IN THE SUPREME COUT OFJUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2003 HCV 01302

BETWEEN	**LEO HUGH WOLLASTON AND AUBREY CLARENCE WOLLASTON (As Executors for and on behalf of The Estate of Aubrey Charles Wollaston, deceased)**	**1ST CLAIMANT**
AND	**LEO HUGH WOLLASTON AND AUBREY CLARENCE WOLLASTON (As Executors for and on behalf of The Estate of Aldine Brown, deceased)**	**2ND CLAIMANT**
AND	**AUBREY GEORGE BROWN**	**1ST DEFENDANT**
AND	**CRAFTON S. MILLER & COMPANY (A FIRM)**	**2ND DEFENDANT**
AND	**MYERS, FLETCHER & GORDON**	**3RD DEFENDANT**
AND	**VINCENT LOSHUSAN & SONS**	**4TH DEFENDANT**
AND	**THE REGISTRAR OF TITLES**	**5TH DEFENDANT**

IN CHAMBERS

Charles Piper and Kanika Tomlinson for the claimants
Walter Scott and Anna Gracie instructed by Rattray, Patterson and Rattray for the second defendant
Dr. Lloyd Barnett and Tavia Dunn instructed by Nunes, Scholefield, Deleon and Company for the third defendant
Daniella Gentles instructed Livingston Alexander and Levy for the fourth defendant
Nicola Brown instructed by the Director of State Proceedings for the fifth defendant

June 11, 12 and July 1, 2008

APPLICATION TO STRIKE OUT CLAIM – NEGLIGENCE – DUTY OF CARE – ECONOMIC LOSS - CLAIM IN NEGLIGENCE STATUTE BARRED - RULE 26.3 (1) (b) and (c) OF THE CIVIL PROCEDURE RULES - REASONABLE GROUNDS TO BRING CLAIM – FRAUD UNDER THE REGISTRATION OF TITLES ACT- PLEADING FRAUD – NEED TO PARTICULARISE - SECTION 71 OF THE REGISTRATION OF TITLES ACT

SYKES J.

1. This is an application by all the defendants except the first to strike out the claim made against them by the first claimant. The applications are made under rule 26.3 (1) (b) and (c) of the Civil Procedure Rules (CPR). I have struck out the claim in fraud against Crafton S. Miller and Company (CSM). The claim in fraud and negligence against Myers Fletcher and Gordon (MFG) is struck out. The claim against Victor Loshusan and Sons (VLS) for fraud is struck out. The claim against the Registrar of Titles is also struck out. All the claims that have been struck out were stricken under rule 26.3 (1) (c), that is to say, the pleadings do not disclose any reasonable grounds for bringing the claim.

2. At this stage I can deal with the application by the fifth defendant, the Registrar of Titles. At the hearing, Miss Brown was not called on by the court. Instead, having read her submissions and authorities, Mr. Piper was asked if he could resist her application. He conceded that he could not and so the claim against the Registrar of Titles was dismissed with costs of only $40,000.00 (because of the exceptional benevolence of Miss Nicola Brown, counsel for the fifth defendant) to the Registrar of Titles.

3. Miss Brown's insurmountable and unassailable propositions were founded on the Court of Appeal's decision of ***Registrar of Titles v Melfitz Limited and Keith Donald*** S.C.C.A. No. 9 of 2003 (delivered July 29, 2005). In that decision Smith J.A., delivering the leading judgment of the court, examined sections 68, 71, 158, 160, 161, 162, 164 of the Registration of Titles Act. His Lordship concluded that claims against the Registrar of Titles cannot be brought unless the preconditions laid down in the Registration of Title Act are met. The Registrar of Titles resides, as far as claims are concerned, behind a heavily defended fortress that cannot be easily breached. The statute sets out the route that must be followed if damages are being sought against the Registrar (see page 14 of the judgment). Anyone seeking damages against the Registrar must first seek compensation and if that fails, the person must file a notice of action against the Registrar one month before beginning such an action (see pp. 13 and 14 of judgment). Importantly, the court held that where a declaration, an injunction, a cancellation of titles or a retransfer is sought there is no need to join the Registrar (see page 13 of judgment). From this case, it is fair to say

that the current claim against the Registrar was destined to fail from the moment it was conceived.

Genesis

4. The facts and circumstances that have led to this claim are now recounted. This comes from the particulars of claim filed by the claimants. Messieurs Leo and Aubrey Clarence Wollaston are executors of the estates of Aubrey Charles Wollaston and Miss Aldine Brown. In this judgment I shall use the middle name of Mr. Aubrey Charles Wollaston to refer to the claim of the first claimant. Thus this claimant is hereafter referred to as Charles. Where necessary I shall use the name Aldine to refer to the second claimant.

5. Charles lived with Aldine for a number of years at premises known as 12 ½ Molynes Road located in the parish of St. Andrew. This property was part of a larger property owned by Mr. Arthur Brown, the father of Mr. Aubrey George Brown (George), the first defendant. The larger property was subdivided into two parcels of land with each having its own title. The property in question here is registered at volume 1096 and folio 915 of the Register Book of Titles in George's name (the property). VLS is now the registered proprietor and so the only hope of removing VLS is by establishing a case of personal dishonesty against VLS which begins with pleading such a case properly.

6. The union of Charles and Aldine, like that of Adam and Eve, was fruitful, and the land, which is the subject matter of this dispute, was replenished and filled with eleven children, two of whom are Messieurs Leo and Aubrey Wollaston, the current executors of the estates of Charles and Aldine.

7. On June 9, 1982, Charles and George signed an agreement for sale in which George agreed to sell and Charles agreed to purchase the property for $36,000.00. The only special condition was that Charles should obtain (i) a mortgage of $24,000.00 from a financial institution at a rate of 14% and (ii) a letter of commitment, presumably from the mortgagee, within four weeks of the signing of the agreement. The third defendant, CSM, known at the time of the execution of the sale agreement as Miller, Mitchell and Co. had carriage of sale. At all material times this firm acted for the vendor, George. At no time was the firm retained by Charles.

8. The mortgagee turned out to be Royal Bank Trust Company (Jamaica) Limited (Royal). The attorneys for Royal were MFG, the third defendant. At no time was this firm retained by or acted for either Charles or George in the transaction.

9. Royal sought the greatest possible security for its loan. In addition to the personal covenant to repay the loan and the mortgage over the property, Royal required a guarantor for Charles' loan. To solve this problem, it was eventually proposed by CSM, after discussion involving CSM, George and Charles, and accepted by Royal that George would also be personally liable on the mortgage. Even though George would be liable on the mortgage the understanding was that Charles would service the loan and George would only be called upon if Charles defaulted. From the documents filed, it appears that George wanted some protection in the event that he was called on to repay the loan. In order to give George protection in the event that he became liable on his personal covenant to repay, it was agreed that George would hold an interest in the property being purchased by Charles. It is critical to note that this decision to provide protection for George was not required by the mortgagee. It was a solution devised by CSM, George and Charles, and the reason for putting it to the mortgagee must be because, in the normal course of things George's name on the title might impair the ability of the mortgagee to exercise its extra curial remedy, that is the power of sale, should it become necessary to do so. It is quite unusual, under the Registration of Titles Act, for the vendor's name to be on the title as retaining a legal interest in the property after it is sold. This is so even if the vendor is also the mortgagee.

10. The following letter dated April 18, 1983 from CSM to MFG sets out the proposal. It needs no comment. It reads:

> *We refer to your letter of 18th March 1983 and previous correspondence dealing with the above matter [sale of land]. On 16th April, 1983 Messrs. Aubrey Brown and Aubrey Wollaston called at our office and agreed that the property should be transferred in their joint names as tenants in common. In this way, it may not be necessary for a guarantee to be executed by Mr. Brown. The transfer to both parties however, will cease upon the repayment of the mortgage loan to Royal Bank Trust, and that he himself is not benefiting in any manner or form from the Mortgage (sic) proceeds, save and except for that he will hold the property as tenants in common with Mr. Wollaston as a result of the liability which he will undertake in being a party to the mortgage.*
>
> *We hope this method will meet your approval, and the transaction will be duly carried out.*

11. On April 22, 1983 MFG wrote to Royal informing it of the proposal and asked for its instructions in that regard. By letter of May 12, 1983, Royal approved the proposal. It was CSM's responsibility to draft the necessary documents to see that they properly reflected the proposal.

12. It appears that CSM sent a transfer under cover of a letter to MFG on June 1, 1983. I say appears because of the wording of MFG's response. MFG responded to this letter on June 2, 1983 and pointed out that the copy transfer sent to it:

> *… seems to refer to the transaction prior to the Trust Company's approval for their mortgage to be taken by Messrs. Brown and Wollaston in their capacity as registered proprietors (Joint Tenants) (sic) of the property. We look forward to receiving the Transfer (sic) in the names of both parties aforementioned.*

13. This reference to joint tenants is now accepted to be an error since Mr. Piper expressly stated that he is not suggesting that MFG were guilty of dishonesty. This error seems to have affected CSM because the transfer prepared by CSM had the words *joint tenants* and not *tenants in common*. Unfortunately, the transfer that was registered on November 1, 1983 indicated that both men were *joint tenants*.

14. The mortgage was repaid by 1992 but sadly nothing was done to remove George's name from the title. Charles died on June 16, 1996. Charles left a will bequeathing the property to Aldine and his children. Charles' death was noted on the title. George took the full legal title under the survivorship principle and eventually transferred the property to VLS which became the registered proprietor on January 5, 2001. Miss Brown died in 2004.

The proper legal approach to these applications

15. The starting point of an application of this nature is the wording of the particular rule under the CPR. Rule 26.3(1) (b) states that the statement of case or part of it may be struck out as an abuse of process or that it is likely to obstruct the just disposal of the proceedings. Even though this rule was referred to in some of the applications the submissions actually made do not reflect any reliance on the rule. Rule 26.3(1) (c) permits the court to strike out the statement of case or part of it because it "discloses no reasonable ground for bringing or defending a claim". Rule 26.1 (c) is entirely new. We must give effect to what it says. Therefore cases such as ***Wenlock v Maloney and others*** [1965] 2 All E.R. 871 which were decided under the old rules are not of much

help. There the issue was whether the case pleaded discloses a reasonable cause of action which simply meant a cause of action known to law.

