**[2023] JMCA Civ 26**

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MISS JUSTICE P WILLIAMS JA**
**THE HON MISS JUSTICE SIMMONS JA**
**THE HON MRS JUSTICE V HARRIS JA**

**SUPREME COURT CIVIL APPEAL NO COA2021CV00063**

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| **BETWEEN** | **CHRISTOPHER DUNKLEY** | **APPELLANT** |
| **AND** | **GUARDIAN LIFE LIMITED** | **RESPONDENT** |

**Written submissions filed by Phillipson Partners for the appellant**

**Written submissions filed by Hylton Powell for the respondent**

**5 May 2023**

**Civil Law - Defamation – Defence of absolute privilege – Defence pursuant to the Protected Disclosures Act 2011 – Tortious interference with attorney-client relationship – Litigious interference with attorney-client relationship – Dispensing with mediation**

**PROCEDURAL APPEAL**

**(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)**

**P WILLIAMS JA**

[1] On 22 June 2021, Hart Hines J (Ag), as she then was ('the learned judge'), struck out a number of paragraphs of the amended defence and the counterclaim along with the counterclaim itself, which had been filed by Mr Christopher Dunkley ('Mr Dunkley'), in response to a claim that had been filed against him by Guardian Life Limited ('GLL') for defamation. In so doing, the learned judge agreed with GLL that the

portions of the amended defence, which relied on the Protected Disclosures Act 2011 ('the Act'), the defence of absolute privilege and which challenged the court's jurisdiction, disclosed no real prospect of success. She also was satisfied that the amended counterclaim disclosed no reasonable grounds for bringing a counterclaim.

[2] Mr Dunkley has appealed this decision asserting that the learned judge erred in her understanding of absolute privilege, especially in the context of communications with the regulators of the industry in which GLL operated. He also contended that the learned judge erred in her consideration of whether the protections in the Act were available to him. Mr Dunkley further argued that the learned judge's assessment of whether tortious interference with attorney-client relationship had occurred was misguided as he had, in fact, pleaded the tort of litigious interference with attorney-client relationship. Additionally, Mr Dunkley took issue with the learned judge's refusal to dispense with mediation, having, he said, dismantled his defence and struck out his counterclaim.

**Factual background**

[3] Mr Dunkley is an attorney-at-law who was instructed by Mrs Catherine Allen ('Mrs Allen') in respect of her dispute with GLL. She was dismissed from the position of vice president and the appointed actuary with GLL on or about 15 August 2018. On 3 September 2018, she filed a claim in the Supreme Court against GLL and others, challenging her dismissal and alleging a breach of duty of mutual trust and confidence, fraud committed by GLL and its president, and breach of the code of professional conduct by Eckler Limited (a business that provided actuarial consulting and related services). Among the issues she raised in her claim was the release of GLL's reserves, which she alleged were altered without her authority, approval and/or consent, and a misrepresentation by GLL to the Financial Services Commission ('FSC') that she had authorised the release of the reserves.

[4] On 25 January 2019, Mr Dunkley wrote a letter to the Central Bank of Trinidad & Tobago ('CBTT'), the financial services' regulatory body in Trinidad & Tobago, which

was copied to the FSC. GLL alleged that some of the statements made in the letter were defamatory. GLL also alleged that Mr Dunkley caused the letter to be republished to a journalist in Trinidad & Tobago, which resulted in the letter being further republished in a nationally televised news report in Trinidad & Tobago. On 31 July 2019, GLL filed a claim in the Supreme Court against Mr Dunkley seeking damages for defamation, aggravated damages, interest, an injunction barring further publication of the alleged defamatory statements and costs.

[5] Mr Dunkley filed an amended defence and counterclaim on 30 April 2021, in which he asserted an entitlement to the defences of truth, fair comment, qualified privilege, absolute privilege, and public interest immunity pursuant to the Defamation Act and the common law. In his counterclaim, Mr Dunkley claimed against GLL for torts of litigious interference with the attorney-client relationship and abuse of process. He claimed special damages for $7,500,000.00, representing loss of future earnings through the termination of his legal services by Mrs Allen. He also claimed general damages for constraining him from exercising his privilege as an attorney-at-law in good standing to faithfully act on behalf of Mrs Allen by bringing this claim for defamation, thereby bringing the cessation of the client/attorney relationship between them. He further claimed aggravated and exemplary damages, costs and attorneys' costs.

**The application to strike out the counterclaim and parts of the defence**

[6] On 12 November 2019, GLL filed an application to strike out the counterclaim and sections of the defence. In its application, GLL sought the following orders:

> "1. The court dispense [sic] with automatic referral to mediation of the claim or counterclaim, or alternatively dispense with automatic referral to mediation of the counterclaim.
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> 2. Paragraphs 14(ii) 24, 35, 40, and 45, subparagraph (i) under the heading 'Particulars of Absolute Privilege' of the defence be struck out as disclosing no reasonable grounds for defending the claim

and/or as being likely to obstruct the just disposal of the proceedings.

3. The counterclaim be struck out as disclosing no reasonable grounds for bringing a claim and/or as being likely to obstruct the just disposal of the proceedings.

4. Alternatively, that paragraphs (iv) and (v) of the relief claimed in the counterclaim be struck out as disclosing no reasonable grounds for bringing the claim for them."

[7] Paras. 14(ii), 24, 35, 40, and 45 of the amended defence are as follows:

"14. [Mr Dunkley] expressly denies the words [GLL] extracted from the letter at issue (per its paragraph 5) were defamatory, and will say that;

…

(ii) [Mr Dunkley] acted in his capacity/role as an Attorney-at-law/Counsel for Mrs Allen and on her instructions when the letter at issue was written, <u>not published</u>, to the CBTT and copied only to FSC, consistent with the protection of his client's rights under [the Act].

…

24. In further response to paragraph 8 of the Particulars of Claim, [Mr Dunkley] will say that the above averments in the Allen Claim are a matter of record which [Mr Dunkley] will rely on for their full terms, interpretation and effects, and that the only recipients of the subject letter were the addressees of the said letter, being the CBTT and the FSC, the interested parties to the Allen Claim, consistent with the protection of his client's rights under [the Act].

…

> 35. [Mr Dunkley] will nonetheless raise the issue of jurisdiction regarding this Claim for Defamation, limited to the Trinidadian aspect of its complaint.
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> 40. [Mr Dunkley] repeats paragraph 14(iii) of this Defence that he held the honest belief that the complaints raised against [GLL] in Mrs Allen's Claim were carefully considered as credible and worthy of investigation by the CBTT and the FSC, and in keeping with the mandate of both as regulators of financial services in their respective jurisdictions and dispatched to both in a manner consistent with the protection of his client's rights pursuant to [the Act].
>
> …
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> 45. [Mr Dunkley] repeats that the letter at issue, written on behalf of [his] client, Mrs Allen, referenced the Allen claim, which complaints were known to both recipients as named parties to that Claim, and in the furtherance of their respective mandates of due diligence on the financial dealings of two of its regulated entities, and dispatched in a manner consistent with the protection of his client's rights pursuant to the tenets of [the Act]."

[8] Although in its application GLL stated that it was also seeking to have "subparagraph (i) under the heading 'Particulars of Absolute Privilege' of the defence" struck out, the learned judge, at para. [15] of her reasons for judgment, referred to para. 54 of the amended defence under the heading 'Particulars of Absolute Privilege & Public Interest Immunity'. It was apparent that the reference in the application was to the paragraph as it originally appeared in the defence, but the learned judge focused on the paragraph as it appeared in the amended defence. Para. 54 in the amended defence stated:

> "i) [Mr Dunkley's] letter of January 25, 2019 written on behalf of [his] client Mrs. Allen was communicated to the regulatory authorities, the CBTT and FSC in a manner consistent with the tenets of [the Act] and is therefore subject of Absolute Privilege.

ii) [Mr Dunkley's] letter of January 25, 2019 with the ongoing Allen Claim (Claim No 2018 CD 00503 Catherine Allen v Guardian Life Limited et al) as its subject, was written to the CBTT and copied to the FSC, both named interested parties to the Allen Claim and was therefore on an occasion of absolute privilege.

iii) [Mr Dunkley's] letter of January 25 2019 was written by him as attorney at law in discharge of his duty to his client, Mrs. Allen, whose claim concerned matters within the scope of the oversight responsibilities of the CBTT and the FSC as regulators statutorily empowered by the Financial Services Commission Act, 2022, and the Central Bank Act 2015, respectively, with their own investigative process.

iv) [Mr Dunkley's] letter of January 25, 2019 referencing Mrs. Allen's claim and her complaints therein was written and delivered to the CBTT and copied to the FSC on an occasion of absolute privilege and therefore [Mr Dunkley], as Attorney-at-law for Mrs Allen, is protected by public interest immunity from suit necessary for the due administration of justice.

v) In light of the letter's subject matter and the circumstances surrounding its writing and delivery, the letter of January 25, 2019, inclusive of the words complained is not capable of being defamatory.

vi) The release or publication of [Mr Dunkley's] letter by TV6 [News] and Ms. [Urvashi] Roopnarine [a reporter with TV6 News] was not by or caused by [Mr Dunkley], and even though [Mr Dunkley's] private letter was publicly broadcasted by TV6 and Ms. Roopnarine, the letter forms part of the regulators' investigation process and is therefore a matter of public interest." (Underlined as in original)

[9] In the counterclaim, Mr Dunkley claimed the tort of litigious interference with attorney-client relationship and abuse of process. It was also stated that GLL was "put on notice that on the successful dismissal of the claim [he] will enlarge his Counterclaim to include the tort of malicious prosecution".

