

COURT OF APPEAL.

Judgment reserved: 31st October, 1996.
 Judgment delivered: 11th December, 1996.

236.

Before: Sir Godfray Le Quesne, Q.C., (President),
 R.C. Southwell, Esq., Q.C., and
 P.D. Smith, Esq., Q.C.

<u>Between:</u>	Frank James Maynard	<u>Plaintiff</u>
<u>And:</u>	The Public Services' Committee of the States of Jersey (formerly the States of Jersey Resources Recovery Board).	<u>Defendant</u>

Appeal of the Defendant against the Judgment of the Royal Court (Samedi Division) of 17th March, 1995, dismissing the Defendant's claim that Plaintiff's right of action was prescribed.

Appeal by way of cross-appeal by the Plaintiff from so much of the said Judgment of the Royal Court of 17th March, 1995, as found that:

- (a) a cause of action in Tort accrues, when it reaches a stage, whether then known or unknown, at which a Judge could properly give damages for the harm that had been done; and
- (b) a cause of action in contract accrues on the date of the breach of contract.

Advocate D.F. Le Quesne for the Plaintiff.
 Advocate S.C.K. Pallot for the Defendant.

JUDGMENT

SOUTHWELL JA: This is the judgment of the Court. In this action Mr. Frank James Maynard sues the States of Jersey Public Services Committee (formerly the States of Jersey Resources Recovery Board), which we will refer to as "the States", for damages for personal injuries including asbestosis alleged to have been caused by the conditions in which Mr. Maynard was required to work when employed by the States in 1978-1979.

In his Order of Justice Mr. Maynard alleges the following facts:

"1. At all material times the Plaintiff was employed by the Defendant.

2. (a) During the period of 1978 to 1979 the Plaintiff was employed by the Defendant for about six or seven months as a foreloader driver operating a loading machine in and about the sorting shed at La Collette, St. Helier, Jersey.

(b) The Plaintiff's job involved driving the loading machine so as to push refuse into the sorting shed and therefore to use the loading machine to turn and sort the refuse into different heaps.

3. This was an extremely dirty and dusty job as it involved moving some forty to sixty loads a day inside the confined area of the sorting shed. Whilst operating the loading machine, the Plaintiff was exposed to the surrounding atmosphere.

4. In or about May 1993 the Plaintiff was informed by his Doctor that he was suffering from the effects of asbestosis.

5. The only time in his life in which the Plaintiff could have been exposed to asbestos such as to cause him the illness was during the aforesaid period when he was employed by the Defendant at the sorting shed at La Collette, St. Helier, Jersey.

6. As a result of the said exposure the Plaintiff suffered as follows:

PARTICULARS OF INJURY

(a) Asbestos plaques in his pleura.

(b) Parenchymal lung [disease].

(c) A significant risk of developing cancer.

Full particulars will be given prior to trial.

7. As a result of the said exposure to asbestos the Plaintiff has suffered loss and damage."

He goes on to allege that the injury and the damage were caused by the tortious and/or contractual negligence and breach of duty of the States.

By paragraph 8 of its Amended Answer the States alleges, *inter alia*, that Mr. Maynard's action is prescribed under Jersey law having been brought more than ten years after his employment by the States.

On 30th September, 1994, the Judicial Greffier ordered (*inter alia*) that the issue as to whether Mr. Maynard's right of action is prescribed be determined by the Royal Court as a preliminary issue.

It appears that, for the purposes only of the hearing of this preliminary issue, the facts alleged by Mr. Maynard in paragraphs 1-7 of

his Order of Justice were treated as correctly so alleged. The issue was argued solely on points of law, leaving over to trial all questions of fact.

5 This action, and the points of law argued before the Royal Court, raise for determination questions of general importance in the law of Jersey. It has become more common for conditions of work to give rise to illness or disease many years later. In this case Mr. Maynard discovered in 1993 that he was suffering from asbestosis, a potentially
10 life-threatening disease of the lungs, sustained (as he alleges) as a result of exposure to asbestos dust while employed by the States some 14 years earlier. It is not alleged by the States that Mr. Maynard could, or could reasonably, have found this out earlier than 1993.

15 The points of law were argued before Lieutenant Bailiff Le Cras sitting alone. In a long and careful judgment delivered on 17th March, 1995, and reported at [1995] JLR 65, the Lieutenant Bailiff held that:

(1) Mr. Maynard's cause of action in tort (if any) accrued on the first
20 date on which a judge could award him damages for personal injury (irrespective of whether Mr. Maynard could know that he had sustained injury), and that Mr. Maynard's cause of action in contract accrued on the date on which a breach of contract (if any) was committed by the States.

25 (2) Under Jersey common law the period of prescription was suspended from running in the case of a plaintiff such as Mr. Maynard while he was unable reasonably to know that he had sustained personal injury.