16. Rule 26.3 (1) (c) speaks of reasonable grounds for bringing or defending a claim. These words permit a striking out on wider grounds than merely that the claim pleaded does not disclose a reasonable cause of action. The new rule clearly conceives of the possibility that a claimant may plead a case that is legitimate, that is to say, known to law, but when the evidence or facts to support the claim are examined it may be that the claim cannot succeed. This would a clear instance that there were no reasonable grounds to bring the claim even though the claim as pleaded states a known cause of action. There is a close affinity between this rule and rule 15 that speaks of giving summary judgment on the grounds that the claim or defence has no reasonable prospect of success.

17. The idea that the court on an application under rule 26.1 (c) is restricted to an examination of just the claim form and particulars of claim is unsupportable. It is incompatible with the new ethos of litigation with its emphasis on efficiency and active case management by the court. Therefore to say that once a claimant pleads a case known to law that is the end of the matter is not correct. A court can look at the evidence, where available, that is to be used in support of the claim. This does not mean that a mini-trial is conducted but that does not mean that the court can ignore patently untenable cases.

18. If one looks at the whole of the CPR and have in mind its overall purpose it will be obvious that this proposition is supportable. First, the court is under a duty to manage case justly and expeditiously (see rule 1.1). Second, part of the management of cases means identifying the real issues in the case (see rule 25.1). Third, the claimant is under a duty to state "all facts [not some] on which the claimant relies" (see rule 8.9 (1)). The claim form or the particulars of claim are to identify or annex any document the claimant considers necessary to his case. Fourth, the defendant must respond to each allegation in the manner specified by rule 10.5. There is no room anymore for a general denial. It is either a denial because the defendant does not know and wishes the claimant to prove the allegation, or a denial followed by an assertion by the defendant that answers the allegation, or an admission. Fifth, the litigants are under a duty to assist in case management (see rule 1.3). All this means that more of the case for the parties is known at a much earlier stage than under the old rules. Therefore depending on the stage of the proceedings the application for striking out under rule 26.3(1) (c) is made, the court may be able to decide that there is no reasonable ground for bringing or defending the claim.

19. If the application is made at the close of pleadings but the proposed evidence is not before the court it may be that the court is by that fact restricted to just the pleadings. On the other hand the application may be made after witness statements have been exchanged. If all the proposed evidence is before the court and the application is made then clearly if there is merit in the application then the court should act and not shrink from taking not only the bull by the horns but lifting up the bull and ejecting him summarily if that is what is required. It is that this point that the affinity with rule 15 becomes apparent. If all the proposed evidence is in, can it not be said that an application for summary judgment can be made if the proposed evidence demonstrates that one party's case is destined to fail?

20. There is nothing in the rules that prescribe the time at which the application under rule 26.1 (c) may be made. It may happen, for example, that the proposed evidence on close examination is inadmissible. It may be that the evidence though admissible comes from a source that is not compellable and the witness has indicated that he is not attending court. Can anyone contend that in these instances, the claim or defence should be allowed to go forward merely because it is properly worded? To uphold this view would strike at the root of what the CPR intends which has as one of its laudable objectives, the ferreting out of hopeless cases.

21. Mr. Piper relied on a passage from Lord Hope's judgment in ***Three Rivers District Council v Bank of England (No. 3)*** [2001] 2 All E.R. 513, 542. According to Mr. Piper, this passage is saying that the court cannot look at evidence. What Lord Hope did say was that the equivalent English rule corresponded in a "broad way" to the old rule under the Rules of the Supreme Court. Lord Hope issued the reminder that the power of striking out is one to be exercised carefully because the consequence is that there is no trial of the issues and it is an important principle of law that a litigant should not be barred unnecessarily from gaining access to the courts and putting forward his case in order to seek redress. Lord Justice May in ***S v Gloucestershire CC*** [2000] 3 All ER 346, 372d makes the point that there is no "embargo on the court receiving evidence" on an application to strike out on the basis that there is no reasonable for bringing or defending the claim. The reason for this, according to his Lordship, is that new rules require that statements of case be verified by a statement of truth. This case was decided before ***Three Rivers*** but I am of the view that both views are compatible. My conclusion is reinforced by an observation of Lord Hobhouse in ***Three Rivers***. It is true that his Lordship dissented but that was in the application of the law to the facts. It is also true that his Lordship was speaking in the context of a different tort than the one

alleged in the case before me but nonetheless his observations are quite apposite and laden with common sense. His Lordship said at paragraph 161:

> *The tort of misfeasance in public office is a tort which involves bad faith and in that sense dishonesty. It follows that to substantiate his claim in this tort, first in his pleading and then at the trial, a plaintiff must be able to allege and then prove this subjectively dishonest state of mind. The law quite rightly requires that questions of dishonesty be approached more rigorously than other questions of fault. The burden of proof remains the civil burden--the balance of probabilities--but the assessment of the evidence has to take account of the seriousness of the allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence. At the pleading stage the party making the allegation of dishonesty has to be prepared to particularise it and, if he is unable to do so, his allegation will be struck out. The allegation must be made upon the basis of evidence which will be admissible at the trial. This common sense proposition has recently been re-emphasised by the Court of Appeal in Medcalf v Mardell [2001] Lloyd's Rep PN 146, in which Peter Gibson LJ said, at paragraph 40: "The material evidence must be evidence which can be put before the court to make good the allegation." Evidence which cannot be used in court cannot be relied upon to justify the making of the allegation of dishonesty. I mention this because it shows the principle to be applied and not because there is any suggestion in the present case that there is any inadmissible material which would support allegations of dishonesty in the present case. It is normally to be assumed that a party's pleaded case is the best case he can make (or wishes to make). Therefore, in the present case, the particulars given provide a true guide to the nature of the case being made by the plaintiffs (claimants).*

22. What Lord Hobhouse said here about pleading dishonest is applicable to the discussion of fraud later in this judgment. The point at this stage is that his Lordship emphasised that a pleading must be based on admissible evidence. The Law Lord stated that it is normally assumed that a party's pleaded case is the

best that he can make. I can only hope that these authorities extirpate the submission that on an application to strike out on the basis that there are no reasonable grounds for bringing or defending claim the court cannot look at the proposed evidence (see also ***Keesondoyal v B.P. Oil UK Ltd*** [2004] C.P. Rep 40 where evidence was placed before the court on an application for summary judgment where fraud was alleged against the defendant). In the case before me I have looked primarily at the case as pleaded by the claimants and some correspondence attached to affidavits filed in the matter and which have been included in the bundle before me. The letters I have looked at are those passing between CSM and MFG on the one hand and those passing between MFG and Royal. This was to get as full a picture as possible regarding the proposal and response to the proposal. I have not relied on any other evidence. There are no witness statements and so I am unable to say that the evidence in the affidavits is all there is likely to be. I now turn to the question of whether the claim for economic loss against CSM and MFG is sustainable in the present case.

Did CSM and MFG owe Charles a duty of care?

23. The claim is for economic loss. This raises complex issues of law which, though difficult, can be resolved at this stage of the proceedings. The issue here is whether a duty of care was owed to Charles? and if yes, by whom? It is perhaps sad to say that in the last half of a century not much progress has been made in developing an appropriate test that is applicable in most situations where the issue has arisen. It would appear that the best that can be said is that the courts have evolved a number of considerations to be taken into account in the actual factual matrix before the court.

24. It is now well settled that there can be claims for economic loss (see dissenting judgment of Denning L.J. in ***Candler v Crane Christmas & Co*** [1951] 2 K.B. 164 which was approved by the House of Lords in ***Hedley Byrne & Co Ltd v Heller Partners Ltd*** [1964] A.C. 465). This jurisdiction has not seen many claims for pure economic loss and in particular, claims against attorneys at law for pure economic loss are as rare as a West Indies victory in a test match.

25. To deal with the stated issue satisfactorily it is appropriate to begin with the famous case of ***Donoghue (or M' Alister) v Stevenson*** [1932] A.C. 562. It is fair to say, with the benefit of hindsight, that claims for economic loss were inevitable once Lord Atkin's elucidation of the proximity principle in ***Donoghue (or M' Alister) v Stevenson*** [1932] A.C. 562 broke the boundary that had previously limited the tort of negligence to physical damage to persons and property where there was either physical proximity or a contractual nexus. What Lord Atkin did was to provide the intellectual foundation that was needed to link the manufacturer of defective good to the ultimate consumer who may not be

physically proximate or in a contractual relationship with the manufacture. Lord Atkin's analysis provided the analytical framework for economic loss cases even though it is doubtful whether anyone or even Lord Atkin himself realized this at the time.

26. Lord Atkin appreciated that there would be difficulty in developing a single test applicable to all situations but nonetheless he was of the view that if the tort of negligence was to develop in a rational way there must be some unifying principle. Lord Atkin was trying to develop a unifying principle that would link the diversity of factual circumstances; a formidable task, even for a judge of the calibre of Lord Atkin, given the impossibility of foreseeing all circumstances in which a claim may arise. This comes out quite clearly in this passage at pp. 579 – 580:

> *The Courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the Courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognizes a duty, but only where the case can be referred to some particular species which has been examined and classified.* ***And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist.*** *To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials.*
> *…*
> ***At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances.*** *The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral*

> *wrongdoing for which the offender must pay.* ***But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief****. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a* ***restricted*** *reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.* (my emphasis)

27. Note that Lord Atkin's formulation does not provide an actual test. His analysis is posed at a fairly high level of abstraction. He clearly had in mind that common sense and policy would guide the development of the law. How does one know whether a particular claimant is sufficiently proximate so that a duty of care arises in the absence of a physical proximity or a contractual nexus? Specifically, what factors make a claimant proximate enough for the purposes of the tort of negligence in economic loss cases where there is no contract between the parties? The answer is that the courts were expected to apply a large measure of common sense tempered by practical policy consideration such as the possibility of what Cardozo C.J. described as "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (see ***Ultramares Corp v Touche*** (1931) 255 NY 170, 179). I shall call this the Cardozo problem. The highlighted portion of Lord Atkin's judgment captures what was already exercising the mind of Cardozo C.J., namely not every injured person can secure a remedy. There must be a limitation on the list of potential claimants. It is important to note as well that Lord Atkin did not favour the notion that for every loss there must be compensation even if morally a good case could be made for redress.

