[COURT OF APPEAL]

BELL v. PETER BROWNE & CO.

1990 Feb. 21; April 11

Mustill, Nicholls and Beldam L.JJ.

Limitation of Action—Contract, breach of—Negligence—Transfer of matrimonial home by plaintiff to wife subject to interest in proceeds of sale—Solicitors failing to protect plaintiff's interest in proceeds of sale—Solicitors' failure continuing to be remediable so long as matrimonial home unsold—Wife selling matrimonial home after six years had elapsed and spending entire proceeds—Plaintiff claiming damages against solicitors for professional negligence—Whether claim statute-barred

In October 1977, following the breakdown of his marriage, the plaintiff consulted the defendants, a firm of solicitors. He discussed with them what was to happen to the matrimonial home, which was registered in the joint names of the plaintiff and his wife. The plaintiff agreed that the house would be transferred into the sole name of his wife, that it should not then be sold but that he would receive one-sixth of the gross proceeds of sale whenever that sale occurred. His continuing interest in the house would be protected by a trust deed or a mortgage. On 1 September 1978 the plaintiff executed a transfer of the house into his wife's sole name but the defendants took no steps to protect his one-sixth share in the proceeds of sale; no declaration of trust or mortgage was prepared or executed. The plaintiff and his wife were divorced during 1979. In December 1986 the plaintiff was told by his former wife that she had sold the former matrimonial home and had spent all the proceeds, thereby depriving the plaintiff of his one-sixth interest in the proceeds of the sale. The plaintiff issued a writ in August 1987 against the defendants claiming damages for professional negligence. The defendants issued a summons to strike out the plaintiff's statement of claim on the ground that any cause of action was statute-barred. The registrar struck out the plaintiff's action and Auld J. dismissed the plaintiff's appeal.

On appeal by the plaintiff:—

Held, dismissing the appeal, (1) that the failure by the defendants to prepare or execute a formal declaration of trust or other suitable instrument or to cause appropriate entries to be made on the register at the time the property was transferred constituted a breach of contract; that although the defendants' obligations were not discharged by the breach, which remained remediable by lodging a caution until the plaintiff's former wife sold the house, the limitation period began to run from the date of the breach in September 1978, and expired before the issue of the writ in August 1987; and that, accordingly, the claim based on breach of contract was statute-barred (post, pp. 500C, H, 509D–G, 511C–D, 513A–B).

Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp [1979] Ch. 384 distinguished.

(2) That a cause of action in negligence did not accrue until damage was suffered; that the plaintiff sustained damage when the transfer was executed and the title to the house passed to

the plaintiff's former wife without any formal agreement or protection of the plaintiff's interest in the house or its proceeds of sale, notwithstanding that the defendants' failure to protect the plaintiff's interest by registration remained remediable so long as the house continued to belong to his former wife, and his actual loss remained nominal until the sale by her; and that, accordingly, the claim in negligence against the defendants was also statute-barred (post, pp. 501H—502B, 503A–D, G—504A, 510E–G, 511C–D).

Forster v. Outred & Co. [1982] 1 W.L.R. 86, C.A. and *D. W. Moore & Co. Ltd. v. Ferrier* [1988] 1 W.L.R. 267, C.A. applied.

Decision of Auld J. affirmed.

The following cases are referred to in the judgments:

Baker v. Ollard & Bentley (unreported), 12 May 1982; Court of Appeal (Civil Division) Transcript No. 155 of 1982, C.A.

Bean v. Wade (1885) 2 T.L.R. 157, C.A.

Birkett v. James [1978] A.C. 297; [1977] 3 W.L.R. 38; [1977] 2 All E.R. 801, C.A. and H.L.(E.)

Forster v. Outred & Co. [1982] 1 W.L.R. 86; [1982] 2 All E.R. 753, C.A.

Harmer v. Cornelius (1858) 5 C.B. N.S. 236

Iron Trade Mutual Insurance Co. Ltd. v. J. K. Buckenham Ltd. [1990] 1 All E.R. 808

Kitchen v. Royal Air Force Association [1958] 1 W.L.R. 563; [1958] 3 All E.R. 241, C.A.

Mersey Steel and Iron Co. v. Naylor, Benzon & Co. (1884) 9 App.Cas. 434, H.L.(E.)

Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp [1979] Ch. 384; [1978] 3 W.L.R. 167; [1978] 3 All E.R. 571

Moore (D. W.) & Co. Ltd. v. Ferrier [1988] 1 W.L.R. 267; [1988] 1 All E.R. 400, C.A.

Ronex Properties Ltd. v. John Laing Construction Ltd. [1983] Q.B. 398; [1982] 3 W.L.R. 875; [1982] 3 All E.R. 961, C.A.

Spoor v. Green (1874) L.R. 9 Ex. 99

No additional cases were cited in argument.

APPEAL from Auld J.

