IN THE HIGH COURT OF JUSTICE

Claim No. CV2012-00789

Between

RAMESHWAR MAHARAJ

VINDRA MAHARAJ

Claimants

AND

ANDREW JOHNSON	**First Defendant**
T. BOWSELL INNISS	**Second Defendant**
CECIL CAMACHO	**Third Defendant**
ROBIN OTWAY	**Fourth Defendant**

(Trading as DE NOBRIGA INNISS & CO., A FIRM)

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Mr. J Phelps for the Claimant

Mr. A. Fitzpatrick S.C. for the Defendant

REASONS FOR DECISION

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BACKGROUND

1. The claimants allege in their statement of case, (all emphasis added), that:-

   i. The Defendants were instructed and retained by the Claimants on or about **27th November 1985** to advise the Claimants on the parcel of land described in paragraph 1 of the Statement of Case ("the subject premises") and to prepare a Deed of Conveyance effectively conveying the subject premises to the Claimants with a good and **marketable** title;

   ii. The Defendants were under a duty to the Claimants to exercise all reasonable skill and care as was to be expected of competent solicitors specialized in conveyancing;

   iii. The Defendants prepared a Deed of Conveyance ("the Deed") for the subject premises in favour of the Claimants which was executed on **6th February 1986** and registered as No. 5179 of 1986;

   iv. Acting in reliance on the advice and expertise of the Defendants that the title to the subject premises was **good** and that the **Deed was effective**, the Claimants paid to the vendor the sum of $170,000.00 and **paid** to the **Defendants their fee** for preparing the Deed on **February 6th 1986**;

   v. The Deed was not effective to convey the subject premises to the Claimants with good marketable title or at all and the Defendants were **negligent** in failing to advise the Claimant of this fact;

   vi. As a consequence of this alleged **negligence** the Claimants suffered loss and damage.

   vii. It was discovered that the title was defective and the claimants suffered loss on or around 29th February 2008 when a prospective purchaser refused to complete a sale of the subject premises.

2. The cause of action pleaded was in negligence.

3. The claimants claim that the **date of the discovery of the damage** is the relevant date for limitation purposes that their cause of action as pleaded did not occur until the **date on which**

they lost the chance of a profitable sale of the property, namely February 2008, and the claim is therefore within time.

4. Further the claimants contend that the defendant owed him a **continuing duty to provide a good marketable title to the property**, which continuing duty was not satisfied up to and including February, 2008, and in respect of which they continued to be in breach. The case of **Midland Bank v Hett, Stubbs & Kemp (A firm) [1979] Ch 384** is cited as authority for this proposition.

5. The defendants contend:

i. That as a matter of law, the relevant period of limitation runs **from the date of the damage**.

ii. That as a matter of law, the date of the damage is the **date of the actual conveyance**, regardless of whether the defect in title was discovered or known to the claimant/ purchaser on that date.

iii. That as a matter of law, **no such continuing duty** to recognise, remedy and rectify the defect in title as alleged exists.

iv. That even if there were such continuing duty as alleged, it does not detract from the fact that the breach occurred once and for all at the date of conveyance, and as a matter of law, the limitation period for the tort of negligence runs from that date.

v. That, though breach of contract was not pleaded, any cause of action in contract accrued at latest on February 6th 1986, the date when the transaction was closed , the deed was executed , and the defendants' fees paid.

ISSUES

6.

i. Whether as a matter of law, the cause of action accrues at, and the relevant period of limitation runs from**, the date of the damage**.

ii. Whether as a matter of law, the date of the damage is the **date of the actual conveyance**, regardless of whether the defect in title was discovered or known to the claimant/ purchaser on that date.

iii. Whether as a matter of law, **any such continuing duty as alleged** exists.

7. As these were purely issues of law, which could be resolved by the application of the law to the facts of the claimant's pleaded case, (putting the claimant's case at its highest and accepting and assuming for this purpose each and every fact pleaded by the claimant), the defendants invited this court to exercise its jurisdiction under CPR Part 26 (2) and dispose of the claim on the basis of the preliminary issue of whether the claimant's alleged cause of action is **statute-barred** under section 5 of the Limitation of Personal Actions Ordinance Chap. 5 No. 6.

FINDINGS

8.

(i) As a matter of law, the relevant period of limitation runs **from the date of the damage**

(ii) As a matter of law, the date of the damage is the **date of the actual conveyance**, regardless of whether the defect in title was discovered or known to the claimant/ purchaser on that date.

(iii) As a matter of law, **no such continuing duty as alleged** exists.

(iv) Even if there were such continuing duty it does not detract from the fact that the breach occurred once and for all at the date of conveyance, and as a matter of law, the limitation period, would begin to run from that date, both in tort, and, (though not pleaded), in contract.

WHETHER A LIMITATION DEFENCE COULD BE DETERMINED AS A PRELIMINARY ISSUE

9. The defendants seek an order that the Claim Form and Statement of Case herein be struck out pursuant to Part 26 (2) of the Civil Procedure Rules 1998 (the CPR) on the ground, inter alia, that the Claimants' alleged cause of action is **statute-barred** under section 5 of the **Limitation of Personal Actions Ordinance Chap. 5 No. 6** (the Ordinance). The Ordinance applies to rights of action accrued before the commencement of the **Limitation of Certain Actions Act** (the Act). The date of commencement of the Act is the 17th November, 1997.

10. It is clearly established in this jurisdiction that such an application is permissible in relation to a defendant's preliminary issue that a limitation defence applies. See **Civil Appeal No. 171 of 2012 Kenneth Julien Et Al and Evolving Tecknologies v Enterprise Development Company Limited.**

11. It was there held that the issue of a **limitation defence should be heard as a preliminary issue** as the facts on which the appellants relied in their applications were not in dispute, taking into account the time wasted, as well as the expense incurred in going to trial, if the claim should be dismissed at trial on the very grounds on which the application is based.