28. One of the first attempts to take advantage of Lord Atkin's reformulation and to apply it to economic torts is to be found in the dissenting judgment of Denning L.J. in ***Crane*** at pages 179 – 181:

> *Let me now be constructive and suggest the circumstances in which I say that a duty to use care in statement does*

exist apart from a contract in that behalf. First, what persons are under such duty? My answer is those persons such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things, and to make reports on which other people - other than their clients - rely in the ordinary course of business. Their duty is not merely a duty to use care in their reports. They have also a duty to use care in their work which results in their reports. Herein lies the difference between these professional men and other persons who have been held to be under no duty to use care in their statements, such as promoters who issue a prospectus: Derry v. Peek (now altered by statute), and trustees who answer inquiries about the trust funds: Low v. Bouverie.. Those persons do not bring, and are not expected to bring, any professional knowledge or skill into the preparation of their statements: they can only be made responsible by the law affecting persons generally, such as contract, estoppel, innocent misrepresentation or fraud. But it is very different with persons who engage in a calling which requires special knowledge and skill. From very early times it has been held that they owe a duty of care to those who are closely and directly affected by their work, apart altogether from any contract or undertaking in that behalf. Thus Fitzherbert, in his new Natura Brevium (1534) 94D, says that: "If a smith prick my horse with a nail, I shall have my action on the case against him, without any warranty by the smith to do it well"; and he supports it with an excellent reason: "for it is the duty of every artificer to exercise his art rightly and truly as he ought". This reasoning has been treated as applicable not only to shoeing smiths, surgeons and barbers, who work with hammers, knives and scissors, but also to shipbrokers and clerks in the Custom House who work with figures and make entries in books, "because their situation and employment necessarily imply a competent degree of knowledge in making such entries": see Shiels v. Blackburne, per Lord Loughborough, which was not referred to by Devlin, J., in Heskell v. Continental Express LD. .

The same reasoning has been applied to medical men who make reports on the sanity of others: see Everett v. Griffiths. It is, I think, also applicable to professional

accountants. They are not liable, of course, for casual remarks made in the course of conversation, nor for other statements made outside their work, or not made in their capacity as accountants: compare Fish v. Kelly; but they are, in my opinion, in proper cases, apart from any contract in the matter, under a duty to use reasonable care in the preparation of their accounts and in the making of their reports.

Secondly, to whom do these professional people owe this duty? I will take accountants, but the same reasoning applies to the others. They owe the duty, of course, to their employer or client; and also I think to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them. But I do not think the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts. Once the accountants have handed their accounts to their employer they are not, as a rule, responsible for what he does with them without their knowledge or consent.

29. Lord Justice Denning is attempting to determine the extent of tortious liability in economic loss cases while being mindful of the Cardozo problem. He does this by stating, first, that in order to be liable for economic loss the defendant needs to be in an occupation that requires special knowledge and skill. Second, the conduct for which it is being said that the professional is being held accountable must be conduct arising in his professional capacity, that is accountant qua accountant, lawyer qua lawyer. According to Denning L.J., if persons who are not in occupations requiring special knowledge and skill are to be held liable, it has to be under the law relating to breach of contract, misrepresentations and the like. So here we see a tightly drawn circle around those who may be potential defendants in economic loss cases. Third, Denning L.J. restricts liability even further by suggesting that even in the case of persons possessing special knowledge and skill, the duty of care is not owed to persons of whom they "heard nothing". It appears that "heard nothing" has a special meaning and is being used metaphorically to refer to persons outside of the group that professional knew or ought to have contemplated would rely directly on his work for a specific transaction. Rather the duty is owed to persons such as those who employed the individual and also to those persons whom the specially skilled person knew his employer would shown their work so as

to induce that person to invest. In other words, to use the language of today, if the defendant knew that a particular transaction was in view and that his work would influence the decision then a duty of care is owed to the person who relies on that work. Thus the valuator of property who knows or ought reasonably to have foreseen that his report would be shown to a potential purchaser in order to induce that purchaser to make the purchase is liable if the report is negligently prepared (see ***Smith v Eric S Bush*** [1990] 1 AC 831).

30. It is to be observed that Denning L.J.'s proximity test is not really a test. It sets forth matters to be considered when determining whether a duty of care is owed and to whom. It is to be noted that Denning L.J. had restricted loss to persons whom the professional knew would be relying on his work in order to conduct a particular transaction. The duty, for the Lord Justice, did not extend to strangers (the heard nothing group) who may choose to rely on the information or the document. While this attempt by Denning L.J. was by no means exhaustive it does make clear that he was concerned to avoid the Cardozo problem.

31. Denning L.J. spoke over fifty years ago. One would think that with the approval of this dissenting judgment in ***Hedley Byrne*** over forty years ago and with the numerous cases that have come before the courts, a test of liability would have emerged. Alas! That is not the case. This pessimistic view was confirmed by what the House of Lords had to say in 2006. In that year it was put to the House of Lords by the litigants in ***Customs and Excise v Barclays Bank plc*** [2007] 1. A.C. 181 that there were three tests used in economic tort cases. The three tests were said to be (a) the assumption of responsibility test; (b) the three fold test and (c) the incremental test. Any hope that the House would have adopted this classification and regard them as true tests were scotched. Lord Bingham's observations on these "tests" should be quoted in full. I have included in his passages, quotations from other judgments delivered over the years to show that judges have not advanced much in elucidating a single comprehensive test since Denning L.J.'s efforts more than half of a century ago. Lord Bingham said at pp. 189 – 190:

> *The first is whether the defendant assumed responsibility for what he said and did vis-...-vis the claimant, or is to be treated by the law as having done so. The second is commonly known as the threefold test: whether loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the relationship between the parties was one of sufficient proximity; and whether in all the circumstances it is fair, just and*

reasonable to impose a duty of care on the defendant towards the claimant (what Kirby J in Perre v Apand Pty Ltd (1999) 198 CLR 180, para 259, succinctly labelled "policy"). Third is the incremental test, based on the observation of Brennan J in Sutherland Shire Council v Heyman (1985) 157 CLR 424 , 481, approved by Lord Bridge of Harwich in Caparo Industries plc v Dickman [1990] 2 AC 605 , 618, that:

"It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed'."

32. In relation to these tests his Lordship observed at pp. 190 – 192:

I content myself at this stage with five general observations. First, there are cases in which one party can accurately be said to have assumed responsibility for what is said or done to another, the paradigm situation being a relationship having all the indicia of contract save consideration. Hedley Byrne would, but for the express disclaimer, have been such a case. White v Jones and Henderson v Merrett Syndicates Ltd, although the relationship was more remote, can be seen as analogous. Thus, like Colman J (whose methodology was commended by Paul Mitchell and Charles Mitchell, "Negligence Liability for Pure Economic Loss (2005) 121 LQR 194, 199), I think it is correct to regard an assumption of responsibility as a sufficient but not a necessary condition of liability, a first test which, if answered positively, may obviate the need for further inquiry. If answered negatively, further consideration is called for.

5 *Secondly, however, it is clear that the assumption of responsibility test is to be applied objectively (Henderson v Merrett Syndicates Ltd [1994] 2 AC 145, 181) and is not answered by consideration of what the defendant thought or intended. Thus Lord Griffiths said in Smith v Eric S Bush [1990] 1 AC 831, 862, that:*

"The phrase 'assumption of responsibility' can only have

any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts upon the advice."

Lord Oliver of Aylmerton, in Caparo Industries plc v Dickman [1990] 2 AC 605, 637, thought "voluntary assumption of responsibility"

"a convenient phrase but it is clear that it was not intended to be a test for the existence of the duty for, on analysis, it means no more than that the act of the defendant in making the statement or tendering the advice was voluntary and that the law attributes to it an assumption of responsibility if the statement or advice is inaccurate and is acted upon. It tells us nothing about the circumstances from which such attribution arises."

In similar vein, Lord Slynn of Hadley in Phelps v Hillingdon London Borough Council [2001] 2 AC 619, 654, observed:

"It is sometimes said that there has to be an assumption of responsibility by the person concerned. That phrase can be misleading in that it can suggest that the professional person must knowingly and deliberately accept responsibility. It is, however, clear that the test is an objective one: Henderson v Merrett Syndicates Ltd [1995] 2 AC 145, 181. The phrase means simply that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by law."

The problem here is, as I see it, that the further this test is removed from the actions and intentions of the actual defendant, and the more notional the assumption of responsibility becomes, the less difference there is between this test and the threefold test.

6 *Thirdly, the threefold test itself provides no straightforward answer to the vexed question whether or not, in a novel situation, a party owes a duty of care. In Caparo Industries plc v Dickman [1990] 2 AC 605, 618, Lord Bridge, having set out the ingredients of the threefold test, acknowledged as much:*

"But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such

precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes."

Lord Roskill made the same point in the same case, at p 628:

"I agree with your Lordships that it has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or in cases where such liability can be shown to exist, determine the extent of that liability. Phrases such as 'foreseeability', 'proximity', 'neighbourhood', 'just and reasonable', 'fairness', 'voluntary acceptance of risk', or 'voluntary assumption of responsibility' will be found used from time to time in the different cases. But, as your Lordships have said, such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty. If this conclusion involves a return to the traditional categorisation of cases as pointing to the existence and scope of any duty of care, as my noble and learned friend, Lord Bridge of Harwich, suggests, I think this is infinitely preferable to recourse to somewhat wide generalisations which leave their practical application matters of difficulty and uncertainty."

