Case Notes

NEGLIGENT PROFESSIONAL ADVISORS REVISITED: THE SIGNIFICANCE OF

MIDLAND BANK TRUST CO. v HETT, STUBBS & KEMP.[1]

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In an earlier article in this Journal[2] the present author drew attention to a line of decisions[3] both English and Australian which at the time of writing suggested that a negligent professional advisor could be liable to his client in respect of negligent advice only for breach of contract. The client who had suffered loss caused by the negligence of his professional advisor had no additional or alternative remedy in tort. It was then submitted that the lack of a possible remedy in tort was potentially productive of hardship to the client[4] and was anomalous when contrasted with the position of a non client advisee who, in the case of financial loss, provided he can bring his claim within the principles of *Hedley Byrne & Co. Ltd.. Heller & Partners Ltd.*[5] and *Mutual Life & Citizens' Assurance Co. Ltd.* v. *Evatt,*[6] is able to sue the advisor in tort. It was further argued that the contract only decisions then analysed were inconsistent with the modern law of negligence particularly as it has developed since *Hedley Byrne.* However, since some of those decisions had been given after *Hedley Byrne,* it was surmised that by 1976 the position had perhaps been reached when they would need to be overruled by legislation although it was noted that in *Esso Petroleum Co. Ltd.* v. *Mardon*[7] Lord Denning M.R. had expressed the opinion that the decisions were no longer good law.[8]

In the light of the foregoing it is therefore a matter of particular satisfaction, mixed with an element of pleasant surprise, to this

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1. [1978] 3 W.L.R. 167.
2. *The Negligent Professional Advisor: Can the Client sue in Tort* (1976) 9 U.Q.L.J., 252.
3. See e.g., *Howell* v. *Young* (1826) 5 B. & C. 259; *Ward* v. *Lewis* (1896) 22 V.L.R. 410; *Jarvis* v. *Moy, Davies, Smith, Vandervell & Co.* [1936] 1 K.B. 399; *Groom* v. *Crocker* [1939] 1 K.B. 194; *Clark* v. *Kirby-Smith* [1964] Ch. 506; *Bagot* v. *Stevens Scanlon & Co. Ltd.* [1966] 1 Q.B. 197; *Cook* v. *Swinfen* [1967] All E.R. 299, per Lord Denning M.R. at p. 302; *Belous* v. *Willetts* [1970] V.R. 45; *Heywood* v. *Wellers* [1976] 2 W.L.R. 101, per James L.J. at p. 113.
4. Particularly in relation to the running of the relevant limitation periods. In the case of an action for breach of contract the limitation period begins from the date of the breach of contract which when constituted by the giving of negligent advice is the date of the giving of the advice. Where a plaintiff claims in tort for negligence the limitation period begins to run from the time when the plaintiff suffers damage which may of course be much later than the date of the act, e.g. giving advice, which caused such damage. For an example of the importance of this distinction in such cases see *Ward* v. *Lewis,* supra, n. 2.
5. [1964] A.C. 465.
6. [1971] A.C. 793.
7. [1976] Q.B. 801.
8. See [1967] Q.B. 801, at p. 819.

author that a judge of the Chancery Division in England, Oliver J., in *Midland Bank Trust Co.* v. *Hett, Stubbs & Kemp,*[9] an action brought by a client against his solicitors, has recently taken the opportunity to reject the contract only decisions. In a judgment noteworthy for a masterly and detailed analysis of the relevant authorities Oliver J. held that an action in tort was available to the client who suffers loss caused by his solicitor's negligent breach of duty, in addition or alternatively to any possible action for breach of contract.

The plaintiffs in the action were the executors of the estate of one Geoffrey Green (G.). In early 1961 G had been granted an option, exercisable for a period of ten years, to purchase a farm from his father (W.). The option agreement had been drawn up by a partner in the defendant firm of solicitors. Unfortunately and because of an inexplicable oversight on the part of that partner the option was not registered as an estate contract under the Land Charges Act 1925 until September 1967 when registration was effected by another partner. A consequence of this omission on the defendant's part was that before registration W. was able to sell the farm elsewhere free from the option. This he did. In August 1967, having by now changed his mind about the option and being determined to defeat it, W. sold and conveyed the farm to his wife. Thus registration of G's option a month later was, as Oliver J. described it in other litigation arising from this matter,[10] "a case of bolting the stable door after the horse had gone".

