Neutral Citation Number: [2010] EWCA Civ 1107

Case No: A3/2009/2362

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
CHANCERY DIVISION
NORRIS J
HCO9C02542

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14th October 2010

Before :

LORD JUSTICE RIX
LORD JUSTICE PATTEN
and
SIR MARK WALLER

- -

Between :

AMIR NOURI	**Appellant**
- and -	
ALI MARVI & ORS	**Respondent**

- -
- -

Philip Jones (instructed by Mackrell Turner Garrett) for the Appellant
Ben Lynch (instructed by Davies Arnold Cooper LLP) for the Respondent

Hearing date : 26th July 2010

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Approved Judgment

Lord Justice Patten :

Introduction

1. This appeal raises the familiar question of when a cause of action in tort has accrued so as to start time running for the purposes of the Limitation Act 1980. Section 2 of that Act provides that:-

> "An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

2. A cause of action in tort (unlike one in contract) only accrues when the claimant suffers actual damage in the sense of measurable loss which can be quantified in money terms and made the subject of an award of damages at the relevant date. In *Forster v Outred* [1982] 1 WLR 86 in the Court of Appeal Stephenson LJ (at page 94) accepted the definition of actual damage put forward by Mr Stuart-Smith (as he then was) in these terms:-

> "What is meant by actual damage? Mr. Stuart-Smith says that it is any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases. They are all illustrations of a kind of loss which is meant by "actual" damage. It was also suggested in argument, and I would accept it, that "actual" is really used in contrast to "presumed" or "assumed." Whereas damage is presumed in trespass and libel, it is not presumed in negligence and has to be proved. There has to be some actual damage."

3. The claimant, Mr Nouri, was from 1996 the registered proprietor of a leasehold flat at 8 Bron Court, Bronsbury Road, London, NW6 ("the Flat"). He bought the Flat when he came to England to study English and to enrol on a business studies course at Westminster University. It was purchased for £69,000 with the benefit of a mortgage from Barclays Bank for £39,000 and with £30,000 provided by his father.

4. In 1998 the first defendant, Mr Marvi, came to London and moved into the Flat. He was a family friend. In July 1999 Mr Nouri left the UK but Mr Marvi remained living in the Flat. By then a further loan of £30,000 had been obtained from Barclays Bank on the security of the property. The arrangements with Mr Marvi were that he would pay sufficient monies into the claimant's Barclays Bank account to meet the mortgage payments and the other outgoings on the flat. Mr Nouri also executed a power of attorney in favour of a Mr Musawi, a friend of his father's.

5. After Mr Nouri left, the mortgage payments fell into arrears and in October 1999 a notice of default was issued by the bank. These and other arrears were cleared in August 2000 when the Barclays Bank mortgage was redeemed and replaced by a new mortgage in favour of iGroup Mortgages. In earlier High Court proceedings before

HHJ Rich QC (which I will come to shortly) evidence was given that Mr Marvi had agreed to clear the indebtedness to Barclays using money provided by his family. But the re-mortgage to iGroup was obtained by Mr Marvi in Mr Nouri's name whose signature on the mortgage deed was forged.

6. In about December 2000 Mr Nouri and his father instructed Mr Musawi to obtain confirmation from Barclays Bank that its charge had been redeemed and he instructed a firm of solicitors (Nattu & Co) to do this. They also asked the bank for the return of Mr Nouri's life policy which had been charged to the bank as part of the security. By March 2001 the bank had told the solicitors that the charge had been redeemed but that the land certificate had been sent to another firm of solicitors. Mr Musavi then instructed Nattu & Co to obtain office copy entries of the registered title, which they did by 3rd May 2001. These, of course, revealed that the Flat was now charged to iGroup under a mortgage which Mr Nouri had not authorised.