7 Fourthly, I incline to agree with the view expressed by the Messrs Mitchell in their article cited above, p 199, that the incremental test is of little value as a test in itself, and

> *is only helpful when used in combination with a test or principle which identifies the legally significant features of a situation. The closer the facts of the case in issue to those of a case in which a duty of care has been held to exist, the readier a court will be, on the approach of Brennan J adopted in Caparo Industries plc v Dickman, to find that there has been an assumption of responsibility or that the proximity and policy conditions of the threefold test are satisfied. The converse is also true.*
>
> ***8*** *Fifthly, it seems to me that the outcomes (or majority outcomes) of the leading cases cited above are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome. This is not to disparage the value of and need for a test of liability in tortious negligence, which any law of tort must propound if it is not to become a morass of single instances. But it does in my opinion concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole.*

33. Thus for Lord Bingham, the so-called assumption of responsibility test, was no test at all but a noun phrase used to identify circumstances in which it can be said that the defendant voluntarily did the impugned action which the law, in hind sight, says imposes liability on the defendant. Indeed, for Lord Bingham, a negative answer under the "assumption of responsibility test" was not the end of the enquiry. As I read the cases under this "test", a vital ingredient is that it has to be shown that the defendant knew or ought reasonably to have known that his advice, information or document would be relied on by the claimant for the particular transaction engaged in by the claimant and the transaction resulted in loss (see ***Smith v Eric Bush*** [1990] 1 A.C. 831). In ***Smith*** Lord Jauncey said that the "question must always be whether the particular facts disclose that there is a sufficiently proximate relationship between the provider of information and the person who has acted on that information to his detriment, such that the former owes a duty of care to the latter" (page 871). It will be recalled that in ***Smith***, the valuator knew that his report was vital to the mortgage transaction and there was a very strong possibility (some might even say virtual certainty) that his valuation would be acted on by the claimant. The Cardozo problem was solved because the class of potential claimants was limited and the full extent of losses was quantified.

34. According to Lord Bingham the second test does not work in novel situations. To discern whether the claimant is sufficiently proximate in economic loss cases there is the requirement that the defendant needs to foresee (determined objectively) the particular use to which his advice, information or document was put before liability is imposed. However, even if this is established it is by no means a foregone conclusion that liability will attach. It is perfectly possible for the defendant to foresee that some persons may use the advice, information or document provided but liability may be excluded because at the time the information is supplied there is no particular transaction in contemplation or the transaction that gives rise to the loss was not the one reasonably contemplated by the defendant (see ***Caparo Industries plc v Dickman*** [1990] 2 AC 605 where it was held that auditors had not owe a duty of care to persons who would use the audited accounts to attempt to take over the audited company).

35. At this point I will refer to Lord Hoffman's reasoning in ***Customs and Excise*** on the question of foreseeability. According to Lord Hoffman in ***Customs and Excise*** in economic loss cases, something more is needed than just reasonable foreseeability of harm. In my view this is clearly right because if reasonable foreseeability of harm to the particular claimant were sufficient then the claimants in ***Caparo Industries*** would have succeeded since it was foreseeable that account prepared by the accountants could be used by all sorts of persons including those who may wish to take over a company, share speculators, lenders or even suppliers of goods to the particular company. His Lordship restricted the operation of the foreseeability principle in the three-fold test by rightly pointing out that an examination of the purpose for which the advice, information or document was supplied and the use to which it was actually put is important. Advice, information or a document may have been prepared or supplied with one purpose in mind and this purpose may not be the purpose for which it was actually used.

36. Lord Hoffman makes another important observation. He stated that a duty of care most often arises from what is done as distinct from what is not done. This observation by Lord Hoffman makes the decision of the House of Lords in ***White v Jones*** [1995] 2 A.C. 207, a remarkable one by any standards. In that case, the solicitor did not carry out the instructions of the would-be testator before he died. It was not a case of purporting to carry out the instructions but doing so badly; the solicitors simply failed to do what they were asked to do. This is why it is vital that it is understood precisely what the defendant was required to do or not to do as the case may be when economic loss cases are considered.

37. The third test has to be applied very carefully. Reasoning by analogy has

certain inherent pitfalls. As I shall show below Mr. Piper's analogy with the wills cases is not apposite. It is vital in this test to delineate as clearly as one is able the points of similarity and dissimilarity between the case before the court and previous instances where liability was imposed and weigh them correctly. What appears to be similar at first glance may turn out to be quite dissimilar when the analysis deepens.

38. Lord Walker in virtual despair at the law and with more than a hint of embarrassment at the current state of English law observed in ***Customs and Excise*** at page 209 that:

> *The development of the tort of negligence since the seminal case of Donoghue v Stevenson [1932] AC 562 has not been one of steady advance along a broad front. It has been a much more confused series of engagements with salients and beachheads, and retreats as well as advances. It has sometimes been only long after the event that it has been possible to assess the true significance of some clash of arms. That may be the case with the decision of this House in Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465, as has been suggested in an important article, criticising what she calls the "pockets of case law" approach, by Professor Jane Stapleton, "Duty of Care and Economic Loss: A Wider Agenda" (1991) 107 LQR 249, especially at pp 259-263. The whole article, although published 15 years ago (that is, soon after the revision or displacement of Anns v Merton London Borough Council [1978] AC 728) contains much that is still very relevant.*
>
> *…*
>
> ***71** Arguably the last 15 years have seen some modest progress in the direction recommended by Professor Stapleton. The increasingly clear recognition that the threefold test (first stated by Lord Bridge of Harwich in Caparo Industries plc v Dickman [1990] 2 AC 605, 617-618) does not provide an easy answer to all our problems, but only a set of fairly blunt tools, is to my mind progress of a sort. Abandoned in Australia-or Not?" (2002) 118 LQR 214.)*
>
> *…*
>
> ***72** This House had indeed, in Caparo itself, recognised both that the elements of the threefold test are labels, and that their usefulness is limited:*

39. The problem of formulating a single "test" is not confined to England. In ***S & T Distributors Limited v CIBC Jamaica Ltd*** S.C.C.A. No 112/04 (July 31. 2007)) the Court of Appeal of Jamaica while accepting that ***Murphy v Brentwood District Council*** [1991] 1 AC 398; [1990] 3 WLR 414; [1990] 2 All ER 908, HL(E) and ***Caparo*** represent the law to be applied in Jamaica, found difficulty in formulating a single test of liability in economic loss cases. At page 34 Harris J.A., said, after noting that "situations and circumstances giving rise to a duty of care are manifold" stated that:

> *A court, however, must ascertain and first be satisfied, that, in a particular case the law recognises the existence of a duty of care and then decide whether such duty should be imposed on a wrongdoer. It follows therefore, that in considering a claim, the court should not only make inquiry into the nature of the relationship between the parties but also address the question of foreseeability and thereafter decide whether it is just and reasonable to impose a duty of care on a defendant. Liability, if imposed, must directly or by analogy fall within the scope of one of the established categories of negligence.*

40. In this passage we see the three-fold test running into the incremental/analogy test.

41. In my view, the three "tests" are not tests at all. They are thought-stimulators designed to focus the mind of the judge on a number factor which the judge ought to ask, not in the abstract, but in the context of the specific case before him. The following questions must be asked by the judge each time a case of economic loss comes before the court. What is the precise relationship between the claimant and the defendant? Is there a contract between them? What was the defendant required to do under the contract? What did the defendant actually do? If there is no contract, is there a relationship akin to contract? Who is the claimant? How did the relationship between the claimant and the defendant arise? Is the claimant the person who contracted with the defendant? Is the claimant a person who the defendant knew was relying on his skill to engage in a particular transaction? Is the transaction that is alleged to have caused the transaction contemplated by the defendant? These questions are not exhaustive. The judge has to work his way through these questions always bearing in mind the Cardozo problem.

Application to CSM and MFG

42. By asking a series of questions I shall now attempt to identify the factors that are to be taken into account in this particular case before me in order to determine whether a duty of care arises in favour of Charles. What was the nature of the relationship between the parties? Was there a contract, if yes, who are the contracting parties? What was the attorney required to do under the contract? Was the relationship between the claimant and the attorneys such that the attorneys knew or ought reasonably to have contemplated that the claimant would act upon the advice, information or document proffered? What were the attorneys required to do? For whom were they required to do what they did? What is it that was actually done by the attorneys? Is the claimant the client or is the claimant a person upon whom the client had instructed the attorney to confer some benefit? Was the attorney required by the terms of his contract to confer a benefit on the claimant? If the attorney was not required to confer a benefit on the claimant, was the claimant a person whom the attorney knew or ought reasonably to have contemplated would be so directly affected by what he (the attorney was required to do) that the he ought to foresee, reasonably, that any negligence in carrying out the instructions would inevitably and necessarily affect the claimant? Are there policy reasons negating liability? Is the Cardozo problem present, and has it been adequately dealt with?

43. CSM was retained by George. There was no contractual relationship between CSM and Charles. Nonetheless CSM knew that the necessity to prepare the transfer in the terms of the agreement was vital to both Charles and George because this arrangement was devised to provide George with security in the event he was required to pay the loan. Charles was to be protected by also having an undivided share of the property. The transaction was specifically designed to exclude the right of survivorship. CSM knew that the transfer was to be prepared in a specific way, that is to say, done in such a manner that the property would be transferred to Charles and George as tenants in common. Each was to get an undivided share in the property.

44. The transfer prepared was used for the very transaction contemplated by CSM and not any other. The duty owed by CSM to Charles can be stated in this way: CSM was under a duty to prepare the transfer in the manner agreed so that Charles would have an undivided interest in the property and the duty also included preparing the transfer in a manner that would exclude the operation of the right of survivorship which arises in a joint tenancy. To use the words of Millett J. (as he then was) in ***Al Saudi Banque v Clark Pixley*** [1990] Ch. 313, 335, in the case of CSM, "*there was in contemplation not only a particular and identified recipient of the information to whom the defendant knew that it would be communicated, but a particular and known purpose for which he could*

foresee that it would be relied upon." For these reasons I do not accept Mr. Scott's submission that CSM owed no duty to Charles. Albeit that Charles did not retain CSM and was therefore not the client of CSM, the relationship between CSM and Charles was akin to contract, that is to say, all the indicia of contract were present save that Charles did not provide the consideration. The failure to prepare the transfer in the manner required was a breach of that duty. There is no Cardozo problem here.

45. I now turn to MFG. MFG, as Dr. Barnett pointed out, was more removed from Charles than CSM. By contrast MFG did not provide any information and was not required to draft the transfer. That was the duty of CSM. What was MFG required to do in this particular transaction? MFG was to put the proposal to its client and communicate its client's response to CSM. MFG's duty was to get a "Yes" or "No" from its client. Once that was done, it was the obligation of CSM to draft the transfer appropriately. This was not the obligation of MFG. One may say that morally, if it saw the error, MFG should have pointed out to CSM or Charles that the transfer referred to joint tenants and not tenants in common but that cannot create a duty of care to Charles. MFG was not required to prepare any document, give advice to Charles or George or confer a benefit on Charles by the preparation of any document. The fact that MFG's letter referred to joint tenants is incapable of creating a duty of care in favour of Charles.