After the failure of family negotiations for the settlement of the dispute G. commenced the present action against the defendants. He claimed damages for negligence and breach of professional duty in the defendant's delay in registration of the option. In 1973 G. died and the action was continued by his executors.

It was held that, by their failure to take proper steps to protect his option interest by its registration as an estate contract, the defendants were in breach of their duty owed to G., a breach which had caused him considerable financial loss. Such breach was actionable both in tort and as a breach of the defendant's contractual duty owed to G. How did Oliver J. reach this decision? To answer this question we must begin by an examination of the argument advanced on behalf of the defendant firm.

In this there were two essential propositions. First, it was argued, a solicitor's duty to his client in such a case is a duty which arises from the contract between them and from the contract alone; that it is a duty which arises *ex contractu* rather than *ex delicto.* There was no lack of authority to support that argument, namely the contract only decisions referred to above. Second, it was argued, although the defendants were prepared to admit that they had been in breach of contract such breach had occurred more than six years before G's action was commenced and was therefore statute barred under the Limitation Act, 1939.[11] This argument was based on the premise that the breach was that of a contractual obligation to affect regis-

9. [1978] 3 W.L.R 167.
10. See *Midland Bank Trust Co* v. *Green* [1978] 3 W.L.R. 149 at p. 154.
11. See s.2(i)(a) of the Act. Similar provisions exist in all Australian States.

tration of the option interest within a reasonable time of the option agreement in 1961, and that such a time must have elapsed well over six years before the action had been commenced in 1972, indeed more than six years before G's interest was defeated by the sale of the farm in August 1967. To paraphrase the defendant's proposition on the contract issue they were in effect saying: "We admit that we ought to have registered the option interest. We ought to have done so at or shortly after the date of the option agreement, by about the end of March 1961. By failing to do so we were in breach of the contract with our client, G., but that breach occurred at that time. Therefore the six years limitation period must have commenced to run from that time with the result that any action must have become statute barred by about the end of March 1967."

It is interesting to note that had these propostions of the defendants been upheld the case would have provided a startling illustration of the potential injustice arising from the contract only decisions, an injustice which was discussed in the earlier article. Let us assume for the moment that the plaintiff had no possible remedy in tort and that the breach of contract occurred in the manner and at the time submitted by the defendants. The position would then have been that any claim would have become statute barred before any damage had occurred and, in the words of Oliver J:[12]

> ". . even before the unfortunate victim of the wrong could, by any conceivable stretch of imagination, have discovered that any damage might occur or could have taken any practical steps to prevent it or seek any redress".

To put it bluntly, G. would have had no remedy at all against his admittedly negligent solicitors, a most lamentable state of affairs. However, both propositions of the defendants were rejected thus avoiding such unfortunate result.

The first proposition was rejected because Oliver J. held that the contract only decisions were no longer law because of the combined effect of the decisions in *Hedley Byrne*[13] and *Esso Petroleum Co. Ltd.* v. *Mardon.*[14] In his Lordship's view these two decisions had destroyed the underlying reasoning of the contract only decisions which was that where a duty of care arose out of a contract between the parties there could not also, at least in the professional advisor-client cases, be a parallel duty in tort. There was nothing to be found in *Hedley Byrne* itself to indicate that the principle of that case was to be anything but one of general application:

> "not to be excluded by the fact that the relationship of dependence and reliance between the parties is a contractual one rather than one gratuitously assumed . . .".[15]

In particular Oliver J. noted[16] that Lord Devlin in *Hedley Byrne* treated the existence of a contractual relationship as being good evi-