7. The mortgage to iGroup secured a loan from them in the sum of £105,000. After payment of the sums due to Barclays Bank about £40,000 remained which Mr Marvi misappropriated. Not, however, content with this he then embarked on the steps which have led to this claim in negligence by Mr Nouri against the first defendants, Athi Kulisra Smith ("AKS"), a firm of solicitors.

8. On 21st December 2000, holding himself out as Mr Nouri, Mr Marvi instructed AKS to act for him on a sale of the Flat to Mr Marvi. Mr Marvi also instructed another firm of solicitors to act for him as the purchaser. On 2nd April 2001 there was a simultaneous exchange of contracts and completion which resulted in AKS releasing to Mr Marvi's solicitors a transfer again containing Mr Nouri's forged signature. On 4th July 2001 Mr Marvi, using the transfer, obtained registration of the Flat in his own name. The purchase price of the Flat was stated to be £179,000. As part of the fraudulent transaction Mr Marvi was able to redeem the iGroup mortgage with a new loan from the Kensington Mortgage Company of £152,090. The balance necessary to complete the purchase was some £29,731.50 which was provided by a Dr Khan. On completion a balance of £55,518.47 was due to Mr Nouri as vendor after the payment of expenses. Mr Marvi forged further letters of instruction which resulted in £30,731.50 of this sum being repaid to Dr Khan and the balance of £24,786.97 being returned to Mr Marvi. Subsequently on 7th January 2003 the Flat was sold on to an unconnected third party, a Mr Razaq, for the sum of £223,000. Mr Razaq was then registered as the proprietor.

9. Despite becoming aware of the unauthorised mortgage to iGroup, Mr Nouri took no steps against Mr Marvi. This enabled the fictitious sale of the Flat to him to be completed and his title registered and also allowed Mr Marvi to go on to sell the Flat to Mr Razaq. It was not until April 2003 that Mr Nouri applied belatedly to the Land Registry for rectification of the register. They directed him to take proceedings against Mr Marvi, Mr Razaq and the Kensington Mortgage Company for rectification. These proceedings were concluded on 18th October 2005 when HHJ Rich QC refused to order rectification largely on the basis that the registration of title in favour of Mr Marvi and subsequently Mr Razaq had occurred due to Mr Nouri's failure to take proper care of his own interests.

10. There has been no appeal against that judgment. Instead, on 2nd July 2007 Mr Nouri commenced these proceedings against Mr Marvi, the Land Registry and AKS. The

claim against AKS is for negligence. The claim cannot be based in contract on the retainer because there was none. Instead it is alleged that, on receipt of the instructions from Mr Marvi in Mr Nouri's name, AKS assumed a responsibility to the real Mr Nouri to handle the sale in a competent manner and knew that if it failed to do so Mr Nouri might suffer loss and damage. Its duty of care to him encompassed not only the conveyancing transaction itself but also an obligation to confirm their instructions directly with the client and to satisfy themselves of his identity. This would include having a face-to-face meeting with him and verifying his identity from his passport. The case against AKS is that none of these steps was taken and that sight of the client's passport was not requested until 15th May 2001. When it was requested and produced, AKS failed to ensure that the passport was that of Mr Nouri.

11. It is also alleged that the firm failed to take note of the advice contained in the Law Society's Green Card warning on property fraud. The warning signs generated by many of the unusual features of the transaction were simply ignored. As a result, AKS failed to warn Mr Nouri or the Land Registry, either before or after the sale, that this was or might be a fraudulent transaction and consequently allowed Mr Nouri to be removed as the registered proprietor and Mr Marvi to be registered in his place.

12. It is common ground that the registration of Mr Marvi as the proprietor of the Flat did cause actual damage to Mr Nouri. As a result of the provisions of s.69 of the Land Registration Act 1925, title was transferred to Mr Marvi by the act of registration. Mr Nouri therefore lost his title and would have had, at the very least, to commence rectification proceedings against Mr Marvi and his mortgagees in order to restore himself to the register. The six year limitation period for the claim in negligence against AKS must therefore have begun to run by 4th July 2001 at the latest. It does not depend on the subsequent sale of the Flat to Mr Razaq. But AKS in their defence have taken a limitation point that time began to run earlier when the fictitious sale to Mr Marvi was completed on 2nd April 2001. If this is correct then the limitation period expired on 2nd April 2007 prior to the issue of the claim form in these proceedings on 2nd July 2007.