46. Undoubtedly, MFG would and quite likely did foresee that if the property was not transferred to Charles and George as tenants in common, Charles may suffer loss but that kind of foreseeability, as Lord Hoffman indicated in ***Customs and Excise***, though necessary is not sufficient to fix MFG with a duty of care to Charles. It is equally true, that the Cardozo problem is solved in the case of MFG but that is not sufficient. The solution of the Cardozo problem, in the claim against MFG, is a tempting factor to impose liability on MFG. However, as Millett J. said in ***Al Saudi***, the "*fact that the plaintiffs are a small and limited class and known to the defendants reduces the seriousness of the consequences of holding that a duty of care exists and may make it less unjust or less unreasonable to impose such a duty; but it cannot by itself create a relationship between the parties*" (see page 336).

47. Implicit in Mr. Piper's submission was a reliance on the third test, the incremental test or the reasoning-by-analogy test. Mr. Piper relied on the wills cases (see ***Ross v Caunters*** [1980] Ch. 297; ***White v Jones*** [1995] 2 A.C. 207). Mr. Piper's submissions reinforce the observation by Lord Bingham in the ***Customs and Excise*** case, that the incremental test or the proceeding by analogy test divorced from the actual context is unlikely to be very helpful. The

submissions also reinforce what I have said before, that the starting point of any analysis of any allegation that an attorney is liable for economic loss must be, what was the attorney required to do? I now give reasons why the analogy does not advance Mr. Piper's position in relation to MFG.

48. I shall deal with the two cases separately. In ***White***, the solicitor did not act upon the instructions promptly and by the time he did, the testator died so that the beneficiaries lost out on the intended bequests and legacies. The dissenting judgment of Lord Mustill makes the powerful point that even if the solicitor had acted promptly and the testator had died before execution the beneficiaries would still be in the same position as they in fact found themselves (see page 288). Thus the omission to act did not, per se, cause loss. This is quite distinct from doing a positive act negligently and that negligent act causes loss. The majority have not satisfactorily met this issue. Lord Mustill was highlighting the causation issue. How did the delay, in and of itself cause loss? The delay did not hasten the death of the intended testator. To say as Lord Goff suggested that it would be unfair to deprive the beneficiaries of a cause of action because the only person who could bring the claim had died, is hardly a convincing reason. Lord Goff is really begging the question. In any event, Lord Mustill makes the additional formidable point that since it is no longer doubted that there can be liability in tort as well as contract contract, if the solicitor would not be liable in tort to the testator because there was no loss and only liable in contract (recovering at best nominal damages), on what basis can it be said that the solicitor is liable in tort to beneficiaries with whom there was no contract? It seems to me that Lord Goff ignored this admonition for Lord Atkin in ***Donoghue*** at page 580:

> *But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief.*

49. It appears that the result of and reasoning of the majority in ***White*** are difficult to support because no member of the majority was able to explain satisfactorily how the solicitor's omission to act before the death of the intended testator caused a loss to the beneficiaries when it is well known that the testator may change his mind at any time. This is clearly distinguishable from a case where the solicitor executes the instructions badly and the testator dies.

50. In ***Ross v Caunters*** the solicitor carried out the instructions but carried them out negligently. Many have tried to provide the reasoning to support ***Ross v Caunters*** as a legitimate extension of the common law. It was decided in the era

when ***Anns*** was the leading case from the House of Lords. Since ***Anns*** demise establishing ***Ross v Caunters'*** place in the legal landscape has proved to be quite daunting. The majority in ***White*** struggled mightily to provide a safe haven for ***Ross v Caunters*** but I do not believe they were successful. Lord Goff searched exhaustively for a sound basis to support ***Ross v Caunters***. His Lordship went from the Antipodes (New Zealand, Australia) to the North American continent (Canada and the United States of America). He made reference to Germany a civilian jurisdiction and with all this, he was unable to get over, satisfactorily, the stubborn and intractable fact that the tortfeasor would not have been liable in tort to the testator and so serious questions remain about the legitimacy of ***Ross v Caunters*** in the post-Anns era. Lord Nolan, another member of the majority, justified his position by stating that it had stood fifteen years without challenge. Well, so too did ***Chandler v Crane Christmas*** but that did not prevent the House of Lords in ***Headley Byrne*** from overruling the majority decision and expressly approving the dissenting judgment of Denning L.J. Lord Browne-Wilkinson, the third member of the majority, did not even refer to ***Ross v Caunters***. He, frankly stated, that "*although the present case is not directly covered by the decided cases, it is legitimate to extend the law to the limited extent proposed using the incremental approach by way of analogy advocated in Caparo Industries Plc. v. Dickman [1990] 2 A.C. 605*" (see page 270). The question is, with what was the comparison being made? It would appear that for Lord Browne-Wilkinson, failure to act is analogous to acting on instructions but doing so badly. These cases, relied on by Mr. Piper, actually demonstrate the force of the observations made in ***Customs and Excise*** that reasoning by analogy in and of itself is not a very useful test.

51. My conclusion is that CSM owed a duty of care to Charles and there was a breach of that duty when the transfer had joint tenants and not tenants in common. MFG did not owe any duty of care to Charles. The claim against MFG in negligence is dismissed. I now consider when the cause of action accrued in order to determine whether the claim against CSM is statute barred.

When did the cause of action accrue?

52. Mr. Piper relied on two cases for the submission that the cause of action arose on January 5, 2001, when VLS became the registered proprietor. These cases are ***Pirilli v Oscar Fabor & Partners*** [1983] 2 A.C. 1 and ***Law Society v Sephton & Co (a firm) and others*** [2006] 2 A.C. 543. For the reason given by Mr. Scott I do not think that the ***Pirilli*** case is particularly helpful because it was a case of physical damage and the discussion in the case is not germane to the issue before me. The more relevant one is the ***Law Society*** case. Mr. Piper relied heavily on the House of Lords' discussion of the Australian High Court decision in ***Wardley Australia Ltd v State of Western Australia*** (1992) 175

CLR 514. Dr. Barnett and Mr. Scott, for their part, relied on the cases of ***Forster v Outred*** [1982] 1 W.L.R. 86 and ***Baker v Ollard & Bentley (A Firm) and Another*** (1982) 126 SJ 593. The reasoning of Dr. Barnett and Mr. Scott is to the effect that date the transfer was registered (November 1, 1983) is the date damage occurred and so this claim in negligence must necessarily be statute barred because it was filed ten years after the registration of the transfer it being common ground that the limitation period is six years from the date the cause of action arose.

53. Mr. Piper also prayed in aid the concept of concealed fraud, as expounded by Lord Denning M.R. in ***King v Victor Parsons & Co*** [1973] 1 W.L.R. 29, 33G in order to say that the claimant did not know of his right to bring a claim and it was concealed by the fraud of CSM and MFG. This was to support the idea that Charles could legitimately bring the claim in 2003 as opposed to 1983.

54. I do not agree with Mr. Piper conclusion. Lord Denning was speaking of section 26 of the Limitations Act of 1939 (UK) which Mr. Piper submits is the same as section 27 of the Jamaican Limitations of Actions Act. The concept of concealed fraud as I understand it in the Limitation of Actions Act does not create a cause of action but rather extends the time within which a cause of action which as accrued can be brought. The principle acts as a life support system that prolongs the life of the cause of action when it would have otherwise died. The principle is that time does not begin to run against the claimant until the cause of action which was concealed by the fraud of the tortfeasor is known by the claimant or the existence of the claim could have been discovered by reasonable diligence.

55. Although Mr. Piper opposes the use of November 1, 1983 (the date the transfer was registered) as the date of damage, his submission on concealed fraud in fact concedes what he is opposing. In order to say that the cause of action was concealed by the fraud of the defendants, one must be saying that the cause of action in fact accrued but the claimant did not know of it and was unable to find out by the exercise of reasonable diligence. Unless the cause of action has accrued there is nothing to conceal because until damage has occurred even if the tortious conduct has taken place, there is no cause of action that can be concealed.

56. Assuming, November 1, 1983 to be the date the cause of action accrued and assuming that CSM and MFG concealed Charles' cause of action, I do not see any reason why Charles, by reasonable diligence, could not have found out about the defective transfer. Had Charles sought to remove George's name even up to

three years after the mortgage was repaid, he would have discovered the defective transfer.

57. I return to the cases of ***Forster*** and ***Baker*** relied on by Dr. Barnett and Mr. Scott to support the submission that damage accrued on November 1, 1983. I make three observations. First, these cases are what are called transaction cases, and so great care has to be taken in relying on them for the reasons given by the High Court of Australia in ***Wardley***. The House of Lords has accepted that ***Wardley*** stated the correct in principles of law. Second, the House of Lords and the High Court of Australia did not conclude or suggest that the actual decision in ***Forster*** was wrong or that the case, though correct in outcome, misapprehended the law. The problem that both courts had with ***Forster*** was its wider implication if certain dicta in the case were given great amplitude. Third, the ***Law Society*** case was dealing with contingent liability – a situation that did not exist in ***Forster***.

