Judgment 8/2007 **Yaddehige v (i) Credit Suisse Trust Limited (ii) Partners of Collas Day (iii) MPR Private Clients Limited - Royal Court (Civil Action File 983) – 30th March 2007**

Actions in contract and in tort – exceptions pleaded by the defendants – nature of exceptions de fonds - locus standi – Royal Court Civil Rules, 1989 (Rule 36) – relevance of prescription and limitation in relation to the contractual and tortious claims respectively – empêchement d'agir – whether reasonable cause of action – whether proceedings frivolous and/or vexatious – date when the cause of action arose – suit dismissed as respects the Second Defendants and to continue as against the First and Third Defendants on the respective tortious claims against them

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 983

The **30th day of March, 2007 before Alan Robin Winston Hancox Esquire, E.G.H., C.B.E., Lieutenant Bailiff, sitting alone**

SENA YADDEHIGE

Plaintiff

And

CREDIT SUISSE TRUST LIMITED
PARTNERS of COLLAS DAY
MPR PRIVATE CLIENTS LIMITED

Defendants

Whereas on 15th, 16th, 17th May 2006 and 30th August 2006 and 25th, 26th and 29th September 2006 and 10th October 2006 the Lieutenant Bailiff considered the Exceptions of the Defendants and heard thereon Advocates N J Barnes, A M Ozanne, S H Davies and J P Greenfield counsel for the Plaintiff, First Defendant, Second Defendant, and Third Defendant respectively and whereas on 22nd January the Lieutenant Bailiff handed down his decision in this respect the Lieutenant

Bailiff this day handed down the reasons for the said decision in the terms attached hereto and found as follows:-

i The First *Exception* pleaded on behalf of CSTL, fails as regards the contractual claim and as regards the claim in tort.

ii The Second *Exception* pleading prescription and limitation on behalf of CSTL succeeds as regards the contractual claim but fails as regards the claim in tort.

iii The First *Exception* pleaded on behalf of Collas Day, and of the relevant partners thereof, wholly succeeds, rendering unnecessary a consideration of their Second *Exception.*

iv The First *Exception* pleaded on behalf of MPR succeeds as regards the claim for breach of duty under contract, but fails as regards the tortuous claim.

v The Second *Exception* pleading prescription and limitation on behalf of MPR fails as regards the claim in tort.

vi The action therefore continues as against the First and Third Defendants on the respective tortious claims against them. The suit is dismissed as against the Second Defendants.

S M D ROSS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY **Approved Text. 30.03.07**

ORDINARY DIVISION

Between:

SENA YADDEHIGE…….Plaintiff/Respondent

And

(1) CREDIT SUISSE TRUST LIMITED}
(2) PARTNERS OF COLLAS DAY }……Defendants/Applicants
(3) MPR PRIVATE CLIENTS LIMITED}

Cases Referred to:-

(1) Cherub Investments v. The Channel Islands Aero Club (Guernsey) Ltd [1982] 13th January, Civil Appeal No. 11
(2) National Real Estate & Finance Co Ltd v. Hassan [1939] 2 K.B 61
(3) Gouriet v. Union of Post Office Workers [1977] 3 AER 70
(4) Inland Revenue Commissioners v. National Federation of Self-Employed & Small Businesses Ltd [1981] 2 AER 93
(5) Attorney-General (*ex rel.* McWhirter) v. Independent Broadcasting Authority [1973] 1 AER 689,
(6) Arsenal Football Club Ltd. v. Ende [1979] AC 1.
(7) Silver Falcon & Others v. International Helenic Operations and Others [1994] Civil Appeal No. 202
(8) Drummond-Jackson v. British Medical Association [1970] 1 WLR 688
(9) Lawrance v. Lord Norreys [1890] 15 App Cas. 210
(10) Wenlock v. Molony [1965] 1 WLR 1238
(11) Nagle v. Fielden [1966] 2 QB 633
(12) IFS Investments Ltd v. Manor Park (Guernsey) Ltd & Others [2004] 1st October, Royal Court Civil Case 817.
(13) Bell v. Peter Browne & Co [1990] 2QB 495
(14) Holdright Insurance Co Ltd v. Willis Corroon Management (Guernsey) Ltd [2000] 25th August, Royal Court Civil Case 424.
(15) Vaudin v. Hamon [1974] AC 569
(16) Public Services Committee v. Maynard [1996] JLR 343
(17) Boyd v. Pickersgill & Le Cornu [1999] JLR 284
(18) Ronex Properties Ltd v John Laing Construction Ltd. [1982] 3 AER 961
(19) Riches v. Director of Public Prosecutions [1973] 1 WLR 1019 [91].
(20) Cow v. Casey [1949] 1 KB 474
(21) Anlaby v. Prætorius [1888] 20 QBD 764
(22) Hilton v. Sutton Steam Laundry [1946] 1 KB 65
(23) Woods v. Martins Bank Ltd and Johnson [1959] 1 QB 55
(24) Candler v. Crane Christmas & Co [1951] 2 KB 164
(25) Hedley Byrne & Co Ltd v. Heller & Partners Ltd [1964] AC 465
(26) Stefani v. Le Pelley [1999] 13th July
(27) Heaven v. Pender ([1883] 11 QBD 503.
(28) Anns v. Merton London Borough Council [1978] AC 729.
(29) Donoghue v. Stevenson [1932] AC 562

(30) Dorset Yacht Co Ltd. v. Home Office 1970 AC 1004
(31) Weller & Co v. Foot & Mouth Disease Research Institute [1966] 1 QB 569;
(32) S.C.M. (United Kingdom) Ltd. v. W.J.Whittall & Son Ltd [1971 1 QB 337
(33) Spartan Steel & Alloys Ltd v. Martin & Co Ltd [1973] QB 27
(34) Yianni v. Edwin Evans & Sons [1982] QB 438
(35) Le Lievre v. Gould [1893] 1 QB 49
(36) Boorman v. Brown [1842] 61 Revised Reports 287
(37) Brown v. Boorman 65 Revised Reports 1
(38) Kelly v. Metropolitan Railway Co [1895] 1 QB 944
(39) Midland Bank Trust Co v. Hett, Stubbs & Kemp [1979] Ch 384
(40) Esso Petroleum v. Mardon [1976] 1 QB 801.
(41) Clark v. Kirby-Smith [1964] Ch 506
(42) Groom v. Crocker [1939] 1 KB 194
(43) Bagot v.Stevens Scanlan & Co Ltd. [1966] 1 QB197
(44) Rose & Frank Company v. J.R.Crompton & Brothers Ltd & Brittains Ltd [1923] 2 KB 261, [1925] AC 445
(45) Cann v. Wilson [1888] 39 ChD 39
(46) Nykredit Mortgage Bank Plc v. Edward Erdmann Group Ltd [1997] 1 WLR 1627
(47) Banque Bruxelles Lambert S.A v. Eagle Star Insurance Co Ltd [1997] AC 191
(48) Forster v. Outred & Co [1982] 1 WLR 86,
(49) Moore v.Ferrier [1987] 1 WLR 267
(50) Cartledge v. E. Jopling & Sons Ltd [1963] AC 758.
(51) Pirelli General Cable Works Ltd v. Oscar Faber & Partners [1983] 2 AC 1
(52) UBAF Ltd. v. European American Banking Corporation [1984] Q.B 713
(53) First Commercial Bank Plc. v. Humberts [1995] 2 AER 673
(54) Davies v. Elsby Brothers [1961] 1 WLR 170
(55) Biss v. Lambeth Southwark & Lewisham Health Authority [1978] 2 AER 125
(56) Allen v. Sir Alfred McAlpine & Sons Ltd. [1968] 1 AER 543

Texts referred to:-

(a) Wharton's Law Lexicon
(b) Droit civil: Les obligations 8th Edition
(c) Chitty on Contracts (28th Edn) paragraph 2–145
(d) Jackson & Powell on Professional Negligence 5th Edition

Statutes referred to:-

Fatal Accidents Act 1846
Land Charges Act 1925
Law Reform (Miscellaneous Provisions) Act 1934
Loi Relative aux Prescriptions 1889
Law Reform (Miscellaneous Provisions) Act 1934
Limitation Act 1939
Law Reform (Tort) (Guernsey) Law 1979
Limitation Act 1980
Supreme Court Act 1981
Latent Damage Act 1986

The Plaintiff was represented by Advocate N.J. Barnes.

The First Defendant was represented by Advocate A.M. Ozanne.

The Second Defendants were represented by Advocate S.H. Davies.

The Third Defendant was represented by Advocate J.P. Greenfield.

Reasons for Judgment on Defendants' *Exceptions* of 27 January 2006.

[1]. On the 22nd January this year I gave, in summary form, my Judgment on the *Exceptions* raised by the Defendants in this case. I now give my reasons for the decision.

[2]. This is an action for economic loss suffered as a result of alleged professional negligence by each of the three Defendants which is said to have occurred in giving advice, either directly or through one or other of the co-defendants, as regards the tax consequences that would ensue following the Plaintiff's change of residence from the United Kingdom to Guernsey in the year 1999.

[3]. As is recited in the Cause, as it now appears at TAB 6 of the Pleadings Bundle, the Plaintiff had been a client of Credit Suisse for several years. In early 1999 he sought its advice as to, *inter alia*, the tax implications of his proposed transfer of residence, and it is a reasonable inference from the pleaded facts that Credit Suisse agreed to provide such advice as was within its power to give, and to obtain other appropriate professional advice where necessary.

[4]. It is an accepted fact for the purposes of this case that Dr. Yaddehige moved to Guernsey on the 15th April, 1999. It is also accepted that a material factor which led to his decision to do so was that he and/or his family, and the Trust with which he was associated (then known as the Sensor Trust) would be relieved of income tax for which, if the proper steps were not taken, liability would otherwise be incurred.

[5]. Dr. Yaddehige was particularly concerned that the income from the company, the shares in which formed a substantial asset of the Trust, Precision Varionics International Ltd (referred to throughout as PVI) would not attract Guernsey Tax in the event of his implementing his intention to move here.

[6]. Such advice as was tendered to Dr. Yaddehige must, in my view, be deemed to be against the background of Section 65 (1)(a) of the Income Tax Law 1975, which provides that 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 unless (a) the settlement is irrevocable for more than six years *and* (b) the settlor—a term which includes his wife by virtue of sub-section (3)—has divested himself of all control over or right to receive any beneficial interest under the trust.

[7]. I should interject at this stage to acknowledge that Advocate Greenfield, representing MPR, stated expressly during the hearing on 26th September that he was making his submissions on the basis that the Plaintiff is able to prove that which is asserted in the

Cause, but that he was not to be taken as thereby necessarily accepting that the facts pleaded in the Cause are correct. I therefore consider it appropriate to state that I will, for the purpose of this Ruling, make this assumption in regard to the Third Defendant's case, with similar assumptions regarding the other two Defendants.

[8]. Accordingly—for the avoidance of doubt—this Ruling will be prepared wholly on the premise stated in the preceding paragraph. I should also state that I shall be referring to the First Defendant interchangeably as 'Credit Suisse' and 'CSTL', and to the 15th April, 1999, as 'D-Day'.

[9]. The first additional professional advice that was obtained was as a result of an approach made to the Second Defendants, who were the partners therein at the material time and are compendiously referred to in the *Exceptions* as Collas Day. As is recited in paragraph 2 of the Cause, Credit Suisse wrote to Collas Day seeking legal advice on 10th February, 1999. Credit Suisse, *inter alia*, canvassed the possibility that the trusteeship of Sensor could be transferred to the Isle of Man if the Plaintiff became resident in Guernsey and PVI remained as a tax exempt company—notwithstanding that it was registered here.

[10]. This was followed two days later by a meeting between the Plaintiff and Advocate Bound (of Collas Day). In view of the subsequent pattern of events in 1999 it is important to be clear as to the advice which Mr. Bound tendered to Dr. Yaddehige at an early stage. I take this from his file note, which records:

> "CJB suggested that Dr. Sena, his wife and son might be excluded from benefit under the Sensor Trust in order to preserve the exempt tax status of the company. Alternatively, the shares in the company could be appointed out to a new settlement under which Dr. Sena, his wife and minor son would not be beneficiaries."

This advice was conveyed, in similar terms, in a letter to Linda Parrack, the manager of Credit Suisse Trust, on the 17th February. Thus, at the outset, Mr. Bound was inclined to the view that the members of the Yaddehige family under consideration should be excluded from benefiting from either the Sensor Trust or from any new Trust by which it was to be replaced.

[11]. Advocate Bound considered that Dr. Yaddehige should, additionally, take local, that is to say Guernsey, tax advice and the name of the Third Defendant firm was put forward. In Mr. Greenfield's First Skeleton Argument of 3rd March, 2006 (with which certain amendments were incorporated on 31st March—at TAB 11 of the Pleadings Bundle) it is specifically denied that MPR was retained by or on behalf of the Plaintiff to provide tax advice and, consequently, there was no privity of contract between MPR and Dr. Yaddehige.

[12]. Thus, not only is there a denial that any privity of contract existed between the Plaintiff (CSTL) and MPR but a positive averment in paragraph 7 of TAB 11 that:

> "……..subject to the extent that there was *any retainer* (my italics), which is denied, the Third Defendant was instructed and retained by CSTL as trustees of the Sensor Trust."

I have set this passage out because it is, in my view, to some extent linked with the issue of *locus non standi*, which was initially pleaded in paragraph 1 of each of the Defendants'

respective *Exceptions*, but during the course of the hearing, discarded for the purposes of this Application (see paragraphs [44] to [46] and [66] to [67] (*infra)*).

[13]. The Plaintiff's case on this aspect is that it was clearly within the scope of Credit Suisse's general and/or implied authority to seek Guernsey tax advice. Paraphrasing Advocate Barnes' submissions, he says that it is obvious from the nature of the situation which was likely to arise in the then near future with regard to Dr. Yaddehige, that this was sensible advice emanating from Mr. Bound, and that if either he or Credit Suisse had not done so, they would have been criticised for the omission should the Plaintiff subsequently be assessed to tax on PVI's income.

[14]. The Plaintiff's case is, further, that it is a fair inference, assuming that the facts stated in the Cause are established, that MPR was retained on the Plaintiff's behalf and with its consent, for, on his next visit to Guernsey on 26th February, the Plaintiff participated in a meeting at which Paul Schreibke, MPR's tax manager and a representative of Credit Suisse were present. The pattern of the subsequent meetings, and especially the letter by the Assistant Administrator to BGL Reads (conceded by Mr. Greenfield to be the same entity as MPR for the purpose of these proceedings) of 24th December, 2002, at pages 10 to 13 of the Correspondence Bundle, are consistent with this view.

[15]. In Mr. Barnes' first Skeleton Argument, filed on the Plaintiff's behalf in reply to the Defendants' Skeleton Arguments, up to and including that at TAB 11 of the Pleadings Bundle, he proposed Amendments to the Cause which now appear as the passages underlined and included in paragraph 1, paragraph 2, and Paragraphs 5.1 and 5.2. The Amendments were allowed by an Order made by me at the outset of the hearing on 15th May, 2006, to which each of the Defendants' Advocates expressly consented, subject only to costs. Consequently paragraph 1 now includes the phrase:

> "The First Defendant……undertook to take all such other steps as might be necessary in order to facilitate the Plaintiff's proposed move to Guernsey including assisting the Plaintiff in obtaining appropriate professional advice on the question of the fiscal implications of his move to the Island……."

[16]. As I have just said, the Defendants' submissions have been advanced on the basis that the facts pleaded in the Cause, as now amended, are accepted. However, I must make it abundantly clear that it is no part of my function here to make any finding, or reach any judgment, as to the truth or otherwise of the pleaded facts otherwise than to regard them as facts which are assumed for the purposes of the present Applications.

[17]. It has therefore been argued that Dr. Yaddehige, by attending the meetings with, *inter alia,* Paul Schreibke, of the 26th February and the 16th September, 1999, was happy with the retention of MPR as an appropriate tax adviser for the purpose of extricating himself, and/or the Trust, from liability to Guernsey tax. MPR, for its part, was doubtless gratified that it had been put forward as a suitable tax consultant and accepted this rôle by participating in these meetings, through its representatives, and by communicating with the tax Authority and disseminating its advice to the first two Defendants. It follows that, in relation to this Defendant, it is the Court's primary task to determine whether these events gave rise to a contractual relationship between Dr. Yaddehige and MPR, as maintained by Mr. Barnes and refuted by Mr. Greenfield.

[18]. Reverting to the chronology of the events of 1999, Mr. Schreibke's note of the meeting of 26th February is not included in the Correspondence Bundle. However, it is pleaded as follows:

> "In the event that Sena moves to Guernsey he is willing to exclude himself and his wife from benefiting from the trust, leaving the children as the beneficiaries."

I pause here to observe that this supposed concession by Dr. Yaddehige is not entirely in line with Mr. Bound's advice, given shortly beforehand, that Dr. Yaddehige, Mrs. Yaddehige *and* their minor son might be covered by the proposed exclusion.

[19]. A further meeting took place on 18th March, 1999, between Linda Parrack, Mr Green, the Senior Manager of Credit Suisse Trust, Advocate Bound and the Plaintiff, at which the former explained that discussions between a Mr. Tony Rigden of MPR and the Administrator of Income Tax had established that PVI could continue to be regarded as an exempt company, provided there were no resident beneficiaries of the Sensor Trust.

[20]. By this time, partly as a result of an intervention by Mr. John Carrell of Messrs. Stephenson Harwood, the Plaintiff's English solicitors, a collective move, whether collated and/or co-ordinated by Credit Suisse or not, seems to have been taken and Mr. Bound's second suggestion—that a new trust should be formed—(one of the courses favoured by Mr. Carrell) was taking root.

[21]. Accordingly, at the 18th March meeting Advocate Bound agreed to draft the necessary documents for transferring the PVI shares into a new trust. A week later Paul Schreibke informed Linda Parrack that one advantage of having a new trust would, in effect, be to 'leave the door open'—in that the Plaintiff could be added as a beneficiary thereof if he ceased to be a resident of Guernsey. Nonetheless, on 30th March, Mr. Schreibke wrote to say that the Plaintiff, his wife and youngest son should be excluded from 'the trust'.

[22]. The foregoing summary of the events occurring in February and March of 1999 may to an extent be regarded as relevant purely as part of the historical background to this case, for, as is shown by the letter forming page 1 of the Correspondence Bundle, on 6th April the new trust, called the Karolis Trust, came into existence and the PVI shares were transferred to it on the following day.

