Trinity Term
[2015] UKPC 28
Privy Council Appeal No 0063 of 2013

JUDGMENT

Maharaj and another (Appellants) *v* Johnson and others (Respondents) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lady Hale
Lord Clarke
Lord Wilson
Lord Carnwath
Lord Hodge

JUDGMENT GIVEN ON

15 June 2015

Heard on 3 February 2015

Appellants
Aidan Casey
(Instructed by Sheridans)

Respondents (1 and 3)
Michael Douglas QC
(Instructed by DWF Fishburns)

The judgment of the majority of the board was delivered by **LORD WILSON: (with whom Lady Hale, Lord Carnwath and Lord Hodge agree)**

Introduction

1. Mr and Mrs Maharaj ("the claimants") appeal to the Board against the order of the Court of Appeal dated 4 March 2013 (Archie CJ, Bereaux and Smith JJA), by which it dismissed their appeal against the order of Rajkumar J sitting in the High Court on 8 February 2013. Rajkumar J had struck out their claim against the defendants, who in February 1986 were partners in a firm of solicitors and conveyancers in practice in Port of Spain under the name De Nobriga, Inniss and Co.

2. The claimants brought their claim against the defendants on 27 February 2012. The claim, as specified in the claim form and in the statement of case, was for damages for negligence. On the application of the defendants to strike it out, Rajkumar J assumed that the facts pleaded in the statement of case were true and, on that assumption, concluded that the claimants had a cause of action against the defendants in negligence. He held, however, that the cause of action had accrued on 6 February 1986 and that, having been brought outside the period of four years from that date, the action was barred under section 5 of the Limitation of Personal Actions Ordinance ("the Ordinance"), which, although repealed in 1997, has continued to apply to causes of action which had previously accrued.

3. The claimants seek to persuade the Board that the cause of action in negligence did not arise until 29 February 2008 and that the action was therefore not time-barred. They also seek its permission to amend their statement of case to plead their claim alternatively in contract and, specifically, that the defendants had a continuing contractual duty to them, of which, until about 4 April 2008, they remained in breach. An action brought on 27 February 2012 in respect of causes of action arising in contract between 27 February 2008 and 4 April 2008 would not be time-barred. But an action brought now, in 2015, in respect of such causes of action would be time-barred and so, were the suggested claim in contract arguable, it would be necessary to consider whether in such circumstances it would be proper to grant permission for the statement of case thus to be amended.

The facts

4. The action surrounds the conveyance of land forming part of the Bonair Estate in Arouca ("the land"). Until his death intestate in February 1976, Patrick Lambert owned the land. Almost nine years later, in December 1984, letters of administration of

his estate were granted to Gwendolyn Lambert, his widow. Shortly prior to her receipt of the grant, namely on 22 August 1984, Mrs Lambert, who lived in Venezuela, executed a Deed by which she conferred a Power of Attorney upon Richard Inniss, described in the Deed as an area superintendent. The nature of his connection, if any, with the firm De Nobriga, Inniss and Co is unclear and irrelevant. By the Deed, which was duly registered, Mrs Lambert empowered Mr Inniss to act on her behalf in a wide range of specified financial transactions, including "to sell any real or personal property belonging to [her] or to which [she] may become entitled, in particular the freehold parcel of land at Bonair Estate, Arouca, comprising 56,464 Superficial Feet". The land to which Mrs Lambert there referred was the land which her husband had owned and to which she was soon to become entitled as his legal personal representative.

5. In 1985 the claimants contracted to purchase the land from Mrs Lambert at a price of $170k. It is unclear whether Mrs Lambert signed the contract in person or whether Mr Inniss did so, or purported to do so, on her behalf; but, although the possible significance of the signatory's identity will soon become apparent, the case has proceeded on the basis that the contract itself was fully effective. The claimants instructed the defendants to act in the purchase on their behalf and, specifically, to do everything necessary to enable them to acquire a good marketable title to the land. The partner within the defendants' firm who had conduct of the purchase on behalf of the claimants was Mr Johnson, the first defendant.

6. By Deed dated 6 February 1986 Mrs Lambert, as personal representative of her husband's estate, conveyed, or purported to convey, the land to the claimants in consideration of their payment of the price, which was duly made on that day and receipt of which was acknowledged. With the approval of the defendants, indeed at their offices, Mr Inniss executed the Deed on Mrs Lambert's behalf pursuant, or purportedly pursuant, to his Power of Attorney. The claimants paid the defendants' fees for having acted for them in the purchase and the defendants closed their file. It was understood on all sides that the claimants had become full legal owners of the land. It never crossed the mind of the claimants that they might not be its full legal owners until their receipt of the letter to which the Board will refer in para 8 below.

7. In January 2008 the claimants decided to offer the land as security for a loan from the Bank of Baroda and they forwarded to the bank the Deed dated 6 February 1986. The bank instructed a firm of lawyers to investigate the claimants' title to the land. But the claimants changed their mind: they decided to sell the land instead. On 1 February 2008 they contracted to sell the land to Mr Sammy, a property developer, for $20m. Terms of the contract identified the closing date for the sale as 29 February 2008 and obliged the claimants to produce to Mr Sammy a good marketable title to the land.

8. Although on 1 February 2008 the claimants informed the Bank of Baroda that they no longer sought to raise the proposed loan, the investigation by the bank's lawyers

of their title to the land for some reason proceeded. By letter dated 21 February 2008 the bank's lawyers informed the claimants that they were unable to certify that their title to the land was of a marketable nature. The basis of the lawyers' doubt about the claimants' title, which they appear to have set out in the letter, was their opinion that the Power of Attorney granted by Mrs Lambert to Mr Inniss had not empowered him to transfer title to land which she held as personal representative of her husband's estate rather than in her personal capacity.

9. On receipt of the letter from the bank's lawyers the first claimant at once contacted the first defendant, who remained in practice as an attorney in Port of Spain. The first claimant informed the first defendant about the contract of sale to Mr Sammy and the contents of the letter from the lawyers. The response of the first defendant was that Mrs Lambert should be located and then asked to rectify the Deed of Conveyance. But efforts to locate Mrs Lambert prior to 29 February 2008 failed. On that date, when the property market may well have been falling, Mr Sammy rescinded the contract for purchase of the land on the ground that the claimants could not discharge their obligation to produce to him a good marketable title to it; and they acknowledged that he was entitled to do so.

10. In March 2008 efforts to locate Mrs Lambert succeeded. She was continuing to live in Venezuela. The first defendant prepared a Deed of Rectification. On 12 March 2008, in her capacity as personal representative of her husband's estate, Mrs Lambert executed it in Venezuela and on 4 April 2008 the claimants executed it in Trinidad. On 15 April 2008 it was registered. Recitals to the Deed stated that the Deed of Conveyance dated 6 February 1986 had been executed "through inadvertence, error and/or omission"; that "doubts" had arisen whether Mr Inniss had had the power to execute it on behalf of Mrs Lambert as personal representative of her husband's estate; and that, "with a view to removing all doubts" about the efficacy of the earlier Deed, she had agreed to execute the present Deed. Mrs Lambert, as personal representative, thereupon proceeded to convey the land to the claimants. The first defendant did not charge the claimants for his services in procuring and registering the Deed of Rectification.