The plaintiff, Barry Bell, consulted the defendant solicitors, Peter Browne & Co., Bristol, about his matrimonial affairs in October 1977. The plaintiff and his former wife were the joint tenants of their matrimonial home at 60, Lower High Street, Shirehampton, Bristol. On 11 October 1977 the plaintiff agreed that the house would be transferred to the wife in her sole name whilst retaining a one-sixth interest in the proceeds of any future sale of the property. That interest would be protected by a declaration of trust or by mortgage. On 1 September 1978 the plaintiff executed a transfer of his interest in the matrimonial home to his former wife. The plaintiff's marriage ended in 1979. On 4 July 1986 the former matrimonial home was sold by his former wife for £33,000. On 12 December in a telephone conversation the plaintiff was informed by his former wife that the property had been sold and that she had spent all the proceeds of sale. The plaintiff then discovered that

his former solicitors had not executed a deed of trust or secured a charge on the property by registering a caution with the Land Registry. On 20 August 1987 the plaintiff issued a writ against his former solicitors claiming damages for breach of duty in both contract and negligence. The solicitors issued a summons on 18 July 1988 to strike out the plaintiff's statement of claim as frivolous, vexatious and an abuse of the process of the court for on the face of the pleadings no cause of action was disclosed which was not statute-barred. On 14 October 1988 in chambers Mr. Deputy District Registrar Walthall struck out the plaintiff's statement of claim upon the ground that any cause of action pleaded was statute-barred. The plaintiff appealed, but on 22 May 1989 Auld J. dismissed that appeal. The plaintiff appealed on 13 July 1989 against that order on the grounds that the judge was wrong in law (1) in holding that the plaintiff's cause of action in negligence or breach of contract accrued more than six years before the commencement of proceedings and that the judge ought to have concluded that the plaintiff's cause of action did not accrue until the earlier of the plaintiff's remarriage on 11 July 1982 or the disposal of the former matrimonial home by the plaintiff's former wife in or about July 1986; (2) in concluding that the defendant solicitors did not in contract owe the plaintiff a continuing duty to rectify their failure to protect his interest in the former matrimonial home by way of a declaration of trust for a notice or caution to be registered against the title; (3) in concluding that the plaintiff suffered loss and damage by reason of the defendant's breach of their duty of care in tort when they ceased to act for him in relation to the property without securing his interest instead of when the plaintiff's former wife was enabled in July 1986 to convey the former matrimonial home free from any charge or incumbrance registered against that property to protect the plaintiff's interest; and (4) there was no or no sufficient evidence upon which the judge could find that the plaintiff could still maintain a claim against his former wife in respect of her failure to agree to a charge over the former matrimonial home to secure the plaintiff's entitlement to a one-sixth share in the net proceeds of any subsequent sale of that property.

Peter W. Smith for the plaintiff. The plaintiff's claim is for professional negligence by a firm of solicitors, or alternatively for breach of contract, in failing to prepare any document regarding the agreement made between them in October 1977 concerning the transfer by the plaintiff of the matrimonial property into the sole name of his wife in consideration of him receiving a one-sixth share of the gross sale price in the event that she sold the same thereafter. Although the solicitors prepared a transfer which was effected on 1 September 1978 they failed to prepare any document recording the agreement or any acknowledgment of the plaintiff's interest whether by way of charge or declaration of trust.

The plaintiff's case is that the solicitors were under a continuing duty in contract to consider their position with regard to the transaction and therefore the cause of action in contract did not accrue until their retainer became incapable of fulfillment with the remarriage of the plaintiff in June 1982 or the disposal of the former matrimonial home by

the plaintiff's former wife in or about July 1986: see *Spoor v. Green* (1874) L.R. 9 Ex. 99 and *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp* [1979] Ch. 384. The obligation of a solicitor in carrying out his retainer is to exercise the care and skill of a competent solicitor: see *Harmer v. Cornelius* (1858) 5 C.B.N.S. 236 and *Kitchen v. Royal Air Force Association* [1958] 1 W.L.R. 563. It is conceded by the solicitors that they are potentially liable to the plaintiff both in contract and in tort on the basis of the decision in *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp* [1979] Ch. 384, the facts of which are indistinguishable from the present case. In that case, it was held that the cause of action in tort did not accrue until the option was extinguished by virtue of its lack of registration. At all times after the transfer to the plaintiff's former wife it would have been open to the solicitors to have protected the agreement by way of a notice or caution registered against the title under sections 48 or 54 of the Land Registration Act 1925: see *Bean v. Wade* (1885) 2 T.L.R. 157. Alternatively, the solicitors at any time until the remarriage of the plaintiff could have applied for a property adjustment order in the divorce proceedings to reflect the agreement and to have protected that application against the property by virtue of a registration of a pending land action.

Forster v. Outred & Co. [1982] 1 W.L.R. 86 and *D. W. Moore & Co. Ltd. v. Ferrier* [1988] 1 W.L.R. 267 relied upon by the solicitors have no application to the present facts. In both of those cases the plaintiff had entered into a transaction which was irreversible so that once the transaction had been entered into it was impossible for the defendants to correct their mistake. The plaintiff in each of those cases was finally and irretrievably damaged as soon as the transaction was entered into in each case. The plaintiff in the present case was only finally damaged on either the date of his remarriage or the date his former wife disposed of the property.

Paul Rees for the defendant solicitors. The plaintiff's claim was barred under sections 2 and 5 of the Limitation Act 1980 and could be struck out on the grounds of being frivolous and vexatious: see *Ronex Properties Ltd. v. John Laing Construction Ltd.* [1983] Q.B. 398. The solicitors owed a duty to the plaintiff to secure his position so that as of right he could call for his share of the proceeds of sale when the property was sold. The solicitors transferred the property without charge or declaration of trust. The cause of action arose both in tort and in contract therefore at the date of the transfer on 1 September 1978. Since the writ was not issued until 20 August 1987, the cause of action in tort and in contract arose more than six years before and the plaintiff's claim was statute-barred: see *Birkett v. James* [1978] A.C. 297.