> *[46] ...But in my judgment, to proceed to trial and hear the entire evidence is effectively to deprive the appellants of the benefit of the limitation provisions which are intended to liberate a litigant from the oppression of defending a stale and dated claim.*
>
> *[47] It is fair that the entire question of limitation under section 14(2) (*section 14(2) of the **Limitation of Certain Actions Act Chap 7:09** in that case) *be addressed first. If the appellants succeed it will save costs and even if they do not then it eliminates one major issue and the trial proceeds on the pure question of breach of duty.* (Per the Honourable Bereaux JA)

12. In the instant case the facts asserted in the claimant's pleaded case were assumed, and the effect, on the facts so assumed, of issues of limitation, date of breach, and the existence and nature of any continuing duty were considered.

ANALYSIS AND REASONING

When in law does the claimant's cause of action accrue?

13. Both parties cited and relied primarily upon the case of **Nykredit Mortgage Bank plc - v - Edward Erdman Group Ltd (No 02) [1998] 1 ALL E.R. 305.** However it appeared that they had two diametrically opposed interpretations of the effect of the reasoning in that case. It is therefore unavoidably necessary to set out in full the relevant portions cited.

Nykredit Mortgage Bank plc - v - Edward Erdman Group Ltd (No 02)

14. In the **Nykredit** case the issue before the House of Lords was the date on which the plaintiff lenders' cause of action in respect of a negligent overvaluation arose.

At pages 308 Paragraph (b) and 310 Paragraph (b), Lord Nicholls stated, (all emphasis added):

Accrual of a cause of action: actual damage

*"As every law student knows, causes of action for breach of contract and in tort arise at different times. In cases of **breach of contract** the cause of action arises **at the date of the breach** of contract. **In cases in tort the cause of action arises, not when the culpable conduct occurs, but when the plaintiff first sustains damage.** Thus **the question which has to be addressed is what is meant by "damage**" in the context of claims for loss which is purely financial (or economic, as it is sometimes described).*

"In Forster V Outred & Co (a firm) [1982] 2 ALL ER 753 at 760, [1982] 1 WLR 86 at 94 Stephenson LJ recorded the submission of Mr Staurt-Smith QC:

*"What is meant by **actual damage**? Counsel for the defendants 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 ... 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."*

*Stephenson LJ [1982] 2 ALL ER 753 at 764, [1982] 1WLR 86 at 98) accepted this submission. I agree with him. I add only the cautionary reminder that the loss must be relevant loss. To constitute **actual damage** for the purpose of constituting a tort, the loss sustained **must be loss falling within the measure of damage applicable to the wrong in question.** (*Page 308 lines a to f).

Take first a simple case which gives rise to no difficulty*. A purchaser buys a house which has been negligently overvalued or* ***which is subject to a local land charge not noticed by the purchaser's solicitor****. Had he known the true position the purchaser would have not have bought.* ***In such a case the purchaser's cause of action in tort accrues when he completes the purchase****. He suffers* ***actual damage by parting with his money*** *and* ***receiving in exchange*** *a* ***property worth less than the price he paid****.* [hereinafter referred to as **the simple case**]

In the ordinary way the purchaser in this example will not know of the negligence of *his valuer or* **solicitor** *when completing the purchase.* ***Despite this his cause of action arises at the date of completion****, and* ***time begins to run for limitation purposes****. In the past this meant, in an extreme case,* ***that a plaintiff could find his cause of action time-barred before he even knew he had reason to bring proceedings against anyone****. On occasions the courts have strained against this evident injustice when considering what is the date at which the plaintiff first suffered damage. By and large, this distorting feature no longer exists.* ***Parliament has now remedied this defect*** *in the limitation statutes. Under s 14A of the* ***Limitation Act 1980****, introduced by s 1 of the Latent Damage Act 1986, the plaintiff in an action for damages for negligence* ***now*** *has the benefit of an extended limitation period* ***where facts relevant to the cause of action are not known*** *at the date when the cause of action accrued. This extended period embraces, in short, three years from the date when the plaintiff first had the knowledge required for bringing an action for damages in respect of the relevant damage, with a long-stop period of 15 years.*

More difficult *is the case where,* ***as a result of negligent advice****,* ***property is acquired as a security.***[hereinafter referred to as **the** ***more difficult*** **case**]. ***In one sense*** *the* ***lender*** *undoubtedly* ***suffers detriment*** *when the loan transaction is completed. He parts with his money, which he would not have done had he been properly advised.* ***In another sense he may suffer no loss at that stage because often there will be no certainty he will actually lose any of his money****: the borrower may not default.* ***Financial loss is possible, but not certain****. Indeed, it may not even be likely. Further,* ***in some cases****, and* ***depending on the facts****, even if the borrower does not default* ***the overvalued*** *security* ***may still be sufficient***

***When**, then, **does** the **<u>lender first</u> sustain** measurable, **relevant loss**? **The first step** in answering this question **is to identify the relevant measure of loss**. It is axiomatic that in assessing loss caused by the defendant's negligence **the basic measure is the comparison between (a) what the plaintiff's position would have been if the defendant has fulfilled his duty of care and (b) the plaintiff's actual position.** Frequently, but not always, the plaintiff would not have entered into the relevant transaction had the defendant fulfilled his duty of care and advised the plaintiff, for instance, of the **true value of the property**. When this is so, **a professional negligence claim calls for <u>a comparison between the plaintiff's position had he not entered into the transaction in question and his position under the transaction</u>. <u>That is the basic comparison</u>**. Thus, typically in the case of **negligent valuation** of an intended loan security, **the basic comparison** called for is **between (a) the amount of money lent by the plaintiff, which he would still have had in the absence of the loan transaction, plus interest at a proper rate, and (b) the value of the rights acquired, namely the borrower's covenant and the true value of the overvalued property**.*

