



In the Royal Court of the Island of Guernsey

The 25th day of August, 2000 before Andrew Christopher King Day,
Esquire, Deputy Bailiff; sitting alone.

WHEREAS on the 5th day of June, 2000 the
Deputy Bailiff considered the attached Exception de Fond of the Defendant
and having heard Advocates J.M. Wessels and G.S. Dinning, Counsel for the
Plaintiff and Defendant respectively, ISSUED this day judgment in the
terms attached hereto.

Her Majesty's Deputy Greffier.

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

BETWEEN

HOLDRIGHT INSURANCE COMPANY LIMITED

("the Plaintiff")

V

WILLIS CORROON MANAGEMENT (GUERNSEY) LIMITED

("the Defendant")

LES DEFENSES

EXCEPTION DE FOND

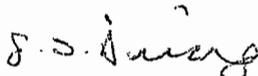
1. The Plaintiff's Cause of Actions is prescribed by virtue of the fact that the alleged breach of contract and/or Cause of Action arose more than six years prior to the date of the commencement of these proceedings. The Defendant will refer, inter alia, to the following facts in support of this Exception:-
 1. The proceedings were issued on 14 July 1988.
 2. By virtue of paragraph (4) of the Cause, the Plaintiff's action is based on the terms of a written agreement dated 21 December 1989 ("the Management Agreement").
 3. By virtue of paragraph (6) of the Cause it is alleged by the Plaintiff that the Defendant attained excess of loss reinsurance on behalf of the Plaintiff "from 1989".
 4. By virtue of paragraphs (8) and (9) of the Cause, the Plaintiff alleges that the actions of the Defendant which gave rise to this claim occurred

between "July and October 1990", namely the allegation that the Slip Policy was amended so as to exclude losses occurred "on 1989 and prior Underwriting Years".

5. It is clearly the Plaintiff's allegation that the breach of duty of care and/or breach of contract was committed between July and October 1990.
6. By virtue of paragraph (10) of the Cause, it is alleged that "in or about June 1991 the Defendant obtained for the Plaintiff reinsurance cover of £750,000 in the aggregate access of £1.5 million in the aggregate...". Paragraphs (15) and (16) of the Cause allege that the arrangements made by the Defendant in June 1991 have led the Plaintiff to suffer a financial loss.
7. It is therefore apparent from allegations pleaded by the Plaintiff in the Cause that this claim is based upon the alleged breach of duty or breach of contract committed sometime between July 1990 and June 1991. It is clear from the Plaintiff's Cause, therefore that the Plaintiff's claim is prescribed. The relevant six year prescription period expired by June 1997 at the latest.

NIANCE

1. The Defendant denies the Plaintiff's claim and the Plaintiff is put to strict proof thereof.


Advocate G S Dinning
12 November 1999

A

IN THE ROYAL COURT OF GUERNSEY

ORDINARY COURT

Between

HOLDRIGHT INSURANCE COMPANY LTD

Plaintiff

B

and

WILLIS CORROON MANAGEMENT (GUERNSEY) LTD Defendant

C

The Defendant's Exceptions de Fonds

Judgment of the Deputy Bailiff

D

Texts referred to:-

- (a) Jackson and Powell on Professional Negligence (4th edition, paragraph 1-134).
- (b) Chitty on Contracts (27th Edition-28-021).
- (c) Terrien, *Commentaires du Droit Civil*.
- (d) Poingdestre, *Les Lois et Coûtumes de l'Isle de Jersey*.
- (e) Carey, *Essai sur les Institutions, Lois et Coûtumes de l'Isle de Guernesey*.
- (f) Pothier, *Traité des Obligations*.
- (g) Dunod, *Traité des Prescriptions*.
- (h) Merlin, *Répertoire de Jurisprudence*.
- (i) Dalloz, *Les Petits codes Dalloz*. (1959).
- (j) Le Marchant, *Remarques et Animadversions sur L'approbation des Lois*.
- (k) Gallienne, *Traité de la Renonciation par Loi Outrée, etc*.

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Cases referred to:-

- (1) Nykredit Mortgage Bank Plc v. Edward Erdmann Group Ltd. formally Edward Erdmann (an unlimited Company) 1997 1WLR 1627.
- (2) Stefani v. Le Pelley and Others (Judgment 13th July, 1999).
- (3) Public Services Committee v. Maynard (Jersey Court of Appeal 11th December, 1996).
- (4) Cherub Investments Ltd. v. The Channel Islands Aero Club (Guernsey) Ltd. (Guernsey Court of Appeal report No.11 1982).
- (5) Vaudin v. Hamon and others (1974) AC 567.
- (6) Smith v. Harvey (Guernsey Court of Appeal (Civil Division) report No. 9 1981).
- (7) Boyd v. Pickersgill and Le Cornu (Jersey Court of Appeal 30th September, 1999).
- (8) Moore v. Ferrier [1988] 1AER 400 CA.
- (9) Williams v. Martin – [1914] Cour des Jugements et Records.
- (10) Baron Shipping Company Ltd. v. J.M.Le Pelley, (Guernsey Civil Appeal 259, 5/1/99).
- (11) Cartledge v. E. Jopling & Son Ltd. [1963] A.C. 758.
- (12) Invercargill C.C. v. Hamlin, [1996] A.C. 624.

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- A**
- (13) Bell v. Peter Browne [1990] 2 QB 495.
 - (14) Hawkins v. Clayton (1984) 664 CLR 359.
 - (15) Morton (formerly Champion) v. Paint, (Guernsey Civil Appeal 219, 9.2.96).
 - (16) Pirelli Gen. Cable Works Ltd. v. Oscar Faber and Partners, [1983] 2 A.C. 1.
 - (17) Forster v. Outred & Co. [1982] 1 W.L.R. 86.
 - (18) Baker v. Bollard and Bentley (1982).
- B**
- (19) Iron Trade Mutual Insurance v. Buckenham [1990] 1 AER 808.
 - (20) Islander Trading v. Hogg Robinson [1990] 1 AER 826.
 - (21) Knapp v. Ecclesiastical Insurance Group Plc., (The Times 17/11/97).
 - (22) Singleton v. Le Noury (Guernsey Court of Appeal, 5/6/90)
 - (23) Gould v. Brown (Guernsey Civil Appeal No. 243, 24th July, 1998).
 - (24) Searle (G.D.) & Co. v. Gunn, [1996] 2 N.Z.L.R. 129.
 - (25) Bagot v. Stevens Scanlan [1966] 1 Q.B. 197.
- C**
- (26) Dutton v. Bognor Regis U.D.C. [1972] 1 Q.B. 373.
 - (27) Sparham-Souter v. Town and Country Developments [1976] Q.B. 858.
 - (28) Anns v. Merton London B.C., [1978] A.C. 728.
 - (29) D & F Estates v. Church Commissioners, [1989] A.C. 177.
 - (30) Murphy v. Brentwood D.C., [1991] 1 A.C. 398.
 - (31) C v. DPP [1996] 1 AC 1.

D

The Plaintiff was represented by Advocate J. M. Wessels.

The Defendant was represented by Advocate G. S. Dinning.

- E** The Plaintiff was incorporated in Guernsey as a mutual insurance company on the 21st December, 1988, in order to accept “stop loss” re-insurances of various Underwriting Members of Lloyds (“the Members”) on various syndicates, who had apparently appointed David Holman & Co. Ltd. as their members’ agent for the 1989 underwriting year onwards.
- F** The majority of the shares in the Plaintiff were owned by those Members who had placed such “stop loss” re-insurance with the Plaintiff. The Plaintiff alleges that the “stop loss” cover provided by it to the Members provided for a single claim to the Plaintiff when the Underwriting result was declared after 36 months, with any subsequent deterioration in the results for the year being paid under the subsequent years’ policies, subject to the Members
- G** maintaining continuous cover under the scheme.

The Defendant is an insurance company manager, also incorporated in Guernsey.

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On the 21st December, 1988, the Plaintiff and the Defendant entered into a written agreement, whereby the Defendant agreed to provide management services for the Plaintiff in respect of the Plaintiff’s insurance operations for an annual fee and subject to the terms and conditions contained in that agreement (“the agreement”).

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A As a result of the agreement, the Defendant in the years 1989, 1990 and 1991 proceeded to organise the purchase of re-insurance for the Plaintiff - the details of which I need not go into for present purposes, save to say, the Plaintiff would allege, that the Defendant failed to obtain sufficient re-insurance cover on the terms and in the amount instructed.

B The Plaintiff further alleges that for the year 1990 the Defendant, in respect of obtaining layer 3 re-insurance for the Plaintiff, failed to protect the latter's potential liability to its Members from deterioration on the 1989 and prior underwriting years, and that for the year 1991, perhaps more pertinently, had again failed to protect such potential liability, on this occasion from deterioration on the 1990 and prior underwriting years. The 1991 re-insurance was obtained in June of that year.

In or about July, 1994, the Plaintiff claimed against the re-insurers under the 1991 re-insurance policy for a total loss to the layer of cover in the sum of £750,000. The re-insurers declined this claim because, it is alleged, most of it was made up of deterioration on the 1990 and prior underwriting years. Accordingly, so it is alleged, the Plaintiff has suffered loss and damage, because the amount of its liabilities to the Members exceeded by some £750,000 the amount which it was entitled to under its own re-insurance policy arranged by the Defendant. The Plaintiff attributes that loss and damage as directly arising from the Defendant's fault in two ways; firstly, from its breach of the agreement in failing to exercise the degree of care and skill which would be exercised by a first class manager of insurance business in and about the arrangement and administration of the 1991 re-insurance; alternatively, the Defendant was negligent, both in failing to ensure that the Plaintiff's 1991 re-insurance adequately matched its obligations to its Members, and also in failing to report what is described as this "mismatch" to the Plaintiff prior to the 25th July, 1994. The Plaintiff's claims against the Defendant are thus based both on breach of contract and in tort.

G My foregoing outline of the Plaintiff's claim against the Defendant is taken from its Cause which was placed on the pleading list on the 4th September, 1998, the relevant summons having been issued a matter of weeks before that date. The Cause is Appendix A. In addition to my summary of the Plaintiff's case, I would draw attention to paragraphs 5 and 14 of the Cause to emphasise the alleged relationship of the parties and the Defendant's duties arising therefrom, these being central to the arguments I have to resolve at this stage of the proceedings.

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A On the 12th November, 1999, the Defendant lodged its defences (Appendix B), which contain Exceptions de Fonds. The Defendant claims that the alleged breach of contract (creating the contractual cause of action) was committed, at the latest, in June, 1991, and, as clarified at the hearing, that the cause of action in tort also accrued in June, 1991, being the date when the Plaintiff suffered relevant actionable damage. Accordingly, the relevant prescription period in both cases being one of 6 years, this claim has been started out of time.