It was necessary to prove actual damage in order to constitute a cause of action in negligence: see *Forster v. Outred & Co.* [1982] 1 W.L.R. 86. The plaintiff acted to his detriment when he signed away his rights in the former matrimonial property without any formal acknowledgment of his retained interest nor any protection for such an interest in the event of a sale to a third party. His right to that acknowledgment or that form of protection could not be asserted in the same way after the execution of the transfer: see *Baker v. Ollard &*

A *Bentley* (unreported), 12 May 1982, Court of Appeal (Civil Division) Transcript No. 155 of 1982 and *D. W. Moore & Co. Ltd. v. Ferrier* [1988] 1 W.L.R. 267. The plaintiff relies on *Midland Bank Trust Co. Ltd. v. Hett Stubbs & Kemp* [1979] Ch. 384 as authority for the proposition that there is a continuing obligation on the part of a negligent firm of solicitors to perfect the act which they have negligently failed to perform. On the facts of that case the solicitors had obtained a B contractual option to purchase but they had failed to register it. It would have been open to them to register the option at any stage up to the point of sale to a third party and the party granting the option would have been powerless to object to such registration. The solicitors continued to deal with their client for many years after the option had been granted, the document remained in their safe and its import was C discussed from time to time. By contrast, in the present case where, having dealt with the transfer, the solicitors closed their file and submitted their bill. Thereafter they had nothing further to do with the plaintiff. It cannot be said that the solicitors owed a continuing obligation to undo the damage which it is said they negligently caused in the first place, by failing to protect their client's interest.

D *Cur. adv. vult.*

11 April. The following judgments were handed down.

NICHOLLS L.J. This appeal raises some short points concerning the date of accrual of the plaintiff's causes of action, for breach of contract and in tort, arising out of his solicitors' alleged negligence. The facts as E pleaded lie in a very small compass. In October 1977 the plaintiff (Mr. Barry Bell), consulted the defendant firm regarding the breakdown of his marriage. One of the points he discussed with his solicitors concerned what was to happen to the matrimonial home, 60, Lower High Street, Shirehampton, Bristol. The house was registered in the joint names of himself and his wife, Sandra. It was worth about £12,000, and subject to F a mortgage for about £8,000. So if the house had then been sold, the plaintiff would have received about £2,000; that is, about one-sixth of the gross proceeds. The plaintiff was agreeable to the house not being sold for the time being, but he was to receive one-sixth of whatever might be the gross proceeds when a sale did take place. Meanwhile the house would be transferred into the sole name of his wife. This would help him to obtain a mortgage to buy other accommodation for himself. G His continuing interest in 60, Lower High Street would be protected by a trust deed or a mortgage.

These arrangements were agreed between the plaintiff and his wife and their respective solicitors. On 1 September 1978 the plaintiff executed a transfer of the house into his wife's sole name. But no steps were taken by the plaintiff's solicitors to protect his one-sixth share in the proceeds of sale. No declaration of trust or mortgage was prepared H or executed. No caution was registered at the Land Registry. The parties were divorced in the following year.

In December 1986 the plaintiff learned from his former wife that she had sold the property in July 1986 for £33,000. That is, almost eight

years after the property had been transferred into her sole name. She had spent all the proceeds. Thus the plaintiff had lost his one-sixth interest in the proceeds of sale.

So the plaintiff brought this action against his former solicitors for damages for professional negligence. The writ was issued on 20 August 1987. The sole question arising on this appeal is whether the action is bound to fail because it is statute-barred.

The claim for breach of contract

It was common ground before us that, on the pleaded facts, the plaintiff has or had claims against his former solicitors in contract and also in tort. I shall consider the two claims in that order. The basic limitation provision regarding claims founded on contract appears now in section 5 of the Limitation Act 1980. That section precludes the bringing of an action founded on simple contract after the expiration of six years from the date on which the cause of action accrued. Ascertaining that date involves identifying the relevant terms of the contract and also the date on which the breach relied on occurred. In the present case there is no difficulty under either head. The plaintiff's solicitor was retained to take all those steps which a reasonably careful solicitor would take in respect of the agreed arrangements for the transfer of the house to the plaintiff and the retention by him of a beneficial interest in a one-sixth share. He was to see to the preparation and execution of a formal declaration of trust or other suitable instrument. He was also to see that the plaintiff's interest would be protected when the wife came to sell the house. Under the agreed arrangements she was to become the sole registered proprietor. By causing appropriate entries to be made on the land register, such as a caution against dealings, the plaintiff's solicitor was to ensure that on a sale of the house the plaintiff would receive his share of the proceeds.

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

A 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. B 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 C 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 D 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 E example of this is the usual form of repairing clause in a tenancy agreement. Non-repair for six years does not result in the repairing obligation becoming statute-barred while the tenancy still subsists. The obligation of the tenant or the landlord to keep the property in repair is broken afresh every day the property is out of repair, as Bramwell B. observed in *Spoor v. Green* (1874) L.R. 9 Ex. 99, 111.

