, it would not, of course, be sufficient for the plaintiffs to establish at trial that the gap solution was not viable. It would be necessary for them to establish that the contrary view, which Mr Callaghan adopted on 14 December 1989, was reached as the result of negligence, as pleaded in sub-paragraphs (b) - (h) in the particulars under paragraph 11 of the statement of claim. Negligence, in this context, connotes something outside the range of reasonable professional judgment. There are formidable hurdles for the plaintiffs to overcome if this action proceeds. But the court must approach this application on

the assumption that the plaintiffs may succeed in overcoming those hurdles at a trial. It is not relevant to speculate whether that assumption might prove ill-founded.

33. The proposition that the defendants can escape liability for negligence on the ground that Mr Callaghan's advice as to the feasibility of the gap solution as a remedy for subsidence was given in the context of litigation requires careful scrutiny. Mr Callaghan was a professional man who undertook, for reward, to provide advice within his expertise. The expectation of those who engaged him must have been that he would exercise the care and attention appropriate to what he was engaged to do. I would find it difficult to accept that Mr Callaghan did not share that expectation. But for the fact that he was a potential witness in pending proceedings there could be no doubt that the law would provide a remedy if that expectation was not fulfilled. But, equally, there can be no doubt that the law does recognise immunity from suit in relation to certain things done or omitted to be done in the course of preparing for or taking part in a trial. It does so on the basis of a supervening public interest which transcends the need to provide a remedy in the individual case. The question on this appeal is whether the facts, as pleaded, fall within that principle.

34. The immunity of a witness from suit in respect of evidence given in court was described by Lord Justice Simon Brown in **Silcott v Commissioner of Police for the Metropolis (**1996) 8 Administrative Law Reports 633, at page 636, as a fundamental rule of law. The origins of the rule were traced in the judgment of Chief Baron Kelly in Dawkins v Lord Rokeby (1873) 8 QB 255, at pages 263-265. He concluded, at page 265, that:

35. Upon all these authorities it may now be taken to be settled law, that no action lies against a witness upon evidence given before any court or tribunal constitutes according to law.

36. The basis of the immunity in respect of evidence given in court was explained by the Lord Chancellor, Lord Halsbury, in **Watson v McEwen [**1905] AC 481, at page 486: *. . . the conduct of legal procedure by courts of justice, with the necessity of compelling witnesses to attend, involves as one of the necessities of the administration of justice the immunity of witnesses from actions being brought against them in respect of evidence they have given.*

37. In **Watson v McEwen** the claim was for damages for slander in respect of evidence given by the appellant, a doctor, in the course of separation proceedings brought by the respondent against her husband. Two questions arose (i) whether the appellant could be liable for evidence given in court and (ii) whether he could be liable for the same or similar information previously given to the husband's legal adviser. Lord Halsbury had no doubt as to the first question: no proceedings would lie for evidence given in court. He observed that the second question was both novel and ingenious. Differing from the courts below, he answered it in these terms, at pages 486-7:

38. It appears to me that the privilege which surrounds the evidence actually given in a Court of justice necessarily involves the same privilege in the case of making a statement to a solicitor and other persons who are engaged in the conduct of proceedings in courts of justice when what is intended to be stated in a court of justice is narrated to them - that is, to the solicitor or writer to the Signet. If it were otherwise, I think what one of the learned counsel has with great cogency pointed out would apply - that from time to time in these various efforts which have been made to make actual witnesses responsible in the shape of an action against them for the evidence they have given, the difficulty in the way of those who were bringing the action would have been removed at once by saying "I do not bring the action against you for what you said in the witness box, but I bring the action against you for what you told the solicitor you were about to say in the witness box". If that could be done the object for which the privilege exists is gone, because then no witness could be called; no one would know whether what he was going to say was relevant to question in debate between the parties. A witness would only have to say, "I shall not tell you anything; I may have an action brought against me tomorrow if I do; therefore I shall not give you any information at all". It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice - namely the preliminary examination of witnesses to find out what they can prove. It may be that to some extent it seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony.

39. It is clear that Lord Halsbury took the view that, if full effect was to be given to the requirement of public policy that witnesses should not be deterred from giving evidence by a fear that they might be sued by a

disappointed party, then the immunity must extend to the making of a witness statement as a step preliminary to the giving of evidence in court.

40. That rationale was adopted by Mr Justice Salmon in **Marrinan v Vibart** [1963] 1 QB 234 when applying the principle to reports made by police officers to the Director of Public Prosecutions. He said this, at page 237: *It has been well settled law for generations - certainly since Lord Mansfield's time - that witnesses enjoy absolute immunity from actions brought against them in respect of any evidence they may give in a court of justice. This immunity exists for the benefit of the public, since the administration of justice would be greatly impeded if witnesses were to be in fear that any disgruntled or possibly impecunious persons against whom they gave evidence might subsequently involve them in costly litigation.* His decision was upheld by the Court of Appeal at [1963] 1 QB 529 .

41. The need for immunity on the basis explained in **Watson v McEwen** and in **Marrinan v Vibart** was relied upon by Mr Justice Drake in **Evans v London Hospital Medical College (University of London)** [1981] 1 WLR 184, at page 191F. He was addressing the question whether, and if so how far, the absolute immunity in respect of things said or done in the preparation of witness statements or reports, recognised in those decisions, extended to cover the acts or omissions of a witness or potential witness during the stage when they were collecting or considering material with a view to its *possible* use in criminal proceedings. He held, at page 191F-G, that: *The immunity given to a witness or potential witness is because* ***". . . the administration of justice would be greatly impeded if witnesses were to be in fear that . . . persons against whom they gave evidence might subsequently involve them in costly litigation":*** see *per* Salmon J in **Marrinan v Vibart** [1963] 1 QB 234, 237.

42. If this object is to be achieved I think it essential that the immunity given to a witness should also extend to cover statements he makes prior to the issue of a writ or commencement of a prosecution, provided that the statement is made for the purpose of a possible action or prosecution and at a time when a possible action or prosecution is being considered. In a large number of criminal cases the police have collected statements from witnesses before anyone is charged with an offence; indeed sometimes before it is known whether or not ***any*** criminal offence has been committed.

43. If immunity did not extend to such statements it would mean that the immunity attaching to the giving of evidence in court or the formal statements made in preparation for the court hearing could easily be outflanked and rendered of little use.