[23]. Nevertheless the pattern of the events leading up to the 7th April, as narrated in the Cause, does give the impression that those parties who were tendering advice to Dr. Yaddehige prior to his move to Guernsey, certainly as far as the new trust was concerned, were oscillating between the view, on the one hand that irrevocable exclusion of all three members of his family was essential, and on the other that the door might be left open, or at least, ajar, for one or more of them subsequently to become beneficiaries.

[24]. On the 8th April Linda Parrack sent copies of the documents setting up the new Trust, and transferring the PVI shares to Karolis, to Mr. Schreibke. The stage was thus apparently set for 'D-Day', that is to say Dr. Yaddehige's move to Guernsey from the United Kingdom on the 15th April.

[25]. I say 'apparently' because, while neither of these documents is included in the Correspondence Bundle, it seems, given the assumption for present purposes that the facts stated in the Cause are correct, that

(a) Dr. Yaddehige, while not included as a beneficiary of the Karolis Trust, was not expressly *excluded* therefrom.

(b) Mrs. Yaddehige, also, was not excluded.

The importance of the distinction appears from the following passage in the letter over five months later from the Assistant Administrator of Income Tax at page 8 of the Correspondence Bundle:

> "If Mr and/or Mrs Yaddehige have not yet been irrevocably excluded from benefiting then the Trust will be revocable and the consequences of that, and the consequences for the company, will have to be considered."

[26]. In this passage the Assistant Administrator was clearly writing in the context of the statutory requirements of Section 65 (1)(a) of the Income Tax Law 1975 to which I have already referred in paragraph 6. The Statute is crystal clear that all income arising to any person (under) a revocable settlement shall be deemed to be the income of the settlor (that is, of course Dr. Yaddehige) unless conditions (a) and (b) are satisfied.

[27]. After Dr. Yaddehige moved to Guernsey, as Mr. Greenfield pointed out in his address, there is a break in the narrative from then until 9th August, when Ms. Parrack wrote to Paul Schreibke, in the terms set out in paragraph 16 of the Cause emphasising that it might be necessary formally to exclude him as a beneficiary of the Karolis Trust. It is alleged that no mention was made in that letter of the need also to exclude Mrs. Yaddehige therefrom

[28]. It seems to me that it is reasonable to construe Mr. Bound's initial advice that, either in the Sensor Trust or in any new trust, express exclusion might be desirable, if not essential, for, if that were not so, there would have been no reason for Mr. Carrell's comment that he did not favour the idea of express exclusion. In taking this view it is important to bear in mind Mr. Barnes' argument that, at that point in time, the parties concerned were focusing on the exempt status issue rather than that which he referred to as the Section 65 issue, for, as he (Mr. Barnes) reminded the Court, prior to 7th April, the only entity in Guernsey capable of attracting tax was the Sensor Trust, which then held the shares in PVI.

[29]. By the 25th March, however (by which time the formation of a new trust had become a distinct possibility) Mr. Schreibke wrote to Linda Parrack (paragraph 10 of the Cause) stating that the Plaintiff could remain a potential beneficiary of the new trust

> "……..so that he could be added as a beneficiary if he ceased to be a Guernsey resident."

(which would obviously be inconsistent with irrevocability). Barely five days later he advised that all three members of the family should be excluded.

[30]. I am moved to comment here that despite the preliminary views of Mr. Bound (at the conference of 12th February) and of Paul Schreibke (in his letter of 30th March) that the Plaintiff and his wife and youngest son should be *excluded* as

beneficiaries, those concerned in drafting the documents setting up the Karolis Trust do not seem to have appreciated the essential distinction (first referred to at paragraph 16) between the non-inclusion of the parties concerned as beneficiaries and their express exclusion as such.

[31]. The first glimmer of the importance from Mr. Barnes' point of view, of the section 65 issue, seems to have been when Mr. Rigden, having by then been in touch with the Income Tax Department, spoke to Mr. Bound on the 22nd March pointing out that which was emphasised and re-emphasised by the Assistant Administrator in his letters of 7th and 30th September, namely that so long as the Plaintiff remained in a position to benefit from whichever trust was holding the PVI shares when he became resident *two,* rather than one, consequences would follow, namely:

(i) that all the income from PVI would be taxable in his hands, and

(ii) the exempt tax status which previously existed in respect of PVI would be jeopardised.

[32]. Mr. Barnes, in his address resisting the *Exceptions*, was at pains to stress the distinction, relevant from the point of view of whether the Plaintiff, as a non-expert in the field of tax, could reasonably be expected to appreciate, between these two substantive issues, over which confusion could easily arise—due to the linkage between them in the instant case.

[33]. In my judgment, the construction placed by the Assistant Administrator on Section 65 (1)(a) is correct, and it is particularly clear from the wording in paragraph (b) that:

> "the settlor *has divested himself*……..of all control over *or right to receive* any beneficial interest thereunder"

coupled with the deeming provisions of sub-section (3), that the Legislature intended that the door should *not* be left open for the settlor, or his or her spouse, to receive benefit thereunder *even* if this was reserved for the future.

[34]. Accordingly, despite the views expressed at different stages by Mr. Bound (paragraph 4 of the Cause—17th February—contradicting that which appears immediately before it), by Mr. Carrell (paragraph 7), a suggestion at the meeting of 18th March at which the Plaintiff was present—paragraph 9), by Mr. Schreibke (paragraph 10—25th March), by Mr. Bound again (paragraph 20—21st September) it behoved those advising clients intending to move from the United Kingdom to Guernsey strictly to follow the conditions prescribed by Section 65 if they wished to mitigate the incidence of tax. Whether the appropriate exclusion could more conveniently be done in the original Trust Deed, or required a separate and formal Deed of Exclusion, would be a matter for those advising the settlor.

[35]. As Mr. Greenfield said, the mischief to be avoided (from the client's point of view) was that if valid declarations of exclusion were <u>not</u> made then all the Trust income would be deemed to be that of Dr. Yaddehige, once he acquired residence in Guernsey. Despite this, Mr. Bound, as late as 21st September, still cherished the hope that it might be possible for the exclusion to be revocable, but was advised by Ms. Parrack

that this was not possible. Accordingly, on 28th September, he drafted a Deed of Exclusion in respect of Dr. Yaddehige, but not, at that stage, of his wife. This did not happen until 17th December.

[36]. It is thus established for the present purpose that:

(1) The law of Guernsey unequivocally required that both the settlor and Mrs. Yaddehige should be excluded from benefiting from the Karolis Trust if tax was to be avoided on the income from PVI

(2) Both of them were not so excluded, and so the Trust did not become irrevocable, within the meaning of the Statute, until 17th December, 1999.

[37]. Consequently the prayer for damages for alleged professional negligence against each of the Defendants in prayer 32 of the Cause encompasses the period from 15th April to 17th December, 1999, quantified (some 2½ years later) after negotiations with the Tax Authority, at £720,000, added to which is the claim for professional fees of £9,099 said to have been incurred in respect of those negotiations.

[38]. As I have indicated earlier, each Defendant has filed Defences by way of *Exceptions.* These are identical in each case, save that those filed by the First and Third Defendants are headed 'Exceptions de Fond', while those of Collas Day are headed respectively 'Exception Declinatoire' and 'Exception Peremptoire'. Each concludes with the usual reservations of all their other rights, and (save in the case of the Second Defendant) the specific right to file further Exceptions de Forme and to amend their existing Defences if necessary.

[39]. It is convenient at this stage to recall the well-known explanation of the nature of an Exception given by Hoffmann J.A. in Cherub Investments v. The Channel Islands Aero Club (Guernsey) Ltd [1982] 13th January, Civil Appeal No. 11, which was enclosed with Mr. Barnes' letter received a fortnight after the hearing had closed, in which he drew attention to the third headnote. As Hoffmann J.A. said at page 4 of the Report, the Guernsey plea of *Exception de Fonds* is very close to the former demurrer:

> "An *Exception de Fonds* approximates to what in the old English practice was known as a 'demurrer'. Essentially it is a defence which challenges the validity of the claim on a ground which requires no evidence from the Defendant, apart from such facts as may be agreed between the parties, and which cannot be cured by any admissible evidence which might be adduced by the Plaintiff."

[40]. The ancient plea of demurrer is described in Wharton's Law Lexicon as:

> "A pleading which admits the facts as stated in the pleading of the opponent, and referring the law arising thereon to the judgment of the Court, waits until by such judgment the Court decides whether he is bound to answer."

[41]. The Rule which replaced the plea of Demurrer, was Order 25 Rule 2. This permitted either party to raise any point of law by his pleading and provided that the Judge should dispose of it at or after the trial, or, with the parties' consent, before the trial. It was known as the 'Demurrer Rule': see National Real Estate & Finance Co Ltd v.

Hassan [1939] 2 K.B 61, at page 73, per Scott L.J, a case which involved a repairing covenant in a lease. As MacKinnon L.J said at page 77:

> "……..where advantage is sought to be taken of this procedure under Order xxxv., r.2, care should be taken that a real point of law is being raised and that there should be a clear definition of what the point of law raised is."

[42]. The successor to the English Order 25 Rule 2, Order 18 Rule 11, was in a shortened form and was distilled down so as to enable a party to raise any point of law in his pleading *simpliciter*. It was read together with Order 33 Rule 3. The authorities show that the same principles are to be followed as under its predecessor. This Rule, and a new Order introduced as 14A in 1990, are included at TAB's 12 and 13 respectively in the Authorities Bundle. It has not been disputed that it is appropriate that the matters raised in the *Exceptions* should (subject to that which I shall say shortly regarding *Locus Standi*) be determined at this stage.

[43]. The first of the Exceptions taken by all the Defendants contained two limbs: first that the Plaintiff does not have *locus standi* to bring the action, and secondly that under Rule 36(1) of the 1989 Rules, paragraphs (a), (b) and (d), the claim should be struck out. As regards the first limb, when I raised the matter of *locus standi* during the afternoon session of 25th September, Mr. Greenfield then queried whether it was in law the Plaintiff's liability to pay the tax in question, and complained that attempts by the Defendants to get particulars of the necessary causal links upon which the Plaintiff relied were merely responded to by letter and that this was not the right way to remedy those which he said were obvious gaps in the Cause.

[44]. The Defence contention in this respect is, indeed, a thread running through their respective skeleton arguments. However, at the outset of the hearing on 11th October, Mr. Greenfield intimated that he was prepared to concede the *locus standi* point, so that the first *Exception* would have excised from it the phrase 'the Plaintiff does not have *locus standi* to bring the current claim against the' [Defendant] 'and……,' for the purposes of the instant applications.

[45]. Mr. Greenfield's stance was thereupon adopted by Advocates Ozanne and Davies. They took the view that if the Court should find that the action is prescribed as against their respective clients under the second *Exception*, then such finding would effectively extinguish the cause of action and, consequently, the issue of *locus standi* would no longer fall to be decided. However Counsel made it clear that in each case he or she reserved the right to revive the *locus standi* issue should it be considered it in their client's best interests to do so.

[46]. As I had initially taken the view that the issue of whether a party has the necessary *locus standi* to sue is fundamental to the existence or continuance of a suit, and that the issue of upon whom the liability to pay income tax would devolve in a given set of circumstances, would be a matter of law and, consequently, not an issue which would be left to the Jurats at a later stage, when the Court resumed on the 20th October I again indicated my misgivings as to whether this was the correct manner in which the Court should proceed.

[47]. While it is trite law that *locus standi* cannot be conferred on a party by consent, it cannot be gainsaid that a successful plea of Prescription would extinguish the

right of action, and not merely the remedy—as would be the position after a successful plea of limitation. This is clear from the Judgment of Day D.B. in the Holdright case (*infra*) when he distinguished the English concept of limitation from the Guernsey concept of prescription. He said at page 24C:

> "In the 1972 report to the States, both the words 'prescription' and 'limitation' are used as if they were interchangeable. The Law itself refers to 'limitation of actions'. 'Prescription', however, is a concept in Guernsey very different to the English concept of 'limitation'. Prescription both establishes and extinguishes rights, in distinction merely to precluding remedies (for which see, particularly, Gallienne at p.314 et seq)."

[48]. In consequence, and also, I add parenthetically, that in view of a further concession, to which I will allude at paragraph [100], the word 'scandalous' is also to be excised from the second *Exception*, it now reads:

> "Pursuant to Rule 36(1) of the Royal Court Civil Rules, 1989 and/or the inherent jurisdiction of the Court, and by way of preliminary issue, the claim should be struck out as showing no reasonable cause of action, as frivolous or vexatious, and as an abuse of process of the Court.

[49]. The fact remains, however, that while the plea as to *locus standi* is stated to be in abeyance, substantial portions of the Defendants' Skeleton Arguments were devoted to it and persisted in until a late stage. For instance, Advocate Ozanne's Skeleton Argument at TAB 9, filed on behalf of Credit Suisse, in paragraph 6 challenges the Plaintiff's *locus standii* to bring the claim. There follow six sub-paragraphs in paragraph 7 devoted to the issue of causation and loss. The concluding sub-paragraph says:

> **"**Further, in the absence of any explanation as to how the Plaintiff may be liable to pay taxes assessed against PVI and others, the Plaintiff cannot demonstrate a sufficient interest for him to be recognised as a proper party to this litigation."

[50]. The Skeleton Argument put forward by Advocate Simon Davies, for the Second Defendants, is identical at this point to that of Advocate Ozanne. Each entitles the relevant part of the Argument as

> "Failure adequately to plead Causation and Loss."

[51]. Advocate Greenfield, however, refers expressly in his first Skeleton Argument to the issue of *Locus Standi* as directly linked to the strike-out Application. All the Skeleton Arguments maintain that the Cause does not plead, adequately or at all, that the Plaintiff was, to use a phrase that is often employed, 'The Proper Contradictor'. In other words they claim that it has not been alleged that the Plaintiff, as distinct from the other entities referred to in paragraph 3 of the Assistant Administrator's letter in reply to Advocate Shepherd's letter at pages 14 to 15 of the Correspondence Bundle was the sole individual or company, liable to pay, or who did pay, the tax in question.

[52]. In his Skeleton Argument of 28th April, 2006, (TAB 15) Mr. Greenfield returned to the issue of *Locus Standi*. In paragraph 12 he interprets paragraph 3 of Mr. Barnes' first Skeleton Argument (TAB 12) as an assertion that the issue is one which should be proved at the trial. Assuming this is the correct meaning of Mr. Barnes' contention in paragraph 3, Mr. Greenfield responded to it by saying (paragraph 12):

> "The Third Defendant submits that it is disproportionate and costly to await a trial of this matter to ascertain that which, by its very nature, affects the *very ability* of the Plaintiff to bring this action."
>
> My italics.

He continued at paragraph 18:

> "The Third Defendant submits that the matter of the Plaintiff's *locus standi* is appropriate for resolution at this early stage and not at trial when it may be ascertained '(*sic* ?) assumed) ' that all parties have wasted enormous costs in defending this litigation only to find that the Plaintiff, in fact, does not have *locus standi*)."

[53]. Thus, as is implied by paragraph 1 of Mr. Davies' letter of the 15th February, page 28 of the Correspondence Bundle, it is not beyond the bounds of possibility that one or more of the other entities involved may have been, in law, responsible for paying the tax, in whole or in part. Indeed, that this was in fact the case is suggested by Mr. Davies at paragraph 2 of the same letter:

> "I note your statement' [in Mr. Barnes' letter of the 12th January] 'that all payments were made by the Plaintiff. That being so, it would appear that <u>your client has voluntarily assumed tax liabilities in addition to his own</u>." [My emphasis].

[54]. All these doubts, so forcibly expressed in the Correspondence and the Skeleton Arguments, and repeated in oral argument by Miss Ozanne and Mr. Davies on the 15th and 17th May respectively, were apparently assuaged by Mr. Barnes' statement in his letter of 14th July, well after these proceedings were under way, that:

> "The tax liabilities settled by the agreement were, as previously advised, <u>the liabilities of my client, Dr. Yaddehige</u>. The agreement reached with the Income Tax Authority referred to other parties so as to ensure that those parties would not face any tax liabilities either. <u>An analysis of the negotiations with the Income Tax Authority shows that the tax liabilities in question were truly those of Dr. Yaddehige</u>. The complete correspondence demonstrating this will be available upon discovery".

Again, the underlining is mine.

[55]. In view of the foregoing, despite the concessions have been made in the instant proceedings, it seems to me that it is open to question as to whether it can be said, with a degree of certainty, that the issue of *locus standi* is no longer live, and this much was accepted by Mr. Greenfield during the dialogue on 20th October. It is therefore appropriate that I should make some reference to the law on this question, though I recognise that many of the relevant authorities deal with *locus standi* in a different context from the instant case.

[56]. The latin term *locus standi* connotes a right to appear in Court on an issue in which the claimant has a legitimate interest. Conversely, as is stated in <u>Jowitt's Dictionary of English Law</u>, to say that a person has no *locus standi* is normally used to indicate the contention, usually on behalf of a defendant to an action, that the plaintiff, applicant or claimant, as the case may be, does not have a sufficient interest in the matter to which the application relates, to enable him to mount the relevant proceedings.

[57]. The leading case is Gouriet v. Union of Post Office Workers [1977] 3 AER 70, in which the appellant, having been refused the Attorney General's consent to bring an action at his relation, sought an injunction to prevent the postal union from soliciting or procuring any of its members not to handle, or wilfully to delay, postal material in the course of transmission between Britain and South Africa, it being contended that it was a criminal offence to do so.

[58]. The House of Lords held that a private citizen, save in a relator action, had no *locus standi* as plaintiff in a civil case to obtain an injunction to restrain another private citizen from committing a public wrong by breaking the criminal law, or a declaration that his conduct is unlawful, unless he can show that some legal or equitable right of his own has been infringed, or that he will sustain some special damage over and above that suffered by the general public.

[59]. Similarly, Inland Revenue Commissioners v. National Federation of Self-Employed & Small Businesses Ltd [1981] 2 AER 93, concerned an application for judicial review of a decision of the Tax authorities which had granted an amnesty to a body of journalists known as 'casuals', who had been systematically filling in imaginary names on the call slips presented on collecting their pay. Under the amnesty the Revenue would proceed with investigations and the collection of arrears for the tax year 1977/78, and the casuals would in future declare their casual employment, but earlier investigations would be discontinued.