We were much pressed with the decision of Oliver J. in *Midland* F *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, as summarised at p. 438D–F. The instant case stands in marked contrast. There is no suggestion that the defendants had any further G 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 amended statement of claim, indeed, alleges that the solicitors owed a "continuing duty" to protect the plaintiff's one-sixth beneficial interest until that duty could no longer be fulfilled or the plaintiff accepted the solicitors' breach as repudiation. But this alleged continuing duty is not founded on any facts other than the initial retainer I have mentioned. H This allegation takes the plaintiff's case no further.

The claim in tort

One might have expected that parallel professional negligence claims based on contract and the tort of negligence would have a common

starting date for the running of the six-year limitation periods applicable in most cases under the Limitation Act 1980. But this is not so, because a cause of action based on negligence does not accrue until damage is suffered. It is from that date, not the date on which the negligent act or omission occurred, that the six-year limitation period prescribed by section 2 of the Limitation Act 1980 runs.

The question of damage and the limitation period in negligence claims has been a troublesome one for some years. Most recently this matter was, in 1984, the subject of recommendations by the Law Reform Committee in its 24th Report, on Latent Damage (Cmnd. 9390). This report led to the Latent Damage Act 1986. The Act of 1986 made amendments to the Act of 1980 which it is hoped will provide a sounder and fairer legal framework for the future. In future, in cases comparable to the present one, the new sections 14A and 14B of the Act of 1980, and not section 2, will apply. But the Act of 1986 is of no assistance to the plaintiff. The changes to the Act of 1980 made by the Act of 1986 do not enable any action to be brought which had already been barred by the Act of 1980: see section 4 of the Act of 1986.

So when did the plaintiff first sustain damage by reason of his solicitors' negligence? On this it is necessary to distinguish between (a) the solicitors' failure to see that the parties' agreement was recorded formally in a suitable declaration of trust or other instrument and (b) their failure to protect the plaintiff's interest in the house or the proceeds of sale by lodging a caution. As to failure (a), clearly the damage, such as it may have been, was sustained when the transfer was executed and handed over. At that point the plaintiff parted with title to the house, and he became subject to the practical inconveniences which might flow from his not having his wife's signature on a formal document. If the wife thereafter chose to deny his entitlement to one-sixth of the proceeds of sale, the plaintiff would have to rely on the correspondence between the solicitors coupled with part performance. To the extent that this was less satisfactory than a formal document recording the deal, the plaintiff suffered prejudice. He suffered that prejudice when the transaction was implemented without his having the protection of a formal document.

The extent of that prejudice depended on the attitude adopted thereafter by his former wife. All we know is that, according to the pleadings and the plaintiff's affidavit evidence, when she sold the house she disposed of all the proceeds and did not account to her former husband for his agreed one-sixth share. But the uncertainty surrounding her future intentions goes only to the quantum of the loss the plaintiff sustained when the transfer was executed without him having the same degree of protection as would be provided by a formal document. Likewise in the decision of the Court of Appeal in *Baker v. Ollard & Bentley* (unreported), 12 May 1982; Court of Appeal (Civil Division) Transcript No. 155 of 1982, cited in *D. W. Moore & Co. Ltd. v. Ferrier* [1988] 1 W.L.R. 267. There the plaintiff acquired a share in a property, rather than, as she ought to have received, the security of a long lease of one floor of the property. The amount of her loss depended on the attitude of her co-owners. But, even so, the damage was held to be

A suffered by the plaintiff at the time of the conveyance, when she received her precarious interest.

Failure (b) comprised the solicitors' omission to protect the plaintiff's interest by making an appropriate entry in the land register. This failure stands on a different footing from failure (a) in that it was within the plaintiff's own power to remedy failure (b) so long as the house continued to belong to his former wife. So long as she did not sell or B mortgage the property, he could protect his interest by taking the simple step of lodging a caution. To do so he did not need her consent or co-operation.

Is this difference material? On the one hand the plaintiff, in the case of failure (b) as much as in the case of failure (a), did not receive the protection he ought to have received when he executed the transfer and C parted with his title to the house. He was at risk, from the outset. His interest was vulnerable. On the other hand, so long as the plaintiff's wife did not deal with the property, failure (b) could easily be put right and at little expense and, had it been remedied, the failure to lodge a caution promptly in 1978 would have caused no financial loss to the plaintiff.

I am unable to accept that remediability puts failure (b) on the other D side of the line from failure (a). The solicitors' breach of duty in 1978 was remediable by the plaintiff, but that was only possible after he became aware that there had been a breach of duty. Apart from any other consideration, to treat the plaintiff's ability to remedy the breach himself without the concurrence of his former wife as a ground of distinction between this case and cases such as *Baker v. Ollard & E Bentley*, Court of Appeal (Civil Division) Transcript No. 155 of 1982 would be to disregard the unlikelihood in practice of the plaintiff ever being in a position to remedy the breach. Once the solicitors closed their file, it was unlikely that failure (b) would come to the notice of the plaintiff or the defendants, until the house was sold and it was too late. That, on the pleaded facts, is exactly what happened. The first the plaintiff knew that his one-sixth share was not properly protected was F after it had gone beyond recall. So his ability to remedy the breach before the house was sold was a matter of more theoretical interest than practical importance.

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 G 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.