44. Lord Browne-Wilkinson put the immunity on the same basis in **X (Minors) v Bedfordshire County Council** [1995] 2 AC 633, 754G-H: *The immunity of witnesses from any action founded on their evidence was originally designed to ensure in the public interest that witnesses would not, through fear of later civil proceedings, be inhibited from giving frank evidence in court. This immunity was widened by this House in* ***Watson v McEwen; Watson v Jones*** *[1905] AC 480 to cover information and reports given by a potential witness to the legal advisers of a party for the purpose of preparing a proof.*

Lord Browne-Wilkinson then set out the passage from the judgment of Mr Justice Drake in **Evans v London Hospital** to which I have just referred, and went on, at [1995] 2 AC 633, 755E: *. . . I find the reasoning of Drake J compelling at least in relation to the investigation and preparation of evidence in criminal proceedings. In my judgment exactly similar considerations apply where, in the performance of a public duty, the local authority is investigating whether or not there is evidence on which to bring proceedings for the protection of the child from abuse, such abuse frequently being a criminal offence.*

45. There is, if I may say so, no difficulty in recognising the need for immunity in relation to the investigation and preparation of evidence in criminal proceedings - or in child abuse cases - in order to ensure that potential witnesses are not deterred from coming forward. For my part, however, I find it much more difficult to recognise an immunity founded on the need to ensure that witnesses are not deterred from giving evidence by the possibility of vexatious suits in a case where the witness is a professional man who has agreed, for reward, to give evidence in support of his opinion on matters within his own expertise - *a fortiori* , where the immunity is relied upon to protect the witness from suit by his own client, towards whom, *prima facie* , he owes contractual duties to be careful in relation to the advice which he gives. I think that there is much force in the observation of Mr Simon Tuckey QC, when sitting as a Judge of the Queen's Bench Division in **Palmer**

v Durnford Ford [1992] 1 QB 483, at page 488 D-E: *. . . I do not think that liability for failure to give careful advice to his client should inhibit an expert from giving truthful and fair evidence in court.*

46. It is important to keep in mind that expert witnesses have the safeguard, in common with other professional men, that they will not be held liable for negligent advice unless that advice is such as no reasonable professional, competent in the field and acting reasonably, could give. I find it difficult to believe that the pool of those who hold themselves out as ready to act as expert witnesses in civil cases, on terms as to remuneration which they must find acceptable, would dry up if expert witnesses could be held liable to those by whom they are instructed for failing to take proper care in reaching the opinions which they advance. Indeed, I would find it a matter of some surprise if expert witnesses offer their services at present on the basis that they cannot be held liable if their advice is negligent.

47. It is important, also, to keep in mind that immunity from suit - where liability would otherwise lie - constitutes an exception to the general law. The exception must be justified on some ground of public policy. The justification requires careful examination. If, as I think, immunity from suit in respect of negligent advice cannot be justified, in the case of a witness who has held himself out as ready to give expert evidence in the course of carrying on his profession, on the ground that, without protection against vexatious claims, the pool of experts willing to testify would dry up, the immunity cannot be recognised unless some more satisfactory basis for departing from the general law on the ground of public policy can be found. It seems to me that the analysis, in the speeches in the House of Lords in **Rondel v Worsley** [1969] 1 AC 191 and in Saif **Ali v Sydney Mitchell & Co** [1980] AC 198, of the public policy underlying advocates' immunity offers assistance.

48. In **Rondel v Worsley** the House had to consider immunity in respect of a barrister's conduct in court in the context of a criminal prosecution of his client. It is, I think, sufficient for present purposes to take the decision from the headnote, at page 191G-192B: *. . . a barrister was immune from an action for negligence at the suit of a client in respect of his conduct and management of a cause in court and the preliminary work connected therewith such as the drawing of pleadings. That immunity was not based on the absence of contract between barrister and client but on public policy and long usage in that (a) the administration of justice required that a barrister should be able to carry out his duty to the court fearlessly and independently; (b) actions for negligence against barristers would make the retrying of the original actions inevitable and so prolong litigation, contrary to the public interest; and (c) a barrister was obliged to accept any client, however difficult, who sought his services.*

49. It is, of course, self-evident that the third of those grounds of public policy has no relevance to the position of an expert witness *vis a vis* his own client in a construction dispute. The expert can choose the clients from whom he is willing to accept instructions. There may be circumstances in which the expert is obliged to accept a nomination from his professional body to assist the court; but that is not a factor in this case.

50. Shortly after the decision in **Rondel v Worsley** *(supra)*, the second of the grounds of public policy identified in that case -the need to avoid a multiplicity of actions - was said by Lord Wilberforce, in **Roy v Prior** [1971] AC 470 at page 480D, to be one of the traditional reasons underlying witness immunity: *The reasons why immunity is traditionally (and for this purpose I accept the tradition) conferred upon witnesses in respect of evidence given in court, are in order that they may give their evidence fearlessly* ***and to avoid a multiplicity of actions in which the value or truth of their evidence would be tried over again .*** [emphasis added].

51. That passage was adopted by Mr Simon Tuckey QC in **Palmer v Durnford Ford** [1992] 1 QB 483, at page 487B, and by Lord Justice Simon Brown in **Silcott v Commissioner of Police for the Metropolis** (1996) 8 Administrative Law Reports 633, at page 637E. *In* ***Rondel v Worsley*** *(supra) the question of liability for work done out of court did not arise on the facts. As was pointed out by Lord Diplock in Saif Ali v Sydney Mitchell & Co [1980] AC 198, at page 217H, the four members of the House who expressed opinions that a barrister would be liable for work done out of court "were not of one mind" as to where the dividing line lay between what work attracted immunity from negligence and what work did not. It was that question which the House had to consider further in Saif Ali itself.*

52. In Saif Ali the plaintiff claimed damages for professional negligence against the defendant solicitors in respect of their failure to join a party (against whom claims had since become statute barred) in proceedings arising out of a motor accident. The solicitors issued a third party notice against the barrister who had settled the writ and statement of claim in those proceedings and who had advised against joinder of the additional party. The barrister sought to have the third party notice struck out on the ground that he was immune from suit in

respect of advice given in connection with the conduct of the case. The House of Lords had to consider whether advocates' immunity extended to the factual situation alleged. As Lord Wilberforce pointed out, [1980] AC 198 at page 212, that required a reconsideration of **Rondel v Worsley** [1969] 1 AC 191. He referred to the need to avoid a multiplicity of actions in the following passage, at pages 214H-215A: *. . . immunity from an action . . . depends upon public policy. 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. These two considerations show that the area of immunity must be cautiously defined.*

53. Lord Diplock was not persuaded that either the first or the third of the grounds in **Rondel v Worsley** *(supra)* provided a satisfactory basis for holding that a barrister ought to be completely immune from liability for negligence for what he does in court in conducting criminal or civil proceedings - *"let alone for anything that he does outside court in advising about litigation whether contemplated or pending or in settling documents for use in litigation"* . He went on to say this, [1980] AC 198 at page 221H: *There are, however, two additional grounds referred to in some of the speeches in* ***Rondel v Worsley*** *[1969] 1 AC 191 which can be used to supplement those reasons so far as they protect a barrister from liability in respect of the way in which he has conducted proceedings in court . . . ;* ***save to a very limited extent, however, neither of them would apply to work done out of court*** . [emphasis added].