[60]. The House of Lords did not rule out the possibility that there might arise a rare case in which an individual taxpayer, or a body of taxpayers, could show a sufficient interest to justify an application to the Court (either by way of an action or for judicial review) in general, to cite the words of Lord Wilberforce at page 99 *a* to *b*:

> "As a matter of general principle I would hold that the taxpayer has no sufficient interest in asking the court to investigate the tax affairs of another taxpayer, or to complain that the latter has been under assessed or over assessed. And this principle applies equally to groups of taxpayers: an aggregate of individuals each of whom has no interest cannot of itself have an interest."

The learned law Lords went on to hold that the Federation had not made out a sufficient case of discriminatory leniency by the Revenue to another class of taxpayers based on an ulterior motive.

[61]. Cases on the other side of the line were Attorney-General (*ex rel.* McWhirter) v. Independent Broadcasting Authority [1973] 1 AER 689, and Arsenal Football Club Ltd. v. Ende [1979] AC 1. In the former it was held that McWhirter, as a member of the viewing public, did (before he obtained the Attorney-General's sanction) have the right to issue a writ claiming an injunction to restrain the showing of a film likely to offend against public decency and morals.

[62]. In the latter case, doubtless in less affluent days, the Arsenal Football Club's stadium, football ground, stands and offices were situated in the London Borough of Islington and had a rateable value of £9,250. Mr. Ende thought that this was inadequate and instituted proceedings resulting in its increase to £13,900. The Lands Tribunal had held that, as a general ratepayer he was not an 'aggrieved person' within the

relevant statute. The Court of Appeal and the House of Lords disagreed, and held that, as a ratepayer, he had the requisite *locus standi* to mount the proceedings.

[63]. Mr. Ende was also, of course, a general taxpayer. Of his *locus standi* in that capacity, Lord Morris of Borth-y-Gest said at page 25:

> "As a taxpayer Mr. Ende is in no different position from all other taxpayers who pay the same amount of tax that he pays. His concern as a taxpayer in regard to the Arsenal Stadium becomes much removed from his concern in regard to that stadium in his capacity as a ratepayer in Islington and in Hackney. The concern of other taxpayers is also far removed. In these matters there comes a stage at which the law must draw a line and say that a claim is too remote. I think that the line to be drawn must deny a locus standi to one whose only status is that of a taxpayer."

[64]. The National Federation case is easily distinguishable from Gouriet and the instant one because it was brought under the then recently introduced procedural reform whereby judicial review under Order 53 R.S.C replaced, *inter alia*, the earlier prerogative orders, which, in turn, replaced the more ancient prerogative writs. However it is of interest because both Lord Diplock and Lord Wilberforce dealt in some detail with the matter of *locus standi* and the stage at which the plea should be raised, which, as has been remarked on above, paragraph [52] *supra*, is at issue between Mr. Barnes and Mr. Greenfield on their respective Skeleton Arguments.

[65]. Once again Lords Diplock and Wilberforce were in agreement as to when the plea of *locus non standi* should be considered—page 106 letters *g* to *j* , and page 96 letters *h* to *j*. At page 96 Lord Wilberforce said:

> "There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no interest sufficient to support the application: then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies being harassed by irresponsible applications.' ['the desire of the busybody to interfere in other people's affairs'— per Lord Fraser at page 108 *b*]. 'But in other cases this will not be so. In those it will be necessary to consider the powers and duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and the breach of those said to have been committed."

The next part of the quotation is especially relevant to the present case even though it is not one for judicial review:

> "In other words, the question of sufficient interest cannot, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule requires sufficient interest *in the matter to which the application relates."*

[66]. The issue of *locus standi* has, I confess, caused me some difficulties. These difficulties have been increased by the late written submissions, on behalf of the Second Defendants, lodged on the eve of the penultimate day's hearing of the *Exceptions*, which comprised some 40 pages of detailed argument. In particular paragraphs 52 and 53 thereof, which reiterate the contention, previously advanced in paragraph 2.5.6 of his Skeleton Argument, that the Cause did not plead that the Plaintiff, rather than PVI, was in law liable to pay the tax on PVI's profits. However, on 30th October Advocate Davies intimated that he would withdraw these two paragraphs for the purpose of this hearing.

[67]. After careful and anxious consideration, I take the view that as the Defendants are, at this stage, content with the assurance given in Mr. Barnes' letter of the 14th July, it would not be right for the Court to attempt to pierce or cast doubt on that assurance. It might be that if the relevant portion of Mr. Barnes' Skeleton Argument of 31st March, is to be interpreted as Mr. Greenfield suggests, the issue will re-surface during the trial, but, as of now, I consider the correct course for me to take is to decide the *Exceptions* as they presently stand.

[68]. I therefore now return to address the second limb of the first *Exception,* which is common to all three Defendants, namely the issue of whether the claim shows a reasonable cause of action as against each Defendant *seriatim,* under paragraph 1 of their respective Defenses. The four branches of Rule 36 (1) are, in effect, separated by the disjunctive word 'or'. In the instant case the Court's task is to consider each of the sub-paragraphs, except (c), as against the pleaded Cause. The success of the plea on any of them would entitle the Defendant in question to judgment.

[69]. Much of Mr. Davies' Written Submissions of the 19th October repeat and amplify the submissions made in Court, and there is criticism of the way in which the Plaintiff's case has been presented, with extensive references to the judgment of Le Quesne J.A in Silver Falcon & Others v. International Helenic Operations and Others *(infra)* with particular regard to the necessity to plead the facts with especial particularity in actions involving *(inter alia)* negligence, which *a fortiori* would include allegations of professional negligence.

[70]. A large part of these further written submissions severely criticises the inadequacy of the particulars of the various averments contained in the Cause, but, as far as I am aware, he has not yet filed any Request for Further and Better Particulars, and in this connexion I note that his Defences of the 26th January do not, as the other two Defenses do, specifically reserve the right to raise the appropriate *Exceptions de Forme* in this respect.

[71]. Dealing first with sub-Rule (a), Miss Ozanne read extensively from the Commentary in the 1999 White Book on 19 (1) of Order 18 of the Rules of the Supreme Court, as they existed in 1999. She submitted that under the principles stated in Drummond-Jackson v. British Medical Association [1970] 1 WLR 688, the case against her client had no reasonable prospect of success. As the Court is considering the allegations in the Cause, as it has been re-presented at TAB 6, which is all it can possibly do at this stage of the case, Miss Ozanne submits that the only conclusion that can be reached is that the action cannot possibly succeed and should therefore be struck out.

[72]. I accept that Rule 36 (1)(a) corresponds to the former Order 18 Rule 19 (1) (a) of the Rules of the Supreme Court. No doubt it is a useful weapon in the hands of the Court to prevent abuse of its process, or the pursuance of hopeless cases, or claims which are clearly shown to be frivolous or vexatious. In Lawrance v. Lord Norreys [1890] 15 App Cas. 210 Lord Herschell L.C said at page 219:

> "It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court.

[73]. Nonetheless it has been settled for many years that the discretion should only be exercised in plain and obvious cases, as, indeed, is indicated at the

commencement of the Commentary in the 1999 White Book at paragraph 18/19/6. In Lawrance v. Lord Norreys Lord Herschell continued:

> "It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.

[74]. The latter part of Lord Herschell's *dictum* was cited with approval by Danckwerts L.J. in Wenlock v. Molony [1965] 1 WLR 1238 at page 1243, and the same Lord Justice said in Nagle v. Fielden [1966] 2 QB 633 at page 648:

> "The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court."

In the same case there appears the celebrated phrase of Salmon L.J., at 651:

> "It is well established that a statement of claim should not be struck out and the Plaintiff driven from the judgment seat unless the case in unarguable."

The foregoing is but an expression of the hallowed principle of English law from time immemorial that to deny the subject a hearing should be the last resort of any court.Accordingly, since, as Hoffmann J.A said in the Cherub Investments case *(supra)* at page 5:

> "As a successful *Exception de Fonds* obviates the need for any hearing it is obviously convenient that it should be taken as soon as possible."

it must be correct to apply the same principles in Guernsey as in England.

[75]. Confirmation, if it were needed, that the former English principles on a strike-out application are followed here appears in this well-known passage from the Judgment of Sir Godfray Le Quesne J.A in Silver Falcon & Others v. International Helenic Operations and Others [1994] Civil Appeal No. 202:

> "A reasonable cause of action means a cause of action with some chance of success when only the allegations and the pleadings are considered……so long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge or jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking out."

and by Day L.B in IFS Investments Ltd v.Manor Park (Guernsey) Ltd & Others [2004] 1st October, Civil Case 817 which is at TAB 5 of the Authorities Bundle and in which these, and other, cases were cited, notably Drummond-Jackson v. British Medical Association *(supra)* (which is not included in the list of Authorities but was referred to by Miss Ozanne). A most helpful passage occurs in the judgment of Sir Gordon Willmer at page 700A:

> "The question whether a point is plain and obvious does not depend on the length of time it takes to argue, rather the question is whether, when the point has been argued, it has become plain and obvious that there can be but one result".

[76]. Miss Ozanne drew attention to paragraphs 4 and 5 of her first Skeleton Argument of the 3rd March, the former of which alleges that the Cause is 'woefully inadequate' in particularising the terms of the alleged retainer of Credit Suisse by Dr. Yaddehige to advise him of the tax implications regarding his proposed move to Guernsey. It is also suggested that the necessary ingredients of tortious liability are inadequately pleaded.

[77]. While I agree that there are aspects of the Cause in relation to the respective heads of liability which could have been more happily drafted, it seems to me that the criticism levelled by Miss Ozanne boils down to a complaint that paragraph 28 of the Cause suggests that it was a necessary implication of the retainer that Credit Suisse was instructed to draft documents (and that, for the purposes of both contractual and tortious liability, it would exercise reasonable skill and care in doing so) and that nowhere else in the Cause had any basis been shown for the averment regarding the drafting of documents.

[78]. I agree that in the original Cause which bears the date 6th January, 2006, and which was being considered at the time of the first Skeleton Argument, there is no substantive averment to the effect that it was CSTL's duty to draft documents. However in the Amended Cause, which was let in without any objection, at the end of paragraph 1 (as amended) it is stated:

> "……..it was further an implied term of the agreement that the First Defendant would arrange for the preparation of any documents that might be necessary whether by itself or by appropriate professionals.

Thus, a foundation for this averment was well and truly laid there, I repeat without objection from this Defendant, when the Consent Order was made on the 15th May. Moreover, when Miss Ozanne filed her Supplementary Skeleton Argument nine days after the Amended Cause, she made no further comment regarding paragraph 28.

[79]. It also has to be noted that the pleader referred to the drafting of documents 'where appropriate' in that paragraph. While the concluding phrase might originally have been regarded as surplusage to the main thrust of paragraph 28, it can now legitimately be linked to the underlined part of paragraph 1, with the result that, as of now, there is an untraversed averment that the preparation of necessary documents, by CSTL or by appropriate professionals, was an implied term of the agreement between the Plaintiff and CSTL. Accordingly I reject paragraph 5.2 of the First Defendant's first Skeleton Argument.

[80]. Mr. Davies adopted Miss Ozanne's submissions as regards paragraph 1 of the *Exceptions* in their entirety. However, in his written submission of the 19th October, he expanded on this, and, in addition to adopting the principles enunciated by Day, L.B. in the IFS Investments case *(supra)*, drew particular attention to the Commentary in the 1999 White Book at 18/19/11 and 18/19/26. This well-known passage in the former, which is set out at paragraph [90] hereof, is to the effect that the Court may strike out a claim in a very clear case of limitation under sub-rules (b) and (d), that is to say that the claim is *ipso facto* frivolous and vexatious and is thereby an abuse of process.

[81]. Mr. Davies also cited Mr. Day's observation in the IFS Investments case that the power of the Court to strike out derives also from its inherent jurisdiction. In other words, he contends that any claim by the Plaintiff here can only be regarded as frivolous and vexatious since, on the face of the Cause, it discloses no cause of action which is not barred by statute, either by Limitation, or in Guernsey, by Prescription— see, in this connexion, the observations of Beldam L.J. in Bell v. Peter Browne & Co at page 505D *(infra).*

[82]. Mr. Davies had submitted, in his initial address, that the foregoing passage would equally apply to an action which is prescribed under the six year period specified in Article 1 of the *Loi Relative aux Prescriptions 1889*, unless the doctrine of *empêchement d'agir* applies, for which the Plaintiff, having laid the necessary foundation for the plea in a Replique, would need to satisfy the practical impossibility test as explained by Day D.B. in the Holdright case *(infra)* at page 18 Letters E to F (an authority also relied on by Miss Ozanne at the outset of her submissions on this aspect of the instant case).

[83]. In Holdright Insurance Co Ltd v. Willis Corroon Management (Guernsey) Ltd [2000] 25th August (TAB 6 of the Bundle of Authorities) Mr. Day extensively reviewed the scope and application of, to use its full description, the maxim *"qui est empêché d'agir la prescription ne court point,"* or, in Latin: "*contra non valentem agere nulla currit praescriptio".* Day D.B referred to it throughout his judgment as 'the maxim' and I shall frequently so refer to it. The shorter version is—as I have just said in the preceding paragraph—expressed as *empêchement d'agir.*

[84]. In essence, the maxim means that a plaintiff may seek to satisfy a court that there can be (and, Mr. Barnes submits, there are in this case) circumstances in which the running of time in contractual cases is not to be held against a plaintiff; in other words, that the running of time is suspended, and therefore the prescription period is interrupted. As it was expressed in Vaudin v. Hamon *(infra)*:

> "That *empêchement d'agir* is recognised in the authorities as preventing the prescriptive period from running, their Lordships would accept, but in their Lordships' opinion that expression does not extend to the length contended for by the appellant."

Per Lord Wilberforce at page 586E of the Report. It also follows from the relevant authorities, which require this plea to be raised by way of a Replique, that the burden of establishing *empêchement* is on the plaintiff.

[85]. The Holdright case concerned a claim for losses which the plaintiff insurer had incurred to its members which, so the plaintiff claimed, should have been covered under its reinsurance policy contracts, but which were not so covered due to the defendant's alleged default in providing the appropriate management services under successive annual management contracts between the parties. Counsel were at one, for the purposes of the hearing, as to the date of the accrual of the causes of action (both in contract and in tort) which, as was again common ground, arose over seven years prior to the tabling of the action.

[86]. Advocate Wessels had sought, on behalf of Holdright to invoke the maxim. Advocate Dinning, for the defendant, submitted that it would be wrong to do so in Guernsey, notwithstanding the observations of the Privy Council in Vaudin v. Hamon

(infra) and thus, in effect, to resurrect a long dormant principle of customary law in the way that the Jersey courts had done in the late 1990's. In a judgment in which he closely analysed the authorities, notably Public Services Committee v. Maynard [1996] JLR 343 and Boyd v. Pickersgill & Le Cornu [1999] JLR 284, both of which have been extensively cited in argument here, Day D.B, (to whose judgment I have already referred in another context—(*supra* paragraph [47]) rejected this argument. He said at page 18:

> "In the light of these authorities, either binding or highly persuasive, I have no doubt, as earlier stated, that the maxim is still very much part of our customary law, at least as far as cases for breach of contract are concerned."

It might be said that before I can begin to address the issue of empêchement d'agir, I would need to determine the issues raised under Rule 36. However, if I understood Mr. Davies' submissions correctly, there is an element of linkage between the two sets of Exceptions.

[87]. Thus, if the Plaintiff fails to establish his claim of empêchement, Mr Davies would argue, and did argue, that it would have the same effect as a clear case of limitation for the purposes of Rule 36 (b) and (d). It is therefore now my task to analyse the authorities to ascertain if they support his argument. I start with Ronex Properties Ltd v. John Laing Construction Ltd & Others [1982] 3 AER 961. There the plaintiff claimed damages for against John Laing's and a Mr. Stephenson, the architect, respectively for the alleged negligent construction and design of a building. Mr. Stephenson had issued a third party notice against the consulting engineers, but died before any further substantial steps in the action had been taken.

[88]. The third parties claimed that, due to a *lacuna* in the law, Mr. Stephenson's claim, while it was preserved against the second defendants, as administrators of his estate, was extinguished as to the right of contribution from the third parties and that therefore there was no reasonable cause of action against them. The Court of Appeal dismissed an appeal from the official referee refusing to strike out the third party proceedings on the ground that it had not been Parliament's intention, when the Law Reform (Miscellaneous Provisions) Act 1934 was passed, to exclude the right of contribution between tortfeasors by reason of the death of one of them.

[89]. The other point taken in the Ronex case was that the action was out of time as against the defendants under the Limitation Acts, the building having been completed in 1972, but the writ was not issued until May, 1978, and was not served for another year. As to the strike-out application on this ground, Donaldson L.J. said at page 965*f* :

> "……it is trite law that the English Limitation Acts bar the remedy and not the right, and furthermore that they do not even have this effect unless and until pleaded. Even when pleaded they are subject to various exceptions, such as the acknowledgment of a debt or concealed fraud' [and as we have seen in the instant case the statutory amendment of 1986] ' which can be raised by right of reply."

On the following page, at 966*a*, he continued:

> "Where it is thought to be clear that there is a defence under the Limitation Act, the defendant can either plead that defence and seek the trial of a preliminary issue, or, in a very clear case, he can seek to strike out the claim on the ground that it is frivo-

> lous or vexatious and an abuse of the process of the court and support his application with evidence."

At page 968 Stephenson L.J said:

> "There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. The right course is therefore for a defendant to apply to strike out his claim as frivolous and vexatious, and an abuse of the process of the court, on the ground that it is statute-barred."

[90]. It is deducible from the Ronex case, and from the earlier case of Riches v. Director of Public Prosecutions [1973] 1 WLR 1019, cited therein, that if a plea of limitation is incontrovertible it can be the subject of a valid strike-out application. It follows that the comment in the White Book at paragraph 18/19/11 to the effect that:

> "…where the statement of claim discloses that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the Limitation Act, and there is nothing before the Court to suggest that the plaintiff could escape from that defence, the claim will be struck out as frivolous, vexatious and an abuse of the process of the Court."

is clearly right in a case where there is no material which can be put before the Court to suggest that the statute will not be a complete answer to the plaintiff's claim. In such a case, whereas limitation is normally defeasible by certain pleas in reply, when it is apparent to the Court that a plea of limitation is unanswerable, it becomes a matter of right to have the action struck out.