B I would only comment that the Exceptions could have been pleaded, in their original form, with greater clarity.

C I am grateful to both Counsel for their submissions, written and oral, including the cases to which they have helpfully referred me.

The central issues can be stated as follows.

D When, both in contract and in tort, do causes of action arise in Guernsey law? In what circumstances may the running of time be suspended in either case so as to delay prescription? All those four issues, naturally enough, can be divided into further sub-issues, but they remain the central ones.

E **The accrual in Guernsey of a cause of action in contract**

Miss Dinning submits that in English law the cause of action for breach of contract accrues at the date of the breach. That is a view with which Mr. Wessels does not disagree, and must unquestionably be the case. It would appear to be a principle that has been clearly established in England for approaching 200 years, at the very least. For which see, for example, Jackson and Powell (a), Chitty (b), and Nykredit (1).

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Miss Dinning further submits that, in this regard, the law of Guernsey is the same as the law in England and Wales, being a view from which, again, Advocate Wessels for present purposes does not dissent. That was the conclusion I came to, in Stefani (2). I stated on that occasion that I was fortified in taking that view by the fact that neither counsel had referred me to any conflicting authority, whether in our customary law, in the Norman Coutumiers or in Pothier. That is also the position in this case. I would add, albeit with my limited knowledge of the texts, that I believe they establish that Miss Dinning's submission in this regard is correct. However, I have noted the reservations (obiter) of Southwell JA, in Maynard (3), as to whether that was necessarily the position under Jersey common law.

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A If it be the case that Guernsey law is the same as English law in this regard, then Miss Dinning's submission must be correct, namely, that on the face of the Plaintiff's own pleadings the alleged breach of contract occurred at the latest in June of 1991, and that accordingly the Plaintiff's claim in contract was commenced out of time.

B In Cherub (4), Hoffmann JA, as he then was, stated (see the penultimate paragraph of p 4 of the report) –

C *“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.”*

D Mr. Hoffmann continued (penultimate paragraph on p.8 of the report) -

E *“Now it seems to me that the test of whether an Exception de Fonds can succeed or not is whether there are no facts which might be proved at the trial which would allow the Plaintiff – no admissible facts consistently (sic) with pleadings which could be proved at the trial – which would allow the Plaintiff to succeed in the action....,”*

Accordingly, if the premise that the cause of action accrued at the date of breach is correct, then I must allow this Exception at this stage.

F **Empêchement d'Agir (in contract)**

G However, Advocate Wessels submitted that there can be, and 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, and therefore prescription, is suspended. This submission is based upon the maxim – “*qui est empêché d'agir la prescription ne court point,*” or “*contra non valentem agere nulla currit praescriptio*”. In short the principle is referred to as “*empêchement d'Agir*” (prescription does not run against a person prevented from bringing an action), which I shall refer to from time to time as “the maxim”. For her part, Advocate H Dinning argued, concisely, that it would be wrong in Guernsey, notwithstanding the observations in Vaudin (5), to resurrect, in effect, a long dormant principle of customary law in the way that the Jersey courts had done in the late 1990's.

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A In my view, the maxim undoubtedly forms part of the customary law of Guernsey as far as
concerns cases founded on breach of contract, and, certainly prior to the enactment of the
Law Reform (Tort) (Guernsey) Law, 1979, did so in cases in tort. I make that bold
statement with confidence, based as it is on the views expressed by the Judicial Committee
B of the Privy Council in the case of Vaudin (5), a case arising from litigation in Sark but
directly binding on me. The judgment of their Lordships was delivered by Lord
Wilberforce, and at p. 586 D he said this –

C *“Suggestions were made in the course of argument before the Court of Appeal and
their Lordships that the appellant would wish to argue that the period of prescription
should not run against him while he was “ empêché d’agir.” 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
D expression does not extend to the length contended for by the appellant.*

*The key to its scope is provided by the word empêchement itself. There must be an
impediment from acting : or as the Latin maxim states “contra non valentem agere
nulla currit praescriptio.” Older authorities provide a number of examples of what at
E various times were accepted as impediments: absence on public business (Terrien,
l.c. p. 332), absence in the service of the state if there is nobody entrusted with his
affairs (Pothier (1831), vol. V., p. 365), being a prisoner of the enemy (Terrien, l.c. p.
332), or various types of personal incapacity. These cannot necessarily be carried
F forward into modern times without consideration of the essential question whether in
modern conditions they bring about an impediment from acting. Mere absence
overseas, even in Crown service, does not in their Lordships’ opinion qualify: it may
be the cause of ignorance, but not of impediment. As regards ignorance, this too is
G mentioned in some of the Commentators, but only when brought about by fraud or
misrepresentation (see Carey, l.c. p. 207).*

*If the appellant wishes to rely upon empêchement under this head, he must do so
with full supporting particulars of the fraud or misrepresentation relied on and he
H must conduct his case strictly within the limits of the particulars stated. Again he
cannot be allowed to put forward a general allegation as support for a fishing
inquiry or cross-examination.”*

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A I would also refer to another binding authority, namely Smith (6). At p. 16 of the report, Sir Godfray Le Quesne Q.C. after referring to the passage of Lord Wilberforce's speech in Vaudin (5) to which I have just referred, said this –

B *“This passage appears to recognise the validity of empêchement d’agir as a general principle. It is fair to add, first, that it was not necessary for the decision of the case, and secondly, that Lord Wilberforce’s remarks were made in the context of a discussion of the forty year period of prescription for immoveable property. It does not necessarily follow that the suspension of prescription on account of*
C *empêchement applied to all periods of prescription or that something which amounted to empêchement for the purposes of one period necessarily did so for another. Nevertheless, we regard the passage which we have quoted as authority recognising that the maxim contra non valentem agree nulla currit praescriptio is a*
D *principle of justice applicable in Guernsey unless there is some good reason of policy or established authority to displace it.*

The discussions of the concept of empêchement by the Norman writers are also limited by their context to particular periods of prescription. Terrien (BK. VIII, Ch. 28, para. 3) discusses empêchement in the context of the prescriptive period of ten years laid down by an ordonnance of Louis XII for actions to set aside transactions on the grounds of fraud, duress, minority and other vitiating circumstances. He divides empêchement into de droict ou de fait. As examples of empêchement de
E *droict he lists “la femme mariée, qui ne peut ester en jugement sans l’authorité de son mary: ou le fils de famille sans l’authorité de son père: ou le mineur sans l’authorité de son tuteur.” He also gives various examples of empêchement de fait, some of which are cited by Lord Wilberforce in the passage to which we have*
F *referred.*

G *We draw the following conclusions from this passage of Terrien:*

- H (1) *The references to femme mariée, fils de famille and mineur show that, in the view of Terrien, a person was empêché de droict if he could not sue as of right, notwithstanding that he could sue with the consent of another or that another could sue on his behalf;*
- I (2) *the citation of this passage of Terrien by Lord Wilberforce in Vaudin v. Hamon shows that, in the opinion of the Board, the principles discussed by Terrien were*

A *of general application, notwithstanding that they appear in the context of Louis XII's Ordonnance and not of the forty year period for immoveables which was under consideration in that case;*

B (3) *although Lord Wilberforce cautioned against applying Terrien's examples of empêchement uncritically in modern times, this warning has more force in relation to empêchements de faict than to the empêchements de droict. If the principle is that a person is empêché de droict if he cannot sue as of right in his own name, this remains true of a minor today."*

C I have quoted from those passages from the two authorities at length, not merely for completeness, but also to make a few comments on them in their proper context.

D (i) In the passage quoted from Vaudin (5), Lord Wilberforce expressed their Lordships' opinion that the maxim did not extend to the length contended for by that appellant. As this opinion was relied upon to some extent by Miss Dinning, I think that an explanation of the background to what his Lordship said is desirable. At various stages during the course of the very lengthy litigation, Mr. Vaudin made, I think no more than vague, allegations of some sort of conspiracy against him regarding the concealment or the destruction of certain records held in the church register in Sark. The Guernsey Court of Appeal (Civil Division-report No. 3) 1969, dealt with this matter succinctly. The Bailiff of Jersey, giving the Judgment of the Court, stated (at p.20) –

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G *"The Respondent, while ultimately admitting that he could not press any allegation of fraud did rely upon the following passage from Laurent Carey's Essai sur Les Institutions Lois et Coûtumes de l'île de Guernesey:*

H *[La prescription]ne court contre qui est empêché d'agir, ou qui est ignorant de son droit au moyen de fiction ou de deception dont on avait usé contra envers lui." (p.207)*

I *"Of this it is sufficient for us to say that the Respondent did not suggest any facts which could possibly support an answer to the plea of prescription on either of the grounds suggested by Carey."*

A Their Lordships dealt equally succinctly with this claim by Mr. Vaudin, for which see the last paragraph of the passage I have quoted from Lord Wilberforce's judgment. (p. 586 H).

B Mr. Vaudin additionally sought to rely on the maxim with regard to his absence from Sark until 1962 in the service of the Crown overseas. On this, Lord Wilberforce observed "*mere absence overseas, even in Crown Service, does not, in their Lordships opinion qualify: it may be the cause of ignorance, but not of impediment.*". (p. 586 G).

C (ii) In Smith (6) the Court of Appeal was concerned principally with *empêchements de droit* and not with *empêchements de faict*, but Sir Godfray Le Quesne did observe that Lord Wilberforce's warning, against applying Terrien's examples of *empêchement* uncritically in modern times, had more force in relation to *empêchements de faict* than to *empêchements de droit*.

D (iii) Sir Godfray Le Quesne concluded that the maxim was a principle of justice applicable in Guernsey unless there was some good reason of policy or established authority to displace it (at p.17). I know of no such established authority. The question as to whether or not there are any good reasons of policy why the maxim should be displaced falls for consideration hereafter.

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F I now refer to two recent Jersey Court of Appeal cases.

The first is Maynard (3). The headnote is as follows:-

G "*The plaintiff-respondent brought an action in the Royal Court for damages for the defendant-appellant's alleged failure to protect him from exposure to hazardous waste.*

H *The plaintiff, who was employed by the defendant Committee at a waste disposal plant, alleged that during his employment he was exposed to waste material containing asbestos from which the defendant should have provided adequate protection. Many years after leaving this employment, the plaintiff was diagnosed as suffering from asbestosis and he subsequently brought an action in both contract and tort for damages.*

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A *The Royal Court (Le Cras, Lieutenant Bailiff) heard the question whether the*
plaintiff's action was prescribed as a preliminary issue of law, proceeding on the
assumption that the facts were as alleged by the plaintiff. The court held, inter alia,
that the plaintiff's cause of action in tort accrued on the first date on which he could
B *properly be awarded damages for the harm done, regardless of whether at that time*
he knew or could have known about it; however, the plaintiff's action was not
prescribed because under the Jersey coutume, time did not run against a person who
was incapable of bringing an action, by virtue of the maxim contra non valentem
C *agree nulla currit praescriptio, which applied in the present case to suspend*
prescription against the plaintiff, since he had been legitimately ignorant of his
condition and could not therefore have brought his action within the limitation
period. These proceedings are reported at 1995 JLR 65.

