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Straw

CLAIM NO. 2003/H.C.V. 01541

BETWEEN	**SUN ROSE LIMITED**	**CLAIMANT**
AND	**HERBERT W. GRANT** (Carrying on Practice as Grant, Stewart, Phillips & Co., Attorneys-at-Law)	**1ST DEFENDANT**
AND	**S. ARTURO STEWART** (Carrying on Practice as Grant, Stewart, Phillips & Co., Attorneys-at-Law)	**2ND DEFENDANT**
AND	**HILARY PHILLIPS, Q.C.** (Carrying on Practice as Grant, Stewart, Phillips & Co., Attorneys-at-Law)	**3RD DEFENDANT**
AND	**DENISE E. KITSON** (Carrying on Practice as Grant, Stewart, Phillips & Co., Attorneys-at-Law)	**4TH DEFENDANT**

Ms. Aisha Mulendwe for Claimant

Mr. Kevin Williams for Defendants

PROFESSIONAL NEGLIGENCE – LIMITATION OF ACTION

Heard: May 29 and 30, 2008 and September 23, 2008

Straw J.

The claimant, Sun Rose Limited, is suing its former attorneys, Grant, Stewart, Phillips Q.C. and Company for damages resulting from professional negligence, recklessness and misconduct. The particulars of claim aver, *inter alia,* that the defendants did not deal with the claimant's business with due expedition and failed to exercise any

reasonable or due care, skill, diligence or competence. It is also alleged that the defendants are guilty of breach of contract of employment.

Chronology of the Facts giving rise to the Claim

In January 1996, George's Garage and Wrecking Service (The third party) filed an action for recovery of $140,784.08 against the claimant for services rendered and storage charged in relation to a 1990 Chevy Panel Van (The underlying claim).

The statement of claim speaks to two (2) motor vehicles registered CC 2885 and CC 2865 (Mr. Aifons Klem, the Director of the claimant, has however explained that this was in fact a mistake, and that the claim was in relation to the van registered CC 2865. He has not been challenged on that issue).

The claimant, through the said Director, instructed the firm of Grant, Stewart, Phillips & Company (The defendants) to represent the claimant in defence of the suit.

Notice of Entry of Appearance was filed on February 15, 1996 by Mr. Leighton Pusey (a then Attorney-at-Law, now a Puisne Judge) as the servant or agent of the defendants. However, no defence was filed within the prescribed time.

By letter dated April 3, 1996, Mr. Pusey requested from the Attorneys for the third party, Myers, Fletcher & Gordon, consent to file

defence out of time as they were not yet in a position to file a Defence as instructions were still being taken from the client.

The consent to an extension of 14 days was granted by Myers, Fletcher & Gordon on the 4th April 1996.

No defence was filed within the extended period of time. As a result of this failure to file a Defence, Attested Judgment in default of defence was filed on the 16th May 1996 against the claimant for the sum of $140,784.08 and costs to be taxed with interest at 6% per annum.

On the 27th May 1996, Mr. Pusey wrote to Mr. Klem informing him that the third party's attorney-at-law had received instructions to enter Default Judgment against the claimant.

The letter also stated that it was evident that the claimant had no defence and advised settlement as the suggested course.

Mr. Klem was also asked to indicate the sum of money that he would be willing to pay in settlement.

On the 22nd August 1996, Mr. Pusey received a letter from Myers, Fletcher & Gordon with an endorsed copy of the Attested Copy Judgment. The letter also stated that the Bill of Costs in the amount of $2,560.75 for taxation had been filed and requesting payment of the sum of $140,784.08 within ten (10) days or that they <u>would be issuing proceedings to enforce payment</u>.

Mr. Klem has stated that he was never made aware of any of these proceedings. He also denied, under cross examination, that he received any such letter dated the 27th May 1996 from Mr. Pusey. However, his witness statement does state that he was advised on or about the 27th May 1996, that there was no defence. He does not clarify whether he was so advised in writing or orally. He admitted that his statement does suggest he received the letter.

On the 10th September 1996, Principe for Writ of Seizure and Sale was filed by Myers, Fletcher & Gordon directing the Bailiff (R. M. Court, Manchester) to levy against the claimant in the amount of $140,784.08 with interest at 6% per annum from the 16th May 1996.