[10] Ultimately, Mr Dunkley sought the following in his counterclaim:

> "i) **Special Damages** in the amount of Seven Million Five Hundred Thousand Dollars, representing [Mr Dunkley's] loss of future earnings through the termination of his legal services by Mrs Catherine Allen, which [he] will prove at any hearing of this Counterclaim.
>
> ii) **General Damages** for constraining [Mr Dunkley] from exercising his privilege as an attorney at law in good standing to faithfully act on behalf of his then client, Catherine Allen by the [sic] bringing this Claim for Defamation against [him], thereby bringing about the cessation of the client/attorney relationship between them.
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> iii) **Aggravated Damages** on the footing that:
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> a. [GLL] and its Attorneys-at-Law deliberately and/or wilfully and/or recklessly bringing this Claim for Defamation against [Mr Dunkley], knowing that the subject letter to the CBTT in Trinidad and Tobago, copied to its Jamaican Counterpart, the FSC was sent to them and received in their dual capacity as regulators and named parties to the Allen Claim, and by him in his capacity as Catherine Allen's Attorney and with every right to do so on her behalf, in furtherance of Canon IV of The Legal Profession (Canons of Professional Ethics) Rules that: *An attorney shall act in the best interests of his clients and represent him honestly, competently and zealously within the bounds of the law. He shall preserve the confidence of his clients and avoid conflicts of interest; and*
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> b. [GLL's] conduct in deliberately and/or wilfully and/or recklessly bringing this Claim for Defamation against [Mr Dunkley], without any, or any sufficient basis to do so, either in law or fact, or any sufficient regard to his personal or professional reputation, must give rise to a proper award against [GLL].

iv) **Exemplary Damages** on the footing that any sum awarded for compensatory and aggravated damages would be insufficient to reflect the gravity of [GLL's] conduct, actions and to otherwise deter [GLL] or any other like entity, from acting similarly or in the future in such an arbitrary and oppressive manner, without any, or any sufficient basis to do so, either in law or fact.

v) Costs

vi) Attorneys' costs;" (Italicised as in original)

[11] In their application, GLL relied on rule 74.4(1) of the Supreme Court of Jamaica Civil Procedure Rules 2002 ('the CPR') in their ground for dispensing with mediation. It asserted that, in the circumstances set out in relation to the striking out of parts of the defence and the counterclaim, the matter could not be resolved through mediation, and there was good or sufficient reason to dispense with mediation. In relation to the order seeking to strike out parts of the defence and the counterclaim, GLL relied on rule 26.3(1)(b) and (c) of the CPR. It asserted that paras. 14(ii), 24, 40, 45 and subparagraph (i) of para. 54 under the heading "Particulars of Absolute Privilege" of the defence and counterclaim, were likely to obstruct the just disposal of proceedings and/or disclosed no reasonable grounds for defending the claim because they sought to rely on the Act in circumstances where the Act was inapplicable.

[12] Further, GLL asserted that para. 35 of the defence disclosed no reasonable grounds for defending the claim. It alleged that the court did not have jurisdiction to hear the claim in circumstances where the statements, the subject of the claim, were made by a defendant who resides in the jurisdiction and against GLL, a company incorporated and carrying on business in Jamaica. This allegation, GLL contended, was misconceived.

[13] In relation to the striking out of the counterclaim, GLL relied on rule 26.3(1) of the CPR and asserted that the counterclaim disclosed no reasonable grounds for bringing the claim against GLL and did not disclose a cause of action for defamation or

any other cause of action known in law. Alternatively, the facts pleaded by Mr Dunkley were likely to obstruct the just disposal of the proceedings and did not allege that he had suffered actual loss or damage. It asserted that, in the circumstances, Mr Dunkley had no real prospect of succeeding on the counterclaim.

[14] On 4 September 2020, Mr Dunkley filed a second affidavit in opposition to the application. He asserted that the letter related directly to court proceedings in which he had acted in his capacity as an attorney-at-law on behalf of Mrs Allen in the matter, and the recipient, CBTT, and the copied entity, FSC, were named as interested parties to the claim. Mr Dunkley maintained that he was entitled to plead absolute privilege. He asserted that GLL was not entitled to challenge his pleas of qualified and absolute privilege, as both were proper defences to the claim of defamation, and it would fall to a trial judge to determine, on evidence, whether he fell within the ambit of the privileges. He also asserted that his counterclaim ought not to be stymied at the interlocutory stage since bringing the claim had cost him his engagement with Mrs Allen, and its passage through the courts would inflict foreseeable and intended damage and eventually impair his ability to practice his profession.

**The learned judge's decision**

[15] The learned judge heard the application on 26 May 2021 and delivered her decision orally on 22 June 2021. She subsequently kept a promise to put her reasons for judgment in writing (with neutral citation [2021] JMSC Civ 115).

[16] She indicated that despite there being an absence of any order referring the parties to mediation, she would refuse to grant the order sought by GLL to dispense with mediation, as GLL had not provided a basis for such an order to be made, nor was she satisfied that there were good reasons for making such an order. She added that since the case is being fervently contested and having regard to the overriding objective, "it seems imperative that the parties be referred to mediation".

[17] The learned judge was satisfied, having assessed the pleadings to determine whether the challenged portions of the amended defence and counterclaim disclosed a defence with a real prospect of success, that they did not. She found that the alleged disclosure in the letter did not fall within the scope of the Act as intended by Parliament. She further found that the letter was not written on an occasion of absolute privilege since it was not written in furtherance of the court proceedings instituted by Mr Dunkley's client. The challenge to the court's jurisdiction, she found, was without merit as the publisher of the alleged defamatory statements resides in Jamaica, and the publication was copied to the FSC in Jamaica. She, therefore, struck out paras. 14(ii), 24, 35, 40, 45 and particulars (i) and (ii) of the 'Particulars of Absolute Privilege' at para. 54 of the amended defence.

[18] In relation to the counterclaim, the learned judge concluded that it did not disclose any reasonable grounds for bringing a counterclaim. She found no merit in Mr Dunkley's assertion that the institution of proceedings against him would defame him and accepted that GLL would be able to rely on the defence of absolute privilege. She was not persuaded that the counterclaim of tortious interference with an attorney-client relationship could succeed, particularly where Mr Dunkley alleged that he was acting on his client's instruction and that Mrs Allen had not been sued because of the letter. She further found that it seemed unlikely that Mr Dunkley could demonstrate that GLL interfered with the relationship with malice or an intent to harm and that the interference was improper or lacked legal justification.

[19] Mr Dunkley had also claimed that GLL's claim was an abuse of process. This, the learned judge noted, was a mere assertion without more. She found that it was insufficient to merely assert malice or improper motive to GLL and that Mr Dunkley failed to demonstrate the manner in which the claim against him was an abuse of process. She, therefore, struck out Mr Dunkley's counterclaim pursuant to rule 26.3(1)(c) of the CPR.

[20] Seeing no basis to depart from the general rule, she awarded costs to GLL to be agreed or taxed. She also granted leave to appeal her decision.

**The appeal and the issues that arise therefrom**

[21] In his notice of appeal, filed on 6 July 2021, Mr Dunkley lists 19 grounds which are as follows:

> "1. The Learned Judge in Chambers failed to consider the applicable case law on suits against Attorneys-at-Law and the contexts in which absolute privilege extends beyond the courtroom as well as the legislation that empowers and governs the CBTT and the FSC.
>
> 2. The Learned Judge in Chambers also erred in failing to consider the Financial Services Commission Act, 2002 which sets out the duties of the FSC, and that Sections 6, 21 and the Fourth Schedule specifically address its investigative powers and prescribes [sic] the consequential offences and financial penalties that may be issued by that regulator.
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> 3. The Learned Judge in Chambers erred in failing to further consider [sic] the duties of the CBTT are set out in Sections 2, 5, and 7 of the Trinidadian Insurance Act, 2020 as well as section 3 of the [sic] their Central Bank Act, 2015 and the investigative powers and prescribed consequential offences and financial penalties that may be issued by this regulator are set out in the Insurance Act, 2020 per section 10 (*which refers to Section 7 of the Financial Institutions Act, 2008 that states that the Inspector of Financial Institutions shall be an officer of the Central Bank*) and that the offences and penalties continue in Sections 254-256 of that Act as well as in the Central Bank Act, 2015 per sections 44D and 44I.
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> 4. The Learned Judge in Chambers erred in law in failing to appreciate that the absolute immunity from suit which applies to judges, advocates and witnesses in respect of statements made in court, also extends to out of court statements on the principle that they could fairly be said to be part of the process of

investigating a crime or a possible crime with a view to prosecution, and this legal principle equally applies to financial regulators.