D *The defendant appealed against this decision and the plaintiff cross-appealed. The*
defendant submitted, inter alia, that (a) the plaintiff's cause of action had accrued
when the alleged injury was originally received during his employment and the
plaintiff's action was therefore prescribed; and (b) prescription had not been
E *suspended because the maxim contra non valentem agree nulla currit praescriptio*
applied only to the specific instances of inability to pursue one's legal rights
mentioned in the customary sources, which did not include latent illness; the maxim
could not be said to apply generally to all those who were ignorant of the existence
of their causes of action, such ignorance on its own not amounting to an
F *"empêchement de fait" or factual impossibility which prevented a plaintiff from*
pursuing his legal rights, and any injustice caused to the plaintiff by the lack of a
legal remedy was curable only by legislation.

G *The plaintiff submitted in reply, inter alia, that (a) it was unreasonable to hold that*
his cause of action accrued before he could possibly have known of his illness;
however, (b) the court had properly held that prescription had been suspended by
virtue of the maxim contra non valentem agree nulla currit praescriptio, which
applied to anyone who, without negligence on his part, was ignorant of his cause of
H *action, such ignorance amounting to an "empêchement de fait."*

I *The court also considered the propriety of the procedure adopted by the Royal Court*
in the present case, namely, the consideration of the question as a preliminary issue
of law on the basis of hypothetical facts the truth of which had yet to be established.

A *Held, dismissing the defendant's appeal and making no finding on the cross-appeal:*

B (1) *Prescription would not run against the plaintiff (or indeed a potential plaintiff) if he could show at trial that he had been prevented from pursuing his legal rights by an empêchement de fait, or practical impossibility, under the maxim contra non valentem agere nulla currit praescriptio, which clearly applied to actions both in contract and in tort. Although ignorance of the necessary facts was alone insufficient to invoke the maxim, it could be a part of the necessary impediment, which in modern conditions could arise from a variety of circumstances. In the present case, the plaintiff would have to show that it would have been impossible for him to discover his illness any earlier, e.g. if he had suffered no obvious symptoms of asbestosis and had had no reason to seek medical examination (page 351, lines 26-35; page 354, lines 21-31; page 335, line 26 – page 356, line 10).*

D (2) *In the light of the above, it was unnecessary to decide when the plaintiff's cause of action accrued and whether it could accrue without the plaintiff's knowing or having the means of knowing about his illness. The trial could now take place to determine the facts relevant to the suspension of prescription. However, the procedure adopted in the present case, namely, the hearing of the issues of law as a preliminary matter, was likely to increase the costs and the time required to hear cases and it would be preferable for the Royal Court to hear all the relevant issues together in future cases (page 359, line 25 – page 360, line 19).*

F Before referring to various passages in the judgment of Southwell JA, I would observe that, of the authorities and texts cited in that case, some are of equal, if not greater, application in Guernsey; for example Carey (e), Pothier (f), Terrien (c) and Vaudin (5).

G Southwell JA, having just referred to the passage of Lord Wilberforce's opinion in Vaudin (5) which I have cited, continued (at p. 349. 42): –

H *"The texts which have been cited to us for the purpose of determining the scope of the maxim in Jersey law include those cited in Vaudin of Terrien, Pothier and Carey. All the texts cited to us make it clear that (a) as stated in Vaudin, the key to the scope of the maxim lies in the " empêchement," the impediment preventing the plaintiff from acting; (b) the various circumstances referred to in the text as constituting empêchements within the maxim are examples, and no more than examples, of the*

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A operation of the maxim: they do not constitute an exhaustive or exclusive list; and (c)
as stated in *Vaudin*, the examples of the operation of the maxim given in the old texts
“cannot necessarily be carried forward into modern times without consideration of
the essential question whether in modern conditions they bring about an impediment
B from acting.” At a time when a personal telephone may be used from the higher
slopes of Mount Everest or the centre of the Sahara Desert, and when rapid travel by
air is a normal part of everyday life, it could not be suggested that mere absence
overseas gives rise to a relevant impediment. But, to take extreme examples,
C imprisonment in a Siberian or Chinese labour camp or being kidnapped and held
hostage by guerrillas would give rise to impediments falling within the scope of the
maxim.”.

D Having then identified the texts on Jersey, Guernsey and Norman customary law, and
various French texts (against the use of which he advised caution, save perhaps for
comparative purposes) to which the Court had been referred, Southwell, J.A. continued at
p.351 12 –

E “Read as a whole, these texts show the scope and operation of the maxim quite
clearly. Empêchements are conveniently divided into empêchements de droit and
empêchements de fait. Empêchements de droit include minority, lack of mental
capacity and the like, though this form of impediment may not apply if a curator has
been appointed to look after the affairs of the person concerned. Empêchements de
F fait may include being involved in war and civil disturbance and, in special
circumstances, absence. These are, as we have said, examples of the application of
the principle embodied in the maxim.

G Mr. Pallot submitted that the examples given in the texts are exhaustive; but in our
judgment, the texts clearly show, as the Privy Council indicated in *Vaudin*, that the
examples there listed are no more than examples and that the maxim can be applied
to new circumstances, but only when they are consonant with the underlying
principle and not otherwise.

H The principle underlying the application of the maxim to empêchements de fait is, in
our judgment, this. Prescription does not run and is suspended while the plaintiff or
potential plaintiff is prevented by a practical impossibility from exercising his right
I to commence or to continue legal proceedings. Such a practical impossibility may

A exist as a result of war, civil disturbance, or imprisonment. or being held hostage.
We emphasize the words “may exist,” because, e.g. mere imprisonment in Jersey
would not be an impediment giving rise to a practical impossibility and even
involvement in a war might not give rise to such an impossibility in some
B circumstances.”.

Southwell JA then particularly identified the references to ignorance (in the context of
empêchement) to be found in some of the texts (Terrien (c), Poingdestre (d), Carey (e),
Pothier (f), Dunod (g), Merlin (h), and Dalloz, and continued (at p.354.20):-

C “We can summarise our conclusions so far on the application of the maxim in Jersey
law in this way:

- (a) It is common ground that the maxim can apply to the customary law
D prescription of claims in contract after 10 years, and is preserved by Article 2
of the 1960 Law in relation to the prescription of claims in tort after 3 years.
(b) The principle underlining the operation of the maxim in Jersey law is the
practical impossibility of the plaintiff being able to exercise his rights.
E (c) Mere ignorance does not bring the maxim into operation.
(d) Where there is an impediment creating such a practical impossibility, of
which ignorance is a part, then the maxim may come into operation and
prevent time running.”.

F The second Jersey case to which I would refer is that of Boyd (7). The basic material facts,
as set out by Beloff, J.A., who gave the main judgment of the Court, were as follows. On 16
November 1974 the appellant was married to a Mr. Alsford from whom she had since been
divorced. Their matrimonial house was Verdala, which was jointly owned. On 28 February
G 1986 Barclays Bank (“the Bank”) (with whom they banked) obtained a charge over Verdala
because no satisfactory proposals had been made to discharge an overdraft in the sum of
£29,220.03 owed to it by them. On 5 March 1986 the Bank made formal demand for
repayment of the overdraft. On 28 November 1986 the Royal Court ordered “*dégrévement*”
H and “*realisation*” of Verdala in favour of the Bank. On 6 January 1987 the Bank accepted
Verdala as “*tenant après dégrévement*”. On 13 February 1987 (“the date of registration”),
Verdala (Clos de la Rocque) Limited, a company owned by the Bank (“the company”) was
registered as a “*tenant après dégrévement*”, and shares in the company were sold in order to
I discharge the Bank’s debts. It was this process, by which the Bank enforced its rights as

A creditor, which that appellant averred could have been prevented or mitigated by appropriate use of "*licitation*". Advocate Le Cornu acted for the Appellant from August 1984 until 13 April 1987 (the respondents' assertion) or 23 April 1987 (the appellant's assertion). From 23 April 1987 Advocate Le Quesne was appointed to act for the appellant in lieu. By a letter dated 21 August 1989 from the Judicial Greffier confirming earlier oral advice in the previous month, the appellant was, she asserted, first made aware of her potential right of action against the respondents. On 21 April 1997 the appellant's proceedings against the respondents for negligence or breach of contract were issued.

The Jersey Deputy Bailiff ruled (6th August 1998) that the appellant's action in contract (a 10 year prescription period) as well as in tort (a 3 year prescription period) was *prima facie* statute barred; and that there was no basis for suspending the period of prescription so as to allow her claim to proceed. The appellant appealed against the ruling, but conceded that the action in tort was necessarily statute barred. The appeal, therefore, proceeded solely on her claim in contract.