*However, for the reasons spelled out by my noble and learned friend Lord Hoffmann in the substantive judgements in this case ([1996] 3 ALL ER 365, [1997] AC 191), a defendant **valuer** is not liable for all the consequences which flow from the lender entering into the transaction. He is not even liable for all the foreseeable consequences. He is not liable for consequences which would have arisen even if the advice had been correct. He is not liable for these because they are the consequences of risks the lender would have taken upon himself if the valuation advice had been sound. As such they are not within the scope of the duty owed to the lender by the valuer.*

*For what then, is the valuer liable? The **valuer** is liable for the **adverse consequence**, flowing from entering into the transaction, which are **attributable to the deficiency** in the **valuation**. This principle of liability, easier to formulate than to apply, had next to be translated into practical terms. As to this, **the basic comparison** remains in point, as the means of identifying whether the **lender** has suffered any loss in consequence of entering into the transaction. **If he has not, then currently he has no cause of action against the valuer.** The deficiency in security has, in practice, caused him **no damage**. However, if*

***the basic comparison** throws up a loss, **then it is necessary to inquire further** and see what part of the loss is the consequence of the deficiency in the **security**.*

*Typically, the answer to this further inquiry will correspond with the amount of loss as shown by **the basic comparison**, for the lender would not have entered into the transaction had he been properly advised, but limited to the extent of the overvaluation. This was the measure applied in the present case. **Nykredit suffered a loss, including unpaid interest of over £3m**. Of this loss the amount **attributable to Erdman's incorrect valuation** was £1.4m, **being the extent of the overvaluation.***

***The basic comparison** gives rise to **issues of fact**. The **moment at which the comparison first reveals a loss** will **depend on the facts** of each case. Such difficulties as there may be are evidential and practical difficulties, not difficulties in principle.*

*Ascribing a value to the borrower's covenant should not be unduly troublesome. A comparable exercise regarding lessees' covenants is a routine matter when valuing property. Sometimes the comparison will reveal a loss from the inception of the loan transaction. The borrower may be a company with no other assets, its sole business may comprise redeveloping and reselling the property, and for repayment the lender may be looking solely to his security. In such a case, **if the property is worth less than the amount of the loan, relevant and measurable loss will be sustained at once**. In other cases **the borrower's covenant may have value**, and until there is default the lender may presently sustain no loss even though the security is worth less than the amount of the loan. Conversely, **in some cases there may be no loss even when the borrower defaults**. A borrower may default after a while but when he does so, **despite the overvaluation, the security may still be adequate.***

*It should be acknowledged at once that, to greater or lesser extent, quantification of the lender's loss is bound to be less certain, and therefore less satisfactory, if the quantification exercise is carried out before, rather than after, the security is ultimately sold. This consideration weighed heavily with the High Court of Australia in Wardley Australia Ltd v State of Western Australia (1992) 109 ALR 247. But the **difficulties of assessment at the earlier stage do not** seem to me to **lead to the conclusion that at the earlier stage the lender has suffered no measurable loss** and has **no cause of action**,*

and that it is only when the assessment becomes more straightforward or final that loss first arises and with it the cause of action."

15. Lord Nicholls recognized potential unfairness in the result where a purchaser could find his claim statute barred before he was aware that he had suffered damage, and therefore had a cause of action, which was partly addressed by the U.K. Parliament by its passage of legislation amending the U.K. Limitation Act. In this jurisdiction amendments have been made to address similar issues by the passage of the **Limitation of Certain Actions Act Chap 7:09**, with effect from November 17th 1997.

16. It is clear that ***the basic comparison*** which he refers to ***as giving rise*** *to* ***issues of fact*** was directed to the particular case of property acquired as security. It was in that context that it became relevant and necessary to ascertain -

> ***"When****, then,* ***does*** *the* ***lender first sustain*** *measurable,* ***relevant loss****?* ***The first step*** *in answering this question* **is to identify the relevant measure of loss**."

17. On his analysis that measure of loss in that case, was different from the simple case where a purchaser acquired property which had a defect in title overlooked by the negligence of the conveyancing solicitor. None of his analysis, in relation to property acquired as security but negligently overvalued, detracts in any way from his clear statement of law, that **in the simple case** of a negligent conveyance where, for example, a solicitor overlooks a land charge or other defect in title to property." ***In such a case the purchaser's cause of action in tort accrues when he completes the purchase****. He suffers* ***actual damage by parting with his money*** *and* ***receiving in exchange*** *a* ***property worth less than the price he paid****."*

18. It was submitted on behalf of the claimants that the basic comparison referred to above was a question of fact. It is clear when the extract is read in context however, that Lord Nicholls was referring to the "**more difficult case**, "*where,* ***as a result of negligent advice****,* ***property is acquired as a security,"*** and loss is suffered as a result of negligent overvaluation.

19. He is not referring to the "***simple case which gives rise to no difficulty***. *A purchaser buys a house which has been negligently overvalued or* ***which is subject to a local land charge not noticed by the purchaser's solicitor."*** In relation to that situation he makes it clear that the purchaser's cause of action arises on the completion of the purchase. The **basic comparison** which gives rise to issues of fact is inapplicable to that situation.

It is the simple case with which the instant action is concerned.