5. The Learned Judge in Chambers erred in failing to appreciate that the letter at issue was written by an attorney at law acting on behalf of his complainant client concerning matters within the statutory scope of their oversight responsibilities and delivered to the regulators on an occasion of absolute privilege.

6. The learned judge in Chambers also erred in that her judgment failed to properly consider or at all that the remit of regulators is to receive and investigate complaints, and so as a matter of public policy and law, a respondent to such a complaint cannot raise defamation against that complainant or their lawful legal representative because such a risk of liability would deter informants from ever initiating complaints, which must be an impediment to the proper administration of justice.

7. The learned judge in Chambers erred in failing to appreciate that [Mr Dunkley's] letter on behalf of Mrs. Allen, in addition to the protection of absolute privilege is also protected by public interest immunity from suit necessary for the due administration of justice for two reasons:

    i) The regulators in the instant appeal are also interested parties to the Allen Claim and the subject matter of the letter was that claim, therefore the letter at issue would be subject to absolute privilege as being applicable to matters before the court; and

    ii) The regulators' investigation process itself attracts its own absolute privilege as its legal and statutory duty to police financial institutions for the protection of the public, making them appropriate recipients for the letter containing the words complained of, for the initiation or furtherance of any investigation of same.

8. The learned judge in Chambers therefore erred in failing to appreciate that it is established in law that public policy renders the protection of immunity from suit necessary for the administration of justice and must as a necessary consequence involve steps towards and part of the administration of justice; which in the circumstances includes the letter at issue.

9. The Learned Judge in Chambers also erred in failing to properly consider that the letter dated January 25, 2019 ('the letter at issue') containing the words complained of, was written by [Mr Dunkley] in his capacity as Attorney-at-Law on behalf of his client, Mrs. Catherine Allen against [GLL] in Claim No. 2018 CD 00503 *Catherine Allen v Guardian Life Limited et al (the Allen Claim),* and with reference to the live Allen Claim, yet [sic] been determined.

10. The Learned Judge in Chambers erred in not sufficiently weighing the relevant circumstances surrounding the Claim before her, that:

    i) Mrs. Allen was the appointed actuary of [GLL] before her dismissal, therefore the issues raised in her claim, although not immediately before the learned Judge in Chambers, are not likely to be inconsequential to the Claim at bar as these are the same issues raised in the words complained of;

    ii) [Mr Dunkley] is an Attorney-at-Law, acting in that capacity as an agent of his client, Mrs. Allen with a clear professional interest in writing and sending the letter at issue and [GLL] has made no allegations of malice, therefore the words complained of do not reflect his personal belief but rather that of his client, a professional, previously employed to [GLL] and whose dismissal was proximate to the circumstances described in the letter at issue and formed part of the preceding Allen Claim.

    iii) The Honourable Mr. Justice Batts ruled in the Allen Claim that Mrs. Allen did not have the locus

to bring the complaint expressed by the words complained of, against [GLL] before the Court as it is the regulator's role to police regulated entities; therefore the letter at issue was directed by [Mr Dunkley] to the regulators on Mrs. Allen's behalf, and whose mandate it was to receive such complaints in the discharge of their public function.

11. The Learned Judge in Chambers erred in coming to her ill-considered finding that [Mr Dunkley's] letter to the regulators, the CBTT and the FSC, subject referencing the Allen Claim, was not towards furthering Mrs. Allen's Claim against [GLL], considering that any resulting action could have possibly vindicated her.

12. The Learned Judge in Chambers erred in failing to appreciate that in all the circumstances [GLL's] Claim is an abuse of process and discloses no reasonable grounds for being brought against [Mr Dunkley].

13. An Attorney-at-Law ought not to suffer the expense of having to defend a Claim to trial in legally established circumstances where immunity from suit and absolute privilege are blatantly applicable.

14. Claims of this nature, if not deterred;

    i) Set an untenable precedent for unjustified claims against Attorneys-at-Law carrying out their lawfully contracted duties for simply being on the opposing side of a dispute, which must be against the good administration of justice.

    ii) Create a negative judgment in the eyes and opinion of [Mr Dunkley's] former, present and potential clients and legal colleagues.

    iii) Allows the court system to be abused in a tactic to separate opposing counsel from their client by creating a conflict of interest by way of an unsustainable Claim.

iv) Sets a precedent that puts at risk the protection of absolute privilege and immunity from suit enjoyed not only by Attorneys-at-Law but also judges, witnesses and politicians.

v) Discourage Attorneys-at-Law from making their representation available to credible informants if there is a risk of exposing themselves to litigation of this kind.

15. This Claim and its continuance in Court has [sic] unquestionably exposed [Mr Dunkley] to risk of considerable damage to his professional reputation and expense even if he is ultimately successful, which consideration ought to have been at the forefront of the minds of [GLL's] principals, its authorized representative and legal advisors.

16. The Court hearing this interlocutory application lacked the jurisdiction to summarily strike out the averments that it did, which consisted of material facts and issues of [Mr Dunkley's] state of mind, without a trial.

17. The Learned Judge in Chambers erred in conducting a mini trial and ruling to strike out parts of [Mr Dunkley's] Defence on the basis that the protections of absolute privilege were not available to his Defence whilst concomitantly ruling in [GLL's] favour on absolute privilege as a defence to [Mr Dunkley's] Counterclaim.

18. The Learned Judge in Chambers further erred in ruling firstly that [GLL] was not entitled to dispense with mediation, then rendered her own decision nugatory by dismantling [Mr Dunkley's] defence and striking out his Counterclaim just prior to the 'no fault' phase of court proceedings, namely mediation, instead of adjourning [GLL's] application to the post mediation phase of the Court's process.

19. The judge's fixing of a further date to hear [Mr Dunkley's] Notice of Application to Strike Out [GLL's] Statement of Case for Abuse of Process, which was also before the Court but unheard due to insufficient

> time, demonstrates her failure to appreciate the legal ramification of her own ruling."

[22] In the written submissions, dated 28 March 2022, filed on behalf of Mr Dunkley, it was noted that the reasons for judgment had been delivered on 9 December 2022, approximately six months after the filing of the notice and grounds of appeal. As such, it was pointed out that the grounds would not be argued in the order they appeared in the notice and grounds of appeal filed. While this approach led to some confusion with some grounds and the submissions being prolix, having no basis in law and bordering on being offensive, it was apparent that several grounds overlapped and could be consolidated and conveniently dealt with under broad issues. Most of the grounds were focused on the learned judge's treatment of the defence of absolute privilege and conflated this issue with others. Some of the paragraphs struck out concerned the provisions of the Act. Although none of the grounds specifically addresses these provisions, one of the findings of law being challenged is "[a]n attorney at law is not an agent of, nor cloaked with the persona of his client for the purposes of the act, which is restricted to *in personam* contact by the informant only, when communicating with the regulators". Additionally, it is noted that the primary order being sought is for the judgment to be varied or set aside. Thus, it seems to me the learned judge's consideration of the impact of the Act must be considered.

[23] The issues that fall for determination are as follows: -

1. Whether the learned judge erred in finding that portions of the amended defence that relied on certain aspects of the defence of absolute privilege disclosed no real prospect of success (see grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13 and 14);
2. Whether the learned judge erred in finding that the portions of the amended defence that relied on the Act disclosed no real prospect of success;

3. Whether the learned judge erred in finding that the counterclaim did not disclose a defence with a real prospect of success (see grounds 12, 15, 16, 17 and 19); and
4. Whether the learned judge erred in referring the matter to mediation after striking out sections of the defence and the counterclaim (see ground 18).

[24] This appeal seeks to challenge the exercise of the learned judge's discretion on an interlocutory application. The approach of this court to such a challenge is now well settled, having been discussed and distilled in several cases following the guidance given by Lord Diplock in **Hadmor Productions and others v Hamilton and others** [1982] 1 All ER 1042. In **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, Morrison P succinctly explained it this way at para. [20]:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist – which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[25] Ultimately, for this court to disturb the learned judge's decision, it must be demonstrated that the learned judge's exercise of her discretion was based on a misunderstanding of the law or the evidence that was before her or that her decision was palpably wrong.

[26] It must be acknowledged, at the outset, that the learned judge appropriately demonstrated an appreciation of the nature of the discretion she was being called upon to exercise in a manner that is not subject to any challenge. She stated, at paras. [24] and [25] of her reasons for judgment, that:

"[24] It is settled law that the power to strike out a claim or defence is to be used sparingly and only in plain and obvious cases where the respondent has no real prospect of success at trial. When the CPR was introduced, it envisaged that there would be active case management by the court, to identify issues at an early stage and decide which issues ought to be ventilated at trial and which ones might be disposed of summarily. A claim or counterclaim might be struck out if it does not disclose a legally recognisable claim or claim unknown in law. Where there is no plain and obvious answer in respect of a point of law argued the application should perhaps not be granted.