By way of letter dated September 13, 1996, Mr. Pusey informed Myers, Fletcher & Gordon that instruction had been received from the client that the sum of money requested for the repair of the vehicle was excessive, and that a reasonable sum had been offered to their client which had been refused and that the sum of $20,000.00 was being offered in full and final settlement.

The defendants, through Mr. Pusey, filed summons to set aside the Interlocutory Judgment in Default of Defence on the 16th September 1996. This was set for hearing on the 19th November 1997.

On the 17th September 1996, Myers, Fletcher & Gordon responded to Mr. Pusey's letter of September 13, 1996 and informed him that a Writ of Seizure and Sale had been filed and that they were awaiting the return of the sealed document from the Court to send to the Bailiff for execution.

The Writ of Seizure and Sale was perfected by the Registrar on the 3rd April 1997. Presumably, it was sent to the Bailiff subsequently and on the 30th June 1997, the Bailiff's office wrote to the Collector of Taxes advising him that on the 18th day of June 1997, the Chevy motor truck registered CC 2865 was sold to one Steve Gooden via Writ of Seizure and Sale. The cooperation of the Collector was requested in effecting the transfer of the title.

The claimant would therefore have suffered the loss of the said Chevy Van in June 1997. The summons to set aside would not have been heard until 19th November 1997. By then the damage would have been done.

The defendant's representative did not attend on the Registrar on the 13th December 1996 when the third party's Bill of Costs was assessed in the sum of $2,560.75. The defendants also did not attend the hearing set for the 19th November 1997; neither did they file any Defence.

The Summons to Set Aside Default Judgment was adjourned *sine die* on the 17th November 1997 and later reissued for a date in November 1998.

Were the Defendants guilty of negligence or of any breach of contractual duty?

An attorney-at-law can be liable both in contract and in tort to his client ***(Midland Bank v Hett Stubbs and Kemp, 1979 Ch. 384)*** Oliver J, in the above case, in discussing the solicitor's contractual duties stated as follows: (per page 434 – 435)

> *"The classical formulation of the claim in this sort of case as 'damages for negligence and breach of professional duty' tends to be a mesmeric phrase. It concentrates attention on the implied obligation to devote to the client's business that reasonable care and skill to be expected from a normally competent and careful practitioner as if that obligation were not only a compendious, but also exhaustive, definition of all the duties assumed under the contract created by the retainer and its acceptance. But, of course, it is not. A contract gives rise to a complex of rights and duties of which the duty to exercise reasonable care and skill is but one."*

In discussing the duty of care and skill of lawyers, the authors of **'Jackson and Powell on Professional Negligence'** 4th edition (London, Sweet and Maxwell 1997), quotes Riley J, in ***Tiffin Hldg Ltd. V Millican*** *4a DLR* (2d) 216 as follows (per heading 'Content of the Duty' at paragraphs 4 – 55, pg. 448):

> *"The obligations of a lawyer are, I think, the following: (1) To be skilful and careful; (2) To advise his client on all*

matters relevant to his retainer, so far as may be reasonably necessary; (3) To protect the interest of his client; (4) To carry out his instructions by all proper means; (5) To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him; (6) To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria."

The precise content of the duty of reasonable skill and care will depend on the circumstances of each case (**per Jackson and Powell,** supra, pg. 448*)*.

The breach of the duty of care used by the lawyer to his client can also arise independently of any contractual duties, express or implied. In practice, however, the failure of the lawyer to carry out some necessary step is normally treated as a breach of the general duty to exercise skill and care rather than a breach of some specific duty implied in the retainer. (**See Jackson and Powell,** paragraph 4 – 05 pg. 412).

However, while the breach of the duty of care can arise both in contract and tort, it has to be distinguished as it has implications in relation to the issue of when the action becomes statute barred.

Mr. Klem contends that he had a defence and the defendants never informed him that they would not be filing a Defence. The defence is in the terms indicated in Mr. Pusey's letter to Myers,

Fletcher & Gordon dated September 13, 1996. A Draft Defence and Counterclaim (see Exhibit 2) which was never filed reads as follows:

"1 ---------

2. The Defendant avers that the Plaintiffs' charges were excessive and unconscionable. That it tendered the sum reasonably owing to the Plaintiff.

