

Judgment 5/2008

Yaddehige v (1) Credit Suisse Trust Ltd (2) Collas Day (3) Fortis Reads Private Clients Ltd – Court of Appeal (Civil Appeal 387) – 31 January 2008

Actions in contract and in tort – appeals from decision of the Royal Court on exceptions de fonds – the test in Cherub Investments Ltd – correct focus must be on the factual assertions made by the Plaintiff – prescription – empêchement d’agir – whether on the facts as pleaded the Plaintiff could succeed on the empêchement issue. – Plaintiff’s appeal allowed, appeals of the First and Third Respondents dismissed.

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

Civil 387

The 31st day of January, 2008 before the Hon Michael Jacob Beloff, QC, presiding, Peter David Smith, QC and Sir de Vic Carey

SENA YADDEHIGE

(Plaintiff/Appellant)

V

CREDIT SUISSE TRUST LIMITED

(First Defendant/First Respondent)

COLLAS DAY

(Second Defendant/Second Respondent)

FORTIS READS PRIVATE CLIENTS LIMITED

(formerly MPR Private Clients Limited)

(Third Defendant/Third Respondent)

In the matter of the appeals by the Plaintiff and by the First and Third Defendants respectively from the decision of the Royal Court handed down on 30 March 2007;

THE COURT, having, on 11 and 12 December, 2007 heard Advocates N J Barnes, Miss A M Ozanne, S H Davies and J P Greenfield for the respective parties, thereon, this day HANDED DOWN JUDGMENTS in the attached terms and: -

1. ALLOWED the appeal by the Plaintiff in respect of the Second and Third Defendants respectively;

2. DISMISSED the appeals by the First and Third Defendants;
3. EXPRESSED the tentative view that the Defendants should each pay one third of the Plaintiff's costs on the recoverable basis, PROVIDED HOWEVER that if any party wished to make representations as to costs they should do so in writing to Her Majesty's Greffier within 14 days of receipt of the Judgments of the Court, and that any other party may respond in writing to such representations within 14 days.

K H TOUGH

Registrar of the Court of Appeal

Approved Text
31.01.08

**IN THE COURT OF APPEAL
OF THE ISLAND OF GUERNSEY**

CIVIL DIVISION

Between

SENA YADDEHIGE

(Appellant)

V

**CREDIT SUISSE TRUST LIMITED,
COLLAS DAY**

And

FORTIS READS PRIVATE CLIENTS LIMITED

(Respondents)

Before:

**Michael Beloff QC (Presiding)
Peter Smith QC
Sir de Vic Carey**

**Hearing dates: 11th, 12th December 2007
Judgment issued: 31st January 2008**

Cases:

Cherub Investments Limited –v- The Channel Islands Aero Club (Guernsey) Limited
1982 (Court of Appeal [Civil Division Report No 11])

Haward v Fawcetts [2006] 1 WLR 683

Holdright Insurance Company Limited –v- Willis Corroon 25th August 2000 [29 GLJ
40]

Bell -v- Peter Browne and Co [1990] 2 QB 495 CA

Public Services Committee –v- Maynard 1996 JLR 343

Boyd -v- Pickersgill & Le Cornu 1999 JLR 284

Invercargill City Council -v- Hamlin [1996] AC 624

Cartledge -v- E. Jopling and Son Ltd. [1963] A.C. 758

X v Bedfordshire CC 1996 AC 633

SMITH JA (delivering the first judgment at the invitation of the President)

The Procedural History

1. The plaintiff claims against Credit Suisse Trust Limited (“Credit Suisse”), Collas Day and Fortis Reads Private Clients Limited (“Reads”) £720,000 in

respect of Guernsey income tax he had to pay because he became a Guernsey resident on 15 April 1999 and both he and his wife had not been irrevocably excluded from benefiting from The Karolis Trust (“Karolis”) (of which the plaintiff was settlor and which held the shares of a company exempt from Guernsey tax called Precision Varionics International Limited (“PVI”)) until 15 December 1999. In addition the plaintiff claims £9,099 for fees incurred in respect of negotiations with the Guernsey income tax authorities and interest.