I am very conscious that in *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp* [1979] Ch. 384 Oliver J. treated it as axiomatic that the H client suffered no loss from non-registration of the option until the farm was sold. But I can see no sound distinction between the present case and binding decisions of this court, such as *Baker v. Ollard & Bentley*, Court of Appeal (Civil Division) Transcript No. 155 of 1982 and *D. W.*

Moore & Co. Ltd. v. Ferrier [1988] 1 W.L.R. 267 which were decided subsequent to the *Midland Bank* case.

I reach the conclusion that the plaintiff's claim in tort, as well as his claim in contract, is statute-barred, with reluctance. It will be cold comfort to the plaintiff to be told of the Latent Damage Act 1986 and that cases such as his will be subject to different rules in future. But I do not think that shortcomings in the applicable Limitation Act 1980 are to be cured by drawing unsound distinctions between one case and the next. I would dismiss this appeal.

BELDAM L.J. This appeal raises again the question: when does a cause of action arise for failure by a solicitor to exercise reasonable care and skill in handling the property affairs of his client? If due to such a breach the client does not get the security for which it is the elementary duty of the solicitor to provide, does he suffer loss at the moment of that failure or only when the contingency against which it is intended to guard occurs some years later?

The question arises in these circumstances. The plaintiff, Mr. Barry Bell, consulted the defendants, Peter Browne & Co., about his matrimonial affairs in October 1977. The defendants practice as solicitors in Shirehampton, Bristol. The plaintiff and his former wife had their matrimonial home at 60, Lower High Street, Shirehampton, Bristol. Subject to a mortgage, they owned the property as joint tenants on trust for sale equally entitled to the balance of any proceeds after discharge of sums outstanding on the mortgage. As is so often the case, it was their only substantial asset. There was one child of the marriage who at that time was 14 years old. The plaintiff's marriage had irretrievably broken down although at that time he continued to live separately in the matrimonial home. He and his wife reached an amicable agreement, no doubt as part of the overall settlement of their affairs, that if he would relinquish his half share in the proceeds of sale she alone would become responsible for the mortgage repayments and would undertake, when she disposed of the property, to pay the plaintiff one-sixth of the gross sale price realised.

It is clear from a letter written by the defendants to the plaintiff on 11 October 1977 that as part of their instructions to act for the plaintiff the defendants were retained to implement the agreement between the plaintiff and his former wife. The letter was written very shortly after the plaintiff had instructed them and included the sentence:

> "Your interest could be legally protected either by declaration of trust or by mortgage and this is something we would have to discuss with your wife's solicitors."

On 1 September 1978 the plaintiff executed a transfer of his interest in the matrimonial home to his former wife but for the purposes of this appeal it has to be assumed that the defendants took no steps to protect the plaintiff's interest in the future proceeds of sale either by requiring a deed of trust to be executed by his former wife, by securing a charge on the property or by registering a caution. Nor did they tell the plaintiff that they had failed to do so. He was unaware that he had surrendered

A his interest in the property for an interest in the proceeds of sale which depended entirely on the ability and willingness of his former wife to fulfil her side of the bargain when the house was sold.

The plaintiff's marriage ended in 1979 and in 1982 he remarried. On 4 July 1986, 60, Lower High Street was sold by his former wife for the sum of £33,000. According to an affidavit of the plaintiff he first heard of the sale from his former wife in a telephone conversation on 12 B December 1986. On the same occasion she informed him that she had already spent the proceeds of sale and could not pay him his one-sixth share.

On 20 August 1987 the plaintiff commenced these proceedings claiming breach of duty by the defendants as his solicitors. His original statement of claim condescended to few particulars though it set out the C material facts as I have outlined them. By their defence the defendants contended that any claim by the plaintiff was barred by limitation since his cause of action arose more than six years prior to the issue of the writ.

Relying upon observations of this court in *Ronex Properties Ltd. v. John Laing Construction Ltd.* [1983] Q.B. 398, the defendants took out a summons to strike out the statement of claim as frivolous and D vexatious and an abuse of the process of the court, contending that this was the appropriate course because on the face of the pleadings they disclosed no cause of action which was not barred by statute.

The registrar upheld the defendants' claim and struck out the action. The plaintiff appealed to Auld J. who on 22 May 1989 dismissed the appeal. In the course of the hearing he allowed amendments to the E statement of claim. The significance of the amendments is to be found in the particulars set out in paragraph 7 of the amended statement of claim. In paragraph 7(ii) the plaintiff contended that the duty owed by the defendants was a duty to protect his interest which continued until the defendants repudiated it or until it became incapable of fulfilment. By paragraph 8 it was averred that the duty only became incapable of being fulfilled when the property was sold on 4 July 1986.

F The purpose of these amendments was to reflect an argument which had been addressed to the judge based upon the decision of Oliver J. in *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp* [1979] Ch. 384.

Auld J. rejected the argument based upon that decision, holding that there was no continuing contractual obligation on the present defendants, and relying upon a decision in this court, *Forster v. Outred & Co.* [1982] G 1 W.L.R. 86, he held that the plaintiff's claim was clearly statute-barred.