54. The first of those grounds is that the barrister's immunity from liability for what he 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. That immunity is based on public policy, designed *"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"* (*ibid*, at page 222A-B). The second is the need to avoid a multiplicity of trials - as Lord Diplock explained at pages 222D-223D. But it is relevant to note that Lord Diplock went on to say this, at page 223E-F:

55. A similar objection [the need to avoid a multiplicity of trials] . . . would not apply in cases where an action has been dismissed or judgment entered without a contested hearing, and there has been 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 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.

56. Without the support of the two additional grounds of public interest which he identified Lord Diplock found 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"* (*ibid*, at page 224B). It is not clear whether either Lord Wilberforce or Lord Diplock regarded that exception as extending to cases in which the evidence was never actually given in court; because, for example, there was no contested trial. But, if it does so extend, it cannot be justified by recourse to the need to avoid a multiplicity of trials - for the reasons which they both set out.

57. Lord Salmon rejected, emphatically, the proposition that there was any general immunity extending to pre-trial advice. He said this. *ibid* at page 230B-C: *I cannot, however, understand how any aspect of public policy could possibly confer immunity on a barrister in a case such as the present should he negligently fail to join the correct persons or to advise that they be joined as defendants; or for that matter should he negligently advise that the action must be discontinued. It seems plain to me that there could be no possibility of a conflict between his duty to advise his client with reasonable care and skill and his duty to the public and the courts. I do not see how public policy can come into this picture.*

58. Nevertheless, Lord Salmon was prepared to recognise that there were cases in which the advice given out of court was so closely connected with conduct of the case in court that it should be covered by the same immunity - see at page 231G-H: *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: see, e.g. ***Marrinan v Vibart*** *[1963] 1 QB 234; [1963] 1 QB 526.*

59. Each of the three members of the House who formed the majority - Lord Wilberforce, Lord Diplock and Lord Salmon - adopted, with approval, the test posed by McCarthy P, sitting in the Court of Appeal in New Zealand in **Rees v Sinclair** [1974] 1 NZLR 180, at page 187 lines 17-25: *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 case in court that it can fairly be said to be a preliminary decision affecting the way the cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice, and that is why I would not be prepared to include anything which does not come within the test I have stated.*

On the basis of that test, the House of Lords held, by a majority, that the facts alleged in **Saif Ali** [1980] AC 198 did not fall within the immunity. The other two members of the House - Lord Russell and Lord Keith - took a wider view of the scope of the immunity.

60. **Evans v London Hospital Medical College (University of London)** [1981] 1 WLR 184 was decided shortly after Saif Ali . Mr Justice Drake considered, in Evans, whether the scope of the decision in **Marrinan v Vibart** [1963] 1 QB 234, [1963] 1 QB 529 had been narrowed by the decision of the House of Lords in **Saif Ali .** He referred to the test in **Rees v Sinclair** which had been adopted by the majority. He observed that, on that test, the immunity would not cover all of the negligence alleged against the defendants in the action with which he was concerned. He went on, *ibid* at page 191 D-F: *But although the immunity attaching to barristers exists for reasons of public policy, as does that attaching to witnesses, I think it clear that it is not identical. The immunity enjoyed by a witness does in fact protect everyone engaged in proceedings in court - not merely the witnesses, but the Judge, counsel, jurors and parties: see Lord Wilberforce in* ***Saif Ali v Sydney Mitchell & Co [****1980] AC 198, 214 and per Lord Diplock at p.222. The barrister's immunity from action in respect of his conduct of the litigation is a separate even if in some ways related branch of immunity. Public policy gives immunity to the barrister so that he may be free without any fear of civil action in his conduct of the litigation: it is not, however, right that he should be given any wider immunity than is necessary for that purpose.*

61. That passage immediately precedes the passage to which I have already referred, [1981] 1 WLR 184, 191F-H, in which Mr Justice Drake explains why it is necessary that the immunity given to a witness should extend to statements made prior to the issue of a writ or the commencement of a prosecution. It is pertinent to note that, when approving Mr Justice Drake's reasoning in Evans, Lord Browne-Wilkinson was careful to limit his approbation to the context with which he was concerned; that is to say, the investigation and preparation of evidence in criminal proceedings and the investigation by a local authority, in performance of a public duty, of allegations of child abuse. In **X (Minors) v Bedfordshire County Council** [1995] 2 AC 633, at page 755F, Lord Browne-Wilkinson said this: *I express no view as to the position in relation to ordinary civil proceedings, but nothing I have said casts any doubt on the decision of Mr Simon Tuckey QC in* ***Palmer v Durnford Ford*** *[1992] QB 483.*

62. It is to the decision **Palmer v Durnford Ford** that I now turn. It is convenient to take a summary of the facts alleged in the statement of claim from the judgment, at page 485H - 486E: *The plaintiffs are haulage contractors. In September 1978 they bought a new lorry tractor unit from Leyland Vehicles Limited. It broke down in May 1981 and its engine was repaired by Arlington Motor Company Limited. In July 1981 the plaintiff sought legal advice from the solicitors as to whether they could recover the cost of the repair and their consequential losses from Leyland. In January 1982, after assurances by him that he had the necessary qualifications and experience, the solicitors retained the expert, who is an engineer, to prepare a report on the cause of the breakdown of the engine. However, before he had reported the engine again broke down and the plaintiff's instructions to the solicitors and their instructions to the expert were extended to include this second breakdown. After inspecting the engine the expert produced a written report dated 12 February 1982 which advised that claims against Leyland and Arlington were justified. Based on this report and counsel's advice the plaintiffs obtained a full legal aid certificate to take proceedings which were issued in January 1983. In due course the date for the trial was fixed for 7 October 1985. As the expert was to be called to give evidence in support of the plaintiffs' claim his written report was disclosed to Leyland and Arlington. Leyland and Arlington then disclosed their own experts' reports. Having seen these reports the expert advised that he would have difficulty in supporting the claim against Leyland but that the claim against Arlington was still justified including a claim that when they had*

repaired the engine Arlington had unnecessarily replaced certain parts. On 8 October 1985, after the first plaintiff and the expert had given evidence, the plaintiffs abandoned their claims and by consent judgment was given for Leyland and Arlington with costs.

63. It was alleged against the expert *(inter alia)* that he should have advised from the outset that no claim against Leyland was justified and that he persisted in an obviously wrong view that Arlington had unnecessarily replaced parts. The expert contended that he was immune from suit because he was at all times acting in the course of preparing evidence for a claim or possible claim. That contention required the Judge to consider the circumstances in which the law will recognise immunity from suit in relation to advice given to a party who has retained him by an expert who is to be called by that party as a witness at a pending trial.