2. The plaintiff became liable for the tax because under section 65 of the Income Tax (Guernsey) Law 1975, as amended, all income “*arising to any person by virtue or in consequence of a revocable settlement shall be deemed to be the income of the settlor*” (subsection (1)) and Karolis was, until 15 December 1999, deemed to be revocable under section 65(3) of the Law which provides that “[*a*] *settlement shall be deemed to be revocable if any income or property which may at any time arise under or be comprised in the settlement is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances whatsoever*”.
3. The plaintiff’s claim against the three defendants is on the basis that each of them owed him duties of care both in contract and in tort and that by reason of their breaches the plaintiff incurred the losses to which I have referred.
4. Each of the defendants responded to the plaintiff’s cause by raising Exceptions. In their Defences Credit Suisse and Reads describe them as “de fonds” and Collas Day as “déclinatoire” and “péremptoire” but nothing appears to turn on this difference. Each defendant contended that the plaintiff’s claim should be struck out as disclosing no cause of action (and on other grounds which have not been pursued before this Court) and that it was prescribed, having been brought more than six years after the plaintiff’s alleged causes of action accrued. It was not disputed between the parties that it was brought on 15 November 2005.
5. In his Réplique the plaintiff denied that his claim was prescribed and contended that time did not start to run against him until one of three dates in 2000, 2001 or 2002 when he received certain information. It was alleged that prior to whichever date is held to be applicable the plaintiff was *empêché d’agir* “*as he could not have reasonably discovered all the facts upon which the causes of action are based*” and what the plaintiff alleges these to be were then set out. In the course of the hearing before this court Advocate N. J. Barnes, who appeared for the plaintiff, applied to amend the Réplique by adding an additional or alternative plea to *empêchement* to the effect that time did not start to run against the plaintiff in tort until he ought reasonably to have discovered the facts upon which his causes of action are based and proposed, as alternatives, the three dates to which I have already referred. Counsel for the defendants (Advocate Alison Ozanne for Credit Suisse, Advocate Simon H. Davies for Collas Day and Advocate John P. Greenfield for Reads) did not object to the proposed amendment but reserved their clients’ position on costs. Accordingly we allowed the amendment, the issue of costs being left to be dealt with as appropriate at a later stage.

6. The Exceptions were heard by A. R. W. Hancox, Esq., EGH, CBE, Lieutenant Bailiff, sitting alone. For the purposes of the proceedings before him and so far as is relevant to this appeal he held:

(1) As between the plaintiff and Credit Suisse that:

- there was a contract between the plaintiff and Credit Suisse;
- Credit Suisse owed the plaintiff a duty of care;
- Credit Suisse was in breach of contract;
- Credit Suisse was in breach of its duty of care;
- the cause of action in contract accrued on 17 September 1999;
- the cause of action in tort accrued on 17 December 1999;
- the plaintiff's claim in contract was prescribed.

(2) As between the plaintiff and Collas Day that:

- there was a contract between the plaintiff and Collas Day;
- Collas Day owed the plaintiff a duty of care;
- there had been no breach of contract;
- there had been no breach of the duty of care.

(3) As between the plaintiff and Reads that:

- there was no contract between the plaintiff and Reads;
- Reads owed the plaintiff a duty of care;
- Reads were in breach of their duty of care;
- the cause of action in tort accrued on 17 December 1999;
- the plaintiff's claim in tort was not prescribed.

7. The plaintiff has appealed the Lieutenant Bailiff's decision in respect of Collas Day contending that he applied the wrong test and that had he applied the correct test he ought to have dismissed Collas Day's Exceptions. Collas Day has furnished a Respondent's Notice seeking to have the decision of the Lieutenant Bailiff affirmed on the basis of what the plaintiff has contended was the correct test or, failing that, that the Lieutenant Bailiff's decision be affirmed on the basis that the plaintiff's causes of action are prescribed and that the plaintiff was not under any *empêchement d'agir*.