[91]. An example of this is Bell v. Peter Browne & Co (*infra* paragraph [192]), where it was held that the strike out procedure was appropriate because on the face of the pleadings any claim by the plaintiff was barred by the limitation statute, and was thus frivolous and vexatious and an abuse of process. So, here, Mr. Davies says, on the face of the only factual pleading available to the Court at this stage, the causes of action arose before the commencement of the six years' prescriptive period laid down by the 1889 Law.

[92]. In Guernsey this plea falls within paragraphs (b) and (d) of Rule 36. Thus, in a case in which the Court would have no discretion to reject the plea of limitation, and order of strike out becomes a matter of right—*ex debito justitiæ*. This is clear from the judgment of Lawton L.J in Riches v DPP *(supra)* at page 1027:

> "One of the uncontested sets of facts which arises from time to time is when on the statement of claim it is clear that the cause of action is statute barred and the defendant tells the court that he proposes to plead the statute and, on the uncontested facts there is no reason to think that the plaintiff can bring himself within the exceptions set out in the Limitation Act 1939. In those circumstances it is pointless for the case to go on so that the defendant can deliver a defence. The delivery of the defence occupies time and wastes money; and even more useless and time consuming from the point of view of the proper administration of justice is that there should have to be a summons for directions, and an order for the issue to be tried, and for that issue to be tried before the inevitable result is attained."

[93]. Whether the plea from the defence is one of limitation or not, the foregoing is part of the wider rule that if the facts proved or accepted (and they are accepted as stated in the Cause here for the purposes of the instant Application) are such that they can only admit of one order which a Court can make, so that it becomes no longer a matter of discretion, the defendant becomes entitled to the order he seeks *ex debito justitiæ,* the meaning of which is given in Wharton's Law Lexicon as:

> "A remedy which the Court has no discretion to refuse."

[94]. It is well recognised that this has for many years been the position on the other side of the line where a plaintiff seeks, for instance, summary judgment—see Lord Greene M.R. in Cow v. Casey [1949] 1 KB 474—but it according to respectable authority this is equally so where a defendant's case is unanswerable. In Anlaby v. Prætorius [1888] 20 QBD 764, service of the specially indorsed writ occurred on 21st January, 1888, so that under the Rules the last day for appearance was the 28th (not the 26th January, as was mistakenly thought) and the time for delivery of the defence, allowing ten clear days to elapse, was 8th February, whereas judgment was signed on the 7th February.

[95]. On application to set the judgment aside, Lopes L.J. said at page 771:

> "….the judgment was entered prematurely, without any right whatsoever. To obtain that judgment was a wrongful act, not an act done within any of the rules. *The defendant is therefore entitled ex debito justitiæ to have it set aside.*" My italics.

[96]. The remaining case to which I desire to refer on this subject is Hilton v. Sutton Steam Laundry [1946] 1 KB 65 in which the plaintiff sued as administratrix under the Fatal Accidents Act as sole dependant for the death of her husband which occurred due to an accident while he was employed on the defendants' premises. Her solicitors did not obtain letters of administration to the deceased's estate until a week before the expiration of the twelve month limitation period within which an action had to be brought under section 3 of the Fatal Accidents Act 1846.

[97]. The writ had been issued within four months of the death, but at that time letters of administration had not been taken out and the writ, in the representative capacity in which the plaintiff had sued, was therefore a nullity. Lord Greene M.R. held that the subsequent grant of letters of administration could not operate by relation back to validate the invalid writ. At page 73 of the Report, Lord Greene said:

> "But the statute of limitations is not concerned with merits. Once the axe falls, it falls, and a defendant who is fortunate enough to have acquired the benefit of the statute of limitations is entitled, of course, to insist on his strict rights."

[98]. Miss Ozanne has strongly submitted in her replying submission that for the Plaintiff's contractual claim to remain alive e*mpêchement* has to be shown. Moreover, she continued, this burden is very high—to the point of establishing practical (as opposed to thereoretical) impossibility whereby a plaintiff must show he was prevented from commencing or continuing legal proceedings. This was the line of argument also pursued by Mr. Davies, who closely analysed the reasoning of Southwell J.A. in Public Services Committee v. Maynard *(supra*).

[99]. In my judgment Miss Ozanne's and Mr. Davies' arguments on this issue have considerable merit. A plea of prescription by way of *Exception* in Guernsey, if the

prescribed period has elapsed, has precisely the same consequence as an unanswerable plea of limitation. The quotations I have set out above exactly fit the situation. It follows, and I so hold, that if, and I repeat the word 'if', the maxim *empêchement d'agir* has not been shown to apply, so as to suspend the six year period, the defendant is entitled to have the claim struck out *ex debito justitiæ* under Rule 36.

[100]. The *Exceptions* in the instant case have been so framed, and it is in my view in accordance with logic and common sense, that I should now address, in the following order, the issues which have been so extensively argued in these interlocutory proceedings. They are:

(I) Does the Cause disclose a reasonable cause of action against each Defendant?

(II) Are these proceedings frivolous and/or vexatious (the aspect of whether they are scandalous having been—rightly in my view—abandoned by the Defendants) and/or an abuse of the Court's process?

If the answer to (I) is Yes and the answer to (II) is No

(III) When did the cause of action arise in respect of

(a) Breach of contract?
(b) Liability in tort?

—the preamble to paragraphs 29 to 31 of the Cause being similar (*mutatis mutandis)* in this respect, and each then being divided into five sub-paragraphs which particularise allegations of breach of a contractual duty and of a duty of care said to be owed respectively by each Defendant, as appropriate (in the Plaintiff's submissions) to the Plaintiff.

(IV) When did the period of prescription under Article 1 of the *Loi Relative aux Prescriptions 1889* end as regards (III) (a) and (b) respectively as against each Defendant?

(V) When did the period of limitation provided by Section 4(1) of the Law Reform (Tort) (Guernsey) Law 1979 end as regards (III) (b) as against each Defendant?

(VI) Has the Plaintiff established, as against each Defendant, that the maxim *empêchement d'agir* applies so as to relieve the Plaintiff of the severity of the six year rule and thus enable him to continue this action against each of them?

[101]. Dealing with the first part of Issue II, as I understood their cases, as presented on behalf of each Defendant, it was not advanced by any of them that the action is frivolous and/or vexatious, or an abuse of the process of the Court, other than as a consequence of

(i) The *locus non standi* of the Plaintiff or,
(ii) That the action is prescribed.

[102]. What, then, is the meaning of these words? The dictionary meaning of 'frivolous' is:

> " ……..…Paltry—trumpery, trifling, futile, not serious, silly."

I do not think it can seriously be advanced that this action is frivolous, and I have no hesitation in finding that it is not. The second word 'vexatious' means:

> "Not having sufficient grounds for action and seeking only to annoy the defendant."

As regards an action said to be vexatious, Wharton's Law Lexicon says:

> "The High Court has an inherent power to stay any action brought merely for the sake of annoyance or oppression (see Lawrance v. Lord Norreys' [to which I have already referred—paragraph [73]])."

[103]. I am not prepared to hold that the instant action is brought in order to oppress or annoy the Defendants. In my view the only tenable contention in the context of whether the action can be said to be vexatious (and therefore an abuse of process) is in the context of considering (i) and (ii) above. For the reasons I have given in paragraphs [44] to [67] (*ante)* (i) no longer falls to be considered, and so I shall in this Ruling, when considering Issue (II) above, address myself solely to whether the action should be struck out under paragraphs (b)and (d) of Rule 36 (1) in the light of (ii) above (see Stephenson L.J. in the Ronex case *(supra)*).

[104]. Returning to the first Issue of those which I have listed above as being in my view necessary for a just determination of these *Exceptions,* the question of whether a reasonable cause of action is disclosed has to be divided into its constituent parts. I conceive that these are as follows:

(α) It has first to be ascertained *whether* a contractual relationship existed between the Plaintiff and each Defendant severally.
(β) Secondly, did the circumstances surrounding the relationship between each Defendant give rise to a duty of care towards the Plaintiff, the breach of which would result in liability in tort within the case law principles which I will consider shortly?
(γ) Is there material on the Record upon which a Court, properly directing itself could reasonably find that a breach of contract (if such a relationship existed) was committed by each Defendant severally ?
(δ) Similarly, is there material on record on which a Court could find that there was a breach of a duty of care apart from contract ?

[105]. As to Issue (I) sub-issue (α), it seems to me that the first part of the Cause discloses, and it is therefore an assumed fact for the purpose of these proceedings, that Dr. Yaddehige sought advice on the tax implications of his proposed move to Guernsey, and that Credit Suisse consented to provide advice to their valued client. It was perfectly natural and reasonable for him to approach CSTL, as a long standing customer, in the first instance, for advice as to what course he should take when changing his residence from the United Kingdom to Guernsey.

[106]. It is also reasonable to infer, and I do infer from the pleading, that the Plaintiff would be conscious of the fact that CSTL are and were at the material time primarily a Bank. As with many banks, it operated a subsidiary trust company, which in

the instant case was the trustee of the Sensor Trust, of which Dr. Yaddehige was the settlor. He would thus have had confidence in CSTL. Taking all the circumstances into account, I find that there existed a clear contractual relationship between the Plaintiff and Credit Suisse.

[107]. The Plaintiff would also, I believe, be equally well aware that CSTL, though possessing a degree of expertise in trust matters, are not legal practitioners (nor, indeed tax experts) and it would be consistent with ordinary prudence for CSTL to seek advice from a local advocates' firm. I find that it was an implied term of the contract that they would have authority to do so. In selecting that firm they would, of course, be expected to take reasonable care.

[108]. Collas Day are a long established firm and it is furthermore clear from the pleading that Advocate Bound was well seised of experience in the field in which CSTL were seeking advice on the Plaintiff's behalf. I am satisfied, on the same pleading, that CSTL had implied authority to, and did, seek advice from a reputable firm and from an experienced partner in that firm on the Plaintiff's behalf. The Plaintiff then personally attended a meeting with Mr. Bound on the 12th February, and in my view it is a reasonable inference in all the circumstances, which I draw, that he not only approbated but accepted that Collas Day were being retained by him.

[109]. Moreover, in my judgment, as from the first meeting between Advocate Bound and the Plaintiff on 12th February, 1999, it is perfectly clear that each intended to enter into a contractual relationship with the other. To put it shortly, from then on Collas Day were the Plaintiff's Advocates in Guernsey during 1999. For the purpose of this Ruling I find that a contractual relationship existed between him and Collas Day.

[110]. Do these respective contractual relationships (which, in the context of the instant Applications I find did exist) carry with them a duty on the part of the person or body from whom advice was being sought to exercise reasonable care and skill in providing the advice, so as to amount to an implied term of the contract? I think it is settled law that they do, and for this I need look no further than this passage from the frequently quoted judgment of Salmon J. (as he then was) in Woods v. Martins Bank Ltd and Johnson [1959] 1 QB 55 at page 71 (later approved by Lord Devlin in Hedley Byrne *(infra)*) which I gratefully adopt:

> "I find that it was and is within the scope of the defendant bank's business to advise on all financial matters and that, as they did advise him, they owed a duty to the plaintiff to advise him with reasonable care and skill in each of the transactions to which I have referred."

[111]. The Cause does not specify the precise capacity in which Dr. Yaddehige had been a client of Credit Suisse over the years, but I think it is implicit from the phrase:

> "……the Plaintiff sought the advice of the First Defendant upon the implications of his' [proposed] 'move and in particular any tax implications in relation to the trust, the exempt company and his personal affairs"

in paragraph 1 of the Cause, that he relied on Credit Suisse, which of course is principally a bank, but provides several other services, for advice on his affairs generally, in relation to the Sensor Trust, as it then was, and the tax position of himself, members of his family

and PVI, and *inter se.* Did this contractual relationship carry with it a duty of care and of the exercise of reasonable skill on the part of CSTL?

[112]. In reliance on those of the foregoing authorities which are relevant to this issue, and in particular on the passage from Salmon J. which I have just cited, I find it is an inescapable inference that the corollary, for the purposes of this Ruling, is that CSTL owed the Plaintiff a duty by reason of this relationship to advise him with due care and skill in his financial and tax affairs for the purposes of the then projected move.

[113]. Coming next to Issue (I) (β), did CSTL owe the Plaintiff a duty apart from contract? In other words: did the relationship give rise to a duty of care and skill the breach of which would result in tortious liability, that is to say negligence within the preamble to paragraph 29 of the Cause? Again, in my judgment the authorities show that a duty of care outside a contractual relationship can exist as a necessary adjunct of that relationship. I turn first to Candler v. Crane- Christmas & Co [1951] 2 KB 164, which concerned a careless misrepresentation by a firm of accountants. At page 179 Denning L.J said:

> "Let me now be constructive and suggest the circumstances in which I say that a duty to use care in statement does exist *apart from a contract in that behalf*. First, what persons are under such duty? My answer is those persons such as accountants surveyors, valuers and analysts, whose profession and occupation it is to examine books and accounts and other things, and to make reports on which other people—other than their clients—rely on in the ordinary course of business. Their duty is not merely to use care in their reports. They also have a duty to use care in their work which results in their reports."

On the next page Denning L.J said:

> "…to whom do these professional people owe this duty? I will take accountants, but the same reasoning applies to the others. They owe the duty of course, to their employer or client; and also I think to any third person to whom they themselves show the accounts or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them."

[114]. The majority judgment of the Court of Appeal in Candler v. Crane Christmas held that a false statement made carelessly, as opposed to fraudulently, was not actionable by another who had acted on it to his detriment in the absence of **any** contractual or fiduciary relationship between the parties. That decision, however, was overruled in Hedley Byrne (infra) and Denning L.J's dicta were expressly approved by Lord Hodson at page 507 and by Lord Devlin at page 530.

[115]. If further authority were needed that the answer to the second question posed in paragraph [104] above is affirmative it appears in this extract from Lord Devlin's Speech in Hedley Byrne & Co Ltd v. Heller & Partners Ltd [1964] AC 465 at page 530:

> "I shall therefore content myself with the proposition that wherever there is a relationship *equivalent to contract, there is a duty of care.* Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer."

Two pages further on Lord Devlin continued:

> "I am satisfied, for the reasons I have given, that a person for whose use a banker's reference is furnished is not, simply because no consideration has passed, prevented from contending that the banker is responsible to him for what he has said."

[116]. It might be thought that, while it is perfectly logical that a banker, though not necessarily, or even ordinarily, a professional man within the categories stated by Denning L.J., should be liable for a duty of care in contract, there is no reason to extend this concept to the law of tort—and thus bring in persons who are not privy to the contract—recognising that the more usual relationship between a banker and a customer would be in contract—in this connexion see paragraphs [166] to [168] *(infra).*

[117]. The preceding paragraph, of course, touches on the point, if I may say so, admirably argued by Miss Ozanne, which is epitomised by the phrase

> "Régle du non-cumul des deux orders de responsabilité."

The translation of this passage at page 333 of the Droit civil: Les obligations 8th Edition was produced by consent and without any opposition from Mr. Barnes, at a very late stage, towards the end of the hearing, and forms part of TAB 18 in the Authorities Bundle. The essence of it is that by French Law a person with the benefit of a contractual obligation cannot improve his position by invoking tortious responsibility on the part of the other party and add it to the contractual aspect of his action: neither can he elect between the two as to which of them is the most beneficial to his case. I need only reproduce here the operative part of the text explaining the doctrine of Non-Cumul—as follows:

> "..the victim of damage in the contractual sphere cannot make appeal to tortious responsibility."

[118]. The argument in favour of the application of this doctrine to the instant case is that the 1889 Law, which is the subject of a substantive *Exception*, and regarding which a major part of the argument put forward on the part of the Defence was advanced, is derived from French sources, and that, accordingly, this doctrine of Non―Cumul should apply to it. If this issue, which was not raised by way of a separate *Exception*, but only during the course of the submissions, were to succeed the consequence would be that the words 'was negligent or' in the first line of paragraphs 29 and 31 of the Cause would fall away, with a similar result as regards the words 'was negligent and/or' in paragraph 30 of the Cause.

[119]. In this connexion, I do not quite understand why the tortious and contractual claims were pleaded alternatively in paragraphs 29 and 31, but cumulatively and in the alternative in paragraph 30. I consider that the fairest way to deal with this subsidiary issue is to regard the omission of the word 'and' in those paragraphs as an accidental omission, and to treat all three paragraphs as though 'and/or' appeared in each of them.

[120]. Leaving aside for the moment the Privy Council case of Vaudin v. Hamon [1974] AC 569, which was a succession case, of the other five Channel Island authorities cited herein case, three, namely Public Services Committee v. Maynard [1996]

JLR 343, the Holdright case and Stefani v. Le Pelley [1999] 13th July concerned an action which was brought in tort as well as in contract. Boyd v. Pickersgill was pleaded in both contract and tort, but it was conceded on behalf of the plaintiff that her action in tort was time-barred, so that no issue as to Non-Cumul fell to be determined. This is equally so as regards the IFS Investments case, which was pleaded in tortious conspiracy alone.

[121]. In the Stefani case no issue arose for decision as to *empêchement d'agir*, but in both Maynard and the Holdright cases the Court had expressly to address this issue, and in both, therefore, two regimes of law, as stated at the commencement of the translation at TAB 18, were evoked. In neither was the plea of Non-Cumul advanced, although the pleas of prescription that were raised have their origins in Norman customary, and subsequently, Guernsey, Law. It is reasonable to assume that, as experienced Counsel were involved in both those cases, they, or one of them, would at least have adverted to the principle of Non-Cumul if it had been thought to have had any validity. Moreover, as far as I can discern from the French text, no case law as to the application of the doctrine appears in any of the footnotes to page 333. I also note that it is specifically stated that Belgian Law knows of no such restriction.

[122]. Furthermore, I cannot help noticing that in the Maynard case at page 357, Southwell J.A referred to the Jersey law of tort as being largely based on the English law of tort as established by the House of Lords. In view of the extent of the research that had been done in that case I find it difficult to believe that if there had been any issue worth considering as to the application of this doctrine, or as to the rectitude or otherwise of combining an action in tort with one in contract, such research would not have revealed it. If further support that I should not apply the doctrine of Non-Cumul in the instant case were necessary it is, in my opinion, to be found in this passage from the judgment of Tindal C.J in the early case of Boorman v. Brown), which follows on from the quotation relating to professional men set out at paragraph [137] (*infra)*:

"……actions against common carriers, against shipowners on bills of lading, against bailees of different descriptions: and numerous other instances occur in which the action is brought in tort or in contract *at the election of the plaintiff."* My italics.