[25] It is not appropriate to conduct a mini-trial involving protracted examination of documents or facts disclosed in written evidence in respect of the striking-out application (see **Wenlock v Moloney [and others]** [1965 1 WLR 1238). In **Swain v Hillman [and others]** [2001] 1 All ER 91 Lord Woolf MR said that where there are issues which should be considered at trial, applications for summary judgment or to strike out a claim or defence were not to be used to dispense with the need for a trial. He discussed the scope of Part 24.2 of the England and Wales CPR, which is equivalent to our Rule 15.2. Lord Woolf also defined the words 'real prospect of success ….'"

[27] The issues in this appeal will now be explored, bearing in mind these considerations.

**Issue 1: Whether the learned judge erred in finding that portions of the amended defence that relied on certain aspects of the defence of absolute privilege disclosed no real prospect of success (see grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13 and 14)**

The submissions

*For Mr Dunkley*

[28] In the submissions advanced on behalf of Mr Dunkley, this court was advised that Mrs Allen had sought and was denied a mandatory interlocutory injunction seeking

the reversal of GLL's reduction of reserves or actuarial liabilities. Batts J, who heard the application, was noted to have correctly ruled that only the regulators had the *locus standi* to pursue any sort of corrective action against GLL in the manner sought by Mrs Allen. Further, it was posited that the ratio of the judgment of Batts J was that the regulator should be left to do its job, uninfluenced by any interim judicial intervention, and, where necessary, take relevant coercive action for wrongful conduct.

[29] It is further explained that with Batts J's refusal to impose the mandatory injunction, Mrs Allen had her attorneys-at-law write to the FSC. The Solicitor-General responded on its behalf, indicating that her office would continue to monitor Mrs Allen's claim. This was interpreted as being at odds with the ruling of Batts J, which expressly left the parties' disputed interpretations exclusively to the FSC. It was seen to "effectively put the ball back in Mrs Allen's court", leading to her instructions to write to the other regulator, the CBTT, about her concerns over the sale transaction between Guardian Holdings Limited ('GHL') and the National Commercial Bank Financial Group.

[30] Counsel pointed out that the letter was addressed to the two regulators who were interested parties to the Allen claim, and the letter's subject line was referenced as Claim No 2018 CD 00503. It was further pointed out that, in addition to being regulators, as interested parties, the CBTT and the FSC had their own right to full access to the Allen claim, the defence to that claim, and all processes and judgments in the claim.

[31] The case of **Patrick Mahon and another v Dr Christian Rahn and others (No 2)** [2000] EWCA Civ 185 was relied on as being one of the authorities that support the submission that the protection of absolute privilege extends to courts and tribunals, as well as financial regulators. It was also relied on as affirming that absolute privilege extends beyond the courtroom, protects the investigation process of the financial regulators, and includes communications to them by informants.

[32] It was submitted that the letter was directed only to the CBTT and copied to the FSC, and raised complaints within their scope as regulatory bodies, having oversight responsibilities under their respective Acts, to include an investigative role and process to be met, independent of the Allen claim. Therefore, it was submitted that it was the investigative procedures and coercive powers of these regulators to act against GLL on a complaint that grounds the protection to a complainant and its lawful representative through absolute privilege.

[33] Counsel noted that the learned judge had sought to distinguish the decision in the **Mahon** from this matter on the basis that there was a regulatory and ongoing investigation in that case, but there was no evidence of any such investigations here. It was submitted that she had relied on no authority for raising that distinction to the level of invalidating immunity from suit. The contention was that the learned judge erroneously introduced an evidentiary shortfall to strike out those parts of the defence that relied on absolute privilege at an interlocutory hearing, and that requiring evidence on the non-issue of an ongoing investigation was outside the law and plainly unjust. It was concluded that the circumstances before the learned judge were similar to the facts in **Mahon**, and the principle applicable in that case, applied with equal force to Mr Dunkley's communication to the regulators as being on an occasion of absolute privilege.

[34] It was further submitted that the learned judge erred in stating that the test was that the letter must be written in furtherance of Mrs Allen's case since the test for absolute privilege is whether the protection is necessary for the administration of justice. It was contended that the authorities support the position that the fact that the words complained of were not made in court was no cause for exclusion from the protection of absolute privilege. **Taylor and others v Director of the Serious Fraud Office and others** [1998] UKHL 39 was relied on.

[35] It was also contended that it was well settled that absolute privilege protecting criminal investigations extends to the investigation process of financial regulators,

which placed the defence squarely within the protection of the privilege and immunity. Thus, it was submitted that absolute privilege extends to communication with regulators since there was no distinction between a situation where a criminal investigator seeks evidence to support a criminal charge and a situation in which an informant, such as Mrs Allen, assists a financial regulator. Mr Dunkley acted as an agent in writing to the regulators such that the regulators could investigate GLL to ascertain whether it was a fit and proper company to continue to conduct insurance business. It was concluded that several authorities support the position that the fact that the letter was not made in court was no cause for exclusion from the protection of absolute privilege. **Richard Anders Westcott v Dr Sarah Westcott** [2008] EWCA Civ 818 was referred to as addressing the issue of whether a complaint needs to lead to a prosecution.

*For GLL*

[36] In the submissions made on behalf of GLL, it was contended that the learned judge was correct in striking out the part of Mr Dunkley's statement of case, relying on absolute privilege, because the letter was not prepared or published as part of any court proceedings. It was submitted that the authority of **Munster v Lamb** (1883) 11 QBD 588 makes it clear that, in order to rely on the defence of absolute privilege, the defamatory words must have been published "in the course of an enquiry regarding the administration of law".

[37] It was submitted that **Taylor v Director of Serious Fraud Office** was distinguishable but ultimately showed that absolute immunity is intended to protect persons who make defamatory statements, as part of a criminal investigation, to serve the public interest in the administration of justice. It does not extend to cases where an attorney publishes a 'gratuitous' defamatory statement to a financial regulator which is carrying out an investigation and had not requested information as part of any investigative process. It was pointed out that there was no allegation in the pleadings

and no evidence that the regulators had initiated an investigation against GLL or requested information from Mr Dunkley or Mrs Allen as part of any investigation.

[38] It was also submitted that **Mahon** was equally unhelpful to Mr Dunkley's case. Although that case had held that a document created during an investigation by a financial regulator attracted absolute privilege, in this case, the regulators were not carrying out any investigation, criminal or otherwise, or conducting a hearing to determine if GLL had breached any laws. Further, it was contended that, more importantly, the regulators had not requested a statement from Mr Dunkley or Mrs Allen in relation to the allegations in the letter.

Discussion

[39] The case of **Munster v Lamb**, although of some antiquity, remains the *locus classicus* for the doctrine of absolute privilege. Sir Brett MR, at page 600, made the following statement:

> "Actions for libel and slander have always been subject to one principle: defamatory statements, although they may be actionable on ordinary occasions, nevertheless are not actionable libel and slander when they are made upon certain occasions…The occasion, with which we now have to deal, is that a defamatory statement has been made either in words or by writing in the course of an inquiry regarding the administration of the law. It is beyond dispute that statements made under these circumstances are privileged as to some persons, and it has been admitted by the plaintiff's counsel that one set of these persons are advocates: it could not be denied that advocates are privileged in respect of at least some defamatory statements made by them in the course of an inquiry as to the administration of the law."

[40] The development of the law to extend immunity to certain statements given in circumstances outside of court proceedings was addressed by the House of Lords in **Taylor v Director of the Serious Fraud Office**. Lord Hoffmann conducted a comprehensive review of the issue and stated the following at pages 213-214:

"There is no doubt that the claim for absolute immunity in respect of statements made by one investigator to another… or by an investigator to a person helping with the inquiry… or to an investigator by a person helping the inquiry who is not intended to be called as a witness …is a novel one….

In *Mann v O'Neill* (1997) 71 A.L.J.R. 903, 907 the judgment of Brennan C.J., Dawson, Toohey and Gaudron L.JJ. describes the rationale as one of necessity:

> 'It may be that various categories of absolute privilege are all properly to be seen as grounded in necessity, and not on broader grounds of public policy. Whether or not that is so, the general rule is that the extension of absolute privilege is 'viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated.' Certainly absolute privilege should not be extended to statements which are said to be analogous to statements in judicial proceedings unless there is demonstrated some necessity of the kind that dictates that judicial proceedings are absolutely privileged.'

Thus the test is a strict one; necessity must be shown, but the decision on whether immunity is necessary for the administration of justice must have regard to the cases in which immunity has been held necessary in the past, so as to form part of a coherent principle.