8. Credit Suisse has appealed on the basis that it was not guilty of any pleaded breach of contract, that it owed no duty of care in tort and that, in any event, the plaintiff's alleged causes of action are prescribed. Reads has appealed on the basis that the Lieutenant Bailiff erred in holding that the date when prescription began to run against the plaintiff was 17 December 1999 and that the plaintiff's claim against Reads is prescribed and further that the Lieutenant Bailiff erred in holding that Reads was guilty of breach of its duty of care.
9. As against Credit Suisse and Reads the plaintiff has furnished a Respondent's Notice contending that only so much of the plaintiff's claim against Credit Suisse and Reads arising from liability to tax on and prior to 15 November 1999 is prescribed and that, in any event, it is not prescribed because the plaintiff was *empêché d'agir* until a date less than six years prior to 15 November 2005. In the course of the hearing Advocate Barnes indicated that he had inadvertently omitted to give notice that the plaintiff wished to appeal against the Lieutenant Bailiff's ruling that there was no contract between the plaintiff and Reads. In response Advocate Greenfield conceded, very fairly but also inevitably, that the allegations in the Cause that Advocate Christopher Bound of Collas Day retained Reads with the plaintiff's agreement and on his behalf amounted to factual assertions sufficient to support this claim and, accordingly, we proceeded on the basis that this point also was before us.
10. It will be noted that Credit Suisse has not appealed the Lieutenant Bailiff's finding as to the existence of a contract between Credit Suisse and the plaintiff and Reads has not appealed the Lieutenant Bailiff's finding as to the existence of a duty of care owed by Reads to the plaintiff.

The Test

11. It was accepted by the parties that the correct test to be applied by a court considering Exceptions is that expressed by Hoffman JA in *Cherub Investments Limited -v- The Channel Islands Aero Club (Guernsey) Limited* 1982 (Court of Appeal [Civil Division Report No 11]) ("the Cherub test") in the following terms (at p. 8):

"Now it seems to us that the test of whether an Exception de Fonds can succeed or not is whether there are no facts which might be proved at the trial which would allow the Plaintiff – no admissible facts consistently with the pleadings which could be proved at the trial – which would allow the Plaintiff to succeed in the action ..."

12. Thus, in considering this appeal we must take the plaintiff's pleaded case at its height. However, in the instant case and by agreement between the parties a number of documents were placed before the Lieutenant Bailiff and they are before us. In my opinion, and consistent with Hoffman JA's remarks, where we are required to consider any of these documents we must construe them in a way as favourable to the plaintiff as we reasonably can.

The Defendants' Approach

13. In their arguments on the issues other than prescription the defendants focussed on the allegations of negligence and breach of contract set out in the plaintiff's Cause. While this is, perhaps, understandable I consider it to have been misconceived. In my view the correct focus must be on the factual assertions made by the plaintiff. Although it is not for the Court to assist him in developing his case against the defendants I do not believe that it can be right to ignore allegations that can properly be extrapolated from the plaintiff's case as pleaded simply because he has not set out particulars of negligence or breach of contract as clearly or accurately as he might have done. Defects of this sort, as distinct from omissions of substance, can be cured in due course in the appropriate manner.
14. Looking at the Cause in this way it readily becomes apparent that, leaving aside prescription, none of the defendants can succeed on their assertion that it does not disclose facts which could be proved and which would allow the plaintiff to succeed against them.

The Plaintiff and Credit Suisse

15. The Plaintiff pleads that he was the settlor of a trust called The Sensor Trust ("Sensor") of which Credit Suisse was the trustee. Part of the trust fund comprised all the shares in PVI. Prior to moving to Guernsey the plaintiff sought the advice of Credit Suisse "*... upon the implications of his move and in particular any tax implications in relation to the trust, [PVI] and his personal affairs*". He continues by pleading that Credit Suisse "*agreed to provide such advice ... including assisting the Plaintiff in obtaining appropriate professional advice*".
16. The plaintiff's Cause goes on to describe Credit Suisse's alleged involvement in the events resulting in the creation of Karolis and the appointment of the PVI shares from Sensor to Karolis prior to the plaintiff becoming a resident on 15 April 1999, and pleads that it failed to ensure the requisite exclusion of the plaintiff and his wife as beneficiaries of Karolis.
17. The Cause refers to letters from Credit Suisse to both Collas Day and Reads dated 29 March 1999 outlining "*the steps that needed to be taken prior to the Plaintiff's arrival in Guernsey on 15th April 1999*" and suggesting amendments to documents drafted by Advocate Bound. It is alleged that the letter to Reads asked: "*Please can you confirm in writing if the above detailed proposals are practical from a tax point of view and if you foresee any potential problems*".
18. The Cause further alleges that on 30 March 1999, and presumably in reply to Credit Suisse's letter of 29 March (the actual correspondence was not before us), Reads replied advising that the plaintiff and his wife and youngest child should be excluded. It is true that this is ambiguous in that it is not alleged that the letter specified express and irrevocable exclusion. However it is open

to the interpretation that there was something to be done which had not been attended to.