Beloff JA summarised the parties' submissions as follows:-

"19. *It is accepted by the Respondents, for the purpose of this appeal, that the latest date for licitation to be effective was the date of registration. Accordingly, on that hypothesis, any breach of contract by the Respondents must have taken place prior to 13 February 1987. Therefore, subject (i) to the accrual point (i.e. when does a cause of action in contract arise in Jersey?) (ii) to time not running, the Appellant's action was clearly prescribed by about two months.*

20. *The Appellant's case as to prescription, in a nutshell, is that she was, through the Respondents' fault, ignorant of her possible cause of action against them until on or about the 21 August 1989, so that time did not run against her until then. (Empêché d'Agir)."*

The issues arising on appeal were stated by Beloff, J.A. to be as follows:-

Issues

25. *The following issues of Jersey law therefore arise:*

(i) *Is a person to whom a lawyer in breach of contract fails to give appropriate advice able to assert that time does not run against him or her in respect of an action*

A *against the lawyer for such breach of contract, until such person can reasonably be expected to be made aware, or is in fact made aware, of the lawyer's breach?*

("prescription")

B (ii) *Is it relevant that such person does not institute proceedings promptly when he or she should have been or is aware of the lawyer's breach of contract?*

("promptness")

C He then continued:-

D *"26. In Maynard, this Court recognised that the maxim upon which the Appellant relies (para. 20 above) was part of the customary law of Jersey. A comprehensive analysis was made of such classic commentators as Terrien: (Commentaries du Droit du Pays et Duché de Normandie) and Poingdestre: (Les Lois et Coustumes des I'lle de Jersey).*

E Beloff JA then referred (at p.354) to the summary of the conclusions given by Southwell JA in Maynard (3), which I have cited above, with regard to the application of the maxim in Jersey law, and continued:-

F *"In those circumstances I see no reason, even were it open to us to do so, to review the authorities further. It is, however, to be noted that Terrien considers that the 10 year period could be suspended for "crainte, violence ou autre cause legitime empeshant de droit ou de fait" – (op.cit, Paris 1578, p. 331) which states the relevant principle in highly pragmatic terms.*

G [I would interpose here to add that Le Marchant (j), in commenting on Livre VIII Chapitre 28 of Terrien (c) ("De Clameur revocatoire, et autres rescisions de contract"), and specifically on certain contracts entered into through deception ("vil prix"), states –

H *".... Il est evident, par les Article 1 et 3 de ce chapitre et la glose et note dessus, qu'un homme qui a esté deceu en un marché hérédital, soit qu'il soit vendeur ou acheteur, d'outre moitié du juste prix, est recevable à suivre sur la ditte deception la rescission du contract, et en obtenir l'effect, ou du moins supplément si il est vendeur, ou restitution si il est acheteur, de l'autre moitié du juste prix, et ce dans le*

I

A *terme de dix ans prochains venant après le passément du contract; et mesme depuis le dit temps passé (i.e. 10 years), en faisant paroistre que la violence ou la crainte, ou autre empeschement légitime, l'auroit de fait ou du droit engardé de faire sa pour suite dans le dit terme;”.*

B By comparison, Article 2251 of the Code Civil states – *“La prescription court contre toutes personnes, à moins qu’elles ne soient dans quelques exceptions établie par une loi”* – upon which Dalloz (i) comments – *“La prescription est suspendue au profit du créancier toutes les fois qu’il peut, aux yeux de la loi, être réputé avoir ignoré l’existence du fait qui donne naissance à son droit ou à son intérêt, et qui ouvre son action”.]*

Beloff, JA continued

D *27. In Maynard it was also said at p.351 “The maxim can be applied to new circumstances, but only when they are consonant with the underlying principle, and not otherwise.” This again, is consonant with the breadth of Terrien’s approach.*

E *28. In my view, the epithet “practical” deployed in Maynard softens rather than strengthens the concept of impossibility. It requires a consideration of what is in fact, not in theory, possible. While ignorance of a cause of action does not per se trigger a suspension of the limitation period, it may, in appropriate circumstances, constitute or create a relevant impediment. The issue before us is of what those circumstances may consist.*

F *29. The test, as it seems to me, is whether the ignorance of the cause of action is reasonable in all the circumstances, reasonable that is both in respect of the facts giving rise to the cause of action and that a cause of action arises in such circumstances. While ordinary cases of professional negligence, as in this case, may be against a lawyer for advice unconnected with court proceedings, it is difficult to see how it could ever be reasonable to assert that one was unaware that a lawyer owed obligations in contract. There may be cases, however, where the law is uncertain e.g. in respect of an advocate’s conduct connected in some way with court proceedings, where ignorance even of the possibility of a cause of action may be reasonable.*

I

A 30. Reasonableness as a test to distinguish between relevant and irrelevant for this
purpose seems to me to be appropriate; it engages a much deployed legal standard;
it satisfies the requirement of perceived public policy; it gives appropriate latitude to
B the potential claimant without too seriously undermining the rationale of
prescription periods. As Poingdestre said, “un home ayant esté empesché d’agir, et
n’estant coupable d’aucune negligence, il n’y auroit pas de raison de le punir pour
une faute supposée, de laquelle il ne seyoit pas coupable” *op.cit.* It is, most
C importantly, inherent in, although not exhaustive of, the test of “practical
impossibility” laid down in *Maynard*.”

C With regard to the “promptness” point, (which was in fact abandoned by the respondents) – I
refer to this because it formed part of Miss Dinning’s submissions, - Beloff JA commented
to the effect that if someone has the right to bring an action in a specified period, delay in
D starting that action within the period could not affect the right.

I now refer to part of the judgment of the Southwell JA, namely:–

E “Dealing next with the first part of the judgment in *Maynard* this Court there stated
the test of an “empêchement de fait” to be whether the potential plaintiff was
prevented by a practical impossibility from exercising his right to bring legal
proceeding (see the summary which Mr. Beloff has already quoted). I wish only to
F emphasise two points on this test: first, the words “practical impossibility” are used
in contradistinction to a “theoretical impossibility”. The difference is, as Mr. Beloff
has indicated, a substantial one. Secondly, the test is to be applied objectively to a
reasonable person in the particular circumstances in which the plaintiff was placed.
It is not a subjective test.”

G For completeness, I also cite the brief judgment of Sumption, J.A., which was as follows:-

H “I agree with the judgment which Mr. Beloff has given. I add only two points, both
of which are designed to draw attention to the limits of what we have decided. The
first is this: in my judgment ignorance may suspend the running of a prescription
period in cases where the law regards that ignorance as reasonable.

I What ignorance the law regards as reasonable is a matter of legal policy, the precise
limits of which will need to be explored from case to case. I am satisfied that the law
regards ignorance as reasonable as a matter of legal policy where there was no

A *means by which the particular plaintiff could reasonably have been expected to*
discover the facts on which her cause of action was based. I do not accept that
policy requires us to apply the same principle in a case where the plaintiff is ignorant
B *not of the facts upon which her cause of action is based, but of the existence of a*
legal remedy against the defendant arising out of those facts. There seems to me to
be an important distinction to be made between those two cases and nothing that has
been decided today bears upon the latter one.

C *Secondly, I should prefer to leave to an occasion when it arises the question when a*
cause of action arises in contract. As at present advised I am not convinced that the
law of England on this point is either unsatisfactory or different from the law of
Jersey.”

D The unanimous decision of the Jersey Court of Appeal was to uphold the appeal, Beloff JA
stressing that the area of any factual investigation at trial would be limited, in that, apart
from the “accrual point”, the Appellant would only need to show a “practical impossibility”
of instituting proceedings for breach of contract which subsisted up to 21st April 1987, that
is, less than 10 years before the proceedings were actually instituted.

E 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. The parameters of the maxim, including its
F application in circumstances where ignorance is part of the impediment, will need to be
developed judicially on a case by case basis. The overall guiding principle is to be obtained
from Vaudin (5), and I adopt the “practical impossibility” test laid down, and explained, by
the Jersey Court of Appeal in Maynard (3) and Boyd (4). The examples in the customary
G texts are to be treated as examples only, some of which may no longer be relevant; whilst
new examples in circumstances inconceivable in earlier centuries will undoubtedly arise
(e.g. asbestosis cases). I am reminded of the wise words of the late Professor Jean Yver,
(Professeur de Droit Normand at Caen University), pre-eminent amongst all authorities on
the Norman Coutume, that the essence of that Coutume was “l’esprit”. Understand
H “l’esprit”, he advised his pupils, and then apply it appropriately. That advice seems to me
equally true to the application of the maxim to circumstances in Guernsey as they arise
today. In any particular circumstances, would it be consonant with or inherent in the tests
adumbrated in the texts or cases, to apply the maxim (to adopt the reasoning of Beloff JA)?

I

A Central to the instant claim are the allegations of a special relationship between the parties and the failure of the Defendant to fulfil its duties arising therefrom. These are matters of fact which are not for me to determine. Accordingly, I conclude that, whether or not the Plaintiff's cause of action for breach of contract occurred in June, 1991, and, therefore, theoretically, was prescribed in June, 1997, it remains open to the Plaintiff to seek to establish that prescription was suspended until the 4th September, 1992, or a few weeks earlier, (i.e. less than 6 years before these proceedings were instituted), on a proper application of the maxim to the facts of this case. (It would, naturally, at this stage of the proceedings not be appropriate for me to give any indications as to how the Plaintiff might seek to do this). The issue can only be determined at trial, after the establishment by the Jurats of the necessary facts. Accordingly, whether or not the Defendant's Exception de Fonds in this regard has merit has to await determination by the trial court.

B

C

D As Advocate Wessels did not argue the point for the purpose of these particular proceedings, the Plaintiff can also, at the trial, if it is so minded, seek to persuade the court that the Exception can be defeated on the grounds that a cause of action in contract arises at some time after its breach, this point, strictly speaking, being separate from the *empêchement* point. Notwithstanding the reservations of Southwell, JA(to which I have already referred) as to whether the date of the accrual of a cause of action in contract in Jersey law is the same as in England and Wales, it is still my view (as I held in Stefani) (2), (until I am persuaded otherwise), that that date in Guernsey is determined in accordance with the English principles - it is the date of breach regardless of knowledge; or to put it more accurately, the principles of English law happen to be the same as, or closely similar to, those of Guernsey law (see, for example, but no more, the quotation above from Le Marchant, p.388, with regard to the date of the accrual of the cause of action in "vil prix" cases).

E

F

G In the large majority of purely contractual cases (that is, when there is no concurrent action in tort) this does not seem to me to be an unsatisfactory position. In the small minority of such cases, any "*wholly unreasonable result*", to adopt the words of Bingham, L.J. in Moore (8) (an action in fact both in contract and tort) can be, if it is appropriate to do so, avoided by the *empêchement* principle. The maxim provides for a judicial solution to potential travesties of justice, as, in the view of Beloff, J.A., it does in Jersey. Indeed, in my view, it accords with the flexibility which is a marked feature of our customary law This in turn answers Sir Godfrey Le Quesne's question in Smith (6), as to whether there are good reasons of policy to displace the maxim. Very much to the contrary, in my view; for the reasons just stated, its retention is necessary and desirable.

H

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A Empêchement d'Agir (in tort)

In my foregoing consideration of whether or not the principle of *empêchement d'agir* is still part of our customary law, I deliberately limited my conclusions to cases of breach of contract. It is abundantly clear, from the two Jersey cases, that the Jersey Court of Appeal was in no doubt that the maxim applies in that jurisdiction both in contract and in tort. The reasoning in Vaudin (5) and Smith (6) must be to the same, but binding effect in this jurisdiction.

B

C With regard to cases in tort, Southwell JA specifically referred to the fact that it was preserved by Article 2 of the Law Reform (Miscellaneous Provisions) (Jersey) Law, 1960. That Article provides as follows –

“Extension of period of prescription of actions founded on tort

D

- (1) *The period within which actions founded on tort may be brought is hereby extended to three years from the date on which the cause of action accrued.*
- (2) *The provisions of this article shall be without prejudice to any rule of law allowing for the extension of such a period as aforesaid.”.*

E

In contrast, section 4, the first section in Part II (headed “Limitation of Actions”) of the Law Reform (Tort) (Guernsey) Law, 1979, (“the 1979 Law”), provides –

F

“4.(1) Notwithstanding the provisions of any enactment or any rule of law, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

G

2) This section shall have effect subject to the provisions of the next succeeding section.”. [Section 5 relates to the time limit (basically three years) in actions for damages for personal injuries].