[123]. In view of the remarks by Southwell J.A to which I have referred at paragraph [122] I propose now to consider whether the pleading discloses a cause of action in tort, as propounded in the Hedley Byrne and other cases. In Hedley Byrne their Lordships were not considering liability as it affected a person who was in a contractual relationship with the merchant banker defendants. They were considering the effect of a banker's reference which was given by the defendants as to the financial standing of a company called Easipower Ltd., with whom they intended to conclude a contract for an advertising programme.

[124]. The written reference, which concluded with the words:

"We believe that ' [Easipower] 'would not undertake any commitments that they were un-able to fulfil."

was provided by the defendants through the City branch of the plaintiffs' own bank, then the National Provincial, who communicated it via their Piccadilly branch who passed it orally to the plaintiffs. In reliance thereon Hedley Byrne placed orders with the company

which resulted in a loss to them of £17,000 after Easipower had gone into liquidation. The negligent advice was thus third hand when it reached the plaintiffs. The issue is neatly put in the opening catchphrase in the headnote of the Report:

"Negligence—duty of care to whom?"

[125]. Clearly the plaintiffs, who had admittedly suffered economic loss, were at least twice removed from any contractual relationship with the defendants. However, the House of Lords held that they would have been liable for damages for breach of duty, had it not been for the express disclaimer they had made at the outset. This is clear from these words of Lord Reid at page 483 of the Report:

"Where there is a contract there is no difficulty as regards the contracting parties: the question is whether there is a warranty……I do not intend to examine the cases about that' [where a person does not merely make a statement but performs a gratuitous ser-vice] 'but at least they show that *in some cases that person owes a duty of care apart from any contract*, and to that extent they pave the way to holding that there can be a duty of care in making a statement of fact or opinion which is independent of contract. "My italics.

[126]. A different approach was adopted by Lord Devlin. Following the passage I cited at paragraph [115] hereof, he said at pages 530 to 531:

"Where there is a general relationship of this sort, it is unnecessary to do more than prove its existence and the duty follows. Where, as in the present case, what is relied on is a particular relationship created *ad hoc*, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility."

[127]. On what principle is this based? It seems to me that it is based on that which was described by their Lordships as the proximity test, of which Lord Hodson said at 505

"The case has been argued first on the footing that the duty was imposed by the relationship between the parties recognised by law as a special relationship derived either from the notion of proximity introduced by Lord Esher in Heaven v. Pender ([1883] 11 QBD 503) or from those cases firmly established in our law which show that they hold themselves out as possessing a special skill are under a duty to exercise it with reasonable care"

This is consistent with Lord Devlin's Speech, in which he continued at pages 530 to 531:

"I regard this proposition as an application of the general concept of proximity. Cases may arise in the future in which a new and wider proposition, *quite independent of any notion of contract, will be needed.*"

[128]. The next in the line of authorities which have developed the proximity aspect of tortious liability is Anns v. Merton London Borough Council [1978] AC 729. I do not need to recount the facts of that case, but I draw attention to the Speech of Lord Wilberforce at page 751G to 752 A as follows:

> "Through the trilogy of cases in this house—*Donoghue v. Stevenson [1932] AC 562, Hedley Byrne & Co Ltd. v. Heller & Partners Ltd [1964] AC 465,* and *Dorset Yacht Co Ltd. v. Home Office 1970 AC 1004* the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the

> facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage *there is a sufficient relationship of proximity or neighbourhood such that in the reason able contemplation of the former, carelessness on his part may be likely to cause damage to the latter —in which case a prima facie duty of care arises.* Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see the *DorsetYacht* case [1970] A.C 1004 *per* Lord Reid at p.1027. Examples of this are Hedley Byrne's case where the class of potential plaintiffs was reduced to those shown to have relied upon the correctness of statements made, and *Weller & Co v. Foot & Mouth Disease Research Institute* [1966] 1 QB 569; and (I cite these merely as illustrations, without discussion) cases about 'economic loss where, a duty having been held to exist, the nature of the recoverable damages was limited:"

Lord Wilberforce then cited S.C.M. (United Kingdom) Ltd. v. W.J.Whittall & Son Ltd [1971 1 QB 337 and Spartan Steel & Alloys Ltd v. Martin & Co Ltd [1973] QB 27, as illustrations of that which he had just said.

[129]. Finally, on this line of cases, I would refer to Yianni v. Edwin Evans & Sons [1982] QB 438 in which the defendants, a firm of valuers, who were instructed to prepare a valuation report on 1, Seymour Road, Hornsey, for the Halifax Building Society to whom the plaintiffs had applied for a mortgage in order to assist them to buy the house.They valued it at £15,000, in consequence of which the Society advanced £12,000, the plaintiffs having savings of £3,000, which made up the purchase price.

[130]. The sale was completed in January, 1976, and in October of that year, serious structural defects caused by subsidence manifested themselves. In fact these defects had been known about eighteen months before the Yiannis became interested and as a result of a claim on the insurers for the cost of repairs a Mr. Kilbey had reported to the loss adjusters, *inter alia,* that:

"There is scarcely a wall which is free from signs of settlement and distortion. On the front elevation there are signs of historic settlement of the party wall, the front door having obviously been adapted from time to time to enable it to close……

"The flank wall shows numerous bulges and distortions, as indeed do the rear walls. Internally, most of the floors appear to slope in one direction or another.

[131]. A number of cosmetic repairs, including decoration, were effected in or about October, 1974, which doubtless encouraged Mr. Yianni to buy without having an independent survey of his own (as had been recommended by the Society) but the main structural defects were never remedied. As a result the likely cost of the structural repairs, after they had become evident, was £18,000. The judge, Park. J, castigated the survey that was carried out as 'a grossly incompetent and negligent survey'.

[132]. It will be observed that the survey performed by Edwin Evans & Co was not as a result of instructions by, or in pursuance of any contractual obligation to, the plaintiffs, but on instructions from the Halifax. The defendants admitted their report was negligent, but denied that they owed any duty of care to the plaintiffs. The judge made two important findings:

(i) that the defendants knew that at some stage the relevant part of their report which indicated that the property was adequate security for the loan of £12,000 would be passed on to the plaintiffs.

(ii) that the plaintiffs were not contributorily negligent by failing to have their own survey as, in general, intending mortgagors were entitled to trust the building societies.

[133]. Park J. then cited the passages from Denning L.J in Candler v. Crane, Christmas & Co *(supra)* which were approved in Hedley Byrne and which I have already cited at paragraph [113], and one further passage which is relevant to the scope of the class of persons to whom a duty of care is owed, which supports (i) above. The passage in question is at page 181 of the Candler Report, à propos of the extent of the duty, and at page 450 G—H of the Yianni Report, and is as follows:

"But I do not think the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts.Once the accountants have handed their accounts to their employer they are not, as a rule, responsible for what he does with them without their knowledge or consent."

[134]. Denning L.J. had summarised instances of cases in which the relationship between the party injured and the wrongdoer was too remote to give rise to tortious liability and instanced the early case of Le Lievre v. Gould [1893] 1 QB 491 in which the building owner had shown his own surveyor's certificates, which had been obtained for the purpose of quantifying the amounts he had to pay to a builder, to his own mortgagees, who advanced money on the certificates, instead of relying on the certificates of their own surveyor. Denning L.J. then expressed the view that the mortgagee's claim that the owner's surveyor owed to the mortgagees a duty of care was clearly too remote and 'obviously untenable'.

[135]. It is therefore, in my judgment, a correct proposition of law, paying regard to Southwell J.A's *dictum* in Public Services Committee v. Maynard, to which I referred at paragraph [122], which applies in Guernsey, that if a person who suffers economic loss is sufficiently proximate to the person or organisation who makes a negligent statement or, as in this case, is alleged to have provided negligent advice, he comes within the scope of the obligation to use reasonable care and skill which the law imposes upon a professional man, or upon one who holds himself out as possessing especial skill and knowledge in the field in which the individual who suffers such loss seeks that advice.

[136]. The foregoing is consistent with very early authority. In Boorman v. Brown [1842] 61 Revised Reports 287 the defendant was an oil broker and retained by the plaintiffs to supply oil on their behalf to purchasers. It was his duty to secure payment for each batch against delivery, which he did as regards certain parcels from the original consignment of thirty tons of oil, less the appropriate discount. However, as regards the residue of the thirty tons, which the plaintiffs had consigned to him, he negligently failed to deliver them to the customer for whom they were intended, but delivered them to another customer without receiving payment, and consequently deprived the plaintiffs of the oil and thus the ability to deliver it to another customer.

[137]. Tindal C.J held that an action of tort lay. At page 297 he said:

> "...there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or non-performance, is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render:"

"On the following page it is put, perhaps even more clearly than in Hedley Byrne:

> "The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or non-feasance, is a ground of action upon a tort."

[138]. The decision of the Court of Exchequer Chamber was affirmed by the House of Lords, which expressly rejected the argument for the appellants that the action was misconceived, submitting that the remedy was in contract and not by way of an action on the case. In the course of the appeal, *sub nom* Brown v. Boorman 65 Revised Reports 1, at page 10, Lord Campbell said:

> "I apprehend, therefore, that whether this count be in contract or in tort is quite immaterial; it is a count on the case, setting out the circumstances and facts of which the plaintiff complains; he shows a cause of action, by showing a contract, a duty, and a breach; and if so, it is a good count in an action on the case, and he is entitled to his judgment…… whenever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of of that employment, *the plaintiff may recover in tort or in contract.."* Again my italics.

[139]. Another early case was Kelly v. Metropolitan Railway Co [1895] 1 QB 944, also cited by Oliver J. in the Midland Bank case *(infra).* He said at page 421G:

> "This'[meaning the passage from A.L.Smith L.J's judgment in Kelly at page 947] 'appears to me to be a clear recognition that the mere existence of a duty of care does not exclude a similar independent duty which arises from the relationship of proximity between the parties."

[140]. The passages I have cited from Brown v. Boorman were cited with approval by Lord Denning M.R. in Esso Petroleum v. Mardon [1976] 1 QB 801 at page 819, in which the plaintiff oil company sought to recover possession of a petrol service station, with its appurtenant showroom and offices, which had been let to the defendant, to whom their local manager had represented that, despite some planning authority re-siting of the premises, the estimated annual sale of petrol would be of the order of 200,000 gallons.

[141]. In reliance on this representation the defendant accepted the tenancy and sank most of his savings, and a great deal of work and endeavour, into the petrol station. In fact the consumption of petrol did not exceed 78,000 gallons. He lost most of his savings and counterclaimed for loss and damages for misrepresentation. In allowing the defendant's appeal and the dismissing Esso's cross-appeal, Lord Denning. M.R, with whom the rest of the court agreed referred to his earlier judgment in Candler v. Crane, Christmas & Co, which by then had been approved in Hedley Byrne.

[142]. In arguing the cross-appeal Mr. Ross-Munro Q.C. had submitted on behalf of Esso [page 813 of the Report] that the authorities in, for example, those which Mr. Day in the Stefani case classified as 'The Solicitor Cases', showed that a solicitor could only be sued for a breach of his duty of care in contract and not in tort. Of this submission Lord Denning said at page 819:

> "He'[Mr. Ross-Munro] 'submitted that when the negotiations between two parties resulted in a contract between them, their rights and duties were governed by the law of contract and not by the law of tort. There was therefore no place in their relationship for Hedley Byrne 1964] AC 465, which was solely on liability in tort. He relied particularly on Clark v. Kirby-Smith [1964] Ch 506 where Plowman J. held that the liability of a solicitor for negligence was a liability in contract and not in tort, following the observations of Greene M.R. in *Groom v Crocker [1939 1 KB 194, 206.* Mr. Ross-Munro might also have cited *Bagot v.Stevens Scanlan & Co Ltd. [1966] 1 QB197,* about an architect: and other cases too. But I venture to suggest that those cases are in conflict with other decisions of high authority which were not cited in them. These decisions show that, in the case of a professional man, the duty to use reasonable care arises not only in contract, but it is also imposed by the law apart from contract, and is therefore actionable in tort. It is comparable to the duty of reasonable care which is owed by a master to his servant, or vice- versa."

[143]. More succinct, but to the same effect is this passage from Shaw L.J. at page 832:

> "In this regard I would differ from the finding of the judge below in holding as he did that no warranty' [meaning the tenancy agreement between Esso and the defendant] 'was given by Esso. Lawson. J did, however, decide that Esso owed Mr. Mardon a duty to take care in relation to the statement made to him as to the potential of the filling station and that they were in breach of that duty. I agree entirely with the reasons and conclusions of the judge on this part of the case. Thus, even if it were right that Esso did not give a warranty to Mr. Mardon, they would be liable to him in negligence following the principle enunciated in *Hedley Byrne & Co Ltd. v. Heller & Partners Ltd [1964] AC 465,* unless a further argument by Mr. Ross-Munro stood in the way."

[144]. For the foregoing reasons, and in the absence of any decided authority to support the application of the maxim, shortly referred to as Non-Cumul, I do not consider it would be right in this case to introduce it at so late a stage, or, indeed, at all. It follows, in a situation such as exists in the instant case, provided the relevant test is satisfied, that liability in tort can co-exist with a similar liability in contract.

[145]. In view of that which I have said in paragraphs [118] to [139] hereof, and applying the principle stated in Brown v. Boorman *(supra)* I have no hesitation in saying that, for the purposes of these Applications, the contractual relationship which I have found to exist between the Plaintiff and Credit Suisse, and between the Plaintiff and the partners of Collas Day at the material time, carried with them also a duty to exercise care and skill in providing advice independently of the respective contracts, breach of which would, in the absence of limitation or prescriptive considerations, create liability to the Plaintiff in tort for financial loss occasioned by negligent advice.

[146]. I now have to address Issue (I)(α) once more, to see if there existed a contractual relationship between the Plaintiff and the tax advisers MPR Ltd, as predicated in paragraph 7 of Mr. Greenfield's first Skeleton Argument. In Volume I of Chitty on

Contracts (28th Edn) paragraph 2–145, it is stated that an agreement is not binding as a contract if it was made without any intention of creating legal relations, and continues:

> "In the case of ordinary commercial transactions it is not normally necessary to prove that the parties to an express contract in fact intended to create legal relations."

The text goes on, at paragraph 2–148, to state that the test as to whether they did so intend must be judged objectively, which, as I understand it, means by applying the test of the reasonable man: that is to say, the question has to be posed 'would a reasonable outsider, considering the available evidence, reach the conclusion that the parties intended to enter into a legally binding contract, with the normal consequence that a breach thereof would ordinarily result in legal action?'

[147]. The only case from which I have been able to derive any assistance on this issue is Rose & Frank Company v. J.R.Crompton & Brothers Ltd & Brittains Ltd [1923] 2 KB 261, which was partially reversed by the House of Lords ([1925] AC 445), the facts of which bear no resemblance to the present case. Briefly, those facts were that the first defendants/respondents were manufacturers of carbonising tissue paper in England, which they supplied to the plaintiffs/appellants who carried out some finishing work on the paper and distributed the perfected product in America. After a trading relationship of some years it was desired that the English companies would confine their sales to the U.S and Canada, and that the plaintiffs for their part would confine their purchases to the two defendant companies. It was also desired that Brittains should henceforth get into a direct business relationship with Rose & Frank.

[148]. Accordingly by a written arrangement of 8th July, 1913, which contained that which was referred to by Lord Phillimore ([1925] AC 451) as a 'remarkable clause' the parties stated that the arrangement was not entered into as a formal or legal agreement and should not be subject to the legal jurisdiction of the Courts of the United States or England. The parties 'honourably pledged them-selves' to carry through the arrangement 'with mutual loyalty and friendly cooperation'. Nevertheless differences between the parties did arise and in the resulting High Court action Bailhache J. decided that the clause was repugnant to that which he interpreted as the main intention of the parties and rejected it. This was reversed by the Court of Appeal which held that the Clause was binding as an honourable pledge only. At page 282 of the first Report Bankes L.J. said:

> "There is, I think, no doubt that it is essential to the creation of a contract, using that word in its legal sense, that the parties to an agreement shall not only be ad idem as to the terms of their agreement, but that they shall have intended that it shall have legal consequences and be legally enforceable."

[149]. It is true that the Court of Appeal decision was reversed in part, but not on this particular point, for at page 454 of the later Report Lord Phillimore, who delivered the leading Speech, said:

> "With regard to the first and most important point, that of the legal force or want of force of the arrangement of 1913 your Lordships are, I conceive, of one mind with the Court of Appeal….with which I venture to concur."

[150]. I now return to the correspondence and the relevant part of the Cause in order to see if the Plaintiff and MPR Private Clients Ltd intended to create legal relations

between them which would be legally enforceable. The pattern of events, as pleaded, is that the first intimation that MPR would be involved emanated from Advocate Bound 'at some time prior to 24th February 1999'. In view of the way in which the Cause is pleaded chronologically I infer that that occurred between the 17th and the 24th February. Certainly the Plaintiff must be taken to have agreed with Mr. Bound's advice, because on his next visit to the Island on 26th February he attended a meeting at which Paul Schreibke, the Third Defendant's tax manager was present together with 'a representative' of Credit Suisse.

[151]. It is part of the Plaintiff's case that the initiative in approaching the Guernsey Tax authorities was taken by Mr Tony Rigden, whose capacity is not stated, though he was clearly an officer of MPR. According to paragraph 9 of the Cause, the result of the discussions between Mr. Rigden and the Administrator's Office were conveyed to those present at the meeting of 18th March, which included Mr. Green and Ms. Parrack of Credit Suisse, and the Plaintiff. This was that PVI could remain as an exempt private company provided there were no beneficiaries of the Sensor Trust resident in Guernsey. It was apparently suggested at the meeting (from which I infer that it was *not* part of the advice from the Tax Office) that the PVI shares could be transferred to a new trust and that the door could be left open for the Plaintiff and his wife and son to be added as beneficiaries if and when they ceased to be Guernsey residents.