64. The Judge identified the principles in the following passage, [1992] QB at page 487 A-C: *It is well settled that witnesses in either civil or criminal proceedings enjoy immunity from any form of civil action in respect of evidence given during those proceedings. The reason for this immunity is so that witnesses may give their evidence fearlessly and to avoid a multiplicity of actions in which the value or truth of their evidence would be tried over again: see* ***Roy v Prior*** *[1971] AC 470, 480. This immunity has also been held to apply to the preparation of the evidence which is to be given in court. Thus in* ***Marrinan v Vibart*** *[1963] 1 QB 528, where the plaintiffs sought to sue police officers who had prepared a report for the Director of Public Prosecutions and appeared as witnesses against him at his criminal trial, the court said, at page 535, that the immunity "****protects witnesses in their evidence before the court and in the preparation of the evidence which is to be so given".***

65. After referring to the decision of Mr Justice Drake in **Evans v London Hospital Medical College (University of London)** [1981] 1 WLR 184, the Judge went on, at page 488 A - F: *In this case the expert was retained for reward by the plaintiffs to advise them as to whether from an engineering point of view a civil claim against Leyland and/or Arlington was justified. The previous cases have been concerned with witnesses who have given or were to give evidence, usually in criminal proceedings, "against" the plaintiffs. There is no English authority dealing with the position of an expert in circumstances such as those which exist in this case. Nor has this point been considered, as far as counsel have been able to discover, in any other common law jurisdiction.*

. . . I approach the matter by noting first that experts are usually liable to their clients for advice given in breach of their contractual duty of care and secondly that the immunity is based upon public policy and should therefore only be conferred where it is absolutely necessary to do so. Thus, prima facie, the immunity should only be given where to deny it would mean that expert witnesses would be inhibited from giving truthful and fair evidence in court. Generally I do not think that liability for failure to give careful advice to his client should inhibit an expert from giving truthful and fair evidence in court.

. . . I can see no good reason why an expert should not be liable for the advice which he gives to his clients as to the merits of the claim, particularly if proceedings have not been started and a fortiori as to whether he is qualified to advise at all. Since both these allegations are made in this case I do not think that the decision [of the District Judge] to strike out the whole of the statement of claim can be justified. . . .

66. Sir Thomas Bingham, Master of the Rolls, expressly approved that decision in his judgment in **M (a Minor) v Newham London Borough Council ,** reported with four related appeals *sub nom* **X (Minors) v Bedfordshire County Council [**1995] 2 AC 633, 661G; and Lord Browne-Wilkinson, in the House of Lords in that case, *ibid* at page 755F, made it clear that, although differing from the Court of Appeal on the scope of witness immunity, nothing which he had said was intended to cast any doubt on the decision in **Palmer.** For present purposes, however, the importance of **Palmer v Durnford Ford** [1992] QB 483 lies not in the actual decision itself but in what the Judge went on to say as to the circumstances in which witness immunity could or could not be relied upon by experts. He said this, at page 488F-H:

67. The problem is where to draw the line given that there is immunity for evidence given in court and it must extend to the preparation of such evidence to avoid the immunity being outflanked and rendered of little use. This problem was considered by the House of Lords in **Saif Ali v Sidney Mitchell & Co [**1980] AC 198 in the analogous but not identical situation of the advocate's immunity from suit for what he does in court. In that case the House decided that the immunity extended to some pre-trial work but only where the particular work was so intimately connected with the conduct of the case in court that it could fairly be said to be a preliminary decision affecting the way that the case was to be conducted when it came to a hearing.

68. I think a similar approach could be adopted in the case of an expert. Thus, the immunity would only extend to what could fairly be said to be preliminary to his giving evidence in court judged perhaps by the principal purpose for which the work was done. So the production or approval of a report for the purposes of disclosure to the other side would be immune but work done for the principle purpose of advising the client would not.

69. Each case would depend upon its own facts with the court concerned to protect the expert from liability for the evidence which he gave in court and the work principally and proximately leading thereto.

70. The approach suggested by Mr Simon Tuckey QC in **Palmer v Durnford Ford** [1992] QB 483 was followed by Mr Justice Holland in **Landall v Dennis Faulkner & Alsop & others [**1994] 5 Med LR 268. The third defendant, a consultant orthopaedic surgeon, had provided a medical report in connection with proceedings brought by the plaintiff in respect of a back injury suffered in a road accident. Those proceedings were settled at the door of the court. The medical report contained the consultant's opinion that the appropriate operation for the relief of the plaintiff's symptoms would be a spinal fusion; and that that operation would give a very good chance of relief of all his symptoms. Following the settlement, the operation recommended was carried out but it failed to ameliorate the plaintiff's back symptoms. The plaintiff sought, in a fresh action against the barrister, the solicitors and the consultant who had advised him in the first action, damages on the basis that he had received negligent advice as to the settlement of the first action. The consultant claimed immunity from suit in respect of the advice contained in his report of 10 February 1987 on the basis that it was prepared in connection with litigation in the first set of proceedings. It is relevant, in the context of the present case, to note the opening words of the expert's report of 10 February 1987 : *"In accordance with your instructions, I have spoken to Professor O'Connor and we are in agreement that . . ."* That issue came before Mr Justice Holland on an application to strike out the claim. It was argued on behalf of the plaintiff that the consultant had a dual role: not only was he an expert for the purposes of litigation but he was also a medical adviser to the plaintiff. So, it was argued, the impugned advice was as much for the purpose of advising the plaintiff as a patient as for disclosure to the other side in litigation. Mr Justice Holland rejected that submission. He held that the circumstances in which the report was prepared on 10 February 1987 made it plain that the report constituted ... *"pre-trial work ...so intimately connected with the conduct of the case in court that it could fairly be said to be a preliminary decision affecting the way that the way the case was to be conducted when it came to a hearing".* Applying the test posed in **Palmer** he struck out the claim against the consultant. If that were a correct conclusion to reach on the facts of that case, then the claim in negligence in the present case ought to be struck out also.