Approaching the matter on this basis, I find it impossible to identify any rational principle which would confine the immunity for out of court statements to persons who are subsequently called as witnesses. The policy of immunity is to enable people to speak freely without fear of being sued, whether successfully or not. If this object is to be achieved, the person in question must know at the time he speaks whether or not the immunity will attach. If it depends upon the contingencies of whether he will be called as a witness, the value of the immunity is destroyed. At the time of the investigation it is often unclear whether any crime has been committed at all. Persons assisting the police with their inquiries may not be able to give admissible evidence; for example, their information may be hearsay, but

> nonetheless valuable for the purposes of the investigation. But the proper administration of justice requires that such people should have the same inducement to speak freely as those whose information subsequently forms the basis of evidence at a trial."

[41] Lord Hoffmann went on to consider the position of investigators exchanging information and made the following helpful comment at page 215:

> "I therefore agree with the test proposed by Drake J. in *Evans v London Hospital Medical College* (University of London) [1981] 1 WLR 184, 192:
>
> > '…the protection exists only where the statement or conduct is such that it can fairly be said to be part of the process of investigating a crime or a possible crime with view to a prosecution or a possible prosecution in respect of the matter being investigated.'
>
> This formulation excluded statements which are wholly extraneous to the investigation - irrelevant and gratuitous libels - but applies equally to statements made by persons assisting the inquiry to investigators and by investigators to those persons or to each other."

[42] The England and Wales Court of Appeal in **Mahon** addressed the question as to whether absolute immunity can be relied on in relation to proceedings other than judicial proceedings. Brooke LJ, writing on behalf of the court, recognised that during the 100 years following **Munster v Lamb**, the protection of absolute privilege was "extended to tribunals exercising functions equivalent to those of an established court of justice" (see para. 147). He went on to make the following observation at para. 194:

> "Important though the investigation of crime undoubtedly is, I have not found it possible to make a logical distinction between the situation in which a criminal investigator seeks evidence to support a criminal charge and a situation in which a financial regulator seeks evidence to put before a tribunal to the effect that someone is not a fit and proper person to conduct investment business. It appears to me … that the flow of information to financial regulators might

> be seriously impeded if its informants feared that they might be harassed by libel proceeding and if it was impeded in this way the purposes of Part I of the Financial Services Act, of protecting the public from unfit investment advisers, would be put at risk…."

[43] Significantly, Brooke LJ recognised that there was another aspect of this immunity that was to be addressed. At para. 150, he stated, "whether the privilege extends beyond the preparation of witness statements to the initial complaint which triggers off the proceedings in question is a different question". He indicated he would turn to that question in due course but ultimately did not deem it necessary in the circumstances to do so.

[44] The question was, however, addressed in **Westcott v Westcott**. In doing so, Ward LJ conducted an extensive review of the authorities and concluded at para. 32 that:

> "The authorities recited above have made it clear that the justification for absolute immunity from suit will depend upon the necessity for the due administration of criminal justice that complaints of alleged criminal conduct should always be capable of being made to the police free from fear that the person accused will subsequently involve the complainant in costly litigation. There is a countervailing public interest in play which is that no-one should have his or her reputation traduced, certainly not without affording him or her a remedy to redress the wrong. A balance has to be struck between these competing demands: is it necessary to clothe the occasion with absolute privilege in which event even the malicious complainant will escape being held to account, or is it enough to allow only the genuine complainant a defence? Put it another way: is it necessary to protect from vexatious litigation those persons making complaint of criminal activity even at the cost of sometimes granting that impunity to malicious and untruthful informants? It is not an easy balance to strike. We must be slow to extend the ambit of immunity."

[45] And at para. 34, he went on to state:

> "In my judgment the answer is to be found in *Taylor.* That establishes that immunity for out of court statements is not confined to persons who are subsequently called as witnesses. The policy being to be [sic] enable people to speak freely, without inhibition and without fear of being sued, the person in question must know at the time he speaks whether or not immunity will attach. Because society expects criminal activity will be reported and when reported investigated and, when appropriate, prosecuted, all those who participate in a criminal investigation are entitled to the benefit of absolute privilege in respect of statements which they make. That applies whether they are informants, investigators, or prosecutors."

[46] It is pellucid that the well-established protection that extends to statements made in the course of and directly related to court proceedings further extends to those made in relation to certain tribunals and investigations. In limited and exceptional circumstances, the immunity can also extend to statements that lead to particular investigations, even where no proceedings flow from those investigations.

[47] It is against these expressions of the law, as it now stands, in relation to absolute immunity, that the treatment of the learned judge will be assessed. The learned judge, before addressing the issue, set out the chronology of events leading up to the publication of the letter. She noted that CBTT and the FSC were named as the first and third interested parties in the claim filed by Mrs Allen. She noted further that, in dismissing Mrs Allen's application for a mandatory injunction, Batts J had stated that it was the FSC and not the court which was "imbued with the authority to take corrective action" and that he did not see a cause of action that gave Mrs Allen a right to compel GLL to act in accordance with her advice.

[48] In addressing the issue, the learned judge first considered whether the letter was published as part of or for the purpose of judicial proceedings. She found that its concluding paragraphs did not suggest that it was not "prepared or published as part of or in furtherance of the court proceedings, but rather, in furtherance of some perceived need to assist the CBTT in its mandate to monitor the conduct of financial

institutions". The paragraphs of the letter were set out at para. [43] of her reasons for judgment as follows:

> "*Executive Action by GLL*
>
> When GLL apparently decided that it needed a dividend pay-out [sic] (mid-year) to facilitate its corporate objectives, the executives authorized a release of the policyholders' reserves at the end of the second quarter of 2018 to achieve that aim.
>
> The objective appears to be that a dividend pay-out [sic] would improve GHL's ratings, making it correspondingly easier and cheaper to raise investment on the capital markets.
>
> GLL took the ostensible position that Mrs Allen was unsupportive of its President, but contrary to her reporting, GLL was seeking to [sic] release of the reserves irregularly, effectively misleading the Financial Services Commission (FSC), our regulators here in Jamaica (*and the CBTT by extension*).
>
> This mid-year release of its reserves coincided with GHL's provision of the dividend pay-out, which in turn coincided with the impending sale of GHL to the National Commercial Bank (NCB).
>
> For your information, the Chairman of GLL, and the Officer ultimately answerable in Jamaica, is also the President and CEO of GHL in Trinidad.
>
> We trust that the foregoing will assist your mandate as regulators of financial services in the Republic of Trinidad and Tobago.
>
> We are in the preliminary stages of fully appraising our FSC on this matter and we welcome the opportunity to do the same for the CBTT, at any time convenient to your Bank." (Emphasis as in original)

[49] She opined that the letter might have been written in light of the observations of Batts J that it would be for the FSC to take corrective action (see para. [44] of her reasons for judgment). I find that this was a reasonable inference in the circumstances.

Indeed, in the submissions for Mr Dunkley to this court, it was expressly stated that, given the posture of the FSC having been advised of the matter, Mrs Allen gave instructions to her attorney to write to the other regulator, the CBTT, about her concerns over the sale transaction between GLL and the National Commercial Bank Financial Group.

[50] The learned judge acknowledged the pronouncements in the authorities **Munster v Lamb** and **Taylor v Director of Serious Fraud Office** and considered, more extensively, **Mahon**. At paras. [55] and [56], she stated the following:

> "[55] The fact that there was a prior regulatory investigation and an ongoing criminal investigation being conducted in the **Mahon** case makes that case distinguishable from this case. In the instant case, [Mr Dunkley] has not stated that either the CBTT or FSC had commenced any investigation into the conduct of GLL. There was no evidence before me to suggest that an investigation was commenced as at the date of the letter or anytime thereafter. It does not appear that the letter was solicited by the CBTT to assist with any ongoing criminal or regulatory investigation. I am not of the view that absolute privilege would attach to the letter where there was no investigation being conducted by the CBTT or FSC, and where it was not written in furtherance of court proceedings. In my opinion the letter in issue in this case does not appear to have been 'made in the course of judicial proceedings', as envisaged by Lord Justice Brooke in **Mahon**.
>
> [56] I am mindful of the fact that absolute privilege serves to safeguard the free flow of information to authorities including regulators. In **Mahon** the Court of Appeal observed that public interest required that persons disclosing information to regulators should be protected to some degree from a defamation claim. However, in the instant case, [Mr Dunkley] was not making a disclosure pursuant to an investigation or pursuant to the Protected Disclosures Act. The principle that no action can be brought against counsel for words spoken or written

> in the course of a trial does not seem applicable in this case since the letter does not appear to have been written as part of judicial proceedings, and neither does it merely repeat or quote the pleadings."

[51] I do not think the learned judge can be fairly said to have not appreciated and applied the proper principles relating to absolute immunity. Neither can it be said that she did not understand the role of the bodies to whom the letter was addressed as regulators with the power to investigate relevant complaints. She was, to my mind, correct in concluding that the letter was not written in the course of the proceedings before the court. She also demonstrated, by her review of **Mahon**, that she, in fact, appreciated that absolute privilege extends beyond statements related directly to court proceedings and could be relied on in circumstances where there was a regulatory enquiry or investigations. I find that, in these circumstances, she did not err in her analysis and conclusion that the letter was not written to assist the regulators in any enquiry since there was no evidence of any such enquiry ongoing at the time.