It was submitted that the need for all the evidence to be before the court, before a determination can be made, was discussed by Lord Nicholls where he stated: - (at letter (d) page 311 – letter (g) page 311):

> *"An alternative, less extreme possibility is th**at the cause of action do**es not arise until the **lender** becomes entitled to have recourse to the security. I am not attracted by this, as a proposition of law. This suggestion involves the proposition that until then, as a matter of law, the lender can never suffer loss, and the lender can never issue his writ, whatever the circumstances. That does not seem right to me. This proposition, like the date of realisation submission, loses sight of the starting point: that the lender would not have entered into the transaction had the **valuer** given proper advice. If **the basic comparison** shows a loss at an earlier stage, why should the lender have to wait until the borrower defaults before issuing his right against the negligent valuer? There may be good reason why the lender wishes to start proceedings without delay."*

20. It was submitted that the need for all the evidence to be before the court, before a determination can be made, was further discussed at letters c - d page 312 as follows:

> "*In UBAF Ltd v European American Banking Corp [1984] 2 ALL ER 226, [1984] QB 713 **the measure of damages** called for a **comparison** between the position of the plaintiffs as it would have been **had they not made the loans** and the position of the plaintiffs **as participants in the loan agreements**. The Court of Appeal, comprising Ackner and Oliver LJJ, declined ([1984] 2 ALL ER 226 at 234-235, [1984] QB 713 at 725) to accept that it was self evident that by entering into the transaction the plaintiffs were worse off. **It was possible, even if unlikely, that the rights they acquired when they lent their money were at that time worth as much as the amount of the loans** **.The facts would need to be established at** **trial**.*"

But again here he is not dealing with the simple case he identified earlier, but rather the more difficult case where property was acquired as security. In the latter situation, the value of the rights acquired by the lender when it lent its money needed to be considered, as that value depended not only on (a) the value of the property and the amount of the overvaluation, but on (b) the value of any personal covenant or other security taken in addition to the overvalued property.

"In other cases ***the borrower's covenant may have value****, and until there is default the lender* ***may presently sustain no loss*** *even though the security is worth less than the amount of the loan."*

Those were complicating matters of fact, unlike the simple case where damage **immediately** occurred from the mere fact that a purchaser had parted with his money in exchange for a property which was worth less than he had paid)

21. He continued, at paragraphs (d) – (f) page 312:

"Finally, of the English authorities, is First National Commercial bank plc v Humberts (a firm) [1995] 2 ALL ER 673 where the court drew the distinction between the two different measures of damages. The evidence established that the financing deal made by the plaintiffs was less valuable than it would have been ***had the defendants' valuation been correct.*** *As Saville LJ([1995] ALL ER 673 at 676) pointed out that was not the relevant measure of damages in that case. The* ***relevant measure*** *involved* ***comparing*** *what the plaintiffs* ***paid out*** *and what they* ***received under the transaction****.* ***On the evidence*** *the plaintiffs did not suffer any relevant damage when they parted with their money and entered into the transaction.* ***It was not until after March 1984****, within the limitation period* ***that their outlay plus cost of borrowing*** *or notional profit obtainable elsewhere* ***exceeded*** ***<u>the value of the security</u>****.*

In Wardly Australia Ltd v State of Western Australia (1992) 109 ALR 247 the High Court of Australia considered the meaning of 'loss or damage' ***in the context of a cause of action*** *for the recovery of loss or damage created by s 82 of the Trade Practices Act 1974. The court held that the* ***indemnity*** *given by the state generated a contingent liability and that the state, as the person misled into giving the indemnity by the misrepresentations, did not suffer loss or damage for the purposes of the statutory cause*

of action ***until****, in short,* ***the contingency occurred****. Of the wider observations made in the course of the judgements, Brennan J stated that a transaction which involves benefits and burdens results in loss or damage only if an adverse balance is struck. Loss cannot be said to be suffered until it is 'reasonably ascertainable' that by bearing the burdens the plaintiff is worse off than if he had not entered into the transaction."*

22. It is clear that no part of the above extensive citations from this decision supports the proposition that in **the simple case** the facts need to be established at trial.

23. It was submitted that Lord Hoffman, supported the alleged principle that a comparison must be applied to **the facts** of each case. Where at page 316 – 377 he stated: - (at paragraphs (h) page 316 – (b) page 317)

*"****Proof of loss*** *attributable to a breach of the relevant duty o****f care is*** *an essential element in a cause of action for the tort of negligence. Given that there has been negligence,* ***the cause of action will therefore arise when the plaintiff has suffered loss*** *in respect of which the duty was owed. It follows that in the present* ***case such loss will be suffered when the lender can show that he is worse off than he would have been if the security had been worth the sum advised by the valuer.*** *The comparison is between the* ***lender's actual*** *position and* ***what it would have been*** *if the valuation had been correct.*

<u>There may be cases</u> in which it is possible to demonstrate that <u>such loss is suffered immediately</u> upon the loan being made. The lender may be able to show that the rights which he has acquired as lender are worth less in the open market than they would have been if the security had not been overvalued. But I think that this would be difficult to prove in a case in which <u>the lender's personal covenant still appears good</u> and interest payments are being duly made. *On the other hand, loss will easily be demonstrable if the borrower has defaulted, so that the lender's recovery has become dependent upon the realisation of his security and that security is inadequate. On the other hand, I do not accept Mr. Berry's submission that no loss can be shown until the security has actually been realised. Relevant loss is suffered when the lender is financially worse off by reason of a breach of the duty of care than he would otherwise have been. This is, I think, in accordance with the decisions of the Court of Appeal in*

UBAF Ltd v European American Banking Corp [1984] 2 ALL ER 226, [1984] QB 714 and First National Commercial Bank plc v Humberts (a firm) [1995] 2 ALL ER 673".

24. It is clear that Lord Hoffman is here dealing with "**the more difficult case**", and in fact recognizes that even in that category the lender's personal covenant may be sufficiently valuable and enforceable to negate any loss from the negligent overvaluation of the security. While that of course would be a question of fact, such questions of fact do not arise in **the simple case**.