12. [1978] 3 W.L.R. 167, at p. 173.
13. Supra, n.4.
14. Supra, n.6.
15. See [1978] 3 W.L.R. 167, at p.188.
16. See [1978] 3 W.L.R. 167, at pp. 192-193.

dence of the general tortious duty he was discussing and specifically mentioned, as an example of a relationship capable of giving rise to a tortious duty of care, that of solicitor and client.[17]

Further, in *Mardon,* the Court of Appeal, in the view of Oliver J., reached its decision imposing liability for negligent advice upon Esso, as being liable either in tort under the *Hedley Byrne* principle or in contract for breach of warranty, on the basis that the duties in tort and contract were interchangeable and co-existing.[18] Therefore that decision is authority for the proposition that the existence of a contractual duty of care does not preclude a parallel claim in tort. This interpretation of *Mardon* is given added and prestigious support in the judgment of Lord Denning M.R. who specifically disapproved the contract only decisions including those such as *Clark* v. *Kirby-Smith*[19] and *Bagot* v. *Stevens*[20] which were decided after *Hedley Byrne.*[21]

In the light of his interpretation of the decisions in *Hedley Byrne* and *Mardon* Oliver J. decided not to follow *Clark* v. *Kirby-Smith* and *Bagot* v. *Stevens.* Because these were both first instance decisions it was open to Oliver J., as another first instance judge, to refuse to follow them. More difficult potential obstacles of precedent were constituted by *Cook* v. *Swinfen*[22] and *Heywood* v. *Wellers,*[23] both post *Hedley Byrne* decisions of the Court of Appeal in which that Court had referred without demur to the exclusively contractual nature of the liability of a solicitor to his client. These references were, however, in the opinion of Oliver J. only *dicta* not being necessary to the decision in either case and his Lordship was for that reason free to refuse to follow them. Even if they were part of the *rationes decidendi* of those decisions as such they were in conflict with the decision of the same court in *Mardon.* Given such a conflict between decisions of the Court of Appeal his Lordship was either bound to follow *Mardon* as the later decision or was free to elect which of them to follow in which case also *Mardon* would be followed.

Therefore, held Oliver J., the defendants in the instant case were liable for the plaintiff's loss in tort because of their negligent failure to register G's option until it was too late to protect his interest in the farm. Because such an action only arose from the time G. suffered damage his action was not statute barred.

In passing one other matter should be mentioned. The present author in the earlier article referred to an illogical consequence of the contract only decisions, namely that a non client advisee could sue his professional advisor in tort under the *Hedley Byrne* principle whereas the client appeared to be confined to whatever action he might have in contract. This illogicality was emphasised by Oliver J. in the following passage:[24]

17. See [1964] A.C. 465, at p. 530.
18. See [1978] 3 W.L.R. 167 at p. 207.
19. [1964] Ch. 506.
20. [1966] 1 Q.B. 197.
21. See [1976] Q.B. 801, at p. 819. Quoted by Oliver J. [1978] 3 W.L.R. 167, at p. 206.
22. [1967] 1 All E.R. 299.
23. [1976] 2 W.L.R. 101.
24. [1978] 3 W.L.R. 167, at p. 194.

> "The effect of the [contract only] authorities . . . is a curious one. The solicitor who gratuitously assumes to advise a relative and does it negligently remains liable to suit at any time within six years of damage occurring. The solicitor who charges a substantial fee to a client who retains his services in the normal way escapes any liability at all if the damage does not occur or is not discovered until six years has elapsed from the date on which the negligent advice is given."

Happily such illogicality will disappear provided the decision of Oliver J. is accepted by other courts as representing the modern law.

It is to be hoped that other courts, including Australian courts, will so accept the decision in *Midland Bank Trust Co.* v. *Hett* and finally jettison the contract only decisions. If this hope is realised the injustice inherent in a decision such as that in *Ward* v. *Lewis,*[25] a decision of the Victorian Supreme Court long before the development of the modern law of negligence, would at last be rectified. In the meantime there is now at least strong ammunition for the argument of a plaintiff client in such a case.