13. On 3rd June 2009 Master Eyre ordered the trial of a preliminary issue on this limitation point. It was tried by Norris J on 7th October 2009 ([2009] EWHC 2725 (Ch)). He found that the claim in negligence was statute barred because Mr Nouri did suffer actual damage on completion of the sale and was not simply exposed to the contingent loss of his title which would depend on whether Mr Marvi applied for registration as proprietor based on the forged transfer released to his solicitors on completion.

14. The judge expressed his reasoning as follows:-

> "15. Although for present purposes I must and do focus upon the questions raised by forged transfers in registered conveyancing, the situation seems to me to raise the same sort of question as would be raised if a solicitor had negligently released a genuine transfer before completion, or if a solicitor had negligently released a forged conveyance in unregistered conveyancing (where the vendor's title would never be defeated by the

purchaser but might be defeated by a third party bona fide purchaser for value).

16. One tool that is sometimes used in circumstances of this sort is to apply what is called "the Bingham test", that proposed by Bingham LJ in *DW Moore v Ferrier* [1988] 1 WLR 267 at 282, namely that if, on the pleaded facts, an action for breach of contract were brought, would anything more than nominal damages be awarded? I do not think that this tool is of particular utility where the origin of the duty is not founded in any contract between Mr Nouri and the third defendants. Instead, I think I must postulate that on 1st May 2003 Mr Nouri laid the then facts before another solicitor and asked him to advise what his position was. It seems to me unlikely that a solicitor would have said to Mr Nouri, "Relax. You are no worse off than if the third defendants had properly performed their duty. You will suffer no harm until the forged transfer is registered. Do nothing in the meantime. Wait and see if that happens. Come back if it does." I do not think that that is an adequate analysis of the situation in which Mr Nouri found himself.

17. It seems to me that until 2nd April 2001 Mr Nouri had an inviolable registered title. On 2nd April 2001 his solicitor (it must be assumed negligently) placed in the hands of a third party outside the control of Mr Nouri a document which could be used to defeat Mr Nouri's title. That constituted an immediate blot on Mr Nouri's title. It was not the position in which he ought to have found himself if the solicitor had properly performed the duties which the Particulars of Claim say should have been discharged. Mr Nouri would have been advised that he was actually (not just potentially) worse off because the forged transfer was in circulation; the adviser would have gone on to say that it would be possible to prevent any consequences flowing from the circulation of the forged transfer and to restore the title to its former inviolable state, but that the removal of that detriment would cost money.

18. I would hold that, on the assumed facts and presumed law, the third defendants failed to preserve or protect an asset of Mr Nouri's which could and should have been protected by the proper performance of their duties in relation to a transaction in which they assumed a responsibility in relation to Mr Nouri's title. Putting into the hands of Mr Marvi a forged transfer constituted an immediate detriment.