[52] The fact is that she proceeded to strike out only two sub-paragraphs of the paragraph under the heading "Particulars of Absolute Privilege & Public Interest Immunity", which seemed to be relying on the immunity afforded to documents produced as part of judicial proceedings. In my view, she was entirely correct for adopting this approach. Other aspects of the immunity remained for Mr Dunkley to advance in his defence. He was not deprived of his right to have those matters explored and ventilated at the trial.

[53] In the circumstances, I find there is no merit in the grounds relating to how the learned judge dealt with the issue of absolute privilege, and they, accordingly, must fail.

**Issue 2: Whether the learned judge erred in finding that the portions of the amended defence that relied on the Act disclosed no real prospect of success**

<u>The submissions</u>

*For Mr Dunkley*

[54] It was submitted that the references to the Act were in relation to its application to Mrs Allen, for whom Mr Dunkley was acting, and were intended to buttress the court's recognition of absolute or qualified privilege. It was noted that qualified privilege was found to be applicable in the case of **Leila Emile Khader v Mariam Aziz and another** [2009] EWHC 2027 (QB), where Eady J is said to have relied on "the long established principle that … 'publication by a solicitor is protected by qualified privilege if his client would have been similarly protected in making the same publication – provided the solicitor is acting within the scope of his authority: see e.g. *Baker v Carrick* [1894] QB 838'". The submission continued that the protection granted to Mrs Allen under the Act may be available at law to her attorney, Mr Dunkley.

[55] It was pointed out that, in her judgment, the learned judge considered section 10 of the Act but was silent on the impact of the FSC's equivocation in response to Mrs Allen before concluding that neither the Act nor absolute privilege could protect the letter written on her behalf by Mr Dunkley. It was explained that it was for the avoidance of doubt that the amended defence was filed to make it clear that Mr Dunkley was relying upon the full extent of the common law protections of absolute privilege and immunity from suit and qualified privilege, which are discrete defences, in addition to the Act, "each protection standing on its own as well as collectively".

*For GLL*

[56] It was contended that in Mr Dunkley's defence, at paras. 14 (ii), 24, 40 and 45, he relied on the provisions of the Act as a defence to the claim. This is evident, counsel noted, from Mr Dunkley's assertion that he wrote the letter in his capacity as Mrs Allen's attorney "in a manner consistent with the protection of his client's rights pursuant to" the Act..

[57] It was pointed out that the Act provided protection to "an employee" who makes a disclosure in specific circumstances, and this disclosure is only protected if made to specific persons as defined in section 2. It was contended that Mrs Allen had discharged

her duty as GLL's actuary by writing to the FSC a letter dated 10 September 2018, and there was no need for Mr Dunkley to write the letter dated 25 January 2019. In any event, it was submitted that the letter did not fall within the definition of "improper conduct" to which the Act was intended to apply and was not published to one of the entities recognised in the Act.

[58] It was concluded that Mr Dunkley had not demonstrated that the learned judge misunderstood the law or evidence before her when she struck out those paragraphs of the defence, which relied on the Act.

Discussion

[59] In my view, there is no disputing that Mrs Allen, as an employee of GLL, was, by the provisions of the Act, able to disclose to a prescribed person, information regarding the conduct of her employer, which she reasonably believed showed or tended to show that improper conduct had occurred or was likely to occur. Such a disclosure fell within the definition of a protected disclosure (see section 2). Mrs Allen would be qualified for protection in those circumstances where she reasonably believed that the conduct disclosed fell within the area of responsibility of the prescribed person (see section 9). A prescribed person is defined in section 2 as "any person specified in the First Schedule for receiving, investigating or otherwise dealing with disclosures under the Act". The FSC is included in the First Schedule, and since the list identifies a prescribed person within the Jamaican context and jurisdiction, it is not surprising that the CBTT is not.

[60] It is also to be noted that the Act expressly acknowledges the role of an attorney-at-law since the definition of a "protected disclosure" includes a disclosure made by an employee to an attorney-at-law, in accordance with section 11, which provides that:

> "A disclosure made by an employee to an attorney-at-law with the object of obtaining, or during the process of obtaining legal advice is a protected disclosure."

[61] Also to be noted in section 2 is the definition of "improper conduct", which is any:

> "(a) criminal offence;
>
> (b) failure to carry out a legal obligation;
>
> (c) conduct that is likely to result in a miscarriage of justice;
>
> (d) conduct that is likely to threaten the health or safety of a person;
>
> (e) conduct that is likely to threaten or damage the environment;
>
> (f) conduct that shows gross mismanagement, impropriety or misconduct in the carrying out of any activity that involves the use of public funds;
>
> (g) act of reprisal against or victimization of an employee;
>
> (h) conduct that tends to show unfair discrimination on the basis of gender, race, place of origin, social class, colour, religion or political opinion; or
>
> (i) wilful concealment of any act described in paragraphs (a) to (h);"

[62] It seems to me that the structure of the Act is such that the protection is afforded to the employee who has first-hand knowledge of the improper conduct being disclosed. This would be eminently logical since the investigation, which could follow, would be of little worth if the information that triggered it equated to being hearsay or otherwise unverifiable second-hand information, incapable of amounting to admissible evidence in the event other proceedings could follow from the disclosure.

[63] The learned judge, in addressing this issue, properly identified the definitions relevant to the application before her (as found in section 2 of the Act), namely: disclosure, prescribed person, and protected disclosure. She also acknowledged the list of prescribed persons found in the First Schedule. She expressly considered the

affidavit of Mr Dunkley, which was before her, that referenced letters that had been written to the FSC. While acknowledging that she had not seen the letters in their entirety and being unable to conclusively say that disclosure had been made pursuant to the Act, she indicated that the excerpt that she had, in fact, seen, suggested that that had been done. The learned judge also noted that, in his judgment, Batts J had opined that Mrs Allen, by her letter to the FSC, "appears to have discharged" her statutory duty.

[64] The learned judge then concluded the following on this issue at para. [35]:

> "In light of the clear wording of the Act, I accept [GLL]'s submission that [Mr Dunkley] has no reasonable prospect of successfully defending the claim on the basis that the January 25, 2019 letter is a protected disclosure under the Act. [Mr Dunkley]'s letter does not fall within the scope of the Act. Further, assuming that Mrs Allen's letter dated September 10, 2018 fell within the scope of the Act, there would appear to have been no need for [Mr Dunkley] to write to the CBTT, as the necessary disclosure would have already been made to the FSC."

[65] I do not find that the learned judge can be faulted for her approach and her conclusion. Mr Dunkley cannot rely on the statutory protection afforded to Mrs Allen by virtue of the Act. In any event, CBTT did not fall within the category of prescribed persons to whom disclosure could be made in Jamaica, so it is also questionable whether Mrs Allen could, herself, have written to the CBTT and claimed that that disclosure was protected. The striking out of those paragraphs in his defence that could be viewed as seeking to rely on the protection of the Act cannot be faulted.

[66] In any event, in his defence, Mr Dunkley sets out some five particulars of qualified privilege which were unaffected by the striking out application before the learned judge and were not linked to any reliance on the Act. Mr Dunkley again has not been deprived of having relevant issues ventilated and explored at trial.

**Issue 3: Whether the learned judge erred in finding that the counterclaim did not disclose a defence with a real prospect of success (see grounds 12, 15, 16, 17 and 19).**

The submissions

*For Mr Dunkley*

[67] The submissions made in relation to the counterclaim first focused on ground 15. For convenience, I will re-state it here:

> "This Claim and its continuance in Court has [sic] unquestionably exposed [Mr Dunkley] to risk of considerable damage to his professional reputation and expense even if he is ultimately successful, which consideration ought to have been at the forefront of the minds of [GLL's] principals, its authorized representative and legal advisors."

[68] It was opined that the learned judge could not accept that Mrs Allen would readily lose confidence in Mr Dunkley, despite the fact that his letter did not have the desired outcome and resulted in GLL's claim against him. It was contended that the learned judge's reasoning failed to appreciate the practical dynamics of a client-attorney relationship. It was further contended that the learned judge failed to understand that the application to strike out was brought before the stage where Mr Dunkley would have had the opportunity to request information or interrogatories. Thus, he was deprived of the opportunity to "demonstrate that GLL interfered with the relationship with malice or intent to harm and that the interference was improper or lacked legal justification" as the learned judge found he would have needed to do (see para. [74] of her reasons for judgment).

[69] Although not specifically identifying the ground, it would appear that other submissions were made with respect to ground 17, which, again, for convenience, I will re-state here:

> "The Learned Judge in Chambers erred in conducting a mini trial and ruling to strike out parts of [Mr Dunkley]'s Defence

> on the basis of absolute privilege were not available to his defence whilst concomitantly ruling in [GLL]'s favour on absolute privilege as a defence to [Mr Dunkley]'s Counterclaim."