25. Despite the reference in **Nykredit** to the potential unfairness of the law that in respect of a conveyance with defective title, the cause of action, and the damage, accrued at the date of completion of the conveyance, the court there considered that to be an example of a simple case, unlike the case of a negligent overvaluation of property acquired as a security. It was the latter situation which was discussed at length, and which required an analysis, **on the facts**, of **the basic comparison**.

26. The simple case was considered to be a case of established law, where damage was suffered at the date of completion of the conveyance. It is therefore clear that no part of the extensive citations above support the proposition that in **the simple case** the facts need to be established at trial.

27. The reason that the simple case is simple and presents no difficulty is that the purchaser who buys property with a defective title or pays for property which is not effectively conveyed to him **suffers actual damage at the time of completion of the transaction when he parts with his money and receives in exchange property worth less that the price he paid.** (See **Nykredit Mortgage Bank plc –v- Edward Erdman Group Ltd (no. 2) [1998] 1 All. E.R. 305 at 308g**.

28. It does not require the fact finding inherent in some permutations of **the difficult case**, where for example, the valuation of the borrower's personal covenant may determine whether there is any loss at all.

29. The cases of **D W Moore & Co Ltd v Ferrier** and **Bell v Peter Browne & Co** were considered in **Nykredit** as follows:-

> *In* ***D W Moore & Co Ltd v Ferrier*** *[1988] 1 All ER 400, [1988] 1 WLR 267 the measure of damages was the measure sometimes loosely referred to as the* ***contract*** *or warranty measure. Had the solicitor done his job properly the plaintiffs would have obtained the benefit of an effective restraint of trade covenant. As it was, they received a worthless covenant.* ***They suffered damage when the transaction was entered into****.* ***Bell v Peter Browne & Co*** *[1990] 3 All ER 124, [1990] 2 QB 495 is a similar type of case. The solicitors could and* ***should have protected the plaintiff's continuing interest*** *in the house he was transferring to his wife.* ***He suffered damage when he parted with the house without that protection****. Similarly in Baker v Ollard & Bentley (1982) 126 SJ 593: the solicitors failed to ensure that the plaintiff obtained security of occupation of the first floor as they could and should have done.* ***She sustained loss when that occurred****. Likewise in the insurance broker cases of Iron Trade Mutual Insurance Co Ltd v J K Buckenham Ltd [1990] 1 All ER 808 and Islander Trucking Ltd v Hogg Robinson & Gardner Mountain (Marine) Ltd [1990] 1 All ER 826: the brokers should have obtained valid and effective insurance or reinsurance contracts.* ***The plaintiffs suffered loss when the brokers failed to do so, since the voidable contracts were of less commercial value****.* **(Pages 311j to 312a)**

D W Moore & Co Ltd v Ferrier

30. In the case of **DW Moore and Co. Ltd and Others v Ferrier and Others** [1988] 1 All E.R. 400 the UK Court of Appeal had previously considered the issue of when a cause of action accrued in the case of solicitor's negligence.

31. In that case two major shareholders of a company carrying on the business of insurance brokers agreed to issue shares in the company to an employer and director subject to his covenanting not to set up as an insurance broker if he left the company. The defendant solicitors drew up agreements which restricted the covenantor from setting up as an insurance broker if he ceased "to be a **member** of the company". The covenantor resigned as a director and employee of the company but **remained a shareholder**. In consequence of his retaining shares, the

restrictive covenants proved unenforceable as the covenantor remained a **member**. The company and its major shareholders commenced action against the defendants for negligence in the drafting of the restrictive covenants. The defendants pleaded that the action was statute-barred on the basis that **the plaintiffs had suffered actual damage when the agreements were executed** more than six years before they commenced their action.

32. The U.K. Court of Appeal held that where a solicitor negligently drafted a contract, **the client suffered damage at the time when the contract was executed** and **not when the defect was discovered,** since **at the time of execution the client was entering into a contract which was of <u>less commercial value</u> than if the solicitor had not been negligent**. Accordingly, **the limitation period for bringing an action against the solicitor for negligence began to run from the time when the contract was executed and not from the time when the defect was discovered or financial loss suffered.**

33. Bingham L.J. accepted, as correct,
a. that **time runs against the claimant from the date when his cause of action accrues**; and
b. that **his cause of action accrues when he suffers damage caused by the negligence complained of** (page 410 letters c to d).

34. Secondly he considered that under the applicable law, **time runs from the date of damage whether the claimant knows of the damage or not** (page 410 letter g).

35. Thirdly he found it clear beyond argument that **from the moment of executing each agreement (prepared by the defendant solicitors) the plaintiffs suffered damage because instead of receiving a potentially valuable chose in action they received one that was valueless** (page 410f). The fact that the damage suffered on execution was not as obvious as in other cases and presented problems of assessment (largely because it depended on the possible future conduct of the covenantor which could not be known at the time of execution) was not relevant (page 411a - g).

36. Fourthly he concluded that though it will be poor solace to the plaintiffs in that action (that subsequent amendments in 1986 to the Limitation acts in the UK might have addressed the situation) the law on limitation must nevertheless be applied as it stands (page 411 letter j).

37. The Claimants, on their own pleadings, suffered actual damage on **6th February 1986** when they paid for property which they either did not receive at all or received encumbered with a defective and unmarketable title. Their cause of action against the Defendants for alleged negligence therefore arose on that date notwithstanding that they were unaware of the damage. In the premises their claim, filed more than four years thereafter, is barred by section 5 of the Limitation of Personal Actions Ordinance Chap. 5 No. 6.

Whether any continuing duty exists in law?

38. The Claimants have alleged breach by the Defendants of a continuing duty to the Claimants to recognise and/or rectify their error in the preparation of the Deed. It was argued that prima facie, a solicitor owes a **continuing duty of care to a client** until he discharges his retainer, and further, that the Court **without oral evidence cannot decide whether or not such continuing duty of care was owed**.