3 The Defendant avers that the Plaintiff refused this sum, detained possession of the vehicles and illegally and unlawfully charged the Defendant storage of the vehicles.

4. That despite repeated request for the return of the vehicles, the Plaintiffs have retained possession of the vehicles.

5. ---------

Counterclaim

6. ----------

7. The Defendant also claims damages for loss of use of the vehicles."

The failure to file Defence by the defendants deprived the client of defending the proceedings. Since the claimant had been contending that there was a defence, at the least, the defendants ought to have applied to the Court for extension of time to file Defence after the time period allowed by Myers, Fletcher & Gordon had expired. There was a

clear breach of the duty of care in contract and tort. Mr. Pusey's letter of 27th May 1996 to Mr. Klem indicates that, in his opinion (Mr. Pusey's), the client had no defence. The fact is that Mr. Klem had been insisting that he had a Defence and had resisted paying the third party since he received the invoice in June 1994.

Whether the Defence had any value would have been another issue all together. Whenever the lawyer's negligence has deprived the client of his chance of bringing or defending proceedings, the Court must assess the value of the 'chance' which has been lost applying the principles formulated in ***Kitchen v Royal Air Force Association,*** 1958 2All E. R., 241

Mr. Williams, Counsel for the defendants, has submitted that in the circumstances of the case, even if there was a breach of duty as a result of the failure to file a Defence, no loss suffered by the claimant can be attributable to any act or omission on the part of the agent of the defendants. He submits that in the face of repeated advice to settle the debt early in the day, the claimant trenchantly refused to do so and is the author of his own misfortune.

The Court does agree that is it the duty of Counsel to advise the Client as to whether or not the case is sustainable. However, while Counsel remains on the record, there is a duty to protect the interest of the client and to carry out his instructions by all proper means.

I am of the view that the failure to file a Defence was a breach of duty which led directly to the loss of the vehicle.

Mr. Williams further submitted that, even if the court reaches the conclusion that Counsel was negligent, what the Court has to assess is the 'value of the chance' which has been lost. He contends that the defence had no value at all and as such no damages should be awarded.

Ms. Mulendwe, Counsel for the claimant, cited the case of **Carmen Mason vs. L.H. McLean** 1979, 16 JLR pg. 432 as support for her submission that the defendants are liable for the value of the Chevy Panel Van at the time it was sold.

There is no evidence before the Court of the actual value of the van in June 1997. Mr. Klem had stated that it was $380,000.00, but this was struck out of his witness statement as there was no foundation laid for the Court to receive this as evidence. He did say, however, that the van was sold by the bailiff for $200,000.00. There is no documentary proof of this but it was not challenged.

In the **Carmen Mason** case, the client sustained injuries in a motor vehicle accident in circumstances in which liability on the part of the driver of the car could not have been in dispute since other pedestrians who had been injured in the same accident had had their

claims for compensation settled by the insurer without resort to litigation.

She lost her right to claim compensation as the attorney had failed to file a writ and the matter had become statute-barred. The Court held that the client had sustained pecuniary loss as a result of the attorney's breach of duty and that she should be compensated to the extent that she would have benefited had the action being filed and pursued to a conclusion.

It is clear that the client in the above mentioned case had lost something of value. It cannot be said, without a proper analysis that the claimant in the present case is in a comparable situation to **Carmen Mason**.

Mr. Williams submitted and the Court agrees that the claimant must satisfy the Court that the negligence of the defendants has caused loss of some right of value.

In **Kitchen vs. Royal Air Force Association** (supra), Evershed, MR speaks to three categories of cases (per pages 250, 251)

> *"If, in this kind of case, it is plain that an action could have been brought and that, if it had been brought, it must have succeeded, the answer is easy. The damaged plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the plaintiff never had a cause of action, that there was no case which the plaintiff could reasonable ever had*

formulated, then it is equally plain that she can get nothing save nominal damages for the solicitor's negligence.

----- The present case, however, falls into neither one nor the other of the categories -- --

In my judgment, assuming that the plaintiff has established negligence, what the Court has to do in such a case ---- is to determine what the plaintiff has lost by that negligence. ---- Has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case it may be that its value is not easy to determine, but it is the duty of the Court to determine that value as best it can."

Analysis of Claimant's and Defendants' Case

Before embarking upon any assessment of the value of the claimant's case, the Court will first analyse the evidence presented and make relevant findings of facts on the issues.