The principal issues in the action

11. In their statement of case the claimants alleged that the defendants were negligent in having failed in 1986 to procure for them a good marketable title to the land and, in particular, to advise them that Mr Inniss had no power to execute on behalf of Mrs Lambert a deed of conveyance in relation to property which she held in her capacity as personal representative. They alleged that, as a result of the negligence, the sale of the land to Mr Sammy for $20m had not proceeded and that, since the present value of the land was only about $4m, they had thereby suffered loss and damage.

12. By their defence the first and third defendants (who, formally, are the only respondents to the appeal before the Board), and by a separate defence the second and fourth defendants, together contended that the claimants' action was time-barred. Without prejudice, they also contended that the Power of Attorney granted by Mrs Lambert to Mr Inniss *had* empowered him to convey on her behalf land which she held as personal representative of her husband's estate as well as land which she held personally; and that therefore, by the Deed dated 6 February 1986, the claimants *had* received good marketable title to the land. The four defendants therefore denied negligence; denied that the claimants had been unable to transfer good marketable title of the land to Mr Sammy; and denied that the claimants had suffered loss or damage as a result of any act or omission on their part.

13. The applications of the first and third defendants, and of the second and fourth defendants, for the statement of case to be struck out had initially been based on the contentions not only that the action was time-barred but also that, properly construed, the Power of Attorney granted by Mrs Lambert to Mr Inniss *had* empowered him to convey on her behalf land which she held as personal representative of her husband's estate. In the event, however, the defendants did not continue to maintain that their second contention was fit for consideration in the strike-out applications; and so it was parked, to await determination at any substantive trial which might take place. It does, however, seem to the Board – and, in view of its conclusion on the appeal, it may be helpful for it to observe – that there are substantial grounds for concluding, contrary to the opinion of the lawyers for the Bank of Baroda in February 2008, that the Power of Attorney *had* empowered Mr Inniss to convey the land to the claimants notwithstanding that it was vested in Mrs Lambert only as personal representative of her husband's estate. It seems to the Board that, in the construction of the Power of Attorney, the absence of any express conferment on Mr Inniss of power to act on Mrs Lambert's behalf in her capacity as personal representative would be likely to lose its significance in circumstances in which it empowered him to sell real property belonging to her "or to which [she] may become entitled" and "in particular" the land, which it proceeded meticulously to describe. It is important to keep in mind that the breach of duty on the part of the defendants to which the Board will hereafter refer is assumed rather than established.

The claim in tort

14. When did the claimants suffer damage as a result of the defendants' breach of duty? The answer will identify the date on which their cause of action accrued and from which the period of four years set by the Ordinance for the bringing of their action therefore began to run.

15. In *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 Lord Nicholls of Birkenhead said, at p 1633:

> "… within the bounds of sense and reasonableness the policy of the law should be to advance, rather than retard, the accrual of a cause of action. This is especially so if the law provides parallel causes of action in contract and in tort in respect of the same conduct. The disparity between the time when these parallel causes of action arise should be smaller, rather than greater."

Quite apart from the desirability of reducing disparity between parallel causes of action, the law encourages prompt claims and should not too readily derail an early complaint of a breach of a duty of care on the basis that the breach has not, or not yet, caused what the law recognises as actual damage. On the other hand, take a case, such as the present, in which the breach of duty was unknown to the claimants for 22 years. In its wider and over-arching function the law fails if in such circumstances it provides that the action is time-barred because the breach caused them actual damage 22 years previously. So a balance needs to be struck. Mr Casey on behalf of the claimants submits to the Board that, in certain of its decisions during the last 33 years, the Court of Appeal of England and Wales has forfeited balance by discerning actual damage in circumstances in which the damage was not actual at all.

16. Both in Trinidad and Tobago and also in England and Wales the legislatures have sought to address the potential for injustice in circumstances in which their laws of limitation require the claimant to have brought the action before he came to know the facts which entitled him to do so. In the case of actions for damages for personal injuries caused by negligence, an alternative period starting only on the date of the claimant's acquisition of specified knowledge is provided in Trinidad by section 5 of the Limitation of Certain Actions Act and in England by section 11 of the Limitation Act 1980 ("the 1980 Act"). But the law of England has gone further than the law in Trinidad. Section 14A of the 1980 Act, inserted by section 1 of the Latent Damage Act 1986, applies to other actions for negligence and provides for an alternative period of three years starting on the date of acquisition of specified knowledge. In actions for negligence in respect of economic loss some of the English decisions since 1986 on the meaning of actual damage as a constituent of the tort have been required because the claimant acquired the specified knowledge more than three years prior to bringing the action and so could not take advantage of section 14A: for example *Knapp v Ecclesiastical Insurance Group Plc* [1998] PNLR 172, *Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863, [2009] Bus LR 42, [2008] PNLR 874, and *Nouri v Marvi* [2009] EWCA Civ 1107, [2011] PNLR 100. But section 14A is subject to section 14B, which provides, as a long stop, that no action to which section 14A applies shall be brought after more than 15 years from the date of the act or omission on the part of the defendant which is alleged to constitute negligence. It follows that, had the present case arisen in England, section 14A would not have availed the claimants and they would have had to establish that they suffered no actual damage until after the period of limitation (being the period of six years prescribed by section 2 of the 1980 Act rather than that of four years prescribed by the Ordinance) had started to run. It follows that, if their claim were to be

barred under the law of Trinidad, it would equally have been barred under the law of England.

17. Analysis of the first two of the claimants' three grounds of appeal requires identification of the rights, if any, which the claimants *did* acquire in relation to the land on or before 6 February 1986. The task is not difficult. On the basis on which the case has proceeded, there is no reason to doubt that the contract for sale of the land would have been susceptible to specific performance. Therefore, according to traditional doctrine, the claimants became equitable owners of the land upon its execution: *Lysaght v Edwards* (1876) 2 Ch D 499 at p 506. But following execution of a contract for sale of land a vendor retains certain temporary rights in relation to it and the better view is that they are proprietary rather than contractual. In *Jerome v Kelly* [2004] UKHL 25, [2004] 1 WLR 1409, Lord Walker of Gestingthorpe said:

> "32 It would therefore be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income."

But the vendor's share of the beneficial ownership, reflective of his right to possession or to receipt of rent, does not survive payment to him of the purchase price or the balance of it: *Wall v Bright* (1820) 1 Jac & W 494, at p 503, 37 ER 456, at p 459. On 6 February 1986 the claimants paid the purchase price or the balance of it and on that date they acquired full equitable ownership of the land and therefore the right to require Mrs Lambert, as their trustee, to transfer legal ownership of it to them.

18. The claimants' first ground of appeal is that their case is a "no transaction" case and that, if so, they suffered no actual loss prior to 29 February 2008 or, at least, that in advance of a full trial the court cannot conclude otherwise. What is a "no transaction" case?