[152]. This, as I mentioned earlier, paragraph [20], was when the idea of a new trust was conceived, because Mr. Bound left the meeting with instructions to draft a transfer of the PVI shares into a new trust. However it would seem from paragraph 10 of the Cause that the hopes of those present (that the door could remain open) were dashed when Mr. Rigden next contacted Advocate Bound, because on 22nd March he explained that any move which would enable the Plaintiff to remain as a resident beneficiary, even *de futuro,* (whether the projected new trust was situated in Guernsey, the Isle of Man or, indeed, elsewhere) would have the consequences I referred to in paragraph [6] hereof and which were made crystal clear by Mr. Gray on 7th September.

[153]. Mr. Schreibke then wrote to Ms. Parrack on the 25th March, as Mr. Greenfield said, floating the idea that the door *could* be left open for the Plaintiff to resume his status as a beneficiary if he ceased to be resident in Guernsey. However, this is in apparent conflict with his letter of the 30th March, which stressed the need for the Plaintiff, *and* his wife and son to be excluded. True, paragraph 12 of the Cause makes the point that the letter of the 30th March did not say from which trust they should be excluded, but it must have been obvious by then that the Karolis Trust was being envisaged, rather than the Sensor Trust, by which the latter was shortly to be superseded.

[154]. The next event narrated in the Cause is that Credit Suisse forwarded the new Trust Deed to Paul Schreibke on 8th April, barely a week before D-Day. So until then, notwithstanding that MPR, by its representative, attended meetings at which the Plaintiff was present, it cannot be gainsaid that the line of communication as regards correspondence, and the advice being tendered by MPR, was to and through Credit Suisse—for the intended benefit of, but not directly to, the Plaintiff.

[155]. Although Mr. Greenfield stated that, so far as these proceedings are concerned, there was a lull between D-Day and August of 1999, it seems there must have been some activity because Paragraph 16 of the Cause opens with the words

> "Following correspondence with the Assistant Administrator of Income Tax Linda Parrack observed in a letter to Paul Schreibke dated 9th August 1999 that she believed 'it may be necessary to irrevocably exclude him [the Plaintiff] by execution of a Deed. At present, Sena is not merely, not included as a beneficiary, rather than generally excluded."

Moreover, in his letter of 7th September, Mr. Gray, the Assistant Administrator, noted that BGL Reads (meaning, in this context, the Third Defendant) had written to the Tax Office on 17th and 23rd August regarding the Karolis Trust and Sena Yaddehige.

[156]. I shall not attempt to speculate as to the pattern of the events which may have taken place during the period from D-Day to the 7th September, although it is reasonable to infer that there were some negotiations as to what steps should be taken (or more correctly, should have been taken, for by then Dr. Yaddehige had already changed his residence to Guernsey). Certainly by the 7th September the matter should have been beyond doubt, because paragraphs 4 and 5 of Mr. Gray's letter state:

> "Have the Trustees of the Karolis Trust made any declarations under Clause 7 in relation to any Excepted Person? If so, may I please have a copy of that declaration?…… If no such declarations have been made then, as the settlor and/or his spouse may become beneficiaries (again under Clause 7) the Trust is revocable. As such, all income of the Trust, and the Company, is deemed to be the income of the settlor."

[157]. Due to the paucity of documentation in the Correspondence Bundle prior to D-Day the Karolis Trust Deed is not available to the Court, but it would appear from the context of the Assistant Administrator's two letters of the 7th and 30th September (which I note are both addressed to BGL Reads—for this purpose the *alter ego* of MPR) that the reference to Clause 7 is to a clause so numbered in the Trust Deed, for in the second of those two letters he states:

> "I note that you are currently confirming the situation with the Trustees regarding Clause 7. If Mr. and/or Mrs. Yaddehige have not yet been irrevocably excluded from benefiting then the Trust will be revocable and the consequences of that, and the consequences for the company, will have to be considered. Any such consequences would, of course, cease once Mr. and Mrs. Yaddehige have been excluded."

As I have just said, it is now common ground as to what those consequences would have been, and Mr. Greenfield was especially at pains to stress the importance of the sequence of the events occurring between the 7th and the 17th September 1999, in the context of the mischief which it was essential to avoid by having the appropriate Declarations of Exclusion in place.

[158]. It is crystal clear that those present at the meeting of the 16th September, that is to say Linda Parrack, Richard Green, Paul Schreibke and the Plaintiff, by then fully understood the necessity for both Dr. and Mrs. Yaddehige to be excluded as beneficiaries, if the Settlor was not to be assessed to income tax on the income of PVI. It is therefore surprising that Ms. Parrack and Mr. Green only mentioned the exclusion of Dr. Sena in paragraph 3 of their letter to Mr Bound of the 17th September.

[159]. Four points may be observed about that letter, namely:

(a) The joint authors say in the second paragraph that Dr. Yaddehige's wife and son had not been included in the Karolis Trust Deed—which was enclosed therewith (but which has not been seen by the Court).

(b) Ms. Parrack was by then well aware of the essential distinction between the non-inclusion of an individual as a beneficiary and his or her express *exclusion* as such for, if the statement in paragraph 16 of the Cause is accepted as true (as it must be for the purpose of these proceedings) in her letter of 9th August to Paul Schreibke) she had highlighted the fact that:

"At present, Sena is merely, not included as a beneficiary, rather than generally excluded."

(c) Paragraphs 3 and 4 suggest that Ms. Parrack and Mr Green had wholly misunderstood not only the purport of the resolution at the previous day's meeting, but also the Assistant Administrator's letter of the 7th September.

(d) The instructions to Advocate Bound to draft 'an appropriate' Deed of Exclusion (which had been agreed at the meeting a day earlier) came from Credit Suisse under the hands of their accredited officers) and not from MPR.

[160]. It is also clear that MPR was the entity which habitually corresponded with the tax authorities regarding Dr. Yaddehige's affairs (and those of his associated trusts) during 1999, for the minutes of the 16th September meeting open with the resolution that the letter drafted by Paul Shreibke should be sent to the Income Tax Office, and it is obvious (although, once again, it is missing from the Bundle) that it was sent because MPR's letter of the 17th was acknowledged by Mr. Gray on 30th September.

[161]. Not only was MPR the conduit through whom communications were made to the Guernsey Tax Office, but the inference from the letter of 24th December, 2001, which forms the next four pages in the Correspondence Bundle, is that MPR also conducted negotiations with the Administrator, hence the rejection by his Assistant six months later of the without prejudice offer that had been made, and the reference to possible proceedings before the Guernsey Tax Tribunal in March 2002. Thereafter the dialogue with the tax authorities regarding Dr.Yaddehige's affairs seems to have been resumed by Advocate Shepherd of Messrs. Ozannes, which resulted in the compromise of £720,000 stated in the letter at page 17 of the Correspondence File, and which, in turn, forms the bulk of the amount claimed by the Plaintiff against all the Defendants, jointly and severally.

[162]. MPR's representative, their tax manager Paul Schreibke, attended the meetings of 26th February and 16th September, 1999. The record of the first of those two meetings is confined to Mr. Schreibke's file note, some of which is reproduced in paragraph 6 of the Cause. It would seem from that that his rôle was confined to the tax implications of Dr. Yaddehige's then forthcoming move. The record of the second of those meetings is more comprehensive, and shows that Paul Schreibke played a significant part in the discussions that took place. However, in my view the main object

of his attendance, very probably, was to apprise Credit Suisse and the Plaintiff of the draft letter to the Tax Office which he had prepared, and to secure their approval to it.

[163]. Considering the effect of the correspondence on the Record, in conjunction with the part played by Paul Schreibke at the meetings of 26th February and 16th September, 1999, respectively, and the submissions of Mr. Barnes and Mr. Greenfield on this issue, in my judgment the correct inference to be drawn is that the rôle of MPR was solely as a tax adviser as regards Guernsey tax liability. They were brought in as having specialist knowledge of the Guernsey tax system, with especial reference to the situation of an individual who wished to change his residence from the mainland, and were entrusted with the duty of negotiating with the Administrator. I do not think the matters which I have just mentioned establish more than that.

[164]. MPR passed on their advice, and the result of any discussions they had with the Tax Office on to Credit Suisse, who are stated in paragraph 8 of the Cause (and, as I am obliged to accept for the purpose of the instant Applications) to be responsible for co-ordinating the advice so received. MPR's engagement, in my view, was with Credit Suisse and not with the Plaintiff. Nowhere in the Pleading or in the correspondence **is** there any evidence of an intention evinced on the part of the Plaintiff to enter into a direct contractual relationship with MPR, nor of MPR to do so in relation to the Plaintiff. For these reasons I uphold the contention in paragraph 7 of the Third Defendant's first Amended Skeleton Argument, and I find that MPR was retained as a tax adviser by Credit Suisse, and was not directly retained by the Plaintiff. I accordingly find that there was no privity of contract between MPR and Dr.Yaddehige.

[165]. Having found, paragraphs [106] and [109], that there existed a contractual relationship between the Plaintiff and Credit Suisse, and between the Plaintiff and the partners of Collas Day respectively, but not between the Plaintiff and MPR, the next step is to ascertain whether there is a basis for liability in tort as between the Plaintiff and each respective Defendant under Issue (I) (β). As I said when considering the issue of Non-Cumul, subject to satisfying the proximity test, the House of Lords decision in Hedley Byrne & Co Ltd v. Heller & Partners Ltd *(supra)* demonstrates that whenever there is a contractual relationship between parties there also exists a correlative duty of care not only in contract but also in tort. As regards Credit Suisse, therefore did there exist at the material time not only a duty of care in contract, but also a general duty of care for the breach of which tortious liability could arise?

[166]. Posing, as I do, that question as between Dr. Yaddehige and Credit Suisse, I again refer to the judgment of Salmon J. in Woods v. Martins Bank *(supra)*, in which the plaintiff had sued the Bank and its branch manager, one Johnson, not only for breach of agreement but also for negligence. The following passage is illustrative of the view which the Courts will take of the duties of persons who, even though they may not be professionally qualified as, for example, advocates, surveyors and doctors, nevertheless have engaged in a calling which requires special knowledge and skill. That bankers fall within the latter category appears clearly from that which Salmon J. said at page 72 of the Report:

> "The next point taken by the defendants is that the plaintiff was not a customer of the defendant bank at the date of the first transaction in May, 1950, in that no current account had then been opened by the plaintiff and that therefore, they owed the plaintiff no duty

> of any kind, at any rate in respect of this transaction of May 1950. I have already stated that in my judgment the plaintiff was then a customer of the defendant bank. Nevertheless, even if he did not become a customer until later, the defendants would still, in my judgment, have been under a duty to exercise reasonable care and skill in advising him in relation to the £5,000 transaction.' [The next sentence is especially appropriate to describe the duties and obligations of CSTL in this case] 'I have found that it is part of the defendant's business to advise customers and potential customers *on financial matters of all kinds.*"

[167]. In my view the reasoning behind the attitude of the Courts in this field of the law (which can almost be said to trespass into the realms of public policy) with regard to bankers is epitomised in the opening address of Mr. Gerald Gardiner Q.C. (later to become Lord Chancellor) in Hedley Byrne & Co Ltd v. Heller & Partners Ltd as follows:

> "In the present case if English law did not provide a remedy, it would be an unfortunate gap. It would be a discredit to English law if, however fraudulent *or negligent* a bank might be in giving such information, there was no remedy against it. If there was no such duty as the appellants' [*sic.* Respondents] submit, it could be said that the information given was either not given in writing or not under seal. But on the correct application of *Donoghue v Stevenson* there should be judgment for the appellants. *It should apply to words as well as deeds*."

[168]. With the foregoing in mind I again refer to the Speech of Lord Devlin in Hedley Byrne at pages 530 to 531 where he said:

> "I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer……..……..Where there is a general relationship of this sort, it is unnecessary to do more than prove its existence and the duty follows. Where, as in the present case, what is relied on is a particular relationship created *ad hoc*, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility……"I regard this proposition as an application of the general concept of proximity. Cases may arise in the future in which a new and wider proposition, quite independent of any notion of contract will be needed."

Applying the above principles, it seems to me that Credit Suisse, notwithstanding that they had briefed Collas Day and engaged MPR, still remained under a duty to advise, and keep a watchful eye on the affairs, including the tax affairs, of their long-standing client Dr. Yaddehige. I, therefore, unhesitatingly answer the question raised by Issue (I) (β), as between the Plaintiff and the First Defendant, affirmatively.

[169]. Addressing myself now to the same question as between Dr.Yaddehige and the partners of Collas Day, I reach a like conclusion. As I have said in paragraph [109] from February, 1999, and for the rest of that year, Collas Day were the Plaintiff's Advocates in Guernsey. That a solicitor can be liable in contract as well as in tort is clearly deducible from Esso Petroleum v. Mardon *(supra)*, in which Lord Denning M.R. concluded that Plowman' J's view in Clark v. Kirby-Smith [1964] Ch 506, that a solicitor's liability for negligence arose solely in contract and not in tort (as had been submitted by Mr. Ross-Munro) was in conflict with the decisions of higher Courts.

[170]. Subject to satisfying the proximity test (in which connexion I draw particular attention to that which I said at paragraphs [127] and [135] *(supra)*), the foregoing proposition can now be safely regarded as settled law. This is shown by the passage I will set out from Lord Morris' Speech in Hedley Byrne at paragraph [174] *(infra),* by the judgment of Oliver J. in Midland Bank Trust Co v. Hett, Stubbs & Kemp paragraph [201] *(infra)* at pages 417A to E and 433C to D, of Nicholls L.J. in Bell v. Peter Browne & Co *(infra)* paragraph [204], at page 500 A to B and of Mustill L.J. at page 513C to D.

[171]. Consequently, I answer question I ((β), in the light of the test set by Lord Wilberforce, see paragraphs [128] *(ante)* and [175] *(infra),* as between the Plaintiff and the Second Defendant(s), affirmatively also. These affirmative answers which I have ventured to give, here and in paragraph [168], clearly apply when there is a contractual relationship which gives rise also to a general duty of care (see Lord Devlin at paragraph [168] *(supra)*).

[172]. What of the Plaintiff's position in tort as regards MPR? In the instant case there is insufficient material on the Record to find that a contractual relationship existed between Dr.Yaddehige and MPR. The issue which therefore must be addressed now as regards MPR in this context is whether, *in the absence of a contractual relationship,* there can still arise a duty of care the breach of which will give rise to tortious liability? In my opinion the authorities to which I have referred and shall refer show that the answer to this question is affirmative *provided that* the parties are in sufficient proximity (in the legal sense) to one another as to give rise to tortious liability.

[173]. By way of introduction to this issue I quote again from the Speech of Lord Morris of Borth-y-Gest in Hedley Byrne at page 495:

> "In the absence of any direct dealings between one person and another, there are many and varied situations in which a duty is owed by one person to another.'[I interpolate here that as I have indicated above, there was personal contact between the Plaintiff and MPR's representative, but not to a degree which would constitute a contractual relationship]. 'A road user owes a duty of care towards other road users. They are his 'neighbours'. A duty was owed by the dock owner in *Heaven v.Pender*. Under a contract with a shipowner he had put up a staging outside a ship in his dock.The plaintiff used the staging because he was employed by a ship painter who had contracted with the shipowner to paint the outside of the ship. The presence of the plaintiff was for business in which the dock owner was interested and the plaintiff was to be considered as having been invited by the dock owner to use the staging. The dock owner was therefore under an obligation to take reasonable care that at the time when the staging was provided by him for immediate use it was in a fit state to be used. For an injury which the plaintiff suffered because the staging had been carelessly put up he was entitled to succeed in a claim against the defendant."

[174]. Lord Morris then went on to give the example of the hairwash sold to the husband knowing it was to be used by the wife. In Candler v. Crane Christmas Denning L.J. gave as examples the doctor who negligently certifies a man to be insane when he is not and the valuer in Cann v. Wilson [1888] 39 ChD 39 whom Chitty J. held liable for a negligent valuation given to a mortgagee's solicitor for the purpose of raising a mortgage on property (not, incidentally cited in the similar fact case of Yianni v. Edwin Evans *(supra)*). In the result, as the next passage I will cite from Lord Morris' Speech shows, it

matters not if the service performed is by way of an action or by way of words, written or oral. The passage is at pages 502–503:

"My Lords I consider that it follows *and that it should now be regarded as settled* that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or *his ability to make careful inquiry* a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

[175]. In this connexion, I am content to adopt the test proposed by Lord Wilberforce in Anns v. Merton London Borough Council *(supra)*, which I have already cited, and in which this passage is included, at page 751H of the Report:

" …one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessless on his part may be likely to cause damage to the latter—in which case a prima facie duty of care arises."

[176]. I have refrained from referring again to Candler v. Crane Christmas in the context of the application of Issue I (β) to the Plaintiff's case against Credit Suisse, because, as I have found, they were in a contractual relationship at the material times. But in the case of MPR I have found that there was no such contractual relationship. This was precisely the situation in Candler v. Crane Christmas where Denning L.J said at page 174:

"Mr. Lawson on behalf of the plaintiff submitted that, *although there was no contract between the plaintiff and the accountants*, nevertheless the relationship between them was so close and direct that the accountants did owe a duty of care to him within the principles stated in *Donoghue v.Stevenson*; whereas Mr. Foster on behalf of the accountants submitted that the duty owed by the accountants was purely a contractual one owed by them to the company, and therefore they were not liable for negligence to a person to whom they were under no contractual duty."

As I have recounted above the latter argument prevailed with the majority of the Court of Appeal, but was expressly over-ruled in Hedley Byrne.

[177]. Accordingly, applying Lord Morris' (*ante* paragraph [173]) and Lord Hodson's (*ante* paragraph [127]) principles to the test stated by Lord Wilberforce in Anns v. Merton London Borough Council, I find that the relationship was sufficiently proximate to found a duty of care on the part of MPR aside from contract. They knew full well that any advice they gave to Credit Suisse would be passed on to Dr. Yaddehige, and thus fell within the subtended passages in Denning L.J's dissenting judgment in Candler v. Crane Christmas & Co *(supra)*, at page 181. I consider it as particularly appropriate as the relevant test for the existence of a relationship giving rise to tortious responsibility for negligent, though not dishonest, advice:

"The test of proximity in these cases is:' {Denning L.J was referring to the illustrations to which I have made reference at paragraph [113]]: did the accountants know that the

accounts were required for submission to the plaintiff and use by him?"