I therefore have to decide what was the effect of the provisions of Part II of the 1979 Law on the application of the maxim on cases in tort.

H

I shall review these provisions in due course, but before doing so I think it would be relevant and helpful to look at the history of the legislation.

I

A On the 25th April, 1951, the States resolved to constitute a committee to be known as the Accident Law Reform Committee. The Committee had the following mandate:-

“To consider and report on:-

B *(a) how far the recovery or proceedings for the recovery of damages or compensation in respect of personal injury or death should affect, or be affected by, the right, arising out of the enactment of the Projet de Loi at present entitled “National Insurance (Guernsey) Law, 1949” to receive from the States Insurance Authority benefits in respect of that injury or death;*

C *(b) the need to amend any legislation now existing in Guernsey which deals with the right of a person to recover damages or compensation in respect of personal injury caused to himself or another;*

(c) what further legislation may be necessary;

D *(d) and in so doing to take note of the reports of the Departmental Committee on Alternative Remedies set up by the Secretary of State for Home Affairs on the 19th July, 1944.”.*

E The Committee reported back to the States on the 26th January, 1972, (see Billet d’Etat II 1972 p.86), which report included:-

“The matters on which we were asked to report in paragraph (a) of our mandate were dealt with in the reports the States Insurance Authority when that authority recommended to the States the introduction of social insurance to which effect was given by the Social Insurance (Guernsey) Law, 1964, and appropriate provisions are contained in that law.

F

We have dealt with the other matters upon which we were asked to consider and report under the following heads:-

G

(1) Contributory negligence.

(2) Prescription.

H

(3) Damages for loss of expectation of life.

(4) Joint and independent tortfeasors.

(5) Proceedings in tort between husband and wife.”.

The relevant part of the report relating to prescription states –

I

"2. Prescription

A *It is considered that under the law of this Island an action in tort is barred after the passing of a year and a day from the date on which the cause of action accrued. We*

B *are of opinion that that period is too short particularly in the case of actions for damages in respect of personal injuries. Frequently it is found after proceedings have begun that the eventual condition or degree of incapacity is more serious than was first estimated and that the amount of damages to be claimed should be*

C *increased. The result is that the plaintiff may tend to exaggerate every feature of his claim in the first instance to ensure that, should the worst happen, he will have claimed an adequate amount. The period within which actions founded in tort must be brought in the United Kingdom is 6 years, with an important exception. In our*

D *opinion the basic period of 6 years is, in the case of actions for personal injuries, too long because it is desirable in the interests of justice that such action should be brought to trial quickly while the evidence is still fresh in the minds of parties and*

E *witnesses. This objection is met in the United Kingdom by the exception to which we have referred by the Law Reform (Limitation of Actions, etc) Act, 1954, which amends the Limitation Act, 1939, in which is contained the basic 6 year rule, and provides that in the case of actions for damages founded in certain classes of tort where the damages claimed consist of or include damages in respect of personal injuries to any person, the period of limitation is, in general, 3 years. We agree with that period in those cases." (I would, in passing, note the words "in general").*

F *We recommend, therefore, that in the case of actions for damages for negligence, nuisance or breach of duty where the damages claimed consist of or include damages in respect of personal injuries to any person, the period of limitation should, in general, be 3 years. All other actions in tort, however, should be prescribed only after a period of 6 years." (Again the use of the words "in general").*

G

H [The Committee further recommended that a Law of 1900, relating to compensation to the families of persons whose death has been caused by accident, should be similarly amended by increasing the prescription period to 3 years].

The Resolution of the States reads as follows:-

I "(1)....

A (2) *That, in actions for damages arising from negligence, nuisance or breach of duty, where the damages claimed consist of or include damages in respect of personal injuries to any person, the period of limitation be 3 years; all other actions in tort, however, shall be prescribed only after a period of 6 years.”.*

B (The words “in general” do not appear).

Silence then descended again on this legislative field until the 30th November, 1978, (see Billet d’Etat XXI 1978 p,701), when the States approved the Projet de Loi entitled “the Law Reform (Tort) (Guernsey) Law, 1978”, which was in the terms of the Law which in due

C course received the sanction of Her Majesty and was brought into force on the 1st July, 1979.

When the States approved the Projet de Loi on the 30th November, 1978, they did not have the benefit of any written explanation as to why various provisions relating to limitation/ prescription (that is, in Part II of the Projet) had been inserted for which there had been no

D previous States Resolution. [It is possible, of course, that an oral explanation was given]. I refer, most specifically, to section 5 (that is, in relation to the time limit for personal injuries, the provisions relating to the date of a plaintiff’s knowledge and how that was to be determined), to section 8 (the power to override the time limits in personal injuries cases), to

E section 9 (disability generally) and to section 11 (relating to the postponement of the limitation period, generally, in cases of fraud or mistake). I suppose these provisions could fall within the ambit of “in general”, the words used in the 1972 report, but that is hardly satisfactory.

F Whilst this legislative process was taking its laboured course, proceedings had been issued (in October, 1977) in Smith (6). My previous reference to this case was in the context of the application of the maxim, but the case was even more fundamentally concerned with the correct prescription period in actions for damages for personal injuries. The defendant had

G pleaded by way of an Exception de Fonds that the plaintiff’s action was prescribed because it was not commenced within one year and one day from the date of the motor accident, the Exception being upheld on the 10th January, 1980, by Frossard DB, who considered himself, correctly, bound by the decision in Williams (9). The Guernsey Court of Appeal, however,

H in May 1981 held that the correct period of prescription in such cases, prior to the coming into force of the Law Reform (Tort) (Guernsey) Law, 1979, was 6 years, and not one year and one day as had previously been generally believed.

I

A From which, of course, it is obvious that the very basis for the enactment Part II of the 1979 Law was flawed, and the effect of the legislation was to reduce rather than extend the limitation period in personal injuries cases. For completeness, and fairness, I should add that the other provisions of the 1979 Law (Parts I, III, IV) reflect, at least generally, the Accident Law Reform Committee's recommendations regarding contributory negligence, joint and independent tortfeasors, and proceedings in tort between husband and wife.

B Before leaving the background to the enactment of the 1979 Law, I would wish to make one further point. 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 (k) at p. 314 et seq).

C I suspect that the Committee may not have fully appreciated that distinction, a factor to be borne in mind when I come to address the question of the 1979 Law on pre-existing rights.

D I turn then to the provisions of Part II of the 1979 Law.

E Advocate Dinning submitted that section 4(1) is clear and unambiguous in its very terms, namely that any previous enactment or rule of law (necessarily including the maxim) relating to the determination of whether an action in tort was prescribed or not, no longer had any application. The question was to be solely answered by the provisions of Part II of the Law. Whilst, she argued, it was dangerous to look too closely at the legislative process as revealed by the Billets, the undoubted purpose of the Law was to replace uncertainty with certainty. This the Law did. The two time limits (3 years or 6 years) had specific statutory exceptions added to them, some of which were common to both periods. Those exceptions were comprehensive with regard to personal injuries cases. With regard to other tortious cases,

F the exceptions may be less comprehensive but they are specific and must exclude all others. Section 11 (fraud and mistake) embraced what previously could have been regarded as *empêchements de fait*, and the legislature must be taken to have intended that no other means of suspending prescription would henceforth be available. The Law was precise in its terms,

G and to hold that the maxim could run in tandem with those terms would again create uncertainty, the opposite of the purpose of the Law. She acknowledged that the lacunae in Jersey law explained the recent developments regarding *empêchement*. To the extent that any lacunae remained in our law, they could only be addressed by legislative action.

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A For his part, Advocate Wessels chivalrously acknowledged that Advocate Dinning's argument in this regard – Part II was a self-contained code – was a fair one. The basis of his submission, however, was that prior to 1979 plaintiffs (and I would add, potential plaintiffs) had certain rights, even if imprecise. For those rights to be abolished the legislature must have expressed a clear intention to do so. That it had not done. He further argued that, as a matter of law, it was not wrong for the provisions of the 1979 Law to run in tandem with common law principles, to the extent that they subsisted. That might be unsatisfactory, but did not effect the strict legal position; it might be undesirable to have a separate, or complementary source of potential remedy, but such undesirable result should not affect the proper construction of the law, by the very terms of which, and in the preceding legislative process, the States had expressed no clear intention to abolish in their entirety pre-existing rights.

B

C

D He did, however, stress that his submission could only, logically, apply to all cases in tort; Part II could not be interpreted to the effect that the maxim was abolished in some cases (e.g. personal injuries) but not in others. The availability of the customary remedy might now be so unnecessary in practice in some cases (e.g. personal injuries), as effectively to abolish it for practical purposes; that fact, however, could not affect the strict legal position as to its availability, if by some, at the moment unforeseeable, chance it became necessary.

E I acknowledged the strength of both arguments; a conflict which I must now resolve.

F The reference to “any enactment” in section 4(1) must be to Article I of the Loi relative aux Prescriptions, 1889, which provides:-

“Toutes demandes mobilières et actions personnelles qui se prescrivent maintenant par le laps de dix ans, seront à l’avenir prescrites par le laps de six ans.”

G That Article merely further reduces the prescription period, following in similar footsteps of two earlier Orders in Council in the nineteenth century. It relates (as did its predecessors) both to actions in contract and in tort. Its terms are unambiguous, save for the problems associated with the words “qui se prescrivent maintenant”. These problems were central to the arguments in Smith (6), namely that the alleged customary prescriptive period in actions of the kind dealt with in that case – a year and a day (Terrien (c) Book VIII Chapter 29) – was specifically preserved by the terms of the 1889 Law; as subsequently confirmed in Williams (9).

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A That, in turn, is the explanation for the necessary reference to “any rule of law” in section 4(1) of the 1979 Law.

The picture which I believe emerges is this. During the course of the nineteenth century, the prescription period (but for all relevant purposes, only that period) in actions in contract and tort was successively reduced. From 1889 to 1979 all actions in contract and tort were prescribed by six years, except for the few cases to which Terrien’s *prescriptions annales* (c) (chapter 29) applied (which in any event, in my understanding, did not relate, for the most part to torts as we would know them). After 1979, the prescription period in all actions in contract has continued to be by six years. This explains why (the repeal section of the 1979 Law merely relating to two sections of the Married Women’s Property Law, 1928) the wording of section 4(1) is limited as it is – “notwithstanding the provisions of any enactment.... an action founded on tort...”. After 1979 the prescription period in all actions in tort was to be exclusively governed by the 1979 Law, thereby directly removing any uncertainty which might previously have existed with regard to the *prescriptions annales* as reserved in the 1889 Law.