[70] It was contended that it was ironic that Mr Dunkley has not been afforded such protection of absolute privilege and continues to suffer under this "unjust claim". Further, counsel submitted that the learned judge deprived Mr Dunkley of his right to the defence of absolute privilege through her reliance on criteria not ordinarily present in the authorities in this area of the law.

[71] The remaining grounds which seemed to relate to the striking out of the counterclaim are grounds 12, 16 and 19, which I will re-state here, for convenience, once more:

> "12. The Learned Judge in Chambers erred in failing to appreciate that in all the circumstances [GLL's] case is an abuse of process and discloses no reasonable grounds for being brought against [Mr Dunkley].
>
> …
>
> 16. The Court hearing this interlocutory application lacked the jurisdiction to summarily strike out the averments that it did, which consisted of material facts and issues of [Mr Dunkley's] state of mind, without a trial.
>
> …
>
> 19. The judge's fixing of a further date to hear [Mr Dunkley's] Notice of Application to Strike Out [GLL's] Statement of Case for Abuse of Process, which was also before the Court but unheard due to insufficient time, demonstrates her failure to appreciate the legal ramification of her own ruling."

[72] I think it is important to note that it was in the section of the submissions headed "Counterclaim" that the complaint was made that the learned judge had "misplaced her balance of her analysis of abuse of process" under her heading dealing with the

question of whether the amended counterclaim disclosed a real prospect of success. It was contended that she had also wrongly uncoupled abuse of process from absolute privilege to arrive at a finding that Mr Dunkley failed to demonstrate that the suit against him was an abuse of process. Further, it was submitted that the learned judge had "patently" misunderstood the arguments advanced for Mr Dunkley, that once the protection of absolute privilege had been established in his favour, the claim against him was an abuse of process. Upon a finding of abuse of process, counsel claimed that malicious prosecution would become "a live issue and [a] cause of action" in Mr Dunkley's counterclaim. The case of **Crawford Adjusters and others v Sagicor General Insurance (Cayman) Limited and another** [2013] UKPC 17 was referred to as providing guidance on the torts of abuse of process and malicious prosecution in civil matters.

*For GLL*

[73] In response, it was submitted that even if Mr Dunkley were able to prove that the statements GLL made in its particulars of claim about him were defamatory or caused him to suffer loss and damage, which was denied, the statements would not be actionable since they are protected by absolute privilege. It was noted that the courts have long held that no cause of action lies against persons for anything said or done by them in the course of proceedings before the court. **Marrinan v Vibart and another** [1962] 3 All ER 380 was referred to in support of this submission.

[74] The decision of the Ontario Superior Court of Justice in **Dooley v CN Weber Ltd et al** 19 OR (3d) 779; [1994] OJ No 2328 was referred to as having held that absolute privilege attaches to pleadings filed in an action and they may not form the basis for a cause of action. Thus, it was submitted that the claims for tortious interference and abuse of process were correctly struck out.

[75] Further, it was contended that in relation to tortious interference, the material before the learned judge was sufficient for her to hold that the mere institution of proceedings against Mr Dunkley could not have led to the termination of his

employment with Mrs Allen. This was particularly so since Mr Dunkley maintained that he acted on her instructions and she had not been sued. It was submitted that there was also no material before the learned judge that GLL had acted with malice or ill intent in bringing the proceedings against Mr Dunkley.

[76] It was urged that **Crawford Adjusters v Sagicor General Insurance** was of no assistance as the facts differ entirely from the instant case. In any event, it was submitted that Mr Dunkley had not counterclaimed for malicious prosecution but indicated an intention to do so, which he could not have done because the present proceedings had not been determined in his favour.

Discussion

[77] In **Marrinan v Vibart**, an action was brought by a disbarred barrister claiming damages for conspiracy against two police officers who, he alleged, had conspired, together with another person, to injure his reputation and standing as a barrister by making false and defamatory statements against him. He alleged that statements incorporated in notices of additional evidence in a criminal matter, sworn evidence given at the trial of the matter and a subsequent inquiry before the Masters of the Bench of his Inn, were falsely and maliciously made. Sellers LJ described his action as being "misconceived" and done "in order to annoy others and give vent to his feelings rather than genuinely to seek redress to which he believes himself entitled".

[78] Sellers LJ, at page 382, stated:

> "It is quite clear, on authority going back well into history … that no court would entertain an action of this character... The principles can be found in the cases already referred to in the judgment, going back to *Revis v Smith* [(1856) 18 CB 126] through *Henderson v Broomhead* [(1859) 4 H&N 569] and down to *Dawkins v Lord Rokeby* [(1873) LR 8 QB 255] in which one finds some of the earlier authorities conveniently summarised by Kelly, C.B [(1873) LR 8 QB 255, at page, 263]. The Chief Baron said:

> 'The authorities are clear, uniform and conclusive, that no action of slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceedings before any court or tribunal recognised by law. The principle which pervades and governs the numberless decisions to that effect is established by the case of *Floyd v Baker* [(1607) 12 Co Rep 23] and many earlier authorities … down to the time of Lord Coke; and which are to be found collected in *Yates v Lansing* [(1810) 5 Johnson's New York Supreme Ct Rep 282] and *Revis v Smith* [which] are themselves direct authorities that no action lies against parties or witnesses for anything done, although falsely and maliciously and without any reasonable or probable cause, in the ordinary course of any proceedings in a court of justice.'"

[79] He went on, at page 383, to state the following:

> "It has been sought in this case to draw a difference between the action of libel and slander, the action of defamation, and that which is set up in this case, one of conspiracy. I can see no difference in the principles of the matter at all. Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence before the court and in preparation of the evidence which is to be given."

[80] It seems to me that the counterclaim that Mr Dunkley sought to bring necessarily attracts the same consideration. The learned judge relied on **Marrinan v Vibart**, considered **Dooley v CN Weber Ltd** and **Love v Bell ExpressVu Limited Partnership et al** 2006 MBCA 92 (a decision from the Manitoba Court of Appeal), and accepted the submissions from counsel for GLL, that GLL would be able to rely on absolute privilege. She found that there was no legal basis for a counterclaim alleging defamation. She was entirely correct in that regard.

[81] The learned judge went on to consider the issue of tortious interference with the attorney-client relationship. However, the counterclaim was for litigious interference with attorney-client relationship and abuse of process. The tort of litigious interference with attorney-client relationships is usually seen in American jurisprudence rather than English common law. It is said to arise in circumstances where one party to a lawsuit commences a countersuit against opposing counsel aimed at creating a conflict of interest, which forces the removal of that counsel from the original lawsuit. This is regarded as an interference as it may create an unfair advantage to the party who caused the conflict, and attorneys will resort to this tort as a means of redress for the loss of client business.

[82] This tort can be most conveniently equated with the torts described by the authors of Winfield and Jolowicz on Tort, 16th Edition, at page 625, as those "the function of which is to protect some of a person's intangible interests - those which may loosely be called his business interests - from unlawful interference". In English jurisprudence, the torts recognised for such interference would include directly inducing a breach of contract and interference with contractual relations. The latter, to my mind, would be most similar to that of litigious interference with attorney-client relationship. The nature of the tort of litigious interference with attorney-client relationships may well be considered an exceptional specie given the particular nature of the relationship.

[83] Although this tort is not generally known in the English jurisprudence, I will still consider whether Mr Dunkley has established that he should be able to raise it in the circumstances of this matter.

[84] The learned judge set out, in terms which have not and, indeed, cannot be challenged, her appreciation of the basis on which she would be able to strike out the defence. At para. [70] she stated:

> "… I am mindful that as a general rule, a judge is not entitled on an application to strike out a claim or defence,

> to conduct a mini-trial on documents without disclosure or cross-examination. However, the law is clear that where there is a basis for going behind a party's untested written evidence set out in an affidavit, for example, if the account is inherently incredible or implausible, the court may reject or disregard the evidence and find that, based on the evidence, there was no reasonable possibility of the defence succeeding (see **Bhogal v Punjab National Bank, Basna v Punjab National Bank** [1988] 2 All ER 296). The decision in **Bhogal** was cited with approval by the Caribbean Court of Justice in **Yolande Reid v Jerome Reid** [2008] CCJ 8 (AJ). Justice Saunders cited the dictum of Bingham LJ (at [page] 303) in **Bhogal** and said at paragraph 24:
>
> > *'In determining whether there is an issue to be tried, the court must not seek to conduct a mini-trial or to weigh the opposing affidavits. Unless, the assertions made are 'shown to be manifestly false either because of their inherent implausibility or because of their inconsistency with the contemporary documents or other compelling evidence', the court should accept the facts stated by the defendant.*" (Emphasis as in original)

[85] It is against that unexceptional appreciation of the law that the learned judge considered the material before her. Given that she was addressing her mind to tortious interference, her finding that the mere institution of proceedings against Mr Dunkley would not necessarily interfere with the attorney-client relationship, particularly where Mr Dunkley alleged that he was acting on Mrs Allen's instruction, who was not herself sued as a result of the letter, is not unreasonable (see para. [71] of her reasons for judgment). There would have to be some unlawful means employed which caused the interference. However, the tort of litigious interference with the attorney-client relationship would be triggered by filing a countersuit, which would give rise to the complaint of interference.