71. Mr Justice Holland's decision in **Landall v Dennis Faulkner & Alsop** must be reviewed in the light of observations in this Court in **M (a Minor) v Newham London Borough Council [**1995] 2 AC 633. In the **Newham** appeal, the child had been seen by a psychiatrist engaged to advise the local authority in relation to steps which should or should not be taken by that authority as the responsible social services authority. Having expressed the view that the relationship between the psychiatrist and the child in that case was such as would ordinarily lead to the conclusion that the psychiatrist owed the child a duty of care, in the absence of reasons why such a conclusion should not follow, Sir Thomas Bingham, Master of the Rolls went on, at page 661A-H: *It was very strongly urged that this conclusion should not follow because the psychiatrist was entitled to a witness's immunity from actions for negligence. It was accepted that the child's claim did not relate in any way to any evidence the psychiatrist gave in court (because she never gave any), and nor to any proof of evidence that the psychiatrist may have provided. But it was said that when interviewing the child and expressing her conclusions and advising on future action she will have known that, if she concluded that there had been abuse and that the abuser was living with the mother and that separation was desirable, there were likely to be proceedings in which she would be a witness. Accordingly she was entitled to the immunity which the law, on grounds of public policy, affords to those who give or offer or prepare to give evidence in court. This argument was founded on* ***Watson v McEwen [****1905] AC 480;* ***Marrinan v Vibart*** *[1963] 1 QB 234 [1963] 1 QB 538;* ***Saif Ali v Sidney Mitchell & Co*** *[1980] AC 198 and* ***Evans v London Hospital Medical College (University of London)*** *[1981] 1 WLR 184.*

In so far as this immunity argument rests upon a factual inference about the psychiatrist's state of mind, I accept it. The psychiatrist must, I am sure, have appreciated that (depending on her findings and advice) there might very well be court proceedings in which she would be a witness. But there is nothing in ***Watson v McEwen , Marrinan v Vibart*** *and* ***Saif Ali v Sidney Mitchell & Co*** *to suggest that a witness is immune from suit is such circumstances. The public*

interest which these authorities recognise and protect is the proper administration of justice: to that end witnesses must be immune from civil action arising from what they say in court; and that protection must not be circumvented by allowing civil actions based on the earlier stages of preparation of a witness's evidence. But the cases do not indicate that those who have never become involved in administration of justice at all enjoy immunity. ***The immunity of a witness has in the past been treated as analogous to the immunity accorded to those involved in the conduct of proceedings, and were the immunity as wide as was claimed a barrister or a solicitor advising a client whether to proceed, or an expert advising a client on a factual question with a view to proceedings, would be immune from actions for negligence: such result is however clearly inconsistent with the authority cited.*** [emphasis added]

72. The **Newham** appeal, and related appeals, went to the House of Lords. The common question in those appeals, reported *sub nom* **X (Minors) v Bedfordshire County Council [**1995] 2 AC 633 was whether a child could maintain an action for damages (whether for breach of statutory duty or common law negligence) against the responsible social services authority for steps taken or not taken in relation to the welfare of that child. The relevant passage, in the present context, is in the speech of Lord Browne-Wilkinson (with whom, on this point, all the other members of the House agreed) at page 754G-755H. He held that the Court of Appeal had placed too narrow a limit on the principle of witness immunity. But, as I have already indicated, Lord Browne-Wilkinson was careful to express no view as to the position in ordinary civil proceedings; and he disclaimed any intention of casting doubt on the decision in **Palmer v Durnford Ford [**1992] QB 483.

73. What, then, is the position in relation to expert reports? It seems to me that the following propositions are supported by authority binding in this Court: (i) an expert witness who gives evidence at a trial is immune from suit in respect of anything which he says in court, and that immunity will extend to the contents of the report which he adopts as, or incorporates in, his evidence; (ii) where an expert witness gives evidence at a trial the immunity which he would enjoy in respect of that evidence is not to be circumvented by a suit based on the report itself; and (iii) the immunity does not extend to protect an expert who has been retained to advise as to the merits of a party's claim in litigation from a suit by the party by whom he has been retained in respect of that advice, notwithstanding that it was in contemplation at the time when the advice was given that the expert would be a witness at the trial if that litigation were to proceed. What, as it seems to me, has not been decided by any authority binding in this Court is whether an expert is immune from suit by the party who has retained him in respect of the contents of a report which he prepares for the purpose of exchange prior to trial - say, to comply with directions given under Order 38 rule 37 RSC - in circumstances where he does not, in the event, give evidence at the trial; either because the trial does not take place or because he is not called as a witness.

74. If there is to be immunity in such circumstances, it must be founded on some, identifiable, ground of public policy. As Lord Wilberforce pointed out **in Saif Ali v Sydney Mitchell & Co [**1980] AC 198, 214H . . . *"account must be taken of the counter policy that a wrong ought not to be without a remedy"* . Further, it must be recognised that the report prepared for the purposes of exchange prior to trial is likely to contain, or reflect, the initial advice as to the merits of the claim - advice which, as Sir Thomas Bingham, Master of the Rolls, pointed out in **M (a Minor) v Newham London Borough Council [**1995] 2 AC 633, 661F, did not itself attract immunity.

75. In my view, the only ground of public policy that can be relied upon as a foundation for immunity in respect of the contents of an expert's report, in circumstances where no trial takes place and the expert does not give evidence, is that identified by Lord Morris of Borth-y-Gest in **Rondel v Worsley [**1969] 1 AC 191, at page 251G and referred to by Lord Diplock in **Saif Ali v Sydney Mitchell [**1980] AC 198, at page 222B: *It has always been the policy of the law to ensure that trials are conducted without avoidable strains and tensions of alarm and fear.*

76. The other grounds mentioned in the authorities - the need to ensure that potential witnesses are not deterred from coming forward and the need to avoid a multiplicity of actions - appear to me to have little or no relevance in the present context. The claim for immunity in a case like the present must, as it seems to me, be tested against the criteria: is the immunity necessary for the orderly management and conduct of the trial which is in prospect.

77. I am not persuaded that experts who, as part of their professional practice and for reward, offer their services as potential witnesses on matters within their expertise are prone to *"strains and tensions of alarm and fear"* at the stage at which they are preparing reports for exchange. I would not, myself, subscribe to the view that

experts' reports would be any more or less helpfully drawn than they now are if the authors were or were not immune from suit by those who retain them in respect of the contents of those reports. But there does come a point at which the expert begins to take part in the management and conduct of the trial in advance of proceedings in court. In **Landall v Dennis Faulkner & Alsop & others [**1994] 5 Med LR 268 Mr Justice Holland referred, at paragraph 14 in the report of his judgment, to the well known observation of Mr Justice Tomlin in **Graigola Merthyr Co Ltd v Swansea Corporation [**1928] 1 Ch 31, at page 38, that: *Long cases produce evils . . . In every case of this kind there are generally many 'irreducible and stubborn facts' upon which agreement between experts should be possible, and in my judgment the expert advisers of the parties, whether legal or scientific, are under a special duty to the Court in the preparation of such a case to limit in every possible way the contentious matters to be dealt with at the hearing. That is a duty which exists notwithstanding that it may not always be easy to discharge . . .*

78. Mr Justice Holland took the view that . . . *"given the importance to the court of agreements such as that evidenced by the impugned report, the public importance of immunity from suit for such is underlined"*. I respectfully agree. It is of importance to the administration of justice, and to those members of the public who seek access to justice, that trials should take no longer than is necessary to do justice in the particular case; and that, to that end, time in court should not be taken up with a consideration of matters which are not truly in issue. It is in that context that experts are encouraged to identify, in advance of the trial, those parts of their evidence on which they are, and those on which they are not, in agreement. Provision for a joint statement, reflecting agreement after a meeting of experts has taken place, is made by Order 38 rule 38 RSC. In my view, the public interest in facilitating full and frank discussion between experts before trial does require that each should be free to make proper concessions without fear that any departure from advice previously given to the party who has retained him will be seen as evidence of negligence. That, as it seems to me, is an area in which public policy justifies immunity. The immunity is needed in order to avoid the tension between a desire to assist the court and fear of the consequences of a departure from previous advice.