E It is useful, I believe, now to consider the decision of the Guernsey Court of Appeal in Baron (10). The Plaintiff/Respondent in that case alleged that the Defendant/Appellant, through its servant or agent, had negligently manoeuvred its motor vessel in St. Peter Port’s harbour so as to collide with the Plaintiff’s yacht, thereby causing the damage for which the cost of repair was claimed. The Defendant pleaded prescription, relying upon section 8 of the Maritime Conventions Act, 1911, (“the 1911 Act”), which had been registered on the records of Guernsey on the 18th January, 1960, whereby the prescription period in respect of damage caused between vessels was two years (subject to certain provisos). It is important to note that the provisions of the Act, and therefore its registration in Guernsey, gave effect to an international convention. In response, the Plaintiff contended that the provisions of section 8 of the 1911 Act had been repealed by the 1979 Law, and in particular by section 4(1) thereof. Dorey B agreed with the Plaintiff’s submissions, holding that the two acts of legislation could not stand together.

H It therefore fell to the Guernsey Court of Appeal to analyse the effect of the enactment of section 4(1) of the 1979 Law on section 8 of the 1911 Act. Collins JA, delivering the judgement of the Court, stated (at p. 4):-

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A *"The Law of 1979 provides for express repeal by the provisions of section 20 of the Law read together with the schedule; this related only to the Married Women's Property Law of 1928. However, this is not necessarily restrictive in its effect, so that in my judgment it is open to a Court to hold that there may be an express repeal*
B *by one or more of the substantive provisions of the statute or law other than the repeal section, where this is sufficiently clear from the terms of that provision of the statute or law in questions."*

Having referred to a number of text books, Collins JA then continued (at p. 5):-

C *"No contemporary support is to be found outside the words of s 4(1) itself in this matter for finding that the States intended a partial or total repeal of s. 8 of the Act of 1911. In this jurisdiction it is permissible to refer to travaux préparatoires in the interpretation of a Law. We were provided with a copy of the report of the States Accident Law Reform Committee which was contained in Billet d'Etat II of 1972*
D *which preceded the Law of 1979, and found therein no reference to the Act of 1911 or its subject matter. Indeed the stated objective appears to have been to bring the Law in this Island into line with that in England.*

E *In these circumstances the Court can only find that there has been an express repeal if it is satisfied that the words used can have no other meaning. On that approach the Court would have to be driven to find that such a repeal was provided for despite the consequent departure from treaty obligations undertaken by the Crown and owed*
F *by this Island as a dependant territory. Reverting to the words in s. 4(1) and in particular the words comprised in the phrase "Notwithstanding the provisions of any enactment or any rule of law..." , these do not in my judgment constitute words of repeal, but rather are capable themselves of being no more than a recognition of the*
G *continued existence of the enactments and laws in question, and I so interpret the provisions. Accordingly, I find that there was no such express repeal as was contended for."*

H The facts in Baron (10) are, of course, in no way similar to those in this case, not least the question of departing from the Island's treaty obligations if the argument advanced by that plaintiff were correct. I nevertheless consider that the reasoning of Collins JA to be of considerable assistance, *mutatis mutandis*, with regard to Miss Dinning's submission in this case, that the wording of section 4(1) of the 1979 Law must be taken to be an express

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A abolition of all rules of the customary law, including the maxim, relating to the prescription period in tort.

If section 4 stood alone, it seems to me that it would be a perfectly legitimate construction of that section (apart from what the legislators might have specifically had in mind, or not, when they approved the Projet) to conclude that the reference to “the provisions of any enactment or any rule of law”, related solely to the length of the limitation period in tortious cases other than for personal injuries, and not at all to when a cause of action might accrue, or in what circumstances prescription might be suspended. That construction, in my view, accords both with the wording itself and with the ambit of the successive legislation, of which the 1979 Law merely forms the final part.

However, section 4(1) of the 1979 Law does not stand alone. One must look at the wider framework of Part II to try and discover if it was the intention, by necessary inference, to abolish all rules of our customary law relating to the suspension of prescription, there being no express statement either to that effect or to the contrary. The Law and the *travaux préparatoires* are silent in this regard.

Section 5(1) relates to any action for damages for negligence, nuisance or breach of duty (howsoever arising) where the damages claimed by the plaintiff for such fault consist of or include damages in respect of personal injuries. The limitation period is 3 years from (a) the date on which the cause of action accrued, or (b) the date (if later) of the plaintiff's knowledge. Full provision is then made for determining the date of a person's knowledge. That limitation period is additionally subject to section 8, which relates to the Court's power to override time limits in certain prescribed circumstances. The provisions of both sections reflect, and in the case of section 8 word for word, the equivalent provisions of the English legislation, contained in the various statutory amendments to the Limitation Act, 1939. (It should, however, be noted that no legislation has been enacted locally equivalent to the English Latent Damage Act, 1986).

Section 9 relates to the extension of the limitation period in all torts in cases of disability, which, by section 15(2), means minors or those of unsound mind.

Section 11 (which again relates to all torts) provides for the postponement of the limitation period in cases of fraud or mistake. It provides –

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A "11. Where, in the case of any action for which a period of limitation is prescribed by this law, either –

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or

B (b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the

C fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it." (my emphasis).

For completeness I would also add that section 6 relates to the time limit for actions under the Fatal Accidents Laws, section 7 relates to dependents being subject to different time limits, section 10 relates to the time limit for claiming contribution between tortfeasors, and sections 12 to 14 contain certain consequential amendments to existing legislation and transitional matters.

E With regard to personal injuries cases, *empêchements de droit* (by s.9) and *de fait* (by ss.5, 8 and 11) would clearly, in my view, appear to have been re-enacted comprehensively in statutory form. I find it difficult not to conclude that the customary principle has been to a large extent, if not wholly, subsumed by this explicit statutory regime.

F With regard to all other actions in tort, *empêchements de droit* (by s.9-disability) and *de fait* (by s.11 – fraud and mistake) have similarly been re-created, albeit with regard to the latter in more limited form, the omission of an impediment arising from ignorance being the most notable. I can certainly see force in Miss Dinning's argument (and see, for example, and G persuasively, Lord Reid's reluctant conclusions in Cartledge (11)) that because the Law specifically provides for the postponement of the limitation period in two cases, fraud and mistake, the legislature must be taken to have intended that postponement would not be available in any other instance. In other words, all other possible remedies, which might H have been applicable or available under the customary law, were to be abolished and replaced by the new statutory regime.

Moreover, whatever deficiencies there may have been by way of explaining the purpose and content of Part II of the 1979 Law, I have to assume that the draftsmen had Vaudin (5) in

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A mind, and thus the existence of the maxim, albeit that it had laid dormant for decades and
that the draftsmen had not had the benefit of any relatively recent local judicial interpretation
(as was subsequently to happen in Jersey some years afterwards). Of equal importance, it is
clear that the draftsmen specifically modelled the new Guernsey provisions (as directed by
B the States) on the equivalent English ones, (as Collins JA observed in Baron (10)); and thus
were bearing in mind, by necessary inference, the position in that jurisdiction both from the
point of view of statute and the common law.

What are the arguments to the contrary?

C I return to Baron (10). The Guernsey Court of Appeal, having found that s. 4(1) of the 1979
Law did not expressly repeal s. 8 of the 1911 Act, then went on to consider whether there
was an implied repeal. The issues with which the Court was concerned, and the reasons for
its conclusions, are to be found in the passage from the judgment of Collins JA (at p. 7)
D when he stated:-

*“Neither the phraseology used in the two provisions in question (i.e s. 8. and s. 4(1))
nor the surrounding circumstances lead me to the conclusion that the latter of the
E two provisions is to be treated as so inconsistent with or repugnant to the earlier one
as to constitute an implied repeal. The language is different and the basis upon
which I have held that the express terms are to be interpreted is itself inconsistent
with any such conclusion as is sought by the Appellants in relation to implication.*

F *Reference has already been made to the terms of the treaty obligations undertaken by
the Crown and owed (inter alia) by the Bailiwick of Guernsey and to the recognition
of those obligations in the title of and recitals to the Act of 1911. To the preference
of the particular act of legislation over the general, is further to be added the
G presumption that the legislature (in this case the States) does not intend to act in
breach of public international law.”*

The Court consequently held that there was no implied repeal of s.8 of the 1911 Act and
allowed the appeal.

H Because of the dissimilarity between the facts and issues in Baron (10) and those in the
present case, I cannot derive as much assistance with regard to an implied repeal as I was
able with regard to the question as to whether section 4(1) of the 1979 Law expressly
I repealed section 8 of the 1911 Act. Nevertheless the Court of Appeal did emphasise the

A principle that to constitute an implied repeal the provisions of a later enactment must be so inconsistent with or repugnant to an earlier one so as to lead to no other conclusion, thus restating well established principles of English law. Again *mutatis mutandis*, I apply that principle to the question as to whether the provisions of Part II of the 1979 Law, taken as a whole, are so inconsistent with or repugnant to the principles of our customary law as necessarily, by inference, to have repealed them in total. Or to put it another way, can the new specific statutory provisions ride in tandem with any subsisting principles of the customary law?

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C Further, I am attracted by the reasoning of the majority of the New Zealand Court of Appeal in Invercargill (12), namely that the inclusion in section 28 of the New Zealand Limitation Act, 1950 (corresponding to section 26 of the English Limitation Act, 1939 – the basis of Lord Reid’s observations), of the three specific instances of fraud, mistake and concealment, did not necessarily exclude the general law. I am fortified in this by the fact that, on my understanding of the background to the 1979 Law, it cannot be said that our legislators had any thoughts or intentions with regard to the general law, and whether to exclude it or not.

D Two policies matters are additional considerations.

E Firstly the “Le Quesne question” – is there a good reason of policy to displace the maxim? I have already answered the question in the negative with regard to contract; and in my view that answer is equally applicable in tort.

F Secondly, I believe that the principles, and the effect of such principles, relating to the suspension of prescription should be as similar as possible, be they in relation to claims which are founded in contract or in tort, and particularly when concurrent claims arise from the same conduct. It is worth emphasizing that, prior to 1979, where these principles were appropriate, they applied generally, without distinction, across both the contractual and tortious boards under our customary law. Whilst very much welcoming the statutory clarification of the position, particularly in relation to personal injuries cases, provided by Part II of the 1979 Law, it is my view that, as a matter of policy, the earlier general application, regardless of the technical legal basis of the claim, is worth preserving, unless bound by unambiguous legislation to the contrary. If not so bound, then the temptation to encourage divergence between remedies, depending upon whether an action was founded in contract or in tort, should be resisted. The example of divergent paths in England and Wales, in respect of claims in contract and tort generally, is not necessarily inspiring.