30 By notice of appeal served on 19th May, 1995, the States appealed against the conclusion on point (2). By an undated notice of cross-appeal Mr. Maynard appealed against the conclusions on point (1). (Such documents should always be dated). The appeal of the States on point (2) was argued first, followed by argument on point (1) in the cross-
35 appeal by Mr. Maynard.

(However, the two points are interlinked. If prescription did not run and was suspended while Mr. Maynard did not know and could not reasonably ascertain that he had sustained asbestosis, then it may not
40 matter when his causes of action accrued, because taking the suspension into account he probably commenced his action in time. If prescription would not have been suspended while he lacked the relevant knowledge, then it would be necessary to decide precisely when his causes of action accrued, since if they accrued before he acquired the relevant
45 knowledge, his action may have been commenced out of time.

 Further, if his causes of action accrued before he acquired this knowledge and prescription was not suspended (as the States contend), then it appears that (a) Mr. Maynard would have gained causes of action,
50 and (b) prescription would have run, and (c) his causes of action would have been prescribed, in circumstances in which apparently he was totally unaware, and could not be aware until too late, even that he had sustained personal injury. The injustice of such a conclusion is obvious. Mr. Pallot for the States acknowledged this, but argued that
55 the only remedy would be the passing of legislation by the States.

Before considering the arguments on the two preliminary points of law, we pay a well-deserved tribute to the care and skill with which they were argued before us by Advocate Steven Pallot for the States and by Advocate David Le Quesne for Mr. Maynard.

Suspension of Prescription

Article 2 of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 (the 1960 Law) provides *inter alia*:

"ARTICLE 2

EXTENSION OF PERIOD OF PRESCRIPTION OF ACTIONS FOUNDED ON TORT.

(1) *The period within which actions founded on tort may be brought is hereby extended to three years from the date on which the cause of action accrued.*

(2) *The provisions of this Article shall be without prejudice to any rule of law allowing for the extension of such a period as aforesaid.*

...."

It is common ground that Article 2 preserved the rule of Jersey common law (derived from Norman customary law, with its origins in the medieval period) expressed in the maxim (in French) that:

"À qui est empêché d'agir la prescription ne court point,"

and (in Latin)

"Contra non valentem agere nulla currit praescriptio".

We will refer to this as "the Maxim".

The issue between the parties is whether the Maxim could operate in Mr. Maynard's favour during the period down to 1993 in which he was unaware that he suffered from asbestosis.

In his judgment the Lieutenant Bailiff held that the Maxim is potentially available to Mr. Maynard.

The nature of the Maxim was touched on by the Privy Council in an appeal from the Court of Appeal of Guernsey in Vaudin -v- Hamon [1974] AC 569. The issues in that case concerned the acquisition of prescriptive title to real property under Sark law. The Privy Council warned (at page 582) of the dangers inherent in drawing analogies from other systems of law, including the law of Jersey. Nevertheless their observations on the Maxim deserve careful attention in the present case. These observations (at page 586) include the following:

"2. *Suggestions were made in the course of argument before the Court of Appeal and their Lordships that the appellant would wish to argue that the period of prescription should not run against him while he was "emêché d'agir". That empêchement*

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

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

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The texts which have been cited to us for the purpose of determining the scope of the Maxim in Jersey law include those cited in Vaudin of Terrien, Pothier and Carey. All the texts cited to us make it clear that:

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(1) as stated in Vaudin, the key to the scope of the Maxim lies in the "empêchement", the impediment preventing the plaintiff from acting;

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(2) the various circumstances referred to in the text as constituting empêchements within the Maxim are examples, and no more than examples, of the operation of the Maxim: they do not constitute an exhaustive or exclusive list;

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(3) as stated in Vaudin, the examples of the operation of the Maxim given in the old texts

"cannot necessarily be carried forward into modern times without consideration of the essential question whether in modern conditions they bring about an impediment from acting."

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At a time when a personal telephone may be used from the higher slopes of Mount Everest or the centre of the Sahara Desert, and when rapid travel by air is a normal part of everyday life, it could not be suggested that mere absence overseas gives rise to a relevant impediment. But, to take extreme examples, imprisonment in a Siberian or Chinese labour camp or being kidnapped and held hostage by guerrillas, would give rise to impediments falling within the scope of the Maxim.

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Several of the tests to which we were referred were quoted at length by the Lieutenant Bailiff, and we do not lengthen this judgment by further extensive quotation. The main texts on Jersey and Guernsey

common law (and the Norman customary law from which they have been derived) were these:

5 (1) Bérault, Godefroy: Commentaires sur la Coûtume de Normandie (1776 Ed'n), Vol. 2, page 481.

10 (2) Terrien: Commentaires du Droit Civil tant public que privé, observé au pays et Duché de Normandie (2nd Ed'n, 1578), pages 316-321, 331-332, 334-338.

(3) Poingdestre: Les Lois et Coûtumes de l'île de Jersey (17th cent., 1928 Ed'n), pages 48-54 and 63-66.

15 (4) Le Geyt: Privileges, Loix et Coûtumes de l'île de Jersey (1953 Ed'n) pages 63-65.