58. In ***Forster*** the claimant alleged that she signed a mortgage document which charged her property for a loan made to her son. She was eventually called on to pay the debt of her improvident son. She had executed the mortgage on February 8, 1973. She commenced her claim in March 1980. The issue was whether she was statute barred. The resolution of this issue depended on when the cause of action accrued. The Court of Appeal held that she suffered actual damage when she signed the mortgage deed. The damage was that her property became less valuable because it was now encumbered. Stephen L.J. in his judgment said at page 94:

> *any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; …*

59. The reference to "liabilities which may arise on a contingency" was said by Lord Hoffman in ***Law Society*** to give rise to an ambiguity (see para 14). The ambiguity being that the Court of Appeal may have meant either (a) that the mortgage immediately depressed the value of the property or (b) incurring a future possible liability was to be regarded as immediate damage. It was the suggestion by the Court of Appeal that the possibility of incurring future liability was to be regarded as immediate damage that caught the attention of Lord Hoffman (see para. 16 – 18) and the High Court of Australia. The House and the High Court rejected the proposition that a claimant necessarily suffered immediate damage if he entered into a contract which exposed him to future possible loss. Both courts concluded that until the contingency occurs there is no

damage. As helpful as Lord Hoffman's analysis is I found the judgments of Lord Walker and Lord Mance more to the point before me. Lord Walker focused on what he called the "transaction cases", that is cases in which a claimant, because of "the negligence of his professional adviser, ended up with a package of rights less valuable than he was entitled to expect" (see para. 45). Lord Walker referred to the judgment of Saville L.J. in ***First National Commercial Bank plc v Humbers*** [1995] 2 All ER 673, 679 where the Lord Justice referred to three cases including ***Forster*** :

> *In all those cases, however, the court was able to conclude that the transaction then and there caused the claimant loss, on the basis that if the injured party had been put in the position he would have occupied but for the breach of duty, the transaction in question would have provided greater rights, or imposed lesser liabilities or obligations than was the case; and that the difference between these two states of affairs could be quantified in money terms at the date of the transaction.*

60. Thus Lord Walker was able to conclude at paragraph 48:

> *In all these cases [transaction cases] the claimant has as a result of professional negligence suffered a diminution (sometimes immediately quantifiable, often not yet quantifiable) in the value of an existing asset of his, or has been disappointed (as against what he was entitled to expect) in an asset which he acquires, whether it is a house, a business arrangement, an insurance policy or a claim for damages.*

61. I pause here to observe that I do not think that Lord Walker was suggesting that disappointment per se gave rise to a cause of action. I believe he meant a diminution in value of what was expected

62. Lord Mance, for his part, referred to the "considerable case law concerning situations where a person's legal position has, through negligence, been altered to his immediate, measurable economic disadvantage, and it has been held that a cause of action accrued although the beneficiary neither knew nor had any reason to know about its existence" (see para. 67).

63. From the analysis of Lord Walker and Lord Mance, unless it can be said that on November 1, 1983 Charles received an estate that was immediately lesser in

value than the estate he ought to have received, Charles would have a cause of action as of November 1, 1983. The possibility of future loss was there as of November 1 when the estate was registered as a joint tenancy. The loss could come to pass if Charles died and George transferred the land after getting the interest of the other joint tenant. But this possibility, without more, does not mean that Charles suffered loss as of November 1, 1983.

64. In the case of ***Baker*** the first defendants, Ollard and Bentley, conveyed a property on April 12, 1973, to the claimant and a husband and wife as tenants in common in shares of 49% for the claimant and 51% for the husband and wife. The claimant thought that she was getting security of tenure of the first floor of the house. The husband and wife sought a sale of the house in December 1973. The difficulty was compromised by agreement on October 16, 1975. The issue before the court was whether the cause of action accrued on April 12, 1973 when the conveyance was executed or on October 16, 1975. The court held that the cause of action in negligence accrued when damage occurred and that date was April 12, 1973. This part of the holding of the court is consistent with authority both in England and Australia and consistent with reason. If there is no damage then the victim has suffered no loss even if there is a breach of duty and so has no cause of action in the tort of negligence.

65. The other part of the holding of the court in my view does not rest on a secure footing. The court held that April 12, 1973, because the claimant did not get what she ought to have received and therefore suffered damage. I make two observations about this. The Court seemed to have assumed without proof, that the fact of not getting what one ought to have received necessarily and inexorably means that one suffers damage. Second, the Court did not seem alive to the fact that in some instances evidence may actually be necessary to make a determination of whether one suffered damage on a particular date as opposed to another date. This aspect of the court's holding is only sustainable on the basis that the court was able to say, with confidence, that damage necessarily occurred at the date of the transaction. Unless this is so, this part of the court's reasoning is open to challenge.

66. I find support for this in this passage from the joint judgment of Mason C.J., Dawson, Gaudron and McHugh JJ. in ***Wardley Australia Ltd*** on the transaction cases helpful. At pp 530 – 531, their Honours said:

> *Be that as it may, the English decisions have proceeded according to the view that, where the plaintiff is induced by a negligent misrepresentation to enter into a contract and the contract, as a result of the negligence, yields property*

or contractual rights of lesser value, the plaintiff first suffers financial loss on entry into the contract, notwithstanding that the full extent of the plaintiff's financial loss may be incapable of ascertainment until some later date. In part, the English approach appears to have been influenced by the general principle stated in Darley Main Colliery Co. v Mitchell that damages in respect of a cause of action are awarded on a once and for all basis. But that principle tells us very little, if anything, about the time when the plaintiff first suffers loss or damage in the circumstances of a particular case, except that, properly understood, Darley Main Colliery emphasizes the need for actual, as distinct from prospective, damage before prospective damages can be included in the award.

Another element in some of the English decisions, as in <u>Jobbins,</u> is the conclusion that, because the subject matter of the agreement lacked the qualities which it had been represented as having, that subject matter was therefore less valuable than it would have been if the representations had been true. That conclusion is acceptable in cases in which the contract measure of damages is appropriate but it is not acceptable here where the contract measure of damages does not apply. The application of that measure of damages may, in some situations, enable a court to conclude more readily that the plaintiff first suffers loss or damage on entry into an agreement.

It has been contended that the principle underlying the English decisions extends to the point that a plaintiff sustains loss on entry into an agreement notwithstanding that the loss to which the plaintiff is subjected by the agreement is a loss upon a contingency. For our part, we doubt that the decisions travel so far. Rather, it seems to us, the decisions in cases which involve contingent loss were decisions which turned on the plaintiff sustaining measurable loss at an earlier time, quite apart from the contingent loss which threatened at a later date. (My emphasis)

67. For tortious liability there must be damage arising from the breach and such damage that is necessary to make the tort actionable may not occur at the time of the breach. It is suffering actual loss, not the possibility of loss in the

future, that makes the claim accrue. It is well known that in some cases evidence has to be heard in order to determine when the cause of action arose. The cases of ***Baker*** and ***Forster*** and other similar cases are explicable only on the basis that the courts there were able to say, just from the pleaded case, that damage necessarily occurred at the date of the transaction, or as in the case I have to decide, at the date of registration of the transfer.

68. The point then is that the real focus of my enquiry has to be whether on the case as pleaded by Charles he suffered there and then on the date of registration of the transfer immediate and measurable loss. The answer is by no means clear. The High Court of Australia in ***Wardley*** insisted that the fact that one did not get what one contracted for or ought to have received, without more, does not mean that one suffers damage. I agree with this point view. By parity of reasoning since Charles did not get what he ought to have received albeit that he had no contract with CSM it does not inevitably follow that he suffered damage. In my view, it is not self evident that a transfer as a joint tenant is necessarily less valuable then a tenant in common. The property in question would have been under a mortgage in any event. I cannot resolve the matter of whether damage was suffered without evidence. Had CSM placed evidence before me that showed that damage occurred on November 1, 1983, whether necessarily so or in this particular case, I would have no hesitation in striking out the claim in negligence on the basis that it is statute barred. If the evidence, when presented, shows that what Charles received under the transfer was less valuable than what he ought to have received had the transfer accurately reflected what was agreed, then the cause of action accrued on November 1, 1983. Assuming that there was concealed fraud, the claim would be statute barred using the November 1, 1983 as the date the cause of action accrued because between 1992 and 1995 Charles could have discovered the defective transfer by the exercise of reasonable diligence. Now, obviously the transfer by George to VLS deprived Charles's estate of the property completely. So in my view evidence is required to resolve the issue of the time the cause of action accrued. Finally, I come to the aspect of the claim based on fraud.

The claim based on fraud

69. The first claimant alleges fraud against four of the five defendants. As noted already, these applications do not involve George. The particulars of fraud against CSM are that:

a. Acting on the instruction of the first defendant to prepare the instrument of transfer to him and the deceased as joint tenants instead of as tenants in common contrary to the agreement between the first defendant and the deceased

that the first defendant would hold a half interest in the said land as tenants in common with the deceased;

b. Causing the deceased to execute an instrument of transfer which provided that the said land was being transferred to the deceased and the first defendant as joint tenants when they knew that the said land was to have been transferred to them both as tenants in common;

c. With knowledge that the deceased and the first defendant were to hold the said land as tenants in common instead of as joint tenants, delivering the instrument of transfer providing for the transfer of the said land to the deceased and the first defendant to the third defendant;

d. Arming the first defendant with the means by which he could breach the terms of the agreement for sale dated 9th June 1982 between himself and the deceased and fraudulently transfer the said land to the fourth defendant;

e. Refraining from taking any steps to prevent the first defendant from carrying into effect his fraudulent intent;

f. Taking or refraining from taking, as is appropriate, all of the steps set out in items (a) to (e) hereof with the intention of facilitating or assisting the first defendant to deprive the deceased and subsequently the deceased's estate of the beneficial and legal estate in the said land.

Against MFG it is alleged that:

a. With knowledge that the deceased and the first defendant were to hold the said land as tenants in common instead of as joint tenants, delivering the instrument of transfer providing for the transfer of the said land to the deceased and the first defendant to the third defendant;

b. Arming the first defendant with the means by which he could breach the terms of the agreement for sale dated 9th June 1982 between himself and the deceased and

fraudulently transfer the said land to the fourth defendant;

c. Refraining from taking any steps to prevent the first defendant from carrying into effect his fraudulent intent;

d. Taking or refraining from taking, as is appropriate, all of the steps set out in items (a) to (c) hereof with the intention of facilitating or assisting the first defendant to deprive the deceased and subsequently the deceased's estate of the beneficial and legal estate in the said land.