It remains to briefly explain why Oliver J. rejected the contract argument advanced by the defendants and so avoided its already mentioned potentially unfortunate consequences. His Lordship held that the contractual obligations of the defendants went beyond that of merely registering the option within a reasonable time of the option agreement. They had an obligation to the plaintiff to:

> "take such steps as were necessary and practicable to ensure that [the option] was binding on the land into whosesoever hands it might come before any third party acquired a legal estate".[26]

Applied to the facts of the case the obligation consisted of a duty to register the option which was of a continuing nature and still existed in August 1967 when the farm was sold and conveyed to a third party. It was at that time, when their duty to protect G's interest by registration was no longer capable of effective performance, that the contractual obligation was breached. That was the breach of which the plaintiff complained.[27] That the obligation was of a continuing nature was also demonstrated by the fact that the defendants had been employed under a retainer and under which, in relation to the option, they had never treated themselves as *functi officio* having opened a file relating to it and having kept relevant documents in their strongroom.[28]

It will be noted that the present case was one in which the defendants were liable in respect of a nonfeasance. As Oliver J. noted[29] had it been a case in which the defendants' breach of contract was

25. (1896) 22 V.L.R. 410.
26. [1978] 3 W.L.R. 167, at p. 210.
27. It was partly for this reason that Oliver J. felt that he could distinguish the decision of the Court of Appeal in *Bean* v. *Wade* (1885) 2 T.L.R. 157, in which the plaintiffs, in similar circumstances, had apparently merely pleaded a failure to take necessary action to protect their interests "within a reasonable time". See [1978] 3 W.L.R. 167, at p. 213.
28. This was another reason why Oliver J. felt able to distinguish *Bean* v. *Wade* (Supra, n. 26), i.e. that in that case it appeared that the defendant solicitors were not in a similar retainer relationship with the plaintiffs.
29. See [1978] 3 W.L.R. 167, at p. 210.

constituted by an act of a positive nature, such as the giving of negligent advice, then the breach would have occurred at that point of time with the result that the limitation period in contract would have run from that time. That in turn demonstrates why the decision of Oliver J. on the tort issue is of such potential importance in the situation of a professional advisor giving negligent advice to his client who later suffers consequent loss.

BOUCHE v SPROULE[1] *IN AUSTRALIA*

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For as long as the Australian taxation system does not particularly penalise the creation of life interests it is to be expected that testators, and even sometimes settlors *inter vivos*, will create life interests and that trustees for life tenants and remaindermen will be faced with the numerous problems associated with the maintenance of the capital and income accounts.

Moreover with the increased activity of trustee investment in the stock market, and the volatility of that market, capital and income issues are bound to arise for trustees who are holding stocks and shares in their trust portfolio. This article examines the duties of the trustees who hold stocks and shares upon any trust which requires the separation of the capital and income accounts and recounts some of the Australian authorities demonstrating the law in fact situations untested elsewhere.

Where stocks or shares are settled upon trust they are normally to be regarded as part of the capital assets of the trust, although the company itself is not concerned with the fact. As Baggallay J. said in *Re Bouch*[2]: "The company are not supposed to know anything about tenant for life or remainderman. They only know the registered holder."

Where the company pays a dividend to the trustee as such registered holder that dividend is normally to be regarded as a distribution of income, payable to the tenant for life. As Roper J. said in *Blakewell* v. *Holme*[3]:

> "Normally any dividend paid by a company whether it be from business profits or capital profits is income in the hands of a trustee shareholder to which life tenants are entitled."

And Vaisey J. said in *Re Kleinwort's Settlement Trusts*[4]:

> "These accretions to the normal income of the trust fund are sometimes metaphorically described as 'windfalls'; and when they have left the parent tree, I can see no principle for notionally replacing them on the boughs from which they have fallen."

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1. (1887) 12 App. Cas. 385.
2. (1885) 29 Ch.D. 635 at p. 650.
3. (1934) 44 S.R. (N.S.W.) 150 at p. 154.
4. [1951] Ch. 860 at p. 863.