19. It was Rimer LJ, in his judgment in *Pegasus Management Holdings SCA v Ernst and Young* [2010] EWCA Civ 181, [2010] PNLR 438, who, at para 28, drew a distinction in cases of professional negligence between "no transaction" cases and "wrong transaction" cases. Perhaps the latter are even better described by Longmore LJ in *Axa Insurance Ltd v Akther and Darby* [2009] EWCA Civ 1166, [2010] 1 WLR 1662, at para 71, as "flawed transaction" cases. In his dissenting judgment in the same case

Lloyd LJ suggested, at para 134, that a focus on the distinction might be an unhelpful distraction. Although the Board considers that the distinction can represent a helpful sign-post to the relevant principles, it is essential to bear in mind that the central concept behind the "no transaction" and the "flawed transaction" cases is different. For in the latter the claimant *does enter* into a "flawed transaction" in circumstances in which, in the absence of the defendant's breach of duty, he would have entered into an analogous, but flawless, transaction. In the former, however, the claimant also enters into a transaction but in circumstances in which, in the absence of the defendant's breach of duty, he *would have entered* into "no transaction" at all. The difference in concept dictates a difference in the inquiry as to whether, and if so when, the claimant suffered actual or measurable damage. In the "flawed transaction" case the inquiry is whether the value to the claimant of the flawed transaction was measurably less than what would have been the value to him of the flawless transaction. In the "no transaction" case the inquiry is whether, and if so at what point, the transaction into which the claimant entered caused his financial position to be measurably worse than if he had not entered into it: see the *Nykredit* case, cited above, at p 1631 (Lord Nicholls). The *Nykredit* case was a classic example of a "no transaction" case in that the claimants, who had lent money on the security of a property which the defendant valuers had negligently overvalued for them, would have declined to make the loan if the valuation had not been deficient.

20. How, then, do the claimants contend that theirs is a "no transaction" case, namely that, in the absence of the defendants' breach of duty, they would not have proceeded to purchase the land? The duty of care, so they contend, obliged the defendants to warn them that, although their payment of the price would secure for them full equitable ownership in the land, the proposed execution of the Deed of Conveyance by Mr Inniss on behalf of Mrs Lambert would fail to convey to them the legal interest in it. Had they been so warned and been invited to address the consequential delay in securing an effective execution of the Deed, so they now say (although they have never so pleaded), their response would be likely to have been to exercise their right not to proceed to purchase the land.

21. In the Board's view the suggested analysis of the nature of the defendants' duty of care is unrealistic. The defendants' duty was to take all reasonable care to ensure that legal, as well as full equitable, ownership of the land became vested in the claimants. They therefore had to take all reasonable care to ensure that Mrs Lambert executed the Deed of Conveyance in a legally effective manner and, if she proposed to execute it otherwise, to reject her proposal on behalf of the claimants and to seek to insist that the manner of her execution of it should be legally effective. There is no suggestion that in February 1986 it would have been impossible within a reasonable time to procure Mrs Lambert's personal execution either of the Deed of Conveyance or of a deed by which she conferred upon Mr Inniss an appropriately enlarged power. Twenty two years later it took less than three weeks to procure her execution of the Deed of Rectification. On Mr Casey's analysis a case of a "flawed transaction" can too easily be reconstituted as a case of "no transaction" by contending, however artificially, that a defendant has a

duty to warn the claimant that, if matters were to proceed in a particular way, the transaction would be flawed and that, if so warned, the claimant would be likely to elect not to proceed with the transaction.

22. The present case is an obvious case of a flawed transaction: it was flawed because it did not convey to the claimants a legal interest in the land and, in the absence of the defendants' breach of duty, they would have entered into an analogous transaction in which it *was* conveyed to them. The inquiry then becomes: was the value of a full equitable interest in the land on 6 February 1986 measurably less than the value then of a full legal and equitable interest in it? If so, the claimants then suffered actual damage and their action in tort is time-barred. The claimant's second ground of appeal, to which the Board now turns, involves criticism of some of the guidance given by the Court of Appeal of England and Wales in relation to this type of inquiry.

23. In the Board's opinion the most helpful guidance in the above regard is located in the judgments in *DW Moore and Co Ltd v Ferrier* [1988] 1 WLR 267. There the claimants instructed the defendant solicitors to draft an agreement between the two personal claimants and F which would restrain him from setting up a rival business within 15 miles of King's Lynn if he were to cease to be a director of the claimant company. The agreement was executed and F became a shareholder and a director. Ten years later F ceased to be a director of the company but retained his shareholding in it; and he set up a rival business in Swaffham, which lies within 15 miles of King's Lynn. The claimants then discovered that the terms of the agreement restrained F only if he ceased to be a shareholder of the company. On the advice of the defendants the personal claimants had entered into a flawed transaction. The Court of Appeal held that the claimants suffered actual damage on execution of the agreement and that their claim in negligence was therefore time-barred. Neill LJ, at p 278, accepted that there was no presumption that the claimants suffered damage when the agreement was executed but concluded that their rights under it were demonstrably less valuable than rights under an adequately drawn agreement. Bingham LJ, at p 280, observed that, had the claimants sued the defendants immediately after execution of the agreement, the risk of F's future departure and of his establishment nearby of a competing business could not even then have been eliminated; and that the judge "would have assessed as best he could on the available evidence the loss fairly and reasonably flowing in the usual course of things from the defendants' breach of contract, reaching a figure that might have been large or small but would not have been nominal".

24. In the *Knapp* case, cited at para 16 above, the defendant brokers, in arranging renewal of insurance for the claimants' outbuildings, carelessly failed to disclose material facts to the insurers. The renewal was a flawed transaction. Six months after the renewal, the outbuildings were damaged by fire and the insurers elected to avoid the policy. The court held that the claimants had suffered actual damage prior to the insurers' election and indeed prior to the fire, namely from the date of the renewal, and that they were therefore time-barred. In giving the leading judgment Hobhouse LJ held,

at p 184, that "[t]he risk of loss existed from the outset and in the absence of better evidence would have to be evaluated and assessed as a risk and damages awarded accordingly". Importantly, however, he added, at p 185, that it was possible to visualise other situations in which the fault could so easily be remedied that the damage would be no more than nominal.

25. Mr Casey is, however, correct to say that there are observations in at least two other decisions of the Court of Appeal which seem to suggest that professional defendants who have breached their duty of care will *always* be able to establish that the claimant suffered actual damage at the time of his entry, on their advice, into the flawed transaction. The Board will make only brief reference to them because in its opinion the defendants in the present case do not need to rely on them.

(a) In *Baker v Ollard and Bentley*, Court of Appeal, 12 May 1982, transcript No 155 of 1982, 126 SJ 593 the defendant solicitors failed in breach of duty to implement the claimant's instructions to secure for her a particular interest in the first floor of a house which she was purchasing with others. The conveyance was a flawed transaction. The decision that she suffered actual damage on the date of its execution is unexceptionable and was approved by the House of Lords in the *Nykredit* case, cited at para 15 above, at p 1634. But, in giving the judgment of the court, Templeman LJ said, at p 3:

> "The plaintiff did not receive that which the solicitors ought to have obtained for her. She received something different. Therefore she suffered damage."

Later he added, at p 4:

> "She suffered damage because she did not get what she should have got."

The phrase "what she should have got" no doubt means "what, in the absence of the defendants' breach of duty, she should have got". In giving the second judgment in the *Knapp* case, cited above, Buxton LJ seems to have been attracted to Templeman LJ's absolute propositions.

(b) Also attracted to them was Rimer LJ in the *Pegasus* case, cited in para 19 above. On the advice of the defendants, who were tax advisers, the second claimant caused a company to be incorporated and he then invested money in it. It later transpired that, in breach of duty, the defendants had failed to advise him that, prior to his investment in it, the new company should have established

subsidiaries. So his investment in it was a flawed transaction. The court held that the second claimant's action for negligence was time-barred because he had suffered damage at the time of his investment. Rimer LJ said at para 82:

> "Starting with *Baker*, there is a clear line of Court of Appeal authority that damage sufficient to complete the tort of negligence will or may be caused in a 'wrong transaction' case by the fact that, as a result of the defendant's negligence, the claimant has not received what he ought to have received. It is, in particular, not necessary to show that the claimant is immediately put into a position in which he is financially worse off than he would have been had the defendant not been negligent."