39. The authorities however do not support the contention that such a continuing duty is a question of fact, appropriate for a trial. They clearly refer to such an alleged duty as a matter of law. In fact, on balance they support the proposition that there is no such continuing duty on the part of a conveyancing solicitor.

40. **This argument as to a continuing duty was considered and summarily dismissed by the U.K. Court of Appeal** in both **Bell v Peter Browne and Co. (a firm)** [1990] 3 All E.R. 124 and **Nouri v Marvi and Ors**. [2010] EWCA Civ.1107.

41. **Bell v Peter Browne and Co. (a firm) [1990] 3 All E.R. 124**

In **Bell** the plaintiff husband employed defendant solicitors in divorce proceedings who were to give effect to an agreement whereby the matrimonial home, which was in the joint names of the parties, was to be transferred into the sole name of the plaintiff's wife with the plaintiff's interest

therein, agreed to be one-sixth of the proceeds of any sale, being protected by a trust deed or mortgage. The house was duly transferred to the wife in 1978 but no steps were taken to protect the plaintiff's interest by way of declaration of trust or mortgage and no caution was entered at the Land Registry. The wife sold the property in 1986 and expended the proceeds. The plaintiff brought an action against the defendant solicitors claiming damages for breach of contract and negligence. The defendants applied to have the action **struck out on the ground that it was time-barred**.

42. In delivering its decision the Court held that **there was no difficulty in determining the date on which the defendants breached their contract with the plaintiff to take those steps which a reasonably careful solicitor would take in respect of the agreed arrangements**. The steps included taking the necessary precautions to ensure that the plaintiff received his share of the proceeds on the sale of the house. Lord Justice Nicholls stated at page 126f)

> *"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 Mr. Bell'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 Mr. Bell learnt, a year or two later, of what had happened, he would still have been entitled to go back to his former solicitor and require him to carry out, belatedly, his contractual obligations so far as they could still be performed. For example, lodging a caution.* ***Despite this, it was in 1978 that the breach occurred. Failure thereafter to make good the omission did not constitute a further breach****. The position after 1978 was simply that,* ***in breach of contract****, the solicitor had failed to do what he ought to have done in 1978 and, year after year, that breach remained unremedied.* ***Nor would the position have been different if in, say 1980, Mr. Bell's***

solicitor had been asked to remedy his breach of contract and he failed to do so. His failure to make good his existing breach of contract on request would not have constituted a further breach of contract: it would not have set a new six-year limitation period running. Once again, the position would have been simply that the solicitor remained in breach. *Nor, finally, is the position any different because, in respect of lodging a caution, the breach remained remediable until 1986 when the house was sold.* ***A remediable breach is just as much a breach of contract when it occurs as an irremediable breach,*** *although the practical consequence are likely to be less serious if the breach comes to light in time to take remedial action.* ***Were the law otherwise****, in any of these instances,* ***the effect would be to frustrate the purpose of the statutes of limitation, for it would mean that breaches of contract would never become statute-barred*** *unless the innocent party chose to accept the defaulting party's conduct as a repudiation or, perhaps, performance ceased to be possible".(page 126 letter f to page 127 letter b).*

For completeness I add that the above observations are directed at the normal case where a contract provides for something to be done, and the ***defaulting party fails to fulfil his contractual obligation in that regard at the time when performance is due under the contract****. In such a case there is a single breach of contract. By way of contrast are the* ***exceptional*** *cases where, on the true construction of the contract, the defaulting party's obligation is a* ***continuing contractual obligation****. In such cases the obligation is not breached once and for all, but it is a contractual obligation which arises anew for performance day after day, so that on each successive day there is a fresh breach. A familiar example of this is the usual form of repairing clause in a tenancy agreement. 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) LR 9 Exch 99 at 111.*
We were much pressed with the decision of Oliver J in ***Midland Bank Trust Co Ltd v Hett*** *Stubbs & Kemp (a firm) [1978] 3 All ER 571, [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 (see [1978] 3 All ER 571 at 614, [1979] Ch 384 at 438). The instant case stands in marked contrast. There is no suggestion that the solicitors had any further contact with Mr Bell 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 Mr Bell's one-sixth beneficial interest until that duty could no longer be fulfilled or Mr Bell 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. This allegation takes Mr Bell's case no further.***

43. (Similarly in the instant case the mere pleading that on February 21st 2008 contact with the defendants was established and a demand made that the title be rectified in time to permit completion on February 29th 2008 cannot be sufficient to create the alleged continuing duty.)

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 1980 Act. 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 s 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 in the Law Reform Committee's 24th Report Latent Damage (Cmnd 9390 (1984)). This report led to the Latent Damage Act 1986. The 1986 Act made amendments to the 1980 Act, 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 ss 14A and 14B of the 1980 Act, and not s 2, will apply. ***But the 1986 Act is of no assistance to Mr Bell.*** *The changes to the 1980 Act made by the 1986 Act do not enable*

any action to be brought which had already been barred by the 1980 Act (see s 4 of the 1986 Act).