(5) Laurent Carey: Essai sur les Institutions, Lois et Coûtumes de l'île de Guernsey (18th cent., 1889 Ed'n), page 207.

20 (6) Le Gros: Traité du Droit Coûtumier de l'île de Jersey (1943), pages 419-422.

We were also referred to Le Masurier: Le Droit de l'île de Jersey (1956), pages 28-42.

25 Several French texts were also referred to:

(i) Pothier: Traité des Obligations (1821 Ed'n), Vol. 2, pages 187-199.

30 (ii) Le Nouveau Dunod au Traité des Préscriptions, by Laporte (1810 Ed'n), pages 103-112 and 155-165.

(iii) Merlin: Répertoire de Jurisprudence (4th Ed'n 1813), pages 541-543.

35 (iv) Dalloz: Répertoire de Législation, de Doctrine et de Jurisprudence, Vol. 36, pages 218-219.

40 (v) Planiol and Ripert: Treatise on the Civil Law, translated in Louisiana (12th Ed'n 1939), Vol. 1, paras. 2697-2705, (11th Ed'n 1939) Vol. 2, paras. 677-683.

45 (vi) Baudry-Lacantinerie, Précis de Droit Civil (11th Ed'n, 1912), Vol. 1, pages 833-835.

(vii) Buy: Prescription de courte durée et suspension de la prescription (1977), section 2833, paras 1-31.

50 However, care has to be taken in referring to French legal texts in connection with the law of Jersey. After the Channel Islands were severed from the rest of the Norman territories in what is now France, Norman customary law continued to develop in Jersey, Guernsey and Normandy in parallel, but not with identical developments. In Normandy development was naturally affected by doctrines prevailing in other parts of France. The Napoleonic Codes embodied much of the pre-existing laws of the French provinces, but with some material changes. After the
55 Napoleonic Codes came into existence, French law developed independently

of developments in Jersey and Guernsey, under the direction or influence of French statutes, French jurisprudential writers, and the case law of the French Courts. Accordingly no great weight can be placed on French law as it exists today, in ascertaining what is Jersey law, except perhaps on a comparative basis as showing how the same problems have been treated in another legal system.

Reference was also made to texts and cases concerning Louisiana law, which in our view is too far removed from Jersey common law to be of any real assistance.

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

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

The principle underlying the application of the Maxim to empêchements de fait is in our judgment this. Prescription does not run and is suspended while the plaintiff or potential plaintiff is prevented by a practical impossibility from exercising his right to commence or to continue legal proceedings. Such a practical impossibility may exist as a result of war, or civil disturbance, or imprisonment or being held hostage. We emphasise the words "may exist", because e.g. mere imprisonment in Jersey would not be an impediment giving rise to a practical impossibility, and even involvement in a war might not give rise to such an impossibility in some circumstances.

The present case involves a plaintiff who alleges that, as a result of contact with asbestos dust during his employment by the States in 1978 and 1979, he suffered injury consisting of asbestosis at some date between then and 1993. For the purposes of the preliminary points of law we have to assume that Mr. Maynard during this period did not know, and could not reasonably have known, that he had sustained injury to his lungs arising out of his employment by the States.

In these circumstances we have to consider whether there could in law be a material empêchement amounting to a practical impossibility for Mr. Maynard to commence legal proceedings.

It is important to note that his case does not depend on mere ignorance of his injury or of his potential rights against the States. Mere ignorance by itself could not, in our judgment, give rise to the operation of the Maxim. What Mr. Le Quesne for Mr. Maynard relies on is the circumstance that the development of asbestosis in his lungs was a fact unknown to him, of which he could not reasonably have made himself

aware before 1993, so that the situation, which - it is alleged - the States created, itself gave rise to a practical impossibility within the Maxim.

5 Mr. Pallot pointed to the absence of any reference by the writers on Norman customary law to the questions arising in the application of the Maxim to cases involving latent development of disease (or other medical conditions) over a long period, or involving latent defects to buildings not discovered for a long time. In our view this is in no way remarkable. Problems arising from slowly developing diseases and other personal injuries have come to prominence in England since 1945. Cartledge -v- Jopling [1963] AC 758; [1963] 1 All ER 341 HL(E) was the first case to reach the House of Lords in which there was directly considered the application of the limitation statutes to cases involving such circumstances, and was decided in January, 1963. It is most improbable that problems such as these were presented to the minds of any of the writers listed above, writing in the 16th to 19th centuries.