26. In the opinion of the Board the observations of Templeman LJ in the *Baker* case and of Rimer LJ in the *Pegasus* case go too far. The fact that the transaction was flawed does not by itself mean that the claimant suffered actual damage on entry into it. Although in the words of Lord Hoffmann in *The Law Society v Sephton & Co* [2006] UKHL 22, [2006] 2 AC 543, at para 21, "it may be relatively easy … to infer that the plaintiff has suffered some immediate damage, simply because he did not get what he should have got", there is no substitute for attending to the particular facts and deciding whether such an inference is properly to be drawn from them.

27. In respectful agreement with the brief judgment of the Court of Appeal in the present case, the Board concludes that the claimants suffered actual damage upon their execution of the Deed on 6 February 1986. An inference to this effect is properly to be drawn from the following.

(a) The claimants' failure to obtain a legal interest in the land on that date subjected them to significant risks which were present from then onwards.

(b) Just as in 2008 the claimants discovered that their lack of a legal interest obstructed their attempts both to borrow on the security of the land and to sell it, they would be likely to have met similar obstruction in the event that at any earlier time after 6 February 1986 they had attempted either to borrow on the security of it or to sell it. Their equitable interest was therefore significantly less valuable to them than a legal interest would have been.

(c) It was not even in the power of the claimants or of the defendants to remedy the flaw by themselves. For it was necessary to procure the participation of Mrs Lambert. In 2008 it so happened that she was quickly located and that she cooperated in a swift execution of the Deed of Rectification. Even in those circumstances costs, for which in the first instance the claimants were liable,

must have been incurred in procuring its execution and in registering it. But from 6 February 1986 onwards there were risks that Mrs Lambert would not be able to be located or would be found to have died: were either risk to have eventuated, there would have been significant extra complications – and extra costs. There was also a risk that, if located, Mrs Lambert would not willingly execute the Deed: were that risk to have eventuated, it would have been necessary to take costly legal steps in order to oblige her to do so.

28. The risks to which the Board has referred were such as to generate an immediate and (no doubt with difficulty) a quantifiable reduction from the value of the asset which the claimants should have received on 6 February 1986 to the value of the asset which they did receive. The risks were not such as to render their loss purely contingent. The distinction is clearly drawn in *The Law Society* case cited at para 26 above. There accountants negligently reported that the accounts of a dishonest solicitor were in order, as a result of which the Law Society refrained for several years from taking steps to strike the solicitor from the roll and he was enabled to continue to defraud his clients. Ultimately his dishonesty was exposed. Having made payments to his clients out of its compensation fund, the society sued the accountants for negligence. The accountants unsuccessfully argued that, from the dates of their negligent reports onwards, the society had been at risk of claims for compensation and had then suffered damage, which rendered its action against them time-barred. The House of Lords held that, prior to the making of the claims for compensation, the society's liability was purely contingent and did not amount to damage. Lord Hoffmann at para 22 distinguished cases in which the "plaintiff had paid money … and in return obtained less than he should have got", as, in somewhat similar terms, did Lord Walker at para 48.

29. It follows that in the view of the Board the claimants' action in tort is time-barred.

The proposed claim in contract

30. The defendants do not contend that the proposed claim in contract, although unpleaded, takes them by surprise. For Rajkumar J discussed it extensively before concluding that it could not save the action from being barred. Of course the claimants have a cause of action arising in contract on 6 February 1986 but it is of no value to them. What they need is a cause of action arising in contract on a date on or after 27 February 2008. So they need to show that every day until after 26 February 2008 the defendants continued to be under a contractual duty to secure for them the legal interest in the land and that, on each of those days until, say, 4 April 2008, they breached it and so generated a fresh cause of action.

31. The proposed claim in contract is heavily reliant on the decision of Oliver J in *Midland Bank Trust Co Ltd v Hett Stubbs and Kemp* [1979] 1 Ch 384. A father and son

instructed the defendant solicitors to draft an agreement which would confer upon the son an option to purchase the father's farm. In March 1961 they both executed it. In breach of their duty to the son, the defendants omitted to register the agreement as an estate contract. In August 1967, aware that the agreement had not been registered, the father conveyed the farm to his wife. By action brought in July 1972 the son's executors successfully sued the solicitors for negligence both in tort and in contract. Oliver J determined the action at a time before it was settled that negligent solicitors were liable to their clients in tort as well as in contract. He held that they could indeed be liable for negligence in tort and also, albeit arguably in conflict with later authorities in the Court of Appeal to which the Board has referred or is about to refer, that the son's cause of action arose not in 1961 but in 1967 when he suffered damage by reason of the father's conveyance. But, in case he was wrong about the exposure of the defendants to liability in tort, Oliver J addressed the claim in contract. He held that the defendants continued to be under a contractual duty to register the option until 1967, when the conveyance made it impossible for them to do so; and that therefore the contractual claim was not time-barred. The son's complaint, said Oliver J at p 434, was not that the option was not registered within a reasonable time – which caused no conceivable loss to anyone – but that it was not registered at all. It was important to note, added the judge at p 435, that the case was one of simple non-feasance.

32. But, as the editors of Jackson and Powell on Professional Liability, 7th ed (2011) correctly observe, at para 5-030, the authority of Oliver J's conclusion in favour of the continuation of the duty in such circumstances was substantially weakened by the decision of the Court of Appeal in *Bell v Peter Browne and Co* [1990] 2 QB 495. There the claimant agreed with his wife, from whom he was separating, that he should transfer his interest in the home to her in consideration of her grant to him of an interest in one-sixth of the gross proceeds of any sale of it; and that his interest should be protected by her making a declaration of trust to that effect or entering into a mortgage in his favour. In 1978 he executed the transfer but, in breach of duty, his solicitors failed to procure the declaration or the mortgage. It was a flawed transaction. Nor did the solicitors secure registration on his behalf of a caution against dealings. Eight years later the wife sold the home and spent the proceeds. The court held that the claimant's action against the solicitors was time-barred. It held that the claimant had suffered not merely potential but actual damage as soon as he had transferred his interest to the wife without obtaining protection for his substituted interest and thus that the claim in tort was barred. It held that, following the husband's execution of the transfer, the solicitors were under no continuing duty to him and that, had they thereafter been requested to lodge the caution, their obligation to do so reflected not a continuing duty of care but a duty to mitigate the consequences of their original and only breach: see the judgment of Mustill LJ at p 513. Nicholls LJ, at p 501, distinguished the *Midland Bank* case on the basis that there the defendants had at no material time treated their obligation to the son as discharged and that they had continued for the following six years to have dealings with him in relation to the option. But Beldam LJ, at p 508, declined to distinguish the *Midland Bank* case; he seems to have concluded that it was wrong.