So when did Mr Bell first sustain damage by reason of his solicitor's negligence*? On this it is necessary to distinguish between (a)* ***the solicitor's 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 Mr Bell'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 Mr Bell parted with title to the house, and he became subject to the practical inconveniences which might flow from his not having Mrs Bell's signature on a formal document. If Mrs Bell thereafter chose to deny his entitlement to one-sixth of the proceeds of sale, Mr Bell 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, Mr Bell 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 Mr Bell'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 Mr Bell 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 (a firm) (1982) 126 SJ 593 cited in D W Moore & Co Ltd v Ferrier [1988] 1 All ER 400 at 407–408, [1988] 1 WLR 267 at 275–276. 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 suffered by the plaintiff at the time of the conveyance, when she received her precarious interest****.*

Failure (b)comprised the solicitors' omission to protect Mr Bell'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 Mr Bell'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 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 Mr Bell, 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 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 Mr Bell'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 Mr Bell.*

I am unable to accept that remediability puts failure (b) on the other side of the line from failure (a)*. The solicitors' breach of duty in 1978 was remediable by Mr Bell, but that was only possible after he became aware that there had been a breach of duty. Apart from any other consideration, to treat Mr Bell'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 & Bentley would be to disregard the unlikelihood in practice of Mr Bell 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 Mr Bell, or the solicitors, until the house was sold and it was too late. That, on the pleaded facts, is exactly what happened. The first Mr Bell knew that his one-sixth share was not properly protected was 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 Mr Bell had learnt 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

solicitors 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.

44. **With respect to the plaintiff's claim in tort**, Nicholls L.J adopted the established view that his **cause of action had arisen** at the **time of the transfer of the house was executed in 1978** **that being the date when the damage was sustained**. On that date the plaintiff parted with title to the house without having a formal document protecting his interest in the sale proceeds (page 128a - b). The **extent of the loss might depend upon the wife's future actions** but **the uncertainty surrounding her future intentions went only to the quantum of loss sustained**.

45. The question of a solicitor's continuing retainer was also considered by Mustill L.J.

"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 solicitor had two duties, one express and the other implied****.* ***The express duty would be to perform the task for which he was retained and paid,*** *namely to put into effect in a legally appropriate manner the informal arrangement between his client 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 formalize and protect his client's interest in the future proceeds of sale, would be to exercise continuing vigilance to discover any mistake which he might have made, and then to busy himself 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 straight away.*** *To my mind* ***the solicitor was 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__*.*"

46. The court described any such continuing duty as a strange one but went on to hold that even if there were such a continuing duty it would still only be breached at the time when the mistake should have been discovered and put right, namely straight away. Nicholls LJ recognized that if the law were otherwise breaches of contract would never become statute barred.

47. *To my mind the solicitor was 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.*

48. *As to the claim in tort, I have little to add. The transaction caused Mr Bell 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 Mr Bell was actually, and not just potentially*, *worse off*** *than if the solicitor had performed his task competently.* ***The sale in 1986 simply meant that the breach and its consequences were irremediable.*** *As Nicholls LJ 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 (a firm) *(1982) 126 SJ 593 and* D W Moore & Co Ltd v Ferrier *[1988] 1 All ER 400, [1988] 1 WLR 267, which are binding on this court.*

49. **Nouri v Marvi and Ors. [2010] EWCA Civ. 1107**

The *Bell* case was followed in *Nouri v Marvi and Ors* (2010) EWCA Civ. 1107, where the issue of limitation was tried as a preliminary issue. This case concerned the fraudulent transfer of the claimant's flat by one Mr. Marvi,(holding himself out as Nouri) to Mr. Marvi himself. Mr. Marvi's title was registered. An attempt to obtain rectification of the register by the claimant was

refused by the court because of Mr. Nouri's delay which permitted third parties to acquire rights in the interim. The claimant subsequently sought damages for negligence from the solicitors involved in the fraudulent transaction. The claim was based in tort for the solicitors' breach of duty to the real Mr. Nouri to satisfy themselves of the identity of the person purporting to transfer the property. (There was no claim in contract as there was no contractual relationship between Nouri and the solicitors).

50. The Court analysed the law relating to limitation in cases of tort as follows:

(i) **a cause of action in tort can accrue for the purposes of limitation without the claimant being aware of it** (paragraph 31);

(ii) **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 consequence **but on whether the breach has in fact caused actual loss (paragraph 32);**

(iii) **in determining whether actual damage has occurred**, **one must assume**, **that the claimant was aware of the breach at the time of its commission and assess the impact of that breach** on the claimant's property or other assets at that date (paragraph 33).

51. The Court accepted in full the reasoning of the *Bell* case on the question of whether or not the defendants owed a continuing duty to the claimant**. It concluded that no special facts were pleaded to support the claim in this regard,**(save for requesting sight of the Marvi's passport after completion), **to suggest that the solicitors owed a continuing duty to the claimant which survived the completion of the transaction** (paragraph 34 to 38).

52. It held that **even if the duty owed by the solicitors was a continuing one of the kind alleged, that duty could make no difference** to the time when the limitation period began to run in a cause of action founded in tort because t**he cause of action accrued when loss was first suffered as a consequence of the breach of the alleged continuing duty.**

53. **Midland Bank Trust Co Ltd -v- Hett, Stubbs & Kemp (a firm)**

It was submitted that **t**he case of **Midland Bank Trust Co Ltd -v- Hett, Stubbs & Kemp (a firm)** provides the nearest factual resemblance to the instant case. In the Midland Case the

solicitors were negligent in not registering their clients' option to purchase a farm. Many years later when a third party acquired an interest free of the option. The client's interest was defeated because of non registration of the option.