Although in the final analysis it did not affect the result of this appeal, in the course of argument the parties canvassed the question of the nature and extent of the defendants' retainer. From the discussion it was clear that an issue of fact might have arisen over the terms of the retainer which would have made the application to strike out the proceedings inappropriate. This is not the first case in which such a state H of affairs has arisen. It is, I feel, necessary to emphasise that as Donaldson L.J. in his judgment in *Ronex Properties Ltd. v. John Laing Construction Ltd.* [1983] Q.B. 398, 405, made clear, such a procedure is only appropriate in "a very clear case." If, from the issues raised in the

pleadings, arguable questions of fact could arise, the procedure will not be appropriate. Similarly if the pleadings are in such a form that the full extent of the issues has not been defined, the procedure will not be appropriate until it has been. This may perhaps seem obvious, but it can only add to the cost and delay of proceedings if such applications are made other than in cases in which on the face of the pleadings it is beyond argument that the cause of action is statute-barred.

The argument for the plaintiff may be summarised in this way. A plaintiff who alleges that he has suffered loss by reason of breach of duty of his solicitor may found his cause of action either in contract or in tort. Although in the ordinary case his cause of action in contract will arise when the breach of duty occurs, in cases where the solicitor's duty includes a duty to protect the plaintiff's interest by taking some positive action, such as registering an interest in or charge over property, the duty is to be regarded as a continuing duty. If the solicitor fails to take the appropriate steps, there may come a time when it could be said he has repudiated that duty. It is, however, trite law that his repudiation does not put an end to his duty unless it is accepted by the other party to the agreement. Thus it is argued that until the duty becomes incapable of performance or until a repudiation of the duty is accepted, the breach is a continuing one capable of giving rise to a cause of action. Alternatively the plaintiff bases his claim in tort, contending that his cause of action did not arise until he suffered damage. On the facts of the present case, since the plaintiff's ex-wife's obligation to pay over to him the agreed portion of the net proceeds of sale only arose on sale of the property, the plaintiff suffered no loss until she failed to comply with her obligation. Thus his cause of action only arose in the present case after the sale of the property in July 1986 and was therefore not barred by statute.

The plaintiff's claim in contract is, as I have said, founded firmly on the judgment of Oliver J. in *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp* [1979] Ch. 384. Auld J. considered that that case could be distinguished upon its facts. In that case the plaintiffs were the executors of a client of the defendant firm. In March 1961 the defendants' senior partner had been instructed to draw up an option agreement for the purchase by the client of his father's farm at a favourable price. The option was to remain effective for 10 years. The client paid a nominal consideration for the option which the defendants failed to register as an estate contract under the Land Charges Act 1925. On a number of occasions subsequently the client consulted the defendants and sought their advice whether he should exercise the option. In due course in August 1967 the client's father, wishing to resile from the option he had granted his son, discovered through other solicitors that the option had not been registered and conveyed the farm to his wife for the sum of £500 within the 10-year period. In October 1967 the client sought without success to exercise the option. In July 1972 he issued proceedings against the defendants, claiming damages for negligence and breach of duty.

Oliver J. held that there was no general or continuing duty arising out of the client's retainer to consider the enforceability of the option on

every occasion on which they were consulted as to a possible exercise of it. He held that the defendants were liable in tort for breach of duty because the damage suffered by their client did not arise until his father conveyed the farm to his wife, thereby defeating the option. The client's cause of action therefore arose within the period of limitation.

Finally he held that the defendants' breach of their contractual duty amounted to nonfeasance of the duty to register the option, and that that duty continued to bind them until it ceased to be effectively capable of performance when the father conveyed the farm to his wife. Thus an action based in contract against the defendants was not statute-barred.

The principal question considered in the judgment was whether the relationship of solicitor and client gives rise to a duty of care in tort as well as to a duty in contract. After concluding that there were concurrent duties, the judge turned to the question whether the defendants were liable in contract. After noting that a contract gives rise to a complex of rights and duties of which the duty to exercise reasonable care and skill is but one, Oliver J. illustrated by analogy from a contract to supply goods and services the differing consequences which may flow from the different types of obligation undertaken.

It was important in that case to note that it was not a case of the giving of wrong and negligent advice—where the breach of contract necessarily occurred at a fixed point of time—but of simple nonfeasance. So far as the client was concerned, it was a matter of total indifference to him at what date the solicitor chose to fulfil his contractual obligations to effect registration so long as it was effectively fulfilled. No doubt a normal careful practitioner would fulfil that obligation as soon as was reasonably practicable. In an appropriate case he might give a priority notice. But if he failed to do so and an effective registration could still be and was effected, his client can have no complaint except the purely technical one that he had been a bit careless and might have done it sooner. He had, 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 had not in fact, acquired an interest. But such a failure could not affect, much less discharge, the primary obligation to effect registration timeously, which continued until it was performed or became impossible of performance or until the client elected to treat the continued non-performance as a repudiation of the contract.