1. Mr. Klem gave the Chevy van to the third party on May 11, 1994. He believes he received the invoice in the amount of about $50,000.00 in June 1994. No Invoice was tendered in evidence.

2. He refused to pay the amount as he believed it was excessive. He offered them $10,000.00. According to Mr. Klem, he was trained as a German machine operator and he was in a position to quantify the work done.

3. On the November 24, 1994, Myers, Fletcher & Gordon wrote to the claimant on the instruction of the third party informing them of the debt of $140,784.08 for services and storage fees incurred in respect of Chevrolet vans registered CC 2885 and CC 2865. The letter also stated that arrangements were to be made to settle the indebtedness within ten (10) days or court action would be initiated.

4. This letter would have written about 17 months after the van was given to the garage. Mr. Klem agreed with Counsel, Mr. Williams that $90,000.00 out of the sum of $140,000.00 would represent storage fees. He also agreed that the storage fees would reflect the sum of $142.00.00 per day for 630 days.

5. Mr. Klem has stated that he first consulted the 4th defendant, Mrs. Kitson about the invoice in December 95, after he received the letter. He stated that he would expect his attorneys to tell him whether or not he had a defence and that neither Mrs. Kitson nor Mr. Pusey told him that they were of the opinion that he had none or he would not have risked the vehicle for $50,000.00.

6. This, however, is inconsistent with paragraph 8 of his witness statement as he clearly stated that he was so advised on or about May 27, 1996.

7. He further stated that he gave Mr. Pusey instructions to prepare a Defence, that such a Defence was prepared.

   It is clear that Mr. Klem is being disingenuous when he states he would not have risked the vehicle for $50,000.00. At the relevant point in time, the amount demanded was no longer $50,000.00 but $140,000.00.

8. The Draft defence indicates that the amount was excessive and that a reasonable sum was offered and refused and the vehicle detained against his will.

9. No distinction had been made between the amount due for repair and the amount due for storage by the claimant in terms of mounting a valid defence.

10. Up to September 1996, Mr. Klem was only willing to offer $20,000.00. This is indicated by Mr. Pusey's letter to Myers, Fletcher & Gordon of September 13, 1996, which states that 'the client is willing to offer $20,000.00 in full and final settlement.' This offer was made after Myers, Fletcher & Gordon informed Mr. Pusey on the 22nd August 2008 that they had received a copy of the Attested Copy Judgment and requested payment within ten (10) days.

    This would have been 'a slap in the face' to the third party and quite, obviously, was given no consideration at all.

Based on the correspondence and the Draft Defence, the Court is of the view that any instructions given to the defendants were very general in their ambit.

Mr. Williams has submitted that the Court should bear in mind that there is no documentary evidence as to how much was charged by the third party to repair the van.

11. Mrs. Kitson has stated that Mr. Klem spoke to her about the invoice in 1994 (although he has denied this) and she told him it was not excessive and that he should pay it. However, Mr. Klem has never stated that he, at any time, gave the invoice to the defendants.

Mr. Williams also submitted that no estimate of the work to be undertaken was obtained, there is no evidence of the work actually done and no independent assessment of the work done so as to put the Court in a position to determine whether the charges were excessive.

12. Mr. Klem merely stated that he was in a position to assess the work done. However, no quantitative comparisons were produced and annexed to the Draft Defence.

These are all relevant factors to be considered by the Court in assessing the value of the chose in action lost by the claimant.

Mr. Williams cited the case of **Patricia Dixon vs. Clement Jones Solicitors** (a firm) 2004 EWCA Civ. 1005. In this case RIX LJ discussed and adopted the principles formulated by Simon Brown LJ in **Mount v Barker Austin** (a firm) 1998 PNLA 493 at 510/511 as being applicable to a solicitor sued for negligence in allowing his client's underlying litigation to be struck out. These are as follows:

"1. The Legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim (or defence to counterclaim) he has lost something of value i.e. that his claim (or defence) had a real and substantial rather than merely a negligible prospect of success ----.

2. The evidential burden lies on the defendant to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position and heavier still where, as here, two firms of solicitors successively have failed to do so. If, of course, the solicitors have advised their client with regard to the merits of his claim (or defence) such advice is likely to be highly relevant.