[86] In the submissions made on behalf of Mr Dunkley, it is admitted that he was not the attorney-at-law for Mrs Allen when she initiated her action against GLL. He was

not retained until after she had sought the intervention of the FSC, following the rulings of Batts J. It was then, when acting on her instructions to write to the CBTT, that Mr Dunkley wrote the letter. In his amended defence and counterclaim, at para. 5, Mr Dunkley asserted that at the time of sending the letter at issue, he appeared along with "Paul Beswick and Terry Guyah instructed by Ballantyne Beswick & Company, the Attorneys at Law on the Record for Mrs Allen". These factors are significant since the filing of a countersuit in the litigious interference claim, must be against opposing counsel in the initial lawsuit, with the intention of creating a conflict of interest, forcing that counsel to withdraw from the initial claim. Mr Dunkley, on his own admission, was not the counsel in the initial lawsuit, and so an essential plank of this tort was absent.

[87] The learned judge found that if Mr Dunkley asserted that he had acted on Mrs Allen's instructions, the allegation that the claim against him had effectively destroyed whatever confidence Mrs Allen may have had in his professional and contractual relationship with her seemed inherently implausible (see para. [72] of her reasons for judgment). In my view, this is an entirely reasonable conclusion. Mr Dunkley would be hard-pressed to show how in doing precisely what he was retained to do, could have, without more, be the cause of the destruction of Mrs Allen's confidence in him and that GLL would have known that the bringing of the claim for defamation, would have had that result.

[88] Further, for establishing litigious interference, Mr Dunkley would be required to demonstrate what conflict of interest resulted from GLL instituting the defamation claim given the nature of the claim brought by Mrs Allen against GLL. He has not attempted to do so and barely asserted, without more, that there was a conflict.

[89] Ultimately, the learned judge recognised that it would be necessary for Mr Dunkley to demonstrate that GLL interfered with the relationship with malice or an intent to harm and that the interference was without legal justification. The response in the submissions that the learned judge ought to have been aware that the application to strike out was brought before the stage where Mr Dunkley would have

had the opportunity to request information and interrogatories, thus depriving him of the opportunity to demonstrate that fact, acknowledged that the learned judge was correct. Mr Dunkley was obliged to include, in the particulars of his counterclaim, a statement of all the facts on which he intended to rely (see rules 8.9(1) and 18.2 of the CPR). To say that he was awaiting the opportunity to request information and interrogatories to present facts to support an essential feature of his claim is unacceptable.

[90] On the issue of abuse of process, it is most curious that there was a complaint that the learned judge had misplaced her analysis of abuse of process while considering whether the amended counterclaim disclosed a real prospect of success. The counterclaim was, specifically, for litigious interference and abuse of process and was, therefore, properly considered at the time the learned judge was considering its prospects of success.

[91] The English Court of Appeal in **Metal Und Rohstoff AG v Donaldson Lufkin & Jenrette Inc and another** [1990] 1 QB 391 considered the elements of the tort of abuse of process. Slade LJ, at page 469, had this to say:

> "The recent decision of this court in *Speed Seal Products Ltd v Paddington* [1985] 1 W. L. R. 1327, establishes that it is at least well arguable that there exists a tort of the abuse of the process of the court of a nature established by the decision of the Court of Exchequer Chamber in *Grainger v. Hill* (1838) 4 Bing. N. C. 212. The facts of the latter case are lucidly summarised by Fox L.J. in the *Speed Seal Products Ltd. V. Paddington*, at page 1334-1335, and we need not attempt a similar summary. However, certain feature of the legal constituents of the tort as appearing from the judgments in *Grainger v Hill* must be noted, namely:
>
> (1) It consists of an abuse of the process of the law 'to effect an object not within the scope of the process:' see, at p.221, per Tindal CJ …

> (2) Since this is the nature of the tort, the plaintiff does not have to show that the suit in question has terminated in his favour: see at p. 221, per Tindall CJ, at p. 222, per Park J, at p. 223, per Vaughan J., and at p. 224, per Bosanquet J.
>
> (3) Neither does he have to show want of reasonable and probable cause for it: see at p. 221 per Tindall CJ, at p. 222, per Park J., and at p. 223, per Vaughan J. Park J, at p.222, commented that the argument as to the omission to prove the termination of the suit in question and to allege want of reasonable and probable cause for it had proceeded upon an erroneous analogy with an action for a malicious arrest.
>
> (4) However, a person alleging such an abuse must show that the predominant purpose of the other party in using the legal process has been one other than that for which it was designed and that as a result he had caused him damage: see Halsbury's Laws of England, 4th ed., vol.45 (1985), p. 630, para. 1381."

[92] On a proper understanding of abuse of process, the fallacy of the submissions made on behalf of Mr Dunkley is that once the protection of absolute privilege is established in his favour, the claim would be one of an abuse of the court process. The learned judge noted that Mr Dunkley had merely asserted, without more, that the claim against him was an abuse of process. Nothing was advanced in the submissions to this court that demonstrates that she erred in arriving at that conclusion.

[93] It is also noted that the learned judge correctly considered the authority that was relied on by Mr Dunkley. At para. [77], she stated:

> "[Mr Dunkley] relies on the Privy Council decision in [**Crawford Adjusters v Sagicor General Insurance (Cayman) Limited**] for its guidance on the torts of abuse of process and malicious prosecution in civil matters. However, in that case, the Privy Council upheld the finding of the trial judge that any perceived ill will or any improper motive for making the allegation, did not convert Sagicor's use of the legal process into an abuse. The Privy Council said at paragraph 79 that the court could not find that the

> alleged intent to destroy Mr. Patterson's professional reputation was to be achieved other than through the initiation and successful prosecution of the action, or that there was no intention to bring the action to trial. No abuse of process was therefore demonstrated. Applying those principles in the **Crawford Adjusters** case, to the instant case, it would seem insufficient for [Mr Dunkley] to merely assert malice or improper motive to GLL. He must go further to demonstrate that the suit is an abuse of process."

[94] The learned judge was entirely correct in arriving at the conclusion that the counterclaim should be struck out, as it disclosed no reasonable ground for bringing it. The grounds challenging this are, therefore, without merit and fail.

**Issue 4: Whether the learned judge erred in referring the matter to mediation after striking out sections of the defence and the counterclaim (see ground 18).**

[95] GLL had applied for an order to dispense with mediation on the basis that the matter could not be resolved through mediation and that the need to strike out parts of the defence and the counterclaim provided good or sufficient reason to dispense with mediation. In the submissions made on behalf of Mr Dunkley, it was pointed out that it had been urged on the learned judge that GLL's pleadings provided no good reason for her to dispense with mediation. The learned judge seemingly agreed with that position when she found that GLL had indeed not provided a basis for the order and that there was no good reason to make the order. She appreciated that the claim was being fervently contested but felt that the parties ought to attend mediation as envisaged by the CPR.

[96] The complaint in the ground of appeal challenging the learned judge's refusal to dispense with mediation was that she erred in ruling that GLL was not entitled to dispense with mediation, and then rendered her own decision nugatory by dismantling the defence and striking out the counterclaim. It was contended that she did this just prior to the no-fault phase of court proceedings, namely, mediation, instead of adjourning GLL's application to the post-mediation phase of the court's process.

[97] What is clear is that it has not been demonstrated that the learned judge erred in exercising her discretion to refuse GLL's application to dispense with mediation. To say that her decision to do so was rendered nugatory by her neutering Mr Dunkley's defence and counterclaim is without merit, as sufficient aspects of Mr Dunkley's defence remained, and there was no good or sufficient reason shown that could satisfy the court that mediation would not be appropriate. Accordingly, ground 18 must also fail.

**Conclusion**

[98] It has not been shown that the learned judge misunderstood the law or the evidence before her when she struck out parts of the defence and the counterclaim. Based on the above reasoning, I would dismiss the appeal. This is a matter where the general principle that costs should follow the event is applicable, and, as such, I would propose that costs be awarded to GLL to be agreed or taxed.

**SIMMONS JA**

[99] I have read in draft the judgment of my sister P Williams JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

**V HARRIS JA**

[100] I, too, have read, in draft, the comprehensive judgment of my learned sister P Williams JA. I agree with her reasoning and conclusion and have nothing useful to add.

**P WILLIAMS JA**

**ORDER**

1. The appeal against the decision of Hart-Hines J (Ag) delivered on 22 June 2021 is dismissed.
2. Costs are awarded to Guardian Life Limited to be taxed if not agreed.