He next considered the decision of the Court of Appeal in *Bean v. Wade* (1885) 2 T.L.R. 157. A husband, who had an interest in trust funds, assigned that interest to the trustee of his marriage settlement. No notice of the assignment was given to the trustees of the fund. Subsequently proceedings were brought by his wife for the removal of the trustees of the marriage settlement and the appointment of fresh trustees. The defendants acted as solicitors for the wife in those proceedings. In due course the plaintiffs were appointed as trustees of the marriage settlement and a deed of assignment from the former trustees to them was executed in 1875 but the defendant solicitors, assuming that notice of the marriage settlement had already been given to trustees of the head settlement, omitted to give any notice to them of

the assignment to the plaintiffs. Subsequently the husband executed a mortgage of his interest under the head settlement to a mortgagee who took without notice of the prior assignment to the plaintiffs. In April 1879 the mortgagee gave notice of his interest to the trustees of the head settlement, thus gaining priority. In due course the plaintiffs were called upon to make good a deficiency of interest and capital to the wife and they sought to claim this loss from the defendant solicitors. At first instance Cave J. found for the plaintiffs but on appeal his decision was reversed on the ground that more than six years had elapsed between the time when notice should have been given and the commencement of the action. Accordingly it was statute-barred. The basis of the decision was that the solicitors' obligation under their retainer was an obligation to give notice within a reasonable time. There was no separate or co-existing continuing duty upon which the action could be founded.

Oliver J. acknowledged the striking resemblance to the case before him. In distinguishing it he emphasised the fact that in that case the solicitors had failed to give notice within a reasonable time of their appointment as trustees; there was no allegation of a continuing breach of duty as there was in the case before him. Finally he said, at p. 438:

> "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 17 August 1967. It seems to me that it was *then* that the contract was broken once and for all." (Emphasis added.)

Later, he said, at p. 438H: "In my judgment the breach of contract on which this action is based occurred on 17 August 1967, and the defence of limitation fails under this head also."

Naturally before us the defendants relied strongly on this paragraph as showing that there was an essential difference between that case and the present. Here they said the defendants were never consulted again after they had effected the conveyance of the plaintiff's interest in the property to the wife. They rendered the plaintiff a bill and from that moment on they were functi officio. For my part, however, I do not think that the liability of a solicitor for breach of contract should depend on such a distinction. Moreover, although it is with the greatest diffidence that I would express any view contrary to that of Oliver J., I am not persuaded that that case was distinguishable on its facts from *Bean v. Wade*, 2 T.L.R. 157 nor from the facts in the present case.

The obligation of a solicitor in carrying out his retainer is to exercise the care and skill of a competent solicitor. His duty to act with that degree of care and skill arises originally from the fact that a professional man warranted that he possessed and would exercise in the execution of the task he undertook the care and skill expected of a person practising

A that profession: see *Harmer v. Cornelius* (1858) 5 C.B.N.S. 236. It is now established that an action may be brought for breach of the duty either founded in contract or in tort.

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 B 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 C 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 D 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 E 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 F 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. Accordingly I would hold that his cause of action in contract was barred by statute. I now G turn to consider his claim in tort.

In the tort of negligence, damage is the gist of the action. So until actual loss is suffered, no cause of action can arise. Thus the plaintiff argued that until the sale of the house he had no right to receive any part of the proceeds from the sale of the property. Until his former wife failed to fulfil her side of the bargain, he had in fact suffered no loss. Consequently no cause of action arose until she failed to fulfil her H promise to pay over a part of the proceeds of sale.

The defendants, however, contended that the case was indistinguishable from *Forster v. Outred & Co.* [1982] 1 W.L.R. 86. In that case the plaintiff had executed a mortgage of her property in the presence of her

solicitors to secure a loan made to her son who subsequently went bankrupt. Some time later she was called upon to repay the loan which she did. About two years later she claimed damages for negligence and breach of contract of her solicitors who were the defendants. The plaintiff and her new advisers were guilty of inordinate and inexcusable delay in proceeding with the action and the defendants applied to dismiss it for want of prosecution. The plaintiff's solicitors thereupon issued another writ claiming damages against the defendants for negligence in connection with the execution of the mortgage. This writ was issued more than six years after she had executed the mortgage but was within six years of the date when she repaid the loan. It was contended on behalf of the plaintiff that the court should not dismiss her action for want of prosecution because, in accordance with the decision in *Birkett v. James* [1978] A.C. 297, the plaintiff could still proceed with her alternative action started by the issue of the fresh writ. The defendants contended that the claim in the second writ was statute-barred and that consequently the decision in *Birkett v. James* was no bar to dismissal of the first action. Thus the question in issue before the court was whether the plaintiff had suffered damage at the time when she executed the original mortgage or only when she discharged the loan, being called upon to pay it.

The court held that the plaintiff in that case had suffered actual damage through the negligence of her solicitors by entering into the mortgage deed which had the effect of encumbering her interest in the freehold estate by a legal charge which could, in the future, mature into an actual loss. The fact that it only did so subsequently did not alter the fact that she had suffered loss at the moment she had executed the deed.

I can see no ground for distinguishing the present case. 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. I desire, however, to add that it is a conclusion at which I arrive with no enthusiasm. As Lord Evershed M.R. said in *Kitchen v. Royal Air Force Association* [1958] 1 W.L.R. 563, 567–568:

> "An action against a firm of solicitors for alleged negligence by one who says that she was their client is always a matter of special anxiety to the court, for to some extent, inevitably, our system and profession of the law is impugned and its inadequacy and competency challenged. Especially is this so in the present case."

Although such claims are now much more frequent, I hope that these words have lost none of their force. Indeed on the assumed facts

of the present case it would be difficult to imagine a case of greater neglect of a client's interest. When it is conceded that the plaintiff who had relied upon the defendants' competence as solicitors had no means of knowing that they had by their negligence left him unprotected, it seems to me an added indictment of our system and profession of the law that they should escape liability by reliance on a rule designed to secure efficiency. The judge regarded the outcome as "unfortunate" for the plaintiff in this instance though in the future he thought such an injustice should in most cases be avoided by the operation of the Latent Damage Act 1986.