20 There are references to ignorance in some of the texts. Terrien at page 321 referred to a case in which mere ignorance of a contract sued on was held not to suspend prescription, whereas in another case where the ignorance of the plaintiff resulted from "*la grande et mauvaise foi*" of the defendant the Maxim was held to apply. Terrien at page 331 cited an edict of Louis XII given at St. Germain en Laye in 1561 in which it was ordered that the ten year period of prescription would not run if there were "*crainte, violence, ou autre cause legitime empêchement de droit ou de fait*". At page 332 Terrien gave as examples ("*comme si*") of empêchement de fait, being made prisoner of the enemy, being long detained in prison, being long ill, being absent on public service where the absence is necessary and not voluntary, or having gone abroad on business and being constrained to remain abroad for a long time. Terrien summed up (on the same page, 332) the principle underlying the category of empêchement de fait in these words: "*Car à ceux-là prescription ne court durant tels empêchements, sinon qu'il fût en leur puissance de les ôter*". (We use in each case the modern French spelling).

40 Poingdestre referred to ignorance in the context of absence, stressing that the Maxim applied in the case of absence only if:

45 "*laquelle a avec elle une juste et legitime ignorance, et partant ne peut être accusée de negligence*" (page 50 "*...[requiring] aussi d'une telle ignorance qui eût pouvoir être en un homme diligent*" (page 51).

50 At pages 51 and 52 Poingdestre also referred to ignorance brought about by the bad faith of the defendant. Mr. Pallot submitted that in these passages Poingdestre was indicating that the Maxim applied to ignorance only if brought about by the other party's bad faith. In our judgment that submission is based on an incorrect reading of the French text. We quote the relevant passage from page 52, and emphasise particularly the final clause beginning "*ni l'ignorance*":

55 "*En tous lesquels cas, il faut bien considerer toutes les circonstances lesquelles peuvent informer les Juges de la sincerité des parties qui les alleguent: car ce qui se fait par fraude ou malice ou par quelque dessein, ne doit jamais être*

reçu pour excuser la partie qui en est coupable: ni l'ignorance innocente & non affectée être cause de condamner celui qui en est enveloppé".

5 Carey dealt with the different forms of prescription in Guernsey law only briefly. At page 207 he used these words:

10 *"Elle ne court contre qui est empêché d'agir ou qui est ignorant de son droit au moyen de fiction ou de déception dont on aurait usé envers lui".*

15 Mr. Pallot again submitted that the reference to ignorance resulting from fraud was exhaustive, and that ignorance arising in any other way would not fall within the Maxim. In our judgment this is a misreading of Carey. Carey was clearly giving this as an example, since he did not mention other circumstances (mentioned by other writers) in which ignorance amounting to inability to exercise his rights on the plaintiff's part would have to be shown.

20 Pothier was writing on the French law of obligations, and was not considering in the passages cited the prescription of tortious claims (délits). But he stated the principle (at pages 191-192) in this way:

25 *"680. Il résulte de ce qui vient d'être dit, que le temps de la prescription ne peut commencer à courir que du jour le créancier a pu intenter sa demande: car on ne peut pas dire qu'il a tardé à l'intenter, tant qu'il ne pouvoit pas l'intenter. De là cette maxime générale sur cette matière: Contra non valentem agere, nulla currit praescriptio".*

35 Pothier goes on to give several examples of empêchements de fait. One example (at pages 194-195) is of "les insensés" when they are without curators, and then definitely come within the scope of the Maxim. Mr. Pallot was given by one of us the example of a man hit on the head by a falling piece of concrete who then remained in a coma for more than three years. Unless the Maxim applied, his cause of action in tort would, on Mr. Pallot's submissions, be prescribed (unless perhaps someone were able to issue proceedings on his behalf). In our judgment the principle underlying the Maxim would be applied to these circumstances just as much as to "les insensés" without curators. At pages 195-196 Pothier referred to the example of absence, and stated that the Maxim would not avail the absent person unless it was impossible for him to inform himself of the circumstances, or in circumstances:

45 *"dans lesquelles un absent a été dans une véritable impuissance, et lorsque cela est évidemment justifié".*

50 In Le Nouveau Dunod (at pages 106-107) it is made clear that mere ignorance does not bring the Maxim into play. This conclusion is carried through to page 111, on which it is stated that "une simple ignorance" does not suffice: there must be circumstances "d'une absence privilégiée ou d'un autre juste empêchement".

55 In Merlin's Répertoire, pages 541-543, a similar distinction is made between mere ignorance, and circumstances amounting to an

empêchement which bring the resulting ignorance within the scope of the maxim.

Dalloz's Répertoire is to similar effect.

Planiol and Ripert dealt in 1939 with the then current French law of prescription. They indicated that though by Article 2251 of the Civil Code the legislature had tried to limit the scope of the Maxim, the Cour de Cassation had held in 1857 that "*prescription is suspended whenever the owner may reasonably be unaware of the fact which gives rise to his right of action and his interest to act*" (page 598). However it is dangerous to apply modern French law by analogy to Jersey law. The same observation applies to Baudry-Lacantinerie at pages 833-835, and to the article by Buy.

We can summarise our conclusions so far on the application of the Maxim in Jersey Law in this way:

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

Mr. Pallot submitted that, even if, viewed objectively, the relevant facts could not have been known by the plaintiff himself or by anyone else (as is likely to be the case in at least part of the period leading to the development of asbestosis and other similar diseases of the lungs), nevertheless the Maxim does not apply in Jersey law, and the plaintiff may be prescribed. In our judgment none of the texts cited to us and referred to above supports this submission.