3. If and insofar as the Court may now have greater difficulty in discerning the strength of the plaintiff's original claim (or defence) than it would have had at the time of the original action, such difficulty should not count against him, but rather against his negligent solicitors. ---- That, however, is not inevitable: it will not be the case in particular (a) where the original claim (or defence) turned on questions of law or the interpretation of documents, or (b) where the only possible prejudice from the delay can have been to the other side's case.

4. If and when the Court decides that the plaintiff's chances in the original action were more than merely negligible, it will then have to evaluate them. That requires the Court to make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out. Generally

speaking one would expect the Court to tend towards a generous assessment given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure ----."

Analysis of the Claim

Has the claimant satisfied the legal burden of proving that the defence had a real and substantial rather than merely a negligible prospect of success?

In my opinion, they have not done so.

(i) The defence has been the same since Mr. Klem received the invoice, then the letter from Myers and lastly since they were served with the claim in January 1995. The instructions written in the letter to Myers, Fletcher & Gordon on the 13th September 1996 reflect the same stance that the amount was excessive and unconscionable.

(ii) Storage fees were also part of the amount being demanded. The claimant had left the van at the garage from June 1994 and even beyond the filing of the suit in January 1995.

(iii) There were no specific details as to why the amount was excessive.

(iv) The defendants, at the least, through Mr. Pusey, did inform Mr. Klem that he had no defence and suggested a settlement of the matter.

(v) Mr. Klem's offer of $20,000.00 in September 1996 to settle a debt of $140,000.00 would not be conducive to a settlement being reached. I am fortified in this view also by the fact that an application to set aside the Default Judgment was filed on the 16th September 1996. Clearly Mr. Klem wanted to pursue the Defence.

Based on these circumstances, the Court is of the view that the defendants have satisfied the evidential burden on them to show that the litigation was of no value to the claimant, in that the claimant had lost nothing of value by their (the defendants') negligent act in not filing a Defence.

The Court is also of the view that the assessment of the defence has not been hampered by the lapse of time. The Invoice of the third party was sent to Mr. Klem. He has not produced it, neither has he stated that it was handed over to the defendants. It is apparent also, that he has never obtained any documentation by an independent assessor.

In view of all the circumstances, the Court has come to the conclusion that the value of the chose in action lost was negligible and the claimant is not entitled to any damages at all.

LIMITATION OF ACTION

Is the Action in any event Statute Barred?

Counsel for the defendants has submitted that the claim in negligence has been barred by the operation of the Limitation of Actions Act.

He has stated that the latest date at which any cause of action in negligence could have arisen is June 18, 1997. This is the date that the Bailiff sold the claimant's Chevy van. He has submitted, and the Court has agreed, that even if Counsel had attended the hearing of the Summons to set aside Default Judgment in November 1997, this would have been to no avail, as the van was sold several months earlier.

The Court has already stated the loss of the van is a direct result or the failure to file a Defence and the entry of the Interlocutory Judgment in Default of Defence on the 16th May 1996.

Mr. Williams submitted that, since the present claim was not brought until the 22nd August 2003, it would be statute-barred by virtue of the operation of the provision of the Limitation of Actions Act (which allows for six (6) years for claims of this nature).

He also stated that the only basis for a relevant date later than 18th June, 1997, would be if the defendants' and/or their agent are found to have concealed the fact that there was a potential claim in

negligence against them ***(**per **Kitchen v Royal Air Force Association,** supra**)***.

Ms. Mulendwe has argued that the action is not time barred as the action would only have arisen since 2001 when the claimant (through the visit of Mr. Klem to the Supreme Court) became aware of the acts or omissions of Mr. Pusey being responsible for the loss.

The existing authorities do not favour the submissions of Ms. Mulendwe. In ***MIDLAND BANK v HETT et al,*** *supra,* it was held that the cause of action in negligence accrued on the date when the damage occurred.

The English Court of Appeal approved the decision in **Midland Bank** in the case of ***FORSTER v OUTRED & CO.,*** *1982, 1WLR 86*. However, In ***BELL v PETER BROWNE & Co.,*** *1990, 3 ALL ER 124*, The English Court of Appeal distinguished between a cause of action in contract and a cause of action in tort and held that, where a solicitor negligently failed to take precautions, such as the registration of a caution or a charge, to protect his client's equitable interest in the proceeds of sale of a property in the sole name of another party who had agreed that the proceeds would be shared, the client's cause of action against the solicitor arose in contract when the breach of duty occurred and in tort when the client parted with his legal interest in return for an equitable interest or at the latest when a careful solicitor

would have registered a caution or charge because that was when the client suffered damage.