Against VLS it is alleged that:

a. The fourth defendant knew of the claimants interest in the said land but proceeded to accept title thereto with the intention of furthering the first defendant's quest to deprive the claimants thereof;

b. On the 25th October 1995, the first defendant transferred to the fourth defendant all that parcel of land registered at volume 1259 folio 158 of the Register Book of Titles being lands adjoining the said land;

c. From at least the time of the transfer of the lands registered at volume 1259 folio 158 of the Register Book of Titles, the fourth defendant knew that the said lands were occupied and that the first defendant had no interest therein;

d. At the time of the transfer of the said lands on 5th January 2001 and at least from the date of the death of the deceased, the fourth defendant ought reasonably to have known of the claimants' interest in the said land by reason of the actual possession and occupation as a residence and for business purposes of the said land by the second claimant and her family;

e. In the event that the fourth defendant claims to have not known of the actual conduct of the first defendant as has been set out above, the fourth defendant neglected or refused to make any or any adequate enquiries of **him** to

ascertain the status of the claimants as occupants of the said land and thereby deliberately deprived itself of the knowledge that the first defendant had no interest in the said land which was capable of being transferred to it, for the purpose and with the intent of securing registration as proprietor thereof so as to deprive the claimants of the said land; VLS knew about the claimants interest but proceeded to accept title with the intention of furthering George's quest to deprive the claimants of the land (my emphasis);

f. In the event that the fourth defendant claims to have not known of the actual conduct of the first defendant as has been set out above, the fourth defendant neglected or refused to make any or any adequate enquiries of the **claimants** to ascertain the status of the claimants as occupants of the said land and thereby deliberately deprived itself of the knowledge that the first defendant had no interest in the said land which was capable of being transferred to it, for the purpose and with the intent of securing registration as proprietor thereof so as to deprive the claimants of the said land. (my emphasis)

70. At the hearing Mr. Piper expressly stated that he was not alleging that MFG are guilty of personal dishonesty. He applied to delete paragraph (d) of the particulars of the allegation of fraud against MFG,

71. In order to determine whether the allegation of fraud was sufficiently particularised as contended by CSM and VLS I have to determine what fraud means under the Registration of Titles Act. In relation to MFG, Dr. Barnett's point was that what was pleaded, if true does not amount to actual dishonesty.

72. Section 71 of the Registration of Titles Act reads:

> *Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall*

be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

73. The starting point of any analysis has to be the passage from Lord Lindley in ***Asset Company Limited v Mere Roihi*** [1905] A.C. 176, 210 where he said:

> *Passing now to the question of fraud, their Lordships are unable to agree with the Court of Appeal. Sects. 46, 119, 129, and 130 of the Land Transfer Act, 1870, and the corresponding sections of the Act of 1885 (namely, ss. 55, 56, 189, and 190) appear to their Lordships to shew that by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud--an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out the fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part.* ***But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him.*** *A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.* (My emphasis)

74. Let us look carefully at this passage. It states that fraud must be proved in order to impugn the title of the registered proprietor. His Lordship stated that

dishonesty by the persons from whom the registered proprietor got his title does not affect him unless it can be shown that he himself was dishonest. Lord Lindley made it abundantly clear that the mere fact that he would have found out the dishonesty of his predecessor in title had he enquired is not dishonesty. In other words, the fact that he did not make enquiries that he may have made does not amount to dishonesty.

75. Mr. Piper sought to refute this analysis by suggesting that Lord Lindley by referring to a person's suspicions being actually aroused was including within his definition of fraud that which a person ought to do. It is my view that properly understood Lord Lindley was not saying what Mr. Piper is attributing to him. Lord Lindley was dealing with what is called willful blindness in English law, or contrived ignorance by the Americans. Note that Lord Lindley did not say if the person's suspicions ought to have been aroused but rather that the person's suspicions were aroused. Lord Lindley could not have expressed it any other way because had he said that the person's suspicions ought to have been aroused he would be speaking of constructive knowledge (equitable fraud) which is based on the failure to meet an objective standard. Instead, Lord Lindley spoke of the person's suspicions being aroused which is consistent with the view that fraud does not affect the person unless it is brought home to him, that is to say, he was personally dishonest.

76. His Honour Stark J. in the High Court of Australia in ***Stuart v Kingston*** (1923) 32 C.L.R. 309, 359 (decision reversed by the Privy Council but the Board did not say that the exposition of the law by Stark J. was flawed) stated:

> *The equitable doctrine of notice, actual and constructive, is founded upon the view that the taking of an estate after notice of a prior right is a species of fraud (Le Neve v. Le Neve). Under the Act, taking property with actual or constructive notice of some trust is not of itself sufficient reason for imputing fraud.* ***The imputation of fraud, therefore, based upon the application of the doctrines of the Court of Chancery as to notice, cannot any longer be sustained in the case of titles registered under the Act.*** *"The difficulty lies," as Mr. Hogg points out (Registration of Title to Land throughout the Empire, p. 142), "in the demarcation of the line between knowledge or notice that is not to be treated as fraud, and notice that under particular circumstances must be treated as fraud." Cases must necessarily arise in which opinions will differ as to whether the conduct proved is or is not fraudulent.* ***No***

> ***definition of fraud can be attempted, so various are its forms and methods. But we may say this: that fraud will no longer be imputed to a proprietor registered under the Act unless some consciously dishonest act can be brought home to him. The imputation of fraud based upon the refinements of the doctrine of notice has gone.*** *But the title of a person who acquires it by dishonesty, by fraud (sec. 69), by acting fraudulently (sec. 187), or by being a "party to fraud" (sec. 187), in the plain ordinary and popular meaning of those words, is not protected by reason of registration under the Act. And to titles so acquired the equitable obligations imposed by the law of trusts are as applicable as formerly.* (My emphasis)

77. The necessity to make it clear that dishonesty is what is meant, particularly when dealing with an alleged case of fraud under the Registration of Title Act is made even more robustly in the next case I am about to cite. This is the judgment of Higgins J. in ***Wicks v Bennett*** 30 C.L.R. 80, 94 – 95:

> *I concur also in the opinion that no fraud has been proved on the part of Diplock such as would deprive him of his right as registered proprietor under sec. 42 of the Real Property Act. "Fraud" implies dishonesty, moral obliquity; and all that is proved is that, before he bought, Diplock was told that the land was held by the "syndicate"-the partnership-under an agreement. Sec. 43 distinctly says that "Except in the case of fraud no person contracting ... with ... the registered proprietor ... shall be affected by notice direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or registered interest is in existence shall not of itself be imputed as fraud." Assuming that the notice of the unregistered interest of the syndicate is equivalent to knowledge, we have here the very case contemplated by these words. Where there is nothing but knowledge of an unregistered interest, it is not a fraud to buy. Such knowledge may be an element in the building up of a case of fraud, but it does not "of itself" constitute fraud. It is not necessary, or perhaps possible, to define fraud. Fraud is a fact to be proved; and it has not been proved here. It was consistent with honesty that Diplock should purchase,*

leaving it to the registered proprietor to settle with the syndicate as to the alleged agreement, perhaps to buy out the interest of the syndicate; or Diplock may have meant to carry out the agreement if it was binding on him, and receive the rent. The Act is designed to facilitate dealings with land; and it seems to mean that a man may purchase land safely from the registered proprietor, closing his mind to the mere fact of any unregistered interest. It was on this ground, I think, that the late A.H. Simpson J. decided the case of Oertel v. Hordern. Although the purchaser, Hordern, knew of the unregistered interest of Oertel and that Oertel was in possession and carrying on a business on the land, and although Hordern had been warned by Oertel of his interest, the learned Judge found that there was no fraud proved on the part of Hordern, as Hordern might, on the facts, have purchased without any intention of wrong to Oertel. This is far from saying that if Hordern intended to wrong Oertel, or to help the vendors to wrong him, Oertel would have failed in his action (Assets Co. v. Mere Roihi).
But it ought to be understood that this decision rests on the provisions of this New South Wales Act, and that the decision, if it rested on the provisions of the corresponding Act in most of the other States, would be different. Under sec. 42 of this Act the registered proprietor holds the land subject to certain specific encumbrances or interests, but not, as elsewhere, to "the interest of any tenant of the land." ***During all the dealings between Bennett and Diplock, the members of the syndicate were tenants of the land, in possession of it through their sub-agent Johnson, who conducted a picture show on the land; but the New South Wales Act allows a purchaser to ignore the unregistered interest even of actual occupiers. Whether this state of the law is desirable or not, it is for the Legislature to consider. So far, I agree with the conclusions of the learned Judge, who believed Wicks's evidence, and evidently found plenty of ground for suspicion, but no proof.*** (My emphasis)

78. The breadth of this statement from Higgins J. ought to be noted. Knowledge of persons occupying the property in and of itself does not prove fraud. The Registration of Titles Act, like that Act of New South Wales that was before the court at the time, permits the purchaser to ignore occupiers. Special note

should also be taken of the summary of fact of the case of ***Oertel v. Hordern*** (1902) 2 S.R. (N.S.W.) (Eq.), 37, given by Higgins J. It is indeed a fine line between knowledge that amounts to dishonesty in certain circumstances and knowledge that does not give rise to dishonesty. As Stark J. observed in ***Stuart***, persons may disagree on which side of the line any particular case falls but the principle is clear. Thus it would appear that merely to say that persons were in open occupation and the purchaser knew of this at the time of the purchase that is not sufficient to establish a case of actual dishonesty under the Registration of Titles Act.

79. Higgins J. was not alone in his analysis. Knox C.J. and Rich J. held in the same case at pages 90 – 91:

> *The question for consideration, then, is whether the evidence establishes a case of fraud against Diplock within the meaning of these sections. In this connection Mr. Loxton relied on the conversation between Wicks and Diplock already referred to. The learned Judge accepted Wicks as a truthful witness, and there is in our opinion nothing in the evidence which would justify this Court in taking a different view, having regard to the fact that Harvey J. had the advantage of observing the demeanour of this witness while giving his evidence. Wick's evidence of the conversation is as follows:-"Q. During that interval did you ever come across a man named Diplock? A. Yes, I saw him towards the end of the year 1918. I met him, and he said he was thinking about negotiation for that lease at the rear portion of the picture show. I said 'You cannot, because it is held by the syndicate under an agreement.' He said, 'Oh, is that so.' That practically finished the conversation between us, and he passed on. That was the only occasion I spoke to Mr. Diplock with reference to the matter until I heard that he had actually purchased." Assuming, as we do for the purpose of this part of the case, that the transaction between Bennett and Diplock was a genuine sale and not a mere sham, we think this evidence amounts to no more than that Diplock was told that the syndicate had an unregistered interest in the land. There is nothing to show that at this time Diplock knew who the members of the syndicate were, or that anything was said as to the identity of the person with whom he was about to negotiate. It is consistent with what was said that he knew that Bennett was a member of the syndicate, and*

> *believed, when he dealt with him, that he had authority to act on behalf of the syndicate or would protect its interest. It is to be observed also that no details of the interest of the syndicate were given, and that this interest might have been no more than a tenancy for a short period, a year or less. We think it is impossible to hold judicially on the evidence as to this conversation, taken in conjunction with the other facts proved, that Diplock was guilty of fraud in purchasing the property.* ***Fraud in these sections means something more than mere disregard of rights of which the person sought to be affected had notice. It imports something in the nature of "personal dishonesty or moral turpitude" (Butler v. Fairclough). In our opinion the evidence in this case falls short of establishing fraud in this meaning on the part of Diplock****. This disposes of the case so far as Diplock and his executrix are concerned.*

80. I have included in this extract the nature of the evidence before the court in order to show how high the test is to find actual dishonesty which reinforces the pleading point that fraud must be specifically pleaded and in the case of the Registration of Titles Act, the closing words of section 71 removes actual knowledge of a prior interest, without more, from being thought of as personal dishonesty. The bar is high indeed.