Mr. Pallot referred in support of his submission to the decision of the Royal Court in Huelin -v- Luce (1939) 240 Ex. 477. There is no report of any *jugement motivé*. The report so far as it goes does not show that the case was decided on the basis that ignorance of relevant facts did not bring the Maxim into operation. It seems possible that the decision of the Royal Court may have been on the footing that, as a practical matter, the plaintiff as the heir to the property could have examined it during the period before the plaintiff gained vacant possession from the tenant on 24th June, 1938. Furthermore, as later held by the Royal Court in Ross -v- Ross (1980) Ex. 147, the heir as the reversionary owner of the property was entitled to cause it to be inspected by his agents (but not by himself if the usufructuary owner objected). This may also have been a ground for the decision. The Royal Court in Huelin may not have reached any conclusion on the point of law now in issue.

Mr. Pallot also referred to the judgment of this Court which Mr. Southwell delivered in Minories Finance Ltd -v- Arya Holdings Ltd [1994] JLR 149 CofA at pages 165-167. This Court was there considering whether a company declared en désastre and wishing to pursue causes of action in tort arising out of the allegedly wrongful déclaration en désastre could rely on the Maxim in respect of the period during which the company remained en désastre and/or during which the company did not have access to documents in the possession of its receivers. The Court of Appeal rejected this attempt to rely on the Maxim on the grounds that (1) the company through its directors or shareholders had the ability and the locus standi to apply to the Royal Court for the désastre to be recalled; (2) the company could have brought a claim for damages based on d'Allain -v- de Gruchy (1890) 214 Ex. 196; 1889-93 TD 50 at the same time; (3) the absence of some information or documents did not prevent the company commencing proceedings or cause prescription not to run; and (4) in any event the company had the documents and information more than three years before the Jersey action was commenced. In our judgment, the grounds of decision in Minories -v- Arya do not assist Mr. Pallot's arguments.

Accordingly in our judgment the submissions to the contrary of Mr. Le Quesne for Mr. Maynard are well-founded. Mr. Maynard is entitled to rely on the Maxim as preventing prescription from running against him so long as he is able to show, on the facts at trial, that in his circumstances after 1979 he was in the position that it was practically impossible for him to pursue his rights (if any) against the States.

In expressing our views on this point we have thought it right to do so in our own words and without reference to the judgment below of the Lieutenant Bailiff. He dealt with this part of the case at [1995] JLR pages 78-102 in a careful and learned assessment of the many authorities placed before him. His conclusion at pages 101-102 was in these terms:

"If there is a latent physical defect of which the claimant is ignorant without negligence on his part, the maxim will apply and prescription will be suspended until his ignorance ceases, or at any rate ought to cease. This point is of course a matter of fact in each case and is, as it must be, remitted for evidence to be heard; ..."

As we have said, the right formulation is in our judgment that the plaintiff is under a practical impossibility to exercise his rights. This may amount to the same test as the Lieutenant Bailiff adopted by the words *"ignorant without negligence"*, but we prefer to state it as a test of practical impossibility which more closely accords with the words used by Pothier, *"une véritable impuissance"*. Mr. Maynard will be able to establish this, for example, if he shows that there were no obvious symptoms during the relevant period calling for medical examination, that in fact he did not undergo relevant medical examination during this period, and that the insidious development of asbestosis in his lungs was such as not to give rise to any other reason for seeking medical advice. We would therefore uphold the judgment of the Lieutenant Bailiff except to the extent that the requirement for the operation of the Maxim is stated in the terms we have indicated.

Accrual of cause of action

5 In view of our conclusion on the application of the Maxim, it is unnecessary for us to reach a conclusion as to when Mr. Maynard's causes of action in contract and tort arose. In his case it suffices that he may be able to rely on the Maxim to prevent prescription running, and to avoid what would otherwise be the injustice we have already stated.

10 However, there are three reasons why we consider it appropriate to make some observations on this other point:

- 15 (i) The Lieutenant Bailiff accepted Mr. Pallot's submissions for the States that the cause of action in tort accrued when injury was sustained by Mr. Maynard (at whatever date from 1979 onwards that might have occurred), that the cause of action in contract accrued when the breaches occurred, i.e. in 1978 and 1979, and that knowledge or means of knowledge are not necessary to the accrual of either cause of action.
- 20 (ii) If we were wrong in the conclusion we have reached on the operation of the Maxim, then it would be essential to reach a conclusion on this point which would represent the only route by which Mr. Maynard could avoid the effect of prescription.
- 25 (iii) In any event the point will fall to be decided hereafter, and it would be inappropriate to make no reference to the content of the excellent submissions of Mr. Le Quesne and Mr. Pallot on this point.