19. In my opinion the allegations to which I have referred are sufficient to meet the *Cherub* test in respect of both contract and tort. In her skeleton argument Advocate Ozanne sought to argue that the plaintiff's case in tort must fail against Credit Suisse through lack of proximity. Once again, however, I consider that the plaintiff's pleading meets the test on this issue also.

The Plaintiff and Collas Day

20. Paragraph 2 of the Cause states that prior to the plaintiff moving to Guernsey and on his behalf, Credit Suisse sought the advice of Collas Day, a firm of advocates, and, in particular, Advocate Bound “... *regarding the provision of advice on the tax and other implications of his move to Guernsey*” and that Collas Day “... *agreed to provide the advice sought and further agreed to do all such other things as might be necessary including drafting documents within their professional competence in order to facilitate from a fiscal point of view the plaintiff's move to Guernsey*”.
21. It seems to me that on the plaintiff's case as pleaded it is arguable that Advocate Bound was engaged not just to prepare documents as defined by someone else but in a role in which, as a lawyer, he ought to have ascertained what the law was in relation to the plaintiff's potential liability for tax on the income of Karolis and to have prepared documents which, from the outset, would have been effective to protect the plaintiff from this liability. Accordingly, I consider that the *Cherub* test is satisfied in relation to both breach of contract and breach of Collas Day's duty of care.

The Plaintiff and Reads

22. The plaintiff alleges in his Cause that Advocate Bound advised the plaintiff that he ought to take local tax advice and suggested that he consult Reads. The plaintiff agreed and Advocate Bound retained Reads on behalf of the plaintiff to provide tax advice “... *following a telephone conversation between Christopher Bound and Martin Shires on behalf of [Reads] on 24th February 1999*”.
23. I have already referred, above, to the correspondence between Credit Suisse and Reads of 29 and 30 March 1999 and one interpretation of Reads' ambiguous letter of 30 March 1999. The other side of the coin is that this letter failed to make it clear to Credit Suisse that the exclusion of the plaintiff and his wife from benefiting from Karolis must be express and irrevocable. This alone, in my view, meets the *Cherub* test in relation to both contract and tort.

Prescription

24. The defendants argued that the Lieutenant Bailiff was wrong to conclude that the plaintiff's causes of action in tort against Credit Suisse and Reads accrued

in December 1999 and argued that both in contract and tort, and as against all three defendants, the causes of action accrued or would have accrued (as the case may be) in April 1999. In response, and in addition to relying on the pleas of *empêchement* and the amendment to his Réplique raising reasonable discoverability, Advocate Barnes contended that the defendants owed continuing duties to the plaintiff between 15 April 1999 (when he moved to Guernsey) and 17 December 1999 (when his wife was finally irrevocably excluded from benefiting from Karolis) and that as the plaintiff incurred income tax on a daily basis during this period a new cause of action against each defendant accrued each day so that, at worst, as the proceedings were commenced on 15 November 2005, the plaintiff's claims against the defendants were not prescribed for the period 15 November 1999 and 17 December 1999. In support of this contention he relied on *Haward v Fawcetts* [2006] 1 WLR 683.

25. It was not unreasonable for the Lieutenant Bailiff, in the light of the judgment of Day DB in *Holdright Insurance Company Limited -v- Willis Corroon* 25th August 2000 [29 GLJ 40] but otherwise unreported to seek to apply the rules of the English common law in determining the dates of accrual of the plaintiff's causes of action whether in contract or in tort. However, although he may have been mistaken in his application of them and when compared with the decision of the Court of Appeal of England and Wales in *Bell -v- Peter Browne and Co* [1990] 2 QB 495, *Howard -v- Fawcetts* appears to provide a very thin foundation for Advocate Barnes' incremental accrual argument, I do not consider that it is our role at this stage to make rulings on every point raised by the parties. In my view the essential issue is whether, on the pleaded facts, the plaintiff could succeed on any basis in persuading the court of trial that his claims are not prescribed.
26. Turning to *empêchement* in *Holdright* (op. cit.) Day DB held that the maxim “à qui est empêché d'agir la prescription ne court point” (in Latin: contra non valentem agere nulla currit praescriptio) is part of the customary law of Guernsey as far as both contract (see p.18) and tort (with the possible exception of personal injury cases - see p. 32) are concerned. In so deciding he was strongly influenced by two decisions of the Jersey Court of Appeal: *Public Services Committee -v- Maynard* 1996 JLR 343 (which, as it happens, was a personal injury case) and *Boyd -v- Pickersgill and Le Cornu* 1999 JLR 284 (which was not).
27. In *Maynard*, in which it was accepted that the maxim forms part of Jersey Law, Southwell JA, delivering the judgment of the court, said (at p. 354) that the principle underlying its operation is the practical impossibility of the plaintiff being able to exercise his rights and he continued:

“... Mere ignorance does not bring the maxim into operation ... Where there is an impediment creating such a practical impossibility of which ignorance is a part, then the maxim may come into operation and prevent time running.”

28. *Boyd -v- Pickersgill* had parallels with the instant case in that the plaintiff's claim against her legal advisers. In that case Beloff JA, with whom the two other members of the Court of Appeal agreed, said the following (at p. 291):

“In my view, the epithet "practical" deployed in Maynard softens rather than strengthens the concept of impossibility. It requires a consideration of what is in fact, not in theory, possible. While ignorance of a cause of action does not per se trigger suspension of the limitation period, it may, in appropriate circumstances, constitute or create a relevant impediment ... The test, as it seems to me, is whether the ignorance of the cause of action is reasonable in all the circumstances, reasonable, that is, both in respect of the facts giving rise to the cause of action and that a cause of action arises in such circumstances.”

and further on (at p. 293) Beloff JA concluded “... *that while the appellant was instructing the respondents, there was prima facie no practical possibility of her appreciating any failure of the respondents to advise her [appropriately]*”.

29. Advocate Davies argued forcefully that applying the test adumbrated in *Boyd's* case the plaintiff could not be viewed as *empêché* from 16 September 1999 when a meeting was held between the plaintiff and representatives of Credit Suisse and Reads. He relied on a note of the meeting prepared by a Reads' employee which referred to a draft letter to the Guernsey income tax authorities which, Advocate Davies asserted, must have been in reply to a letter of 7 September 1999 from an official in Guernsey Income Tax which said that if the trustees of Karolis had made no declaration in respect of any “*Excepted Persons*” and as, therefore, the settlor and his wife might become beneficiaries, Karolis would be revocable and all income of it would be deemed to be income of the settlor.
30. However, it is not apparent from the note (which was one of the documents before us by agreement) that the draft letter was to have been a reply to the letter of 7 September 1999. Furthermore, it is not clear whether the plaintiff saw the letter of 7 September 1999 or, if he did, what he made of it or what a reasonable person in his position would have made of it. That it would be very dangerous to draw an adverse inference against the plaintiff from this note is starkly illustrated by the fact that one of the representatives of Credit Suisse who attended the meeting subsequently drafted a letter to Advocate Bound which was inconsistent with the point made in the letter of 7 September 1999, in that it requested Advocate Bound to draft a deed excluding only the plaintiff from benefiting from Karolis and made no mention of his wife.
31. In my opinion on the facts as pleaded the plaintiff could succeed on the *empêchement* issue.
32. The same applies to reasonable discovery. In *Invercargill City Council -v- Hamlin [1996] AC 624* the Privy Council accepted that it was open to the courts of New Zealand to adopt, in relation to the accrual of causes of action in

tort in respect of defective buildings, the test of when the relevant defect became apparent or ought to have been discovered. In *Maynard* the Jersey Court of Appeal opined that the reasonable discoverability approach may have been available to the plaintiff/appellant (op. cit. at p. 359). Southwell JA said that it seemed to the court to be “*reasonably arguable that the Jersey common law should be developed so as to ensure that causes of action in the tort of negligence accrue on the basis of a reasonable discoverability test*”. In *Holdright* (op. cit.) Day DB said the following (at p. 39):

“I am satisfied that in principle the courts in this jurisdiction are free to develop as they see fit the principles relating to the accrual of a cause of action in tort; and that as a matter of policy it would be desirable not to follow the English example in this field. The preferable position to adopt would be that which has been adopted in, amongst many other common law jurisdictions, New Zealand; that is to say, the 'reasonable discoverability' test should be that which in Guernsey determines the date of the accrual of a cause of action in tort.”