81. So from these cases the common principle which can be discerned is that fraud in the context of the Registration of Titles Act means dishonesty. Fraud is not mere notice of a prior equitable or legal interest. This meaning of fraud has been accepted by the courts of Jamaica in ***Enid Timoll-Uylett v George Timoll*** (1980) 17 J.L.R. 257, 261D; ***Willocks v George Wilson and Doreen Wilson*** (1993) 30 J.L.R. 297. In ***Enid Timoll*** Kerr J.A. said at page 260H and 261D respectively:

> *It is clear from the decided cases dealing with the interpretation of "fraud" in similar legislation, that the word does not embrace what is sometimes called "equitable fraud".*

And

> *I accept as a correct statement that "fraud" in the Registration of Titles Act means actual fraud, i.e.,*

"dishonesty of some sort", but the question will always be 'what sort'?

82. The legislature clearly appreciated that fraudsters did not disappear once the Registration of Titles Act became law. It is plain that the law had shifted in favour of purchasers who did not inspect the land. The law makers had to reach a compromise not because they were heartless and were unconcerned about persons fraudulently deprived of land but the policy decision as reflected in provision like sections 68, 71 and 161, was to shift the burden of loss to persons other than a registered proprietor who was not guilty of personal dishonesty. For the removal of doubt, the law makers specifically stated in section 71 that a person taking a transfer from a registered proprietor is not required to know how, when and by what means the registered proprietor came by the property. The person taking the transfer is not affected by notice, actual or constructive despite what equity and the law say.

83. Mr. Piper relies on the Jamaican Court of Appeal decision of ***Life of Jamaica Ltd v Broadway Imports Exports*** (1997) 34 J.L.R. 526 which states that when a person is in open occupation of land then there is a burden on the purchaser to make enquiries of those in occupation and not just the registered proprietor if the occupier is different from the registered proprietor. My first observation about this case is that the court was not dealing with an allegation of personal dishonesty against a registered proprietor of the legal estate. Second, as Miss Gentles pointed out, the cases dealt with two equitable interests and which should take priority. The court used the doctrine of constructive notice to resolve the issue.

84. Mr. Piper perhaps had in mind Rattray P.'s view expressed at page 533C where he said that the:

> *Registration of Titles Act does not destroy the principle that open possession of a tenant is notice that the tenant has some interest in the land or property occupied and any purchasers having notice of that fact is bound to make a prudent enquiry as to what that interest is.*

85. Neither Rattray P. nor any other member of the court stated that failure to make enquiries of persons in open occupation of land was inevitably a case of personal dishonesty. Counsel sought to extrapolate this principle by submitting failure to make such enquiries is necessarily fraud. This proposition is contrary to authority. The case ***Wicks v Bennett*** shows that knowledge that a person is in open occupation does not necessarily amount to personal dishonesty. The

Australians have resolved the issue by holding that in cases where purchasing land with knowledge of a prior interest does not amount to personal dishonesty, the purchaser takes the land subject to that interest (see ***Bahr v Nicolay (No. 2)*** 164 C.L.R. 604.

86. Having established that fraud under the Registration of Titles Act means personal dishonesty it is necessary so see whether the pleading in the case before me meets the strict pleading requirements where an allegation of dishonesty is being made.

87. Buckley L.J. said in ***Belmont Finance Corporation Ltd. v. Williams Furniture Ltd.*** [1979] Ch. 250, 268:

> *An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognised rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used . . . The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity.*

88. The idea then that an allegation of fraud under the Registration of Titles Act can be sustained by saying that defendant "ought to have known" is not acceptable (see para. (d) of the allegations of fraud against VLS). The reason is explained by Millett L.J. in ***Armitage v Nurse*** [1998] Ch 241, 257:

> *That case [Belmont Finance] is authority for the proposition that an allegation that the defendant "knew or ought to have known" is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud. It is not treated as making two alternative allegations, i.e. an allegation (i) that the defendant actually knew with an alternative allegation (ii) that he ought to have known; but rather a single allegation that he ought to have known (and may even have known - though it is not necessary to allege this).*

> *Before turning to the pleadings I would add one thing more. In order to allege fraud it is not sufficient to sprinkle a pleading with words like "wilfully" and "recklessly" (but not "fraudulently" or "dishonestly"). This may still leave it in doubt whether the words are being used in a technical sense or merely to give colour by way of pejorative emphasis to the complaint.*

89. In respect of the case of fraud as pleaded against CSM paragraph (a) is consistent with negligence. One cannot say from reading paragraph (a) that the pleader is saying that CSM was personally dishonest. Again, paragraphs (b) and (c) are really speaking of negligence. I do not see how causing Charles to execute a document containing the wrong information is necessarily dishonest. Knowing what the instrument ought to have contained and delivering it with the incorrect information is not, without more, an allegation of dishonesty. Paragraphs (d) to (f) cannot sustain an allegation of personal dishonesty. Paragraph (d) at first blush may seem to be able to do this but when carefully read it does not have that quality. Although paragraph (d) uses the expression "fraudulently" (assuming it means personal dishonesty) the pleading is not saying that CSM was dishonest. What it is saying is that CSM provided George with the means to be dishonest. Paragraph (d) as pleaded is consistent with CSM negligently providing George with the means to commit a fraud (see ***Heid v Reliance Finance Corporation Pty*** 154 C.L.R. 326). Thus unless it can be said that the allegation in paragraph (d) must mean that CSM was personally dishonest the pleading is inadequate to ground personal dishonesty. Paragraphs (e) and (f) do not allege personal dishonesty against CSM. In fact paragraphs (e) and (f) really confirm the ambiguity of the pleading of the case against CSM. They are saying that CSM omitted to take steps to stop George from doing what he did. The omission to act may have arisen from negligence or being a party to dishonesty. They are ambiguous. The claim in fraud against CSM is struck out.

90. I need not dwell on the allegation of fraud against MFG because Mr. Piper expressly stated that he was not alleging dishonesty against MFG. If this is so then there is no case of dishonesty against MFG. I have already explained that there is no cause of action known as concealed fraud. In any event the pleadings against MFG fail the test I have identified from the cases of ***Belmont Finance*** and ***Armitage***.

91. Regarding the case of fraud pleaded against VLS, while paragraphs (a) to (c), on a superficial examination, appear to support an allegation of fraud, the case as pleaded does not amount to an allegation of personal dishonesty. To assist someone to deprive another of property is not necessarily dishonest. It could be

that VLS honestly thought that George was entitled to transfer the land. As far as paragraph (a) is concerned, mere knowledge is not by itself dishonesty. Paragraph (b) could not be said to advance the case of the claimant. It just states a fact that is not in dispute and does not mean personal dishonesty. Paragraph (c) states a conclusion without any supporting facts to justify that conclusion. The paragraphs state bald facts which admit of several explanations including explanations inconsistent with dishonesty.

92. Paragraphs (d), (e) and (f) of the pleaded case of fraud against VLS are really allegations of negligence. To say VLS neglected or refused to make enquiries is not an allegation of personal dishonesty because it is clear law that under the Registration of Titles Act mere failure to make enquiries does not inevitably mean that the person was personally dishonest and even if the person did and found out about the interest in the claimants interest but nonetheless bought the land, that in and of itself is not necessarily personal dishonesty (see ***Wicks v Bennett***). The reason is that in the law there is a huge difference between dishonesty and negligence even if the negligence is gross. Neglecting to do an act is not intrinsically dishonest. The paragraphs are "*not inconsistent with honesty*" (per Millett L.J. in ***Armitage*** at page 258). It is well established that if the pleading admits of "*several possible explanations, all innocent and plausible*" (per Millett L.J. in ***Armitage*** at page 258) then the pleading is not sufficient to sustain an allegation of dishonesty. The pleading of fraud against VLS are struck out as they do not disclose reasonable grounds for bringing a claim in fraud.

93. The conduct of VLS may be to be deplored but he was doing what the law allows him to do. To say, as the pleading does that VLS knew that George had no interest in the property is really a conclusion that assumes certain facts exist. There is nothing setting out the basis on which VLS had this knowledge. This type of pleading is not particularising as is required in a case of personal dishonesty under the Registration of Titles Act. The facts pointing to the conclusion must be spelt out so that the defendant is able to know whether the claimant is talking about mere knowledge, negligence however gross or personal dishonesty. That was not done here. It would seem that the cases of ***Stuart*** and ***Wicks*** are able to support a submission that summary judgment ought to have been given, if what is pleaded is all that there is. But the case was not argued on this basis.

Conclusion

94. CSM succeeds in its application to strike out the claim against them only in respect of the claim based on fraud. The claim in fraud as pleaded is insufficient to sustain a case of dishonesty. The claim based on negligence is not struck out. There was a duty owed to Charles by CSM and that duty was breached. Evidence

needs to be heard on whether the claimant suffered damage on the date the transfer was registered. If damage occurred on November 1, 1983, then the claim is statute barred.

95. MFG succeeds in its application to have the claim of fraud and negligence struck out. The claim as pleaded cannot sustain a case of dishonesty. Also there was an express disclaimer of an allegation of fraud against MFG. MFG did not owe a duty of care to Charles.

96. VLS succeeds in its application to strike out the claim of fraud. Costs to CSM but to dealt with at the end of the trial of the claim. Costs to MFG and VLS to be agreed or taxed.

97. The case against the Registrar of Titles was disposed of in the manner indicated at the beginning of this judgment.