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A I gain, I believe, at least some support for this statement from the observations of Lord
Nicholls of Birkenhead in Nykredit (1) (at p. 1633 D) to the effect that, within the bounds of
sense and reasonableness, as a matter of principle the disparity between the time when
parallel causes of action in contract and in tort arise should be smaller rather than greater
B (which would have the effect, I accept, in England of advancing rather than retarding the
accrual of a cause of action in tort). And in Bell (13), Mustill LJ stated (at p. 511 E):-

C *“On the more general plain, I think it a pity that English law has elected to recognise
concurrent rights of action in contract and tort. Other legal systems seem to manage
quite well by limiting attention to the contractual obligations which are, after all, the
foundation of the relationship between the professional man and his client: as for
example, in the case of French law, via the doctrine of non cumul. That precisely the
same breach of precisely the same organisation should be capable of generating
D causes of action which arise at different times is in my judgment an anomaly which
our law could well do without. Nevertheless the law is clear and we must apply it.”.*

Finally I accept the validity of Advocate Wessels’ argument that it would be a wholly
unwarranted construction of Part II of the Law to hold that its effect was totally to abolish
E the existing customary law rights in certain areas, and not to abolish them in others. In that
regard, I, again, acknowledge the difficulty in deciding that with regard to personal injuries
cases certain residual customary common law rights continue to be available,
notwithstanding that the comprehensive statutory regime apparently provided for such cases
F in sections 5, 8, 9 and 11.

After this almost Cromwellian mental debate, I arrive at my conclusions (with equally
Cromwellian decisiveness, I trust).

G Part II of the 1979 Law did not abolish, in relation to tort, all the previous potential rights
and remedies derived from the customary law principle of *empêchement d’agir*. I
deliberately express the belief that, in relation to personal injuries cases, it will be very
difficult for any plaintiff to argue, successfully, that he has a remedy outside that provided
H by the statutory regime. In all other cases in tort, not least where ignorance might properly
form part of an “*empêchement*” or “practical impossibility” in being able to institute
proceedings, I find that the customary law remedy is still available, save to the extent that the
1979 Law provides otherwise (ss 9 and 11), the interpretation of such provisions falling to be

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A determined by the leading English authorities in respect of similar provisions in that jurisdiction (Gould (23), Maynard (3), for which see later).

The paramount considerations which have led me to this conclusion I summarise as follows:-

B (i) The lack of any express intention (either in the *travaux préparatoires* or in the Law itself) to abolish in their entirety the customary law rights and remedies. The reports to the States are deafeningly silent in this regard, including any consideration of the concept of prescription in Guernsey.

C (ii) Similarly, such abolition is not a necessary inference to be drawn from the provisions of Part II of the 1979 Law taken as a whole.

D (iii) The rationale of Part II predominantly relates to personal injuries cases, based on the perception (albeit in the event largely mistaken) that victims in such cases needed much greater assistance from the law. I can find no indication that the legislature at the same time intended to move in the opposite direction by removing potential rights and remedies from victims of other tortious conduct.

E Two areas of such conduct spring to mind (there may no doubt be others).

F Firstly, the type of case exemplified in Boyd (7), that is a claim against a professional adviser. (Although on appeal Boyd (7) was merely concerned with the contractual situation, the comments of Beloff JA would be equally applicable to a case in tort). In Boyd (7) Beloff JA said this (32 onwards):-

G *“It may well not be practically possible for a layman to evaluate legal advice given by a lawyer. It is certainly **prima facie** practically impossible for a layman to identify that he or she has not been given appropriate legal advice nor would it be reasonable, in ordinary circumstances, to expect him or her to do so. As a matter of policy it may indeed be asked, as the **amicus** put it, why a lawyer should be excluded from contractual liability for a hidden vice (i.e. failing to give advice) which manifests itself later? The lawyer would become the author of his own good fortune. As the Appellant observed, equally pithily:-*

H *If you take legal advice in relation to a dispute with another person,*
I *and your lawyer on whom you rely negligently fails to advise you on*

A *an aspect of that dispute and you suffer loss as the result of that negligent omission, then you could lose your right of action against your lawyer by expiry of the limitation period without ever knowing you had such a right.*"

B Beloff JA then went on to observe that in Jersey the customary law permitted a judicial solution to such a situation. He also noted that such a solution was to be encouraged by the approach taken by the High Court of Australia in Hawkins (14) (a solicitor's negligence case) where it held that the limitation period should exclude any period when the wrongful act which had inflicted the injury had at the same time effectively precluded the bringing of an action for damages. As was trenchantly stated, by Deane J at p. 590, to decide otherwise would be "*a travesty of justice and common sense*".

D The potential similarity of the facts in this case will be obvious.

The second area is that of "latent building defects" cases; about which I need not, I am sure, expand.

E In both areas the potential injustices are clearly not covered in any way by the provisions of the 1979 Law, and I am sure that the legislature had no intention to deprive potential victims of their pre-existing rights and remedies.

F (iv) For certain, the provisions of Part II create a new statutory regime, either comprehensively (it would appear) or in part. Far from being repugnant to the customary law principles, they are consonant with and reflect them. Insofar as the customary principles subsist, they "*can walk alongside any statutory change in the same field of law*" to adopt the words Blom-Cooper JA in Morton (15); and they are for the same stated purpose, that is, to help, not hinder, potential claimants.

G (v) Not being precluded entirely by the statutory regime, policy considerations can be taken into account; firstly, the retention of the maxim in tort, as in contract, is both necessary and desirable as a potential means of defeating injustices; secondly, the remedies available in tort in respect of the suspension of prescription should be as similar as possible to those in contract. This must particularly be right when concurrent causes of action arise from the same conduct.

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A As in the Plaintiff's claim in contract, so too the Plaintiff's allegations central to its claim in tort relate to a special relationship between the parties and the failure of the Defendant to fulfil its duties thereunder. It is therefore open to the Plaintiff to seek to establish that in its claim in tort, as in its claim in contract, prescription was suspended until the 4th September, 1992, or some weeks earlier (i.e. less than 6 years before the proceedings were instituted).

B Again, that is an issue which can only be determined at trial.

The accrual in Guernsey of a cause of action in tort

C Advocate Wessels' principal line of attack on the Defendant's Exception was that the common law of England relating to the accrual of a cause of action in tort is not and should not be the law in Guernsey. Advocate Dinning, on the other hand, submitted that it was, and should be. In brief, she argued, in English law and therefore Guernsey law, the date of accrual is to be determined by the date when relevant actionable damage occurs, whether or not a plaintiff has any knowledge of such damage; as determined, for example in, Cartledge (11) (latent medical defects), Pirelli (16) (latent building defects), the line of "solicitors" cases, such as Forster (17) Moore (8), Baker (18), and Bell (13), the insurances cases, such as Iron Trade Mutual Insurance (19), Islander Trading (20), and Knapp (21). I would also

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E add Nykredit (1).

In Advocate Wessels' submission, Guernsey could and should follow the trail, which many other common law jurisdictions have blazed, in adopting what I shall loosely describe as "the reasonable discoverability" test, (to which I will revert), a trail which diverges

F fundamentally from that which the English common law has followed.

In Stefani (2), a case involving economic loss arising from the alleged negligence of an advocate, I held that the law in Guernsey with regard to the accrual of the cause of action in tort was the same as that in England; and I cited, inter alia, the cases to which Advocate Dinning has referred me. I should point out that in Stefani (2), I heard no arguments relating to *empêchements* and the linked question of the date of the accrual for causes of action in tort; they were not issues which I had substantively to consider. If I am going to depart from that decision, and follow the course urged upon me by Advocate Wessels, then the first

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H question which I must ask myself is the extent to which I am free to do so, even if I so wished. That question does not relate to whether I am bound by my own previous decision, because I am not, but rather whether I am bound in this matter to follow English common law precedent.

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In Morton (15), Southwell JA commented (at p. 5 of his judgment) that it was common ground between the parties that in tort cases the Guernsey Courts follow the decisions of the English Courts on the common law, except in so far as the Guernsey law of torts is covered by customary law or statutes. In Maynard (3) he was more specific. At p.357, he stated:–

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“3. The Jersey law of tort is based on the English law of tort and insofar as it is so based, it is necessary that the courts of Jersey apply the law of tort as established by the House of lords; it is not appropriate for the courts of Jersey to reconsider the law as so established (see T. A. Picot (CI) Limited v. Crills). Insofar as Jersey statutes contain the same wording as the equivalent English statutes, English decisions on statutory interpretation may be persuasive authority as to the meaning of the Jersey statutes. But the Jersey law of prescription does not depend on English law (except, perhaps, insofar as the words used in art. 2 (1) of the 1960 Law reflect similar wording in section 2 of the English Limitation Act, 1939); it is, therefore, necessary for the Jersey courts to reach their own decision as to the content of the Jersey law of prescription.”.

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I adopt that statement, *mutatis mutandis*, as being the position in Guernsey. I merely note in passing that, as regards the same wording of equivalent English statutes, the most obvious example which springs to mind, in the present context, are the provisions of section 8 (1) and (3) of the 1979 Law, which are identical to the provisions of section 33 (1) and (3) of the Limitation Act 1980, which in turn repeat the provisions of section 2 D (1) and (3) of the Limitation Act 1939; upon which Nutting JA, in giving the judgment of the Guernsey Court of Appeal in Gould (23), commented –

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“The interpretation and application of such provisions (i.e. the equivalent provisions applicable in England and Wales) has been the subject of a considerable corpus of judicial material of an appellate nature and it is appropriate that the courts in this Island should follow such authorities both in the House of Lords and the Court of Appeal.”.