[178]. Shortly before this Denning L.J. had said:

> "…there are some cases—of which the present is one—where the accountants know all the time, even before they present their accounts, that their employer requires the accounts to show to a third person so as to induce him to act on them: and then they themselves, or their employers, present the accounts to him for the purpose. In such cases I am of the opinion that the accountants owe a duty of care to the third person."

[179]. This passage was relied on by Park J in Yianni v Edwin Evans at page 450H. It follows that if the question is asked: 'Do the circumstances of the case show that there was a duty of care on the part of MPR. towards the Plaintiff apart from contract?' I unhesitatingly answer it affirmatively.

[180]. I now have to address the issues I listed in paragraph (I)(γ) and (δ), namely were there breaches by the respective Defendants of the duties that I have found to exist in respect of each, and if so, Issue (III) arises, namely when did they respectively occur so as to found the causes of action pleaded?

[181]. Taking Credit Suisse first, there can be little doubt that it acted correctly in putting the Plaintiff into touch with a reputable firm of Advocates in Guernsey, and also by (indirectly) approving and engaging MPR as local tax specialists. For its part MPR, almost from the inception of their appointment, were at pains, through their officers, to contact the tax authorities, with the result stated in paragraph 10 of the Cause, namely that Mr. Rigden explained to Advocate Bound that if the Plaintiff 'remained able' to benefit from the Trust, whether it be the Sensor or the Karolis Trust, there was a risk that this would attract tax liability on the income of PVI, let alone jeopardising its tax exempt status.

[182]. It is not clear, on the available material, whether this relatively early awareness that exclusion from benefit, at least of Dr. Yaddehige himself, was an essential requirement of any Trust arrangements that might be made, was passed on to CRSL. If it was, it does not seem that Ms. Parrack, at least, appreciated the vital importance of the requirement, for in her letter to the Plaintiff of the 31st March she did not record, much less stress, its importance. I infer that it was not provided for in the new Trust Deed because, if it had been, the reasonable expectation would be that action thereon would have been taken well before Mr. Bound was instructed to draw up the single Deed of Exclusion on the 17th September.

[183]. Even then, the proposed Exclusion was not satisfactory because Ms. Parrack failed to emphasise the necessity of excluding the Plaintiff's wife, as well as the Plaintiff, and this was not done—according to paragraph 25 of the Cause, notwithstanding that Linda Parrack became aware, certainly by 9th August, of the essential distinction, from a tax angle, between non-inclusion and exclusion of a beneficiary.

[184]. I regard the correspondence, conversations and other communications, as narrated in the Cause, between the respective Defendants, and between each Defendant and the Plaintiff from the inception of the process of contemplating the Plaintiff's move in January or February, until D-Day as a necessary preparation period for the exchange of views regarding the statutory requirements of the Income Tax legislation, because no

question has yet arisen in this case as to whether Dr. Yaddehige ought to have been advised to delay D-Day until all the advisers were *ad idem* as to the Deeds and other documents which should have been in place. The indications are that Dr. Yaddehige's intention was to move to Guernsey in any event.

[185]. Moreover, as the letters from the Assistant Administrator show, the Department was quite prepared to enter into discussions with MPR, as the tax specialists, as to the statutory requirements to be satisfied which would enable PVI to continue to qualify as an exempt body, and to ensuring that Dr. Yaddehige, as settlor, would not be called upon to pay tax on its income.

[186]. As regards the period between 9th August, when Ms. Parrack became aware (at the latest) that in order that the tax benefits should apply it was not enough simply to omit the name of a beneficiary from the Deed or document creating the trust, but that positive exclusion was essential, on close analysis of paragraphs 17 to 24 of the Cause, I make the following observations regarding Ms. Parrack's actions:

(a) Linda Parrack was advised by Paul Schreibke in the letter of 30th March that the exclusion should cover all three persons involved, that is to say the Plaintiff, his wife and his younger son.

(b) At the meeting of 16th September the *consensus* of those present (which included Linda Parrack and Richard Green) was that the Deed of Exclusion, which Advocate Bound would be instructed to draft, should cover both Dr. Sena *and* Mrs. Yaddehige.

(c) Paragraph 2 of the joint letter from these relatively senior officers in CSTL of 17th September, is equivocal and refers to the non-inclusion, rather than the exclusion, of Dr.Sena and of his wife and youngest son. Despite the resolution of the meeting only a day earlier paragraph 4 gave instructions to Mr. Bound only to exclude Dr. Sena.

(d) It would seem that paragraph 4 of the joint letter prevailed for, as Mr Davies stressed in the course of his address on 25th September this year, Advocate Bound's letter of 21st September, 1999, referred only to the Doctor's exclusion in the enclosed draft Deed.

(e) On 24th September she wrote to Advocate Bound regarding the Plaintiff's exclusion. Once again, she did not mention the exclusion of Mrs Yaddehige

(f) Last, but not least, the Assistant Administrator's letter of the 30th September, which made it crystal clear that *both* Dr. and Mrs. Yaddehige should be irrevocably excluded from benefiting, was forwarded by MPS to Linda Parrack on 8th October.

(g) Incredibly, the matter appears to have gone to sleep again from 8th October until 17th December, 1999, when Mrs Yaddehige was finally excluded. Thus, it is common ground that Guernsey Income Tax on the income of PVI was exigible from D-Day until that date. The Plaintiff says that this would not have happened if he had been properly advised by the Defendants.

[187]. In my judgment the First Defendants were on notice from, at the latest, the occasion of the 16th September meeting that both Dr. Yaddehige *and* his wife (the son seems to have disappeared from the scene by then) not only needed not to be included in the beneficiaries of the Trust, but that both had to be *irrevocably excluded.* I say this because Linda Parrack's letter of 9th August emphasised this requirement as regards Dr. Sena, but did not mention the wife. Taking a favourable view it is just possible that Ms. Parrack did not realise, when she wrote the letter of 9th August, that the requirement was in respect of the Doctor and his wife, but she certainly must have known this by the 16th September.

[188]. Given that Ms. Parrack and, almost certainly, Mr. Green, must have so realised by the 16th September (when the requirement was made clear), it is incredible that, the very next day, these two senior and (I assume) responsible officers of CSTL were the authors of the equivocal letter of 17th September. Mr. Bound acted in accordance with those which he might reasonably have believed were his instructions. He was entitled to assume that he was being instructed to prepare only one Deed of Exclusion.

[189]. Again, in my judgment, these two officers of CSTL who were concerned with Dr. Yaddehige's affairs must have known that the double exclusion was essential, and yet failed to ensure that the exclusion of Mrs. Yaddehige was acted upon before the 17th December. They should have been assiduous in seeing that everything was done that was possible in the circumstances and their failure in this respect which is attributable also to CSTL by reason of the maxim *respondeat superior,* was, to my mind a breach of CSTL's contractual duty of care towards an obviously valued client.

[190]. I accordingly find that there is material on record demonstrating that CSTL, through its officers, was in breach of its contract with the Plaintiff, and I also take the view that this breach occurred on 17th September, when they wrote to Advocate Bound. I therefore answer Issue (I) (γ) in the affirmative, and (III) (a) by saying that in my judgment the contractual cause of action arose on the 17th September, 1999. As it is common ground that this action was commenced on handing the Summons to H.M.Sergeant on 15th November, 2005, unless the Plaintiff can show that the maxim *empêchement d'agir,* or some other factor which would operate to suspend the running of time, applies in this case, so much of the second *Exception* as relates to Article 1 of the 1889 Law is entitled to succeed.

[191]. I now have to ask myself the question: was there a breach by CSTL of its duty to exercise due care and skill towards Dr. Yaddehige apart from contract, that is to say in tort? In my judgment the proximity test to which Lord Wilberforce referred in Anns v. Merton London Borough Council, which is included in the passage I have already set out *in extenso* at paragraph [128] and reiterated at paragraph [175] hereof, is satisfied and applies to this Defendant. I find that the two officers of CSTL who have featured in this case, and who were especially concerned with Dr. Yaddehige's affairs, had a continuing duty to exercise the maximum diligence in ensuring that their client did not suffer that for which he had specifically instructed CSTL, namely the avoidance of liability to Guernsey tax on PVI's income. For this I need only reiterate that which I have previously said regarding the decisions of their Lordships in Hedley Byrne and Anns v. Merton London Borough Council, *(supra),* and the citations therein.

[192]. It follows, therefore, that I take the view that the Cause discloses a reasonable cause of action in tort as against CSTL. As I have indicated earlier in this Ruling when dealing with the Non-Cumul issue, and as Lord Hoffmann said in Nykredit Mortgage Bank Plc v. Edward Erdmann Group Ltd [1997] 1 WLR 1627 at page 1638C:

> "[The cause of action] 'was for breach of the duty of care owed by the valuer to the lender, *which existed concurrently in contract and in tort.* (My italics).

(cited by Day D.B. in Stefani v. Le Pelley *(supra)*) these two causes of action can co-exist. Denning L.J. was even clearer in the Esso Petroleum v. Mardon *(supra)* at 819D-E:

> "……...in the case of a professional man, the duty to use reasonable care arises not only in contract, *but it is also imposed by the law apart from contract, and is therefore actionable in tort*. It is comparable to the duty of reasonable care which is owed by a master to his servant, or vice-versa." (Again my italics).

[193]. The question, then, immediately arises, in order to resolve Issue III(b) as to when the tortious cause of action arose. That this is not necessarily the same as the parallel contractual issue is shown by the following passage from the judgment of Nicholls L.J. in Bell v. Peter Browne & Co *(infra)* at page 501 H to 502 A:

> "One might have expected that parallel professional negligence claims based on contract and the tort of negligence would have a common starting date for the running of the six year limitation periods applicable in most cases under the Limitation Act 1980. But this is not so, because a cause of action based on negligence does not accrue until damage is suffered. It is from that date, not the date on which the negligent act or omission occurred that the six-year limitation period prescribed by the limitation Act 1980 runs."

[194]. When he became Lord Nicholls he expressed the same view in the Nykredit case at page 1630C:

> "*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 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 my judgment the same principle must apply where the tortious claim is said to be barred by prescription.

[195]. The facts in that case were that the lenders, Nykredit, had advanced £2.45m. on the security of a property valued by the valuers, Edward Erdman Group, in February, 1993, at £3.5m, resulting in a loss to them of just over £2.1m. The Judge found the correct value to be at most, £2.375m. He gave judgment for a sum, which included damages, for the plaintiffs' loss attributable to the fall in the market which had occurred before the property was sold.

[196]. Leading Counsel for Nykredit submitted that the lenders were misled not only as to the value of the property, but also as to the risk of the borrowers' defaulting,

because had the lenders known the true value of the properties which formed their security for the advance (which had been agreed at £2.1m), they would have concluded that the borrowers' proposed developments were non-viable; it would have followed that, as the borrowers were single asset companies, default was inevitable. As a result the lenders, not being able to realise their securities up to the values they had anticipated, respectively £2.5m and £3.5m, would have been locked into the loans for indefinite periods in that which was, by the time they wished to do so, a falling market. They eventually sold the property for only £345,000, but could not recover more than £1.4m because that was the amount by which Erdmann's had over-valued the security.

[197]. Passages from the decision of the House of Lords in the Nykredit case were cited extensively by Mr. Day in Stefani v. Le Pelley, and according to my understanding of his judgment, the decision played a significant part in his finding that the cause of action occurred by the end of September, 1990. Accordingly, as the plaintiff had not taken proceedings within six years thereof, the action was prescribed. It has, however, to be remembered that in Nykredit the determination of the date of accrual of the cause of action was required for two purposes, namely assessing the interest on the damages due to Nykredit under Section 35A of the Supreme Court Act 1981, and also for the purpose of limitation under the Limitation Act 1980. It is, of course, for the latter of those two purposes that the decision needs to be analysed in the instant case.

[198]. It is also relevant, as a matter of history, that the Nykredit case began as one of three actions in which questions of law had arisen for decision under the name of Banque Bruxelles Lambert S.A v. Eagle Star Insurance Co Ltd [1997] AC 191, and in which their Lordships gave judgment in the combined appeals on 20th June, 1996. By the time the appeal to which I have been referring came before the House of Lords Banque Bruxelles was no longer a party. As the *ratio* of that earlier decision was that the amendment to the Statement of Claim then sought (even if allowed) would not disclose a reasonable cause of action, because the kind of loss claimed did not flow as a foreseeable consequence of the duty allegedly owed by the Defendants to the Plaintiffs, the issues remaining for decision in the Nykredit appeal were as I have set them out in the second part of the preceding paragraph.

[199]. However, as Day DB pointed out in the Stefani case (page 20):

> "I find the reasoning of Lord Nicholls and Lord Hoffmann' [in Nykredit] 'to be of great assistance. Nevertheless, the potential complications of a 'valuer case'─ namely the two factors, the strength of the borrower's covenant and the accuracy of the valuation of the property ─ may not necessarily, if at all, be present in a 'solicitor' case".

[200]. With this *caveat* in mind I now return to Lord Hoffmann's Speech in the Nykredit case. At page 1638C to D he said:

> "In order to decide when the cause of action arose, it is first necessary to recall, by reference to your Lordships' earlier judgment, precisely what the cause of action was. It was for breach of duty of care owed by the valuer to the lender, which existed concurrently in contract and in tort. Your Lordships identified the duty as being in respect of any loss which the lender might suffer by reason of the security which had been valued being worth less than the sum which the valuer had advised. The principle approved by the House was that the valuer owes no duty of care in respect of his entering into the transaction as such and that it is therefore insufficient, for the purpose of establishing liability on the part of the

> valuer, to prove that the lender is worse off than he would have been if he had not lent the money at all. What he must show is that he is worse off as a lender than he would have been if the security had been worth what the valuer said……in order to establish a cause of action in negligence he must show that his loss is attributable to the overvaluation, that is that he is worse off than he would have been if it had been correct."

[201]. Another factor which must be borne in mind in cases of parallel claims in contract and in tort is, as Day DB noted at page 17 in Stefani, the principle stated earlier in the Report by Lord Nicholls at page 1633D, namely:

> "…….within the bounds of sense and reasonableness the policy of the law should be to advance rather than retard, the accrual of a cause of action. The disparity between the time when these parallel causes of action arise should be smaller rather than greater."

[202]. I have considered the other authorities on Issue (III)**,** with which I am now dealing, to which Miss Ozanne, in particular, but also Mr. Davies and Mr. Greenfield, referred. The most salient of these are Forster v. Outred & Co [1982] 1 WLR 86, Moore v.Ferrier [1987] 1 WLR 267, and those cited in the extracts from Jackson & Powell on Professional Negligence, to which Mr. Barnes and Mr. Greenfield drew my attention. The first case in the passage at paragraph 5-014, cited by Mr. Greenfield (although he did not refer to its facts) was Midland Bank Trust Co v. Hett, Stubbs & Kemp [1979] Ch 384 where Mr. Green senior agreed in March, 1961, to grant to his son an option to purchase the freehold reversion of a farm (which he already had under a tenancy from his father at an agreed price) exercisable within ten years. They jointly consulted the defendant firm of solicitors and the conveyancing partner drew up a handwritten document recording the option.

[203]. It was the solicitor's duty to protect Mr. Green junior's interest by registering the option under the Land Charges Act 1925. This he did not do, and Mr. Green senior subsequently repented of his generosity and defeated it by conveying the farm to his wife. The wife died in March, 1968, Mr. Green senior in February, 1972, and Mr. Green junior in May, 1973. Mr. Green junior had commenced proceedings in 1970, before his death, against his father and his mother's estate for a declaration that the option was binding on the latter.

[204]. Clearly the solicitors were liable in tort (and, as Oliver J. went on to find, for breach of contractual duty) for their negligence in failing to register the option before the wife had acquired an adverse interest in the farm. In an action by Mr. Green junior's executors the Court was called upon to determine, for the purpose of the Limitation Acts, when the cause of action arose. Following Hedley Byrne and Esso Petroleum v. Mardon and Anns v. Merton London Borough Council *(supra)* Oliver J. said at page 433C:

> "In my judgment, the instant case is one in which there was clearly between the defendant firm and Geoffrey' [Mr.Green junior] 'a relationship of the sort which gave rise to a duty of care under the Hedley Byrne principle. And, in my judgment, the interpretation of that principle in Esso Petroleum v. Mardon leads to the conclusion that there was here a liab-bility in tort which arose when the damage occurred on August 17, 1967.

Oliver J. held that that was the date on which the duty to register the option ceased to be effectively capable of performance. Accordingly as the writ was issued on 21st July, 1972, the action was not time-barred. I shall refer to this case again shortly.

[205]. The Midland Bank case was considered in Bell v. Peter Browne & Co [1990] 2 QB 495 which is also cited in paragraph 5-014 of Jackson & Powell, to which Mr. Greenfield also drew my attention. Although the Court of Appeal regarded the Midland Bank case as distinguishable on the facts, I do not read the judgments of the members of the Court of Appeal as differing from the *ratio* of the decision of Oliver J. In Bell v. Browne the plaintiff, on the breakdown of his marriage consulted the defendants, his solicitors, as a result of which he transferred the matrimonial home to his ex-wife, which was not then sold, with the proviso that, when it was sold, he would receive one-sixth of the gross proceeds of sale.

[206]. Nine years later, in December, 1986, the wife sold the house and spent the proceeds, and only then was it discovered that the defendants had failed to protect the one-sixth interest by a trust deed or mortgage and the plaintiff sued them for negligence in August, 1987. The claim was struck out by the registrar as frivolous and vexatious as, on the face of it, the claim was time-barred. Auld J. dismissed the plaintiff's appeal, and so did the Court of Appeal. At page 509G-H of the Report Beldam L.J said:

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

[207]. The Court of Appeal rejected that argument. They held that the solicitors should have prepared and procured the execution of a declaration of trust, or other suitable form of protection when the husband transferred the house to his ex-wife in September, 1978, and that the period of limitation ran from then. Accordingly the action was rightly struck out. The judgment of Nicholls L.J touched on the provisions of the Latent Damage Act 1986, which featured in the submissions here, but the Statute did not avail the plaintiff as it became law well after his cause of action arose.