54. The claimant cited paragraph 5:030 of the 2010 edition of **Mc Gee as supporting the relevance of the** Midland Bank case as follows: -

(i) "*Where the solicitor's negligence takes the form of failing to do something the cause of action may not accrue until the latest date when it could properly have been done. In* ***Midland Bank v Hett, Stubbs & Kemp*** *(A Firm) the defendants* ***failed to register an interest*** *in land, and it was held that the cause of action accrued only when it was too late to register it. To put the matter another way, there was a continuing breach of duty, so that fresh cause of action accrued each day. In Bell v Peter Browne & Co. the negligence took the form of failure to cause the execution of a declaration of trust in respect of the matrimonial home of the plaintiff's divorce/and or* ***failure to register a caution*** *at the Land Registry against dealings with the property. As a result the plaintiff lost one-sixth interest in the proceeds of sale which had been agreed as part of the divorce settlement. The Settlement happened in 1978, but the action was not commenced until 1987. It was held that the tort action was not commenced until 1987. It was held that the tort action accrued in 1978, since* ***damage was immediately suffered****. Although the damage arising from the failure to lodge a caution could have been remedied, that did not alter the fact that it had happened.*

(ii) *Nicholls L.J. distinguished the decision in the Midland Bank case on the ground that the solicitors there had never treated themselves as functis officio in relation to their client's affairs, but had continued to correspond with him, whereas the defendants in the latter case had had no dealings with their client since the conclusion of the divorce proceedings, and should not therefore be regarded as having had a continuing duty to him. This distinction is unconvincing, for* ***the argument*** *for Mr Bell* ***was not that his solicitors had a general continuing duty to him****, but that they had been under a duty to correct their earlier omission, or to put it another way, a duty to complete the task for which they had*

originally been engaged. ***However Bell v Peter Browne must now be regarded as firmly established."***

55. I find that it is clear that, even on the material supplied by the claimants, the **Midland Bank** case is considered to be an aberration. Although attempts to reconcile it with existing authority are unconvincing, the UK Court of Appeal in **Bell,** and in **Nouri** described it as being very much dependent on or distinguishable on its own facts.

56. The **Bell** case is the one which is considered to be "firmly established". I am satisfied that the **Midland Bank** case does not alter in any way the law established by the other authorities cited, and the lucid reasoning of Mustill J is clearly preferable.

57. **Midland Bank** is not recognized as representing the law in the United Kingdom, and I consider that it does not represent the position in law in this jurisdiction.

58. The fallacy in the claimant's submissions was revealed with the hypothetical example of a sale of the subject land being first attempted, not in 2008, but in 2108, 100 years later. According to the claimant, if the defect in title were then discovered then the continuing duty alleged, to remedy and rectify the defect in title, would still exist, and the limitation period would still not have expired.

59. This result would be to read into the **Limitation of Personal Actions Ordinance Chap. 5 No. 6** (the Ordinance) wording that it does not contain.

60. If this reasoning were upheld limitation need never expire, and it would defeat the attempt to bring certainty to the period after which claims in tort, and contract, would be permitted, and expose parties to the potential oppression of stale and dated claims, as recognized by the Honourable Bereaux JA.

61. The Limitation of Certain Actions Act was not in force until 1997 and cannot assist the claimants. As in **Bell**, the law must be applied as it stood at the time the cause of action arose.

62. I find that the established rule under legislation equivalent to the **Limitation of Personal Actions Ordinance Chap. 5 No. 6** is that in the case of tort the cause of action runs from the date of damage, and that damage is immediately suffered at the date of conveyance when the purchaser parts with his money and gets property with defective title, worth less than he paid for.

Must the property be worth less than paid as a result of the pleaded defect in title?

63. It remained to consider even more closely whether the defect in title was one such that it can be inferred it caused what was conveyed to the claimant to be worth less than what he had paid, and therefore caused him to sustain damage, at the time of the conveyance, of the type contemplated in Nykredit.

64. The claimant's case was that the defendants overlooked the fact that the power of attorney by which they obtained title from the vendor in fact did not confer any authority on him to convey title. In fact therefore what they obtained was a conveyance and deed from someone who could not confer or convey any title to the subject property.

65. Counsel for the claimant was given the further opportunity to provide any authority for the proposition that:-

a. it is not all defects in title that render a property worth less than paid for, (necessary to establish damage – and therefore begin the running of time for the limitation period) and that

b. in the instant case one cannot infer that this defect in fact rendered the property worth less than paid for.

66. None was provided. Nor could it be. The claimants got nothing of value, until title was perfected by a deed of rectification ensuring that the party who could convey title to them was the one who in fact did so.

67. No authority was supplied to support the claimant's contention that in law the title which he had received was one which could be sufficient to entitle him to specific performance against a purchaser. In fact the claimants' own case recognizes that they had no such title as could be enforced against a prospective purchaser. Such a purchaser allegedly in February 2008 declined to complete upon discovering the state of title to the subject land, and an action for specific performance to complete at a sale price of $20 million was not instituted. Nor could it be.

68. I find that the date of rectification is of no relevance as the limitation period began to run from the date of conveyance, when damage was sustained, and not discovery of the breach.

69. Further even if there were in fact a continuing duty on the part of the defendants, (and I find as a matter of law that there was no such duty on the pleaded facts), the limitation period in tort would still have begun to run from the date of the damage sustained, which, as **Nykredit** recognized, was the date of the conveyance, when the claimant got less than he paid for.

70. The limitation period in contract, even if breach of contract had in fact been pleaded, would have run from the date of the breach. That is, the date when the defect in the conveyance should have been discovered and put right - that is – immediately **on 6th February 1986**.

71. I find:-

i. That the relevant period of limitation in tort runs **from the date of the damage**.
ii. That the date of the damage is the **date of the actual conveyance on 6th February 1986**, regardless of whether the defect in title was discovered or known to the claimant/ purchaser on that date. Even if it had been pleaded, any cause of action for breach of contract, in the circumstances of this case as pleaded, would have accrued **on 6th February 1986.**
iii. That as a matter of law that there was no continuing duty to recognize or rectify the defect in title on the pleaded facts.

72. In those circumstances there was no necessity for a trial.

CONCLUSION

72. On the facts that were pleaded by the claimant, and the law as established clearly on the cases, the limitation defence was bound to succeed. The Claimants claim, having been filed well after 5th February 1990, is statute barred and should be, and is, hereby struck out.

DISPOSITION AND ORDER

73**.** In those circumstances the claimant's claim was dismissed with costs to be assessed in default of agreement.

Dated this 4th day of March, 2013

Peter A. Rajkumar
Judge