33. In *Nouri v Marvi*, cited in para 16 above, a claimant made another unsuccessful attempt to overcome a time-bar by alleging the defendant to be under a continuing contractual duty. On instructions from M, who was masquerading as the claimant, the defendant solicitors completed a so-called sale of the claimant's flat to M and, believing him to be no more than the purchaser, they released to him the transfer on which he had forged the claimant's signature. In so doing they were in breach of their duty to the claimant to take reasonable steps to ascertain his identity before purporting to act on his behalf. The Court of Appeal held that the claimant had suffered loss even prior to M's registration of his bogus title, namely on the date of completion, and that the action was therefore time-barred. In rejecting the claim that, following completion, the defendants continued to owe a contractual duty to the claimant, Patten LJ observed, at para 36, that in the *Bell* case the court had treated the decision in the *Midland Bank* case as very much dependent on its own facts. He held, at para 38, that there were no special facts suggestive of any duty surviving completion; that the defendants had no duty to take any further steps in relation to the flat analogous to the duty to register the option in the *Midland Bank* case; and that, almost immediately after completion, they had concluded that they had done all that they were required to do.

34. The Board considers that the claimants' proposed claim in contract is not arguable. The claim is that for 22 years, namely from 6 February 1986 until about 4 April 2008 and in any event until after 26 February 2008, the defendants were under a continuing contractual duty to procure execution of a Deed of Rectification. But their fees had been promptly paid. Their file had been closed. There is no evidence of any communication between the claimants and the first defendant (or any of the other defendants) from 1986 until the telephone call late in February 2008. The *Midland Bank* case was, as Oliver J stressed, one of non-feasance: the contract obliged the solicitors to register the option and the obligation remained outstanding for six years. The Board recognises that the *Bell* case could be subject to a similar analysis, namely that the contract obliged the solicitors to register the caution and that the obligation remained outstanding for eight years. Beldam LJ may have been correct to accept that, in relation to the alleged continuing duty, the two cases were indistinguishable. Mr Casey argues forcefully that, on this point, it was the *Bell* case, rather than the *Midland Bank* case, which was wrongly decided. In any event, however, the present case is different. The complaint is not that the defendants failed to take action pursuant to their contract with the claimants; it is that, in proceeding on the basis that Mr Inniss had validly executed the Deed of Conveyance on behalf of Mrs Lambert, the action by which they purportedly performed their contract was negligently wrong. At the point when they paid the purchase price, the claimants did not receive the marketable title which they had contracted to receive. There was no reference in the contract, express or implied, to an obligation to procure execution of a deed of rectification and, unlike the facility of solicitors to secure registration of an option or a caution, the defendants could not have procured execution of a deed of rectification without the participation of a third party, namely Mrs Lambert. The proposed claim in contract is, in a word, factitious.

35. The Board has had the advantage of reading the dissenting judgment of Lord Clarke in which he rejects its analysis in para 34 above. His characteristic – and admirable – sensitivity to the perceived merits of a claim leads him, in the Board's respectful view, to question settled law which has a firm foundation in the public policy against ventilation of ancient claims. He considers it to be arguable that, unbeknown to both sides, the defendants owed a contractual duty to the claimants for more than 22 years. Indeed, but for the decision of the claimants in February 2008 to mortgage or sell the land, the suggested duty might equally have endured for, say, 42 years or 62 years, enforceable if necessary on behalf of their estate. Better, surely, than the artifice of a continuing contractual duty would be for Trinidad to mitigate the rigours of section 5 of the Ordinance in its application to claims in negligence otherwise than for personal injuries by claimants for long unaware of the existence of their cause of action. Were Trinidad to choose to follow the English model in that respect, it would throw a life-line to a number of claimants; but it would not rescue the claimants before the Board for, as it has explained in para 16 above, the public policy to which it has referred has generated in England the long stop prohibition against actions brought more than 15 years after the allegedly negligent act.

36. So the Board dismisses the appeal and, subject to any submissions to the contrary filed within 28 days, orders the claimants to pay the defendants' costs of and incidental to it.

LORD CLARKE: (dissenting)

The claim in contract

37. I agree with paras 1 to 29 of Lord Wilson's judgment and that, for the reasons he gives, the claimants' claim in tort is time barred. I have, however, arrived at a different conclusion with regard to their claim in contract. In this judgment I will use the same expressions as he does in his judgment. As he says at para 30, the defendants do not say that they are taken by surprise by the proposed claim in contract. Rajkumar J ("the judge") discussed it in some detail.

38. The defendants were acting pursuant to a contract between the parties. As Lord Wilson puts it at para 5, the claimants instructed the defendants to act in the purchase of the land on their behalf and, specifically, to do everything necessary to enable them to acquire a good marketable title to the land. As the judge put it at para 1(ii) of his judgment, they were "under a duty to the claimants to exercise all [such] reasonable skill and care as was to be expected of competent solicitors specialised in conveyancing". As I see it, that duty was owed both in tort and in contract. The contrary was not suggested. Although the judge said in para 2 that the cause of action pleaded was in negligence, he noted at para 4 that the claimants' case was that the defendant

owed them a continuing duty to provide a good marketable title to the land, which was not satisfied up to and including February 2008, when they lost the chance of a profitable sale of the property.

39. In para 8 the judge noted that as a matter of law, the relevant period of limitation in tort ran from the date of the damage; that as a matter of law the date of the damage was the date of the actual conveyance**,** regardless of whether the defect in title was discovered or known to the claimants on that date and that no such continuing duty to recognise, remedy and rectify the defect in title as alleged existed; that, even if there were such continuing duty as alleged, it did not detract from the fact that the breach occurred once and for all at the date of conveyance; and that, as a matter of law, the limitation period for the tort of negligence runs from that date. The judge further concluded that, although breach of contract was not pleaded, any cause of action in contract accrued at the latest on February 6th 1986, the date of conveyance.

40. Before the Board, the claimants' case in contract was put with clarity and force by Mr Aidan Casey, both orally and in writing. Mr Casey conceded that in the claim form and statement of case the claimants' case was put as a claim for damages for negligence. However, he noted that in para 18 of the statement of case the claimants alleged that the defendants owed them a continuing duty, which was not essentially different from the duty alleged in tort. This can be seen from the claimants' proposed amendments to the claim form and the statement of case. They propose that the claim form be amended to add "and breach of contract" after the word "negligence" in the narrative and the prayer and that the prayer in the statement of case be amended in the same way. The point can be seen most clearly in the proposed amendment to para 18 of the statement of case as follows:

> "Further and/or alternatively, the claimants aver that the defendants had a continuing duty <u>in contract to fulfil or complete their said retainer, or the said tasks they were retained to complete</u>. In breach of that duty (and/or in breach of their said tortious duty of care) the defendants failed to execute a Deed of Rectification in respect of the subject premises prior to the Completion Date set out in the Agreement for Sale with Junior Sammy. As a result the claimants were unable to complete the sale and sustained losses as aforesaid. The claimants repeat para 15 hereof." [*remainder deleted*]

Para 15 alleged the agreement for sale to Junior Sammy.

41. Mr Casey submitted that the particulars of breach of contract alleged are in essence the same as the particulars of negligence, at any rate in so far as the case in negligence was pleaded in the alternative as a breach of a continuing duty of care. Both

before the judge and before the Court of Appeal it was submitted on behalf of the claimants that the defendants were negligent in their preparation of the deed and that there was a continuing duty to provide a good marketable title to the property, which continuing duty was not satisfied up to and including February 2008 and reliance was placed upon the decision of Oliver J in *Midland Bank Trust Co v Hett, Stubbs and Kemp* [1979] Ch 384.