Based on these authorities, the action brought in August 2003 by the claimant would be statute barred both in contract and in tort.

Did the Defendants conceal the fact that there was a potential claim for negligence?

The equitable doctrine is that the effect of fraud is to postpone the running of time until the person damnified had discovered it or ought to have discovered it. (See **Preston and Newsome's Limitation of Actions**, 3rd edition, London)

This doctrine applied both no cases of actions based on fraud and to cases where a right of action was fraudulently concealed (See **Preston** supra). The claimant would therefore not be barred until six years had expired after the actual or national discovery.

In the present circumstances, there is no issue of fraud. However, Mr. Williams has raised the issue of whether there was any fraudulent concealment of the claimant's right of action. This equitable principle was actually codified by the English Limitation Act, 1939 S 26.

In **Kitchen vs. Royal Air Force,** supra, the Court of Appeal considered the definition of the word 'fraud' in that section of the English Law which reads as follows:

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

(a) The action is based upon the fraud of the defendant or his agent, or

(b) The right of any action is concealed by the fraud of any such person as aforesaid ....

The period of limitation shall not begin to run until the plaintiff has discovered the fraud ---- or could with reasonable diligence have discovered it."

The Court of Appeal in the above case stated that fraud was not confined to deceit or dishonesty but included conduct that amounted to concealment.

In the present case, the defendants, through Mr. Pusey, were aware by the 22nd August 1996, that Judgment had been entered and instructions received by the third partys' attorneys to issue proceedings to enforce judgment if payment not made within ten (10) days.

Mr. Pusey's letter dated September 13, 1996 to the said attorneys, indicates that instructions had just been received from the client and that the client was willing to pay the sum of ($20,000) in full and final settlement. The defendants then filed Summons to Set Aside the Interlocutory Judgment on September 16, 1996.

The letter of the 17th September 1996 from Myers, Fletcher & Gordon to Mr. Pusey indicated that a Writ of Seizure and Sale was filed on the 10th September 1996. There is no documentary evidence to indicate that the claimant was informed of this. However, the Summons to Set Aside had already been filed. There is no evidence from which the Court can draw a reasonable inference that before or after June 1997, the defendants concealed any facts that could have alerted Mr. Klem that the claimant had or possibly had any right of action.

There were discussions orally, in writing or electronic between Mr. Klem and the fourth defendant, Mrs. Kitson, between 2001 and 2002 in relation to the loss of the van. Some of the discussions involved Mr. Klem stating that he wished to make a claim against the attorneys for liability insurance. The last email sent by Mrs. Kitson (part of Exhibit 2) is dated 21st November 21, 2002.

The mail reads as follows:

> ***"We have formally sent out notification of your claim..."***

Mrs. Kitson testified that she had told Mr. Klem that the Firm did have liability insurance and that if he wished to make a claim against the Firm, she would have to discuss it with the other partners and notify the insurers of the contingent liability. Mr. Klem stated that he

had told Mrs. Kitson during discussions in 2001 that he would sue the Firm and that she told him the firm's insurers would compensate him. Mrs. Kitson denied that she told him that.

The Court does not find Mr. Klem to be as credible a witness as would be desired in order to provide cogent evidence on the point. He has made inconsistent statements as to whether he had received the letters of May 27, 1996 from Mr. Pusey. There has been no explanation for the contradiction and it goes to the root of the case for the claimant in relation to whether the attorneys advised Mr. Klem on certain issues.

The Court therefore prefers the evidence of Mrs. Kitson on the point. There is also nothing to be inferred from the e-mail correspondence to the contrary.

It is also quite clear that from 2001, Mr. Klem was aware of a potential right of action against the defendants. Between 1997 and 2001, there is nothing in the evidence to indicate any concealment on their part.

The Court has therefore come to the conclusion, that the claimant's right of action against the defendants would be statute-barred even if the Court had found that they were entitled to damages.

Judgment is therefore entered for the defendants with costs to be agreed or taxed.