79. In the present case, as in **Landall v Dennis Faulkner & Alsop [**1994] 5 Med LR 268, the expert's report was made after, and as a result of, a meeting between the experts on each side. The report incorporated what had been agreed. On that ground, I agree with the Judge's conclusion that Mr Callaghan and the other defendants are immune from suit by the plaintiffs in respect of the alleged negligence in agreeing the viability of the gap solution on 14 December 1989 and incorporating that agreement in the report delivered on 18 December 1989.

80. I have sought to explain why, contrary to the Judge's view, I am of opinion that the claims that (absent negligence) Mr Callaghan went beyond, or acted inconsistently with, what he had been instructed to do are misconceived and ought also to be struck out. It follows that I would allow this appeal.

LORD JUSTICE OTTON:

81. I agree that this Appeal should be allowed.

82. I gratefully adopt Chadwick LJ's analysis of the history of the proceedings and analysis of the facts. I concur with his conclusions that the allegations he identifies as (3) (4) and (5) cannot be sustained and for the reasons he gives.

83. This case poses the question: In what circumstances should an expert witness be granted immunity from suit in respect of work done in preparing a report prior to, and in contemplation of, pending proceedings?

84. The Stantons say that Mr Callaghan was negligent in advising that the "gap solution" was feasible and would restore their property to its full market value, an allegation which, I must assume for the purposes of this decision, is capable of being proven at trial. They say a wrong has been done for which they should be entitled to pursue a remedy through the courts. Mr Callaghan in turn says that, as an expert witness, he cannot be sued for the work he did in preparation for the trial as he is protected by the principle of witness immunity. Although a hearing never took place over this matter, so Mr Callaghan never did appear as witness, for the sake for convenience I shall nonetheless refer to "witness" immunity.

85. I have chosen to approach this case by asking the following questions:
(i) What is the principle of witness immunity?
(ii) What is its scope i.e. who enjoys this immunity and in what circumstances?
(iii)What is the rationale for the principle of immunity?

(iv)What is the role of an expert witness?

86. I turn first to an examination of the principle of witness immunity.

The principle of witness immunity

87. When Lord Diplock in **Saif Ali v Sydney Mitchell & Co [**1980] AC 198 at 222 spoke 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..."*. he was not stating a novel proposition. Rather, as the following citations illustrate, this rule has long been thought uncontroversial.

"It may now be taken to be settled law, that no action lies against a witness upon evidence given before any court or tribunal constituted according to law". Kelly CB in **Dawkins v Lord Rokeby [**1873] LR 8 QB 255, at 265.

"As to the immunity of a witness for evidence given in a Court of justice, it is too late to argue that as if it were doubtful. By complete authority, including the authority of this House, it has been decided that the privilege of a witness, the immunity from responsibility in an action when evidence has been given by him in a Court of justice, is too well established now to be shaken. Practically may I say that in my view it is absolutely unarguable - it is settled law and cannot be doubted". Lord Halsbury LC in **Watson v McEwan [**1905] AC 481, at 486

It has been well settled law for generations - certainly since Lord Mansfield's time - that witnesses enjoy absolute immunity from actions brought against them in respect of any evidence they may give in a court of justice. Salmon J in **Marrinan v Vibart [**1963] 1 QB 234, at 237.

88. So, we might ask, how does this principle assist Mr Callaghan? For it is clear that these statements refer to court proceedings, and no proceedings have yet taken place in this case. The Stantons are hoping to sue Mr Callaghan for actions which took place prior to any trial.

The scope of the witness immunity principle

89. However, not only does this principle cover evidence given at trial, over the years the protection has extended to cover certain pre-trial actions thought to be deserving of immunity from suit (**Evans v London Hospital Medical College (University of London)** [1981] 1 WLR 184). Immunity has been held to cover not only to witnesses giving evidence, but also to extend to the preliminary examination of witnesses (**Watson v McEwan**) and also to other pre-trial work in preparing the case (**Marrinan v Vibart ; Rondel v Worsley** [1969] 1 AC 191, **X (Minors) v Bedfordshire County Council** [1995] 2 AC 633). This extension of immunity is important because it illustrates the courts' recognition that the smooth administration of justice, commonly given as a reason for granting immunity, and one to which I shall return, relies on not only what happens in the courtroom, but also what goes on before. The hearing cannot be neatly divorced from the preparatory work it depends on.

90. The immunity for pre-trial work is not indiscriminate. Not all work done prior to a hearing will be covered. It is a tailored immunity, and whether or not immunity exists in respect of pre-hearing conduct rests on an assessment of whether the work in question can be said to be: *"So intimately connected with the conduct of the case in court that it can fairly be said to be a preliminary decision affecting the way the cause is to be conducted when it comes to a hearing"*. McCarthy P of the New Zealand Court of Appeal in **Rees v Sinclair** [1974] 1 NZLR 180, at 187, which test was adopted by a majority of the House of Lords in **Saif Ali** .

91. The issue of whether this protection should properly be applied to pre-hearing work done by an expert, such as Mr Callaghan, came before the courts only recently in **Palmer v Durnford Ford** [1992] QB 483. In that case, the facts of which are set out in the judgment of Lord Justice Chadwick, Mr Simon Tuckey QC, as he then was, cognisant that he was dealing with a novel situation and referring to the House of Lords' decision in **Saif Ali** as set out above, said, at p 488H: *"Immunity would only extend to what could fairly be said to be preliminary to his giving evidence in court judged perhaps by the principal purpose for which the work was done. So the production or approval of a report for the purposes of disclosure to the other side would be immune but work done for the principal purpose of advising the client would not.*

Each case would depend upon its own facts with the court concerned to protect the expert from liability for the evidence which he gave in court and the work principally and proximately leading thereto".

92. The position of experts had been considered in subsequent cases, but I do not think anything has been said to disturb these principles as stated in **Palmer v Durnford Ford .**

93. Thus there is clear authority that, provided the test of "principal and proximate connection" is satisfied, the pre-hearing work of an expert will come within the protective circle of the witness immunity principle. What remains to be considered is whether it is appropriate to draw the circle narrower so that some experts, say lawyers and police officers, are admitted, while others, such as surveyors and architects, are not. Are there circumstances or a guiding principle which would permit of such a distinction?