42. As I see it in the light of the submissions that have been made to the Board, two questions arise, namely whether permission should now be granted to give the claimants permission to amend their claim form and whether the claimants' claim for damages for breach of contract is arguable. It is convenient to consider the second question first because, if the claim for damages for breach of contract is unarguable, there would be no point in granting permission to amend the claim form to include it.

Is the claim in contract arguable?

43. Before the Board Mr Casey put the claimants' case broadly as follows. The defendants owed them a continuing duty to exercise care and skill primarily in contract. It was owed primarily in contract because the mutual obligations of the parties arose out of the contract between the parties. The starting point must be the terms of the retainer. In paras 3 and 5 of the statement of case the claimants alleged that: (a) the claimants instructed and retained the defendants for the purpose of doing all such acts deeds and things as were necessary for the purpose of acquiring a good and marketable title to the subject premises by way of conveyance; and (b) on or about 27 November 1985 the claimants instructed the firm and/or the defendants, among other things, to advise them on the title to the subject premises and to prepare the requisite deed of conveyance and to do all such other acts deeds and things as were necessary for its due preparation, execution and registration as an effective and appropriate conveyance of the subject premises. It was recognised that the defences disputed that the retainer was on these terms but for the purposes of an application to strike the claim out, the claimants' case must be accepted as correct.

44. Where a solicitor accepts a retainer upon the terms alleged by the claimants to perform a certain task which can be performed at any time, then: (a) his failure to perform it cannot discharge him from the obligation; (b) that is so even if his obligation is cast as an obligation to perform it within a reasonable time; (c) the failure to perform timeously may or may not give rise to a repudiatory breach of the contract of retainer, but that is writ in water unless and until it is accepted by the client as bringing the contractual obligation to an end. Thus, for example, if the client discovers the failure one or two years later, the client is contractually entitled to insist on performance. The solicitor cannot say that (without more) he is now discharged. If the solicitor fails at that point to perform, it is strained and unreal to suggest that the only complaint the client has is that the solicitor failed to perform at the moment in time when a reasonable time

had expired. In the absence of an express or implied term of the contact, neither of which was suggested, the correct analysis is that: (i) the solicitor is not in breach until the reasonable time has elapsed, (ii) once that time has arrived, he is in continuous breach until he finally discharges his obligation, or (if these are the facts) until events make it impossible for him to discharge it.

45. There is no sensible basis for a conclusion either that the obligation arises at only one moment in time, namely at the moment when a reasonable time expires, or that it is a continuing obligation which expires after a reasonable time. There is no express term to that effect and there is no basis for implying such a term. If asked whether that was the position, the officious bystander would not say of course. Moreover such a term is not necessary to make the contract work, or to give business efficacy to the contract. No sensible client could be expected to agree to such a term. Moreover, viewed from a client's perspective neither of those is at all a likely or sensible construction of the retainer. If a solicitor wishes to achieve such a state of affairs – namely release from the primary obligation, simply through inactivity – that is something which would have to be expressly and clearly provided for in the retainer, which it was not. As I see it, the position is that, where there is an express obligation in the retainer to achieve a particular result, it would be necessary to have either an express or implied term in the retainer to override or limit the obligation, whereas here there is neither.

46. As a matter of authority, that analysis was precisely that of Oliver J in *Hett*, where a solicitor negligently failed to register an option to purchase under the Land Charges Act 1925. One of the questions for decision was whether the solicitor owed a continuing duty to do so. Oliver J answered that question yes. At pp 434D to 435E, he set out the position as he saw it unassisted by authority as follows:

> "Unassisted by authority, I would again favour Mr Harman's submission. The reality is that the plaintiffs' complaint is not that the option was not registered within a reasonable time - which caused no conceivable loss to anyone – but that it was not registered at all. The defendants simply did not perform their contract and if their continued failure constituted a repudiation it was not one which was known to Geoffrey and, not being accepted, gave rise to no cause of action until events put it out of their power any longer to perform. ...
>
> …
>
> If I employ a carpenter to supply and put up a good quality oak shelf for me, the acceptance by him of that employment involves the assumption of a number of contractual duties. He must supply wood of an adequate quality and it must be oak. He must fix the shelf. And he must carry out

the fashioning and fixing with the reasonable care and skill which I am entitled to expect of a skilled craftsman. If he fixes the brackets but fails to supply the shelf or if he supplies and fixes a shelf of unseasoned pine, my complaint against him is not that he has failed to exercise reasonable care and skill in carrying out the work but that he has failed to supply what was contracted for. He may fix the brackets and then go away for six months, but unless and until I accept that conduct as a repudiation, his obligation to complete the work remains.

It is, I think, important in the instant case to note that it is not a case of the giving of wrong and negligent advice - where the breach of contract necessarily occurs at a fixed point of time - but of simple non-feasance. If one were to seek to write out in longhand the obligations which Mr. Stubbs senior assumed when he engaged to act in the matter of the grant of the option, they were (1) to draw and have completed a proper and enforceable option agreement which would bind the parties; (2) to take such steps as were necessary and practicable to ensure that it was binding on the land into whosesoever hands it might come before any third party acquired a legal estate, and (3) to carry out his work with the care and skill which a normally competent practitioner would bring to it.

So far as the client is concerned, it is a matter of total indifference to him at what date the solicitor chooses to fulfil his contractual obligation under (2) above so long as it is effectively fulfilled. No doubt a normally careful practitioner would fulfil that obligation as soon as is reasonably practicable. In an appropriate case he might give a priority notice. But if he fails to do so and an effective registration can still be and is effected, his client can have no complaint except the purely technical one that he has been a bit careless and might have done it sooner. He has, no doubt, exhibited a failure to show the normal competence and care for his client's affairs by carelessly allowing a period to elapse during which a third party might have, but has not in fact, acquired an interest. But such a failure cannot, I should have thought, affect, much less discharge, the primary obligation to effect registration timeously, which continues until it is performed or becomes impossible of performance or until the client elects to treat the continued non-performance as a repudiation of the contract."

47. At p 435G Oliver J considered the defendant's argument that he was bound by *Bean v Wade* (1885) 2 TLR 157 to find for the defendant. He rejected that argument at p 438 on the basis that the only breach of duty being alleged by the plaintiffs was the failure to give notice "within a reasonable time" and the court, having decided that the only claim lay in contract, was concerned solely with the question of when that breach occurred, or, in other words, at what point a reasonable time could be said to have expired.

48. Mr Casey accepted that Oliver J also said at p 438E that the defendants in *Hett* "never treated themselves as functi officio in relation to the option", but submitted that that did not form any part of his reasoning in distinguishing *Bean v Wade*. This is apparent from p 437G, where he explained that the facts of *Bean* in this respect were not clear from the report:

> "… but there is no indication in the report whether or not they continued to act thereafter. It looks as if they were treated as functi officio once the assignment to the plaintiffs was concluded, for the judgment continues at p 405: "In a letter by one of the defendants to one of the plaintiffs asking him to execute the conveyance, it was distinctly said that that would complete the matter." How far these matters were considered as significant by the court it is not easy to see from the report."