30 Our observations are as follows:

- 35 (1) In relation to the cause of action in contract, the question is what is the position in Jersey common law as to the accrual of the cause of action. In relation to the cause of action in tort, the question is what is the correct interpretation of the words in Article 2(1) of the 1960 Law "*from the date on which the cause of action accrued*", having regard to the relevant Jersey common law.
- 40 (2) There is no case law in Jersey as to whether or not knowledge or means of knowledge are necessary before either cause of action accrues. It seems to have been previously assumed that knowledge or means of knowledge were not necessary. But the point does not seem to have been argued expressly in any previous case.
- 45 (3) The Jersey law of tort is largely based on the English law of tort, and insofar as it is so based it is necessary for the Courts of Jersey to apply the law of tort as established by the House of Lords, and it is not appropriate for the Courts of Jersey to reconsider the law as so established (see T.A. Picot (CI) Ltd & Anor -v- Crills [1995] JLR at pages 46-47 and 64). Insofar as Jersey statutes contain the same wording as the equivalent English statutes, English decisions on statutory interpretation may be persuasive authority as to the meaning of the Jersey statutes. But the Jersey law of prescription does not depend on English law (except perhaps insofar as the words used in Article 2(1) of the 1960 Law reflect similar wording in section 2 of the English Limitation Act 1939), and therefore it is necessary for the Jersey
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Courts to reach their own decision as to the content of the Jersey law of prescription.

- 5 (4) In Cartledge -v- Jopling (above) Lords Reid and Hodson expressed the strong view that, if the matter were governed solely by the English common law, the House of Lords should have held that a cause of action for personal injury did not accrue

10 *"until either the injured person has discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances. The common law ought never to produce a wholly unreasonable result, nor ought existing authorities to be read so literally as to produce such a result in circumstances never contemplated when they were decided".* [1963] AC p.772; [1963] 1 All ER p.343E.

20 On the other hand, in his speech (with which all of the other law Lords agreed) Lord Pearce said:

25 *"Past cases have been decided on the basis that the time runs from the accrual of the cause of action whether known or unknown and no case has been cited in which the plaintiff's lack of knowledge has prevented the time from running where that lack of knowledge has not been induced by the defendant".* [1963] AC p.782; [1963] 1 All ER p.351E.

30 But all their Lordships held that the matter was governed by the English Limitation Act 1939, and that on its true interpretation such a cause of action accrued when damage occurred, irrespective of knowledge or means of knowledge. Their Lordships then called for urgent legislative intervention.

- 35 (5) As a result of subsequent English legislation, the statutory position in England is substantially similar to the position which Lords Reid and Hodson would have wished to achieve through development of the common law.

- 40 (6) In interpreting Article 2 of the 1960 Law in the context of Jersey common law, it would be open to the Jersey courts to derive guidance from the views of their Lordships in Cartledge and from the policy underlying the legislative changes in England since 1963.

- 45 (7) The reasoning of the House of Lords in arriving at their decision on statutory interpretation in Cartledge has been subjected to serious criticism both by academic and other commentators at the time, and recently by the New Zealand Court of Appeal in Invercargill City Council -v- Hamlin [1994] 3 NZLR 513 and GD Searle & Co -v- Gunn [1996] 2 NZLR 129. Searle was a personal injury case in which the New Zealand Court of Appeal rejected the reasoning in Cartledge, and held that in New Zealand a cause of action in negligence for personal injury "accrues when bodily injury of the kind complained of was discovered or was reasonably discoverable as having been caused by the acts or omissions of the defendant" (page 133). An appeal to the Privy Council in Searle
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is pending. In deciding whether or not to adopt the conclusion in Cartledge or to proceed on the basis illustrated by the Searle decision and the English legislation, the Jersey Courts would need to take into account the criticisms of the reasoning in Cartledge. It is also of relevance that the reasonable discoverability test for the accrual of causes of action for negligence resulting in personal injury has been adopted in Canada by the Supreme Court in KM -v- HM (1992) 96 DLR (4th) 289, and in the United States (see the cases cited in Searle at page 133).

(8) One of the main grounds of criticism of the decision in Cartledge concerns Lord Pearce's reasoning that if knowledge were necessary for accrual, a widow might have no cause of action under the English Fatal Accidents Acts if her husband died before acquiring the relevant knowledge. Having examined the provisions of the Fatal Accidents (Jersey) Law, 1962 (which are substantially to the same effect as the equivalent English provisions) we have some doubt whether Lord Pearce's concerns on this account were justified. Article 2 gives certain classes of relative of the deceased a cause of action if (inter alia) the wrongful act, neglect or default of any person which caused the death "*would, if death had not ensued, have entitled the deceased person to maintain an action and recover damages in respect thereof*". Article 2 does not make express provision as to the moment at which the deceased person must be treated as having been able to maintain an action. This could be at the moment when the widow seeks to maintain her action, rather than at the date of the deceased's death. In the light of these observations it may be necessary to reconsider Lord Pearce's concern as to the position of a widow or other dependants when the matter comes to be decided under Jersey law and in connection with the Fatal Accidents (Jersey) Law, 1962.