> 19. In *Bell v Peter Browne*, to which I have already referred, a solicitor failed to fulfil his obligations to his client in two respects. First, he failed to secure a formal document recording the bargain that had been made between his client husband and the wife, to whom the matrimonial home had been transferred. Secondly, he failed to protect by a caution the husband's interest under the agreement, given that title had been vested in the wife. The husband's interest could have been protected by a caution, and that caution could have been entered on the register at any time until the wife sold the house and the husband's interest was finally defeated. Nicholls LJ held that the second failure (to register the caution) occasioned immediate loss. In an oft-cited passage, which although considered extensively in subsequent authorities has never been criticised or doubted, Nicholls LJ said:
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> > "In considering whether damage was suffered in 1978 one can test the matter by considering what would have happened if in, say, 1980 the plaintiff had learned of his solicitors' default and brought an action for damages. Of course, he would have taken steps to remedy the default. But he would have been entitled at least to recover from the defendants the cost incurred in going to other solicitors for advice on what should be done and for their assistance in lodging the appropriate caution. The cost would have been modest, but not negligible."
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> In other words, he held that there was an immediate loss, even though there was a contingent greater loss (the defeasance of the husband's interest).
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> 20 I would hold that the consequence of allowing into circulation a document which put at risk Mr Nouri's title was capable of remedy and that the costs of ameliorating that immediate detriment form a ready measure of the financial consequences of the solicitor's breach of duty. I would accordingly hold that the cause of action in negligence was complete on 2nd April 2001 when the forged transfer was put into circulation. Mr Nouri suffered the detriment of having a blot upon his title, a detriment which is to be measured by the cost of removing the detriment."

15. Mr Nouri now appeals to this court. There are two grounds of appeal. First it is said that the release of the forged transfer on 2nd April 2001 did not constitute an immediate loss to the claimant. Actual damage was not suffered until registration of

Mr Marvi's title on 4th July 2001. Secondly, he contends that the duty of care owed by AKS was a continuing duty to take steps to prevent Mr Nouri from losing his registered title. This duty subsisted after completion and continued at least until 4th July 2001. The judge was wrong to find (as he did) that no such continuing duty existed. AKS has filed a respondent's notice in which they seek to uphold the judge's decision both for the reasons which he gave and on the additional ground that the value of the Flat was materially diminished by the completion of the sale to Mr Marvi and the release of the forged transfer because any prospective purchaser, once aware of the existence of the transfer, would have known that there was a risk of his becoming embroiled in litigation to secure his title and was at risk of Mr Marvi being able to register himself as proprietor before the purchaser would be able to register his own title.

Actual damage

16. The starting point must be to identify the nature of the damage which Mr Nouri is alleged to have suffered as of the completion of the sale to Mr Marvi on 2nd April 2001. The judge's analysis was that the transfer constituted a blot on Mr Nouri's title because it gave Mr Marvi the means to deprive Mr Nouri of registered ownership of the Flat. Although steps could have been taken to prevent registration by Mr Marvi by obtaining an injunction against him and, in particular, by arranging for the registration of an inhibition against Mr Nouri's title, those steps would have cost money. There was therefore an immediate financial detriment to Mr Nouri.

17. Some support for this analysis can be found in the judgment of Nicholls LJ in *Bell v Peter Browne* [1990] 2 QB 495 which was relied on by the judge. In that case a husband agreed with his wife on divorce that a property registered in their joint names should be transferred into the wife's sole name and sold and that he should receive one-sixth of the net proceeds of sale. He arranged with his solicitors that his beneficial interest would be protected by a trust deed but no steps were taken in this respect. Instead the solicitors allowed the house to be transferred to the wife who subsequently sold it and spent all the proceeds. The claim was dismissed on the ground that the limitation period began to run when the solicitors allowed the property to be transferred to the wife without the protection of the trust deed and suitable entries being made on the register of title even though the omission could have been remedied by the registration of a caution at any time up to the date of sale. The husband had contended that no damage occurred until the sale took place.

18. Nicholls LJ had to consider two alleged heads of negligence which bear a striking similarity to the claim against AKS in this case. There was the solicitors' failure to ensure that the agreement about the husband's one-sixth share of the proceeds of sale was properly recorded in a trust deed and there was their failure to protect that interest against the wife and any third party by the registration of a caution. But in his view actual loss was suffered by the husband as from the date of the transfer to the wife. From then on the husband's ability (in the absence of a trust deed) to secure his share of the proceeds of sale depended upon the wife's co-operation. She had title and could deny him his share. Secondly, although his rights could have been protected by a caution up to the date of any sale, the solicitors' file was closed on completion of the transfer so that the consequences of not having registered a caution were unlikely to be reviewed and would not have become apparent until after a sale. It should be

noted in this regard that Nicholls LJ rejected the existence of any continuing duty in that case and I shall return to this when I consider the second ground of appeal.