49. Mr Casey recognised that *Hett* was distinguished by the Court of Appeal in *Bell v Browne and Co* [1990] 2 QB 495. Lord Wilson has set out the facts of *Bell* at para 32. As he says, there the claimant agreed with his wife, from whom he was separating, that he should transfer his interest in the home to her in consideration of her grant to him of an interest in one-sixth of the gross proceeds of any sale; and that his interest should be protected by her making a declaration of trust to that effect or entering into a mortgage in his favour. In 1978 he executed the transfer but, in breach of duty, his solicitors failed to procure the declaration or the mortgage. In addition they did not secure registration on his behalf of a caution against dealings. Eight years later the wife sold the home and spent the proceeds. The court held that the claimant's action against the solicitors was time-barred. The claim in tort was time-barred because he suffered actual damage without obtaining protection for his substituted interest and the claim in contract was time-barred because the solicitors owed no continuing duty to him.

50. Mr Casey submitted that the grounds given by Nicholls LJ in *Bell* at p 501 for distinguishing *Hett* are exiguous and unconvincing. The upshot is described by McGee in the 7th ed (2014) of his book on *Limitation Periods* at para 10-032 in this way:

> "This aspect of the case appears to cause some difficulty. The plaintiff naturally sought to draw an analogy with … *Hett*. … So far as the failure to obtain a declaration of trust is concerned, the case is obviously distinguishable, since that was something which had to be done at the time of the divorce if it was to be done at all. The failure to register the caution in the present case seems to be more directly comparable with the failure to register the option in the earlier case, and it is submitted that this aspect of the decision leaves the law in a state of undesirable confusion."

51. Mr Casey further relied upon the fact that *Hett* was referred to with approval by Waller LJ in *Carlton v Fulchers* [1997] PNLR 337, 342 in these terms:

> "As it seems to me, the passage in Oliver J's judgment in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384, 438 to which we were referred holds that, in a case where there is a continuous contractual obligation, the limitation period does not begin to run until the contract finally becomes impossible of performance. In the case of want of prosecution by a solicitor for example, it would be wholly unsatisfactory to contemplate defining the date of breach for limitation purposes by reference to a solicitor's first failure to take out the summons for directions for the reasons given by Oliver J. Nothing, as I see it, in *Bell v Peter Browne & Co* [1990] 2 QB 495 criticises that aspect of the judgment in a continuing duty case. Indeed as I see it, Nicholls LJ at p 501 and Mustill LJ at p 512, seem to recognise that the continuing retainer type of case both exists and will bring a different result from the situation being dealt with in *Bell* … "

52. Mr Casey adopted that reasoning, submitting that, if the approach in *Bell* were correct, the solicitor could presumably say that the obligation to issue a summons for directions was one that had to be performed within a reasonable time, and that there was a once and for all breach as soon as a reasonable time had passed. That is counter-intuitive, essentially for the reasons set out above, so that, in so far as there is a conflict between the principles stated in *Bell* and those stated in *Hett*, the analysis of Oliver J in *Hett* is to be preferred.

53. In response to submissions that such a conclusion would have extreme consequences and could result in relevant types of claim never becoming time-barred, Mr Casey submitted that there is a limit to how far such policy arguments could be taken, for these reasons. First, the existence of the continuing duty is a product of the contract which the solicitor has chosen to enter; it would be simple and salutary for solicitors to delimit the terms of their retainers, and the temporal scope of their duties, when entering into the contract with the client and, by that simple device, the risk of 'long-tail' claims could be avoided (and the client would be given the opportunity to consider the proposed terms in advance and on an informed basis). Secondly, on Oliver J's analysis the duty only persists so long as it is possible for the solicitor to discharge the relevant obligation, so that there is a control mechanism.

54. I would accept Mr Casey's submissions. Nicholls LJ distinguished *Hett* on the basis that there the defendants had at no material time treated their obligation to the son as discharged and that they had continued for the next six years to have dealings with him in relation to the option. As I read the judgments of Mustill LJ and Nicholls LJ it is possible for a contract to contain continuing obligations. Whether it does or not depends

upon the particular circumstances. In this regard I agree with the approach of Waller LJ in *Carlton v Fulchers* quoted above.

55. In so far as Beldam LJ (and perhaps Mustill LJ) thought that the reasoning of Oliver J in *Hett* was wrong, as stated above I prefer that of Oliver J. Moreover, in so far as Mustill LJ expressed the view (referred to by Lord Wilson at para 32) on the facts of *Bell* at p 513 that, following the husband's execution of the transfer, the solicitors were under no continuing duty to him and that, had they thereafter been requested to lodge the caution, their obligation to do so reflected not a continuing duty of care but a duty to mitigate the consequences of their original and only breach, it appears to me that it is at least arguable that that approach is wrong.

56. The same is true of a passage in the judgment of Nicholls LJ at pp 500-501. In considering the facts of *Bell* and after setting out the various steps which the solicitor had to take he said this:

> "Clearly, all those steps needed to be taken at the time of the transfer or, in the case of lodging a caution, as soon as reasonably practicable thereafter. When the solicitor failed to take those steps in 1978 he was, thereupon, in breach of contract. This was so even though the breach, so far as it related to lodging a caution, remained remediable for many years. Indeed, it remained remediable until the plaintiff's former wife sold the house. Thus the six-year limitation period began to run from the date of the breach, in September 1978, and it expired long before the writ was issued nearly nine years later, in August 1987. Accordingly, in my view, Auld J. was correct in holding that the claim based on breach of contract is statute-barred.
>
> It is, of course, true that the solicitor's breach of contract in 1978 did not *discharge* his obligations. Had the plaintiff learned, a year or two later, of what had happened, he would still have been entitled to go back to his former solicitor and require him to carry out, belatedly, his contractual obligations so far as they could still be performed. For example, lodging a caution. Despite this, it was in 1978 that the breach occurred. Failure thereafter to make good the omission did not constitute a further breach. The position after 1978 was simply that, in breach of contract, the solicitor had failed to do what he ought to have done in 1978 and, year after year, that breach remained unremedied. Nor would the position have been different if in, say, 1980 the plaintiff's solicitor had been asked to remedy his breach of contract and he had failed to do so. His failure to make good his existing breach of contract on request would not have constituted a further breach of contract: it would not have set a new six-year limitation period running. Once again, the position would have been simply that the

solicitor remained in breach. Nor, finally, is the position any different because, in respect of lodging a caution, the breach remained remediable until 1986 when the house was sold. A remediable breach is just as much a breach of contract when it occurs as an irremediable breach, although the practical consequences are likely to be less serious if the breach comes to light in time to take remedial action. Were the law otherwise, in any of these instances, the effect would be to frustrate the purpose of the statutes of limitation, for it would mean that breaches of contract would never become statute-barred unless the innocent party chose to accept the defaulting party's conduct as a repudiation or, perhaps, performance ceased to be possible.