In *Boyd* (op. cit.) Southwell JA suggested that the reasonable discoverability approach might have been available to the plaintiff/appellant in that case besides *empêchement d'agir* (p. 295) and, indeed, implied that that approach may be available in relation to contract as well as tort (see p. 294).

33. In *Holdright* Day DB then went on (at p.39) to hold that, in the light of sections 5 and 11 of the Law Reform (Tort) (Guernsey) Law 1979, it was impossible for him to find that reasonable discoverability was the proper test and he accordingly accepted that, as in England and Wales, the date of accrual is when relevant actionable damage occurs, regardless of knowledge.

34. In my view it is arguable that Day DB's conclusion was a non sequitur akin to that which the Court of Appeal of New Zealand identified (see *Invercargill* op. cit. at page 645) in Lord Reid's similar reasoning in *Cartledge -v- E. Jopling and Son Ltd [1963] A.C. 758* at page 763 based on Section 26 of the Limitation Act 1939. However, given the limited scope of this appeal it is neither necessary nor appropriate to come to a firm conclusion on this issue. It may or may not arise as a live issue at the trial. If it does it will fall to be considered in the light of the facts as found and not necessarily as presently assumed.

Disposal

35. Accordingly:

- (1) I would allow the plaintiff's appeal in respect of Colles Day and Reads; and
- (2) I would dismiss the appeals of both Credit Suisse and Reads.

The events which gave rise to this action having occurred over eight years ago I fervently hope that it will now be brought to trial as quickly as possible.

Costs

36. My tentative view is that costs should follow the event - in other words that the plaintiff should have his costs here and below against the defendants, to be taxed in default of agreement on the standard basis, and that each defendant should pay one third of those costs.
37. If any of the parties wish to make any representations on what I have proposed they should furnish written submissions to HM Greffier within fourteen days of receipt of the judgments of the Court. Any party may then respond in writing again within fourteen days.

BELOFF JA (President)

38. I agree and would add only a few words. The Plaintiff wished to become a Guernsey resident. Not unnaturally, he wished, in so doing, to minimize his tax liability. He asserts that he sought advice as to how to do so from the three Defendants. In the event, his hopes were frustrated. He found himself liable to a substantial bill for income tax. If his assertions as to the nature of his relationship with each Defendant and the obligations necessarily consequent thereon are correct, he would appear prima facie to have a claim against one or more of them.
39. To paraphrase, Lord Nicholls of Birkenhead in *Haward v Fawcetts* [2006] 1 *WLR* 556 (a case also raising allegations of negligent professional advice) at para 20, stated in broad and simple terms the Plaintiff's claim is that the Defendants did not do their job properly; not so much - to paraphrase yet more venerable authority - that they did those things that they ought not to have done but that they left undone those things that they ought to have done. I respectfully concur with the views of Smith J A that the learned pleader may not have seen the wood for the trees or at any rate not identified every material tree, but, for reasons which Smith J A also gives on a strike out application we should extend every reasonable latitude to the pleader and concentrate on the facts express or necessarily implied in his statement of the Plaintiffs case rather than the precise legal form in which they are clothed.
40. The Defendants' interest in seeking to strike out the claims against them is obvious. The events to which any trial courts attention would be directed cannot merit the epithet fresh. We have indeed been furnished with no explanation as to why the claim is brought, if not actually outside any material limitation period, perilously close to its boundary: The issues raised of both fact and law even in relation to the substantive claim are potentially complex. Litigation would be expensive, and, whatever the outcome, unlikely to burnish the Defendants professional reputations. So it is that the Defendants have, excusably, among other vigorous submissions, focused on pleading points relating, in particular, if not exclusively, to the allegations of breach made,

prayed in aid limitation defences, and sought to rebut the Plaintiffs response to such defences that he was *empêché d'agir*.