19. At p. 503 Nicholls LJ set out his answer to the question whether these breaches of duty had caused any actual damage as of the date of completion rather than when the property was subsequently sold. He concluded that they had, see the passage cited by Norris J at paragraph 19 of his judgment (at paragraph 14 above).

20. The other members of the court came to the same conclusion but based their judgments on the diminution in value of the husband's interest in the property. At page 510 Beldam LJ said that:-

> "Due to the defendants' negligence, the plaintiff parted with his legal estate in the property conveyed to his wife in exchange for an equitable interest in the proceeds of sale. That equitable interest until secured by a charge or acknowledged by a deed of trust was clearly less valuable to the plaintiff. Unprotected against the interests of third parties by registration of a charge or of a caution, it was less valuable still. I consider therefore that the plaintiff's cause of action arose when he parted with his property or at the latest at the time when the careful solicitor would have affected registration either of a charge or of a caution. For those reasons I would dismiss this appeal."

21. Mustill LJ at page 513 put it this way:-

> "As to the claim in tort, I have little to add. The transaction caused the plaintiff to exchange his valid legal estate for an equitable interest in the proceeds of sale which was dependent on the goodwill and solvency of the wife unless and until protected by a formal declaration of trust and the lodging of a caution. The failure to see that these steps were taken promptly meant that the plaintiff was actually, and not just potentially, worse off than if the solicitors had performed their task competently. The sale in 1986 simply meant that the breach and its consequences were irremediable."

22. Although expressed differently, I do not believe that the analysis of damage contained in the passage quoted from the judgment of Nicholls LJ is different in principle from that of the other two members of the court. In that case the husband had not taken steps to secure his title to his share of the proceeds of sale by registration of a caution and had not therefore incurred the expense to which Nicholls LJ refers. The only loss he can have suffered was a loss of value in his rights to the proceeds of sale. The costs of putting matters right is therefore simply a convenient way of calculating what the minimum amount of that loss would be, just as in a claim for damages for breach of a repairing covenant in a lease the cost of repairs is often taken to be the amount of the diminution in value of the reversion which the landlord has suffered. This is, I think, what Norris J had in mind in the passage in paragraph 21 of his judgment quoted above.

23. The question therefore in this case is whether Mr Nouri suffered an equivalent diminution in the value of the Flat due to the completion of the fraudulent sale to Mr Marvi. Because Mr Nouri took no steps to prevent Mr Marvi from registering his title, he cannot claim for the cost of doing so. But he will have had an actionable claim in negligence against AKS if post-completion the asset in his hands had become less valuable.

24. Mr Jones submits that until the registration of Mr Marvi's title on 4th July 2001 any loss by Mr Nouri was purely theoretical and contingent. The forged transfer might never have been used and if Mr Nouri had wished to sell the Flat in the meantime the intending purchaser would have acquired priority over Mr Marvi simply by making the customary search of the register. To support this argument he took us to the decision of the House of Lords in *Law Society v Sephton & Co* [2006] 2 AC 543 where the House had to consider whether a purely contingent liability created by the negligence of solicitors caused actual damage at the date when the liability was incurred or only when the contingency was fulfilled and the loss actually materialised.

25. Following the decision of the High Court of Australia in *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514, the House of Lords held that a purely contingent liability did not necessarily cause actual damage at the time when it was incurred. In order to argue for the earlier date it was necessary to show some immediate measurable loss or diminution in the value of the claimant's assets that was attributable to the imposition of the liability. In *Law Society v Sephton & Co* the potential liability on the Law Society's compensation fund caused by a solicitor's fraud was held not to have been actual damage so as to set time running for a claim in negligence. The effect of the solicitor's conduct was to expose the Law Society to a potential liability. It was not a case in which the solicitor's duty was to protect his client's property (as in this case) or to enable a client to acquire property through a transaction for which the solicitor was responsible.