For completeness I add that the above observations are directed at the normal case where a contract provides for something to be done, and the defaulting party fails to fulfil his contractual obligation in that regard at the time when performance is due under the contract. In such a case there is a single breach of contract. By way of contrast are the exceptional cases where, on the true construction of the contract, the defaulting party's obligation is a continuing contractual obligation. In such cases the obligation is not breached once and for all, but it is a contractual obligation which arises anew for performance day after day, so that on each successive day there is a fresh breach. A familiar example of this is the usual form of repairing clause in a tenancy agreement. …

We were much pressed by the decision of Oliver J in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384. That case may be distinguishable on its facts. There the defendant firm of solicitors never treated themselves as functi officio in relation to the option. They continued to have dealings with their client in respect of the unregistered option. … The instant case stands in marked contrast. There is no suggestion that the defendants had any further contact with the plaintiff or his affairs after the conclusion of the divorce proceedings. That was more than six years before the writ was issued. … [The] alleged continuing duty is not founded on any facts other than the initial retainer …"

57. In that passage Nicholls LJ does not say that *Hett* was wrongly decided. It is I think of note that Nicholls LJ recognised that, after say a year or two, the husband would still have been entitled to go back to his former solicitor and require him to carry out, belatedly, his contractual obligations so far as they could still be performed. It appears to me that the juridical basis of that obligation was the contract, under which he owed a continuing duty to register the option. He could be required to discharge that obligation under the contract, as explained by Oliver J. The only reason that Nicholls LJ gives for his conclusion is that, were it otherwise, it would mean that breaches of contract would never become statute barred. However, as Oliver J explained, that is not correct: the obligation can no longer exist when it cannot be performed. There is in my

opinion nothing in the law of contract to lead to the conclusion that the relevant obligation was not a continuing one.

58. In any event Mr Casey further submitted that, as is common ground, it was accepted in *Bell* that it was possible for the parties to agree that the solicitor was under a continuing duty to his client and that, on the facts of this case, it is at least arguable that they in fact so agreed and that there is no support for the conclusion that it was agreed that the solicitor became functi officio at any point, or indeed that the defendants at any relevant stage regarded themselves as functi officio. As the passage from the judgment of Nicholls LJ in *Bell* quoted above shows, the defendant firm of solicitors in *Bell* never treated themselves as functi officio in relation to the option. The inference was that, if they had, the position would or might have been different. I am sceptical about that because I do not see how the solicitors could unilaterally have treated themselves as functi officio. They could only become functi officio by performance, frustration, the acceptance of a repudiatory breach or by the terms of the retainer or of a subsequent agreement.

59. However that may be, Mr Casey made a number of points in this regard as follows: (1) Para 19(f) of the statement of case pleads (a) that on 21 February 2008 (some 21 years and 11 months after the date of the transaction) the first claimant telephoned the first defendant and informed him that Girwar and Deonarine had said that they were unable to certify that the title was valid; and (b) that (on the face of it in the same conversation) the first defendant advised the first claimant that Gwendolyn Lambert would have to be located in order to rectify the Deed of Conveyance. (2) These facts alone support a contention that the first defendant had not treated himself as functi officio. (3) It appears likely from these facts that there was a continuing relationship between the claimants and the first defendant. The fact that the first defendant was apparently able to give advice instantly and over the telephone suggests that he had the file, or the facts, at his fingertips. Accordingly it is to be inferred that the defendants were not, or had not treated themselves as, functi officio. (4) Para 19(h) pleads that the defendants then went on to prepare the deed of rectification and para 19(i) pleads that the defendants did not charge any fees or disbursements for that work. These facts support a contention that the defendants perceived it as their duty, not under any fresh retainer, to prepare the deed of rectification and that the reason was that they perceived that they were not, and were not treating themselves as, functi officio. Mr Casey submitted that, put at their lowest, those considerations demonstrate that the position falls to be investigated at trial.

60. I would accept those submissions and hold that the claimants have an arguable case that the defendants owed them a continuing duty to take all reasonable steps to enable them to acquire a good marketable title to the land after the expiry of a reasonable time, on the basis that the continuing duty arose primarily in contract and that it was a duty to perform the retainer, not to correct previous errors. In these circumstances the

claimants seek permission to amend the statement of case so as to put the claim on to a proper footing.

61. I should add that the reason why the positions in tort and contract are different is that the legal principles are different. In tort the cause of action accrues when relevant damage is sustained, whereas in contract it arises when there is a breach of contract.

62. I am conscious that Lord Wilson says in para 35 that the continuing duty might last for many years (as is indeed the case) but that, as he puts it, better surely than the artifice of a continuing contractual duty would be for Trinidad to mitigate the rigours of the current law in its application to claims in negligence by some form of statute, as has been done in England. However, I respectfully disagree that the conclusion that there was a continuing duty is an artifice. As I see it, it is simply the application of the ordinary principles of the law of contract to this particular situation. While a statute would be one solution, as indicated above, another solution would be for solicitors who wish to ensure that there is a cut-off date for the consequences of their negligence to introduce an express term to that effect in the retainer.

Permission to amend the statement of case?

63. As to the correct approach, it was submitted that the basic principle (applicable in cases other than amendments sought close to trial, and which will result in the loss of a trial date) is that if an amendment has some prospect of success, and does not cause prejudice which cannot be compensated in costs, then it should be allowed: *Cobbold v Greenwich London Borough Council* [1999] EWCA Civ 2074.

64. Under the Civil Proceedings Rules 1998 of Trinidad and Tobago Part 20 ("CPR"), a party may amend without permission at any time prior to the first case management conference. There has been no case management conference in this case. However it is correctly accepted that that untrammelled right cannot apply to an application made to an appellate court.

65. The CPR contain no provisions dealing with amendments to add new claims after the expiry of the limitation period. The position prior to the CPR was governed by Order 20, rule 5 of the Orders and Rules of the Supreme Court of Judicature of Trinidad and Tobago 1975 which is in almost identical terms to the previous Order 20, rule 5 of the English RSC. Order 20, rule 5(2) and (5) provided as follows:

> "(2) Where an application to the court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court

> may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it is just to do so.
>
> (5) An amendment may be allowed under paragraph (2), notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

66. It appears that these principles are applicable by virtue of section 83(1) of the Supreme Court of Judicature Act 1962 (c 4.01), which provides:

> "Save as is otherwise provided by this Act or by Rules of Court all forms and methods of procedure which, under or by virtue of any law, custom, general order or rules whatsoever, were formerly in force in any of the courts the jurisdiction of which is vested in the High Court or the Court of Appeal respectively, and which are not inconsistent with this Act or with Rules of Court, may continue to be used in the High Court and the Court of Appeal respectively in the like cases and for the like purposes as those in and for which they have been applicable in the former respective courts."

67. Mr Casey submitted that the facts of this case bring it within RSC Order 20 rule 5(2) on the footing that the claim in contract arises out of a new cause of action which arises out of the same facts or substantially the same facts as the cause of action in tort in respect of which relief has already been claimed in the action within the meaning of rule 5(5). In my opinion this is a classic example of the application of the rule. In these circumstances, although the claim in contract was not formally pleaded, it was argued before the judge and, as Lord Wilson observes at para 30, the defendants do not contend that they were taken by surprise. It follows that this is a paradigm case for the grant of permission to amend to take the point and I would so hold.

Conclusion

68. For these reasons I would hold that the claimants' claim arising out of the contract is at least arguable and that permission should be granted to permit the claimants to take the point. I would allow the appeal accordingly. I would only add that I say nothing about the strength of the claimants' case on the merits and, in particular, on the question whether the power of attorney granted by Mrs Lambert to Mr Inniss had in fact empowered him to convey on her behalf land which she held as personal representative on the likelihood or otherwise of the claim in damages succeeding. As

Lord Wilson points out in para 13, the defendants did not continue to maintain that point on the application to strike out. I do not disagree with Lord Wilson's comments in that regard. Further, I say nothing about the possible quantum of any claim.