How effective the operation of that Act will prove to be in the future to enable persons who have suffered damage in circumstances similar to the plaintiff to recover their loss remains to be seen; it will not avail those who from the negligent performance of duty before July 1980 suffer damage in the future. Nor will it avail those who may become aware of their loss after a period of 15 years. For my part I would have hoped that consideration could be given to a more comprehensive assurance against similar loss in the future.

MUSTILL L.J. I agree, but with the same regret as Nicholls and Beldam L.JJ. have already expressed. The hardship to a person in the position of the plaintiff, whose justifiable reliance on the professional skills of his advisers was precisely the reason he had no cause to suspect that there had been a failure to exercise those skills will be greatly mitigated for the future by the Latent Damage Act 1986. This will be cold comfort to the plaintiff, who could have hoped for better from the legal system and its practitioners. On the more general plane, I think it a pity that English law has elected to recognise concurrent rights of action in contract and tort. Other legal systems seem to manage quite well by limiting attention to the contractual obligations which are, after all, the foundation of the relationship between the professional man and his client: as for example, in the case of French law, via the doctrine of non cumul. That precisely the same breach of precisely the same organisation should be capable of generating causes of action which arise at different times is in my judgment an anomaly which our law could well do without. Nevertheless the law is clear and we must apply it.

As regards the breach of contract, I entirely agree with Nicholls and Beldam L.JJ. and would add only a few brief observations on one aspect of *Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp* [1979] Ch. 384: namely the proposition, developed at pp. 434–435, that in cases where there is a breach of contract, not accepted by the promisee as a repudiation, the promisee has no cause of action. In this respect I believe that a distinction must be drawn between two situations.

In the first, the promisor makes it plain by words or conduct, before the time fixed for performance, that when the time arrives he cannot or will not perform. This is the case of anticipatory breach of contract, where under English law the promisee has an option whether or not to continue with the contract. If he elects to "accept" the promisor's conduct as a wrongful repudiation the obligations for the future of both parties are discharged, and the promisee may sue at once to recover

damages for loss of the bargain. If however he elects not to treat the contract as repudiated the obligations of both sides continue in existence and the promisor's renunciation has no effect as a breach of contract and gives no immediate cause of action for damages, although it may create certain rights in equity.

The second situation exists where there is no renunciation in advance, but where when the day for performance (if the obligation is to do a once-for-all act) or the first day for performance (if the contract requires acts to be done continually or intermittently over a period of time) arrives the promisor either performs badly or does not perform at all. Here the fate of the bilateral obligation will depend upon a number of factors. First, upon the nature of the obligation and magnitude of the breach. If the obligation is a condition of the contract, or if the breach is serious enough to go to the root of the contract, the promisee will have the option to treat himself as discharged from his present and future obligations. Second, upon whether the breach, even if insufficient in itself to justify a termination, nevertheless demonstrates when placed in the context of other relevant facts, an unwillingness or inability on the part of the promisor to go ahead and perform his obligations in the future. If it does, the promisee may elect to treat himself as discharged by anticipatory breach of those future obligations: *Mersey Steel and Iron Co. Ltd. v. Naylor, Benzon and Co.* (1884) 9 App. Cas. 434. Third, upon the conduct of the promisee himself. This may be such as to be a waiver of the right to treat a breach of condition, or a serious breach of an "innominate" term, as a ground to terminate the contract. Or it may show an election not to treat the future obligations as having been the subject of an anticipatory breach. In such cases the contract remains alive for the future. The point however for present purposes is that even if the promisee does not "accept" the promisor's breach as a repudiation, it retains its character as a breach and is actionable at once, even though the continuing obligation to perform in the future will also be capable of founding new causes of action when the time becomes ripe. Thus I would not for my part accept that there is no right of suit, and hence no commencement of the limitation period, until the promisee finally loses patience and elects to bring the contract to an end.

In fact, however, I doubt whether this theoretical question is material to the present case. 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. As Nicholls L.J. has pointed out, the solicitors' negligence had two different aspects: the failure to obtain the wife's participation in a formal instrument, and the failure to protect the interests by a caution, but I respectfully agree with his view that this characteristic forms no ground for distinguishing *Baker v. Ollard & Bentley,* Court of Appeal (Civil Division) Transcript No. 155 of 1982 and *D. W. Moore & Co. Ltd. v. Ferrier* [1988] 1 W.L.R. 267, which are binding on this court.

I would add that since the conclusion of the arguments a report has appeared of the decision of Mr. Kenneth Rokison Q.C. in *Iron Trade Mutual Insurance Co. Ltd. v. J. K. Buckenham Ltd.* [1990] 1 All E.R. 808 where a similar point to the present arose in the context of clauses against insurance brokers. After an extensive discussion of the cases to which Nicholls and Beldam L.JJ. have referred, the deputy judge arrived at a conclusion identical to our own.

With regret, therefore I must concur in the opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: Hyde Mahon & Bridges Sawtell for Croftons, Manchester; Willey Hargrave for Wansbroughs, Bristol.

[Reported by NIGEL J. MASON, ESQ. Barrister-at-Law]