26. The speeches are, however, useful for the guidance which they give as to the basis of the decisions in cases such as *Bell v Peter Browne & Co*. At paragraph 22 of his speech Lord Hoffmann said that:-

> "Thus cases like *Bell v Peter Browne & Co* [1990] 2 QB 495 and *Knapp v Ecclesiastical Insurance Group plc* [1998] PNLR 172 are readily explicable as cases in which the damage was the difference between the plaintiff's position as it was and as it would have been if the defendant had performed his duty and in which it was possible to infer that the plaintiff's failure to get what he should have got from a bilateral transaction was quantifiable damage, even though further damage which might result from the flaw in the transaction was still contingent. The plaintiff had paid money, transferred property, incurred liabilities or suffered diminution in the value of an asset and in return obtained less than he should have got. But these authorities have no relevance to a case in which a purely contingent obligation has been incurred."

27. Lord Walker (at paragraph 48) said:-

> "In all these cases the claimant has as a result of professional negligence suffered a diminution (sometimes immediately quantifiable, often not yet quantifiable) in the value of an existing asset of his, or has been disappointed (as against what he was entitled to expect) in an asset which he acquires, whether it is a house, a business arrangement, an insurance policy, or a claim for damages. Your Lordships have not, I think, been shown any case in which the imposition on a claimant of a purely personal and wholly contingent liability, unsecured by a charge on any of the claimant's assets, has been treated as actual loss. That would have been the position if the claimant in the *Forster* case [1982] 1 WLR 86 had given a personal covenant guaranteeing her son's debts (which she seems not to have done - she paid them simply to prevent enforcement of the security on her farm) and if she had not given any security over any of her own assets."

28. The application of the ratio in *Sephton* to the facts of particular cases of contingent liability has not been without its difficulties: see e.g. *Axa Insurance Limited v Akther & Darby Solicitors* [2010] 1 WLR 1662. But further analysis of those difficulties is unnecessary for the disposal of this appeal. This is not a case concerning contingent liabilities. The only issue is whether Mr Nouri suffered loss in relation to the value of his property. If the Flat diminished in value at the date of completion, actual damage was clearly sustained by Mr Nouri as at that date.

29. There was no valuation evidence before the judge directed to this issue but Mr Jones accepts that had a potential purchaser been told of the forged transfer in the period prior to registration of Mr Marvi's title, this would undoubtedly have led to a diminution in the price he would have been willing to pay. Although the contract and the transfer to Mr Marvi were of no legal effect, they did expose any purchaser to the risk of possible litigation even if that risk was more apparent than real. This is the point taken in the respondent's notice.

30. On this basis there will have been a diminution in the open market value of the Flat following completion on 2nd April 2001. Mr Jones contests this conclusion because it proceeds, he says, on a false assumption: i.e. that a potential purchaser would have been made aware of the difficulties caused by the forged transfer. He submits that there was no realistic possibility of Mr Nouri having discovered the fraud before registration on 4th July and therefore no question of his being under any obligation to disclose those matters to a potential purchaser. The facts were that he remained in ignorance of the fraud until much later.

31. I do not accept this analysis. It is well established that a cause of action in tort can accrue for the purposes of the Limitation Act without the claimant being aware of it. The decisions of the House of Lords in *Cartledge v E. Jopling & Sons Ltd* [1963] AC 758 and *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1 led to limited changes to the Act to provide alternative time limits of three years running from the date of knowledge. These are now contained in ss.11 and 14A of the 1980 Act.