94. Although the immunity granted to pre-hearing conduct has been expressly approved in certain cases, for instance, preparation for criminal proceedings and investigations into allegations of child abuse, see the comments of Lord Browne-Wilkinson in **X (Minors) v Bedfordshire County Council ,** at p 755E, I would point out that there has been no express confinement of the principle of immunity to these situations ***alone.*** I note that, having approved the application of the principle to these situations, Lord Browne-Wilkinson then went on to say (at p 755F): *"I express no view as to the position in ordinary civil proceedings".*

95. While the need to grant immunity may be more obvious in some cases than others, I do not think we should rush to draw a rigid boundary between situations where immunity is automatically granted to some and not to others. This is not an area of law where categorisation is a helpful exercise. While mindful of the considerations relating to expert witnesses in this field as set out by Lord Justice Chadwick, these may not exist in every case.

96. Witnesses who claim to be and are treated as experts come from many disciplines and appear in ever widening areas of litigation. They can range (alphabetically) from accident re-construction experts, accountants, architects, through to veterinary surgeons. With the ever-increasing claims against professionals the range of expertise has increased and with it their numbers. Lord Woolf has observed: *"A large litigation support industry, generating a multi-million pound fee income, has grown up among professions".* (Access to Justice, Chapter 13, para 2.)

97. I start by adopting the pragmatic approach of Mr Simon Tuckey QC that each case should depend on its own facts. It may be appropriate to constrict immunity in one situation for a particular expert, in an individual case. In another case it may be appropriate to enlarge the immunity. Two examples suffice. A large firm of accountants may advise a Merchant Bank on a course of action in the financial world which leads to litigation. The Merchant Bank may claim that the commercial, the pre-litigation and pre-trial advice was negligent. Here the advice given at each stage may be inexorably linked in which case it may be unrealistic, undesirable and unreasonable to protect the expert from liability beyond the evidence he gave (or was to give) in Court or a Court ordained meeting between experts. Thus financial experts advising in commercial matters recognise that they have assumed responsibilities and thus adopt proper risk management techniques. Instructing big accounting firms is now likely to involve separate engagement letters for every new task and the terms of those letters are likely to be subject to lengthy negotiations. They define the scope of work to be undertaken and the professional's terms of business. If the scope of work is not defined, it is assumed to include all areas where advice is customarily provided (see **Hunlingham Estates v Wilde [**1997] LLR 525).

98. Where professionals practice as partnerships, as the law presently stands, they have unlimited liability. This consideration together with the rising tide of claims against professionals have made them ever more alive to the need to find ways to limit their exposure. Hence a variety of clauses, of ever increasing complexity have been incorporated into letters of engagement designed to exclude or limit liability. They include: exclusion clauses, caps on liability, proportionality clauses and indemnity/hold harmless clauses.

99. In certain circumstances, professionals cannot exclude liability, e.g. auditors undertaking a statutory audit (s.310 Companies Act 1980) or solicitors engaged in litigation. No expert can exclude liability for death or personal injuries (s 2 [1] Unfair Contract Terms Act 1977). In cases of economic loss, a clause excluding or restricting liability is valid and enforceable to the extent that the professional proves that it is reasonable (s 2 [2] and s 11 UCTA). In determining reasonableness the Courts may have regard to the relative strengths of the parties' bargaining positions.

100. Such is the commercial scene where as a matter of policy restricting the immunity is desirable and where both parties have defined their positions with precision and at arms length, in practice reasonable.

101. The position may be markedly different at the other end of the scale. Parents conceive and are charged with nurturing a child who suffers from profound and irreversible cerebral palsy. Was the condition constitutional

in origin or caused or significantly contributed to by the treatment or withholding of treatment during the birth process? If they can prove causation and negligence the child will recover damages often in excess of £1m. If they cannot, they must rear the child throughout the life span (albeit probably diminished) out of their own resources augmented by limited state benefits. They instruct solicitors who in turn find an expert on whose advice litigation is initiated. His advice may include matters concerning prognosis or treatment. There is almost certainly no written contract either with the solicitors or with the parents. The doctor is unlikely to qualify his opinion as 'given without responsibility'. Without some protection he is vulnerable to suit before he meets the other side's expert or at the doors of the court or goes into the witness box. For my part I can well imagine a doctor in such circumstances being deterred not merely from giving evidence but from getting involved at all when there is a possibility of suit if the outcome of the litigation or settlement does not meet the parents hopes or expectations.

102. It would not necessarily allay the expert's reluctance to be told that in common with other professional persons that he will not be held liable for negligent advice unless that advice is such as no reasonable professional, competent in the field and acting reasonably, could give. He (or increasingly, she) would rather not run the risk. The parents and child would be bereft of professional testimony even where there was a reasonable chance of success or even a settlement which would alleviate hardship.

103. Holland J appears to have extended the immunity to advice given at the Court doors which was not confined to the issue of negligence and causation but to the efficacy of future treatment and prognosis. (**Landell v Dennis Faulkner + Alsop & ors** [1994] 5 Med LR 268). On the other hand, in **Hughes v Lloyds Bank** (unreported, 3 November 1997), the Court of Appeal (Lord Bingham CJ presiding) held that immunity did not attach to a medical report which brought about an early settlement but which was never intended to be exchanged, and ordered that the proceedings against the doctor should continue.

104. Of course, experts are required to maintain certain professional standards. They should not be negligent in carrying them out. But reliance on professionalism may not be enough of a reason for keeping them outside the circle of immunity. If immunity is to be granted, then it should be granted on wider considerations.

105. I would suggest that in circumstances such as these there should be some principle which overrides the apprehension of suit and that the rationale falls either within the principles of public policy or, by analogy with the commercial example, reasonableness (or both).

The rationale underpinning the immunity principle

106. Immunity is granted to those connected with court proceedings for a reason. Indeed, several reasons have been given as the basis for this, notably the need to stop matters being litigated over and over again by disgruntled parties (**Roy v Prior** [1971] AC 470), the need to protect witnesses themselves from suits stemming from the evidence they are to give (**Munster v Lamb** (1883) 11 QBD 588; **Watson v McEwan** [1905] AC 481; **Lincoln v Daniels** [1962] 1 QB 237, 263); *a fortiori* , the need to encourage witness to come forward and say what they have to in court.