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In Maynard (3), the Jersey Court of Appeal did not have to reach any conclusion as to when a plaintiff's cause of action in tort arose. Nevertheless, that Court considered that it was appropriate to make ten observations on that matter (see pps. 356 to 359). Southwell JA then concluded (at p. 359, 30) –

A *“In the light of factors 1-10 above, it seems to us reasonably arguable that Jersey common law should be developed so as to ensure that causes of action in the tort of negligence accrue on the basis of a reasonable discoverability test and that the decision of the Lieutenant Bailiff on the accrual point in the present case was wrong.*

B *But as we have indicated, it is not necessary to decide the accrual point at this present stage. When it comes to be decided, whether in this action or subsequently, it will be necessary to make a more detailed examination of the impact of such development on the law of Jersey: In this action it will probably not be necessary to decide the accrual point. But if it becomes necessary to decide it, or when it arises in a later case, the accrual point will then have to be considered afresh in the light of the 10 factors we have set out above and of the detailed examination we have mentioned.”*

D I now turn to the New Zealand case of Invercargill (12). The Privy Council in that case reviewed the development of the law in New Zealand, with regard to “latent building defects” cases, since at least the decision, in 1979 of the New Zealand Court of Appeal in Mount Albert Borough Council; and concluded (a) that the law in New Zealand was firmly established, and (b) was relatively clear and straightforward. The Privy Council also upheld the majority view of the New Zealand Court of Appeal that the reasoning in Pirelli (16) (although their Lordships did not depart from it in the context of English law), should not, at that late stage, be adopted by the New Zealand courts, which would, in consequence, divert it from the course it had taken on this matter so as to align itself with the position adopted in England and Wales. As Cooke P. concluded in the New Zealand Court of Appeal - (at p. 523 of the report):-

“To introduce now the outmoded English position in New Zealand law would seem a paradoxical and peculiarly unsatisfactory step.”

The headnote in Invercargill (12) states, inter alia, -

H *“Held, dismissing the appeal, (1) that since the common law adapted itself to the differing circumstances of the countries in which it had taken root, the Court of Appeal of New Zealand ought not to be deflected from developing the common law of New Zealand by the consideration that the House of Lords had not regarded an identical development as appropriate in the English setting; that the decision whether to hold a local authority liable for the negligence of a building inspector had*

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A *been the subject of the marked divergence of view among other common law*
jurisdictions, being based in part on policy considerations, and as such was
especially unsuited for the imposition of a single monolithic solution; and that,
B accordingly, the decision of the New Zealand courts to develop the common law on
the basis for community standards and expectations demanded the imposition of a
duty on local authorities to take reasonable care during their inspection of new
D dwellings, which could not be said to have been reached by faulty reasoning or to
have been based on a misconception, would be upheld.”.

C The New Zealand courts have also adopted a similar stance with regard to the accrual of a
cause of action in personal injury cases – see Searle (24) in which the reasoning in
Cartledge (11) was rejected [I am not aware that Searle (24) has in the event been appealed
to the Judicial Committee, presumably because of the decision in Invercargill (12)]. The law
D in Canada and the United States has followed a similar course.

Lord Lloyd of Berwick, in delivering the judgment of their Lordships in Invercargill (12)
also reviewed, albeit briefly, the “less smooth” course which English authority had run in
”building defects” cases from, for example, Bagot (25) through Dutton (26), Sparham–
E Souter (27), Anns (28), Pirelli (16) D & F Estates (29), and Murphy (30). I do not intend to
undertake any such review of those English authorities, save to comment that they have been
the subject of strong and widespread criticism, as has Cartledge (11), both judicially and
academically.

F I am also mindful of the reasoning of Blom-Cooper and Southwell JJA in Morton (15), and
in particular the comments of the latter that a fundamental principle of Guernsey customary
law could not be changed save by legislation – being what he referred to as the Singleton
G (22) test (in relation to “nul servitude sans titre”). But, in my view, the question as to when
a cause of action arises in tort is not, in any way, comparable to such a fundamental principle
of Guernsey customary law as “nul servitude sans titre”. I am not aware of any binding, or
long established authority derived from the cases or the customary texts, which would direct
me otherwise. (This, in my view, as I have previously indicated, is in contrast to the position
H in contract – separate tortious claims being a far more recent jurisprudential development).
Similarly, the question of the duties of occupiers was held by the Guernsey Court of Appeal
in Morton (15) not to be such a fundamental principle.

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

I express that view not merely because it is a test which seems to be eminently sensible and
C just, but also, and more pertinently, because it seems to me to be a development which grows naturally from the roots of our own customary law, namely the *empêchement d’agir* principle. Indeed, the reasoning of the Privy Council in Invercargill (12), as summarised in the headnote to which I have previously referred, must apply with even greater force to a
D jurisdiction, such as ours, where the roots of customary law in a field such as this are not embedded historically or solely in the English tradition. Indeed, I would go further, and say that the *empêchement* principle, for so long and so firmly established in our customary law, illustrates a very different tradition, at least compared with the developments in English law to which I have referred. It must be noted, however, that the Jersey Court of Appeal in
E Maynard (3) did not identify the natural development of the *empêchement* principle as one of their observations or factors to be taken into account in helping to decide when a cause of action in tort accrued in that jurisdiction. On the other hand, in Boyd (7) Southwell JA, whilst emphasising (as he had in Maynard) (3) that the cause of action point and the
F *empêchement de fait* point were separate, acknowledged that the legal and policy considerations underlying the two points were very similar.

Save for the enactment of the 1979 Law, my undoubted conclusion would have been that in
G Guernsey law the test for establishing the date of the accrual of a cause of action in tort is that of reasonable discoverability.

I cannot, however, avoid consideration of the consequences of the enactment of Part II of that Law. I do not propose to review its provisions again.

H Part II of the 1979 Law does not contain any provisions which expressly relate to the date of the accrual of the cause of action in tort. (A silence reflected in the *travaux préparatoires*)

What, however, are the necessary and proper inferences to be drawn from those provisions?

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A Unquestionably, both by virtue of its terms and as proposed in the *travaux préparatoires*, Part II was modelled on the relevant provisions of English legislation. The amending provisions to the 1939 Act were successively enacted in order to overcome the difficulties arising from the position in that jurisdiction regarding the date of the accrual of a cause of action in tort, that being the date of relevant actionable damage regardless of knowledge.

B There must, therefore, be a very strong argument that the Guernsey legislature, by adopting the same statutory provisions, was acknowledging the same difficulties which the English legislation was designed to overcome. This remorselessly leads me to the conclusion that the States clearly had in mind that the accrual of the cause of action in tort was indeed the same

C as the common law position in England. Why was section 5 necessary (i.e. the provisions relating to identifying when a person's knowledge might be deemed to have arisen, by definition after the accrual of the cause of action), if the position in our customary law with regard to the relevance of knowledge was different in any way from that in England? If that

D was and is the position in Guernsey in relation to personal injuries cases, then in logic it must apply to all cases in tort, without exception. Indeed, that position is affirmed, by inference, in section 11, as I emphasised when I referred to it earlier, namely that "*the period of limitation shall not begin to run until the Plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it*".

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It is, in my view, an unavoidable inference to be drawn from sections 5 and 11 of the 1979 Law that the States clearly identified that knowledge itself was irrelevant in determining the date of the accrual of a cause of action in tort. It is, therefore, impossible for me, now, in defiance of the statutory position, to decide that the proper test in Guernsey for determining the accrual date is that of reasonable discoverability. This is not just a situation where

F "*Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched*" (the second of Lord Lowry's "navigational aids" – see Southwell JA in Morton (15) and his Lordship in C v. the DPP (31)). Our legislature has both acknowledged a difficulty and has specifically legislated to overcome it. In addition, it would be wrong for me to hold that what I believe should be the position in law, as naturally developed from our *coutume*, can walk comfortably alongside the specific statutory provisions. On the contrary, and in direct contrast to the

G *empêchement* situation, any such principles would be inconsistent with and repugnant to the statutory provisions. I must also be guided by the fifth of Lord Lowry's "navigational aids" – that judges should not make a change unless they can achieve finality and certainty. If I

H was to hold that the reasonable discoverability test should apply in some cases but not in

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A others, I would achieve confusion as well as uncertainty. The position on this matter is very
different both from that analysed by the Jersey Court of Appeal in relation to that
jurisdiction, with its different statutory provisions, and from that in Morton (15) in our
jurisdiction where there were no relevant provisions to be considered. If it is thought that
B Guernsey law may have taken an unfortunate turn in 1979 (because the reforms did not go
far enough and have frustrated any ability to develop our common law in this area by judicial
decision), then only further legislative action can remedy that position. This whole area is
one which I recommend should be comprehensively examined by our legislature.

C On this matter, therefore, I concur with Miss Dinning's submissions, though her success may
be somewhat pyrrhic, in that my conclusion with regard to the *empêchement* point may
minimise, or even obviate, its effect. One result of my conclusion – though not, I would
stress, a factor in reaching that conclusion – is that the disparity between the date of the
D accrual of a cause of action in tort and that in contract will be smaller rather than greater, a
desirable position, in my view, when, and if, balanced against the similar *empêchement*
remedies potentially available in both cases.

Summary of conclusions

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I summarise my conclusions as to the position in Guernsey law as follows:-

- (i) I am satisfied that the accrual of a cause of action in contract is the date of breach.
- F (ii) I find that the principles embodied in the maxim of *empêchement d'agir* are still
very much part of our law in contract cases, awaiting further development and
refinement. Their effect, when and if applied in the instant case, must await trial
(as they will in other cases).
- G (iii) I find that the position is the same in tort, subject to the application of the
provisions of Part II of the 1979 Law in appropriate cases.
- (iv) I find that the date of the accrual of a cause of action in tort is when relevant
actionable damage occurs, regardless of knowledge.
- H (v) Consequently, with regard to (ii) and (iii), this case must proceed to further
pleadings, etc., subject to what I say in the penultimate paragraph below, and
thereafter, trial. At either stage, the parties will still be free to advance arguments
I in respect of (i) if they so wish.

A It was not, strictly speaking, necessary for me to consider, and reach conclusions on, all of items (i) to (iv) above, as my decision in respect of the availability of the *empêchement* remedy in contract would have sufficed, though unsatisfactorily, for the matter to proceed to trial. I have done so, however, both out of respect to Counsel's submissions, and because it will enable a higher tribunal to give its own opinion on all or any of these four matters, if invited to do so.

Procedural matters

C I would wish to make one final point. It relates to matters of procedure. It will not be for a plaintiff in any particular case, whether in contract or in tort, to allege in its Cause that the principle might be applicable. That situation only arises if and when a defendant specifically pleads prescription, which of course it has to do (see Gallienne (k) and my earlier observation relevant thereto). In that eventuality, in any particular case, the plaintiff should then file a *réplique*, or similar response, in which it can make its allegations as to the relevance of the maxim in the circumstances of that case, providing details of the supporting particulars to be relied upon (a necessary course which I must emphasise). In this way, the pleadings themselves (their normal purpose), will establish the issues between the parties, rather than those issues being left less properly for consideration in interlocutory applications. One result may be that all relevant issues are left to trial, rather than a possible succession of interlocutory hearings (and, perhaps appeals). No bad thing in the administration of justice, to achieve savings of time and costs, a course clearly recommended in Jersey (Maynard) (3), and on occasions in our Court of Appeal. I therefore direct that the Plaintiff should now file its *Réplique*, with supporting particulars, within a period to be agreed by the parties or, in default, on application.

Costs

G Unless otherwise persuaded, costs are reserved in the cause.

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