32. In this case Mr Nouri was not assisted by s.14A because he had the requisite knowledge of the fraudulent sale to Mr Marvi by 2002. But the provision of these alternative time periods to address the problem of lack of knowledge has left intact the principle that time will run under s.2 even if the claimant is unaware of the circumstances which have led to it. The existence of actual damage for these purposes does not therefore depend on the claimant's state of knowledge in relation to the breach of duty or its consequences but on whether the breach has in fact caused actual loss.

33. For this purpose the correct hypothesis must be to ask whether Mr Nouri could have maintained an action for damages against AKS following completion of the sale to Mr Marvi. That requires one to assume that he was aware of the breach and to assess the impact of that on his property or other assets as at that date. Consistently with this hypothesis, any diminution in the value of the Flat attributable to the breach has to be determined on the basis that Mr Nouri was aware of the forged transfer and was under a corresponding duty to alert a purchaser to that problem. The Flat was unsaleable without such disclosure. It must therefore follow that its open market value was what a purchaser would pay for it with knowledge of the forged transfer. There was therefore actual damage suffered by Mr Nouri as of 2nd April 2001.

Continuing duty

34. The second ground of appeal is that the judge was wrong to reject the claim based on a continuing duty. There are no particular facts pleaded to support this claim beyond the fact that AKS requested and obtained sight of the passport after completion. Mr Nouri is unaware of when the passport was received and does not allege that this occurred after 2nd July 2001: i.e. within the six year limitation period. But what is said is that the solicitors' duty to protect Mr Nouri's title subsisted until at least 4th July 2001.

35. The principal authority relied on by Mr Jones to support the claim that the duty was a continuing one is the decision of Oliver J in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384. The solicitors' breach of duty consisted of a failure to register an option as an estate contract under the Land Charges Act 1925. The failure to register it enabled the guarantor of the option to convey the property to his wife free of the option. Oliver J held that there was no general or continuing duty on the part of the solicitors to consider the enforceability of the option but that on the facts of that case:-

> "The defendants here never treated themselves as functi officio in relation to the option. They kept the document on Geoffrey's behalf in their strongroom. They opened a file relating to the matter. They were consulted about it at intervals over the next 6½ years. In my judgment the obligation to register which they assumed when they were first consulted continued to bind them. It was an obligation to protect the interest from third parties by registration and without their client's knowledge they failed to perform it until it ceased to be effectively capable of performance on August 17, 1967. It seems to me that it was then that the contract was broken once and for all."

36. In *Bell v Peter Browne & Co* the Court of Appeal treated the decision of Oliver J as very much dependent on its own facts. Mustill LJ (at page 512) said that:-

> "Certainly, a solicitor may have a continuing retainer from his client, and no doubt there are retainers which require the solicitor to be constantly on watch for new sources of potential danger, and to take immediate steps to nip them in the bud. I confess however that I cannot see the relationship between the present parties in any such light. The proposition entails that the defendants have two duties, one express and the other implied. The express duty would be to perform the task for which they were retained and paid, namely to put into effect in a legally appropriate manner the informal arrangement between the plaintiff and his wife. The second duty, implied and presumably gratuitous, and commencing immediately after the last moment when a careful solicitor would have taken the necessary steps to formalise and protect his client's interest in the future proceeds of sale, would be to exercise continuing vigilance to discover any mistake which they, themselves, might have made, and then to busy themselves in putting it right. Evidently this obligation would continue up to, but not beyond, the time when the mistake became irretrievable. I find it impossible to imply such a strange obligation from the mundane facts of the present case; and equally improbable to suppose that if it did exist the obligation would be broken at any time other than the time when the mistake should have been discovered and put right: namely, straightaway. To my mind the solicitors were employed to complete the transaction, and to complete it within the appropriate time. No more than that. Any further steps taken or not taken would relate to mitigating the consequences of a breach which had already occurred.
>
> As to the claim in tort, I have little to add. The transaction caused the plaintiff to exchange his valid legal estate for an equitable interest in the proceeds of sale which was dependent on the goodwill and solvency of the wife unless and until protected by a formal declaration of trust and the lodging of a caution. The failure to see that these steps were taken promptly meant that the plaintiff was actually, and not just potentially, worse off than if the solicitors had performed their task competently. The sale in 1986 simply meant that the breach and its consequences were irremediable."