(9) Some further guidance may be derived from the developments in English (and New Zealand) law concerning latent defects in buildings. In Anns -v- Merton LBC [1978] AC 728; [1977] 2 All ER 492 the House of Lords treated such defects as being actionable because resulting in physical damage to a building. In Pirelli General Cable Works Ltd -v- Oscar Faber and Partners [1983] 2 AC 1; [1983] 1 All ER 65 the House of Lords held that a cause of action in respect of such latent defects arose when damage to the building occurred, even though the damage was then not known to the plaintiff and not reasonably knowable by him. This approach was undermined by the House of Lords in D & F Estates -v- Church Commissioners [1988] 2 All ER 992 and in Murphy -v- Brentwood DC [1991] 1 AC 398; [1990] 2 All ER 908 (in which the House of Lords departed from Anns), by holding that such defects gave rise to economic damage which manifested itself when the building owner sold the building at a price lowered by reason of the defects or had to incur expense in repairing the defects. In Invercargill the New Zealand Court of Appeal rejected the Pirelli approach, in part relying on its rejection by the Supreme Court of Canada in City of Kamloops -v- Nielsen (1984) 10 DCR (4th) 641, but also relying on the new direction taken by the House of Lords in D & F Estates and Murphy. The Privy Council upheld the decision of New Zealand Court of Appeal in Invercargill at [1996] 2 WLR 367; [1996] 1 All ER 756, though without explicitly refusing to follow

Pirelli. Although in characterising the plaintiff's loss as economic the Privy Council adhered to the theory of damage constituting accrual, it is arguable that there is no commonsense basis for distinguishing between physical and economic damage. There may be logic in assimilating the two lines of cases into a single reasonable discoverability test for accrual of the cause of action (as by the New Zealand Court of Appeal in Invercargill and Searle).

(10) It appears from the limited French authority cited by Mr. Pallot that in modern French law the tendency is for rights of action in tort and contract to be treated as accruing when damage materialises or is discovered: le Tourneau: La Responsabilité Civile (3rd Ed'n, 1982), page 305. But relatively little weight could be placed on this analogy in the absence of more extensive research, for example, in Mazeaud and Tunc on Responsabilité Civile.

If we are wrong in the conclusion we have reached as to the suspension of prescription, then the only way of avoiding the injustice referred to by Lords Reid and Hodson in Cartledge would be by the conclusion that no cause of action accrues without knowledge or reasonable means of knowledge.

In the light of factors (1)-(10) above it seems to us reasonably arguable that Jersey common law should be developed so as to ensure that causes of action in the tort of negligence accrue on the basis of a reasonable discoverability test, and that the decision of the Lieutenant Bailiff on the accrual point in the present case was wrong. But, as we have indicated, it is not necessary to decide the accrual point at this present stage. When it comes to be decided, whether in this action or subsequently, it will be necessary to make a more detailed examination of the impact of such a development in the law of Jersey. In this action it will probably not be necessary to decide the accrual point. But if it becomes necessary to decide it, or when it arises in a later case, the accrual point will then have to be reconsidered afresh in the light of the ten factors we have set out above and of the detailed examination we have mentioned. In this case, at this stage, it is sufficient for this Court to affirm the decision of the Lieutenant Bailiff on the first point as to suspension of prescription, and to remit the case for trial in the light of this judgment.

The decision of this Court is purely interlocutory, since it involves no final decision, and the facts relevant to the suspension of prescription (as well as all the other issues of fact arising on the pleadings) have yet to be decided.

It appears from the Order of the Judicial Greffier of 30th September, 1994, that the issue he ordered to be heard as a preliminary issue, "*whether the Plaintiff's right of action is prescribed*", was an issue of both fact and law. In the event it was argued before the Lieutenant Bailiff and before this Court simply as involving points of law. To choose points of law such as these for initial decision seems to us to be within the current practice of the Royal Court of Jersey. However, in our judgment the Royal Court should reconsider its current practice. To single out bare points of law in this way (which might, when the facts are found, prove to be hypothetical) is likely to

5 increase costs and to extend the time before the plaintiff knows whether he or she is to receive damages for his or her injury, and receives the damages awarded. Justice delayed is usually justice denied, particularly in personal injury cases, in which the normal approach should be to fix as early a date as possible for the trial of all issues together.

10 It was agreed by Advocate Pallot and Le Quesne that costs should follow the event. Accordingly we order that the States should pay Mr. Maynard's costs of and occasioned by the hearing before the Lieutenant Bailiff and the hearing before this Court of the appeal and cross-appeal.