41. But the very exercise exposed its fragility as a legal tactic. As Smith J A's succinct exposition illustrates, the issues of limitation and (especially) of *empêchement* are themselves acutely fact sensitive and again raise not altogether easy points of law.
42. These features i.e. difficult or developing areas of law and/or controversial matters of fact are cases of where an application to strike out is inappropriate. See e.g. *X v Bedfordshire CC 1996 AC 633* per Lord Browne Wilkinson at pp. 740 G – 741 D, a classic but by no means isolated summary of the principles which are as pertinent in Guernsey and Jersey as in England and Wales.
43. In *Cherub Investments v Channel Islands Aero Club*, Guernsey Court of Appeal No. II (Civil) 1982, the President (Hoffman JA at p.7) repeated the saying "*A short cut is sometimes the longest way round*". These applications (and these cross-appeals) provide further doleful illustration of that pithy epigram which practitioners may too easily forget.

CAREY JA

44. I agree with both judgments that have been delivered including what Smith JA has proposed concerning costs. I wish only to add a comment on *Empêchement d'agir*.
45. Even with the benefit of the judgments of the Jersey Court of Appeal in the two cases cited above and the judgment of the Privy Council in *Vaudin v Hamon* all of which support the principle that in these islands, plaintiffs may still be able to rely on the doctrine of *Empêchement d'agir*, when faced with a plea that an action is prescribed, there is inevitably going to be continuing uncertainty as to the precise limits on when and where the doctrine should apply
46. In *Vaudin*, where the Appellant Plaintiff was suggesting the doctrine could be used to justify inaction over a period of nearly thirty years, the Members of the Board were sceptical as to whether in the modern age, absence overseas could ever qualify as an *empêchement* and one notes that that judgment was delivered in the days before modern communication systems such as the internet. Their Lordships continued:

“as regards ignorance, this too is mentioned in some of the commentators, but only when brought about by fraud or misrepresentation (see Laurent Carey page 207). If the Appellant wishes to rely upon empêchement under this head, he must do so with full supporting particulars of the fraud or misrepresentation relied on, and he must conduct his case strictly within the limits of the particulars stated...”

Again it seems that the Board may have been influenced by the Appellant's imprecision in his complaint of *empêchement* (see further the comments of Day DB in *Holdright* at page 8 of his judgment)

47. In *Maynard* use was able to be made of the principle to allow a plaintiff not to be shut out in the case of an industrial illness that could not have been detected within the usual limitation period. The issue was clear cut to the extent that the Plaintiff could not reasonably have had knowledge until the problem was diagnosed and there was to use the Court's words " a practical impossibility of his being able to exercise his rights" at an earlier date.
48. In *Boyd*, the issue was professional negligence and the Court was faced, as it is here, with a procedural appeal against the rejection of a claim on grounds of prescription and elucidated the principles on which the appellant might be able to rely at trial. I respectfully agree with all that Beloff JA said in his judgment at pages 291 to 293 of the Report and do not wish to risk confusing the development of the law by adding any unnecessary gloss of my own.
49. For my part I consider that in an age where the prudent man is encouraged to place his affairs, be they legal, medical, financial or otherwise, in the hands of professional consultants, that the client should be entitled to rely on such advice or services being rendered to him with competence and with care. It is not for the client in such circumstances, where he does not have any expertise of his own, to be continuously auditing or obtaining secondary advice on what is being done for him by those experts. I venture to suggest that it may be inequitable for that consultant when the client claims there has been a failure on the part of the consultant, giving grounds for action against him in contract or in tort, to be able to use prescription as a shield by alleging that the client should have been aware of the failings claimed to give rise to the cause of action, at a time when the client was relying and was still entitled to be relying on the consultant to discharge the duties for which he had been retained. In such circumstances I further cannot see that it is necessary to allege fraud or deliberate misrepresentation by the retained consultant.
50. *Empêchement d'agir* appears to me to have developed as what might be called an equitable remedy tempering the way in which the strict rules of prescription of the Common Law are to be applied. We must remind ourselves that the Island courts have never formally distinguished between law and equity in the way that the courts of England did, but that does not mean that the Royal Court over the centuries did other than endeavour to apply the law fairly in accordance with the principles of justice then prevailing.
51. At the stage that this Court is with these proceedings, it would be wrong to form a view as to whether the Plaintiff can rebut the defence of prescription by establishing that he was *empêché*. As Beloff JA has said, these issues are "*acutely fact sensitive*" and are matters peculiarly for the Court at trial to determine.