[208]. The last authority cited in Jackson & Powell to which I need refer is the well-known case of Cartledge v. E. Jopling & Sons Ltd [1963] AC 758 which was mentioned by Miss Ozanne and Mr. Greenfield. The plaintiffs had been employed for many years as steel dressers in the defendants' foundry which manufactured steel castings. They were exposed to dust particles of sand and silica in the work atmosphere and in October, 1950, were diagnosed as suffering from pneumoconiosis as a result of prolonged inhalation of these particles. Although the diseases were not discovered until between 1950 and 1955 it was evident that the lung damage had occurred well before October, 1950, but the writs were not issued until October, 1956.

[209]. Miss Ozanne cited the first holding in the headnote, which shows that in personal injury cases, as well as in other forms of tort, the cause of action accrues at the time when damage is suffered, and that the absence of knowledge on the part of the plaintiff of his loss or damage is generally irrelevant. The House of Lords unanimously upheld the Court of Appeal in deciding that, as the date when the plaintiffs suffered damage was the criterion, notwithstanding that due to the state of medical science, as it then was, the disease was not discovered until later, the actions were statute barred by Section 2 of the Limitation Act 1939.

[210]. I should also briefly refer to the case of Pirelli General Cable Works Ltd v. Oscar Faber & Partners [1983] 2 AC 1, which is considered at paragraph 5-017 of Jackson & Powell. There a firm of consulting engineers advised on and designed an addition to Pirelli's factory premises, with the addition of a chimney. They used the wrong material in its construction in June and July of 1969 and, by April of the following year, cracks had developed in the chimney. It was found that Pirelli could not have discovered the damage with reasonable diligence until October 1972, but that they did not discover it, in fact, until November, 1977, and the writ was not issued until October, 1978.

[211]. The House of Lords, in effect, extended the principle of the personal in-jury case of Cartledge v.Jopling to cases involving economic loss, and rejected the argument that the damage occurred when it was capable of discovery by the plaintiffs—as opposed to the actual discovery of the damage. To some extent this decision is ameliorated by the Latent Damage Act 1986, but I do not think it affects the position in Guernsey under the *Loi Relative aux Prescriptions 1889*.

[212]. Returning to the Nykredit case, bearing in mind that it was a valuation case rather than one such as the present, I yet think that the most succinct passage to be extracted from all the authorities is that which fell from Lord Hoffmann at page 1639D, when, after considering the opposing submissions of Leading Counsel as to when the cause of action arose, he said:

> "Relevant loss is suffered when the lender is financially worse off that he would otherwise have been. This is in accordance with the decisions of the Court of Appeal in *UBAF Ltd. v. European American Banking Corporation* [1984] Q.B 713 and *First Commercial Bank Plc. v. Humberts* [1995] 2 AER 673."

[213]. In the instant case when was Dr. Yaddehige worse off than he would have been had both the appropriate Deeds of Exclusion been duly executed, as was clearly the *consensus* of those present at the meeting of 16th September, 1999, and as it was agreed that instructions should be given to Mr. Bound to do? That this was the missing link was made crystal clear in the Assistant Administrator's letter of the 7th September, of which all participants in that meeting were aware. It was followed up by his letter of the 30th, but still the necessary action was not taken.

[214]. Counsel involved in this case canvassed various dates within the period from 16th April to 17th December, 1999, which could be advanced as the latest date for the causes of action in tort to have accrued, but I have derived no assistance from the documentation produced as to when this was, and neither was there, for example, an Affidavit from the Plaintiff which might have assisted the Court in this respect.

[215]. In the Midland Bank case (*supra*, paragraph [201]) Mr. Harman Q.C abandoned his submission that the solicitor's duty to register the option was a continuing one in favour of the obligation to register it before a third party, namely the wife (Mr. Green junior's mother) acquired an interest, a submission which Oliver J. upheld. In my respectful opinion that must be right, and I unhesitatingly reject Mr. Barnes' submission that the tortious cause of action was a continuing one, inasmuch as Dr. Sena's tax liability would necessarily have increased in amount as each day passed. Nevertheless, it is in my judgment incumbent on the Court to make a finding under Issue III(b). Should the Court

decide on a date 'plucked from the air', as is sometimes said when quantifying the damages for loss or pain and suffering in personal injury cases?

[216]. I do not consider that that would be the right approach to this difficult issue. In all the valuation cases the Court was able to arrive at a finding on the date when the loss to the lender crystallised and became certain. In the Midland Bank case, as I have just said, the idea of a continuing breach was abandoned and Oliver J. found that the loss crystallised when Mr. Green senior conveyed the farm to his wife, namely 17th August, 1967, because, at that date, the option was no longer registrable. The case is further of interest, because Oliver J. found that the duties under both the law of contract and of tort were co-terminous, and the relevant date when the cause of action arose happened to be the same in both cases.

[217]. In my judgment, doing the best I can in the circumstances, I consider the correct date here is when the liability to tax crystallised and became ascertained. That was on the 17th December, when the second Deed of Exclusion was executed so that the tax liability for PVI's income did not continue beyond then. It is true that, on one view, it could be said that that was the date on which the Plaintiff was saved from further liability, but the correct view, in my opinion, is that it was on that day that it became possible for the first time to assess the quantum of the liability, which was for the period 15th April to 17th December.

[218]. The 17th December, 1999, then, was the date when it could be said with certainty that Dr. Yaddehige was definitively worse off that he would have been if he had been correctly advised throughout. I so find. The result of this finding is that the action was brought just within the permitted time as against Credit Suisse for breach of tortious duty, but not for the breach of duty in contract, which I have also found occurred. Thus the Plaintiff had, in my judgment, so far as the tortious claims against Defendants 1 and 3 are concerned, a margin of just over one month before the expiry of the six year period.

[219]. That which I have just said behoves plaintiffs not to delay in bringing their cases until the eleventh hour for, as Holroyd Pearce L.J said in Davies v. Elsby Brothers [1961] 1 WLR 170, in which the correction sought was held not be a mere case of misnomer but a substantive amendment which caused the action to be struck out after the limitation period had expire, at page 175:

> "I arrive at that conclusion reluctantly, because it is based on a technicality. But, so far as the merits are concerned, the Plaintiff has brought the matter on himself. He waited for three years.There was no correspondence or bargaining to justify the delay. Moreover the writ, when issued just within the statutory period of three years, was not served until the three hundred and sixty fourth day of the following year…one day before it would finally expire. When plaintiffs delay in that way it becomes very difficult for actions to be properly tried. And if, having left the matter so late, they get into technical difficulties (as this plaintiff did) they are liable to find that they have no opportunity to put the matter right."

[220]. The following quotation further illustrates the peril in which plaintiffs may place themselves if they delay unduly in filing their proceedings, notwithstanding that the action is still technically in time. Lord Denning, in Biss v. Lambeth Southwark & Lewisham Health Authority [1978] 2 AER 125, said at page 132:

> "If (the plaintiff) was foolish and indolent enough to delay unduly and unjustifiably

during the permitted period he ran a risk: for it could be taken into account later."

[221]. Moreover, as Miss Ozanne submitted in her final address, there is an element of injustice if professional men, bankers, accountants and the like have the sword of Damocles hanging over them for too long, which would tend to inhibit the efficient performance of their professional duties. This aspect of a case where there is a long delay in bringing proceedings was recognised by Lord Denning M.R. in Allen v. Sir Alfred McAlpine & Sons Ltd. [1968] 1 AER 543 when he said:

> "It is, I think, a grave injustice to professional men to have a charge of this kind outstanding for so long."

[222]. Although I recognise the merits of these submissions, by reason of the findings I have just reached, I do not need, in the instant Applications, to consider the doctrine of *empêchement d'agir* in relation to the tortious cause of action which I have found CSTL had as against Credit Suisse. But what of the doctrine as regards its liability for breach of contact to Dr. Yaddehige? In this respect I consider I am bound by the decision of the Jersey Court of Appeal in Public Services Committee v. Maynard *(supra)* in which Southwell J.A gave the leading judgment, where it was held that only a practical impossibility of the plaintiff exercising his rights could save him from the rigour of the prescription period. Moreover, ignorance of his rights cannot assist the plaintiff save in a few rare cases.

[223]. The Maynard case is reinforced, if this were necessary by Vaudin v. Hamon to which I referred at paragraph [120]. In that case the period that had elapsed between the cause of action arising and its commencement was over 25 years and 6 months. The relevant period of prescription was 20 years, and the Court of the Seneschal of Sark had held that the plaintiff's (the appellant's) claim to be the rightful successor to the property of Marie Elizabeth Vaudin deceased was barred by the preliminary plea of prescription. This decision was reversed by the then Bailiff of Guernsey, and the Court of Appeal upheld his decision.

[224]. Mr Greenfield referred to portions of the Judgment of the Privy Council delivered by Lord Wilberforce at page 582 of the Report, which, indeed, found that the plaintiff's absence in Mauritius on Crown service would not have availed him as regards the maxim *empêchment d'agir.* The Privy Council, however, concluded that certain vital facts had not been found by the Court of Seneschal—in particular that the cause of action had not arisen on the deceased's death but on the date on which adverse possession of the property was taken by the respondent, and that the relevant period was different from that which had been supposed. The Privy Council, accordingly, remitted the case to the Court of first instance to find the facts necessary to support or repel a case of acquisitive prescription.

[225]. I do not agree with the submissions by Mr. Barnes that the Plaintiff's knowledge here can be split between the two aspects of fiscal liability. It has not been shown that any practical impossibility existed to avail the Plaintiff here. If he did not realise before, he was certainly well aware by the 16th September as to what the tax position would be if both the exclusions were not in place. Yet he took no action for over six years from then. In the result the Second *Exception* filed on behalf of CSTL succeeds as regards the Plaintiff's cause of action for breach of contractual duty, but fails as

regards the cause of action against it of which I have held there is *prima facie* evidence of negligence in tort.

[226]. This brings me now to consider Issue (I) as against the partners of Collas Day. At their preliminary meeting of 12th February, 1999, Advocate Bound explained the options that he considered would be open in the light of the questions posed in CSTL's letter sent two days before. An indication of the nature of those questions appears in paragraph 2 of the Cause, although unfortunately the letter itself was not included in the Correspondence Bundle, with the result that its full text is not available to the Court.

[227]. Nevertheless the impression I receive from the ensuing two paragraphs of the Cause is that Mr. Bound was careful to present as accurate a picture of the Guernsey tax scene that Dr. Yaddehige could reasonably expect if he was to achieve his objective of preserving the exempt tax position of PVI. Moreover it is worthy of repetition that the initial suggestion made some days later, that local tax advice would be advisable, (an eminently sensible precaution) came from Mr. Bound. It was because of that advice that (a) the Third Defendants were engaged, and (b) through Mr. Rigden, an approach was made by MPR to the Guernsey tax authorities and those advising the Plaintiff were eventually pointed in the right direction, as Mr. Rigden explained to Mr. Bound on the 22nd March.

[228]. There is no record that Mr. Bound, or his firm Collas Day, played any active part in the Plaintiff's or his Companies' tax affairs between late March and the second half of September of 1999, when Mr. Bound received instructions to Draft the necessary Exclusion Deed. I use the singular advisedly because, as I have already said, whereas it was resolved at the meeting of the 16th that *both* the Doctor and his wife should be excluded, the instruction that *actually* went out from CSTL the very next day was to draft 'an appropriate Deed of Exclusion irrevocably excluding Dr. Sena' (*only*) 'as a potential beneficiary'.

[229]. What did Mr. Bound then do? As indicated in his letter in response of 21st September, he complied with the instructions he had received from the entity which, after all, had instructed his firm to act in the first place—albeit on the Plaintiff's behalf—and enclosed a Draft Deed of Exclusion in respect of Dr. Sena only, emphasising the word 'irrevocably'. None of the steps taken by Mr. Bound, or the advice he gave throughout the period I have been considering, seem to me to amount to a breach of his professional duty of care, either in contract or in tort, as alleged, and subsequently particularised, in paragraph 30 of the Cause.

[230]. The proper test to be applied in a case such as this is, as Beldam L.J said in Bell v. Browne at page 509A-B:

> "[In this particular case has there] 'been a failure by a solicitor to exercise that degree of care and skill' [that] 'a competent solicitor would' [exercise] 'in the discharge of his duty in these circumstances?"

In my judgment the answer is clearly 'No'. I consider that all the relevant documentation shows that Mr. Bound explained the various options to his client and, when he received definite instructions, that he complied therewith.

[231]. Neither do I consider that the fact that Mr. Bound and his opposite number in London Mr. Carrell, were not comfortable with the idea that one or more of the family should be expressly and irrevocably excluded from benefiting under either the old or the then proposed Trust, detracts from this position. Furthermore, Mr. Bound's opinion as to the interpretation of the tax Laws as expressed in paragraph three of his letter of the 21st September, which appears to be at variance with the official position as set out successively by Mr. Gray in his two letters of September, 1999, is, again, not, in my judgment, an indication of lack of professional skill and care, but of the opposite, namely that he was doing his utmost to protect Dr. Yaddehige's interests, so far as the tax situation was concerned.

[232]. As Oliver J. said in the Midland Bank case (*supra*) at page 437E 'the duties of a solicitor depend upon the particular retainer and upon the particular circumstances of each individual case'. In the circumstances prevailing in this case in 1999, and for the foregoing reasons, I take the view that that Mr. Bound was not negligent, and did not breach his (or his firm's, as then constituted) contractual obligation to exercise due care and skill. I therefore find that no reasonable cause of action is disclosed against the Second Defendants, either in contract or in tort, by the facts pleaded in the Cause (which Counsel agree I must accept for the purposes of the present proceedings) under Issue (I) above. Accordingly, in my judgment, the First *Exception* is well taken by the Second Defendants and succeeds. It becomes unnecessary, therefore, to consider their second *Exception.*

[233]. Turning, once again to the issues as between the Plaintiff and the Third Defendant, I have found that there was no contractual relationship between the Plaintiff and the Third Defendants, but that, nonetheless, the relationship between them was sufficiently proximate to give rise to a general duty to exercise due care and skill in providing advice outside the realm of contract.

[234]. Manifestly Issue (I) (γ) does not now arise for decision but it is now incumbent upon me to address the question of whether the material on record so far establishes *prima facie* that MPR was in breach of that general duty under Issue I (δ).

[235]. Accordingly, I frame the following further question, namely—is there some credible material upon which a reasonable Guernsey Court, properly constituted and directed, could find that MPR was in breach of its general duty of care towards Dr. Yaddehige so as to give rise to tortious liability for his economic losses?

[236]. As I said earlier, paragraph [177], it is an inescapable inference that MPR knew that whatever advice it gave as regards the tax position of PVI would be passed on by Credit Suisse, as the coordinator, to Dr. Sena, within the test stated by Denning L.J in Candler v, Crane Christmas. It knew also that Credit Suisse was in direct contractual relationship with him, and was responsible for ensuring that he would not be liable for tax on PVI's profits. Moreover MPR was, from March onwards, and thence throughout the period which I have been considering, the prime mover in the approaches made to the Tax Authority.

[237]. Furthermore, MPR's tax manager, Paul Schreibke, played a leading part in, and recorded the minutes of, the meeting of 16th September. The dominant purpose of that crucial meeting, to the knowledge of all participants, including the Plaintiff, was to ensure that the necessary steps were taken to avoid Guernsey tax on PVI's income. Those steps were that not only Dr. Sena, but also his wife, should each be covered by Deeds of Exclusion which would irrevocably bar them from benefiting under the Trust.

[238]. That this did not happen is, as I have previously emphasised, evident from the immediately ensuing correspondence between Collas Day and CSTL. It is not recorded whether the letters of 17th and 21st September were copied to MPR, but, at the very least, by 8th October, when MPR forwarded Mr.Gray's letter of 30th September to CSTL (which had made it crystal clear that both the Doctor and his wife would need to be excluded from benefiting) Paul Schreibke, and by inference, MPR, must have known that the purpose of the meeting of 16th September had not been achieved. I so find.

[239]. In my judgment it was MPR's clear duty to follow up the steps taken by CSTL and to ensure that Paul Schreibke's advice had been complied with. It did not do so, for if Paul Schreibke had followed it up, as in my judgment he should have done pursuant to MPR's general duty of care and skill towards the Plaintiff, he (the Plaintiff) would not have been assessed to tax for the period from 15th April to 17th December, 1999.

[240]. Following the foregoing reasoning, I find, for the purpose of the instant proceedings, that there exists credible evidence, upon which a reasonable Guernsey Court, properly constituted and directed, could reach the conclusion that MPR was in breach of its general duty of care (apart from contract) towards Dr. Yaddehige. If the Court, properly directed, does so find after hearing all the evidence, tortious liability by MPR to the Plaintiff would then follow, subject to any issue of Prescription or of Limitation.

[241]. As I said at Paragraphs [216] and [217] regarding the case against CSTL, and for the same reasons, on this issue I have no hesitation in finding that the date of accrual of the cause of action in tort against the Third Defendants, was the 17th December, 1999.

[242]. Addressing, *seriatim*, the Issues which I set out at paragraph [100] hereof, I consider that Issues (I), (II) and (III) have been answered in the subsequent text. Turning to Issue (IV) I find that the prescriptive period as against CSTL under the claim in contract ended on 17th September, 2005. As regards the extant claims in tort against CSTL and MPR the period would have ended on 17th December, 2005.

[243]. As to Issue (V) I find that as regards the tortious claims the limitation period, likewise, ended on 17th December, 2005. Regarding Issue (VI), as regards the claim in contract against the First Defendant only, I answer the question posed in the negative.

[244]. To summarise the result of the present Applications by way of *Exceptions*, I find as follows:

(i) The First *Exception* pleaded on behalf of CSTL, fails as regards the contractual claim and as regards the claim in tort.

(ii) The Second *Exception* pleading prescription and limitation on behalf of CSTL succeeds as regards the contractual claim but fails as regards the claim in tort.

(iii) The First *Exception* pleaded on behalf of Collas Day, and of the relevant partners thereof, wholly succeeds, rendering unnecessary a consideration of their Second *Exception.*

(iv) The First *Exception* pleaded on behalf of MPR succeeds as regards the claim for breach of duty under contract, but fails as regards the tortious claim.

(v) The Second *Exception* pleading prescription and limitation on behalf of MPR fails as regards the claim in tort.

(vi) The action therefore continues as against the First and Third Defendants on the respective tortious claims against them. The suit is dismissed as against the Second Defendants.

[245]. I am prepared to hear Counsel on the issue of costs if any of them so wish.

Orders accordingly.

A.R.W.Hancox.
Lieutenant Bailiff.
30th March, 2007.