37. Beldam LJ (at page 509) also thought that the breach occurred when the property was conveyed without the necessary precautions being taken to secure the husband's interest:-

> "Whether in any particular case there has been a failure by a solicitor to exercise that degree of care and skill depends upon the circumstances of each case and on the finding of the court

> as to how the competent solicitor would discharge his duty in those circumstances. Where, as in the present case and in *Midland Bank Trustees Co. Ltd. v. Hett, Stubbs & Kemp* [1979] Ch. 384 and *Bean v. Wade*, 2 T.L.R. 157, the duty is to protect the interests of the client by giving notice or by registration of a charge or caution, I cannot believe that a competent solicitor would regard it as a satisfactory discharge of that duty to postpone action for months or years. Indeed there would be many cases when even postponement for a day would be regarded as negligent and a breach of duty. Further in a case in which it is necessary to take precautions to preserve a client's interest against the failure by another to fulfil an obligation whether by requiring the execution of a charge or a deed of trust, it seems to me clear that the exercise of reasonable care requires the transactions to be contemporaneous. I do not believe, therefore, that it is correct to say that in a case such as the present the obligation of the solicitor in contract was one which was capable of performance at any time up until the property was sold. If by chance he realised his mistake in time, he could take steps to prevent the consequences of breach of the obligation and to that extent repair the damage caused. I believe that the defendants were in breach of their duty when they permitted the plaintiff to execute a conveyance of his interest in the freehold property without securing by deed of trust or charge an interest in the proceeds of sale. They ought to have appreciated that the plaintiff had only executed at that stage in escrow and should have insisted on the performance by his wife of the condition to which she had agreed. Whilst it may not have been a breach of duty to fail to register the plaintiff's interest immediately or within a day or two on the facts of this particular case, nevertheless experience shows that such a duty should be discharged as soon as is practicable. Consequently, although the plaintiff only suffered nominal damage until the property was sold in July 1986, his cause of action arose when he conveyed his interest in the property to his former wife without proper precautions being taken to protect his future interest in the proceeds of sale."

38. It seems to me that the same reasoning applies in this case. There are no special facts to suggest that the solicitors assumed a continuing duty to Mr Nouri which survived the completion of the transaction. This was not a case in which they were under a contractual duty to take specific steps in relation to Mr Nouri's property or title as in the *Midland Bank* case. Although they obtained the passport after completion, that was simply indicative of their general lack of care and diligence rather than of any assumption of continuing responsibility towards Mr Nouri. Before 2nd July 2001 they had done all that they considered necessary to complete the sale. It was not for them to supervise the registration of Mr Marvi's title or to carry out any further investigations once they had seen the passport.

39. But even if the duty owed by AKS was a continuing one of the kind alleged, it makes no difference. The cause of action in tort accrued when loss was first suffered as a consequence of the breach of duty. As explained earlier, the damage to the value of Mr Nouri's property was caused when completion took place. Although after 4th July 2001 it became necessary to seek rectification of the register in order to displace Mr Marvi as proprietor, which was obviously more expensive than merely registering an inhibition to prevent such registration taking place, this is simply an enhanced measure of damages which takes into account the full consequences of the breach and might be disputed on the ground that Mr Nouri had failed to mitigate. But the loss remains the same. In either case, one is still dealing with a diminution in the value of the Flat which was Mr Nouri's only relevant asset. In these circumstances, the loss attributable to the breach of duty (continuing or not) would still have started time running on 2nd April 2001.

40. I would therefore dismiss this appeal.

Sir Mark Waller :

41. I agree.

Lord Justice Rix :

42. I also agree.