107. I pause here to note that immunity is not granted primarily for the benefit of the individuals who seek it. They themselves are beneficiaries of the overarching public interest, which can be expressed as the need to ensure that the administration of justice is not impeded. This is the consideration which should be paramount. And it is not only the conduct of the immediate hearing which we should consider to be the "administration of justice". This is not a narrowly-drawn phrase: it is best served by a purposive construction. In this I agree with Lord Wilberforce who said in **Roy v Prior** at p 480: *"Immunities conferred by the law in respect of legal proceedings need always to be checked against a* ***broad*** *view of the public interest".* (emphasis added)

108. Each party who comes, or is about to come, before a court is participating in an event which supervenes individual concerns and interests. When we are concerned with the proper and smooth administration of justice through our legal system we should not seek to place burdens on those who participate in it at any stage. Thus I do not think it necessary to make distinctions between the various reasons which have been given to justify the granting of immunity and approach this situation in an algorithmic fashion and say that some reasons should apply to some cases but not to others; the case is best approached by asking the simple question:

109. Would it serve the interests of the administration of justice to grant immunity?

110. To answer this question we need to examine the role and place of an expert in the legal system.

The role of an expert witness

111. In **Rondel v Worsley ,** Lord Morris of Borth-y-Gest described the court process thus at p 253: *"It is desirable in the public interest that a case in court should be regarded by all concerned as being a solemn occasion when the utmost endeavour is being made to arrive once and for all at a fair and just result. The atmosphere must be created in which every person is given full opportunity to play his part".*

112. The role of an expert witness was recently considered by Cresswell J in the case of **The "Ikarian Reefer"** [1993] 2 Ll. L Rep 68. At pp 81 - 82 (citations omitted), he said:

"1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.

3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

4. An expert witness should make it clear when a particular question or issue falls outside his expertise. ....

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court".

113. I have cited at length from the judgment of Cresswell J because I think it important not to gloss over the responsibilities and role of an expert witness, but set them out in full. If we are to assess how the interests of the administration of justice are best served then I think it necessary to have a comprehensive understanding of the unique role played by the expert witness in achieving that.

114. What these comments demonstrate is that although expert witnesses have duties to their clients, they have also another, overriding, duty to the court, to assist the court in resolving the issues and coming to a just conclusion. This also is the understanding of the role of an expert witness as expressed in chapter 13 of Lord Woolf's *Access to Justice* report, where Lord Woolf said: *"Para 11. ... the expert's function is to assist the court. .... Para 25. There is wide agreement that the expert's role should be that of an independent adviser to the court ... lack of objectivity can be a serious problem".*

115. Lord Woolf himself saw these comments not as a fundamental shift in the role of the expert witness, but as a reaffirmation of the witness' already-existing duty: *"Para 29. .... [the expert's] responsibility is to help the court impartially on the matters within his [or her] expertise. This responsibility will override any duty to the client. The rule will reaffirm the duty which the courts have laid down as a matter of law in a number of cases, notably* ***Whitehouse v Jordan [****1981] 1 WLR 246, when Lord Wilberforce said:* ***"Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation".***

116. It is clear to me that in order to enable the court to arrive at the fair and just result in the way set out by Lord Morris of Borth-y-Gest, expert witnesses must be given full opportunity to uphold their duty to the court, and achieve it in the way set out by Cresswell J and Lord Woolf, in an atmosphere free from threats of suit from disappointed clients.

117. Against the analysis I consider the particular circumstances of this case. On any basis the Defendant when attending the meeting with his opposite number enjoyed the immunity. It is true that he did not do so pursuant to 0.38 rule 38 but the purpose of the meeting was to identify those parts of the evidence and the other's opinion which they could agree and those which they could not. It was in the public interest to do so. The duty to the Court must override the fear of suit arising out of a departure from a previously held position. The expert must be able to resile fearlessly and with dignity. In the instant case both experts resiled from more extreme positions. In theory, at least, the defendants could have sued their expert for placing them in a more adverse position. It must follow that there was no duty to inform the lay clients or the solicitors or to seek instructions before recording the concession in the joint statement.

118. Accordingly I would allow the Appeal.

LORD JUSTICE NOURSE:

119. I also agree with each of the conclusions reached by Lord Justice Chadwick. However, since his judgment and that of Lord Justice Otton demonstrate that on the question of expert witness immunity in general different views are tenable, I will briefly state my own position on that question.

120. The extent of an expert witness's immunity from suit is still in course of development. No doubt it can and will be developed on a case by case basis. Nevertheless it is desirable that it should so far as practicable be governed by a general rule, just as in the case of a witness of fact. The rule cannot be quite the same because the expert witness usually has the dual capacity of advising the client as well as giving evidence in support of his case.

121. That said, I see no justification for distinguishing between an expert and a lay witness, either on the ground that the expert is usually remunerated for his services or on the ground that he may be less likely than a lay witness to be deterred from giving evidence. Nor would I make any distinction between civil and criminal proceedings. An immunity founded on a requirement of public policy that witnesses should not be inhibited from giving frank and fearless evidence cannot afford to make distinctions such as these. If they were allowed, it could never be certain that the public policy would not sometimes be put at risk.

122. In regard to the dual capacity of an expert witness the judgment of Mr Simon Tuckey QC in **Palmer v. Durnford Ford** [1992] QB 483 is a helpful starting-point. Having said that in **Saif Ali v. Sidney Mitchell & Co** [1980] 8 AC 198 the House of Lords had decided that the advocate's immunity from suit extended to some pre-trial work but only where the particular work was so intimately connected with the conduct of the case in court that it could fairly be said to be a preliminary decision affecting the way that the case was to be conducted when it came to a hearing, the judge continued at p. 488G-H: *"I think a similar approach could be adopted in the case of an expert. Thus, the immunity would only extend to what could fairly be said to be preliminary to his giving evidence in court judged perhaps by the principal purpose for which the work was done. So the production or approval of a report for the purposes of disclosure to the other side would be immune but work done for the principal purpose of advising the client would not. Each case would depend upon its own facts with the court concerned to protect the expert from liability for the evidence which he gave in court and the work principally and proximately leading thereto."*

123. In that passage the suggested analogy with the advocate's immunity from suit led Mr Tuckey into propounding, though tentatively, a principal purpose test for pre-trial work. While I doubt that the distinction will often be material, I am not certain that that is the correct test. If the object of the immunity is to be achieved, it might well be said that a substantial purpose test should be preferred. That question does not, however, arise here. It is clear that Mr Callaghan's draft report of 11th December 1989, the joint statement which followed his meeting with Mr Kelsey on 14th December and his final report of 18th December or thereabouts were all prepared for the principal, if not the sole, purpose of his giving evidence in court at the trial fixed to start on 11th January 1990. Moreover, it is to my mind obvious that the immunity was not lost by Mr Callaghan's not subsequently giving the evidence he was expected to give.

124. I too would allow this appeal.

Order: appeal allowed; action to be struck out with costs, to include the costs before Master Murray on 11.7.97 and to include the costs also in front of the deputy judge on 10.9.97, but excluding the costs of the appeal, as to which there is no order; order for costs of the action not to be enforced without the leave of the court. [Not part of approved judgment]

MR R JACKSON QC and MR D SEARS (instructed by Messrs Veale Wasbrough, Bristol) appeared on behalf of the Appellant Defendants.

MR J COGGINS (instructed by Messrs Norman Saville & Co, London N10) appeared on behalf of the Respondent Plaintiffs.