Authorities

- Huëlin -v- Luce [1939] 240 Ex 477.
- Vaudin -v- Hamon [1974] A.C. 569.
- Ross-v-Ross (1980) Ex 147
- Smith -v- Harvey (1981) Court of Appeal of Guernsey.
- Charles Church (Spitfires) Limited and Others -v- Aviation (Jersey) Limited and Others [1993] JLR 93-98.
- Cartledge -v- E. Jopling & Sons Limited [1963] 1 All ER 341 HL(E); [1963] AC 758.
- Letang -v- Cooper [1964] 2 All ER 929.
- Pirelli General Cable Works Limited -v- Oscar Faber & Partners (a firm) [1982] 1 All E.R. 65-73.
- Knight -v- Le Gallais Real Estates Limited [1952] JJ 19.
- Scarfe and Ors. -v- Walton [1964] JJ 387.
- T.A. Picot (C.I.) Limited & Anor. -v- Crills [1995] JLR 33.
- de Carteret -v- Applegate & Anor. (1985-86) JLR 236 CofA.
- Searle & Company -v- Gunn [1996] NZLR 129 New Zealand Court of Appeal.
- Invercargill City Council -v- Hamlin [1996] 1 All ER 756; [1996] 2 NZLR 129.
- KM -v- HM (1992) 96 DLR (4th) 289.
- Arya Holdings Ltd -v- Minorities Finance Ltd; (31st March, 1992) Jersey Unreported.
- Minorities Finance Ltd -v- Arya Holdings Ltd [1994] JLR 149 CofA.
- Bell -v- Heating & Ventilation Engineering Co Ltd & Ors. [1985] JLR 241.
- Foster -v- AG (1992) JLR 6 CofA.
- Terrien: Commentaires du Droit Civil du pays et Duché de Normandie (Paris, 1578): pp. 316-21; 331-2; 334 - 8.
- Bérault, Godefroy, d'Aviron: Commentaires sur la Coûtume de Normandie (Nouvelle Ed'n: Rouen, 1776): Tome 2: p.481.
- Poingdestre: Les Lois et Coûtumes de l'Ile de Jersey. (Jersey, 1928): pp. 48-54: le temps où la Prescription ne court point.
pp. 63-66: de la Prescription de dix ans.

- Le Geyt: Privilèges Lois & Coustumes de l'Ile de Jersey (Jersey, 1953): pp. 63-65: Titre X: des Prescriptions.
- Carey: "Essai sur les Institutions, Lois et Coûtumes de l'Ile de Guernsey" (Guernsey, 1889): p. 207: des Prescriptions.
- Le Gros: Traité du Droit Coûtumier de l'Ile de Jersey (Jersey, 1943) pp. 419-422.
- Le Masurier: Le Droit de l'Ile de Jersey. (Paris, 1956): pp. 28-42.
- Loi (1919) sur la Location des Biens Fonds.
- Pothier: Oeuvres complètes (Nouvelle Edition) (Tome II): Traité des Obligations (Paris 1821): pp. 187-199: Chapter VIII: 676-688.
- Dunod & Laporte: Traité des Prescriptions (Paris, 1810): Chapter XII and Chapter XIV.
- Merlin: Répertoire de Jurisprudence (9th Volume) (4th Ed'n) (Paris 1813): pages 541-543.
- Dalloz: Répertoire de Legislation, de Doctrine et de Jurisprudence: Tome XXXVI: para. 738: p.218-219.
- Planiol: Treatise on the Civil Law [translation]: Volume 1, Part 2, Section 6; Volume 2, Part 1, Section 4.
- Baudry-Lacantinerie: Précis de droit civil (first Volume) (Paris, 1912): pages 833-835.
- Buy: Prescriptions de courte durée et suspension de la prescription (1977) ss 2833.
- Philippe Le Tourneau: "La Responsabilité Civile" (3rd Ed'n) (Dalloz, 1982).
- Zweigert: "Introduction to Comparative Law".
- RJ Reynolds Tobacco Co -v- Hudson [United States Court of Appeals, March 14, 1963] 314 Federal Reporter, 2nd series, pp.776-788.
- Tulane Law Review Volume XII: The scope of the maxim *contra non valentem* in Louisiana: pp.244-254.
- Louisiana Law Review Volume 56 [1995]: Douglas Nichols: *contra non valentem*: pp.337-362.
- Extinctive Prescription on the Limitation of Actions [Kluwere Law International]: Reports to the XIVth Congress of the International Academy of Comparative Law: General Report: pp.1-25: EW Hondius (Professor of Law University of Utrecht).
- Law Reform (Miscellaneous Provisions) (Jersey) Law, 1960.
- Limitation Act 1939: ss 1 and 26.

Fatal Accidents Act 1976.

Anns -v- Merton LBC [1978] AC 728; [1977] 2 All ER 492.

Pirelli General Cable Works Ltd -v- Oscar Faber & Partners [1983] 2 AC
1; [1983] 1 All ER 65.

D & F Estates -v- Church Commissioners [1989] AC 177; [1988] 2 All ER
992.

Murphy -v- Brentwood DC [1991] 1 AC 398; [1990] 2 All ER 908.

City of Kamloops -v- Neilsen (1984) 10 DCR (4th) 641.